

# WHY IS CONGRESS STILL REGULATING NONCOMMERCIAL ACTIVITY?

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## INTRODUCTION

In popular news media, the United States Court of Appeals for the Ninth Circuit is regularly characterized as left of the mainstream. Fox News commentator Bill O'Reilly once went so far as to say that "many of the federal judges sitting on that bench will not enforce the drug laws because they want legalization of narcotics."<sup>1</sup> The claim might strike some as extravagant rhetoric or the product of an overactive imagination,<sup>2</sup> but it's possible that O'Reilly was actually referencing a real opinion by the Ninth Circuit. In *Raich v. Ashcroft*,<sup>3</sup> the Ninth Circuit granted a preliminary injunction to prevent the federal government from enforcing the Controlled Substances Act ("CSA")<sup>4</sup> against two medical marijuana patients and their caregivers. *Raich*, however, is a far cry from the liberal judicial activism Bill O'Reilly made it out to be. In fact, the decision was based on the decidedly conservative Commerce Clause cases *United States v. Lopez*<sup>5</sup> and *United States v. Morrison*.<sup>6</sup> The *Raich* court held that enforcement of the CSA would be unconstitutional as applied to the plaintiffs because they were engaged in purely intrastate,

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1. *The O'Reilly Factor* (Fox News Channel television broadcast, Jan. 13, 2004).

2. O'Reilly acknowledged being "pretty much alone on television in reporting it" during an earlier *O'Reilly Factor* episode in which he accused the Ninth Circuit of wanting to legalize drugs. *The O'Reilly Factor* (Fox News Channel television broadcast, Dec. 3, 2003). In that episode he also called the Ninth Circuit "the most liberal court in American history" and said that it had "shamed the nation." *Id.*

3. 352 F.3d 1222 (9th Cir. 2003), cert. granted, 124 S. Ct. 2909 (2004).

4. Pub. L. No. 91-513, tit. II, 84 Stat. 1236, 1242-84 (1970) (codified as amended at 21 U.S.C. §§ 801-904 (2000)).

5. 514 U.S. 549 (1995).

6. 529 U.S. 598 (2000).

noneconomic activity outside the scope of Congress's Commerce Clause power.<sup>7</sup> The plaintiffs, who manufactured and possessed marijuana but did not engage in its sale, had sued the federal government for a preliminary injunction on Commerce Clause grounds.<sup>8</sup>

The Ninth Circuit's dedicated application of *Lopez* and *Morrison* in 2003 was not limited to liberal causes like medical marijuana.<sup>9</sup> They also issued two other important Commerce Clause opinions: the first, *United States v. McCoy*, overturning a conviction for child pornography possession,<sup>10</sup> and the second, *United States v. Stewart*, striking a conviction for possession of a machine gun.<sup>11</sup> Judge Alex Kozinski, the Ninth Circuit's leading conservative,<sup>12</sup> authored the *Stewart* opinion, while *McCoy* was written by prominent liberal Judge Stephen Reinhardt.<sup>13</sup> Together, the three cases demonstrate a slowly increasing willingness on the part of lower courts to take seriously the Supreme Court's directives in *Lopez* and *Morrison*. More importantly, however, these decisions indicate that the "broader scheme" doctrine that has hitherto been almost universally overlooked by scholars<sup>14</sup> will play a fundamental role in determining the limits and meaning of the post-*Lopez* Commerce Clause.

The doctrine, mentioned only twice in *Lopez*, allows Congress to regulate activity that is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."<sup>15</sup> What *that* allows, however, is not entirely clear. Does it mean, for instance, that

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7. See *Raich*, 352 F.3d at 1234 ("[W]e find that the CSA, as applied to the appellants, is likely unconstitutional.").

8. *Id.* at 1224–25, 1227–28.

9. Drug policy reform issues like medical marijuana are generally considered to be liberal issues. However, many conservatives and libertarians also support drug policy reform. See, e.g., William F. Buckley Jr., *Reefer Madness*, NAT'L REV., July 14, 2003, at 54.

10. 323 F.3d 1114 (9th Cir. 2003).

11. 348 F.3d 1132 (9th Cir. 2003).

12. See, e.g., Emily Bazelon, *The Big Kozinski*, LEGAL AFFAIRS, January-February 2004, available at [http://www.legalaffairs.org/issues/January-February-2004/feature\\_bazelon\\_janfeb04.html](http://www.legalaffairs.org/issues/January-February-2004/feature_bazelon_janfeb04.html) (characterizing Judge Kozinski as "the high-flying conservative of the Ninth Circuit Court of Appeals").

13. See, e.g., Erwin Chemerinsky, *Not So Far Out After All*, NATIONAL LAW JOURNAL, Oct. 7, 2002, at A12 (discussing misperceptions about the Ninth Circuit but noting that "Reinhardt is unquestionably liberal").

14. See *infra* text accompanying notes 30–32.

15. *United States v. Lopez*, 514 U.S. 549, 561 (1995); *cf. id.* at 558 ("Rather, 'the Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968))).

Congress can regulate gun possession in a school zone<sup>16</sup> if it does so under a regulatory scheme that seeks to eliminate the gun trade entirely,<sup>17</sup> criminalizes gun possession as part of the effort, and tacks on a penalty enhancement for doing it in a school zone for good measure?<sup>18</sup> In other words, does the mere inclusion of an otherwise impermissible regulation in a larger regulatory scheme save it?

Most lower courts have said, in a word, yes.<sup>19</sup> More alarmingly, they have almost uniformly adopted their expansive interpretations without any serious exploration of the broader scheme doctrine's meaning, limits, history, or other possible interpretations.<sup>20</sup> The First Circuit's treatment of the broader scheme issue in its discussion of the Youth Handgun Safety Act ("YHSA") in *United States v. Cardoza*<sup>21</sup> is instructive. Cardoza challenged convictions related to aiding and abetting juvenile gun possession in violation of the YHSA.<sup>22</sup> In a one paragraph discussion, the First Circuit determined that "the possessory prong of the YHSA"<sup>23</sup> was an essential part of a broader scheme, reasoning that it was part of Congress's effort to regulate supply and demand of handguns:

The YHSA can be thus seen as criminalization of the two points where the prohibited commerce finds its nexus; the demand for the firearms (possession), and the sale or transfer designed to meet that demand. The two prohibitions go hand in hand with one another.

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16. The same activity regulated by the statute held unconstitutional in *Lopez*.

17. Putting aside any concerns under the Second Amendment.

18. Posing a similar hypothetical, one court argued:

We think there is little doubt that if Congress had intended to eliminate the interstate market for guns (assuming, arguendo, that such a law would be constitutional), Congress could proscribe the intrastate possession of firearms. But the intent behind the Gun Free School Zones Act was to protect school children from gun violence—not to regulate a national market in firearms.

*United States v. Adams*, 343 F.3d 1024, 1033 n.10 (9th Cir. 2003).

19. See *infra* section II (discussing the lower court approach to the broader scheme doctrine).

20. At times these opinions have not even included a separate discussion of the issue. Instead, they have discussed comprehensive scheme questions in the context of determining whether an activity is economic or whether its effects on interstate commerce are too attenuated (the first and fourth *Morrison* factors). See, e.g., *United States v. Kallestad*, 236 F.3d 225, 230 (5th Cir. 2000) (arguing, in a discussion of the attenuation issue, that "Congress could rationally determine that banning purely local possession was a necessary adjunct to its effort to ban interstate traffic"); *id.* at 228 (considering whether mere possession of child pornography was an economic activity, the court argued that "the conduct being regulated here is commercial in character" as part of the "interstate traffic in child pornography").

21. 129 F.3d 6 (1st Cir. 1997).

22. *Id.* at 9. Cardoza also challenged a conviction for another offense not related to this discussion. *Id.*

23. *Id.* at 12.

Invalidation of one half of the equation would likely have deleterious effects on the efficacy of the legislation.<sup>24</sup>

*Cardoza*, like most lower court opinions on the subject, views the broader scheme doctrine as little more than a truism: if Congress has the power to enact larger scheme X and statute Y is connected to or part of that scheme, then Congress has the authority to enact statute Y.<sup>25</sup>

While that approach certainly has the virtue of simplicity, it is far from clear that it is the method of analysis envisioned by the *Lopez* court. First, it does not seem to provide for the sort of meaningful limitation on Congressional Commerce Clause power that was central to the Court's opinion in *Lopez*.<sup>26</sup> The notion that Congress can regulate even the most local, noncommercial, activity simply by including it in a larger scheme might make Congress more careful about *how* it constructs its regulations, but ultimately does not impact *what* activities Congress can and cannot regulate.<sup>27</sup> Similarly, the expansive view of the regulatory scheme rule actually creates a perverse incentive for Congress to regulate *more* broadly than it otherwise would.<sup>28</sup> For example, if Congress wished to regulate a noncommercial activity, it would have an incentive to pass the statute as part of a broader regulatory scheme, thus regulating a swath of activity to protect against challenges to the potentially suspect regulation. If this is a limitation on Congress's Commerce Clause power, it does not appear to be a particularly meaningful one. Moreover, lower courts have almost universally failed to consider the

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24. *Id.*

25. *See, e.g., GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 640 (5th Cir. 2003) ("ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes."). The *GDF* court commendably undertook a significantly more thorough inquiry into the broader scheme doctrine than most others before reaching this brief conclusion. *See id.* at 638–40.

26. *See, e.g., United States v. Lopez*, 514 U.S. 549, 556–57 ("But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits."); *id.* at 564 ("Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power . . . . Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."); *id.* at 565 (arguing in response to Justice Breyer's dissent that "[t]hese suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance"); *id.* ("Again, Justice Breyer's rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial.").

27. *See infra* section II (discussing the problems with the lower court approach).

