

# UNITED STATES v. STEWART: A FAITHFUL APPLICATION OF LOPEZ

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*"First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."*<sup>1</sup>

## INTRODUCTION

As Justice Thomas reminds us, our Commerce Clause jurisprudence has drifted far from the original understanding the Constitution's framers and ratifiers had intended.<sup>2</sup> "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes."<sup>3</sup> It is well documented that "the object of vesting in Congress the power to regulate commerce with foreign nations and among the several States was to insure uniformity of regulation against conflicting and discriminating state legislation,"<sup>4</sup> something the Articles of Confederation failed to do.<sup>5</sup> Adherence to the original meaning and purpose of the Commerce Clause is of the utmost

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<sup>1</sup> The Federalist No. 51 (James Madison) (Clinton Rossiter ed., 1961).

<sup>2</sup> United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

<sup>3</sup> Id. at 585 (referring to a 1773 dictionary of the English language). See 1 S. Johnson, A Dictionary of the English Language 361 (4<sup>th</sup> ed. 1773) (defining commerce as "Intercour[s]e; exchange of one thing for another, interchange of any thing; trade; traffick"). See also Randy E. Barnett, The Original Meaning of the Commerce Clause, 68 U. Chi. L. Rev. 101 (2001) and Randy E. Barnett, New Evidence of the Original Meaning of the Commerce Clause, 55 Ark. L. Rev. 847 (2003) (in depth analysis on the original meaning of the Commerce Clause).

<sup>4</sup> Kidd v. Pearson, 128 U.S. 1, 21 (1888).

<sup>5</sup> Gibbons v. Ogden, 22 U.S. 1, 13 (1824).

importance today if we wish to preserve federalism, a principle embodied in our constitutional structure, designed to balance the power between our federal and state governments. Without federalism, we lose the double security meant to protect our liberties against the government. That is why I answer the following question in the affirmative.

“Is it wise to unsettle sixty years of understanding and expectations concerning such an important constitutional provision simply to keep some gun possession cases out of federal court?”<sup>6</sup> The decision in *United States v. Lopez*<sup>7</sup> stands for the proposition that federalism is not a myth that law students learn about in Constitutional Law when reading pre-New Deal Era cases, but a real concept that exists in our form of government. The *Lopez* decision gave hope for the preservation of what is left of federalism and possibly a return to reestablishing the principle to its rightful form. Perhaps that is why many scholars such as Donald H. Zeigler<sup>8</sup> and J. Clay Smith Jr.,<sup>9</sup> both mentioned in this paper, along with the media such as the New York Times<sup>10</sup> charged the *Lopez* decision as “radical” and “activist.” The *Lopez* decision was by no means “radical.” A “radical” decision would have invalidated many of the “radical” New Deal Era cases such as *NLRB v. Jones & Laughlin Steel Corp.*,<sup>11</sup> *United States v. Darby*<sup>12</sup> and *Wickard v. Filburn*.<sup>13</sup> An “activist” decision, as Randy Barnett notes, would be “to do nothing in the face of legislation that runs afoul of the written Constitution.”<sup>14</sup>

The Ninth Circuit, in *United States v. Stewart*,<sup>15</sup> has addressed a far reaching commerce-based law setting the stage for the Supreme Court to bring us one step closer to preserving federalism. Before examining that case, however, this paper will provide an overview of Commerce Clause jurisprudence and what some scholars think of *Lopez*. Finally, before concluding, this paper

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<sup>6</sup> Donald H. Zeigler, The New Activist Court, 45 AM. U.L. Rev. 1367, 1400 (1996)(referring to *United States v. Lopez*, 514 U.S. 549 (1995)).

<sup>7</sup> *Lopez*, 514 U.S. 549 (1995).

<sup>8</sup> Zeigler, *supra* at 1369.

<sup>9</sup> J. Clay Smith, Jr., Shift of Federalism and Its Implications for Civil Rights, 39 How. L.J. 737 (1996).

<sup>10</sup> A Court Running in the Wrong Direction, N.Y. Times, July 6, 1995, at A20 (editorial).

<sup>11</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>12</sup> *United States v. Darby*, 312 U.S. 100 (1941).

<sup>13</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>14</sup> Randy E. Barnett, Is the Rehnquist Court an Activist Court? The Commerce Clause Cases, 73 U. Colo. L. Rev. 1275, 1277 (2002).

<sup>15</sup> *United States v. Stewart*, 348 F.3d 1132 (9<sup>th</sup> Cir. 2003).

will address a possible loophole that undermines *Lopez* and cases such as *Stewart*.

## I. HISTORY OF COMMERCE CLAUSE JURISPRUDENCE

### A. PRE-NEW DEAL ERA

The famous *Gibbons v. Ogden*<sup>16</sup> case is the decision from which the Commerce Clause doctrine evolved.<sup>17</sup> In that case, Aaron Ogden was granted a license to operate a steamboat between New York and New Jersey.<sup>18</sup> The license was granted to Ogden from Robert Livingston and Robert Fulton who had been granted the exclusive right to operate steamboats in New York waters by the State of New York.<sup>19</sup> Gibbons obtained his license under a 1793 federal law that permitted him to operate his steamboat in “coastal trade.”<sup>20</sup> At issue in the case was whether New York could enjoin Gibbons from operating his steamboat in New York waters. The Court answered this question in the negative.

Writing for the majority, Chief Justice John Marshall wrote: “This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.”<sup>21</sup> Recognizing that federalism is a structure embedded in our Constitution, Chief Justice Marshall stated, “The completely internal commerce of a State, then, may be considered as reserved for the State itself.”<sup>22</sup>

This decision only held that the federal law preempted the New York law insofar as it applied to interstate navigation. This is hardly a far reaching application of the Commerce Clause. As Professor Barnett points out, *Gibbons* is consistent with the notion that our federal system protects wholly intrastate commerce from the reach of Congress.<sup>23</sup> “Indeed, if Article I had included the power to regulate wholly intrastate commerce, it would simply have read ‘Congress shall have power to regulate commerce.’”<sup>24</sup>

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<sup>16</sup> *Gibbons*, 22 U.S. 1 (1824).

<sup>17</sup> Calvin R. Massey, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 183 (New York: Aspen, 2001).

<sup>18</sup> See *Gibbons*, 22 U.S. at 1.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 196.

<sup>22</sup> *Id.* at 195.

<sup>23</sup> Barnett, *supra* note 14, at 1283.

