THE CONSTITUTIONAL LIMITATION ON TRADEMARK PROPERTIZATION

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ABSTRACT

The following article seeks to apply the retrenchment in constitutional Commerce Clause jurisprudence of the last few decades to the phenomenon of trademark propertization, the expansive and largely federal movement towards protecting trademarks as assets apart from any connection to referent goods and services. Trademark scholars have filled the trademarks literature with critiques of propertization that generally object, on policy and historical grounds, to the trend and offer constructions of the Lanham Act designed to check its progress. With the notable exception of an article published in 2000 by Professor Kenneth Port, however, the literature has largely avoided addressing the question of whether the United States Congress possesses the authority to push trademark law so far in that direction.

Building off of Barton Beebe's semiotic account of trademark law, the article observes that much of the Commerce Clause case law in the trademark space is muddied by the failure to draw an analytic distinction between the trademark as such (i.e., the trademark's signifier) and the goods and services with which it is used. Moreover, many of the seminal cases in the area predate such important new contributions to Commerce Clause jurisprudence as United States v. Lopez, Gonzalez v. Raich, *and* National Federation of Independent Business v. Sibelius.

Upon close review of these and other recent precedents, and a thorough application of contemporary, three-category Commerce Clause analysis to trademark propertization, the article concludes that there is a firm constitutional limit to Congresses' ability to regulate trademark signifiers detached from goods and services. Namely, Congress may not recognize or protect a property interest in trademarks as such except as a rational means of furthering the regulation of referent goods or services. Although distant and unreachable in most cases, this constitutional ceiling serves as a critical constructional limit on certain controversial trademark doctrines like dilution and the rule against assignments in gross, and prevents the U.S. Congress from ever recognizing pure trademarks in the abstract as property upon creation. Although a complete defense of trademark "localism" is outside of the article's scope, it ends by offering some basic policy and structural justifications for accepting this limit on federal authority in the trademark sphere.

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TABLE OF CONTENTS

INTRODUCTION

For decades now, intellectual property scholars have engaged in a critique of the so-called "propertization" of trademarks in the United States. Although the exact contours of propertization are vague, the term loosely refers to a shift toward protecting trademarks "as things valuable in and of themselves,"[1] or in semiotic terms, protecting a trademark's signifier (i.e., the mark itself), disconnected from any referent goods or services. These propertization critiques generally object, on policy and historical grounds, to the phenomenon and offer constructions of the Lanham Act designed to check its progress. One leading propertization scholar, Kenneth Port, further raises the possibility that some of these changes "rest on questionable constitutional grounds."[2]

The following Article seeks to explore in depth, and in light of new Supreme Court precedents, the fundamental question first raised by Professor Port: namely, does the federal government have the constitutional authority to propertize trademark law? Can Congress, to put the matter in the extreme, pass a statute simply recognizing that one who creates a trademark is its owner?[3]

Putting aside the normative question of whether the federal government should be allowed this authority, it finds that posing the basic descriptive question is more complex, and the analytic framework harder to apply, than generally assumed. Accounts that cite to Congress's authority, under the Commerce Clause, to regulate goods and services that flow in, or affect, interstate commerce generally fail to acknowledge the conceptually distinct question of Congress's right to regulate trademark signifiers divorced from those goods and services. This failure is particularly notable in light of the propertization critique's central premise that trademark law has steadily been divorcing trademark signifiers from their referent goods and services. Other accounts, such as Professor Port's, observe the distinction but fail to account for the full breadth of Congress's authority to protect trademark signifiers, standing alone, by virtue of having once been connected to goods and services in commerce, or as part of a rational overall scheme for the regulation of such goods and services.

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1 Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1688 (1999) [hereinafter Lemley, *Death of Common Sense*].

2 Kenneth L. Port, *The Congressional Expansion of American Trademark Law: A Civil Law System in the Making*, 35 WAKE FOREST L. REV 827, 829 (2000) [hereinafter Port, *Congressional Expansion*].

3 This hypothetical is based on that put forward by Stephen L. Carter in his article, *Does it Matter Whether Intellectual Property is Property?*, 68 CHI.-KENT L. REV. 715, 720–21 (1993).

The Article begins in Part I by providing an overview of trademark propertization, and a hypothetical designed to test the limits of Congress's ability to adopt a purely propertized trademark regime in the United States. Relying heavily on Barton Beebe's semiotic analysis of trademark law, it then offers in Part II a short section summarizing the structure of trademarks particularly as related to trademark propertization.

It then moves in Part III to the Commerce Clause, and shows how Congress's authority to regulate the goods and services with which trademarks are used is immensely broad. Whether analyzed under the first, second, or third category of contemporary, formal Commerce Clause analysis, or some combination of the three, Congress has ample authority to regulate these trademark referents. For this reason, Congress's power over the regulation of trademarks used or intended to be used in connection with goods and services is, and should be, virtually limitless.

The Article then shows in Part IV that the foregoing analysis is fundamentally inapposite as applied to trademark propertization. It offers, in this connection, an analogy to food and drug regulation, designed to show that Congress's right to regulate labels used with foods and drugs is not coextensive with its right to regulate labels more generally. Trademark propertization, akin to regulation of labels in general, requires a separate and distinct Commerce Clause analysis from that used to justify regulation of trademarks affixed to goods and services.

Accordingly, the Article then moves in Part V to a pure application of Commerce Clause analysis to trademark signifiers as such. It finds, contrary to prior scholars, that the strongest support for such regulation may be found in the first and second categories of Commerce Clause analysis under a "state-border crossing" theory analogous to Congress's right to apply federal law to firearms that previously moved in commerce even if no longer possessed by the original transporter. This regulatory power, however, remains limited by some original nexus to that earlier border crossing by a good or service. A similar result follows from category three analysis under cases such as *Gonzales v. Raich*[4] and *National Federation of Independent Business*

4 545 U.S. 1, 9 (2005) (holding that the Controlled Substances Act was a valid exercise of congressional power under the Commerce Clause because the authority to regulate interstate markets for medicinal substances includes parts of those markets "supplied with drugs produced and consumed locally").

v. Sebelius.[5] Namely, Congress's power to regulate trademark signifiers, as part of a rational plan to regulate goods and service in or affecting commerce, is broad. It is not, however, unlimited. In particular, there must always be some reasonably articulable tie back to the regulation of actual goods and services. In no event, however, may Congress simply recognize standalone property rights in a trademark as such.

At the conclusion of this Part, the Article then reviews, in the absence of Commerce Clause authority, what other sources of constitutional authority Congress might rely on to regulate all aspects of the trademark relationship. It finds that none of these sources provides Congress with authority to recognize trademark signifiers as a pure property right.

In Part VI, the Article concludes that there is a firm constitutional limit to Congress's ability to regulate trademark signifiers detached from goods and services. Namely, Congress may not recognize or protect a property interest in trademark signifiers except as a rational means of furthering the regulation of referent goods or services. Although distant and unreachable in most cases, this constitutional ceiling nevertheless serves as a critical constructional limit on certain controversial trademark doctrines like dilution and the rule against assignments in gross, and prevents Congress from ever simply granting trademark rights to the creator of a new trademark as such. Although a defense of trademark "localism" is expressly outside of the Article's scope, it ends by offering some basic policy and structural justifications for accepting this limit on federal authority in the trademark sphere, and to lay the groundwork for future normative inquiry.

I. THE LIMITS OF TRADEMARK PROPERTIZATION

The central subject of this Article, trademark propertization, has meant different things to different people. The legal realist Felix Cohen was one of the earliest adopters of the notion, using the phrase "thingification of property" to describe a means by which courts veil value judgments in trademark cases though conclusory application of the term "property" to trademark uses they wish to

5 132 S. Ct. 2566, 2591 (2012) (holding that the individual mandate in the Affordable Care Act could not be sustained under the Commerce Clause because it compelled, rather than regulated, commercial activity).

protect.[6] As such Cohen approached trademark propertization as the transformation of something inherently valueless, namely an abstract word or symbol, into something valuable through the setting of a legal entitlement, namely the grant of an exclusive right to use it.

In more current usage, the term tends to refer to the contemporary push to protect trademark rights, akin to patents and copyrights, as "intellectual products of the mind."[7] Under this conception, "A's ownership rights in a mark come because she has thought it up and not because she has used it to distinguish her goods in commerce . . . ."[8] For instance, we might see the adoption of the intent-to-use trademark regime in the late 1980s as emblematic of a move towards trademark propertization because it grants creators of trademarks the power to reserve rights in marks they have thought up but not yet used with any goods.[9]

A close corollary usage considers trademark propertization as the attempt to protect trademarks apart from underlying goodwill, or in gross.[10] Mark Lemley explains this phenomenon as "an increasing tendency to treat trademarks as assets with their own intrinsic value, rather than as a means to an end."[11] Kenneth Port suggests that it is a move towards a civil law based system, "where the trademark itself is considered subject to property ownership," and away from the common law origins of the U.S. system.[12]

In a broader sense, some have used propertization to refer to a more general "shift in trademark law away from confusion-based protection and towards a property-based regime that is focused only superficially on consumers."[13] Under this conception, a range of doctrinal developments arguably rooted in brand-value retention rather

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6 Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815–816 (1935) (internal quotation marks omitted).

7 Carter, *supra* note 3, at 720.

8 *Id.* at 720–21.

9 *Id.* at 721.

10 *See* Kenneth L. Port, *The Illegitimacy of Trademark Incontestability*, 26 IND. L. REV. 519, 553 (1993) [hereinafter Port, *Illegitimacy*] (distinguishing between the rights granted to patent and copyright owners, which resemble classical property rights, and those given to trademark holders). Relying on A.M. Honore's list of the incidents of ownership, Port concludes that trademarks, traditionally understood, lack many of the key rights we associate with property. *Id.* at 554–55. For example, one of those incidents, the right to possess, is defined by Honore as the right to exclusive control over the thing in question. *Id.* Trademark holders, however, do not enjoy exclusive authority over the trademark, for other entities may use the mark under the doctrine of "fair use." *Id.* at 555.

11 Lemley, *Death of Common Sense*, *supra* note 1, at 1693.

12 Port, *Congressional Expansion*, *supra* note 2, at 829.

13 Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1847 (2007).

than consumer protection and information-transmission norms (e.g., dilution and trade dress protections) are consistent with increased trademark propertization.[14]

This Article will use the term trademark propertization in a closely related but slightly more focused manner to refer to the grant of some degree of legal protection to a trademark's signifier disconnected from any referent goods or services. This definition is meant to track Barton Beebe's semiotic explanation, discussed below, that "to expand the scope of their property rights, trademark owners have sought to define their property rights as an exclusive right to the signifier in itself."[15]

This Article does not address the substance of the propertization claim (i.e., whether trademark rights are becoming more propertized, and if so whether that is a good or bad thing). Rather, it focuses on whether, and to what degree, Congress and federal courts interpreting federal law have the authority to protect trademark signifiers as a pure form of property.

For instance, it is conceivable that Congress might seek to push federal trademark law to its constitutional extreme. As Professor Carter intimated, it might wish to amend the Lanham Act to recognize trademark rights as commencing not with use of (or intention to use) a trademark with goods and services, but rather with simple authorship of a trademark, in the sense used in the Copyright Act.[16]

"Trademark protection," the amended statute might run, "subsists in trademarks fixed in any tangible medium of expression." Continuing the parallel to copyright law, the statute might continue, "Trademarks protected under this title vest initially in the author or authors of the marks." Under this new regime, one could conceive of an entire industry of brand creation companies developing and then selling rights to authored trademarks. Could the U.S. Congress so baldly set such a radical shift in U.S. trademark law? [17]

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14 *Id.* S*ee also* Lemley, *Death of Common Sense*, *supra* note 1, at 1699–1700.

15 Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 651 (2004). The definition used in this Article intentionally excludes increased trade dress protections from its scope. The increase of trade dress protection is attributable to the merger of the signifier with the referent, as opposed to elimination of the referent from the trademark structure. Accordingly, it is a categorically different type of claim that is not within the scope of this Article.

16 *See* 17 U.S.C. § 102(a) (2012) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression . . . ."); 17 U.S.C. § 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work.").

17 It may be tempting to respond to this extreme case with a simple citation to the *Trade-Mark Cases*, the 135-year-old and still leading precedent in trademark Commerce Clause

II. TRADEMARK PROPERTIZATION AND SEMIOTICS

Before turning to the Commerce Clause and testing this hypothetical statute, it is helpful to first place the above definition of trademark propertization in its native semiotic context. As Barton Beebe lays out in his leading article on the subject, trademarks may be understood semiotically as triadic structures consisting of three necessarily separate but linked aspects: (1) the trademark's signifier (the tangible symbol, i.e., word, name, symbol, device, etc.); (2) the trademark's referent (the actual goods or services to which the signifier refers); and (3) the trademark's signified (the source's goodwill).[18] Beebe gives the example of the trademark NIKE which consists of the signifier ("the word 'nike'"), the signified ("the goodwill of Nike, Inc."), and the referent ("the shoes or other athletic gear to which the 'nike' signifier is attached").[19]

Trademark propertization, insofar as it makes the signifier itself its own product or referent, thus entails a radical semiotic restructuring. It "collapses the trademark's conventional triadic structure by forcing a merger of signified and referent."[20] Rather than NIKE being protected in relation to its connection to shoes, the term NIKE (and the signified goodwill it represents) is now itself the thing being protected for its own sake. Shoes lose their relevance. Propertization is thus the story of "the rise of the dyadic mark, unaffixed to any particular

jurisprudence. 100 U.S. 82 (1879). As discussed in the body of this piece below, that case makes clear that Congress's authority to regulate trademarks only extends as far as the reach of the Commerce Clause. *Id.* at 96. For this reason, the case invalidated the first general federal trademark act, the Trademark Act of 1870, due to Congress's failure to stay within those bounds. *Id.* at 97. Even, however, if one were to close an eye to the fact that Commerce Clause jurisprudence has expanded radically since the case was decided in 1879, the *Trade-Mark Cases* holding is deceptively inapposite to this hypothetical. The original statute held unconstitutional in that case required use of, or intention to use, the subject trademark in connection with goods. *Id.* For instance, under the 1879 Act, the applicant was "required to furnish a statement of the class of merchandise, and the particular description of the goods comprised in such class, by which the trade-mark has been or is intended to be appropriated." *Id.* (internal quotation marks omitted). The constitutional infirmity, according to the Court, lay in the statute's failure to require that those goods be transported from one state to another. *Id.* In other words, the Court determined that if a U.S. trademark regime is to be constructed around use of trademarks in connection with goods, then those goods must be goods in interstate commerce. *Id.* It is an oft-repeated mistake to read the case, standing alone, as setting a constitutional requirement that trademarks must be used in connection with goods in commerce. It literally says nothing about a federal trademark statute based on creation of trademark signifiers as such. While it might have some persuasive application to such a propertized trademark regime, the precedent is at best tangential and certainly non-binding.

18 Beebe, *supra* note15, at 646.

19 *Id.*

20 *Id.* at 658.

product, referring to no product other than its own distinctiveness."[21] The key insight of the propertization critique for purposes of this Article may thus be summed up as the untethering of the associational link between trademarks and the goods and services with which they are used.

