

The Commerce Clause and Federal Firearms Prohibitions

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“**Most**” modern federal criminal laws are predicated on Congress’s power to regulate [interstate commerce](#). Federal firearms offenses are [no different](#) in this respect. For example, [18 U.S.C. § 922\(g\)\(1\)](#), which prohibits felons from possessing firearms “in or affecting commerce,” stems from Congress’s Commerce Clause power. The Supreme Court has interpreted the statutory precursor to § 922(g)(1) to require that the government prove that the firearm has a “[requisite nexus](#)” with interstate commerce. Federal appeals courts have uniformly [held](#) what was perhaps “[implicit](#)” in the Court’s cases: that the felon-in-possession prohibition is a valid exercise of Congress’s authority under the [Commerce Clause](#).

[Justice Thomas](#), [federal judges](#), and [scholars](#) have expressed serious doubt, however, as to the soundness of these and similar constitutional conclusions, suggesting that the felon-in-possession ban and other federal restrictions on firearms possession exceed Congress’s authority under the Commerce Clause. On July 21, 2026, in *Squire v. United States*, a majority of the active judges on the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) [agreed](#) that the full court would decide whether the Commerce Clause is a proper source of authority for § 922(g)(1). One judge dissented from the order granting a rehearing, warning that to invalidate § 922(g)(1) as unconstitutional would by logical extension “[imperil](#) much of the United States Code” that rests on the Commerce Clause and “would [mark](#) the start of a new, severely contracted Commerce Clause era.”

This Sidebar describes the relationship between the Commerce Clause and federal firearms laws to aid in an understanding of the constitutional issues to be considered by the Fifth Circuit in the *Squire* case. The Sidebar begins with an overview of the Supreme Court’s Commerce Clause jurisprudence. It then addresses the Commerce Clause in the context of federal firearms laws, paying specific attention to judicial concerns with the constitutionality of [18 U.S.C. §§ 922\(g\)\(1\) and 922\(o\)](#), the federal prohibition on the possession of machineguns. The Sidebar closes with considerations for Congress.

Commerce Clause Jurisprudence

The Supreme Court has [stressed](#) that every law enacted by Congress must be traced to a power in the Constitution. The same is true of federal criminal laws; the Court has [recognized](#) that Congress “[cannot](#) punish felonies generally” but [instead](#) “may enact only those criminal laws that are connected to one of its

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constitutionally enumerated powers, such as the authority to regulate interstate commerce.” Article I, Section 8, Clause 3 of the Constitution, referred to as the “the [Commerce Clause](#),” grants Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Federal courts have [observed](#) that the Commerce Clause is the constitutional source of authority for “most” federal offenses. Such is the case for federal firearms offenses: The primary federal “[criminal](#)” statute applicable to firearms, the Gun Control Act (GCA), is [predicated](#) on the Commerce Clause.

The scope of the Commerce Clause power has “[evolved over time](#)” to include three general areas. In 1995, the Supreme Court in *United States v. Lopez* recognized that Congress may [invoke](#) the Commerce Clause to regulate “three broad categories of activity”: (1) the “[channels](#) of interstate commerce,” or what interstate commerce moves through (e.g., highways, railroads, navigable waterways, or airspace); (2) the “[instrumentalities](#) of interstate commerce, or [persons or things](#) in interstate commerce,” or what travels on the channels of interstate commerce (e.g., airplanes, trucks, or trains, as well as people or objects); and (3) “activities that [substantially affect](#) interstate commerce,” that is, intrastate activities that, when taken in the aggregate, would substantially affect interstate commerce (e.g., [limiting](#) the intrastate, personal production of a good to stabilize national prices for that good). Applying the stated scope of the Commerce Clause, the Court in *Lopez* [struck down](#) a federal law that prohibited the possession of a gun in a school zone, reasoning that the law regulated a purely local, noneconomic activity. In its discussion, the Court appears to have “[relied heavily](#)” on the economic/noneconomic distinction, [observing](#) that under the third category the Court has upheld “regulations of activities that arise out of or are connected with a commercial transaction,” further [recounting](#) that the Court has “upheld a wide variety of congressional Acts regulating intrastate economic activity where [it has] concluded that the activity substantially affected interstate commerce.” The Court [said](#) the “pattern is clear”: “Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.” As to the federal law in question, the Court [explained](#) that the third category does not extend to “a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise,” or to a statute that 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.”

