

Four Shots at the Commerce Clause: The Firearms Freedom Act and the Unarticulated Products Category of the Commerce Power

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I. INTRODUCTION

*You can get further with a kind word and a gun than you can with just a kind word.*¹

The Supreme Court’s Commerce Clause decisions of the last two decades lack the consistency necessary to guide lower courts on the extent of the congressional commerce power to regulate products that remain intrastate. The current jurisprudence is muddled, and district courts have been inconsistent in this application of Congress’s Commerce Clause power.² The perpetual battle between the Congress

¹ THE UNTOUCHABLES (Paramount Pictures 1987).

² Corey Rayburn Yung, *One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 423 (2009). See also, Jennifer A. Maier, Comment, *Outgrowing the Commerce Clause: Finding Endangered Species a Home in the Constitutional Framework*, 36 GOLDEN GATE U.L. REV. 489, 506 (2006) (“Lopez and Morrison provided

and the states has escalated, with the former claiming authority to regulate behavior on a national level, and the latter declaring independence under the Tenth Amendment. What at first looked like a coup by the Rehnquist Court to reestablish strong federalism instead led to a more invasive federal government and less power for the judiciary to review congressional authority.³ Even with significant scholarship begging for clarity⁴ and continued challenges in this new commerce power regime,⁵ the Supreme Court has not remedied the situation.

The federal government now faces a challenge to the Commerce Clause⁶ that packs more firepower than most. The Montana Firearms Freedom Act (MFFA),⁷ “declares that any firearms made and retained in-state are beyond the authority of Congress under its constitutional power to regulate commerce among the states.”⁸ Montana asserts its Tenth Amendment powers to regulate intrastate commerce and challenges the federal government’s right to regulate the intrastate manufacture and possession of firearms.⁹ A lawsuit currently in federal court requests a declaratory judgment stating that Congress has no power to regulate guns manufactured and distributed in accordance with the MFFA.¹⁰ As of publication, seven other states have passed similar legislation.¹¹

little guidance on how to define the term, ‘economic,’ which has led to the arbitrary distinctions in *Raich* and will continue to cause confusion and inconsistency in Court opinions until the ambiguity is resolved.”); Amanda M. Jones, *Gonzales v. Raich: How the Medical Marijuana Debate Invoked Commerce Clause Confusion*, 28 HAWAII L. REV. 261, 287 (2005) (“Because *Raich* and *Lopez* seem indistinguishable using *Morrison*’s four-factor test, confusion is inevitable.”); Kenton J. Skarin, *Not All Violence is Commerce: Noneconomic, Violent Criminal Activity, RICO, and Limitations on Congress Under the Post Raich Commerce Clause*, 13 TEX. REV. LAW & POL. 187, 190 (2009) (“However, the Court’s next major Commerce Clause decision, *Gonzales v. Raich*, created serious confusion among both lower courts and commentators as to the current state of Commerce Clause jurisprudence.”).

³ Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL’Y 507, 508 (2006); see generally, John W. Moorman, Note, *Conflicting Commerce Clauses: How Raich and American Trucking Dishonor Their Doctrines*, 15 WM. & MARY BILL RTS. J. 687 (2007).

⁴ See generally *supra* note 2.

⁵ E.g., *United States v. Comstock*, 130 S. Ct. 1949 (2010).

⁶ U.S. CONST. art. I, § 8, cl. 3 (“[Congress shall have power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes. . . .”).

⁷ Montana Firearms Freedom Act, MONT. CODE ANN. §§ 30-20-101–106 (2010).

⁸ *The Firearms Freedom Act (FFA) is Sweeping the Nation.*, FIREARMS FREEDOM ACT (June 3, 2010), <http://firearmsfreedomact.com>.

⁹ Montana Firearms Freedom Act, MONT. CODE ANN. §§ 30-20-101–106 (2010).

¹⁰ Notice of Appeal, *Mont. Shooting Sports Ass’n v. Holder*, No. CV-09-147-M-DWM-JCL (D. Mont. Filed Dec. 2, 2010).

¹¹ Tennessee Firearms Freedom Act, TENN. CODE ANN. § 4-54-101 (2010); Alaska Firearms Freedom Act, ALASKA STAT. § 44.99.500 (2010); ARIZ. REV. STAT. § 13-3114 (LexisNexis 2010); IDAHO CODE ANN. § 18-3315A (2010); S.D. CODIFIED LAWS § 37-35-2 (2010); Utah State-Made Firearms Protection Act, UTAH CODE ANN. § 53-5b-

The MFFA is not merely the work of the pro-gun lobby, nor is it an issue that is isolated to a few states. The MFFA is a larger movement—a deliberate effort to challenge congressional authority.¹² Although this statute relates to firearms, any challenge to Congress’s commerce power can have far-reaching consequences in the way the federal government operates and interacts with the states. Litigation surrounding the MFFA could either severely limit the commerce power or affirm the force with which Congress currently wields that power.

Following *United States v. Lopez*,¹³ circuit courts have evaluated federal statutes invoking the Commerce Clause by placing them into one of the three categories that Congress may regulate under the guise of interstate commerce.¹⁴ This Comment uncovers a fourth category that federal courts have yet to clearly articulate or recognize. This unspoken category has been reserved for intrastate *products* — tangible objects that Congress is attempting to regulate — as opposed to intrastate *activities*. Evidence for this fourth category can be found by carefully reviewing the seminal Commerce Clause cases and analyzing recent decisions in the circuit courts.

This Comment proposes, first, that the product-based analysis already exists and second, that it must now be expressly stated, with a clearly articulated test, in order to properly adjudicate cases when the regulation in question relates to a product that has not traveled in interstate commerce. The inconsistent outcomes of cases that involve intrastate products can be explained by looking to the subject of the case. Medical marijuana, violence against women, wheat, and sex offender registries are very different from one another and thus, have been treated differently by courts, even though all have been unreasonably placed in the same *Lopez* category. Few commentators have been willing to read between the lines and recognize the underlying issues involved in products cases, including the possibility of personal and societal biases based on the object in Congress’s crosshairs.¹⁵ It is time for current

101 (LexisNexis 2010); Wyoming Firearms Freedom Act, WYO. STAT. ANN. § 6-8-401 (2010).

¹² See e.g. Barak Y. Orbach et. al., *Arming States’ Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 ARIZ. L. REV. 1161 (Winter 2010). Orbach posits that the MFFA is a key use of what he calls the “Commerce Battering Ram” to strengthen states’ rights. *Id.* at 1164. The “Commerce Battering Ram” is “a political-legal apparatus that private lawmakers design and employ to challenge current Commerce Clause jurisprudence” and primarily invokes the Tenth Amendment. *Id.*

¹³ 514 U.S. 549 (1995).

¹⁴ See *infra* Part II.

¹⁵ E.g., Lyle Dennison, *Justice Kennedy and the “War on Drugs,”* SCOTUSBLOG (June 6, 2005), <http://www.scotusblog.com/2005/06/commentary-justice-kennedy-and-the-war-on-drugs> (suggesting that Justice Anthony M. Kennedy has a “zero tolerance

jurisprudence to acknowledge those concerns and to fill the gap left by the three *Lopez* categories, even if it is at “gunpoint.”

Section II presents a historical review of the Supreme Court’s jurisprudence in Commerce Clause cases as well as a showing of the confusion among the circuit courts in trying to apply *Raich* in federal sex offender registry law.¹⁶ In Section III, this Comment considers the MFFA, the motivation and goals of its supporters, and the current court challenges to the legislation. Section IV identifies the products category of the Commerce Clause, suggesting a balancing test that requires consideration of four factors. The balancing test takes into consideration scattered elements of federal courts’ previous analyses. Section V considers the viability of the MFFA under this new regime and shows how the MFFA is likely to be insulated from regulation by the federal government. It also examines other products to show that the category has always existed, but until now, has not been articulated.

II. COMMERCE CLAUSE HISTORICAL BACKGROUND

A. A Limited Congressional Power Grows

In *Gibbons v. Ogden*,¹⁷ the first Commerce Clause case, the Supreme Court stated that “traffic” and “intercourse” that take place beyond state borders is within congressional jurisdiction.¹⁸ This power to regulate had inherent limitations because the “exclusively internal commerce of a State” is not an enumerated power of Congress.¹⁹ In the wake of the American Civil War, which was, at its core, a debate on states’ rights, the Reconstruction Amendments²⁰ ushered in the theory that the federal government had responsibility for enforcing civil rights for all citizens.²¹ The Supreme Court’s decision in *The Civil Rights*

point of view” when it comes to illegal drugs and that in *Raich*, Justice Kennedy abandoned his more consistent legal position of favoring state powers over an expanding role of the federal government).

¹⁶ See *United States v. Dixon*, 551 F.3d 578 (7th Cir. 2008) *cert granted sub nom. Carr v. United States*, 130 S. Ct. 47 (2009).

¹⁷ 22 U.S. 1 (1824).

¹⁸ *Id.* at 189–95.

¹⁹ *Id.* at 194–95.

²⁰ U.S. CONST. amends. XIII, XIV, XV.

²¹ Rebecca E. Zietlow, *John Bingham and the Meaning of the Fourteenth Amendment: Congressional Enforcement of Civil Rights and John Bingham’s Theory of Citizenship*, 36 AKRON L. REV. 717, 718 (2003) (“After the Civil War, the Fourteenth Amendment and the Reconstruction era, civil rights statutes reflect the fact that the Thirty-ninth Congress adopted an expansive vision of the rights of federal citizens and that Congress embraced its role as protector of those rights.”).

Cases of 1883,²² however, was a major defeat for the Reconstruction Amendments and the federal legislation that Congressional Republicans passed to enforce the spirit of those constitutional changes. The Supreme Court struck down the Civil Rights Act of 1875, and declined to extend the statute's anti-discrimination and equal protection provisions to private actors, but rather extended the provisions only to the states.²³ The Court suggested, however, that federal discrimination laws could be sustained under the Commerce Clause.²⁴ This planted the seed for federal anti-discrimination law in the next century.²⁵

The Court directly addressed Congress's commerce power as the 20th century approached. *The Lottery Case*²⁶ established that Congress could not use the Anti-Lottery Act of 1895 to outlaw all lottery tickets; rather, the act could only outlaw those that traveled in interstate commerce. This holding was based on the proposition that it is within the federal government's reach to regulate what "evils" are permitted on the channels of interstate commerce.²⁷

This same reasoning applied to the Court's decisions in *Hoke v. United States*²⁸ and *Caminetti v. United States*,²⁹ which upheld the White Slave Traffic (Mann) Act³⁰ as a constitutional use of the Commerce Clause to control what products or people are permitted in interstate channels.³¹ Congress had a well-defined, but limited, power over interstate commerce. The Supreme Court, however, did not allow the

²² *United States v. Stanley*, 109 U.S. 3 (1883).

²³ *Stanley*, 109 U.S. at 18–20.

²⁴ *Id.* at 18–19 (“Of course, these remarks do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, among the several States, and with the Indian tribes, the coining of money, the establishment of post offices and post roads, the declaring of war, etc. In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof And whether Congress, in the exercise of its power to regulate commerce amongst the several States, might or might not pass a law regulating rights in public conveyances passing from one State to another, is also a question which is not now before us, as the sections in question are not conceived in any such view.”).

²⁵ *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (“Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce.”).

²⁶ *Champion v. Ames*, 188 U.S. 321 (1903).

²⁷ *Id.* at 362.

²⁸ 227 U.S. 308 (1913).

²⁹ 242 U.S. 470 (1917).

³⁰ White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (current version at 18 U.S.C. §§ 2421–24 (2006)).

³¹ *Id.*

federal government to regulate the same “evils” that did not cross state lines.