28. *See* Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325 (2001) (arguing that the broader scheme doctrine creates perverse incentives for commerce).

pre-*Lopez* Supreme Court treatment of the doctrine or other possible interpretations, instead assuming that the language from *Lopez* was meant to support the most sweeping interpretation.<sup>29</sup>

Scholars, in turn, have assumed the lower courts' interpretation is correct and all but ignored the doctrine. None have explored the doctrine's history in detail, asked whether the current approach is correct, or offered an alternate framework for analyzing broader scheme issues.<sup>30</sup> The one academic article that does focus on the broader scheme doctrine astutely points out that it creates perverse legislative incentives for Congress but limits its analysis to that single point and, in particular, assumes that the expansive lower court readings that creates these incentives is correct.<sup>31</sup> Even in the wake of that article, the broader scheme doctrine remains a "critical passage that has gone largely unnoticed by commentators."<sup>32</sup>

As a result, the broader scheme doctrine has continued to be misunderstood despite its growing importance in Commerce Clause jurisprudence. Prior to *Lopez*, the concept was justifiably overlooked. For nearly 60 years, Congress's Commerce Clause power seemed almost limitless as the Supreme Court consistently upheld every statute faced with a Commerce Clause challenge that came before it.<sup>33</sup> But in striking down the Gun Free School Zones Act ("GFSZA") of 1990, which made gun possession in a school zone a federal offense, the broader scheme doctrine suddenly gained new significance.

The importance of the broader scheme doctrine has become increasingly clear after *Morrison*, even as its meaning remains muddled and neglected. Prior to *Morrison*, lower courts understandably applied *Lopez* with a great deal of caution as it was unclear whether the decision was an "epochal case" or "only a

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29. This is especially curious as the pre-*Lopez* cases that discuss the doctrine, while limited, are inconsistent with the expansive view of the broader scheme doctrine. See *infra* section III.

30. As noted above, my research revealed only one article that even focused on the broader scheme doctrine. See Vermuele, *supra* note 28. A number of Commerce Clause articles mention the doctrine in passing but do not discuss it in depth. See, e.g., Michael C. Blumm & George Kimbrell, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act's Take Provision*, 34 ENVTL. L. 309, 349-55 (2004) (discussing the broader scheme doctrine in analyzing part of the Endangered Species Act); Lilly Santaniello, *Commerce Clause Challenges to the Endangered Species Act's Regulation of Intrastate Species on Private Land*, 10 HASTINGS W.-N.W. J. ENV. L. & POL'Y 39 (2003) (discussing the same).

31. *Id.* at 1331.

32. *Id.*

33. See, e.g., *United States v. Taylor*, 226 F.3d 593, 598 (7th Cir. 2000) ("From 1937 to 1995, the Supreme Court consistently upheld federal legislation against claims that Congress had overstepped its authority under the Commerce Clause.").

misstep.”<sup>34</sup> After *Morrison*, however, the broader scheme doctrine became a central issue—perhaps the most important—in defining the scope of federal Commerce Clause power.<sup>35</sup> The primary reason for this is that the broader scheme doctrine is the *only* doctrine the Supreme Court has recognized that may have the power to save Congressional regulation of noneconomic activity.<sup>36</sup> Lower courts have relied on the broader scheme doctrine in upholding statutes ranging from prohibitions against drug possession,<sup>37</sup> aiding and abetting juvenile handgun possession,<sup>38</sup> and child pornography possession<sup>39</sup> to environmental<sup>40</sup> and endangered species regulations.<sup>41</sup> Indeed, because *Lopez* defines possession as a noneconomic activity, the broader scheme doctrine is the only doctrine that can save possession-based statutes.<sup>42</sup>

This essay provides the first thorough examination of the broader scheme doctrine and its history, argues that the prevailing interpretation by lower courts is misguided, and proposes a preferable framework for analyzing broader scheme questions. The analysis reveals a fundamental misinterpretation of *Wickard*'s aggregation doctrine<sup>43</sup> as the source of the expansive, purpose-based view. Lower courts have mistakenly read *Wickard* as a part of the broader scheme doctrine. However, *Lopez*'s treatment of *Wickard* was meant to limit the aggregation principle to statutes that regulate economic activity, a concept unrelated to the broader scheme doctrine. Instead, cases like

34. *United States v. Lopez*, 514 U.S. 549, 614–15 (1995) (Souter, J., dissenting).

35. Presuming that the Court continues to pursue its new approach to the Commerce Clause and faithfully apply *Lopez* and *Morrison*. Both *Lopez* and *Morrison* were decided by 5-4 margins.

36. In other words, statutes that fail the four-part *Morrison* substantial effects test.

37. *United States v. Tisor*, 96 F.3d 370, 375 (9th Cir. 1996) (“The challenged laws are part of a wider regulatory scheme criminalizing interstate and intrastate commerce in drugs.”); *see also* *United States v. Leshuk*, 65 F.3d 1105, 1112 (4th Cir. 1995) (“In contrast to the firearm possession prohibited in the Gun Act, the intrastate drug activities regulated in the Drug Act are clearly tied to interstate commerce.”).

38. *E.g.*, *United States v. Cardoza*, 129 F.3d 6 (1st Cir. 1997).

39. *E.g.*, *United States v. Adams*, 343 F.3d 1024 (9th Cir. 2003).

40. *E.g.*, *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 201–02 (2d Cir. 2002) (upholding toxic substance statute on broader scheme grounds).

41. *E.g.*, *Gibbs v. Babbitt*, 214 F.3d 483, 497 (4th Cir. 2000) (“This regulation is also sustainable as ‘an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.’”) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)); *see also* *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003).

42. Because *Lopez* already found the activity of possessing a gun in a school zone to be noneconomic, this essay will focus primarily on statutes that regulate possession in order to most clearly analyze the broader scheme doctrine and its impact on otherwise noneconomic activity.

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

*Maryland v. Wirtz*<sup>44</sup> and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*<sup>45</sup> are the source of the broader scheme doctrine. These cases show a doctrine based on the enterprise theory, which allows for an analytical framework that conforms to the mandates of *Lopez* and *Morrison*.

Section I contains a brief overview of the Supreme Court's substantial effects Commerce Clause jurisprudence. Section II reviews lower courts' treatment of the broader scheme doctrine and the implications of their adopted approach. Section III considers the Supreme Court case law on the broader scheme doctrine and the source of the expansive interpretation adopted by the lower courts. Section IV proposes an approach to the broader scheme doctrine, based on the enterprise concept, which addresses the problems of the prevailing analytical framework and is consistent with the pre-*Lopez* cases that mention the broader scheme concept.

#### I. THE RISE OF THE SUBSTANTIAL EFFECTS TEST

Before *United States v. Lopez*, perhaps the only clear Commerce Clause rule was that there were no rules. Judge Kozinski, for example, wondered "why anyone would make the mistake of calling it the Commerce Clause instead of the 'Hey, you-can-do-whatever-you-feel-like Clause.'"<sup>46</sup> *Lopez* and *Morrison* famously ended the Supreme Court's long string of cases upholding statutes under the Commerce Clause and announced a new framework for analyzing Commerce Clause challenges. The framework is based on "three broad categories of activity that Congress may regulate under its commerce power":<sup>47</sup> the channels of interstate commerce; the instrumentalities of interstate commerce, or persons or things in interstate commerce; and activities that substantially affect interstate commerce.<sup>48</sup>

Both *Lopez* and *Morrison* dealt primarily with the substantial effects category, under which the broader regulatory scheme doctrine falls. In both cases, the Court identified the question of whether the regulated activity was commercial (economic) or noncommercial (noneconomic) as central to analyzing a statute's constitutionality.

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44. 392 U.S. 183 (1968).

45. 452 U.S. 264 (1981).

46. Alex Kozinski, *Introduction to Volume Nineteen*, 19 HARV. J.L. & PUB. POL'Y 1, 5 (1995).

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

48. *Id.* at 558-59.

Justice Rehnquist, who authored the majority opinion in both *Lopez* and *Morrison*, implied that economic regulations would almost always be upheld: “[T]he pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”<sup>49</sup> The cases also demonstrated that noneconomic regulations will almost certainly be struck down.<sup>50</sup>

*Morrison* established a controlling four factor test for determining the constitutionality of regulations under the substantial effects category. The test places particular emphasis on whether the regulated activity is economic and whether the effect of the activity on interstate commerce is attenuated.<sup>51</sup> The other two factors considered under the test are whether the statute contains an “express jurisdictional element which might limit its reach” and whether there are any Congressional findings on interstate commerce contained in the statute or its legislative history.<sup>52</sup> Significantly, the statute held unconstitutional in *Morrison*, the Violence Against Women Act, which sought to address the problem of gender motivated violence by creating a federal civil cause of actions for victims of such violence,<sup>53</sup> contained detailed legislative findings on the effects of gender motivated violence on interstate commerce.<sup>54</sup> This demonstrated that Congressional findings alone would not save a statute from a Commerce Clause challenge, a question that had been left open in *Lopez*.<sup>55</sup> *Lopez* and *Morrison* also considered whether the activity is one traditionally regulated under state authority, but this was not part of the four factor test.<sup>56</sup>

Together, *Lopez* and *Morrison* demonstrate that the Court is serious

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49. *Id.* at 560.

50. See *United States v. Morrison*, 529 U.S. 598, 613 (2000) (“While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”).

51. *Id.* at 610–13.

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

53. 42 U.S.C. § 13981(c) (2000).

54. See, e.g., H.R. CONF. REP. NO. 103-711, at 385 (1994); S. REP. NO. 103-138, at 41 (1993); S. REP. NO. 101-545, at 33 (1990).

55. See *Morrison*, 529 U.S. at 614 (“[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation . . . [S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”) (quoting *Lopez*, 514 U.S. at 557 n.2).

