

REGULATING LITIGATION UNDER THE PROTECTION OF
LAWFUL COMMERCE IN ARMS ACT: ECONOMIC ACTIVITY
OR REGULATORY NULLITY?

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I. INTRODUCTION

The Protection of Lawful Commerce in Arms Act (PLCAA) limits the types of civil actions that can be brought against firearm manufacturers.¹ In particular, the PLCAA bars plaintiffs from suing firearm manufacturers for the negligent or criminal misuse of guns by third parties.² It also requires pending lawsuits involving such misuse to be dismissed.³ In enacting the PLCAA, Congress relied primarily on its commerce powers.⁴ This Article examines whether such reliance is warranted in light of the Supreme Court's

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¹ 15 U.S.C.A. §§ 7901–03 (West Supp. 2006). The PLCAA does not draw a legal distinction between “manufacturers” and “sellers” of firearms. See *id.* § 7903(5)(A) (describing the statute’s applicability to manufacturers *or* sellers). Therefore, unless otherwise indicated, I use the term “manufacturers” as shorthand for both.

² See *id.* § 7901(b)(1) (noting that the purpose of the PLCAA is “[t]o prohibit causes of action against manufacturers . . . of firearms . . . for the harm solely caused by the criminal or unlawful misuse of firearm products . . . by others when the product functioned as designed and intended”).

³ *Id.* § 7902(b).

⁴ See H.R. REP. NO. 108-59, at 32 (2003) (reporting on an earlier version of the Act, which contained identical language, “the [House] Committee [on the Judiciary found] the authority for this legislation in article I, section 8, clause 3 of the Constitution”).

modern Commerce Clause jurisprudence.

The Supreme Court's modern Commerce Clause jurisprudence begins with *United States v. Lopez*⁵ and *United States v. Morrison*.⁶ In this pair of cases, the Court invalidated two federal statutes on grounds that they exceeded Congress's regulatory authority under the Commerce Clause.⁷ In making this determination, the Court found the distinction between the regulation of economic and non-economic activity to be of central importance.⁸ Since the Court found neither gender-motivated crimes of violence (i.e., rape) nor gun possession in a school zone to constitute an economic activity, it concluded that Congress could not draw upon its Commerce Clause powers to effect their regulation.⁹

Despite the Court's heavy focus on economic activities in *Lopez* and *Morrison*, it has done remarkably little in defining what, precisely, economic activities are.¹⁰ In fact, the Court's repeated failure to define the term "economic activity" has led more than one commentator to lament: "the standards articulated in *Lopez* and *Morrison* . . . are unworkable. . . [and] will inevitably lead to the kind of ad hoc review that characterized obscenity law in the 1960s and 1970s."¹¹ However, because the characterization of something

⁵ 514 U.S. 549 (1995).

⁶ 529 U.S. 598 (2000).

⁷ *Morrison*, 529 U.S. at 601–02 (invalidating section 13981 of the Violence Against Women Act); *Lopez*, 514 U.S. at 551 (invalidating the Gun-Free School Zones Act).

⁸ *Morrison*, 529 U.S. at 610 ("[A] fair reading of *Lopez* shows that the *noneconomic*, criminal nature of the conduct at issue was central to our decision in that case." (emphasis added)); *id.* ("[T]he pattern of analysis is clear. 'Where *economic activity* substantially affects interstate commerce, legislation regulating that activity will be sustained.'" (emphasis added) (citation omitted) (quoting *Lopez*, 514 U.S. at 560)); *see also* *Gonzales v. Raich*, 545 U.S. 1, 68–69 (2005) (Thomas, J., dissenting) ("This Court has never held that Congress can regulate *noneconomic activity* that substantially affects interstate commerce." (emphasis added)); Mitchell N. Berman, Guillen and Gullibility: *Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1500 & n.62 (2004) (noting that the Court in *Lopez* and *Morrison* "made clear that the nature of the activity being regulated as *either economic or non-economic* was of 'central' importance" to the outcome of the case (emphasis added)); Allan Ides, *Economic Activity as a Proxy for Federalism: Intuition and Reason in United States v. Morrison*, 18 CONST. COMMENT. 563, 573 (2001) ("The Court in *Lopez* and *Morrison* insisted that the economic nature of an activity was central in determining whether Congress could regulate that activity.").

⁹ *Morrison*, 529 U.S. at 613; *Lopez*, 514 U.S. at 567.

¹⁰ *E.g.*, Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After Morrison*, 25 OKLA. CITY U. L. REV. 843, 865 (2000); Ides, *supra* note 8, at 573–74.

¹¹ Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605, 631 (2001); *see also* Ides, *supra* note 8, at 574 (critiquing the Court's standard for defining economic activity as so an ad hoc as to amount to "something along the lines of 'I know it when I see it.'"). Compare the Court's failure to define the term "economic activity" with the amorphous standard that it

as an economic or non-economic activity is of central importance to the Court's modern Commerce Clause analysis,¹² this Article will attempt to construct a coherent framework through which to define this significant, albeit elusive, term.

Part II of this Article provides an overview of the PLCAA, summarizing the Act's key provisions and providing examples of the types of civil actions that it is intended to bar. Part III summarizes the Supreme Court's Commerce Clause jurisprudence, with special emphasis on the modern cases: *Lopez*, *Morrison*, and more recently, *Gonzales v. Raich*.¹³ Part IV of this Article addresses the key issue by drawing upon precedents, works of scholars, as well as principles from related bodies of law. Part IV examines the various ways that the term "economic activity" has been defined and assesses whether civil litigation of the type regulated by the PLCAA falls within the scope of any of the proposed definitions.¹⁴ Part IV ultimately concludes that PLCAA-regulated litigation does not constitute an economic activity. Congress' enactment of the Act, therefore, fell beyond its Commerce Clause powers.

II. THE STATUTE: PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

The PLCAA was initially introduced in the 107th Congress as House Resolution (H.R.) 2037.¹⁵ Before Congress could take formal action on the bill, a series of sniper attacks besieged the Washington, DC area.¹⁶ In the aftermath of those attacks, Congress abandoned H.R. 2037, and it died in the House Judiciary

set forth to adjudge obscenity in *Jacobellis v. Ohio*. 378 U.S. 184, 191 (1964). In *Jacobellis*, Justice Stevens remarked:

I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [of being obscene]; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it*, and the motion picture involved in this case is not that.

Id. at 197 (Stewart, J., concurring) (emphasis added).

¹² *E.g.*, *Morrison*, 529 U.S. at 610.

¹³ 545 U.S. 1 (2005).

¹⁴ This Article addresses only the narrow question of whether *PLCAA-regulated litigation* constitutes an economic activity. The answer to this question, however, has broader implications for the characterization of civil litigation more generally.

¹⁵ H.R. 2037, 107th Cong. (2001) (introduced by Rep. Cliff Stearns); *see also* S. 2268, 107th Cong. (2002) (introduced by Sen. Zell Miller) (companion bill to H.R. 2037).

¹⁶ *See* H.R. REP. NO. 108-59, at 98 (2003) (dissenting views); *accord* Katharine Q. Seelye, *The Gun Lobby: Killings May Not Affect Gun Control Measures*, N.Y. TIMES, Oct. 20, 2002, at 33. *See* Lizette Alvarez & Sarah Kershaw, *Living in a Sniper's Shadow with Defiance and Fatalism*, N.Y. TIMES, Oct. 13, 2002, at A1 and Kate Zernike, *Accommodating Fears in a Sniper's Killing Field*, N.Y. TIMES, Oct. 12, 2002, at A1, for further descriptions of the impact of the sniper attacks on individuals and communities in the Washington, DC area.

Committee.¹⁷ The spirit underlying the PLCAA, however, remained far from forgotten, and Senator Larry E. Craig revitalized the Act in the 109th Congress through Senate Bill 397.¹⁸ This time, the PLCAA passed the Senate by a vote of 65-31 and the House by a vote of 283-144.¹⁹ President Bush signed the PLCAA into law on October 26, 2005.²⁰

The PLCAA is designed to limit the types of civil actions that can be brought against manufacturers of firearms.²¹ Section 7902 of the Act provides:

(a) In general

A qualified civil liability action may not be brought in any Federal or State court.

(b) Dismissal of pending actions

A qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.²²

The phrase “qualified civil liability action” is defined broadly by the Act. It includes:

[Any] civil action or proceeding . . . brought by any person against a manufacturer or seller of a qualified product [i.e., firearm, ammunition, “or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce”²³] for damages, punitive damages, injunctive or declaratory relief, abatement,

¹⁷ See H.R. REP. NO. 108-59, at 98 (dissenting views).

¹⁸ S. 397, 109th Cong. (2005) (introduced by Sen. Larry E. Craig); see also H.R. 800, 109th Cong. (2005) (introduced by Rep. Cliff Stearns) (companion bill to S. 397).

¹⁹ 151 CONG. REC. H8990, 9010 (daily ed. Oct. 20, 2005); 151 CONG. REC. S9374, 9396 (daily ed. July 29, 2005).

²⁰ Acts Approved by the President, 41 WEEKLY COMP. PRES. DOC. 1622 (Oct. 31, 2005); Press Release, White House Office of the Press Secretary, Statement on S. 397, “The Protection of Lawful Commerce in Arms Act” (Oct. 26, 2005), 2005 WL 2769658.

²¹ 15 U.S.C.A. § 7901(b)(1) (West Supp. 2006).

²² *Id.* § 7902 (emphasis added). Section 7903 exempts the following categories of civil claims from section 7902’s coverage: claims brought against persons who transfer a firearm with the knowledge that it will be used to commit a crime of violence or a drug trafficking crime by a party directly harmed by the transfer; claims brought against sellers of firearms “for negligent entrustment or negligence per se”; claims “in which a manufacturer or seller of [firearms] knowingly violate[s] a State or Federal statute applicable to the sale or marketing of [firearms], and the violation was a proximate cause of the harm for which relief is sought”; claims “for breach of contract or warranty in connection with the purchase of [a firearm]”; claims “for death, physical injuries or property damage resulting directly from a defect in design or manufacture of [a firearm] when used as intended or in a reasonably foreseeable manner”; or claims “commenced by the Attorney General to enforce” firearms provisions under the federal criminal code or the Internal Revenue Code. *Id.* § 7903(5)(A).

²³ *Id.* § 7903(4) (defining “qualified product”).

restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.²⁴

In practice, the PLCAA is aimed at barring two types of civil actions. First, the Act bars actions brought by *individual* plaintiffs for injuries caused to them by the negligent or criminal misuse of firearms by third parties.²⁵ *Ileto v. Glock Inc.* represents such an action.²⁶ In *Ileto*, Buford Furrow, a convicted felon, illegally purchased an arsenal of firearms from the secondary market and used the firearms to shoot six people, injuring five and killing one.²⁷ Victims and family members sued the firearm manufacturer, Glock, under theories of negligent marketing and public nuisance.²⁸ Glock moved for dismissal, claiming that it could not be held liable for the criminal acts of Furrow, for two reasons.²⁹ First, as a manufacturer, Glock owed no duty of care to the third-party victims of Furrow's firearm misuse;³⁰ second, Furrow's criminal firearm misuse constituted a superseding cause of the victims' injuries for which Glock could not be held responsible.³¹ The Ninth Circuit rejected both of Glock's arguments and allowed plaintiffs' action to proceed.³² The enactment of the PLCAA throws the precedential value of *Ileto* into considerable doubt.

The PLCAA also bars civil actions brought by *municipality* plaintiffs for the reimbursement of costs incurred as a result of responding to gun-related violence within their borders.³³ For example, in *White v. Smith & Wesson*, the City of Cleveland filed an action against more than thirteen firearm manufacturers under theories of negligent marketing, products liability, and public

²⁴ *Id.* § 7903(5)(A) (defining "qualified civil liability action").

²⁵ See H.R. REP. NO. 108-59, at 5-9 (2003).

²⁶ 349 F.3d 1191, 1196 (9th Cir. 2003); see also *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1252 (5th Cir. 1985); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1201 (7th Cir. 1984); *Keene v. Sturm, Ruger & Co.*, 121 F. Supp. 2d 1063, 1063 (E.D. Tex. 2000); *Patterson v. Gesellschaft*, 608 F. Supp. 1206, 1208 (N.D. Tex. 1985); *Merrill v. Navegar, Inc.*, 28 P.3d 116, 119 (Cal. 2001) (abrogated in part by the repeal of CAL. CIV. CODE § 1714.4 (West 1998) (repealed 2002)).

²⁷ *Ileto*, 349 F.3d at 1195, 1197.

²⁸ *Id.* at 1196.

²⁹ *Ileto v. Glock, Inc.*, 194 F. Supp. 2d 1040, 1050 (C.D. Cal. 2002), *rev'd*, 349 F.3d 1191 (9th Cir. 2003).

³⁰ *Id.*

³¹ *Id.* at 1055.

³² *Ileto*, 349 F.3d at 1208.

³³ See H.R. REP. NO. 108-59, at 12 (2003).

nuisance.³⁴ The City sought to recover the extra costs it had incurred in responding to firearm incidents, such as the costs of “enhanced police protection, emergency services, police pension benefits, court and jail costs, and medical care.”³⁵ Notwithstanding the manufacturers’ argument that the City’s lawsuit violated principles of public policy and standing,³⁶ the District Court for the Northern District of Ohio allowed the case to go forward.³⁷ Relatedly, in *Penelas v. Arms Technology, Inc.*, Miami-Dade County sued twenty-six firearm manufacturers for injunctive relief.³⁸ There, the County sought an injunction to compel the defendant manufacturers to: (i) implement “life-saving features” into their firearm devices; and (ii) modify their methods of distribution and marketing.³⁹ The trial court in *Penelas* dismissed the County’s action and the Florida District Court of Appeal affirmed.⁴⁰ According to the appellate court, the County’s action constituted nothing more than “an attempt to regulate firearms . . . through the medium of the judiciary ” and as a result, violated the separation of powers principle of the state and federal constitutions.⁴¹

Although a number of courts have permitted municipality actions seeking the reimbursement of costs to move forward, all courts, to date, have refused to hear similar claims for injunctive relief.⁴² The PLCAA draws no distinction between these two categories of cases but effectively writes them both out of existence.⁴³

III. CONSTITUTIONAL MANDATE: THE COMMERCE CLAUSE

There are three paradigmatic principles of constitutional law that are relevant to the analysis presented in this Article. First, the federal government is a government of limited, enumerated

³⁴ 97 F. Supp. 2d 816, 819 (N.D. Ohio 2000).

³⁵ *Id.* at 824.

³⁶ *Id.* at 820 (public policy); *id.* at 823 (standing).

³⁷ *Id.* at 830.

