



# Congressional Authority to Regulate Firearms: A Legal Overview

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April 5, 2013

Congressional Research Service

7-5700

[www.crs.gov](http://www.crs.gov)

R43033

## Summary

Congress has broad authority pursuant to the Commerce Clause to enact laws in areas that may overlap with traditional state jurisdiction. As such, Congress has passed complex statutory provisions that regulate the possession, receipt, transfer, and manufacture of firearms and ammunition. Generally, courts have upheld the validity of firearms laws pursuant to Congress's commerce power. However, courts have been confronted with the question of whether federal laws can be applied to intrastate possession and intrastate transfers of firearms, or whether such application exceeds the authority of Congress. This report explores these cases and how courts have analyzed these as-applied challenges under the Supreme Court's Commerce Clause jurisprudence primarily set forth in *United States v. Lopez*.

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## Overview of Commerce Clause

The U.S. Constitution specifies the enumerated powers of the federal government.<sup>1</sup> These powers, however, have been interpreted broadly so as to create a large potential overlap with state authority. States may generally legislate on all matters within their territorial jurisdiction.<sup>2</sup> Indeed, criminal law, family law, property, and contract and tort law, among others, are typical areas of law that are regulated at the state level.<sup>3</sup> Accordingly, states have enacted their own laws regarding the unlawful possession and disposition of firearms, as well as the manner in which firearms may be carried.

Congress, too, has enacted legislation related to firearms control. It includes, among others, the National Firearms Act of 1934,<sup>4</sup> the Gun Control Act of 1968,<sup>5</sup> the Firearm Owners' Protection Act of 1986,<sup>6</sup> and the Brady Handgun Violence Prevention Act of 1993.<sup>7</sup> Generally, Congress has relied on its authority under the Commerce Clause to enact such statutes.<sup>8</sup> The Commerce Clause states: "The Congress shall have Power ... To regulate Commerce with foreign Nationals, and among the several States, and with Indian Tribes."<sup>9</sup>

Although a plain reading of the text might suggest that Congress has only a limited power to regulate commercial trade between persons in one state and persons of another state, the Clause has not been construed quite so narrowly, particularly in the modern era.<sup>10</sup> Since the 1930s, the U.S. Supreme Court has held that Congress has the ability to protect interstate commerce from burdens and obstructions "no matter what the source of the dangers which threaten it."<sup>11</sup> Over

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<sup>1</sup> U.S. Const., art. I, §1("All legislative power herein granted shall be vested in a Congress of the United States.")

<sup>2</sup> The states' authority, or "police power," to enact such legislation does not arise from the U.S. Constitution. Rather, it is an inherent attribute of states' territorial sovereignty. *See Alden v. Maine*, 527 U.S. 706 (1999). The Supreme Court in *Alden* affirmed that states retain a "residuary and inviolable sovereignty" and that "our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Id.* at 748.

<sup>3</sup> *See, e.g., Screws v. United States*, 325 U.S. 91, 109 (1945) plurality opinion ("Our national government is one of delegated powers alone. Under our federal system the administration of justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States."). The states have retained "inherent police power," *Newberry v. United States*, 256 U.S. 232 (1921), meaning the power to legislate for the "health, safety, and morals" of the citizenry. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

<sup>4</sup> P.L. 73-474 (1934), *codified at* 26 U.S.C. ch.53.

<sup>5</sup> P.L. 90-618 (1968), *codified at* 18 U.S.C. §§921 *et seq.*

<sup>6</sup> P.L. 99-308 (1986).

<sup>7</sup> P.L. 104-159 (1994).

<sup>8</sup> The National Firearms Act of 1934 levies taxes regarding the manufacture and transfer of certain firearms and other weapons. Therefore, it could be argued that Congress is also relying on its authority under the Taxing Clause to enact this statute. U.S. Const., art. I, §8, cl. 1.

<sup>9</sup> U.S. Const., art. I, §8, cl. 3.

<sup>10</sup> For a historical overview and early jurisprudence regarding the Commerce Clause, *see* CRS Report RL32844, *The Power to Regulate Commerce: Limits on Congressional Power*, by Kenneth R. Thomas. In the early 20<sup>th</sup> century, the U.S. Supreme Court generally declared various federal statutes, which regulated the movement of goods or persons, constitutional under the Commerce Clause. However, the Court struck down a series of federal statutes which attempted to extend commerce regulation to activities such as "production," "manufacturing," or "mining." *See, e.g., United States v. E.C. Knight Co.*, 156 U.S. 1 (1895); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>11</sup> *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 36 (1937) ("The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' [citation omitted] for 'its protection and advancement' [citation omitted]; to adopt measures 'to promote its growth and insure its safety' [citation omitted]; 'to (continued...)

time, the Court concluded that Congress had considerable discretion in determining which commercial activities, including intrastate commercial activities, “affect” interstate commerce, as long as the legislation was “reasonably” related to achieving its goals of regulating interstate commerce.<sup>12</sup> Furthermore, the Court in *Wickard v. Filburn* also held that an activity, “though it may not be regarded as commerce, it may still, whatever its nature,” be regulated by Congress if, in the aggregate, “it exerts a substantial economic effect on interstate commerce.”<sup>13</sup> Under this prevailing interpretation of the Commerce Clause, the Supreme Court has upheld a variety of federal laws, including those regulating the production of wheat on farms,<sup>14</sup> racial discrimination by businesses,<sup>15</sup> and loan-sharking.<sup>16</sup>

### ***United States v. Lopez and Progeny***

However, in 1995, the Supreme Court revisited the scope of the Commerce Clause in *United States v. Lopez*.<sup>17</sup> In *Lopez*, the Supreme Court held that Congress had exceeded its constitutional authority when it passed the Gun-Free School Zones Act of 1990<sup>18</sup> (School Zones Act). The Court, clarifying the judiciary’s traditional approach to Commerce Clause analysis, identified three broad categories of activity that Congress may regulate under its commerce power. These are

1. the channels of commerce;
2. the instrumentalities of commerce in interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and
3. activities which “substantially affect” interstate commerce.<sup>19</sup>

Under the first two categories, *Lopez* endorses Congress’s “power to regulate all activities, persons or products that cross state boundaries. So long as a federal regulation relates to interstate

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(...continued)

foster, protect, control and restrain.’ [citation omitted] ... Although 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.” *Id.* at 37).

<sup>12</sup> *United States v. Darby*, 312 U.S. 100 (1941) (approving legislation relating to working conditions).

