EXAM No. _____

CORNELL LAW SCHOOL

Constitutional Law (C&F) Final Exam

Fall 2006

Professor Meyler

December 11, 2006

This is a four-hour, open book examination. You may not discuss the exam with anyone nor may you consult any online sources if you are using a laptop.

The exam consists of three questions which will be weighted according to the designated percentages. If a question is unclear or you think you need more facts, make appropriate assumptions or indicate what facts would be necessary to arrive at a determination.

If you write by hand, use every other line and leave the back side of each page blank.

Good luck!

Question I (40 percent)

The State of Homer has a state-run liquor store, which sells hard alcohol, wine, and beer. This state liquor store ("SLS") provides health care for its employees, including drug benefits, but it refuses to cover benefits for morning after pills (which function to prevent fertilized eggs from attaching to the uterine wall). It seeks to promote an interest in life. The SLS drug benefit policy covers other forms of birth control, including condoms, but only for in-state employees. Its rationale for covering birth control only for in-state employees is that SLS does not wish to interfere with the public policy determinations of other states with regard to their possible attempts to encourage procreation.

The State of Homer has also just passed a law regulating the sale of wine, in response to concerns about a particularly pervasive but visually imperceptible form of blight that has attacked grapes in neighboring states, rendering some of the wine produced from such grapes unpalatable. The law specifies that one bottle from each case of wine originating in the states of Virgil and Joyce must be sampled by one of the SLS employees before the wine will be approved for sale in Homer.

Your law firm has been approached by a number of disgruntled individuals and organizations, all of whom want to know if they have valid cases against the State of Homer. One is Amanda, an in-state employee of SLS who recently used a morning after pill and was dismayed at having to pay for it herself. Another is Ben, a citizen of the State of Virgil, who wants his purchase of condoms to be covered by SLS's health care policy. A third is the Calypso Winery, which operates in the State of Joyce, and had previously contracted with the Delphi Restaurant in Homer to sell them directly ten cases of wine per month. The fourth and final individual is the manager of the Delphi Restaurant itself. What kinds of constitutional claims can these individuals bring and will they be able to establish standing to assert them?

Question II (30 percent)

Examine the opinion attached in the Appendix (pages 5-9 below). Imagine that you are clerking for a Justice on the U.S. Supreme Court and are considering a challenge to the decision of the Court of Appeals. The Justice has asked for your opinion specifically on the "substantial effects" prong of the Commerce Clause question. In your memo to the Justice, would you recommend upholding or reversing this part of the holding in the opinion below and why?

Question III (30 percent)

Please answer either (a) or (b) below, but not both.

a) The U.S. Supreme Court employs a variety of standards of review in evaluating governmental action. In general, it has claimed to apply strict scrutiny in cases of both alleged infringements upon fundamental rights and of race-based classification. Imagine that you are a clerk for a new Supreme Court Justice, Justice Odysseus, a philosopher who lacks prior judicial experience. He calls you into his office and says, "What's all this language about 'strict scrutiny'? I can't figure out the underlying rationale for when and why it's used. Please write me a memo either explaining a unifying reason for using strict scrutiny or telling me why the Court should abandon the standard."

b) Looking at the Equal Protection Clause and the Dormant Commerce Clause, explain any differences in the Court's treatment of discrimination in the two contexts and provide reasons why these differences should or should not exist.

END OF EXAMINATION

McConnell, Circuit Judge.

I. Factual and Procedural Background

[Defendant-Appellant Carl Patton, a former gang member, who had served time for felony gang-related violence, was caught while wearing a bulletproof vest, which he had purchased in order to protect himself against continued threats of violence from rivals, even though he claimed to have turned his life around. Mr. Patton was apprehended in Wichita, Kansas, where he lived. The vest had been manufactured in California.]

