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Tara M. Stuckey

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JURISDICTIONAL HOOKS IN THE WAKE OF *RAICH*: ON PROPERLY INTERPRETING FEDERAL REGULATIONS OF INTERSTATE COMMERCE

*Tara M. Stuckey**

INTRODUCTION

When Congress casts its Commerce Clause power into the waters of intrastate and interstate activity, Congress has two important tools at its disposal: the jurisdictional hook and the regulatory net. The power of the jurisdictional hook, or element,[1] received significant attention in *United States v. Lopez*[2] and *United States v. Morrison*,[3] which are often considered to mark the dawn of a "new federalism" era.[4] *Lopez* and *Morrison* conveyed to Congress that when it desires to regulate seemingly intrastate activity pursuant to its Commerce Clause

* Candidate for Juris Doctor, Notre Dame Law School, 2007; B.S., Journalism, Ohio University, 2004. Many thanks to Professor Anthony J. Bellia Jr. for his invaluable guidance and suggestions throughout the planning and editing of this Note. I would also like to thank members of the *Notre Dame Law Review* for their helpful editing suggestions.

1 For purposes of Commerce Clause jurisprudence, the terms jurisdictional hook and jurisdictional element are synonymous and will be used interchangeably throughout this Note. *See, e.g.*, Susanna Frederick Fischer, *Between Scylla and Charybdis: The Disagreement Among the Federal Circuits over Whether Federal Law Criminalizing the Intrastate Possession of Child Pornography Violates the Commerce Clause*, 10 NEXUS 99 (2005) (discussing jurisdictional elements/hooks in the context of Commerce Clause challenges and using the terms interchangeably throughout).

2 514 U.S. 549 (1995).

3 529 U.S. 598 (2000).

4 *See* Fischer, *supra* note 1, at 101–02; *see also* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 430–31 (2002) (describing "the Rehnquist Court's federalism revival"); Daniel A. Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133, 1138 (2000) ("Arguably, the most startling of the recent federalism rulings was *United States v. Lopez*, the first decision since the New Deal to hold that Congress had exceeded its regulatory powers under the commerce clause." (footnote omitted)).

power, it should cast its power using a jurisdictional hook. A jurisdictional hook is a statutory clause requiring that the regulated activity have a connection with interstate commerce.[5] This hook, the Court reasoned, would "ensure, through case-by-case inquiry," that the regulated activity has a sufficient nexus to interstate commerce.[6] Essentially, the presence of a jurisdictional hook would ensure that each and every regulated activity reeled in by a given statute is a "keeper,"[7] allowing courts to reject "throwbacks"[8] on a case-by-case basis. Because the hook requires that every activity have a nexus to commerce, its very presence supports the facial constitutionality of a statute.[9] The Supreme Court found that the absence of a jurisdictional hook in the statutes at issue in *Lopez* and *Morrison* cut against the facial constitutionality of those statutes.[10]

Years after *Lopez* and *Morrison*, the Court in *Gonzales v. Raich*[11] reminded Congress of a second tool at its disposal, suggesting that the use of a jurisdictional hook is not the most effective, nor the most efficient, method of legislating. Rather, casting a broad statutory net[12] allows Congress to regulate any intrastate activity under a provision that Congress rationally includes within the greater statutory scheme. In articulating what this Note will refer to as the "*Raich* principle,"[13] the majority held that the local cultivation of marijuana for

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5 Jonathan E. Duckworth, Rancho Viejo *and* GDF Realty*: Extending Commerce Clause Powers to Intrastate Species by Defining the Precise Regulated Activity*, 50 WAYNE L. REV. 977, 981 n.40 (2004); *see also* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 679 (2005) (defining a jurisdictional element as "a fact included in a statute that must be pled and proven by the plaintiff in each case, serving as a nexus between a particular piece of legislation and Congress's constitutional power to enact that legislation and to regulate the conduct at issue").

6 *Lopez*, 514 U.S. at 561; *see Morrison*, 529 U.S. at 611–12.

7 *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 683 (11th ed. 2003) (defining "keeper" as "one suitable for or worth keeping . . . a fish large enough to be legally caught and kept"); Frank Davis, Loads of Trout Available Between Grand Isle and Lafitte (Aug. 17, 2005), http://rodnreel.com/articles/articles.asp?cmd=view&StoryID=849.

8 Fish that are not "keepers" are often referred to as "throwbacks." *See* Davis, *supra* note 7.

9 *See Morrison*, 529 U.S. at 611–12; *Lopez*, 514 U.S. at 561.

10 *See Morrison*, 529 U.S. at 611–13; *Lopez*, 514 U.S. at 561.

11 125 S. Ct. 2195 (2005).

12 *See id.* at 2237 (Thomas, J., dissenting) ("So long as Congress casts its net broadly over an interstate market, according to the majority, it is free to regulate interstate and intrastate activity alike.").

13 This has also been referred to as the "comprehensive scheme" principle. *See* Michael C. Blumm & George A. Kimbrell, *Clear the Air:* Gonzalez v. Raich*, the "Comprehensive Scheme" Principle, and the Constitutionality of the Endangered Species Act*, 35 ENVTL. L. 491, 491 (2005).

medicinal purposes may be constitutionally prohibited under the Controlled Substances Act (CSA)[14] because the activity is regulated by a federal statutory provision that is part of a larger regulatory scheme and Congress had a rational basis for concluding that failure to regulate the class of activity at issue would "undercut" the larger scheme.[15] Although the Court relied on the decades-old aggregation theory in *Wickard v. Filburn*,[16] the *Raich* principle is somewhat surprising in light of the "new federalism" era marked by *Lopez* and *Morrison*.[17] *Raich* gives Congress an incentive to legislate broadly[18] by modeling statutes after the provisions at issue in *Raich*, which are part of a broader statutory scheme and do not contain jurisdictional elements.[19] The unsuccessful constitutional challenge in *Raich* raises the question of why Congress would choose to legislate with a jurisdictional hook when it could quickly and easily catch all intrastate and interstate activities with a broad regulatory net.

Even if *Raich* leads Congress to draft more regulatory nets into future legislation, numerous statutes already contain jurisdictional hooks. Unlike the relevant provisions of the CSA, which did not contain a jurisdictional element, the Sherman Act,[20] the Racketeer Influ-

14 21 U.S.C.A. §§ 801–904 (West 1999 & Supp. 2005). The CSA makes it "unlawful . . . to manufacture, distribute, or dispense, or possess . . . a controlled substance" except in a manner authorized by the CSA. 21 U.S.C. § 841(a)(1) (2000). The CSA groups all controlled substances into five schedules, with Schedule I drugs being subject to the most stringent controls. *Id.* § 812. Under the CSA, marijuana is classified as a Schedule I drug. *Id.* § 812(c). The CSA was enacted under Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, tit. II, 84 Stat. 1236, 1242–48.

15 *Raich*, 125 S. Ct. at 2208–15.

16 317 U.S. 111 (1942).

17 *See supra* note 4 and accompanying text; *see also* Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849, 1859 (1997) ("Over the past sixty years, in a series of highly deferential decisions, the Court allowed Congress free rein to regulate purely intrastate activity as long as that activity had a sufficient effect on interstate commerce when considered in the aggregate.").

18 *Raich*, 125 S. Ct. at 2221 (O'Connor, J., dissenting) ("[T]he Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision."); *see supra* note 12 and accompanying text.

19 Raich v. Ashcroft, 352 F.3d 1222, 1231 (9th Cir. 2003), *vacated sub nom.* Raich v. Gonzales, 125 S. Ct. 2195. Note that the Supreme Court neglects to mention the absence of a jurisdictional element in its opinion. *See Raich*, 125 S. Ct. 2195.

20 15 U.S.C.A. §§ 1–7 (West 1997 & Supp. 2005). The Sherman Act applies only to conduct that has a "direct, substantial, and reasonably foreseeable effect . . . on trade or commerce." 15 U.S.C. § 6a(1) (2000).

enced and Corrupt Organizations Act (RICO),[21] the Federal Arbitration Act (FAA),[22] and child pornography statutes[23] are just a few examples of Congress's decision to legislate using a jurisdictional hook to ensure a nexus to interstate commerce. If the *Raich* principle applies to these statutes, their jurisdictional hooks will be rendered meaningless; under *Raich*, courts may easily find that the statutes are comprehensive schemes regulating economic activity and that Congress rationally concluded that regulating intrastate activity was necessary to the larger regulatory scheme.[24] Thus, even though Congress purposely inserted a hook in many statutes, courts applying *Raich* to these statutes will drown those hooks in the jumbled sea of intrastate and interstate activity swept in by *Raich*'s net.

Courts are currently divided as to how, if at all, *Raich* should apply to statutes containing jurisdictional elements. The Eleventh, Tenth, Sixth, and Fourth Circuits have applied *Raich* to statutes containing jurisdictional elements, catching intrastate child pornography violations with the *Raich* net and dismissing the particular nexus re-

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21 18 U.S.C. §§ 1961–1968 (2000). RICO prohibits certain activities relating to "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." *Id.* §§ 1962(a)–(b).

22 9 U.S.C. §§ 1–14 (2000 & Supp. II 2002). The FAA applies to arbitration clauses in contracts "evidencing a transaction involving commerce." *Id.* § 2 (2000).

23 *See, e.g.*, 18 U.S.C.A. § 2251(a) (West Supp. 2005) (prohibiting production of child pornography that has traveled in interstate commerce or that was produced using materials that have traveled in interstate commerce); 18 U.S.C.A. § 2252A(a) (West 2000 & Supp. 2005) (prohibiting possession of child pornography that has traveled in interstate commerce or that was produced using materials that have traveled in interstate commerce). Professor Fischer summarizes a number of child pornography laws:

> Since the 1970s, Congress has enacted and amended several child pornography laws, which now ban, among other things, the knowing transportation or shipment of child pornography in interstate or foreign commerce; the knowing receipt or distribution of child pornography in interstate or foreign commerce; and the knowing sale of child pornography that has been shipped in interstate or foreign commerce. These federal statutes also criminalize the knowing possession of child pornography in certain circumstances.

Fischer, *supra* note 1, at 100.

24 *See, e.g.*, United States v. Jeronimo-Bautista, 425 F.3d 1266, 1269 (10th Cir. 2005) (referring to 18 U.S.C.A § 2251(a) as a "comprehensive scheme" to regulate child pornography without explanation as to how the court reached that conclusion), *cert. denied*, 126 S. Ct. 1771 (2006); *id.* at 1273 (finding the rational basis requirement satisfied); United States v. Croxford, No. 04-4158, 2006 WL 541250, at *9 (10th Cir. Mar. 7, 2006) (applying *Raich* and following *Jeronimo-Bautista* to find that the rational basis requirement was satisfied in § 2251(a)).

quired by the statutes' jurisdictional hooks.[25] Yet another court, the Middle District of Pennsylvania, has suggested that *Raich* should apply to some jurisdictional elements but not others.[26] Finally, the Second and Ninth Circuits have distinguished *Raich* from cases involving challenges to statutes with jurisdictional hooks but have offered *Raich* to support some degree of narrow aggregation in satisfying these hooks.[27]

This Note poses the question of what effect, if any, courts should give to jurisdictional elements in as-applied challenges of the post-*Raich* era. Part I examines the background of the jurisdictional element, including the role its absence played in *Lopez* and *Morrison* and the saving power of jurisdictional elements in facial challenges. It also discusses the extent to which courts should narrow jurisdictional elements to account for concerns of over-aggregation and constitutionally insufficient jurisdictional elements. Part II explores the status of Commerce Clause challenges in the *Raich* era by examining the *Raich* decision and the various ways it may be interpreted. Finally, Part III calls into question the role that jurisdictional elements should play in evaluating as-applied Commerce Clause challenges, setting forth four possibilities for the treatment of jurisdictional elements in light of *Raich*. Part III ultimately argues that courts should give meaning to jurisdictional hooks by adopting the approach exemplified by the Second and Ninth Circuits, calling on courts to distinguish *Raich* from cases involving statutes with jurisdictional hooks while respecting the effect that *Raich* may have on future Commerce Clause jurisprudence. Additionally, Part III suggests that courts handle potentially insufficient hooks in a flexible manner so as to give proper meaning to the hooks and provide Congress with incentives to legislate with precision.