<sup>13</sup> *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (upholding constitutionality of the Agricultural Adjustment Act of 1938, which regulated national production of wheat, as applied to consumption of homegrown wheat).

<sup>14</sup> *Id.*

<sup>15</sup> *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 256(1964) (upholding Title II of Civil Rights Act of 1964 as applied to hotels and stating “[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.”); *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964) (upholding Title II of Civil Rights Act of 1964 as applied to restaurants and stating “the power to regulate [interstate commerce] extends to activities of retail establishments, including restaurants, which directly or indirectly burden or obstruct interstate commerce”).

<sup>16</sup> *Perez v. United States*, 402 U.S. 146 (1971).

<sup>17</sup> 514 U.S. 549 (1995).

<sup>18</sup> P.L. 101-647 (1990). The School Zones Act had made it a federal offense for “any individual to knowingly possess a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone.” 18 U.S.C. §922(q) (1988 ed. Supp. V). The *Lopez* decision is significant in that it was the first time since 1937 that the Supreme Court struck down a federal statute purely based on a finding that Congress had exceeded its powers under the Commerce Clause.

<sup>19</sup> *Lopez*, 514 U.S. at 558-59.

transactions or interstate transportation, the federal regulation would be justified under the first two branches....<sup>20</sup> However, in examining the School Zones Act, the Court concluded that possession of a gun in a school zone was neither a regulation of the channels nor the instrumentalities of interstate commerce.<sup>21</sup> Because the conduct regulated was considered to be a wholly intrastate activity, the Court concluded that Congress could only regulate the activity if it fell within the third category and “substantially affects” interstate commerce. The Court indicated that intrastate activities have been, and could be, regulated by Congress where the activities “arise out of or are connected with a commercial transaction” and which are “part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”<sup>22</sup> The Court struck down the School Zones Act, declaring that the intrastate activity—possession of a handgun near a school—was not part of a larger economic firearms regulatory scheme.<sup>23</sup> Moreover, the act did not require that interstate commerce be affected, such as by requiring the gun to be transported in interstate commerce.<sup>24</sup>

For the same reasons identified in *Lopez*, the Supreme Court subsequently invalidated a part of the Violence Against Women Act (VAWA) in *United States v. Morrison*.<sup>25</sup> The Court in *Morrison* concluded that the activity regulated—a federal civil remedy for gender-motivated crimes—did not fall within the first two commerce categories, or the third category, because it was not an “economic activity”; furthermore, the provision contained no “jurisdictional element establishing that the federal cause of action [was] in pursuance of Congress’s power to regulate interstate commerce.”<sup>26</sup> In both *Lopez* and *Morrison*, the Court rejected the government’s reasoning in

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<sup>20</sup> Erwin Chemerinsky, *Constitutional Law: Policies and Principles*, at §4.6 (3d ed. 2006).

<sup>21</sup> *Lopez*, 514 U.S. at 559-60. Interestingly, the Court in *Lopez* did not discuss that the three categories are intertwined to a certain degree. For example, the first category—the regulation of “streams” or “channels” of commerce, which allows for the regulation of the creation, movement, sale, and consumption of merchandise or services—was justified in *NLRB v. Jones & Laughlin* by the “effect” of these activities on commerce. See *NLRB*, 301 U.S. at 31. Similarly, the second category—the regulation of the instrumentalities of commerce, such as planes, trains or trucks—is also based on the theory that a threat to these instrumentalities “affects” commerce, even if the effect is local in nature. See *Southern Railway Co. v. United States*, 222 U.S. 21, 26-27 (1911) (regulation of intrastate rail traffic has a substantial effect on interstate rail traffic). The third category arguably acts as a “catch-all” for all other activities that “substantially affect” interstate commerce.

<sup>22</sup> *Lopez*, 514 U.S. at 561 (referencing *Wickard v. Filburn*, 317 U.S. 111 (1942)).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 561-62. The Court found it significant that that the act “contains no jurisdictional element which would ensure, through a case-by-case inquiry, that the firearm possession in question affects interstate commerce.” A jurisdictional element would also “limit [the statute’s] reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce.” *Id.* at 562.

In 1996, Congress passed a new version of the Gun-Free School Zones Act (P.L. 104-208) that added a jurisdictional hook. The provision reads: “It shall be unlawful for any individual to knowingly possess a firearm that has moved in or otherwise affects interstate or foreign commerce at ... a school zone.” The revised School Zones Act was challenged again in lower courts, but has been since upheld. See, e.g., *United States V. Dorsey*, 418 F.3d 1038, 1046 (9<sup>th</sup> Cir. 2005) (holding that the new §922(q) “resolves the shortcomings that the *Lopez* Court found in the prior version of this statute because it incorporates a ‘jurisdictional element which would ensure, through case-by-case inquiry, that the firearm in possession in question affects interstate commerce’”).

<sup>25</sup> 528 U.S. 598 (2000).

<sup>26</sup> *Id.* at 613. Because the regulated activities in both *Lopez* and *Morrison* were considered noneconomic, the Court did not defer to Congress’s conclusion that the regulated activities at issue substantially affected interstate commerce. Although the Court in *Lopez* stated that congressional findings could assist it in evaluating the legislature’s judgment that the activity in question substantially affected interstate commerce, it noted that “[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” *Lopez*, 514 U.S. at 557 n.2.

establishing a connection between the regulated activity and its purported effect on interstate commerce, because the Court would have been required to “pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”<sup>27</sup>

Although finding that Congress had exceeded its authority under the Commerce Clause with respect to the laws in *Lopez* and *Morrison*, the Court in *Gonzales v. Raich* subsequently clarified that Congress still has considerable authority under the “substantially affects” doctrine to regulate activity that is “quintessentially economic” on the intrastate level, even though the activity itself is not a part of interstate commerce.<sup>28</sup> The Court stated it did not need to determine for itself whether the activities, taken in the aggregate, substantially affect interstate commerce or undercut the larger regulatory scheme. Instead, it needed only to determine whether Congress had a rational basis to make such a conclusion.<sup>29</sup> Justice Scalia, in his concurring opinion, also emphasized the role of the Necessary and Proper Clause.<sup>30</sup> He opined that the Clause has been inherently relied on to regulate (1) economic intrastate activities that substantially affect interstate commerce, and (2) noneconomic intrastate activities that do not themselves substantially affect interstate commerce but that are a “necessary part of a more general regulation of interstate commerce.”<sup>31</sup> The latter category, however, is limited by *Lopez* and *Morrison*, where the Court rejected arguments that “Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences.”<sup>32</sup>

## **Constitutional Limitations on Congress’s Authority to Regulate Firearms**

Although the Commerce Clause gives Congress broad authority to enact laws, there may be other constitutional constraints on its ability to regulate firearms. One constitutional limitation may be the Tenth Amendment to the U.S. Constitution, which provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

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<sup>27</sup> *Lopez*, 514 U.S. at 567 (The Court in *Lopez* rejected the argument that possession of guns in school zones affected the national economy by its negative impact on education. *Id.* at 564.). In *Morrison*, the Court stated that if it accepted the government’s argument, Congress would be allowed to regulate “any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.” *Morrison*, 529 U.S. at 616.