³⁸ 778 So. 2d 1042, 1043–44 (Fla. Dist. Ct. App. 2001).

³⁹ *Id.* at 1044.

⁴⁰ *Id.*

⁴¹ *Id.* at 1045.

⁴² For a collection of both types of municipality cases, see Andrew S. Cabana, Comment, *Missing the Target: Municipal Litigation Against Handgun Manufacturers: Abuse of the Civil Tort System*, 9 GEO. MASON L. REV. 1127, 1135–44 (2001).

⁴³ 15 U.S.C.A. § 7903(5)(A) (West Supp. 2006) (barring civil actions for “damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief”).

powers.⁴⁴ Second, powers not given to the federal government are reserved to the states.⁴⁵ Third, “the ordinary administration of criminal and civil justice” is a power left to the states, to be exercised by the states with minimal federal intervention.⁴⁶ These three principles, taken together, raise a substantial question about Congress’s authority to enact the PLCAA: if the federal government is indeed a government of limited, enumerated powers, from where does it derive its authority to regulate civil litigation—an activity that, by its very nature, is an “ordinary administration of . . . civil justice”?⁴⁷ The answer, not surprisingly, is found in the Commerce Clause of Article I.⁴⁸

⁴⁴ *E.g.*, THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) (“The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”); Choper & Yoo, *supra* note 10, at 846 (“[T]he national government was not intended to have general regulatory authority . . . but rather to be one of limited, enumerated—albeit significant—powers.”).

⁴⁵ U.S. CONST. amend. X; Choper & Yoo, *supra* note 10, at 846 (“As the Tenth Amendment makes clear, the Framers understood that all . . . powers, which were left unenumerated in the text [of the Constitution], would be reserved to the States.”).

⁴⁶ *See* THE FEDERALIST NO. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 30–31 (1998) (“In defending the Constitution, the Federalists were often quite explicit in what areas would be off limits to the federal government. In *The Federalist No. 17*, Alexander Hamilton included the ‘administration of private justice between the citizens of the same State.’”); *id.* at 31 (“Hamilton identified ‘the ordinary administration of criminal and civil justice’ as one of the most important powers to be left in the hands of the states.”); *id.* at 29 (noting that in drafting the Constitution, the Framers understood and intended for the states to “retain primary jurisdiction over . . . judicial administration and law enforcement”).

⁴⁷ THE FEDERALIST NO. 17 (Alexander Hamilton), *supra* note 46, at 120.

⁴⁸ *See* H.R. REP. NO. 108-59, at 32 (2003) (stating the constitutional authority for enactment of the PLCAA).

In his article, *Sounds of Sovereignty*, Professor John Yoo noted that, at the time of the founding, the Framers understood the Constitution to grant the national government primarily those powers involving foreign relations and the state governments powers over domestic affairs. Yoo, *supra* note 46, at 29–30. An important caveat to this general division of federal-state power, according to Professor Yoo, was Article I, Section 8’s grant of Commerce Clause powers to Congress. *Id.* at 30.

Indeed, in enacting the PLCAA, Congress sought to link the Act to interstate (and foreign) commerce in two ways. First, Congress limited the types of manufacturers that were covered under the Act: only manufacturers that “shipped or transported [firearms] in interstate or foreign commerce” were immunized from civil suit under the PLCAA. 15 U.S.C.A. § 7903(4). Second, Congress grounded the rationale for enactment of the PLCAA on interstate (and foreign) commerce grounds. *Id.* § 7901(a)(6) (West Supp. 2006). According to Congress’s findings:

The possibility of imposing liability on an entire industry for harm that is solely caused by others . . . invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

Id. (emphasis added).

A. The Commerce Clause in a Historical Context

Article I, Section 8 of the Constitution authorizes Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁴⁹ In *Gibbons v. Ogden*, Chief Justice Marshall glossed the Commerce Clause with a broad interpretation, holding that it conferred upon Congress the power to regulate “commercial intercourse” that “concern[ed] more States than one.”⁵⁰ This regulatory power did not end at the states’ jurisdictional borders but could be exercised therein.⁵¹ According to Marshall, Congress’s power under the Commerce Clause was, essentially, “complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”⁵²

Initially, Marshall’s broad view of the Commerce Clause represented a road not taken. For at the turn of the century, the Court began to strictly limit Congress’s ability to regulate activities of a primarily intrastate nature.⁵³ In *Hammer v. Dagenhart*, the Court invalidated a federal statute that prohibited the transportation of goods produced at factories employing child labor.⁵⁴ In so doing, the Court found a legally significant distinction between “commerce” and “manufacturing,” holding that while Congress had “ample” authority to regulate the former, the latter was a “matter of local regulation” beyond the ambits of federal control.⁵⁵ In *A. L. A. Schechter Poultry Corp. v. United States*⁵⁶ and

⁴⁹ U.S. CONST. art. I, § 8, cl. 3.

⁵⁰ 22 U.S. (9 Wheat.) 1, 189–90, 194 (1824); *see also* *United States v. Lopez*, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring) (noting that Chief Justice Marshall’s holding in *Gibbons* “can be understood now as an early and authoritative recognition that the Commerce Clause grants Congress extensive power and ample discretion to determine its appropriate exercise”). *But 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, 1687 (2002) (noting that those seeking a “restrictive interpretation of Congress’s Commerce Clause power [can] find support in other portions of . . . [the *Gibbons*] opinion, where [Marshall] highlights the fact that the Constitution is a written constitution with limited, enumerated powers” (footnote omitted)).

⁵¹ *Gibbons*, 22 U.S. at 196.

⁵² *Id.*

⁵³ *See* Choper & Yoo, *supra* note 10, at 848.

⁵⁴ 247 U.S. 251, 268, 276–77 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

⁵⁵ *Id.* at 272; *see also* *United States v. E. C. Knight Co.*, 156 U.S. 1, 12 (1895) (noting that “[c]ommerce *succeeds* to manufacture, and is not a part of it” (emphasis added)).

⁵⁶ 295 U.S. 495 (1935).

Carter v. Carter Coal Co.,⁵⁷ the Court invalidated federal regulations that sought to standardize wage and hour requirements for certain groups of intrastate employees on grounds that those regulations had only an “indirect effect” upon interstate commerce.⁵⁸

President Roosevelt’s Court-packing plan and Justice Roberts’s well-timed “switch in time that saved nine” fundamentally altered the Court’s trajectory and led to a vast expansion in the scope of the Commerce Clause.⁵⁹ This expansion was exemplified in cases like *NLRB v. Jones & Laughlin Steel Corp.*⁶⁰ and *United States v. Darby*.⁶¹ In those cases, the Court abandoned the stringent “direct effects” test that it had utilized in prior cases and moved toward a new standard of deference.⁶² Under this new standard, Congress was permitted to invoke its commerce powers to regulate any activity—*interstate or intrastate*—so long as it had a rational basis for believing that the “regulated activity [bore] a ‘close and substantial relation to interstate commerce.’”⁶³ *Wickard v. Filburn* represents the furthest extension of this principle.⁶⁴

In *Wickard*, the Court upheld an application of the Agricultural Adjustment Act (AAA), which imposed a growth quota on wheat farmers.⁶⁵ Plaintiff exceeded his quota and was fined by the

⁵⁷ 298 U.S. 238 (1936).

⁵⁸ *Carter*, 298 U.S. at 307–09 (“That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce may be, if it has not already been, freely granted; [but] the final and decisive inquiry [is] whether . . . that effect is direct . . . or indirect.”); *A. L. A. Schechter Poultry Corp.*, 295 U.S. at 546, 548 (“[T]he distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system.”); see also *United States v. Lopez*, 514 U.S. 549, 554–55 (1995) (describing the Court’s determination in *A. L. A. Schechter Poultry Corp.* that “[a]ctivities that affected interstate commerce directly were within Congress’ power; activities that affected interstate commerce indirectly were beyond Congress’ reach”).

⁵⁹ *Choper & Yoo*, *supra* note 10, at 848–49; *McGimsey*, *supra* note 50, at 1690 (internal quotation marks omitted).

⁶⁰ 301 U.S. 1, 30–32 (1937) (upholding the National Labor Relations Act, which prohibited employers from discharging employees for engaging in union-related activities).

⁶¹ 312 U.S. 100, 115 (1941) (upholding a federal statute that prescribed minimum wage and maximum hour requirements for employees).

⁶² See *Choper & Yoo*, *supra* note 10, at 848–49; *McGimsey*, *supra* note 50, at 1690.

⁶³ *McGimsey*, *supra* note 51, at 1690 (quoting *Jones & Laughlin Steel Corp.*, 301 U.S. at 37); accord *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 276–77, 280 (1981); *Perez v. United States*, 402 U.S. 146, 156–57 (1971); *Katzenbach v. McClung*, 379 U.S. 294, 303–04 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964).

⁶⁴ See 317 U.S. 111 (1942); see also *United States v. Lopez*, 514 U.S. 549, 560 (1995) (“*Wickard* . . . is perhaps the most far reaching example of Commerce Clause authority over intrastate activity . . .”).

⁶⁵ 317 U.S. at 114.

Secretary of Agriculture.⁶⁶ Instead of paying his fine, he challenged the constitutionality of the AAA under the Commerce Clause.⁶⁷ Applying the “substantial effects” test of *Jones & Laughlin* and *Darby*, the Court rejected plaintiff’s challenge.⁶⁸ In so doing, it set forth the aggregation principle, which further enhanced Congress’s commerce powers by enabling it to regulate activities that substantially affected interstate commerce *only when taken in aggregate with other, similar activities*.⁶⁹ As applied to *Wickard*, the Court conceded that plaintiff’s lone violation of the AAA had only negligible effects on interstate commerce.⁷⁰ However, because the violation would have had “substantial effects” had it been viewed in light of other, similar violations, Congress acted within its authority in regulating against the violations as a class.⁷¹

In the five decades after *Wickard*, the Court rarely, if ever, occasioned to strike down a federal act rooted in the Commerce Clause.⁷² This is hardly surprising given the permissive “substantial effects” standard that it had set forth in *Jones & Laughlin* and the aggregation principle that it had announced in *Wickard*. The Court’s seemingly unending deference to Congress, however, was destined to run its course, and it finally did in 1995 with the case of *United States v. Lopez*.⁷³

B. The Modern Commerce Clause

Lopez involved a constitutional challenge to the Gun-Free School Zones Act (GFSZA), which made it a federal crime “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.”⁷⁴ Defendant, a twelfth-grade student at the time, brought a concealed .38 caliber handgun to school and was charged and

⁶⁶ *Id.* at 114–15.

⁶⁷ *Id.* at 118.

⁶⁸ *See id.* at 128–29.

⁶⁹ *See id.* at 127–28.

⁷⁰ *Id.* at 127.

⁷¹ *Id.* at 127–28. According to the *Wickard* Court: “That [plaintiff’s] own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, *taken together with that of many others similarly situated, is far from trivial.*” *Id.* (emphasis added).

⁷² McGimsey, *supra* note 50, at 1701 (“From 1937 until the Court’s 1995 *Lopez* decision, the Court, using a lenient rational-basis standard of review, uniformly upheld congressional statutes against Commerce Clause challenges.”).

⁷³ 514 U.S. 549 (1995).

⁷⁴ *Id.* at 551 (internal quotation marks omitted).

convicted under the Act.⁷⁵ He challenged his conviction, arguing that the Act exceeded Congress's regulatory authority under the Commerce Clause.⁷⁶ The Court agreed and, in a move that surprised many, struck the GFSZA down as an invalid exercise of federal power.⁷⁷ In so doing, the Court set forth the modern framework for adjudging the constitutionality of legislation enacted pursuant to the Commerce Clause.

1. The *Lopez* Framework: Channels, Instrumentalities, Substantial Effects

At the threshold, the *Lopez* Court identified three categories of activities that were subject to Commerce Clause regulation.⁷⁸ First, Congress was authorized to "regulate the use of the channels of interstate commerce."⁷⁹ Regulation of the channels of commerce included the regulation of "highways, waterways, and airways."⁸⁰ It also included the regulation of "persons or goods . . . pass[ing] through interstate commerce."⁸¹ Second, Congress was authorized "to regulate and protect the instrumentalities of interstate commerce"—that is, things used to carry out interstate commerce.⁸² Such instrumentalities include motor vehicles, trains, planes, and even specific forms of communication media.⁸³ Persons and things in interstate commerce could also be regulated under the

⁷⁵ *Id.*

⁷⁶ *Id.* at 552.

⁷⁷ *Id.* at 551.

⁷⁸ *Id.* at 558–59.

⁷⁹ *Id.*

⁸⁰ McGimsey, *supra* note 50, at 1696.

⁸¹ *Id.*; accord *United States v. Rybar*, 103 F.3d 273, 288–89 (3d Cir. 1996) (Alito, J., dissenting) ("[I]t seems clear that the first category of Commerce Clause authority [i.e., channels] concerns Congress's power to regulate, for economic or social purposes, the passage in interstate commerce of either people or goods."); see also *Caminetti v. United States*, 242 U.S. 470, 491–92 (1917) (upholding a federal law that prohibited the interstate transportation of women for immoral purposes, on grounds that "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question"); *Champion v. Ames (Lottery Case)*, 188 U.S. 321, 356–58 (1903) (upholding a federal law that prohibited the interstate shipment of lottery tickets, on grounds that the law was necessary to protect the channels of interstate commerce from the spread of "evil" and "contamination").

⁸² *Lopez*, 514 U.S. at 558.

⁸³ McGimsey, *supra* note 50, at 1692; see also *Houston, E. & W. Tex. Ry. Co. v. United States (Shreveport Case)*, 234 U.S. 342, 351 (1914) (upholding a federal regulation on *intrastate* railroad rates, on grounds that the regulation was necessary to protect "the security of [interstate] traffic, . . . the efficiency of the interstate service, and . . . the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance").

“instrumentalities” prong.⁸⁴ Lastly, Congress was authorized to regulate “activities that substantially affect interstate commerce.”⁸⁵ Prior to *Lopez*, the Court applied the “substantial effects” test generously, preferring, instead, to defer to the judgment of Congress.⁸⁶ *Lopez* represented a sharp break from this tradition.

