Constitutional Law - Commerce Clause - Regulation by Congress

John W. Boyle

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CONSTITUTIONAL LAW—COMMERCE CLAUSE—REGULATION BY CONGRESS—The United States Supreme Court held that the Gun-Free School Zones Act of 1990 exceeded Congress' power under the Commerce Clause because the Act sought to regulate a non-economic, intrastate activity.


Alfonso Lopez ("Lopez") was a twelfth grade student at Edison High School in San Antonio, Texas, when, on March 10, 1992, he carried a concealed weapon onto school grounds. An anonymous source reported to school officials that Lopez had in his possession a .38 caliber handgun and five bullets. School officials subsequently questioned Lopez, who admitted that he had in his possession the handgun and bullets. Local authorities arrested Lopez and charged him with violating a state law which prohibited possession of firearms on school property. The State dismissed the charges the following day. Federal officials then charged Lopez with violating the Gun-Free School Zones Act of 1990 (the "Act"). The Act made possession of a firearm within 1,000 feet of a school a federal offense.

A federal grand jury indicted Lopez for violating § 922(q) of the Act. Lopez sought to have the indictment dismissed based on the theory that it was outside Congress' power to regulate

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2. Lopez, 115 S. Ct. at 1626.
3. Id.
4. Id. The Texas law made it a felony to enter the grounds of a school or any educational institution with a firearm. TEX. PENAL CODE ANN. § 46.03(a)(1) (Supp. 1994).
5. Lopez, 115 S. Ct. at 1626.
6. Id. The Act included findings that crime was a nationwide problem exacerbated by the interstate movement of firearms; firearms have been found in increasing numbers in schools; and school authorities have had a difficult time in trying to cope with an increase in gun possession. 18 U.S.C. § 922(q)(1)(A-I) (1990 & Supp. V 1993). Therefore, Congress made it a crime for an individual to possess a firearm at a place that the individual knows or has reason to know is a school zone. 18 U.S.C. § 922(q)(1)(A)-(I), (2)(A) (1990 & Supp. V 1993).
8. Lopez, 115 S. Ct. at 1626.
conduct in public schools. The district court dismissed Lopez' motion, holding that Congress acted within its power under the Commerce Clause of the United States Constitution when it enacted § 922(q) of the Act. The district court ultimately found Lopez guilty of violating the Act and sentenced him to six months in prison and two years probation. On appeal, the United States Court of Appeals for the Fifth Circuit concluded that Congress overstepped its authority under the Commerce Clause in enacting the Act. The United States appealed the decision and the United States Supreme Court granted certiorari. The Supreme Court affirmed the decision of the Fifth Circuit.

Chief Justice Rehnquist, writing for the majority, cited two reasons why Congress, in passing the Act, exceeded its authority under the Commerce Clause of the Constitution. First, in enacting § 922(q) of the Act, Congress sought to regulate a non-commercial intrastate activity reserved to the states. Second, the Act did not contain a requirement that the activity regulated by § 922(q) have a nexus to interstate commerce. In justifying its arrival at this conclusion, the majority stressed the importance of the two-tiered system of government created by the United States Constitution. Citing the Federalist, a recent Supreme Court decision on the matter and the Constitution, the Court emphasized that the balance of power between states and the federal government must be maintained in order to assure that neither government could encroach upon the freedom of its citizens.

9. Id.
10. Id. The Commerce Clause grants Congress the power to "regulate commerce ... with foreign nations, among the States and with Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The interpretation of the Clause allows Congress to reach intrastate, i.e., local activity which has a substantial impact on interstate commerce. See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942).
11. Lopez, 115 S. Ct. at 1625.
14. Id. The vote was 5-4, with Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas for the majority; and, Justices Stevens, Souter, Breyer and Ginsburg dissented. Id. at 1625.
15. Id. at 1630-31.
16. Id. at 1632.
17. Id. at 1631.
18. Lopez, 115 S. Ct. at 1626.
With the constitutionally mandated concept of federalism drawn as its base, the Court then analyzed over 150 years of Commerce Clause jurisprudence to define the limits of the power of Congress to regulate intrastate activity under the guise of the Commerce Clause. Nearly all of the decisions cited by the Court as establishing these limits upheld various regulations enacted by Congress to regulate intrastate activity. The Court pointed out, however, that even these decisions, which expanded the regulatory authority of Congress under the Commerce Clause, recognized a limit to that power.

The Court then identified three areas of intrastate activity that Congress, under its commerce clause power, has the authority to regulate. The first area is the regulation of the channels of interstate commerce; the second area is the regulation and protection of the instrumentalities of interstate commerce; and the third area is the regulation of those intrastate activities that have a substantial effect on interstate commerce. The Court maintained that because the Act regulated neither the channels nor the instrumentalities of interstate commerce, it could uphold the Act only as a regulation of an intrastate activity which had a substantial effect on interstate commerce.

While the Court conceded that past decisions upheld a wide variety of congressional actions which regulated intrastate activity, it found a vivid pattern in the cases which framed the issue before it. The pattern indicated that under the Commerce Clause, Congress could regulate intrastate activity only if the activity had a substantial effect on interstate commerce and the activity was commercial in nature.

22. Lopez, 115 S. Ct. at 1628. See, e.g., Jones & Laughlin, 301 U.S. at 37 (holding that the Commerce Clause could not be used to the extent that it negated any difference between local and national responsibilities).
24. Id.
25. Id. at 1630.
26. Id.
27. Id. The majority conceded that there had been no clear precedent regarding the degree to which intrastate activity must affect interstate commerce in order to fall within the reach of the Commerce Clause. Id. Although prior cases used both the “effects” and the “substantially affects” tests, the majority ultimately
majority illustrated the reach of this power by citing a 1942 decision in which the Court upheld the Agricultural Adjustment Act because it had found that the regulated activity had a substantial effect on interstate commerce.28 The Lopez majority pointed out, however, that even though the Agricultural Adjustment Act regulated an entirely intrastate activity, the activity was commercial in nature.29 The Act at issue in Lopez, the majority continued, did not seek to regulate an intrastate commercial activity.30 Section 922(q) was entirely a criminal statute that intruded upon the authority of states to enact criminal statutes.31 Therefore, the Court concluded, because the Act did not regulate a commercial activity, the Court could not uphold it under the Commerce Clause.32

The Court noted that § 922(q) lacked an express requirement that the regulated activity have a connection to interstate commerce.33 Without this requirement, the majority opined, there would be no basis from which to judge whether a particular firearm possession had an effect on interstate commerce.34 The Court concluded that such a requirement was essential in that it would limit the scope of authority of the regulation to only those specific acts which had a direct connection to interstate commerce.35

The Court then considered the lack of explicit legislative findings that supported the argument that the possession of firearms in a school zone had an adverse effect on interstate commerce.36 Although the Court admitted that the lack of such findings was not dispositive, it noted that the lack of any findings hampered efforts to evaluate the rationale of Congress in enacting the legislation.37 The Court discounted the Government's rationale that because Congress had many years of experience in dealing with various firearm regulations, it was

concluded that the "substantially effects" test was the proper measure for Commerce Clause cases. Id.

