CASE COMMENTS

Constitutional Law—Ninth Circuit Upholds Constitutionality of Felon-in-Possession of Body Armor Statute with De Minimus Jurisdictional Element—United States v. Alderman, 565 F.3d 641 (9th Cir. 2009), reh’g en banc denied, 593 F.3d 1141 (9th Cir. 2010)

Although Congress may, as a general matter, extensively regulate interstate commerce, the federal government’s authority to legislate in areas of traditional state concern is limited.1 Courts, spurred by a renewed interest in federalism, have begun scrutinizing federal criminal laws that regulate noncommercial intrastate behavior by means of de minimus jurisdictional elements—statutory provisions that purport to ensure legislation’s constitutionality by limiting its applicability to conduct involving items that have previously traveled in interstate commerce.2 In United States v. Alderman,3 the United States Court of Appeals for the Ninth Circuit, in a case of first impression, considered whether 18 U.S.C. § 931 constitutionally prohibits a felon from possessing body armor where the sole link to commerce is the body armor’s prior interstate movement.4 The court deemed § 931’s jurisdictional element sufficient to render the statute an appropriate exercise of congressional power under the Commerce Clause.5


3. 565 F.3d 641 (9th Cir. 2009), reh’g en banc denied, 593 F.3d 1141 (9th Cir. 2010).


5. See 565 F.3d at 648 (holding body armor’s prior movement in interstate commerce provided requisite nexus between possession and commerce). In this context, jurisdictional elements are statutory provisions that “tether the legislation” to interstate commerce, thus bringing legislation within the ambit of Congress’s
After arresting Cedrick Alderman during a controlled purchase of cocaine, an officer noticed that Alderman was wearing a bulletproof vest. Alderman’s possession of the vest, coupled with his prior conviction for felony robbery, subjected him to indictment under § 931, which criminalizes the possession of body armor that has traveled in interstate commerce by a person previously convicted of a crime of violence. After indictment, Alderman promptly filed a motion to dismiss, asserting five separate grounds for relief. Most notably, Alderman contended that Congress exceeded its authority under the Commerce Clause by enacting § 931.

Relying on Ninth Circuit precedent upholding the constitutionality of another felon-in-possession statute with an analogous jurisdictional element, the district court found the body armor’s prior passage through interstate commerce sufficient to bring its possession within federal jurisdiction, and accordingly denied Alderman’s motion to dismiss. Alderman subsequently entered a conditional guilty plea, reserving the right to appeal § 931’s constitutionality. On appeal, the Ninth Circuit affirmed the district court’s judgment, holding that legislative findings, the nature of the statute, and, most importantly, the presence of a jurisdictional element rendered the statute constitutional.

The development of a national economy has played a pivotal role in shaping commerce power. See United States v. Peters, 403 F.3d 1263, 1272 (11th Cir. 2005) (defining jurisdictional element).

6. See 565 F.3d at 643 (reviewing events leading up to prosecution).
7. See id. (describing Alderman’s indictment under § 931). Felony robbery qualifies as a crime of violence, which federal law defines as a crime involving the “use, attempted use, or threatened use of physical force against the person or property or another.” 18 U.S.C. § 16(a) (2006) (defining “crime of violence”).
8. See United States v. Alderman, No. CR06-0117C, 2006 U.S. Dist. LEXIS 44108, at *2-3 (W.D. Wash. June 27, 2006) (listing asserted grounds for dismissal), aff’d, 565 F.3d 641 (9th Cir. 2009). Alderman alleged that § 931 was void for vagueness, that his Due Process rights were violated, that application of § 931 violated the Ex Post Facto Clause, that the indictment failed to allege an offense, and that Congress exceeded its authority under the Commerce Clause. Id. at *2-3.
11. See 565 F.3d at 644 (summarizing plea agreement). As part of the plea agreement, Alderman admitted that his possession of the bulletproof vest fell within the ambit of the statute’s jurisdictional element, i.e., that the vest was, at some point, sold in interstate commerce. Id.
12. See id. at 646 (summarizing justifications for decision).
the Supreme Court’s Commerce Clause jurisprudence over the past two centuries; with the widespread growth of America’s infrastructure, the Court has employed legal principles with the effect of expanding the scope of the commerce power.\footnote{13} It was during this period of economic growth and deferential Commerce Clause jurisprudence that the Court, in United States v. Scarborough,\footnote{14} broadly interpreted the jurisdictional element of a felon-in-possession statute as reaching noncommercial intrastate activity.\footnote{15} In a nearly unanimous decision, the Court rejected the defendant’s contention that the predecessor statute to 18 U.S.C. § 922(g)(1) required the government to prove the defendant possessed a firearm in a manner presently affecting commerce, and held that the firearm’s prior interstate movement was sufficient to satisfy the statute’s jurisdictional hook.\footnote{16} Three recent decisions, however, not only cast doubt on Scarborough’s continuing vitality, but also call into question Congress’s power to regulate spheres typically reserved to the states.\footnote{17}