After summarizing the three categories of activities subject to Commerce Clause regulation, the *Lopez* Court “quickly disposed of” the first two categories, holding that the GFSZA was neither “a regulation of the use of the channels of . . . commerce, nor . . . an attempt to protect an instrumentality of . . . commerce.”⁸⁷ Additionally, the Court found that the GFSZA did not regulate an activity that “substantially affect[ed]” interstate commerce for three reasons.⁸⁸ First, the GFSZA did not regulate an “*economic activity*.”⁸⁹ Second, the GFSZA did not provide a “*jurisdictional element*” connecting the regulated activity to interstate commerce.⁹⁰ Third, the GFSZA did not contain “*legislative findings*” that documented the effects of the regulated activity upon interstate commerce.⁹¹ On those grounds, the Court invalidated the Act.⁹²

⁸⁴ *Lopez*, 514 U.S. at 558; *Rybar*, 103 F.3d at 287 & n.3 (Alito, J., dissenting).

⁸⁵ *Lopez*, 514 U.S. at 558–59. Before *Lopez*, there was some ambiguity as to whether Congress was authorized to regulate intrastate activities that merely “affect”—rather than “substantially affect”—interstate commerce. *Id.* (internal quotation marks omitted). *Lopez* put this question to rest, holding that the proper inquiry is whether a regulated activity “*substantially affects*” interstate commerce. *Id.* (emphasis added) (internal quotation marks omitted).

⁸⁶ McGimsey, *supra* note 50, at 1691. In reviewing the application of the substantial effects test pre-*Lopez*, McGimsey noted:

The substantial-effects prong set a low bar. Under the prong, the Court simply asked whether Congress had a rational basis to conclude that the activity in question, when aggregated with similar activities, substantially affected commerce. Such a forgiving standard hardly seems consistent with the Constitution’s grant of only limited powers to the federal government. With such a deferential definition of what substantially affects interstate commerce, it is not surprising that both Congress and the federal courts have paid little attention to the other two prongs of Congress’s Commerce Clause power.

Id. (footnotes omitted).

⁸⁷ *Lopez*, 514 U.S. at 559.

⁸⁸ *Id.* at 561–63.

⁸⁹ *Id.* at 561 (emphasis added); *id.* (“[The GFSZA] is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”); *id.* at 567 (“The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”).

⁹⁰ *Id.* at 561–62 (emphasis added).

⁹¹ *Id.* at 562–63 (emphasis added). According to the Court, while legislative findings are not mandatory, they can help the Court “evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye.” *Id.* at 563.

⁹² *Id.* at 567–68.

The remainder of this section focuses on the distinction that the *Lopez* Court drew between the regulation of economic and non-economic activities and traces the way that this distinction has developed through subsequent cases like *United States v. Morrison*⁹³ and *Gonzales v. Raich*.⁹⁴

2. The *Lopez* Framework: Economic Versus Non-economic Activity

In their article, *The Scope of the Commerce Clause After Morrison*, Professors Jesse Choper and John Yoo noted that “the *Lopez* . . . Court[s] effort to limit the substantial effects prong of the Commerce Clause power to only commercial (or economic) activity represents a new limitation never before clearly articulated.”⁹⁵ Once this new limitation *had been* articulated, however, it quickly evolved into the centerpiece of the Court’s modern Commerce Clause jurisprudence. The Court in *Lopez* alluded to the importance of this distinction when it struck down the GFSZA upon concluding that “[t]he possession of a gun in a local school zone is *in no sense an economic activity* that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”⁹⁶ Five years later, *Morrison* cemented the economic/non-economic distinction into the Court’s Commerce Clause framework when it observed that “a fair reading of *Lopez* shows that the *noneconomic*, criminal nature of the conduct at issue was *central* to our decision in that case.”⁹⁷

Notwithstanding the centrality of the economic/non-economic distinction, the Court has yet to provide us with a clear, coherent definition of what the term economic activity means.⁹⁸ Justice Breyer, dissenting in *Lopez*, made precisely this point.⁹⁹ He criticized the majority’s economic/non-economic distinction as being unworkable, but failed to propose a definition of his own to

⁹³ 529 U.S. 598 (2000).

⁹⁴ 545 U.S. 1 (2005).

⁹⁵ Choper & Yoo, *supra* note 10, at 865.

⁹⁶ 514 U.S. at 567 (emphasis added).

⁹⁷ *Morrison*, 529 U.S. at 610 (emphasis added); *see also* Berman, *supra* note 8, at 1500 (noting that “the Court [in *Morrison*] made clear that the nature of the activity being regulated as either economic or non-economic was of ‘central’ importance” to the outcome of the case).

⁹⁸ *See, e.g.,* Ides, *supra* note 8, at 573–74 (noting that while “[t]he Court in *Lopez* and *Morrison* insisted that the economic nature of an activity was central in determining whether Congress could regulate that activity. . . . [it did not] provide . . . a working definition of economic (or commercial) activity” in either case).

⁹⁹ 514 U.S. at 627–29 (Breyer, J., dissenting).

ameliorate the problem.¹⁰⁰ Justice Thomas, on the other hand, did propose such a definition.¹⁰¹ In his *Lopez* concurrence, he suggested limiting the scope of the modern Commerce Clause to the regulation of trade and exchange only.¹⁰² This narrow definition of the Commerce Clause, according to Thomas, would comport most closely with an original understanding of the Constitution.¹⁰³

a. *United States v. Morrison*

A majority of the Court came no closer to defining the term economic activity in *United States v. Morrison*, a case decided five years after *Lopez*.¹⁰⁴ In *Morrison*, the Court invalidated section 13981 of the Violence Against Women Act (VAWA), which provided a federal civil remedy for individuals victimized by “crimes of violence motivated by gender.”¹⁰⁵ Analyzing the VAWA under the “substantial effects” prong of the Commerce Clause, the Court concluded: “the proper resolution of the present case is clear. *Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.*”¹⁰⁶ Such activity is, therefore, not subject to federal regulation under the Commerce Clause.¹⁰⁷ While *Morrison* helped drive home the centrality of the economic/non-economic distinction,¹⁰⁸ the opinion, like *Lopez*, did precious little to

¹⁰⁰ See *id.*

¹⁰¹ See *id.* at 585–88 (Thomas, J., concurring).

¹⁰² *Id.* at 585.

¹⁰³ *Id.* at 587–88; see also Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847, 862 (2003) [hereinafter Barnett, *New Evidence*] (arguing that historical evidence strongly supports a narrow interpretation of the Commerce Clause); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 112 (2001) [hereinafter Barnett, *The Original Meaning*] (arguing that “textual and contextual reasons” support a narrow definition of commerce that more closely resembles the “original meaning”). *Contra* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 13, 36 (1999) (arguing that the scope of the original Commerce Clause extended to the regulation of “all market-based activity”).

¹⁰⁴ 529 U.S. 598 (2000).

¹⁰⁵ *Id.* at 602, 605 (internal quotation marks omitted).

¹⁰⁶ *Id.* at 613 (emphasis added).

¹⁰⁷ *Id.*

¹⁰⁸ See, e.g., *id.* at 610 (“[T]he pattern of analysis is clear. ‘Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.’” (citation omitted) (quoting *Lopez*, 514 U.S. at 560)); *id.* at 611 (“*Lopez*’s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.”); *id.* at 613 (“While we need not adopt a categorical rule against aggregating the effects of any

explain what, exactly, the term economic activity means, other than to suggest that such activity should be “of an apparent commercial character.”¹⁰⁹

b. Gonzales v. Raich

After its remarkable silence in *Lopez* and *Morrison*, the Court made its first bona fide attempt to define the term economic activity in *Gonzales v. Raich*.¹¹⁰ In that case, federal agents raided the plaintiff's house and destroyed the cannabis that plaintiff had cultivated for her personal medical use.¹¹¹ While plaintiff's possession and cultivation of marijuana had conformed to state law,¹¹² it had violated the federal Controlled Substance Act (CSA).¹¹³ After the raid, plaintiff initiated an as-applied challenge to the CSA, claiming that enforcement of the Act against her constituted an unauthorized exercise of Commerce Clause powers.¹¹⁴ The Court in *Raich* disagreed and upheld the Act upon concluding that “the activities regulated by the [Act] are *quintessentially economic*.”¹¹⁵ The Court then defined “economics” in accordance with a 1966 version of *Webster's Third New International Dictionary*, as “refer[ring] to ‘the production, distribution, and consumption of commodities.’”¹¹⁶

In dissent, then-Justice O'Connor criticized the majority's definition of “economic activity” as “breathtaking[ly]” broad and proposed an alternative way of conceptualizing the term.¹¹⁷

noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”).

¹⁰⁹ See *id.* at 611 n.4. In *Morrison*, Justice Breyer again critiqued the majority's economic/non-economic distinction as unworkable. *Id.* at 656–58 (Breyer, J., dissenting). Justice Thomas, echoing his concurrence in *Lopez*, argued for a return to an original understanding of the Commerce Clause. See *id.* at 627 (Thomas, J., concurring).

¹¹⁰ 545 U.S. 1 (2005).

¹¹¹ *Id.* at 7.

¹¹² *Id.*; see also Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2006) (codifying Proposition 215).

¹¹³ *Raich*, 545 U.S. at 7 (citing Controlled Substances Act, 21 U.S.C. §§ 801–904 (2000)).

¹¹⁴ *Id.* at 8.

¹¹⁵ *Id.* at 25 (emphasis added); see also *id.* at 26 (“Because the CSA is a statute that directly regulates *economic, commercial activity*, our opinion in *Morrison* casts no doubt on its constitutionality.” (first emphasis added)).

¹¹⁶ *Id.* at 25 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966) [hereinafter WEBSTER'S DICTIONARY]).

¹¹⁷ *Id.* at 49–50 (O'Connor, J., dissenting). According to O'Connor, giving Congress the power to regulate all activities pertaining to the production, distribution, and consumption of commodities “threatens to sweep all of productive human activity into federal regulatory

According to O'Connor, economic activities are "activities . . . of an *apparent commercial character*" or "activities that *arise out of or are connected with a commercial transaction*."¹¹⁸ O'Connor concluded that plaintiff's possession and cultivation of marijuana could not be deemed an activity "of an apparent commercial character": neither the marijuana that plaintiff had possessed nor the supplies that she had used to cultivate the marijuana had ever entered the stream of commerce.¹¹⁹ Nor could plaintiff's possession and cultivation of marijuana be deemed an activity that "ar[ose] out of or [was] connected with a commercial transaction."¹²⁰ Plaintiff did not come into possession of the marijuana through any commercial dealings.¹²¹ To the contrary, she grew the marijuana in her own home, for her personal use, without ever having had to "acquir[e], buy[], sell[], or barter[] a thing of value" in exchange for it.¹²² On those grounds, O'Connor concluded that the plaintiff in *Raich* had engaged in a *non-economic* activity.¹²³ She would consequently have sustained plaintiff's as-applied challenge to the CSA.¹²⁴

Justice Thomas's dissent also took issue with the majority's definition of economic activity for three reasons.¹²⁵ First, like O'Connor, Thomas criticized the majority's definition for being over-inclusive.¹²⁶ According to Thomas, "[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."¹²⁷ Second, Thomas questioned the *source* from which the majority derived its definition.¹²⁸ Particularly, Thomas wondered why the definition of "economic" from the 1966 version of *Webster's Third New International Dictionary* should be superior to, or more authoritative than, definitions found in other dictionaries, such as the 1992 version of *The American Heritage Dictionary of the English Language* or the 1987 version of *The Random House Dictionary of*

reach." *Id.* at 49.

¹¹⁸ *Id.* at 50 (emphasis added) (internal quotation marks omitted) (quoting *United States v. Morrison*, 529 U.S. 598, 611 n.4 (2000) and *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *See id.* at 50–51 (stating that Congress's Commerce Clause authority did not extend "to something as modest as the home cook's herb garden").

¹²⁴ *Id.* at 57.

¹²⁵ *Id.* at 67 (Thomas, J., dissenting).

¹²⁶ *Id.* at 69.

¹²⁷ *Id.*

¹²⁸ *Id.* at 69–70.

the English Language.¹²⁹ Third, and most significantly, Thomas assailed the majority's definition of economic activity for being inconsistent with the original understanding.¹³⁰ Echoing his concurrences in *Lopez* and *Morrison*, Thomas argued that the original Commerce Clause empowered Congress to regulate trade and exchange only—i.e., “the buying and selling of goods and services trafficked across state lines [and] ‘transporting for these purposes.’”¹³¹ In *Raich*, there was no requisite trade or exchange: plaintiff did not buy or sell any of the marijuana that she had cultivated or consumed but had retained it all for her personal use.¹³² Plaintiff also did not attempt to “traffick” in the relevant good (i.e., marijuana) across state lines; to the contrary, she had cultivated the marijuana “entirely in . . . California” and the marijuana had remained intrastate at all times.¹³³ For those reasons, Thomas would have found plaintiff's activity to be of a *non-economic* nature.¹³⁴ As a result, he, like O'Connor, would have sustained plaintiff's constitutional challenge to the CSA.¹³⁵

3. Analyzing the Economic/Non-Economic Distinction in the PLCAA Context

The overarching question underlying this Article is whether Congress's enactment of the PLCAA constituted a valid exercise of its Commerce Clause powers. According to *Lopez*, *Morrison*, and *Raich*, the answer to this question depends largely on whether the PLCAA sought to regulate an economic or non-economic activity. Although a five-Justice majority in *Raich* defined “economic activity” as “the production, distribution, and consumption of commodities,”¹³⁶ it is not entirely clear whether PLCAA-regulated litigation would have to comport with this definition in order to avoid constitutional invalidation. Indeed, there are compelling

¹²⁹ *Id.* at 69 nn.7–8.

¹³⁰ *Id.* at 70.

¹³¹ *Id.* at 58 (quoting *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring)).

¹³² *Id.* at 59.

¹³³ *Id.*

¹³⁴ *Id.* (“[T]he CSA exceeds Congress’ commerce power as applied to [the plaintiff’s] conduct, which is purely intrastate and noncommercial.”).

¹³⁵ *Id.* at 74.

¹³⁶ *Id.* at 25 (majority opinion) (internal quotation marks omitted) (quoting WEBSTER’S DICTIONARY, *supra* note 116, at 720). The five Justices in the *Raich* majority were Justices Stevens (author), Kennedy, Souter, Ginsburg, and Breyer. *Id.* at 3.

reasons to believe that the *Raich* definition of “economic activity” is deeply flawed: the definition was adopted pursuant to only cursory analysis;¹³⁷ it was adopted over forceful dissents that decried the definition’s over-inclusiveness;¹³⁸ additionally, *Raich*’s definition of “economic activity” has the potential to be under-inclusive, *as well as* over-inclusive.¹³⁹

The next section examines four possible definitions of the term economic activity and assesses whether each of the definitions is sufficiently broad to encompass PLCAA-regulated litigation. The first—and arguably most authoritative—definition that we consider is the one that a majority of the Supreme Court adopted in *Raich*. The second and third definitions are drawn from then-Justice O’Connor and Justice Thomas’s *Raich* dissents. Finally, I consider the definition of economic activity that Professor Richard Posner sets forth in his influential book, *Economic Analysis of Law*.¹⁴⁰ At the end of this section, I conclude that PLCAA-regulated litigation does *not* constitute an economic activity and is thus not subject to federal regulation under the modern Commerce Clause.