56. See, e.g., *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring) (“Were the federal government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.”).

about (re)placing limits on Congress's Commerce Clause authority. However, the opinions raise almost as many questions as they answer.<sup>57</sup> Even the fundamental lines separating the Court's three Commerce Clause categories are not clearly drawn. *Lopez*, for example, characterized *Heart of Atlanta Motel v. United States*<sup>58</sup> as a case in the channels category<sup>59</sup> and, separately, as a substantial effects case.<sup>60</sup> With regard to the commercial activity inquiry, the Court itself acknowledged the difficulty in determining whether an activity is commercial or noncommercial, the central question in the substantial effects category.<sup>61</sup> Both *Lopez* and *Morrison* appeared to emphasize the traditional state interest over a regulated activity as an important part of their analysis (FN) but neither case discusses how the factor should be used in future cases and it is not included in *Morrison*'s four-prong test.<sup>62</sup> Adding to the confusion, neither case explicitly overruled old law,<sup>63</sup> though both seem to conflict with prior opinions.<sup>64</sup>

Despite the unanswered questions, *Lopez* and *Morrison* reveal at the very least that the Supreme Court, as currently constituted, is serious about placing meaningful limits on Congress's Commerce Clause authority.<sup>65</sup> They also indicate that these limits should render unconstitutional all or most stand-alone regulation of noncommercial

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57. See, e.g., Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 735 (2003) ("[M]any remaining issues must be addressed if these decisions are truly to be the harbinger of a revolution in Commerce Clause doctrine.").

58. 379 U.S. 241 (1964).

59. *Lopez*, 514 U.S. at 558.

60. *Id.* at 559. It is unclear if the Court meant that *Heart of Atlanta Motel* fell into both categories or whether its inclusion in more than one category was an error.

61. *Id.* at 566 ("Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty.").

62. See, e.g., *Lopez*, 514 U.S. at 564 ("Under the theories that the Government presents in support of § 922 (q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."); *Morrison*, 529 U.S. at 618 (arguing that the Court could "think of no better example of the police power, which the Founders denied to the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.")

63. See Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605, 616–17 (2001) ("With one hand the majority refuses to relinquish the rational basis test, while with the other hand the majority strikes down legislation with standards that clearly are stricter than rational basis.").

64. See, e.g., *United States v. Kallestad*, 236 F.3d 225, 232 (5th Cir. 2000) (Jolly, J., dissenting) ("[T]he persuasiveness of *Wickard* in the wake of *Lopez* and *Morrison* is questionable in the analysis of the criminal statute we consider today.") (citations omitted).

65. See *Lopez*, 514 U.S. at 554–57.

activity such as statutes that cover simple possession<sup>66</sup> and possibly environmental and endangered species regulations.<sup>67</sup> But even if limited to possession—which *Lopez* concluded was a noncommercial activity<sup>68</sup>—a wide range of federal legislation is on very questionable constitutional ground. The primary reason news programs haven't been filled with stories of federal courts decriminalizing drugs is the lower courts' interpretation of the broader scheme doctrine. The broader scheme theory is currently the *only* basis mentioned by the Supreme Court that might allow Congress to enact statutes that regulate noncommercial activity such as simple possession.<sup>69</sup> It is therefore integral to understanding and determining the breadth of the Congress's Commerce Clause power over noncommercial activities after *Lopez*. Unfortunately, determining its meaning is no easy task.

*Lopez* mentions the broader scheme doctrine only twice and fails to elaborate on its meaning to guide lower courts.<sup>70</sup> Indeed, it is debatable whether the *Lopez* Court intended to recognize the broader scheme issue as a separate doctrine at all.<sup>71</sup> Lower courts, however, have seized on the broader scheme principle as a viable and robust means to sustain the regulation of possession and other

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66. "For whatever else it may be cited, *United States v. Lopez* at least stands for the proposition that purely intrastate non-commercial possession of a non-fungible good 'is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.'" Kallestad, 236 F.3d at 231 (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)).

67. See, e.g., *Gibbs v. Babbitt*, 214 F.3d 483, 497 (4th Cir. 2000) ("This regulation is also sustainable as 'an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'") (quoting *Lopez*, 514 U.S. at 561); see also *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003).

68. While the GFSZA was limited to possession in a school zone, there is little reason to think the four-part *Morrison* analysis would be different for general possession statutes. The school zone aspect of the statute in *Lopez* would be irrelevant to the question of whether an activity is economic. The act of possession is equally economic no matter where it occurs—whether a school zone or anywhere in the United States.

69. The Supreme Court has declined to announce a bright line rule against aggregating noncommercial activity, so it is possible the Court will announce a new rule that can save such activity. Such a rule would almost surely further blur the limits that *Lopez* and *Morrison* purport to place on congressional commerce power.

70. In the most famous instance, the court did not even cite any cases that would suggest the meaning and origin of the doctrine. *Lopez*, 514 U.S. at 561. In the other instance, the court quoted a passage from *Maryland v. Wirtz*, 329 U.S. 183, 197 n.27 (1968), that mentioned the doctrine. *Lopez*, 514 U.S. at 558 (asserting that a "relatively trivial impact on commerce" does not justify "broad general regulation of state or private activities"). This suggests that it stems from the *Wirtz* line of cases.

71. One could argue that the Court's one-sentence discussion of the broader scheme doctrine is merely a clumsy way of affirming the principle that economic activity can be aggregated. However, the context in which the majority discusses the broader scheme doctrine and the prominent place it has served in lower court Commerce Clause decisions suggest that it is a distinct doctrine.

noncommercial activities in the wake of *Lopez* and *Morrison*. Most of these courts have assumed without discussion that the doctrine is to be read expansively, despite the fact that *Lopez*'s limited treatment calls out for additional analysis before adopting any interpretation.

## II. THE BROADER SCHEME DOCTRINE ENCOUNTERS THE LOWER COURTS

*Lopez* and *Morrison* caused a stir among commentators. One commentator argued that “[p]erhaps the most striking feature of the Rehnquist Court’s [Commerce Clause] jurisprudence has been the revival... of doctrines of constitutional federalism.”<sup>72</sup> Based exclusively on lower court opinions, however, there would be little reason to believe Commerce Clause analysis has changed at all in the last ten years.<sup>73</sup> Professors Brannon P. Denning and Glenn H. Reynolds conducted two comprehensive surveys of post-*Lopez* Commerce Clause cases in the lower courts and both concluded that lower courts have consistently continued to uphold statutes in the face of Commerce Clause challenges.<sup>74</sup> They noted that “[i]n many cases, little supporting analysis is offered for [the Court’s] conclusions”<sup>75</sup> and that “[e]ven where the courts attempt analysis, they seem intent on minimizing the significance of the Court’s recent Commerce Clause decisions.”<sup>76</sup> In this climate, it is not surprising that lower courts have been quick to adopt an expansive reading of the broader scheme doctrine and declined to outline a meaningful analytical framework when applying it.

As a result, even after *Morrison*, *Lopez* seems more like an anomaly<sup>77</sup> than like a groundbreaking, influential decision. Even

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72. Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24, 25 (2001).

73. See, e.g., Carl W. Chamberlin, *Johnny Can't Read 'Cause Jane's Got a Gun: The Effects of Guns in Schools, and Options After Lopez*, 8 CORNELL J.L. & PUB. POL'Y 281, 328 (1999) (“So far, *Lopez* has not had a significant impact on Commerce Clause decisions.”).

74. “In fact, in nearly two years following *Morrison*, only one statute has been held unconstitutional on its face, and that decision did not survive *en banc* review.” Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1256 (2003); see also Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369.

75. Denning & Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, *supra* note 74, at 1263.

76. *Id.* at 1266.

77. Following *Lopez*, it was widely debated whether or not the decision truly marked a new approach to Commerce Clause analysis. Dissenting in *Lopez*, Justice Souter

statutes that regulate the act of simple possession—the same type of activity regulated by the statute in *Lopez*—are regularly upheld by lower courts.<sup>78</sup> Some courts have produced labored explanations to characterize possession as a commercial activity distinguishable from *Lopez*. For example, in *United States v. Rodia*, the Third Circuit argued, as one of its reasons for upholding a child pornography possession statute, that the intrastate activity was commercial because child pornography might be addictive and addicted possessors would lead to increased trafficking.<sup>79</sup> However, because such strained definitions of economic activity are so clearly at odds with *Lopez*, most lower courts have avoided them, particularly after *Morrison*. Instead, they have relied on cursory and unrestrained applications of the broader scheme doctrine to uphold statutes facing commerce challenges.

Although courts usually apply the broader scheme doctrine as though its meaning were self evident, the varying explanations and discussions of the doctrine indicate it is not. There is not even a uniform approach among lower courts as to where the broader scheme doctrine should be placed in Commerce Clause analysis. Some courts treat the broader scheme doctrine separately from the four part *Morrison* test, as a means of saving the regulation of admittedly noncommercial activity. Other opinions have incorporated their analysis of the broader scheme doctrine into the economic activity question. Still another approach reads the *de minimis* effects principle<sup>80</sup> and the broader scheme doctrine as one to conclude that even if an activity is noncommercial and, as a class, has *de minimis* effects on interstate commerce, it can be upheld if the class of activities that is regulated by the broader scheme has substantial effects on interstate commerce.<sup>81</sup>

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wondered whether the case was “only a misstep.” *Lopez*, 514 U.S. at 614–15.

78. See, e.g., *United States v. Kallestad*, 236 F.3d 225 (5th Cir. 2000) (upholding child pornography possession statute).

79. 194 F.3d 465, 478 (3rd Cir. 1999) (“Another way to describe the nexus between intrastate and interstate activity here is in terms of the notion of addiction . . .”). *Rodia* also relied on the broader scheme doctrine in its holding. See *id.* at 479 (“[C]hild pornography cannot be effectively regulated without federal control over both the interstate and local versions of the activity.”).

80. It is also known as the aggregation principle.

81. See, e.g., *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 630 (5th Cir. 2003) (“The *de minimis* instance, however, must be ‘an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.’”); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1077 (D.C. Cir. 2003) (“Hence, because much activity regulated by the ESA does bear a substantial relation to commerce, it may well be that the hiker hypothetical proffered by the plaintiff is ‘of no consequence’ to the statute’s constitutionality.”).

The common thread in each approach is an expansive view of the broader scheme doctrine that gives it the power to save highly questionable regulations merely because they are part of a larger congressional effort. Courts generally use the broader scheme doctrine either to expand the regulated class of activities to one that is economic or to focus on the statute's purpose and emphasize how useful regulating an otherwise noncommercial activity is to achieving it. Considering a representative opinion demonstrates the practical impact of the expansive broader scheme approach as well as the need for courts to announce a more thorough, logical, and consistent analytical framework for dealing with broader scheme questions.

