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INTRODUCTION

Robert Wilson Stewart was in the business of selling rifle assembly parts kits.1 Because Stewart had previously been convicted for possessing and transferring a machine gun,2 the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) investigated Stewart’s business and obtained a federal warrant to search Stewart’s residence.3 During its search, the ATF found five machine guns that Stewart had fabricated from parts that had traveled through interstate channels.4 Stewart was convicted in the United States District Court for the District of Arizona of “five counts of unlawful possession of a machinegun5 in violation of 18 U.S.C. § 922(o).”6

Under 18 U.S.C. § 922(o)(1) it is “unlawful for any person to transfer or possess a machinegun,”7 The history behind earlier gun

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2. A machine gun is legally defined as “any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.” I.R.C. § 5845(b) (2003).

3. Stewart, 348 F.3d at 1132.

4. Id. at 1134–35.

5. A “machine gun” is “a gun that fires small-arms ammunition automatically and can keep up a rapid fire of bullets.” However, “machinegun” means “to fire at with a machine gun.” THE WORLD BOOK DICTIONARY 1238 (1971). I have retained this standard English usage throughout, except in situations like the present where I am quoting without alteration from an original source, and the source uses “machinegun” instead of “machine gun.”

6. Stewart, 348 F.3d at 1132, 1134.

7. The entire subsection reads:

(o) (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to—

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

control legislation indicates that Congress passed such legislation under the Commerce Clause in an attempt to control interstate commerce in firearms. However, when Stewart appealed his conviction, the Court of Appeals for the Ninth Circuit found that the Commerce Clause does not give Congress the authority to "regulate someone with no relation to interstate commerce at all—such as a person who builds a machinegun from scratch in his garage . . . ." This ruling broke with earlier decisions by several courts of appeals, including the Ninth Circuit, that the Commerce Clause does reach to mere possession of a machine gun.

This Note examines this circuit split in detail by focusing on two related issues. The first issue is whether 18 U.S.C. § 922(o)(1) is constitutional under the Commerce Clause. The second issue is whether Congress ever has authority under the Commerce Clause to ban the mere possession of an object that was created from parts that moved in interstate commerce. Such bans have been limited so

8. U.S. CONSt. art. I, § 8, cls. 1, 3. The Constitution provides that "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." Id.

  [E]xisting Federal controls over such traffic [in firearms] do not adequately enable the States to control this traffic within their own borders through the exercise of their police power . . . only through adequate Federal control over interstate and foreign commerce in these weapons . . . can this grave problem [of dangerous people obtaining firearms] be properly dealt with, and effective State and local regulation of this traffic be made possible . . . the lack of adequate Federal control over interstate and foreign commerce in highly destructive weapons . . . has allowed such weapons . . . to fall into the hands of lawless persons . . . thus creating a problem of national concern . . .

10. Stewart, 348 F.3d at 1141.
11. United States v. Wright, 117 F.3d 1265, 1271 (11th Cir. 1997), rehearing granted in part, opinion vacated in irrelevant part; sentence aff'd, 133 F.3d 1412 (11th Cir. 1997); United States v. Kendzor, 113 F.3d 27 (5th Cir. 1997); United States v. Rybar, 103 F.3d 273, 285 (3d Cir. 1996); United States v. Beuckelaere, 91 F.3d 781, 787 (6th Cir. 1996); United States v. Knutson, 91 F.3d 884, 891 (7th Cir. 1996); United States v. Rambo, 74 F.3d 948, 952 (9th Cir. 1996); United States v. Kirk, 70 F.3d 791, 797 (5th Cir. 1995), rehearing en banc granted, 78 F.3d 160 (5th Cir 1996), and on rehearing en banc, 105 F.3d 997 (5th Cir. 1997); United States v. Wilks, 58 F.3d 1518, 1522 (10th Cir. 1995); United States v. Pearson, 8 F.3d 631, 633 (8th Cir. 1993); United States v. Hale, 978 F.2d 1016, 1018 (8th Cir. 1992); United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991).
far to machine guns and child pornography. Although these items provoke highly negative emotional reactions in many people, the constitutionality of the way in which Congress has used the Commerce Clause to support such bans merits dispassionate discussion. Millions of Americans possess objects that they created out of components that moved in interstate commerce, objects such as self-designed clothing, meals, decorations, electronic devices, vehicles, and a host of other items as numerous and varied as the individuals who produced, and now possess, them. Whether the Commerce Clause reaches to the mere possession of such items, that is, into the private domain of nearly every American, is therefore worthy of examination.

This Note has four sections. Section I outlines the historical background of the Commerce Clause's application to gun control legislation in general, and to gun possession in particular. Section II discusses the current circuit split on the constitutionality of 18 U.S.C. § 922(o)(1), and argues that the Commerce Clause does not give Congress the authority to outlaw the mere possession of a machine gun. Section III examines whether the Commerce Clause ever gives Congress the power to ban the possession of any self-created item whose components moved in interstate commerce, and argues that the Commerce Clause does not give Congress that authority. Section IV discusses the Supreme Court's recent decision to remand Stewart for "further consideration in light of" Gonzales v. Raich, and argues that Gonzales does not apply to self-created objects.

I. Historical Background of the Commerce Clause's Relationship to Gun Control Legislation

A. The National Firearms Act of 1934, the Taxing Power, and Firearms Possession

The earliest federal gun control legislation was the National Firearms Act of 1934 (NFA). Congress intended the NFA to

12. Under 18 U.S.C.A. § 2252(a)(4)(B) (LexisNexis Supp. 2004), it is unlawful to "knowingly possess[ ] . . . matter . . . containing any visual depiction . . . which was produced using materials which have been . . . transported [in interstate or foreign commerce] . . . if—(i) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (ii) such visual depiction is of such conduct . . . ."


“provide for the taxation of manufacturers, importers, and dealers in certain firearms and machine guns, to tax the sale or other disposal of such weapons, and to restrict importation and regulate interstate transportation thereof.”

In accordance with Congress’s intent, the NFA required “every importer, manufacturer, and dealer in firearms” to “register with the collector of internal revenue for each district in which such business is to be carried on . . . and pay a special tax . . . .” The NFA also required “every person possessing a firearm [to] register, with the collector of the district in which he resides . . . .” The NFA further regulated firearm possession by making it “unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of” the NFA’s tax and registration requirements.

During congressional hearings concerning the NFA, there was disagreement over whether Congress had any constitutional authority for prohibiting firearms possession. Representative David J. Lewis, a Maryland Democrat, asked Attorney General Homer S. Cummings, who originally wanted the NFA bill to proceed under both the commerce and the taxing power, how such a bill could avoid violating the constitutional right to keep and bear arms. Cummings replied that the Constitution did not give Congress the power to prohibit mere possession of a machine gun: “You see, if we made a statute absolutely forbidding any human being to have a machine gun, you might say there is some constitutional question involved.” Cummings then explained that although the mere possession of machine guns could not be constitutionally prohibited, it could be constitutionally regulated under the taxing power.

Later in the hearings, the following exchange concerning

the Internal Revenue Code of 1939; codified as ch. 53 of the Internal Revenue Code of 1954; codified as amended at I.R.C. § 5801-72 (2003)).

15. Id. at 1236.
16. § 2(a), 48 Stat. at 1237.
17. § 5(a), 48 Stat. at 1238.
18. § 6, 48 Stat. at 1238.
21. 1934 House Firearms Hearings, supra note 19, at 19. The Constitution provides that “the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.
23. Id.
whether Congress could constitutionally ban possession of machine guns occurred between Representative Allen T. Treadway, who was a Republican from Massachusetts, and Assistant Attorney General Joseph B. Keenan:

MR. TREADWAY: What benefit is there in allowing machine guns to be legally recognized at all? Why not exclude them from manufacture?

MR. KEENAN: We have not the power to do that under the Constitution of the United States. Can the Congressman suggest under what theory we could prohibit the manufacture of machine guns?

MR. TREADWAY: You could prohibit anybody from owning them.

MR. KEENAN: I do not think we can prohibit anybody from owning them. I do not think that power resides in Congress.\(^{24}\)

The NFA was modified in committee to eliminate all Commerce Clause provisions and to become purely a tax regulation requiring firearms registration.\(^{25}\)

As Cummings explained in his exchange with Lewis, although it is constitutionally questionable to ban machine gun possession, "when you say, 'We will tax the machine gun,' . . . you are easily within the law."\(^{26}\) Congress therefore sought to avoid future constitutional challenges to the NFA by regulating machine gun possession solely through the taxing power.

Nevertheless, there was a challenge to the constitutionality of the NFA's regulation of firearms possession.\(^{27}\) In *Sonzinsky v. United States*, the appellant, Max Sonzinsky, had been convicted of violating the NFA by possessing a sawed-off shotgun without having obtained the required written order\(^{28}\) from the Commissioner of Internal Revenue.\(^{29}\) Sonzinsky argued on appeal that the NFA was

\(^{24}\) *Id.* at 100 (statements of Rep. Treadway and Assistant Att'y Gen. Keenan).

\(^{25}\) *Id.* at 86.

\(^{26}\) *Id.* at 19 (statement of Att'y Gen. Cummings).

\(^{27}\) *Sonzinsky v. United States*, 86 F.2d 486 (7th Cir. 1936), aff'd, 300 U.S. 506 (1937).

\(^{28}\) "It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on an application form issued in blank in duplicate for that purpose by the Commissioner [of Internal Revenue]." National Firearms Act, Pub. L. No. 474, § 4(a), 48 Stat. 1236, 1237-38 (1934) (superseded by the Internal Revenue Code of 1939; codified as ch. 53 of the Internal Revenue Code of 1954; codified as amended at I.R.C. § 5801-72 (2003)).

\(^{29}\) *Sonzinsky*, 86 F.2d at 487.
invalid because its true purpose was crime suppression, not revenue raising. Sonzinsky asserted that the NFA was unconstitutional because it was not a taxation law but a penal law in disguise that encroached on the states' police power. It is notable that Sonzinsky never questioned the constitutionality of a tax law regulating mere possession of a firearm.

The Court of Appeals for the Seventh Circuit noted that section 6 of the NFA only prohibits possession of a firearm that was transferred in violation of sections 3 or 4 of the NFA. Therefore, Sonzinsky could not be convicted for possessing a firearm without the required written order, because "mere proof that the defendant had not obtained blanks [forms] from the collector fell far short of proof that such firearm had been transferred 'not in pursuance of a written order,' as charged in the second count of the indictment." The court therefore reversed Sonzinsky's conviction on the possession charge on evidentiary grounds. However, it rejected Sonzinsky's constitutional argument, holding that the tax imposed by the NFA "can reasonably be said to be for the purpose of producing revenue . . . . It is unimportant, under such circumstances, that such levy may at the same time impose a degree of regulation."