Similarly, in 2000, in *United States v. Morrison*, the Court [invalidated](#) a provision of the Violence Against Women Act that created a federal civil remedy for victims of gender-motivated violence, as the Court found that such violence is not an economic activity. The Court in *Morrison* [compiled](#) four factors that may help draw the distinction between economic/noneconomic activities, including (1) whether the regulated “actor” or the regulated “conduct” “has a commercial character,” or whether the statutory “purpose” has an “evident commercial nexus”; (2) the existence of a jurisdictional hook; (3) congressional findings; and (4) the link between the activity and interstate commerce. Quoting *Lopez*, *Morrison* also [explained](#) that federalism undergirds the inquiry into the economic nature of the regulated activity: “Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur.”

In 2005, in *Gonzalez v. Raich*, the Court [upheld](#) the application of the federal Controlled Substances Act to growing marijuana for personal, intrastate use because Congress had a “[rational basis](#)” for concluding that such cultivation and consumption would impact the supply and demand in the national market for cannabis. According to the Court, the regulated market’s federal illegality did not matter for purposes of the statute’s constitutionality.

In 2012, concluding that the Affordable Care Act’s individual mandate could not be upheld pursuant to the Commerce Clause, in *National Federation of Independent Business (NFIB) v. Sebelius*, the Court [determined](#) that Congress cannot compel individuals to engage in an economic activity (i.e., to purchase health insurance or face a fine) and thereby bring these individuals within the ambit of the Commerce Clause. Similarly, the Court explained that Congress cannot regulate [inactivity](#), even if the individual

choice to not do something (i.e., to not purchase health insurance) has economic consequences (i.e., externalized and increased health care costs).

Debate Regarding the Commerce Clause as a Constitutional Basis for Certain Federal Firearms Regulations

The Felon-in-Possession Prohibition

Federal law, at 18 U.S.C. § 922(g), prohibits nine classes of individuals, including felons, from possessing firearms “in or affecting commerce.” The Supreme Court has [recognized](#) that this “in or affecting commerce” language and similar formulations, referred to as a “jurisdictional hook,” “signal Congress’ intent to invoke its full authority under the Commerce Clause.”

In 1971, in *United States v. Bass*, the Supreme Court rejected a Commerce Clause challenge to the predecessor statute to § 922(g)(1), which subjected any felon who “receives, possesses, or transports” a firearm “in commerce or affecting commerce” to criminal punishment. The Court [read](#) the “in commerce or affecting commerce” language to apply to all three elements of the offense, including possession and receipt, to alleviate federalism concerns. The Court [interpreted](#) the language to mean that the government must prove that the firearm “previously traveled in interstate commerce.” In 1977, the Court in *Scarborough v. United States* [clarified](#) that, in enacting this clause, there is “no indication that Congress intended to require any more than the minimal nexus that the firearm have [sic] been, at some time, in interstate commerce.” According to these cases, the interstate movement of the firearm [need not](#) be contemporaneous with the defendant’s possession of the firearm.