28. Lopez, 115 S. Ct. at 1628. See Wickard v. Filburn, 317 U.S. 111 (1942) (upholding a provision of the Agricultural Adjustment Act which authorized the Secretary of Agriculture to fine a farmer who grew wheat for his own consumption in excess of that allowed by the Act).
29. Lopez, 115 S. Ct. at 1628.
30. Id. at 1630-31.
31. Id.
32. Id. at 1631.
33. Id.
34. Lopez, 115 S. Ct. at 1631.
35. Id.
36. Id.
37. Id. at 1631-32.
not unreasonable to conclude that Congress had a sufficient basis to determine that gun possession within a school zone had a substantial effect on interstate commerce without issuing express findings on the matter.\textsuperscript{38} The majority feared that if the Government's reasoning was accepted, the Court would have opened the door for federal regulation in any matter that had been traditionally reserved to the states.\textsuperscript{39} Congress could regulate matters concerning family law, education and law enforcement, the Court opined, if Congress simply found that particular activities related to those areas traditionally regulated by the states had an impact on interstate commerce.\textsuperscript{40} The majority stated that the Court would be at a loss to find any local activity that could not be regulated by Congress if this rationale were accepted.\textsuperscript{41} According to the Court, this would effectively destroy the concept of federalism, which, as the Court previously indicated, was essential to the preservation of fundamental liberties.\textsuperscript{42}

Justice Kennedy, in a concurring opinion, considered the two extremes.\textsuperscript{43} On the one hand, Justice Kennedy cautioned that the \textit{Lopez} opinion should be limited and should not be used to uproot the past sixty years of commerce clause jurisprudence.\textsuperscript{44} On the other hand, Justice Kennedy sought to reinforce the justification for the Court's role in preserving the federal-state balance.\textsuperscript{45} Justice Kennedy recognized that many areas of regulation where the Court had upheld a federal role would have been unthinkable to the Framers of the Constitution.\textsuperscript{46} The Constitution, however, was flexible enough to allow the Court to react to changing economic times and uphold what Justice Kennedy referred to as a "practical conception of the commerce power."\textsuperscript{47} Justice Kennedy stated that this "practical conception of the commerce power," however, did not give

\textsuperscript{38} \textit{Id.} at 1632.
\textsuperscript{39} \textit{Lopez}, 115 S. Ct. at 1632.
\textsuperscript{40} \textit{Id.}
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.} at 1634.
\textsuperscript{43} \textit{Id.} (Kennedy, J., concurring). Justice O'Connor joined in Justice Kennedy's concurring opinion. \textit{Id.}
\textsuperscript{44} \textit{Lopez}, 115 S. Ct. at 1634. This part of Justice Kennedy's opinion appeared to be a reaction to Justice Thomas' concurring opinion which called for a total reconsideration of the "substantial effects" test. \textit{Id.}
\textsuperscript{45} \textit{Id.} at 1639.
\textsuperscript{46} \textit{Id.} at 1637. The Framers, according to Justice Kennedy, could not have foreseen the modern role of the federal government; nor could they have imagined that the federal government would play such a role rather than the states. \textit{Id.} (citing New York v. United States, 505 U.S. 144, 157 (1992)).
\textsuperscript{47} \textit{Id.} at 1636-37.
Congress a blank check to infringe upon the delicate balance of power between the states and the federal government.\textsuperscript{48}

In this instance, Justice Kennedy reasoned that Congress sought to use its commerce clause authority to prohibit a purely local activity, one that ostensibly had no commercial relevance or a commercial nexus, that was justified only in that the prohibited activity may have, in some remote manner, an adverse impact on interstate commerce.\textsuperscript{49} In this regard, Justice Kennedy asserted that the Court had the responsibility to intervene when one branch of the federal government overstepped its authority.\textsuperscript{50} Justice Kennedy stated that nearly any local activity could be construed as ultimately having an impact on interstate commerce.\textsuperscript{51} For Justice Kennedy, such characterization recognized no limits to the Commerce Clause.\textsuperscript{52} Justice Kennedy concluded, therefore, that without a more solid connection to commercial activity, the Act could not be upheld as a constitutional exercise of Congress' commerce clause authority.\textsuperscript{53}

Justice Thomas, in a concurring opinion, was more critical of the past sixty years of commerce clause jurisprudence.\textsuperscript{54} Although Justice Thomas maintained that he simply sought to support the majority opinion, Justice Thomas ultimately concluded that the "substantial effects" test used by the Court to determine the constitutionality of commerce clause cases should be reconsidered.\textsuperscript{55} Justice Thomas asserted that the Court had misinterpreted the original intent of the Commerce Clause; and, therefore, he advocated a more strict interpretation of the Constitution as it related to the Commerce Clause.\textsuperscript{56} In this regard, Justice Thomas stated that the Constitution did not grant Congress the power to regulate activities having a "substantial effect" on interstate commerce.\textsuperscript{57} Justice Thomas underscored this point by illustrating that commerce, as the Framers understood it, simply meant "transportation of goods."\textsuperscript{58} In Justice Thomas' opinion, agriculture and

\begin{footnotes}
\item[48] Id. at 1637-38.
\item[49] \textit{Lopez}, 115 S. Ct. at 1640.
\item[50] Id. at 1639.
\item[51] Id. at 1642.
\item[52] Id.
\item[53] Id.
\item[54] \textit{Lopez}, 115 S. Ct. at 1642 (Thomas, J., concurring).
\item[55] Id. at 1642-43.
\item[56] Id. at 1643-44.
\item[57] Id. at 1644.
\item[58] Id. at 1643-44.
\end{footnotes}
manufacturing were local activities separate and apart from commerce. Although these activities had a "substantial effect" on interstate commerce, Justice Thomas reasoned that the Framers never intended to allow Congress the power to regulate local activities. According to Justice Thomas, therefore, the "substantial effects" test did not stand on sound constitutional footing. Justice Thomas concluded by noting that in expanding the power of the Commerce Clause beyond its original intent, the Clause granted the federal government police powers well beyond those envisioned by the Framers.

Justice Breyer issued the primary dissent. According to Justice Breyer, the Act was a valid constitutional exercise of Congress' commerce clause power. Justice Breyer concluded that the Court's prior commerce clause holdings permitted

59. Lopez, 115 S. Ct. at 1643.
60. Id. at 1644. Justice Thomas stated that had the framers meant to allow Congress to regulate activities that had a "substantial effect" on interstate commerce, they would have explicitly stated it in the Constitution. Id. at 1646. Justice Thomas illustrated this point by citing additional enumerated powers in Article I, § 8 of the Constitution which explicitly give Congress the power to regulate certain activities that have a "substantial effect" on interstate commerce, including the power to establish post offices and grant patents and copyrights. Id. at 1644. Justice Thomas concluded that had the Framers intended to grant Congress the power under the Commerce Clause to regulate activities which had a "substantial effect" on interstate commerce, these additional explicit powers enumerated in Article I, § 8 would be meaningless. Id.
61. Id. at 1646.
62. Id. at 1649.
63. Id. at 1657 (Breyer, J., dissenting). Justices Stevens, Souter and Ginsburg joined in Justice Breyer's dissenting opinion. Id.
Justice Stevens wrote a brief, separate dissent concluding that because guns were "both articles of commerce and articles that can be used to restrain commerce," Congress could certainly regulate firearm possession by certain individuals in certain areas. Id. at 1651 (Stevens, J., dissenting).
Justice Souter also wrote a separate dissent in which he counseled the Court to adhere to its policy of judicial restraint. Id. at 1651 (Souter, J., dissenting). Justice Souter opined that the Court should refrain from legislating in an area that had been specifically assigned to another branch under the Constitution. Id. In this instance, Justice Souter believed that the Court needed only to apply the rational basis test. Id. at 1653. In Justice Souter's opinion, the Court went well beyond that in this case, reflecting a time long past where substantive due process and direct/indirect effects tests were the standard. Id. at 1653-54. Justice Souter concluded by objecting to the contention of the majority that the Act was suspect in that it infringed upon areas of traditional state concern. Id. at 1655. Justice Souter stated that the touchstone of constitutionality under the commerce power was not whether the regulated area was traditionally reserved to the states, but whether Congress had a rational basis to determine that the regulated activity had a substantial impact on interstate commerce. Id. at 1656-57. As long as the Act could have passed the rational basis test, Justice Souter believed the Act should have been upheld. Id. at 1651-57.
64. Lopez, 115 S. Ct. at 1657.
Congress to regulate local activities whose cumulative impact had a "significant effect" on interstate commerce. Furthermore, because the Constitution delegated to Congress the power to regulate interstate commerce, Justice Breyer stated that it was for Congress, not the Court, to make that determination. Therefore, according to Justice Breyer, the issue before the Court was whether Congress had a rational basis for concluding that possession of firearms on school property had a "significant" impact on interstate commerce; and not, as the majority concluded, whether the activity in question had a substantial effect on interstate commerce.