Until 1937, the Supreme Court had significantly curtailed the power of Congress to legislate under the Commerce Clause if the Court considered a law to have more local than interstate characteristics.³² Early in Franklin Roosevelt’s presidency, the Court rebuffed Roosevelt’s “New Deal” agenda, finding his initiatives to be beyond the scope of congressional commerce power.³³ But the Court eventually agreed with the administration and Congress in *NLRB v. Jones & Laughlin Steel Corp.*³⁴ The National Labor Relations Act (NLRA) mandated that workers be permitted to unionize and participate in collective bargaining and that the NLRB could issue a complaint against any company operating with “unfair labor practices” that were “affecting commerce.”³⁵ The Court stated, “[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.”³⁶

Armed with the newly-expanded reading of the Commerce Clause, Congress continued to pass laws invoking their commerce power for the next sixty years.³⁷ This expansion did not go uncontested. Ohio farmer Roscoe Filburn filed suit against the government after he was penalized for harvesting too much wheat pursuant to the statutory maximum in the Agricultural Adjustment Act (AAA).³⁸ The AAA had a basis in rudimentary economics: the lesser the supply of wheat on the market, the higher the price would rise, which would, in turn, encourage wheat production.³⁹ In *Wickard v. Filburn*, Filburn argued that his excess wheat was for his own consumption, and so long as his product did not enter the national market, it could not directly affect interstate commerce and could not come under Congress’s commerce power.⁴⁰

³² Gregory W. Watts, Note, *Gonzales v. Raich: How to Fix a Mess of “Economic” Proportions*, 40 AKRON L. REV. 545, 548 (2007).

³³ See *United States v. Butler*, 297 U.S. 1 (1936); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Panama Refining Co. v. Ryan (The Hot Oil Case)*, 293 U.S. 388 (1935); *R.R. Ret. Bd. v. Alton Ry. Co.*, 295 U.S. 330 (1935); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

³⁴ 301 U.S. 1 (1937).

³⁵ *Id.* at 22–25.

³⁶ *Id.* at 37.

³⁷ John M.A. DiPippa, *The Death and Resurrection of RFRA: Integrating Lopez and Boerne*, 20 U. ARK. LITTLE ROCK L.J. 767, 781 n.95 (1998).

³⁸ See Jim Chen, *Filburn’s Legacy*, 52 EMORY L.J. 1719, 1733–36 (2003).

³⁹ *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942).

⁴⁰ *Id.* at 119–20.

The Supreme Court ruled that although Filburn's individual consumption had little effect on interstate commerce, if farmers in aggregate acted in contravention of the statute, there would be a "far from trivial" effect on demand for wheat.⁴¹ The Court upheld the AAA and Congress's absolute ability to control the market price of a commodity in interstate commerce.⁴² "*Filburn* is regarded today as the high-water mark of the New Deal's constitutional revolution."⁴³

B. A Confusing Modern Era

Lopez v. United States proved to be the breaking point for commerce power expansion. In 1992, a Texas high school student was indicted and charged with a violation of the Gun-Free School Zones Act of 1990 (GFSZA).⁴⁴ This federal law made it a crime to possess a firearm in a school zone.⁴⁵ The opinion in *Lopez*, written by Chief Justice Rehnquist, announced that it would define the "outer limits" of Congress's commerce power.⁴⁶ The Rehnquist Court articulated three broad categories of activities that Congress has the ability to regulate.⁴⁷

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.⁴⁸

The Court stated that the GFSZA would be evaluated under the substantially affects category.⁴⁹ The GFSZA parted from statutes such as the AAA in that the latter related to an economic activity,⁵⁰ whereas the GFSZA concerned criminal penalties.⁵¹ The Court explained that when

⁴¹ *Id.* 127–28.

⁴² *Id.* at 127–29.

⁴³ Chen, *supra* note 38, at 1747. *See also*, *United States v. Lopez*, 514 U.S. 549, 560 (1995) ("*Wickard* . . . is perhaps the most far reaching example of Commerce Clause authority over intrastate activity. . . .").

⁴⁴ *Lopez*, 514 U.S. at 551.

⁴⁵ 18 U.S.C. § 922 (q)(1)(A) (1988 ed., Supp. V).

⁴⁶ *Lopez*, 514 U.S. at 556–57.

⁴⁷ *Id.* at 558.

⁴⁸ *Id.* (citations omitted). The three categories, in order, are hereinafter alternatively identified as the "channels category," the "instrumentalities, persons, and things category," and the "substantially affects category." *Id.*

⁴⁹ *Id.* at 559.

⁵⁰ *Id.* at 560.

⁵¹ 18 U.S.C. § 922 (q)(1)(A).

Congress follows the “pattern” of economic activity cases, the Court will uphold the statute.⁵² Therefore, the Supreme Court did not overrule *Jones & Laughlin Steel* or *Wickard*.⁵³ The Court declared instead that the GFSZA did not relate to commerce or any type of economic activity, and also lacked any jurisdictional element that would tie the concern to interstate commerce.⁵⁴ In response to *Lopez*, Congress amended § 922(q) and included findings that guns in and around schools affect interstate commerce.⁵⁵

Lopez was affirmed in *United States v. Morrison*.⁵⁶ The Supreme Court considered the Violence Against Women Act of 1994 (VAWA),⁵⁷ which gave victims of gender-motivated violence a civil remedy against their attackers.⁵⁸ Looking again at the substantially affects category, the Court discussed four “significant considerations” stated in *Lopez*.⁵⁹ First, the GFSZA was a criminal statute and it did not relate to commerce or the economy.⁶⁰ Second, the GFSZA had no jurisdictional element or “explicit connection with or effect on interstate commerce.”⁶¹ Third, although not required, the statute contained no legislative history or congressional findings on how interstate commerce was affected by guns in a school zone.⁶² Lastly, the Court did not see more than an attenuated link between the possession of a firearm in a school zone and interstate commerce.⁶³

With these four factors established, the Court found that VAWA satisfied only one factor, congressional findings, which the Court declared as insufficient to uphold the act under Congress’s commerce power.⁶⁴ Furthermore, Congress came to these findings using reasoning

⁵² *Lopez*, 514 U.S. at 560.

⁵³ Chen, *supra* note 38, at 1751 (quoting *Lopez*, 514 U.S. at 602 (Thomas, J., concurring)).

⁵⁴ *Lopez*, 514 U.S. at 561.

⁵⁵ *Id.* at 563 n.4. The amended statute has not come before the Supreme Court, but it has been upheld in the circuit courts. See also Seth J. Safra, Note, *The Amended Gun-Free School Zones Act: Doubt as to Its Constitutionality Remains*, 50 DUKE L.J. 637 (2000).

⁵⁶ 529 U.S. 598 (2000).

⁵⁷ 42 U.S.C. § 13981 (2000).

⁵⁸ 42 U.S.C. § 13981(c) (2006) (“for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.”).

⁵⁹ *Morrison*, 529 U.S. at 610.

⁶⁰ *Id.* (quoting *Lopez*, 514 U.S. at 561).

⁶¹ *Id.* at 611–12 (quoting *Lopez*, 514 U.S. at 562).

⁶² *Morrison*, 529 U.S. at 612.

⁶³ *Id.*

⁶⁴ *Id.* at 614, 615.

that the Court denied in *Lopez*.⁶⁵ The Court rejected VAWA as outside the scope of Congress's power to regulate, given that violence against women is a noneconomic crime, even if it has an aggregate effect on interstate commerce.⁶⁶ The Court further noted that it is a local activity, and that "[t]he Constitution requires a distinction between what is truly national and what is truly local."⁶⁷

*Gonzales v. Raich*⁶⁸ has replaced *Lopez* as the seminal commerce power case, which was a surprising turn.⁶⁹ The Drug Enforcement Administration (DEA) seized and destroyed cannabis plants grown by the respondents, who legally possessed them under the California Compassionate Use Act. The Compassionate Use Act encouraged the affordable accessibility of marijuana to "seriously ill" patients and called for exceptions for doctors, caretakers, and other individuals to prescribe, cultivate, and possess marijuana.⁷⁰ In order to justify seizure of the plants, the DEA invoked the Controlled Substances Act (CSA), which makes possessing, obtaining, or manufacturing marijuana a federal crime.⁷¹ Respondents sued for relief from the enforcement of the CSA, arguing that it violated the Commerce Clause.⁷² Justice Stevens, writing for the majority, found the CSA to be constitutional.⁷³ The Court recited the history of the CSA and called the law a "comprehensive statute," which Congress passed to halt or control the international and interstate trade of illicit drugs and controlled substances.⁷⁴

The Court compared the "striking" similarities of the CSA and the statute reviewed in *Wickard*, the AAA, finding that both regulated the supply and demand of fungible commodities that Congress had a rational basis to believe would affect interstate commerce.⁷⁵ In order to accomplish the goal of limiting the use and trade in controlled illicit substances, Congress enacted the CSA, which the Court deemed

⁶⁵ *Id.* at 615.

⁶⁶ *Id.*

⁶⁷ *Id.* at 617–18.

⁶⁸ 545 U.S. 1 (2005).

⁶⁹ See Tara M. Stuckey, Note, *Jurisdictional Hooks in the Wake of Raich: On Properly Interpreting Federal Regulations of Interstate Commerce*, 81 NOTRE DAME L. REV. 2101, 2103 (2006). "[T]he *Raich* principle is somewhat surprising in light of the 'new federalism' era marked by *Lopez* and *Morrison*." (alterations added).

⁷⁰ *Raich*, 545 U.S. at 6–8.

⁷¹ 21 U.S.C. § 801 (2006).

⁷² *Raich*, 545 U.S. at 7–8. Respondents also claimed the enforcement of the CSA violated the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments, and the doctrine of medical necessity. *Id.*

⁷³ *Id.* at 9.

⁷⁴ *Id.* at 10–15.

⁷⁵ *Id.* at 17–22.

“necessary and proper” to combat enforcement problems.⁷⁶ The Court further noted, “[t]hat the regulation ensnares some purely intrastate activity is of no moment.”⁷⁷ The Court also distinguished the CSA as a complex regulatory scheme and not a single-subject statute, in contrast to the GFSZA.⁷⁸ The complexity of the CSA supported the government’s proposition that the restriction on marijuana could not be specifically exempted.⁷⁹

In rejecting the respondents’ claim that the *Morrison* decision applied, the Court explained that neither VAWA nor the GFSZA regulated economic activity.⁸⁰ In contrast, the Court labeled the provisions of the CSA “quintessentially economic,” and defined “economics” as “the production, distribution, and consumption of commodities.”⁸¹ The Court noted, “[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.”⁸² The concept of supply and demand is such a basic concept that Congress had the right to control commerce in the way the CSA permitted.⁸³

The Court also rejected the claim that the California medicinal marijuana supply could be cut off from the national supply.⁸⁴ First, the Court noted that the Supremacy Clause of the Constitution⁸⁵ settles all conflicts in law in favor of the federal government.⁸⁶ Second, the Court recognized that “unscrupulous people” would have no issue in using the California law to their devious advantage and would therefore be able to move marijuana into the national marketplace.⁸⁷ The Court fully supported the CSA as falling within the bounds of Congress’s commerce power.

⁷⁶ *Id.* at 22 (citing U.S. CONST. art. I, § 8).

⁷⁷ *Id.* at 22.

⁷⁸ *Raich*, 545 U.S. at 23–24.

⁷⁹ *Id.*

⁸⁰ *Id.* at 25.

⁸¹ *Id.* at 25–26 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 720 (3d ed. 1966)).

⁸² *Id.* at 26.

⁸³ *Id.* at 28–29.

⁸⁴ *Raich*, 545 U.S. at 29–32.

⁸⁵ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

⁸⁶ *Raich*, 545 U.S. at 29.

⁸⁷ *Id.* at 31–32.