<sup>24</sup> *Id.*

For the next 113 years, the Supreme Court struggled with questions such as “What is commerce and what is not?”<sup>25</sup> “Does it directly affect interstate commerce?”<sup>26</sup> and “Is it necessary to regulate interstate commerce in order to protect instrumentalities of commerce?”<sup>27</sup>

## B. NEW DEAL ERA

It was not until 1937 that Commerce Clause jurisprudence took a radical turn giving Congress power to regulate everything it wanted. Whether this was a reaction by the Supreme Court to President Franklin Roosevelt’s threat to expand the Supreme Court to fifteen Justices in order to save his New Deal remains in dispute.<sup>28</sup> It was during the New Deal Era that the principle of federalism almost withered away into nothing.

In *NLRB v. Jones & Laughlin Steel Corp.*,<sup>29</sup> the Court upheld the National Labor Relations Act, which protected the rights of employees to organize.<sup>30</sup> In its justification for doing so, the Court reasoned that it did not matter that the workers were engaged in purely intrastate production<sup>31</sup> because the “stoppage of those operations by industrial strife would have the most serious effect upon interstate commerce.”<sup>32</sup> By examining the facts to determine the “directness” of the effect on interstate commerce of the regulated activity instead of examining the logical relation between the two, as the Court did in *Carter Coal*,<sup>33</sup> the holding considerably expanded the range of activities that Congress could regulate.<sup>34</sup>

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<sup>25</sup> *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). The Court held that “manufacturing” was not part of commerce and could not be regulated under the Commerce Clause.

<sup>26</sup> *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). The Court struck the Bituminous Coal Conservation Act that regulated maximum hours and minimum wages for coal miners as being too remote to affect interstate commerce.

<sup>27</sup> *Houston, East & West Texas Railway Co. v. United States*, 234 U.S. 342 (1914). The Court upheld an Interstate Commerce Commission mandate requiring railroads to charge the rates for intrastate shipments as for interstate shipments as necessary to protect an instrumentality of commerce.

<sup>28</sup> Barry Cushman, *RETHINKING THE NEW DEAL COURT : THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (New York : Oxford University Press, 1998).

<sup>29</sup> *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 40.

<sup>32</sup> *Id.* at 41.

<sup>33</sup> *Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>34</sup> Massey, *supra* note 17 at 199.

It is surprising that anything remained of federalism after *Wickard v. Filburn*,<sup>35</sup> a case decided five years after *NLRB v. Jones & Laughlin Steel Corp.* In that case, an Ohio farmer, Roscoe Filburn, was penalized for growing extra wheat used to feed his livestock.<sup>36</sup> The Agricultural Adjustment Act established maximum quotas for wheat production.<sup>37</sup> The Court upheld the penalty, reasoning that if many people were to engage in the same activity, then the aggregate effect on interstate commerce would be great.<sup>38</sup>

### C. UNITED STATES v. LOPEZ: THE MARK OF A NEW ERA?

This new form of Commerce Clause jurisprudence granting Congress power to regulate everything it wanted dominated the next six decades until *United States v. Lopez*.<sup>39</sup> In fact, *Lopez* was the first case to strike down a law passed under the Commerce Clause in six decades.<sup>40</sup> In *Lopez*, Alfonso Lopez Jr., a twelfth-grade high school student in San Antonio, Texas, brought a .38 caliber pistol to school with five bullets so he could sell it to some friends for use in a gang war.<sup>41</sup> He was charged under Texas state law for bringing the weapon to school.<sup>42</sup> These charges were dropped after federal agents charged him with violating section 922(q) of the Gun-Free School Zones Act of 1990.<sup>43</sup> Lopez was tried and convicted under the federal law.<sup>44</sup> The Fifth Circuit Court of Appeals reversed the conviction holding that section 922(q) was invalid as beyond the power of Congress under the Commerce Clause.<sup>45</sup>

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<sup>35</sup> *Wickard*, 317 U.S. 111 (1942).

<sup>36</sup> *Id.* at 114.

<sup>37</sup> *Id.* at 113.

<sup>38</sup> *Id.* at 127, 128.

<sup>39</sup> See *Lopez*, 514 U.S. at 549.

<sup>40</sup> *Eg.*, Scott D. Gerber, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 179 (New York University Press 1999). Professor Gerber noted that there was one other time since 1937 that the Court held that Congress exceeded its Commerce Clause authority in *National League of Cities v. Usery* (1976), however that case was overruled by *Garcia v. San Antonio Metro Transit Authority*, (1985). See *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528 (1985).

<sup>41</sup> *United States v. Lopez*, 2 F.3d 1342, 1345 (5<sup>th</sup> Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

<sup>42</sup> See *Lopez*, 514 U.S. at 551.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 552.

In a 5-4<sup>46</sup> decision, the Court affirmed the holding of the Fifth Circuit.<sup>47</sup> In the majority opinion, Chief Justice William Rehnquist began by invoking “first principles” stating that “the powers delegated...to the federal government are few and defined,” and the powers reserved to the states are “numerous and indefinite.”<sup>48</sup> As a reminder why federalism is important, the Chief Justice noted, “[A] healthy balance of power between the States and Federal Government will reduce the risk of tyranny and abuse from either front.”<sup>49</sup> The Chief Justice stated that “section 922(q) is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”<sup>50</sup>

Distinguishing *Wickard v. Filburn* from the case at bar, Chief Justice Rehnquist wrote, “Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not.”<sup>51</sup>

In sum, the Court defined three categories of activity that Congress can regulate under the Commerce Clause: (1) “the use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”; and (3) “those activities having a substantial relation to interstate commerce.”<sup>52</sup> If anything should be clear after *Lopez*, it should be that congressional statutes passed in the name of the Commerce Clause that can only be justified by piling inference upon inference are probably unconstitutional, especially when the statutes give the federal government a general police power normally retained by the States.

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<sup>46</sup> Chief Justice Rehnquist delivered the opinion of the Court, in which O’Connor, Scalia, Kennedy, and Thomas, JJ., joined. Kennedy, J., filed a concurring opinion, in which O’Connor, J., joined. Thomas, J., filed a concurring opinion. Stevens, J., and Souter, J., filed dissenting opinions. Breyer, J., filed a dissenting opinion, in which Stevens, Souter, and Ginsburg, JJ., joined.

<sup>47</sup> *Id.* at 549.

<sup>48</sup> *Id.* at 552.

<sup>49</sup> *Id.* (quoting *The Federalist* No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

<sup>50</sup> *Id.* at 561.

<sup>51</sup> *Id.* at 560.

<sup>52</sup> *Id.* at 558-59.