Two things are clear from the court's rulings in Sonzinsky. First, it is clear that that the taxing power under which the NFA was passed is indeed constitutionally sufficient to regulate firearm possession. In fact, no one questioned whether the taxing power reached possession. Sonzinsky's argument that the NFA was not a tax statute demonstrates that he implicitly accepted that the taxing power reaches possession. Second, it is clear that that the NFA's regulation of firearm possession was to apply narrowly to individuals who possess firearms as a proximate result of an illegal transfer. That is, Sonzinsky could not be convicted of possessing a firearm without proof that he possessed that firearm as a direct result of it having been transferred illegally.

In brief, although the taxing power does reach firearm possession via the NFA, the taxing power has not been held to extend to

30. Id. at 490.
31. Id.
32. Id. at 488.
33. Id. at 489.
34. Id. at 489, 491.
35. Id. at 490.
36. Id.
37. Id. at 488-89.
the possession of a firearm absent an illegal transfer. Therefore, mere possession of a firearm was never prohibited by the NFA.

B. *The Federal Firearms Act of 1938 and the Failure of the Commerce Clause to Reach Firearms Possession*

The first federal gun control legislation to be enacted under Congress’s Commerce Clause authority was the Federal Firearms Act of 1938 (FFA). The FFA made it unlawful for any “manufacturer or dealer, except a manufacturer or dealer having a license issued under the provisions of this Act, to transport, ship, or receive any firearm or ammunition in interstate or foreign commerce.”

The FFA also made it unlawful “for any person to receive any firearm or ammunition transported or shipped in interstate or foreign commerce in violation of the manufacturer’s or dealer’s licensing requirements.” The FFA, unlike the NFA, only made unlawful the receipt of a firearm that was shipped in interstate commerce in violation of federal licensing requirements.

The FFA did not make it unlawful to possess a firearm under any circumstance. It did, however, state that the “possession of a firearm . . . by any [person convicted of a violent crime or by a fugitive from justice] shall be presumptive evidence that such firearm . . . was shipped or transported or received, as the case may be, by such person in violation of this Act.” The FFA also stated that possession of “any firearm from which the manufacturer’s serial number has been removed, obliterated, or altered . . . shall be presumptive evidence that such firearm was transported, shipped, or received, as the case may be, by the possessor in violation of this Act.”

It is important to underscore here that possession of a firearm was regulated under the NFA, which was passed under the taxing power, but not under the FFA, which was passed under the Commerce Clause. The FFA made it unlawful to receive a firearm that was shipped in interstate commerce in violation of FFA requirements. However, the FFA only made it “presumptive evidence” of an FFA violation to possess a firearm while belonging to one or

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39. § 2(a), 52 Stat. at 1250.
40. § 2(b), 52 Stat. at 1250.
41. Id.
42. § 2(f), 52 Stat. at 1251.
43. § 2(i), 52 Stat. at 1251.
44. § 2(b), 52 Stat. at 1250.
more narrowly defined groups of people, or to possess a firearm lacking a manufacturer’s serial number. The same FFA subsections that prohibit receipt merely make possession presumptive evidence of a violation. It follows that Congress chose not to use the FFA to prohibit the possession of firearms, including machine guns, even though Congress did use the FFA to prohibit other kinds of firearms activities.

Even if the congressional hearings concerning the NFA had not made it clear that the Constitution fails to give Congress the power to prohibit people from possessing firearms, congressional discussions preceding the passage of the FFA show a reluctance to ban firearm possession for other reasons. The Senate Committee on Commerce stated in its report that there was an “outstanding necessity” to regulate and control the “interstate shipment of firearms and ammunition” because there were millions of pistols in the United States, many of them imports, and there was a need to “eliminate the gun from the crooks’ hands.” Congress passed the FFA under the commerce power because Congress decided that the most effective way to cope with this “firearm situation” and thereby reduce crime, was to control interstate firearms shipments. However, the committee also recognized that Congress must interfere “as little as possible with the law-abiding citizen from whom protests have been received against any attempt to take from him his means of protection from the outlaws who have rendered living conditions unbearable in the past decade.”

This tension over writing a constitutional law that would effectively prevent criminals but not law-abiding citizens from possessing firearms is also apparent in an earlier congressional debate. Senator Royal S. Copeland, a New York Democrat, stated in the Congressional Record that the original version of the proposed bill met with considerable “opposition [from] sportsmen and other respectable citizens” who owned firearms. In response to what Copeland described as “bitter opposition to the previous bill” and “innumerable letters indicating such opposition,” Congress formulated a new

45. § 2(f), (i), 52 Stat. at 1251.
46. Id.
47. 1934 House Firearms Hearings, supra note 23.
49. Id.
50. Id. at 2.
51. 79 CONG. REC. S11973 (1935).
52. Id. (statement of Sen. Copeland).
bill that incorporated contributions from the Rifle Association, the
Pistol Association, and Congress's own experts. It was no doubt
due to pressure from organized groups of law-abiding gun owners
that Congress decided that the FFA would defer to the states on the
issue of regulating possession of firearms. As Copeland explained
to Senator William E. Borah, an Idaho Republican, the purpose of
the FFA was to aid the states in their law enforcement efforts, not
to federally ban firearms possession:

MR. COPELAND: If a gun is shipped into a State where a
license is required to have possession of a firearm, it can not be
lawfully received except by a person who has such a license. It
does not apply at all to other States which do not require
licenses.

MR. BORAH: In other words, it is simply in aid of the
States to enforce their law?

MR. COPELAND: That is correct.

MR. BORAH: And is nothing more than that?

MR. COPELAND: That is its purpose.

Copeland also explained that because criminals would not have
state licenses to carry guns, the FFA would make it difficult for
criminals to get possession of firearms shipped through interstate
channels, but at the same time would allow law-abiding citizens to
possess firearms. Copeland did not address how the FFA would
prevent criminals who lived in states that did not require a license
to possess a firearm from gaining possession of firearms shipped in
interstate commerce. It is logical to assume, however, that because
the purpose of the FFA was to help the states enforce their laws,
Congress chose not to address the issue of those states that had no
gun licensing laws to enforce.

It follows then, that when Congress passed the FFA in 1938,
constitutional issues and strong political pressures caused it to re­
frain from banning firearms possession.

53. Id. (statement of Sen. Copeland).
54. "If a State does not choose to have a licensing law, the bill does not apply to
such State, but it does apply to those States which have licensing laws." Id. (statement
of Sen. Copeland).
55. Id. (statements of Sens. Copeland and Borah).
56. Id. (statement of Sen. Copeland).
57. Id.
C. The Omnibus Crime Control and Safe Streets Act of 1968 and Congress's Lack of Findings Regarding Firearms Possession and Interstate Commerce

In 1968, Congress repealed the FFA\textsuperscript{58} and passed the Omnibus Crime Control and Safe Streets Act of 1968 (Omnibus Act), which included almost all of the provisions of the FFA.\textsuperscript{59} The Omnibus Act, like the FFA, was enacted under Congress's commerce power.\textsuperscript{60} The Omnibus Act made it unlawful "for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce."\textsuperscript{61}

The Omnibus Act's prohibition of unlicensed persons from manufacturing or dealing in firearms expands the FFA's restrictions on transporting, shipping, and receiving firearms through interstate channels.\textsuperscript{62} By prohibiting unlicensed persons from dealing in firearms (even to same-state residents) and from manufacturing firearms, Congress expanded the FFA's restrictions into intrastate activities.\textsuperscript{63} When the Omnibus Act was passed in 1968, intrastate activities, such as manufacturing, were beyond the reach of the Commerce Clause unless they had such a "close and substantial relation to interstate commerce that their control [was] essential or appropriate to protect that commerce from burdens or obstructions . . . ."\textsuperscript{64}

The Senate never considered in its report on the Omnibus Act whether manufacturing or dealing firearms to same-state residents

\begin{footnotes}
\item[59] §§ 921-28, 82 Stat. at 226-35.
\item[61] § 922(a)(1), 82 Stat. at 228.
\item[63] Manufacturing is an intrastate activity. "[T]hat which does not belong to commerce is within the jurisdiction of the police power of the State . . . . Commerce succeeds to manufacture, and is not a part of it." United States v. E. C. Knight Co., 156 U.S. 1, 12 (1895).
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had a "close and substantial relation" to interstate commerce.\footnote{65} When the Senate mentioned Congress's commerce power justification for the Omnibus Act, it was solely in terms of making it easier for the states to exercise their police powers:


\[\text{[T]}\text{he existing Federal controls over [interstate and foreign traffic in firearms] do not adequately enable the States to control this traffic within their own borders through the exercise of their police power . . . only through adequate Federal control over interstate and foreign commerce in these weapons, and over all persons engaging in the businesses of importing, manufacturing, or dealing in them can this grave problem [of dangerous people obtaining firearms] be properly dealt with, and effective State and local regulation of this traffic be made possible . . . .}\footnote{66}\

Likewise, the House of Representatives reported that the purpose of H.R. 5037, whose provisions would later become part of the Omnibus Act, was to provide federal money to help state and local governments address lawlessness more effectively: "H.R. 5037 is the heart of President Johnson's national strategy against crime."\footnote{67} The Omnibus Act itself states that the Act's purpose is "[t]o prevent crime and to insure the greater safety of the people" and that Congress finds that "crime is essentially a local problem that must be dealt with by State and local governments . . . ."\footnote{68}

When Congress passed the Omnibus Act it used the commerce power to encroach on the intrastate activities of manufacturing and of dealing firearms to same-state residents, but did not consider whether such activities met the constitutional "close and substantial relation" standard articulated in \textit{NLRB v. Jones}.\footnote{69} The Omnibus Act also encroaches on the intrastate activity of possession, by making it unlawful for several categories of people to possess a firearm.\footnote{70} These categories include convicted felons, dishonorably discharged members of the armed forces, mental incompetents, former American citizens who have renounced their citizenship, and illegal aliens.\footnote{71} The Act also forbids "[a]ny individual who to his
knowledge and while being employed" by any person in these categories to possess a firearm "in the course of such employment."72 The Omnibus Act does state that Congress found that such possession of a firearm, which is clearly an intrastate activity, is a "burden on commerce or threat affecting the free flow of commerce . . . ."73

Remarkably, however, there is nothing in the legislative history of the Omnibus Act that indicates that Congress ever considered whether firearms possession affects commerce. The Omnibus Act also states that Congress found that firearms possession by individuals within these categories constitutes a "threat to the exercise of free speech and the free exercise of a religion . . . ."74 There is nothing in the legislative history that addresses, let alone supports these findings, either.

