CONSIDER the following laws:

- The Sherman Anti-Trust Act, designed to outlaw monopolies that attempt to dominate particular industries and eliminate all competition.
- The Fair Labor Standards Act, aimed at ensuring that employers pay their employees fair wages and that employers do not force employees to work unreasonable numbers of hours.
- The Civil Rights Act of 1964, which prohibits certain forms of discrimination on the basis of race, color, religion, or national origin.

These three laws may cover different subjects, but they are alike in one important regard: Congress enacted them under its power “to regulate Commerce ... among the several States.”

Given the importance of these and the many other laws Congress has passed under its commerce power, it is no wonder that these few words have resulted in many controversies and substantial litigation. Concern over the exercise of the power to regulate commerce was present at the Constitution’s birth and continues today. At each stage of the nation’s development from a former colony isolated from the world’s commercial centers to a country wielding vast economic power, legal disputes of great significance tested the powers of government to regulate the economy. During certain periods, such as John Marshall’s chief justiceship, the decisions of the Supreme Court enhanced the role of the federal government in promoting economic development. At other times, however, such as the period immediately following the Great Depression, the Court’s interpretations thwarted the government’s attempts to overcome economic collapse. From the earliest days of the nation, battles over the commerce power have raised basic questions: What is commerce? What is commerce among the states (now called interstate commerce)? How do we distinguish interstate commerce from intrastate commerce? What does it mean to regulate? What powers of commercial regulation does the Constitution grant to the federal government, and what powers remain with the states?

Rather than address these questions individually, in this chapter we explore the development of the commerce power chronologically. We take this approach because, as we have just suggested, the Court has answered such questions in various ways in different eras, sometimes enhancing the federal government’s power and sometimes curtailing it. These phases tend to correspond to the cyclical debate between dual and cooperative federalism that we considered in Chapter 6 (see Table 6-2). Keep in mind, however, that at times justices who adopt the tools of the dual federalism approach—especially the Tenth Amendment and narrower approaches to defining interstate commerce—are more committed to an anti-regulation regime than they are to states’ rights.

FOUNDATIONS OF THE COMMERCE POWER

A primary reason for the Constitutional Convention was the inability of the government under the Articles of Confederation to control the country’s commercial activity effectively. Economic conditions were dismal following the Revolutionary War. The national and state
governments were deeply in debt. The tax base of the newly independent nation was minimal, and commerce was undeveloped, leaving property taxes and customs duties as the primary sources of government funds.

The states were almost exclusively in charge of economic regulation. To raise enough revenue to pay their debts, the states imposed substantial taxes on land, placing farmers in an economically precarious condition. The states also erected trade barriers and imposed duties on the importation of foreign goods. Although these policies were enacted in part to promote the states’ domestic businesses, the result was a general strangulation of commercial activity. Several states printed their own money and passed statutes canceling debts. With each of the states working independently, the national economy continued to slide into stagnation, and, for all practical purposes, the central government was powerless to respond effectively.

When agrarian interests reached their economic breaking point—culminating in the 1787 march on the federal arsenal at Springfield, Massachusetts, by a makeshift army of farmers led by Revolutionary War veteran Daniel Shays and others—it was clear that something had to be done. Congress called for a convention to reconsider the status of the Articles of Confederation, a convention that ultimately resulted in the drafting of the United States Constitution.

**Commerce and the Constitutional Convention**

The delegates to the Constitutional Convention recognized the necessity of giving the power to regulate the economy to the central government. The nation could no longer tolerate the individual states’ pursuit of independent policies, each having a different impact on the country’s economic health. To that end, Article I of the Constitution removed certain powers from the states and gave the federal government powers it did not have under the Articles of Confederation. States could not print money, impose the obligation of contracts, or tax imports or exports. The federal government obtained the authority necessary to impose uniform regulations for the national economy. Among the powers granted to the central government were the authority to tax and impose customs duties, to spend and borrow, to develop and protect a single monetary system, and to regulate bankruptcies. Most important was the authority to regulate interstate and foreign commerce. Article I, Section 8, states: “The Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

The need for Congress to speak for the nation with a single voice on these matters was clear to the framers. Even Alexander Hamilton and James Madison, who disagreed on many questions of federalism, were in accord on the necessity of the central government to control interstate and foreign commerce. Hamilton wrote in *Federalist Paper* No. 22:

> In addition to the defects already enumerated in the existing federal system, there are others of not less importance which concur in rendering it altogether unfit for the administration of the affairs of the Union.

The want of a power to regulate commerce is by all parties allowed to be of the number.

In *Federalist* No. 42 Madison took a similar position, arguing that the experience of the United States under the articles, as well as that of European countries, demonstrated that a central government without broad powers over the nation’s commerce was destined to fail. Congress quickly seized on the authority to regulate commerce with other nations. Almost immediately, it imposed import duties as a means of raising revenue. The constitutional grant in this area was clear: the power to regulate foreign commerce, as well as other matters of foreign policy, was given unambiguously to the national government, and the role of the states was eliminated. Since ratification, the states have challenged congressional supremacy over foreign commerce only on rare occasions.

The power to regulate interstate commerce, however, was a different story. Congress was slow in responding to this grant of authority, and federal officials continued to view business as an activity occurring within the borders of the individual states. In fact, Congress did not pass comprehensive legislation governing commerce among the states until the Interstate Commerce Act of 1887.

**Marshall Defines the Commerce Power**

The commerce clause gives Congress the power to “regulate Commerce . . . among the Several states.” But what do these terms—“regulate,” “commerce,” and “among”—mean? The history of the commerce clause is replete with disputes over definitions. Is “commerce”
limited to buying and selling goods, or is its meaning broad enough to include other activities, such as manufacturing and production? What about “among”? How should we distinguish interstate commerce, which, according to the Constitution, the federal government regulates, from intrastate commerce, over which the states may retain regulatory power? Problems associated with such distinctions were difficult enough in the early years, but they became even more complex as the economy grew and the country changed from agrarian to industrialized. As many constitutional law cases illustrate, disputes over commercial regulatory authority often involve power struggles between the national government and the states.

Disputes over the meaning of the commerce clause came to the Supreme Court even during the early years of nationhood. The justices probed the constitutional definition of “commerce” and the proper division of federal and state power to regulate it. Of the commerce cases decided by the Supreme Court in those early decades, none was more important than Gibbons v. Ogden (1824). This dispute involved some of the nation’s most prominent and powerful businessmen and attorneys. A great deal was at stake, both economically and politically. In his opinion for the Court, Chief Justice John Marshall responded to the fundamental problems of defining the power to regulate commerce among the states. His answers to the questions presented in this case are still very much a part of our constitutional fabric.

Gibbons v. Ogden
22 U.S. (9 Wheat.) 1 (1824)
https://caselaw.findlaw.com/us-supreme-court/22/1.html
Vote: 6 (Duvall, Johnson, Marshall, Story, Todd, Washington)
0

OPINION OF THE COURT: Marshall
CONCURRING OPINION: Johnson
NOT PARTICIPATING: Thompson

FACTS:
This complicated litigation can be traced back to 1798, when the New York legislature granted the wealthy and prominent Robert R. Livingston a monopoly to operate steamboats on all waters within the state, including the two most important commercial waterways, New York Harbor and the Hudson River. New York officials did not see the monopoly grant as particularly important because no one had yet developed a steamship that could operate reliably and profitably. Livingston, however, joined forces with Robert Fulton, and together they produced a commercially viable steamship. This
mode of transportation became extremely popular and very profitable for the partners. When they obtained a similar monopoly over the port of New Orleans in 1811, they had significant control over the nation's two most important harbors.

The rapid westward expansion taking place at that time fueled the need for modern transportation systems. The Livingston-Fulton monopoly, however, put a damper on the use of steam engines in the evolution of such a system. The New York monopoly was so strong and so vigorously enforced that retaliatory laws were enacted by other states, which refused to let steam-powered vessels from New York use their waters. Especially hostile relations developed between New York and New Jersey, and violence between the crews of rival companies became common. Livingston died in 1813, followed two years later by Fulton, but their monopoly lived on.

Aaron Ogden, a former governor of New Jersey, and Thomas Gibbons, a successful Georgia lawyer, entered into a partnership to carry passengers between New York City and Elizabethtown, New Jersey. Ogden had purchased the right to operate in New York waters from the Livingston-Fulton monopoly, and Gibbons had a federal permit issued under the 1793 Coastal Licensing Act to operate steamships along the coast. With these grants of authority the two partners could carry passengers between New York and New Jersey. The leaders of the New York monopoly, however, pressured Ogden to terminate his relationship with Gibbons and to join them. As a result, the Ogden-Gibbons partnership dissolved.

Gibbons then joined forces with Cornelius Vanderbilt, and they began a fierce competition with Ogden and the New York monopoly interests. Gibbons and Vanderbilt entered New York waters in violation of the monopoly whenever they could, picking up as much New York business as possible. In response, Ogden successfully convinced the New York courts to enjoin Gibbons from entering New York waters. Gibbons appealed this ruling to the U.S. Supreme Court.

To press their case, Gibbons and Vanderbilt acquired the services of two of the best lawyers of the day, William Wirt and Daniel Webster. Wirt, the attorney general of the United States, argued that the federal permit issued to Gibbons took precedence over any state-issued monopoly, and therefore Gibbons had the right to enter New York waters. Webster took a more radical position, explicitly stating that the commerce clause of the Constitution gave Congress near exclusive power over commerce and that the state-granted monopoly was a violation of that clause. Ogden’s lawyer responded that navigation was not commerce under the meaning of the Constitution but instead was an intra-state enterprise left to the states to regulate. The oral arguments in the case lasted four and a half days.

ARGUMENTS:

For the appellants, Thomas Gibbons:

- Although not all regulations that might affect commerce are exclusively in the power of Congress, the power exercised by the state in this case is a federal power that did not remain with the states in the Constitution.
- The power to regulate commerce is crucial to the nation’s well-being. In establishing the Constitution, the people understood this and transferred the commerce power from the states to the federal government so that a uniform and general system could be maintained. What is regulated here is not the commerce of the several states, respectively, but the commerce of the United States.
- The inevitable consequence of this analysis is that Congress may establish ferries and turnpikes and may regulate in other ways that touch the interior of states.