## 1. UNITED STATES v. MORRISON: TAKING LOPEZ SERIOUSLY

In *United States v. Morrison*,<sup>53</sup> Christy Brzonkala, a student at Virginia Tech, alleged that she was raped by two other students and that her attack violated 42 U.S.C. section 13981, which provides a civil remedy for the victims of gender-motivated violence.<sup>54</sup> The defendants challenged the civil remedy on the grounds that it was unconstitutional.<sup>55</sup> The United States intervened to defend the constitutionality of the provision,<sup>56</sup> claiming that the statute was valid under the third *Lopez* category as a “regulation of activity that substantially affected interstate commerce.”<sup>57</sup> Unlike the statute in *Lopez*, section 13981 was supported by congressional findings that gender-motivated violence has a serious impact on interstate commerce.<sup>58</sup> “By deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.”<sup>59</sup>

In a 5-4 decision, with the same voting alignment as *Lopez*, the Court held that Congress did not have the authority under the Commerce Clause to enact a civil remedy for victims of gender-motivated violence.<sup>60</sup> In addressing the congressional findings, the Court stated that the method of reasoning used by Congress was “unworkable if we are to maintain the Constitution’s enumeration of powers.”<sup>61</sup> The congressional findings, according to the Court, affirmed their concern in *Lopez* that Congress might use the Commerce Clause to “completely obliterate the Constitution’s distinction” between what is truly national and what is truly local.<sup>62</sup>

There was no doubt after *Morrison* that *Lopez* was not another *National League of Cities v. Usery*.<sup>63</sup> *Morrison* affirmed *Lopez* and the general

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<sup>53</sup> United States v. Morrison, 529 U.S. 598 (2000).

<sup>54</sup> Id.

<sup>55</sup> Id. at 604.

<sup>56</sup> Id.

<sup>57</sup> Id. at 609.

<sup>58</sup> Id. at 614.

<sup>59</sup> H. R. Conf. Rep. No. 103-711, at 385.

<sup>60</sup> Morrison, 529 U.S. 598.

<sup>61</sup> Id. at 615.

<sup>62</sup> Id.

<sup>63</sup> National League of Cities, 426 U.S. 833 (1976), overruled by Garcia, 469 U.S. 528 (1985).

proposition that Congress could not regulate non-economic activities under the Commerce Clause as they had been accustomed to doing in the past.

## 2. REACTIONS TO LOPEZ

So what do scholars think of *Lopez*? Is there a common denominator that can be extracted from the opinion? In an analysis of the jurisprudence of Justice Thomas, Professor Scott Gerber says that “*Lopez* signaled that the Rehnquist Court—and especially Justice Thomas—may be ready to usher in a new era of the Court’s Commerce Clause jurisprudence.”<sup>64</sup> Professor Barnett noted that the result in the *Lopez* decision is “much closer to the original meaning of the Commerce Clause than any case in the previous sixty years.”<sup>65</sup> The public meaning of “commerce” at the time of the enactment of the Commerce Clause, Barnett stated, “was the trade and transportation of what is produced by agriculture and manufacturing.”<sup>66</sup> At no time was it ever used to refer to non-economic activity.<sup>67</sup> After noting that possession of a gun in a school zone was not “commerce” within the original meaning of “commerce,” Barnett concluded that Congress had exceeded its power under the Commerce Clause and the Court was not “activist” for finding so.<sup>68</sup>

Other scholars also have recognized that *Lopez* seemed to mark a change in the Court’s previous Commerce Clause jurisprudence, but they do not share Gerber’s and Barnett’s enthusiasm. In “The New Activist Court,”<sup>69</sup> Professor Donald H. Zeigler, a professor at New York Law School, uses the *Lopez* decision as an example of judicial activism.<sup>70</sup> He correctly cites a plethora of cases upheld under the Commerce Clause that have no more of an impact on commerce than the statute at issue in *Lopez*.<sup>71</sup> After citing *Heart of Atlanta*

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<sup>64</sup> Gerber, *supra* note 40, at 179.

<sup>65</sup> Barnett, *supra* note 14, at 1290.

<sup>66</sup> *Id.* at 1284.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1285.

<sup>69</sup> Zeigler, *supra* note 6.

<sup>70</sup> As part of my initiative to rebel against the legal hierarchy in academia, I choose to cite scholars that are not well known. If enough people stop paying deference to those scholars at the top of the hierarchy they will soon be forgotten as just another voice. See Duncan Kennedy, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (New York University Press, 2004).

<sup>71</sup> Zeigler, *supra* note 6, at 1396-97.

*Motel, Inc. v. United States*<sup>72</sup> and *Katzenbach v. McClung*,<sup>73</sup> Zeigler stated that, “While the impact on interstate commerce may be more direct than in *Lopez*, it does not seem more substantial.”<sup>74</sup>

This anomaly in case law makes it readily apparent that either Congress does have a general police power under the Commerce Clause or it does not. It makes no sense for the Supreme Court, after *Lopez*, to continue to allow Congress to regulate in certain areas simply because some regulations are more admirable than others. If the regulation is not economic in nature, then it should be declared unconstitutional. There is no doubt that it would difficult, if not impossible, to clearly reconcile the line of cases stemming from the New Deal to the spirit of *Lopez*.

It is ironic, however, that Professor Ziegler recognizes this anomaly but chooses to charge the Rehnquist Court as being “activist” without ever considering the possibility that the cases stemming from the New Deal are themselves “activist.” After all, the New Deal cases chose to ignore and overturn the past 150 years of cases dealing with the Commerce Clause. One can hardly charge the *Lopez* decision as “activist” when that case did not even overturn the past 60 years of far reaching cases from the New Deal Era. Any criticisms that the Rehnquist Court is “activist” because of the decision announced in *Lopez* should be aimed at the fact that the Court, unlike Justice Thomas, used “first principles” instead of adherence to the original meaning of the Commerce Clause so that it could uphold New Deal Era cases.<sup>75</sup>

Professor J. Clay Smith, Jr., also recognizes that *Lopez* could have an effect on many areas of questionable Commerce Clause based laws. He notes that “The Court may be posturing itself to play a more aggressive role in monitoring, and thus limiting, the power of Congress to regulate American life.”<sup>76</sup> Professor Smith’s concern is primarily with the possible impact that *Lopez* could have on Congress’ ability to regulate in the area of civil rights.<sup>77</sup> He seems to be concerned with the Court’s inability to articulate a sound Constitutional basis for upholding legislation such as Title II of the Civil Rights Act of 1964 in cases like *Heart of Atlanta Motel*<sup>78</sup> and *Katzenbach*.<sup>79</sup>

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<sup>72</sup> *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 273 (1964) (The Court determined that discrimination of the hotel industry deters African Americans from interstate travel).