*A. United States v. Adams: Broader Scheme Doctrine and the Economic Question*

In *United States v. Adams*,<sup>82</sup> the Ninth Circuit considered a facial challenge to the federal child pornography possession statute.<sup>83</sup> The case came months after *United States v. McCoy*,<sup>84</sup> in which a different Ninth Circuit panel overturned a conviction under the same statute on an "as applied" challenge but expressly left unanswered whether the statute was facially unconstitutional.<sup>85</sup> Adams, who had viewed and downloaded illegal images from the internet, was arrested as part of an investigation against the web site from which he had obtained the images. He was charged with possessing and receiving child pornography but was convicted of only the possession charge in a conditional plea bargain.<sup>86</sup> As part of his plea Adams admitted to a number of facts, including that he was "in possession of a ... number of computer diskettes" that "contained visual depictions of minors engaged in sexually explicit conduct" and that "[t]he computer diskettes ... contained components that were not manufactured in the State of California."<sup>87</sup> Adams appealed his conviction on the grounds that the federal child pornography statute was unconstitutional under the Commerce Clause because it regulated possession, a noncommercial activity with an attenuated connection to interstate commerce.

The court began its analysis by distinguishing the facts from

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82. 343 F.3d 1024 (9th Cir. 2003).

83. 18 U.S.C. § 2252(a)(4)(B) (2000).

84. 323 F.3d 1114 (9th Cir. 2003).

85. *Id.* at 1132.

86. *Adams*, 343 F.3d at 1027.

87. *Id.*

*McCoy*, noting that McCoy possessed material which she had made herself outside of the commercial market for pornography while Adams possessed “commercial child pornography.”<sup>88</sup> This distinction prevented Adams from raising an as applied challenge because “if constitutional at all” the statute would reach Adams’ conduct.<sup>89</sup> The court then outlined the four part *Morrison* test, concluding that the statute had no limiting “jurisdictional hook” and that the factor therefore weighed in favor of Adams.<sup>90</sup> It recited the legislative history, concluded that it weighed in favor of the government and moved on to the two most important *Morrison* factors: economic activity and attenuation.<sup>91</sup>

The court began its economic activity analysis by discussing the broader scheme doctrine<sup>92</sup> and proceeded to rely on it almost exclusively in finding that simple possession of child pornography was an economic activity. It did not provide any explanation for including the broader scheme doctrine in the economic activity prong of *Morrison*. Instead the court argued that the inclusion of child pornography in a broad scheme distinguished the activity from *Lopez* because of Congress’s *purpose* in enacting the larger scheme. “In contrast to *Lopez*, here the statute criminalizing possession *is* part of the larger congressional scheme to eradicate the market for child pornography. *Lopez* does not stand for the proposition that Congress is powerless in all situations to criminalize the intrastate possession of a contraband good, particularly where the congressional intent is to stamp out the entire market for that good.”<sup>93</sup> This distinction was the only one cited to support the court’s conclusion that “the possession of commercial child pornography has some nexus to the child pornography market.”<sup>94</sup> The court adopted a similar supply and demand argument in its brief treatment of the attenuation prong.<sup>95</sup> It concluded that the four part test weighed in favor of finding the statute constitutional. The decision rested almost entirely on the

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88. *Id.* at 1030.

89. *Id.*

90. *Id.*

91. *Id.* at 1031–33.

92. “Congress criminalized possession of child pornography as ‘part of a larger regulation of economic activity.’ We therefore conclude that the possession of commercial child pornography has at least some nexus to economic activity; we explain in more detail below precisely why this is so.” *Id.* at 1032 (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

93. *Adams*, 343 F.3d at 1033.

94. *Id.*

95. *Id.*

broader scheme doctrine.

Under the *Adams* approach, representative of most lower court opinions,<sup>96</sup> the broader scheme doctrine is used primarily to consider congressional purpose in assessing the economic quality of an activity. The economic “nexus” found in *Adams* is the relationship between the act of possession and the purpose of Congress’s broader scheme. This approach fails to limit Congress as it can define any activity as commercial through the purpose of its broader scheme. In addition, defining the economic quality of an activity in relation to Congressional purpose is analytically unsound. The relationship between the act of possession, for example, and commerce is the same whether regulated by the GFSZA or the CSA. But the main characteristic of the *Adams* broader scheme doctrine is that it defines the economic or commercial quality of an action and whether it has an attenuated impact on commerce by the purpose of the statute that regulates it, not by the quality of the act itself. When a regulation is attached to a larger scheme and it is helpful in achieving the purpose of that scheme, it is found to be constitutional.

### *B. Problems With the Expansive Broader Scheme Approach*

The *Adams* decision is emblematic of the expansive approach to the broader scheme doctrine taken throughout lower courts. This reading of the doctrine allows Congress to potentially regulate any noncommercial activity simply by placing it in a broader scheme under the theory that Congress has determined that regulating the noncommercial activity is helpful to achieving the goals of the broader act. This is problematic for a number of reasons. First, by focusing on Congress’s purpose in enacting a statute, it gives Congress near limitless power and discretion. Second, to the extent that this view of the doctrine does place limits on Congress, these limits can be overcome simply by regulating more broadly, thus creating a perverse incentive for Congress. Because of this effect,

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96. See, e.g., *United States v. Angle*, 234 F.3d 326, 337 (7th Cir. 2000) (“Angle’s contention that intrastate possession of child pornography has little or no bearing on interstate commerce ignores the interstate demand for child pornography which Congress took into consideration in enacting the statutory scheme ... .”); *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 640–41 (5th Cir. 2003) (“ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes.”); *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 200–01 (2d Cir. 2002) (upholding toxic substance statute on broader scheme grounds); *Gibbs v. Babbitt*, 214 F.3d 483, 497 (4th Cir. 2000) (“This regulation is also sustainable as ‘an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.’”) (quoting *Lopez*, 514 U.S. at 561).

*Lopez* may have the counterintuitive result of encouraging Congress to regulate more activity, not less. Finally, by failing to provide a substantive limit to Congress's Commerce Clause power, this reading of the broader scheme doctrine is at odds with the central goal of *Lopez* and *Morrison*.

In *Adams*, the court used the purpose of the broader scheme doctrine to determine its analysis of the economic activity question. As an initial matter, it is difficult to discern why the broader scheme doctrine should have any bearing on whether an activity is defined as economic or not. The *Lopez* majority recognized the difficulty in determining the economic quality of an activity.<sup>97</sup> Whatever the factors in making this determination, however, it seems plain that the best way to define the activity is by considering the activity itself rather than by the broader scheme doctrine as used in *Adams*.

Even if disconnected from the economic question, the expansive broader scheme doctrine fails to place reasonable limits on congressional power. By deferring to Congress in its definition of the class or activity or in its use of statutory purpose to define the regulated noncommercial activity as economic, the broader scheme doctrine allows Congress to regulate any noncommercial activity by simply including it in a broader scheme. Under this reading Congress could, for example, revive the GFSZA simply by including the statute as part of a scheme to regulate the national market for guns.<sup>98</sup> Justice Breyer asked in his *Morrison* dissent whether Congress could save the VAWA "by including it, or much of it, in a broader 'Safe Transport' or 'Workplace Safety' act?"<sup>99</sup> Under the expansive purpose view of the broader scheme doctrine, this would indeed save the regulation struck down in *Morrison*. This interpretation of broader scheme doctrine turns the Commerce Clause limits of *Lopez* and *Morrison* from substantive restrictions to procedural ones. Congress could still reach any activity it pleased; it would just have to do it in a particular way. This is why so few lower court opinions have struck down

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97. *Lopez*, 514 U.S. at 566 ("Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty.").

98.

We think there is little doubt that if Congress had intended to eliminate the interstate market for guns (assuming *arguendo*, that such a law would be constitutional), Congress could proscribe the intrastate possession of firearms.

But the intent behind the Gun Free School Zones Act was to protect school children from gun violence—not to regulate a national market in firearms.

*United States v. Adams*, 343 F.3d 1024, 1033 n.10 (9th Cir. 2003).

99. *United States v. Morrison*, 529 U.S. 598, 657 (2000).

statutes on Commerce Clause grounds.<sup>100</sup>

In discussing the aggregation principle, *Lopez* stated that Congress could not use a “relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.”<sup>101</sup> The lower court’s interpretation of the broader scheme doctrine gives Congress the incentive to do exactly that. It encourages Congress to regulate even *more* activity than it otherwise would by giving it the incentive to pass broad regulations instead of limited ones.<sup>102</sup> If Congress wished to regulate a noncommercial activity, it would be left with two choices: regulate just that activity and see the statute held unconstitutional, or pass a large regulatory scheme to reach more activity than the one it wants to regulate.<sup>103</sup>

Even if the case law that grounded the broader scheme doctrine prior to *Lopez* was consistent with the lower courts’ sweeping interpretation of the broader scheme doctrine,<sup>104</sup> the effects of such an interpretation make it inconsistent with *Lopez* and *Morrison*. In both opinions, the Court highlighted the need to place meaningful limits on commerce power. In *Morrison*, for example, the Court stressed that “[t]he Constitution requires a distinction between what is truly national and what is truly local.”<sup>105</sup> The *Lopez* court rejected arguments to uphold the GFSZA because it would make it “difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”<sup>106</sup> The most noteworthy argument by the *Lopez* court in this regard is its rejoinder to Justice Breyer, arguing that his “rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial.”<sup>107</sup> The expansive view of the broader scheme

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100. Denning & Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, *supra* note 74, at 1256 (noting that lower courts have only rarely overturned convictions or statutes on Commerce Clause grounds even after *Morrison*).

101. *Lopez*, 514 U.S. at 558 (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)).

102. Vermeule, *supra* note 28.

103. *Id.* at 1330.

104. A review of the limited case law mentioning the broader scheme doctrine indicates it is not. *See infra* section IV.

105. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000).

106. *Lopez*, 514 U.S. at 564.