For the respondents, Aaron Ogden:

- The Constitution provides for limited and expressly delegated powers, which can be exercised only as granted, or in the cases enumerated. This principle, which distinguishes the national from the state governments, follows from the fact that the Constitution itself is a delegation of power, not a restriction of power previously possessed and from the express stipulation in the Tenth Amendment. The Constitution must be construed strictly with regard to the powers expressly granted. Every portion of power not granted must remain with the states.
- The practice of the states shows that the commerce power has always been considered concurrent. New York has passed numerous laws that are regulations of commerce with foreign nations, with other states, and with the Indian tribes. The state may exercise its power, so long as its laws do not interfere with any right exercised under the Constitution or laws of the United States.
• The commerce power is not only concurrent but also limited in Congress. It does not extend to the regulation of the internal commerce of any state because terms used in the grant of power are “among the several States.” Internal commerce is that which is carried on within the limits of a state.

• The state law does not even regulate commerce; it regulates internal trade and the right of navigation within a state. This belongs exclusively to the states, even though it incidentally may affect the right of intercourse between the states.

MR. CHIEF JUSTICE MARSHALL DELIVERED THE OPINION OF THE COURT.

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States.

They are said to be repugnant—

To that clause in the constitution which authorizes Congress to regulate commerce.

The words are, “Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”

The subject to be regulated is commerce; and our constitution being one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. 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 mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word “commerce,” to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word “commerce.”

Daniel Webster’s 1821 handwritten note to Cornelius Vanderbilt acknowledging receipt of a $500 retainer to represent Thomas Gibbons in the case of Gibbons v. Ogden.
To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has been universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

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 phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. 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. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.

This principle is, if possible, still more clear, when applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining States, commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. . .

We are now arrived at the inquiry—What is this power?

It 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. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.
The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness, that, although the power of Congress to regulate commerce with foreign nations, and among the several States, be co-extensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the States may severally exercise the same power, within their respective jurisdictions. In support of this argument, it is said, that they possessed it as an inseparable attribute of sovereignty, before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates, except the last, contends, that full power to regulate a particular subject, implies the whole power, and leaves no residuum, that a grant of the whole is incompatible with the existence of a right in another to any part of it. . . .

In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a State regulate commerce with foreign nations and among the States, while Congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the 10th section, as supporting their opinion. . . .

It has been contended by the general counsel for the appellant, that, as the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the Court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the Court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. . . .

But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it. . . .

But all inquiry into this subject seems to the Court to be put completely at rest, by the act already mentioned, entitled, "An act for the enrolling and licensing of steam boats."

This act authorizes a steam boat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.
This act demonstrates the opinion of Congress, that steam boats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a State inhibiting the use of either to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act.

Like his opinions in *Marbury* and *McCulloch*, Marshall’s opinion in *Gibbons* laid a constitutional foundation that remains in place today. The decision made several important points. First, commerce involves more than buying and selling; it also includes the commercial intercourse between nations and states, and therefore transportation and navigation clearly fall within the definition of commerce. Second, commerce among the states begins in one state and ends in another; it does not stop when the act of crossing a state border is completed. Consequently, commerce that occurs within a state may be part of a larger interstate process. Third, once an act is considered part of interstate commerce, Congress, according to the Constitution, may regulate it. The power to regulate interstate commerce is complete and has no limitation other than what may be found in other constitutional provisions. But note that Marshall rejects Ogden’s argument that the Tenth Amendment serves as such a limit. In line with his opinion in *McCulloch*, Marshall does not find that the amendment creates an “enclave” of state power. Instead, he emphasizes that Congress is limited to its delegated powers (see Chapter 6)—in this case, the power to regulate interstate commerce, however broadly defined. This brings us to the fourth point: because the text of the commerce clause limits congressional power to regulate commerce among the states, the power to regulate commerce that occurs completely within the boundaries of a single state and does not extend to or affect other states belongs to the states.

*Gibbons v. Ogden* was a substantial victory for national power. It broadly construed the terms *regulate*, “Commerce,” and “Commerce... among the several States” (or interstate commerce). But Marshall did not go as far as Daniel Webster had urged. The opinion asserts only that Congress has complete power to regulate interstate commerce and that federal regulations are superior to any state laws. The decision does not answer the question of the legitimacy of states regulating interstate commerce in the absence of federal action. That controversy was left for future justices to decide.

**ATTEMPTS TO DEFINE THE COMMERCE POWER IN THE WAKE OF THE INDUSTRIAL REVOLUTION**

Marshall provided a clear, if expansive, framework for the exercise of congressional commerce power, but the national legislature did not take immediate advantage of this broad interpretation of its authority. As a result, commerce clause cases did not become major items on the Supreme Court’s agenda until the second half of the nineteenth century. By that time, small intrastate businesses were giving way to large interstate corporations. Industrial expansion blossomed, and the interstate railroad and pipeline systems were well under way. The infamous captains of industry were creating large monopolistic trusts that dominated huge segments of the national economy, squeezing out small businesses and discouraging new entrepreneurs. The industrial combines that controlled the railroads also, in effect, ruled agriculture and other interests that relied on the rails to transport goods to market. This commercial growth brought great prosperity to some, but it also caused horrendous social problems. Children worked in sweatshops, and unsafe working conditions and low wages plagued employees of all ages, eventually leading to the formation of labor unions.

In light of these developments, Congress sought to exert some control over both the economic and the social concerns following from the rise of big business. To deal with the former, it passed several laws—aimed at regulating business practices—based in its commerce power. In the case of social problems, it began to make use of the commerce clause as a federal police power—that is, the government’s authority to regulate for the health, safety, morals, and general welfare of its citizens.

Critics immediately attacked Congress for exceeding its constitutional authority. Their primary argument was that the laws regulated intrastate activity, not “Commerce... among the several States,” and so Congress had overstepped its power; the regulation of intrastate activity was reserved to the states under the Tenth Amendment. In the social realm, they also
questioned whether laws motivated by morality considerations were an appropriate exercise of the commerce power and whether laws that prohibited particular kinds of activities—for example, shipping lottery tickets across state lines—fell within Congress’s power “to regulate” commerce.

In what follows, we consider the Court’s response to these arguments, beginning with the debate over intra- versus interstate commerce, and moving next to the use of commerce as a federal police power. As you read the cases, consider whether the developing doctrine was compatible with Marshall’s foundational decision in *Gibbons*.

**Defining Interstate Commerce**

As we just noted, in the wake of the rise of big business, Congress passed several laws based on its commerce power. Two are particularly notable: the Interstate Commerce Act of 1887, which established a mechanism for regulating the nation’s interstate railroads, and the Sherman Anti-Trust Act of 1890 (hereafter Sherman Act), which was designed to break up monopolies that restrained trade. Business interests challenged both, primarily on the ground that they were regulations not of interstate commerce, but rather of intrastate activity, which was the purview of the states, not Congress.

Even with Marshall’s decision in *Gibbons*, discriminating between inter- and intrastate commerce was not easy. The Supreme Court faced a significant number of appeals that asked the justices to clarify whether the national legislature had overstepped its bounds and regulated commerce that was purely intrastate. To say that the Court had difficulty developing a coherent doctrine is an understatement.

**Manufacturing and Its Relationship to Interstate Commerce.** The Court’s endorsement of the federal power to regulate transportation, navigation, and instruments of commerce did not extend initially to the attempts by Congress to impose effective antitrust legislation. The targets of the antitrust statutes were the monopolies that controlled basic industries and choked out all competition. During the late 1800s these trusts grew to capture and exercise dominance over many industries, including oil, meatpacking, sugar, and steel. The Sherman Act was Congress’s first attempt to break up these anticompetitive combines. It outlawed all contracts and combinations of companies that had the effect of restraining trade and commerce or eliminating competition.

For the antitrust law to be fully effective, however, its provisions had to cover the manufacturing and processing stages of commercial activity, which raised a serious constitutional problem. In earlier cases the Court had ruled that manufacturing was essentially a local activity and not part of interstate commerce. In *Veazie v. Moor* (1853), the Court had labeled it a far-reaching “pretension” to suggest that the federal power over interstate commerce extended to manufacturing. Later, in *Kidd v. Pearson* (1888), the Court took an even stronger stand. At issue was an Iowa statute that outlawed the production of alcoholic beverages. The law was challenged on the ground that the liquor being manufactured was intended for interstate shipment and sale, and consequently, the state was unconstitutionally regulating interstate commerce.

Speaking for the Court, Justice Lucius Q. C. Lamar rejected the attack, arguing,

> No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incident thereto constitute commerce.

Could the new antitrust law be applied to manufacturing? Or had Congress exceeded its constitutional authority in regulating production? These questions were answered in *United States v. E. C. Knight Co.* (1895), a battle over the federal government’s attempts to break up the sugar trust.

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**United States v. E. C. Knight Co.**

156 U.S. 1 (1895)


Vote: 8 (Brewer, Brown, Field, Fuller, Gray, Jackson, Shiras, White)

1 (Harlan)

**OPINION OF THE COURT: Fuller**

**DISSENTING OPINION: Harlan**

**FACTS:**

At the end of the nineteenth century, six companies dominated the American sugar refining industry. The
largest was American Sugar Refining Company, which had control of about 65 percent of the nation’s refining capacity. Four Pennsylvania refiners shared 33 percent of the market, and a Boston company had a scant 2 percent. In March 1892 American Sugar entered into agreements that allowed it to acquire the four Pennsylvania refineries, including E. C. Knight Company, giving it absolute control over 98 percent of the sugar refining business in the United States.

The federal government sued to have the acquisition agreements canceled. According to Justice Department attorneys, the sugar trust operated as a monopoly in restraint of trade in violation of the Sherman Act. Attorneys for American Sugar and the acquired companies held that the law did not apply to sugar refining because that activity is manufacturing subject to state, not federal, control.