The Senate reported that the purpose of the Omnibus Act was to combat crime, not to restrict law-abiding citizens from possessing firearms for lawful purposes, or to "discourage or eliminate the private ownership" of firearms by such citizens.75 It stands to reason then, that since there are far fewer individuals in the restricted categories than there are law-abiding citizens, that Congress was never concerned that the mere possession of firearms by persons within the restricted categories had any kind of deleterious effect on interstate commerce or on the free exercise of speech and religion. It appears, from the legislative history, that individuals such as convicted felons and illegal aliens were prohibited from possessing firearms solely as a means of reducing crime, and not as a protection for interstate commerce.

D. The Gun Control Act of 1968 Does Not Prohibit Firearms Possession

Later in the same year, Congress passed the Gun Control Act of 1968 (GCA).76 Like the Omnibus Act, the GCA was passed under the commerce power.77 Congress did consider the constitu-

72. § 1202(b), 82 Stat. 197 at 236-37.
73. § 1201(1), 82 Stat. 197 at 236.
74. § 1201(3), 82 Stat. 197 at 236.
77. The GCA states that its purpose is to "provide for better control of the interstate traffic in firearms." 82 Stat. at 1213. The House of Representatives reported that the GCA's "principal purpose" was to "strengthen Federal controls over interstate and foreign commerce in firearms and to assist the States effectively to regulate firearms
tionality of outlawing firearms possession, just as it did before passing the NFA. However, Congress learned once again that it had no constitutional authority to prohibit such possession. When a proposal to prohibit all persons younger than twenty-one from possessing firearms was made during a GCA congressional hearing, General Counsel of the Treasury Fred B. Smith responded, "It seems doubtful that the provision can be justified under the taxing or commerce powers, or under any other power enumerated in the Constitution . . . ." Smith added that although the Treasury Department opposed "in principle, the possession of [NFA] firearms by persons of immature years" it favored accomplishing this goal by prohibiting licensed dealers from selling firearms to anyone underage.

The GCA does not prohibit possession of a firearm by any category of persons. Furthermore, the GCA states that it does not have the purpose of restricting law-abiding citizens from possessing firearms for lawful purposes. However, it expands the list of categories of persons subject to certain federal firearms restrictions by prohibiting persons addicted to illegal drugs and those who have been committed to mental institutions from shipping or transporting "any firearm . . . in interstate or foreign commerce" and from receiving "any firearm . . . which has been shipped or transported in interstate or foreign commerce."

Only a few months earlier, Congress had prohibited several categories of dangerous persons from possessing firearms under the Omnibus Act by claiming to have made findings concerning interstate commerce. It is therefore reasonable to ask why Congress did not also prohibit the new GCA categories of dangerous persons subject to federal firearms restrictions from possessing firearms.

There is no evidence that Congress considered whether the

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79. 1934 House Firearms Hearings, supra note 18, at 100.
80. 1967 Senate Firearms Hearings at 1089.
81. Id. at 1088-89 (statement of Fred B. Smith, General Counsel of the Treasury).
82. Id. at 1089 (statement of Fred B. Smith, General Counsel of the Treasury).
84. § 922(g), (h), 82 Stat. at 1220-21.
86. § 1201(1), 82 Stat. 197 at 236.
new GCA categories were likely to have a less substantial effect on interstate commerce by possessing firearms than the Omnibus Act categories were likely to have. As demonstrated earlier, there is also nothing in the Omnibus Act’s legislative history that supports Congress’s claim that firearms possession by persons in these categories affects interstate commerce. It is logical to assume, then, that Congress could have found that firearms possession by persons in the GCA categories affected interstate commerce despite there being no legislative history to support such findings. It is not likely that Congress’s failure to do so was an oversight, because the only difference in restrictions between the two categories is that the GCA categories are not prohibited from possessing firearms.87

It is also not likely that political considerations account for this difference. There is no indication in the GCA’s legislative history that Congress was under pressure from any groups advocating that mental patients and persons addicted to illegal drugs should possess firearms. The GCA does state clearly that its purpose is not to restrict law-abiding citizens from possessing firearms,88 which may have been due to political pressure from gun owner groups. However, illegal drug addicts are not law-abiding citizens by definition, and do not form the constituency of such groups.

However, before passing the GCA, Congress considered the constitutionality of prohibiting firearms possession,89 something it did not consider before passing the Omnibus Act. Congress ascertained that it had no power to prohibit firearms possession.90 Given the prohibition on firearms possession in the Omnibus Act, it is likely that if Congress believed it had constitutional authority to prohibit these new categories of dangerous persons from possessing firearms, it would have done so.

E. The Firearms Owners’ Protection Act and the Scarce Legislative History Behind § 922(o)

The most recent federal gun control legislation is the Firearms Owners’ Protection Act (FOPA), which includes 18 U.S.C.

89. 1967 Senate Firearms Hearings at 1089.
90. Id. at 1088-89.
§ 922(o). 91 Congress passed the FOPA because Congress found that the "rights of citizens" under the Second, Fourth, Fifth, Ninth, and Tenth Amendments required "additional legislation to correct existing firearms statutes and enforcement policies." 92 Congress also found that "additional legislation [was] required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968." 93 The FOPA quotes this congressional intent from section 101 of the Gun Control Act of 1968: "[I]t is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the . . . possession, or use of firearms appropriate to the purpose of . . . any . . . lawful activity . . . ." 94

The FOPA does, however, amend 18 U.S.C. § 922(g), which codifies both section 1202 of the Omnibus Act and section 922(g), (h) of the GCA, to expand the categories of persons who may not possess firearms "in or affecting commerce." 95 The FOPA also amends 18 U.S.C. § 922(h) to forbid "any individual, who to that individual's knowledge and while being employed by any person described in any paragraph of subsection (g) of this section, in the course of such employment" to possess a firearm "in or affecting interstate or foreign commerce." 96 The entire list of categories of persons now prohibited by 18 U.S.C. § 922(g) from possessing a firearm "in or affecting commerce" comprises felons, fugitives from justice, persons who use or who are addicted to illegal drugs, mental defectives, persons who have been committed to mental institutions, illegal aliens, persons who have been dishonorably discharged from the armed services, persons who have renounced their U.S. citizenship, and persons under restraining orders for violent behavior or who have been convicted of domestic violence misdemeanors. 97

However, the FOPA's prohibition on machine gun possession reaches beyond these categories to affect all law-abiding citizens. The FOPA amends 18 U.S.C. § 922 by adding subsection (o), which

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92. § 1(b)(1), 100 Stat. at 449.
93. § 1(b)(2), 100 Stat. at 449.
95. § 102(6), 100 Stat. at 452.
96. § 102(7), 100 Stat. at 452.
makes it unlawful for "any person to transfer or possess a machinegun" unless such possession is under the authority of the United States or a state or the machine gun was lawfully possessed before May 19, 1986. 98

Very little legislative history concerns § 922(o), which was a last-minute amendment that was not referred to in any House hearings or reports. 99 One piece of this scarce history appears in a House report that mentions an earlier, rejected bill which would have prohibited the possession of machine guns used by "racketeers and drug traffickers" for criminal purposes, but would have permitted those who possessed "lawfully registered machine guns" to continue possessing them. 100 The only reference in the legislative history concerning the House vote on § 922(o) is that of Representative William J. Hughes, a New Jersey Democrat who sponsored § 922(o), and who asked for "an opportunity to explain why machineguns should be banned" when there were only three minutes of discussion left before a vote was to be taken on the FOPA bill. 101 Over the objection of Representative F. James Sensenbrenner, Jr., a Wisconsin Republican, and while the Clerk continued reading the amendment, Hughes declared, "I do not know why anyone would object to the banning of machineguns." 102

There was also little Senate discussion of § 922(o). A colloquy between Kansas Senator Robert J. Dole and Utah Senator Orrin G. Hatch, who were both Republican proponents 103 of the FOPA, concerned machine gun possession. 104 The senators stated that the amendment which was to become § 922(o) would not prohibit persons or manufacturers who possessed machine guns prior to the FOPA's enactment from continuing to possess and transfer those machine guns. 105 Furthermore, manufacturers would not be prohibited from possessing machine gun parts which had not been assembled before the date of the FOPA's enactment. 106 The senators

98. § 102(9), 100 Stat. at 452-53 (emphasis added).
103. 132 CONG. REC. S9601 (1986).
104. Id. at S9599-601.
105. Id. at S9599-600.
106. Id.
also said that the amendment would not prohibit manufacturers who sought to sell machine guns to police, military, or defense contractors from continuing to possess machine guns. However, neither senator discussed whether machine gun possession had any effect on interstate commerce.

Other senators expressed doubt concerning Dole and Hatch's interpretation of the amendment. Senator Howard M. Metzenbaum, an Ohio Democrat, remarked that colloquies often "provide interpretations that were not originally intended" and wanted it on record that Dole and Hatch's colloquy was "not to serve any purpose as to changing the intent or the purpose or any aspect whatsoever of the legislation." Senator Edward M. Kennedy, a Massachusetts Democrat, stated in a colloquy with Metzenbaum that his understanding of the House's intent concerning the amendment was to prohibit manufacturers from possessing machine gun parts which had not yet been assembled by the date of the FOPA's enactment. Neither Metzenbaum nor Kennedy discussed whether machine gun possession had any effect on interstate commerce.

The FOPA marks the first time in the history of federal gun control legislation that Congress outlawed almost all persons, in almost all circumstances, from merely possessing a particular kind of firearm. As is clear from the almost nonexistent legislative history concerning § 922(o), none of which addresses the effect of machine gun possession on interstate commerce, § 922(o) was passed without any substantial congressional investigation as to whether § 922(o) is constitutional under the Commerce Clause.