I. BACKGROUND OF THE JURISDICTIONAL HOOK

A. Anatomy and Purpose of the Hook

The jurisdictional hook, or element, is a statutory clause[28] that serves as a nexus between three points—a piece of legislation, Congress's constitutional power to enact that legislation, and Congress's power to regulate the particular conduct at issue.[29] This simple statutory clause establishes "congressional jurisdiction—substantive con-

25 *See infra* Part III.A.1.
26 *See infra* Part III.A.2.
27 *See infra* Part III.A.3.
28 Duckworth, *supra* note 5, at 981 n.40.
29 *See* Wasserman, *supra* note 5, at 679.

gressional constitutional power or authority—to regulate particular real-world conduct through legislation."[30] In a Commerce Clause context, the jurisdictional hook requires that the regulated activity or object have a nexus to interstate commerce.[31] To ensure this nexus, a plaintiff must plead and prove satisfaction of the jurisdictional hook in each case.[32] In a criminal statute, the hook becomes an element of the crime, requiring the prosecution to prove the connection to commerce beyond a reasonable doubt.[33]

The nexus required by a jurisdictional hook serves dual and interrelated purposes. First, on an as-applied basis, the jurisdictional element "limit[s] the reach of a particular statute to a discrete set of activities that substantially affect interstate commerce."[34] In this way, jurisdictional elements preserve the viability of as-applied challenges to their respective statutes. The jurisdictional element may preclude application of a statute, whether criminal or civil, to certain intrastate activity if the activity lacks the nexus to commerce required by the language of the jurisdictional element.[35] Second, this required nexus may aid in "saving" a statute that would otherwise be found facially unconstitutional for want of a connection to interstate commerce.[36] While the limiting function may uphold as-applied challenges to statutes containing jurisdictional elements, it is that very function that supports the facial constitutionality of many statutes.

To achieve these purposes, Congress has different types of hooks at its disposal. Jurisdictional elements range from broad language requiring that an activity "affect . . . commerce"[37] or "involve[ ] commerce"[38] to narrower clauses requiring that a particular piece of property be "used in" interstate commerce or an activity "affecting"

30 *Id.* at 684; *see also* United States v. Morrison, 529 U.S. 598, 612 (2000) ("[A] jurisdictional element may establish that the enactment is in pursuance of Congress' regulation of interstate commerce.").

31 *Morrison*, 529 U.S. at 612.

32 Wasserman, *supra* note 5, at 679.

33 *See* United States v. Allen, 129 F.3d 1159, 1163 (10th Cir. 1997); United States v. DiSanto, 86 F.3d 1238, 1246 (1st Cir. 1996); John S. Baker, *Jurisdictional and Separation of Powers Strategies To Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545, 563–64 (2005); Nathaniel Stewart, Note, *Turning the Commerce Clause Challenge "On Its Face": Why Federal Commerce Clause Statutes Demand Facial Challenges*, 55 CASE W. RES. L. REV. 161, 210 (2004).

34 United States v. McCoy, 323 F.3d 1114, 1124 (9th Cir. 2003).

35 *See supra* notes 32–33 and accompanying text.

36 *See infra* Part I.B.

37 18 U.S.C. §§ 1962(a), (b) (2000).

38 9 U.S.C. § 2 (2000).

interstate commerce.[39] Other seemingly narrow statements can sweep in nearly any activity by requiring that materials used in a particular activity have traveled in interstate commerce.[40] The language of these hooks serves an important function in determining the degree of aggregation to be employed[41] and the extent to which the hooks fulfill their purpose of limiting a statute's reach.[42]

B. Lopez, Morrison, *and the Saving Power of the Jurisdictional Hook's Limiting Function in Facial Challenges*

There is no question that the Supreme Court intends for jurisdictional elements to carry significant meaning. Jurisdictional elements have played a noteworthy role in at least four recent Supreme Court cases determining the as-applied or facial constitutionality of a federal statute.[43] Two of these cases, *Lopez* and *Morrison*, merit primary attention because in these cases the Supreme Court sent a clear message to Congress that drafting a jurisdictional element into statutes would support the facial constitutionality of the statutes. Lower courts have interpreted *Lopez* and *Morrison* in two ways. Some view the cases as guaranteeing that a jurisdictional element will save a statute from facial attacks,[44] while others find the cases merely lend support to the facial constitutionality of a statute.[45] This subpart will first examine the doctrine set forth in *Lopez* and *Morrison*, and then it will explore the degree to which a jurisdictional element has "saving power" against facial attacks on federal statutes.

1. *Lopez*

While *Lopez* is probably most well known for its striking return to federalism after the Court's sixty-year streak of rejecting Commerce Clause challenges,[46] it also contributed to Commerce Clause jurisprudence by introducing the jurisdictional element to case law.[47] In *Lo-*

39 18 U.S.C. § 844(i) (2000).

40 18 U.S.C.A. §§ 2241, 2251, 2252, 2252A (West 2000 & Supp. 2005).

41 *See infra* Part I.C.

42 *See infra* Part I.D.

43 *See* Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003); Jones v. United States, 529 U.S. 848 (2000); United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

44 *See infra* note 71 and accompanying text.

45 *See infra* note 72 and accompanying text.

46 *See supra* notes 4, 17 and accompanying text.

47 Shargel, *supra* note 17, at 1859 ("Prior to *Lopez*, the concept of a jurisdictional element did not present itself in Commerce Clause case law."). Pre-*Lopez* cases certainly examined the constitutionality of statutes containing jurisdictional elements

pez, the Court found facially unconstitutional § 922(q) of the Gun-Free School Zones Act of 1990 (GFSZA), which prohibits the possession of a firearm in school zones.[48] The Court identified three broad categories of activity that Congress may regulate under its Commerce Clause power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities that substantially affect interstate commerce.[49] Finding that the GFSZA fell within the third category,[50] the Court upheld the facial challenge,[51] voicing two primary concerns relevant to this Note. First, § 922(q) bore no relation to commerce or economic activity.[52] The Court wrote that the statute "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[53] Second, § 922(q) lacked a jurisdictional element that would "ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[54] The Court contrasted § 922(q) with the statute at issue in *United States v. Bass*,[55] which made it a crime for a felon to "'receive[ ], possess[ ], or transport[ ] *in commerce* or *affecting commerce* . . . any firearm.'"[56] The *Bass* Court set aside a conviction under the statute because the nexus to interstate commerce was not met.[57] Under the reasoning of the *Lopez* majority, both a large regulatory scheme and the function of a jurisdictional element had the potential to tip the scale toward facial constitutionality.[58]

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and even suggested that the presence of a jurisdictional element supported the constitutionality of a statute, but they did not label the jurisdictional element as a significant factor to be considered in a typical Commerce Clause challenge. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 31 (1937) (stating that the statute at issue, which regulates unfair labor practices "affecting commerce," demonstrates that the statute "purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds").

48 *Lopez*, 514 U.S. at 551 (citing 18 U.S.C. § 922(q)(1)(A) (Supp. V 1993)).

49 *Id.* at 558–59.

50 *Id.* at 559.

51 *Id.* at 567–68.

52 *Id.* at 561.

53 *Id.*, *quoted in* Gonzales v. Raich, 125 S. Ct. 2195, 2209 (2005).

54 *Lopez*, 514 U.S. at 561.

55 404 U.S. 336 (1971).

56 *Id.* at 337 (emphasis added) (quoting 18 U.S.C. app. § 1202(a) (1982) (repealed 1986)).

57 *Id.* at 347.

58 The Court noted that congressional findings and a nonattenuated connection to interstate commerce may also support a statute's constitutionality. *Lopez*, 514 U.S. at 562–63, 567. However, § 922(q) had neither of these attributes.

Less than eighteen months after *Lopez*, Congress amended § 922(q) to better conform to the *Lopez* opinion. In addition to inserting a variety of legislative findings regarding the effect of guns in school zones on interstate commerce,[59] Congress inserted a jurisdictional hook: "It shall be unlawful for any individual knowingly to possess a firearm *that has moved in or that otherwise affects interstate or foreign commerce* at a place that the individual knows, or has reasonable cause to believe, is a school zone."[60]

The amended version has been held constitutional based on the presence of its jurisdictional element,[61] illustrating the saving power of the jurisdictional element introduced in *Lopez*.

2. *Morrison*

Years later, the absence of a jurisdictional element also played a key role in *Morrison*. The *Morrison* Court summarized *Lopez* to set forth four factors that would support the facial constitutionality of a statute[62]: (1) the economic nature of the regulated activity; (2) the presence of a jurisdictional element; (3) the presence of legislative findings regarding the effects upon interstate commerce; and (4) the link between the regulated activity and a substantial effect on interstate commerce is not attenuated.[63] The majority found that section 13,981 of the Violence Against Women Act of 1994 (VAWA),[64] which provided a federal civil remedy for the victims of gender-motivated violence, failed on each factor.[65] Commenting on the statute's lack of a jurisdictional element, the majority wrote: "Although *Lopez* makes clear that such a jurisdictional element would lend support to

59 Act of Sept. 30, 1996, Pub. L. No. 104-208, § 57, 110 Stat. 3009 (codified as amended at 18 U.S.C. § 922(q)(1) (2000)).

60 *Id.* (codified as amended at 18 U.S.C. § 922(q)(2)(A)) (emphasis added).

61 *See* United States v. Dorsey, 418 F.3d 1038, 1046 (9th Cir. 2005) (stating the amendment adding a jurisdictional element to the statute "resolves the shortcomings that the *Lopez* Court found in the prior version of this statute"); United States v. Danks, 221 F.3d 1037, 1038–39 (8th Cir. 1999) (rejecting defendant's challenge to the constitutionality of the amended version of § 922(q)(2)(A) based on the presence of the jurisdictional element).

62 These factors have been referred to as the *Lopez/Morrison* factors. *See, e.g.*, Robert J. Pushaw, Jr., *Does Congress Have the Constitutional Power To Prohibit Partial-Birth Abortion?*, 42 HARV. J. ON LEGIS. 319, 336 (2005) (referring to a "*Lopez/Morrison* factor").

63 United States v. Morrison, 529 U.S. 598, 610–12 (2000).

64 Pub. L. No. 103-322, § 40,302, 108 Stat. 1941, 1941–42 (codified as amended at 42 U.S.C. § 13,981 (2000)), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

65 *Morrison*, 529 U.S. at 613–19.

the argument that section 13,981 is sufficiently tied to interstate commerce, Congress elected to cast section 13,981's remedy over a wider, and more purely intrastate, body of violent crime."[66] Just as the *Lopez* majority contrasted the GFSZA with the statute in *Bass* that contained a jurisdictional element, so the *Morrison* majority contrasted VAWA section 13,981 with a different statutory provision of VAWA that contained a jurisdictional element. Section 40,221(a) of VAWA made it a crime for a person who "*travels across a state line* . . . with the intent to injure, harass or intimidate that person's spouse or intimate partner" to commit an intentional act of domestic violence "in the course of or as a result of such travel."[67] The Court noted that section 40,221(a) had been "uniformly upheld" as an appropriate exercise of Congress's Commerce Clause power under the first *Lopez* category, i.e., activity in channels of interstate commerce.[68] *Morrison* reaffirms the distinction made in *Lopez* between statutes containing and lacking a jurisdictional element, demonstrating the support that such an element lends to the facial constitutionality of a statute.[69]

3. The Hook's Saving Power Cannot Save a Statute on Its Own

Since *Lopez* and *Morrison*, the Court has made it clear that the *absence* of a jurisdictional element does not signify automatic facial *un*constitutionality.[70] The extent to which the *presence* of a jurisdictional hook may save a statute, however, has been interpreted in two mutually exclusive ways by courts and commentators: some view a jurisdictional element as the ultimate saving grace of a statute,[71] while others

66 *Id.* at 613.

67 18 U.S.C. § 2261(a)(1) (2000) (emphasis added).

68 *Morrison*, 529 U.S. at 614 n.5.

69 Although legislation has attempted to enact versions of the statute that include jurisdictional elements, none have been enacted. *See* Julie Goldscheid, *The Civil Rights Remedy of the 1994 Violence Against Women Act: Struck Down but Not Ruled Out*, 39 FAM. L.Q. 157, 166 n.48 (2005).

70 Sabri v. United States, 514 U.S. 600, 605 (2004) ("We simply do not presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook . . . ."); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 168 (15th ed. 2004).

71 *See, e.g.*, United States v. Merritt, No. IP 01-0081-CF-01 T/F, 2001 WL 1708830, at *3 (S.D. Ind. Nov. 8, 2001) ("After *Lopez*, courts have 'repeatedly found the inclusion of that jurisdictional element in other provisions of the Gun Control Act sufficient to overcome Commerce Clause challenges.'" (quoting Gillespie v. City of Indianapolis, 185 F.3d 693, 704–05 (7th Cir. 1999))), *aff'd*, 361 F.3d 1005 (7th Cir. 2004); Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 472 (2005) ("Adding a jurisdictional element to even the most ambitious federal environmental statutes would preserve their constitutionality,

opine that a jurisdictional element alone cannot ensure the facial constitutionality of a statute.[72] The better view is the latter; while *Lopez* and *Morrison* state that the presence of a jurisdictional hook lends support to the facial constitutionality of a statute, it does not guarantee the constitutionality of the statute.

The latter view finds support in *Morrison* and many circuit decisions. The majority in *Morrison* states a jurisdictional element "*may* establish that the enactment is in pursuance of Congress' regulation of interstate commerce."[73] When determining whether the statute is in pursuance of the regulation of interstate commerce, courts may subject the language and limiting force of a jurisdictional element to close scrutiny. Most circuits have held that "the mere presence of a jurisdictional hook [does] not automatically render a statute constitutional unless it actually limit[s] the statute's reach."[74] To hold otherwise would allow Congress to regulate any activity beyond its reach simply by inserting a hook into every statute as a formality, thereby negating the purpose of the hook as a guarantee of constitutional application.[75] As this Note will discuss in Part I.D, some jurisdictional elements establish such a weak nexus to interstate commerce that they have been found insufficient to guarantee the constitutional application of a statute.