<sup>73</sup> *Katzenbach v. McClung*, 379 U.S. 294, 300 (1964) (The Court determined that discrimination in restaurants restricted the interstate travel of African Americans).

<sup>74</sup> Zeigler, *supra* note 6, at 1397.

<sup>75</sup> Barnett, *supra* note 14, at 1290.

<sup>76</sup> Smith, *supra* note 9, at 747.

<sup>77</sup> *Id.*

<sup>78</sup> *Heart of Atlanta Motel*, 379 U.S. 241.

<sup>79</sup> *McClung*, 379 U.S. 294.

In both of those cases the Court upheld the validity of Title II, reasoning that racial discrimination affected interstate commerce because it deterred African Americans from traveling interstate.<sup>80</sup> Smith cites the concurring opinions of Justices Kennedy and O'Connor in which they state that *Heart of Atlanta Motel* and *Katzenbach* are “within the fair ambit of the Court’s practical conception of commercial regulation.”<sup>81</sup> Even though they mentioned that those cases “are not called into question by our decision today,” Smith stated that Justice Thomas “failed to reaffirm the precedential force” of those cases, seemingly “inviting a direct challenge to these decisions.”<sup>82</sup>

All of these scholars seem to recognize that *Lopez* appears to stand for the proposition that the Court will not let Congress use the Commerce Clause as a tool to confer upon itself a general police power. So why are lower courts reluctant to follow the law set forth in *Lopez*, especially when faced with laws that are more constitutionally questionable than the one in *Lopez*? John C. Eastman posits this question in the environmental law context.<sup>83</sup>

As one example, Professor Eastman points to a Fourth Circuit case, *Gibbs v. Babbitt*,<sup>84</sup> that held that Congress could regulate red wolves under the Commerce Clause, even though a red wolf was not an article of commerce.<sup>85</sup> What Eastman found shocking was that the decision in that case was delayed pending the Supreme Court’s decision in *United States v. Morrison*.<sup>86</sup> Eastman correctly recognizes that “*Morrison* all but compelled the conclusion that Congress had no authority under its commerce power to criminalize the taking of red wolves on private property.”<sup>87</sup>

In another example, Eastman cites *Rapanos v. United States*,<sup>88</sup> a Sixth Circuit case, that was remanded from the Supreme Court for further consideration in light of *Solid Waste Agency of Northern Cook County v.*

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<sup>80</sup> See *McClung*, 379 U.S. 294 at 300; *Heart of Atlanta Motel*, 379 U.S. 241 at 273.

<sup>81</sup> Smith *supra* note 9, at 744 (quoting *United States v. Lopez* 514 U.S. 549, 573-74 (1995)).

<sup>82</sup> *Id.* at 748.

<sup>83</sup> John C. Eastman, *A Fistful of Denial: The Supreme Court Takes a Pass on Commerce Clause Challenges to Environmental Laws*, 2004 *Cato Sup. Ct. Rev.* 469 (2004).

<sup>84</sup> *Gibbs v. Babbitt*, 214 F.3d 483 (4<sup>th</sup> Cir. 2000).

<sup>85</sup> *Id.* at 493-95.

<sup>86</sup> Eastman *supra* at 473. See *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the Commerce Clause did not provide Congress with the authority to enact the civil remedy provision of the Violence Against Women Act, 42 U.S.C. §13981, which creates a civil cause of action against a person who commits a violent crime motivated by gender).

<sup>87</sup> *Id.* at 473.

<sup>88</sup> *Rapanos v. United States*, 533 U.S. 913 (2001).

*United States Army Corps of Engineers*<sup>89</sup> (SWANCC). Eastman notes that “although the Supreme Court rejected the government’s position on statutory construction grounds, it left no doubt that the *Lopez* analysis was not limited to criminal law, as the government contended, but applied in the environmental law context as well.”<sup>90</sup> On remand the Sixth Circuit upheld the criminal conviction of the Rapanos for adding fill dirt to their property.<sup>91</sup> According to the Sixth Circuit, the Rapanos’s property contained “wetlands” that fell within the “navigable waters” jurisdiction of the U.S. Army Corps of Engineers under the Clean Water Act, even though the property was some twenty miles from the nearest navigable stream.”<sup>92</sup> Eastman’s complaint with cases like these is that they affect property rights expressly protected in the Constitution, unlike many of the rights that the Court seems to recognize and create.<sup>93</sup>

## II. UNITED STATES v. STEWART

### A. FACTS OF THE CASE

At least one circuit has recognized the limits placed on commerce-based laws. The Ninth Circuit Court of Appeals, in *United States v. Stewart*,<sup>94</sup> reversed the conviction of Robert W. Stewart for the unlawful possession of machineguns in violation of 18 U.S.C. section 922(o).<sup>95</sup> The defendant sold parts kits for the manufacture and assembly of Maadi-Griffin .50 caliber rifles.<sup>96</sup> He advertised these kits on the internet and in *Shotgun News*, a national firearms magazine.<sup>97</sup> The magazine advertisement indicated that the receivers—the part of the weapon that houses the cartridge before it is discharged—were seventy-five percent complete requiring approximately thirty additional minutes to make the necessary modifications.<sup>98</sup>

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<sup>89</sup> *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). SWANCC was a post-Morrison case that rejected the government’s argument that it had power, pursuant to the Commerce Clause, to regulate a proposed local landfill because migratory birds sometimes stopped to bathe in the puddles that developed after rain in the gravel pit that was to be the site of the landfill.

<sup>90</sup> Eastman *supra* note 83, at 474. See SWANCC, 531 U.S. at 173-74.

<sup>91</sup> *United States v. Rapanos*, 339 F.3d 447, 454 (6<sup>th</sup> Cir. 2003).

<sup>92</sup> *Rapanos*, 339 F.3d at 449, 452-54.

<sup>93</sup> Eastman *supra* note 83, at 484.

<sup>94</sup> *Stewart*, 348 F.3d 1132 (9<sup>th</sup> Cir. 2003).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 1133.

<sup>97</sup> *Id.*

<sup>98</sup> Brief for Appellee at 6, *United States v. Stewart*, 348 F.3d 1132 (9<sup>th</sup> Cir. 2003) (No.02-10318).