IV. PLCAA-REGULATED LITIGATION: ECONOMIC OR REGULATORY NULLITY?

A. *The Raich Majority’s Commodity-Based Definition*

The *Raich* majority’s definition of economic activity is the only one that the Court has articulated since *Lopez* first introduced the economic/non-economic distinction into the modern Commerce Clause framework. The inquiry into whether PLCAA-regulated litigation constitutes an economic activity, then, must begin with *Raich*. While a majority of the Court in *Raich* defined economic activity as “the production, distribution, and consumption of *commodities*,”¹⁴¹ it did not elaborate on what “commodities” means. Most modern dictionaries, however, define the term as referring to a good or product, rather than a service or facet of human behavior.

¹³⁷ See *id.* at 49 (O’Connor, J., dissenting) (“The Court uses a dictionary definition of economics to skirt the real problem of drawing a meaningful line between ‘what is national and what is local.’” (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937))).

¹³⁸ See *id.* at 49; *id.* at 68–69 (Thomas, J., dissenting).

¹³⁹ See *infra* Part IV.A.3.ii.

¹⁴⁰ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 3 (6th ed. 2003).

¹⁴¹ See *Raich*, 545 U.S. at 25 (emphasis added) (internal quotation marks omitted) (quoting WEBSTER’S DICTIONARY, *supra* note 116, at 720).

The *Oxford American Dictionary*, for example, defines “commodity” as “a useful thing, an article of trade, a product.”¹⁴² The *Random House Dictionary of the English Language* more explicitly draws the product/service distinction, defining the term “commodity” as “an article of trade or commerce, *esp. a product as distinguished from a service.*”¹⁴³

The *Raich* majority likely understood the term commodities as referring to goods and products, rather than services and human behavior, as well. This is so for several reasons. First, the *Raich* majority used the term “commodities” interchangeably with the terms “product” and “articles of commerce.” Immediately after finding the CSA to be a regulation upon “the production, distribution, and consumption of *commodities*,” the majority upheld the Act, concluding that “[p]rohibiting the intrastate possession or manufacture of *an article of commerce* is a rational (and commonly utilized) means of regulating commerce in that *product*.”¹⁴⁴ Second, in drawing additional support for its proposed definition of economic activity, the *Raich* majority cited to a series of federal statutes.¹⁴⁵ Virtually all of the cited statutes regulated a good or product, while none regulated a service or facet of human behavior.¹⁴⁶ This further supports the inference that the *Raich* majority understood and intended for the term commodities to be used in its product-oriented, rather than service-oriented sense.

¹⁴² OXFORD AMERICAN DICTIONARY 126 (1980).

¹⁴³ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 412 (2d. ed. 1987) (emphasis added); *see also* BLACK’S LAW DICTIONARY 248 (5th ed. 1979) (defining “commodity” as “[g]oods, wares, and merchandise of any kind; . . . articles of trade or commerce[; m]ovable articles of value; things that are bought and sold. This word is a broader term than merchandise, and, in referring to commerce may include almost any article of movable or personal property.”); MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 250 (11th ed. 2003) (defining “commodity” as “a product of agriculture[,] . . . an article of commerce[, or] a mass-produced unspecialized product”); THE NEW OXFORD AMERICAN DICTIONARY 345 (2001) (defining “commodity” as “a raw material or primary agricultural product that can be bought and sold”).

¹⁴⁴ *Raich*, 545 U.S. at 25–26 (emphasis added).

¹⁴⁵ *Id.* at 26 n.36.

¹⁴⁶ *See id.* (citing to federal statutes that regulated biological weapons, nuclear materials, plastic explosives, and contraband cigarettes). *But see* *Katzenbach v. McClung*, 379 U.S. 294, 304–05 (1964) (upholding Title II of the Civil Rights Act of 1964, which regulated racially discriminatory *behavior*); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (upholding the National Labor Relations Act, which regulated unfair labor *practices*).

1. Civil Litigation Is Not a Commodity

If “commodities” is to be understood as a product-oriented term, then PLCAA-regulated litigation would invariably fall beyond the scope of the term’s coverage. Neither the act of litigation, nor the resources utilized in the course of such litigation, is susceptible to being characterized as a good, product, or article of commerce. The act of litigation itself is more akin to a *process* initiated for the purpose of enforcing a right, seeking a remedy, or reversing a wrong.¹⁴⁷ The resources utilized in the course of such litigation are service-based, rather than product-driven, as well. Parties to the litigation pay legal fees, not in exchange for some good or product, but for receipt of beneficial services that their attorneys are expected to provide. Society, through tax dollars, pays the compensation of individuals working in the court system (i.e., judges, juries, clerks, court reporters) with the expectation that those individuals will provide the services through which justice can be achieved. In sum, civil litigation is an activity that targets the exploitation of human services, not the production, distribution, and consumption of goods. As a result, such litigation does not constitute an economic activity pursuant to the standard set forth by the majority in *Raich*.

2. Rejoinders

Two rejoinders can be made to this argument. First, as a threshold matter, we do not have to accept the basic premise that “commodities” is a product-oriented term. It is true that most modern dictionaries define it as such, but who is to say that the *Raich* majority did not intend to imbue this term with a broader meaning? The *Random House Dictionary of the English Language* provides one example of such a meaning: its secondary definition for the term commodity is “something of use, advantage, or value.”¹⁴⁸

¹⁴⁷ See, e.g., Brief of Robert & Luann Whitmer as Amici Curiae Supporting Respondents at 8, *Pierce County v. Guillen*, 537 U.S. 129 (2003) (No. 01-1229), 2002 WL 1964100 [hereinafter Whitmer Brief]. According to the authors of this brief:

The administration of justice has not been an article of commerce since the barons gathered at Runnymede to force King John to renounce the sale of right or justice. There can be no commercial trade or bargaining in civil discovery or the administration of trial. The administration of justice is simply not a commercial or economic activity, whether one adopts a narrow interpretation of the commerce clause, or a broad view.

Id. (citations omitted).

¹⁴⁸ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 143, at 412.

Similarly, *Merriam-Webster's Collegiate Dictionary* defines commodity as “one that is subject to ready exchange or exploitation within a market.”¹⁴⁹ Under those definitions, PLCAA-regulated litigation readily constitutes a commodity falling on the economic side of the economic/non-economic line. Legal services provided by attorneys and public services provided by courts are undoubtedly things of “use, advantage, or value”¹⁵⁰—both to litigants and to the society at large. Furthermore, such services possess monetary values and can be bargained for, exchanged, and exploited in the relevant markets.¹⁵¹ Although viable, this rejoinder is weak in light of textual and intentionalist evidence to the contrary. More likely, the *Raich* majority *did* intend to use the term commodities for its narrower meaning. This intention is evidenced by: (i) the *Raich* majority’s virtually exclusive reliance on, and citation to, *product*-driven legislation in support of its definition of economic activity¹⁵² and (ii) its interchangeable use of the term “commodities” with terms that were clearly of a product-oriented nature (i.e., “product” and “article of commerce”).¹⁵³

The second rejoinder is that the PLCAA *does* seek to regulate “the production, distribution, and consumption of *commodities*”¹⁵⁴ as that term is used in its strict sense. After all, the PLCAA does not seek to regulate civil litigation in isolation; it seeks to regulate civil litigation *in the context of firearms and ammunitions*, and firearms and ammunitions are clearly goods, products, and articles of commerce—even under the most restrictive definition of those terms.¹⁵⁵ On a doctrinal level, however, this rejoinder must fail.

¹⁴⁹ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 143, at 250.

¹⁵⁰ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 143, at 412.

¹⁵¹ See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 143, at 250.

¹⁵² See *Gonzales v. Raich*, 545 U.S. 1, 26 n.36 (2005).

¹⁵³ See *id.* at 26.

¹⁵⁴ *Id.* at 25 (internal quotation marks omitted) (quoting WEBSTER'S DICTIONARY, *supra* note 116, at 720).

¹⁵⁵ Arguably, a unanimous Court accepted a version of this rejoinder in *Pierce County v. Guillen*, 537 U.S. 129 (2003). There, the Court, per Justice Thomas, upheld a federal statutory provision that immunized certain categories of municipality documents from civil discovery, without touching on the issue of whether civil discovery itself constituted an economic activity. See *id.* at 146–48. Rather, the Court found the documents at issue to be related to highway safety and concluded that since Congress had the unquestioned authority to regulate highway safety under the channels/instrumentalities prongs of the Commerce Clause, it had the corresponding authority to regulate documents relating to highway safety as well. *Id.* at 147. In so holding, the *Guillen* Court overlooked the fact that what the statute actually sought to regulate was not highway safety, but rather, use of the civil discovery process. Multiple scholars have offered critiques of *Guillen* on this ground. *E.g.*, Vikram David Amar, *The New “New Federalism”: The Supreme Court in Hibbs (and Guillen)*, 6

For, while the PLCAA *implicates* firearms and ammunitions, it does not seek to *limit* their sale, manufacture, or use. The Act, instead, seeks to limit certain categories of litigation pertaining to such firearms and ammunitions, and it does so by providing for the dismissal of currently pending suits and by foreclosing preexisting channels of redress.¹⁵⁶ In short, a fair reading of the PLCAA shows the Act to be squarely concerned with regulation of the *litigation process* itself, rather than any specific goods or articles that are mere byproducts of that process.

3. The Viability of the *Raich* Definition: A Normative Question

The previous section described the *Raich* majority's definition of economic activity and assessed whether PLCAA-regulated litigation fell within the scope of its terms. This section addresses a more normative question: Whether the definition set forth by the *Raich* majority is viable and should serve as the basis for distinguishing between economic and non-economic activity in future Commerce Clause cases. This section concludes that it should not.

a. *Over-inclusiveness*

The *Raich* majority's definition of economic activity should not be applied in future Commerce Clause cases because it is over-inclusive. If taken to heart, it has the potential to exceed even the generous boundaries prescribed by Chief Justice Marshall in his opinion in *Gibbons v. Ogden*.¹⁵⁷ In *Gibbons*, Marshall held that while Congress had the authority to regulate commerce that "concerns more States than one," it did not have the authority to regulate activities that were "completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government."¹⁵⁸ The *Raich* definition would enable Congress

GREEN BAG 349, 356 (2003) ("Justice Thomas' opinion [in *Guillen*] does not ask whether the discovery of information or the introduction into evidence of information by litigants—the very activity regulated by the federal statute—is economic activity or not."); Berman, *supra* note 8, at 1502 (arguing that the main problem with *Guillen* is the Court's failure to acknowledge that the statute at issue was "*not* a regulation of either the channels of interstate commerce . . . or the instrumentalities of interstate commerce" but was "a regulation of state court litigation").

¹⁵⁶ See 15 U.S.C.A. § 7902 (West Supp. 2006).

¹⁵⁷ 22 U.S. (9 Wheat.) 1 (1824).

¹⁵⁸ See *id.* at 194–95.

to regulate precisely the types of activities that Marshall had intended to put beyond Congress's reach. Justice Thomas forcefully made this argument in his *Raich* dissent.¹⁵⁹ He pointed out that the majority's definition of economic activity—as “the production, distribution, and consumption of commodities”¹⁶⁰—essentially empowered Congress to regulate activities of a wholly intrastate nature.¹⁶¹ Such activities, according to Thomas, included “quilting bees, clothes drives, and potluck suppers throughout the 50 States.”¹⁶²

The *Raich* definition is over-inclusive for another reason: it potentially sweeps in activities that the Court had previously held to be non-economic. *Lopez* represents the most troubling manifestation of this problem.¹⁶³ In *Lopez*, the Court invalidated the GFSZA after concluding that possession of a gun in a school zone did not constitute an economic activity.¹⁶⁴ It is not clear whether the result in *Lopez* remains viable after *Raich*. While gun possession in a school zone certainly could not constitute a “production” or “distribution” of the relevant commodity (guns), it can certainly be deemed a “consumption” of that commodity. *The Random House Dictionary of the English Language* defines “consumption” as “the act of consuming, as by use, decay, or destruction.”¹⁶⁵ Gun possession is arguably a “use” of a gun, even in

¹⁵⁹ See *Raich*, 545 U.S. at 66 (Thomas, J., dissenting).

¹⁶⁰ *Id.* at 25 (majority opinion) (internal quotation marks omitted) (quoting WEBSTER'S DICTIONARY, *supra* note 116, at 720).

¹⁶¹ See *id.* at 71 (Thomas, J., dissenting).

¹⁶² *Id.* at 69. Upon closer examination, Thomas's cautionary words appear to be warranted, as this example of quilting bees will show. Quilting bees are traditionally described as:

[A] group of people who get together to sew and quilt . . . Often, a bee is thought of as a group of women gathered around a large quilting frame, all of them helping work on the quilting of a single quilt. . . . Quilting bees provide their members the opportunity to talk about their ideas and their quilts with other quilters. They also benefit broader communities since many bees regularly take on projects to benefit either a larger quilting guild or a chosen community group, such as a hospital or a nursing home.

Austin Area Quilt Guild, Quilting Bees, <http://www.aaqg.org/html/quiltingbees.php> (last visited Oct. 14, 2006). Applying the definition set forth by the *Raich* majority, quilting bee activities would invariably constitute economic activities, falling within the regulatory scope of the Commerce Clause. Quilting bees engage in the “production” of commodities (i.e., quilts) through their collective sewing effort. They engage in the “distribution” of commodities when they donate their quilts to “larger quilting guild[s]” or “chosen community group[s].” *Id.* The guilds or community groups, in turn, engage in the “consumption” of such commodities through their beneficial use.

¹⁶³ 514 U.S. 549 (1995).

¹⁶⁴ *Id.* at 561.