A jurisdictional element does indeed have saving power, as set forth in *Lopez* and *Morrison*, but this saving power is not complete in

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albeit at the expense of each statute's comprehensiveness."); Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 599 (2005) (noting that "[w]here a statute contains such a jurisdictional element, courts are quick to hold that the statute withstands constitutional scrutiny under the Commerce Clause" and stating that "the presence of a valid jurisdictional element dooms any challenge to [RLUIPA's] constitutionality under the Commerce Clause").

72 United States v. Ho, 311 F.3d 589, 600 (5th Cir. 2002) (stating that a "'jurisdictional element is not alone sufficient to render [a challenged statute] constitutional'" (alteration in original) (quoting United States v. Kallestad, 236 F.3d 225, 229 (5th Cir. 2000))); Stewart, *supra* note 33, at 209 ("[T]he jurisdictional element does not insulate the statute from judicial review, nor guarantee that the courts will find it constitutional.").

73 *Morrison*, 529 U.S. at 612 (emphasis added); *see also Ho*, 311 F.3d at 600 (emphasizing that *Morrison* does not guarantee that a jurisdictional element will ensure the constitutionality of a statute).

74 Fischer, *supra* note 1, at 119. The First, Second, Third, Fifth, Sixth, Ninth, and Eleventh Circuits have followed this view. *Id.* at 118.

75 United States v. Maxwell, 386 F.3d 1042, 1062 (11th Cir. 2004) ("The fact is obvious to the point of tautology: if a statute's jurisdictional element is not sufficiently restrictive to cabin the statute's reach to permissible applications, then the element is no guarantee of constitutional application."), *vacated*, 126 S. Ct. 321 (2005).

and of itself. Jurisdictional elements must be in pursuit of Congress's power to regulate interstate commerce and must actually place limits on statutes' reach. *Lopez* and *Morrison* therefore encourage Congress to legislate using jurisdictional hooks, but they do not guarantee that the mere insertion of a jurisdictional hook will render a statute facially constitutional.

C. Jurisprudential Dangers, Aggregation, and As-Applied Challenges

When analyzing as-applied Commerce Clause challenges, courts have found themselves "caught between two jurisprudential dangers that the Court's recent precedent directs them to avoid."[76] The first danger is violating the "non-infinity principle," which holds that courts must guard federalism and state sovereignty by respecting the outer limits of Congress's Commerce Clause power and preventing the federal government from regulating all activity.[77] The opposite danger is adopting such a constrained interpretation of the Commerce Clause power that courts violate the well established "aggregation principle,"[78] which allows courts to reject as-applied challenges when an intrastate activity "forms part of a general practice that has a substantial effect on commerce."[79] In their most extreme forms, the two principles represent courts' choice between aggregating nothing and aggregating everything. Prior to *Raich*, the Supreme Court had not provided guidance as to which principle courts should steer toward.[80]

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76 Fischer, *supra* note 1, at 101.

77 *Id.*; *see also* United States v. Lopez, 514 U.S. 549, 556–57 (1995) ("But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.").

78 Fischer, *supra* note 1, at 101. The Necessary and Proper Clause, which underlies the "substantial effects test . . . requires a showing that the regulated activity affects interstate commerce when aggregated with similar activities." John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 202 (1998).

79 Fischer, *supra* note 1, at 101. The Supreme Court articulated the aggregation principle in *Wickard v. Filburn*, 317 U.S. 111 (1942), a case that has been "often thought to demonstrate the outer limits of the 'affecting commerce' rationale." SULLIVAN & GUNTHER, *supra* note 70, at 147. The *Wickard* Court held a farmer's local production of wheat largely for home consumption may be constitutionally regulated by the federal government because "his contribution, taken together with that of many others similarly situated, [has an impact on interstate commerce that is] far from trivial." *Wickard*, 317 U.S. at 128.

80 Fischer, *supra* note 1, at 102. Professor Fischer hoped that *Raich* would settle this issue. *Id.*

Neither principle can be ignored. Violations of the non-infinity principle pose a grave threat to the viability of as-applied challenges under the Commerce Clause, regardless of whether a statute contains a jurisdictional element. Even before *Raich*, aggressive aggregation techniques caused some commentators to question whether as-applied challenges to all statutes were "doom[ed]" because nearly any scheme could be found to affect interstate commerce.[81] At the same time, the aggregation principle requires some degree of flexibility in finding a relationship to interstate commerce—at least for statutes without narrow jurisdictional elements. One view is that "[t]he correct answer lies somewhere in the middle, between aggregating everything and aggregating nothing, with Congress given deference to choose what activities to combine—provided it explains why."[82] This view recognizes the importance of striking a balance while giving due regard to the language and intent of Congress.

If courts give Congress deference regarding the activities it chooses to combine, they must respect the explicit statutory language Congress has inserted in the form of jurisdictional elements. By requiring a showing of a relationship to interstate commerce in every individual case, jurisdictional elements steer courts toward narrower

81 *See, e.g.*, Nagle, *supra* note 78, at 201 ("Courts often say that they are considering the constitutionality of a particular application of a statute under the Commerce Clause . . . but the fact that trivial instances and de minimis application are nonetheless within the scope of congressional power invariably dooms such challenges."). Professor Nagle attributes the lack of successful as-applied Commerce Clause challenges to the "de minimis" idea first expressed in *United States v. Wirtz*, 392 U.S. 183 (1968), that "'where a general regulatory scheme bears a substantial relation to interstate commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" Nagle, *supra* note 78, at 200–01 (quoting *Wirtz*, 392 U.S. at 196 n.27). *Wirtz* has been widely cited for this proposition. *See, e.g.*, *Lopez*, 514 U.S. at 558 (quoting this language from *Wirtz*); *see also* Gonzales v. Raich, 125 S. Ct. 2195, 2206 (2005). The broadest reading of *Wirtz* is that the *de minimis* idea only requires that the scheme itself bear a substantial relation to interstate commerce, regardless of the individual or aggregated impact of the specific activity in the case. This broad view renders as-applied challenges to a statutory scheme essentially moot. Nagle, *supra* note 78, at 203. As explained in Part II.B, this is the view the majority takes in *Raich*. A narrower reading posits that if the particular activity at issue, when aggregated, has a substantial effect on interstate commerce, an individual instance of that activity may be regulated. *See id.* at 202–04. Under the narrower view, the court must decide how the class of activities is defined, i.e., what activity will be aggregated. In the case of medicinal use of home-grown marijuana, for instance, the courts could look to a class of activities as broad as the impact of controlled substances generally or as narrow as the use of marijuana for medicinal purposes when prescribed by a physician pursuant to state law.

82 Nagle, *supra* note 78, at 204.

aggregation.[83] To the extent that overaggregation places as-applied challenges in jeopardy,[84] the jurisdictional hook serves as a safeguard of as-applied challenges and the non-infinity principle.[85] The Court reflected a belief in as-applied challenges for statutes containing a jurisdictional element when it complained of the absence of such elements in *Lopez* and *Morrison*.[86]

On the spectrum of aggregation between aggregating everything and nothing, jurisdictional elements direct courts closer to the "nothing" end. However, due to the variety of jurisdictional elements that Congress employs,[87] courts may implement varying degrees of aggregation within that narrow range to effectuate Congress's language and intent. The language of a particular jurisdictional element provides courts with some guidance as to the degree of aggregation that should be employed. While narrow hooks generally require a closer nexus to interstate commerce and thereby tend to respect the non-infinity principle, broader versions lend themselves to more aggressive aggregation. As illustrated by two Supreme Court cases, the language of each statute's jurisdictional element largely determines the balance courts strike between the non-infinity principle and the aggregation principle when applying a given statute.

In the unanimous decision of *Jones v. United States*,[88] the Supreme Court interpreted the narrow jurisdictional element in 18 U.S.C. § 844(i) to respect the non-infinity principle while allowing some degree of aggregation.[89] The jurisdictional element requires courts to

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83 *See id.* (noting that the narrowest view of aggregation would require a showing of a relationship to interstate commerce in every individual case, which would be "the equivalent of requiring each federal statute to contain a jurisdictional element").

84 *See supra* note 81 and accompanying text.

85 *See* Diane McGimsey, Comment, *The Commerce Clause and Federalism after* Lopez *and* Morrison*: The Case for Closing the Jurisdictional-Element Loophole*, 90 CAL. L. REV. 1675, 1720 (2002) ("If a statute does contain a jurisdictional element asserting Congress's authority, then the statute is presumed to be facially valid, and a reviewing court must determine whether the statute is valid 'as applied' to each particular case.").

86 *See* Douglas W. Kmiec, Gonzales v. Raich*:* Wickard v. Filburn *Displaced*, 2005 CATO SUP. CT. REV. 71, 88 (stating the Court "obviously anticipated doing as-applied analyses when it complained in both *Lopez* and *Morrison* about the absence of jurisdictional elements that would make as-applied case-by-case examination possible").

87 *See supra* notes 37–40 and accompanying text.

88 529 U.S. 848 (2000). The statute at issue in this case criminalizes the malicious damage or destruction, or attempt to damage or destruct, "by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i) (2000).

89 *Jones*, 529 U.S. at 859.

inquire whether property damaged by fire or explosives is property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."[90] While the Court noted that "affecting . . . commerce," when unqualified, signals Congress's intent to invoke its full Commerce Clause authority, the jurisdictional element in § 844(i) requires a closer analysis into whether the damaged property was "used" in commerce or in an activity affecting commerce. "The proper inquiry . . . 'is into the function of the building itself, and then a determination of whether that function affects commerce.'"[91] The Court rejected the government's attempts to satisfy the "use[ ] in interstate . . . commerce" requirement with activities that were not central to the purpose of the home but that affected commerce in some way, such as "using" a residence to receive natural gas from out-of-state sources.[92] If such a connection sufficed to trigger § 844(i), the language in the jurisdictional element would have no meaning because "hardly a building in the land would fall outside the federal statute's domain."[93] Aided by the narrow language of § 844(i)'s jurisdictional element, the Court construed the statute in a way that respects the non-infinity principle and avoids constitutional doubts.[94]

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90 18 U.S.C. § 844(i).

91 *Jones*, 529 U.S. at 854 (quoting United States v. Ryan, 9 F.3d 660, 675 (8th Cir. 1993) (Arnold, C.J., concurring in part and dissenting in part)).

92 Prior to *Jones*, several circuits had found that a passive connection between a building and interstate commerce met the jurisdictional element of § 844(i). United States v. Tush, 151 F. Supp. 2d 1246, 1248–49 (D. Kan. 2001) (citing as examples cases finding a nexus between interstate commerce and local churches and restaurants that used out-of-state natural gas and food supplies).

93 *Jones*, 529 U.S. at 857. The Court approved of its previous holding that a building "'used as rental property'" satisfies the jurisdictional element. *Id.* at 853 (quoting Russell v. United States, 471 U.S. 858, 858 (1985)).

94 *See Jones*, 529 U.S. at 857 ("Our reading of § 844(i) is in harmony with the guiding principle that 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" (quoting United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 409 (1909)). For more on the principle of interpreting statutes so as to avoid constitutional doubts, see Richard H. Fallon, Jr., Marbury *and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 23 (2003) ("Another frequently cited prescription of constitutional avoidance calls for courts to prefer statutory interpretations that do not generate constitutional difficulties: '[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'" (alteration in original) (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988))). *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 3.3.5, at 264–65 (3d ed. 2006) (describing recent Supreme Court rulings that have incorporated a

As noted by the *Jones* Court, statutes containing less restrictive jurisdictional elements than the one in § 844(i)—i.e., those that do not contain "qualifying" language—require a less stringent nexus to interstate commerce and are therefore more susceptible to aggregation. For example, the Federal Arbitration Act enforces arbitration provisions in all "contracts evidencing a transaction involving commerce."[95] The Court has held the words "involving commerce" are the functional equivalent of "affecting commerce," thereby indicating a congressional intent to legislate to the limits of Commerce Clause authority.[96] To satisfy the FAA's jurisdictional element, courts have looked to a variety of factors, such as whether (1) the general practice of the transaction affects commerce;[97] (2) the negotiations require an individual to move to another state to fulfill the contract;[98] (3) the contracting parties receive or use goods from out-of-state vendors in fulfilling the terms of the contract;[99] (4) out-of-state payment is accepted, e.g., from insurance carriers;[100] and (5) the activity is regulated by federal administrative bodies.[101] The lenience of these factors suggests that very few contracts will fall outside the FAA.[102] This result is generally consistent with the meaning of the language "affecting commerce," which reaches to the outer limits of Congress's Commerce Clause authority. In order to give meaning to the jurisdic-

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principle of avoiding constitutional doubts). *But see* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 898 (2001) (arguing against application of the doctrine of constitutional avoidance).

