The Federal Government's "Police Power" and the Takings Clause: Part IV

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Part I in this series explained that Congress does not have a general police power. Part II added that Congress can seize property pursuant to its Commerce and Necessary and Proper Clause Powers. Part III turned to 18 U.S.C. 922(o), the statute that purportedly authorized the bump stock ban.

This fourth part will analyze whether this statute is constitutional under *Lopez*, *Morrison*, and *Raich*.

18 U.S.C. 922(o) provides:

(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.
18 U.S.C. 922(o) lacks a jurisdictional hook. In contrast, other provisions of 18 U.S.C. 922 expressly reference interstate commerce.

- 922(g) provides, "It shall be unlawful for any person knowingly to deliver or cause to be delivered to any common or contract carrier for transportation or shipment in **interstate or foreign commerce**, to persons . . . ."

- 922(f) provides, "It shall be unlawful for any common or contract carrier to transport or deliver in **interstate or foreign commerce** any firearm or ammunition. . . ."

- 922(n) provides, "It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in **interstate or foreign commerce** any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in **interstate or foreign commerce**."

- And the revised Gun-Free School Zones Act, codified at 922(q), found that "firearms and ammunition move easily in **interstate commerce**," and the "raw materials [to make a firearm] have considerably moved in **interstate commerce**."

But 922(o) lacks any reference, whatsoever, to interstate commerce.

Lopez identified "three broad categories of activity that Congress may regulate under its commerce power." You can remember them with the helpful acronym CIA.

Randy and I offer this explanation *An Introduction to Constitutional Law*:

1. "Congress may regulate the use of the **channels** of interstate commerce." In Darby and Heart of Atlanta, for example, the Court upheld Congress's authority to keep "the channels of interstate commerce free from immoral and injurious uses." In such cases, Congress can regulate local activities that block the flow of interstate commerce.

2. "Congress is empowered to regulate and protect the **instrumentalities** of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." For example, Congress could protect ports and railroads from foreign terrorist attack, even though these hubs are entirely intrastate.

3. Congress had the "authority to regulate those . . . [intrastate] **activities** that substantially affect interstate commerce." *Darby* and *Wickard* established the substantial effects test.

Those decisions found that Congress could regulate such intrastate activity as a necessary and proper means of regulating interstate commerce.

Many law students (and regrettably law professors) assume the substantial effects test is an element of the Supreme Court's Commerce Clause jurisprudence. Not so. The substantial effects test is premised on Congress's authority under the Necessary and Proper Clause. This test was introduced in *Jones & Laughlin Steel* (1937), clarified in *Darby* (1941), expanded in *Wickard* (1942), and cabined in *Lopez* (1995).

Which of the three *Lopez* tests does 922(o) fall under? In the wake of *Lopez*, the circuits split. United States v. Kenney (1996), which was decided by 7th Circuit one year after Lopez, offers a helpful summary of three precedents.

United States v. Wilks (10th Cir. 1995) relied on the second category from *Lopez*:

The circuit courts have provided several post-Lopez rationales for § 922(o)'s constitutionality. In United States v. Wilks (10th Cir.1995), the Tenth Circuit held § 922(o) constitutional under the **second category** of commerce regulation, that of " 'things in commerce'-i.e., machineguns," reasoning that "[t]he interstate flow of machineguns 'not only has a substantial effect on interstate commerce; it is interstate commerce.' " The court found that the legislative history of federal firearms regulation as a whole supported its view that § 922(o) regulates "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." Id.

United States v. Kirk (5th Cir. 1995) (en banc granted), relied on either the first or second category.

In United States v. Kirk (5th Cir.1995), rehearing en banc granted, (5th Cir.1996), a two-judge majority of a Fifth Circuit panel concluded that § 922(o) falls into either the first or second category. To rebut the appellant's claim that the statute regulates not commerce but "mere possession," the court placed particular importance on § 922(o)'s grandfather clause, § 922(o)(2)(B), reasoning that in light of the provision "there could be no unlawful possession under section 922(o)without an unlawful transfer." Id. Therefore:

In this context, the limited ban on possession of machineguns must be seen as a necessary and proper measure meant to allow law enforcement to detect illegal transfers where the banned commodity has come to rest: in the receiver's possession. In effect, 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.

The Kirk majority acknowledged that "some of the activity made unlawful is purely intrastate," but found that, as with the federal regulation of controlled substances, there was "a rational basis to conclude that federal regulation of intrastate incidents of transfer and possession is essential to effective control *889 of the interstate incidents of such traffic." Id. at 797.

(I will discuss the en banc proceeding in *Kirk* later).

United States v. Rambo (9th Cir. 1995) relied on the first category. (A very apt name for a machine gun prosecution).

Finally, in United States v. Rambo (9th Cir.1996), the Ninth Circuit also upheld the constitutionality of § 922(o), finding that it fits into the first category of regulation, that of Congress's power to regulate the use or misuse of the channels of commerce. The court was particularly persuaded by the Kirk majority's "market theory" analysis that the structure of § 922(o) meant that every unlawful possession would necessarily be preceded by an unlawful transfer.