In summary, no federal gun control legislation's legislative history supports a finding that machine gun possession affects interstate commerce and therefore may be regulated under the commerce power. The National Firearms Act of 1934 used the taxing power, not the commerce power, to prohibit firearms possession, and restricted this prohibition to firearms obtained from illegal transfers. The Federal Firearms Act of 1938 did not pro-

107. Id. at S9600.
108. Id. at S9601 (statement of Sen. Metzenbaum).
109. Id. at S9602.
110. Congress, however, did conclude that firearms possession affects the national economy. This conclusion is discussed infra Part II. A.
111. 1934 House Firearms Hearings at 86.
112. Sonzinsky v. United States, 86 F.2d 486, 488-89 (7th Cir. 1936) (holding that the appellant could not be convicted of possessing a firearm without proof that he possessed the firearm as a result of an illegal transfer).
hibit firearms possession; it merely made firearms possession by certain categories of dangerous persons, or possession of a firearm without a manufacturer’s serial number, presumptive evidence of FFA violations.\(^{113}\) The statement in the Omnibus Crime Control and Safe Streets Act of 1968, that the possession of firearms by certain categories of dangerous persons burdens commerce and threatens free speech and religion, is dubious because no mention of these findings occurs anywhere in the Omnibus Act’s legislative history.\(^{114}\) The Gun Control Act of 1968 does not prohibit firearms possession.\(^{115}\) Section 102(9) of the Firearms Owners’ Protection Act prohibits machine gun possession,\(^{116}\) but its scarce legislative history does not address the effect of machine gun possession on interstate commerce.

There is reason to ask, then, whether 18 U.S.C. § 922(o)(1) is a constitutional exercise of Congress’s commerce power.

II. Is 18 U.S.C. § 922(o)(1) CONSTITUTIONAL?

A. Pre-Lopez Court Challenges to § 922(o)(1)

The first case to challenge 18 U.S.C. § 922(o)(1) as an unconstitutional use of Congress’s commerce power was United States v. Evans, decided by the Court of Appeals for the Ninth Circuit in 1991.\(^{117}\) Creed Miles Evans was indicted in the United States District Court for the District of Montana on charges of conspiracy and of aiding and abetting related to the possession of machine guns in violation of § 922(o).\(^{118}\) Although the indictment relating to § 922(o) was dismissed in exchange for Evans’s guilty plea to another charge,\(^{119}\) the question whether § 922(o) is constitutional was considered on appeal.\(^{120}\)


\(^{118}\) Evans, 928 F.2d at 858-59.

\(^{119}\) Id. at 860.

\(^{120}\) Id. at 862.
The court held that because Congress had found that "at least 750,000 people had been killed in the United States by firearms" between 1900 and 1986 (the date of the FOPA's enactment), it was "reasonable for Congress to conclude that the possession of firearms affects the national economy, if only through the insurance industry."\textsuperscript{121}

However, § 922(o)(1) prohibits the possession of machine guns, not firearms in general.\textsuperscript{122} The court overstated its argument when it applied the number of deaths attributed to firearms in general to those attributed to machine guns in particular. In fact, the following evidence tends to support that for many decades now, very little violent crime has been associated with machine guns. Stephen E. Higgins, the director of the Bureau of Alcohol, Tobacco and Firearms, was asked during a congressional hearing, in a letter dated May 16, 1984 from Representative William J. Hughes, the chairman of the House Subcommittee on Crime, about what Higgins had characterized in an earlier letter to Hughes as the "law enforcement aspects of the commerce in machineguns . . . ."\textsuperscript{123} Higgins responded to Hughes's questions:

\begin{quote}
#16. Q. The number of criminal cases involving all types of machineguns, and the number of criminal cases involving registered machineguns.

A. A total of 707 machineguns were acquired by ATF during FY-83. Most of the Federal firearms violations involved in these acquisitions are for illegal making or possession of unregistered firearms.

Registered machineguns which are involved in crimes are so minimal so as not to be considered a law enforcement problem. . . .

#17. Q. The number of thefts of NFA weapons.

A. While actual statistics are not available, the number of thefts of registered NFA weapons are minimal and is not considered a law enforcement problem.\textsuperscript{124}
\end{quote}

There are only four state and federal appellate cases concerning machine gun murders that occurred between 1944 and 1991,

\textsuperscript{121} Id.
\textsuperscript{123} Armor Piercing Ammunition and the Criminal Misuse and Availability of Machineguns and Silencers: Hearings on H.R. 641 and Related Bills Before the Subcomm. on Crime of the House Comm. on the Judiciary, 98th Cong. 195 (1986) [hereinafter 1984 House Machineguns Hearings].
\textsuperscript{124} Id. at 208 (questions of Rep. Hughes and answers of Dir. Higgins).
when the court decided *Evans*.125 This dearth of cases suggests a dearth of machine gun murders.

The *Evans* court did recognize that the connection it asserted between machine gun possession and interstate commerce was a “rather tenuous nexus” but held that nexus to be sufficient, citing the Supreme Court’s ruling in *Heart of Atlanta Motel, Inc. v. United States* that hotels that practice racial discrimination affect interstate commerce.126 In *Heart of Atlanta Motel*, however, the Court did *not* hold that racial discrimination at hotels had a merely tenuous connection to interstate commerce. To the contrary, the Court asserted that Congress may only exercise its commerce power to regulate interstate activities that have a “real and substantial relation to the national interest.”127 It also held that Congress may use the commerce power to “regulate discriminatory practices now found *substantially* to effect interstate commerce.”128 Furthermore, in *Maryland v. Wirtz*, the Court noted that it has never ruled that “Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.”129

The *Evans* court’s holding that the commerce power reaches activities that have a tenuous connection to interstate commerce is not supported by either *Heart of Atlanta Motel* or *Wirtz*. Although the court found that it was “reasonable for Congress to conclude that the possession of firearms affects the national economy, if only through the insurance industry,”130 the court based this finding on Congress’s finding that 750,000 people had been killed by firearms between 1900 and 1986.131 The court’s reasoning was not based on

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125. *Evans v. State*, 855 A.2d 291, 292-94 (Md. 2004) (concerning an appellant who was convicted of using a machine gun to murder two narcotics witnesses in 1983); *Searcy v. City of Dayton*, 38 F.3d 282, 284-85 (6th Cir. 1994) (concerning an off-duty police officer who pled guilty to murdering a suspected drug dealer with a registered machine gun in 1988); *People v. Silva*, 754 P.2d 1070, 1075-76 (Cal. 1988) (concerning a defendant who was convicted of murdering a kidnap victim with a machine gun in 1981); *State v. Holloway* 195 S.W.2d 662, 663-64 (Mo. 1946) (concerning a jail inmate who murdered a sheriff with a machine gun while attempting to help the appellant, another inmate, to escape in 1944).

126. *Evans*, 928 F.2d at 862 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964)).

127. *Heart of Atlanta Motel*, 379 U.S. at 255.

128. *Id.* at 252 (emphasis added).


130. *Evans*, 928 F.2d at 862.

131. *Id.*
the actual number of people killed in crimes involving machine guns in particular but on the number of people killed in crimes involving firearms in general. Therefore, the Evans court's holding that § 922(o) is constitutional under the Commerce Clause lacks both legal and factual support.

The next case that raised commerce power challenges to § 922(o) was United States v. Hale, which was decided in 1992. Wilbur Hale was convicted in the United States District Court, Eastern District of Arkansas, of possessing machine guns in violation of § 922(o). He argued on appeal that § 922(o) "assert[s] no nexus with interstate commerce" and is therefore an unconstitutional use of Congress's commerce power. The Hale court began its analysis by quoting from the Supreme Court's ruling in Perez v. United States: "Where the class of activities is regulated, and that class is within the reach of federal power, the courts have no power to 'excise, as trivial, individual instances' of the class."

However, the Hale court failed to address the fact that the only class of activities being regulated under § 922(o)(1) is machine gun transfer and possession. Machine gun possession is not an "individual instance" of a larger class of regulated activities, it is the class of regulated activities. Although machine guns themselves certainly fall within the larger class of firearms in general, Congress has never, in the entire history of gun control legislation, prohibited nearly all law-abiding citizens from merely possessing firearms. Therefore, prohibiting nearly all machine gun possession exceeds the kinds of regulation that has been placed on firearms as a class. In short, because § 922(o)(1)'s prohibition on machine gun possession is not an "individual instance" of a larger class of activities, the Hale court improperly applied Perez.

The Hale court then stated that "[t]he legislative history of section 922(o) indicates that Congress considered the relationship between the availability of machine guns, violent crime, and narcotics trafficking." However, the legislative history of § 922(o) considers no such relationship. In fact, as demonstrated earlier, the legislative history of § 922(o) barely exists. The court offers support for its statement by citing to H.R. REP. NO. 495, 99th Cong., 2d Sess., at

133. Id. at 1016-17.
134. Id. at 1017-18.
135. Id. at 1018 (quoting Perez v. United States, 402 U.S. 146, 154 (1971)).
136. Id.
However, this report neither refers to § 922(o), nor to the availability of machine guns. It does refer to an earlier, rejected bill that would have prohibited "possession of machine guns, used by racketeers and drug traffickers for intimidation, murder and protection of drugs and the proceeds of crime." However, this statement says nothing about machine gun availability, and is dubious in light of Higgins's statement: "Most of the Federal firearms violations involved in these acquisitions [of 707 machine guns in 1983] are for illegal making or possession of unregistered firearms." 139

The Hale court then stated that § 922(o) was passed under the FOPA as an amendment to the Omnibus Act, and that when Congress enacted the Omnibus Act, it had "found facts indicating a nexus between the regulation of firearms and the commerce power" and that those findings had not changed. 140 The Hale court said that it agreed with the Evans court that § 922(o) is within Congress's commerce power. 141

The Hale court made the same error of reasoning as the Evans court in that the Hale court failed to distinguish between firearms in general and machine guns in particular. As demonstrated earlier, § 922(o)(1) has almost no legislative history and there are no findings concerning a nexus between interstate commerce and the prohibition of machine gun possession, even though machine guns are the only firearms whose possession Congress almost completely prohibited. 142 Also, the court treated the unique prohibited status of machine guns as if that status fell under a larger class of activities, 143 even though the prohibition on machine gun possession exceeds the extent of the regulations on all other firearms. 144 The

137. Id.
139. 1984 House Machineguns Hearings, supra note 124.
141. Id. (citing United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991)).
143. Hale, 978 F.2d at 1018.
court therefore misapplied Perez, which pertains specifically to smaller instances of larger classes of activities. The Hale court’s holding that § 922(o) is constitutional under the Commerce Clause appears to lack factual, historical, and legal support.

B. United States v. Lopez

The Supreme Court’s 1995 decision in United States v. Lopez changed previous standards for determining whether the Commerce Clause reaches an intrastate activity, such as firearms possession. Under 18 U.S.C. § 922(q), it was “unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.” Alfonso Lopez, Jr., a high school student, was convicted in the United States District Court for the Western District of Texas of knowingly possessing a firearm (a handgun) in a school zone in violation of § 922(q). Lopez appealed his conviction, arguing that § 922(q) exceeded Congress’s commerce power. The Court of Appeals for the Fifth Circuit agreed with Lopez’s argument and reversed his conviction. The government then appealed.