95 9 U.S.C. § 2 (2000).

96 Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277 (1995).

97 *See* Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 58 (2003); Serv. Corp. Int'l v. Fulmer, 883 So. 2d 621, 629 (Ala. 2003); Wolff Motor Co. v. White, 869 So. 2d 1129, 1134–35 (Ala. 2003).

98 *See* Whitley v. Carolina Neurosurgical Assocs., No. 1:01CV00105, 2002 U.S. Dist. LEXIS 27686, at *6–7 (M.D.N.C. Feb. 6, 2002); Thornton v. Trident Med. Ctr., L.L.C., 592 S.E.2d 50, 54 (S.C. Ct. App. 2003).

99 Maddox v. USA Healthcare-Adams, L.L.C., 350 F. Supp. 2d 968, 974 (M.D. Ala. 2004); *Whitley*, 2002 U.S. Dist. LEXIS 27686, at *6; Potts v. Baptist Health Sys., Inc., 853 So. 2d 194, 203 (Ala. 2002).

100 *See Whitley*, 2002 U.S. Dist. LEXIS 27686, at *6.

101 *See Serv. Corp. Int'l*, 883 So. 2d at 630.

102 *See id.* at 629 ("Given this background, and in light of the continued vitality of *Wickard* . . . it would be difficult indeed to give an example of an economic or commercial activity that one could, *with any confidence*, declare beyond the reach of Congress's power under the Commerce Clause and, by extension, under the FAA. While there can be no *per se* rule that would preclude a trial court's role in evaluating whether a contract 'evidences a transaction involving commerce,' . . . a trial court evaluating a contract connected to some economic or commercial activity would rarely, if ever, refuse to compel arbitration on the ground that the transactions lacked 'involvement' in interstate commerce." (quoting 9 U.S.C. § 2 (2000))).

tional element, courts have interpreted it more broadly in accordance with the broader statutory language. Although this approach may encroach upon the non-infinity principle, it nonetheless indicates that jurisdictional elements should be given the meaning that Congress intended them to carry.

In steering between the two "dangers" of violating the non-infinity principle or the aggregation principle, the Supreme Court has indicated that courts should examine carefully the language of jurisdictional elements on a statute-by-statute basis in order to give the elements their intended meaning.

D. The Question of Sufficiency

Another type of jurisdictional element not explored in Part I.C forces courts to come dangerously close to violating the non-infinity principle without even utilizing aggregation techniques. For example, statutory language may permit regulation of any activity that crosses a state line or that involves materials that have traveled in interstate commerce, even if the activity has no substantial effect on interstate commerce.[103] Because these "line-crossing" hooks expand, rather than limit, Congress's Commerce Clause authority, they have been the subject of significant criticism.[104] Perhaps the most hotly contested line-crossing hook is the materials-in-commerce prong[105] in provisions of the Child Pornography Prevention Act of 1996 prohibiting the possession and production of child pornography created using materials that have traveled in interstate commerce.[106] Commentators and courts have suggested that a number of other jurisdictional elements should fall within the same category.[107]

As discussed previously, a jurisdictional element must "actually limit[ ] the statute's reach" for it to support the constitutionality of a

103 *See supra* note 23.

104 *See, e.g.*, Fischer, *supra* note 1, at 120 (stating that these jurisdictional hooks violate the non-infinity principle); McGimsey, *supra* note 85, at 1720 (noting that "when courts allow any line crossing . . . to satisfy the jurisdictional element and thus ensure a sufficient connection to interstate commerce, the statutes undergo no additional Commerce Clause analysis. In sum, constitutionality is essentially assumed both facially and as applied"); *id.* at 1710–19 (questioning the sufficiency of line-crossing hooks in a variety of statutes).

105 *See* Fischer, *supra* note 1, at 101.

106 *See* 18 U.S.C.A. §§ 2251(a), 2252(a), 2252A(a) (West 2000 & Supp. 2005).

107 *See* McGimsey, *supra* note 85, at 1710–19.

statute.[108] A constitutionally sufficient jurisdictional element—that is, a jurisdictional element that creates a nexus to interstate commerce that is sufficient to ensure that a statute is constitutional as applied to a given set of facts[109]—is defined as one that "either limits the regulation to interstate activity or ensures that the intrastate activity to be regulated falls within one of the three categories of congressional power."[110] If a court determines a jurisdictional element does not meet these criteria, it may deem the jurisdictional element constitutionally insufficient.

The question of constitutional sufficiency is best illustrated by the child pornography statutes. The courts of appeals are split as to the sufficiency of the materials-in-commerce prong in the child pornography statutes, with the majority of the circuits holding that it is insufficient to ensure the constitutional application of the statutes to defendants' local behavior.[111] Courts have recognized that some judicial restraint must be exercised if jurisdictional elements are to carry any meaning and fulfill their aim of "limit[ing] the reach of a particular statute to a discrete set of cases that substantially affect interstate commerce."[112] As a result, these courts have often looked beyond the jurisdictional element to determine whether the regulated activity has an otherwise-substantial effect on interstate commerce.[113] If no such relationship exists, courts refuse to apply the statutes to the situation. For example, before the Supreme Court handed down a decision in *Raich*, the Eleventh Circuit in *United States v. Maxwell*[114] had reversed the defendant's conviction for possession of child pornography

108 Fischer, *supra* note 1, at 118; *supra* notes 73–75 and accompanying text. This limiting function was contemplated by the Supreme Court in *Lopez* and *Morrison*. *See supra* note 6 and accompanying text.

109 *See* Fischer, *supra* note 1, at 104–07.

110 United States v. Rodia, 194 F.3d 465, 473 (3d Cir. 1999).

111 *See* Fischer, *supra* note 1, at 118–19.

112 United States v. McCoy, 323 F.3d 1114, 1125 (9th Cir. 2003); *see also Rodia*, 194 F.3d at 473 (finding the materials-in-commerce prong did not "adequately perform[ ] the function of guaranteeing that the final product regulated substantially affects interstate commerce," but ultimately upholding the defendant's conviction because the defendant's conduct had a substantial effect on interstate commerce).

113 *See* Fischer, *supra* note 1, at 110–18. Varying degrees of aggregation are utilized to determine whether this relationship exists, which may determine whether as-applied challenges are upheld or rejected. *Compare* United States v. Corp, 236 F.3d 325, 332 (6th Cir. 2001) (refusing to find a relationship to interstate commerce based on the aggregate effects of intrastate child pornography and reversing defendant's conviction), *with Rodia*, 194 F.3d at 468 (upholding defendant's conviction and finding a substantial effect on interstate commerce because the intrastate production of child pornography has an effect on the interstate market for child pornography).

114 386 F.3d 1042 (11th Cir. 2004), *vacated*, 126 S. Ct. 321 (2005).

images on two computer disks that had traveled in interstate commerce after their manufacture but before the illegal images were saved to the disks.[115] The court had found that the materials-in-commerce prong was "patently insufficient to ensure the statute's constitutional application" and additionally concluded that the "substantial effects" test was not met.[116]

Maxwell's subsequent history indicates that after *Raich*, the constitutional insufficiency of jurisdictional elements may no longer be a problem. The Supreme Court vacated and remanded *Maxwell* for review in light of *Raich*,[117] and the Eleventh Circuit reversed its prior decision, essentially ruling that when an activity falls within Congress's broad power as described in *Raich*, a statute's jurisdictional element and any debates as to its sufficiency may be ignored.[118] In the court's view, sufficiency is only relevant when "a jurisdictional element is required," i.e., when the *Raich* principle does not apply.[119]

Although the Eleventh Circuit applied *Raich* to disregard the sufficiency of the materials-in-commerce prong, questions remain as to whether this is an appropriate application of *Raich*. When courts determine what meaning to give jurisdictional elements in the post-*Raich* era, it will be important for them to consider questions of sufficiency, the language and purpose of the jurisdictional element, and the balance between the non-infinity principle and the aggregation principle. The next Part will discuss the *Raich* decision, and Part III will explore the role these factors play in a post-*Raich* analysis of the jurisdictional element.

II. THE *RAICH* ERA

A few home-grown marijuana plants prompting the *Raich* litigation have germinated into the beginning of a new Commerce Clause era following the "new federalism" counterrevolution of *Lopez* and *Morrison*.[120] *Raich* reaffirms the effectiveness and efficiency of Congress's use of a regulatory net as a tool for legislating broadly to catch interstate and intrastate activities alike. The jurisdictional hook finds itself in a precarious position after *Raich*, struggling to require a nexus to interstate commerce despite the *Raich* net's threat to dispense with case-by-case inquiry and nullify the very purpose of the hook. This

115 *Id.* at 1055.
116 *Id.* at 1063.
117 *Maxwell*, 126 S. Ct. 321.
118 *Maxwell*, 446 F.3d at 1218–19.
119 *Id.* at 1218.
120 *See supra* notes 4, 17 and accompanying text.

Part will first explore the *Raich* decision and then discuss the various ways in which courts may interpret and narrow the decision in future cases.

A. *The* Raich *Decision*

Raich concerns the application of the Controlled Substances Act to Angel McLary Raich and Diane Monson, two California citizens using home-cultivated marijuana as medical treatment for serious illnesses.[121] The CSA prohibits the manufacture, distribution, or possession of marijuana and recognizes no legitimate use for the substance.[122] After federal agents seized Monson's marijuana in 2002, she and Raich filed suit in the Northern District of California against the United States Attorney General and the head of the Drug Enforcement Administration seeking injunctive and declaratory relief to prevent government enforcement of the CSA against their medicinal use of marijuana.[123]

In their motion for a preliminary injunction, the plaintiffs contended that the regulation of the intrastate, noncommercial use of medical marijuana is outside the scope of Congress's Commerce Clause power, and therefore the CSA was unconstitutional as applied to them.[124] The District Court denied the plaintiffs' motion based on Ninth Circuit precedent upholding the application of the CSA to the wholly intrastate cultivation of marijuana.[125] A divided panel of the Court of Appeals for the Ninth Circuit reversed, distinguishing the Ninth Circuit cases by narrowing the definition of the class of activities at issue[126] and finding that said class of activities failed all four prongs

121 Raich v. Gonzales, 125 S. Ct. 2195, 2199–200 (2005).

122 21 U.S.C. §§ 841(a), 844(a) (2000); *see also supra* note 14 (describing the CSA).

123 *Raich*, 125 S. Ct. at 2200.

124 Raich v. Ashcroft, 248 F. Supp. 2d 918, 923 (N.D. Cal. 2003), *rev'd*, 352 F.3d 1222 (9th Cir. 2003), *vacated sub nom.* Raich v. Gonzales, 125 S. Ct. 2195.

125 *Id.* at 920, 925.

126 The Ninth Circuit demonstrated the significance of how the class of activities is defined for purposes of aggregation. *Raich*, 352 F.3d at 1228 ("[W]hereas the earlier cases concerned drug *trafficking*, the appellants' conduct constitutes a *separate and distinct class of activities*: the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law. Clearly, the way in which the activity or class of activities is defined is critical."). For more on the difficult question of which class of activities to regulate, see Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 965 (2001) ("The Supreme Court has never addressed the level of specificity that Congress must use under the Commerce Clause when aggregating activities affecting interstate commerce.") and discussion *supra* note 81.

of the *Lopez/Morrison* "substantial effects" test.[127] First, the CSA does not regulate commerce or any sort of economic enterprise, and therefore the aggregation analysis in *Wickard* is not available.[128] Second, and most pertinent to this Note, the relevant provisions of the CSA do not contain a jurisdictional element that would limit its application.[129] Third, although the CSA includes certain congressional findings regarding the effects of intrastate activity on interstate commerce, the findings "do not specifically address the class of activities at issue here."[130] Finally, the court found only an attenuated connection between the regulated activity and an effect on interstate commerce.[131]

The Supreme Court vacated the judgment of the Ninth Circuit in a 6-3 decision written by Justice Stevens, finding the CSA constitutional as applied to the facts of the case.[132] The Court turned to *Wickard* to illustrate the principle that Congress may regulate "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[133] The Court found "striking" similarities between this case and *Wickard*, including the nature of the goods being regulated, the activity involved, and the purpose of the statutes in question.[134] Accepting the Ninth Circuit's characterization of the narrow "class of activities" at issue in the case, the Court found that Congress acted rationally in including these activities as an essential part of the larger regulatory scheme: "One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana . . . locally cultivated for personal use . . . may have a substantial impact on the interstate market for this extraordinarily popular substance."[135] Ultimately, the Court con-

127 *Raich*, 352 F.3d at 1234.

128 *Id.* at 1229–31.

129 *Id.* at 1231.

130 *Id.* at 1231–33.

131 *Id.* at 1233–34.

132 Raich v. Gonzales, 125 S. Ct. 2195, 2201 (2005).

133 *Id.* at 2205.

134 *Id.* at 2206–07.