C. Scarborough: *The Outlier Within*

*Scarborough v. United States*⁸⁸ is mentioned only once in the *Lopez-Morrison-Raich* line of cases, in dissent,⁸⁹ but the case is relevant to Commerce Clause jurisprudence when dealing with the regulation of an intrastate product. Scarborough was convicted under the Omnibus Crime Control and Safe Streets Act of 1968 for being a convicted felon “who receives, possesses, or transports in commerce or affecting commerce . . . any firearm”⁹⁰ The defendant had been convicted of a narcotics felony in 1972, and in 1973, law enforcement executed a search warrant and found four firearms in his bedroom.⁹¹ He was charged with a violation of 18 U.S.C. § 1202.⁹² The government argued that it need only prove that the weapons in his possession had traveled in interstate commerce at some point,⁹³ and the Supreme Court agreed, ending a circuit split on the matter.⁹⁴ After a discussion of statutory construction and the legislative record, the Court concluded that Congress intended no more than a “minimal nexus” between the firearm and interstate commerce, meaning that the statute reached any firearm that traveled in interstate commerce at any time.⁹⁵ But the Court did not say that this conviction could be upheld absent the interstate travel of the firearm. In wording that foreshadowed the “regulatory scheme” language of *Raich*, the Court held that the defendant’s theory that the nexus between the possession of firearms and interstate commerce was too attenuated would “create serious loopholes in the congressional plan to ‘make it unlawful for a firearm . . . to be in the possession of a convicted felon.’”⁹⁶ *Scarborough* is noteworthy because it was not overruled following the Supreme Court’s decisions in *Lopez* and *Morrison*, and thus, remains good law.⁹⁷

D. Federal Sex Offender Registries

One area that has yielded significant case law in post-*Raich* jurisprudence, but has failed to contribute to further clarity of *Raich*, is federal registration for sex offenders. The Sex Offender Registration and

⁸⁸ 431 U.S. 563 (1977).

⁸⁹ *United States v. Morrison*, 529 U.S. 598, 658 (2000).

⁹⁰ *Scarborough*, 431 U.S. at 564.

⁹¹ *Id.* at 564–65.

⁹² *Id.*

⁹³ *Id.* at 565.

⁹⁴ *Id.* at 566–67.

⁹⁵ *Id.* at 567–75.

⁹⁶ *Scarborough*, 431 U.S. at 575–76 (internal citations omitted).

⁹⁷ Justice Rehnquist did not participate in the consideration or decision of *Scarborough*.

Notification Act (SORNA), part of the Adam Walsh Child Protection and Safety Act of 2006, (the “Walsh Act”),⁹⁸ requires sex offenders to register in the jurisdiction or jurisdictions in which they reside, work, or attend school.⁹⁹ The federal law establishes the registration requirements and dictates how long offenders must remain registered based on the level of their offense.¹⁰⁰ As a condition of some federal law enforcement funding, states must have a registry that complies with federal standards.¹⁰¹ A National Sex Offender Registry is maintained by the Federal Bureau of Investigation.¹⁰²

Nearly every challenge to SORNA on Commerce Clause grounds in the circuit courts has favored the federal government, but the way in which the courts have reached that conclusion has differed.¹⁰³ Although there is not a true circuit split in the final decisions in these cases, as they have all found SORNA constitutional under the Commerce Clause, the categorization of SORNA under the three *Lopez* categories has varied.¹⁰⁴

⁹⁸ 42 U.S.C. §§ 16901–16929 (2006).

⁹⁹ *United States v. Myers*, 591 F. Supp. 2d 1312, 1315 (S.D. Fla. 2008); 42 U.S.C. § 16913 (2006).

¹⁰⁰ 42 U.S.C. § 16915 (2006). Tier I offenders must remain registered for 15 years; Tier II offenders must remain registered for 25 years; and Tier III offenders must remain registered for life. Offenders may be able to lower their required registration time based on a clean record. *Id.*

¹⁰¹ 42 U.S.C. § 14071(g)(2) (2006). Even if there is a Spending Power issue involved, it would not reach the issue of a federal statute being used to enforce a state registry, even if it was required by the federal government. *Id.*

¹⁰² 42 U.S.C. § 16919(a) (2006).

¹⁰³ The Eighth Circuit in *United States v. May*, 535 F.3d 912 (8th Cir. 2008) and *United States v. Howell*, 552 F.3d 709 (2009) and the Ninth Circuit in *United States v. George*, 579 F.3d 962 (9th Cir. 2009) held that SORNA is permitted under the first two categories of *Lopez*. The Fifth Circuit in *United States v. Whaley*, 577 F.3d 254 (2009) determined that the penalty provision is covered under the “channels of commerce” category of *Lopez* and that the registration requirement falls into the substantially affects category. The Tenth Circuit in *United States v. Lawrance*, 548 F.3d 1329 (10th Cir. 2008) and *United States v. Hinckley*, 550 F.3d 926 (10th Cir. 2008) and the Eleventh Circuit in *United States v. Ambert*, 561 F.3d 1202 (11th Cir. 2009) placed both provisions of SORNA into the “channels of commerce” category, or alternatively, the “instrumentalities, persons, and things” category, explaining that the movement of sex offenders is akin to the movement of people for “immoral purposes” as a permitted regulation in *Caminetti*. The Fourth Circuit in *United States v. Gould*, 568 F.3d 459 (4th Cir. 2009) found that § 2250 of SORNA implicated the first two *Lopez* categories, and that § 16913 was supported by the regulatory scheme of the Walsh Act, for which the court cited extensive congressional findings on the effects that sex offenders traveling interstate would have on interstate commerce. The Second Circuit in *United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010) found that § 2250 is permissible under the first and second *Lopez* categories, as it would not otherwise reach intrastate sex offenders, and that although § 16913 “is more difficult” to determine, it is part of the Walsh Act’s larger regulatory scheme that can be regulated under the Necessary and Proper Clause powers of Congress.

¹⁰⁴ *See supra* note 103.

It appears, however, that the extensive circuit court work in this area is moot because the Supreme Court has avoided the Commerce Clause argument in these cases altogether.¹⁰⁵

Despite the buildup at the circuit court level, the Supreme Court's decisions regarding SORNA prove that it was not meant to be a watershed commerce clause statute. In *Carr v. United States*,¹⁰⁶ the Supreme Court determined that an individual who committed an underlying sexual offense and traveled in interstate commerce prior to SORNA's enactment cannot be prosecuted under § 2250.¹⁰⁷ It is likely not a coincidence that *Carr*, on appeal from the Seventh Circuit's case *United States v. Dixon*, was the case that the Court chose to review. The Seventh Circuit did not discuss the Commerce Clause implications of SORNA, and the Supreme Court's final decision reflected that.¹⁰⁸ By avoiding the Commerce Clause issues of SORNA, the Supreme Court has done nothing to settle the inconsistencies that exist in the jurisprudence.

III. THE MONTANA FIREARMS FREEDOM ACT

A. Statutory History

The Montana Firearms Freedom Act was signed by Governor Brian D. Schweitzer and became effective on October 1, 2009, signaling the start of the controversy.¹⁰⁹ According to the MFFA, the Ninth¹¹⁰ and Tenth Amendments¹¹¹ to the Constitution preclude federal regulation of purely intrastate manufacture of firearms, firearms accessories, and ammunition.¹¹² The MFFA invokes the Second Amendment, "as that right was understood at the time that Montana was admitted to statehood," as a contractual bond with the federal government and the state and people of Montana.¹¹³ The MFFA deems specific firearms

¹⁰⁵ *Carr v. United States*, 130 S. Ct. 2229 (2010). *But see* Corey Rayburn Yung, *When is a Circuit Agreement Really a Circuit Split?*, CONCURRING OPINIONS (Mar. 10, 2009) http://www.concurringopinions.com/archives/2009/03/when_is_circuit.html (arguing that there is actually a circuit split disguised as an agreement).

¹⁰⁶ 130 S. Ct. 2229 (2010).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* Instead, the ruling was based on statutory interpretation. *Id.*

¹⁰⁹ Montana Firearms Freedom Act, MONT. CODE ANN. §§ 30-20-101–106 (2010).

¹¹⁰ U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

¹¹¹ U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

¹¹² MONT. CODE ANN. § 30-20-102 (2010).

¹¹³ *Id.*

exclusively intrastate, and thus not subject to any federal regulations. The firearms that fall within the ambit of the statute are those with all of their major parts, accessories, and ammunition manufactured in the state and that have received a special permit requiring them to remain in Montana.¹¹⁴ The legislature also declares that small, insignificant parts and raw materials that may move in interstate commerce do not subject the finished product to federal regulation.¹¹⁵ To market the firearm in Montana, the weapon must have “Made in Montana” stamped on a major metallic part.¹¹⁶ The MFFA also states that the statute will not protect firearms that require more than one person to carry, firearms that have a larger bore diameter and smokeless powder, ammunition that has an exploding projectile using chemical energy, or automatic weapons.¹¹⁷

The actual effect of the legislation on the production of firearms in Montana is unclear. There are only eight firearms manufacturers in Montana,¹¹⁸ but business has been booming due to high demand.¹¹⁹ Whether that demand or the legislation increases the amount of in-state manufacturers remains to be seen. At present, all individuals and companies that manufacture firearms and ammunition, as well as those who conduct interstate and intrastate sales, are required to have a federal license and follow all federal regulations.¹²⁰ Therefore, the MFFA presents a significant divergence with the current law.

B. Federal Firearms Statutes

The MFFA targets federal firearms statutes. The 1934 National Firearms Act (NFA) imposed taxes on the manufacture and sale of firearms,¹²¹ and also provided for registration.¹²² The Gun Control Act of 1968 (GCA)¹²³ intended to assist the states in regulating and controlling the marketplace for firearms in order to enforce the states’ own gun

¹¹⁴ *Id.* at § 30-20-104.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at § 30-20-106.

¹¹⁷ *Id.* at § 30-20-105.

¹¹⁸ *Montana Firearms Manufacturers and Gunsmiths*, MONTANA SHOOTING SPORTS ASSOCIATION, <http://www.mtssa.org/mt.phtml> (last visited Dec. 20, 2010).

¹¹⁹ Myers Reece, *Surrounded by Job Losses, Montana’s Firearms Industry Thrives*, FLATHEAD BEACON (Oct. 30, 2009) (available at http://www.newwest.net/city/article/surrounded_by_job_losses_montanas_firearms_industry_thrives/C8/L8) (“And [in 2009,] prompted by concern over how the Obama administration will affect federal gun laws, business has gone through the roof.”).

¹²⁰ 18 U.S.C. § 923 (2006).

¹²¹ 26 U.S.C. §§ 5811–22 (2006).

¹²² *Id.* at § 5841.

¹²³ 18 U.S.C. §§ 921 (2006).

control laws and help slow serious crime.¹²⁴ The GCA also established a list of prohibited acts,¹²⁵ licensing,¹²⁶ penalties,¹²⁷ and concealed carry regulations,¹²⁸ among many other requirements.¹²⁹ The federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE) has the authority to investigate violations of the NFA and the GCA.¹³⁰

Federal firearms laws state that no one may be in “the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing firearms ammunition” until they obtain a Federal Firearms License (FFL).¹³¹ FFL holders can “ship, transport, or receive any firearm in interstate or foreign commerce.”¹³² FFL holders must also maintain records for any business they conduct,¹³³ though the types of records differ depending on the type of license, *i.e.*, manufacturing versus importing.¹³⁴ One such record is the Firearms Transaction Record, BATF Form 4473, which FFL holders must complete.¹³⁵ FFL holders must verify the recipient’s identity and conduct a background check with the National Instant Criminal Background Check System.¹³⁶ The GCA also requires that every firearm imported or manufactured have a serial number permanently on the receiver or frame of the firearm.¹³⁷

C. The MFFA in Federal Court

When the MFFA went into effect on October 1, 2009, proponents filed suit in federal court, seeking a declaration that the MFFA and the activities that it authorizes are permissible notwithstanding current

¹²⁴ S. Rep. No. 1866, 89th Cong., 2s Sess. 1 (1966). The three goals of the legislation were to “(1) regulate more effectively interstate commerce in firearms so as to reduce the likelihood that they fall into the hands of the lawless or those who might misuse them; (2) assist the States and their political subdivisions to enforce their firearms control laws and ordinances; and (3) help combat the skyrocketing increases in the incidence of serious crime in the United States.” *Id.*

¹²⁵ 18 U.S.C. § 922 (2006).

