

United States v. Lopez **Too far to stretch the Commerce Clause**

Alfonso Lopez, Jr. was a 12th-grade student. He brought a concealed handgun into his high school and thus ran afoul of a federal statute known as the Gun-Free School Zones Act of 1990.

The statute prohibited "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone."

Mr. Alfonso Lopez, Jr. was indicted and attacked the statute as unauthorized under any power of Congress.

The federal trial court disagreed, ruling that the statute was a constitutional exercise of Congressional power under Article I, Section 8's Interstate Commerce Clause.

The federal court of appeals disagreed, ruling that the statute was beyond the power of Congress.

Even though the Commerce Clause has been stretched unconscionably far (see [*Wickard v. Filburn*](#)), this time the Court, in a majority opinion by Justice Rehnquist, agreed that Congress had gone too far. [I have made no substantive changes to his opinion. All footnotes have been removed.]

The opinion of Justice Rehnquist

In the Gun-Free School Zones Act of 1990, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "[t]o regulate Commerce . . . among the several States . . ." U.S. Const., Art. I, 8, cl. 3.

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We start with first principles. The Constitution creates a Federal Government of enumerated powers. See U.S. Const., Art. I, 8. As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*. "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, 8, cl. 3. The Court, through Chief Justice Marshall, first defined the nature of Congress' commerce power in *Gibbons v. Ogden*:

"Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." The commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id.*, at 196. The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause.

"It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary. "Comprehensive as the word `among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State."

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In 1887, Congress enacted the Interstate Commerce Act and in 1890, Congress enacted the Sherman Antitrust Act. These laws ushered in a new era of federal regulation under the commerce power. * * * [T]he Court held [in cases that followed] that, where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation.

In *A. L. A. Schechter Poultry Corp. v. United States*, the Court struck down regulations that fixed the hours and wages of individuals employed by an intrastate business because the activity being regulated related to interstate commerce only indirectly. In doing so, the Court characterized the distinction between direct and indirect effects of intrastate transactions upon interstate commerce as "a fundamental one, essential to the maintenance of our constitutional system."

Activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly were beyond Congress' reach. The justification for this formal distinction was rooted in the fear that otherwise "there would

be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."

Two years later, in the watershed case of *NLRB v. Jones & Laughlin Steel Corp*, the Court upheld the National Labor Relations Act against a Commerce Clause challenge, and in the process, departed from the distinction between "direct" and "indirect" effects on interstate commerce. ("The question [of the scope of Congress' power] is necessarily one of degree"). The Court held that intrastate activities that "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" are within Congress' power to regulate.

In *United States v. Darby*, the Court upheld the Fair Labor Standards Act, stating:

"The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."

See also *United States v. Wrightwood Dairy Co.* (the commerce power "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power").

In *Wickard v. Filburn*, the Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of home-grown wheat. The *Wickard* Court explicitly rejected earlier distinctions between direct and indirect effects on interstate commerce, stating:

"[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 interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"

The *Wickard* Court emphasized that although *Filburn's* own contribution to the demand for wheat may have been trivial by itself, that was not "enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."

Jones & Laughlin Steel, *Darby*, and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also

reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.

In *Jones & Laughlin Steel*, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." * * *

Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.

Similarly, in *Maryland v. Wirtz*, the Court reaffirmed that "the power to regulate commerce, though broad indeed, has limits" that "[t]he Court has ample power" to enforce. In response to the dissent's warnings that the Court was powerless to enforce the limitations on Congress' commerce powers because "[a]ll activities affecting commerce, even in the minutest degree, [Wickard], may be regulated and controlled by Congress," the *Wirtz* Court replied that the dissent had misread precedent as "[n]either here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities," Rather, "[t]he Court has said only that where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence."

Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power.

First, Congress may regulate the use of the channels of interstate commerce. * * *

Second, 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.

Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce. * * *

* * * We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

We now turn to consider the power of Congress, in the light of this framework, to enact [Section] 922(q). The first two categories of authority may be quickly disposed of: 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce.

Thus, if 922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, McClung, inns and hotels catering to interstate guests, and production and consumption of home-grown wheat. These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

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. It was his practice to sow winter wheat in the fall, and after harvesting it in July to sell a portion of the crop, to feed part of it to poultry and livestock on the farm, to use some in making flour for home consumption, and to keep the remainder for seeding future crops. The Secretary of Agriculture assessed a penalty against him under the Agricultural Adjustment Act of 1938 because he harvested about 12 acres more wheat than his allotment under the Act permitted. The Act was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained. The Court said, in an opinion sustaining the application of the Act to Filburn's activity:

"One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce."

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.

Second, 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. * * *

Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, the Government concedes that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone."

We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

The Government argues that Congress has accumulated institutional expertise regarding the regulation of firearms through previous enactments. We agree, however, with the Fifth Circuit that importation of previous findings to justify 922(q) is especially inappropriate here because the "prior federal enactments or Congressional findings [do not] speak to the subject matter of section 922(q) or its relationship to interstate commerce. Indeed, section 922(q) plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation."

The Government's essential contention, in fine, is that we may determine here that 922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce.

The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe.

The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would

have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that 922(q) substantially affects interstate commerce.

We pause to consider the implications of the Government's arguments.

The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.

Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.

Under the theories that the Government presents in support of 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate. [My emphasis.]

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To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States [under the Tenth Amendment].

Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

[Before anyone cheers too much, it must be noted that the *Lopez* is but one of a handful of cases in which the Supreme Court, liberal and conservative justices alike, have ruled that Congress has gone too far in exercising its power under the Interstate Commerce Clause. Even Rehnquist in *Lopez* seems to accept the reasoning and outcome in *Wickard v. Filburn*.]