Trademark propertization can apply, under this formulation, to two different but related types of control of the trademark's signifier. First, there is the vertical relationship between a trademark's signifier and the signified, known as signification.[22] This is, in essence, the "positive meaning" we ascribe to a term or logo.[23] Second, there is the horizontal relationship between the signifier and other trademarks, known as value.[24] This is the negative difference or distinctiveness of a term or logo from other terms or logos.[25] Beebe goes into some depth on the interrelated nature of signification and value,[26] however for these purposes it is enough to say that trademark propertization is not exclusively tied to signification or value. What is key is that whether we are talking about control over a signifier's meaning or its distinctiveness or both, when we are talking about trademark propertization we are leaving out the good or service referent.

Dilution doctrine is a classic instance of trademark propertization under this definition.[27] This is because of dilution's laser focus on the mark as a mark. As defined in the current Lanham Act, dilution by blurring is "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the

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21 *Id.* at 683.

22 *Id.* at 639.

23 *Id.*

24 Beebe, *supra* note 15, at 639.

25 *Id.*

26 *Id.* at 640–41.

27 Most scholars or commentators writing on the issue of trademark propertization have targeted dilution as a key battleground. *See, e.g.*, Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461, 493–95 (2005) (considering the interrelationship between dilution doctrine and a merchandising right); Lemley, *Death of Common Sense*, *supra* note 1, at 1699 (identifying ways that dilution doctrine has expanded trademark rights); McKenna, *supra* note 13, at 1912 ("The concept of trademark dilution generally is considered a radical departure from traditional trademark principles."); Port, *Congressional Expansion*, *supra* note 2, at 829 (considering dilution an area of major recent development in trademark law with the passage of the Federal Dilution statute in 1996); Port, *Illegitimacy*, *supra* note 10, at 558 ("Not to place [antidilution law's fame] restriction on trademark holders would come too close to recognizing a trademark itself as property."); Michael Pulos, Comment, *A Semiotic Solution to the Propertization Problem of Trademark*, 53 UCLA L. REV. 833, 855–57 (2006) (arguing that "propertization" critiques of the dilution doctrine are misplaced).

famous mark."[28] This definition on its face says nothing about the goods or services with which the mark is used—or even for that matter about the mark's connection with its source. Rather it is conceptually centered around protection of the trademark signifier as such. As Beebe explains, dilution in its most radical incarnation protects "the mark as a unique identifier, regardless of its source or product."[29]

A recent Louis Vuitton case, for instance, reveals dilution as a form of propertization.[30] The famous brand-owner prevailed on summary judgment with respect to its federal dilution claim against the car-maker Hyundai, with respect to a Hyundai Super Bowl advertisement for the latter's Sonata car.[31] The thirty-second ad featured, in passing, an "inner-city basketball game" scene in which the basketball in play contained a design similar, but not identical, to Louis Vuitton's famous "toile monogram" mark.[32] As recounted by the court, Hyundai intentionally drew an association with the toile monogram for the 2011 Sonata ad in order to contrast a symbol of "old luxury" from Hyundai's image in the context of a recession.[33]

The claim at issue, being one for trademark dilution rather than infringement, involved no analysis of any goods or services.[34] The key point, for the court, was simply that the use by Hyundai of the imitative pattern on the basketball was intended to, and in fact did, create an "association" with the original toile mark.[35] It was irrelevant to the

28 15 U.S.C. § 1125(c)(2)(B) (2012). A parallel definition is provided for dilution by tarnishment, which covers association that "harms the reputation of the famous mark." 15 U.S.C. § 1125(c)(2)(C).

29 Beebe, *supra* note 15, at 688.

30 Louis Vuitton Malletier, S.A. v. Hyundai Motor Am., No. 10 Civ. 1611(PKC), 2012 WL 1022247, at *1 (S.D.N.Y. Mar. 12, 2012).

31 *Id.*

32 *Id.* The "toile monogram" mark was described as "a repeating pattern design of the letters 'LV' and flower-like symbols on a chestnut-brown background." *Id.* The main change was that the ball contained the letters "LZ" rather than "LV". *Id.*

33 *Id.* at *2 (internal quotation marks omitted). At deposition, Louis Vuitton showed that this association with Louis Vuitton was also made "to raise the image of the Hyundai brand in the mind of the consumer." *Id.* at *3.

34 To the contrary, the court made clear that the federal anti-dilution statute, under which the claim was brought, was targeted against use "in a non-confusing way in an unrelated area of commerce." *Id.* at *5 (quoting TCPIP Holding Co. v. Haar Commc'ns, Inc., 244 F.3d 88, 95 (2d Cir. 2001) (internal quotation marks omitted)).

35 *Id.* at *9–14 (recounting evidence of, inter alia, intentional and actual intermark association, and concluding that Hyundai was liable for dilution by blurring as a matter of law). Although the test the court adopts clearly refers to association between the marks as marks, the court's analysis conflates this with association between the parties. *Compare id.* at *9–10 (stating that the court weighs associations between the marks in its analysis) *with id.* at *13 ("Louis Vuitton has set forth evidence that Hyundai utilized the Louis Vuitton

court that "the pattern was not used to designate Hyundai's own goods, services, or business."[36] Speaking in heavily propertized terms, the gist of the offense was "laddering and borrowing equity from Louis Vuitton."[37]

The dilution claim in this case is thus an exemplar of trademark propertization. As understood by the court, the dilution provisions of the Lanham Act ("designed solely for the benefit of sellers")[38] purely protect "brand equity" from being taken by another.[39] The signifier (and its signified goodwill) is all that matters. Indeed, the contention by Hyundai that referent goods or services should factor-in at all was dismissed as "conflat[ing] dilution with a false designation of origins."[40] Thus, Louis Vuitton prevailed on its claim as a matter of law, positioning it to prevent its toile monogram mark from appearing, for a fleeting moment, on a basketball in a car ad.

Although a model form of propertization, the dilution claim in the Louis Vuitton case is not propertization at its most extreme, but rather a middle ground on a propertizing continuum. This is because the plaintiff's toile monogram had for decades been used in connection with goods—namely luxury goods such as the high-end luggage famously sold under the mark. It was only defendant's use of the subject mark that was unaffixed to any trademark referents.

At the most extreme end of the propertization continuum even a brand-owner's initial acquisition of the mark might be protected, from infancy, apart from any relation to goods and services (such as in the hypothetical trademark statute offered above).[41] This propertizes the entire regime—beginning with initial acquisition by the plaintiff.

The remainder of this Article seeks to identify what constitutional limitations, if any, there might be to Congress's ability to propertize trademarks, and to place that limit somewhere on the continuum shaped by the above examples.

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marks for its own branding goals, and, in the minds of some consumers, created actual association between Hyundai and Louis Vuitton.").

36 Louis Vuitton Malletier, S.A. v. Hyundai Motor Am., No. 10 Civ. 1611(PKC), 2012 WL 1022247, at *13 (S.D.N.Y. Mar. 12, 2012) (internal punctuation omitted) (noting that such goods presumably included "a hypothetical product such as the Louis Vuitton Sonata, or the actual sale of Louis Vuitton-style basketballs")

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

38 *Id.* at *5.

39 *Id.* at *13.

40 *Id.*

41 *See supra* Part I.

III. TRADEMARKS AND THE COMMERCE CLAUSE

In order to answer the foregoing question this Article now turns to the Commerce Clause in general, and applications of the Commerce Clause to trademark law in particular. It finds that while contemporary Commerce Clause jurisprudence appropriately recognizes the vast breadth of Congress's right to regulate trademarks, such cases center their analyses around the good and service referents with which trademarks are used (and not the trademarks' signifiers as such). This greatly limits their value in answering constitutional questions about trademark propertization.

A. Contemporary Commerce Clause Jurisprudence Gives Ample Room for Congress to Regulate the Goods and Services with Which Trademarks are Used

Current Supreme Court jurisprudence generally identifies three categories of regulation under which Congress is authorized to "regulate Commerce . . . among the several States".[42] First, Congress can regulate the channels of interstate commerce, such as the nation's highways, waterways, airways, and Internet.[43] Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce (such as planes, trains, automobiles, computers, and telephones) and persons or things in interstate commerce.[44] Third, Congress has the power to regulate activities that substantially affect interstate commerce.[45]

Before turning to federal court and agency treatments of the Commerce Clause in actual trademark cases, it is helpful to first acknowledge the imperfect fit between this formal *Lopez*-style analysis and trademark cases.[46] Congress's power to regulate trademarks implicates and cuts across all three categories, blurring the boundaries and complicating attempts at categorization.[47]

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42 U.S. CONST. art. I, § 8, cl. 3.

43 Gonzales v. Raich, 545 U.S. 1, 16 (2005); BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 5.01[B][1] (2d ed. 2013) (citing United States v. MacEwan, 445 F.3d 237, 244 (3d Cir. 2006)).

44 *Raich*, 545 U.S. at 16–17; DENNING, *supra* note 43, § 5.01[B][2].

45 *Raich*, 545 U.S. at 17.

46 Although *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) is probably the leading case associated with three-category analysis, it was first introduced in *Perez v. United States*, 402 U.S. 146, 150 (1971). *See, e.g.*, *Raich*, 545 U.S. at 33–34 (Scalia, J., concurring) (identifying *Perez* as the origin of three-category analysis in Commerce Clause jurisprudence).

47 Gordon G. Young contends that it is more helpful to divide Commerce Clause cases into two categories, with the understanding that they are not entirely distinct: those involving regulations based on (1) "Congress's power to control and facilitate reasonably identifia-

Take, for instance, the typical case of the PEPSI trademark on a label on a bottle of Pepsi soda. You could locate Congress's authority to regulate that label under the first category, as the labeled bottles are distributed via highway, waterway and/or train track, and ordered over the Internet. Under category one, Congress may deny "the facilities of interstate commerce" to "adulterated" products (i.e., infringing goods) in order to prohibit such products from being shipped from one state to another.[48]

Alternatively, you could look to the Pepsi bottles, and the labels on them, as the actual "things" in interstate commerce under the second category. Under this conception, rather than denying the channels of commerce to adulterated products, the regulation is trying to "protect" the Pepsi soda itself as a thing in commerce.[49] Finally, sales of Pepsi soda "affect" interstate commerce in the aggregate, and therefore individual sales (including local sales at a local convenience store) might be regulated under the third category as well, under the theory that failure to regulate local sales would undercut the constitutionally valid regulation of the interstate market for soda.[50]

To be sure, you could easily develop other scenarios slicing across the categories at different tangents. Take, for instance, the archetypal Memorial Day vacationer, who buys a PEPSI-branded soda at a gas station off the interstate. The traveler herself, now, could be the "person" in interstate commerce (category two), who needs protecting (as contrasted to the Pepsi which was previously considered the endangered "thing" in commerce). And the "effect" on interstate commerce could be the effect, maybe, of the numbers of persons willing to drive far distances for vacation (which might be reduced if you

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ble border crossings" and (2) "the regulated activity's effect on interstate commerce." *The Significance of Border Crossings:* Lopez, Morrison *and the Fate of Congressional Power to Regulate Goods, and Transactions Connected with Them, Based on Prior Passage Through Interstate Commerce*, 61 MD. L. REV. 177, 186 (2002). His argument is quite convincing on this point. Where convenient, this article accordingly adopts Young's formulation when it refers to Congress's power to regulate border crossings.

48 Hipolite Egg Co. v. United States, 220 U.S. 45, 58 (1911).

49 *See, e.g.*, *Perez*, 402 U.S. at 154–56 (observing that under category two analysis, the federal government may pass a statute protecting against thefts from interstate shipments).

50 *Raich*, 545 U.S. at 17–18 (citing Wickard v. Filburn, 317 U.S. 111, 128–29 (1942)). It is this third category of analysis that has been limited (to what degree remains disputed), by the *Lopez* and *Morrison* line of cases. The key distinction drawn by the Court appears to be that Congress has more latitude to regulate economic, rather than non-economic, activities (with economic activities understood to involve the "production, distribution, and consumption of commodities"). *Raich*, 545 U.S. at 25 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF ENGLISH LANGUAGE 720 (1966) (defining "economics")).

could not safely, confidently, and quickly buy trusted beverages en route).

Or we might alternatively hypothesize the branded good as a computer that may be connected to the Internet (say, an iPad). This again implicates all three categories, but differently. Now, the iPad is itself an instrumentality of commerce (as part of the Internet),[51] in addition to traveling in (as it is shipped to the buyer)[52] and affecting (via its usage or sale) interstate commerce.

Service marks, too, cut across all the categories.[53] For instance, take the BANK OF AMERICA mark used in connection with banking services. It could be regulated to keep pure the channels of commerce (e.g., keeping the Internet free from confusingly similar online banking platforms). It could be regulated to protect people in interstate commerce (a business traveler who visits an ATM to withdraw cash while traveling). And it could be regulated as banking services on their face "affect" interstate commerce.

One thing becomes clear from a glance at the above scenarios. Namely, current Commerce Clause jurisprudence casts such wide nets in so many directions that it is difficult to conceive of any good sold or service provided in the United States that cannot, by some argument or another, be snagged by Congress's commerce power in the digital age.[54] But contained within this vast conclusion is an essential limitation. Namely, in almost every case, the jurisdictional hook arises from the referent good or service, and not the trademark signifier as such.

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51 *See, e.g.*, United States v. Hornaday, 392 F.3d 1306, 1311 (11th Cir. 2004) (holding that the Internet is an instrumentality of interstate commerce as it is subject to congressional regulation).

52 *See, e.g.*, Ford Motor Co. v. Greatdomains.com, Inc., 177 F. Supp. 2d 635, 649 (E.D. Mich. 2001) (citing Intermatic, Inc. v. Toeppen, 947 F. Supp. 1227, 1239–40 (N.D. Ill. 1996) (quoting 1 JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 5.11[2], at 5–234 (1996) ("Because Internet communications transmit instantaneously on a worldwide basis there is little question that the 'in commerce' requirement would be met in a typical Internet message . . . ."))) (holding that things sold over or traveling through the Internet, such as domain names and e-mail messages, are things "in commerce"); *see also* Planetary Motion, Inc. v. Techsplosion, Inc., 261 F.3d 1188, 1194–95 (11th Cir. 2001) (holding that software distributed for end users over the Internet is a thing in commerce).

53 A service mark is a trademark used to distinguish one's services rather than goods. Bos. Duck Tours, LP v. Super Duck Tours, LLC, 531 F.3d 1, 12 n.8 (1st Cir. 2008).

54 This has led commentators such as Professor Thomas McCarthy to observe that "[i]t is difficult to conceive of an act of infringement which is not 'in commerce' in the sense of the modern decisions," and to approvingly anticipate the "demise of the intrastate infringement defense." J. THOMAS MCCARTHY, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:57 (4th ed. 2014).