E. C. Knight was the Court’s first antitrust case. The outcome was crucial to the government’s attempts to break up powerful monopolies. Some observers have charged that Attorney General Richard Olney failed to provide the best prosecution of the case. Olney was not a dedicated trustbuster; he had opposed the passage of the antitrust act and later worked for its repeal.¹

ARGUMENTS:

For the appellant, United States:

- The power to control the manufacturing of sugar is a monopoly over an important good, which cannot be enjoyed by most Americans unless it is shipped in interstate commerce. As a result, the federal government, in the exercise of its power to regulate commerce, may prohibit monopolies directly and set aside the instruments that have created them.

- The products of these refineries were sold and distributed among the states, therefore, all the companies were engaged in trade or commerce with several states and other nations.

For the appellee, E. C. Knight Co.:

- Congress’s commerce clause power does not extend to articles that are manufactured simply because they are manufactured with an intent to sell later to citizens of the same state or another. No article is part of trade or commerce, which can be regulated by Congress, until it is put in the way of transit. Congress can only regulate trade and commerce between the states (contracts to buy, sell, exchange goods to be transported, the actual transportation, and the instrumentalities of transportation). There is, in short, a distinction between manufacturing and commerce.

- If businesses agree that they will not transport goods from one state to another, they make a contract in restraint of trade between the states. If, however, they simply agree that they will not manufacture goods within a certain state, even if this results in no trade in the goods with other states, Congress cannot interfere because the agreement pertains to manufacturing, not commerce.

power to regulate it, it was left free except as Congress might impose restraints. Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States, and if a law passed by a State in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the State cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof; and that which is not supreme must yield to that which is supreme. “Commerce, undoubtedly, is traffic,” said Chief Justice Marshall, “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.” 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.

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessities of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rules by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in represson of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce.

It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedi-ents of even doubtful constitutionality.

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the States and belongs to commerce. This was so ruled in Coe v. Errol [1866], in which the question before the court was whether certain logs cut at a place in New Hampshire and hauled to a river town for the purpose of transportation to the State of Maine were liable to be taxed like other property in the State of New Hampshire. Mr. Justice Bradley, delivering the opinion of the court, said: “Does the owner’s state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. . . . There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the State of their origin to that of their destination.”

And again, in Kidd v. Pearson, where the question was discussed whether the right of a State to enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, could be overthrown by the fact that the manufacturer intended to export the liquors when made, it was held that the intent of the manufacturer did not determine the time when the article or product passed from the control of the State and belonged to commerce, and that, therefore, the statute, in omitting to except from its operation the manufacture of
intoxicating liquors within the limits of the State for export, did not constitute an unauthorized interference with the right of Congress to regulate commerce. . . .

Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy.

Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. 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.

It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States or their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. . . .

Decree affirmed.

MR. JUSTICE HARLAN, dissenting.

In my judgment, the citizens of the several States composing the Union are entitled of right, to buy goods in the State where they are manufactured, or in any other State, without being confronted by an illegal combination whose business extends throughout the whole country, which by the law everywhere is an enemy to the public interests, and which prevents such buying except at prices arbitrarily fixed by it. I insist that the free course of trade among the States cannot coexist with such combinations. When I speak of trade I mean the buying and selling of articles of every kind that are recognized articles of interstate commerce. Whatever improperly obstructs the free course of interstate intercourse and trade, as involved in the buying and selling of articles to be carried from one State to another, may be reached by Congress, under its authority to regulate commerce among the States. The exercise of that authority so as to make trade among the States, in all recognized articles of commerce, absolutely free from unreasonable or illegal restrictions imposed by combinations, is justified by an express grant of power to Congress and would redound to the welfare of the whole country. I am unable to perceive that any such result would imperil the autonomy of the States, especially as that result cannot be attained through the action of any one State.

Undue restrictions or burdens upon the purchasing of goods, in the market for sale, to be transported to other States, cannot be imposed even by a State without violating the freedom of commercial intercourse guaranteed by the Constitution. But if a State within whose limits the business of refining sugar is exclusively carried on may not constitutionally impose burdens upon purchases of sugar to be transported to other States, how comes it that combinations of corporations or individuals, within the same State, may not be prevented by the national government
from putting unlawful restraints upon the purchasing of that article to be carried from the State in which such purchases are made? If the national power is competent to repress State action in restraint of interstate trade as it may be involved in purchases of refined sugar to be transported from one State to another State, surely it ought to be deemed sufficient to prevent unlawful restraints attempted to be imposed by combinations of corporations or individuals upon those identical purchases; otherwise, illegal combinations of corporations or individuals may—so far as national power and inter-state commerce are concerned—do, with impunity, what no State can do. . . .

To the general government has been committed the control of commercial intercourse among the States, to the end that it may be free at all times from any restraints except such as Congress may impose or permit for the benefit of the whole country. The common government of all the people is the only one that can adequately deal with a matter which directly and injuriously affects the entire commerce of the country, which concerns equally all the people of the Union, and which, it must be confessed, cannot be adequately controlled by any one State. Its authority should not be so weakened by construction that it cannot reach and eradicate evils that, beyond all question, tend to defeat an object which that government is entitled, by the Constitution, to accomplish.

Chief Justice Melville Fuller’s opinion shows the initial development of the Court’s focus on the extent to which the various stages of business affect interstate commerce. Proponents of federal regulation often argued that if an intrastate economic activity—whether manufacturing and production or shipment and distribution—had any effect on interstate commerce, Congress could regulate it. The Supreme Court rejected this position in E. C. Knight. To the Court, commerce is different from manufacturing and production because “commerce succeeds to manufacture, and is not a part of it.” As a result, manufacturing affects interstate commerce only indirectly and Congress may not regulate it; rather, it is a local matter that is up to the states to regulate. Fuller’s comments also indicate his position that activities in such areas as agriculture and mining fall into the same regulatory category as manufacturing. Federal authority becomes activated only when the intrastate activity has a direct effect on interstate commerce. In the sugar trust case, Fuller concluded that the challenged monopoly of refining facilities had only an indirect effect on interstate commerce and therefore was not subject to federal regulation. While the distinction between direct and indirect effects could be interpreted various ways, conservative Courts continued to use it to strike down other federal regulatory attempts.

Although E. C. Knight removed manufacturing from the authority of the Sherman Act, it did not doom federal antitrust efforts. In fact, when the monopolistic activity was not manufacturing, the Court was quite willing to apply the law. For example, the Court held that companies engaged in production and interstate sale of pipe came under the sections of the Sherman Act. In 1904 the Court went even farther, ruling in Northern Securities Company v. United States that stock transactions creating a holding company (the result of an effective merger between the Northern Pacific and Great Northern Railroad companies) were subject to Sherman Act scrutiny. In spite of these applications of the antitrust law, E. C. Knight set an important precedent, declaring manufacturing to be outside the definition of interstate commerce. This ruling later would be extended, with serious repercussions, to bar many of the New Deal programs passed to combat the Great Depression. It was only at such a time of economic collapse that the wisdom expressed in Justice John Marshall Harlan [I]’s dissent in E. C. Knight became apparent: the federal government must be empowered to regulate economic evils that are injurious to the nation’s commerce and that a single state is incapable of eradicating.

The Shreveport Doctrine. The regulation of the railroads provided the Court an early opportunity to refine the definition of interstate commerce. The first railroads were small local operations regulated by the states, but as interstate rail systems developed, the justices held that their regulation was rightfully a federal responsibility.1 Congress responded by passing the Interstate Commerce Act of 1887, which created the Interstate Commerce Commission (ICC) to regulate railroads and set rates. The Court approved the constitutionality of the commission but later stripped it of its ability to set rates.2 In 1906 Congress revised the authority and procedures of the commission and reestablished its rate-setting power.

1 Addyston Pipe and Steel Co. v. United States (1899).
2 Wabash, St. Louis & Pacific Railway Co. v. Illinois (1886).

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The Court’s decision in *Houston, E. & W. Texas Railway Co. v. United States* (1914), better known as the *Shreveport Rate Case*, firmly established congressional power over the nation’s rails. This dispute arose from competition among three railroad companies to serve various cities in Texas. Two were based in Texas, one in Houston and the other in Dallas, and the third competitor operated out of Shreveport, Louisiana. The Texas Railroad Commission regulated the Texas companies because their operations were exclusively intrastate, but the Shreveport company came under the jurisdiction of the ICC. Difficulties arose when the Texas regulators set rates substantially lower than did the ICC. The motive behind these lower rates was clear: the Texas commission wanted to encourage intrastate trade and to discourage Texas companies from taking their business to Shreveport. These intrastate rates placed the Shreveport railroad at a distinct disadvantage in competing for the Texas market. In response, the ICC ordered the intrastate Texas rates to be raised to the interstate levels. When the commission’s authority to set intrastate rail rates was challenged, the Supreme Court ruled in favor of the ICC, articulating what became known as the Shreveport doctrine. The Court held that the federal government had the power to regulate intrastate commerce when a failure to regulate would cripple, retard, or destroy interstate commerce. According to Justice Charles Evans Hughes’s opinion for the Court,

The fact that [these] carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field.

It was clear to Hughes that the regulatory power of the federal government extends to those aspects of intrastate commerce that have such a close and substantial relation to interstate traffic that control is essential to protect the security and efficiency of interstate commerce.

*The Stream of Commerce Doctrine.* Government efforts to break up the meatpacking trust presented a different constitutional challenge. The corporations that dominated the meat industry, such as Armour, Cudahy, and Swift, ruled the nation’s stockyards, which stood at the throat of the meat-distribution process. Western ranchers sent their livestock to the stockyards to be sold, butchered, and packed for shipment to consumers in the East. Livestock brokers, known as commission men, received the animals at the stockyards and sold them to the meatpacking companies for the ranchers. Consequently, when the meatpacking trust acquired control of the stockyards and the commission men who worked there, it was in a position to direct where the ranchers sent their stock, fix meat prices, demand unreasonable rates for transporting stock, and decide when to withhold meat from the market. The government believed these actions constituted a restraint of trade in violation of the Sherman Act. The meatpackers argued that their control over the stockyards was an intrastate matter to be regulated by the states.