In determining that Congress had a rational basis for concluding that firearms possession in a school zone had a significant effect on interstate commerce, Justice Breyer referred to a voluminous number of reports, studies and hearings that he believed justified the actions of Congress.

Justice Breyer then addressed the majority's fear that upholding the Act would expand the reach of the Commerce Clause into areas traditionally reserved to the states. He concluded that this holding was merely a recognition of the flexibility of the Constitution to react to changing economic times and did not represent a significant expansion of the scope of the Commerce Clause.

Finally, Justice Breyer criticized the majority on three points: first, for ignoring sixty years of commerce clause jurisprudence which upheld congressional regulation of local activity that had arguably less impact on interstate commerce than that of the very serious problem of guns in American schools; second, for resurrecting the type of distinction the Court had rejected long ago (i.e., a distinction

65. Id. at 1657-58.
66. Id. at 1658.
70. Id.
69. Lopez, 115 S. Ct. at 1662.
71. Id. at 1662-63 (citing Perez v. United States, 402 U.S. 146 (1971) (upholding a federal law criminalizing intrastate "loan sharking"), Katzenbach v. McClung, 379 U.S. 294 (1964) (upholding a prohibition of discrimination at local restaurants) and Wickard v. Filburn, 317 U.S. 111 (1942) (upholding a restriction on the amount of wheat a local farmer could grow for personal consumption)).
between commercial and non-commercial activity) when it abandoned the direct/indirect test because the test was too vague, and third, for creating uncertainty in an area of law which had been settled for nearly sixty years.

Article I, Section 8 of the United States Constitution grants Congress, among other things, the power to regulate interstate commerce. In *Gibbons v. Ogden*, the Court first expounded upon the scope of the Commerce Clause. *Gibbons* presented the issue of whether a New York law, which granted an exclusive license to operate steamships in New York waters, violated the Commerce Clause by conflicting with a federal licensing statute. Writing for the Court, Chief Justice Marshall stated that the New York law was in violation of the Constitution in that the power granted to Congress to regulate interstate commerce was plenary and could not be contradicted by a state law.

In reaching this holding, Chief Justice Marshall gave the commerce clause power a broad scope. After first dismissing a strict interpretation of the Clause, Chief Justice Marshall defined what he saw as the extent of Congress' commerce clause power. According to Chief Justice Marshall, commerce was

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72. *Id.* at 1663-64.
73. *Id.* at 1664-65. Justice Breyer believed that the Court's ruling would "restrict Congress' ability to enact criminal laws aimed at criminal behavior that, considered problem by problem rather than instance by instance, seriously threatens the economic, as well as social, well-being of Americans." *Id.*
74. U.S. Const. art. I, § 8, cl. 3, states in pertinent part: "The Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." *Id.*
75. 22 U.S. (9 Wheat.) 1 (1824).
77. *Id.* at 2-3. Robert Fulton and Robert Livingston received an exclusive license under the New York law to operate steamships in New York waters. *Id.* at 2. They then assigned Aaron Ogden the right to operate a ferry between New York and Elizabethtown, N.J. *Id.* Thomas Gibbons was licensed under a federal statute and began operating a competing ferry service between Elizabethtown and New York. *Id.* Ogden obtained an injunction in the New York courts which prohibited Gibbons from operating his ferry. *Id.*
78. *Id.* at 196.
79. *Id.*
80. *Id.* at 189-93. Ogden argued that the Commerce Clause did not include the power to regulate navigation but was limited to "traffic, to buying and selling, or the interchange of commodities." *Id.* at 189. But Chief Justice Marshall concluded
“commercial intercourse” and Congress' power to regulate commerce included every type of “commercial intercourse” among the states.\(^81\) Furthermore, Chief Justice Marshall contended that the power to regulate commerce could reach the internal activity of a state when that activity had an effect on interstate commerce.\(^82\) Although Chief Justice Marshall conceded that the power could not reach the exclusively internal matters of a state,\(^83\) he concluded that the only restraint on the power was that which Congress had placed on itself.\(^84\)

The Court had little opportunity over the next seventy years to interpret the scope of Congress' affirmative use of its commerce clause power.\(^85\) The passage of congressional regulation over the next fifty years that dealt with problems of industrialization and a growing economy, however, brought this period to an abrupt end.\(^86\) The passage of the Sherman Anti-Trust Act of 1890\(^87\) (the “Sherman Act”) gave rise to one of the earliest challenges to congressional regulation of this type in
United States v. E.C. Knight Co.\textsuperscript{88}

In \textit{E.C. Knight}, the Supreme Court considered whether a provision of the Sherman Act, which prohibited monopolies in restraint of interstate commerce, could be applied to rescind the purchase of stock of four sugar refining companies in Pennsylvania by the American Sugar Refining Company, when that purchase created a monopoly in manufacturing.\textsuperscript{89} In the majority opinion, Chief Justice Fuller acknowledged that Congress' power over interstate commerce was plenary; but he indicated that the states, under their police powers, had sole authority to regulate intrastate activity which was not commerce.\textsuperscript{90} Chief Justice Fuller, declaring that manufacturing was not commerce, ruled that Congress could not regulate a monopoly in manufacturing under the Sherman Act.\textsuperscript{91}

In declaring that commerce and manufacturing were distinct activities,\textsuperscript{92} Chief Justice Fuller relied on past cases which dealt not with Congress' affirmative commerce clause power, but with the "dormant" Commerce Clause.\textsuperscript{93} \textit{Coe v. Errol}\textsuperscript{94} and \textit{Kidd v. Pearson}\textsuperscript{95} were two of the cases cited by Justice Fuller.\textsuperscript{96} In \textit{Coe}, the Supreme Court ruled that a state maintained regulatory power over goods produced within that state even though the owner of the goods intended to transport the goods in interstate commerce.\textsuperscript{97} In \textit{Kidd}, the Supreme Court ruled that a state's prohibition of the manufacturing of intoxicating beverages did not unconstitutionally interfere with Congress' authority to regulate interstate commerce even though the prohibition had an indirect effect on interstate commerce.\textsuperscript{98}

\textsuperscript{88} 156 U.S. 1 (1895).
\textsuperscript{89} \textit{E.C. Knight}, 156 U.S. at 11.
\textsuperscript{90} Id. at 12. The Court stated: "That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state." \textit{Id}.
\textsuperscript{91} Id. at 17.
\textsuperscript{92} Id. at 12. The Court stated that "[c]ommerce succeeds to manufacture and is not a part of it." \textit{Id}.
\textsuperscript{93} Id. at 13-14. See, e.g., \textit{Coe v. Errol}, 116 U.S. 517 (1886) (holding that Congress' power over interstate commerce commences not when one contemplated the movement of a product in interstate commerce, but when the product actually began to move in interstate commerce); \textit{Kidd v. Pearson}, 128 U.S. 1 (1888) (holding that it was within the police power of a state to prohibit the manufacture of intoxicating beverages, and that the prohibition was not an unconstitutional infringement upon the power of Congress to regulate interstate commerce).