B. In Trademark Cases, the Court and United States Patent and Trademark Office ("USPTO") Generally Ask Whether the Referent Goods and Services are In Commerce or Affect Commerce

As predicted by the foregoing considerations, Commerce Clause analysis in actual trademark cases, whether at the United States Patent and Trademark Office ("USPTO") or in federal court, largely tracks the flow of goods and services with which the marks are used.[55] Historically, this was encouraged by the original, and still leading, application of the Commerce Clause to federal trademark regulation, the *Trade-Mark Cases*.[56]

In that case, the Supreme Court invalidated Congress's original attempt to regulate trademarks under the Patent and Copyright Clause of the Constitution.[57] Trademark regulation could not be based on that Clause because a trademark, unlike a patent or copyright, does not "depend upon novelty, invention, discovery, or any work of the brain. It requires no fancy or imagination, no genius, no laborious thought. It is simply founded on priority of appropriation."[58] As to the Commerce Clause, that could not save the original statute as "there is no hint that the goods are to be transported from

55 *See generally id.* §§ 25:53–57 (and cases cited therein). Professor McCarthy's treatise does not recognize a distinction between trademark signifiers and referents as it reviews Commerce Clause decisions in trademark cases. However, consistent with the analysis in this section, the cases he cites tacitly reveal referents flowing in or affecting interstate commerce. For instance, he cites the Eighth Circuit's *Coca-Cola* infringement case. *See id.* § 25:56 (citing Coca-Cola Co. v. Stewart, 621 F.2d 287, 290 (8th Cir. 1980)). In that case, a local defendant restaurateur claimed that he was not subject to Lanham Act infringement liability for secretly substituting other colas when "Coca-Cola" and "Coke" were ordered by name in its purely local restaurants. *Id.* The Court (and McCarthy) rejected this argument on the basis that the substitutions had an effect on "interstate use of a trademark," even if the infringing acts themselves occurred only locally, because the "trademark owner's reputation and good will, built up by use of the mark in interstate commerce, are adversely affected by an intrastate infringement." *Id.* (internal quotation marks omitted). Like most trademark cases, further detailed below, this opinion suffers from ambiguity in failing to clarify exactly what element(s) of the trademark relationship were essential to affecting the commerce holding (i.e., the signifier, signified, referent, or, as it appears, some combination of the three). Nevertheless, in the *Coca-Cola* case, as in most others, there clearly was an underlying referent good (here, the Coca-Cola soda product) flowing in more than one state. *See* MCCARTHY, *supra* note 54 § 19:123 ("[T]here appears no statutory or Constitutional barrier to a holding that local sales are made 'in commerce' for trademark registration purposes if the sales are either made to interstate travelers or the sales involve the purchase of parts, materials or products from out of state.").

56 100 U.S. 82 (1879).

57 *Id.* at 93–94.

58 *Id.* at 94.

one State to another."[59] Thus, the Court left open the possibility (soon acted upon by Congress) that a federal trademark statute could be constitutionally enacted if limited to goods that cross state lines.

It is critical to recall, however, that this opinion was fundamentally limited in its scope—that is, it literally said nothing about a purely propertized trademark regime. As indicated above,[60] rather, it merely said that if a trademark regime was to be built around use with goods, then those goods must be in commerce. It was intentionally agnostic as to alternative regimes.[61]

Eschewing such alternatives, later trademark acts, including the Lanham Act itself, sensibly followed the clear path laid bare by the *Trade-Mark Cases* decision. Like the 1870 Act, they were constructed around a goods and services model, but with the further requirement that those referents cross state lines. In the language of the current Lanham Act, a trademark is only in "use in commerce" when "the *goods* are sold or transported in commerce."[62] Likewise, for service marks, use in commerce similarly requires that "the *services* are rendered in commerce" or "the person rendering the *services* is engaged in commerce in connection with the *services*."[63]

Since the advent of the Lanham Act, Commerce Clause analysis in trademark cases has naturally followed this goods-and-services oriented approach.[64] For instance, in *In re Gastown, Inc.*, the predecessor court to the Federal Circuit focused on the fact that a service station operator provided "automotive service and maintenance for customers who are traveling interstate on federal highways[,]" and thus its services were rendered "in commerce," in determining that it was en-

59 *Id.* at 97.

60 *See supra* note 17.

61 *See Trade-Mark Cases*, 100 U.S. at 96–97 (explaining that a valid congressional regulation of commerce under the Constitution would, on its face, indicate that it is a regulation of commerce with "foreign nations, or among the several States, or with the Indian tribes," but not addressing other potential souces of authority for congressional regulations falling outside these categories).

62 15 U.S.C. § 1127(1)(B) (2006) (emphasis added).

63 15 U.S.C. § 1127(2) (emphasis added). Of course, under the "affixation rule," a label of the mark will normally be affixed to the goods or their packaging as those travel across state lines. *See generally* Peter J. Karol, *Affixing the Service Mark: Reconsidering the Rise of an Oxymoron*, 31 CARDOZO ARTS & ENT. L. J. 357 (2013) (discussing the history and current application of affixation rule in trademark law). Thus, the flow of a trademark's referent across a state line will often, as a practical matter, entail that of its signifier as well.

64 For a useful overview of trademark cases applying the Commerce Clause prior to passage of the intent-to-use provisions, see Charles James Vinicombe, *The Constitutionality of an Intent to Use Amendment to The Lanham Act*, 78 TRADEMARK REP. 361 (1988).

titled to register its service mark.[65] Also consistent with the model is the longstanding USPTO requirement that Internet usage of a trademark is considered mere advertising insufficient to substantiate registration unless there is a "means of ordering the goods directly from the applicant's web page, such as a telephone number for placing orders or an online ordering process."[66] The ability to attain the underlying referent good or service over the Internet (or through some other channel of interstate commerce, such as the mail or phone) is key.[67]

Under the same reasoning, an Italian car maker's claim to trademark rights under the Lanham Act was rejected where the evidence showed that not one of its cars was ever shipped to the United States or even sold to someone living in the United States.[68] This result fol-

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65 326 F.2d 780, 782 (C.C.P.A. 1964). The same sort of analysis is often used in the restaurant context, where a single-location restaurant owner is deemed to have attained federally protectable trademark rights by virtue of serving an interstate clientele. *See, e.g.*, Dominic's Rest. of Dayton, Inc. v. Mantia, No. 3:09–CV–131, 2009 WL 1045916, at *5 (S.D. Ohio Apr. 20, 2009) (explaining that the restaurant service mark in question was used in interstate commerce, as the restaurant served a substantial number of customers coming from "throughout the country"); *see also* Lebewohl v. Heart Attack Grill, LLC, 890 F. Supp. 2d 278, 291 (S.D.N.Y. 2012) (determining that the deli's mark was used in and affected interstate commerce because the deli, a celebrated tourist attraction, served many interstate travelers). As discussed below with respect to *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964), *infra* note 115, another consideration in these cases was the fact that the restaurants in question served food that had travelled in interstate commerce. *See Lebewohl*, 890 F. Supp. 2d, at 292; *Dominic's*, 2009 WL 1045916, at *5.

66 United States Patent and Trademark Office, Trademark Manual of Examining Procedure, § 904.03(i) (Jan. 2015) *available at* http://www.uspto.gov/trademarks/resources/TMEP_archives.jsp.

67 *Id.* Cases do clarify that an actual purchase of the referent product is not essential to survive Commerce Clause analysis where the product is being distributed over the Internet, albeit for free. *See* Planetary Motion, Inc. v. Techsplosion, Inc., 261 F.3d 1188, 1194–95 (11th Cir. 2001) (stating that a party may establish "use in commerce" even in the absence of sales). Rendering of services directly over the Internet, such as the provision of news and information, is similarly considered sufficient to satisfy the Commerce Clause with respect to the associated trademark signifier. Cable News Network, L.P. v. Cnnews.com, 177 F. Supp. 2d 506, 517 (E.D. Va. 2001) ("[I]t is clear that the provision of news and information services on the Internet constitutes commerce under the [Lanham] Act." (internal quotation marks omitted)); *see also* Planned Parenthood Fed'n of Am. v. Bucci, No. 97–CV–0629, 1997 WL 133313, at *3 (S.D.N.Y. Mar. 24, 1997) ("Internet users constitute a national, even international, audience, who must use interstate telephone lines to access defendant's web site on the Internet. The nature of the Internet indicates that establishing a typical home page on the Internet, for access to all users, would satisfy the Lanham Act's 'in commerce' requirement.").

68 Maruti.com v. Maruti Udyog Ltd., 447 F. Supp. 2d 494, 499 (D. Md. 2006). Had the cars been sold to U.S. citizens but not shipped to the United States, they would likely have been considered to be "in commerce" by virtue of being in foreign trade, thereby being within both the "commerce with foreign nations" phrase of the Commerce Clause and the scope of the Lanham Act. *See* Int'l. Bancorp, LLC v. Societe des Bains de Mer et du

lowed even though it had a website that showed photos of the cars and information about them and allowed visitors, including U.S. visitors, to enter their contact information if they were "planning to buy a car."[69] The court trained its focus on the location of the goods themselves.

The same basic goods-and-service-focused approach usually holds in infringement suits, where the defendant questions federal assertions of authority over its conduct.[70] Even under an "affecting" commerce model in trademark cases,[71] the inquiry traditionally remained analytically focused on whether the goods or services at issue had an

Cercle des Etrangers a Monaco, 329 F.3d 359, 366 (4th Cir. 2003) (holding that a casino's mark was used in commerce because U.S. citizens had purchased casino services "sold by a subject of a foreign nation," which constited "trade with a foreign nation that Congress may regulate").

69 *Maruti.com*, 447 F. Supp. 2d at 499 n.21. Some courts are careful to emphasize in this context that simply because a defendant's rendering of some service over the Internet satisfies Commerce Clause requirements does not mean it necessarily did so "in connection with the sale, offering for sale, distribution, or advertising of any goods or services" for purposes of Lanham Act infringement or unfair competition liability. *See, e.g.*, Savannah Coll. of Art & Design v. Houeix, 369 F. Supp. 2d 929, 942–948 (S.D. Ohio 2004) (explaining that the trademark defendant's mere provision of information over the Internet satisfies the Commerce Clause requirements but not the requirements of the Lanham Act).

70 For instance, in *Thompson Tank & Mfg. Co.. v. Thompson*, the federal appellate court affirmed the district court's finding that the defendant failed to put its goods (in that case, large oil storage tanks) in interstate commerce, and thus was not subject to the Lanham Act under an "in commerce" rationale. 693 F.2d 991, 992 (9th Cir. 1982).

71 The Federal Circuit and USPTO were very late to accept an "affecting commerce" rationale for trademark cases. Not until *Larry Harmon Pictures Corp. v. Williams Rest. Corp.*, in 1991, did they recognize an applicant's right to register marks used in connection with goods or services that merely affect commerce. 929 F.2d 662, 666 (Fed. Cir. 1991). Previously, they had taken the statutory position that the Lanham Act reached only actual "commerce," construing the Act in a manner narrower than the full extent permitted by the Constitution. *See, e.g.*, *id.* at 668–70 (Newman, J., dissenting) (advocating to keep the more limited original construction of the Lanham Act). Many, including this author, believe that the dissent in *Larry Harmon* was right to locate such a statutory limitation in the Lanham Act based on the Act's legislative history. Nevertheless, this Article follows the great majority of courts in assuming that Congress intended to legislate to the full extent of its constitutional authority in the Lanham Act. *See, e.g.*, *Maruti.com*, 447 F. Supp. 2d at 498 (quoting *Int'l Bancorp*, 329 F.3d at 363–64) ("'[C]ommerce' under [the Lanham Act] is coterminus with that commerce which Congress may regulate under the Commerce Clause of the United States Constitution."); United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc., 128 F.3d 86, 92 (2d Cir. 1997) ("The history and text of the Lanham Act show that 'use in commerce' reflects Congress's intent to legislate to the limits of its authority under the Commerce Clause . . . ."). *But see* Laurel Capital Grp., Inc. v. BT Fin. Corp., 45 F. Supp. 2d 469, 478 (W.D. Pa. 1999) (quoting Licata & Co., Inc. v. Goldberg, 812 F. Supp. 403, 409 (S.D.N.Y. 1993)) (adopting the view that the Lanham Act "does not extend to the full outer limits of the commerce power").

effect on commerce.[72] There is rarely mention, particularly in early cases, of trademarks (i.e., signifiers) as such.[73]

Courts in trademark cases have more recently pushed "affecting commerce" jurisdiction to its logical extreme with respect to assertions of Lanham Act jurisdiction over local defendants in the infringement context. In particular, most courts now hold that the scope of defendant's use is effectively irrelevant so long as plaintiff's use of its mark with its goods or services was interstate.[74] It is immate-

72 Thus, when the court in *Thompson* proceeded to address the "affecting" commerce aspects of the case, it again upheld the district court's finding of no jurisdiction under the Lanham Act because defendant's oil tank construction "activities did not affect the interstate commerce in which [the plaintiff] was engaged." *Thompson*, 693 F.2d at 993. Of particular importance to the court was the fact that defendant was in the business of manufacturing mobile tanks mounted on trucks, whereas plaintiff built old-fashioned oil tanks. This meant that it was unlikely that the activities in connection with the latter would affect the former. *Id.*

73 Where the mark as such is mentioned explicitly, it is usually inextricably intertwined with referent goods and services. *See, e.g.*, Arrow United Indus., Inc. v. Hugh Richards, Inc., 678 F.2d 410, 413 n.5 (2d Cir. 1982) (acknowledging that false designation of origin claims, if proven against the defendants, may adversely affect plaintiff's interstate business); Mother Waddles Perpetual Mission, Inc. v. Frazier, 904 F. Supp. 603, 611 (E.D. Mich. 1995) ("[T]he interstate commerce jurisdictional requirement may be met by showing that the infringing mark was used in connection with goods in commerce, or that the defendant's use, while instrastate, substantially affected interstate business."); Demetriades v. Kaufmann, 698 F. Supp. 521, 524 (S.D.N.Y. 1988) (holding that interstate contracts, even when a limited aspect of a business's operations, are sufficient to establish that the plaintiffs were engaged in "interstate commerce"); Schroeder v. Lotito, Jr., 577 F. Supp. 708, 714 (D.R.I. 1983) (noting that the "use in commerce" requirement can be met either by a plaintiff demonstrating that the infringing mark, or the false designation or misrepresentation, was used in connection with goods in commerce or that defendant's use, while wholly interstate, had a substantial effect on plaintiff's interstate business); Kampgrounds of Am., Inc. v. N. Del. A-OK Campground, Inc., 415 F. Supp. 1288, 1291 (D. Del. 1976) ("[D]efendant's facilities and those of [plaintiff's] franchisees in Delaware, [and] nearby [states] are competitive with each other . . . . Thus, if plaintiff were to establish that defendant's mark is likely to cause confusion among consumers as to the true origin of defendant's services, then defendant, to the extent it traded on plaintiff's good will and took business away from [plaintiff's] franchisees would be interfering with plaintiff's interstate use of its marks.").

74 *See, e.g.*, United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc., 128 F.3d 86, 93 (2d Cir. 1997) (citing Dawn Donut Co., Inc. v. Hart's Food Stores, Inc., 267 F.2d 358, 365 (2d Cir. 1959)) ("Congress's power to protect a plaintiff's mark used in interstate commerce necessarily implies the power to regulate a defendant's unauthorized use of the mark within a state's borders."); Browne v. McCain, 612 F. Supp. 2d 1125, 1132 (C.D. Cal. 2009) (reaffirming the broad scope of the "in commerce" requirement under the Lanham Act); SMJ Grp., Inc. v. 417 Lafayette Rest. LLC, 439 F. Supp. 2d 281, 287 (S.D.N.Y. 2006) (holding that defendant's actions of distributing leaflets with plaintiff's mark in an attempt to send a message about working conditions in restaurants qualifies as a "service" under the Lanham Act); Scott Fetzer Co. v. Gehring, 288 F. Supp. 2d 696, 704 (E.D. Pa. 2003) ("[T]here is no requirement that defendant must be infringing upon the mark in interstate commerce."); *see also* Coca-Cola v. Stewart, 621 F.2d 287, 290 (8th Cir. 1980)

rial, under these cases, whether and to what extent a defendant puts goods and services into commerce as the inquiry ends once a plaintiff qualifies for Lanham Act protection. They simply assume, often without inquiry, that defendant's accused activities have an effect on interstate commerce because they affect plaintiff's trademark rights.[75] Congressional regulatory authority over infringement defendants under this theory is plenary so long as plaintiffs can establish that their trademarks qualify for federal protection (i.e., so long as plaintiffs can show that their marks were used with goods and services that were placed in, or affect, commerce). The flow of goods and services remains embedded in this analysis, it just does so only on the plaintiff's side of the ledger.