<sup>28</sup> *Gonzales v. Raich*, 545 U.S. 1 (2005). The Court held that the application of the Controlled Substances Act (CSA), which prohibited the possession of marijuana, to California users of homegrown marijuana for medical purposes was a proper use of Congress’s Commerce Clause powers. The Court declared 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.” *Id.* at 18.

<sup>29</sup> *Id.* at 21. The Court rejected the argument that the statute was unconstitutional because Congress did not make specific findings regarding the effect of intrastate cultivation and possession of marijuana on the larger interstate marijuana market.

<sup>30</sup> U.S. Const., Art. I, §8, cl. 18.

<sup>31</sup> *Raich*, 545 U.S. at 36-7 (Scalia, J., concurring) (“[U]nlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce and thus the power to regulate them cannot come from the Commerce Clause alone.” *Id.* at 34.).

<sup>32</sup> *Id.* at 36 (“*Lopez* and *Morrison* affirm that Congress may not regulate certain ‘purely local’ activity within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government.” *Id.* at 38-9.).

respectively, or to the people.”<sup>33</sup> Although the Tenth Amendment may limit the type of legislation Congress can pass, “a valid exercise of Congress’ Commerce Clause power is not a violation of the Tenth Amendment.”<sup>34</sup> Generally, the Supreme Court has ruled that the federal government’s power over interstate commerce does not authorize it to require, or commandeer, state or local governments to take legislative acts or certain executive actions. For example, in *New York v. United States*, the Supreme Court held that federal legislation cannot require states to develop legislation on how to dispose of all low-level radioactive waste generated within the state, nor can it order states to take title to such waste.<sup>35</sup> Although the Court held that Congress had authority under the Commerce Clause to regulate low-level radioactive waste directly, such power did not authorize them to order states to enact laws.<sup>36</sup> The Court subsequently held in *Printz v. United States* that Congress cannot commandeer state executive branch officials from carrying out a federal program, as such an act is outside Congress’s power and inconsistent with the Tenth Amendment.<sup>37</sup> However, the Court has upheld federal legislation that regulated state activities with respect to information obtained from drivers’ license applications, because the law at issue “does not require the states in their sovereign capacity to regulate their own citizens ... [and it] does not require [the state] legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.”<sup>38</sup>

The Second Amendment to the U.S. Constitution is another constitutional provision that may limit the type of legislation Congress may pass related to firearms. The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” The Supreme Court in *District of Columbia v. Heller* held that the Second Amendment protects an individual right to keep a firearm, unconnected with service to the militia, and to use that firearm for lawful purposes such as self-defense in the home.<sup>39</sup> Although Congress has the authority to regulate firearms under its commerce authority, it may not do so in a way that infringes upon the right guaranteed by the Second Amendment. Since *Heller*, several federal firearms laws have been challenged under the Second Amendment, though all have been upheld. For a discussion on how federal firearms laws are evaluated under a Second Amendment analysis, see CRS Report R43031, *Second Amendment Challenges to Firearms Regulations Post-Heller*, by Vivian S. Chu.

In sum, Congress has the general authority to enact regulations under its Commerce Clause authority, so long as the activities or conduct regulated fall within one of the three categories established by *Lopez*. However, even where Congress may have direct authority to regulate, it cannot do so in a manner that would be inconsistent with other constitutional principles, such as those under the Tenth or Second Amendments to the U.S. Constitution.

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<sup>33</sup> U.S. Const., amend. X.

<sup>34</sup> *Montana Shooting Sports Ass’n. v. Holder*, 2010 U.S. Dist. LEXIS 104301, at \*73 (D. Mont. 2010).

<sup>35</sup> *New York v. United States*, 505 U.S. 144 (1992).

<sup>36</sup> *Id.* at 159-60 (neither the text nor structure of the Constitution empowers Congress to commandeer the legislative process of the states).

<sup>37</sup> *Printz v. United States*, 521 U.S. 898, 926 (1997) (holding that Congress did not have the authority to pass part of the Brady Handgun Violence Prevention Act, which required state law enforcement officers to conduct background checks on prospective handgun purchasers within five days of an attempted purchase).

<sup>38</sup> *Reno v. Condon*, 528 U.S. 141, 151 (2000) (upholding the Driver’s Protection Privacy Act of 1994, which imposed limitations on state governments’ and private persons’ ability to disclose information received through drivers’ license applications).

<sup>39</sup> 554 U.S. 570 (2008).



## Commerce Clause Challenges to Federal Firearms Laws

Federal firearms laws have been challenged periodically on grounds that Congress did not have authority under the Commerce Clause to pass them. This section examines lower courts' decisions regarding the constitutional validity of certain federal firearms laws, particularly the application of these laws to intrastate possession and intrastate transfer of firearms.

As described above, Congress's authority under the Commerce Clause extends to regulating items that move through interstate commerce and commercial activities that affect interstate commerce. It is therefore relatively settled that Congress may regulate the manufacture and transfer of firearms. For example, the constitutionality of a federal semiautomatic assault weapons ban, which was in effect for ten years, was challenged under the Commerce Clause. In 1994, Congress passed the Violent Crime Control and Law Enforcement Act, which included a provision making it unlawful to possess, manufacture, or transfer certain types of semiautomatic pistols, rifles, and shotguns (i.e., "assault weapons").<sup>40</sup> The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), in *Navegar, Inc. v. United States*, addressed the question of whether the activities regulated under this act fell within one of the three categories of activity identified in *Lopez*.<sup>41</sup> Like the Court in *Lopez*, the D.C. Circuit determined that it was not required to analyze the act under the first or second categories because the "[it] readily falls within category 3 as a regulation of activities having a substantial [e]ffect on interstate commerce."<sup>42</sup> The court analyzed individually the act's prohibitions on manufacture, transfer, and possession.