135 *Id.* at 2211. The majority referred and deferred to Congress's "rational basis" no less than six times in the opinion. *Id.* at 2206 ("When Congress decides that the 'total incidence' of a practice poses a threat to the national market, it may regulate the entire class." (quoting Westfall v. United States, 274 U.S. 256, 259 (1927))); *id.* at 2207 ("In *Wickard*, we had no difficulty concluding that Congress had a rational basis . . . ."); *id.* at 2208 ("We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."); *id.* ("[W]e have no difficulty concluding that Congress had a rational basis . . . ."); *id.* at 2212 ("The congressional judgment that an exemption for such a significant segment of the total market would undermine the orderly enforcement of the entire regulatory scheme is entitled to a strong

cluded that in both *Wickard* and the instant case, Congress had a rational basis for believing that in the aggregate, exempting the home-consumed plant from the regulatory scheme "would have a substantial influence on price and market conditions."[136]

Criticizing the respondents' "myopic focus," the Court stated that the respondents' reliance on *Lopez* and *Morrison* overlooks "the larger context of modern-era Commerce Clause jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents' creation, they read those cases far too broadly."[137] The Court distinguished *Lopez* and *Morrison* in three ways. First, the respondents in this case raise an as-applied challenge to the CSA, whereas both *Lopez* and *Morrison* involved a "markedly different" facial challenge.[138] The Court noted that the "distinction [between as-applied and facial challenges] is pivotal for we have often reiterated that '[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class.'"[139] Second, the Court found that the CSA is "at the opposite end of the regulatory spectrum" in relation to the GFSZA at issue in *Lopez*.[140] The CSA, enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970,[141] is a "lengthy and detailed statute creating a comprehensive framework," whereas the GFSZA was merely a "discrete prohibition."[142] Borrowing language from *Lopez*, the Court found that the CSA was "merely one of many 'essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.'"[143] Third, the CSA regulates "quintessentially economic" activity because it "regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market."[144] Furthermore, specifically prohibiting the intrastate possession or manufacturing of an "article of com-

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presumption of validity."); *id.* at 2215 ("Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.").

136 *Id.* at 2207.

137 *Id.* at 2209.

138 *Id.*

139 *Id.* (quoting Perez v. United States, 402 U.S. 146, 154 (1971)).

140 *Id.* at 2210.

141 Pub. L. No. 91-513, tit. II, 84 Stat. 1236, 1242–48 (codified as amended at 21 U.S.C.A. § 801–971 (West 1999 & Supp. 2005)).

142 *Raich*, 125 S. Ct. at 2210.

143 *Id.* at 2210 (alteration in original) (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

144 *Id.* at 2211.

merce" (in this case, marijuana) "is a rational . . . means of regulating commerce in that product."[145]

In his concurrence, Justice Scalia supported the idea that local activities may be regulated as part of a larger regulatory scheme of commerce.[146] Under Justice Scalia's view, Congress may regulate an intrastate activity under a comprehensive scheme even though the activity does not itself "substantially affect" interstate commerce and even if it is noneconomic, so long as the activity is a necessary part of that scheme.[147] Invoking the Necessary and Proper Clause and conducting a means-end analysis, Justice Scalia concluded that Congress could reasonably find that regulation of the class of activities is a necessary and proper means to effectuate the congressional objective of prohibiting marijuana from the interstate market.[148]

In a heated dissent, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Thomas, argued that the Court's rule "gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause"[149] and "is tantamount to removing meaningful limits on the Commerce Clause."[150] Justice Thomas, in a separate dissent, argued that neither the Commerce Clause nor the Necessary and Proper Clause justifies the regulation of interstate and intrastate activity alike merely because "Congress casts its net broadly over an interstate market"[151] and further urged that as-applied challenges should remain viable.[152] Demonstrating the danger of encroaching on the non-infinity principle, he wrote that "[i]f the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States" simply by casting a broad net.[153]

B. Interpreting Raich*: Handing Congress the Regulatory Net*

In distinguishing *Lopez* and *Morrison*, the *Raich* majority made clear that those cases should not be read "too broadly" and must be considered in "the larger context of modern-era Commerce Clause jurisprudence preserved by those cases."[154] In the wake of the "new

145 *Id.*
146 *Id.* at 2217 (Scalia, J., concurring).
147 *Id.*
148 *Id.* at 2220.
149 *Id.* at 2221 (O'Connor, J., dissenting).
150 *Id.* at 2222.
151 *Id.* at 2237 (Thomas, J., dissenting).
152 *Id.* at 2238.
153 *Id.* at 2236.
154 *Id.* at 2209 (majority opinion).

federalism" approach stirred up by *Lopez* and *Morrison*,[155] *Raich* informs us that *Lopez* and *Morrison* are not the last word on Commerce Clause jurisprudence, nor do those opinions govern all Commerce Clause challenges to all statutes.[156] To determine what meaning *Raich* will take on in future Commerce Clause challenges involving statutes with jurisdictional hooks, it is first necessary to clarify the principles for which *Raich* stands and the effect it may have on Commerce Clause jurisprudence.

It is difficult to determine how courts will apply *Raich* and to what extent the Supreme Court may narrow its holding. Just as the *Raich* Court narrowed *Lopez* and *Morrison* and confined their holdings to facial challenges, so also may courts narrow the *Raich* principle to certain facts of the case.[157] The main thrust of *Raich*, to which this Note has referred as the *Raich* principle, states that "regulation of noncommercial, intrastate activity is constitutionally permissible under the Commerce Clause if the regulation 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.'"[158] The Court emphasized a high level of deference to Congress, stating that Congress need only have a rational basis for determining that failure to regulate the local activity would "'undercut'" the comprehensive regulatory scheme.[159]

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155 *See supra* notes 4, 17 and accompanying text.

156 *See, e.g.*, Blumm & Kimbrell, *supra* note 13, at 497 ("More generally, *Raich* signals that the Rehnquist Court's so-called federalism 'revolution,' if it ever existed, is hardly as radical as some feared. The ripple effects of the *Raich* decision are just starting to be felt in the lower courts, but early analysis suggests that, at the end of the day, the history books may view *Lopez* and *Morrison* more as aberrations in the Court's Commerce Clause jurisprudence rather than as the genesis of a seismic constitutional revolution." (footnotes omitted)); Craig M. Bradley, *What Ever Happened to Federalism?*, TRIAL, Aug. 2005, at 52, 52 (stating that in *Raich* "the Court strangled in its infancy the so-called federalism revolution that began a mere 10 years ago with the *United States v. Lopez* decision and which was reinforced five years later in *United States v. Morrison*" (citations omitted)); Paul J. Watford, *State Lines: Redefining the Reach of the Commerce Clause May Be One of the Important Legacies of the Rehnquist Court*, L.A. LAW., Nov. 2005, at 24, 28 ("In the wake of *Raich* . . . whatever momentum *Lopez* and *Morrison* generated for curtailing the commerce clause powers of Congress seems to have been halted.").

157 *See supra* text accompanying notes 138–45.

158 Blumm & Kimbrell, *supra* note 13, at 492 (quoting *Raich*, 125 S. Ct. at 2209).

159 *Raich*, 125 S. Ct. at 2209 (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)); *see supra* note 135.

When the *Raich* principle applies, as-applied challenges will inevitably fail.[160] Therefore, it is important to determine when the *Raich* principle applies. The majority writes that the "distinction [between as-applied and facial challenges] is pivotal for we have often reiterated that '[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" of the class.'"[161] To the extent that *Raich* precludes as-applied challenges, debates about the degree of aggregation are no longer relevant.[162] Justice Thomas disagrees with this result in his dissent, arguing that as-applied challenges should be permitted in order to curb Congress's "overreaching on a case-by-case basis."[163] The case-by-case inquiry Justice Thomas seeks to preserve is the exact function of the jurisdictional element;[164] applying *Raich* to statutes containing jurisdictional elements would negate this function entirely. It seems an absurd result to permit the *Raich* principle to overshadow Congress's intentional drafting of a jurisdictional element into a statute, but this is the inevitable result if the *Raich* principle applies even to statutes containing jurisdictional elements.[165] By ignoring the jurisdictional element in these statutes, courts could allow federal prosecutions for arson even when a building has no tie to interstate commerce and for child pornography violations even when the images are created entirely intrastate; in addition, courts could

160 Of the little commentary available thus far regarding the effect of *Raich* on as-applied challenges, one letter to the editors of *Environmental Law* explains the probable impact of *Raich* on the Endangered Species Act, which was at issue in *Rancho Viejo, L.L.C. v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), the now famous (or infamous) "hapless toad" case: "We think the Court's recent embracing of the comprehensive scheme rationale immunizes the ESA take provision from the sort of as-applied attacks property rights activists have previously brought against its application." Blumm & Kimbrell, *supra* note 13, at 496.

161 *Raich*, 125 S. Ct. at 2209 (second alteration in original) (quoting Perez v. United States, 402 U.S. 146, 154 (1971)).

162 *See* Blumm & Kimbrell, *supra* note 13, at 498 (noting that then Judge Roberts's dissenting concern over the scope of aggregation in *Rancho Viejo* is "no longer a live [issue] in the post-*Raich* era, as it has been superceded by the *Raich* Court's resounding affirmation of the comprehensive scheme principle"). The statute of concern in *Rancho Viejo*, the Endangered Species Act, does not contain a jurisdictional element. *See* 16 U.S.C. §§ 1531–1544 (2000 & Supp. III 2003).

163 *Raich*, 125 S. Ct. at 2238 (Thomas, J., dissenting) ("This Court has regularly entertained as-applied challenges under constitutional provisions, including the Commerce Clause. There is no reason why, when Congress exceeds the scope of its commerce power, courts may not invalidate Congress' overreaching on a case-by-case basis." (citations omitted)).

164 *See supra* Part I.

165 *See infra* Part III.A.1–2.

enforce the Federal Arbitration Act in contractual disputes between intrastate parties over a transaction involving no significant interstate activity. The key to assessing the viability of the jurisdictional element, then, is determining when courts may narrow application of the *Raich* principle and whether they may do so in a way that preserves the meaning of the jurisdictional element.

Under the broadest reading of *Raich*, the *Raich* principle applies when the following requirements are present: (1) the challenge is an as-applied one; (2) the statutory provision is part of a regulatory scheme; (3) the regulatory scheme governs economic activity; and (4) the court finds Congress had a rational basis for regulating local activity under the regulatory scheme. A more conservative reading, however, may look to factors that are not themselves elements of the *Raich* principle, for example: (5) the intrastate activity at issue involves a commodity; and (6) the statutory provision does not contain a jurisdictional element. With respect to the fifth criterion, the Court referred to the fungible nature of the marijuana when assessing its economic nature and comparing it to the wheat in *Wickard*,[166] suggesting that perhaps *Raich* may someday be narrowed to govern only commodities for which there is an interstate market.

The last factor is the focus of this Note. Although the absence of a jurisdictional element was never mentioned by the Court, the statutory scheme played a key role in the decision and therefore it is possible that a jurisdictional element could serve as a distinguishing point in cases to come. As this Note will discuss in the next Part, some courts have read *Raich* broadly and rendered statutes' jurisdictional elements irrelevant when applying the *Raich* principle, while others have continued to give jurisdictional elements significant meaning by limiting the application of *Raich* in as-applied challenges involving a jurisdictional element.

III. THE MEANING OF JURISDICTIONAL HOOKS AFTER *RAICH*

Even if Congress chooses to utilize the *Raich* net when drafting statutes from this point forward, it has already cast its power using a jurisdictional hook in a significant number of statutes.[167] Does *Raich* permit courts to disregard the case-specific hooks and use the *Raich* net to catch intrastate and interstate activity alike, regardless of

166 *Raich*, 125 S. Ct. at 2206. The fungible nature of regulated activity became an important factor in *United States v. Forrest*, 429 F.3d 73 (4th Cir. 2005), which analogized marijuana and child pornography, both of which are commodities with an interstate market. *See id.* at 78.

167 *See supra* notes 20–23 and accompanying text.

whether the regulated activities would be "keepers" using solely a hook? Or should the CSA in *Raich* be distinguished from statutes containing jurisdictional elements, thereby requiring courts to ignore the *Raich* principle when a jurisdictional hook is present? Several courts of appeals have already confronted these questions (explicitly or implicitly) and approached the issue in different ways, and the Supreme Court has vacated and remanded at least two cases involving as-applied challenges to jurisdictional elements for review in light of *Raich*.[168]

This Part identifies four possible approaches for dealing with the question of whether *Raich* applies to statutes containing jurisdictional elements. First, courts may apply the *Raich* principle to statutes containing jurisdictional elements, rendering the elements meaningless and avoiding any debates as to the sufficiency of the jurisdictional element. Second, courts may apply the *Raich* principle to statutes containing certain types of jurisdictional elements but not others, based on the *Lopez* category of Commerce Clause regulation (e.g., channels of commerce, instrumentalities of commerce, or activities that substantially affect commerce) or Congress's motivation in inserting the hook. Third, courts may find that *Raich* never applies to statutes containing jurisdictional elements. The final approach, and the one this Note will argue is the most sound, is that courts not apply *Raich* directly but offer it to support either a principle of narrow aggregation or the regulation of intrastate activity that has a substantial effect on interstate commerce.