The Court settled the dispute in *Swift & Company v. United States* (1905), in which Justice Oliver Wendell Holmes held for a unanimous Court that the Sherman Act applied to the stockyards. The commercial sale of beef, the justice reasoned, began when the cattle left the range and did not terminate until final sale. The fact that the cattle stopped at the stockyards, midpoint in this commercial enterprise, did not mean that they were removed from interstate commerce. Holmes’s opinion develops what has become known as the “stream of commerce doctrine,” which allows federal regulation of interstate commerce from the point of its origin to the point of its termination. Interruptions in the course of that interstate commerce do not suspend the right of Congress to regulate. *Stafford v. Wallace*, an appeal based on another federal assault on the meatpacking combines, developed the doctrine more fully.

*Stafford v. Wallace*

258 U.S. 495 (1922)


Vote: 7 (Brandeis, Clarke, Holmes, McKenna, Pitney, Taft, Van Devanter)

1 (McReynolds)

**OPINION OF THE COURT:** Taft

**NOT PARTICIPATING:** Day
Armed with the *Swift & Company* precedent, Congress in 1921 passed the Packers and Stockyard Act. This legislation attempted to go beyond antitrust considerations in regulating the meatpacking industry. In addition to making it unlawful for the packers to fix prices or engage in monopolistic practices, the law forbade meatpackers in interstate commerce to engage in any unfair, discriminatory, or deceptive practices. It required all stockyard dealers and commission men to register with the secretary of agriculture. The transactions at the stockyards had to conform to a schedule of charges open for public inspection. Fees and charges could be changed only after ten days’ notice to the secretary. Congress delegated to the Agriculture Department the authority to make rules and regulations to carry out the act, set stockyard rates, and prescribe record-keeping procedures for stockyard officials.

Stafford and Company, a corporation engaged in commercial transactions of cattle, sued Secretary of Agriculture Henry Wallace, asking the courts to enjoin his enforcement of the act. The lower court refused to issue the requested injunction, and the company appealed.

**FACTS:**

For the appellants, T. F. Stafford et al.

The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other. Expenses and so on. If Congress can regulate these activities—that is, all the incidents connected with that commerce—the entire sphere of mercantile activity would exclude state control over contracts and commerce that are purely domestic in their nature.

For the appellees, Henry Wallace, secretary of agriculture, et al.

- Various Court decisions have established the power of Congress to regulate all instrumentalities by which interstate commerce is carried on or conducted. The appellant’s business, which offers terminal facilities at one of the world’s largest livestock markets, is embraced within those instrumentalities of interstate commerce just as if it were an integral part of a great railroad system.

- The question here is not whether the appellants should be covered by the Packers and Stockyard Act by judicial interpretation but whether Congress had the power to designate them and their transactions as part of the “current of commerce” and therefore covered by the act. The answer is yes because they form as much a part of the “current of commerce” as the railroads or the stockyards company. See *Swift*. The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.

**ARGUMENTS:**

For the appellants, T. F. Stafford et al.

- The lower court’s decision rests on the following syllogism: “the stockyards themselves are instrumentalities of interstate commerce,” and the dealers in livestock at the yards are “engaged in or participating in that commerce within the stockyards”; accordingly, the dealers are engaged in interstate commerce, which Congress can regulate. Both the premise and conclusion are wrong. The dealers are not engaged in “commerce within the stockyards.” They buy and sell livestock for others, which is something separate and distinct from interstate commerce. It is not affected by whether the shipment originates within the state or out of state. The transportation ceases when the livestock reaches the stockyards, and it does not begin again, if ever, until after the services of appellants have been fully performed.

- If the appellants are engaged in interstate commerce solely because they perform a service concerning livestock that may be shipped in interstate commerce, so too are the men who feed the cattle, and the packers and commission dealers, on the one hand, and the packers and dealers on the other.
incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce.

The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another. Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow: they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to its continuity. The origin of the live stock is in the West, its ultimate destination known to, and intended by, all engaged in the business is in the Middle West and East either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce.

The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion. Nor is there any doubt that in the receipt of live stock by rail and in their delivery by rail the stockyards are an interstate commerce agency. The only question here is whether the business done in the stockyards between the receipt of the live stock in the yards and the shipment of them therefrom is a part of interstate commerce, or is so associated with it as to bring it within the power of national regulation. A similar question has been before this court and had great consideration in *Swift & Co. v. United States*. The judgment in that case gives a clear and comprehensive exposition which leaves to us in this case little but the obvious application of the principles there declared.

The application of the commerce clause of the Constitution in the *Swift Case* was the result of the natural development of interstate commerce under modern conditions. It was the inevitable recognition of the great central fact that such streams of commerce from one part of the country to another which are ever flowing are in their very essence the commerce among the States and with foreign nations which historically it was one of the chief purposes of the Constitution to bring under national protection and control. This court declined to defeat this purpose in respect of such a stream and take it out of complete national regulation by a nice and technical inquiry into the noninterstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part.

The principles of the *Swift Case* have become a fixed rule of this court in the construction and application of the commerce clause.

Of course, what we are considering here is not a bill in equity or an indictment charging conspiracy to obstruct interstate commerce, but a law. The language of the law shows that what Congress had in mind primarily was to prevent such conspiracies by supervision of the agencies which would be likely to be employed in it. If Congress could provide for punishment or restraint of such conspiracies after their formation through the Anti-Trust Law as in the *Swift Case*, certainly it may provide regulation to prevent their formation.

As already noted, the word "commerce" when used in the act is defined to be interstate and foreign commerce. Its provisions are carefully drawn to apply only to those practices and obstructions which in the judgment of Congress are likely to affect interstate commerce prejudicially. Thus construed and applied, we think the act clearly within congressional power and valid.

Other objections are made to the act and its provisions as violative of other limitations of the Constitution, but the only one seriously pressed was that based on the Commerce Clause and we do not deem it necessary to discuss the others.

The orders of the District Court refusing the interlocutory injunctions are

*Affirmed.*
The stream of commerce precedents set in the *Swift* and *Stafford* stockyards cases were applied later to other regulatory schemes. Most notable was *Chicago Board of Trade v. Olsen* (1923), which brought the grain exchanges under the rubric of interstate commerce. Such decisions broadened the power of the federal government to control the economy.

But, we hasten to note, the Court continued to find that certain commercial activities exerted too little direct impact on interstate commerce to justify congressional control. The most prominent among these were manufacturing and processing. The 1895 sugar trust case of *E. C. Knight* established this principle, and the Court reinforced it in numerous decisions over the next three decades.

## Regulating Commerce as a Federal Police Power

Challenging laws as regulating intrastate, not interstate, commerce was only one approach taken to resist federal regulatory efforts during this period. Business interests also attacked certain kinds of laws as being beyond the congressional commerce power on the ground that they regulated morality and not commerce. They claimed that Congress was inappropriately using the commerce clause as a federal police power. The term *police power* refers to the general authority of a government to regulate for the health, safety, morals, and general welfare of its citizens. The states possessed general police powers prior to the adoption of the federal Constitution and retained them when the national government was created. Consequently, states may pass laws for the general welfare without any specific grant of power to do so. As long as the legislation does not run afoul of specific constitutional limitations (such as the Bill of Rights), the states are free to act.

The federal government, on the other hand, is a government of delegated powers. It does not possess any general police power. For an act of Congress to be valid, it must rest on a specific grant of authority—for example, an enumerated, implied, or inherent power. Madison described the situation aptly in *Federalist* No. 45: the “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.”

Consider prostitution, which was at issue in *Hoke v. United States* (1913). Based on its police powers, a state could pass legislation outlawing prostitution without any justification necessary. The federal government, however, could pass such a law only if Congress could justify it as an exercise of a delegated power. Consequently, we have the dispute in *Hoke* over whether a law making it a criminal violation to take “any woman or girl” across state lines “for the purpose of prostitution or debauchery, or for any other immoral purpose” was a valid exercise of the power to regulate interstate commerce.

So, while most of the battles over the meaning of interstate commerce have been largely economic—*Gibbons* and *E. C. Knight* provide examples—*Hoke* illustrates that the regulation of commerce can be structured in a way that affects matters of health, safety, and morals. But are regulations of this sort constitutional? Congress framed the law at issue in *Hoke*, known as the Mann Act, as an exercise of its commerce power. But the legislators may have been motivated by moral, rather than commercial, considerations. Is this an appropriate exercise of the commerce power? May Congress legitimately use the commerce clause as a means of exercising an authority at the national level similar to the states’ police powers? A related consideration is that many of these laws, including the Mann Act, prohibit particular activities. Are “prohibition” regulations within the meaning of the commerce clause?

Marshall’s opinion in *Gibbons* is suggestive. Recall his words: “Th[e] [commerce] 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.” In other words, if an activity falls under the definition of commerce among the states, then Congress has the right to regulate it as long as the regulation does not violate a constitutional limitation (such as the First Amendment). The commerce clause itself imposes no limitations on the motivations for such legislation.

Would subsequent Courts agree? *Champion v. Ames* provides an initial response. The case demonstrates, first, that the power to “regulate” commerce includes the power to *prohibit* certain activities. It also shows how Congress can use the commerce power to depress certain activities it deems unacceptable. This goal is much different from those that are present when Congress regulates commerce for economic reasons.

As you read Justice John Marshall Harlan’s opinion for the Court, notice the expansive terms he uses to describe the commerce power. Does he convince you that Congress can use the commerce clause to include the power to prohibit what Congress thought was an immoral trade? The four dissenters did not think so. They argued that Congress was not regulating commerce at all; instead, it was trying to prohibit lotteries, a matter for the police powers of the state to address.
## Champion v. Ames

188 U.S. 321 (1903)


Vote: 5 (Brown, Harlan, Holmes, McKenna, White)

4 (Brewer, Fuller, Peckham, Shiras)

**OPINION OF THE COURT:** Harlan

**DISSENTING OPINION:** Fuller

### FACTS:

In 1895 Congress passed a statute prohibiting lottery tickets from being imported from abroad, transported across state lines or sent through the mail. United States Marshal John Ames arrested Charles Champion in Chicago on charges that he had arranged for a shipment of lottery tickets, supposedly printed in Paraguay, to be transported from Texas to California by Wells Fargo. When federal authorities attempted to transport Champion to Texas to stand trial on the charges, he filed for a writ of habeas corpus challenging his arrest. He alleged that Congress acted unconstitutionally when it passed the lottery ticket law.