In *Kenney*, the Seventh Circuit disagreed with these precedents. It held that 922(o) could not be supported by *Lopez*'s first category:

Although we too hold § 922(o) constitutional, we find that the statute is best analyzed in the third category. As an initial matter, § 922(o) does not appear to be properly categorized as a regulation of the channels of interstate commerce in the narrow sense of the first category set forth in Lopez and Perez. The examples used in these decisions indicate that this category is limited to direct regulation of the channels of commerce, for each of the statutes and cases cited, like § 922(g)(1), contains a jurisdictional nexus element. . . . The first category thus does little more than justify § 922(o) insofar as it regulates interstate transfers and possessions. As the Kirk dissent noted, the Kirk majority's analysis that every illegal possession would necessarily be preceded by an illegal transfer is not entirely true: an automatic weapon may be created by modifying a semiautomatic weapon with raw materials. . . .

Kenney also held *Lopez*'s second category was inapt:

For similar reasons, § 922(o) appears to be an ill fit in the second Lopez/Perez category, that of things in or instrumentalities of interstate commerce, because the regulation is much broader than the category. . . . The Wilks court's observation that "[t]he interstate flow of machineguns 'not only has a substantial effect on interstate commerce; it is interstate commerce,' " is correct as far as it goes, but it does not address the different question of the propriety of § 922(o)' s regulation of intrastate possession and transfer.
I agree that 922(o) cannot fit into the first or second category.

Kenney held that 922(o) was valid under *Lopez*'s third category. Kenney held that Congress could regulate the *possession* of machine guns as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." The court added, "Kenney's *possession* of a machine gun is much like the *possession* of wheat in *Wickard v. Filburn* . . . cited with approval in *Lopez*."

Not quite. *Lopez* did not favorably cite *Wickard* because the federal government regulated Filburn's "*possession* of wheat." Rather, Wickard was *growing* wheat, which was an "economic activity." Here is the full passage from which *Kenney* quotes. Chief Justice Rehnquist explained:

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. Roscoe Filburn operated a small farm in Ohio, on which, in the year involved, he *raised* 23 acres of wheat. . . .

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. Section 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. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Under Category #3, the substantial effects test, the activity must be "economic" in nature. Simple possession of a weapon is not "economic activity." *Lopez* stated this point explicitly.

United States v. Morrison (2000) would further clarify this doctrine. Chief Justice Rehnquist held that VAWA was unconstitutional, in part, because, "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." For this reason, Congress stepped beyond the line that the Court had drawn in *Lopez*.

Gonzales v. Raich (2005) maintained this line, in theory at least, but used an expansive definition of "economic activity." Justice Stevens held that the local cultivation of marijuana was economic activity. Randy and I explain in *An Introduction to Constitutional Law*:

[Justice Stevens] found that *Lopez* and *Morrison* authorized Congress to regulate the local cultivation of marijuana. To support this broad conception of economic activity, Justice Stevenes relied on *Webster's Third New International Dictionary*. It defined "economic" as "the production, distribution, and consumption of commodities." Because Angel's caregivers and Diane were engaged in the activity of producing marijuana, according to *Webster's*, they were engaged in "economic" activity. Therefore, under *Morrison* and *Lopez*, Congress could regulate their intrastate activity. As a result, the CSA was constitutional as applied to the locally cultivated marijuana.

Justice Stevens also offered an alternative holding:

"Congress has the power to regulate purely local activities" when doing so is necessary to implement a comprehensive national regulatory program. Unlike the Gun- Free School Zones Act, the Controlled Substances Act was such a comprehensive program.

Once again, Stevens's analysis turned almost entirely on the fact that Raich and Monson were cultivating a product for home consumption:

The similarities between this case and Wickard are striking. Like the farmer in Wickard, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market.28 Just as the Agricultural Adjustment Act was

designed "to *19 control the volume [of wheat] moving in interstate and foreign commerce in order **2207 to avoid surpluses …" and consequently control the market price, id., at 115, 63 S.Ct. 82, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. See nn. 20–21, supra. In Wickard, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. **Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.** . . . .

While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.

The relevant sections of the Controlled Substances Act made numerous references to interstate commerce. (See footnotes 20-21 of *Raich*). Section 922(o), the sole statute to prohibit machine guns, does not.

In short, the simple possession of a bump stock is not an "economic activity." And unlike machine guns, the transfer of those devices was entirely lawful, without any federal license, prior to 2019. Nor has Congress even hinted that "leaving home-[produced bump stocks] outside federal control would similarly affect price and market conditions." 18 U.S.C. 922(o) makes no reference to interstate commerce, at all. I don't think this statute falls within the first or second category of *Lopez*. And it is not consistent with the substantial effects test.