Stewart, having been previously convicted for the possession of machineguns, believed the kits were legal to sell and possess because the receivers were not yet completely machined, therefore bringing them out of the definition of a firearm.<sup>99</sup> An agent from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) began investigating Stewart's business once discovering his prior conviction.<sup>100</sup> After purchasing one of Stewart's kits through an undercover agent, the ATF determined that the kits could be readily converted into an unlawful firearm.<sup>101</sup> Based on this information, the ATF obtained a federal search warrant for Stewart's residence and found, among other weapons, five machineguns for which he was charged with five counts in violation of 18 U.S.C. section 922(o).<sup>102</sup> At issue in the case was whether Congress could, under its Commerce Clause power, prohibit the mere possession of homemade machineguns.<sup>103</sup> In a well reasoned opinion written by Judge Alex Kozinski,<sup>104</sup> the court held that Congress could not.<sup>105</sup>

## B. ANALYSIS

At the beginning of the analysis, the Ninth Circuit noted the absence of any jurisdictional requirement in section 922(o) that the machinegun had "traveled in" or "substantially affected" interstate commerce.<sup>106</sup> It should be noted from the outset that the reason Congress failed to include a jurisdictional element anchoring the prohibited activity, here machinegun possession, to interstate commerce is because it is perhaps impossible to do so and would require the piling of inference upon inference, which *Morrison* explicitly denounced. The Ninth Circuit seems to recognize this when it addresses the possibility of section 922(o)'s constitutionality under the third category of *Lopez*. It is important to mention this here as a reminder that the court's constitutional analysis of section 922(o) renders that statute unconstitutional "on its face," not just "as applied" to Stewart as the holding states.

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<sup>99</sup> Stewart, 348 F.3d at 1133.

<sup>100</sup> Id.

<sup>101</sup> Id.

<sup>102</sup> Id. at 1134.

<sup>103</sup> Id. at 1133.

<sup>104</sup> For more on Judge Alex Kozinski, see Emily Bazelon, The Big Kozinski, Legal Affairs, Jan./Feb. 2004, Vol.3, No.1, at 24. Judge Kozinski was appointed to the appeals court in 1985 by President Ronald Reagan. He also served as a clerk for former Supreme Court Chief Justice Warren Burger.

<sup>105</sup> Stewart, 348 F.3d at 1140.

<sup>106</sup> Id. at 1134.

At the outset, the Ninth Circuit reiterated the three categories of activity that Congress can regulate under its commerce power as specified in *Lopez*: (1) “the use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”; and (3) “those activities having a substantial relation to interstate commerce.”<sup>107</sup> In *United States v. Rambo*,<sup>108</sup> the Ninth Circuit held that section 922(o) was “a regulation of the use of the channels of interstate commerce,” the first *Lopez* category, because an illegal transfer or sale must have preceded the criminalized possession.<sup>109</sup>

Rejecting the district court’s reasoning that “the parts, at least, moved in interstate commerce,” thus satisfying the illegal transfer of the machineguns in interstate commerce, the Ninth Circuit reasoned that Stewart did not receive the machineguns from someone else, rather, he assembled them himself.<sup>110</sup> The Ninth Circuit commented that “everything we own is comprised of something that once traveled in commerce. This cannot mean that everything is subject to federal regulation under the Commerce Clause, else that constitutional limitation would be entirely meaningless.”<sup>111</sup> Drawing an analogy to *United States v. McCoy*,<sup>112</sup> the Ninth Circuit stated that *McCoy* recognized that “just because certain of the elements that make up an object have traveled in interstate commerce at one time or another, this does not necessarily mean that Congress can regulate that object under the Commerce Clause.”<sup>113</sup> Ending the analysis here would have been sufficient to overturn Stewart’s conviction. However, the government in its appellate brief devoted the majority of its commerce clause argument to citing the other circuits that have decided the issue of section 922(o)’s constitutionality, albeit under different categories of *Lopez*.<sup>114</sup>

It is in this part of the analysis that the Ninth Circuit impliedly holds that section 922(o) is unconstitutional “on its face”, not just “as applied” to Stewart.

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<sup>107</sup> *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)).

<sup>108</sup> *United States v. Rambo*, 74 F.3d 948 (9<sup>th</sup> Cir. 1996).

<sup>109</sup> *Id.* at 952.

<sup>110</sup> *Stewart*, 348 F.3d at 1136.

<sup>111</sup> *Id.* at 1135.

<sup>112</sup> *United States v. McCoy*, 323 F.3d 1114 (9<sup>th</sup> Cir. 2003). In *McCoy*, the defendants were prosecuted under 18 U.S.C. §2252(a)(4)(B), which criminalizes possession of child pornography. The statute includes a jurisdictional element allowing prosecutions as long as the pornographic material was produced using materials which have been in interstate commerce at one time. The court held that the statute did not apply to the defendants because the picture, a nude photograph of the woman and her child, was homemade and intended for the husband’s home use.

<sup>113</sup> *Stewart*, 348 F.3d at 1136.

<sup>114</sup> Brief for Appellee at 20-22, *United States v. Stewart*, 348 F.3d 1132 (9<sup>th</sup> Cir. 2003) (No.02-10318).

The holding of *Rambo*, that section 922(o) is a regulation under the first *Lopez* category, was an effort to dodge *Lopez* altogether and uphold its constitutionality. The statute at issue in *Lopez* was analyzed under the third category.<sup>115</sup> A close reading of this part of the analysis, however, undermines that holding. In section two of the opinion, the court entertains the possibility that Stewart's possession of machineguns may have substantially affected interstate commerce.<sup>116</sup> If so, the statute could be upheld under the third *Lopez* category.

After citing three circuits that have upheld the statute under this category, the Ninth Circuit rejected the notion that the simple possession of machineguns has a "substantial effect" on interstate commerce.<sup>117</sup> Citing *Morrison*, the Ninth Circuit recited the controlling test for determining whether a regulated activity "substantially affects" interstate commerce: (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 commerce is attenuated.<sup>118</sup> Stating that the first prong of the *Morrison* test was not satisfied, the Ninth Circuit reasoned that "possession of a machine gun is not, without more, economic in nature. Just like the statute struck down in *Lopez*, section 922(o) 'is a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms.'"<sup>119</sup> By making the analogy to the statute in *Lopez* and borrowing powerful language from *Lopez* itself to describe the nature of section 922(o), it becomes obvious that the Ninth Circuit has exposed the statute for what it is—an unconstitutional exercise of authority under the Commerce Clause.