### ARGUMENTS:

**For the appellant, Charles Champion:**

- The power to regulate lotteries, and to permit or prohibit the sale of lottery tickets, is exclusively a police power reserved to the states. The suppression of lotteries is not an exercise of any power the Constitution commits to Congress and so violates the Tenth Amendment.

- The law can be sustained only as an exercise of the commerce power. But it is not a regulation of commerce; it is a suppression of an alleged evil. Sending lottery tickets is not a transaction within the scope of the commerce power. And it cannot be doubted that the intention and purpose of Congress was to suppress lotteries.

- Although the law may be necessary to suppress lotteries, it has no relation to interstate commerce and, therefore, is not “necessary and proper for carrying into execution” the power to regulate commerce among the states.

**For the appellee, John C. Ames, U.S. marshal:**

- Lottery tickets are articles of commerce in the sense that they are things that are the subjects of barter and sale.

- Whether an article is or is not an article of commerce is dependent not on its noxiousness or usefulness, nor on whether the states have prohibited it within their borders in the exercise of their police power, but on whether such articles have been, in the ordinary and usual channels of trade, the subjects of purchase and sale. Any article that people buy or sell is an article of commerce and comes under the power of Congress when its exchange is interstate.

- The power to prohibit is absolute, and the legislature is the final judge of the wisdom of its exercise.

**MR. JUSTICE HARLAN DELIVERED THE OPINION OF THE COURT.**

What is the import of the word “commerce” as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one State to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several States include something more? Does not the carrying from one State to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified also constitute commerce among the States? . . .

The leading case under the commerce clause of the Constitution is Gibbons v. Ogden. Referring to that clause, Chief Justice Marshall said: "... 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. These are expressed in plain terms, and do not affect the questions which arise in this case or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." . . .

... [P]rior adjudications . . . sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. They show that commerce among the States embraces...
navigation, intercourse, communication, traffic, the transit of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject only to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed.

We come then to inquire whether there is any solid foundation upon which to rest the contention that Congress may not regulate the carrying of lottery tickets from one State to another, at least by corporations or companies whose business it is, for hire, to carry tangible property from one State to another.

We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States.

It is to be remarked that the Constitution does not define what is to be deemed a legitimate regulation of interstate commerce. In Gibbons v. Ogden it was said that the power to regulate such commerce is the power to prescribe the rule by which it is to be governed. But this general observation leaves it to be determined, when the question comes before the court, whether Congress in prescribing a particular rule has exceeded its power under the Constitution. While our Government must be subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another.

The whole subject is too important, and the questions suggested by its consideration are too difficult of solution to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that under its power to regulate commerce among the several States Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has
The naked question is whether the prohibition by Congress of the carriage of lottery tickets from one State to another by means other than the mails is within the powers vested in that body by the Constitution of the United States. That the purpose of Congress in this enactment was the suppression of lotteries cannot reasonably be denied. That purpose is avowed in the title of the act, and is its natural and reasonable effect, and by that its validity must be tested.

The power of the State to impose restraints and burdens on persons and property in conservation and promotion of the public health, good order and prosperity is a power originally and always belonging to the States, not surrendered by them to the General Government nor directly restrained by the Constitution of the United States, and essentially exclusive, and the suppression of lotteries as a harmful business falls within this power, commonly called of police.

It is urged, however, that because Congress is empowered to regulate commerce between the several States, it, therefore, may suppress lotteries by prohibiting the carriage of lottery matter. Congress may indeed make all laws necessary and proper for carrying the powers granted to it into execution, and doubtless an act prohibiting the carriage of lottery matter would be necessary and proper to the execution of a power to suppress lotteries; but that power belongs to the States and not to Congress. To hold that Congress has general police power would be to hold that it may accomplish objects not entrusted to the General Government, and
Congress passed the Mann Act, as we mentioned earlier, as a method of curtailing interstate prostitution rings (1918). In the case of *Hammer v. Dagenhart* (1918), the Supreme Court upheld the commerce clause to prohibit taking women across state lines for purposes of prostitution or other immoral activities. In 1906 Congress passed the Meat Inspection Act and the Pure Food and Drug Act, which prohibited contaminated foods from interstate commerce. Five years later the Supreme Court upheld the Food and Drug Act as a proper exercise of the commerce power. In 1910, as a method of curtailing interstate prostitution rings, Congress passed the Mann Act, as we mentioned earlier. In *Hoke* the Court unanimously ruled that the federal government has the authority under the commerce clause to prohibit taking women across state lines for purposes of prostitution or other immoral activities. In addition, Congress passed various laws that federalized criminal activity that extends beyond the boundaries of a single state. Kidnapping that crosses state lines, interstate transportation of stolen property, and even interstate flight to avoid prosecution are all federal crimes because of Congress’s power to regulate commerce among the states.

And yet, just when it seemed that the Court would continue to allow Congress to develop federal police powers via the commerce clause, it dealt Congress a significant blow in the case of *Hammer v. Dagenhart* (1918).

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**Hammer v. Dagenhart**

247 U.S. 251 (1918).


Vote: B (Day, McReynolds, Pitney, Van Devanter, White)

A (Brandeis, Clarke, Holmes, McKenna)

**OPINION OF THE COURT: Day**

**Dissenting Opinion: Holmes**

**FACTS:**

In the 1880s America entered the industrial age, which was characterized by the unfettered growth of the private-sector economy. The Industrial Revolution changed the United States for the better in countless ways, but it also had a downside. Lacking any significant government controls, many businesses had less-than-benevolent relations with their workers. Some forced employees to work more than fourteen hours a day at absurdly low wages and under dreadful conditions. They also had no qualms about employing children under the age of sixteen.

Americans were divided over these practices. On one side were the entrepreneurs, stockholders, and others who gained from worker exploitation: By employing children, paying low wages, and providing no benefits, they minimized expenses and maximized profits. On the other side were the progressives, reformist groups, and individuals who sought to persuade the states and the federal government to enact laws to protect workers. These two camps repeatedly clashed in their struggle to attain diametrically opposed policy ends.

One of the first battles came in 1915, when Congress began consideration of a bill to prohibit the shipment in interstate commerce of factory products made by children under the age of fourteen or by children ages fourteen to sixteen who worked more than eight hours a day. Numerous progressive groups supported the legislation, but it faced substantial opposition from employer associations such as the Executive Committee of Southern Cotton Manufacturers. This group was made up of militant mill owners who organized in 1915 solely to defeat federal child labor legislation. After months of legislative battles, Congress finally passed the legislation, known as the *Keating-Owen Child Labor Act of 1916*. The committee’s leader, David Clark, vowed that his group would challenge the constitutionality of the act in court. He retained the services of a corporate law firm that held a laissez-faire philosophy to argue the committee’s case. He then sought the right test case to challenge the law. Eventually, he decided on a suit against the Fidelity Manufacturing Company.

The case he brought was perfect for the committee’s needs. Roland Dagenhart and his two minor sons were employed at Fidelity, a cotton mill in North Carolina. Under state law, each of Dagenhart’s sons was permitted to work up to eleven hours a day. Under the new federal

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Footnotes:


We detail additional arguments below.

Those between the ages of fourteen and sixteen to work.

No age limit on factory employees, and only ten allowed

ers. His brief pointed out that only three states placed

eliminate the exploitation of young children by employ-

data indicating that the states themselves had sought to

Congress’s purview, but he also supplied the Court with

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eliminate the exploitation of young children by employ-

ers. His brief pointed out that only three states placed

no age limit on factory employees, and only ten allowed

those between the ages of fourteen and sixteen to work.

We detail additional arguments below.

ARGUMENTS:

For the appellant, William C. Hammer, U.S. attorney:

• The commerce clause authorizes Congress to
  “regulate commerce among the several states.”
  Here, the statute is clearly a regulation, and
  it applies only to the actual transportation of
  products out of state, not to the intrastate activity
  of manufacturing. Supreme Court precedent has
  established that transportation of goods is clearly
  within the meaning of “commerce.” Therefore, the
  statute is wholly within the bounds of congressional
  commerce power.

• Unfair competition concerns also justify the act.
  States cannot limit child labor without raising the
  costs of manufacturing within their borders, which
  puts them at an economic disadvantage. The federal
government is the only body that is able to enact a
uniform law to prevent business practices that lead
to unfair competition.

• The question of states’ rights is irrelevant if
  the statute is found to be a valid exercise of
  congressional power under the commerce clause.

For the appellee, Roland Dagenhart:

• In their writings, the framers made clear that
  the purpose of the commerce clause was not to
  grant a positive power to the federal government. Rather,
  it was viewed as a provision designed to prevent
  injustices committed in commerce by the states.

• Legislative history shows that the purpose of the act
  is to prevent child labor, not to protect or promote
  commerce. Congress is attempting to regulate the
  pretransportation conditions of labor, not the actual
  transportation of the goods. That is beyond the
  scope of the commerce clause, and Congress may
  not do indirectly what it is prohibited to do directly.

• Any consequences of child labor are local, so they
  may be regulated only by the state. The Tenth
  Amendment reserves the right to exercise police
  power over intrastate matters to the states.

MR. JUSTICE DAY DELIVERED THE OPINION OF THE COURT.

It is . . . contended that the authority of Congress may be
exercised to control interstate commerce in the shipment of
child-made goods because of the effect of the circulation
of such goods in other states where the evil of this class
of labor has been recognized by local legislation, and the
right to thus employ child labor has been more rigorously
restrained than in the state of production. In other words,
that the unfair competition thus engendered may be con-
trolled by closing the channels of interstate commerce to
manufacturers in those states where the local laws do not
meet what Congress deems to be the more just standard
of other states.

There is no power vested in Congress to require the
states to exercise their police power so as to prevent pos-
sible unfair competition. Many causes may co-operate to
give one state, by reason of local laws or conditions, an
economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. In some of the states laws have been passed fixing minimum wages for women; in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in the use in other states and approved by Congress.

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the 10th Amendment to the Constitution. . . .

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every state in the Union has a law upon the subject, limiting the right to thus employ children. In North Carolina, the state wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

. . . The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the nation by the Federal Constitution.

In interpreting the Constitution it must never be forgotten that the nation is made up of states, to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government. To sustain this statute would not be, in our judgment, a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.