One noteworthy exception to the general analytic focus on the flow and affect of referent goods and services is a line of cases that asks not whether goods or services are in, or affect, interstate commerce, but whether associated advertising is itself in commerce.[76] Support for this notion originally derives from *Tiffany & Co. v. Boston Club, Inc.*, a federal district court case in Massachusetts which offered two bases for concluding that a defendant's allegedly infringing conduct came within the scope of § 43 of the Lanham Act.[77] First, it used a traditional "affecting commerce" argument along the lines of the cases above, finding that the Act reached defendant's operation of a local restaurant named "Tiffany" because of its "damaging effect on plaintiff's federally protected interstate business."[78] For no apparent reason, however, the court went on to note, as an alternative ground, that jurisdiction could be established over defendant on the

("[J]urisdiction under the Lanham Act encompasses intrastate activity that substantially affects interstate commerce.").

75 *See, e.g.*, *Browne*, 612 F. Supp. 2d at 1132 ("The interstate commerce jurisdictional predicate for the Lanham Act merely requires a party to show that the defendant's conduct affects interstate commerce, such as through diminishing the plaintiff's ability to control use of the mark, thereby affecting the mark and its relationship to interstate commerce."); *SMJ Grp., Inc.*, 439 F. Supp. 2d at 286–87 (holding that plaintiffs are likely to show that defendants' use of plaintiffs' marks is in commerce because the plaintiff businesses "engage in interstate commerce—commerce that is alleged to be adversely affected by defendants' use of their trademarks").

76 *See generally* Christopher J. Schulte, Abracadabra Int'l, Ltd. v. Abracadabra Creations, Inc.—*Internet Advertising Just Federalized the Nation's Service Mark Law!*, 22 HAMLINE L. REV. 563 (1999) (discussing the expansion of the "use in commerce" requirement for service marks and the shift toward recognizing interstate advertising of a service mark as sufficient to place the service in commerce).

77 231 F. Supp. 836, 841 (D. Mass. 1964).

78 *Id.*

basis that the advertising for its restaurant was itself in interstate commerce, even if the restaurant itself was purely local.[79]

Tiffany may be read narrowly as standing for the limited proposition that interstate advertising may be circumstantial evidence that defendants are rendering an interstate service (i.e., drawing clientele from other states). Later cases, however, expanded on *Tiffany*,[80] leading ultimately to a Trademark Board decision which held that interstate advertising by itself supported federal registration, without other evidence of an effect on commerce,[81] and federal court opinions that rely solely on interstate advertising to support jurisdiction.[82] Variations of the notion continue to surface in broad, ambiguous dicta in some recent cases.[83]

The exact reach of these pure advertising cases remains unclear. In the earlier decisions on which the line of reasoning is based, the advertising portion was not essential for any holdings.[84] Moreover,

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79 *Id.* ("[D]efendant's business is sufficiently interstate to supply a basis for federal jurisdiction if the above-cited grounds were not available, by reason of the fact that defendant has advertised on several radio stations and one television station which engage in multistate transmissions, has placed advertisements in newspapers circulated in Massachusetts and several other states, and has utilized billboards located on interstate highways.").

80 *Tiffany* was first followed by another federal district court case concerning unfair competition. *See* Burger King of Fla., Inc. v. Brewer, 244 F. Supp. 293, 298 (W.D. Tenn. 1965). The court again used the existence of a defendant's interstate advertising as an alternative basis for applying the Lanham Act to defendants' intrastate restaurant business. *Id.* The Trademark Trial and Appeal Board, in *Abracadabra Int'l, Ltd. v. Abracadabra Creations Inc.*, then extended this approach to a registration priority contest, also in an alternative holding not necessary for its ruling, when it opined that "advertising of services in interstate commerce places the services in such commerce." 172 U.S.P.Q. 142, 144 (T.T.A.B. 1971). A federal district court in New York similarly factored interstate advertising into its decision (but did not rely solely on that point) in determining that a motion to dismiss was too early, procedurally, to decide the issue of subject matter jurisdiction. B & B St. James Pub, Inc. v. Hod O'Brien Rest. Corp., 189 U.S.P.Q. 732, 733 (S.D.N.Y. 1975); *see also* Berghoff Rest. Co., Inc. v. Lewis W. Berghoff, Inc., 357 F. Supp. 127, 130 n.1 (N.D. Ill. 1973) (citing *Tiffany*, 231 F. Supp. at 843) (holding that interstate advertising is sufficient to meet Commerce Clause).

81 *See* United States Shoe Corp. v. J. Riggs West, Inc., 221 U.S.P.Q. 1020, 1022 n.6 (T.T.A.B. 1984). The applicant's intrastate billiard parlor services were mentioned alongside the applied-for mark in advertisements running in more than one state. *Id.*

82 *See* Lobo Enter., Inc. v. Tunnel, Inc., 822 F.2d 331, 333 (2d Cir. 1987) (finding that significant advertising in interstate travel guides is commerce that Congress may regulate where entertainment service is rendered locally).

83 *See, e.g.*, Bros. of the Wheel M.C. Exec. Council, Inc. v. Mollohan, 909 F. Supp. 2d 506, 537 (S.D. W.Va. 2012) (quoting Int'l Bancorp, LLC v. Societe des Bains de Mer et du Cercle des Etrangers a Monaco, 329 F.3d 359, 364 (4th Cir. 2003) ("[A]dvertising is itself commerce that Congress may regulate.").

84 In both *Tiffany* and *Burger King*, the primary holding that a defendant's conduct falls within the reach of the Lanham Act so long as it affects plaintiff's concededly interstate business is consistent with later cases that assert Lanham Act jurisdiction over infringement defendants by the mere fact that plaintiffs have used the subject mark in commerce. *See,*

they have been criticized on the ground that they do not appear to follow the language of the Lanham Act, cited above, which focuses on the use of goods and services.[85] It is also difficult to evaluate whether the advertising was deemed sufficient because the mark, the service, or both, were interstate.[86] And some of the reasoning shown in the cases is based on statutory, not constitutional grounds.[87] In the end, the cases are probably best understood as using interstate advertising as circumstantial evidence that the service is being rendered, under the subject mark, to customers who travel from other states, and are thus a variation of the "border-crossing" cases discussed below.[88]

IV. CONGRESS'S AUTHORITY TO REGULATE TRADEMARKS IN CONNECTION TO GOOD AND SERVICE REFERENTS IS NOT COEXTENSIVE WITH ITS AUTHORITY TO REGULATE TRADEMARK SIGNIFIERS

As has been shown, Commerce Clause analysis in trademark cases has largely flowed with referent goods and services thanks in no small part to the suggestion in the *Trade-Mark Cases* that such an approach would be constitutional if the referent goods and services were in commerce. Where the trademark owner's referent goods and services cross borders, or are delivered along a channel of commerce (e.g., highway service station), or ordered through a channel of commerce (Internet), or simply affect commerce, the courts find that

e.g., United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc., 128 F.3d 86, 93 (2d Cir. 1997) (noting that Congress's power to protect a plaintiff's mark used in interstate commerce implies the power to regulate defendant's unauthorized intrastate use of the mark).

85 Schulte, *supra* note 76, at 582–85. This criticism is supported by the legislative history of the Lanham Act. For instance, one of the more extended debates over the "use in commerce" provision occurred over whether mere advertising should be allowed to support service mark use (with detractors arguing for an additional requirement that the service mark be used in connection with provision of the service itself). *See* Karol, *supra* note 63, at 385–87. Ultimately, a compromise was reached wherein mere advertising would support service mark use, but the underlying service to which the advertisement referred was required to be rendered in commerce. *Id.* Accordingly, advertising alone was never intended to suffice as a constitutional hook, for Commerce Clause purposes, by the original drafters of the Act.

86 In *United States Shoe*, for instance, it is clear that the ads contained both. 221 U.S.P.Q. at 1022 n.6.

87 *See, e.g.*, Laurel Capital Grp. v. BT Fin. Corp., 45 F. Supp. 2d 469, 478 (W.D. Pa. 1999) (analyzing the "plain meaning" of the term "in commerce").

88 As discussed in Part VI(A), to the extent these holdings assert that national advertising alone is sufficient to meet contemporary Commerce Clause requirements, disconnected from the interstate sale of effect of referent goods or services, the author disagrees that early precedent supports such a position.

Congress has extensive, perhaps plenary, authority to regulate those goods and services.[89]

Congress, under the basic *Raich*-type analysis discussed above, may use the means of a federal trademark registration system to accomplish its goal of protecting these goods and services crossing state borders or affecting commerce. That is, it may decide that it can best protect the trademark referents through the grant of exclusive national rights in trademark signs via a federal registration system and by providing a cause of action for infringement of unregistered marks. Such a system, after all, is designed to prevent confusion in the purchase of these goods and services and to encourage the maintenance of strong quality standards for them. As such, this trademark regulatory regime is a close conceptual cousin of food and drug regulation. And just as does the latter, the former easily survives Commerce Clause analysis. The means are clearly a rational way of regulating information transmitted about goods or services to consumers and protecting their quality.

This explanation, though convincing within its scope, fails to account for trademark propertization—Congress's decision, as understood by the federal courts, to grant property rights to trademark signifiers separate and apart from referent goods or services.[90] It would be a fallacy to reason that because Congress has the authority to regulate trademark signifiers in connection with goods and services, it also necessarily has the authority to regulate them standing alone. The nature of this fallacy is clearly shown by analogy to food and drug labeling regulation.

Under the Commerce Clause, Congress may require (and long has required) clear and accurate labeling of foods or drugs trans-

89 This was the understanding of the drafters of the Lanham Act as to its constitutionality; this is illustrated by the comments of Edward S. Rogers, one of the firmest proponents of the Lanham Act, during a 1928 hearing. *See Trade-Marks: Hearing on H.R. 6683 and H.R. 11988 Before the Comm. on Patents*, 70th Cong. 54–55 (1928) (statement of Stoughton Bell). Representative Lanham asked for the constitutional basis for adding in a provision protecting service marks. *Id.* at 54. Rogers answered with the example of a laundromat in Maryland, which cleans clothes at one location but then ships the cleaned clothes to various states; the laundromat does not sell the clothes as goods but merely cleans them as a service. *Id.* According to Rogers, this laundering service was rendered in interstate commerce (even though the mark did not travel with the clothes themselves) because the service was provided over a state line. *Id.* at 54–55. Thus it followed for Rogers that marks used in connection with "concerns of that sort" may be protected "under registration law." *Id.* at 55.

90 *See, e.g.*, Port, *Congressional Expansion, supra* note 2 at 904 ("[A]lthough that justifies why Congress might have had original authority to regulate trademarks as used on actual goods or services, it does not justify expanding that regulation to include the subjective understanding or impression of trademarks as they exist in the minds of the citizenry.").

ported across state lines.[91] As part of this regulatory scheme, it may further control the possession or resale of mislabeled foods and drugs previously shipped across state lines,[92] including those by a defendant who bought the products solely by local sale from a wholesaler, six months after the original interstate shipment.[93] It may also control the process by which the foods and drugs are manufactured and initially labeled, prior to any interstate shipment, including through regulation of the employment practices used by the manufacturer or labeler.[94] It may even control the labeling of foods and drugs solely for private in-state consumption by a private individual, if failure to regulate that local class of activities would undercut the overall food and drug regulatory scheme.[95]

What, though, if Congress attempts to expand its regulatory reach to label typefaces in general? Imagine that Congress, for instance, passes an amendment to the Food and Drug Act requiring that all labels containing text in the United States use Times New Roman font in a size at least fourteen-point or larger. The justification is simply that this makes all labels easier to read. Because the statute is unlimited, it includes not just food and drug labels, but also the use of price stickers applied to artisan platters at a local craft store, generic and premade "Hello, My Name Is" labels, children's stickers, and even office nameplates to name a few. In such a case, Congress could not defend the statute as a rational means for regulating the clear and accurate labeling of foods and drugs. The latter is no longer the "class of activities" it is seeking to regulate, the relevant class having been broadened substantially to labels in general.[96]

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91 *See* United States v. Sullivan, 332 U.S. 689, 697–98 (1948) (noting the power of Congress under the Commerce Clause to regulate the branding of items that have completed an interstate shipment and are now being held for future sales in local or intrastate commerce); McDermott v. Wisconsin, 228 U.S. 115, 128–131 (1913) (arguing that Congress's power to require the correct branding of foods transported across state lines relates to its authority to keep the channels of commerce free from the transportation of harmful or illicit materials).

92 Hipolite Egg Co. v. United States, 220 U.S. 45, 58 (1911).

93 *Sullivan*, 332 U.S. at 696–98.

94 United States v. Darby, 312 U.S. 100, 122 (1941).

95 *See* Gonzales v. Raich, 545 U.S. 1, 18 (2005) ("Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.").

96 As explored below, the question of whether a regulation is "constitutionally deficient" must remain centered around "the larger regulatory scheme," properly defined. *Raich*, 545 U.S. at 26. *Raich* was something of the exact inverse situation, as the error made by the lower appellate court in that case was in defining the class too narrowly—rather than too broadly—for constitutional purposes. *Id.* Specifically, by wrongly defining the sub-

This is not to say that the new statute could never be authorized under the Commerce Clause. Rather, we would need to conduct a new Commerce Clause analysis, this time focused on labels themselves, to make that determination. As detailed in Part V below, we would need to ask whether the statute is limited to labels shipped, or to be shipped, in interstate commerce, or perhaps ordered over the Internet.[97] If not, we would then ask, does the production, dissemination, and possession of those labels have a substantial effect on interstate commerce? If the answer is no, then we might still be able to save the statute (or its application in specific instances) if Congress can show, for those labels that do not substantially affect interstate commerce, that it is rational for Congress to regulate them in the context of regulating the entire interstate market for labels.[98] The key point is that this latter analysis is centered around the regulation of labels, as labels, and not the regulation of foods and drugs. Congress's authority to regulate the market for foods and drugs is not logically coextensive with its authority to regulate the market in labels, even if fair labeling is one important aspect of food and drug regulation.[99]

The next section accordingly seeks to stitch, largely out of whole cloth, a viable account for the extension of congressional authority to pure trademark propertization.

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ject class too narrowly, the lower appellate court understood the subject class as noneconomic and noncommercial and thus wrongly held the broader statute unconstitutional as applied to that narrower class. *Id.* Nevertheless, the key point is that the definition of the "class of activities" being regulated is always a critical threshold predicate to Commerce Clause analysis. *See* Perez v. United States, 402 U.S. 146, 154 (1971) (noting that the "measure" in Commerce Clause analysis is the "class of activities regulated"); San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1175 (9th Cir. 2011) ("Pursuant to *Raich*, when a statute is challenged under the Commerce Clause, courts must evaluate the aggregate effect of the statute (rather than an isolated application) in determining whether the statute relates to 'commerce or any sort of economic enterprise.'"); United States v. Nascimento, 491 F.3d 25, 42 (1st Cir. 2007) ("[T]he class of activity is the relevant unit of analysis . . . ."); United States v. Clark, 435 F.3d 1100, 1110 n.16 (9th Cir. 2006) (cautioning that the subject statute can survive category three Commerce Clause analysis as to one class of activities without necessarily surviving as to another class of activities).