¹²⁶ *Id.* at § 923.

¹²⁷ *Id.* at § 924.

¹²⁸ *Id.* at § 926A–936C.

¹²⁹ *Id.* at §§ 921–931.

¹³⁰ 28 U.S.C. § 599A (2006).

¹³¹ 18 U.S.C. § 923 (2006).

¹³² *Id.* at § 922(a)(1)(A).

¹³³ *Id.* at § 923(g)(1)(A).

¹³⁴ 27 C.F.R. §§ 478.121–25.

¹³⁵ 18 U.S.C. § 922(t) (2006); 27 C.F.R. §§ 478.102, 478.124. The statute is also known as BATF Form 4473. 27 C.F.R. §§ 478.102, 478.124.

¹³⁶ 18 U.S.C. § 922(t); 27 C.F.R. §§ 478.102, 478.124.

¹³⁷ 18 U.S.C. § 923(i) (2006).

federal laws.¹³⁸ The Montana Shooting Sports Association (MSSA), along with its president Gary Marbut¹³⁹ and the Second Amendment Foundation (SAF) filed the complaint, which seeks to enjoin the federal government from prosecuting Montana citizens for following the MFFA.¹⁴⁰ The plaintiffs have expressed their wishes to manufacture and sell firearms and ammunition within the state without federal registration.¹⁴¹ Marbut inquired directly to BATFE regarding the issue and the agency told Marbut that he was required to register with them.¹⁴²

The findings and recommendations by the magistrate judge,¹⁴³ which were later accepted in full by the district court,¹⁴⁴ make it clear that the two sides are arguing very different cases. The MSSA argued that the Constitution does not give Congress the power to regulate the contemplated actions by Marbut, and that the Ninth and Tenth Amendments should permit this intrastate regulation.¹⁴⁵ The MSSA also disputed the federal government's argument that the Supremacy Clause superseded any state claims in the area of firearms regulation.¹⁴⁶

This argument regarding the Ninth and Tenth Amendments may very well be colorable, but that analysis is beyond the scope of this Comment.¹⁴⁷ Some consider the Tenth Amendment an important part of "New Federalism,"¹⁴⁸ while others give it no more importance than "a

¹³⁸ Mont. Shooting Sports Ass'n v. Holder ("MSSA"), CV-09-147-M-DWM-JCL, 2010 U.S. Dist. LEXIS 104301 (D. Mont. Aug. 31, 2010).

¹³⁹ *Officers*, MONTANA SHOOTING SPORTS ASSOCIATION, <http://www.mtssa.org/officers.phtml> (last visited Dec. 20, 2010); Declan McCullagh, "Gun-Rights Groups Plan State-by-State Revolt," *Political Hotsheet*, CBS NEWS, (June 16, 2009) available at <http://www.cbsnews.com/blogs/2009/06/16/politics/politicalhotsheet/entry5090952.shtml>.

¹⁴⁰ *Id.* 3-4; 8-10.

¹⁴¹ *Id.* 5-6.

¹⁴² *Id.* 13-14.

¹⁴³ Mont. Shooting Sports Ass'n v. Holder ("MSSA"), CV-09-147-M-DWM-JCL, 2010 U.S. Dist. LEXIS 104301 (D. Mont. Aug. 31, 2010).

¹⁴⁴ Mont. Shooting Sports Ass'n v. Holder, CV-09-147-M-DWM-JCL, 2010 U.S. Dist. LEXIS 110891 (D. Mont. Oct. 18, 2010).

¹⁴⁵ *MSSA*, 2010 U.S. Dist. LEXIS 104301, at *9.

¹⁴⁶ *Id.*

¹⁴⁷ The premise of this Comment is that there may be an easier route through a better-articulated categorization of the ways in which Congress can or cannot regulate based on the Commerce Clause power. As will be discussed, *infra*, the United States argues that the federal government's power in this area derives from the Commerce Clause, and my prediction is that this is the course that this suit, and others like it, will follow. Though the Tenth Amendment argument may be a more popular, and populist, way of attacking the issue, as has been done in the news media, the MFFA would need to defeat a Commerce Clause claim first. See *New York v. United States*, 505 U.S. 144, 156 (1992); *Raich v. Gonzales*, 500 F.3d 850, 867 (9th Cir. 2007).

¹⁴⁸ Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503 (2007).

truism with attitude.”¹⁴⁹ It is more appropriate to consider the validity of the MFFA under the Commerce Clause directly.¹⁵⁰

After rejecting the MSSA’s claim on both sovereign immunity¹⁵¹ and standing,¹⁵² the magistrate judge addressed the Commerce Clause issues. The court cited *Raich* and pointed out that “even purely local activities” can be regulated by Congress when the activity falls under the third *Lopez* category, as is the case with the MFFA.¹⁵³ At the heart of the ruling was a comparison between the CSA in *Raich* and the NFA and GCA.¹⁵⁴ The court refused to distinguish *Raich* from the case at bar.¹⁵⁵ The court also looked to *United States v. Stewart (Stewart II)*,¹⁵⁶ the relevant Ninth Circuit precedent, to lend support to its findings and recommendations.¹⁵⁷ The MSSA has filed for an appeal before the Ninth Circuit.¹⁵⁸

IV. IDENTIFYING THE PRODUCTS CATEGORY

A. The Need for an Articulated Fourth Category For Products

The substantially affects category of *Lopez* is over-inclusive and must be narrowed in order to reach more coherent and consistent results. Statutes such as VAWA, which the Supreme Court analyzed in *Morrison*, and the NLRA, permitted under *Jones & Laughlin Steel*, should continue to occupy this category. This “broad” category remains relevant and coherent for intangibles, or as the Supreme Court has characterized them, activities.¹⁵⁹ VAWA included no aspect of economics,¹⁶⁰ but rather concerned the implementation of a civil remedy for a violent crime.¹⁶¹ Yet the four factors of *Morrison* have applied too broadly to cases involving products, both in interstate and intrastate

¹⁴⁹ Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469 (2008).

¹⁵⁰ See McCullagh, *supra* note 139.

¹⁵¹ Mont. Shooting Sports Ass’n v. Holder, No. CV-09-147-DWM-JCL, 2010 U.S. Dist. LEXIS 104301, *15–29 (D. Mont. Aug. 31, 2010).

¹⁵² *Id.* at *29–46.

¹⁵³ *Id.* at *49.

¹⁵⁴ *Id.* at *49–53.

¹⁵⁵ *Id.* at *58–70.

¹⁵⁶ 451 F.3d 1071 (9th Cir. 2006).

¹⁵⁷ MSSA, 2010 U.S. Dist. LEXIS 104301, at *53–56. A more detailed review of *Stewart II* follows *infra* Parts VI and V.

¹⁵⁸ Notice of Appeal, Mont. Shooting Sports Ass’n v. Holder, No. CV-09-147-M-DWM-JCL (D. Mont. Filed Dec. 2, 2010).

¹⁵⁹ *United States v. Lopez*, 514 U.S. 549, 558 (1995).

¹⁶⁰ *United States v. Morrison*, 529 U.S. 598, 613 (2000) (“Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity”).

¹⁶¹ *Id.* at 601.

commerce. The Court's decision in *Lopez* to place anything that is not the use of a channel of interstate commerce or is not an instrumentality, person, or thing in interstate commerce into this amorphous third category of "activity" created several problems. This broad language gives lower courts no substantial guidance, as almost anything can be considered part of a larger activity and therefore may be regulated by Congress.

The analysis of what activities are covered under Congress's commerce power is also muddled by different judicial preferences regarding these varied policy goals of the regulations in question. In his concurrence in *Raich*, Justice Scalia considered his change of position from his decisions in *Lopez* and *Morrison* not a reversal, but rather part of a "nuanced" view of the Commerce Clause powers vested in the federal government.¹⁶² Justice Scalia relied heavily on the Necessary and Proper Clause of the Constitution¹⁶³ as a supplement to the Commerce Clause power. Others have seen Justice Scalia's concurrence as his justification for accomplishing a conservative policy goal.¹⁶⁴ "Unlike in *Lopez* and *Morrison*, which involved gun possession and violence against women—two issues that [Justice] Scalia arguably did not want to see nationalized—[Justice] Scalia saw a need for federal involvement in regulating the availability of marijuana."¹⁶⁵

Confusion also arises because *Scarborough* has not been given its proper place in Commerce Clause jurisprudence. Although *Lopez* struck down a related gun law, § 922(g) is still valid despite there being a minimal nexus between gun possession and interstate commerce.¹⁶⁶

¹⁶² *Gonzales v. Raich*, 545 U.S. 1, 33 (2005).

¹⁶³ U.S. CONST. art. I, § 8, cl. 18 ("The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

¹⁶⁴ JAMES B. STAAB, *THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA* 271 (2006). Staab characterized this as a more balanced approach to federalism that Justice Scalia adopted beginning in the 1990s that shifted him from a "Hamiltonian" to a "Madisonian." Staab also considers the political reasons that Justice Scalia may have used "Hamiltonian means . . . to accomplish conservative goals." *Id.* This theory falls short, however, when one considers Justice Scalia's opinion in *Kyllo v. United States*, 533 U.S. 27, 34–36, in which Scalia found that there was an "unreasonable" search, in violation of the Fourth Amendment, when law enforcement's use of thermal imaging to find halide lights used to grow marijuana indoors.

¹⁶⁵ *Id.* Justice Scalia was also skeptical of the premise of the suit and *Raich*'s goals in the first place. *Id.* "Scalia did not likely approve of marijuana being described as medical treatment, and was concerned about the Compassionate Use Act being misused and marijuana becoming more prevalent in interstate commerce." *Id.*

¹⁶⁶ Brent E. Newton, *Felons, Firearms, and Federalism: Reconsidering Scarborough in Light of Lopez*, 3 J. APP. PRAC. & PROCESS 671, 676–77 (2001).

Some circuits have argued that logically, the concept of an interstate nexus noted in *Scarborough* could not survive *Lopez*, but none of these courts overruled the 1977 decision.¹⁶⁷ *Scarborough* has been criticized for creating the “legal fiction” that no matter how remote a gun’s connection to interstate commerce may be, even if in the past, it could be considered to be “in” commerce.¹⁶⁸ *Raich* permitted Congress’s reach into intrastate possession because the object regulated was subject to a comprehensive regulatory scheme. *Scarborough* addresses nothing about markets or any commercially related activity whatsoever. In terms of the Commerce Clause framework, the possession of guns in *Scarborough* has no home in any *Lopez* category, yet it has not been overturned in the face of these conflicts.

This amorphous substantially affects category has led to wheat farmers, child pornographers, gun-toting felons, medicinal marijuana growers, and labor unions all being regulated under the same constitutional principle. For cases in which a product that remains in intrastate commerce is the concern, a fourth category is appropriate.¹⁶⁹ But, in case after case, the Court has been unable to divorce itself from the *Lopez* framework and has indiscriminately dropped every irregular issue into the third category as an “activity.”

Raich operated under this flaw, using “activity” to mean “product,” as if the terms are interchangeable. The Court in *Raich* said, “*Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself ‘commercial’ in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.”¹⁷⁰ A “purely intrastate activity” cannot be “produced for sale.” Consider the root word: a *product* is what is produced. The “evil” that Congress wants to regulate is not that Filburn farmed, generally. Had Filburn planted excessive acreage that yielded no wheat he would not have faced fines under the AAA. His *activity* of growing is not the problem: his *product*, wheat, is.

¹⁶⁷ *Id.*

¹⁶⁸ *United States v. Coward*, 151 F. Supp. 2d 544, 549 (E.D. Pa. 2001) (“This fiction is indelible and lasts as long as the gun can shoot. Thus, a felon who has always kept his father’s World War II trophy Luger in his bedroom has the weapon ‘in’ commerce.”).