We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations, and not by an invasion of the powers of the states. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution.

In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states—a purely state authority. Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the Federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters intrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.

For these reasons we hold that this law exceeds the constitutional authority of Congress. It follows that the decree of the District Court must be affirmed.

MR. JUSTICE HOLMES, dissenting.

The act does not meddle with anything belonging to the states. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the states, but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the states. Instead of being encountered by a prohibitive tariff at her boundaries, the state encounters the public policy of the United States which it is for Congress to express. The
public policy of the United States is shaped with a view to the benefit of the nation as a whole. . . . The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

If William Day’s opinion was a total victory for the Executive Committee, it meant little to the Dagenharts (see Box 7-1). More important is what it meant for congressional power under the commerce clause. First, it perpetuated that distinction drawn in E. C. Knight between the manufacturing and the production of goods, which the Court regarded as intrastate commerce and therefore to be regulated only by the states, and their shipment in interstate commerce, which Congress could regulate. In Hammer the Court saw the law as a regulation of the manufacturing stage rather than a regulation of interstate commerce. Seen in this way, some say the decision was not so much a rejection of the power of Congress to regulate social matters as it was a reminder that the justices would treat these types of laws in the way they did the Anti-Trust Law at issue in E. C. Knight: Congress must show that it is not regulating manufacturing or production. On the other hand, Day seemed to reprimand Congress for using the commerce power to invade state police power. As he wrote, “The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.” This is related to another striking aspect of Hammer: the Court’s use of the Tenth Amendment as, seemingly, an independent brake on the commerce power.

**THE SUPREME COURT AND THE NEW DEAL**

The Supreme Court’s related moves of narrowing the definition of commerce and invoking the Tenth Amendment in E. C. Knight and Hammer probably reflected less a
commitment to states’ rights than a willingness on the part of the Court to embrace a free enterprise philosophy. If so, this matched the general mood of the public, as at least some Americans were benefiting so much from the economic boom of the 1920s that they opposed regulation. Calvin Coolidge famously put it this way: “After all, the chief business of the American people is business.”

This changed almost overnight when the New York Stock Exchange crashed on October 29, 1929. The crash set in motion a series of events that shook the American economy and drove the nation into a deep depression. For the next two years, the stock market continued to tumble, with the Standard & Poor’s Industrial Average falling 75 percent. The gross national product declined 27 percent over three years, and the unemployment rate rose from a healthy 3.2 percent in 1929 to a catastrophic 24.9 percent in 1933.

The Republican Party, which had been victorious in the November 1928 elections, controlled the White House and both houses of Congress. The party attempted to cope with the Great Depression by adhering to the laissez-faire philosophy of government that it had followed prior to the stock market crash, but that approach was no longer working; the economic forces against which the Republicans were fighting were enormous. A different political approach was necessary to battle the collapse, and the American people were demanding such a change. They got it, as we detail in this section, with the election of a Democratic president and Congress in the 1932 elections.

Although some of the Court’s decisions, such as Swift and Stafford, seemed to give the government more power to regulate the economy, others, such as E. C. Knight and Hammer, were obstacles, limiting Congress’s ability to cope effectively with a full-scale economic collapse. And at least initially the justices of the Supreme Court were unwilling to remove them. This situation touched off one of history’s most dramatic confrontations between the Court and the president, and it permanently altered the allocation of government powers.

The Depression and Political Change

In the 1932 presidential election, voters rejected incumbent Herbert Hoover and swept Democratic candidate Franklin Roosevelt into office by a huge margin. With new Democratic majorities in the House and the Senate, the president began combating the Depression with policies he called the New Deal. The overwhelming Democratic margins in Congress gave Roosevelt all the political clout he needed to gain approval of his radical new approach to boosting the economy. His programs were so popular with the American people that in 1936 they reelected Roosevelt by an even greater margin and provided him with even larger Democratic majorities in Congress, reducing the Republicans almost to minority status. Clearly, the severe economic events following the 1929 crash triggered substantial political change, with the legislative and executive branches experiencing wholesale partisan shifts (see Figure 7-1).

The U.S. Supreme Court, however, did not change. In 1929, just before the stock market crash, the Court membership was six Republicans and three Democrats. The economic conservatives (Pierce Butler, James McReynolds, Edward T. Sanford, George Sutherland, William Howard Taft, and Willis Van Devanter) were in control, outnumbering the justices more sympathetic to political and economic change (Louis D. Brandeis, Holmes, and Harlan Fiske Stone). By 1932 the Court had three new justices. Former justice Charles Hughes, who had resigned his seat in 1916 to seek the presidency, succeeded Taft as chief justice; Benjamin Cardozo took Holmes’s seat; and Owen J. Roberts replaced Sanford. Although these changes reduced the Republican majority to five, it created no appreciable change in the ideological balance of the Court. Hoover filled all three of these vacancies, which occurred before Roosevelt took office. Inaugurated in March 1933, Roosevelt had no opportunity to name a Supreme Court justice until Van Devanter retired in June 1937. Roosevelt’s first appointment, Hugo Black, assumed his seat in August of that year. Not until 1940 did the Court have a majority appointed from the period after Roosevelt’s first election.

In the executive branch, however, Roosevelt was able to assemble a cadre of young, creative people to devise novel ways of approaching the ailing economy, and these New Deal Democrats quickly set out to develop, enact, and implement their programs. Congress passed the first legislation, the Emergency Banking Act of 1933, just five days after Roosevelt’s inauguration, and a string of statutes designed to control all major sectors of the nation’s economy followed (see Box 7-2). In adopting these programs, Congress relied on a number of constitutional powers, including the powers to tax, spend, and regulate interstate and foreign commerce.

The new political majority that dominated the legislative and executive branches called for the government to take an active role in economic regulation. The Supreme Court remained firmly in the control of representatives of the old order, with views on the relationship
Figure 7-1  The Great Depression and Political Change

![Bar chart showing changes in political representation from 1929 to 1937 in the House of Representatives, Senate, and Supreme Court.]

Note: These data depict the change in political representation in the three branches of the federal government following the 1929 stock market crash and the deepening depression that continued over the next several years. Members of the House and one-third of the senators were elected the previous November. The data on presidential election margins are based on the previous November’s elections. Supreme Court information is as of January of the designated years.

of government and the economy at odds with those of the political branches. A clash between the president and the Court was inevitable.

The Court Attacks the New Deal

As soon as the New Deal programs came into being, conservative business interests began to challenge their constitutional validity. In just two years the appeals started to reach the Court’s doorstep. Beginning in 1935 and lasting for two long, tense years, the Court and the New Deal Democrats fought over the constitutionality of an expanded federal role in managing the economy.

During this period, the justices struck down a number of important New Deal statutes. Of ten major programs, the Supreme Court approved only two—the Tennessee Valley Authority and the emergency monetary laws. Four hard-line conservative justices—Butler, McReynolds, Sutherland, and Willis Van Devanter—formed the heart of the Court’s opposition. Many observers thought their obstruction of New Deal initiatives would bring about the nation’s ruin. As a consequence, they became known as the Four Horsemen of the Apocalypse, a biblical reference to the end of the world in the Book of Revelation. Two of the four, Butler and McReynolds, were Democrats (see Box 7-3).
BOX 7-2
New Deal Legislation

THE Roosevelt Democrats moved on the nation’s economic problems with great speed after the president took the oath of office on March 4, 1933. Listed below are the major economic actions passed during Roosevelt’s first term. Note how many were enacted within the first one hundred days of the new administration.

March 9, 1933  Emergency Banking Act
March 31, 1933  Civilian Conservation Corps created
May 12, 1933  Agricultural Adjustment Act
May 12, 1933  Federal Emergency Relief Act
May 18, 1933  Tennessee Valley Authority created
June 5, 1933  Nation taken off gold standard
June 13, 1933  Home Owners Loan Corporation created
June 16, 1933  Federal Deposit Insurance Corporation created
June 16, 1933  Farm Credit Administration created
June 16, 1933  National Industrial Recovery Act
January 30, 1934  Dollar devalued
June 6, 1934  Securities and Exchange Commission authorized
June 12, 1934  Reciprocal Tariff Act
June 19, 1934  Federal Communications Commission created
June 27, 1934  Railroad Retirement Act
June 28, 1934  Federal Housing Administration authorized
April 8, 1935  Works Progress Administration created
July 5, 1935  National Labor Relations Act
August 14, 1935  Social Security Act
August 26, 1935  Federal Power Commission created
August 30, 1935  National Bituminous Coal Conservation Act
February 19, 1936  Soil Conservation and Domestic Allotment Act

BOX 7-3
The Four Horsemen

Willis Van Devanter (1910–1937)

James Clark McReynolds (1914–1941)

George Sutherland (1922–1938)

Pierce Butler (1922–1939)
**BOX 7-4**

**The Supreme Court and the New Deal**

Listed below are eight major decisions handed down by the Supreme Court in 1935 and 1936 declaring parts of the New Deal legislative program unconstitutional.