On July 29, 2004, Mr. Patton was charged with being a felon in possession of body armor, in violation of a recently enacted statute, 18 U.S.C. § 931. On October 14, 2004, Mr. Patton moved to dismiss the indictment on the grounds that it violated the Commerce Clause of the federal Constitution. The district court denied the motion on November 16. The next day, a superseding indictment added charges that Mr. Patton had possessed the body armor "in and affecting commerce" and that the body armor was a bulletproof vest "that was not produced in the State of Kansas and was sold or offered for sale in interstate or foreign commerce."

On April 6, 2005, Mr. Patton was sentenced to eighteen months in federal prison and one year of supervised release. He now appeals the issues preserved in the conditional plea.

II. The Commerce Clause

Mr. Patton argues that he was convicted under a statute that exceeds Congress's power under the Commerce Clause. The statute is 18 U.S.C. § 931, which makes it a crime "for a person to purchase, own, or possess body armor, if that person has been convicted of a felony" that qualifies as a crime of violence under 18 U.S.C. § 16. 18 U.S.C. § 931(a). "Body armor" is defined as "any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire." *Id.* § 921(a)(35). We stress that Mr. Patton was convicted of mere *possession* of the body armor--not purchase, not sale, not commercial use. This possession occurred entirely within the borders of the State of Kansas. The statute makes no reference to any effect Mr. Patton's possession or use of the bulletproof vest might have had on interstate commerce. The only connection between his possession and interstate commerce is the fact that, prior to his purchase, the bulletproof vest was manufactured in another state and moved across state lines. Moreover, at the time Mr. Patton acquired the vest in 2001, Congress had not yet made the purchase or possession of body armor by felons a federal crime. It may also be significant that during the incident for which Mr. Patton was prosecuted, he was not armed; for all that appears, he was wearing the bulletproof vest solely in self-defense against attacks motivated by his former association with the Junior Boys gang.

The Supreme Court has articulated "three general categories of regulation in which Congress is authorized to engage under its commerce power." *Gonzales v. Raich*, 545 U.S. 1 (2005). These are "the channels of interstate commerce"; "the instrumentalities of interstate commerce, and persons or things in interstate commerce"; and "activities that substantially affect interstate commerce." We conclude that the statute prohibiting possession of body armor by a felon does not fit within any of the three categories.

[Sections IIA and IIB of the opinion address the "channels of interstate commerce" and "instrumentalities of interstate commerce" arguments and determine that the statute cannot be upheld on those bases.]

C. Activities Substantially Affecting Interstate Commerce

Under the third category, Congress may regulate "activities that substantially affect interstate commerce." This is the most unsettled, and most frequently disputed, of the categories. Under the first two categories Congress may regulate or protect actual interstate commerce; the third allows Congress to regulate intrastate noncommercial activity, based on its effects.

1. *Is the regulated activity commercial?*

We first consider "whether the prohibited activity is commercial or economic." The Constitution gives Congress the power "[t]o regulate Commerce ... among the several States." U.S. Const. art. I, § 8, cl. 3. The distinction between what is and is not commercial therefore lies at the heart of the Commerce Clause. Of course, like many constitutional terms, the meaning of "commerce" is neither obvious nor uncontested. The Supreme Court has warned against a definition under which "any activity can be looked upon as commercial," since this would obliterate the intended limits on federal power. The best historical scholarship indicates that in addition to its primary sense of buying, selling, and transporting merchandise, the term "commerce" was understood at the Founding to include the compensated provision of services as well as activities in preparation for selling property or services in the marketplace, such as the production of goods for sale. In *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 189-90 (1824), Chief Justice Marshall referred to commerce as "a general term, applicable to many objects.... Commerce, undoubtedly, is traffic, but it is something more.... It describes the commercial intercourse between nations, and parts of nations, in all its branches." In the usage of the time, "the 'branches' of 'commercial intercourse' referred to activities integrally related to trade, such as transportation, production, labor, banking, and insurance."

In *Lopez,* the Court held that possession of firearms, in itself, is not commercial or economic. That makes sense, because the mere possession of a firearm does not constitute the buying, selling, production, or transportation of products or services, or any activity preparatory to it. The same conclusion must follow for the possession of body armor. We can think of no reason that mere possession of body armor by a felon would be deemed commercial when the mere possession of a firearm near a school was not.