Where courts find *Raich* does not apply, as in the third and fourth approaches mentioned above, they are faced with a second task of dealing with jurisdictional elements that may be insufficient. This Part argues that when assessing the constitutional sufficiency of a jurisdictional element, courts should adopt a flexible approach that does not penalize Congress for drafting a weak jurisdictional element.

A. *Four Possibilities for Application and Nonapplication of* Raich

1. *Raich* Always Applies

The broadest view of *Raich* and Congress's Commerce Clause power holds that the *Raich* principle always applies to statutes containing jurisdictional elements. Under this view, the sufficiency of the jurisdictional element is irrelevant because the nexus between individual instances and interstate commerce is no longer required. All that is necessary is that an activity be regulated by a federal statu-

168 *See infra* Part III.A.

tory provision that is essential to a larger regulatory scheme and that Congress had a rational basis for concluding that failure to regulate the class of activity at issue would "'undercut'" the larger scheme.[169] The Eleventh, Tenth, Sixth and Fourth Circuits have recently adopted this broad view in cases involving the materials-in-commerce prongs of the child pornography statutes.

After the Supreme Court vacated and remanded an Eleventh Circuit decision for review in light of *Raich*, the Eleventh Circuit's application of *Raich* rendered meaningless the jurisdictional element in 18 U.S.C. § 2252A(a)(5)(B), which prohibits the possession of child pornography that has traveled in interstate commerce or was produced using materials that have traveled in interstate commerce.[170] As mentioned in Part I.D, the Eleventh Circuit in *United States v. Maxwell* applied the *Raich* principle to uphold Maxwell's conviction for possession of child pornography on computer disks that had traveled in interstate commerce prior to their use.[171] Blatantly disregarding the statute's jurisdictional element and its admitted insufficiency, the court read *Raich* to permit regulation of all intrastate possession of child pornography, not just that which fulfilled the materials-in-commerce prong.[172] The court recognized that "where a jurisdictional element is required, a meaningful one . . . must be offered," but here the materials-in-commerce prong was not "required" to regulate Maxwell's activity under the *Raich* principle.[173] In effect, the court allowed the *Raich* principle to negate the specific nexus of the materials-in-commerce prong.

Justifying its decision, the *Maxwell* court reasoned that Congress should not be penalized for failing to exercise its authority to regulate all child pornography.[174] Essentially striking insufficient jurisdictional elements from a statute, however, hardly seems to be the method of interpretation that best serves congressional interests. *Maxwell* allows courts to disregard the jurisdictional elements of federal statutes regulating intrastate activity that could be swept in under the broad *Raich* net; this effectively permits courts to rewrite statutes to extend more

169 *Raich*, 125 S. Ct. at 2209 (quoting United States v. Lopez, 514 U.S. 549, 561 (1995)).

170 United States v. Maxwell, 446 F.3d 1210, 1217–18 (11th Cir. 2006). A similar Eleventh Circuit decision, *United States v. Smith*, 402 F.3d 1303 (11th Cir. 2005), *vacated*, 125 S. Ct. 2938 (2005), was also vacated and remanded for review in light of *Raich*. At the time of this printing, the Eleventh Circuit had not reconsidered *Smith*.

171 Maxwell, 446 F.3d at 1212, 1216–19.

172 *Id.* at 1218–19.

173 *Id.* at 1219.

174 *Id.* at 1218–19.

broadly than the statutes' plain language indicates—and perhaps more broadly than Congress intended the statutes to reach.

In *United States v. Jeronimo-Bautista*,[175] the Tenth Circuit applied the *Raich* principle to hold that 18 U.S.C. § 2251(a), which prohibits the inducement of minors to engage in sexually explicit conduct for the production of child pornography using materials that have been transported in interstate and foreign commerce, was constitutionally applied to defendant Jeronimo-Bautista's local production of pornographic images of a child.[176] Referring to § 2251(a) as part of a "comprehensive scheme" to eliminate child pornography,[177] the court applied the *Raich* principle without hesitation. Because Congress had a rational basis for determining that regulation of intrastate child pornography production is an essential part of the comprehensive scheme, the court struck down Jeronimo-Bautista's as-applied challenge.[178] In a footnote, the court noted the presence of a jurisdictional element but quickly dismissed its significance and any questions as to its sufficiency:

> Section 2251(a) includes a jurisdictional element as required by the *Lopez/Morrison* factors. While other courts have questioned the sufficiency of § 2251(a)'s jurisdictional element, we need not linger on the issue. In light of the Supreme Court's ruling in *Raich*, and our conclusion that the activity regulated in this case has a substantial impact on interstate commerce, any "failure of the jurisdictional element effectively to limit the reach of the statute is not determinative."[179]

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175 425 F.3d 1266 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 1771 (2006).

176 *Id.* at 1272–73.

177 *Id.* at 1269.

178 *Id.* at 1273.

179 *Id.* at 1273 n.4 (citation omitted) (quoting United States v. Holston, 343 F.3d 83, 89 (2d Cir. 2003)). The Court cited with approval *Holston*, a Second Circuit pre-*Raich* decision that "anticipated the analysis subsequently laid out in *Raich*" and also dismissed the importance of § 2251(a)'s jurisdictional element:

> [In *Holston*], the court held that "when Congress regulates a class of activities that substantially affect interstate commerce, the fact that certain intrastate activities . . . may not actually have a significant effect on interstate commerce is . . . irrelevant. Moreover, the nexus to interstate commerce . . . is determined by the class of activities regulated by the statute as a whole, not by the simple act for which an individual defendant is convicted. Where, as 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."

Id. at 1273 (omissions in original) (quoting *Holston*, 343 F.3d at 90–91).

By applying the *Raich* principle, the Tenth Circuit avoided the extensive debate regarding the sufficiency of § 2251(a)'s jurisdictional element.[180] The court's reasoning renders the jurisdictional element irrelevant and makes possible the regulation of *all* child pornography production, regardless of its individual nexus to commerce, simply because the production of child pornography using materials that have traveled in commerce forms part of a comprehensive scheme to regulate child pornography.

The Sixth Circuit has also applied *Raich* to child pornography statutes. In *United States v. Gann*,[181] Gann moved to dismiss charges under § 2251(a),[182] arguing that although the materials-in-commerce element was easily met by the facts of the case, more should be required due to the questionable sufficiency of this jurisdictional element.[183] Earlier Sixth Circuit cases had required a separate showing of a substantial effect on interstate commerce,[184] and Gann argued that the court should require a similar showing in his case.[185] Placing heavy reliance on *Raich*, however, the Sixth Circuit ruled that no such showing was necessary.[186] As in *Raich*, the statute was part of a broader regulatory scheme "'to regulate the interstate market in a fungible commodity,'"[187] and "Congress ha[d] a rational basis for believing that 'homegrown' child pornography can 'feed[ ] the national market and stimulate[ ] demand.'"[188] The Sixth Circuit dismissed the concern that general regulation of child pornography may sweep in purely intrastate activity, stating, as in *Raich*, that this result was of "'no moment.'"[189] The Sixth Circuit has followed *Gann* in interpreting § 2252A(a)(5)(B).[190]

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180 *See supra* Part I.D. The Tenth Circuit has recently followed its analysis in *Jeronimo-Bautista*, reaffirming that it is unnecessary to inquire into the adequacy of the jurisdictional element in § 2251(a). *See* United States v. Grimmett, 439 F.3d 1263, 1272 (10th Cir. 2006); United States v. Croxford, No. 04-4158, 2006 WL 541250, at *9–10 (10th Cir. Mar. 7, 2006).

181 160 F. App'x 466 (6th Cir. 2005).

182 *Id.* at 467.

183 *Id.* at 470, 472.

184 *Id.* at 470–71 (citing United States v. Andrews, 383 F.3d 374, 377–78 (6th Cir. 2004) and United States v. Corp, 236 F.3d 325, 332–33 (6th Cir. 2001)).

185 *Id.* at 470, 472.

186 *Id.* at 472–73.

187 *Id.* at 473 (quoting Gonzales v. Raich, 125 S. Ct. 2195, 2209 (2005)).

188 *Id.* (second and third alterations in original) (quoting United States v. Andrews, 383 F.3d 374, 378 n.1 (2004)).

189 *Id.* (quoting *Raich*, 125 S. Ct. at 2209).

190 *See* United States v. Chambers, 441 F.3d 438, 454–55 (6th Cir. 2006).

The Fourth Circuit, in *United States v. Forrest*,[191] also rejected as-applied challenges to local regulation of child pornography activity and dismissed the materials-in-commerce jurisdictional element in a footnote. Relying on *Raich*, the Fourth Circuit upheld Forrest's conviction for "wholly intrastate production and possession of child pornography" under § 2251(a) (production) and § 2252A(a)(5)(B) (possession).[192] Comparing *Forrest* to *Raich*, the court found *Raich* controlled because of three "striking[ ]"[193] similarities in both cases: (1) the regulatory schemes govern "'quintessentially economic'" activities,[194] i.e., both statutes directly regulate economic activity in a "'fungible commodity'";[195] (2) Congress had a rational basis for concluding that local regulation of both commodities was essential to their interstate regulation; and (3) Congress made findings of the local activities' effect on the interstate markets, although it is not required to do so.[196]

While the Fourth Circuit's *Raich* analysis is relatively straightforward, its cursory dismissal of the jurisdictional element is rather puzzling given the nature of the CSA and Fourth Circuit precedent. In the first footnote, the court responded to Forrest's argument that the materials-in-commerce jurisdictional element is insufficient:

> Although a jurisdictional element may establish that a given statute "is in pursuance of Congress' regulation of interstate commerce," *United States v. Morrison*, 529 U.S. 598, 612, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), an effective jurisdictional element is certainly not required where, as here, the statute directly regulates economic activity. *See, e.g., Gonzales v. Raich*, — U.S. —, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (upholding Controlled Substances Act under Commerce Clause without discussion of statute's jurisdictional element).[197]

The Fourth Circuit attempted to cite *Raich* for the proposition that although the CSA had a jurisdictional element, the Supreme Court ignored that element when setting forth the *Raich* principle. The obvious problem with this argument is that the relevant statutory provisions at issue in *Raich* do *not* contain a jurisdictional element, as noted by the Ninth Circuit when applying the four-pronged *Lopez/Morrison*

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191 429 F.3d 73 (4th Cir. 2005).

192 *Id.* at 78.

193 *Id.*

194 *Id.* (quoting *Raich*, 125 S. Ct. at 2211).

195 *Id.* (quoting *Raich*, 125 S. Ct. at 2206).

196 *Id.*

197 *Id.* at 77 n.1.

test.[198] The Court's statement that an effective jurisdictional element is not required here is also puzzling because of its prior decisions recognizing the viability of the materials-in-commerce prongs.[199] Regardless of the Court's precedent or reasoning, *Forrest* stands for the principle that *Raich* fully applies to statutes regulating economic activity, even if those statutes contain jurisdictional elements. Because "an effective jurisdictional element is certainly not required,"[200] its presence or absence—and therefore its sufficiency—is irrelevant under *Forrest.*

Under these circuits' precedent, *Raich* applies regardless of whether a statute contains a jurisdictional element. Debates regarding the sufficiency of a jurisdictional element are moot because the jurisdictional element itself is meaningless. The *Raich* principle should not be used as a means of avoiding the debate as to the constitutional sufficiency of jurisdictional elements. Flawed reasoning taints the arguments supporting this approach, further demonstrating that applying *Raich* to statutes containing jurisdictional elements is an unsound approach in the post-*Raich* era.

2. *Raich* Applies to Some Jurisdictional Hooks, but Not Others

At least one court has explicitly stated that some jurisdictional elements fall within *Raich,* while others do not.[201] Possible bases for distinction—other than the sufficiency of jurisdictional elements, which will be discussed in Part III.B—include the particular *Lopez* category regulated by the hook (channels of commerce, instrumentalities of commerce, or substantial effect on commerce) and the congressional intent in inserting the hook. Each of these bases will be discussed in turn.

a. Distinction Between Categories of Activity Regulated

The Middle District of Pennsylvania has made a distinction based on the particular *Lopez* category regulated by the hook. In *United States v. Garcia,*[202] a recent memorandum opinion by the Middle Dis-

198 *See supra* note 19 and accompanying text.

199 *See* Fischer, *supra* note 1, at 115 (discussing prior Fourth Circuit cases that "seem[ ] to amount to an endorsement of the reasoning . . . that the mere existence of the jurisdictional hook is sufficient to protect the statute from a facial challenge" and that uphold the constitutional sufficiency of the jurisdictional element).

200 *Forrest,* 429 F.3d at 77 n.1.