¹⁶⁹ For another reason to create a fourth category under the *Lopez* framework, see Ryan K. Stumphauzer, Note, *Electronic Impulses, Digital Signals, and Federal Jurisdiction: Congress’s Commerce Clause Power in the Twenty-First Century*, 56 VAND. L. REV. 277, 320 (2003) (suggesting that a fourth category is necessary to analyze the federal regulation of interstate communication devices).

¹⁷⁰ *Gonzales v. Raich*, 545 U.S. 1, 18 (2005).

Herein lies the flaw of *Wickard* and *Raich*. Both of the statutes in question regulate products and their markets. Even if the product is never sold, the economic laws of supply and demand justify the congressional prerogative if the goal of the legislation is to control the national market.¹⁷¹ Yet, that economic-based regulation is not always the purpose of congressional action. The fourth category of products would establish a test to determine if Congress can regulate an intrastate product.

The circuit courts have been unable to avoid this confusion. In *United States v. Patton*,¹⁷² the Tenth Circuit recognized that although “[i]t may seem like common sense to prohibit felons’ possession of bulletproof vests and other forms of body armor,” it does not necessarily mean that Congress has the power to regulate that possession.¹⁷³ The Tenth Circuit’s dilemma is that it had to decide whether to make the decision based on the three categories of *Lopez* or to utilize the *Scarborough* standard.¹⁷⁴ The bulletproof vest in question in *Patton* was manufactured in another state but was possessed by the defendant only in Kansas.¹⁷⁵ *Patton* was convicted of violating 18 U.S.C. § 931, which prohibits the “purchase, ownership, or possession of body armor by violent felons.”¹⁷⁶

The court dismissed the channels category and the instrumentalities, people, and things category as sources for congressional authority.¹⁷⁷ In order to evaluate the substantially affects category, the court employed its own four-factor test outlined in *United States v. Grimmitt*.¹⁷⁸ The Tenth Circuit explained that to decide if Congress had a rational basis for believing the activity taken in aggregate would substantially affect interstate commerce, the court must consider whether:

- (1) the activity at which the statute is directed is commercial or economic in nature;
- (2) the statute contains an express jurisdictional element involving interstate activity that might limit its reach;
- (3) Congress has made specific findings regarding

¹⁷¹ Whether or not this is a sound economic policy is an issue for another day. Precedent allows for such a prerogative.

¹⁷² 451 F.3d 615 (10th Cir. 2006).

¹⁷³ *Id.* at 618 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426 (1821) (Marshall, C.J.) (“Congress has . . . no general right to punish murder committed within any of the States.”)).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 619–20.

¹⁷⁶ 18 U.S.C. § 931 (2006).

¹⁷⁷ *Patton*, 451 F.3d at 620–22.

¹⁷⁸ 439 F.3d 1263 (10th Cir. 2006).

the effects of the prohibited activity on interstate commerce; and (4) the link between the prohibited conduct and a substantial effect on interstate commerce is attenuated.¹⁷⁹

First, the court found that the possession of body armor is not commercial.¹⁸⁰ Second, the Tenth Circuit posited that this law regulated only specific possession, not the market itself, as required by *Raich*.¹⁸¹ The court also found that the government's argument that there was a link between crime and an effect on interstate commerce was insufficient, akin to a mythical butterfly effect.¹⁸² Similar arguments had already been rejected in *Lopez* and *Morrison*.¹⁸³ Third, the Tenth Circuit recognized that Congress mentioned the national market for body armor, but also noted that the statute did nothing to limit that market in any way.¹⁸⁴ Despite findings to the contrary, the majority of states already regulate the possession and use of body armor, so the federal regulations may not even be necessary, and may actually impede upon the states' local police powers, which they traditionally control.¹⁸⁵ Fourth, the definition of body armor in federal law was overbroad in that almost all body armor would be regulated by it.¹⁸⁶ Congress did not give reasons as to why body armor that travels in interstate commerce and does not fall into the possession of a felon should not be regulated, making it difficult to find if that particular activity substantially affected interstate commerce.¹⁸⁷ The court thus found § 931 unconstitutional under this framework.¹⁸⁸

The Tenth Circuit then cautiously returned to *Scarborough*. The court cited over a dozen opinions, in several circuits, in which the validity of *Scarborough* was questioned in light of the current line of commerce power cases.¹⁸⁹ The court completely discounted the regulatory scheme and other standards in *Raich* in reaching the conclusion that § 931 is a constitutional use of Congress's commerce power.

¹⁷⁹ *Id.* at 1272.

¹⁸⁰ *Patton*, 451 F.3d at 625.

¹⁸¹ *Id.* at 626–28.

¹⁸² *Id.* at 628–29.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 630–31.

¹⁸⁵ *Id.* at 631–32.

¹⁸⁶ *Patton*, 451 F.3d at 633.

¹⁸⁷ *Id.* at 633.

¹⁸⁸ *Id.* at 633–34.

¹⁸⁹ *Id.* at 634–35. See e.g., *United States v. Kitsch*, 307 F. Supp. 2d 657, 660–61 (E.D. Pa. 2004) (relying on *Scarborough* and circuit precedent for a ruling on § 922(g)).

The Tenth Circuit explicitly stated that there is “considerable tension between *Scarborough* and the three-category approach,” but “[a]ny doctrinal inconsistency between *Scarborough* and the Supreme Court’s more recent decisions is not for this Court to remedy.”¹⁹⁰ Though the circuits may not technically be split on some of these matters, it is clear that they are, at best, pleading for clarification, and at worst, challenging the Supreme Court to settle these divergent paths of Commerce Clause analysis.

B. The Four Factor Test

The circuit courts have come to their conclusions on the regulation of products in intrastate commerce based on disparate reasoning. Using four common and powerful determinative factors, a balancing test emerges. These factors should be weighed against one another to address the validity of these regulations.

1. Does the Constitution Grant the Product Special Treatment?

There are few amendments that invoke power over particular items.¹⁹¹ The First Amendment orders that government may not engage in “abridging the freedom of speech.”¹⁹² By outlawing certain articles, photos, or other tangible objects, Congress may be in violation of the First Amendment. The Supreme Court has used this premise as an example in other Commerce Clause cases: “[U]nder the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment.”¹⁹³ Therefore, it is important to recognize which products the First Amendment protects in order to determine the scope of Congress’s authority to regulate.

¹⁹⁰ *Patton*, 451 F.3d at 636 (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

¹⁹¹ I will reserve that discussion on the Second Amendment for Section V, where I will speculate as to how this factor will weigh in determining the constitutionality of the MFFA. The Thirteenth Amendment is a self-sufficient amendment, in as much as it permits congressional enforcement of ensuring that any semblance of slavery is not permitted. U.S. CONST. amend. XIII. In the abhorrent event someone attempts to claim a human being as an intrastate product, the Thirteenth Amendment would defeat any claim that Congress acted beyond the commerce power. The Twenty First Amendment states, “[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. CONST. amend. XXI, § 2. Although the amendment is about a product, it only becomes a factor when the product enters one state from another, putting this discussion into the channels category or the instrumentalities, persons, or things category of *Lopez*.

¹⁹² U.S. CONST. amend. I.

¹⁹³ *New York v. United States*, 505 U.S. 144, 156 (1992).

The Child Pornography Prevention Act of 1996 (CPPA) criminalizes the receipt, transportation, and possession of child pornography.¹⁹⁴ Some pre-*Raich* cases ruled that the CPPA was an unconstitutional exercise of congressional commerce power.¹⁹⁵ The Eleventh Circuit reheard *United States v. Maxwell*¹⁹⁶ on remand from the Supreme Court and concluded that the *Raich* decision could serve as an outline opinion by merely substituting the CPPA for the CSA.¹⁹⁷

The Eleventh Circuit also reconsidered the CPPA in *United States v. Smith (Smith II)*.¹⁹⁸ Defendant Alvin Smith was originally found guilty of violating the CPPA¹⁹⁹ for the production and possession of child pornography.²⁰⁰ Smith's conviction was overturned on appeal before the Eleventh Circuit because the interstate commerce nexus was not considered sufficient to uphold the criminal statute under the Commerce Clause.²⁰¹ Yet *Smith II*, even with the *Raich* analysis, also addressed a First Amendment argument.²⁰² Smith took issue with the statutory construction of the CPPA, specifically the "knowingly" requirement.²⁰³ The Eleventh Circuit considered the implications of the defendant's knowledge of the age of those depicted in the pornography, as the material could be constitutionally protected if it involved only adults.²⁰⁴ The court refers to the seminal cases on obscenity and child pornography, notably *New York v. Ferber*,²⁰⁵ in which the Supreme Court determined that the First Amendment did not protect child pornography.²⁰⁶ In this brief discussion, the Eleventh Circuit invoked a

¹⁹⁴ 18 U.S.C. § 2252A (2006).

¹⁹⁵ See, e.g., *United States v. Maxwell (Maxwell I)*, 386 F.3d 1042 (11th Cir. 2004) (court weighed four factors of *Morrison* and found the activity as non-economic; to link between defendant's possession of child pornography to interstate commerce was attenuated; that the jurisdictional hook was insufficient; and that the congressional findings and legislative history were not sufficient to outweigh the other factors). *Id.* at 1055–67. See also Sarah J. Farley, Comment, *Gonzalez v. Raich and the Federal Child Pornography Statutes: Balancing the Commerce Clause and State Sovereignty*, 2 SETON HALL CIR. REV. 621 (2006).

¹⁹⁶ 446 F.3d 1210 (11th Cir. 2006).

¹⁹⁷ *Id.* at 1216.

¹⁹⁸ 459 F.3d 1276 (11th Cir. 2006).

¹⁹⁹ 18 U.S.C. §§ 2251(a) and 2252A(a)(5)(b) (2006).

²⁰⁰ *Smith II*, 459 F.3d at 1282.

²⁰¹ *Id.* at 1282–85.

²⁰² *Id.* at 1287–89.

²⁰³ *Id.*

²⁰⁴ *Id.* at 1288.

²⁰⁵ 458 U.S. 747 (1982).

²⁰⁶ *Id.* at 764. The Eleventh Circuit quoted *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 240 (2002) ("As a general rule, pornography can be banned only if obscene, but under [*New York v. Ferber*, 458 U.S. 747 (1982)] pornography showing minors can be proscribed whether or not the images are obscene under the definition set forth in *Miller*

factor that is not normally considered in most Commerce Clause cases, nor required in *Lopez*, *Morrison*, or *Raich*. Because a Constitutional protection of a product is so rare, it is an important factor that has weighed heavily in courts' analysis.

2. Is the Regulation a Comprehensive Regulatory Scheme?

The second factor federal courts should consider is whether there is a comprehensive regulatory scheme for the product in question. This factor has been prominent in many cases due to the importance the Supreme Court gave it in *Raich*.²⁰⁷ The premise of this inquiry is somewhat dubious: length and detail in statutory language does not automatically make a "comprehensive" law.²⁰⁸ "Comprehensive" is defined as "covering completely or broadly."²⁰⁹ The use of this word in the Court's analysis seems particularly troubling for the purposes of determining if Congress has overstepped its boundaries. That irony aside, the subjectivity of the determination is also a cause for confusion. The Fourth Circuit, in the decision that preceded *Morrison*, called VAWA a "comprehensive federal statute."²¹⁰

The Supreme Court did not reject, nor even consider, the comprehensiveness of the statute when declaring VAWA unconstitutional. As a result of *Raich*, such analysis is required.²¹¹ In *Raich*, the Court explained that Congress's goal of halting drug abuse and controlling legal and illegal drug traffic was meant to be accomplished under the CSA, as the CSA created "a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA."²¹²

v. *California*.)" (internal citations omitted) (alterations added). See also, *United States v. Smith* (Smith II), 459 F.3d 1276, 1288–89 (11th Cir. 2006).