Some federal appeals court judges have opined that there is a “[tension](#)” and a “[fundamental and irreconcilable conflict](#)” between *Scarborough*—allowing Congress to regulate any firearm that has “at some time” traveled between states—and *Lopez* and its progeny—which insist that the regulation fit within at least one of three categories of activities. Federal courts also have [noticed](#) that some circuits adhere to *Scarborough*, while others apply *Lopez*. Courts using the former approach observe that the Supreme Court has [not overruled](#) *Scarborough*. For instance, *Lopez* [did not cite](#) *Scarborough*, let alone place *Scarborough* in a negative light. Moreover, these courts have [explained](#) that *Scarborough* is the appropriate case to use when the statute at issue has an express jurisdictional hook, as the statute under review in *Scarborough* had such language and the law examined in *Lopez* did not. Courts following *Scarborough* in other contexts have [stated](#) that a statute would necessarily be read with the Commerce Clause in mind and resultingly construed to fall within its constitutional boundaries.

At the same time, some judges in concurring and dissenting opinions have [questioned](#) the vitality of *Scarborough*. One question arises out of the temporal separation between when the firearm may have crossed state lines and when the firearm was possessed. On this score, a judge raised the concern that *Scarborough* would [enable](#) Congress to criminalize firearm possession if the “firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce.” As an example, a circuit [upheld](#) a § 922(g)(1) prosecution where the firearm had “crossed into [the state] after its manufacture at some indeterminate moment in time—possibly years before it was discovered in [the defendant’s] possession.” Some have suggested that *Scarborough* may [disturb](#) the federal-state balance by permitting Congress to assume state police powers: As one judge [put it](#), under *Scarborough*’s logic, Congress could “enact a federal law requiring students in private schools to read their homework assignments, so long as the government establishes that the textbooks were published in another state.” In addition, some Justices have [argued](#) that *Scarborough* [turned on](#) statutory interpretation

and thus should not govern a constitutional Commerce Clause analysis. Still other judges have reasoned that to use *Scarborough* is to render the *Lopez* framework “superfluous” and to reduce the constitutional inquiry to a simple check for a jurisdictional hook.

For courts that analyze § 922(g)(1) under *Lopez*, the statute may fall within the case’s first category on the theory that Congress sought to keep the channels of interstate commerce “clear of firearms” possessed by felons. Critics have resisted this proposition for at least three reasons. First, they argue that *Lopez* rejected the argument that a federal statute prohibiting firearm possession in a school zone could be justified under the first category, finding the statute “is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce.” Judges upholding § 922(g)(1) have found the first category to be “not relevant” in its constitutional analysis. Second, Justice Thomas has expressed concern with the potential temporal gap between when the firearm traversed a channel of interstate commerce and when the defendant has possessed that firearm; as that gap grows, the interstate character of the regulation and the justification for federal involvement lessen. Third, a circuit court has observed that a federal statute prohibiting felons from possessing body armor “in” commerce did not, under *Lopez*, regulate a channel of interstate commerce because the statute “is not directed at the movement of body armor through the channels” and instead “prohibits the stationary and entirely intrastate act of possession of body armor.” Some judges have found this analysis to be persuasive in the context of § 922(g)(1).

With § 922(g)(1) expressly prohibiting felons from possessing a firearm “in” commerce, some courts have posited that the second category of *Lopez*—authorizing Congress to regulate goods or things in interstate commerce—is the applicable source of constitutional authority for the statute. Others disagree, pressing arguments related to the intrastate character of firearm possession, costs to federalism, and the specialized meaning of an “instrumentality” of interstate commerce. First, some argue that the firearm’s existence “in” interstate commerce could occur many years prior to the firearm possession, yet the harm addressed by § 922(g)(1) is possession of the firearm by a felon and therefore § 922(g)(1) at bottom criminalizes an intrastate act—an argument made by Justice Thomas with respect to § 922(g)(1) and judges in other federal criminal contexts. Second, according to an expert on firearm manufacturing and distribution, 95% of firearms cross state lines; put differently, “few” firearms stay within a state. These individuals argue that the “in” interstate commerce requirement—if read only to ensure that a firearm has crossed state lines at some point—would not meaningfully limit the scope of congressional power under the Commerce Clause, at the expense of state rights. Third, § 922(g)(1) may not involve an instrumentality as that term is understood by some courts. In a case on the constitutionality of a federal carjacking offense, a circuit court held that Congress can regulate intrastate instrumentalities of interstate commerce where the instrumentalities have the capability of “transporting goods and people across state lines,” but a firearm, unlike a vehicle, train, or plane, does not have an “inherently mobile” character. In addition, according to Justice Thomas, a regulation of an instrumentality of interstate commerce requires proof that the possession poses a “risk to interstate buying, selling, shipping, or transportation”; § 922(g)(1) does not require this showing. In the body armor case, the circuit court determined that the second *Lopez* category only permits Congress to regulate activities that “threaten” instrumentalities of commerce and “things actually being moved in interstate commerce, not all people and things that have ever moved across state lines”—reasoning that concurring judges favorably cited in a § 922(g)(1) case.