We recognize that in *Raich,* the Court interpreted the contours of the third category by reference to "economics" rather than "commerce," and included the "consumption of commodities" as well as their production and distribution within that definition. That does not alter our conclusion. First, we are bound by the holding of *Lopez,* reaffirmed in *Raich,* that the mere possession of firearms near a school is not a commercial activity for purposes of the third category. Second, possession of firearms or body armor cannot be described as "consumption." Consumption is the "act of destroying a thing by using it; the use of a thing in a way that thereby exhausts it," *Black's Law Dictionary* 336 (8th ed.2004), and possessing or wearing body armor neither destroys nor exhausts it. Finally, we note that the *Raich* opinion as a whole treats congressional authority over the domestic consumption of marijuana as within the third category only because it was connected to a comprehensive national ban on "the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market." The Controlled Substances Act, the statute at issue in *Raich,* prohibited possession of marijuana as a "means of regulating commerce in that product." *Id.* We do not interpret *Raich* as holding that Congress may criminalize the mere possession of a commodity for the purpose of consumption, divorced from such a comprehensive regulatory scheme, based on the third category.

Our conclusion that the possession of body armor is not a commercial activity does not end the inquiry, but it does channel our analysis. Where the regulated activity is commercial in nature, it generally (perhaps invariably) follows that, aggregated with similar activities elsewhere, the activity affects the national economy sufficiently to fall within congressional power. But where the regulated activity is not commercial in nature, Congress may regulate it only where there are "substantial" and not "attenuated" effects on other states, on the national economy, or on the ability of Congress to regulate interstate commerce. In considering that question, we give special deference to any findings Congress may have made regarding the connection of the statute to interstate commerce, and we assess the effect of any jurisdictional hook that may confine application of the statute to situations affecting interstate commerce. We ask not whether, as judges, we believe the challenged statute has a substantial effect on interstate commerce, but whether Congress could reasonably have thought so.

2. *What is the relation of the regulated activity to interstate commerce?*

Where possession of an item is not a commercial activity in itself, it may nonetheless have a substantial and non-attenuated effect on interstate commerce in two ways. First, possession of a good is related to the market for that good, and Congress may regulate possession as a necessary and proper means of controlling its supply or demand. Second, possession of a good is related to the use of that good, and its use may have effects on interstate commerce. For example, no one would doubt Congress's authority to prohibit the civilian possession of surface-to-air missile launchers, on the theory that their only possible use would substantially affect interstate commerce. We will examine both possibilities, in light of Supreme Court precedents in analogous cases.

a. Regulation of possession as a means of regulating the interstate market for body armor

In both *Raich* and *Wickard,* the regulation of domestic possession and use was justified on the basis of its impact on a comprehensive regulatory scheme directed at interstate production, distribution, and sale. By contrast, in *Lopez,* where there was no such connection to a comprehensive regulation of the national market, the Court made clear that Congress could not reach mere possession under the Commerce Clause.

Where the statute is not part of a comprehensive scheme of regulation, however, the Court has not upheld federal regulation of purely intrastate noneconomic activity.

We must therefore determine whether the prohibition on possession of body armor by felons is an essential part of "comprehensive legislation to regulate the interstate market in a fungible commodity." It is not. In contrast to its comprehensive ban on marijuana under the Controlled Substances Act, Congress has not prohibited the manufacture, distribution, sale, possession, or use of body armor. Members of the U.S. military, federal agents of the CIA and FBI, local police officers, security guards, hunters, convenience store owners--all non-felons--are free to buy, own, and possess body armor. Companies are free to produce and sell it. The prohibition of possession by a small class of persons, felons, is unrelated to any broader attempt to suppress the market or to comprehensively control supply. Even with respect to felons, the statute's non-commercial focus is clear from what goes unpunished. No one violates the law by selling to a felon or buying from a felon, and felons themselves may sell body armor previously acquired or use it in the course of their licit occupations. 18 U.S.C. § 931(b)(1).