¹⁶⁵ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 143, at 437 (emphasis added).

the absence of brandishment or discharge. For example, the defendant in *Lopez* could have “used” the gun for self-protection, intimidation, or exertion of authority within a gang. The majority’s definition of economic activity in *Raich*, then, is over-inclusive not only because it facilitates over-regulation,¹⁶⁶ but also because it calls into question—and potentially renders inconsistent—established Supreme Court precedent.

b. Under-inclusiveness

Additionally, and somewhat paradoxically, the *Raich* majority’s definition of economic activity is also *under*-inclusive, calling into question prior cases in which the Court had sustained exercises of federal authority over intrastate activities that had little to do with the regulation of commodities.¹⁶⁷ *Raich*, for example, casts doubt upon Congress’s ability to regulate unfair labor practices under the National Labor Relations Act (NLRA), which the Court upheld in *Jones & Laughlin*.¹⁶⁸ After all, the NLRA was not aimed at regulating commodities but at protecting collective bargaining rights.¹⁶⁹ *Raich* could also call into question Congress’s ability to legislate against racial discrimination under Title II of the Civil Rights Act, which the Court upheld in *Heart of Atlanta Motel*¹⁷⁰ and *Katzenbach v. McClung*.¹⁷¹ Like the NLRA, Title II was not designed to prescribe limitations on goods or products (commodities), but rather to root out particular genres of discriminatory behavior.¹⁷²

This section highlighted some problems with the *Raich* majority’s

¹⁶⁶ See *Raich*, 545 U.S. at 57–58 (Thomas, J., dissenting) (“If Congress can regulate [wholly intrastate activities] under the Commerce Clause, then it can regulate virtually anything.”); *id.* at 49 (O’Connor, J., dissenting) (“[T]he Court’s definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.”).

¹⁶⁷ While the *Raich* dissenters criticized the majority’s definition of economic activity for being over-inclusive, they appeared to be less perturbed by the definition’s potential for *under*-inclusiveness. See *Raich*, 545 U.S. at 49 (O’Connor, J., dissenting); *id.* at 69 (Thomas, J., dissenting).

¹⁶⁸ 301 U.S. 1, 30 (1937).

¹⁶⁹ See *id.* at 33.

¹⁷⁰ 379 U.S. 241, 242–43 (1964).

¹⁷¹ 379 U.S. 294, 295 (1964).

¹⁷² See *id.* at 298–99; *Heart of Atlanta Motel*, 379 U.S. at 245; see also *United States v. Lopez*, 514 U.S. 549, 628 (1995) (Breyer, J., dissenting) (noting that the economic/non-economic distinction promulgated by the majority “could not be reconciled with . . . civil rights cases [like *McClung*]” because in “those cases the specific transaction [that Congress sought to regulate] . . . was not itself ‘commercial’”).

definition of economic activity and discussed how these problems could undermine the definition's potential for future use. The next section considers alternative ways of defining the term economic activity and assesses the viability of the proposed definitions.

B. Definition Two: O'Connor's Commercial-Based Definition(s)

In her dissent in *Gonzales v. Raich*, then-Justice O'Connor proposed two alternative ways of defining the term economic activity.¹⁷³ According to O'Connor, economic activity should be limited to commercial activities only—that is: (i) “activities . . . of an *apparent commercial character*”; or (ii) “activities that *arise out of or are connected with a commercial transaction*.”¹⁷⁴ O'Connor did not specify what “apparent commercial character” means nor did she elaborate on what it means for an activity to “arise out of or [be] connected with a commercial transaction.”¹⁷⁵ It is possible, though, to attempt to gauge O'Connor's intent by referencing the writings of scholars and by drawing on analogies from other bodies of law.

1. Apparent Commercial Character

Under O'Connor's first proposed definition, economic activity is “activit[y] . . . of an apparent commercial character.”¹⁷⁶ Standing alone, this definition is cryptic, telling us next to nothing. Scholarly writing in the Commerce Clause area, however, shed some light on potential ways of giving this definition substance. In *Removing Intrastate Lawsuits*, Kelly Black proposed evaluating the economic/non-economic nature of an activity from a layperson's perspective—that is, by asking “whether an ordinary person would describe the activity in economic terms.”¹⁷⁷ Although Black's layperson approach predates O'Connor's *Raich* dissent by more than ten years, it seems to be the approach most consistent with O'Connor's probable intentions in that case. This is especially true

¹⁷³ See 545 U.S. 1, 50 (2005) (O'Connor, J., dissenting).

¹⁷⁴ *Id.* (emphasis added) (internal quotation marks omitted) (quoting *United States v. Morrison*, 529 U.S. 598, 611 n.4 (2000) and *Lopez*, 514 U.S. at 561).

¹⁷⁵ *Id.* (internal quotation marks omitted).

¹⁷⁶ *Id.* (internal quotation marks omitted); see also *Lopez*, 514 U.S. at 601 n.9 (Thomas, J., concurring) (arguing that “commercial character” is not only a natural but an inevitable ‘ground of Commerce Clause distinction’” (quoting *Lopez*, 514 U.S. at 608 (Souter, J., dissenting))).

¹⁷⁷ Kelly G. Black, Note, *Removing Intrastate Lawsuits: The Affecting-Commerce Argument After United States v. Lopez*, 1995 BYU L. REV. 1103, 1119.

if we believe that O'Connor deliberately used the word "apparent" to convey its common and ordinary meaning.¹⁷⁸

a. PLCAA-Regulated Litigation Does Not Constitute Activity of an "Apparent Commercial Character"

If O'Connor's definition of economic activity does, in fact, appeal to the perceptions of the ordinary layperson, one must ask whether such a layperson would view PLCAA-regulated litigation in economic terms. Few would contend that civil litigation initiated against firearm manufacturers for personal injury, wrongful death, and reimbursement of monetary expenses has strong economic overtones.¹⁷⁹ Parties to this type of litigation hire attorneys and pay attorney's fees, thereby participating in a patently commercial transaction from the outset.¹⁸⁰ During the course of the litigation, individual plaintiffs seek economic damages, such as lost wages, lost earning capacity, and out-of-pocket medical expenses.¹⁸¹ Municipality plaintiffs seek to recoup the economic costs they had incurred in responding to gun-related violence, such as the costs of "enhanced police protection, emergency services, police pension benefits, court and jail costs, and medical care."¹⁸² Defendants also have substantial economic stakes in the outcome of the litigation: they may be held liable for substantial jury awards, and their financial well-being or even solvency may depend on the disposition of a case or a series of cases.¹⁸³

¹⁷⁸ See, e.g., THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 143, at 100 (defining "apparent" as "readily seen; exposed to sight; open to view; visible[;] capable of being easily perceived or understood; plain or clear; obvious"); THE NEW OXFORD AMERICAN DICTIONARY, *supra* note 143, at 74 (defining "apparent" as "clearly visible or understood; obvious").

¹⁷⁹ See, e.g., *Ileto*, 349 F.3d 1191, 1196 (9th Cir. 2003) (individual civil action for personal injury and wrongful death); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1043-44 (Fla. Dist. Ct. App. 2001) (municipality's civil action for recovery of monetary costs).

¹⁸⁰ See POSNER, *supra* note 140, at 584 ("The principal input into litigation is lawyers' time. The purchase of this input is essential to vindicating even a meritorious claim, but is also costly."); Berman, *supra* note 8, at 1505 ("There is no doubt that a law prescribing economic features of the commercial relationship between attorney and client would be a regulation of economic activity.").

¹⁸¹ See *Ileto*, 349 F.3d at 1198; see also Jerry J. Phillips, *Hoist by One's Own Petard: When a Conservative Commerce Clause Interpretation Meets Conservative Tort Reform*, 64 TENN. L. REV. 647, 662 (1997); Collin Sult, Note, *Questionable Medicine—Why Federal Medical Malpractice Reform May Be Unconstitutional*, 47 ARIZ. L. REV. 195, 215 (2005).

¹⁸² *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 824 (N.D. Ohio 2000).

¹⁸³ See Phillips, *supra* note 181, at 662; Sult, *supra* note 181, at 215; see also Jack B. Weinstein, *Some Reflections on United States Group Actions*, 45 AM. J. COMP. L. 833, 834-35 (1997) (noting how large-scale civil litigation has bankrupted a substantial portion of the

Ultimately though, PLCAA-regulated litigation could not be viewed as a predominantly economic activity.¹⁸⁴ This is so for several reasons. First, apart from economic damages, individual plaintiffs in PLCAA-regulated litigation almost invariably seek non-economic damages, such as damages for pain and suffering and mental or emotional distress as well.¹⁸⁵ In appropriate contexts, both individual and municipality plaintiffs will also seek punitive damages.¹⁸⁶ Municipality plaintiffs, in addition, have the opportunity to pursue injunctive relief.¹⁸⁷ Non-economic damages, punitive damages, and injunctive relief, taken together, serve the policy goals of compensation and deterrence. Neither goal is readily reducible to economic terms.¹⁸⁸

i. Compensation

The goal of compensation is not reducible to economic terms for several reasons. For one, while a plaintiff seeks compensatory damages *in exchange* for injuries that she had suffered, the motivating principle behind this exchange is corrective justice, not profit maximization.¹⁸⁹ In other words, compensatory damages seek

asbestos industry).

¹⁸⁴ On this point, scholars writing on the subject are by and large in accord. See, e.g., Phillips, *supra* note 181, at 662–63 (products liability litigation does not constitute economic activity); Black, *supra* note 177, at 1119–20 (intrastate civil litigation does not constitute economic activity); Sult, *supra* note 181, at 216–17 (medical malpractice litigation does not constitute economic activity); see also Brief for Respondents at 42, *Pierce County v. Guillen*, 537 U.S. 129 (2003) (No. 01-1229), 2002 WL 1964063 (judicial proceedings in general do not constitute economic activity); Brief of Law Professors Lynn A. Baker & Mitchell N. Berman Supporting as Amici Curiae Respondents at 24, *Pierce County v. Guillen*, 537 U.S. 129 (2003) (No. 01-1229), 2002 WL 1964091 (civil litigation for money damages in state court does not constitute economic activity); Whitmer Brief, *supra* note 147, at 8 (civil discovery does not constitute economic activity).

¹⁸⁵ See *Ileto*, 349 F.3d at 1198; Phillips, *supra* note 181, at 662; Sult, *supra* note 181, at 216–17.

¹⁸⁶ See Phillips, *supra* note 181, at 662 (referring to punitive damages as a “noneconomic item of recovery” (emphasis added)).

¹⁸⁷ See, e.g., *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1044 (Fla. Dist. Ct. App. 2001).

¹⁸⁸ Professor Jerry Phillips forcefully argued this point in his article, *Hoist by One’s Own Petard*. According to Professor Phillips:

Tort law serves two primary goals—compensation and deterrence. Deterrence cannot be conceived of as primarily economic in nature. Nor, for that matter, can the goal of compensation. Principles of corrective justice permeate the law of torts. The citizen wants her day in court. The overriding public concern is with the safety of products. Only by a Babbitt sort of analysis can these central goals of tort law be bastardized into primarily economic concerns.

Phillips, *supra* note 181, at 662–63 (footnote omitted).

¹⁸⁹ See *id.* at 662 (arguing that “[p]rinciples of corrective justice permeate the law of torts” (emphasis added)); Sult, *supra* note 181, at 217 (noting that compensatory damages “serve[]

to put a plaintiff in her “rightful position,” not confer upon her a profit or windfall for her injuries.¹⁹⁰ Also, ordinary laypersons tend to view economic activities as *voluntary* activities—i.e., activities in which the parties have some level of choice as to their participation.¹⁹¹ In PLCAA-regulated litigation, however, individual plaintiffs do not choose to become victims of gun violence and municipality plaintiffs do not choose to become battlegrounds for firearm misuse. The element of voluntariness is, therefore, wholly absent from the compensatory damages framework. Finally, a number of remedies scholars have proposed to use a hypothetical marketplace to value non-economic injuries—that is, awarding plaintiff “the amount it would cost to hire someone to suffer [her] injuries” in a voluntary transaction.¹⁹² No court, to date, has adopted this valuation model, and the judiciary’s uniform rejection of this model further supports the argument that compensation cannot be viewed as a predominantly economic goal in the civil litigation context.¹⁹³

ii. Deterrence

Deterrence, backed by the threat of punitive damages and injunctive relief, is also not a goal that an ordinary layperson would view as economic.¹⁹⁴ To the contrary, deterrence serves to create

the *noneconomic function of correcting a wrong* committed against an innocent party” (emphasis added)).

¹⁹⁰ See DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 16 n.2 (3d ed. 2002). In fact, one of the bedrock principles upon which remedies law rests is that while plaintiffs are “entitled to be made whole,” defendants are entitled to make plaintiffs “whole *in the least expensive way*.” *Id.* at 23 n.6 (emphasis added); see also, e.g., United States v. 50 Acres of Land, 469 U.S. 24, 36 (1984) (finding that a plaintiff should not receive a windfall); O’Brien Bros. v. The Helen B. Moran, 160 F.2d 502, 506 (2d Cir. 1947) (indicating that damages must be calculated so that an award does not compensate for more than was lost).

¹⁹¹ *Contra* POSNER, *supra* note 140, at 218, 228 (arguing that *involuntary* transfers of wealth—such as those perpetrated by criminal acts—*could*, under certain circumstances, constitute an economic activity).

¹⁹² See LAYCOCK, *supra* note 190, at 152 n.8; Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341, 1342 (1995) (considering the varying jury verdicts that may result from different instructions describing the cost of making a plaintiff whole versus paying her to be subject to the harm in the first place); see also DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 9–10 (3d ed. Supp. 2006) [hereinafter LAYCOCK, 2006 SUPPLEMENT]. According to the study that McCaffery and his co-authors conducted, most lawyers and judges view the hypothetical marketplace valuation model as “prohibited, absurd, or both.” See LAYCOCK, 2006 SUPPLEMENT, *supra*, at 10.

¹⁹³ See LAYCOCK, *supra* note 190, at 152 n.8.

¹⁹⁴ See, e.g., Phillips, *supra* note 181, at 662–63; Sult, *supra* note 181, at 217.

rightful incentives and further public safety.¹⁹⁵ It creates rightful incentives by making it prohibitively expensive for a defendant to continue to engage in the type of liability-causing conduct that had given rise to the initial lawsuit.¹⁹⁶ It promotes public safety by barring the present defendant's unsafe conduct from further occurrence (specific deterrence) and also by putting future defendants on notice that certain types of misconduct could subject them to potentially massive liability (general deterrence).¹⁹⁷

b. The "Apparent Commercial Character" Test Is Unsound

O'Connor's proposed definition of economic activity is unsound for three reasons. First, as with the "reasonable prudent person" standard in tort law¹⁹⁸ and the "excessiveness" standard in punitive damages law,¹⁹⁹ the "apparent commercial character" standard in the Commerce Clause context²⁰⁰ is difficult to apply because it is overly dependent upon individualistic perceptions and subjective value judgments. As a result, it fails to give Congress sufficient notice as to what it can or cannot regulate *ex ante*. To take just one example, do unfair employment practices constitute activities "of an 'apparent commercial character'?"²⁰¹ Some would reasonably say yes, focusing on the fact that employment practices take place in a commercial setting and directly affect one's ability to sell his labor and services in exchange for valuable consideration. Others might just as plausibly say no, relying on the fact that the primary goal of the NLRA is to protect workers' rights, and that this goal is of a primarily *social*—rather than economic—nature.