In distinguishing *Wickard* from *Stewart*, the Ninth Circuit stated that section 922(o) does not have an economic purpose, whereas the statute in *Wickard* was enacted primarily to control the price of wheat.<sup>120</sup> "[T]here is no evidence that section 922(o) was enacted to regulate commercial aspects of the machinegun business. More likely, section 922(o) was intended to keep machineguns out of the hands of criminals—an admirable goal, but not a commercial one."<sup>121</sup>

Moving on to the fourth prong of the *Morrison* test, the Ninth Circuit stated that the link between Stewart's possession of homemade machineguns and its

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<sup>115</sup> See Lopez, 514 U.S. at 559.

<sup>116</sup> Stewart, 348 F.3d at 1136.

<sup>117</sup> Id.

<sup>118</sup> Id. (quoting United States v. Morrison, 529 U.S. 598, 610-12 (2000)).

<sup>119</sup> Id. at 1137.

<sup>120</sup> Id.

<sup>121</sup> Id.

effect on commerce was highly attenuated.<sup>122</sup> Referring back to *Lopez*, the Ninth Circuit stated that *Lopez* had already rejected the reasoning that the cost of violent crimes spread through insurance, significantly effect the national economy and that violent crime substantially affected commerce because of people's unwillingness to travel to unsafe areas of the country.<sup>123</sup>

By stating that possession of a machinegun had a highly attenuated impact on commerce and that the statute did not have an economic purpose, *Stewart* effectively undermined the holding of *Rambo*, the Ninth Circuit case upholding the constitutionality of section 922(o).<sup>124</sup> After giving lip service to the holding in *Lopez*, *Rambo* explicitly declared that "although *Lopez* is instructive, it does not control our analysis of section 922(o)."<sup>125</sup> In only two short paragraphs (one paragraph was essentially a quote from another case), the Ninth Circuit in *Rambo* reasoned that section 922(o) was constitutional because it regulated the interstate market for machineguns, somehow making the statute a "regulation of the use of the channels of interstate commerce."<sup>126</sup> Amazingly, *Rambo* was able to distinguish section 922(o) from section 922(q), the statute in *Lopez*, in only three sentences!<sup>127</sup> *Rambo* never provided a sound articulation as to why section 922(o) is constitutional, it only stated conclusions.<sup>128</sup> This is something that every first-year law student learns not to do after the first semester.

The inadequate reasoning in *Rambo* and the reasoning in *Stewart* cannot be reconciled. Section 922(o) is either distinguishable from section 922(q), the statute in *Lopez*, or it is not. This contradiction becomes readily apparent when the two following excerpts from *Stewart* and *Rambo* are compared:

...while section 922(o) is **much closer** to the statute struck down in *Lopez*. That statute criminalized gun possession in a particular location—a school zone. Section 922(o) criminalizes possession of a particular type of firearm—a machinegun. The latter no more has an inherent link to interstate commerce than the former.<sup>129</sup>

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<sup>122</sup> Id.

<sup>123</sup> Id.

<sup>124</sup> Rambo, 74 F.3d 948.

<sup>125</sup> Id. at 951.

<sup>126</sup> Id. at 952.

<sup>127</sup> Id.

<sup>128</sup> Id.

<sup>129</sup> Stewart, 348 F.3d at 1139.

The prohibition of possession under section 922(o) **differs greatly** from the prohibition in section 922(q). Section 922(q) did not regulate the market in weapons, and instead regulated merely the possession of a weapon in a specific geographic area. Section 922(o), on the other hand, prohibits the possession of all machine-guns illegally transferred. Section 922(o) regulates the use of the channels of interstate commerce.<sup>130</sup>

When these excerpts are read in context, the only difference between them is that *Stewart* actually devoted over two and one-half pages to soundly articulating the reasons why the two sections are similar,<sup>131</sup> while *Rambo* gave no articulation at all.<sup>132</sup> One can only wonder how *Rambo*'s holding that section 922(o) is constitutional has any legs to stand on after the strongly rooted constitutional analysis articulated in *Stewart*.

Other circuits that have decided the same issue similarly fail under the analysis articulated in *Stewart* and backed by *Lopez*. None of the cases cited by the government in its appellate brief were able to provide a sound articulation of why section 922(o) was constitutional in light of *Lopez*. The Tenth Circuit Court of Appeals, in *United States v. Wilks*,<sup>133</sup> upheld the constitutionality of section 922(o) under the second *Lopez* category as a regulation of an instrumentality or thing in interstate commerce.<sup>134</sup> *Wilks* reasoned that because Congress had the authority to regulate the interstate flow of machineguns and that the machineguns themselves are commodities in commerce, the authority to regulate possession of the commodity logically falls within Congress's power.<sup>135</sup>

It is unlikely that any court would ever hold that Congress is without authority to regulate the transporting or receiving of machineguns in interstate commerce. The flaw in the logic of *Wilks* is that it fails to articulate how the act of merely possessing property can ever be "in" or "affecting" commerce. *Stewart* recognized this flaw and addressed it by stating, "[T]here is no reason to assume that prohibiting local possession of machineguns would have the same national and commercial consequences as prohibiting the interstate and foreign traffic in firearms."<sup>136</sup>

The only way that possession of a machinegun can be regulated as a "thing in interstate commerce" under the second *Lopez* category is under the

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<sup>130</sup> *Rambo*, 74 F.3d at 952.

<sup>131</sup> See *Stewart*, 348 F.3d at 1139-41.

<sup>132</sup> See *Rambo*, 74 F.3d at 952.

<sup>133</sup> *United States v. Wilks*, 58 F.3d 1518 (10<sup>th</sup> Cir. 1995).

<sup>134</sup> *Id.* at 1521

<sup>135</sup> *Id.* at 1521

<sup>136</sup> *Stewart*, 348 F.3d at 1140.

legal fiction of *Scarborough* that makes the past a present, therefore allowing Congress to regulate the mere possession of a gun so long as it has been in commerce at any time in the distant past. This is precisely the legal fiction that Congress invoked when it amended section 922(q) after it was struck down in *Lopez*.<sup>137</sup> The statute now makes it unlawful if the weapon has ever “moved in” interstate commerce.<sup>138</sup>

As I will discuss in more detail below, the legal fiction of *Scarborough* appears to be in direct conflict with the language of *Morrison* stating that “[A] fair reading of *Lopez* shows that the non-economic criminal nature of the conduct at issue was central to our decision in that case.”<sup>139</sup> Luckily, *Stewart* did not have to address this issue since Stewart’s machineguns were entirely homemade.<sup>140</sup> However, *Stewart* did hint that mere possession could not be regulated when it addressed the possible “substantial effect” of such possession stating, “We cannot agree that simple possession of machineguns—particularly possession of homemade machineguns—has a substantial effect on interstate commerce.”<sup>141</sup>

After concluding that section 922(o) was unconstitutional as applied to *Stewart*,<sup>142</sup> Judge Kozinski answered Judge Stephen Trott’s dissent in *McCoy*,<sup>143</sup> since the *McCoy* majority did not do so.<sup>144</sup> According to the *McCoy* dissent, the Supreme Court appeared to have ruled out “as applied” challenges in Commerce Clause cases<sup>145</sup> when it stated in *Lopez* that “where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.”<sup>146</sup> Applying this sentence to *McCoy*, Judge Trott stated that the *de minimis* nexus of McCoy’s personal activity to interstate commerce is of no consequence as long as her conduct fell within the ambit of the statute and the

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<sup>137</sup> 18 U.S.C. 922(q)(2)(a) (2000). The statute now reads: “It shall be 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.”