107. *Id.* at 565.

doctrine undermines this principle by allowing Congress to dodge the substantive limits of *Lopez* and *Morrison* simply by including unconstitutional statutes in a valid larger scheme. *Lopez* described *Wickard* as “perhaps the most far reaching example of Commerce Clause authority over intrastate activity”<sup>108</sup> but the prevailing lower court approach to the broader scheme doctrine reaches activity with a markedly smaller connection to commerce, such as possession, than that in *Wickard*. In *Wickard*, although Filburn’s individual actions may have been outside of commerce, the contested statute regulated a generally economic activity, namely cultivation.<sup>109</sup> Possession, on the other hand, is a *generally* noncommercial activity.<sup>110</sup>

*C. United States v. McCoy: An “As Applied” Commerce Clause Challenge*

Although lower courts for the most part have not been receptive to Commerce Clause challenge, they have begun to show a willingness to place some limits on Congress in a number of recent cases by entertaining as applied Commerce Clause challenges. However, these cases have also failed to explore the meaning of the broader scheme doctrine, instead confusing it as part of the debate over as-applied commerce challenges. In *United States v. McCoy*,<sup>111</sup> for example, the Ninth Circuit overturned a child pornography conviction on an as applied Commerce Clause challenge. Rhonda McCoy was convicted of possession of child pornography based on a single photograph of her and her ten-year-old daughter taken in April 2000.<sup>112</sup> The picture was taken one evening when McCoy, who suffered from mental health and substance abuse problems, was at home with her family and intoxicated. McCoy’s husband was taking pictures of the family and at some point in the evening she and her daughter posed for the camera with their genitals exposed.<sup>113</sup> McCoy did not intend to sell or distribute the picture, though it was taken with materials that had traveled in interstate commerce.<sup>114</sup> She entered a conditional guilty

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108. *Id.* at 560.

109. *Wickard v. Filburn*, 317 U.S. 111, 114 (1942) (noting that Filburn sold part of the crop that he harvested).

110. *Lopez*, 514 U.S. at 561 (finding possession of a gun in a school zone as an act that “has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms”).

111. 323 F.3d 1114 (9th Cir. 2003).

112. *Id.* at 1115.

113. *Id.*

114. *Id.* at 1116.

plea to possession of child pornography and appealed on the grounds that the statute was unconstitutional either on its face or as applied to her.<sup>115</sup>

*McCoy*, decided only months before *Adams*,<sup>116</sup> determined that the statute was unconstitutional as applied to McCoy and “others similarly situated”<sup>117</sup> but avoided the question of whether it was unconstitutional on its face.<sup>118</sup> Although the court in *McCoy* ostensibly conducted an as applied inquiry, its analysis did not often focus on the specifics of the case and its logic seems equally applicable to all cases under the statute.<sup>119</sup> The court began by applying the economic *Morrison* prong. The analysis of this factor focused on the application of *Wickard*’s holding to McCoy’s activity. While the result in *McCoy* was different than that of lower courts that relied on the expansive broader scheme interpretation, the *McCoy* court similarly placed the connection between the regulated activity and the purpose of the statute at the center of their interpretation of the broader scheme doctrine. The *McCoy* court distinguished *Wickard* from the facts before it by turning to the broader scheme doctrine, and arguing that the home grown wheat in *Wickard* competed with other wheat and impacted the demand for wheat. “McCoy’s venture, in contrast, was purely non-economic and non-commercial, and had no connection with or effect on any national or international commercial child pornography market ... .”<sup>120</sup> Based on this factor, the court concluded that the material possessed was not connected to any commercial enterprise and that “[s]ection 2252(a)(4)(B) is, thus, not ‘an essential part of a larger regulation of economic activity.’”<sup>121</sup> In other words, the *McCoy* court seemed to reason that because the individual act at issue was not linked to commerce, the entire statute was not an essential part of a broader scheme. Like the *Adams*’ approach, this interpretation of the broader scheme doctrine turns primarily on purpose but looks to whether the individual activity at

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115. *Id.* at 1116–17.

116. See discussion *supra* section IIA.

117. *McCoy*, 323 F.3d at 1131.

118. *Id.* at 1132 (“We express no view of the constitutional application of § 2252(a)(4)(B) to wholly intrastate possession of a commercial or economic character.”).

119. *Id.* at 1140–41 (Trott, J., dissenting) (“Holding this statute unconstitutional as applied to McCoy’s conduct ... may render unconstitutional *all* intrastate child pornography possession prosecutions ... . *To the statute*, it is immaterial that the particular child pornography under scrutiny was not produced for sale or trade.”).

120. *Id.* at 1122.

121. *Id.* (quoting *Lopez*, 514 U.S. at 561). It is noteworthy that the court made this statement about the statute as a whole.

issue is necessary to achieve the purpose. The *McCoy* court's error was not in its underlying reason for distinguishing *Wickard* but in conflating the *Wickard* analysis with the broader regulatory scheme question.

After concluding that McCoy's activity was not economic in nature, the court turned to the attenuated effect factor. Having already dismissed the supply and demand purpose argument, the court considered other theories of effect and found that they would require the court to engage in the type of "but-for" analysis barred by *Lopez* and *Morrison*.<sup>122</sup> The court determined that the remaining two *Morrison* factors also weighed in McCoy's favor.<sup>123</sup> Finally, it discussed whether a court can entertain as-applied Commerce Clause challenges, and concluded that such challenges were acceptable.<sup>124</sup>

In dissent, Judge Trott argued that courts are not permitted to consider as-applied Commerce Clause challenges and must instead "take the statute head on."<sup>125</sup> He quickly summarized his basis for the argument by saying: "the Supreme Court said in *Lopez* that 'where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'"<sup>126</sup> Trott cited *Wickard* as "[o]ne of the leading cases"<sup>127</sup> for this principle, noting that the *Wickard* court considered supply and demand in concluding that Congress could "regulate the production of wheat, even particular wheat that had no connection to interstate commerce."<sup>128</sup> He then turned to consider the merits of a facial challenge to the statute and determined that possession was an economic activity by defining the regulated class of activities as those affecting the "interstate economic market" for child pornography and focusing on Congress's purpose in passing the possession statute.<sup>129</sup>

The majority responded in two ways. First, they argued that the dissent failed "to counter" their "central premise" that "*Wickard*'s theory of aggregate impact ... applies *only* when 'the regulated intrastate activity is a commercial or economic one.'"<sup>130</sup> Second, and

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122. *Id.* at 1123.

123. *Id.* at 1124–29.

124. *Id.* at 1132–33.

125. *Id.* at 1133 (Trott, J., dissenting).

126. *Id.* at 1134 (quoting *Lopez*, 514 U.S. at 558).

127. *Id.* at 1136.

128. *Id.*

129. *Id.* at 1138.

130. *Id.* at 1122 n.17 (quoting *United States v. Ballenger*, 312 F.3d 1264, 1270 (11th

more importantly, they argued that McCoy's activity did not fall under the *de minimis* rule because it was part of a distinguishable *class* of activities. "The cases cited by the dissent involve singular and trivial instances of conduct at the outer edges of a particular statute's reach; that is not the case here. We interpret the statute as applied to McCoy's conduct as it falls within a *class of activity* that § 2252(a)(4)(B) purports to reach: intrastate possession of a non-commercial and non-economic character."<sup>131</sup>

While the result in *McCoy* is more consistent with *Lopez* and *Morrison* than those of most lower court Commerce Clause cases, it too lacks a coherent analytical framework. The majority's treatment of the broader scheme doctrine is muddled but indicates that they understand it to mean that where Congress regulates an activity that is generally economic, it can reach *de minimis* noneconomic instances of activity within the broader activity. This is essentially the same understanding as the dissent, the two sides just disagree over how broadly to define the regulated activity. The main flaw in this approach is in mistaking the broader scheme doctrine and the aggregation, or *de minimis*, principle as one rule when the two are distinct doctrines. The aggregation principle announced in *Wickard* permits regulation of individual acts that are unrelated to commerce, if the activity, in the aggregate, is. By confusing the two concepts, the court avoided potentially significant problems related to crafting a rule for as applied Commerce Clause challenges—a problem by framing the issue as part of the broader scheme doctrine. As a result, the *McCoy* court failed even to outline rules for distinguishing between a "noncommercial class of activity" that can be carved out from a statute and a *de minimis* noncommercial instance of activity that cannot be.<sup>132</sup>

Instead, the majority resolved this problem simply by stating that McCoy's actions were part of a distinct class of noneconomic activity while, in contrast, previous cases involved "idiosyncratic facts of an individual instance of *de minimis* character."<sup>133</sup> This analysis does not create a clear line for defining a class of activity. The characterization of past cases as involving *de minimis* actions that were not part of a

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Cir. 2002), *vacated en banc*, 369 F.3d 1238 (11th Cir. 2004)).

131. *McCoy*, 323 F.3d at 1132.

132. One reason for this problem might be that, as the dissent argues, the majority opinion would seem to support overturning the statute on its face. As a facial challenge, the opinion would have avoided these problems and its treatment of the broader scheme doctrine would have been a great example for other courts to follow.

133. *Id.* at 1132.

arguably involved a distinct noncommercial class of activities, namely growing wheat at home for personal consumption. The *McCoy* court provides no reason why Filburn's noncommercial activity was a *de minimis* part of the commercial activity of wheat production but McCoy's activity belonged to a class of noncommercial activity distinct enough to be carved out of the (presumably economic) activity covered by the statute.<sup>134</sup>

At the heart of this confusion is the dispute over as applied challenges and their relationship to the broader scheme doctrine. The dissent reads the broader scheme doctrine as encompassing both *Wickard's* rule on aggregation as well as its theory that Congress can regulate noncommercial activity if its purpose is to regulate the supply and demand of a national market. The majority reads *Lopez* and the broader scheme doctrine as requiring a connection between each individual's activity and the economic purpose of a statute. Neither view provides a persuasive or detailed discussion about the broader scheme doctrine or its relationship to *Lopez's* interpretation of *Wickard*. Although *McCoy* does not result in the same practical problems as most lower court cases, such as perverse incentives, it suffers from the same underlying analytical problems and disputes. Specifically, the *McCoy* court also considers purpose as the key factor in broader scheme analysis. An analysis of pre-*Lopez* broader scheme case law reveals the fundamental misinterpretations that have led to this problem and indicate the path toward a more faithful and logical framework for resolving issues under the broader scheme doctrine.