Moreover, in this case, Mr. Patton acquired his bulletproof vest at a time when possession of body armor by felons was lawful. Here, therefore, there is no logical connection--not even an attenuated one--between his possession and the body armor market. Since it was lawful for him to purchase and possess the armor when he bought it, prohibition of continued possession cannot contribute, even indirectly, to regulating the market.

Nor does it matter that body armor is subject to pervasive regulation by the states, as discussed below. Such regulation of a commodity is not enough to establish a comprehensive regulatory scheme, because this was surely present in *Lopez* and the states and the federal government regulate firearms more extensively than body armor. Like the statute in *Lopez,* section 931 regulates possession for its own sake and cannot be justified as part (much less as an essential part) of a comprehensive regulation of the market in body armor.

b. Regulation of possession as a means of controlling uses that might affect interstate commerce

The second way in which noncommercial, intrastate possession of an item might substantially affect interstate commerce is related to use. Possession might be prohibited as an anticipatory means of prohibiting use of a thing in a way that affects interstate commerce.

Actually, any use of anything might have an effect on interstate commerce, in the same sense in which a butterfly flapping its wings in China might bring about a change of weather in New York.... That is why the Supreme Court has insisted that, to justify congressional exertion of the commerce power within the third category, the effects must be both "significant" and not "attenuated."

No one would question that the possession of body armor by felons contributes to crime, or that crime has a measurable and significant impact on the national economy. But that was the argument rejected in *Lopez* and *Morrison*. Possession of firearms in the vicinity of schools can contribute to crime, and gender-motivated violence *is* crime. This Court, being bound by the precedents of *Lopez* and *Morrison*, therefore cannot hold that simply because body armor facilitates crime, the subject falls within Congress's commerce power.

Indeed, application of section 931 in this case has an even more attenuated relation to interstate commerce than the possession of firearms in *Lopez*—let alone the actual commission of violent offenses in *Morrison*. Unlike carrying a firearm in the vicinity of a school, wearing body armor is not an inherently threatening act. Much of the time, wearing body armor is an act of self-defense, which reduces rather than increases crime. This case illustrates the point: Mr. Patton was not armed at the time he was apprehended and-- according to his story--was wearing the vest solely because his prior gang activity, now abandoned, made him vulnerable to attack. If the statute were limited to possession of body armor in conjunction with an offensive weapon, or to the use of body armor in the commission of a crime affecting interstate commerce, which were the scenarios motivating its enactment, the connection would be less attenuated. As it is, however, application of section 931 to the circumstances of this case cannot be reconciled with *Lopez* and *Morrison*.

Moreover, the dissenters' arguments in *Lopez* and *Morrison* regarding the substantial effect of the regulated conduct on interstate commerce largely rested on the frequent incidence, and therefore significant aggregated effect, of the conduct. The theory was that widespread conduct, occurring nationwide, has national consequences and warrants a national response. The House Report on section 931, by contrast, contained a Congressional Budget Office estimate, based on information from the U.S. Sentencing Commission, that the prohibition on possession of body armor by felons "would probably affect fewer than 10 cases each year." H.R.Rep. No. 107-193, pt. 1, at 7 (2001). Ten criminal cases a year is at the other end of the spectrum from *Lopez* and *Morrison*. The CBO estimate shows that the effect on interstate commerce of felons' possession of body armor is probably negligible and certainly far from substantial.

3. *What are the congressional findings?*

Analysis of the effect of felons' possession of body armor is facilitated by Congress's "specific findings regarding the effects of the prohibited activity on interstate commerce."

Although there were no preambulatory findings enacted as part of the statute, the House Report contained the following formal findings regarding the rationale for section 931:

> (1) nationally, police officers and ordinary citizens are facing increased danger as criminals use more deadly weaponry, body armor, and other sophisticated assault gear;
>
> (2) crime at the local level is exacerbated by the interstate movement of body armor and other assault gear;
>
> (3) there is a traffic in body armor moving in or otherwise affecting interstate commerce, and existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power;
>
> (4) recent incidents, such as the murder of San Francisco Police Officer James Guelff by an assailant wearing 2 layers of body armor, a 1997 bank shoot out in north Hollywood, California, between police and 2 heavily armed suspects outfitted in body armor, and the 1997 murder of Captain Chris McCurley of the Etowah County, Alabama Drug Task Force by a drug dealer shielded by protective body armor, demonstrate the serious threat to community safety posed by criminals who wear body armor during the commission of a violent crime....