97 *See infra* Part V.

98 *See, e.g.*, *Raich*, 545 U.S. at 26 (holding that Congress acted rationally in determining that a narrower class of activities was an essential part of a larger regulatory scheme).

99 *Cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591 (2012) (arguing that the compelled purchase of health insurance is not properly regarded as regulation of health care financing, even if the two are "inherently integrated," because they involve different transactions, timing, and providers).

V. LOCATING CONGRESS'S AUTHORITY TO PROPERTIZE TRADEMARKS

A. *Arguments Justifying Federal Regulation of Trademark Signifiers Under Traditional Commerce Clause Analysis*

1. Category One Analysis

Trademark signifiers are not literally "channels" of interstate commerce (in the sense of highways or waterways). They certainly, however, appear on such channels, insofar as they are displayed on the Internet and in television advertisements and spoken about on the radio. Under category one, then, we might seek to locate congressional authority to regulate trademark signifiers, divorced from any connection to goods and services under its authority to regulate the Internet and national communications as channels of commerce.

In the Internet or televised media context, we might reason that Congress clearly has the right, subject to First Amendment and other considerations, to regulate the content of what is shown on television or the Internet; indeed it has authorized creation of an administrative agency, the FCC, to do so.[100] If I create a new logo or adopt a term as my company's trademark and then promote it heavily during the Super Bowl in some humorous ad that makes no attempt to associate the new brand with any good or service, why can't Congress (through its Commerce Clause authority to regulate national communication channels) grant me the exclusive rights to use that logo or word?

There are two problems with this theory for congressional trademark propertization authority. The first is that, by its own terms, it is limited to regulation of national communication channels. It could not justify, by itself, reaching the use of the imitative toile monogram logo by Hyundai, for instance, on posters at its car dealerships. The latter would still need to be reached by an additional "affecting commerce" theory.

Perhaps a more substantial difficulty, though, is that content-based congressional regulations of what is shown on television and other media are intentionally viewed with heavy suspicion. They must be given "intermediate scrutiny, asking whether the restriction was narrowly tailored to advance a substantial government interest."[101]

100 *See* 47 U.S.C. § 151 (2012); FCC v. League of Women Voters of Cal., 468 U.S. 364, 376–77, 399 (1984) (noting that, subject to regulatory oversight by Congress, the FCC has the authority to grant licenses for the use of broadcast frequencies to serve the public's right to be informed on matters of public importance).

101 *See, e.g.*, *League of Women Voters*, 468 U.S. at 380 ("[T]hese restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial

Thus, if we are to locate congressional authority to regulate trademark signifiers as an offshoot of its right to regulate national media content, separate from any underlying commercial transactions, that authority will be heavily circumscribed by countervailing free speech considerations (in a manner more pointed than that usually given to trademark regulations connected with goods and services).[102]

Congress would, moreover, have difficulty justifying the grant of an exclusive right in trademark signifiers that merely appear on television, separate and apart from any goods or services, as narrowly tailored to achieve an important objective. Given the breadth of such a regulation, the objective would need to be defined as something like "encouraging the creation and marketing of logos and brand names." But, as Mark Lemley persuasively argues, that is hardly a reasonable goal standing alone.[103] Rather, protecting logos and brands is just a further means to controlling information about goods and services in the marketplace and the quality of those goods and services. Trademarks are not necessarily original, creative contributions to society that we might wish to encourage for their own sake, like patents and copyrights.[104]

II. Category Two Analysis

Turning to an analysis under category two, trademark signifiers could alternately be described as things in interstate commerce, or a

governmental interest . . . ."); Ruggiero v. FCC, 317 F.3d 239, 244 (D.C. Cir. 2003) (construing *League of Women Voters* as holding that intermediate scrutiny was appropriate because the object of the anti-editorial statute was content).

102 Trademark infringement regulations generally do not require heightened constitutional review on the theory that they are designed to prevent commercial fraud in consumer transactions involving the sale of goods and services, and the First Amendment does not protect against commercial fraud. Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 905 (9th Cir. 2002) (citing Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980)).

103 *See* Lemley, *Death of Common Sense*, *supra* note 1, at 1694 ("We don't protect trademarks to encourage the creation of more trademarks, and so the incentive rationale for intellectual property will not work here.").

104 Although outside the scope of this Article, the First Amendment might prove, for similar reasons, a fertile alternative ground for a constitutional attack on an attempt to propertize the nation's trademark regime, separate and apart from any limit to Congress's constitutional authority under the Commerce Clause. In particular, it could be argued that any attempt to protect a trademark's signifier, disassociated from goods and services, is on its face a pure regulation of speech (i.e., symbols) without any countervailing substantial interest (as contrasted, for instance, with the countervailing interests and exceptions underlying copyright law). *See* Lemley, *Death of Common Sense, supra* note 1, at 1694–95. In other words, Congress may not be in the business of regulating language for language's sake. The author is indebted to Ralph Clifford for this observation.

way of protecting things and people in commerce, or even as instrumentalities of things in commerce.[105] Might any of these characterizations support congressional authority to regulate trademark signifiers?

Taking the second characterization first, it quickly collapses upon the limitation Congress would be trying to avoid: namely, it depends on a connection to tangible goods and services referents with which trademarks are used. Trademarks, conventionally understood, protect people and things in commerce by assuring such people (like the quintessential highway vacationer or commercial traveler)[106] that they are buying the good or service that they mean to be buying, and that the good or service will be of an expected quality.[107] If the good or service is removed from the equation, and we just seek to protect trademark signifiers as such, then this fails to protect these customers from anything. Vacationers using highways are not protected by dilution law, brand-owners are. By definition, there is no confusion.

Certainly an alternative justification for trademark law is the protection of brand-owners themselves (say, Nike, Inc. or Louis Vuitton). It assures them that they will receive the "financial, reputation-related rewards associated with a desirable product."[108] The question here, though, is not whether trademark law properly protects brand-owners in addition to customers, but rather whether such brand-owners are things or people in commerce in the meaning of category two analysis. Except under an unreasonably broad reading of a border-crossing case such as *Katzenbach v. McClung*,[109] multinational corpora-

105 Edward S. Rogers, a leading advocate for the Lanham Act legislation before Congress, long ago advanced a close variation of this argument in House Committee hearings on an early version of the Act. In particular, in defense of Congress's ability to regulate trademark law, he likened trademarks to the psychological equivalent of railway cars: "[T]rade-marks are what move goods from the manufacturer to the consumer. It is the confidence that people have in articles marked in a certain way that makes the public buy them. Consequently, it is just as much a means of getting goods from the manufacturer to the consumer as the railroads and trucks are which provide the physical transportation. Trade-marks are an instrumentality of commerce, just exactly as means of transportation are, and if Congress can regulate the means, the objective means of transportation, they can regulate the subjective means of transportation." *Trade-marks: Hearing on H.R. 9041 Before the Subcomm. on Trade-marks of the Comm. on Patents*, 75th Cong. 51 (1938) (statement of Edward S. Rogers).

106 *See, e.g.*, Larry Harmon Pictures Corp. v. Williams Rest. Corp., 929 F.2d 662, 666 (1991) (stating that a single-location restaurateur who locally uses a trademark with its intrastate services may attain federal trademark registration by virtue of serving at least some customers that travelled across state boundaries).

107 Qualitex Co. v. Jacobson Products Co., 514 U.S. 159, 163–64 (1995).

108 *Id.*

109 379 U.S. 294, 298–99 (1964) (finding that a refusal to serve customers based on race impacts the overall number of customers served, thereby reducing the amount of food

tions, as legal entities, are not persons or things in commerce to be protected in the meaning of category two.[110]

This takes us then to the argument that trademark signifiers, as such, are "things" in commerce that Congress may protect. Just as we saw that Congress may keep impure eggs,[111] or wrongly labeled medicines,[112] out of the interstate commercial channels, we might argue that Congress may prohibit knock-off trademark signifiers from entering them.

This could arise in a few ways. The simplest and most convincing approach is to argue that trademark signifiers flow in the nation's commercial channels when goods to which they are affixed are shipped through those channels.[113] The immediate difficulty here, of course, is that we are back to being limited by goods and services, as this analysis hinges on the underlying good or service being shipped across a state line. An important line of constitutional criminal cases, however, gives Congress some freedom to regulate just the signifier in this regard.

In particular, a number of appellate courts following *Lopez* have concluded that the federal government might criminalize simple gun possession merely because that gun once moved in interstate commerce.[114] Under this theory, as scholars have considered it, once a jurisdictional predicate of a border crossing occurs, Congress can argue

bought and sold by the restaurant and impacting interstate commerce as a whole). As discussed below, one could argue that under *Katzenbach* the receipt and use of materials shipped from another state (there, food) essentially subjected the restaurant to federal regulation for all purposes. One could try to extend this to a Nike or Louis Vuitton and argue that as these entities receive raw materials from other states, the companies are "in commerce" for all purposes. As Young suggests, however, this would allow category two analysis to take over Commerce Clause inquiry, which surely cannot be the intent of *Lopez* and related cases. *See* Young, *supra* note 47, at 210–11.

110 *Cf.* Jones v. United States, 529 U.S. 848, 857 (2000) (narrowly construing a federal arson statute to avoid a broad reading that would have necessitated the constitutionally problematic conclusion that any building that receives natural gas from another state, or is paid for with a federally regulated mortgage, is a thing in commerce).

111 Hipolite Egg Co. v. United States, 220 U.S. 45, 58 (1911).

112 United States v. Sullivan, 332 U.S. 633, 697–98 (1948).

113 The current statutory "affixation" rule requires in most cases that a federally registered trademark signifier be physically affixed to the good in question as it travels in commerce, making it quite likely that any trademark signifier that has qualified for Lanham Act protection was in fact attached to its referent product when crossing a state line. 15 U.S.C. § 1127 (2012) (definition of "use in commerce"). Service marks might also be connected to services rendered across state lines, such as when a Peter Pan Bus ferries passengers from Boston to New York with a distinctive logo on its side.

114 *See generally* DENNING, *supra* note 43, § 5.04[I][1][a] (listing cases following *Lopez*).

that federal law may follow the material that crossed state lines "like bubble gum stuck to a shoe."[115]

We might then extend this analysis to trademark signifiers. Like a person carrying a gun over a border, we might view goods as carrying their trademark signifiers over the line. Once that occurs, under the border-crossing theory, we can argue that federal law sticks to the signifier even if later separated from the good (just as federal law sticks to the gun even if the defendant was not the one who brought it over the state line).[116]

There are problems with this theory. The first is that its reach is controversial, even in the criminal gun possession context. Scholars such as Gordon Young have pointed out that under such a broad theory of category one and two "there is little in modern American life that Congress cannot regulate, including events having no future effect on interstate commerce."[117] Theoretically, under such logic, once a person crosses a state boundary, or eats food shipped over the line, anything he does is subject to federal regulation for the remainder of his life.[118] Category one and two analysis would thus completely swallow the other categories. Second, this border-crossing theory still requires a good or service at some point to carry a signifier over a state line. This means that any dilution law, for instance, must be tethered (even if remotely) to some interstate good or service. And it also means that the hypothetical purely propertized federal trade-

115 Young, *supra* note 47, at 180. Young also suggests that Katzenbach v. McClung, 379 U.S. 294 (1964), a Civil Rights Act racial discrimination case, can be read to support the same principle. Young, *supra* note 47, at 199, 211. The Court in *Katzenbach* arguably affirmed Congress's right to regulate discrimination at a purely local restaurant under the theory that the restaurant served food that previously crossed a state border. *Id.* at 199 (citing *Katzenbach*, 379 U.S. at 298–99). Contemporary courts continue to advance such evidence as a factor supporting Lanham Act jurisdiction in restaurant service mark cases. *See* Lebewohl v. Heart Attack Grill, LLC, 890 F. Supp. 2d 278, 292 (S.D.N.Y. 2012) (finding that jurisdiction is satisfied because the deli purchased a large amount of ingredients from out-of-state vendors); Dominic's Rest. of Dayton, Inc. v. Mantia, No. 3:09-cv-131, 2009 WL 1045916, at *5 (S.D. Ohio Apr. 20, 2009) (regulating restaurant in part on the basis that "a substantial portion of the food and supplies used by [it] moved in interstate commerce"). Federal law appears in these cases to travel with the food over the border, and then seep into the host restaurant generally.

116 *See, e.g.*, United States v. Sorrentino, 72 F.3d 294, 296 (2d Cir. 1995) (reaffirming the continuing validity, post-*Lopez*, of the rule in *Scarborough v. United States*, 431 U.S. 563, 564 (1977), that required "proof that the possessed firearm previously traveled in interstate commerce is sufficient" to establish a legitimate nexus to intersate commerce).

117 Young, *supra* note 47, at 180.

118 *Id.* at 211–12. *But cf.* Nat'l Fed'n Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2648 (2012) (Scalia, J., dissenting) ("But if every person comes within the Commerce Clause power of Congress to regulate by the simple reason that he will one day engage in commerce, the idea of a limited Government power is at an end.").

mark statute introduced at the outset of this Article would remain unconstitutional.

At a slightly higher level of abstraction, to further distance oneself from the yoke of goods or services, one might argue that the trademark signifiers (in the sense of labels, hangtags, stickers, or patches) themselves might be "things" in commerce.[119] The Louis Vuitton toile monogram, the argument might go, is a thing in commerce that is harmed when Hyundai appropriates it for the design of a basketball in a commercial about the meaning of luxury. Thus Congress is free to protect that thing, apart from any connection to goods and services. The logo itself is the defenseless passenger travelling on our highways, the sensitive medicine being shipped interstate, the insecure email sent over the Internet to be protected from tamper.

In a certain sense, this seems like a simple definitional question over the meaning of a "thing." Surely such an amorphous term is loose enough to fit a standalone trademark signifier, particularly if we want Congress, for policy reasons, to be able to regulate these things at a national level. This is essentially the logic used in the well-known merchandising case, *Boston Professional Hockey Ass'n v. Dallas Cap & Emblem Manufacturing*, where the defendant was in the business of selling emblems or patches of professional hockey teams, unaffixed to any goods.[120] The court simply assumed in passing that these emblems were in "interstate commerce" before proceeding to its analysis on the merits.[121]

As Barton Beebe explains about the case, while the court facially considered the physical "fabric and thread" of the patches to be the good subject to regulation, that was really just a pretext. In fact, "[t]he defendant's 'fabric and thread' is not the product that the consumer seeks, nor is any other material object. The product that is being sold is the plaintiff's signified, its goodwill, its positive affect, commodified in the form of the plaintiff's signifier."[122] Thus, in the

119 One federal appeals court has indeed stated in dicta, without analysis or explanation, that "trademarks are an instrumentality of commercial intercourse and the provision of the services necessarily involves both channels of and instrumentalities of that commercial intercourse." Int'l Bancorp, LLC v. Societe Des Bains De Mer et Du Cercle Des Etrangers a Monaco, 329 F.3d 359, 369 (4th Cir. 2003). This statement, made in the context applying the Lanham Act to foreign trade, encompasses in one breath both trademarks as such (in the signifier sense) and the provision of referent services. The court likely did not mean to suggest that trademarks could be an instrumentality of commerce disassociated from those referent services.