<sup>138</sup> *Id.*

<sup>139</sup> *Morrison*, 529 U.S. at 613.

<sup>140</sup> *Stewart*, 348 F.3d at 1133.

<sup>141</sup> *Id.* at 1136.

<sup>142</sup> *Id.*

<sup>143</sup> *McCoy*, 323 F.3d 1114, 1133-41 (9<sup>th</sup> Cir. 2003) (Trott, J., dissenting).

<sup>144</sup> *Stewart*, 348 F.3d at 1140.

<sup>145</sup> *McCoy*, 323 F.3d at 1133.

<sup>146</sup> *McCoy*, 323 F.3d at 1134 (quoting *United States v. Lopez*, 514 U.S. 549, 558 (1995)).

statute itself is valid.<sup>147</sup> Judge Kozinski charged that Judge Trott took the sentence entirely out of context:

*Lopez* itself borrowed this sentence from a footnote in *Maryland v. Wirtz*, a case that has nothing to do with as applied challenges, but instead announced the so-called “enterprise concept,” which allows Congress to exercise authority over a large enterprise or industry by regulating its smaller components, even those components that bear no relation to interstate commerce on their own.<sup>148</sup>

The Court in *Wirtz*<sup>149</sup> held that Congress could regulate employees that did not have a direct connection to interstate commerce because “strife disrupting an enterprise involved in commerce may disrupt commerce”<sup>150</sup> and “substandard labor conditions among any group of employees, whether or not they are personally engaged in commerce or production, may lead to strife disrupting an entire enterprise.”<sup>151</sup> When read in context, Kozinski stated that the sentence means that “where a regulatory statute governs a large enterprise, it does not matter that the components have a *de minimis* relation to interstate commerce on their own. What does matter is that the components could disrupt the enterprise, and could thus interfere with interstate commerce.”<sup>152</sup> After stating that the conduct in *McCoy* and *Stewart* were not part of a larger enterprise, Judge Kozinski concluded that the excerpt taken from *Lopez* had no bearing on the cases.<sup>153</sup>

To further bolster this argument, Judge Kozinski stated that “as applied” challenges under the Commerce Clause have been entertained by the Supreme Court in two cases involving Title II of the Civil Rights Act of 1964, *Heart of Atlanta Motel* and *Katzenbach*.<sup>154</sup> In both cases the Supreme Court found that Title II was valid “as applied” to the motel and the restaurant. “If the dissent in *McCoy* were right, we would only have needed one case to say Title II is valid, period.”<sup>155</sup> Because *Stewart* was decided before *McCoy*, Judge Trott was not given an opportunity to rebut the contention that *Heart of Atlanta* and

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<sup>147</sup> McCoy, 323 F.3d at 1135.

<sup>148</sup> Stewart, 348 F.3d at 1140.

<sup>149</sup> Maryland v. Wirtz, 392 U.S. 183 (1968).

<sup>150</sup> Id. at 192.

<sup>151</sup> Id.

<sup>152</sup> Stewart, 348 F.3d at 1141.

<sup>153</sup> Id.

<sup>154</sup> Id.

<sup>155</sup> Stewart, 348 F.3d at 1141.

*Katzenbach* were both “as applied” challenges. However, the government in *Stewart* and Judge Restani, the dissenting judge in *Stewart*, were given the opportunity to rebut this and neither addressed what Judge Kozinski stated about the two challenges to Title II. In the petition brief for certiorari in *Stewart*,<sup>156</sup> the government relied heavily on the assumption that the Supreme Court ruled out “as applied” challenges in Commerce Clause cases.<sup>157</sup>

Relying on *Wickard* as a principal illustration for his argument, Judge Trott stated that the Court turned a deaf ear to Filburn’s “as applied” challenge because “Congress had rationally identified wheat as a ‘defined class of activities’ [sic] with national economic overtones.”<sup>158</sup> The government, likewise, used *Wickard* in its petition for certiorari to illustrate this theory.<sup>159</sup> Instead of stating that “wheat” was a defined “class of activities,” the government stated that “*Wickard* establishes that even non-commercial activity occurring within a regulated market is subject to Congress’s commerce power.”<sup>160</sup>

Judge Kozinski, to the contrary, recognized that *Wickard* is distinguishable on the grounds that production of wheat is itself a commercial activity, whereas the possession of a machinegun is not.<sup>161</sup> Judge Kozinski further noted that *Wickard* was an “as applied” challenge because “had the Court deemed regulation of the business of agriculture a sufficient basis for upholding the application of the Agricultural Adjustment Act to Filburn, there would have been no need for it to analyze how his particular activities affected interstate commerce.”<sup>162</sup> This statement alone undercuts the idea that *Wickard* illustrates that the Supreme Court does not entertain “as applied” challenges to commerce-based laws. Not surprisingly, the government does not even attempt to rebut this statement.<sup>163</sup>

In support of his argument, Judge Kozinski quoted Professor Richard H. Fallon Jr., noting that “traditional thinking has long held that the normal if not exclusive mode of constitutional adjudication involves an as-applied challenge.”<sup>164</sup> Kozinski also quoted the Supreme Court in *United States v.*

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<sup>156</sup> Brief for Petitioner, *United States v. Stewart*, 348 F.3d 1132 (9<sup>th</sup> Cir. 2003), petition for cert. filed, 73 U.S.L.W. 3298 (U.S. Nov. 5, 2004) (No. 04-617).

<sup>157</sup> Id. at 7-10.

<sup>158</sup> McCoy, 323 F.3d at 1136.

<sup>159</sup> Brief for Petitioner, at 8, Stewart, (No. 04-617).

<sup>160</sup> Id.

<sup>161</sup> Stewart, 348 F.3d at 1141.

<sup>162</sup> Id. at 1142.