The Supreme Court considered the commerce power’s history, starting with the “first principles” embedded in the Constitution and continuing with a discussion of earlier, landmark Commerce Clause cases. The Court then determined that there are “three broad categories of activity that Congress may regulate under its commerce power.” The first category of activity is the “use of the channels of interstate commerce.” The second category is


145. Perez v. United States, 402 U.S. 146, 154 (1971). The Court found that intrastate loan sharking activities are smaller instances of a larger class of organized crime activities that affect interstate commerce, and may therefore be regulated under the Commerce Clause. Id. at 146 et seq.

148. Lopez, 514 U.S. at 549, 551-52.
149. Id. at 552.
150. Id. at 549, 552; United States v. Lopez, 2 F.3d 1342, 1367-68 (5th Cir. 1993).
151. Lopez, 514 U.S. at 549, 552.
152. Id. at 552-58.
153. Id. at 558.
154. Id.
"instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."

The third category is "those activities having a substantial relation to interstate commerce." The Court then ruled that an activity within this third category only falls under the commerce power if the activity "'substantially affects' interstate commerce."

The Court decided that because § 922(q) does not regulate channels, instrumentalities, persons, or things in interstate commerce, § 922(q) should be considered under the third category, and so the "'substantially affects' interstate commerce" test must be applied. In applying this test, the Court noted that § 922(q) "is a criminal statute that by its terms has nothing to do with 'commerce.'" The Court also noted that § 922(q) "is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." Furthermore, § 922(q) "has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce." The Court found § 922(q) unconstitutional, holding that the "possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."

Section 922(q) prohibited mere possession of any firearms in a defined area (a school zone). Section 922(o)(1) prohibits almost all persons anywhere from merely possessing a particular kind of firearm (a machine gun). It is, therefore, reasonable to apply the Lopez court's analysis of § 922(q) to § 922(o)(1). That is exactly what appellants and courts have been doing since Lopez was decided.

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155. Id.
156. Id. at 558-59.
157. Id. at 559.
158. Id.
159. Id. at 561. The government argued that "possession of a firearm in a school zone may result in violent crime and that violent crime [may] be expected to affect the functioning of the national economy in two ways." Id. at 563. One of those ways was insurance costs. Id. at 563-64. The other way was by "threatening the learning environment" and thereby producing "a less productive citizenry." Id. at 564.
160. Id. at 561.
161. Id. at 562.
162. Id. at 567.
C. *Post-Lopez Court Challenges to § 922(o)*

Since 1995, every appellate court that has ruled on Commerce Clause challenges to § 922(o) has grappled with *Lopez*. The first of these cases was *United States v. Wilks*. Larry Francis Wilks operated a gun shop, from which he sold three machine guns to undercover agents from the Bureau of Alcohol, Tobacco, and Firearms (BATF). BATF agents also found two machine guns while searching Wilks's home. Wilks was charged under 18 U.S.C. § 922(o) with illegal transfer and possession of a machine gun. Wilks claimed that 18 U.S.C. § 922(o) was unconstitutional and filed a motion to dismiss the indictment in the United States District Court for the Northern District of Oklahoma. After the district court denied Wilks's motion, Wilks entered conditional pleas of guilty to the possession counts. He then appealed to the Court of Appeals for the Tenth Circuit, arguing that 18 U.S.C. § 922(o) "asserts no nexus with interstate commerce, and is thus beyond the constitutional power granted to Congress to regulate commerce."

The *Wilks* court distinguished § 922(o) from § 922(q) by examining the former under the second category of activity that the *Lopez* Court said could be regulated under the Commerce Clause, that of "things in interstate commerce." Noting that the *Lopez* Court had determined that § 922(q) was a break with earlier federal firearms legislation, the *Wilks* court further distinguished § 922(o) as "consistent with this earlier federal legislation because it merely regulates the movement of a particular firearm in interstate commerce."
commerce.”175 The Wilks court rested its distinction on the Lopez Court’s finding that § 922(q) went beyond the Commerce Clause’s reach to regulate a “purely intrastate” activity,176 holding that § 922(o) sought to reach an interstate commerce activity by regulating the machine gun market by prohibiting possession.177

However, this distinction weakens under the Wilks court’s discussion of machine guns as national commodities. The Wilks court began this discussion by distinguishing the Lopez Court’s analysis that § 992(q) “sought to regulate an activity [firearms possession in school zones] which by its nature was purely intrastate and could not substantially affect commerce even when incidents of those activities were aggregated together.”178 The Wilks court then decided, based on a statement made by the United States District Court for the Eastern District of Michigan, in United States v. Hunter, that machine guns “by their nature are ‘a commodity . . . transferred across state lines for profit by business entities.’”179

According to the Wilks court, a handgun like that possessed by Lopez is not “by its nature” a commodity transferred in interstate commerce, but a machine gun is. Given that both products are sold across state lines, nothing in the Wilks decision explains why the court agreed with Lopez that handgun possession is essentially intrastate but then decided that machine gun possession is not. The only support the Wilks court provides for considering machine guns to be “by their nature” commodities in interstate commerce is the Hunter court’s statement that there is a “definitively national market for machineguns” (alteration in original).180 However, the Hunter court’s statement is based on allegations in the indictments against the defendants in Hunter,181 not on any significant investigation into whether machine gun possession substantially affects interstate commerce. However, the act of machine gun possession is not a “thing[ ] in interstate commerce” and so cannot fall under the second Lopez category.182

The Wilks court then decreed, based on its contention that machine guns, but not handguns, are in their essence things in inter-

175. Id.
176. Id. at 1521 (citing Lopez, 514 U.S. at 561).
177. Id.
178. Id. (citing Lopez, 514 U.S. at 561).
180. Id. (quoting Hunter, 843 F. Supp. at 249).
182. Lopez, 514 U.S. at 558.
state commerce, that § 922(o) “represents Congressional regulation of an item bound up with interstate attributes and thus differs in substantial respect from legislation concerning possession of a firearm within a purely local school zone.”183

Mere possession of any object, without a transfer, does not bring that object into commerce. Even if the Wilks court had demonstrated that machine guns are essentially “things in interstate commerce,” it did not address whether the purely intrastate activity of machine gun possession falls under any of the categories of proper Commerce Clause regulation articulated in Lopez. Therefore, the court failed to rule on what § 922(o)(1) actually regulates.

The Wilks court acknowledged that 18 U.S.C. § 922(o) has almost no legislative history.184 Relying on observations made by the Hale court, the Wilks court pointed out that Congress had, however, considered the relationship between machine gun availability and violent crime when it passed the FOPA.185 The Wilks court noted that Congress had found a “nexus between the regulation of firearms and the commerce power when it first enacted [§] 922” of the Omnibus Act.186 Furthermore, the court stated that § 922(o) became part of the FOPA as an amendment to § 922 of the Omnibus Act, and that § 922(o) did not alter any Omnibus Act findings.187

However, the Hale court did not distinguish between congressional findings related to firearms in general and machine guns in particular when it discussed the FOPA’s legislative history. The Wilks court therefore relied on an apparent error of reasoning in the Hale court’s ruling.

The Wilks court also relied on the incorrect rationale from Hunter, quoting: “Thus, although not explicitly stated in the language of the statute itself, it is evident that Congress prohibited the transfer and possession of most post-1986 machineguns not merely to ban these firearms, but rather, to control their interstate movement by proscribing transfer or possession.”188 The court found

183. Id.
184. Id. at 1519-20.
185. Id. at 1520 (citing United States v. Hale, 978 F.2d 1016, 1018 (8th Cir. 1992), cert. denied, 507 U.S. 997 (1993)).
186. Id. (citing Hale, 978 F.2d at 1018).
187. Id. (citing Hale, 978 F.2d at 1018).
§ 922(o) constitutional.\textsuperscript{189}

It is far from evident, however, based on the lack of legislative history concerning § 922(o) and the lack of Congressional findings addressing the impact of machine gun possession on interstate commerce, that Congress ever considered whether machine gun possession affects interstate commerce. The \textit{Evans} court stated that the standard of review for determining the "validity of an act that is said to violate the Commerce Clause . . . [is] whether a reasonable Congress could find that the class of activity regulated affects interstate commerce."\textsuperscript{190} But it is not clear that a reasonable Congress would have found that machine gun possession affects interstate commerce. The \textit{Evans} court only found that a reasonable Congress could have determined that, based on the high number of people killed by firearms, "possession of firearms affects the national economy, if only through the insurance industry."\textsuperscript{191} But this finding is based on firearms in general, not on the small number of machine guns in particular.

Therefore, in its reliance on the \textit{Hunter} court's indictment allegation-based assertions that the market for machine guns is definitively national, the \textit{Wilks} court's basis for defining machine guns as an \textit{essentially} interstate commodity is exceedingly weak. This weakness makes analyzing § 922(o) under Lopez's second category, "things in interstate commerce,"\textsuperscript{192} questionable. Analyzing § 922(o) as if it prohibited machine guns instead of \textit{possession} of machine guns that were not legally possessed prior to May 19, 1986 makes the court's analysis further suspect. Finally, by relying on the faulty reasoning employed by the \textit{Hale} court in its discussion of the FOPA's legislative history, that is, the \textit{Hale} court's confusion of firearms in general with machine guns in particular, the \textit{Wilks} court perpetuated this error in its own analysis. The \textit{Wilks} court's holding that § 922(o) is constitutional under the Commerce Clause rests, therefore, on dubious grounds.

The next case that raised a constitutional challenge to 18 U.S.C. § 922(o) was \textit{United States v. Kirk}.\textsuperscript{193} From September 1988 through January 4, 1989, William J. Kirk "attempted to sell various unregistered machineguns" to Donald Mueller, who was cooperat-

\begin{itemize}
\item \textsuperscript{189} Id.
\item \textsuperscript{190} United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991) (citing Perez v. United States, 402 U.S. 146, 152-56 (1971)).
\item \textsuperscript{191} Id.
\item \textsuperscript{192} United States v. Lopez, 514 U.S. 549, 558 (1995).
\item \textsuperscript{193} United States v. Kirk, 70 F.3d 791 (5th Cir. 1995).
\end{itemize}
ing with the Bureau of Alcohol, Tobacco and Firearms. On January 4, 1989, Kirk and Mueller went to a rifle range where they obtained parts to convert a semi-automatic rifle into a machine gun. They then "test-fired the converted machinegun" and Kirk sold this machine gun to Mueller. On February 21, 1989, Kirk and Mueller met at the same rifle range, where Kirk sold Mueller an UZI carbine that had been converted into a machine gun. Kirk was charged with unlawful possession and transfer of a machine gun in violation of 18 U.S.C. § 922(o). Kirk filed a motion to dismiss the indictment in the United States District Court for the Western District of Texas, arguing that 18 U.S.C. § 922(o) "exceeded the power of the federal government under the Commerce Clause." After the district court denied his motion, Kirk entered a conditional guilty plea and appealed to the Court of Appeals for the Fifth Circuit.