201 United States v. Garcia, No. CRIM. 1:04-CR-0301, 2005 WL 1862409 (M.D. Pa. Aug. 5, 2005).

202 2005 WL 1862409.

trict of Pennsylvania, the district court held that *Raich* does not apply to jurisdictional elements regulating the channels of commerce.[203] The *Garcia* court denied a constitutional challenge to 18 U.S.C. § 2422(b), which criminalizes the use of mail or other interstate communications to engage in a sexual crime.[204] In response to the defendant's argument that his activity did not substantially affect interstate commerce, the court wrote that the "constitutional basis for the statute" is regulation of the channels of commerce, rather than regulation of activity that has a substantial effect on commerce: "The statute targets conduct involving . . . 'the use of the channels' of interstate commerce: interstate phone and internet communications."[205] The court stated that proof of interstate economic impact required under *Raich* and other "substantial effects" cases such as *Lopez* and *Wickard* does not apply to Congress's power to regulate the channels of commerce.[206] While the court was not referring to application of the *Raich* principle per se, it certainly separated the "channels of commerce" category from *Raich*, suggesting there is some basis for distinguishing *Raich* from cases involving statutes with specific types of jurisdictional elements. It is likely that the *Garcia* court would also separate from *Raich* jurisdictional elements regulating "instrumentalities of commerce,"[207] thus leaving only the "substantial effects" hooks subject to *Raich*.

Logically, this distinction makes some sense because the jurisdictional hooks requiring that an activity "affect commerce" have been interpreted to extend to the full reach of Congress's authority under the Commerce Clause, and *Raich* marks the full reach of that power. Practically, however, there are at least two problems with this approach. First, it will have overreaching effects because it does not call for a case-by-case analysis, which is the very function of a jurisdictional element. The results of a *Raich* analysis and a case-by-case analysis, while both purporting to reach to the edges of Congress's Commerce Clause power, will not always be the same. This is because while *Raich* permits regulation of *any* intrastate activity that is regulated pursuant to a comprehensive scheme, jurisdictional elements typically specify the *type of activity* that must have a substantial effect on interstate commerce. For example, in the FAA, it is the transaction evidenced in the

203 *Id.* at *3.

204 *Id.* (citing 18 U.S.C. § 2422(b) (2000)).

205 *Id.*

206 *Id.*

207 *See* McGimsey, *supra* note 85, at 1699 ("The channels and instrumentalities prongs are often referred to in tandem, perhaps reflecting the fact that some cases can be analyzed under either prong.").

contract that must "involv[e] commerce."[208] In the arson statute, it is the *use* of the property that must be "in" or "affecting" interstate commerce.[209] In addition, when a jurisdictional element is present, the Supreme Court has advocated narrowing the scope of federal statutes so as to avoid "constitutional doubts."[210] This principle supports courts' undergoing a case-by-case analysis rather than ignoring a jurisdictional element that requires a specific nexus to interstate commerce.

A second problem also casts doubt on the viability of the distinction between types of jurisdictional elements. It is often unclear which *Lopez* category applies to statutes containing jurisdictional elements.[211] Some statutes, such as the arson statute, purport to reach more than one category.[212] Even if a jurisdictional element appears on its face to regulate only one category, courts may interpret it to reach more than one. For example, courts have applied the FAA's "involving commerce" language to transactions that substantially affect interstate commerce, as well as to those that arguably fall under the "channels of commerce" category.[213] Because of these practical problems, courts should avoid attempting to apply the *Raich* principle to certain types of jurisdictional elements while declining to apply it to others.

b. Distinction Based upon Congressional Motive

Another basis upon which courts could distinguish the application of *Raich* to different jurisdictional elements is the motive of Congress in inserting the jurisdictional element. After the Supreme Court emphasized the saving power of jurisdictional hooks in *Lopez* and *Morrison*, Congress had a strong incentive to legislate using jurisdictional hooks to aid in ensuring the facial constitutionality of a statute. The amendment to the GSFZA is one example of a jurisdictional element inserted into a statute by Congress to satisfy the *Lopez/Morrison* test.[214] Should courts distinguish between hooks inserted as mere formalities and hooks that are inserted to serve a meaningful purpose? The diffi-

208 9 U.S.C. § 2 (2000); *see supra* note 22.

209 18 U.S.C. § 844(i) (2000); *see supra* notes 90–94 and accompanying text.

210 *See supra* note 94 and accompanying text.

211 *See* Thomas W. Merrill, *Rescuing Federalism After* Raich*: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 839 (2005). Professor Merrill criticizes the three-category framework and argues that statutes with jurisdictional elements do not fall neatly into any of the three categories. *Id.*

212 *See supra* notes 90–91 and accompanying text.

213 *See supra* notes 97–101 and accompanying text.

214 *See supra* notes 60–61 and accompanying text.

culty in distinguishing between a textual intent to reach certain activities and an unwritten motive to insert a hook as a mere formality is simply unworkable, and the doctrine of constitutional avoidance counsels against such a distinction. This doctrine calls courts to interpret statutes so as to avoid constitutional doubts "'unless such construction is *plainly* contrary to the intent of Congress.'"[215] Disregarding jurisdictional elements based on a purported congressional motive would raise constitutional doubts because applying the *Raich* principle may permit the very overreaching of the Commerce Clause power into intrastate activity that a jurisdictional element is designed to prevent. Further, the very nature of a jurisdictional element plainly indicates Congress's intent to reach a particular set of activities. Courts should avoid attempting to distinguish between jurisdictional elements inserted as formalities from those that are intended to serve a true limiting function. Doing so will avoid constitutional doubt and respect the plain meaning of Congress's intent.

In practice, distinguishing between jurisdictional elements on grounds such as the category of activity regulated or the congressional motive would generate significant problems. Because all constitutionally sufficient jurisdictional elements share a similar limiting function, they should all be permitted to serve that function.

3. *Raich* Never Applies

On the opposite end of the spectrum from the "*Raich* always applies" category, the narrowest view of *Raich* would hold that *Raich* has no application to statutes containing jurisdictional elements. This would continue the practices of interpreting statutes on an element-by-element basis and assessing the sufficiency of jurisdictional elements.[216] No court has thus far embraced this approach—even if courts have not applied the *Raich* principle, they have at least cited *Raich* to support some form of aggregation or their decision that regulation of a particular activity is constitutional. At this point in the wake of *Raich*'s jurisprudence, courts are rightfully avoiding complete disregard of *Raich*. Until the Supreme Court provides further guidance or declares that *Raich* clearly does not apply to a given category of cases, just as it narrowed *Lopez* and *Morrison* to facial challenges,[217]

215 Fallon, *supra* note 94, at 23 (emphasis added) (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)); *see supra* note 94 and accompanying text.

216 *See infra* Part III.B.

217 *See supra* text accompanying notes 138–39.

lower courts will do well to strike a middle ground by paying at least some deference to *Raich* without applying its principles blindly.

4. Raich *Does Not Apply Directly but Supports a Principle of Aggregation*

A middle course between the "always applies" and "never applies" approaches described previously states that while the *Raich* principle does not directly apply to statutes containing jurisdictional elements, *Raich* may still be cited for some theory of aggregation or to provide added support to a case-by-case decision to regulate intrastate activity. In this way, courts will avoid two pitfalls: they will not blindly apply the *Raich* principle, and they will not ignore the effect it may have on future Commerce Clause jurisprudence. At least until the Supreme Court provides further guidance or narrows *Raich* in some way, lower courts should attempt to strike this middle ground. Like the third approach, this approach will lead courts to interpret statutes on an element-by-element basis and assess the sufficiency of jurisdictional elements.[218] The Second Circuit has taken this approach, and the Ninth Circuit probably falls into this category. The Ninth Circuit has stated that *Raich* may be distinguished from cases involving child pornography statutes, suggesting that the jurisdictional element of those statutes provides the basis for a viable distinction.[219]

The Second Circuit, in *United States v. Logan*,[220] upheld a conviction based on the jurisdictional element in 18 U.S.C. § 844(i), which makes it a crime for one who "maliciously damages or destroys, or attempts to damage or destroy, by means of fire . . . any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce."[221] Even after *Raich*, the Second Circuit applied the two-step inquiry identified in *Jones* to determine whether § 844(i)'s jurisdictional element is met: first, the court ascertains the function of the building, and then the court decides whether that function affects interstate commerce.[222] The court cited *Raich* to support application of an earlier precedent holding that rental homes are part of a class of activities that affect interstate commerce.[223] The Second Circuit reflects the view that *Raich* does not directly apply to

218 *See infra* Part III.B.

219 United States v. Tashbook, 144 F. App'x 610, 613 n.2 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 777 (2005).

220 419 F.3d 172 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1067 (2006).

221 18 U.S.C. § 844(i) (2000).

222 *Logan*, 419 F.3d at 179.

223 *Id.* at 179–80 (citing Gonzales v. Raich, 125 S. Ct. 2195, 2205 (2005)).

statutes containing jurisdictional elements but may be used to support a theory of narrow aggregation.[224]

In two as-applied challenges to statutes containing jurisdictional elements, the Ninth Circuit has looked to the individual regulated activity when determining if the jurisdictional element is satisfied.[225] In *United States v. Tashbook*,[226] the Ninth Circuit explicitly stated, without explanation, that *Raich* is distinguishable from the child pornography cases[227] and therefore it is unnecessary to "address any effect *Raich* may have on the current case."[228] The court noted that when *Raich* applies, there is a question of whether as-applied challenges are valid at all.[229] The *Tashbook* court upheld the defendant's conviction under § 2251(a), recognizing the validity of the jurisdictional element[230] and noting specific facts that supported the requisite nexus to interstate commerce.[231] It is unclear on what basis the Court distinguished the

224 The Eleventh Circuit recently issued an opinion that is in line with *Logan* but that does not so clearly embody the fourth post-*Raich* approach as to merit inclusion of the decision in this category. In *United States v. Phillips*, No. 03-14413, 2006 WL 1117882 (11th Cir. Apr. 26, 2006), the court looked to specific facts that satisfied the jurisdictional element in 18 U.S.C. § 922(g) and then rejected the defendant's arguments as to the sufficiency of the jurisdictional element by citing *Raich*. *Id.* at *11 (citing *Raich*, 125 S. Ct. at 2209). Unlike *Logan*, it is not clear from the *Phillips* opinion that the court views satisfaction of the jurisdictional element as a prerequisite to regulation under the statute, particularly in light of the court's opinion in *Maxwell*. *See id.*; *supra* Part III.A.1.

225 A third case decided by the Ninth Circuit this year took a similar approach with respect to the Foreign Commerce Clause. *See* United States v. Clark, 435 F.3d 1100, 1109–18 (9th Cir. 2006) (analyzing the case under the relaxed "rational basis" standard of *Raich* but explaining extensively why both jurisdictional elements of the statute at issue were met in this case). This Note has not included *Clark* in the main text because the court viewed the "Foreign Commerce Clause independently from its domestic brethren." *Id.* at 1116.

226 144 F. App'x 610 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 777 (2005).

227 The Ninth Circuit was referring to *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), *vacated*, 125 S. Ct. 2899 (2005); *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003); and the *Tashbook* case itself. *Tashbook*, 144 F. App'x at 613 & n.2.

228 *Tashbook*, 144 F. App'x at 613 n.2.

229 *Id.*

230 *Id.* at 613–14. The Ninth Circuit distinguished its opinion in *McCoy*, which held the materials-in-commerce prong was insufficient to guarantee the as-applied constitutionality of § 2252(a)(4)(B). *McCoy*, 323 F.3d at 1124. The *Tashbook* court therefore recognized the validity of the jurisdictional element in the production provision of § 251(a), reasoning that the production of child pornography "is far more likely to be 'economic' in nature" than the "'mere possession'" at issue in *McCoy* under § 2252(a)(4)(B). *Tashbook*, 144 F. App'x at 613–14.

231 The court noted that the defendant posted advertisements for his work on the Internet, communicated with an intrastate child victim by e-mail and telephone, and pursued victims in other states. *Tashbook*, 144 F. App'x at 614.

case from *Raich*—perhaps either the nature of the statutes at issue or the presence of the jurisdictional element.[232] Regardless, in the wake of *Raich*, *Tashbook* represents a continued respect for jurisdictional elements and establishes precedent for distinguishing *Raich* from other cases, at least those involving child pornography challenges under § 2251(a) and § 2252(a)(4)(B). This Note includes the Ninth Circuit in this final category only on the assumption that the distinguishing basis for the court's opinion was the presence of a jurisdictional element in § 2251(a).

In a later memorandum decision involving an as-applied challenge to 18 U.S.C. § 922(q)(1), the Ninth Circuit provided some affirmation that it should fall within this fourth category. The court ruled that a lower federal court had jurisdiction under the statute because the defendant's handgun had the requisite nexus with interstate commerce—it was manufactured in Germany and imported into Virginia before reaching California.[233] To support this ruling, the Court cited *Raich* with a "*cf.*" signal[234] and described *Raich* in a parenthetical: "Congress' power to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate commerce is firmly established."[235] While somewhat vague and subject to many interpretations,[236] the citation to *Raich* and the court's attention to the specific facts creating a nexus to commerce suggest the Ninth Circuit was drawing support from the aggregation principle in *Raich* without directly applying *Raich* to § 922(q)(1). Thus, at least one reading of this decision supports placing the Ninth Circuit in this fourth category based on its *Tashbook* opinion.