²⁰⁷ *Gonzales v. Raich*, 545 U.S. 1, 24 (2005). ("[T]he CSA . . . was a lengthy and detailed statute creating a comprehensive framework for regulating the production, distribution, and possession of five classes of 'controlled substances.'").

²⁰⁸ Christopher Beam, *Paper Weight: The Health Care Bill is More Than 1,000 Pages. Is That a Lot?*, SLATE (Aug. 20, 2009, 6:12 PM) <http://www.slate.com/id/2225820> (noting that there are other reasons a law may be lengthy. "Increased partisanship over the years has meant that the minority party is willing to do anything it can to block legislation—adding amendments, filibustering, or otherwise stalling the lawmaking process. As a result, the majority party feels the need to pack as much meat into a bill as it can . . .").

²⁰⁹ MERRIAM-WEBSTER ONLINE DICTIONARY, (Merriam-Webster Online 2010).

²¹⁰ *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 962–63 (4th Cir. 1997).

²¹¹ *Raich*, 545 U.S. at 22–25.

²¹² *Id.* at 13 (citing 21 U.S.C. §§ 841(a)(1) and 844(a) (2006)).

The importance of defining and identifying a comprehensive regulatory scheme cannot be overstated. Prior to *Raich*, jurisdictional hooks served the purpose of tying a federal regulation into interstate commerce in order to defend the constitutionality of the commerce power exercised.²¹³ Following *Lopez* and *Morrison*, the jurisdictional hook was an important tool to find not only a nexus to interstate commerce, but also to limit the power of Congress by restricting the regulation only to those activities that are actually part of interstate commerce.²¹⁴ But the result of *Maxwell II*²¹⁵ is a prime example of how *Raich*'s comprehensive regulatory scheme framework has altered the landscape. The Eleventh Circuit determined that jurisdictional sufficiency could be ignored when an activity falls under *Raich*.²¹⁶ With jurisdictional hooks no longer playing a part in Commerce Clause decisions, the comprehensive regulatory scheme is the most concrete limitation that came out of *Raich*.

The circuit courts have taken up the comprehensive regulatory scheme factor as part of their consideration in a number of Commerce Clause cases. The Tenth Circuit reviewed this factor in *Patton* and found that *Raich* placed the CSA into the third category of *Lopez* because it presented a comprehensive regulatory scheme.²¹⁷ The court's discussion on the comprehensive regulatory scheme revolved around the effect that mere possession of a product has on the marketplace.²¹⁸ The *Patton* court noted that Congress had not opted to make the manufacture, distribution, sale, possession, or use of the product, body armor, illegal, but instead only targeted possession for a specific group.²¹⁹ This was not a proper use of the commerce power to regulate a market.²²⁰ The Tenth Circuit set a limit that regulation of a product that is not comprehensive is not sufficient to bring the regulation within the commerce power, as

²¹³ Stuckey, *supra* note 69, at 2105.

²¹⁴ *Id.* at 2111–12.

²¹⁵ 446 F.3d 1210 (11th Cir. 2006).

²¹⁶ 18 U.S.C. § 2252A(a)(5)(B) (2006); *United States v. Maxwell* (Maxwell I), 386 F.3d 1042, 1045–46 (11th Cir. 2004); Stuckey, *supra* note 69, at 2118–19. In *Maxwell I*, the Eleventh Circuit overturned the conviction under 18 U.S.C. § 2252A for possessing a disk that included child pornography. 386 F.3d at 1052–70. The jurisdictional hook of the statute was that the physical item that contained the child pornography had to be “mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or . . . produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer.” 18 U.S.C. § 2252A(a)(5)(B).

²¹⁷ *United States v. Patton*, 451 F.3d 615, 625 (10th Cir. 2006).

²¹⁸ *Id.* at 626–27.

²¹⁹ *Id.* at 627.

²²⁰ *Id.*

even the federal regulation in *Lopez* was not enough to uphold the GFSZA.

In 2006, following *Raich*, the Ninth Circuit reheard *United States v. Stewart (Stewart II)*²²¹ and made significant changes in its analysis as to what constituted a regulatory scheme. Stewart was in possession of five homemade machineguns which he constructed from unique and legal parts.²²² In *Stewart I*, the focus on the federal regulation for possession of a machinegun, in violation of the GCA,²²³ relied on the economic and commercial nature of the regulation, defined by both the actual text of the statute as well as the congressional findings.²²⁴ The focus shifted in *Stewart II* because of *Raich*'s specific articulation of the role that the regulatory scheme must play in a Commerce Clause analysis.²²⁵ The court compared the CSA to the GCA, finding that both set different controls based on the uses of each class of drugs or firearms, respectively.²²⁶ The *Stewart II* court found that *Raich* allows Congress to ban the possession of a product where there is a comprehensive regulation and a rational basis for believing the product will affect the interstate market of that product.²²⁷ Congress is granted deference for all instances where a comprehensive regulatory scheme is in place.²²⁸

3. Is the Product a Fungible Commodity?

Determining whether a product is fungible,²²⁹ a commodity,²³⁰ or a fungible commodity is key to the analysis of whether Congress had sufficient commerce power to regulate a certain area. The importance of this determination is grounded in the Court's reliance in *Raich* on this point to distinguish the product at issue from those items in *Lopez* and *Morrison* and to connect it to precedent set in *Wickard*. The Supreme

²²¹ 451 F.3d 1071 (9th Cir. 2006).

²²² *United States v. Stewart (Stewart I)*, 348 F.3d 1132, 1134, 1135 (9th Cir. 2003).

²²³ 18 U.S.C. § 922(o) (2006).

²²⁴ *Stewart I*, 348 F.3d at 1137–40 (“Nothing in the legislative history suggests that Congress ever considered the impact of purely intrastate possession of homemade machineguns on interstate commerce, and there is no reason to assume that prohibiting local possession of machineguns would have the same national and commercial consequences as prohibiting the interstate and foreign traffic in firearms.”).

²²⁵ *Stewart II*, 451 F.3d at 1076–77.

²²⁶ *Id.* at 1076.

²²⁷ *Id.* at 1076–77.

²²⁸ *Id.* at 1077.

²²⁹ See MERRIAM-WEBSTER ONLINE DICTIONARY, (Merriam-Webster Online 2010) (defining “fungible” as “being of such a nature that one part or quantity may be replaced by another equal part or quantity in the satisfaction of an obligation; interchangeable.”).

²³⁰ See *id.* (defining “commodity” as “an economic good: as **a** : a product of agriculture or mining **b** : an article of commerce especially when delivered for shipment . . . **c** : a mass-produced unspecialized product . . .”).

Court found *Wickard* and *Raich* had “striking” similarities; notably, both cases involved the “cultivating for home consumption, a *fungible commodity*, for which there is an established . . . interstate market.”²³¹ Both statutes, the AAA in *Wickard* and the CSA in *Raich*, had the goal of controlling the supply and demand of a fungible commodity on that market.²³² The *Raich* court noted that “Congress’[s] power to regulate commerce includes the power to prohibit commerce in a *particular commodity*.”²³³ The CSA, in listing marijuana as a Schedule I drug, prohibits marijuana entirely.²³⁴ The Court held that homegrown marijuana intended for medical use is indistinguishable from other marijuana, and therefore, it may enter into the nationwide illegal market, which would frustrate the purpose of the comprehensive regulation.²³⁵ The Court relied on the characterization of marijuana as a commodity in order to label the “activity” of *Raich* economic and thereby within Congress’s commerce power.²³⁶ It follows that despite my qualm with the characterization of a “fungible commodity” as an “activity,” this factor in the balancing test must stay true to the decision in *Raich* by allowing congressional regulation when the product in question is fungible and/or a commodity. “But at some level, everything is unique; fungibility is a matter of degree.”²³⁷

The *Raich* decision altered not only the Ninth Circuit’s standards of what constituted a comprehensive regulatory scheme, as described *supra*, but also the court’s concept of commodity. In *Stewart I*, the Ninth Circuit contrasted Stewart’s homemade machineguns with wheat.²³⁸ Wheat was a “staple commodity” that Fillburn would have otherwise purchased had he not grown it, whereas Stewart would likely not have purchased a machinegun if he had not constructed his own.²³⁹ *Stewart II* reached a different conclusion, basing the definition of commodity on the existence of a nationwide market for the product, even if that particular item did not travel in interstate commerce.²⁴⁰

²³¹ *Gonzales v. Raich*, 545 U.S. 1, 18 (2005) (emphasis added).

²³² *Id.* at 19.

²³³ *Id.* at 19 n.29 (emphasis added).

²³⁴ *See id.* at 14 (characterizing it as a drug with high potential for abuse, without legitimate medical use, and a lack of acceptable safety for use).

²³⁵ *Id.* at 22, 40–41.

²³⁶ *Id.* at 25–26.

²³⁷ *United States v. Stewart (Stewart II)*, 451 F.3d 1071, 1077–78 (9th Cir. 2006).

²³⁸ *United States v. Stewart (Stewart I)*, 348 F.3d 1132, 1138 (9th Cir. 2003).

²³⁹ *Id.* The court also used the word “commodity” to describe machineguns in a footnote, but the significance of the term was substantially lower prior to *Raich*. *Id.* at 1138 n.3.

²⁴⁰ *Stewart II*, 451 F.3d at 1077.

The *Patton* court struggled with the concept of commodity, as it recognized that *Raich* used it in the context of “consumption.”²⁴¹ The *Patton* ruling defined “consumption” as the “act of destroying a thing by using it; the use of a thing in a way that thereby exhausts it.”²⁴² The court did not rule specifically if body armor is in fact a “fungible commodity” as *Raich* would require, but instead dismissed the case because the statute was not a total prohibition against body armor.²⁴³ Yet it still appears that the court had difficulty in divorcing “consumption” from “commodity,” so if a product cannot be consumed, it cannot be a commodity.

The *Patton* commodity definition clashes with the D.C. Circuit’s definition in reference to child pornography.²⁴⁴ In *United States v. Sullivan*, the D.C. Circuit defined child pornography as a commodity because the duplication of the product through trading gave it more economic qualities.²⁴⁵ The court stated that because of the “viral character” of digital images, even if the original is destroyed, the subsequent copies many continue to multiply as the commodity is still traded.²⁴⁶ This peculiar twist on the definition of commodity lends more support to the idea that these definitions are often twisted to fit the preferences of the court based on the intrastate product in question.

4. Do Congressional Findings Show a Connection to Interstate Commerce or Another Reasonable Purpose for Federal Regulation?

Lastly, courts must review congressional findings as to how the product affects interstate commerce, as well as the other reasons Congress gives to regulate the product. Particular congressional findings are not required, nor does the lack of findings do anything to minimize congressional authority, but they are nonetheless helpful in evaluating Congress’s intention and to allow courts to judge the interstate nexus.²⁴⁷ The lack of findings was a pitfall of the GFSZA in *Lopez*,²⁴⁸ and the Supreme Court rejected the findings in *Morrison* that attempted to connect VAWA to interstate commerce.²⁴⁹

²⁴¹ *United States v. Patton*, 451 F.3d 615, 625 (10th Cir. 2006).

²⁴² *Id.* at 625 (quoting BLACK’S LAW DICTIONARY 336 (8th ed. 2004)).

²⁴³ *Id.* at 627.

²⁴⁴ *United States v. Sullivan*, 451 F.3d 884, 889–91 (D.C. Cir. 2006).

²⁴⁵ *Id.* at 891.

²⁴⁶ *Id.*

²⁴⁷ *Gonzales v. Raich*, 545 U.S. 1, 21 (2005).

²⁴⁸ *United States v. Lopez*, 514 U.S. 549, 563 (1995).

²⁴⁹ *United States v. Morrison*, 529 U.S. 598, 610 (2000).