\footnote{13} See Wickard v. Filburn, 317 U.S. 111, 128-29 (1942) (aggregating intrastate economic activity to demonstrate requisite effect on interstate commerce); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937) (holding Congress can regulate intrastate activities with “close and substantial relation to interstate commerce”); see also Gil Seinfeld, The Possibility of Pretext Analysis in Commerce Clause Adjudication, 78 NOTRE DAME L. REV. 1251, 1256-72 (2003) (detailing Supreme Court’s shifting Commerce Clause doctrine).

\footnote{14} 431 U.S. 563 (1977).


\footnote{16} See United States v. Scarborough, 431 U.S. 563, 577 (1977) (declining to interpret statute to require present link with commerce at time of offense). One can fairly read Scarborough as premised on a theory the Court later rejected in Lopez, i.e., that a felon’s mere possession of a firearm creates a sufficient nexus to commerce because of the costs of crime to society. See Young, supra note 15, at 197-99 (downplaying significance of jurisdictional hook to Scarborough Court’s holding).

In *United States v. Lopez*, the Supreme Court considered whether the Commerce Clause empowers Congress to prohibit the possession of firearms in school zones. In striking down the Gun-Free School Zones Act, the Court rejected the government’s argument that gun possession substantially affected commerce. Central to the majority’s reasoning was that noncommercial intrastate conduct with an attenuated impact on commerce could not fall within congressional control if the Court was to preserve the distinction between “what is truly national and what is truly local.” The Court resolved some questions regarding *Lopez*’s import when, in *United States v. Morrison*, the Court once again narrowly construed the Commerce Clause by declaring unconstitutional a statute providing a federal civil remedy for victims of gender-motivated violence. In holding that Congress could not, under the statute prohibiting violent intrastate criminal activity unconstitutional); *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (invalidating statute regulating local criminal conduct on federalism grounds); see also Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 Hastings L.J. 573, 573 (2004) (suggesting *Lopez, Morrison, and Jones* augur “major rethinking of the scope of federal criminal law”).


19. See *United States v. Lopez*, 514 U.S. 549, 552 (1995) (stating issue before the Court). The Court outlined three categories subject to federal regulation under the Commerce Clause: use of the channels of interstate commerce, instrumentalities of interstate commerce and persons or things in interstate commerce, and intrastate activities having a substantial relation to commerce. *Id.* at 558-59.

20. See *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (holding gun possession does not fall within third category subject to regulation under Commerce Clause). The government posited three rationales in support of their claim that the intrastate possession of a firearm in a school zone substantially affects interstate commerce: insurance prices spread the costs of crime throughout the nation, crime discourages interstate travel, and an unsafe learning environment results in a less productive national economy. *Id.* at 558-59. The majority reasoned that if the Court were to credit the government’s argument, it would be difficult to place any logical limit on congressional authority. *Id.* at 564. Such limits are necessary, the Court noted, because the Constitution prevents Congress from exercising a general police power over the nation. *Id.* at 566. Rather, the “[s]tates possess primary authority for defining and enforcing the criminal law.” *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)) (indicating Gun Free School Zones Act would infringe on state sovereignty). Although detractors of *Lopez* sharply criticize the distinction between commercial and noncommercial activity as formalistic and untenable, the Court maintained that rules creating legal uncertainty follow unavoidably from the enumeration of powers. *Compare* United States v. Lopez, 514 U.S. 549, 627 (1995) (Breyer, J., dissenting) (suggesting proper analysis probes regulated activity’s interstate effect, not nature), with *United States v. Lopez*, 514 U.S. 549, 566 (1995) (stressing legal uncertainty arises due to Supreme Court’s function to delineate constitutional boundaries). Finally, the Court viewed the dearth of legislative findings regarding gun possession’s effect on commerce as counseling against upholding the statute’s constitutionality. *United States v. Lopez*, 514 U.S. 549, 562-63 (1995) (articulating reasons for statute’s invalidation).