\textsuperscript{94} 116 U.S. 517 (1886) (giving a broad interpretation to a state's taxing power).
\textsuperscript{95} 128 U.S. 1 (1888) (giving a broad interpretation to a state's police power).
\textsuperscript{96} \textit{E.C. Knight}, 156 U.S. at 13-15.
\textsuperscript{97} \textit{Coe}, 116 U.S. at 529.
\textsuperscript{98} \textit{Kidd}, 128 U.S. at 26.
Chief Justice Fuller reasoned that if states could regulate manufacturing as a local activity then Congress could not regulate manufacturing as a part of its authority to regulate commerce between the states.\textsuperscript{99} This was so even though the manufacturer intended to ship the goods in interstate commerce, and the state regulations had an indirect effect on interstate commerce.\textsuperscript{100} Otherwise, Chief Justice Fuller concluded, the states would lose their police power over the internal operations of businesses within their borders.\textsuperscript{101}

While cases such as \textit{E.C. Knight} dealt a blow to the ability of Congress to reach internal activities which had a practical, albeit "indirect" effect on interstate commerce, the Court developed an alternative approach in deciding several railroad related cases in the early twentieth century.\textsuperscript{102} \textit{Houston, East & West Texas Railway Co. v. United States,}\textsuperscript{103} commonly referred to as the \textit{Shreveport Rate Cases}, best illustrated this new approach. The \textit{Shreveport Rate Cases} considered whether Congress, in creating the Interstate Commerce Commission (the "ICC"), could regulate the intrastate rates of an interstate rail carrier, when the rates had a discriminatory effect on interstate commerce.\textsuperscript{104} The Supreme Court maintained that the power of Congress to regulate interstate commerce included the power to

\textsuperscript{99.} \textit{E.C. Knight,} 156 U.S. at 16.
\textsuperscript{100.} \textit{Id.}
\textsuperscript{101.} \textit{Id.} Chief Justice Fuller concluded: "Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control." \textit{Id.}
\textsuperscript{102.} \textit{See, e.g.,} \textit{Southern Ry. v. United States,} 222 U.S. 20 (1911) (upholding penalties assessed against a rail carrier that violated the Federal Safety Appliance Act); \textit{Mondou v. New York, N.H. & H. R.R.,} 223 U.S. 1 (1912) (upholding the authority of Congress to regulate the liability of a rail carrier, whether or not a negligent employee was employed in interstate or intrastate commerce); \textit{Railroad Comm'n v. Chicago, B. & Q. R.R.,} 257 U.S. 563 (1922) (upholding an order of the Interstate Commerce Comm'n increasing the intrastate passenger rail rates of certain rail carriers to match an increase it had ordered for interstate passenger rates under the same rationale as that of \textit{Houston, E. & W. Tex. Ry. v. United States,} 234 U.S. 342 (1914)).
\textsuperscript{103.} 234 U.S. 342 (1914).
\textsuperscript{104.} \textit{The Shreveport Rate Cases,} 234 U.S. at 350. Congress authorized the ICC, under the Interstate Commerce Act, to set rates for interstate rail carriers. \textit{Id.} In this instance, the ICC ordered several railroads to increase their intrastate rates for hauling goods within Texas to a rate proportionate to that which the ICC set for hauling goods from Shreveport, Louisiana to destinations within Texas. \textit{Id.} at 349. The rail carriers objected to the ICC order which prohibited the carriers from charging higher rates to ship goods from Shreveport to points within Texas than the rates they charged for equal distances for hauling goods between points within Texas. \textit{Id.}
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protect interstate commerce. Thus, the Court stated that Congress had the power to regulate the activities of interstate carriers which had an injurious effect on interstate commerce, regardless of whether those activities were deemed intrastate. The Court drew upon previous railroad cases which upheld Congress' use of its commerce clause power to regulate the intrastate activity of interstate railroads. While the Court conceded that these cases sustained regulations geared mainly toward ensuring safety on interstate railways, it stressed that the cases vividly demonstrated that Congress may prohibit entities engaged in both intrastate and interstate commerce from using the former to injure the latter.

The Court was more receptive in the early part of the twentieth century to Congress' affirmative use of its commerce clause power in prohibiting the interstate shipment of goods that Congress deemed harmful. The case of Champion v. Ames, which set the precedent in this field, illustrated Congress' use of its commerce prohibiting power. In Champion, the Court considered whether Congress' power to regulate commerce included the authority to prohibit the interstate shipment of lottery tickets when Congress deemed them injurious to the public welfare. The Court ruled that Congress' power to regulate interstate commerce included the ability to prohibit the interstate shipment of lottery tickets. Justice Harlan, writing for the majority, reasoned that if

105. Id. at 351. See, e.g., The Daniel Ball, 77 U.S. 557 (1871).
106. The Shreveport Rate Cases, 234 U.S. at 351.
107. Id. at 352.
108. Id. at 353. The Court acknowledged that Congress could not regulate the internal commerce of a state; but that Congress could take all reasonable means to protect interstate commerce even if it meant regulating the intrastate aspects of an interstate rail carrier's business. Id.
109. See, e.g., Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (upholding the confiscation of tainted eggs which had been shipped in interstate commerce under the Pure Food and Drug Act of 1906); Hoke v. United States, 227 U.S. 308 (1913) (upholding the Mann Act which prohibited the interstate transportation of women for "prostitution and debauchery").
110. 188 U.S. 321 (1903).
111. Champion, 188 U.S. at 363.
112. Id. at 354. Champion challenged his conviction for conspiring to transport lottery tickets in interstate commerce under an act of Congress "entitled 'An Act for the Suppression of Lottery Traffic through National and Interstate Commerce and the Postal Service, Subject to the Jurisdiction of the United States.'" Id. at 321. Champion argued that the Act exceeded the Congress' commerce clause power because lottery tickets were not, and could not be made by Congress, "commerce among the states, within the meaning of the clause of the Constitution." Id. at 321-25.
113. Id. at 363.
Congress had the power to regulate the shipment of goods between the states, it made little sense that Congress must allow the interstate shipment of goods it deemed intolerable and detrimental to the public welfare. The majority concluded that if the states could prohibit the sale of lottery tickets which they deemed harmful to their citizens, then certainly Congress, in the interest of protecting commerce between the states, could prohibit the interstate shipment of lottery tickets.

The commerce prohibiting technique received a chilling reception, however, when the Supreme Court considered the case of *Hammer v. Dagenhart*. *Hammer* raised the issue of whether Congress, under its commerce clause power, could prohibit the interstate shipment of goods produced by a manufacturer using child labor. The Court ruled that Congress' prohibition of interstate transportation in goods produced by child labor exceeded its power under the Commerce Clause. The Court distinguished previous cases in which it upheld the commerce prohibiting technique. The Court

114. Id. at 355-56. Justice Harlan also reiterated that the power of Congress was plenary and that under the holding of McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), Congress had broad powers in implementing the means by which it executed its enumerated powers. *Champion*, 188 U.S. at 355-56.

115. *Champion*, 188 U.S. at 357. The Court expressly limited its decision in the case to the prohibition of lottery tickets in interstate commerce. Id. at 363. The Court did not decide the extent of this commerce prohibiting technique. *Id.* Justice Harlan addressed the issue of whether Congress could prohibit anything from interstate commerce, regardless of its impact on society, by stating that the Court would consider those cases when they come before the Court. *Id.* Justice Harlan suggested, however, that the only remedy to Congress' prohibition of articles in interstate commerce rested with the people whom they represented, and not with the courts. *Id.*

116. 247 U.S. 251 (1918), overruled by United States v. Darby, 312 U.S. 100 (1941). A father, on behalf of his two sons, both minors, brought suit to enjoin the enforcement of a federal law prohibiting the transportation of goods in interstate commerce that were produced by child labor. *Hammer*, 247 U.S. at 268.

117. *Id.* at 269. Section 1 of the statute provided in pertinent part:
That no producer, manufacturer, or dealer shall ship or deliver for shipment interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of 7 o'clock postmeridian, or before the hour of 6 o'clock antemeridian.