Although the jurisdictional hook may no longer be required in the wake of *Raich*,²⁵⁰ the Court does provide for one check, albeit broad: “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.”²⁵¹ Congress’s declaration that a regulation affects interstate commerce is not unlike a jurisdictional hook in that it is not “a talisman that wards off constitutional challenges.”²⁵² The rational basis test has extended into most evaluations of Commerce Clause cases.²⁵³

In addition to these other factors to evaluate, it remains important for our basic notion of federalism for courts to at least consider if Congress is overstepping its powers. This evaluation should be based on the traditional role of the federal government, and should consider if the reasoning behind the regulation is superfluous. The motivation behind the body armor felon-in-possession statute was a reaction to high-profile police battles with armored criminals.²⁵⁴ Child pornography legislation is justified with an explanation of the effects that this sexual exploitation has on the children who are victimized.²⁵⁵

Even the *Raich* court conceded that congressional findings are not infallible, as Justice Stevens agrees that marijuana does have a therapeutic purpose as noted in the Compassionate Use Act, despite Congress’s classification of marijuana as a Schedule I drug that has no legitimate medical use.²⁵⁶ The *Patton* court found a similar problem with the congressional findings that felons who possessed body armor were dangerous,²⁵⁷ because the court believed wearing body armor is a self-defense tactic that reduces crime.²⁵⁸

²⁵⁰ See Stuckey, *supra* note 69.

²⁵¹ *Raich*, 545 U.S. at 22.

²⁵² *United States v. Patton*, 451 F.3d 615, 632 (10th Cir. 2006).

²⁵³ See, e.g., *United States v. Patton*, 451 F.3d 615, 625 (10th Cir. 2006) (“[W]e give special deference to any findings Congress may have made regarding the connection of the statute to interstate commerce”); *United States v. Rose*, 522 F.3d 710, 717–19 (6th Cir. 2008) (finding that Congress had a rational basis to believe the intrastate transfer of firearms would affect the national market).

²⁵⁴ *United States v. Alderman*, 565 F.3d 641, 644 (9th Cir. 2009) (citing H.R. REP. 107–193, pt. 1, at 2 (2001)).

²⁵⁵ Effective Child Pornography Prosecution Act of 2007, Pub. L. No. 110–358, title I, § 102, 122 Stat. 4001 (2008).

²⁵⁶ 545 U.S. at 9.

²⁵⁷ H.R. REP. No. 107–193, pt. 1, at 2 (2001).

²⁵⁸ *Patton*, 451 F.3d at 629. In this particular case, the defendant wore the body armor to protect himself from gang violence rather than purchase a firearm to do so. *Id.*

V. APPLYING THE FOURTH CATEGORY'S FOUR FACTOR TEST

A. Montana Firearms Would Likely be Exempt from Congressional Regulation

This analysis will rest on the assumption that the product in question conforms with all three MFFA requirements: (1) the firearm, whether handgun or rifle, was manufactured in Montana or another respective state; (2) the firearm must have the "Made in Montana" stamp on a large metal portion; and (3) the firearm must not have traveled in interstate commerce."

1. Does the Constitution Grant the Product Special Treatment?

The status of firearms as a constitutionally protected product is nascent. The Supreme Court ruled in *District of Columbia v. Heller*²⁵⁹ that the Second Amendment recognizes the pre-existing civil right of an individual to keep and bear arms.²⁶⁰ The Court further stated in *McDonald v. Chicago*²⁶¹ that the Second Amendment right to keep and bear arms is "among those fundamental rights necessary to our system of ordered liberty."²⁶²

Yet, "[l]ike most rights, the right secured by the Second Amendment is not unlimited."²⁶³ The Court was not clear about what standard should apply in evaluating federal firearms regulations, only that the mere "rational basis" scrutiny would not be enough.²⁶⁴ The review of gun control laws is supposed to be rigorous;²⁶⁵ however, the degree to which that has been true in the lower courts is mixed. Judge J. Harvie Wilkinson III, although critical of both *Heller* and *Roe v. Wade*, declared them "two of the most important decisions of the modern judicial era. They now together cast a long shadow over contemporary constitutional law."²⁶⁶ Other analysis, however, has shown that the practical effect on the lower federal courts has been minimal.²⁶⁷

²⁵⁹ 554 U.S. 570 (2008).

²⁶⁰ *Id.* at 592 ("Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation.").

²⁶¹ 130 S. Ct. 3020 (2010).

²⁶² *Id.* at 3023.

²⁶³ *Heller*, 554 U.S. at 593.

²⁶⁴ Robert A. Levy, *Second Amendment Redux: Scrutiny, Incorporation, and the Heller Paradox*, 33 HARV. J. L. & PUB. POL'Y 203, 206 (2010).

²⁶⁵ *Id.*

²⁶⁶ J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 256 (2009).

²⁶⁷ See Adam Liptak, *Few Ripples From Supreme Court Ruling on Guns*, N.Y. TIMES, Mar. 17, 2009, at A14, available at <http://www.nytimes.com/2009/03/17/us/17bar.html>.

Although Justice Scalia stated in a footnote that the current firearms regulations are “presumptively lawful,” there is nothing in the *Heller* opinion that suggests that the current federal gun control laws could stand absolutely.²⁶⁸ The only regulation directly upheld in *Heller* was the one questioned in *United States v. Miller*²⁶⁹ on short-barreled shotguns.²⁷⁰ *Heller* distinguishes *Miller* to apply only to that particular statute.²⁷¹ A district court in the Second Circuit was one of the first courts to recognize that the Second Amendment “creates an individual right to possess a firearm unrelated to any military purpose, it also establishes a protectible [sic] liberty interest.”²⁷² Although the Supreme Court has yet to define what restrictions can properly be placed on firearms possession, circuit courts would be wise to respect the states that choose to impose less restrictive means on a recognized civil right.

In *MSSA*, the court discounted the plaintiffs’ claim at oral argument that the Second Amendment requires strict scrutiny of the GCA.²⁷³ First, the plaintiffs did not make an appropriate constitutional claim.²⁷⁴ That notwithstanding, although *McDonald* has recognized the individual fundamental right to possess a handgun in the home for self-defense, this does not extend to the right to manufacture and sell firearms.²⁷⁵

2. Is the Regulation a Comprehensive Regulatory Scheme?

The GCA is the primary regulation that the MFFA seeks to avoid. Several rulings have declared the GCA a “comprehensive regulatory scheme,” even prior to the importance that *Raich* put on the term.²⁷⁶ This factor weighs heavily against the MFFA, although it might not apply for all of the individual restrictions. Some parts of the GCA intend to keep firearms away from particular classes of people.²⁷⁷ In that regard, the GCA is comprehensive.²⁷⁸ Through its findings in *MSSA*, the court made

²⁶⁸ *Heller*, 554 U.S. 678 n.26.

²⁶⁹ 307 U.S. 174 (1939).

²⁷⁰ *Id.* at 178.

²⁷¹ *Heller*, 554 U.S. at 677.

²⁷² *United States v. Arzberger*, 592 F. Supp. 2d 590, 602 (S.D.N.Y. 2008) (rejecting the Adam Walsh Amendments that require an accused sex offender to relinquish his Second Amendment right to keep and bear arms before the individual has been convicted of any crime).

²⁷³ *Mont. Shooting Sports Ass’n v. Holder* (“*MSSA*”), CV-09-147-M-DWM-JCL, 2010 U.S. Dist. LEXIS 104301, *50–51 n.15 (D. Mont. Aug. 31, 2010).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *E.g.*, *NRA of Am. v. Magaw*, 132 F.3d 272, 277 (6th Cir. 1997); *San Diego County Gun Rights Comm. v. Reno*, 926 F. Supp. 1415, 1419–20 (S.D. Cal. 1995).

²⁷⁷ *See* 18 U.S.C. § 922(d) (2006).

²⁷⁸ *Barrett v. United States*, 423 U.S. 212, 218 (1976).

the comparison between the GCA and the CSA, as the Ninth Circuit did in *Stewart II*.²⁷⁹ Yet this is not a universal application.

Another issue with analyzing many aspects of the GCA, including the felon-in-possession provisions, is that the relevant cases were decided in the 1970s, resulting in few being subject to reexamination. There is also the issue of whether the entire market for firearms should be regulated, as opposed to only specific instances. A strong argument can be made that only statutes such as 18 U.S.C. § 922(o), banning machineguns entirely, constitute a comprehensive regulation of the market. This would bring machineguns in line with marijuana. In order to fully understand the effect the articulation of the fourth category of the commerce power in relation to the GCA, each individual provision, and its aims would have to be considered separately.

3. Is the Product a Fungible Commodity?

The MFFA attempts to cure the problem of fungibility by mandating that all firearms include a “Made in Montana” stamp on a “central metallic part.”²⁸⁰ There is no such provision for the accessories or ammunition, however. Regardless of the markings, there has been uncertainty by courts and scholars regarding whether firearms are fungible. The Fifth Circuit, in the lower court case for *Lopez*, determined that, “firearms do not have the fungible and untraceable characteristics of narcotics,” a prescient comparison.²⁸¹ Other courts and commentators have sparred over determining the fungibility of firearms.²⁸²

Perhaps a reason for this confusion is that fungibility also varies from the viewpoint of the observer and the purpose of the user. That is to say that some guns are better suited for crimes than others, but even so, the criminal could just as easily find another gun to fit her needs to commit a crime.²⁸³ With this ambiguity, and keeping in mind the

²⁷⁹ Mont. Shooting Sports Ass’n v. Holder (“MSSA”), CV-09-147-M-DWM-JCL, 2010 U.S. Dist. LEXIS 104301, *52–55 (D. Mont. Aug. 31, 2010).

²⁸⁰ Montana Firearms Freedom Act, MONT. CODE ANN. §§ 30-20-106 (2010).

²⁸¹ United States v. Lopez, 2 F.3d 1342, 1367 n.51 (5th Cir. 1993).

²⁸² Compare Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1066–67 (N.Y. 2001), with Harold Hongju Koh, Lecture, *The Robert L. Levine Distinguished Lecture Series: A World Drowning in Guns*, 71 FORDHAM L. REV. 2333, 2337 (2003) (“Guns that are sold legally often wind up in illegal hands. Their fungibility, their portability, their small size, and their widespread availability makes them an alternative black-market global currency for transnational terrorists. Small arms can be bartered for food, livestock, smuggled money, even diamonds.”).

²⁸³ Timothy D. Lytton, *Tort Claims Against Gun Manufacturers for Crime-Related Injuries: Defining a Suitable Role for the Tort System in Regulating the Firearms Industry*, 65 MO. L. REV. 1, 43 (2000) (“[P]laintiffs often distinguish certain models of

warning that “fungibility is a matter of degree,”²⁸⁴ it would only favor the constitutionality of the MFFA by having additional markings that would make the firearm distinguishable. Randy Barnett, the counsel for Raich, speculated that the MFFA may need to require more markings as one way of assuring the federal government that the intrastate products can be distinguished on the national market.²⁸⁵ In *MSSA*, the court quoted *Raich* and called firearms “commodities for which there is an established, lucrative interstate market”²⁸⁶ but did not consider the actual definition of “commodity.” Courts continue to incorrectly label any object a “commodity” in order to fit it into the flawed *Lopez* framework, which likewise incorrectly equates “product” with “activity.”

4. Do Congressional Findings Show a Connection to Interstate Commerce or Another Reasonable Purpose for Federal Regulation?

Finally, the congressional findings will vary depending on the exact statute in question. Congress can say whatever it wants to in the way of congressional findings. *Lopez* is an example where congressional findings could not save a federal gun regulation.²⁸⁷ In the Fifth Circuit case of *Lopez*, the court rejected the government’s theory, harshly criticizing it: “If Congress can thus bar firearms possession because of such a nexus to the grounds of *any* public or private school, and can do so without supportive findings or legislative history, on the theory that education affects commerce, then it could also similarly ban lead pencils, ‘sneakers,’ Game Boys, or slide rules.”²⁸⁸ Though the Fifth Circuit would not speak to the potential approval with modified findings,²⁸⁹ the government did not rely on the findings of § 922(q) as they existed when

guns as especially well suited for crime when describing what makes certain marketing practices negligent On the other hand, defendant-manufacturers have argued that the marketing of a particular gun is not a substantial factor in causing a crime-related injury, even where the crime gun is successfully traced, since countless other guns are available and would have served the criminal just as well.”)