23. See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (applying principles revitalized in *Lopez*); Strang, *supra* note 15, at 400 (asserting *Morrison* gave “remarkable breadth” to *Lopez*). In adjudicating the constitutionality of the Violence Against Women Act, the Court held that *Lopez* directly controlled the issue before the Court. *United States v. Morrison*, 529 U.S. 598, 602 (2000). In what became known as the substantial effects test, the Court considered whether the statute regulated commercial activity, whether the statute contained any jurisdictional element that would limit its application to “a discrete set of [cases] that additionally have an explicit connection with or effect on interstate commerce,” whether the statute or
guise of the commerce power, regulate non-economic local criminal activity based on that activity’s aggregated commercial effect, Morrison further demonstrated the Court’s increased willingness to limit congressional authority in order to preserve the federal-state balance. In each case, the majority found salient that the statutes under scrutiny lacked jurisdictional elements, which, according to the Court, could ensure a statute’s constitutionality by limiting its applicability to a discrete set of cases with a substantial commercial nexus.

Despite the Supreme Court’s recent attempts to curtail federal power, the four federal courts to address § 931’s constitutionality have upheld the statute.

26 legislative history contained findings indicating the regulated activity’s effect on commerce, and whether the nexus between the regulated activity and commerce was attenuated. Id. at 610-12 (quoting United States v. Lopez, 514 U.S. 549, 562 (1995)). In striking down the statute, the Court found highly significant the non-economic, local, and violent nature of the regulated activity, the lack of a jurisdictional element, the legislative findings’ failure to demonstrate gender-motivated violence’s substantial effect on interstate commerce, and the weak nexus between intrastate violence and commerce. Id. at 610-16. Scholars continue to debate this test’s proper application. See Brannon P. Denning & Glenn H. Reynolds, Ratings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts, 55 Ark. L. Rev. 1253, 1258-60 (2003) (indicating full implications of Lopez test remain unclear after Morrison); Barry Friedman, Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez, 46 Case W. Res. L. Rev. 757, 788 (1996) (noting “sharp debate” regarding whether jurisdictional element alone satisfies Lopez test).

24. See United States v. Morrison, 529 U.S. 598, 615-16 (2000) (discussing justifications for holding). The government argued that the regulated activity substantially affects commerce because gender-motivated violence deters interstate travel, diminishes national productivity, increases medical costs, and decreases the supply of and demand for goods. Id. at 615 (summarizing legislative findings). The Court compared these justifications to those it had rejected in Lopez, and remarked that the government’s argument, if accepted, would permit regulation of almost any activity nationwide, including family law matters, education, and other subjects typically within the province of the states. Id. at 615-16 (observing government’s reasoning lacks logical stopping-point).


Likewise, § 922(g)(1)—prohibiting felons from possessing firearms “in or affecting commerce”—has withstood every Lopez-based attack in each of the United States Circuit Courts of Appeals, notwithstanding the statute’s extension to firearms that have previously traveled through interstate commerce. Also, the Ninth Circuit has repeatedly relied on Scarborough in upholding federal criminal statutes containing jurisdictional elements similar to that of § 931.

In United States v. Alderman, the Ninth Circuit adhered to Scarborough in determining that body armor’s prior interstate movement created a sufficient nexus between the possession of body armor and commerce so as to bring § 931 within the ambit of congressional power. The court analogized the possession of body armor to that of a firearm, and recognized that § 931 and § 922(g)(1)—the predecessor of which was at issue in Scarborough—contained nearly identical jurisdictional elements. Although the Ninth Circuit acknowledged that recent Supreme Court decisions suggested noncommercial intrastate activity was beyond the scope of congressional regulation, the court narrowly interpreted those cases by concluding Congress could nonetheless regulate such conduct if it involved some item that had crossed state lines. In other words, the court read Scarborough not only as surviving Lopez and Morrison, but also as extending to § 931. In light of Lopez and Morrison’s