<table>
<thead>
<tr>
<th>Case (Decision Date)</th>
<th>Acts Ruled Unconstitutional (Grounds)</th>
<th>Majority</th>
<th>Dissent</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Panama Refining Co. v. Ryan</em> (January 7, 1935)</td>
<td>Portions of the National Industrial Recovery Act (improper delegation of congressional powers)</td>
<td>Brandeis, Butler, Hughes, McReynolds, Roberts, Stone, Sutherland, Van Devanter</td>
<td>Cardozo</td>
</tr>
<tr>
<td><em>Railroad Retirement Board v. Alton Railroad Co.</em> (May 6, 1935)</td>
<td>Railroad Retirement Act of 1934 (exceeded commerce clause powers; Fifth Amendment due process violations)</td>
<td>Butler, McReynolds, Roberts, Sutherland, Van Devanter</td>
<td>Brandeis, Cardozo, Hughes, Stone</td>
</tr>
<tr>
<td><em>A. L. A. Schechter Poultry Corp. v. United States</em> (May 27, 1935)</td>
<td>Portions of the National Industrial Recovery Act (a regulation of intrastate commerce and improper delegation of congressional power)</td>
<td>Brandeis, Butler, Cardozo, Hughes, McReynolds, Roberts, Stone, Sutherland, Van Devanter</td>
<td></td>
</tr>
<tr>
<td><em>Hopkins Savings Association v. Cleary</em> (December 12, 1935)</td>
<td>Home Owners Loan Act of 1933 (Tenth Amendment)</td>
<td>Brandeis, Butler, Cardozo, Hughes, McReynolds, Roberts, Stone, Sutherland, Van Devanter</td>
<td></td>
</tr>
<tr>
<td><em>United States v. Butler</em> (January 6, 1936)</td>
<td>Agricultural Adjustment Act (taxing and spending power violations)</td>
<td>Butler, Hughes, McReynolds, Roberts, Sutherland, Van Devanter</td>
<td>Brandeis, Cardozo, Stone</td>
</tr>
<tr>
<td><em>Carter v. Carter Coal Co.</em> (May 18, 1936)</td>
<td>Bituminous Coal Conservation Act (a regulation of intrastate commerce; improper delegation of congressional power)</td>
<td>Butler, McReynolds, Roberts, Sutherland, Van Devanter</td>
<td>Brandeis, Cardozo, Hughes, Stone</td>
</tr>
<tr>
<td><em>Ashton v. Cameron County District Court</em> (May 25, 1936)</td>
<td>Municipal Bankruptcy Act (Tenth Amendment; Fifth Amendment property rights)</td>
<td>Butler, McReynolds, Roberts, Sutherland, Van Devanter</td>
<td>Brandeis, Cardozo, Hughes, Stone</td>
</tr>
</tbody>
</table>
Naturally, these four justices by themselves could not declare void any act of Congress. They needed the vote of at least one other justice. As Box 7–4 indicates, they had little trouble attracting others to their cause. Of the eight major 1935–1936 decisions in which they struck down congressional policies, three were by 5–4 votes in which Justice Roberts joined the four conservatives. In one additional case, both Roberts and Chief Justice Hughes voted with them. But in three of these significant decisions, the Court was unanimous, with even the liberals, Brandeis, Cardozo, and Stone, voting to strike down the challenged legislation.

The first salvo in the war between the two branches occurred on January 7, 1935, when the Court announced its decision in Panama Refining Company v. Ryan. By an 8–1 vote the justices struck down a section of the National Industrial Recovery Act of 1933 (NIRA) as an improper delegation of congressional power to the executive branch. The section in question was a major New Deal weapon for regulating the oil industry. It gave the president the power to prohibit the interstate shipment of oil and petroleum products that were produced or stored in a manner illegal under state law. The justices found fault with the act because it did not provide sufficiently clear standards to guide the executive branch; rather, it gave the president almost unlimited discretion in applying the prohibitions. Panama Refining was the first case in which the Court struck down legislation because it was an improper delegation of power. (See Chapter 5 for more on the delegation of powers.)

Although the decision in Panama Refining was restricted to the delegation question and did not focus on Congress’s interstate commerce authority, it promised bad days ahead for the administration. Not only was the decision a disappointment for the president, but also the vote was lopsided. Justice Cardozo alone voted to approve the law.

The Court dropped its biggest bomb on the New Deal four months later. The justices voted 5–4 on May 6 to declare the Railroad Retirement Act of 1934 an unconstitutional violation of the commerce clause and the due process clause of the Fifth Amendment.7 Then, on May 27—a date that became known as Black Monday—the justices announced three significant blows to the administration’s efforts to fight the Depression, all by unanimous votes. First, in Humphrey’s Executor v. United States (excerpted in Chapter 4), the Court declared that the president did not have the power to remove a member of the Federal Trade Commission (FTC). Second, the justices invalidated the 1934 Frazier-Lemke Act, which had provided mortgage relief, especially to farmers.8 Finally, in A. L. A. Schechter Poultry Corp. v. United States the Court handed the president his most stinging defeat by declaring major portions of the NIRA unconstitutional as an improper delegation of legislative power and a violation of the commerce clause.

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A. L. A. Schechter Poultry Corp. v. United States
295 U.S. 495 (1935)
Vote: 9 (Brandeis, Butler, Cardozo, Hughes, McReynolds, Roberts, Stone, Sutherland, Van Devanter)

OPINION OF THE COURT: Hughes
CONCURRING OPINION: Cardozo

FACTS:
Congress passed the National Industrial Recovery Act (NIRA), the most far-reaching and comprehensive of all the New Deal legislation, on June 16, 1933. Applying to every sector of American industry, the NIRA called for the creation of codes of fair competition for business. The codes would regulate trade practices, wages, hours, and other business activities within various industries. Trade associations and other industry groups had the responsibility for drafting the codes, which were submitted to the president for approval. In the absence of the private sector’s recommendations, the president was authorized to draft codes himself. Once approved by the president, the codes had the force of law, and violators faced fines and even jail.

The NIRA was vulnerable to constitutional challenge on two grounds. First, it set almost no standards for the president to use in approving or drafting the codes. Congress had handed Roosevelt a blank check to bring all of American industry into line with his views of what was best for economic recovery. Second, the law regulated what at that time was considered intrastate commerce.

The Schechter case involved a challenge to the NIRA poultry codes, focusing on the industry in New York, the nation’s largest chicken market.9 This market clearly was

9For a good discussion of the Schechter case, see Irons, The New Deal Lawyers, chap. 5.
operating in interstate commerce, as 96 percent of the poultry sold in New York came from out-of-state suppliers. The industry was riddled with graft and plagued by deplorable health and sanitation conditions. The Live Poultry Code approved by President Roosevelt set a maximum workweek of forty hours and a minimum hourly wage of fifty cents. In addition, the code established a health inspection system, regulations to govern slaughtering procedures, and compulsory record keeping.

A. L. A. Schechter Poultry Corporation, owned by Joseph, Martin, Aaron, and Alex Schechter, was a poultry slaughtering business in Brooklyn. Slaughterhouse operators such as the Schechters purchased large numbers of live chickens from local poultry dealers who imported the fowl from out of state to be killed and dressed for sale.

Government officials found the Schechters in violation of the Poultry Code on numerous counts: They ignored the code’s wage and hour provisions, failed to comply with government record-keeping requirements, and did not conform to the slaughter regulations. Their worst offense, however, was selling unsanitary poultry that the government found unfit for human consumption. For this reason, Schechter Poultry became known as the “sick chicken case.”

The government obtained indictments against the Schechter Poultry Corporation and the four brothers on sixty counts of violating the code, and the jury found them guilty of nineteen. Each of the brothers was sentenced to a short jail term. They appealed unsuccessfully to the court of appeals and then pressed their case to the U.S. Supreme Court, asserting that the NIRA was unconstitutional on improper delegation and commerce clause grounds.

ARGUMENTS:  

For the petitioners, A. L. A. Schechter Poultry Corp. et al.:  

- The act attempts to override and ignore not only the limitations of the commerce clause but also the prohibition against illegal delegation of legislative power. It is a bold and unparalleled law that is drastic in character.
- The act is an illegal delegation of power because Congress has set up no intelligible policies to govern the president and no standards to guide and restrict his action.
- The act exceeds the commerce power because, according to existing precedent, production—whether by way of manufacture, mining, farming, or any other activity—is not commerce and is not subject to regulation under the commerce clause. To hold otherwise, as decisions of the Court make clear, would destroy our dual system of government and allow the federal government to nationalize industry.

For the respondent, United States:  

- Under the Court’s decisions, the act’s provisions are within the commerce power of the Congress. Petitioners’ slaughtering business is so closely related to interstate movement that it makes no difference what parts of their business are “in” interstate commerce and what parts are less “in” but still necessary to its functioning.
- The effect of petitioners’ practices on the national price and on the interstate movement of poultry is the same as the effect of the local activities at issue in Stafford v. Wallace. The New York market dominates the live poultry industry and determines the prices in other markets, as well as the prices received by shippers and farmers.
- Petitioners’ practices also affect the quality and volume of poultry shipped in interstate commerce, another reason for federal regulation. Because consumers are unable to distinguish good poultry from unfit poultry, they distrust the market and buy less poultry. It is estimated that if unfit poultry were excluded from the market by effectively prohibiting its sale in New York, the consumption and shipment of poultry would increase by about 20 percent.
- Even if the practices here in normal economic times would have only an indirect effect upon interstate commerce, economic conditions are such that they now substantially burden interstate commerce because we are in a period of overproduction, cutthroat competition, unemployment, and reduced buying power. Only Congress can deal with the causes contributing to these problems. It would be impossible for the states to take quick and uniform action.
The question of the delegation of legislative power. We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. The Constitution provides that “All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” Art. I, §1. And the Congress is authorized “To make all laws which shall be necessary and proper for carrying into execution” its general powers. Art. I, §8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. . . .

Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, §3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion described in section one. In view of the scope of that broad declaration, and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.

. . . The question of the application of the provisions of the Live Poultry Code to intrastate transactions. . . . This aspect of the case presents the question whether the particular provisions of the Live Poultry Code, which the defendants were convicted for violating and for having conspired to violate, were within the regulating power of Congress.

These provisions relate to the hours and wages of those employed by defendants in their slaughterhouses in Brooklyn and to the sales there made to retail dealers and butchers.

(1) Were these transactions “in” interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other States. But the code provisions, as here applied, do not concern the
transportation of the poultry from other States to New York, or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees to defendants. When defendants had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the City, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce.

The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a “current” or “flow” of interstate commerce and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the State and is there held solely for local disposition and use. So far as the poultry here in question is concerned; the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other States. Hence, decisions which held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other States. Hence, decisions which

(2) Did the defendants’ transactions directly “affect” interstate commerce so as to be subject to federal regulation? The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations. Thus, Congress may protect the safety of those employed in interstate transportation “no matter what may be the source of the dangers which threaten it.” We said in Second Employers’ Liability Cases, that it is the “effect upon interstate commerce,” not “the source of the injury,” which is “the criterion of congressional power.” We have held that, in dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their intrastate operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. And combinations and conspiracies to restrain interstate commerce, or to monopolize any part of it, are none the less within the reach of the Anti-Trust Act because the conspirators seek to attain their end by means of intrastate activities, . . .