²⁸⁴ *United States v. Stewart* (Stewart II), 451 F.3d 1071, 1077–78 (9th Cir. 2006).

²⁸⁵ *Glenn Beck: Interview with Randy Barnett, Professor, Georgetown Univ. Law Ctr.* (Fox News Channel television broadcast May 11, 2009), available at http://www.youtube.com/watch?v=IL_AmV6VIBA (“I don’t think [marking the firearm only once] is going to be good enough. I think all the parts, or many of the parts, have to be marked . . .”).

²⁸⁶ *Mont. Shooting Sports Ass’n v. Holder* (“*MSSA*”), CV-09-147-M-DWM-JCL, 2010 U.S. Dist. LEXIS 104301, *53 (D. Mont. Aug. 31, 2010) (quoting *United States v. Raich*, 545 U.S. 1, 32 (2005)).

²⁸⁷ *United States v. Lopez*, 514 U.S. 549, 562–63 (1995).

²⁸⁸ *United States v. Lopez*, 2 F.3d 1342, 1367 (5th Cir. 1993).

²⁸⁹ *Id.* at 1368.

presented to the Supreme Court, nor the amended version that stands in the current statute.²⁹⁰

Congressional findings that are appropriate for this evaluation come in many forms. Findings that show a nexus between the regulation of a product at issue and interstate commerce may be difficult to uphold, as these are mostly criminal laws that are traditionally left to the states. Other findings that intend to regulate a specific firearm or accessory, including machineguns or body armor, will vary based on the end goal of the statute. Under § 922(o), machineguns are banned entirely, and therefore, the congressional findings that explain the merits of the elimination of this product's market will help weigh in favor of a court permitting the regulation.²⁹¹ On the other hand, § 931 bans body armor for felons, and congressional findings made pursuant to this statute elude only to the danger of felons specifically possessing body armor, but make no comment about the national market.²⁹² In this case, because there is not an absolute ban on firearms, the government would not be able to make a strong argument on those grounds. The federal government's argument would have to be tailored to issues regarding the regulation of the national market, which creates complications as explained *supra*.

5. The Factors Weigh In Favor of Upholding the MFFA

Thanks to the *Heller* and *McDonald* decisions, firearms are in a unique position, as they are one of a handful of products that have special Constitutional protections.²⁹³ Although gun laws are lengthy and many courts have considered the GCA to be a comprehensive regulatory scheme, it is not as comprehensive when considered on a statute-by-statute basis, or perhaps more appropriately, on a product-by-product basis. We will only learn which federal gun control regulations will prevail when the federal government enforces these statutes against an individual who is adhering to his states' firearms freedom act. The MFFA is explicit in its attempt to eliminate the issue of fungibility by using markings, a unique solution to a difficult problem. Accordingly, congressional findings in this area will come under greater scrutiny, and again, will vary based on the specific regulation. In this environment, the MFFA will likely succeed.

²⁹⁰ *Lopez*, 514 U.S. at 562–63.

²⁹¹ 18 U.S.C. § 922(o) (2006).

²⁹² *Id.* at § 931.

²⁹³ *District of Columbia v. Heller*, 554 U.S. 570, 591–94 (2008).

B. The Application of the Products Category's Balancing Test Still Upholds Federal Regulations on Intrastate Child Pornography and Marijuana

Testing the fourth category with precedent demonstrates that it does, in fact, already exist. The regulation of child pornography and marijuana, would still be permitted. Although no court has explicitly laid out these factors in determining the constitutionality of such restrictions, application of the balancing test leaves these decisions on firmer ground.

1. Child Pornography

Child pornography cases have borne out significant legislation recently in many different aspects of the law, but the end result has been consistent: federal law outlaws intrastate child pornography. These cases have been particularly useful in finding the threads that connect to create the fourth category. First, there is no constitutional protection of child pornography under the First Amendment, so this prong weighs in favor of Congress. Such speech has been used by the Supreme Court as an example of a type “fully outside the protection of the First Amendment.”²⁹⁴

Second, child pornography regulations have often been found to be comprehensive. The CPPA has been called comprehensive by the Sixth,²⁹⁵ Seventh,²⁹⁶ Ninth,²⁹⁷ Tenth,²⁹⁸ Eleventh,²⁹⁹ and the District of Columbia Circuits.³⁰⁰ District courts in other circuits have relied on some of these decisions and quoted their analyses on the comprehensiveness of the CPPA.³⁰¹ Although there are several courts that have not opted to bestow the CPPA with the “comprehensive” distinction, the courts have still upheld its constitutionality.³⁰² In many

²⁹⁴ United States v. Stevens, 130 S. Ct. 1577, 1586 (2010); *See also* New York v. Ferber, 458 U.S. 747 (1982).

²⁹⁵ United States v. Gann, 160 F. App'x. 466, 473 (6th Cir. 2005).

²⁹⁶ United States v. Blum, 534 F.3d 608, 611 (7th Cir. 2008).

²⁹⁷ United States v. McCalla, 545 F.3d 750, 755 (9th Cir. 2008).

²⁹⁸ United States v. Croxford, 170 F. App'x. 31, 41 (10th Cir. 2006); United States v. Jeronimo-Bautista, 425 F.3d 1266, 1269–72 (10th Cir. 2005).

²⁹⁹ United States v. Maxwell (Maxwell II), 446 F.3d 1210, 1217 (11th Cir. 2006).

³⁰⁰ United States v. Sullivan, 451 F.3d 884, 890 (D.C. Cir. 2006).

³⁰¹ *E.g.*, United States v. Keller, No. 2:09-CR-20113, 2009 U.S. Dist. LEXIS 71688, at *14–18 (D. Mich. June 30, 2009) (quoting United States v. Blum, 534 F.3d 608 (7th Cir. 2008)); United States v. McGee, 2007 U.S. Dist. LEXIS 3743, at *12–14 (D. Miss. 2007) (quoting United States v. Maxwell (Maxwell II), 446 F.3d 1210, 1218 (11th Cir. 2006)).

³⁰² *See, e.g.*, United States v. Forrest, 429 F.3d 73 (4th Cir. 2005) (finding that the “general regulatory scheme” compared to *Raich*); United States v. Lewis, 554 F.3d 208,

instances, the analysis noted the importance of the suppression of the entire market of child pornography.³⁰³ The CPPA explains that its purpose is to “eliminate the market for the sexual exploitative use of children” by “prohibiting the possession and viewing of child pornography.”³⁰⁴ This leaves no exceptions to the rule and focuses the regulation on the product itself.

Third, the fungibility of child pornography has been analyzed in federal courts. Some courts have deemed that child pornography is a fungible commodity and have not differentiated it from the wheat in *Wickard* or the marijuana in *Raich*.³⁰⁵ The D.C. Circuit considered child pornography to have even greater commodity characteristics because sharing child pornography actually increases the supply.³⁰⁶ The consumption of the product actually creates more of it, rather than diminishing it.³⁰⁷ The court additionally recognized the fungibility of child pornography and how it could be diverted from intrastate into interstate markets.³⁰⁸ On the other hand, the Ninth Circuit, in a pre-*Raich* case, held that a single photo of a mother and her daughter partially undressed was not fungible because the mother had no intention of exchanging it for more child pornography or for any other economic reasons.³⁰⁹

Fourth, there are significant congressional findings for the regulation of child pornography. It focuses primarily on the serious long-term effects that sexual exploitation has on children, a protected

214 (1st Cir. 2009). The First Circuit did not reexamine *United States v. Morales-De Jesus*, 372 F.3d 6 (1st Cir. 2004) decided prior to *Raich* decision. *Morales-De Jesus* only noted a “comprehensive backdrop” as to congressional findings. *Id.* at 12. See also, *United States v. Cramer*, 213 F. App’x. 138, 143 (3d Cir. 2007). The Third Circuit did not review the decision in *United States v. Rodia*, 194 F.3d 465 (3d Cir. 1999), that the CPAA is constitutional on Commerce Clause grounds.

³⁰³ See, e.g., *Forrest*, 429 F.3d at 78–79.

³⁰⁴ 18 U.S.C. § 2251 (2006).

³⁰⁵ See, e.g., *United States v. Maxwell*, 446 F.3d 1210, 1216 (11th Cir. 2006) (“We find very little to distinguish constitutionally Maxwell’s claim from *Raich*’s. Indeed, much of the Court’s analysis could serve as an opinion in this case by simply replacing marijuana and the CSA with child pornography and the CPPA.”).

³⁰⁶ *United States v. Sullivan*, 451 F.3d 884, 889–91 (D.C. Cir. 2006) (“In contrast to wheat or marijuana, the supply of electronic images of child pornography has a viral character: every time one user downloads an image, he simultaneously produces a duplicate version of that image. Transfers of wheat or marijuana merely subdivide an existing cache; transfers of digital pornography, on the other hand, multiply the existing supply of the commodity, so that even if the initial possessor’s holdings are destroyed, subsequent possessors may further propagate the images.”).

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 891.

³⁰⁹ See *United States v. McCoy*, 323 F.3d 1114, 1122 (9th Cir. 2003).

class in our society.³¹⁰ Child pornography that is intrastate could be ensnared by congressional regulations under the fourth category.

2. Marijuana

Although one could simply take *Raich* to declare federal drug regulations such as the CSA constitutional, the balancing test of the fourth category bares out the same conclusion. First, there is no right to marijuana under any amendment to the Constitution. Second, *Raich* sets the standard in explaining the comprehensive regulatory scheme of the CSA.³¹¹ Justice Stevens devotes considerable ink to describing the history of the CSA and why it is a prime example of this ideal regulatory scheme.³¹² Third, the fungibility of marijuana, like wheat in *Wickard*, is without question.³¹³ *Raich* clearly outlined this characteristic, which is what makes it such an important factor in the current jurisprudence. Likewise, the fourth and final category, congressional findings, were found to be sufficient in *Raich*.³¹⁴ With all four factors on their side, Congress would still be justified in regulating intrastate marijuana.

VI. CONCLUSION

Regardless of the outcome in Montana's federal case, the MFFA and related challenges are not going away. Criticism of Congress's heavy regulatory hand has come in large part from the actions it has taken with its Commerce Clause power. The authority that courts vested in Congress in the last century, despite a brief turnaround, continues to dominate the federal landscape. *Lopez*, *Morrison*, *Raich*, and *Scarborough* are four cases that cannot peaceably coexist within the current three-category framework if we are to consider consistency in the circuit courts and restraint of the national government as part of our legal system. *Lopez* gave us what it intended to be three all-inclusive categories, but it falls short. A fourth category has emerged in scattered strands in various cases in the federal circuit courts, but no court has been willing or able to pull them all together. Now, Montana and other states are using the MFFA to fire a shot directly at the courts, urging them to stop talking and to take action.³¹⁵ A fourth category exclusively

³¹⁰ Effective Child Pornography Prosecution Act of 2007, Pub. L. 110-358, § 102, 122 Stat. 4001 (2008).

³¹¹ *Gonzales v. Raich*, 545 U.S. 1, 23-24 (2005).

³¹² *Id.* at 10-15.

³¹³ *Id.* at 18-22, 22.

³¹⁴ *Id.* at 12, 20-21.

³¹⁵ Recall that the Tenth Circuit neglected to settle the problems it saw with *Scarborough* and the three *Lopez* categories. *United States v. Patton*, 451 F.3d 615, 636

for intrastate products will bring together all of the Commerce Clause cases that are currently in great tension with one another. When courts are upfront that the product itself is actually what is evaluated, Commerce Clause jurisprudence will no longer be an easy target for criticism.

(10th Cir. 2006) (“Any doctrinal inconsistency between *Scarborough* and the Supreme Court’s more recent decisions is not for this Court to remedy.”).