Another reason why the "apparent commercial character" standard does not work is because the standard's definitional

¹⁹⁵ See, e.g., Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 8–9 (1982).

¹⁹⁶ See, e.g., Jennifer K. Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications for Reform*, 50 BUFF. L. REV. 103, 111 (2002).

¹⁹⁷ See, e.g., *id.*

¹⁹⁸ See RESTATEMENT (SECOND) OF TORTS § 283 (1965).

¹⁹⁹ See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996) (setting out the standard for determining when punitive damages are excessive); Jenny Miao Jiang, Comment, *Whimsical Punishment: The Vice of Federal Intervention, Constitutionalization, and Substantive Due Process in Punitive Damages Law*, 94 CAL. L. REV. 793, 794 (critiquing punitive damages law's "excessiveness" standard as unworkable).

²⁰⁰ *Gonzales v. Raich*, 545 U.S. 1, 50 (2005) (O'Connor, J., dissenting) (internal quotation marks omitted) (quoting *United States v. Morrison*, 529 U.S. 598, 611 n.4 (2000)).

²⁰¹ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 22, 49 (1937) (upholding the National Labor Relations Act against a Commerce Clause challenge).

contours inevitably shift with time and circumstances. What arguably constitutes apparent commercial activities today may not have been thought of as even remotely commercial in decades past.²⁰² Take law enforcement, for example. Until recently, most people would have viewed policing and incarceration as quintessential governmental functions rather than apparent commercial activities. With the increasing privatization of the police²⁰³ and the rise of what has become known as the “prison-industrial complex,”²⁰⁴ however, the traditional view of law enforcement as a non-commercial, governmental function has been much eroded. The opposite can also be true: activities that were once considered to be clearly commercial nature have since been re-conceptualized by modern society. Slavery represents the most obvious (and disgraceful) manifestation of this phenomenon.²⁰⁵

O'Connor's proposed definition of economic activity is also

²⁰² The Court made a parallel argument when it overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *National League of Cities*, the Court held that Congress could not enforce a federal statute against a state if the federal statute attempted to regulate the state “in areas of traditional governmental functions.” 426 U.S. at 852. Overruling this standard in *Garcia*, the majority opined:

[T]he “traditional” nature of a particular governmental function can be a matter of historical nearsightedness; *today's self-evidently “traditional” function is often yesterday's suspect innovation*. Thus, *National League of Cities* offered the provision of public parks and recreation as an example of a traditional governmental function. A scant 80 years earlier, however . . . the Court pointed out that city commons originally had been provided not for recreation but for grazing domestic animals “in common,” and that “[i]n the memory of men now living, a proposition to take private property [by eminent domain] for a public park . . . would have been regarded as a novel exercise of legislative power.”

469 U.S. at 544 n.9 (emphasis added) (latter alterations in original) (citation omitted) (quoting *Shoemaker v. United States*, 147 U.S. 282, 297 (1893)).

²⁰³ See generally David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999) (describing the growing trend of privatizing traditionally state operated security functions and the effect it may have on the administration of criminal law).

²⁰⁴ See, e.g., Craig Haney, *Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency*, 9 HASTINGS WOMEN'S L.J. 27, 65 (1998) (noting the trend whereby the economic interests of private industries involved in the prison system override the goals of rehabilitating criminals and reducing crime); Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 952 (2004) (discussing privatization of police, prisons, and the military); see also KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 100–01 (1997) (listing the many different private interests that have come to be involved in the prison system).

²⁰⁵ See, e.g., U.S. CONST. art. I, § 2, cl. 3 (setting forth the terms of the Three-Fifths Clause); U.S. CONST. art. IV, § 2, cl. 3 (providing for the return of runaway slaves between states); *Scott v. Sandford*, 60 U.S. (19 How.) 393, 410–12 (1857) (holding that slaves are not citizens of the United States but property of their owners), *superseded by* U.S. CONST. amend. XIV.

unsound because it is under-inclusive. Racial discrimination, for example, is clearly not an activity “of an apparent commercial character.”²⁰⁶ Yet Congress sought to regulate precisely this form of discrimination in the Civil Rights Act of 1964, and the Court upheld this federal regulatory scheme in *Heart of Atlanta Motel, Inc. v. United States*²⁰⁷ and *Katzenbach v. McClung*.²⁰⁸ If adopted, O’Connor’s definition of economic activity would cast the Court’s preexisting line of civil rights cases into doubt without there being a compelling reason to do so.

2. The “Arising Out Of” Test

The previous section considered whether PLCAA-regulated litigation was an “apparent commercial activity” and concluded that it was not. This section examines whether PLCAA-regulated litigation could be deemed to “arise out of or [be] connected with a commercial transaction” and thereby fall within the scope of O’Connor’s second proposed definition.²⁰⁹ While O’Connor did not elaborate on what “aris[ing] out of or [being] connected with a commercial transaction”²¹⁰ means, a well-established body of civil procedure law provides some insight into O’Connor’s probable intentions, albeit in a different context.

*a. The “Arising Out Of” Test in the Minimum Contacts Context*²¹¹

While the “arising out of” terminology may be novel in the Commerce Clause area, a comparable phrase has been a familiar part of civil procedure law for years. In *International Shoe Co. v. Washington*, the Supreme Court held that state courts may exercise personal jurisdiction over a non-resident defendant if that defendant had “certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional

²⁰⁶ See *United States v. Lopez*, 514 U.S. 549, 628 (1995) (Breyer, J., dissenting) (noting that in the context of the civil rights cases, the specific transaction that gave rise to defendants’ liability—i.e., defendants’ race-based exclusion—was not itself commercial).

²⁰⁷ 379 U.S. 241, 247, 261 (1964).

²⁰⁸ 379 U.S. 294, 298, 305 (1964).

²⁰⁹ See *Gonzales v. Raich*, 545 U.S. 1, 44 (2005) (O’Connor, J., dissenting) (internal quotation marks omitted) (quoting *Lopez*, 514 U.S. at 561).

²¹⁰ See *id.*

²¹¹ For a cogent article on the Supreme Court’s minimum contacts law, see generally Lea Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77.

notions of fair play and substantial justice.”²¹² The Court fine-tuned the *International Shoe* standard in *Helicopteros Nacionales de Colombia, S.A. v. Hall* where it held that to establish minimum contacts, a plaintiff must show that his claim is “related to or ‘arises out of’ a defendant’s contacts with the forum [state].”²¹³

In assessing minimum contacts, the various circuits have gravitated toward one of two standards: “but for” causation and proximate cause.²¹⁴ Under the former standard, a plaintiff’s claim is considered to arise out of or relate to a defendant’s in-state contact if the claim would not have come about “but for” the contact.²¹⁵ In *Shute v. Carnival Cruise Lines*, for example, plaintiff bought a cruise ticket from defendant’s agent in Washington upon the agent’s active in-state solicitation.²¹⁶ While the cruise ship was in international waters, plaintiff slipped on the deck of the ship and sustained injuries.²¹⁷ She subsequently sued defendant in Washington, claiming that her fall resulted from defendant’s negligent maintenance of the ship’s conditions.²¹⁸ Defendant argued that Washington’s court had no jurisdiction over it because plaintiff’s claim did not arise out of or relate to defendant’s in-state solicitation activities in Washington.²¹⁹ The court disagreed. It held that it had personal jurisdiction over defendant because defendant’s solicitation activities in Washington were the “but for” cause of the plaintiff’s claim.²²⁰ In the absence of the solicitation, plaintiff would not have had the opportunity to purchase the ticket, take the cruise, or sustain injuries.²²¹ According to the court in *Shute*, then, a plaintiff’s claim could be deemed to arise out of or relate to a defendant’s in-state contact so long as the claim would not have occurred in the absence of such contact.²²²

²¹² 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

²¹³ 466 U.S. 408, 414 (1984) (emphasis added).

²¹⁴ *E.g.*, *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998); *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 714 (1st Cir. 1996).

²¹⁵ *E.g.*, *Creech v. Roberts*, 908 F.2d 75, 80 (6th Cir. 1990); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385 (9th Cir. 1990), *rev’d on other grounds*, 499 U.S. 585 (1991); *Lanier v. Am. Bd. of Endodontics*, 843 F.2d 901, 908–09 (6th Cir. 1988); *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215–16 (7th Cir. 1984); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n.21 (5th Cir. 1981).

²¹⁶ 897 F.2d at 379.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 383.

²²⁰ *Id.* at 386.

²²¹ *Id.*

²²² *See id.*

Other courts apply a narrower test. Under this narrower test, a plaintiff's claim is considered to arise out of or relate to a defendant's in-state contact only if such contact formed the "proximate cause" of the plaintiff's injury.²²³ Courts define "proximate cause" narrowly, requiring "virtually a direct link between [the plaintiff's] claim and [the defendant's] contacts in order to pursue a specific jurisdiction analysis."²²⁴ In *Luna v. Compania Panamena de Aviacion, S.A.*, plaintiff's decedent purchased a ticket from the defendant airline in Texas.²²⁵ After decedent's plane crashed in Panama, plaintiff brought a wrongful death claim against defendant in the Texas district court.²²⁶ Applying the "proximate cause" standard, the court dismissed the plaintiff's claim, holding that the claim did not arise out of or relate to the defendant's in-state contacts with Texas (i.e., defendant's sale of the plane ticket in Texas).²²⁷ To the contrary, plaintiff's claim arose out of the defendant's "alleged negligence in aircraft maintenance and operation of a flight"—acts that took place wholly *outside* the state.²²⁸ According to the stricter standard of *Luna*, then, a plaintiff's claim could be said to arise out of or relate to a defendant's in-state contact only if there exists a direct or "virtually . . . direct link between [the] claim and contacts."²²⁹

²²³ *E.g.*, *Luna v. Compania Panamena de Aviacion, S.A.*, 851 F. Supp. 826, 832 (S.D. Tex. 1994); *Kervin v. Red River Ski Area, Inc.*, 711 F. Supp. 1383, 1389–90 (E.D. Tex. 1989).

²²⁴ *See Kervin*, 711 F. Supp. at 1389–90.

²²⁵ 851 F. Supp. at 828, 832.

²²⁶ *Id.* at 832.

²²⁷ *Id.* at 832–33.

²²⁸ *Id.*

²²⁹ *See id.* at 832 (internal quotation marks omitted) (quoting *Kervin*, 851 F. Supp. at 1389–90). *Nowak v. Tak How Investments, Ltd.* is another case that illustrates the restrictive scope of the "proximate cause" test. 94 F.3d 708, 713 (1st Cir. 1996). There, defendant solicited plaintiff and decedent's business in Massachusetts. *Id.* at 711. Plaintiff and decedent responded to defendant's solicitation by making reservations to stay at defendant's hotel in Hong Kong. *Id.* During their stay, decedent drowned in the hotel swimming pool. *Id.* Plaintiff subsequently brought a wrongful death action against defendant that was tried before the Massachusetts district court. *Id.* at 712. Defendant moved for dismissal of plaintiff's action for lack of personal jurisdiction. *Id.* at 711. It argued that decedent's drowning did not "arise out of, or relate to, the defendant's forum-state activities" (i.e., defendant's solicitation in Massachusetts), as those activities did not proximately cause decedent's death. *See id.* at 712–13 (internal quotation marks omitted) (quoting *Pritzker v. Yari*, 42 F.3d 53, 60 (1st Cir. 1994)). The First Circuit agreed but nevertheless allowed plaintiff's action to proceed on the basis of equitable considerations. *See id.* at 716.

For our purposes, it is significant to note that in applying the "proximate cause" test, the First Circuit *conceded* that plaintiff's cause of action could not be said to "arise out of, or relate to," defendant's contacts with the forum state, *notwithstanding its acceptance of the following factual findings*:

The Hotel's solicitation of . . . business [in Massachusetts] and the extensive back-and-

b. Applying the Minimum Contacts Standard in the Commerce Clause Context

Notwithstanding minor linguistic differences, *Helicopteros*' minimum contacts standard tailors closely to the definition of economic activity that O'Connor sets forth in her dissent in *Raich*.²³⁰ This section takes the *Helicopteros* test and applies it by way of analogy in the Commerce Clause context. The goal is to determine whether, under either the "but for" or "proximate cause" prongs of this test, PLCAA-regulated litigation could be deemed to "arise out of or [be] connected with a commercial transaction"²³¹ and, accordingly, be regulated as an economic activity under O'Connor's proposed definition.

i. The "But for" Test

In *Shute*, the court was primarily concerned with the level of *contacts* that the non-resident defendant had with the forum state.²³² Accordingly, it held the minimum contacts test to have been satisfied only after it determined that plaintiff's claim would not have arisen in the absence of defendant's in-state activities.²³³ O'Connor's proposed definition of economic activity is less concerned with contacts; to the contrary, it cares more about the existence of an underlying commercial transaction and the proximity of that transaction to the federally regulated activity.²³⁴ To reframe *Shute*

forth resulting in [the reservation of] a set of rooms . . . set in motion a chain of reasonably foreseeable events resulting in [the decedent's] death. The possibility that the solicitation would prove successful and that one or more of the guests staying at the Hotel as a result would use the pool was in no sense remote or unpredictable; in fact, the Hotel included the pool as an attraction in its promotional materials.

Id. (internal quotation marks omitted) (quoting *Nowak v. Tak How Inv. Ltd.*, 899 F. Supp. 25, 31 (D. Mass. 1995)). With respect to those findings, the First Circuit simply noted: "While the nexus between [the defendant's in-state] solicitation . . . and [the decedent's] death *does not constitute a proximate cause relationship*, it does represent a meaningful link between [the defendant's] contact and the harm suffered." *Id.* (emphasis added).

²³⁰ Compare *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (plaintiff's cause of action must be "*related to or 'arise[] out of'* a defendant's contacts with the forum [state]" (emphasis added)), with *Gonzales v. Raich*, 545 U.S. 1, 44 (2005) (O'Connor, J., dissenting) (economic activity must "*arise out of or [be] connected with* a commercial transaction" (emphasis added) (internal quotation marks omitted) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995))).

²³¹ *Raich*, 545 U.S. at 44 (internal quotation marks omitted) (quoting *Lopez*, 514 U.S. at 561).

²³² 897 F.2d 377, 380 (9th Cir. 1990).

²³³ *Id.* at 386.