Regarding the manufacturing prohibition, the D.C. Circuit declared that "[t]he Supreme Court has repeatedly held that the manufacture of goods which may ultimately never leave the state can still be activity which substantially affects interstate commerce."<sup>43</sup> Regarding the prohibition on transfers, the court similarly remarked that "the Supreme Court precedent makes clear that the transfer of goods, even as part of an intrastate transaction, can be an activity which substantially affects interstate commerce."<sup>44</sup> Based on these maxims, the court held that "it is not even arguable that the manufacture and transfer of 'semiautomatic assault weapons' for a national market cannot be regulated as activity substantially affecting interstate commerce."<sup>45</sup>

However, with respect to the possession of a semiautomatic assault weapon, the court in *Navegar* noted that the *Lopez* decision raised a question of whether "mere possession" can substantially

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<sup>40</sup> P.L. 103-322 (1994). For discussion on the federal assault weapon ban and legislative proposals, see CRS Report R42957, *Federal Assault Weapons Ban: Legal Issues*, by Vivian S. Chu and CRS Report R42987, *Gun Control Proposals in the 113<sup>th</sup> Congress: Universal Background Checks, Gun Trafficking, and Military Style Firearms*, by William J. Krouse.

<sup>41</sup> 192 F.3d 1050, 1066-68 (D.C. Cir. 1999), rehearing *en banc* denied, 200 F.3d, 868 (D.C. Cir. 2000), *cert. denied* 531 U.S. 816 (2000).

<sup>42</sup> *Id.* at 1055.

<sup>43</sup> *Id.* at 1057 (citing *United States v. Darby*, 312 U.S. 100, 118-19 (1941); *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)).

<sup>44</sup> *Id.* at 1058 (citing *Lopez*, 514 U.S. at 560-61 (citing *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (noting that farmer's home consumption of wheat substantially affected interstate commerce and that farmer's selling of homegrown wheat and local marketing substantially affects interstate commerce)).

<sup>45</sup> *Id.*

affect interstate commerce. The court proceeded to analyze the purposes behind the act to determine whether “it was aimed at regulating activities which substantially affect interstate commerce.”<sup>46</sup> Analyzing the congressional hearings, the court determined that the ban on possession was “conceived to control and restrict the interstate commerce in ‘semiautomatic assault weapons,’” and that the “ban on possession is a measure intended to reduce the demand for such weapons.”<sup>47</sup> The D.C. Circuit stated that the ban on possession was “necessary to allow law enforcement to effectively regulate the manufacture and transfers where the product comes to rest, in the possession of the receiver.”<sup>48</sup> Based on these factors, the court concluded that the “purpose of the ban on possession has an ‘evident commercial nexus.’”<sup>49</sup> Accordingly, the court held that the federal semiautomatic assault weapons ban was valid under Congress’s commerce power.

## **Intrastate Possession**

The Gun Control Act includes several provisions that criminalize possession of a firearm. For instance, 18 U.S.C. §922(o) makes it unlawful for any person to “possess a machinegun” and 18 U.S.C. §922(g) makes it unlawful for certain categories of persons to “possess in or affecting commerce, any firearm or ammunition.”<sup>50</sup> As demonstrated above, however, whether Congress actually has authority to regulate “mere possession” of firearms has been questioned by the courts.<sup>51</sup> In particular, courts have confronted the issue of whether these provisions as applied to intrastate possession are a proper exercise of Congress’s power under the Commerce Clause. Analysis regarding the validity of these federal possession provisions has varied slightly, given the development of the Supreme Court’s jurisprudence on the Commerce Clause.

## **Possession Without a Jurisdictional Hook**

Prior to and post-*Lopez*, federal courts generally upheld §922(o) as a valid exercise of Congress’s commerce power, despite the absence of jurisdictional language requiring that the machinegun travel in or substantially affect interstate commerce.<sup>52</sup> However, once *Lopez* was decided, at least

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<sup>46</sup> To determine whether an activity that does not have an clear connection with interstate commerce, the Court in *Lopez* stated that it would consider legislative findings and even congressional committee findings to determine if there were a rational basis for congressional action. *Lopez*, 514 U.S. at 562.

<sup>47</sup> *Navegar*, 192 F.3d at 1058-59 (citing other cases such as *United States v. Rybar*, 103 F.3d 273 (3d. Cir 1996) (holding that the Firearm Owners Protection Act of 1986 targets the mere intrastate possession of machine guns as a “demand-side measure to lessen the stimulus that prospective acquisition would have on the commerce of machine guns”); *United States v. Rambo*, 74 F.3d 948 (9<sup>th</sup> Cir. 1995) (holding that the ban on possession is in effect “an attempt to control the interstate market ... by creating criminal liability for the demand-side of the market, i.e., those who would facilitate illegal transfer out of the desire to acquire mere possession” [citation omitted])).

<sup>48</sup> *Id.* at 1059.

<sup>49</sup> *Id.* (citing *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring)). Although the Supreme Court further clarified its Commerce Clause jurisprudence in later decisions, as discussed above, it appears that the Commerce Clause analysis applicable to the ability of Congress to regulate or ban certain semiautomatic assault weapons would not be fundamentally altered by these later developments.

<sup>50</sup> 18 U.S.C. §922(o). Other similar provisions include 18 U.S.C. §§922(j), (k), (p), and (x).

<sup>51</sup> See, e.g., Dean Strang, *Felons, Guns, and the Limits of Federal Power*, 39 Marshall L. Rev. 386 (2006); Joseph Luppino-Esposito, *Four Shots at the Commerce Clause: The Firearms Freedom Act and the Unarticulated Products Category of the Commerce Power*, 7 Seaton Hall Cir. Rev. 229 (2010).