### III. PURPOSE, AGGREGATION, OR ENTERPRISE? HISTORY OF THE BROADER SCHEME DOCTRINE

The broader scheme doctrine might be seen to operate in one of three ways. First, it might be seen as merely rephrasing *Wickard's* aggregation principle which allows for the regulation of *de minimis* noncommercial activity that falls within a commercial class of activities, effectively precluding or severely limiting as-applied Commerce Clause challenges.<sup>135</sup> Under this reading, the broader

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134. A detailed analysis of whether such a workable scheme can be devised and whether as-applied Commerce Clause challenges are possible at all is beyond the scope of this article.

135. See, e.g., Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 88 (1999) (citing the "broader scheme" quote from *Lopez* for the proposition that "the Chief Justice stressed that gun possession in a school zone was not intrastate economic activity that might,

scheme doctrine would not impact statutes that fail the *Morrison* test since the aggregation principle is already incorporated into the substantial effects inquiry. Second, it might allow for a statute that regulates a noncommercial class of activity if it is helpful to the purpose of a comprehensive scheme, saving all otherwise unconstitutional statutes when included in a broad scheme. Third, it might allow Congress to regulate certain specific types of noncommercial activity—but not all—if done so in a broader scheme.

Both the first and second possibilities—the as applied and expansive purpose interpretations—are based on the same fundamental error. The main source of confusion has been the lower court's reliance on *Wickard* for the proposition that the broader scheme doctrine is mainly concerned with statutory purpose. The *Wickard* line of cases, however, stands for the *de minimis* effects, or aggregation, principle, which is separate from the broader scheme doctrine and limits as applied challenges. The cases that best fit the broader scheme language from *Lopez* do not discuss purpose but rather focus on the enterprise theory. This concept allows Congress to regulate discrete parts of a business enterprise that may not themselves be economic in isolation but can be seen as economics within the context of a broader regulatory scheme. An examination of the relationship between *Wickard* and *Lopez* demonstrates the flaws in the first two possible approaches to the broader scheme doctrine.

#### A. The Meaning of *Wickard* After *Lopez*

Lower courts have consistently based their expansive approaches to the broader scheme doctrine on the importance of congressional purpose. This interpretation stems from reading *Wickard*'s discussion of the relationship between Congress' goal of regulating wheat and the principles of supply and demand as related to the broader scheme doctrine rather than aggregation doctrine. As a result, lower courts have interpreted the doctrine to be permissive of otherwise unconstitutional statutory provisions when those provisions are helpful in providing for a broader regulatory purpose.<sup>136</sup> The problem with this approach is that it fundamentally misunderstands the limits *Lopez* places on *Wickard*'s aggregation principle.

Discussing *Wickard* as a “substantial effects” case, the *Lopez* Court acknowledged the economic nature of *Wickard*'s activities in the

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through repetition elsewhere, have a substantial effect on interstate commerce”).

136. See, e.g., *United States v. Cardoza*, 129 F.3d 6, 12 (1st Cir. 1997).

context of their impact on interstate commerce.<sup>137</sup> In particular, *Lopez* found that *Wickard* “involved economic activity in a way that the possession of a gun in a school zone does not.”<sup>138</sup> Labeling Filburn’s activity “commercial” is noteworthy because the *Wickard* Court averred that the individual instance of wheat production at issue was not commercial.<sup>139</sup> In what way, then, was the activity in *Wickard* economic? Unfortunately, the Supreme Court did not provide a direct answer in *Lopez*. Instead, the Court upheld its precedent entirely, even in the face of a seemingly inconsistent case, leaving for lower courts the daunting task of reconciling apparent incongruities.<sup>140</sup> There are three conceivable explanations for characterizing the *Wickard* activity as economic. First, the *Lopez* court might have decided to disregard *Wickard*’s determination about the commercial (and economic) quality of the activity and substitute their own. Second, *Wickard*’s individual activity might be qualified as economic because of its relationship to the purpose of the act, the reading mistakenly adopted by lower courts in their broader scheme analysis. Finally, *Wickard*’s actions might be seen as economic because, although individually they were not commercial, the act of wheat growing is in general commercial, and, wheat production when aggregated, has economic consequences; in other words, the aggregation principle.

The first possibility, that the Court disregarded *Wickard*’s language, can quickly be dismissed. The Court was aware that *Wickard* had characterized the activity at issue as noncommercial.<sup>141</sup> And given some members of the Rehnquist Court’s professed aversion to judicial activism,<sup>142</sup> it is unlikely that the majority would have made a factual determination contrary to *Wickard*’s.

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137. *United States v. Lopez*, 514 U.S. 549, 560 (1995) (“Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”).

138. *Id.*

139. *See United States v. Wickard*, 317 U.S. 111, 128 (1942) (noting that Filburn’s activity could be regulated “though it may not be regarded as commerce”). *See also* Choper, *supra* note 57, at 744 (explaining that the *Lopez* majority’s observation that aggregation was only applied to economic activity was “contradicted by the *Wickard* Court’s analysis”).

140. *Cf. United States v. Morrison*, 529 U.S. 598, 637 (2000) (Souter, J., dissenting) (“Although a new jurisprudence has not yet emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them.”).

141. *See Lopez*, 514 U.S. at 628 (Breyer, J., dissenting) (noting that the Court in *Wickard* expressly found that Filburn’s homegrown wheat consumption was not economic activity).

142. *See, e.g., Antonin Scalia, Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989).

There are some signs that might sustain an argument that *Lopez's* economic characterization of *Wickard's* actions was based on regulatory purpose, which is the reading that lower courts have adopted as the foundation of their broader scheme interpretations. For example, in discussing *Wickard*, *Lopez* recites the supply and demand relationship between Filburn's actions and the cost of wheat.<sup>143</sup> By implication then, if Congress can regulate the economy of wheat, it can regulate wheat production. However, because *Wickard* determined the activity to be noncommercial, this reading would explicitly allow for the aggregation of noncommercial activity if Congress had a worthy goal.<sup>144</sup> Aggregation of noncommercial activity is precisely what *Lopez* purports to restrict.<sup>145</sup> Equally important, this reading has no limit as "an interstate state market exists for virtually any product one might possess."<sup>146</sup> Finally, it confuses the purpose discussion in *Wickard* for a legal rule instead of supporting argument. The holding in *Wickard* was based on the aggregation principle, not the purpose broader regulatory scheme doctrine.<sup>147</sup> For these reasons, a purpose based broader scheme doctrine is discordant with both *Wickard* and *Lopez*, whose central holding was to limit *Wickard's* aggregation principle.

The third possibility, that *Lopez's* characterization of Filburn's actions as economic was meant to limit the *de minimis* effects, or aggregation, principle to statutes that cover activity which is generally

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143. *Lopez*, 514 U.S. at 560 ("One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions.") (quoting *Wickard*, 317 U.S. at 128).

144. See discussion *supra* sections II, III.

145. See *Lopez*, 514 U.S. at 561.

146. *United States v. Kallestad*, 236 F.3d 225, 233 n.3 (5th Cir. 2000) (Jolly, J., dissenting) ("The majority asserts that *Wickard* stands for the principle that 'when ... a product ... is traded in an interstate market,' Congress can regulate local possession of that product. This expansive interpretation of Congress's commerce power has no limit.").

147. *Wickard* does refer to the Agricultural Adjustment Act of 1938 as a "scheme" twice. See *Wickard*, 317 U.S. at 115 ("The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce."); *id.* at 128-29 ("This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."). However, this language still would not support the broad purpose reading given *Lopez's* recharacterization of *Wickard's* activity as economic. Instead, it would support a reading that the broader scheme doctrine is synonymous with the aggregation doctrine which would even more severely limit the reach of commerce power than the enterprise reading proposed here.

economic is the most consistent with the goals and meaning of *Lopez* as well as the original holding in *Wickard*. According to *Lopez*, *Wickard* held that while Filburn's activity was "trivial by itself, that was not 'enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.'"<sup>148</sup> This is a clear re-statement of the *de minimis* aggregation principle, the central holding in *Wickard* that allows Congress to reach *individual* activity not related to commerce if the *class* of activity, in the aggregate, is commercial.<sup>149</sup> *Lopez* is best read as upholding this principle, which seems to proscribe, or severely limit, as-applied challenges for statutes that validly regulate activity that is generally economic, but limiting it to economic classes of activity.<sup>150</sup> While, the purpose interpretation fails to recognize that "[r]ather than expressly reaffirming the decision in *Wickard*, *Lopez* reconsidered that and other prior decisions,"<sup>151</sup> the *de minimis* interpretation acknowledges this shift by upholding the aggregation principle announced in *Wickard* but limiting it to statutes that cover an economic class of activity as well as individual activity within that class. Importantly, the statute itself, not the broader scheme, defines the class of activity. Indeed, *Lopez*'s characterization of *Wickard* indicates that the broader scheme doctrine is separate from the as applied aggregation principle considered in *Wickard*.

### B. Enterprise Concept and the Broader Scheme Doctrine

Considering *Wickard* in light of *Lopez* provides scant support for the purpose broader scheme reading and indicates *Wickard* is best read apart from the doctrine entirely. Cases like *Maryland v. Wirtz*<sup>152</sup> and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*<sup>153</sup>

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148. *Lopez*, 514 U.S. at 556.

149. *Wickard* itself did not specifically require that the activity be generally economic. See *Wickard*, 317 U.S. 111, 127–28 (1942). Rather this requirement was added in *Lopez*'s interpretation of the aggregation principle as applying only to generally economic activity. See *Lopez*, 514 U.S. at 560.

150. This essay takes no position on the question of whether or to what extent as-applied challenges are permitted under the Commerce Clause. However, even if *Wickard*'s aggregation principle does not severely limit such challenges, it is, at the very least, central to resolving the issue. For example, reading *Lopez* as requiring each individual act to be "economic" in nature in order to be aggregated would support allowing as-applied challenges.

151. *Kallestad*, 236 F.3d at 233 n.2 (Jolly, J., dissenting).

152. 392 U.S. 183 (1968), *overruled on other grounds by* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976).