H.R. Rep. 107-193, pt. 1, at 2.

Several of these findings make no mention of interstate commerce. Those that do focus on three points: (1) an interstate market for body armor exists, (2) the interstate movement of body armor increases crime, and (3) federal controls over the interstate market will allow states to control the intrastate trade in body armor. The first two points are surely true, but they were also true in *Lopez*. An

interstate market exists for guns and for body armor, and the interstate movement of both can increase crime. Yet in *Lopez* the existence of the market and the incidence of crime did not establish that the prohibited possessions substantially affected interstate commerce.

The congressional findings regarding the existence of an interstate market for body armor would be more meaningful if the statute attempted to suppress or limit that market. As discussed above, however, it does not. Manufacture, distribution, and sale of body armor--even sale of body armor to felons--is entirely lawful, and has not been regulated by Congress. Congressional findings that "crime at the local level is exacerbated by the interstate movement of body armor and other assault gear" and that "there is a traffic in body armor moving in or otherwise affecting interstate commerce," while undoubtedly true, do nothing to explain or justify a statute that does not limit the interstate movement of body armor or the traffic in it.

The third point suggests that federal regulation of the interstate traffic in body armor would somehow enable the states themselves to prohibit felons' possession. But thirty-one states already regulate the possession or use of body armor, with an array of legislative approaches. It is thus clear that the federal prohibition does not "enable" state prohibitions. At best, the federal law duplicates the state prohibitions. At worst, it may conflict with a state's policy judgment; discourage experimentation; or even preempt state criminal laws.

Moreover, the findings indicate that this statute falls primarily within an area of traditional regulation by the states, namely protecting "police officers and ordinary citizens" from violent crime. Congress was understandably concerned about "the serious threat to community safety posed by criminals who wear body armor during the commission of a violent crime." Yet in this area the Supreme Court has emphasized the prerogatives of the states. Moreover, as noted above, this statute not only intrudes on an area of traditional state concern but also potentially conflicts with the widespread state regulation that already exists. Far from establishing a substantial effect on interstate commerce, these findings raise concerns about federal intrusion and suggest that wearing body armor affects interstate commerce insofar as all crime hurts the economy—an argument the Supreme Court rejected in *Lopez* and *Morrison.*

4. Is there a sufficient jurisdictional hook?

The statute under which Mr. Patton was charged has a jurisdictional hook, but it does not seriously limit the reach of the statute. The jurisdictional hook, § 921(a)(35), limits the definition of "body armor" to "any product sold or offered for sale, in interstate or foreign commerce, as personal protective body covering intended to protect against gunfire." Nearly all body armor will meet that test. More important, there is no reason to think that possession of body armor that satisfies the jurisdictional hook has any greater effect on interstate commerce than possession of any other body armor.

If Congress intended to suppress the interstate market in body armor, then directing a prohibition on possession towards armor that had moved in interstate commerce would make sense. Where Congress has chosen to allow production, distribution, and sale of body armor in interstate commerce, however, it is hard to understand why possession of armor that meets that description is more objectionable than any other.

* * *

Given that Mr. Patton's possession was not interstate, not commercial, and not an essential part of a comprehensive scheme of economic regulation, that his use of the bulletproof vest was in self-defense and not connected to crimes that might affect interstate commerce, and in light of the CBO's prediction that the statute would be applied fewer than ten times a year, we find no rational basis for concluding that the possession of body armor prohibited by section 931 substantially affects interstate commerce. We thus conclude that 18 U.S.C. § 931 cannot be justified as a regulation of intrastate activity that substantially affects interstate commerce.