27. 18 U.S.C. § 922(g)(1) (2006) (criminalizing certain felon firearm possessions); see, e.g., United States v. Lemons, 302 F.3d 769, 771-72 (7th Cir. 2002) (rejecting Commerce Clause challenge to § 922(g)(1) in light of Lopez, Morrison, Jones and Scarborough); United States v. Smith, 101 F.3d 202, 215 (1st Cir. 1996) (declaring firearm’s prior movement in commerce renders statute constitutional under Scarborough); United States v. Chesney, 86 F.3d 564, 568 (6th Cir. 1996) (asserting firearm’s prior interstate movement ensures § 922(g)(1)’s constitutionality under Lopez and Scarborough).

28. See, e.g., United States v. Cortes, 299 F.3d 1030, 1037 (9th Cir. 2002) (sanctioning federal statute prohibiting carjacking where automobile previously moved through commerce); United States v. Jones, 231 F.3d 508, 513-15 (9th Cir. 2000) (upholding federal statute proscribing persons subject to restraining order from possessing firearms that moved interstate); United States v. Polanco, 93 F.3d 555, 563 (9th Cir. 1996) (rejecting challenge to § 922(g)(1)). But see United States v. McCoy, 323 F.3d 1114, 1133 (9th Cir. 2003) (invalidating federal statute proscribing possession of child pornography created with materials that crossed state lines). But see United States v. McCoy, 323 F.3d 1114, 1133 (9th Cir. 2003) (invalidating federal statute proscribing possession of child pornography created with materials that crossed state lines).

29. 565 F.3d at 643 (deeming § 931 within Congress’s authority under Commerce Clause).

30. See id. at 645-46 (comparing § 931 and § 922(g)(1)). The court glossed over any logical difficulties that might arise in comparing the two prohibited activities by succinctly stating: “[W]e agree with the Tenth Circuit that the ‘prohibition on possessing body armor cannot be distinguished from the prohibitions on possessing firearms that we have upheld.’” Id. at 646 (quoting United States v. Patton, 451 F.3d 615, 635 (10th Cir. 2006)). Although the language of the jurisdictional elements differs, each is satisfied upon a showing that the item in question, at some prior point in time, traveled through interstate commerce. See 18 U.S.C. § 922(g)(1) (2006) (prohibiting felon’s possession of firearm in or affecting commerce); 18 U.S.C. §§ 921(a)(35), 931(a)(1) (2006) (criminalizing felon’s possession of body armor “sold or offered for sale in interstate commerce”); United States v. Scarborough, 431 U.S. 563, 577 (1977) (interpreting § 922(g)(1)’s predecessor to encompass possession of firearms that crossed state lines).

31. See 565 F.3d at 643 (suggesting jurisdictional hook validates otherwise unconstitutional statute).

32. See id. at 645 (extending Scarborough to § 931). The Ninth Circuit distinguished its decision in McCoy on the grounds that the statute in that case—prohibiting possession of child pornography generated with materials that had traveled in commerce—was much broader than § 931. Id. at 647-48. Unlike the statute in McCoy, which threatened to bring nearly all pornography within its reach, § 931’s jurisdictional element seriously limited the statute’s reach because it did not affect homemade body armor or body armor
failure to overrule any prior case involving a federal criminal statute containing a de minimus jurisdictional element, and the Supreme Court’s express recognition that jurisdictional elements may satisfy the substantial effects test, the majority interpreted *Lopez* and *Morrison* as suggesting that the commerce power may extend to noncommercial intrastate activity. In rejecting the federalist principles underlying the Supreme Court’s recent Commerce Clause jurisprudence, the Ninth Circuit also looked to what it considered binding circuit authority regarding felon-in-possession statutes containing jurisdictional elements analogous to that of § 931, and to those jurisdictions that had adjudicated the constitutionality of § 931.