²³⁴ See *Raich*, 545 U.S. at 44 (O'Connor, J., dissenting).

in PLCAA terms, then, one must ask the following questions: (1) did the defendant firearm manufacturer engage in an underlying commercial transaction; and (2) if so, did this transaction constitute the “but for” cause of the resulting civil litigation? If the answer to both of these questions is yes, then the litigation at issue could be viewed as “aris[ing] out of or [being] connected with a commercial transaction”²³⁵ and accordingly, be regulated as an economic activity under the Commerce Clause.

Firearm manufacturers named as defendants in PLCAA-regulated litigation inevitably engage in the requisite commercial transaction sufficient to satisfy the first part of the “arising out of” inquiry. In *Ileto v. Glock Inc.*, for example, the guns that Buford Furrow used to wound plaintiffs were the same guns that the defendant manufacturer had originally sold to the Cosmopolis Police Department.²³⁶ Likewise, in *City of Philadelphia v. Beretta U.S.A., Corp.*, the guns that were used by third parties to commit violent crimes were the same guns that the defendant manufacturers had initially sold to “straw buyers.”²³⁷ In both cases, (facially) legitimate commercial transactions underlie the basis for the “arising out of” analysis.

These underlying commercial transactions also form the “but for” cause of the resulting civil litigation. Again, *Ileto* illustrates this point. There, the defendant manufacturer’s initial commercial dealing with the Cosmopolis Police Department set in motion the chain of events that ultimately resulted in the plaintiffs’ personal injury and wrongful death actions.²³⁸ “But for” the defendant manufacturer’s initial sale of guns to the police department, the department would not have needed to exchange those guns for more suitable ones and the unsuitable guns would not have ended up in the secondary market.²³⁹ Had the unsuitable guns not ended up in the secondary market, they would not have been available for purchase at the gun show that Furrow attended.²⁴⁰ Had the guns not been so available, Furrow would not have been able to purchase them through a “gun collector,” who was able to sell to Furrow

²³⁵ *Id.* (internal quotation marks omitted) (quoting *Lopez*, 514 U.S. at 561).

²³⁶ 349 F.3d 1191, 1197 (9th Cir. 2003).

²³⁷ 126 F. Supp. 2d 882, 888 (E.D. Pa. 2000). “Straw buyers” are lawful purchasers of firearms who “resell [such] weapons to felons and others unable to legally obtain . . . firearms” on their own. *Id.*

²³⁸ *See* 349 F.3d at 1197.

²³⁹ *See id.*

²⁴⁰ *See id.*

without complying with the requisite state registration laws.²⁴¹ Finally, had Furrow not been able to purchase the guns, he could not have used them guns to injure the plaintiffs and the *Ileto* litigation would not have ensued.²⁴²

Under *Shute*'s "but for" test, PLCAA-regulated litigation would likely constitute an "activit[y] that arise[s] out of or [is] connected with a commercial transaction."²⁴³ Accordingly, it would be subject to federal regulation under O'Connor's view of the Commerce Clause.²⁴⁴

ii. The "Proximate Cause" Test

PLCAA-regulated litigation would fare less well as an economic activity under the "proximate cause" prong of the *Helicopteros* test. First and foremost, the *text* of the PLCAA expressly limits the scope of proximate cause.²⁴⁵ Section 7903 of the Act provides a list of exceptions to the general litigation ban of section 7902.²⁴⁶ Among other things, section 7903 permits plaintiffs to sue firearm manufacturers under theories of products liability, "except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the *sole proximate cause* of any resulting death, personal injuries or property damage."²⁴⁷ Section 7903 appears to suggest that a defendant's course of action could constitute the "proximate cause" of a plaintiff's injury *only when* that course of action directly brings about that injury. Any intervening act would, correspondingly, break the chain of causation and free the defendant from civil liability.

Civil procedure law substantially accords with section 7903.

²⁴¹ *See id.*

²⁴² *See id.* at 1195.

²⁴³ *Gonzales v. Raich*, 545 U.S. 1, 44 (2005) (O'Connor, J., dissenting) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

²⁴⁴ One problem with the "but for" test is attenuation. To attribute a third party's criminal misuse of a firearm to the defendant manufacturer's initial sale of that firearm requires one to rely upon a highly tenuous line of reasoning, of which the Court has disapproved in the modern Commerce Clause context. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598, 616–17 & n.6 (2000) (invalidating the VAWA partly on attenuation grounds and noting that "[w]e are not the first to recognize that the but-for causal chain must have its limits in the Commerce Clause area"); *Lopez*, 514 U.S. at 564 (rejecting the government's "cost of crime" and "national productivity" arguments as "tenuous[]").

²⁴⁵ *See* 15 U.S.C.A. § 7903(5)(A)(v) (West Supp. 2006).

²⁴⁶ *Id.* § 7903(5)(A).

²⁴⁷ *Id.* § 7903(5)(A)(v) (emphasis added).

Courts applying the “proximate cause” standard in the minimum contacts context have held that a plaintiff’s claim could be deemed to arise out of or be related to a defendant’s in-state contacts only if there exists a “virtually . . . direct link between [the] claim and [the] contacts.”²⁴⁸ When reframed in PLCAA terms, the “proximate cause” standard gives rise to the following two-part inquiry: (1) did the defendant firearm manufacturer engage in an underlying commercial transaction²⁴⁹ and (2) if so, did this transaction bear a direct or virtually direct link to the civil litigation that subsequently ensued?²⁵⁰ If the answer to both of these questions is yes, then the litigation at issue could be deemed to “arise out of or [be] connected with a commercial transaction”²⁵¹ and accordingly, be regulated as an economic activity under O’Connor’s proposed test.

As previously discussed, defendants involved in PLCAA-regulated litigation almost always engage in the requisite commercial transaction sufficient to satisfy the first part of the “arising out of” inquiry.²⁵² The problem is that such transactions rarely—if ever—bear a sufficiently direct link to the litigation that subsequently ensues. Take, for example, the case of *City of Philadelphia v. Beretta U.S.A., Corp.*, where the City sued defendant manufacturer for negligent marketing.²⁵³ There, Philadelphia sued defendant firearm manufacturer for negligent marketing.²⁵⁴ The crux of the City’s claim was that defendant sold guns to “straw buyers” who, in turn, resold to individuals who were unable to lawfully purchase guns on their own.²⁵⁵ When the end-purchasers used the guns to commit crimes of violence, the City incurred increased policing and medical costs, which it sought to recoup through a subsequent civil lawsuit.²⁵⁶ While the threshold commercial transaction between the defendant manufacturer and the “straw buyer” undoubtedly constituted the “but for” cause of the

²⁴⁸ See, e.g., *Kervin v. Red River Ski Area, Inc.*, 711 F. Supp. 1383, 1389–90 (E.D. Tex. 1989).

²⁴⁹ This is identical to the first part of the inquiry conducted under *Shute*’s “but for” test. See *supra* notes 232–34 and accompanying text.

²⁵⁰ Compare this to the *less* stringent requirement of *Shute*’s “but for” test. See *supra* notes 232–34 and accompanying text.

²⁵¹ *Gonzales v. Raich*, 545 U.S. 1, 44 (2005) (O’Connor, J., dissenting) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

²⁵² See *supra* notes 233–35 and accompanying text.

²⁵³ 126 F. Supp. 2d 882, 888 (E.D. Pa. 2000).

²⁵⁴ *Id.* at 888.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

City's subsequent lawsuit, it could not reasonably be viewed as the "proximate cause" of that lawsuit vis-à-vis *Luna*.²⁵⁷

Recall that in *Luna*, the court refused to hold decedent's purchase of an airline ticket to be the "proximate cause" of her death in the resulting plane crash.²⁵⁸ Rather, the *Luna* court found decedent's death to be more directly linked to, and thus proximately caused by, the defendant's negligent maintenance and operation of the doomed aircraft.²⁵⁹ The logic of *Luna*, if applied to *City of Philadelphia*, would suggest that a firearm manufacturer's initial sale of a gun to a straw buyer could never constitute the "proximate cause" of civil litigation that ensues as a result of third-party misuse of that gun. To the contrary, litigation resulting from such third-party misuse would be more directly attributable to the straw buyer's subsequent resale of that gun to the criminal third party; it would be *most* directly attributable to the actual perpetration of the criminal act by the third party himself.²⁶⁰ Under the "proximate cause" test envisioned by section 7903 and applied in *Luna*, then, PLCAA-regulated litigation could not be deemed to "arise out of or [be] connected with a commercial transaction."²⁶¹ Accordingly, such litigation would not be subject to federal regulation as an economic activity under O'Connor's view of the Commerce Clause.

In her dissent in *Raich*, O'Connor proposed to define economic activity as activities that "arise out of or are connected with a commercial transaction."²⁶² This section sought to give O'Connor's definition substance by drawing upon well-established principles from civil procedure law. This section concluded that while PLCAA-regulated litigation *could* be deemed to "arise out of or [be] connected with a commercial transaction"²⁶³ under the lenient "but for" test, it fails to satisfy the more stringent test of "proximate cause." The next section of this Article goes on to argue that, as a normative matter, O'Connor's "arising out of" test fails to provide a doctrinally sound basis for distinguishing between economic and

²⁵⁷ See *Luna v. Compania Panamena de Aviacon, S.A.*, 851 F. Supp. 826, 832 (S.D. Tex. 1994); see also *supra* notes 223–29 (summarizing the *Luna* court's minimum contacts analysis).

²⁵⁸ 851 F. Supp. at 832.

²⁵⁹ *Id.* at 832–33.

²⁶⁰ The court in *City of Philadelphia* did, ultimately, dismiss the municipality's action for lack of proximate cause. 126 F. Supp. 2d at 903.

²⁶¹ *Gonzales v. Raich*, 545 U.S. 1, 44 (2005) (O'Connor, J., dissenting) (internal quotation marks omitted) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

²⁶² *Id.* (internal quotation marks omitted) (quoting *Lopez*, 514 U.S. at 561).

²⁶³ *Id.* (internal quotation marks omitted) (quoting *Lopez*, 514 U.S. at 561).

non-economic activities. Accordingly, it should be rejected as unworkable on that basis.

c. As a Normative Matter, O'Connor's "Arising Out Of" Test Is Unworkable

A fundamental problem with O'Connor's "arising out of" test is that it depends too much on the existence of an underlying commercial transaction. To assess whether an activity is economic under this test, the court must first find a commercial exchange upon which to base its inquiry.²⁶⁴ While this transactional requirement may prove unproblematic in the PLCAA context, it has the potential to produce arbitrary results when applied in other areas—particularly, areas where commercial dealings do not necessarily underlie the activity sought to be regulated.

For example, take the case of *United States v. Morrison* in which a majority of the Court struck down section 13981 of the Violence Against Women Act (VAWA).²⁶⁵ Had the Court applied O'Connor's "arising out of" test in the context of *Morrison* it would likely have reached the same result, but for a different reason. As a threshold matter, the Court would have asked whether the defendant engaged in a requisite commercial transaction prior to, or in pursuance of, the rape. Examining the facts of *Morrison* as presented, it would appear that the answer is no.²⁶⁶ In the absence of such a commercial transaction, the Court would not have needed to reach the second step of its analysis—that is, it would not have needed to assess whether defendant's rape "a[rose] out of or [was] connected with a commercial transaction."²⁶⁷ To the contrary, the Court would have been able to invalidate section 13981 for lack of the requisite commercial transaction alone.

Notwithstanding its facial consistency with *Morrison*, it is important to recognize how erratically the outcome of the "arising

²⁶⁴ An interesting question arises in cases like *Heart of Atlanta Motel, Inc.* and *McClung* where the alleged misconduct giving rise to the plaintiff's cause of action is the defendants' refusal to engage in a commercial transaction with the plaintiff because of the plaintiff's race. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 297 (1964). In such cases, it is not clear whether O'Connor would permit the defendants' affirmative failure to engage in a commercial exchange with the plaintiff to underlie the basis of her "arising out of" inquiry.

²⁶⁵ 529 U.S. 598, 601–02 (2000).

²⁶⁶ See *id.* at 602 (describing the facts of the rape at issue in that case).

²⁶⁷ *Raich*, 545 U.S. at 44 (O'Connor, J., dissenting) (internal quotation marks omitted) (quoting *Lopez*, 514 U.S. at 561).

out of” test can change with the most trivial shifts in facts and circumstances. For example, instead of the actual facts of *Morrison*, take a hypothetical case in which the defendant lived out-of-state but bought a bus ticket into town for the purpose of raping the plaintiff. Could a court in such a case use the underlying commercial transaction between the defendant and the bus company to form the basis for its “arising out of” inquiry? After all, there is a threshold commercial exchange (i.e., defendant’s purchase of the bus ticket) as well as “but for” causation between this exchange and the regulated activity (i.e., rape). At least under *Shute*, then, it would appear that the rape in our hypothetical case could be deemed an economic activity, while the rape in the actual *Morrison* case remains non-economic. On a normative level though, *why* should that be the case? That is, why should rape committed pursuant to a paid bus ride be any more “economic” than rape committed in its absence? Plainly, it should not.²⁶⁸ Yet, if taken seriously, this is precisely the type of tangential distinction that the “arising out of” test could potentially force courts to draw. For this reason, the test is unsound and should be rejected.²⁶⁹

C. Other Definitions

The previous section of this Article examined then-Justice O’Connor’s proposed definitions of the term economic activity and concluded that they were “unsound in principle and unworkable in practice.”²⁷⁰ This section surveys two alternative definitions of the

²⁶⁸ Then-Judge, now Justice, Alito raised a parallel point in his dissenting opinion in *United States v. Rybar*, 103 F.3d 273, 291–92 (3d Cir. 1996) (Alito, J., dissenting). There, a majority of the Third Circuit upheld 18 U.S.C. § 922(o) against an as-applied challenge under the Commerce Clause, thereby sustaining the criminal defendant’s conviction for possession of machine guns. *See id.* at 275, 286 (majority opinion). In dissent, Judge Alito criticized the majority’s decision for being inconsistent with *Lopez*. *See id.* at 291–92 (Alito, J., dissenting). According to Judge Alito: “The majority does not explain why possession of a firearm within a school zone is less ‘commercial’ or ‘economic’ than possession elsewhere—because it plainly is not.” *Id.* at 292 n.5. He then asked rhetorically: “If someone drives through a school zone with a firearm in his possession, does that person quickly cease to engage in a ‘commercial’ activity on entering the zone and then quickly begin on leaving?” *Id.*

²⁶⁹ An additional problem with the “arising out of” test is that it is in tension with *Wickard v. Filburn*, 317 U.S. 111 (1942). In *Wickard*, the defendant’s liability-causing conduct consisted of growing excessive wheat for his own personal use. *Id.* at 113. It is difficult to see how this conduct “arise[s] out of or [is] connected with a commercial transaction” under either the “but for” or “proximate cause” test. *Raich*, 545 U.S. at 44 (O’Connor, J., dissenting) (internal quotation marks omitted) (quoting *Lopez*, 514 U.S. at 561).