<sup>52</sup> See, e.g., *United States v. Evans*, 712 F. Supp. 1435 (D. Mont. 1989); *United States v. Pearson*, 8 F.3d 631 (8<sup>th</sup> Cir. 1993); *United States v. Rambo*, 74 F.3d 948 (9<sup>th</sup> Cir. 1996); *United States v. Beuckelaere*, 91 F.3d 781 (6<sup>th</sup> Cir. 1996); (continued...)

one federal court of appeals held §922(o) to be unconstitutional as applied to a defendant who was convicted of possessing machineguns that had been home assembled through parts kits. In *United States v. Stewart (Stewart I)*, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) held that there were limits in applying §922(o).<sup>53</sup> The court rejected the argument that the statute was constitutional under either of the first two categories in *Lopez*, even though some of the parts of the machineguns had, at some point, moved in interstate commerce.<sup>54</sup> It also found that the defendant's simple possession of homemade machineguns did not substantially affect interstate commerce as recognized by *Lopez*. In particular, the Ninth Circuit determined that possession of a machinegun is not, without more, economic in nature and that nothing in the legislative history indicates that the regulation itself has an economic purpose.<sup>55</sup> Therefore, the court held that, as applied to the defendant's possession of homemade machineguns, §922(o) was an unlawful extension of Congress's commerce power. *Stewart I*, however, was decided prior to the Supreme Court's decision in *Gonzales v. Raich*.

Upon remand, the Ninth Circuit in *Stewart II* held that §922(o) can be constitutionally applied to the defendant's possession of homemade machineguns in light of the Supreme Court's analysis in *Raich*.<sup>56</sup> The statute at issue, as well as the actions and claims of the defendant, were "nearly identical" to the claims and statute at issue in *Raich*, where the Court rejected the argument that the federal provision criminalizing possession of marijuana could not be applied to the intrastate possession of medical marijuana. As discussed *supra*, the Court in *Raich* reaffirmed its prior holdings that Congress may regulate "purely intrastate activity that is not itself 'commercial' ... if it concludes that failure to regulate that activity would undercut the regulation of the interstate market in that commodity."<sup>57</sup> Under this reasoning, the defendant in *Raich* was not successful in his attempt to carve out a class of intrastate activities as beyond the reach of Congress's commerce power. Relying on this analysis, the Ninth Circuit in *Stewart II* concluded that, like the regulation on possessing drugs in the Controlled Substances Act, the machinegun possession ban fits within a larger scheme for the regulation of interstate commerce of firearms.<sup>58</sup> The court's new focus under the substantially affects doctrine post-*Raich* was "not [the defendant] and his homemade machine guns, but all homemade machineguns manufactured intrastate. Moreover, [the court] does not require the government to prove that those activities *actually* affected interstate commerce; we merely inquire whether Congress had a rational basis for so

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(...continued)

United States v. Haney, 264 F. 3d 1161 (10<sup>th</sup> Cir. 2001).

<sup>53</sup> United States v. Stewart (Stewart I), 348 F.3d 1132 (9<sup>th</sup> Cir. 2003), *vacated by, remanded by*, 545 U.S. 1112 (2005).

<sup>54</sup> *Id.* ("At some level, of course, everything we own is composed of something that once traveled in commerce. This cannot mean that *everything* is subject to federal regulation under the Commerce Clause, else that constitutional limitation would be entirely meaningless." (emphasis in the original)).

<sup>55</sup> *Id.* at 1136-40. The Ninth Circuit applied a four-prong test articulated by the Supreme Court in *Morrison* to determine if the activity substantially affected commerce. The four factors are (1) whether the regulated activity is commercial or economic in nature; (2) whether an express jurisdictional element is provided in the statute to limit its reach; (3) whether Congress made express findings about the effects of the proscribed activity on interstate commerce; and (4) whether the link between the prohibited activity and the effect on interstate commerce is attenuated. *Morrison*, 529 U.S. at 610-12.

<sup>56</sup> United States v. Stewart (Stewart II), 451 F.3d 1071 (9<sup>th</sup> Cir. 2006).

<sup>57</sup> *Id.* at 1075 (citing *Raich*, 545 U.S. at 18).

<sup>58</sup> The Ninth Circuit noted §922(o), unlike the possession ban in the CSA, was enacted 20 years after the statute establishing the current federal firearms regulatory scheme. However, it stated that *Raich* did not require it to consider §922(o) as a standalone provision, "[t]hat Congress took a wait-and-see approach when it created the regime doesn't matter. The Commerce Clause does not prevent Congress from correcting deficiencies in its regulatory scheme in piecemeal fashion." *Id.* at 1076-77.

concluding.<sup>59</sup> Thus, under this lens, machineguns, whether they are homemade or commercially made, are fungible commodities like marijuana,<sup>60</sup> and Congress had a rational basis for concluding that “in the aggregate, possession of homemade machineguns could substantially affect interstate commerce in machineguns.”<sup>61</sup>

The analysis in *Raich*, followed by the Ninth Circuit in *Stewart II*, has been relied upon by other courts in evaluating state legislation that purports to exempt from federal law the intrastate manufacture and sale of firearms, firearms accessories, and ammunition. This type of law is known as a Firearms Freedom Act.<sup>62</sup> The United States District Court for the District of Montana, echoing the concerns in *Raich* and *Stewart II*, declared that “Montana’s attempt to... excise a discrete local activity from the comprehensive regulatory framework provided by federal firearms laws cannot stand.”<sup>63</sup> In upholding the validity of the National Firearms Act and Gun Control Act as applied to the intrastate manufacture and sale of firearms and firearms accessories, the district court stated that Congress had a rational basis, without the need to have particularized findings, to conclude that failure to regulate intrastate manufacture and sale of firearms would leave a “gaping hole” in the federal scheme regulating firearms.<sup>64</sup>

### **Possession with a Jurisdictional Hook**

Individuals, who have been convicted under §922(g) for being a felon, or other prohibited person, in possession of a firearm, also have challenged whether such a provision is constitutionally valid under Congress’s commerce power. For instance, the Ninth Circuit in *United States v. Jones* addressed the constitutional validity of §922(g)(8), which makes it unlawful for a person who is “subject to a court order that ... [meets specific requirements] ... to ... possess in or affecting commerce, any firearm or ammunition .”<sup>65</sup> The Ninth Circuit distinguished §922(g)(8) from the School Zones Act in *Lopez* on the basis that this statute contains “a jurisdictional element explicitly requiring a nexus between the possession of firearms and interstate commerce.”<sup>66</sup> The

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<sup>59</sup> *Id.* at 1077 (emphasis in the original).

<sup>60</sup> *Id.* at 1078 (Like seekers of unlawful drugs, “those seeking machineguns care only whether the guns work effectively-whether they discharge large amounts of ammunition with a single trigger pull. To the extent that homemade machineguns function like commercial machineguns, it doesn’t matter whether they do so in a unique way; as economic substitutes, they are interchangeable.” *Id.*).