119. *Id.* at 270. See, *e.g.*, *Champion v. Ames*, 188 U.S. 321 (1903); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911); *Hoke v. United States*, 227 U.S. 308
maintained that in these cases, the offending party needed the use of interstate transportation to accomplish the harm Congress sought to regulate.\textsuperscript{120} Therefore, the Court opined that the only way Congress could regulate the harm was to prohibit the use of interstate transportation in the commodities.\textsuperscript{121} According to the Court, that situation simply did not exist in \textit{Hammer} because the prohibited item was not harmful in and of itself.\textsuperscript{122} The Court concluded that the Act was merely an attempt to control the means of production within a state, which was clearly beyond the reach of the commerce clause power of Congress.\textsuperscript{123}

The Great Depression of the 1930's brought a new era of congressional regulation that dealt with national economic problems, and with it arose new limitations on Congress' ability to regulate local activity deemed by it to have an adverse impact on interstate commerce.\textsuperscript{124} Congress first felt the sting of rejection in this regard in \textit{A.L.A. Schechter Poultry Corp. v. United States},\textsuperscript{125} where operators of a chicken slaughterhouse and market challenged a provision of the National Industrial Recovery Act of 1933.\textsuperscript{126} The issue in \textit{Schechter} was whether

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\item \textsuperscript{120} \textit{Hammer}, 247 U.S. at 271.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} Id. at 271-72. The Court stated: [\textit{In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. . . . This element is wanting in the present case. . . . The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. . . . When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power. Id.\textsuperscript{123} at 272}. (citing Kidd v. Pearson, 128 U.S. 1 (1888) and Coe v. Errol, 116 U.S. 517 (1886)). Justice Holmes issued a strong dissent in which he maintained that Congress' power to prohibit interstate commerce extended to the power to prohibit goods of any character, not just those inherently evil. \textit{Id.} at 277-81 (Holmes, J., dissenting). If, Justice Holmes stated, Congress chose to attack a societal ill, it mattered not whether the particular evil occurred before or after a commodity was shipped in interstate commerce. \textit{Id.} According to Justice Holmes, Congress merely needed to conclude that the interstate transportation aided the societal ill Congress sought to cure. \textit{Id.}\textsuperscript{124}
\item \textsuperscript{123} Id. at 272.\textsuperscript{125} Id. at 271-72.\textsuperscript{126} 295 U.S. 495 (1935).
\end{itemize}

\textit{Schechter}, 295 U.S. at 519-21. The National Industrial Recovery Act of 1933 authorized the President of the United States to approve or prescribe codes in certain trades or businesses which, \textit{inter alia}, could regulate hours, wages and allow for collective bargaining of the employees in those trades or businesses. \textit{See} 48 Stat. 195, ch. 90 (1933).
Congress exceeded its commerce clause power when it authorized the President of the United States to establish the Live Poultry Code, which set hours and wages for individuals employed in the poultry industry.\textsuperscript{127} The Supreme Court ruled that because Schechter's transactions at the slaughterhouse and market were neither "in" interstate commerce nor did they "directly affect" interstate commerce, Congress had exceeded its power under the Commerce Clause.\textsuperscript{128} Although the Court conceded that the company received its poultry through interstate transportation, the Court found that Schechter's activities were completely local because the company slaughtered and sold poultry totally within the borders of the state.\textsuperscript{129} Thus, the Court ruled that Schechter's activities could not be considered "in" the stream of interstate commerce and were beyond the reach of federal regulation.\textsuperscript{130} Furthermore, although the Government displayed how wages and hours had an effect on interstate commerce, the Court concluded that this was merely an indirect effect.\textsuperscript{131} The Court feared that if Congress could regulate wages and hours because of some remote effect on interstate commerce, then the federal government could regulate any production-related matter.\textsuperscript{132}

In \textit{Carter v. Carter Coal Co.},\textsuperscript{133} the Supreme Court invalidated yet another congressional act which sought to regulate the hours and wages of workers.\textsuperscript{134} In \textit{Carter}, the Court considered whether Congress went beyond the reach of its commerce clause power when it enacted the Bituminous Coal Conservation Act of 1935 which, \textit{inter alia}, regulated the hours and wages of those employed in the mining industry.\textsuperscript{135} The Court, as it did in \textit{Schechter}, determined that because worker's wages and the hours they worked had only an indirect effect on interstate commerce, Congress exceeded its authority under the

\begin{itemize}
  \item \textsuperscript{127} \textit{Schechter}, 295 U.S. at 542.
  \item \textsuperscript{128} Id. at 542-43.
  \item \textsuperscript{129} Id. at 543.
  \item \textsuperscript{130} Id. See, e.g., \textit{Stafford v. Wallace}, 258 U.S. 495 (1922); \textit{Swift & Co. v. United States} 196 U.S. 375 (1904).
  \item \textsuperscript{131} \textit{Schechter}, 295 U.S. at 548-49.
  \item \textsuperscript{132} Id. at 549.
  \item \textsuperscript{133} 298 U.S. 238 (1936).
  \item \textsuperscript{134} \textit{Carter}, 298 U.S. at 297. The Bituminous Coal Conservation Act of 1935 established a national bituminous coal code which regulated wages and hours of those employed in the industry and imposed a tax on coal companies that failed to comply with the code. See Bituminous Coal Conservation Act of 1935, ch. 824, 49 Stat. 991 (repealed 1937).
  \item \textsuperscript{135} \textit{Carter}, 298 U.S. at 278.
\end{itemize}
Commerce Clause in regulating this aspect of production. The Court reasoned that the labor provisions in the Act mainly affected production of coal and did not affect interstate commerce. Production, the Court continued, was a local activity beyond the reach of Congress to regulate under the Commerce Clause because production had only an indirect effect on interstate commerce as opposed to a direct, or immediate, effect. The Court stated that Congress could regulate intrastate activities which had a direct effect on interstate commerce, but not those which had only an indirect effect. The Court concluded by noting that the fact that a commodity may have been intended for interstate shipment did not place the production of the commodity under the power of federal regulation.

By 1936, the Court had developed two distinct theories under which it could determine whether congressional regulation of intrastate activity which Congress deemed as having an impact on interstate commerce was constitutional. The Court measured the constitutionality of congressional regulation by considering whether a regulated activity had a direct or indirect effect on interstate commerce or by considering whether the regulated activity had such an effect on interstate commerce that it was necessary for Congress to regulate the entire field of activity. Although momentum appeared to be on the side of the direct/indirect effects evaluation, the test for determining the constitutionality of federal regulation of intrastate activity which Congress deemed to have an effect on interstate commerce changed abruptly in NLRB v. Jones & Laughlin Steel Corp.