120 510 F.2d 1004, 1010–11 (5th Cir. 1975).

121 *Id.* at 1011.

122 Beebe, *supra* note 15, at 659.

patch, we might see an effectively referentless trademark signifier that flows in commerce (and is therefore subject to congressional regulation).

The difficulty with this model, however, is that it proves too much. At heart, the argument suggests that if I put the word "LOVE" on a letter and ship it to my grandmother in Florida, or tweet "LOVE" over the Internet, then Congress has plenary authority to regulate uses of that word under the Commerce Clause. It converts the federal courts into regulators of pure language and symbols once the word travels from one state to another.

For something like this reason, later courts intentionally limited *Boston Professional Hockey* to the situation where the patch was intended for a specific good.[123] Although on statutory and not constitutional Commerce Clause grounds, the court in *United States v. Giles*, as Beebe points out, thus determined that a freestanding patch was not a "good" for criminal purposes under the Lanham Act.[124] The *Giles* Court's palpable discomfort with regulating trademark signifiers apart from goods in commerce thus brings us back, ineluctably, to the goods-and-services anchor.

Perhaps the saving limitation in the real world is that trademark signifiers we wish to protect are generally connected, or at least were at some point, to goods and services in commerce. The toile monogram certainly appeared on many goods flowing through interstate commerce (i.e., on luggage). Thus, the signifiers we are seeking to protect are categorically different from abstract terms like "LOVE." Yet again, though, this has left us grasping in our Commerce Clause analysis at the goods and services themselves as an absolute requirement for congressional regulation.

III. Category Three Analysis

Category three, directly at issue in the *Lopez* line of cases, authorizes Congress to regulate purely local activities that are part of an economic class of activities that have a substantial effect on interstate

123 United States v. Giles, 213 F.3d 1247, 1250 (10th Cir. 2000) (noting, of *Boston Prof'l Hockey*, that "[T]he Fifth Circuit specifically confined its opinion to the product at hand: 'We need not deal here with the concept of whether every artistic reproduction of the symbol would infringe upon plaintiffs' rights. We restrict ourselves to the emblems sold principally through sporting goods stores for informal use by the public in connection with sports activities . . . .'").

124 *Giles*, 213 F.3d at 1251.

commerce.[125] After *Raich*, the question is simply whether "Congress could have rationally concluded that the regulation of [the local activity] was an essential part of the larger regulatory scheme."[126]

Under this rule, for instance, a purely local restaurant defendant might be made subject to Lanham Act infringement claims for secretly substituting one soda for another if these purely intrastate acts nevertheless affect interstate commerce (by affecting the interstate operations of that national soda brand).[127] This is because Congress could rationally have concluded that it needed to prohibit even trivial intrastate misuses of a trademark in order to maintain a comprehensive scheme of consumer-confusion prevention in the restaurant industry.[128]

Scholars who have previously addressed the constitutional question in relation to trademark propertization, in particular Kenneth Port, have understandably focused their attention on this open-ended category.[129] Professor Port's analysis, published in 2000, and therefore prior to current leading cases such as *Raich*, attempts to distinguish earlier expansive category three cases as limited to "actual, physical conduct occurring, or actual physical or financial harms or penalties being suffered because of that conduct."[130] By contrast, Pro-

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125 *See* Gonzales v. Raich, 545 U.S. 1, 17 (2005) (noting that case law "firmly establishes" Congress's power to regulate local activities that are part of an economic class of activities that substantially affect interstate commerce). In Justice Antonin Scalia's view, articulated in his concurring opinion in *Raich*, Congress may further regulate even "intrastate activity [that] does not itself 'substantially affect' interstate commerce" where it is "essential to a comprehensive regulation of interstate commerce." *Id.* at 37 (Scalia, J., concurring). This extends, for Justice Scalia, even to the regulation of noneconomic local activity: "The relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power." *Id.* (citing United States v. Darby, 312 U.S. 100, 121 (1941)).

126 Alabama-Tombigbee Rivers Coal. v. Kempthorne, 477 F.3d 1250, 1274 (11th Cir. 2007) (citing *Raich*, 545 U.S. at 26–27).

127 *See, e.g.*, Coca-Cola v. Stewart, 621 F.2d 287, 291–92 (8th Cir. 1980) (holding that even if the alleged acts of infringement did not cause the mark owner a large loss in sales, this did not detract from the fact that the misappropriation of good will had a substantial effect on interstate commerce).

128 *Id.* at 290–91 (citing Wickard v. Filburn, 317 U.S. 111, 127–28) (1942)).

129 Port, *Congressional Expansion*, *supra* note 2, at 904–10 (discussing the third category of *Lopez*-style Commerce clause analysis: the "substantial relationship to interstate commerce").

130 *Id.* at 904 (explaining that in other cases where Commerce Clause legislation has been upheld by the Supreme Court, the conduct and harm were both actual and physical, whereas recent expansions to trademark law, such as the introduction of an intent to use scheme, concern hypothetical conduct). *See also* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 282 (1981) (explaining that Congress has the authority, under the Commerce Clause, to prevent harmful interstate competition); Wickard v. Filburn, 317 U.S. 111, 120 (1942) (noting that questions of congressional authority under

fessor Port continues, recent trademark expansions such as the intent-to-use regime and dilution involve situations where the market, goods, and services are "hypothetical" and thus constitutionally suspect.[131]

This actual/hypothetical distinction doesn't appear to survive the broad reasoning of *Raich*. *Raich* makes it clear that Congress only needs a rational basis for concluding that its regulation of even non-economic local activity is a rational means of regulating products in commerce.[132] There would seem to be no reason, under *Raich*, why an intent-to-use regime could not be considered a rational means to attain the legitimate end of regulating goods and services in commerce. After all, the applicant is swearing that it has "a bona fide intention to use" the applied-for mark in commerce with the claimed goods and services.[133] The early application process just helps smooth out the path to bringing branded products to market by creating an orderly process for securing rights while the final product is being completed, without fear of being scooped by a competitor. The fact that the pre-use filing might be "hypothetical" seems irrelevant under *Raich*.[134] That said, Professor Port's basic insight that the actual sale or rendering of goods and services must still enter the equation at some point–even under *Raich*–remains entirely valid as detailed below.

Key to engaging in an affects analysis of this sort is first defining the legitimate end that Congress is seeking to achieve (such as control of wheat or drugs flowing through the country).[135] What, then, is

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the Commerce Clause must take into account the actual effects the activity in question has on interstate commerce); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36 (1937) (holding that congressional authority to protect interstate commerce is not limited to transactions that are an essential part of interstate commerce).

131 Port, *Congressional Expansion*, *supra* note 2, at 905.

132 *See* Gonzales v. Raich, 545 U.S. 1, 22 (2005); *see also id.* at 37 (Scalia, J., concurring) (citing United States v. Darby, 312 U.S. 100, 121 (1941)) (arguing that the means must be "reasonably adapted to the attainment of a legitimate end").

133 *See* 15 U.S.C. § 1051(b)(1).

134 Interestingly, some language in *Sebelius* can be read to support an actual/hypothetical distinction, at least where there is a large temporal gap between the two. Chief Justice John Roberts, for instance, rejects "the proposition that Congress may dictate the conduct of an individual today because of prophesied future activity . . . ." Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2590 (2012). In *Sebelius*, the expectation at issue was that healthy individuals will later in life engage in a healthcare transaction. *Id.* However, as discussed below, that discussion relates more to the distinction between the regulation and creation of commerce. *Id.* at 2591. In the intent-to-use context, moreover, the applicant has sworn a current intent to bring a product forward in the near future, which is very different from the likelihood of needing health care later in life.

135 *See, e.g.*, *Raich*, 545 U.S. at 25–33 (engaging in extended threshold analysis to properly define "class of activities" being regulated in regard to the drug market); *Wickard*, 317

the "legitimate end" of trademark regulation generally? Not until we determine this can we ask whether local instances of trademark propertization are reasonably adapted to meet this end.

As has been discussed extensively above in a few contexts, that legitimate end is the regulation of the sale and rendering of goods and services flowing in commerce, and the protection of brand-owners who invest in maintaining a reputation for those products.[136] Critically, the legitimate end is *not* the creation and protection of trademark signifiers for their own sake. Nor can it be for a few reasons.

First, the creation of a property right in trademark signifiers cannot itself be the legitimate end because Congress can only regulate preexisting commerce under the Commerce Clause, not create new commerce.[137] Chief Justice John Roberts, as well as the joint dissenters, make this very point in their various analyses in *Sebelius*.[138] In Chief Justice Roberts' words, "[t]he power to regulate commerce presupposes the existence of commercial activity to be regulated."[139] Just as Congress could not use its Commerce Clause authority to create the Affordable Care Act's individual mandate because that would vest

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U.S. at 128–29 (determining that regulation of price of wheat in interstate market was legitimate end). *Accord Sebelius*, 132 S. Ct. at 2592–93 (explaining that Congress was acting within its authority under the Necessary and Proper Clause although the regulation at hand involved some "purely intrastate activity"); Perez v. United States, 402 U.S. 146, 154 (1971) (noting that the appropriate "measure" is the "class of activities regulated"); San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163, 1175 (9th Cir. 2011) ("Congress has the power to regulated purely intrastate activity as long as the activity is being regualated under a general regulatory scheme that bears a substantial relationship to interstate commerce."); United States v. Nascimento, 491 F.3d 25, 42 (1st Cir. 2007) ("[T]he class of activity is the relevant unit of analysis.").

136 *See generally supra* Part IV(A)(ii). Congress has analogously given the Federal Trade Commission authority to regulate, under the Commerce Clause, "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (2012). This is generally understood to include "the responsibility to protect the consumer from being misled by governing the conditions under which goods and services are advertised and sold to individual purchasers." Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 685 (D.C. Cir. 1973). As such, the constitutional analysis effectively parallels the Lanham Act in its tight link to the effect on actual goods and services in interstate commerce. *See, e.g.*, Goodyear Tire and Rubber Co. v. FTC, 331 F.2d 394, 403 (7th Cir. 1964) (summarizing evidence of sales of tires, batteries, and automobile accessories to support the holding that these activities substantially affected commerce).

137 A majority of five Justices (Chief Justice Roberts, writing the opinion, and the four dissenting Justices) clearly reached this conclusion. *See Sebelius*, 132 S. Ct. at 2586 ("If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous."). *See also id.* at 2644 (Scalia, J., dissenting) (arguing that to "regulate" something "can mean to direct the manner of something but not to direct that something come into being").

138 *Id.* at 2594 (discussing Congress's constitutional authority to tax with respect to the Affordable Care Act).

139 *Id.* at 2572.

it with "the extraordinary ability to create the necessary predicate to the exercise of an enumerated power,"[140] Congress may not propertize trademark signifiers as the necessary predicate to regulating them.[141]

This analysis ties directly back to Felix Cohen's early critique of trademark propertization as an entirely circular phenomenon.[142] As Cohen observed, it is nonsensical to say that we should protect trademarks because they are valuable.[143] Rather, in calling a trademark property, we give it value. In just the same way, were Congress to pass a trademark statute granting property rights to trademark signifiers as such, the statute would itself be creating the property interest and the mark's value. In no way would Congress be protecting a preexisting thing of value or property interest.[144]

Second, trademark signifiers, standing alone, are non-economic things. They are symbols or signs associated mentally with their signified meanings. In other words, they are just language. Only in their connection to referent goods or services do they take on economic importance, in the sense of being involved the "production, distribu-

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140 *Id.* at 2573.

141 Professor Port anticipated this language in *Sebelius* when he noted in regards to dilution:

> [T]he regulation of trademarks in the abstract is what gives them commercial value in the first place. But for the FTDA, trademarks would not have value in the abstract as used on products unrelated to the goods or services specified in the trademark application. It seems quite circular to argue that Congress' regulation has given something commercial value; because it has commercial value it is now inherently commercial"; and, therefore, Congress can regulate it. This seems to be the logic that flows from the notion of federal protection of trademarks from dilution.

Port, *Congressional Expansion*, *supra* note 2, at 905.

142 *See* Cohen, *supra* note 6, at 814 ("Modern developments in the law of unfair competition offer many examples of such circular reasoning.").

143 *Id.* at 815.

144 One escape from this circle in the federalism context could be that one or more states create the property interest, and Congress regulates activities affecting that interest as "substantially affecting commerce." In other words, if one or more states adopt a propertized trademark regime (for example, passing laws such that, in those states, one who creates a trademark is its owner), then it would be the state regime, not Congress, which created the value. Congress would merely be recognizing the state-created interests and protecting against activities, including local ones, that affect the interest's value. One immediate difficulty emerges, though, regarding this potential justification for federal protection of trademark propertization. Namely, the common law of trademarks consistently requires use with goods or services to attain state trademark rights. *See generally* Restatement (Third) Unfair Competition § 18 (1995) ("A designation is 'used' as a trademark . . . when the designation is displayed or otherwise made known to prospective purchasers in the ordinary course of business in a manner that associates the designation with the goods, services, or business of the user . . . ."). The author is indebted to Tigran W. Eldred for this insight.

tion, and consumption of commodities."[145] Under *Lopez*, *Morrison*, and even *Raich*, the end goal of an affecting commerce analysis itself should still relate to an "economic enterprise" (consistent with the commercial nature of the "Commerce" Clause) even if the chosen means need not be in each instance.[146]

If, then, Congress is able regulate trademark signifiers due to their effect on interstate commerce, it must be as a rational means to regulate referent goods and services in commerce.[147] How reasonable, then, is it for Congress to grant exclusive use of certain words and symbols, divorced from any referent goods and services, in order to regulate goods and services? Put in *Lopez* terms, what chain of inferences must we be willing to allow Congress to make in order to propertize trademarks in the name of regulating goods and services?[148]

Tracking the logic used in the category one and two analyses above, Congress can justify granting exclusive rights in trademark

145 Gonzales v. Raich, 545 U.S. 1, 25 (2005) (citing Webster's Third New International Dictionary (1966)). Port is more cautious about this conclusion and is willing to "concede that regulation of trademarks may be inherently commercial, even in the abstract." Port, *Congressional Expansion, supra* note 2, at 905. But viewed through the semiotic lens, there appears to be nothing inherently commercial about symbols unless and until they are used with goods and services. In other words, it is not the inherent nature of trademark signifiers that makes them commercial, but rather their logically subsequent (and inessential) association to goods and services that makes them so.

146 *See Raich*, 545 U.S. at 25–26 (noting that the activities regulated by the Controlled Substances Act are "quintessentially economic"); United States v. Morrison, 529 U.S. 598, 610 (2000) (reaffirming that the Court will uphold congressional acts regulating economic activity that substantially affects interstate commerce); United States v. Lopez, 514 U.S. 549, 559–561 (1995) (holding that where economic activity substantially affects interstate commerce, legislation that seeks to regulate that activity will be sustained). *But c.f.*, *Sebelius*, 132 S. Ct. at 2643 (Scalia, J., dissenting) (distinguishing Wickard v. Filburn, 317 U.S. 111 (1942) on the basis that the failure to act, like "the failure to grow wheat," is "not an economic activity").