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232 If the court distinguished *Tashbook* on a basis other than the presence of a jurisdictional element, the Ninth Circuit may hold in the future that *Raich* does apply to some statutes containing jurisdictional elements and therefore precludes as-applied challenges to those statutes. If it distinguished *Tashbook* on the basis of the presence of a jurisdictional element, the Ninth Circuit falls squarely within this fourth category.

233 United States v. Artiaga, 152 F. App'x 636, 637 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1484 (2006).

234 The "*cf.*" signal indicates that the "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 47 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

235 *Artiaga*, 152 F. App'x at 637.

236 Possible interpretations may include the following: (1) *Raich* applies to statutes containing jurisdictional elements other than the child pornography statutes identified in *Tashbook*; (2) *Raich* never applies to statutes containing jurisdictional elements but is worth mentioning; or (3) *Raich* does not directly apply but provides support for the principle of aggregation.

The Second and Ninth Circuits have adopted the soundest approach for applying *Raich* to statutes containing jurisdictional elements. They have found a middle ground by maintaining the purpose and meaning of jurisdictional elements, while allowing *Raich* to provide some support for a decision to aggregate or regulate intrastate activity that has a substantial effect on interstate commerce.

B. Dealing with the Sufficiency Issue when Raich *Does Not Directly Apply*

If *Raich* does not apply to statutes containing jurisdictional elements,[237] or only applies to the extent that it supports a principle of narrow aggregation,[238] the question of a jurisdictional element's sufficiency becomes an important issue. In pre-*Raich* cases holding jurisdictional elements constitutionally insufficient, courts attempted to find a substantial relationship between interstate commerce and the intrastate activity being regulated, utilizing varying degrees of aggregation.[239] In the post-*Raich* era, courts must consider the impact the *Raich* principle may have on their analyses. Does the insufficient jurisdictional hook shift the statute into the *Raich* net, thereby permitting regulation of any intrastate activity, or is a closer nexus required? When considering these questions, courts must account for the degree of aggregation utilized, congressional intent, and the incentives their interpretations may give Congress when drafting legislation.[240]

This Part identifies three possible approaches for courts dealing with insufficient jurisdictional elements after *Raich*. This Part briefly discusses the first two approaches, both of which would undermine the meaning and purpose of the jurisdictional hook, and then it argues that courts should take a third, and more flexible, approach that gives meaning to jurisdictional hooks and respects congressional intent.

1. The Strict Sufficiency Rule

The strictest approach would uphold Commerce Clause challenges whenever a jurisdictional element is insufficient. While this approach may have been feasible pre-*Raich* because it would have provided Congress with an incentive to insert a stronger jurisdictional element, it is no longer workable post-*Raich* because now, rather than inserting stronger jurisdictional elements, it would be simpler and more efficient for Congress to redraft legislation to eliminate any po-

237 *See supra* Part III.A.3.

238 *See supra* Part III.A.4.

239 *See supra* notes 113–16 and accompanying text.

240 *See supra* note 18 and accompanying text.

tentially insufficient jurisdictional element.[241] This would result in less precise, hook-less statutes similar to the CSA that fall easily into the *Raich* net. The elimination of jurisdictional elements is the opposite result of the one contemplated by the *Lopez* and *Morrison* Courts when they included the presence of a jurisdictional element as a factor that may support the facial constitutionality of a statute.[242]

2. The Blue Pencil Rule

To borrow a term from contract law,[243] the "blue pencil" rule would dictate that when a jurisdictional element is insufficient, courts should not declare the entire provision unconstitutional but should simply run a blue pencil through the jurisdictional element, essentially striking it from the statute.[244] The court could then treat the statute as though the jurisdictional element never existed and apply the *Raich* principle, sweeping in all instances of intrastate activity. This is essentially what the courts in the "*Raich* always applies" category have done when applying *Raich* to statutes with jurisdictional elements.[245]

This undesirable approach would provide a congressional incentive to insert either a strong jurisdictional element or no jurisdictional element at all. The blue pencil rule essentially penalizes Congress for inserting a weak jurisdictional hook; when Congress inserts a jurisdictional hook intended to serve a meaningful limiting function, this limiting function disappears entirely if a court determines that the hook is insufficient and treats the statute as the *Raich* court treated the CSA. The blue pencil rule substitutes the *Raich* net for a hook simply because the hook was not strong enough, a result opposite that which Congress intended in drafting the hook into the statute.

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241 *See supra* notes 18–19 and accompanying text.

242 *See supra* notes 54–57, 66–69 and accompanying text.

243 *See* GUENTER TREITEL, THE LAW OF CONTRACT 507 (11th ed. 2003) (explaining the blue pencil test, which allows courts to sever a contractual promise when "this can be done by cutting words out of the contract (or by running a blue pencil through the offending words)").

244 It would be relatively simple for courts to "run a blue pencil" through an insufficient hook and treat the statute as though the hook never existed. For instance, courts could sever the FAA's jurisdictional hook in 9 U.S.C. § 2 (2000), allowing the statute to apply to arbitration provisions "in contracts evidencing a transaction," rather than "in contracts evidencing a transaction involving commerce."

245 *See supra* Part III.A.1.

3. The Flexible Approach

The preferred method, the flexible approach,[246] would retain insufficient jurisdictional elements and give them generous meaning. Courts would only apply the statute to a given set of circumstances when it is consistent with pre-*Raich* precedent to do so, thereby upholding the "substantial effects" test to the extent that courts have done so in the past. This approach would attempt to give jurisdictional elements meaning regardless of their sufficiency, allowing room for interpretation and consideration of individual circumstances. If a jurisdictional element is wholly incapable of application, courts would simply treat the jurisdictional element as though the language read "substantially affecting commerce," thereby finding a middle ground between an insufficient hook and the *Raich* net. For example, if a court found the "materials-in-commerce" prong of the child pornography statutes insufficient, it would reinterpret the language proscribing the creation of such "visual depiction . . . produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means"[247] to prohibit the creation of child pornography when "the *particular* visual depiction *substantially affects* interstate or foreign commerce." This interpretation would not allow merely any line-crossing to suffice. In addition, it would require that the particular activity at issue (here, the "visual depiction") have a specific nexus to commerce, rather than allowing the *Raich* net to sweep in any intrastate activity simply because Congress could rationally determine that the regulation of child pornography in the aggregate has an effect on interstate commerce.

A pre-*Raich* decision from the Sixth Circuit[248] illustrates how the flexible approach would operate in the wake of *Raich*.[249] In *United States v. Corp*,[250] the Sixth Circuit reversed the defendant's conviction for the possession of child pornography under § 2252(a)(4)(B).[251]

246 For purposes of continuing the parallel to contract law, note that the Restatement § 184 has rejected the blue pencil rule in favor of a more flexible method that allows courts to sever contractual terms and enforce the remainder of the enforceable terms "if the party who seeks to enforce the term obtained it in good faith and in accordance with reasonable standards of fair dealing." RESTATEMENT (SECOND) OF CONTRACTS § 84 (1981).

247 18 U.S.C.A. § 2251(a) (West Supp. 2005).

248 United States v. Corp, 236 F.3d 325 (6th Cir. 2001).

249 The Sixth Circuit disregarded this case post-*Raich* when the Sixth Circuit applied *Raich* to the child pornography statute in *United States v. Gann*. *See supra* text accompanying notes 184–87.

250 236 F.3d 325.

251 *Id.* at 333.

Notwithstanding the wholly intrastate production and possession of the photographs, the trial court relied on the materials-in-commerce prong of § 2252(a)(4)(B) and based federal jurisdiction on the fact that the photographic paper used to develop the images was manufactured in Germany.[252] Noting that jurisdictional elements "are to be read as meaningful restrictions," the Sixth Circuit generously interpreted the otherwise-insufficient materials-in-commerce prong to require a substantial relationship between the defendant's activity and interstate commerce.[253] Rejecting the overly broad aggregation that a jurisdictional element seeks to avoid, the court also declined to base jurisdiction on the "aggregate effect" of intrastate child pornography as a whole.[254] By insisting upon a truly substantial relationship between the defendant's individual activity and interstate commerce, the Sixth Circuit in *Corp* carried out the intended function of the statute's jurisdictional element to place a meaningful restriction on the statute's reach.

This flexible approach best enables courts to implement Congress's intent because it allows jurisdictional elements to serve their intended purpose of placing meaningful limitations on a statute's reach. Congress has inserted jurisdictional elements in statutes to require a specific nexus to interstate commerce, and the flexible approach allows courts to appreciate that nexus. If courts disregarded any jurisdictional element they deemed insufficient, they would, in effect, penalize Congress for inserting a weak jurisdiction element by allowing the *Raich* net to overshadow meaningful statutory language. If courts declared the entire statutory provision unconstitutional, they would thwart Congress's efforts to regulate a particular activity. By giving jurisdictional elements generous meaning, courts would realize Congress's goal of requiring a specific nexus to commerce and thereby maintain the viability of as-applied challenges.

In addition, the flexible approach provides proper incentives for Congress when legislating. When Congress desires to regulate commerce in a particular way, it will do so with precision and will insert a strong hook that will probably not be found insufficient. Still, the *Raich* principle will always give Congress an incentive to omit a juris-

252 *Id.* at 326–27.

253 *Id.* at 332.

254 *Id.* This reluctance to aggregate is preferable to the approach of some pre-*Raich* courts that, after finding a jurisdictional element insufficient, sought a relationship between the activity at issue and interstate commerce, but then applied an overly broad, *Wickard*-style aggregation theory to establish that relationship, rather than examining the specific nexus between the defendant's individual activity and interstate commerce. *See supra* note 113.

dictional element altogether, thereby resulting in broad legislation. To the extent that Congress desires to require a nexus to commerce, however, the flexible approach allows courts to give Congress's words meaning within the bounds of the Commerce Clause, even if the jurisdictional element is insufficient.

C. Summary: The Ideal Combination—A Flexible Hook Analysis with Minimal Net Support

In summary, the ideal combination of approaches is for courts to: (1) require case-by-case satisfaction of the jurisdictional hook, distinguishing *Raich* from cases involving statutes with jurisdictional elements and citing *Raich* only to support principles of aggregation on a case-by-case basis; and (2) apply a flexible approach when dealing with insufficient jurisdictional elements. Rather than applying *Raich* to jurisdictional elements and thereby precluding any case-by-case inquiry into the regulated activity's nexus to commerce, courts should distinguish cases involving statutes with jurisdictional elements to give true meaning to jurisdictional elements and sustain the viability of as-applied challenges. Until courts receive further guidance from the Supreme Court as to the scope of *Raich*'s applicability, the best approach is for courts to essentially use the *Raich* net for minimal support, citing *Raich* for principles of aggregation on a case-by-case basis, rather than ignoring its effect completely. When moving to the next step of dealing with the potential insufficiency of a particular jurisdictional element, courts should utilize a more flexible approach to give generous meaning to jurisdictional elements and account for the circumstances of the case, rather than disregard the jurisdictional element or declare the entire statutory provision unconstitutional. The flexible approach will provide Congress with the appropriate incentives to insert a jurisdictional element when it intends for courts to undertake a case-by-case analysis without penalizing Congress when it inserts a weak jurisdictional element. The ideal combination of approaches will best preserve the role of the hook, giving Congress a real choice between casting its Commerce Clause power with the jurisdictional hook or the regulatory net.

CONCLUSION

In the wake of *Raich*, the viability of the jurisdictional hook is uncertain. *Raich* permits Congress to cast a wide regulatory net over interstate and intrastate activity alike, but unlike the statutory provision of the CSA in *Raich*, many statutes contain jurisdictional hooks requiring a case-by-case nexus to interstate commerce. To give juris-

dictional elements meaning by allowing them to serve the limiting function identified in *Lopez* and *Morrison*, courts must consider the implications of the various ways in which *Raich* may be applied—or not applied—to statutes containing jurisdictional hooks. The approach that will allow courts to give jurisdictional hooks their true meaning is one that declines to apply the *Raich* principle to statutes containing jurisdictional hooks, thereby requiring a case-by-case nexus to commerce and permitting as-applied challenges. *Raich* may be cited, however, for principles of narrow aggregation when applying the typical pre-*Raich* "substantial effects" test. When a jurisdictional element's constitutional sufficiency is in question, courts should use a flexible approach that avoids shifting to a *Raich* analysis whenever a court deems a jurisdictional element insufficient. The combination of these approaches will allow Congress to continue to legislate with two tools—a regulatory net or a jurisdictional hook—and allow courts to rely on the *Raich* net to provide some support to jurisdictional hooks. In addition, it will give meaning to jurisdictional hooks by ensuring that each activity regulated under a jurisdictional hook is a "keeper," permitting courts to toss "throwbacks" into the waters where they belong.

INDEX

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