136. Id. at 307-09.
137. Id. at 304.
138. Id. at 307-08.
139. Id. at 309 (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).
140. Carter, 298 U.S. at 303.
141. Stern, supra note 85, at 647.
142. See, e.g., Carter, 298 U.S. at 307-10; Schechter, 295 U.S. at 546; United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895).
144. See, e.g., Carter, 298 U.S. at 309; Schechter, 295 U.S. at 495.
145. 301 U.S. 1 (1937). Some commentators believe that this reversal was due to President Roosevelt's so-called Court Packing Plan. Stern, supra note 85, at 677-82. Unhappy with the decisions of the Court regarding his New Deal legislative agenda, President Roosevelt appealed to Congress and the people of the United States to dramatically change the makeup of the United States Supreme Court. Id.
In *Jones & Laughlin*, the Supreme Court considered whether a federal regulation, which protected the right of workers to organize and collectively bargain, could apply to workers employed in manufacturing and production at Jones & Laughlin's steel plants in Pennsylvania. The Court stated that where the practical result of labor turmoil, which Congress deemed emanated from the inability of workers to organize and collectively bargain, had a substantial effect on interstate commerce, Congress had the authority to regulate labor relations under its commerce clause power. Taking into account the wide range of businesses in which Jones & Laughlin engaged in across the United States, and the importance of its Pennsylvania plants to those businesses, the Court ruled that labor relations at the plant were exactly the type of local activity that Congress could reach under the Commerce Clause due to the substantial impact those relations had on interstate commerce. In setting aside Jones & Laughlin's argument

Expressing doubts about the abilities of the aged members of the Court (six of the Justices were over 70), the President's plan called for the appointment of one additional justice for each current Supreme Court Justice over the age of 70. While the plan ultimately languished in Congress, President Roosevelt proclaimed overall victory with the decision in *Jones & Laughlin*. The NLRB charged Jones & Laughlin with unfair labor practices under the National Labor Relations Act of 1935. Specifically, the NLRB charged that Jones & Laughlin fired employees because of their pro-labor activities. The NLRB sought reinstatement of the employees and recovery of lost wages. Although the opposing sides argued over whether or not the activity at Jones & Laughlin's plants could be considered "in" the stream of commerce, as were the stockyards in Swift & Co. v. United States, 196 U.S. 375 (1904) and Stafford v. Wallace, 258 U.S. 495 (1922), the Court did not feel it had to analyze this case in that fashion. The Court stated:

> [W]e do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the "stream of commerce" cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power which the Government invokes in support of the present Act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate commerce. That power is plenary. Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

*Jones & Laughlin*, 301 U.S. at 41-42. The Court queried:

> [W]hen industries organize themselves on a national scale, making their relationship to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect
that Congress could not regulate production,\textsuperscript{149} the Court concluded that simply showing that the employees labored in production was not dispositive.\textsuperscript{150} The Court considered the actual effect the labor had on interstate commerce to be a more important consideration.\textsuperscript{151} Four years later, the Supreme Court further expanded the scope of the Commerce Clause in \textit{United States v. Darby}.\textsuperscript{152} George Darby's ("Darby") challenge to the Fair Labor Standards Act of 1938 (the "FLSA") raised two issues.\textsuperscript{153} The first issue considered by the Court was whether Congress could prohibit the interstate shipment of lumber products when the employees who produced the products labored under conditions inconsistent with those prescribed by the FLSA.\textsuperscript{154} The second issue was whether Congress could mandate an employer to adhere to the prescribed wage and hour provisions of the FLSA when the employer was engaged in manufacturing goods, a local activity, which it intended to ship in interstate commerce.\textsuperscript{155} In addressing the first issue, the Court ruled that Congress could prohibit the interstate shipment of goods produced by manufacturers who did not adhere to the labor provisions of the FLSA.\textsuperscript{156} Justice Stone, writing for the majority, dismissed Darby's two arguments against the applicability of the FLSA.\textsuperscript{157} In expressly overruling \textit{Hammer v. Dagenhart}, Justice Stone concluded that Congress' plenary power over interstate commerce from the paralyzing consequences of industrial war?

\textsuperscript{149} Id. at 41. 

\textsuperscript{150} Id. at 40. 

\textsuperscript{151} Id. 

\textsuperscript{152} 312 U.S. 100 (1941). 

\textsuperscript{153} Darby, 312 U.S. at 108. Darby operated a lumber mill in Georgia. Id. at 111. He was charged with violating provisions of the Fair Labor Standards Act which prohibited the interstate shipment of goods produced by employees earning less than a prescribed minimum wage and working more than prescribed maximum hours. \textit{Id.} See 29 U.S.C. § 207(a)(1) (1988 & Supp. V 1993). 

\textsuperscript{154} Darby, 312 U.S. at 108. 

\textsuperscript{155} Id. 

\textsuperscript{156} Id. at 115. 

\textsuperscript{157} Id. at 115-16.
interstate commerce allowed it to prohibit any article from interstate transportation, notwithstanding the inherent qualities of that article.\textsuperscript{158} Furthermore, Justice Stone noted that the motives of Congress for banning a particular commodity from interstate commerce did not matter because it was for Congress alone to determine what could or could not be transported in interstate commerce.\textsuperscript{159}

Justice Stone addressed the second issue by stating that the regulatory authority Congress had over interstate commerce extended to intrastate activities that had a substantial effect on interstate commerce.\textsuperscript{160} When Congress legislated in this area, Justice Stone continued, Congress could enact any and all measures reasonably adapted to enforce its enumerated power.\textsuperscript{161} Justice Stone concluded that because the FLSA was meant to prohibit the use of interstate commerce as a means to promote unfair labor practices, Congress was within its authority to force manufacturers to adhere to certain minimum labor standards.\textsuperscript{162}

Any lingering doubts as to the extent of the power of Congress to reach intrastate activity that had an effect on interstate commerce were firmly and unanimously put to rest in \textit{Wickard v. Filburn}.\textsuperscript{163} In \textit{Wickard}, the Supreme Court addressed the issue of whether a provision of the Agricultural Adjustment Act of 1938 exceeded the commerce clause authority of Congress when the Act regulated the amount of wheat a local farmer could grow for his own consumption.\textsuperscript{164} Justice Jackson,

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158. \textit{Id.} at 116-17. \\
159. \textit{Darby}, 312 U.S. at 115. \\
160. \textit{Id.} at 118. \\
161. \textit{Id.} at 121. \\
162. \textit{Id.} at 122-23. Justice Stone limited the decision in \textit{Carter} to the extent it was inconsistent with the ruling in \textit{Darby}. \textit{Id.} at 123. Justice Stone also discussed the alleged limitations the Tenth Amendment placed upon Congress' authority to reach local activity: Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively or to the people." The amendment states but a truism. . . . There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. \\
\textit{Id.} at 123-24. \\
163. 317 U.S. 111 (1942). \\
164. \textit{Wickard}, 317 U.S. at 118. Filburn challenged the Agricultural Adjustment Act after he received a fine for growing too much wheat in violation of provisions of
\end{flushright}
writing for a unanimous Court, stated that irrespective of the local nature of an activity, whether it was considered commerce or not, if the activity has a "substantial economic effect" on interstate commerce, Congress could regulate it. Because the use of home grown wheat competed with wheat in interstate commerce and affected the price of the wheat, Congress, the Court reasoned, could regulate its production. The Court dismissed the challenge to the Act as an unconstitutional encroachment on a local activity. In so doing, the Court firmly rejected the use of such approaches as the direct/indirect effects distinction to determine the constitutionality of legislation which regulated manufacturing and production. This test, according to the Court, completely disregarded the actual impact that an activity had on interstate commerce. The Court concluded by noting that even though the impact on interstate commerce, when considered alone, may have been slight, it was the cumulative effect of the actions, added to those similarly situated, which brought them within the parameters of Congress' regulatory power.

The decision in Wickard did not answer the question of how far Congress could go in regulating local activity when it concluded that the activity had an impact on interstate commerce. In deciding two civil rights cases on the same day in 1964, the Court seemed to answer the question by stating that Congress had no limits. In the first case, Heart of Atlanta Motel, Inc. v. United States, a motel owner alleged that a provision of the Civil Rights Act of 1964, which prohibits places of public

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the Act. Id. at 113. The Act sought to control the amount of wheat in interstate commerce by, inter alia, regulating the amount of wheat a farmer could grow in certain years. Id. at 114-15

165. Id. at 125. The Court stated:
But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

Id.