147 In this regard, we need to pay close attention to the type of goods and services with which Congress may be seeking to regulate trademark signifiers. This is because the Lanham Act allows for regulating marks used in connection with both commercial and noncommercial activities. United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc., 128 F.3d 86, 92–93 (2d Cir. 1997). Although the relevance of the distinction for Commerce Clause purposes between commercial and non-conmmercial activities remains hotly debated, it is generally agreed that *Lopez* and *Morrison* made federal regulation of the latter more constitutionally suspect, at least to some degree. *See* DENNING, *supra* note 43, at 5–41 (analyzing arguments as to whether "the *Lopez* distinctions between economic and non-economic (or commercial and non-commercial) activities is a harbinger of judicial revisionism to come").

148 *See Lopez*, 514 U.S. at 567 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.").

signifiers, even as to non-confusing goods and services, in order to incentivize brand owners to first create and use strong brands with particular goods and services in commerce. Congress may reasonably conclude that promising such a long-term reward in the form of a dilution right is a way to encourage the conveyance of clear information about goods and services early on.[149] It may, in other words, rationally choose a scheme that allows trademark owners to protect their brands divorced from specific goods and services after sufficient use with those goods and services, like a space shuttle ejecting its booster rockets once it clears the atmosphere.

Congress may not, however, grant dilution-type protection immediately upon creation of a new logo that has not been used, and is not yet intended to be used, with any particular goods and services. This would require the inference that the logo will be used to help convey information about goods and services in commerce, but there is no logical basis for such an inference. There is by definition no connection here to any goods and services. This is true even if the marks achieve immense fame and distinction as marks, and are unlike any other marks that ever came before them. Unless at some point the chain links the mark to specific goods and services in commerce, then the means is completely non-adapted to attaining the ends and therefore lacking constitutional authorization. Nor, for the same reason, may Congress constitutionally grant property rights in standalone trademark signifiers as such.

If this result should seem similar to the conclusions reached under categories one and two, then that should not be surprising. The key point across each analysis is that goods and services are in commerce, not trademarks. Congress may regulate the latter to control the former. But, no authority exists under the Commerce Clause for Congress to authorize the creation or protection of the latter for its own sake.

B. The Commerce Clause and Collective Action Federalism

Apart from traditional Commerce Clause analysis, it is also useful to view the question through the lens of newer theoretical models

149 Professor Port cautiously reaches a different conclusion with respect to dilution and other propertizing amendments to the Lanham Act, arguing, "[l]ike in *Lopez*, the Lanham Act's essential purpose will not fail without ITU, FTDA, or ACPA." Port, *Congressional Expansion*, *supra* note 2, at 906. This, however, appears to ask whether the FTDA is necessary to achieve the Lanham Act's purpose, which is not the current test under *Raich*. Rather, the test is simply whether it is "rational" means (or "reasonably adapted," as Justice Scalia's concurrence states) to achieve the chosen ends. *Raich*, 545 U.S. at 22, 37.

that have been developed to explain the scope of congressional authority under the clause. In particular, Robert D. Cooter and Neil S. Siegel argue that the Commerce Clause, consistent with the general structure of the enumerated powers, is best understood to apply to solve "a problem of collective action involving at least two states."[150] This approach encourages us to ask whether the subject area of regulation poses a collective action problem created by "interstate externalities and national markets."[151] If it does not, then a more convincing case can be made that the Commerce Clause does not authorize its regulation by Congress.

To understand what is meant by this theoretical approach to Commerce Clause analysis, the authors explain their "internalization principle" of U.S. federalism, which tells us to "assign power to the smallest unit of government that internalizes the effects of its exercise."[152] This economically-minded principle balances two ever-present tensions in the federal system: the incentive for states to free ride on other states in the absence of federal power, and the converse majoritarian risk that a national Congress will exploit states in the minority.[153]

Thus "the key inquiry" as to whether commerce is interstate, and therefore within the scope of Congress's commerce power, is whether there is a collective action problem between at least two states.[154] For instance, in criminal cases we might ask "how much coordination among law enforcement personnel in different states is required to police the proscribed conduct at issue."[155] The particular conclusion in *Lopez* could be explained by the fact that

> enforcing a prohibition on guns within school zones seems the opposite of a problem requiring coordination among law enforcement officers in different states. It seems local: local officials presumably have better information concerning who might carry firearms near schools, and better incentives to do something about the problem.[156]

150 Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 164–65 (2010).

151 *Id.* at 116.

152 *Id.* at 144.

153 *See id.* ("[B]enefits and costs that spill across state lines create an incentive for each state to free ride on efforts of other states . . . . Empowering Congress animates collective action, but risks exploiting states in the minority.").

154 *Id.* at 165.

155 Cooter & Siegel, *supra* note 150, at 163.

156 *Id.* at 164.

There is arguably no collective action problem in keeping schools gun free (though there might be one in suppressing the national market for guns).

Of particular interest here, the authors observe their internalization principle running throughout all of the enumerated power of Article 1, Clause 8, including Section 8, which they characterize as authorizing Congress "to make intellectual property."[157] The authors suggest that the decision to give the federal government this power may be justified by the internalization principle:

> Effective intellectual property law enables creators to collect fees from users of their creations, which provides an incentive for creativity. Because the problem of unauthorized use extends across state lines, the problem is national and Congress is better placed than the states to solve it. Federal intellectual property laws enable creators to collect fees from users across the nation, which creates a unified national market for creative works.[158]

For our purposes, then, we might ask whether trademark propertization poses a collective action problem. In seeking to regulate trademark signifiers divorced from goods or services, is Congress faced with something akin to the problem of unauthorized use of patents or copyrights, where states would be hard-pressed to coordinate efficiently with one another without free-riding and creating externalities that impact the incentives for creation (such as if one state became an IP-piracy haven)? Or are problems such as dilution more like local crimes that states can remedy (or not) within their own borders without the need for much coordination?

Put more concretely, is there necessarily an interstate externality created if the Louis Vuitton toile monogram is made weaker, in the abstract, in some states than others? The answer is far from obvious. On the one hand, it is a nationally-known symbol, and we might worry that one state's weak trademark propertization regime might risk diluting the brand for all purposes in all places. Trademark signs cannot be contained within one state's jurisdiction; they travel wherever they are known in the public's mind, so we cannot simply tell the trademark owner to enter only those states it prefers. Moreover, it would be far more difficult for all states to come together to agree on

157 *Id.* at 148–49. This is, more precisely the Patent and Copyright Clause, not a clause covering trademark law, which is an important clarification for these purposes.

158 *Id.*

a dilution law—without encouraging race-to-the-bottom type behaviors[159]—than for Congress to simply step in and create one.

On the other hand, for centuries trademark law generally has followed geographical lines. Just as we should not be concerned if a mark-owner's rights are senior in Massachusetts but junior elsewhere, there is no reason to presume that we have a problem just because an abstract symbol might be more distinctive in Massachusetts than in Alabama. This latter view, moreover, is consistent with the original thoughts of the Supreme Court in the *Trade-Mark Cases*, which resisted the notion that trademarks could be justified as creative goods like patents and copyrights that we need to encourage through a national system of protection.[160] Even schemes as quintessentially national under the collective-action theory as the patent and copyright systems, for that matter, still look to state law for underlying property-type questions such as ownership and transfer.[161]

In the end, the collective action question is a deeply empirical one that is outside the scope of this Article to answer satisfactorily. As Cooter and Siegel caution, "Finding the scope of interstate externalities and market failures requires mathematical theory, econometrics, cost-benefit analysis, psychological surveys, behavioral experiments, etc."[162] What is critical, however, is that the collective action question must be addressed to the protection of trademark signifiers as such, and not trademark regulation generally.

C. Alternative Justifications for Federal Authority to Regulate Trademark Signifiers

Before concluding any review of Congress's authority to propertize trademarks, two alternative constitutional sources need to be considered: the Patent and Copyright Clause[163] and the Treaty-Implementing Power.[164]

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159 *See* White v. Samsung Electronics Am., Inc., 989 F.2d 1512, 1518–19 (9th Cir. 1993) (Kozinski, J., dissenting) (describing an analogous issue under copyright law in the publicity context).

160 The Trade-Mark Cases, 100 U.S. 82, 94 (1879).

161 State law, for instance, generally "governs contractual obligations and transfers of property rights to patents." Krauser v. BioHorizons, Inc., 903 F. Supp. 2d 1337, 1349 (S.D. Fla. 2012) (citations omitted). The same is generally true of copyrights as well. *See, e.g.*, Keith v. Scruggs, 507 F. Supp. 968, 970 (S.D.N.Y. 1981) (holding that an action to establish title does not arise under the federal Copyright Act and should be brought in state court).

162 Cooter & Siegel, *supra* note 150, at 154–55.

163 U.S. CONST. art. I, § 8, cl. 8.

164 The treaty-implementing power, as elucidated in *Missouri v. Holland*, is not expressly contained in the text of the Constitution. 252 U.S. 416, 432 (1920) ("If the treaty is valid

i. Patent and Copyright Clause

As discussed above in Part III.B, the Patent and Copyright Clause was first advanced almost 135 years ago as the source for Congress's authority to pass the original federal trademark statute.[165] The Supreme Court, however, rejected that argument, because trademarks are not novel or original products of the brain that are invented or discovered like the subjects of patent and copyright law. Rather, trademark rights are acquired through simple priority of use with goods and services.[166]

The Court based its analysis, however, on the premise that the trademark statute under consideration did not create trademark property rights in the first instance, as such rights were created by the common law.

> This exclusive right was not created by the act of Congress, and does not now depend upon it for its enforcement. The whole system of trademark property and the civil remedies for its protection existed long anterior to that act, and have remained in full force since its passage.[167]

The trademark statute was understood merely to provide a mechanism for registering and enforcing this common law property right.

The trademark propertization critique, however, largely flips this premise on its head. It is now Congress that seeks to recognize trademark property rights in the first instance. While this makes it harder to justify Commerce Clause authorization, it potentially brings Congress closer to the subject matter of the Patent and Copyright Clause. The essence of the propertization model is that Congress is making trademarks more like copyrights and patents.

Problems, however, remain with using the Patent and Copyright Clause as a fount for congressional authority. First, trademark rights are not issued for "limited times," as required by the text of the clause, but may be maintained and renewed indefinitely so long as in use.[168]

The Patent and Copyright Clause, moreover, is at least arguably premised on a quid pro quo model.[169] The government grants a lim-

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there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.").

165 The Trade-Mark Cases, 100 U.S. at 93–94.

166 *Id.* at 94.

167 *Id.* at 92.

168 *See* Eldred v. Ashcroft, 537 U.S. 186, 199–204 (2003) (describing the "limited Times" requirement for copyrights and early patents).

169 *Id.* at 214 (demurring to petitioners' description of the Copyright Clause as a grant of legislative authority empowering Congress "to secure a bargain—this for that").

ited-time right in return for contributing to the public a new invention or work of authorship. But, as the Supreme Court observed, trademarks do not require novelty or originality.[170] Society is assured no new product of the mind by the grant of a trademark right. We would therefore need to import both a novelty or originality requirement, and a time limit, into trademark law before the Patent and Copyright Clause could be the source of congressional authority for trademark propertization.

ii. Treaty-Implementing Authority

The Supreme Court expressly avoided, in the *Trade-Mark Cases*, addressing the question of whether a general federal trademark statute might be supported under Congress's right to pass laws necessary to carry treaties into effect.[171] The question of whether Congress can pass such laws, even if those laws would otherwise be beyond Congress's enumerated powers, is the subject of intense academic debate and outside the scope of this article.[172] It should be noted, though, that there is some evidence that Congress relied upon its treaty-implementing power in passing at least some early trademark legislation.[173]

Even assuming that Congress possesses such a power, we would need to locate a treaty necessitating that the United States propertize trademark rights for it to apply in this context. Although many foreign jurisdictions use property-based trademark regimes,[174] most trademark treaties to which the United States is a party (such as the Paris Convention) merely require the United States to grant foreign nationals the same protections that it makes available to U.S. citi-

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170 The Trade-Mark Cases, 100 U.S. 82, 94 (1879).

171 *Id.* at 99.

172 *See generally* Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice*, 56 WM. & MARY L. REV. 59 (2014) (using an analysis of historical practice to contribute to the current debate over whether Congress can pass legislation beyond its enumerated powers in order to implement treaties under the Necessary and Proper Clause).

173 Specifically, as explored by Jean Galbraith, the treaty-implementing power was probably the source relied upon by Congress when it passed its first revised piece of trademark legislation in the wake of the Supreme Court's decision in the *Trade-Mark Cases*. *Id.* at 97–102.

174 *See, e.g.*, Council Regulation 207/2009 art. 11, 2009 O.J. (L 78) 1, 2 (EC) ("A Community trade mark is to be regarded as an object of property which exists separately from the undertakings whose goods or services are designated by it."). *See also*, Port, *Congressional Expansion*, *supra* note 2, at 831–34 (analyzing civil law jurisdictions where trademarks are treated as subject to property ownership).

zens.[175] Others, like the Madrid Protocol, are merely administrative vehicles for aiding the acquisition and maintenance of registrations in countries outside of the applicant's country of origin.[176]

There are admittedly some baseline substantive requirements in various treaties to which the United States is a party, but none of them can credibly be read to require Congress to grant rights to trademark signifiers apart from any goods and services.[177] The Paris Convention requirement to prevent some forms of unfair competition, for instance, is inextricably tied to goods and commercial activities.[178] Perhaps the Well-Known Marks requirement in that same convention under provision 6*bis* (requiring, in essence, that marks famous in another country but not yet used in the subject country be protected) comes closest.[179] But that only applies to non-U.S. marks (and therefore cannot justify signifier protection for U.S.-based marks), and in any event courts have ruled that the United States "has not yet incorporated that doctrine into federal trademark law."[180]

VI. THE CONSTITUTIONAL LIMITATION ON TRADEMARK PROPERTIZATION

As explicated at length above, a thorough review of the arguments supporting Congress's authority to propertize trademarks reveals that there is a fundamental, constitutional limitation on trademark propertization. Namely, Congress may not recognize or protect a

175 *See generally* MCCARTHY, *supra* note 54, § 29:25–26 (noting that the convention only requires the United States to give protection to foreign marks equal to the protection afforded domestic ones).

176 *Id.* § 29:32.

177 The Anti-Counterfeiting Trade Agreement, which the United States. signed in 2011, does contain some baseline requirements for IP enforcement that could be interpreted as protecting trademark signifiers. *See, e.g.*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, ACTA FACT SHEET AND GUIDE TO PUBLIC DRAFT TEXT (2010), *available at* http://www.ustr.gov/about-us/press-office/fact-sheets/2010/acta-fact-sheet-and-guide-public-draft-text (describing "a requirement for criminal remedies for use or importation of labels for packaging of counterfeit goods"). It is not, however, a treaty but rather a trade agreement entered into by the United States Trade Representative under the authority of the President, without the consent of Congress. MCCARTHY, *supra* note 54, § 29:33.50 (citing Sean Flynn, *ACTA's Constitutional Problem: The Treaty is Not a Treaty*, 26 AM. U. INT'L L. REV. 903, 926 (2011)).

178 *See* MCCARTHY, *supra* note 54, § 29:25 (citing United International Bureaux for the Protection of Intellectual Property, Paris Convention for the Protection of Industrial Property art. 10*bis*, July 14, 1967, 21 U.S.T. 1583 [hereinafter Paris Convention]).