153. 452 U.S. 264 (1981).

provide additional support for this view. Both cases contain the broader scheme language employed by *Lopez* and indicate that the doctrine was intended to refer to the enterprise concept. *Wirtz* provided the first and most comprehensive discussion of its meaning.

In *Wirtz*, Maryland challenged the extension of the Fair Labor Standard Act to cover additional categories of employees and remove an exemption for state-run enterprises such as hospitals and schools.<sup>154</sup> The original statute required employers to pay each employee who was engaged in commerce or the production of goods for commerce specified minimum wages.<sup>155</sup> The challenged amendment extended the law to include all employees working for an enterprise engaged in commerce or the production of goods for commerce, regardless of whether the individual employee was involved in such activity.<sup>156</sup> Maryland argued that regulation of these employees was beyond Congress's commerce power.

The Court relied on the enterprise concept in upholding the extension of employees covered, noting that the amendment did "not ... enlarge the class of *employers* subject to the Act."<sup>157</sup> This distinction was important as evidence that the commercial enterprise itself was the target of the regulation. In explaining the enterprise concept, the Court noted that even sections of enterprises not engaged in commerce nevertheless may have an impact on commerce.<sup>158</sup> "We uphold the enterprise concept on the explicit premise that an 'enterprise' is a set of operations whose activities in commerce would all be expected to be affected by the wages and hours of any group of employees, which is what Congress obviously intended."<sup>159</sup> The Court further distinguished this rule from one impermissibly allowing Congress to "use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities."<sup>160</sup> The Court founded the enterprise concept on the proposition that when a "rational basis for finding a chosen regulatory scheme [is] necessary

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154. *Wirtz*, 392 U.S. at 199–201. The state-run argument was made on Eleventh Amendment grounds and is not relevant to the discussion here.

155. *Id.* at 185.

156. *Id.* at 186.

157. *Id.* at 188.

158. *See, e.g., id.* at 192 (explaining that "strife disrupting an enterprise involved in commerce may disrupt commerce" and that "there is a basis in logic and experience for the conclusion that substandard labor conditions among any group of employees, whether or not they are personally engaged in commerce or production, may lead to strife disrupting an entire enterprise").

159. *Id.* at 197 n.27.

160. *Id.*

to the protection of commerce, our investigation is at an end.”<sup>161</sup>

Although cases that challenged the Surface Mining Control and Reclamation Act of 1977 do not explicitly discuss the enterprise concept, their treatment of the broader scheme doctrine indicates that it is best considered to cover schemes that regulate commercial enterprises. A *Hodel v. Indiana* footnote contains the most far reaching characterization of the broader scheme doctrine in a Supreme Court case:

A complex regulatory program ... can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies [the Commerce Clause] test.<sup>162</sup>

Even this statement, however, does not support the purpose analysis engaged in by lower courts. Immediately before making it, the Court rejected the need for every specific provision of the scheme to “be shown to be related to the congressional goal of preventing adverse effects on interstate commerce.”<sup>163</sup>

Instead, in upholding the statute, the Court in *Hodel v. Virginia Surface Mining & Reclamation Ass’n* focused on Congress’s power to regulate the commercial *enterprise* of coal mining.<sup>164</sup> The challenged scheme regulated surface coal mining.<sup>165</sup> The plaintiffs questioned a number of specific provisions in the coal mining scheme and chiefly argued that Congress was powerless under the Commerce Clause to regulate “the use of private lands within the borders of the States.”<sup>166</sup> The Court rejected the question as framed on the grounds that the substantial effects<sup>167</sup> inquiry is focused on the regulated activity, or

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161. *Id.* at 190 (quoting *Katzenbach v. McClung*, 379 U.S. 294, 303–04). *See also id.* at 197 n.27 (“[W]here a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.”).

162. *Hodel v. Indiana*, 452 U.S. 314, 329 n.17 (1981).

163. *Id.*

164. Considering that *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981), was decided after four decades witnessing an unparalleled expansion of the Commerce Clause power, it is possible that the majority believed the Commerce Clause had no limits whatsoever. *Lopez*, in contrast, eviscerates that the Commerce Clause power is not limitless. *See United States v. Lopez*, 514 U.S. 549, 559 (1995).

165. *Va. Surface Mining & Reclamation Ass’n*, 452 U.S. at 268.

166. *Id.* at 275.

167. *Va. Surface Mining & Reclamation Ass’n* required simply that the activity “affects” interstate commerce. *Va. Surface Mining & Reclamation Ass’n*, 452 U.S. at 276; *see also Lopez*, 514 U.S. at 559 (discussing ambiguity in the case law as between whether an activity must “affect” or “substantially affect” interstate commerce, and applying the

enterprise, not the regulated article.<sup>168</sup> This reading is consistent with *Lopez*'s brief treatment of *Virginia Surface Mining & Reclamation Ass'n* which characterized the case as one concerning regulation of the commercial activity of intrastate coal mining.<sup>169</sup>

*Wirtz* and *Virginia Surface Mining & Reclamation Ass'n* support the proposition that the broader scheme doctrine mentioned in *Lopez* most likely refers to the enterprise concept and not congressional purpose. *Lopez* mentioned the broader scheme or regulatory scheme doctrine only twice, once in a direct quote from *Wirtz*.<sup>170</sup> The enterprise concept's structure is also consistent with the broader scheme language, which presumably allows Congress to regulate noncommercial classes of activity, in some situations, by including them as an integral part of a regulatory scheme. Unlike the prevailing purpose approach, however, the enterprise reading does not give Congress limitless substantive authority. Rather, the enterprise concept extends Congress's regulatory power only as far as enterprises that engage in commerce.<sup>171</sup>

At least one lower court opinion has indicated support for an enterprise-based view of the broader scheme doctrine. In *United States v. Stewart*, Judge Kozinski argued that the *Wirtz* broader scheme language quoted in *Lopez* did not support denying as-applied commerce challenges<sup>172</sup> but instead was a characterization of the enterprise theory.<sup>173</sup> In other parts of the opinion, however, Judge

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latter standard).

168. *Va. Surface Mining & Reclamation Ass'n*, 452 U.S. at 276 ("We do not accept either appellees' framing of the question or the answer they would have us supply . . . . The court must defer to a congressional finding that a regulated activity affects interstate commerce . . . .").

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

170. *Lopez*, 514 U.S. at 558 ("[T]he Court has said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.") (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27).

171. *See, e.g., United States v. Stewart*, 348 F.3d 1132, 1141 (9th Cir. 2003) ("[W]here a general regulatory statute governs a large enterprise, it does not matter that its components have a *de minimis* relation to interstate commerce on their own. What does matter is that the components could disrupt the enterprise, and could thus interfere with interstate commerce.").

172. *Id.* at 1142. The opinion did not thoroughly address the meaning of *Wickard*'s aggregation principle, the principle that *does* relate to as-applied commerce challenges. *See id.* Instead Judge Kozinski argued that *Wickard* could not stand for constricting as-applied challenges because "*Wickard* was also an as-applied challenge: [Had it not been] there would have been no need for [the Court] to analyze how [Filburn's] particular activities affected interstate commerce." *Id.*

173. *See id.* at 1141 ("Read in context, the sentence quoted by the *McCoy* dissent can only mean that, where a general regulatory statute governs a large enterprise, it does not matter that its components have a *de minimis* relation to interstate commerce on their own.

Kozinski seemed to embrace a purpose view of the broader scheme doctrine similar to the one in *Adams*.<sup>174</sup> The opinion did not elaborate on how an enterprise interpretation of the broader scheme doctrine might function. Because of these shortcomings, the broader scheme interpretation in *Stewart* provided inadequate guidance for future opinions. Nevertheless, *Stewart* offers additional support for the proposition that the broader scheme doctrine is rooted in *Wirtz*'s enterprise concept.

#### IV. THE ENTERPRISE CONCEPT: A COHERENT FRAMEWORK FOR ANALYZING BROADER SCHEME PROBLEMS

To address the problems with the current lower court view and harmonize the existing case law, courts should adopt an approach to the broader scheme doctrine based on the *Wirtz* enterprise concept. This proposed framework for analyzing issues under the broader scheme doctrine would save regulation of noncommercial activity performed by a business enterprise but maintain the substantive lines in *Lopez* and *Morrison* against regulating individuals engaged in noncommercial activity. The test would have two prongs: first, the broader scheme must be targeted at a commercial enterprise; second, the regulated actors or entities must be performing the specific activity as part of the enterprise. The first prong would ensure the proper relationship between the activity and the enterprise while the second prong would restrict Congress from regulating individuals engaged in noncommercial activity outside of a commercial enterprise. The broader scheme analysis would be employed in substantial effects cases for statutes that fail the four prong *Morrison* test.

The core of the broader scheme doctrine under the enterprise principle would be the regulation of actors or activities undertaken by a commercial or economic entity. Consistent with the overall substantial effect analysis, courts would not consider the attributes of articles of commerce<sup>175</sup> but rather the attributes of activities.<sup>176</sup> This

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What does matter is that the components could disrupt the enterprise, and could thus interfere with interstate commerce.”).

174. *See id.* at 1138.

175. This type of analysis should be limited to instrumentalities review, which looks at the object regulated, not at activity.

176. *See Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 277 (1981) (“Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations.”) (quoting *Fry v. United States*, 421 U.S. 542, 547 (1975)).

would prevent Congress from regulating, for example, simple possession under the theory that it was connected to the industry that created the item because the regulated activity and the commercial activity are only tangentially related.<sup>177</sup> By contrast, a similarly noncommercial activity such as the segregation and preservation of topsoil<sup>178</sup> could be regulated as part of a broader scheme regulating coal mining. Congress could likewise regulate the details of writing a prescription, a noncommercial intrastate act in and of itself, because of its link to the commercial enterprise of a pharmacy.<sup>179</sup> In these instances, the noncommercial activity is part of the commercial enterprise and, therefore, rationally could be seen by Congress as essential to a broad regulatory scheme focused at the enterprise. This distinction builds on *Lopez's* focus on the economic quality of an activity and whether its relationship to commerce is attenuated. Further, by eliminating the purpose of the broader scheme from consideration, the approach avoids the convoluted reasoning of lower courts that considers the broader scheme activity first (e.g., sale of illegal drugs) and the individual activity second (e.g., drug possession). Applying this proposed framework to the facts of *Adams* will help demonstrate its superiority to the current approach.