Faced with the choice of deviating from well-settled Supreme Court and circuit precedent clearly upholding a statute practically identical to § 931 or following a contemporary line of cases applying vital principles but announcing ambiguous legal rules, the Ninth Circuit understandably reached the wrong decision in validating § 931. In strongly suggesting Congress could not regulate noncommercial intrastate behavior, *Lopez* and *Morrison* embody the Court’s endeavor to safeguard federalism. Preventing federal incursions into areas of state concern enhances liberty by preventing the accumulation of power and concomitant risk of tyranny by a single branch of government, by not obfuscating political accountability, and by preserving the role of states as laboratories devising unique solutions to social problems.
primarily responsible for abiding by constitutional principles, but the very nature of public office counsels against blind reliance on legislative self-restraint and politics, especially when congressional judgment infringes on federalist principles.\textsuperscript{38}

The Court’s reasoning in \textit{Lopez} and \textit{Morrison} implied statutes regulating noncommercial intrastate conduct were unlikely to pass constitutional muster under \textit{Lopez}’s third prong.\textsuperscript{39} Had the Court failed to distinguish commercial from noncommercial activity, it would have effectively recognized federal power to regulate nearly every human activity because, in the context of the United States economy, even strictly noncommercial conduct, at least in the aggregate, “substantially affects” commerce in a literal sense.\textsuperscript{40} The key question, then, in ascertaining the propriety of the Ninth Circuit’s decision in \textit{Alderman}, is whether § 931 and the statutes at issue in \textit{Lopez} and \textit{Morrison} are distinguishable on the basis that § 931, because its jurisdictional element cabins the statute’s reach to body armor “sold or offered for sale” in interstate commerce, regulates economic activity, while the other statutes, which lack

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See United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (emphasizing Court’s responsibility in enforcing constitutional norms). Justice Kennedy stated: “[T]he absence of structural mechanisms to require [Congress] to [preserve the Constitution], and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role.” \textit{Id.} Advocates of judicial restraint argue that politics, not judicial review, is the appropriate means of preserving the federal balance under a power as broad as the Commerce Clause. See United States v. Morrison, 529 U.S. 598, 647 (2000) (Souter, J., dissenting) (pointing to futility of recognizing independent state spheres in nation with interconnected commercial markets).

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See United States v. Morrison, 529 U.S. 598, 613 (2000) (recognizing intrastate noneconomic activity as beyond scope of commerce power); United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (acknowledging authority of states, not federal government, to regulate noncommercial criminal activity); \textit{see also} 565 F.3d at 650 (Paez, J., dissenting) (deeming presence of jurisdictional element subsidiary to determination of activity’s commercial or noncommercial nature).

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See United States v. Morrison, 529 U.S. 598, 615-16 (2000) (declining to aggregate local noneconomic activity to satisfy substantial effects test); United States v. Lopez, 514 U.S. 549, 564 (1995) (suggesting Congress could regulate any activity if Court accepted government’s theory). The broad language of the substantial effects test necessitates the distinction between economic and noneconomic activity. See United States v. Morrison, 529 U.S. 598, 627 (2000) (Souter, J., dissenting) (suggesting the Court should abandon the statutory test because it a viable test for Congress to satisfy the commerce clause); United States v. Lopez, 514 U.S. 549, 584-85 (1995) (Thomas, J., concurring) (urging Court to abandon the substantial effects test because it gives Congress police power); \textit{see also} Bradley, \textit{supra} note 17, at 578-79 (cautioning substantial effects test tends to support broad federal authority to enact criminal laws); Strang, \textit{supra} note 15, at 406 (noting substantial effects test susceptible to slippery slope reasoning).
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such a jurisdictional element, do not. 41 Framing the issue in such a manner inevitably leads to the conclusion that an item’s prior interstate movement cannot transform the entirely intrastate act of possession into a commercial activity. 42 If de minimus jurisdictional hooks possessed such transformative ability, the federal government would be one of unlimited, not enumerated, powers, because almost every activity involves the use of some item that has crossed state lines. 43

By suggesting that a jurisdictional element, standing alone, can satisfy the substantial effects test, and by refusing to overrule Scarborough and similar decisions upholding federal criminal statutes reaching intrastate activity by means of de minimus jurisdictional elements, the Supreme Court severely limited the import of its recent Commerce Clause jurisprudence. 44 Although inconsistent with the Supreme Court’s renewed interest in restricting what had essentially become a plenary commerce power, one must view Alderman in light of binding Supreme Court precedent that has repeatedly dictated the outcome of binding circuit and persuasive sister circuit authority, even if Scarborough appears outdated. 45 Until the Supreme Court expressly addresses