<sup>61</sup> *Id.* at 1077. Observing that “the market for machineguns is established and lucrative, like the market for marijuana,” the Ninth Circuit had no doubt that there was a rational basis for Congress to conclude “that federal regulation of intrastate incidents of transfer and possession is essential to effective control of the interstate incidents of such traffic.” *Id.* (citing *United States v. Rambo*, 74 F.3d 948, 952 (9<sup>th</sup> Cir. 1996)).

<sup>62</sup> *Montana Shooting Sports Ass’n v. Holder*, 2010 U.S. Dist. LEXIS 104301, at \*1 (D. Mont. Aug. 31, 2010).

<sup>63</sup> *Id.* at \*52.

<sup>64</sup> *Id.* (“The size of the ‘gaping hole’ that would be left in the federal regulatory scheme were Montana able to exempt the intrastate activities contemplated by the Act is of particular concern when taking into account the fact that, as of this writing, virtually identical Firearms Freedom Act legislation has been enacted in six more states and proposed in twenty-two others.” *Id.* at \*54-5.).

<sup>65</sup> *United States v. Jones*, 231 F.3d 508 (9<sup>th</sup> Cir. 2000).

<sup>66</sup> *Id.* at 514 (noting that the Ninth Circuit’s post-*Lopez* decisions have upheld the constitutionality of §922(g)(1) on the same basis and that several other federal courts of appeals have also concluded that §922(g)(8) is a valid exercise of Congress’s power under the Commerce Clause). See also *United States v. Baker*, 197 F.3d 211 (6<sup>th</sup> Cir. 1999); *United States v. Bostic*, 168 F.3d 718 (4<sup>th</sup> Cir. 1999); *United States v. Cunningham*, 161 F.3d 1343 (11<sup>th</sup> Cir. 1998).

court affirmed that this provision constitutes a valid exercise of Congress’s power to regulate activity under the second and third categories identified under the *Lopez* framework.<sup>67</sup>

However, the jurisdictional hook—“in or affecting commerce”—relating to possession under §922(g), may not be “a talisman that wards off constitutional challenges.”<sup>68</sup> One reason a jurisdictional hook is employed is to make facial constitutional challenges unlikely or impossible, “and to direct litigation toward the statutory question of whether, in the particular case, the regulated conduct possesses the requisite connection to interstate commerce.”<sup>69</sup> Notwithstanding the jurisdictional hook that distinguishes it from the School Zones Act in *Lopez*, an argument could be made that a felon-in-possession statute does not fall within any of the categories identified in *Lopez*.

The U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit) examined this issue in *United States v. Patton*, within the context of another federal statute similar to the felon-in-possession statute.<sup>70</sup> In *Patton*, the court analyzed whether Congress had authority to prohibit the intrastate possession by a felon of a bulletproof vest, in the absence of any commercial transaction or evidence of a connection to commercial activity other than the fact that, prior to the defendant’s lawful purchase, the vest had been sold across a state line.<sup>71</sup> The Tenth Circuit concluded that such a provision did not fit within any of the three categories of *Lopez*, as clarified and affirmed by *Raich*, but the court nonetheless upheld the provision under a pre-*Lopez* precedent from the Supreme Court. After dismissing the three categories of commerce,<sup>72</sup> the Tenth Circuit turned to the Supreme Court decision *Scarborough v. United States*, which had analyzed the pre-Gun Control Act felon-in-possession statute.<sup>73</sup>

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<sup>67</sup> *Jones*, 231 F.3d at 514 (“[W]e observed that §922(g) can ‘rationally be seen as regulating the interstate transportation of firearms and ammunition’ and so constitutes a valid exercise of Congress’s power to regulate activity” under the second category, which relates to the “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.” *Id.*).

<sup>68</sup> See *United States v. Rodia*, 194 F.3d 465, 472-73 (3d Cir. 1999) (rejecting a “hard and fast rule that the presence of a jurisdictional element automatically ensures the constitutionality of a statute”).

<sup>69</sup> *United States v. Patton*, 451 F.3d 615, 632 (10<sup>th</sup> Cir. 2006).

<sup>70</sup> *Id.* at 618 (examining 18 U.S.C. §931).

<sup>71</sup> In this case, the defendant was convicted of possession, all instances of which occurred entirely within the borders of the State of Kansas. According to the court, the only connection between the defendant’s possession and interstate commerce was the fact that the bullet proof vest, prior to his purchase, had been manufactured in another state and moved across state lines. *Id.* at 620.

<sup>72</sup> *Id.* at 620-634. First, the court stated the provision prohibiting mere possession of body armor does not fit within the first category—channels of commerce—because “it is not directed at the movement of body armor through the channels of interstate commerce.” *Id.* at 620-21. Second, the court stated that the provision does not fit within the second category—instrumentalities—because body armor is not an “an instrumentality, or means, of interstate commerce, and the statute does not protect it while moving in interstate shipment. Nor is the statute directed at the use of body armor in ways that threaten or injure the instrumentalities of interstate commerce.” *Id.* at 621-22. Finally, the court concluded that the provision does not fit within the third category—substantially affects—because possession of body armor is not an activity that is commercial in nature, which is regulated as an essential part of “comprehensive legislation to regulate the interstate market in a fungible commodity as in *Raich*.” Furthermore, the court could not pinpoint any legislative history to suggest that regulating possession of body armor substantially affects the market for or movement of body armor. *Id.* at 622-34.

<sup>73</sup> 431 U.S. 563 (1977) (examining former 18 U.S.C. App. §§1201-1203, which made it unlawful for any person who had been convicted of a felony to “receive[], possess[], or transport[] in commerce or affecting commerce ... any firearm.”).