Eight judges of the Fifth Circuit agreed with this analysis. In 1997, the Fifth Circuit affirmed the District Court's decision in *Kirk* by "an equally divided en banc court."Judge Edith Jones, joined by seven other judges, wrote a lengthy dissent. Here is the introduction:

The specific issue is whether Congress breached its Commerce Clause authority in enacting 18 U.S.C. § 922(o), which was the basis for appellant Kirk's conviction for the wholly intrastate possession of a machinegun. Half of the judges participating in this en banc1 rehearing conclude that Lopez has more than mere symbolic significance. Carefully applied, it compels the conclusion that the § 922(o) ban on mere intrastate possession of a machinegun exceeds Congress' authority "[t]o regulate Commerce … among the several States." U.S. Const., Art. 1, § 8, cl.3. The other half of the participating judges disagree with this conclusion, although their reasoning differs. Kirk's conviction must be affirmed by an equally divided court, but the importance and recurring nature of these issues lead us to publish this opinion. . . . .

On its face, § 922(o) seems a clone of § 922(q), the provisions struck down in Lopez. The statute bans for present purposes "mere possession" of machineguns manufactured or imported after 1986; it is supported neither by a jurisdictional nexus requirement nor by salvaging

legislative findings; it is a criminal, not an economic regulatory provision; and it clearly overlaps state and local law enforcement authority. Other circuit courts and other judges in this court, however, have not seen it that way,11 although their reasons for upholding the statute differ significantly. Most of these cases err by assuming that every intrastate possession of machineguns involves interstate commerce. That error leads to misapplication of the first and second categories of Commerce Clause cases described by Lopez, and to an untenable distinction between § 922(o) and § 922(q) when the third Lopez category is considered. The errors in other cases are best exposed by our analysis,12 which will discuss § 922(o) under each category of Lopez,and which takes Lopez seriously as establishing at least an outer boundary on Congress's criminal jurisdiction under the Commerce Clause.
I agree with Judge Jones. Her analysis is consistent with *Lopez*, as well as *Morrison* and *Raich* which had not yet been decided. Here is her prescient analysis:

Among the three elements of Lopez 's substantial effects test, the first and most critical is that of characterization: whether § 922(o) fulfills the mission of regulating interstate commerce as (1) a regulation of economic activity which, although itself local, has substantial effect on interstate commerce, or (2) a regulation of activity which is essential to maintaining a larger, interstate regime of economic regulation. Neither Kenney nor the government in supporting § 922(o) has characterized it as a regulation of economic activity. It is not. It 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." Lopez.

Judge Jones rejects the "essential part" analysis:

Defenders of § 922(o) argue instead that the possession ban is an essential part of the regulation of "commercial activity," either to insure federal control of the market for machineguns or to enforce a freeze on the number of available machineguns. See, e.g. Beuckelaere, 91 F.3d at 785; Kenney, 91 F.3d at 890. No doubt Congress has undertaken fully to regulate the business of firearms dealing, insofar as sales and transfers in or affecting commerce are concerned.21 But as we have repeatedly noted, mere intrastate possession of a machinegun does not necessarily involve a transfer or an economic transaction of any kind.22

Judge Jones also draws the appropriate distinction with *Wickard*:

Moreover, the analogy to Wickard is flawed. In Wickard, the government's agricultural program aimed to control and support prices in the wheat market. Filburn's consumption of home-grown wheat substituted for the controlled wheat, impairing to that extent the price support effort. Section 922(o), by contrast, intends to extirpate any domestic commercial market for machineguns manufactured or imported after 1986. Even if this goal constitutes a legitimate regulation of interstate commerce, it does not follow that criminalizing purely private, intrastate possession is necessary to eliminate the market. Section 922(o)also prohibits transfers of machineguns and, to the extent it represents a permissible exercise of Commerce *1015 Clause power,23 that prohibition aims directly and completely at commercial activity in machineguns. Private possession of a machinegun does not involve a market activity, and there is no legitimate market in which a substitution effect would occur.

Congress could potentially save 922(o) by making the requisite findings. Judge Jones explains:

If Congress had made findings explaining the connection of mere intrastate possession of machineguns to interstate commerce, or if there were an expressly required nexus between such possession and commerce,25 § 922(o) might be vindicated under the second *1016 Lopez prong. These features are lacking. Whatever the effect a single intrastate possession of a machinegun has on economic activity in firearms, the text and legislative history of § 922(o) do not support any conclusion that Congress considered such effects or viewed § 922(o) as part of a comprehensive approach to federal regulation of commerce in machineguns.

However, the ATF cannot save the bump stock regulation. The rulemaking provides no additional findings that could connect the bump stock ban with interstate commerce or economic activity. Indeed, I don't think the agency could. Such findings must come from Congress, not the executive branch. Of course, Congress could have banned bump stocks. But President Trump preferred executive action. (I discuss this history in my amicus brief for the Cato Institute.)

Going forward, it is unlikely that any court would revisit the ban of 922(o) as applied to machine guns, writ large. There have been countless prosecutions under this statute. But the challenge to the novel bump stock ban is ripe. 922(o) very well may be unconstitutional, as applied to bump stocks.

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