166. Id. at 128-29.
167. Id. at 124-25.
168. Id.
170. Id. at 127-28.
173. Civil Rights Act of 1964, Pub. L. No. 88-352, § 201(a)-(c), (e) and §§ 203-
accommodation from refusing rooms to travellers based on race, exceeded Congress' authority to regulate interstate commerce because the operation of the motel was a strictly local activity. The Court disagreed, ruling that Congress could prohibit racial discrimination by motels which catered to interstate travellers, no matter how local the operation, when the discrimination had an effect on interstate commerce. In this instance, the Court relied on the nature of the motel business, which depended heavily upon interstate travellers, and the recorded testimony before Congress regarding the passage of the Civil Rights Act of 1964, which revealed strong evidence that discrimination had a substantial impact on interstate commerce. The Court concluded that this was more than enough evidence to concede that Congress could constitutionally prohibit racial discrimination at locally owned motels.

The Court's decision in Katzenbach v. McClung mirrored the decision in Heart of Atlanta. In Katzenbach, the Supreme Court considered whether the provisions in Title II of the Civil Rights Act of 1964 applied to a restaurant which refused service to individuals based on race when a significant amount of the food the restaurant served arrived through interstate commerce. The Court found the provisions of Title II, as applied to a restaurant which received a significant amount of the food it served through interstate commerce, to be within Congress' power to regulate interstate commerce. Similarly, as in Heart of Atlanta, the Court in Katzenbach relied on congressional hearings which illustrated the impact that

07 (codified at 42 U.S.C. § 2000a(a)-(c), (e) and §§ 2000e-2 to 2000a-6 (1988)). The Civil Rights Act prohibits certain places of public accommodation from discriminating on the basis of race. Id.

174. Heart of Atlanta, 379 U.S. at 247-49. Title II of the Civil Rights Act prohibits discrimination in any public lodging facilities, restaurants, or cinemas if the operation of such public accommodations affects commerce. Id. at 247.

175. Id. at 258. The Court stated that "if it is said that the operation of the motel here is of a purely local character. But, assuming this to be true, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." Id. (quoting United States v. Women's Sportswear Manufacturers Asso'n, 336 U.S. 460 (1949)).

176. Id. at 243.
177. Id. at 252-53.
178. Id. at 258.
181. Id. at 298. Ollie's Barbecue refused to serve African-Americans. Id. at 296-97.
182. Id. at 304-05.
racial discrimination in restaurants had on interstate commerce. The Court also reiterated its conclusion in Wickard v. Filburn, dismissing the appellee's contention that the volume of food served at the restaurant was too insignificant to have an impact on interstate commerce. The Court concluded by noting that it would not simply act as a rubber stamp for federal regulation of intrastate activity which Congress deemed had an impact on interstate commerce. The Court continued, however, by stating that where Congress had a "rational basis" for concluding that a regulated activity affected interstate commerce, the Court's inquiry into the validity of that regulation ceased.

The Supreme Court expanded the scope of the Commerce Clause even further in Perez v. United States. In Perez, the Court entertained a challenge to Title II of the Consumer Credit Protection Act. The issue in Perez was whether Title II of the Consumer Credit Protection Act exceeded the power of Congress under its commerce clause authority when the Act sought to prohibit extortionate credit activities which took place completely intrastate. The Court found that because Congress reasonably concluded that the type of activity the Act prohibited had an effect on interstate commerce, Title II was well within the power of Congress to regulate interstate commerce. The Court relied on the fact that congressional findings graphically illustrated the adverse impact that "loan sharking" had on interstate commerce, and that past cases clearly established that if an activity, whether or not local in

183. Id. at 299-300.
184. Id. at 300-01.
186. Id. at 303-04. The Court stated:
Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.

Id.
187. 402 U.S. 146 (1971)
188. Perez, 402 U.S. at 146. Title II of the Consumer Credit Protection Act found that organized crime was a nationwide problem; that extortionate credit dealings financed a significant amount of that activity; that these dealings were carried on in interstate commerce; and that even local "loan sharking" activity had an effect on interstate commerce. Id. Therefore, Congress sought to prohibit all interstate and intrastate "loan sharking" activity. See 18 U.S.C. § 891 (1988 & Supp. V 1993).
189. Perez, 402 U.S. at 146-47.
190. Id. at 155-56.
191. Id.
character, had an effect on interstate commerce, Congress could regulate it.\textsuperscript{192} The Court concluded by dismissing the contention of the petitioner, Perez, that his action, when taken alone, had little or no impact on interstate commerce.\textsuperscript{193} The Court stated that it was required to review the constitutionality of the Act, not by the effect that Perez' act alone had on interstate commerce, but rather by the effect that the entire "class of activities" had on interstate commerce.\textsuperscript{194}

The Court reaffirmed its position that Congress' commerce clause power reached intrastate activities which had an effect on interstate commerce when it upheld the Surface Mining Control and Reclamation Act of 1977 in \textit{Hodel v. Virginia Surface Mining & Reclamation Ass'n.}\textsuperscript{195} In \textit{Hodel}, Justice Marshall framed the issue of the case as whether the Surface Mining Conservation and Reclamation Act was a valid exercise of Congress' power to regulate interstate commerce when the Act sought to regulate surface mining on a national scale.\textsuperscript{196} Justice Marshall reiterated past decisions of the Court in stating that when Congress rationally determined that a local activity had an effect on interstate commerce, Congress was well within its power under the Commerce Clause to regulate in that field.\textsuperscript{197} In this instance, Justice Marshall relied on congressional hearings, which evidenced the effect that surface mining had on interstate commerce, to determine that Congress had a rational basis to find that the activity of surface mining had an effect on interstate commerce.\textsuperscript{198} Therefore, Justice Marshall concluded, because coal was shipped in interstate commerce and the production of the coal had an effect on interstate commerce, Congress could regulate the production of coal in accordance with the Act.\textsuperscript{199}

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\item 192. \textit{Id.} at 151-52 (citing United States v. Darby, 312 U.S. 100 (1941) and Wickard v. Filburn, 317 U.S. 111, 125 (1942)).
\item 193. \textit{Id.} at 152.
\item 195. 452 U.S. 264, 305 (1981).
\item 196. \textit{Hodel}, 452 U.S. at 276. The appellees sought to frame the issue as whether land could be considered "in" commerce, and therefore whether land regulations could be promulgated by Congress under its commerce clause power. \textit{Id.} at 275.
\item 197. \textit{Id.} at 277.
\item 198. \textit{Id.} at 277-80.
\item 199. \textit{Id.} at 281. Justice Rehnquist issued a foreboding concurrence in which he stated:
\begin{quote}
It is illuminating for purposes of reflection, if not for argument, to note that
\end{quote}
A review of the past sixty years of commerce clause jurisprudence reveals an inconsistency regarding the extent to which an activity must affect interstate commerce before Congress may regulate that activity.200 Must Congress conclude that an activity merely affects interstate commerce to employ its commerce clause power or must Congress find that the activity substantially affects interstate commerce before it acts?201 It is not surprising that Chief Justice Rehnquist, in view of his concurring opinion in Hodel, used Lopez to establish the stricter standard. What is surprising, however, is the brevity with which Chief Justice Rehnquist treats this significant clarification. The Chief Justice acknowledged the conflict, then in fewer words, and with no citations, simply resolved the matter in favor of the “substantially effects test.”202 The Court gave no firm direction as to when an activity ceased to have a substantial impact on interstate commerce. The Court merely hinted at where the line should be drawn in Maryland v. Wirtz.203 In Wirtz, the majority responded to the fears of the

one of the greatest “fictions” of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people. The manner in which this Court has construed the Commerce Clause amply illustrates the extent of this fiction. Although it is clear that the people, through the States, delegated authority to Congress to [regulate interstate commerce], one could easily get the sense from this Court’s opinions that the federal system exists only at the sufferance of Congress.

Id. at 307-08 (Rehnquist, J., concurring). Justice Rehnquist went on to take exception to the test employed by the Court in finding federal regulation of intrastate activity within the commerce clause power of Congress:

[T]he Court asserts that regulation will be upheld if Congress had a rational basis for finding that the regulated activity affects interstate commerce. . . . In my view, the Court misstates the test . . . it has long been established that the commerce power does not reach activity which merely “affects” interstate commerce. There must instead be a showing that regulated activity has a substantial effect on that commerce.