With respect to whether § 922(g)(1) fits the *Lopez* third category, on one hand, *Lopez* held that “[t]he possession of a gun in a local school zone is in no sense an economic activity,” such as purchasing, selling, transporting, producing, or consuming a thing. The same logic may apply to firearm possession generally. It may especially apply to the defendant in *Squire*, who possessed a firearm in his home, the defense of which lies at the core of the right to keep and bear arms. A finding that possession is not economic may end the constitutional inquiry; a circuit court argued that aggregation of economic effects is appropriate only when the underlying activity is economic. The *Lopez* Court also cautioned against

stacking inferences to find that an activity substantially affects interstate commerce, and here possession may be seen as a step removed from production, an economic exchange, or other commercial conduct.

On the other hand, courts have [found](#) that “[p]rohibiting possession by felons limits the market for firearms, and discourages shipping, transporting, and receiving firearms in or from interstate commerce,” adding that firearms possession facilitates interstate firearms trafficking, “a clearly commercial activity.” Likewise, a circuit court [upheld](#) the constitutionality of [a federal law](#) prohibiting juveniles from possessing a handgun on similar grounds, [writing](#) that the ban “is an essential part of a regulatory scheme . . . that directly and substantially regulates interstate handgun markets by excluding juveniles from them.” Further, the Supreme Court has emphasized that, under the third category, Congress need only have a [rational basis](#) to believe the regulated activity will substantially affect interstate commerce—a “[modest](#)” bar for congressional action. It remains to be seen how the Fifth Circuit will respond to these and other prospective arguments.

The Prohibition on the Possession of Machineguns

Federal law, at [18 U.S.C. § 922\(o\)](#), prohibits the possession of machineguns. Unlike § 922(g)(1), § 922(o) [lacks](#) a jurisdictional hook. Every circuit to have confronted the issue has [found](#) that § 922(o) is an appropriate exercise of the Commerce Clause. Several Fifth Circuit judges in dissent [have argued](#), however, that § 922(o) exceeds this source of authority. They have stated that § 922(o) is a “[clone](#)” of the statute invalidated in *Lopez* and that § 922(o) should suffer the same constitutional fate. In contending that § 922(o) falls short under *Lopez*, these judges have added that § 922(o) extends to [intrastate possession](#) of machineguns and thereby “[intrudes](#) upon the traditional police powers of the states.” Private possession is [not economic](#) and “does [not involve](#) a market activity,” they have argued. Finally, they lamented the absence of a [limiting principle](#) to the market regulation approach: Criminalizing possession to impact “the demand side of the market can be applied to the possession of anything.”

Considerations for Congress

The Fifth Circuit’s *Squire* case could impact the constitutionality of many federal firearms laws, and its reasoning could apply to other federal statutes criminalizing possession and other federal statutes grounded in the Commerce Clause power. Congress may, in anticipation of or as a result of *Squire*, add or strengthen the jurisdictional hook in federal firearms statutes. Congress also may seek to await two pending consolidated Supreme Court [cases](#) on whether certain assault-weapon bans comply with the [Second Amendment](#); while these cases involve another constitutional provision, the Court may offer insight into its impressions of the constitutional basis for federal firearms regulations.

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