*Adams* challenged his conviction for possession of child pornography under 18 U.S.C. §2252(a)(4)(B).<sup>180</sup> Like all statutes that fall into the substantial effects category, the analysis would begin with the four-part *Morrison* test. The Ninth Circuit determined that the commercial activity prong weighed against *Adams* because of the relationship between his possession and Congress's purpose in enacting the statute.<sup>181</sup> They distinguished their finding from *Lopez* based on the purpose reading of the broader scheme doctrine.<sup>182</sup> Under the proposed framework, the broader scheme doctrine is considered apart from the four-part analysis, so the economic factor will be considered on its own merits. The government might argue that *Adams's* possession can still be characterized as economic

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177. This is the theory used by lower courts that have adopted a purpose-based broader scheme reading.

178. See *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. at 269.

179. Cf. Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1587–88 (2002). Klein analyzes the prescription example through the purpose, as-applied mixed broader scheme reading, but the enterprise theory is also applicable to this example. See *id.*

180. *United States v. Adams*, 343 F.3d 1024, 1026 (9th Cir. 2003).

181. See *id.* at 1033. ("In contrast to *Lopez*, here the statute criminalizing possession is part of the larger congressional scheme to eradicate the market for child pornography.")

182. See *id.*

because he received the pictures through a commercial transaction.<sup>183</sup> However, under *Lopez* the relevant inquiry is not where the object possessed comes from<sup>184</sup> but rather the economic nature of the regulated activity itself. Here, the act of possession is the same as that of *Lopez*.<sup>185</sup> Possession can only be described as economic in relation to the purpose of the scheme regulating it, which is not allowed under the enterprise broader scheme framework. The economic factor would therefore weigh in favor of Adams. Similarly, the *Adams* court focused on purpose in its discussion of the *Morrison* attenuation factor.<sup>186</sup> Eliminating purpose from the inquiry results in the attenuation prong weighing against the constitutionality of the statute, as it did in *Lopez*. The other two *Morrison* factors would be unchanged from *Adams*: the jurisdictional hook would weigh in favor of Adams and the legislative history against Adams. The *Morrison* factors in total then would weigh against the constitutionality of the statute.

After failing the *Morrison* substantial effects test, the statute would be analyzed under the proposed broader scheme test. First, the court would consider whether the broader scheme regulated a commercial enterprise. The government might argue that the scheme aims to control the “enterprise” of child pornography trafficking.<sup>187</sup> However, this argument confuses the enterprise and market concepts. A scheme focused on regulating an enterprise sets rules and regulations for businesses. The child pornography regulations aim to control the supply and demand of a market. The statute considered in *Wirtz*, for

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183. See *id.* at 1030 (noting that Adams possessed “commercial child pornography”).

184. See *United States v. Lopez*, 514 U.S. 549, 561 (1995). The court, however, failed to discuss the origin of *Lopez*’s weapon in its opinion. See *id.*

185. Although the *Lopez* statute reached only possession of a gun in a school zone, the school zone aspect is irrelevant to the economic determination. See *Lopez*, 514 U.S. at 567. Instead, it represented a traditional area of state authority. See *id.* at 561 n.3.

186. See *id.* at 1033 (“Laws criminalizing the possession of a good decrease the demand for that good.”).

187. Courts use essentially the same argument in purpose analysis. See, e.g., *United States v. Angle*, 234 F.3d 326, 337 (7th Cir. 2000) (“Angle’s contention that intrastate possession of child pornography has little or no bearing on interstate commerce ignores the interstate demand for child pornography which Congress took into consideration in enacting the statutory scheme . . . .”); *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 640–41 (5th Cir. 2003) (“ESA is an economic regulatory scheme; the regulation of intrastate takes of the Cave Species is an essential part of it. Therefore, Cave Species takes may be aggregated with all other ESA takes.”); *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 201 (2d Cir. 2002) (upholding toxic substance statute on broader scheme grounds); *Gibbs v. Babbitt*, 214 F.3d 483, 497 (4th Cir. 2000) (“This regulation is also sustainable as ‘an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.’”) (quoting *Lopez*, 514 U.S. at 561).

example, did not expand the scope of employers subject to regulation.<sup>188</sup> With regard to the second factor, the statute targets the possession, irrespective of any potential links to a commercial enterprise. It does not single out activity that, because performed as part of an economic enterprise, is linked to commerce.<sup>189</sup> To be sure, there are acts of possession under the statute that occur in the setting of an economic endeavor. However, the statute in *Lopez* undoubtedly covered some activity that could be defined as economic; for example, possession of a gun in a school zone by a person intending to distribute. Adopting this logic would allow Congress to use a small impact to justify a broad statute.<sup>190</sup> Because the statute in *Adams* fails both the four part *Morrison* test and the enterprise broader scheme test, it would be held unconstitutional.

This broader scheme test has a number of advantages over the current approach. While the prevailing reading is premised on purpose—leaving Congress free to regulate any noncommercial activity so long as it does so in the context of a broader scheme whose purpose is market regulation—the proposed view considers whether those regulated are part of a commercial enterprise. Therefore, Congress retains the power to regulate economic actors whose noncommercial activity is performed as part of their commercial enterprise. However, unlike the purpose approach, Congress cannot cure all unconstitutional statutes simply by passing a broad regulatory scheme. Some activity, such as simple possession, will remain outside the scope of the commerce power. This addresses a problem in the current approach—namely, its failure to place substantive limits on Congress.<sup>191</sup> At the same time, it does not overly constrict Congress by preventing it from regulating activity that, while not economic itself, is performed as part of an economic enterprise.

Further, the limits of the proposed framework conform to the spirit of *Lopez*'s economic versus noneconomic distinction and concerns about attenuated effects. Whether regulated alone or as part of a broad supply and demand scheme, the act of simple possession is equally noneconomic and has the same attenuated relationship with interstate

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188. *Maryland v. Wirtz*, 392 U.S. 183, 188 (1968).

189. *See, e.g., id.* at 192 (noting that the acts taken as part of a commercial enterprise have a natural link to commerce).

190. *See Lopez*, 514 U.S. at 558 (“[N]either here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities ... .”) (quoting *Wirtz*, 392 U.S. at 197 n.27).

191. The broader scheme test similarly solves the perverse incentive problem.

commerce. The prevailing broader scheme approach, however, uses the purpose of the broader scheme to artificially create distinctions in these *Morrison* factors.<sup>192</sup> By contrast, the proposed enterprise broader scheme doctrine only allows for the regulation of noncommercial and attenuated activity when performed as part of a commercial enterprise. Activity such as the preservation of topsoil, considered noncommercial in itself, if regulated as part of a scheme governing coal mining, might be considered commercial as regulated because of its relationship with the business enterprise. In this way, the noncommercial activity Congress may reach under the enterprise broader scheme doctrine is substantively different from the activity it may not reach.

Finally, in addition to being more consistent with the holdings of *Lopez* and *Morrison*, the proposed approach is more faithful to the pre-*Lopez* case law. The current approach misreads *Wickard* as holding that Congress may regulate anything so long as it has a valid economic purpose. Instead, *Wickard* stands for the aggregation principle, which allows Congress to regulate activity that as, a whole, impacts commerce, although individual instances of it may not.<sup>193</sup> As discussed earlier, the purpose broader scheme approach adopted by the lower courts permits the regulation of activity that does not in the aggregate impact commerce so long as that activity is related to larger activity that does. The proposed framework instead finds support in *Wirtz* and *Hodel*, both of which also mention the broader scheme doctrine and outline the enterprise concept consistent with that doctrine.

## V. CONCLUSION

The difficulties and uncertainties in Commerce Clause jurisprudence, as seen by exploring the broader scheme doctrine, suggest the merits of returning to the pre-*Lopez* approach. While there are persuasive arguments that *Lopez* was wrongly decided, this essay remains agnostic on that debate. However, if the Court is serious about placing new and meaningful limits on the Commerce Clause, it must limit the lower courts' expansive interpretation of the broader

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192. See *supra* section II (discussing the lower court approach).

193. See Choper, *supra* note 57, at 743 ("In *Wickard v. Filburn*, the Court upheld congressional regulation of a farmer's personal consumption of his own privately grown small acreage of wheat because the effects of such use, when aggregated with that of other farmers, would have a substantial effect on prices in the national wheat market. *Lopez* and *Morrison* expressly reaffirm this aggregation principle, a core component of the 'substantial effects' prong.").

scheme doctrine. Lower court Commerce Clause opinions demonstrate that the broader scheme doctrine will be of central importance in defining the scope and limits of the Commerce Clause. The interpretation adopted by the vast majority of these lower courts would effectively remove the substantive limits to Congress's commerce power that *Lopez* and *Morrison* seek to place. Congress would still be able to regulate whatever substantive activity they wished to, they would just have to do it in a particular way. The Supreme Court will face these questions this term as part of *Raich*, which involves cultivation and possession of medical marijuana. Whatever the outcome on the issue of cultivation, the distinct possession question in the case raises the broader scheme problems discussed in this article. If the Supreme Court adopts the prevailing lower court approach to distinguish *Lopez* and permit regulation of marijuana possession, the Commerce Clause may once again be rendered an "intellectual joke"<sup>194</sup>—albeit a more complicated and convoluted one.

This essay considers the history and meaning of the broader scheme doctrine and offers a proposal that addresses the major problems of current lower court interpretation while still giving it meaning and direction. The framework adheres to *Lopez*'s substantive limits against federal regulation of purely local, noncommercial activity by permitting Congress to regulate noncommercial activity only when performed as part of an economic enterprise. Whatever approach is ultimately adopted, however, courts and commentators must seriously consider the meaning of the broader scheme doctrine in order to define the post-*Lopez* scope of congressional Commerce Clause power.

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194. See Deborah Jones Merritt, *Commerce*, 94 MICH. L. REV. 674, 691 (1995).