Id. at 311-12.

200. See, e.g., Hodel, 452 U.S. at 279 (stating that “[t]he court must defer to a congressional finding that a regulated activity affects interstate commerce”); Heart of Atlanta, 379 U.S. at 255 (stating that “the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated . . . has a real and substantial relation to the national interest”); Wickard, 317 U.S. at 125 (stating that “if [the] activity be local . . . it may still . . . be reached by Congress if it exerts a substantial economic effect on interstate commerce”); United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942) (stating that “[t]he commerce power is not confined in its exercise to the regulation of commerce among the states . . . [but] extends to those activities intrastate which so affect interstate commerce or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end.”).

201. Lopez, 115 S. Ct. at 1630.

202. Id.

dissent that congressional power under the Commerce Clause was limitless. The majority in *Lopez* attempted to allay these fears by stating that Congress could not employ "a relatively trivial impact" on interstate commerce to reach intrastate activities.

If this is what the Court meant by "merely affects" as opposed to "substantially affects," then it is unclear why it did not apply this rationale in *Lopez*. It is clear that the majority found the Government's evidence that gun possession in school zones had a substantial effect on interstate commerce unconvincing. Furthermore, the majority indicated that the Supreme Court is the ultimate arbiter of what does or does not have a substantial effect on interstate commerce. The Court, then, could simply let this issue be dispositive and conclude that because gun possession in school zones does not have a substantial impact on interstate commerce, Congress may not regulate the activity.

Instead of deciding the issue in terms of whether Congress had a rational basis upon which to conclude that gun possession in school zones had a substantial impact on interstate commerce, the Court resolved the issue in a most troubling manner. Chief Justice Rehnquist, relying on the past sixty years of commerce clause decisions, concluded that Congress may only regulate those intrastate activities that have a substantial impact on interstate commerce and which are commercial in nature. Chief Justice Rehnquist drew this conclusion by alluding to past commerce clause cases which, in his opinion, all involved the regulation of economic activity. Even *Wickard*, the Chief Justice declared, the most far reaching example of the commerce clause cases, involved the regulation of an economic activity.

Chief Justice Rehnquist's novel assumption is reminiscent of the conclusion drawn in *Hammer*, where the Court declared invalid the prohibition of goods in interstate commerce because

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204. *Wirtz*, 392 U.S. at 196-97 n.27.
206. *See id.* at 1631-32.
207. *Id.* at 1629 n.2.
208. This is essentially the manner in which Justice Breyer analyzed the issue in his dissent where he concluded that Congress had a rational basis to conclude that gun possession in school zones had a substantial impact on interstate commerce. *Lopez*, 115 S. Ct. at 1659-62 (Breyer, J., dissenting).
210. *Id.* at 1630.
211. *Id.*
212. *Id.*
they were not inherently evil.\textsuperscript{213} In \textit{Hammer}, the Court took a retrospective look at cases that had allowed Congress to prohibit certain goods from interstate commerce and concluded that those cases permitted Congress to prohibit from interstate commerce only those goods which were inherently evil.\textsuperscript{214} \textit{Darby} recognized the fallacy and impracticality of this assumption and explicitly overruled \textit{Hammer} twenty-three years later.\textsuperscript{215}

The majority's assumption is not only novel, but it also contradicts the holding of \textit{Wickard}, the case the Court used to justify its conclusion.\textsuperscript{216} While the disputed regulation in \textit{Wickard} involved an essentially commercial activity, the Court asserted that any intrastate activity, no matter what its character, could be reached by Congress if the activity had a substantial impact on interstate commerce.\textsuperscript{217} This assertion reflects the recent history of commerce clause jurisprudence which indicates that congressional regulation of intrastate activity should be evaluated on the practical effects the activity has on interstate commerce.\textsuperscript{218}

Justice Breyer's dissent called into question the majority's reliance on the newly created distinction between commercial and non-commercial activity.\textsuperscript{219} Justice Breyer stated that the cases cited by the majority as examples of this distinction focused primarily on the practical effects an activity has on interstate commerce and not whether the activity was commercial or non-commercial.\textsuperscript{220} The issue, therefore, according to Justice Breyer, should have been whether Congress

\begin{itemize}
\item \textsuperscript{213} \textit{Hammer}, 247 U.S. at 270-77.
\item \textsuperscript{214} \textit{Id.} at 270-72.
\item \textsuperscript{215} \textit{Darby}, 312 U.S. at 116. The Court stated: \textit{Hammer v. Dagenhart} has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. \textit{Id.}
\item \textsuperscript{216} \textit{See Lopez}, 115 S. Ct. at 1630.
\item \textsuperscript{217} \textit{Wickard}, 317 U.S. at 125. The Court stated: "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on inter-state commerce." \textit{Id.}
\item \textsuperscript{218} \textit{See}, e.g., \textit{Jones & Laughlin}, 301 U.S. at 41-42. The Court in \textit{Jones & Laughlin} stated: "We have often said that interstate commerce itself is a practical conception. It is equally true that interference with that commerce must be appraised by a judgement that does not ignore actual experience." \textit{Id.}
\item \textsuperscript{219} \textit{Lopez}, 115 S. Ct. at 1663-64 (Breyer, J., dissenting).
\item \textsuperscript{220} \textit{Id.} (citing \textit{Wickard}, 317 U.S. at 122-25, \textit{McClung}, 379 U.S. at 301-03 and \textit{Perez}, 402 U.S. at 150-52).
\end{itemize}
could have had a rational basis to conclude that gun possession in school zones substantially affected interstate commerce.\textsuperscript{221}

Since the landmark case of \textit{Jones & Laughlin}, the Court has admonished Congress that it will not stand by and let Congress erode the concept of federalism through regulation of intrastate activity deemed to affect interstate commerce.\textsuperscript{222} Only once in nearly sixty years, however, has the Court held invalid Congress' affirmative use of its commerce clause power.\textsuperscript{223} This expansion of the Commerce Clause has been troubling to some, but is perhaps more reflective of the complex society in which we live rather than an erosion of states' rights.\textsuperscript{224} Economic change does not occur in a vacuum. The effects of this change have a great impact on many aspects of people's lives. When interstate commerce begins to "feel the pinch" of this change, "it does not matter how local the operation which applies the squeeze."\textsuperscript{225}

Though it may be correct that the effect that gun possession in schools has on interstate commerce is not substantial, the Court shied away from the battleground upon which Justice Breyer sought to resolve the issue. Instead, the Court created a novel distinction which, as Justice Breyer so aptly put it, "fails to heed this Court's earlier warning not to turn 'questions of the power of Congress' upon 'formula[s]' that would give 'controlling force to nomenclature such as "production" and "indirect" and foreclose consideration of the actual effects of the activity in question upon interstate commerce."\textsuperscript{226}

\textit{John W. Boyle}

\textsuperscript{221} \textit{Id. at} 1659. See, e.g., \textit{Heart of Atlanta}, 379 U.S. at 258-59; \textit{Hodel}, 452 U.S. at 276.
\textsuperscript{222} \textit{Jones and Laughlin}, 301 U.S. at 30. See also, e.g., \textit{Katzenbach}, 379 U.S. at 303.
\textsuperscript{224} \textit{Lopez}, 115 S. Ct. at 1643 (Thomas, J., concurring).
\textsuperscript{225} \textit{Heart of Atlanta}, 379 U.S. at 258 (quoting United States v. Women's Sportswear Manufacturers Ass'n, 336 U.S. 460, 464 (1949)).
\textsuperscript{226} \textit{Lopez}, 115 S. Ct. at 1663 (quoting \textit{Wickard}, 317 U.S. at 120).