The court began its analysis by misreading § 922(o): "When read as a whole, it is plain that the activities [transfer or possession of a machine gun] prohibited by section 922(o) constitute commerce." But as Circuit Judge Edith H. Jones pointed out in her dissent, the majority made a "fundamental mistake by ... their misconstruction of the plain language of the statute." Jones noted that because the language of § 922(o) employs the disjunctive, "possession alone is criminalized independent of any transfer of a machine gun." This means that the statute does not limit its prohibition to acts of possession that affect interstate commerce, "[r]ather, it criminalizes the mere private possession of a machine gun." Nevertheless, the majority decided that because § 922(o) only prohibits the possession of machine guns that were not legally possessed before May 19, 1986, "there could be no unlawful possession under section 922(o) without an unlawful transfer." The court

194. Id. at 792.
195. Id.
196. Id.
197. Id.
198. Id. at 793.
199. Id. at 792-93.
200. Id.
201. Id. at 796.
202. Id. at 799 (Jones, J., dissenting).
203. Id.
204. Id.
205. Id. at 796 (majority opinion).
then reasoned that "the ban on such possession is an attempt to control the interstate market for machineguns by creating criminal liability for those who would constitute the demand side of the market, i.e., those who would facilitate illegal transfer out of the desire to acquire mere possession."206

There is a twofold problem with this reasoning. First, as the Sonzinsky court held in 1936, mere possession of a firearm is not proof that the firearm was illegally transferred.207 Absent proof of an illegal transfer, Sonzinsky could not be convicted under the NFA of illegally possessing a firearm.208 Second, as the case of United States v. Stewart would later demonstrate, it is possible for a person to possess machine guns that were neither lawfully possessed before May 19, 1986, the date that § 922(o)(1) became effective,209 nor unlawfully transferred.210 Stewart possessed machine guns he made himself out of parts; some of those parts moved through interstate channels but none of Stewart's machine guns did.211 Therefore, Judge Jones was proved to be correct, in that transfer and possession are wholly independent acts under § 922(o)(1), and that § 922(o)(1) prohibits possession of a machine gun whether or not that possession has any connection with interstate commerce.212 An activity that has no connection with interstate commerce is beyond the reach of the Commerce Clause, because it does not fall within any of the three categories of activity that Congress can regulate that the Court articulated in Lopez.213

Based on its reasoning that unlawful possession under § 922(o) cannot occur absent an unlawful transfer, the Kirk court determined that § 922(o) should be analyzed under the first category of activities that the Supreme Court held in Lopez fell under the Commerce Clause, that of the "use of the channels of interstate commerce."214 The Kirk court then concluded that "even though, admittedly, some of the activity made unlawful is purely intrastate,"

206. Id.
207. Sonzinsky v. United States, 86 F.2d 486, 488-89 (7th Cir. 1936), aff'd, 300 U.S. 506 (1937).
208. Id. at 489.
211. Id. at 1135-36.
212. Kirk, 70 F.3d at 799 (Jones, J., dissenting).
214. Kirk, 70 F.3d at 796-97 (citing Lopez, 514 U.S. at 558).
§ 922(o) is constitutional.\footnote{Kirk, 70 F.3d at 797.}

It is important to note that since Kirk was decided, every appeals court (except the Stewart court) that has heard Commerce Clause challenges to § 922(o) has based its ruling on either repetitions or expansions of the flawed reasoning articulated in Hale, Wilks, and Kirk. The Court of Appeals for the Ninth Circuit in United States v. Rambo, which was the first post-Kirk Commerce Clause challenge to § 922(o), adopted the Kirk court’s reasoning.\footnote{United States v. Rambo, 74 F.3d 948, 951-52 (9th Cir. 1996).} The second post-Kirk Commerce Clause challenge to § 922(o) was United States v. Kenney, in which the Court of Appeals for the Seventh Circuit relied on the legislative history that the Wilks court relied on from the Hale court, perpetuating the error of applying congressional findings that related to firearms in general to machine guns in particular.\footnote{Id. at 888-89.} The Kenney court also relied on the Kirk court’s misreading that unlawful possession under § 922(o) requires unlawful transfer.\footnote{Id. at 886, 889-90 (quoting Lopez, 514 U.S. at 558-59).} The Kenney court did differ from the rulings in Wilks and Kirk by assigning § 922(o) to the third category articulated in Lopez, that of activities “having a substantial relation to interstate commerce.”\footnote{Id. at 890.} Then, without acknowledging Hale, the Kenney court applied the Hale court’s ruling that machine gun possession was part of a larger class of regulated activities affecting commerce.\footnote{United States v. Wright, 117 F.3d 1265, 1270 (11th Cir. 1997) (holding that there is a direct relation between machine gun demand and interstate transfer, but providing no findings or other facts for support); United States v. Knutson, 113 F.3d 27, 30-31 (5th Cir. 1997) (relying on Congressional findings concerning firearms in general, not machine guns in particular); United States v. Rybar, 103 F.3d 273, 279-82 (3d Cir. 1996) (relying on Congressional findings concerning firearms in general, not machine guns in particular); United States v. Beuckelaere, 91 F.3d 781, 784-85 (6th Cir. 1996) (relying on Congressional findings concerning firearms in general, not machine guns in particular).} The relationship between machine gun possession and interstate commerce is so uncertain that there has been no consensus
concerning how to analyze it under Lopez. The first four appeals courts to hear post-Lopez Commerce Clause challenges to § 922(o) assigned § 922(o) to three different Lopez categories.\textsuperscript{222} The court in United States v. Beuckelaere considered § 922(o) under all three categories.\textsuperscript{223} The court in United States v. Rybar analyzed § 922(o) under the third category, and stated that other courts' assignments of § 922(o) to other categories supported its argument.\textsuperscript{224} The court in United States v. Knutson also analyzed § 922(o) under the third category, but claimed that the statute likewise "fits comfortably" under the first two categories.\textsuperscript{225} However, the court in United States v. Wright rejected the first two categories and held that § 922(o) must be analyzed under the third.\textsuperscript{226}

And that is where the law stood, until the Court of Appeals for the Ninth Circuit decided Stewart.\textsuperscript{227}

D. United States v. Stewart: Where We Are Now

In 2003, the Court of Appeals for the Ninth Circuit broke from all earlier appellate decisions concerning whether the Commerce Clause provides authority for § 922(o) and ruled that § 922(o) is unconstitutional under the Commerce Clause as applied to appellant Robert Wilson Stewart.\textsuperscript{228} Stewart had created his machine guns from parts that had moved in interstate channels.\textsuperscript{229} The court described the way Stewart fashioned his machine guns:

[M]any additional parts and tools, as well as expertise and industry, were needed to create functioning machineguns. This is quite different than if Stewart had ordered a disassembled gun and simply put the parts together, the way one might assemble a chair from IKEA. These machineguns were a "unique type of firearm," with legal parts mixed and matched from various origins; they required more than a simple turn of a screw-driver or a hit of a hammer to become machineguns. We therefore cannot

\textsuperscript{222} Kenney, 91 F.3d at 889 (assigning § 922(o) to the third category); United States v. Rambo, 74 F.3d 948, 952 (9th Cir. 1996) (assigning § 922(o) to the first category); United States v. Kirk, 70 F.3d 791, 796-97 (5th Cir. 1995) (assigning § 922(o) to the first category); United States v. Wilks, 58 F.3d 1518, 1521 (10th Cir. 1995) (assigning § 922(o) to the second category).
\textsuperscript{223} Beuckelaere, 91 F.3d at 784-87.
\textsuperscript{224} Rybar, 103 F.3d at 283-84.
\textsuperscript{225} Knutson, 113 F.3d at 29-30.
\textsuperscript{226} Wright, 117 F.3d at 1270.
\textsuperscript{227} United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003), vacated and remanded, 125 S. Ct. 2899 (2005).
\textsuperscript{228} Id. at 1140, 1142.
\textsuperscript{229} Id. at 1135.
say that the machine guns themselves—in any recognizable form—traveled in interstate commerce.  

Stewart therefore presented the court with the “difficult question . . . where to draw the line between a regulated object and the matter from which that object was created.”  

The Stewart court began its analysis by distinguishing its holding in Rambo, which was based on the Kirk court’s holding, that “there can be ‘no unlawful possession under section 922(o) without an unlawful transfer.’” The Stewart court found its Rambo holding inapplicable because Stewart did not receive his machine guns from a transfer; rather, he made the machine guns himself. Therefore, the court determined that Stewart did not “use the channels of interstate commerce” to obtain the machine guns, and so his act of possession did not fall under the first category of Lopez. Furthermore, because the machine guns themselves never traveled in interstate commerce, the court also determined that Stewart’s act of possession did not concern “things in interstate commerce” and so did not fall under the second category of Lopez.  

The court then turned to the third category of Lopez, that of “activities having a substantial relation to interstate commerce.” To determine whether Stewart’s possession of machine guns had a substantial effect on interstate commerce, the court applied the four-prong test set out by the Supreme Court in United States v. Morrison. The test is:

1. whether the regulated activity is commercial or economic in nature;
2. whether an express jurisdictional element is provided in the statute to limit its reach;
3. whether Congress made express findings about the effects of the proscribed activity on interstate commerce; and
4. whether the link between the prohibited activity and the effect on interstate commerce is attenuated [meaning that if the link is attenuated the activity fails this prong].