<sup>163</sup> See Brief for Petitioner, at 8-10, Stewart, (No. 04-617).

<sup>164</sup> Stewart, 348 F.3d at 1142 (quoting Richard H. Fallon Jr., As-Applied and Facial Challenges and Third Party Standing, 113 Harv. L. Rev. 1321, 1328 (2000)).

*Salerno*,<sup>165</sup> where it stated “a facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”<sup>166</sup>

## 1. IS THERE A LOOPHOLE THAT UNDERMINES LOPEZ?: SCARBOROUGH, A SELF-INFLICTED WOUND

Does Congress have the power to regulate the mere possession of weapons under the Commerce Clause after *Lopez* and *Morrison*? This issue is highlighted in the context of 18 U.S.C. section 922(g)(1),<sup>167</sup> the federal statute that makes it a crime for a felon to possess a gun. In *Scarborough v. United States*,<sup>168</sup> the Supreme Court upheld 18 U.S.C. section 1202(a),<sup>169</sup> the predecessor of section 922(g)(1), which also made it a crime for a felon to possess a gun, under the legal fiction that a gun can be declared to be in interstate commerce if the gun had traveled at some time in interstate commerce.<sup>170</sup>

In *United States v. Coward*,<sup>171</sup> U.S. District Court Judge Stewart Dalzell questioned the validity of *Scarborough* after *Lopez*.<sup>172</sup> In part “D” of his opinion, Judge Dalzell turned to *Morrison’s* understanding of *Lopez* and quoted “[A] fair reading of *Lopez* shows that the non-economic criminal nature of the conduct at issue was central to our decision in that case.”<sup>173</sup> The judge also quoted “[T]hus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”<sup>174</sup> After having been convinced that *Lopez* meant that Congress could not use the Commerce Clause to penalize criminal non-economic activity, Judge Dalzell turned to *Jones v. United States*.<sup>175</sup>

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<sup>165</sup> United States v. Salerno, 481 U.S. 739 (1987).

<sup>166</sup> Stewart, 348 F.3d at 1142 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

<sup>167</sup> 18 U.S.C. §922(g)(1) (2000).

<sup>168</sup> Scarborough v. United States, 431 U.S. 563 (1977).

<sup>169</sup> 18 U.S.C.A. App. 1 §1202(a) Repealed. Pub. L. 99-308, §104(b), May 19, 1986, 100 Stat. 459.

<sup>170</sup> Scarborough, 431 U.S. at 568.

<sup>171</sup> United States v. Coward, 151 F.Supp.2d 544 (2001).

<sup>172</sup> Id.

<sup>173</sup> Id. at 552 (quoting United States v. Morrison, 529 U.S. at 610 (2000)).

<sup>174</sup> Id. (quoting United States v. Morrison, 529 U.S. at 613 (2000)).

<sup>175</sup> Jones v. United States, 529 U.S. 848 (2000).

In *Jones*, the defendant threw a Molotov cocktail through a window of a private residence.<sup>176</sup> Jones was prosecuted and convicted under 18 U.S.C. section 844(i),<sup>177</sup> which makes it a crime to damage or destroy any property used in interstate commerce by means of fire or explosive.<sup>178</sup> The Court held that section 844(i) only covered property “currently used in commerce or in any activity affecting commerce.”<sup>179</sup> Because the holding in *Jones* stated that Congress could only reach property “currently” used in interstate commerce, Judge Dalzell was convinced that the *Scarborough* fiction “that allows a past to become a present” was effectively negated.<sup>180</sup>

After analyzing *Lopez*, *Morrison* and *Jones*, the judge found that the defendant’s possession of the gun was neither used in interstate commerce nor did it have any commercial or transactional context.<sup>181</sup> The judge stated that “the conviction should not stand because no federal crime was committed.”<sup>182</sup> Unfortunately, Judge Dalzell felt compelled to uphold the conviction in light of *Rodriguez de Quijas v. Shearson/American Express, Inc.*,<sup>183</sup> where the Supreme Court cautioned: “If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case that directly controls, leaving this Court the prerogative of overruling its own decisions.”<sup>184</sup>

### III. CONCLUSION

So what did *Stewart* actually accomplish besides what it held? As mentioned above, *Stewart* held that Congress was without authority to regulate Robert Stewart’s mere possession of homemade machineguns. More importantly, however, *Stewart* artistically undermined the holding of *Rambo*, the case upholding the validity of section 922(o), which makes it a crime to possess a machinegun. By comparing the statute at issue in *Stewart* to the statute at issue in *Lopez*, Judge Kozinski made it clear that section 922(o) was no different than the statute struck down in *Lopez*. Knowing that *Stewart* could not overrule the controlling precedent set forth in *Rambo*, Judge Kozinski did the next best

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<sup>176</sup> Id.

<sup>177</sup> 18 U.S.C. §844(i) (2000).

<sup>178</sup> Id.

<sup>179</sup> Jones, 529 U.S. at 859.

<sup>180</sup> Coward, 151 F.Supp.2d at 554.

<sup>181</sup> Id.

<sup>182</sup> Id.

<sup>183</sup> Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

<sup>184</sup> Coward, 151 F.Supp.2d at 554-55 (quoting Rodriguez de Quijas, 490 U.S. at 484 (1989)).

thing. He creatively used the facts in *Stewart* as an opportunity to undercut *Rambo*. Additionally, he made it more compelling for the Supreme Court to grant certiorari by ruling against the government, an entity that rarely loses. In effect, *Stewart* paved a clear path for the Supreme Court and provided all the necessary ammunition, in the event certiorari was granted, to strike section 922(o) down “on its face” not just “as applied” to Stewart.

If more courts would follow the law set forth in *Lopez*, as the Ninth Circuit did in *Stewart*, then our Commerce Clause jurisprudence would make a systematic return to what our framers and ratifiers had intended.<sup>185</sup> This is necessary if we are to undo the severe destruction to our Constitution that was caused by the New Deal Era cases. Federalism is not a principle that should be dispensed with simply to allow Congress to regulate a few gun possession laws. There is no good reason to think that a federal law is any more effective on crime than a state law.

In our dual system of government, the power is divided between the state and federal governments. This is meant to prevent power from becoming concentrated in one government. When power is centralized it is more susceptible to abuse. Without federalism, we lose the double security embedded in our Constitution designed to protect our liberties.

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<sup>185</sup> The Supreme Court will render another an important decision this term in *Gonzales v. Raich*, No. 03-1454 (argued Nov. 29, 2004). The case involves an analogous “as applied” constitutional challenge to the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, another far reaching commerce-based law.