Because “in or affecting commerce” applies to the word “possess,”<sup>74</sup> the government, in cases of pure possession, must prove that possession of a firearm has some nexus to commerce in order to validly regulate the activity. Thus, in *Scarborough* the Court had to determine what proof is necessary for the government to satisfy the nexus between possession and interstate commerce.<sup>75</sup> The court rejected the argument that possession of the gun have some “contemporaneous connection with commerce at the time of the offense.”<sup>76</sup> Instead, the Court concluded that the sensible reading, supported by the legislative history, demonstrated that “Congress intended no more than a minimal nexus requirement,” which may be satisfied by proving that the firearm possessed had, at some time, traveled in interstate commerce.<sup>77</sup> Applying the principles from *Scarborough*, the Tenth Circuit in *Patton* upheld the constitutional validity of the body armor statute as applied to the defendant’s intrastate possession, because the item, at some point, had moved across state lines and therefore such activity could be regulated under Congress’s commerce power.<sup>78</sup>

As discussed above, a firearms possession statute, like §922(g), may be considered a proper exercise of Congress’s commerce authority under the *Lopez* categories.<sup>79</sup> However, a reviewing court that conducts a thorough analysis of §922(g), like the Tenth Circuit in *Patton* did with similar regulation, could find that mere intrastate possession of a firearm, or any firearms accessory, does not fit under any of the three *Lopez* categories. If so, *Scarborough*, which appears to have been left intact by *Lopez*, seems to be the controlling precedent under which the federal firearms possession statute may be enforced against prohibited intrastate possessors. One court has noted that “nothing in *Lopez* suggests that the ‘minimal nexus’ test should be changed.”<sup>80</sup> Notably, while courts have continued to follow *Scarborough*, they have also expressed doubts about its continuing validity. For example, in upholding the validity of §922(g), the United States Court of Appeals for the Fifth Circuit opined:

If the matter were *res nova*, one might well wonder how it could rationally be concluded that mere possession of a firearm in any meaningful way concerns interstate commerce simply

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<sup>74</sup> An earlier Supreme Court decision, *United States v. Bass*, 404 U.S. 336 (1971), examined the pre-Gun Control Act felon-in-possession statute, described *supra*; the Court had to determine if the statutory phrase “in commerce or affecting commerce” applied to “possess[.]” or whether the statute “reaches the mere possession of guns without any showing of an interstate commerce nexus” in individual cases. *Id.* at 345-46. It adopted the narrower reading that the phrase “in commerce or affecting commerce” modified all three offenses, that is, unlawful receipt, possession, and transport of a firearm. *Id.* at 348-51. Notably, the Court in *Bass* had left open the question of the nexus of interstate commerce that must be shown in individual ways. *Id.* at 351.

<sup>75</sup> *Scarborough*, 431 U.S. at 564.

<sup>76</sup> *Id.* at 568-69. In other words, the defendant suggested that “at the time of the offense the possessor must be engaging in commerce or must be carrying the gun at an interstate facility.” The defendant also suggested that one may be “convicted for possession without any proof of a present connection with commerce so long as the firearm was acquired after conviction.” *Id.* The Court in *Scarborough* commented that the defendant’s last theory creates “serious loopholes” because it would allow, for example, “an individual to go out in the period between his arrest and conviction and purchase and stockpile weapons with impunity.” *Id.* at 576.

<sup>77</sup> *Id.* at 575.

<sup>78</sup> *Patton*, 451 F.3d at 635-36. *See also* 2A Fed. Jury Prac. & Instr. §39:14 (6<sup>th</sup> ed. updated Westlaw 2013). This model jury instruction for the federal courts on proving the element “in or affecting commerce” for §922(g)(1) offense states that the “government may meet its burden of proof on the question of being [“in or affecting commerce”] ... by proving to you, beyond a reasonable doubt, that the firearm identified in the indictment had traveled across a state boundary line.”

<sup>79</sup> *See, e.g.*, *United States v. Luna*, 165 F.3d 316 (5<sup>th</sup> Cir. 1999) (upholding applicability of §922(j) which makes it unlawful to possess stolen firearms).

<sup>80</sup> *United States v. Morris*, 457 Fed. Appx. 900 (11<sup>th</sup> Cir. 2012).

because the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce. It is also difficult to understand how a statute construed never to require any but such a per se nexus could “ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.” [citation omitted]<sup>81</sup>

Several federal courts of appeals have noted the tension between *Scarborough* and the three-category approach later adopted by the Supreme Court.<sup>82</sup> Should the Supreme Court revisit the potential doctrinal inconsistency between *Lopez* and *Scarborough*, it is conceivable that regulation of intrastate possession of a firearm or any other firearms accessory may be found to be beyond the reach of Congress. Alternatively, if the jurisdictional hook were interpreted so that the intrastate possession must have some contemporaneous connection with interstate commerce—e.g., the defendant is engaging in commerce at the time of the offense or possessing the gun at an interstate facility,<sup>83</sup> then it would not be beyond Congress’s commerce power to regulate some intrastate possession. The consequence of such an interpretation, however, would be that a subset of individuals would not be captured under Congress’s commerce power (e.g., those who fall within a prohibited possessor category but who only maintain a firearm at home and never carry or possess it elsewhere). Another option could be to bring the wording of the current felon-in-possession statute in line with §922(o), which lacks a jurisdictional hook. In such case, to the extent that the Supreme Court would agree with the Ninth Circuit’s application of *Raich* in its *Stewart II* decision, a felon-in-possession statute without a jurisdictional hook could constitutionally apply to intrastate possession, and would appear to remove the burden on the government to satisfy the nexus requirement between possession and interstate commerce.

## Intrastate Transfer of Firearms

Section 922(d)(1) of title 18 of the U.S. Code makes it unlawful for any person to dispose or transfer a firearm to another individual knowing or having reasonable cause to believe that such person is under indictment for, or has been convicted in any court of, a crime punishable by more than one year’s imprisonment.<sup>84</sup> Individuals who have been convicted under this provision for making unlawful transfers intrastate have contended that Congress exceeded its authority under the Commerce Clause by enacting this provision. Such challenges have proven unsuccessful. For instance, the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) in *United States v. Rose* held that this contention “lacks merit inasmuch as the Supreme Court precedent leaves no doubt regarding the constitutionality of §922(d)(1).”<sup>85</sup> The Sixth Circuit analyzed this provision under the third *Lopez* category—the substantially affects doctrine—and concluded that the *Raich* analysis leads to the conclusion that §922(d)(1) is proper use of Congress’s commerce power.<sup>86</sup>

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<sup>81</sup> *United States v. Rawl*, 85 F.3d 240, 243 (5<sup>th</sup> Cir. 1996) (Garwood, J., concurring).

<sup>82</sup> *Patton*, 451 F.3d at 634-36.

<sup>83</sup> Notably, this argument was rejected in *Scarborough*.

<sup>84</sup> 18 U.S.C. §922(d)(1).

<sup>85</sup> *United States v. Rose*, 522 F.3d 710, 717 (6<sup>th</sup> Cir. 2008). *See also* *United States v. Monteleone*, 77 F.3d 1086, 1091-92 (8<sup>th</sup> Cir. 1996); *United States v. Peters*, 403 F.3d 1263 (11<sup>th</sup> Cir. 2005); *United States v. Haskins*, 511 F.3d 688, 695 (7<sup>th</sup> Cir. 2007) (declining to directly address the Commerce Clause issue but citing *Peters* and *Monteleone* with approval).