179 Paris Convention, *supra* note 178, art. 6*bis*.

180 ITC Ltd. v. Punchgini, Inc., 482 F.3d 135, 142 (2d Cir. 2007); *see generally* Blake W. Jackson, Note, *Notorious: The Treatment of Famous Trademarks in America and How Protection Can Be Ensured*, 3 J. BUS. ENTREPRENEURSHIP & L., 61, 65–77 (2009) (explicating the same).

property interest in trademark signifiers except as a rational means to furthering the regulation of referent goods or services. This principle should be used as both a limitation on the drafting of federal trademark laws, as well as a practical guideline for limiting construction of such legislation.

This limitation, it must be underscored, is critically distinct from the statutory "use in commerce" requirement built into the Lanham Act.[181] The latter is simply one means to avoid the constitutional problem by requiring a trademark owner to use the mark in connection with goods and services in commerce to attain a registration, or unregistered rights under Section 43(a). The constitutional limitation articulated here, by contrast, is in one sense broader and more permissive in that it allows Congress to adapt any rational means to regulate such goods and services (including, for instance, an incentive system that only requires the trademark be used with goods and services for a limited time). But at the same time, the limitation is more fundamental and potentially more meaningful in that unlike the particular statutory use in commerce requirement in the Lanham Act, Congress can never avoid this ultimate constitutional ceiling. It is a bar for all time, with the one exception of constitutional amendment.[182] A number of examples of the operation of this constitutional limitation follow below.

A. *Examples of the Constitutional Limitation in Operation*

Starting with an extreme case, at its outset this article hypothesized a statute, based on Professor Stephen L. Carter's conception of trademark propertization, as commencing not with use of (or intention to use) a trademark with goods and services, but rather with authorship of a trademark:

> Trademark protection subsists in trademarks fixed in any tangible medium of expression. Trademarks protected under this title vest initially in the author or authors of the marks.

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181 *See supra* notes 62–63 and accompanying text.

182 As detailed by Zvi Rosen, constitutional amendments designed to clarify and broaden Congress's power over trademark regulation were introduced and referred to committee on eight different occasions between 1879 and 1955. *See* Zvi S. Rosen, *In Search of the* Trade-mark Cases*: The Nascent Treaty Power and the Turbulent Origins of Federal Trademark Law*, 83 ST. JOHN'S L. REV. 827, 875–901 (2009) (charting history of attempted constitutional amendments). Rosen generally attributes the historic failure of, and current lack of interest in, such an amendment to the expansion of the Commerce Clause power, which grew to cover enough commerce so as to render an amendment unnecessary. *Id.* at 901.

Could, then, Congress pass this new federal trademark law? Under the constitutional limitation on trademark propertization, it could not do so. Such a statute would be unconstitutional on its face, lacking any connection to referent goods or services.

What, then, if Congress sought to pass the same statute with a jurisdictional hook that seeks to avoid an explicit connection to goods and services? For instance, imagine a federal law saying:

> Trademark protection subsists in trademarks in commerce fixed in any tangible medium of expression. Trademarks protected under this title vest initially in the author or authors of the marks. The word "commerce" means all commerce which may lawfully be regulated by Congress.

This new statute would be unconstitutional on its face unless it was saved by reading the "in commerce" limitation to bring in goods and services through the back door. If "in commerce" as used here is not tied to referent goods or services, then the attempted jurisdictional hook fails because it would be effectively meaningless. As discussed at length above, trademark signifiers as such are simply not commerce.[183]

What about the current dilution statute, Section 1125(c)? Are there any constitutional concerns lurking there? As currently drafted, the statute likely avoids a facial constitutional problem, but only because of the definition of fame. In particular, only "famous" marks are protected from dilution, and a mark is only famous if "widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner."[184]

What, though, if Congress tweaks the statute to broaden the definition of fame to cover any mark "widely recognized by the general consuming public of the United States" so as to make fame less dependent on use with specific goods and services? This would be unconstitutional. This seeks to protect trademark signifiers merely for being well known, not for being well known with specific goods and services. It is thus not a rational means to encourage use of strong brands with goods or services to convey product information to the public, but rather to encourage strong brands as such. Nor can we save the statute by pointing to the fact that we are asking whether the general "consuming" public recognizes the mark, as opposed to the general public. That is just a limitation on who is doing the recognizing, as opposed to what they recognize (i.e., whether that recognized thing is "in commerce").

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183 *See supra* Part V.A.

184 15 U.S.C. § 1125(c)(2) (2012).

The constitutional limitation on trademark propertization also has potentially powerful application to the arena of assignments in gross. The Lanham Act limits the ability of trademark owners to assign their registrations and marks as follows:

> A registered mark or a mark for which an application to register has been filed shall be assignable with the good will of the business in which the mark is used, or with that part of the good will of the business connected with the use of and symbolized by the mark.[185]

While this does require that a mark's goodwill (signified) be sold with the signifier, it specifically omits any requirement that the referent goods or services ("business") be included in an assignment. Indeed, such a further limitation only appears in the context of intent-to-use applications, which require that the applicant assign not just the goodwill in its business but actually "the business of the applicant, or portion thereof, to which the mark pertains." [186]

This raises serious constitutional concerns. If Congress's legitimate end in regulating trademarks must be the control of goods and services, how can it justify a regime that allows for the sale of a trademark's signifier divorced from the actual goods or services with which it was used? How can this be a rational means to control goods and services? To the contrary, in sanctioning sales divorced from referents, Congress cedes all such control.

In support of this provision's constitutionality one could argue that Congress might rationally determine that too few people would invest in developing strong trademarks for use with goods and services if they cannot sell those marks once successful. That is true enough. To take the further step, however, and argue that too few people would invest in developing strong trademarks for use with goods and services unless they could sell those marks *separate and apart from that portion of their business* is a different, and far weaker, proposition. The italicized language adds little to the businessperson's incentives to develop a trademark. Yet the underlined language captures the essential feature of an assignment in gross. In short, Congress cannot justify a trademark regime permitting assignments in gross on the basis of the importance of permitting assignments generally, because that relies on too attenuated a chain of inferences under *Lopez* and related cases.[187]

The constitutional limitation might also apply to priority contests, including especially priority contests where one party claims priority

185 15 U.S.C. § 1060(a)(1) (2012).

186 *Id.*

187 *See supra* Part V.

of use through pre-sale activities.[188] No court may read the Lanham Act to give priority before the occurrence of either: (1) actual delivery of a good or rendering of a service in, or affecting, commerce or (2) evidence that such delivery or rendering is forthcoming.[189] Put another way, under the Lanham Act, mere advertising of a trademark's signifier must be insufficient to support use of a trademark for constitutional (and not merely statutory) reasons.[190]

For similar reasons, *United States Shoe*[191] and related "pure advertising" cases discussed in Part III(B), *supra*, are wrongly decided and should be reversed. Unless the parties can show that the subject service affected interstate commerce, or somehow connect (even circumstantially) interstate advertising to customers arriving from those states (neither of which were shown in *United States Shoe*), reliance on national advertising, by itself, cannot constitutionally justify the grant of federal trademark rights.

Finally, what about the Hyundai ad from the *Louis Vuitton* case discussed above?[192] This remains a very tough case. It involves a clearly famous mark owned by a plaintiff that the plaintiff long used with specific goods and services in commerce. Defendant (who placed an imitation of the logo on a basketball) arguably did not use the signifier in commerce. Can the court constitutionally apply the dilution statute to that defendant's conduct while denying, as it did, the materiality of whether Hyundai ever used the mark in connection with its own goods and services?[193]

The answer turns on whether Congress may reasonably decide to snuff out any and all use by a defendant in order to regulate goods and services of the plaintiff. Critically, this is an additional step re-

188 *See, e.g.*, New West Corp. v. NYM Co. of Cal., Inc., 595 F.2d 1194, 1200 (9th Cir. 1979) (observing that pre-sale activities involving mark may establish trademark priority where the mark was still used "in a way sufficiently public to identify or distinguish the marked goods in an appropriate segment of the public mind").

189 *See, e.g.*, *id.* (holding that circulation of 430,000 of exemplar covers of new magazine, acceptance of subscriptions and other activity, establishes use of mark even though magazine itself was not yet published). *See also* Planetary Motion, Inc. v. Techplosion, Inc., 261 F.3d 1188, 1196–98 (11th Cir. 2001) (establishing priority through presale activities relating to referent software product with which mark was to be used).

190 *Cf. New West Corp.*, 595 F.2d at 1200 (holding that mere advertising is insufficient, under the Lanham Act, for use priority). This analysis only applies to priority decisions that a federal court justifies by reference to federal law (i.e., the Lanham Act). The Commerce Clause poses no bar to a federal court looking to state law for a substantive rule of priority.

191 United States Shoe Corp. v. J. Riggs West, Inc. 221 U.S.P.Q. 1020, 1022 (T.T.A.B. 1984).

192 *Supra* Part II.

193 Louis Vuitton Malletier, S.A. v. Hyundai Motor Am., No. 10 Civ. 1611, 2012 WL 1022247, at *13 (S.D.N.Y. 2012).

moved from saying that the use by the defendant affects the trademark signifier of the plaintiff. It must connect back to plaintiff's goods and services. As previously discussed, there is certainly an argument that Congress is entitled to reward brand-owners with such expansive rights in order to encourage clearly labeled goods and services somewhere down the inference chain. However, that is just an argument, and depending on how strictly we read cases like *Morrison* or *Lopez*, it might take the form of an impermissible inference built upon an inference. This is particularly true if one considers use of a trademark's signifier, disassociated from any goods and services, to be a fundamentally non-economic activity.

B. In Support of Trademark Localism

It is largely outside the scope of this Article to explore in any depth the relative merits, from a policy and federalism perspective, of state or even local control of substantive trademark law, as compared to federal control. A few points may help frame what would surely be a fruitful area for further inquiry.

First, one needs to clarify the nature of the inquiry. The central question should not, for this purpose, be whether propertization is a good or bad thing. Rather, as articulated by Cooter and Siegel,[194] the more important question from a constitutional perspective is what decision making body is in the best position to answer the propertization question? That decision must be informed by the practical realities of a national economy, and questions of externalities and majoritarian exploitation of minorities.[195]

Second, anybody wading into these waters must acknowledge at the outset that pushing control of any part of trademark law down to the state or even municipal level will initially strike most trademark practitioners and brand-owners as being an irrational lark at best, or more likely a mad rush off a cliff. No one in their right mind, the claim might go, would advocate for a patchwork quilt of state trade-

194 Cooter & Siegel, *supra* note 150, at 116.

195 Professor Port tends toward the former approach. While he convincingly argues that propertization is a bad thing, and contrary to historical trademark practice in the United States, he generally avoids explaining why decentralization is a proper response to the issue. Constitutional federalism is, after all, about who should be shaping the law, not about what shape it should take. The closest Professor Port comes to justifying decentralized control over trademark regulation in *Congressional Expansion* is to argue that dilution law "had been a traditional area of state regulation." Port, *Congressional Expansion*, *supra* note 2, at 906. But this does not tell us who should be doing the regulating, or why they should be doing it, in the prescriptive sense.

mark regulation over a national rule in anything trademark related. Imagine analyzing a simple clearance search for one mark, which would require not just a search of each state registry, but an application of each unique state law to the results.[196] A national brand-owner, like a long-distance trucker charting a course through states with different trucking regulations, would either need to rebrand at problem state boundaries or avoid them entirely. One could only imagine the looks one would get if one were to float, at an International Trademark Association annual meeting, the idea of giving more trademark control to the states. Trademark practitioners and brand owners would think the idea preposterous on its face. No cocktail party invitation will be forthcoming for the lonely proponent. How, then, could decentralized trademark control possibly be justified in the global information age?

One tempting response to this challenge emphasizes the historical fact that trademark regulation was until the twentieth century a creature of state common law control. The federalization project has long been in tension with the strong state-based underpinnings of U.S. trademark law.[197] As Professor Port emphasizes, dilution for instance was exclusively a state law creature until the mid-1990s.[198]

Though accurate, this answer remains susceptible to the retort that our twenty-first century digital economy is far more nationalized (indeed, globalized) now than it was in the nineteenth century, or even the 1940s when the Lanham Act was passed. Why shouldn't trademark law adapt to the times, and itself become more national? Few if any brand-owners see state lines as relevant to the reach of their products or services. So why should the trademark law continue to give state boundaries such importance, even if that made sense before? Congress, assuming no constitutional barrier, is free to alter statutorily the underlying source of trademark rights to accommodate the changing times.

A more satisfying answer avoids this counterargument. As suggested throughout this Article, this alternate answer focuses on the

196 This was basically the state of U.S. dilution law prior to the creation of a federal action for dilution. *See* Port, *Congressional Expansion*, *supra* note 2, at 876–77 (noting that, prior to passage of the federal dilution law, twenty-five states had adopted dilution statutes, and three states included dilution as part of their common law).

197 *See generally* MARK P. MCKENNA, TRADEMARK LAW'S FAUX FEDERALISM, IN INTELLECTUAL PROPERTY AND THE COMMON LAW, Shyamkrishna Balganesh, ed. (Cambridge University Press 2013) (arguing that state law has not played a significant substantive role in the history of trademark and unfair competition, except in some cases in the modern era to broaden the scope of rights beyond the Landham Act).

198 Port, *Congressional Expansion*, *supra* note 2, at 906.

conceptual importance of separating trademark regulation generally from trademark propertization. When viewed separate and apart from goods and services flowing in or affecting commerce, the need for national regulation of a trademark's signifier becomes far less self-evident. What we are really talking about here, after all, is control over the signified meaning and strength of logos and words, their signification and value. We are not asking to what physical products a swoosh may be affixed, but rather what we think of (or don't think of) when we think of a swoosh, and how immediately and clearly we come to think of that.

Viewed from that perspective (i.e., trademark propertization as control over raw symbol strength and meaning) it is difficult to conceive of anything more personal, intimate, and local. This is, in essence, language. If anything cries out for some level of community control, it is the pure communicative function to us and those around us of the symbols we see when we take a walk, ride the subway, or open the refrigerator. The regulation of goods and services that these symbols refer to may certainly be something of national concern. But the amount of abstract differential distinctiveness that we wish to grant each such symbol over all other symbols, and the right to control the meaning of that symbol, separate from goods and services actually in the world, remains a question best answered differently in every community.

This is not to say, of course, that Nike should not have any control over the abstract meaning and distinctiveness of a swoosh. Rather, the degree we wish to cede such control to Nike should be a local decision because local groups are better situated to make that fundamentally social-linguistic determination than the government of the United States. The more we federalize trademark propertization, the more we federalize language, culture, and who we are as people.

In all, Congress's power under the Commerce Clause to regulate goods and services crossing state borders, or affecting commerce that does, is broad to the point of being plenary. In connection with this power, Congress certainly may regulate the symbols used to make those goods and services, and their qualities, memorable in the public's mind. Congress may not, however, leverage its authority to regulate referent goods and services into a plenary authority to regulate trademark signifiers as such. Its right to regulate trademark signifiers, especially its right to create exclusive property interests in them, must always remain rooted in the regulation of goods and services. The further it drifts from that end, the more skeptical we must be towards using trademark propertization as a means. Otherwise, we risk federalizing the pure use of words and logos as words and logos, or, put another way, basic language.