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230. Id. at 1136.
231. Id.
232. Id. at 1134 (quoting United States v. Rambo, 74 F.3d 948, 952 (9th Cir. 1996), quoting United States v. Kirk, 70 F.3d 791, 796 (5th Cir. 1995)).
233. Id. at 1135.
234. Id. at 1134-36 (quoting United States v. Lopez, 514 U.S. 549, 558 (1995)).
235. Id. (quoting Lopez, 514 U.S. at 558).
236. Id. at 1134, 1136 (quoting Lopez, 514 U.S. at 558-59).
237. Id. at 1136-37 (citing United States v. Morrison, 529 U.S. 598, 610-12 (2000)).
238. Id. (citing Morrison, 529 U.S. at 610-12).
The court held that mere possession of a machine gun is not economic in nature and so § 922(o) fails the first prong.\textsuperscript{239} The court also held that because there is no evidence that Stewart intended to sell or transfer his machine guns, the link between his possession of machine guns and interstate commerce is "highly attenuated" and therefore § 922(o) fails the fourth prong.\textsuperscript{240} Section 922(o) contains no jurisdictional element attaching machine gun possession to interstate commerce and so § 922(o) fails the second prong.\textsuperscript{241} Finally, the court held that because there were no congressional findings concerning the effect of machine gun possession on interstate commerce, § 922(o) fails the third prong.\textsuperscript{242} The court concluded that § 922(o), as applied to Stewart, is unconstitutional.\textsuperscript{243}

Although the court only struck down § 922(o) on an as-applied basis given the unique facts of Stewart's case, the court's holding has wider implications. By recognizing the "limits of Rambo's logic," that is, by recognizing that § 922(o) does in fact prohibit unlawful possession absent an unlawful transfer,\textsuperscript{244} the Stewart court confirmed Judge Jones's observation that § 922(o) criminalizes possession independently of transfer.\textsuperscript{245} Therefore, § 922(o) criminalizes acts of possession that, absent a showing of any "substantial affect" on interstate commerce, are purely intrastate activities that are beyond the commerce power's reach.\textsuperscript{246} Furthermore, as the Stewart court states, "nothing in the legislative history of any of the earlier firearms statutes speaks to the relationship between mere possession of firearms and interstate commerce."\textsuperscript{247} Nothing in § 922(o)'s legislative history speaks to this relationship, either, because § 922(o)'s legislative history is almost nonexistent. There is therefore no evidence that mere possession of a machine gun has any affect on interstate commerce, let alone a substantial affect.

Section 922(o) is not merely unconstitutional as applied to Stewart. It is wholly unconstitutional, and should be struck down.

\textsuperscript{239} Id. at 1137.
\textsuperscript{240} Id.
\textsuperscript{241} Id. at 1138.
\textsuperscript{242} Id. at 1138-40.
\textsuperscript{243} Id. at 1140.
\textsuperscript{244} Id. at 1135.
\textsuperscript{245} United States v. Kirk, 70 F.3d 791, 799 (5th Cir. 1995) (Jones, J., dissenting).
\textsuperscript{247} Stewart, 348 F.3d at 1139.
III. DOES THE COMMERCE CLAUSE REACH TO MERE POSSESSION OF SELF-CREATED OBJECTS WHOSE PARTS MOVED IN INTERSTATE CHANNELS?

Suppose you create objects out of components that you obtain through interstate channels. Suppose further that none of these components by itself constitutes your finished product, and that your product is not merely the end result of assembling these various components. Like Stewart's machine guns, your self-created objects require your expertise and industry, your ability to manifest your vision into a tangible form that nobody else has ever produced. Your product is a unique type of similar products, a type that never existed before, and would never have existed at all but for your creativity. Does the Commerce Clause give Congress the power to prohibit you, under any circumstances, from merely possessing such objects?

The Stewart court's analysis of Stewart's mere possession of self-created machine guns is a useful guide to this wider issue of how to analyze the mere possession of any self-created object. The Stewart court applied the categories under which Congress may exercise its commerce power, as determined by the Supreme Court in Lopez. The same method of analysis reveals that mere possession of any self-created object cannot fall within the first two Lopez categories.

As to the first category, "the use of the channels of interstate commerce," it is physically impossible for an object that does not exist to use the channels of anything. A self-created object does not exist until an individual creates it. Also, a self-created object does not exist as separate components that travel through interstate channels because the existence of such an object also requires the ingenuity and inventiveness of a human mind and human labor. Therefore, so long as a person is merely possessing such an object, that act of possession cannot make "use of the channels of interstate commerce."

As to the second category, that of "things in interstate commerce," it is also impossible for an object that only exists as a
unique type once a person has created it to be considered such a thing. Although its components traveled through interstate channels, the object itself could not have done so, because the object did not exist until it was produced by a human being. Furthermore, its uniqueness means that it is not a commodity that is already available through commercial channels and so it cannot be considered to be essentially commercial. Therefore, the act of merely possessing such an object cannot encompass a "thing[ ] in interstate commerce."254

However, the question whether the mere possession of a self-created object can ever fall under the third category of Lopez, that of "activities having a substantial relation to interstate commerce,"255 is more complicated. Here, the Morrison test is helpful, as summarized by the Stewart court.256 The Morrison test is intended to determine whether an activity "substantially affects" interstate commerce,257 that is, whether it falls under the third Lopez category and therefore can be constitutionally regulated by Congress.258

The second prong of the Morrison test, "whether an express jurisdictional element is provided in the statute to limit its reach,"259 can be dispensed with immediately. Even if Congress were to include a jurisdictional element in a statute prohibiting the mere possession of a self-created object, its inclusion does not support Congressional authority for such a prohibition absent fulfillment of the first and fourth prongs of the Morrison test.260

The third prong of the Morrison test, "whether Congress made express findings about the effects of the proscribed activity on interstate commerce,"261 is also easily done away with. If Congress were to make such findings, these findings would likely become the basis for including a jurisdictional element in the statute, so it is important to note that the second and third prongs of the Morrison test are closely related. However, such findings are even more closely related to the first and fourth prongs of the test.262

254. Id.; see Stewart, 348 F.3d at 1136.
255. Lopez, 514 U.S. at 558-59.
257. Lopez, 514 U.S. at 558-59.
258. Morrison, 529 U.S. at 608-09.
259. Stewart, 348 F.3d at 1136 (citing Morrison, 529 U.S. at 611-12).
260. Morrison, 529 U.S. at 609-12.
261. Stewart, 348 F.3d at 1136 (citing Morrison, 529 U.S. at 612).
262. See Lopez, 514 U.S. at 563.
The first prong is "whether the regulated activity is commercial or economic in nature." If a proscribed activity is not commercial or economic, thereby failing the first prong, it would be impossible for Congress to find that the activity affects interstate commerce because any activity affecting commerce is, by definition, commercial in nature. The fourth prong is "whether the link between the prohibited activity and the effect on interstate commerce is attenuated." Any activity with a merely attenuated link to interstate commerce would fail the fourth prong, and therefore also make it impossible for Congress to find that such activity substantially affects interstate commerce.

Clearly, an activity cannot meet the third prong of the Morrison test unless it also meets the first and fourth prongs, and it is not likely to meet the second prong if it does not meet the third prong. The only reason the third prong exists is to "enable [the Court] to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce . . . ." Because there is no requirement that Congress make findings concerning an activity's burden on interstate commerce, this prong exists only as an aid to judicial determination, not as a requirement. It is therefore essential to determine whether mere possession of a self-created object can ever meet the first and fourth prongs of the Morrison test.

Can mere possession of a self-created object ever be "commercial or economic in nature"? Possession is an intrastate activity. The Supreme Court said in Lopez that Wickard v. Filburn "is perhaps the most far reaching example of Commerce Clause authority over intrastate activity." Does Wickard say anything about the act of possession?

In Wickard, Roscoe C. Filburn sought an injunction and a declaratory judgment against Claude R. Wickard, Secretary of Agriculture, for assessing a marketing penalty against him under the Agricultural Adjustment Act of 1938. Wickard had assessed this penalty because Filburn had grown more wheat than the Act allowed, even though this excess wheat was mostly for consumption

263. Stewart, 348 F.3d at 1136 (citing Morrison, 529 U.S. at 610-11).
264. Id. at 1136-37 (citing Morrison, 529 U.S. at 612).
266. Id. (citing Lopez, 514 U.S. at 562).
267. Stewart, 348 F.3d at 1136 (citing Morrison, 529 U.S. at 610-11).
269. Lopez, 514 U.S. at 560.
on Filburn's own farm. Filburn argued that the production and consumption of wheat are "local in character" and have no more than an indirect effect on interstate commerce, therefore the Act exceeded the reach of the Commerce Clause. The Supreme Court, however, ruled that such activities may affect interstate commerce because, even if the wheat was never marketed, "it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce."

The Stewart court looked to Wickard in considering whether Stewart's possession of self-created machine guns was a commercial or economic activity. The court distinguished Stewart's possession of self-created machine guns from Wickard's production and consumption of wheat by holding that only the latter was an economic activity: "[W]here growing wheat in one's backyard could be seen as a means of saving money that would otherwise have been spent in the open market, a homemade machinegun may be part of a gun collection or may be crafted as a hobby." The court ruled that mere possession of a machine gun is not an economic activity.

Mere possession of any self-created object is never an economic activity. Filburn's wheat was not self-created; it was not a unique type of wheat in the sense that Stewart's machine guns were a unique type of machine gun. Filburn was producing a commodity that easily could have taken the place of identical commodities in the market. However, the person who creates an object of a type that never existed before is not creating a commodity that can otherwise be bought on the market. The self-created object does not exist on the market and so cannot be bought on the market. Merely possessing a self-created object is therefore not an economic activity.

Can mere possession of a self-created object ever meet the fourth prong of the Morrison test? That is, can any link between mere possession of a self-created object and its "effect on interstate commerce in any way?"

271. Id. at 114-15.
272. Id. at 119.
273. Id. at 128.
275. Id.
276. Id.
277. Id. at 1136-37 (citing United States v. Morrison, 529 U.S. 598, 612 (2000)).
commerce” ever be more than attenuated? If Wickard is read as the “most far reaching example of Commerce Clause authority over intrastate activity[,]” then the answer is no. In Wickard, the Court ruled that Filburn’s production and consumption of wheat in excess of the legal quota impacted commerce because it replaced wheat purchases that Filburn would have otherwise made in the open market. However, the Court also noted that “[c]ommerce among the states in wheat is large and important” and that the “effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop.” Commerce among self-created objects, however, cannot rise to the level of “large and important” because self-created objects are always unique items. They cannot otherwise be bought in the open market. Therefore, they cannot ever have more than an attenuated link to interstate commerce and they cannot meet the fourth prong of the Morrison test.

Because the mere possession of self-created objects must necessarily fail the Morrison test, such possession must also necessarily lie beyond the reach of the Commerce Clause. The commerce power therefore does not give Congress the authority to prohibit the mere possession of self-created objects.