41. See supra note 39 (minimizing relevance of jurisdictional element in substantial effects inquiry). The Alderman court rested its holding not only on the presence of a jurisdictional element, but also on § 931’s legislative history. See 565 F.3d at 646 (describing multiple bases for holding). Yet, these findings are indistinguishable from those in Morrison, which the Court deemed insufficient to render constitutional a statute that did not otherwise satisfy the substantial effects test. Compare United States v. Morrison, 529 U.S. 598, 614-15 (2000) (holding legislative findings cannot validate statute failing to regulate conduct substantially affecting interstate commerce), with 563 F.3d at 644-46 (considering legislative findings in upholding § 931). It was undisputed that the Court could not uphold § 931 under either of the first two prongs of the Lopez test, because it does not involve the movement of body armor through the channels of interstate commerce, nor does it regulate the instrumentalities of commerce or persons or things in commerce. 565 F.3d at 647 n.4 (ruling out alternative grounds for validating § 931).

42. See 565 F.3d at 655 (Paez, J., dissenting) (asserting body armor satisfying jurisdictional hook does not impact commerce more than other body armor); United States v. Patton, 451 F.3d 615, 633 (10th Cir. 2006) (maintaining body armor’s interstate movement cannot distinguish it from other body armor vis-à-vis commercial effect); supra notes 15 & 17 (suggesting item’s prior interstate movement irrelevant in determining commercial impact of regulated activity).

43. See Bradley, supra note 17, at 599 (calling Scarborough “bad law” in light of Lopez, Morrison, and Jones); Friedman, supra note 23, at 791 (arguing item’s prior interstate movement does not alleviate slippery slope concerns); supra note 2 (addressing relevancy of past interstate movement as to whether regulated activity substantially affects commerce).

44. See supra note 25 (highlighting Lopez and Morrison’s inconsistent treatment of statutes containing jurisdictional elements). The Alderman dissent admonished the majority for seizing upon language in Lopez and Morrison suggesting that the existence of a jurisdictional element insulates a statute from constitutional scrutiny because, according to the dissent, § 931’s jurisdictional element fails to limit the statute’s reach to conduct that substantially affect commerce. See 565 F.3d at 655 (Paez, J., dissenting) (pointing out nearly all body armor falls within minimal jurisdictional element). Yet, in this regard, § 931 is practically identical to § 922(g)(1)—which Scarborough upheld due to its de minimus jurisdictional element—because nearly all firearms have traveled in interstate commerce. See Taylor, supra note 25, at 205 (noting experts estimate ninety-five percent of firearms, ammunition, or component parts have crossed state lines).

45. See supra notes 26-28 and accompanying text (offering partial list of myriad federal cases relying on Scarborough). The Alderman court acknowledged its unwillingness to resolve doctrinal inconsistencies between Lopez and Scarborough. See 565 F.3d at 648 (following Scarborough without engaging in “careful
the issue of de minimus jurisdictional elements, the disposition of cases such as *Alderman* will prove unsatisfying, at least to those philosophically disposed to federalism-based reasoning.46

In *United States v. Alderman*, the Ninth Circuit considered whether Congress could prohibit felons from possessing body armor on the theory that the body armor’s prior interstate movement provided a sufficient commercial nexus to bring its possession within congressional authority under the Commerce Clause. In upholding regulation of a noncommercial intrastate activity solely on the basis that the regulated conduct involved some item that had traveled in commerce, the *Alderman* court failed to place effective limits on the commerce power, because nearly all human conduct involves goods that have crossed state lines. The upshot is an erosion of federalist principles—revitalized in *Lopez* and *Morrison*—that not only benefitted the states, but also the nation as a whole. The lion’s share of the blame, however, cannot fall on the Ninth Circuit, which was bound by Supreme Court and circuit precedent regarding an indistinguishable statute. Rather, the culprit is the Supreme Court itself, which, in a manner inconsistent with the reasoning that animated its recent Commerce Clause jurisprudence, permitted federal regulation to escape constitutional scrutiny provided that the legislation includes a jurisdictional element. Until the Supreme Court overrules *Scarborough* or otherwise resolves this ambiguity, jurisdictional elements will continue to save otherwise unconstitutional federal legislation.

Richard A. Gambale

46. See Newton, *supra* note 15, at 683-84 (urging Supreme Court to grant certiorari despite lack of circuit split on jurisdictional element issue).