²⁷⁰ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) (deploying this phrase for the first time in overturning *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

term and assesses their respective viability.

1. Justice Thomas's Original Understanding

Justice Thomas has consistently advocated for the Court's return to an original understanding of the Commerce Clause.²⁷¹ In his dissent in *Raich*, Thomas opined:

[T]he Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines. *The Clause's text, structure, and history all indicate that, at the time of the founding, the term "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes.* . . . Throughout founding-era dictionaries, Madison's notes from the Constitutional Convention, The Federalist Papers, and the ratification debates, the term "commerce" is consistently used to mean *trade or exchange*—not all economic or gainful activity that has some attenuated connection to trade or exchange.²⁷²

According to Thomas, the Commerce Clause enables Congress to regulate only those activities that it could have regulated at the time of the founding.²⁷³ Put another way, Thomas would limit the scope of the modern Commerce Clause to encompass the regulation of "trade or exchange" only.²⁷⁴ This definition, by its terms, excludes civil litigation. When coupled with the mandate of *The Federalist* No. 17—which squarely places the power to administer ordinary

²⁷¹ *E.g.*, *Raich*, 545 U.S. at 69–70 (Thomas, J., dissenting); *Morrison*, 529 U.S. at 627 (Thomas, J., concurring); *Lopez*, 514 U.S. at 584 (Thomas, J., concurring).

²⁷² 545 U.S. at 58 (Thomas, J., dissenting) (emphasis added) (citations omitted) (quoting *Lopez*, 514 U.S. at 585 (Thomas, J., concurring)). In two articles, Professor Randy Barnett documented the results of his extensive study on the Commerce Clause. Barnett, *New Evidence*, *supra* note 103; Barnett, *The Original Meaning*, *supra* note 103. This study was based on: (i) constitutional text; (ii) contemporary dictionaries; (iii) notes from the Constitutional Convention; (iv) the Federalist Papers; (v) ratification conventions; and (vi) conventional public use of the term "commerce" at the time of the founding as derived from the *Pennsylvania Gazette*, a contemporaneous newspaper. Barnett, *New Evidence*, *supra* note 103, at 856; Barnett, *The Original Meaning*, *supra* note 103, at 112–16. Ultimately, Professor Barnett found himself in agreement with Thomas. See Barnett, *New Evidence*, *supra* note 103, at 858–59. From his study, he concluded that at the time of the founding, the Commerce Clause, in all likelihood, referred solely to "trade or exchange," and not to "any gainful activity," as other scholars—most notably, Professors Nelson and Pushaw—have suggested. Barnett, *New Evidence*, *supra* note 103, at 858; Barnett, *The Original Meaning*, *supra* note 103, at 112, 114.

²⁷³ *E.g.*, *Raich*, 545 U.S. at 58–59 (Thomas, J., dissenting); *Lopez*, 514 U.S. at 601 & n.8 (Thomas, J., concurring).

²⁷⁴ *Raich*, 545 U.S. at 58 (Thomas, J., dissenting).

civil justice in states' hands²⁷⁵—Thomas's definition leaves little room for doubt as to which side of the economic/non-economic line PLCAA-regulated litigation would fall if viewed through the lens of the original understanding.

The problem with Thomas's historical definition of the Commerce Clause is that its adoption would lead to the invalidation of countless federal laws upon which modern society has come to rely.²⁷⁶ In *Removing Intrastate Lawsuits*, Kelly Black proposed a modification to Thomas's definition in hopes of ameliorating this problem.²⁷⁷ According to Black, courts reviewing legislation enacted pursuant to the Commerce Clause should begin with the notion of an original understanding²⁷⁸—that is, courts should begin by asking whether the activity at issue constituted a “trade or exchange” at the time of the founding.²⁷⁹ If so, then the activity is, per se, subject to federal regulation.²⁸⁰ If not, then the Court must strike the regulation down, *unless* it determines that the regulation sought to reach an activity that “shares strong enough similarities to historical commerce, a strong enough effect on that commerce, or a sufficiently close tie to it.”²⁸¹ This modified approach, according to

²⁷⁵ THE FEDERALIST NO. 17, at 120 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In *Federalist No. 17*, Alexander Hamilton wrote:

There is one transcendent advantage belonging to the province of the State governments . . . *the ordinary administration of . . . civil justice*. This, of all others, is the most powerful, most universal, and most attractive source of popular obedience and attachment. It is this which . . . contributes more than any other circumstance to impressing upon the minds of the people affection, esteem, and reverence towards the government. This great cement of society, *which will diffuse itself almost wholly through the channels of the particular governments*, independent of all other causes of influence, would insure them so decided an empire over their respective citizens as to render them at all times a complete counterpoise, and, not unfrequently, dangerous rivals to the power of the Union.

Id. (emphasis added).

²⁷⁶ See, e.g., Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2000); Clean Water Act of 1977, 33 U.S.C. §§ 1281a, 1294–1297 (2000); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000h-6 (2000); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000). Even Justice Thomas has acknowledged that a return to an original understanding of the Commerce Clause could prove problematic in light of current law and modern practice. *Lopez*, 514 U.S. at 601 n.8 (Thomas, J., concurring). In his *Lopez* concurrence, he conceded:

Although I might be willing to return to the original understanding [of the Commerce Clause], I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.

Id.

²⁷⁷ Black, *supra* note 177, at 1119.

²⁷⁸ *Id.*

²⁷⁹ *Raich*, 545 U.S. at 58 (Thomas, J., dissenting).

²⁸⁰ See Black, *supra* note 177, at 1119.

²⁸¹ *Id.*

Black, would enable Congress to preserve the integrity of the original understanding while, at the same time, respond dynamically to unforeseen modern developments.²⁸²

To be sure, Black's modified approach infuses Thomas's historical understanding of the Commerce Clause with an added flexibility. However, this modified approach is problematic in its own right. If adopted, it would force courts to engage in the highly speculative business of (i) analogizing between pre-founding and post-founding activities and (ii) making subjective value judgments as to which post-founding activities have attained the sufficient level of similarity to constitute a "modern equivalent[] of historical commerce."²⁸³ The Court has grappled with a similar historically-based test in the Seventh Amendment context for decades and has yet to come up with a coherent standard for determining when a new, modern-day claim has attained the sufficient level of similarity to a "[s]uit[] at common law" to warrant jury trial.²⁸⁴ There is no good reason to venture into a similar constitutional quagmire in this different constitutional context.

2. The Posnerian Definition

In his influential book, *Economic Analysis of Law*, Professor Posner defined economics as "the science of rational choice in a world—our world—in which resources are limited in relation to human wants."²⁸⁵ PLCAA-regulated litigation would almost certainly fall within Posner's broad definition of economic activity for several reasons. First, PLCAA-regulated litigation implicates both voluntary and involuntary transfers of wealth: (i) parties to the litigation hire attorneys and pay attorney's fees (voluntary transfer); (ii) society pays for the cost of administering civil justice through tax dollars (coercive transfer); and (iii) defendants found liable in the litigation pay damages to the prevailing plaintiff(s) (coercive transfer).

PLCAA-regulated litigation also involves the allocation of

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *E.g.*, *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 564–70 (1990) (analogizing several modern claims to actions at law or equity in the eighteenth century); *Tull v. United States*, 481 U.S. 412, 417, 420–21 (1987) (finding an action under the Clean Water Act to be analogous to an eighteenth century common law action); *see also* STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 666–85 (5th ed. 2000) (discussing the historical right to trial by jury).

²⁸⁵ POSNER, *supra* note 140, at 3.

economic rights and resources as well as the establishment of incentive structures. In suits for money damages, factfinders must decide whether they are legally and morally bound to shift the burden of loss from the plaintiff to the defendant in light of policy concerns such as: (i) creating proper incentives for the avoidance of future accidents;²⁸⁶ or, if future accidents cannot be avoided, (ii) shifting the loss of such accidents to the party in the best position to bear it.²⁸⁷ In actions for injunctive relief, judges must decide whether to award a prevailing plaintiff the right to set his own price on the liability-causing conduct by enjoining such conduct, and in doing so, forcing the parties into negotiate the value of dissolving the injunction.²⁸⁸

The problem with Posner's definition of economic activity is that it is sufficiently broad to encompass virtually "all human activity directed at satisfying human wants."²⁸⁹ Surely, it is sufficiently broad to sweep in many of the activities that the Court had previously held to be non-economic. The rape that defendant committed in *Morrison*, for example, would clearly constitute an economic activity under Posner's definition because it involved a "coercive transfer . . . of wealth or utility from victim to wrongdoer."²⁹⁰ The *Lopez* defendant's possession of a gun in a school zone would, likewise, be deemed an economic activity under the Posnerian model because such possession involved an "exercise of dominion over personal property."²⁹¹ Posner's definition of economic activity thus appears to be fundamentally at odds with the Court's modern Commerce Clause jurisprudence. As a result, its

²⁸⁶ See *id.* at 171 (pointing to the Hand Formula as a means to "create[] . . . proper incentives to avoid negligent accidents"); see also *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (articulating the Hand Formula for the first time).

²⁸⁷ See POSNER, *supra* note 140, at 182–83 (discussing loss-shifting in the context of products liability litigation).

²⁸⁸ See *id.* at 67–71 (describing circumstances under which an injunction should or should not be issued in the property rights context).

²⁸⁹ See Black, *supra* note 177, at 1116.

²⁹⁰ Ides, *supra* note 8, at 569 (performing a Posnerian analysis on the facts of *Morrison*); see also POSNER, *supra* note 140, at 216 (describing rape as a crime that "bypasses the market in sexual relations . . . in the same way that theft bypasses markets in ordinary goods and services").

²⁹¹ Ides, *supra* note 8, at 569. The defendant's possession and cultivation of marijuana in *Raich* would also constitute an economic activity under the Posnerian model. Defendant's possession of marijuana would constitute an economic activity because it implicated the "exercise of dominion over personal property." See *id.* Defendant's cultivation of marijuana would constitute an economic activity because it enabled her to opt out of—or "bypass"—the demand curve in the marijuana market, thereby impeding a voluntary (albeit illegal) transfer of wealth that would otherwise have occurred. See POSNER, *supra* note 140, at 216.

unlikely to be embraced by the Court any time in the near future.²⁹²

The weight of authority appears to militate against calling PLCAA-regulated litigation an economic activity for Commerce Clause purposes. Such litigation does not fall comfortably into any of the proposed definitions discussed in this Article. Additionally, scholars writing on the issue have generally not viewed similar types of litigation in economic terms.²⁹³ On a doctrinal level, then, it would appear that Congress exceeded its constitutional authority in enacting the PLCAA. The Court must, therefore, step in and strike the Act down as unconstitutional.²⁹⁴

V. CONCLUSION

The heart of this Article contained two sets of questions: the first were descriptive, the second, normative. Descriptively, this Article asked whether PLCAA-regulated litigation constituted an economic

²⁹² In fact, as early as *Lopez*, the Court indirectly manifested its intent to repudiate a Posnerian definition of economic activity. See *United States v. Lopez*, 514 U.S. 549, 565–66 (1995). In *Lopez*, a majority rejected Justice Breyer’s argument that “[t]he business of schooling” could constitute an economic activity under the modern Commerce Clause framework. See *id.*; *id.* at 629 (Breyer, J., dissenting). According to the majority, Breyer’s argument “lack[ed] any real limits because, depending on the level of generality, any activity [could] be looked upon as commercial.” *Id.* at 565 (majority opinion); see also *Ides*, *supra* note 8, at 574 (noting that while the *Lopez* and *Morrison* Court did not provide us with a working definition of the term economic activity, “[w]e can say with some confidence that this [definition] is significantly narrower than the Posnerian view of economics”).

²⁹³ See *supra* note 184 and accompanying text.

²⁹⁴ Doctrine, however, is not everything, and this Article would be incomplete if it did not at least allude to the potential loophole that may, in the end, shield the PLCAA from constitutional doom. The PLCAA’s saving grace is embodied in the recently decided but little-known case of *Pierce County v. Guillen*, 537 U.S. 129 (2003). See *supra* note 155 (summarizing *Guillen*). There, the Court upheld a federal statute that immunized municipality documents relating to highway safety from civil discovery without deciding the issue of whether civil discovery itself constituted an economic activity. *Guillen*, 537 U.S. at 146–48. Rather, the Court decided *Guillen* under the channels and instrumentalities prongs of the Commerce Clause. *Id.* at 147. It held that since Congress had the authority to regulate highway safety under the channels and instrumentalities prongs of the Commerce Clause, it had the corresponding authority to regulate *the civil discovery of documents that related to highway safety* as well. *Id.*

The Court may well utilize a similar line of reasoning in its analysis of the PLCAA. This line of reasoning would proceed as follows: since Congress had the authority to regulate the interstate transportation and shipment of guns under the channels/instrumentalities prongs of the Commerce Clause, it had the corresponding authority to regulate civil litigation relating to those guns as well. This reasoning would enable the Court to uphold the PLCAA while, simultaneously, avoid the more complex question of whether civil litigation constitutes an economic activity. See *Amar*, *supra* note 155, at 356. The wisdom of this judicial avoidance, the repercussions that it is expected to draw, and the uncertainties that it may engender for the future of the Commerce Clause, are all important and timely questions, the discussion and resolution of which must await another day.

activity under the Supreme Court's modern Commerce Clause jurisprudence. The answer to this question is both important and complex. It is important because the economic/non-economic distinction forms the centerpiece for assessing the constitutionality of the PLCAA. The answer to this question is also complex: PLCAA-regulated litigation contains both economic and non-economic elements, and as a result, is not susceptible to bright-line characterization as either one. The already difficult task of determining the nature of PLCAA-regulated litigation is further compounded by the fact that the Court has yet to provide us with a working definition of what, precisely, the term economic activity means.

This Article also contained a normative element. Apart from asking whether PLCAA-regulated litigation constituted an economic activity, it examined whether each of the proposed definitions of economic activity set forth in this Article made legal and practical sense. In particular, this Article highlighted some of the most glaring problems that inhered in each of the proposed definitions of economic activity and sought to bring those problems to the forefront of the Commerce Clause analysis. In doing so, the aim of this Article (perhaps surprisingly) is not to advocate for the wholesale dismantling of the economic/non-economic framework, but rather, to facilitate additional thought and dialogue on how better to formulate this framework for future use. Ultimately, this Article does not seek to end the *Lopez*, *Morrison*, and *Raich* Court's search for the golden "economic activity" rule, but to push that search in a more fruitful and constructive direction.