IV. NEW DEVELOPMENTS: DOES GONZALES V. RAICH CHANGE ANYTHING?

On June 13, 2005, the Supreme Court vacated the Court of Appeals for the Ninth Circuit’s ruling in Stewart, and remanded this case for “further consideration in light of” the Supreme Court’s recent ruling in Gonzales v. Raich. Gonzales addresses whether the federal Controlled Substances Act (CSA), as applied to individuals who grow marijuana for medical use, is constitutional under the Commerce Clause. The CSA makes it “unlawful for any person [to] knowingly or intentionally . . . possess with intent to manu-

278. Id. at 1136-37 (citing United States v. Morrison, 529 U.S. 598, 612 (2000)).
281. Id. at 125.
282. Id. at 127.
283. Id. at 125.
284. United States v. Stewart, 125 S. Ct. 2899 (2005) (referencing Gonzales v. Raich, 125 S. Ct. 2195 (2005)).
facture, distribute, or dispense, a controlled substance.”286 However, California’s Compassionate Use Act authorizes the use, and therefore the possession, of a controlled substance, i.e. marijuana, for medical purposes.287

Gonzales respondent Diane Monson is a California resident who suffers from “a variety of serious medical conditions.”288 Monson’s physician, a board-certified family practitioner, had prescribed “a host of conventional medicines” to treat Monson’s conditions, and concluded that “marijuana is the only drug available that provides effective treatment.”289 Monson grew her own marijuana plants for her personal medical use.290 County deputy sheriffs and federal Drug Enforcement Administration (DEA) agents came to Monson’s home to investigate her marijuana-related activities.291 Although the county officials determined that Monson’s “use of marijuana was entirely lawful as a matter of California law[,]” the DEA agents seized and destroyed Monson’s marijuana plants.292 Monson brought an action against the Attorney General of the United States and against the head of the DEA, claiming that their enforcement of the CSA against her violated the Commerce Clause.293 Specifically, Monson argued that the CSA’s “prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes . . . exceeds Congress’ authority under the Commerce Clause.”294

The Supreme Court determined that of the three categories under which Congress may exercise its Commerce Clause authority, only the third category, that of “activities that substantially affect interstate commerce[,]” was implicated in Gonzales.295 The Court then relied heavily on Wickard to resolve whether the intrastate possession of marijuana does have a substantial effect on interstate

288. Gonzales, 125 S. Ct. at 2199.
289. Id. at 2200.
290. Id.
291. Id.
292. Id.
293. Id.
294. Id. at 2204-05.
commerce, stating that its "decision in Wickard is of particular relevance... The similarities between [Gonzales] and Wickard are striking."296

The Court noted that Monson, like Filburn, the wheat farmer in Wickard, was "cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market."297 Just as Congress had a rational basis for concluding that the unregulated consumption of "home-grown wheat" would "have a substantial influence on price and market conditions" Congress had a rational basis for concluding that leaving "home-consumed marijuana outside federal control would similarly affect price and market conditions."298 The Court held that it made no difference that the interstate market for marijuana is unlawful, because the Commerce Clause gives Congress the "power to prohibit commerce in a particular commodity [even an illegal one]."299 What mattered to the Court is that unregulated home-grown medical marijuana substantially affects the interstate market by creating "an economic incentive" for physicians to prescribe this drug, which "can only increase the supply of marijuana in the California market."300 Given the fact that several other states have also "authorized the use of medical marijuana," this increased supply will encourage "unscrupulous people [to] make use of the California [medical marijuana] exemptions to serve their commercial ends."301 The Court therefore ruled that the Commerce Clause reaches the intrastate possession of medical marijuana.302

The Supreme Court's decision to remand Stewart for "further consideration in light of" Gonzales303 raises two issues that are relevant to this Note's focus. The first issue is whether Gonzales is likely to affect the Court of Appeals for the Ninth Circuit's ruling in Stewart. The second issue is whether Gonzales has settled the question whether the Commerce Clause reaches to self-created objects.

296. Gonzales, 125 S. Ct. at 2206.
297. Id.
298. Id. at 2207.
299. Id. at 2207 n.29.
300. Id. at 2213-14.
301. Id. at 2214.
302. Id. at 2209.
A. *Is the Court of Appeals for the Ninth Circuit Likely to Reverse Stewart?*

The *Stewart* court did not consider whether § 922(o) is wholly unconstitutional. The court ruled only that § 922(o) is unconstitutional as applied to the unique facts of Stewart’s case.\(^{304}\) The court based its ruling on the following considerations:

1. Stewart’s machine guns were a “unique type of firearm” that Stewart created in his home out of non-machine gun parts that traveled interstate; therefore the machine guns themselves never existed in interstate commerce “in any recognizable form.”\(^{305}\)
2. Stewart therefore did not “use the channels of interstate commerce” to obtain his machine guns, and so his act of possession does not fall within the first category under which Congress may exercise its Commerce Clause authority.\(^{306}\)
3. Because the machine guns never traveled in interstate commerce, Stewart’s act of possession did not concern “things in interstate commerce” and so did not fall under the second category under which Congress may exercise its Commerce Clause authority.\(^{307}\)
4. Therefore, Congress cannot regulate Stewart’s act of possession unless that act had “a substantial relation to interstate commerce[.]” that is, unless that act fell within the third category under which Congress may exercise its Commerce Clause authority.\(^{308}\)
5. Stewart’s act of possession is not an activity that is substantially related to interstate commerce under the *Morrison* test.\(^{309}\)

The *Stewart* court also found support for its conclusion that § 922(o)(1) is unconstitutional as applied to Stewart by distinguishing *Stewart* from *Wickard*.\(^{310}\) The court found that unlike the consumption of home-grown wheat, which diminishes the wheat market, mere possession of a machine gun is not an economic activity.\(^{311}\)

This distinction is likely to hold up when the court reconsiders *Stewart* in light of *Gonzales*, for two reasons. The first reason is

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\(^{304}\) United States v. Stewart, 348 F.3d 1132, 1140 (9th Cir. 2003), *vacated and remanded*, 125 S. Ct. 2899 (2005).

\(^{305}\) *Id.* at 1136.

\(^{306}\) *Id.* at 1134-36 (quoting United States v. Lopez, 514 U.S. 549, 558 (1995)).

\(^{307}\) *Id.* (quoting *Lopez*, 514 U.S. at 558).

\(^{308}\) *Id.* at 1134, 1136 (quoting *Lopez*, 514 U.S. at 558-59).

\(^{309}\) *Supra* text accompanying notes 237-43.

\(^{310}\) *Supra* text accompanying notes 274-76.

\(^{311}\) *Id.*
that to reverse its ruling, the court must find that Stewart’s possession of self-created machine guns passes the *Morrison* test and therefore had a “substantial relation to interstate commerce.”

*Gonzales* provides no guidance here, because *Gonzales* is silent concerning self-created objects. The *Gonzales* Court found only that home-grown medical marijuana effects interstate commerce because marijuana is a fungible commodity for which there is an interstate market.

The Court was concerned that unregulated home-grown marijuana would increase the market supply and attract “unscrupulous people” willing to exploit the medical marijuana exemptions for commercial ends.

Stewart’s machine guns, like all self-created objects, are not a fungible commodity because they do not exist on the marketplace. His mere possession of these self-created objects does not impact the limited market for machine guns because, unlike marijuana and Filburn’s wheat, they are unique *sui generis* objects that cannot be bought anywhere else. The Court of Appeals for the Ninth Circuit based its finding that Stewart’s mere possession of self-created machine guns failed to impact interstate commerce on the fact of their uniqueness. As nothing in *Gonzales* addresses the market impact of unique, non-fungible objects, it is likely that the *Stewart* court will not change its finding in light of *Gonzales*.

Furthermore, the *Gonzales* Court relied heavily on *Wickard*, stating that the “similarities between [*Gonzales*] and *Wickard* are striking.” Both *Wickard* and *Gonzales* conclude that the Commerce Clause reaches to the mere possession of home-grown natural substances when such possession affects the interstate market for those substances.

The *Stewart* court, however, distinguished *Wickard*. The court stated:

[By] crafting his own guns and working out of his own home, Stewart functioned outside the commercial gun market. His activities obviously did not increase machinegun demand. Nor can we say that Stewart’s homemade machineguns reduced overall demand. Unlike wheat, for example, which is a staple commod-

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312. See *Lopez*, 514 U.S. at 558-59; see also *United States v. Morrison*, 529 U.S. 598, 610-12 (2000).
314. *Id.* at 2213-14.
315. *Stewart*, 348 F.3d at 1135.
316. *Gonzales*, 125 S.Ct. at 2206.
318. *Stewart*, 348 F.3d at 1138.
ity that Filburn would probably have had to buy, had he not
grown it himself, there is no reason to think Stewart would ever
have bought a machinegun from a commercial source, had he
been precluded by law from building one himself. . . . Thus, the
link between Stewart’s activity and its effect on interstate com­
merce is simply too tenuous to justify federal regulation.319

It is therefore likely that the Stewart court will not apply the
Supreme Court’s Wickard-based ruling to Stewart’s particular cir­
cumstances, especially in light of the fact that Gonzales does not
consider whether the Commerce Clause reaches unique, self-cre­
ated objects.

B. Has Gonzales Settled Whether the Commerce Clause Reaches
to Self-Created Objects?

Even if the Stewart court does reverse its decision in light of
Gonzales, such a reversal is not likely to impact the larger question
of the Commerce Clause’s reach to self-created objects because Stewart was decided on an as-applied basis.320 This means that even
if the Stewart court does find that § 922(o)(1) is constitutional as
applied to Stewart’s particular situation, it will not preclude other
individuals in other circumstances from challenging § 922(o)(1) or
any other law that gets applied to the possession of a self-created
object. Furthermore, because the Gonzales Court’s reasoning,
holdings, and ruling are based on the facts surrounding a fungible
commodity that is widely available on the marketplace321 and not
on a unique, self-created object for which no market exists, Gonzales is not applicable to self-created objects.

Conclusion

The lack of legislative history and Congressional findings sup­
porting § 922(o)(1) proves that Congress has never made a finding
linking mere possession of machine guns with interstate commerce.
The appeals courts that have upheld the constitutionality of
§ 922(o) have done so by erroneously applying legislative history
that concerned firearms in general to machine guns in particular, or
by misreading the statute itself and confusing its prohibition of the
act of possessing a machine gun with a regulation of machine guns
themselves. The Court of Appeals for the Ninth Circuit found that

319. Id.
320. Id. at 1140.
321. Gonzales, 125 S. Ct. at 2206.
§ 922(o) is unconstitutional when applied to a person who made his own machine guns from various parts obtained through interstate channels, because in such a case § 922(o) prohibits mere possession, not transfer, of an object; an activity that has no connection to interstate commerce.

Because § 922(o) prohibits activities that have no connection to interstate commerce it should be struck down as wholly unconstitutional. Congress may not constitutionally prohibit the mere possession of self-created objects. Mere possession of such objects fails the *Morrison* test, and therefore such possession lies beyond the reach of the Commerce Clause.

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