<sup>86</sup> As described above, the Court in *Raich* upheld the application of the federal law to California users of homegrown marijuana because the Court determined that Congress had a rational basis to conclude that failure to regulate homegrown marijuana, a fungible product, would undercut the larger regulatory scheme of the interstate market in the commodity.

The Sixth Circuit stated that guns, similar to marijuana, are a “fungible commodity” for which there is an established interstate market and that the provision at issue is a part of the larger regulatory framework.<sup>87</sup> The court concluded that the relevant “legislative history supports the logical connection between the intrastate sale and disposition of firearms and interstate market in firearms.”<sup>88</sup>

## Background Checks

As part of the regulatory framework for ensuring that firearms are not transferred to those persons deemed to be prohibited under federal law, Congress passed the Brady Handgun Violence Prevention Act of 1993 (Brady Act), which requires federal firearms licensees (FFLs) to conduct a background check on prospective firearms purchasers through the National Instant Criminal Background Check System (NICS).<sup>89</sup> However, prior to the establishment of NICS, the Brady Act’s interim provisions required the chief law enforcement officers within a state to conduct a background check on a prospective firearms purchaser within five business days.<sup>90</sup> This portion of the act was invalidated on Tenth Amendment grounds in *Printz v. United States* under the theory that Congress was without authority to order or “commandeer” state executive branch officials.<sup>91</sup>

The holding in *Printz* indicates that although the Tenth Amendment limits the way in which Congress can implement background checks, it is not beyond its commerce power to require such checks as part of transferring a firearm. Under the current scheme, FFLs are required to conduct a background check through NICS before transferring a firearm to any non-FFL, including those who reside within the state in which the FFL is located.<sup>92</sup> Currently, Congress is considering legislation that would impose a background check on transactions between non-FFLs that occur within a state.<sup>93</sup> Just as Congress’s authority to regulate intrastate transfers has been challenged, one might question whether Congress has the authority to require, or impose a requirement, that FFLs or non-FFLs conduct a background check on intrastate firearms transactions. Based on the Court’s holdings in *Lopez* and *Raich*, discussed above, it seems that requiring a background check on intrastate firearms transactions is unlike regulating simple possession of firearms in a school zone.<sup>94</sup> Although the act of conducting a background check may not be itself “commercial,” it is a condition on the commercial transfer of a firearm. Therefore, if such a measure were enacted, it seems that there would be a substantial basis upon which a court could regard it as a provision supporting the larger regulatory scheme—the Gun Control Act—that Congress enacted to “keep

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<sup>87</sup> *Id.* at 718.

<sup>88</sup> *Id.* at 719 (reviewing the legislative history of the 1968 firearms laws, which emphasized that the principal way to address the widespread prevalence of lawlessness and violent crime is to have “adequate Federal control over interstate and foreign commerce in these weapons, and over all *persons engaging in the business of importing, manufacturing, or dealing in them ...* (emphasis added)”).

<sup>89</sup> P.L. 103-159 (1994), *codified at* 18 U.S.C. §922(t).

<sup>90</sup> 18 U.S.C. §922(s).

<sup>91</sup> *Printz*, 521 U.S. at 926.

<sup>92</sup> 18 U.S.C. §922(t). FFLs may only transfer handguns to residents who reside within the state in which the FFL is located, and they may transfer long guns (i.e., rifles and shotguns) to both in-state and out-of-state residents.

<sup>93</sup> H.R. 137, the Fix Gun Checks Act of 2013 (113<sup>th</sup> Cong.); S. 374, the Fix Gun Checks Act of 2013 (113<sup>th</sup> Cong.).

<sup>94</sup> *See also Morrison v. United States*, 529 U.S. 598 (2000) (holding unconstitutional under the Commerce Clause a provision of the Violence Against Women Act that created a federal civil remedy for the victims of gender-motivated crimes of violence which was enforceable in both state and federal courts).



firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency, and to assist law enforcement authorities in the states and their subdivisions in combating the increasing prevalence of crime in the United States.”<sup>95</sup>

## Conclusion

Congress has broad authority pursuant to the Commerce Clause to enact laws in areas that may overlap with traditional state jurisdiction. As such, Congress has passed complex statutory provisions that regulate the possession, receipt, transfer, and manufacture of firearms and ammunition. Notwithstanding this broad authority, Congress may not exceed other constitutional provisions or doctrines, such as the Tenth or Second Amendments to the U.S. Constitution. Thus, Congress may not pass legislation that infringes on the right guaranteed by the Second Amendment, nor may it pass legislation that orders state legislatures or its officials to implement and perform a federal law or program. Outside these types of limitations, exercise of Congress’s commerce power appears to be proper as long as the regulated activity or conduct falls within one of the three categories established by the Supreme Court in *United States v. Lopez*, that is, (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, including persons and things; and (3) activities that substantially affect interstate commerce. As explored in this report, courts have been confronted with the question of whether federal laws can be applied to intrastate possession and intrastate transfers of firearms, or whether such application exceeds the authority of Congress under its commerce power. Generally, the courts have upheld such laws under these as-applied challenges. With respect to intrastate possession, there remains noticeable tension between the Commerce Clause analysis set forth in *Lopez* and the pre-*Lopez* Supreme Court precedent that is still relied on by lower courts to uphold regulations on the possession of firearms. It is unclear how Congress’s authority to regulate firearms possession would be affected should the Supreme Court resolve any perceived doctrinal inconsistency. Furthermore, the Supreme Court’s analysis in *Gonzales v. Raich* has also buttressed the reasoning by which lower courts have concluded that Congress’s authority to regulate firearms extends to intrastate manufacture and intrastate transfers and, as such, states cannot exempt themselves from federal regulation.

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<sup>95</sup> S. Rept. No. 90-1097 (1968). The Gun Control Act, like the CSA in *Raich*, is a statute that “directly regulates economic, commercial activity.” *Raich*, 545 U.S. at 26. Furthermore, similar to the Court in *Raich*, which found that failure to regulate intrastate manufacture and possession of marijuana would leave a “gaping hole” in the CSA, were such a measure to be enacted and subsequently challenged, it is conceivable for a reviewing court to conclude that not regulating background checks on intrastate firearms transactions between non-licensees also potentially leaves significant room for an unregulated secondary market in which firearms could be diverted into illicit channels, ultimately having a substantial effect on the national market for legal firearms.