In determining how far the federal government may go in controlling intrastate transactions upon the ground that they “affect” interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as, e.g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State’s commercial facilities would be subject to federal control. As we said in the Minnesota Rate Cases:

“In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored and to an appreciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the State.”

436  PART THREE • NATION-STATE RELATIONS

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The distinction between direct and indirect effects has been clearly recognized in the application of the Anti-Trust Act. Where a combination or conspiracy is formed, with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. But where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statute, notwithstanding its broad provisions.

...[T]he distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government. We must consider the provisions here in question in the light of this distinction.

The question of chief importance relates to the provisions of the Code as to the hours and wages of those employed in defendants’ slaughterhouse markets. It is plain that these requirements are imposed in order to govern the details of defendants’ management of their local business. The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce. This appears from an examination of the considerations urged by the Government with respect to conditions in the poultry trade. Thus, the Government argues that hours and wages affect prices; that slaughterhouse men sell at a small margin above operating costs; that a slaughterhouse operator paying lower wages or reducing his cost by exacting long hours of work, translates his saving into lower prices; that this results in demands for a cheaper grade of goods; and that the cutting of prices brings about a demoralization of the price structure. Similar conditions may be adduced in relation to other businesses. The argument of the Government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power.

The Government also makes the point that efforts to enact state legislation establishing high labor standards have been impeded by the belief that unless similar action is taken generally, commerce will be diverted from the States adopting such standards, and that this fear of diversion has led to demands for federal legislation on the subject of wages and hours. The apparent implication is that the federal authority under the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in intrastate trade and industry generally throughout the country, thus overriding the authority of the States to deal with domestic problems arising from labor conditions in their internal commerce.

It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce, and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce “among the several States” and the internal concerns of a State. The same answer must be made to the contention that is based upon the serious economic situation which led to the passage of the Recovery Act—the fall in prices, the decline in wages and employment, and the curtailment of the market for commodities. Stress is laid upon the great importance of maintaining wage distributions which would provide the necessary stimulus in starting “the cumulative forces making for expanding commercial activity.” Without in any way disparaging this motive, it is enough to say that the recuperative efforts of the federal government must be made in a manner consistent with the authority granted by the Constitution.

We are of the opinion that the attempt through the provisions of the Code to fix the hours and wages of employees...
of defendants in their intrastate business was not a valid exercise of federal power.

The other violations for which defendants were convicted related to the making of local sales. Ten counts, for violation of the provision as to “straight killing,” were for permitting customers to make “selections of individual chickens taken from particular coops and half coops.” Whether or not this practice is good or bad for the local trade, its effect, if any, upon interstate commerce was only indirect. The same may be said of violations of the Code by intrastate transactions consisting of the sale “of an unfit chicken” and of sales which were not in accord with the ordinances of the City of New York. The requirement of reports as to prices and volumes of defendants’ sales was incident to the effort to control their intrastate business. . . .

On both the grounds we have discussed, the attempted delegation of legislative power, and the attempted regulation of intrastate transactions which affect interstate commerce only indirectly, we hold the code provisions here in question to be invalid and that the judgment of conviction must be reversed.

**MR. JUSTICE CARDozo, concurring.**

The delegated power of legislation which has found expression in this code is not canaled within banks that keep it from overflowing. It is unconfined and vagrant. . . .

This is delegation running riot. . . .

The code does not confine itself to the suppression of methods of competition that would be classified as unfair according to accepted business standards or accepted norms of ethics. It sets up a comprehensive body of rules to promote the welfare of the industry, if not the welfare of the nation, without reference to standards, ethical or commercial, that could be known or predicted in advance of its adoption. . . . Even if the statute itself had fixed the meaning of fair competition by a way of contrast with practices that are oppressive or unfair, the code outruns the bounds of the authority conferred. What is excessive is not sporadic or superficial. It is deep-seated and pervasive. The licit and illicit sections are so combined and welded as to be incapable of severance without destructive mutilation.

But there is another objection, far-reaching and incurable, aside from any defect of unlawful delegation.

If this code had been adopted by Congress itself, and not by the President on the advice of an industrial association, it would even then be void, unless authority to adopt it is included in the grant of power “to regulate commerce with foreign nations, and among the several States.” United States Constitution, art. 1, 8, cl. 3.

I find no authority in that grant for the regulation of wages and hours of labor in the intrastate transactions that make up the defendants’ business. As to this feature of the case, little can be added to the opinion of the court. There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. . . .

I am authorized to state that MR. JUSTICE STONE joins in this opinion.

The decision in *Schechter* closely paralleled the *E. C. Knight* ruling and rejected the application of the stream of commerce doctrine. In *E. C. Knight* the Court held that sugar refining was a manufacturing stage not part of interstate commerce and, therefore, the federal government could not regulate it. Similarly, in *Schechter* the Court classified the slaughtering and local sale of chickens as intrastate commerce. The stream of commerce evident in the stockyards decisions did not apply. In *Schechter* the interstate movement of the poultry had ceased. Once the distributor had sold to local processors like the Schechters’ company, the chickens had reached their state of final destination and became a part of intrastate commerce. Also consistent with *E. C. Knight*, the justices concluded that the poultry slaughter business had only an indirect effect on interstate commerce.

Through the remaining months of 1935 and into 1936, the Court continued to strike down federal legislation designed to cope with the Depression. In some cases the Court found the statutes defective for violating the federal taxing and spending power or for depriving individuals of their right to property without due process of law, topics we cover in later chapters. No matter what the reason for the decision, the Court throughout this period was concerned with congressional actions that went beyond constitutional authority to regulate interstate commerce. Congress could not constitutionally legislate local business activity, such as manufacturing, processing, or refining, unless it had a direct effect on interstate commerce. The Court supported congressional regulation when the commerce was in movement from one state to another, but, as demonstrated in *Schechter*, the justices were unwilling to allow Congress to act on commerce after it had completed its interstate journey. *Schechter* examined when interstate commerce ends; in May 1936
the Court taught the administration a lesson in when interstate commerce begins, with its decision in Carter v. Carter Coal Company.

Congress passed the Bituminous Coal Conservation Act in August 1935, following the Schechter decision. This law replaced the NIRA coal codes, which had been reasonably effective in bringing some stability to the depressed coal industry. The new act called for the establishment of a commission empowered to develop regulations regarding fair competition, production, wages, hours, and labor relations. The commission included representatives from coal producers, coal miners, and the public. To fund the program, Congress imposed a tax at the mines of 15 percent of the value of the coal produced. As was not the case with the NIRA codes, compliance with the new code regulations was voluntary. There was, however, an incentive for joining the program. Companies that participated were given a rebate of 90 percent of the taxes levied by the act.

James W. Carter and other shareholders urged their company, Carter Coal, not to participate in the program. The board of directors did not want to join, but it believed that the company could not afford to pay the 15 percent tax and forgo the participation rebate. Carter and the stockholders sued to prevent the company from joining the program on the ground that the Coal Act was unconstitutional. Of Carter’s several attacks on the law, the most deadly was the charge that coal mining was not interstate commerce.

By a 5–4 vote the justices struck down the law. The majority held that coal mining was not interstate commerce because the activity occurred within a single state. The stream of commerce doctrine was inapplicable because the movement of the coal to other states had not yet begun. Furthermore, the justices concluded that the production of coal did not have a direct effect on interstate commerce. For these reasons, the Court invalidated federal regulation of coal mining. But Carter v. Carter Coal was to be Roosevelt’s last major defeat at the hands of the Four Horsemen and their allies.

**The Court-Packing Plan**

The Court entered its summer recess in 1936 having completed a year and a half of dealing with Roosevelt’s legislative program and striking down several of the New Deal’s most important programs. The Four Horsemen constituted a solid bloc, and in major cases these justices could count on the support of at least one other—usually Owen Roberts. Roosevelt was understandably frustrated with what he viewed as the Court’s obstructionism; he was also impatient that no vacancies had occurred that he might fill with appointees sympathetic to the New Deal.

In the national elections of 1936, few doubted that Roosevelt would be reelected and that the Democrats would continue to control Congress.¹⁰ The only question was how big the margin was going to be. Roosevelt won by a landslide, capturing 98 percent of the electoral votes. His Republican opponent, Alf Landon of Kansas, carried only Maine and Vermont. The congressional elections were also a triumph for the Democrats. When the legislature reconvened in early 1937, they controlled approximately 80 percent of the seats in both houses. With such an impressive mandate from the people and such strong party support in Congress, Roosevelt was willing to proceed with his planned attack on the Court. If no vacancies on the Supreme Court occurred naturally, Roosevelt would try to create some.

On February 5, 1937, the president announced his plan to reorganize the federal court system. His proposed legislation was predicated, at least formally, on the argument that the judiciary was too overworked and understaffed to carry out its duties effectively. His idea was to expand the number of lower court judgeships; streamline federal jurisdiction, especially with respect to cases having constitutional significance; and adopt a flexible method of temporarily moving lower court judges from their normal duties to districts with case backlogs.

To many observers these administrative reforms were little more than a smoke screen for Roosevelt’s proposals concerning the Supreme Court. The president asked Congress to authorize the creation of one new seat on the Court for every justice who had attained the age of seventy but remained in active service. Up to six new justices could be appointed in this way, bringing the potential size of the Court to a maximum of fifteen. At the time of his proposal, six sitting justices were older than seventy. If Roosevelt could appoint six New Deal advocates to the Court, they probably could attract the votes of at least two others and form a majority that would give constitutional approval to the president’s programs. Although Roosevelt attempted to justify his idea on the ground that the advanced age of several sitting justices

¹⁰ Not everyone predicted a Roosevelt victory. The *Literary Digest* published a famous poll during that election year forecasting a Roosevelt defeat. The poll has become universally regarded as a classic case of defective research procedures. Within months after the election, the *Literary Digest* was defunct.
justices called for the addition of younger, more-vigorous colleagues, everyone saw the plan for what it was—an attempt to pack the Court.

Reaction was not favorable. Public opinion polls taken during the course of the debate over the plan reveal that at no time did a majority of Americans support Roosevelt’s proposal (see Figure 7-2). Members of the organized bar were overwhelmingly opposed. Even with large Democratic majorities in both houses of Congress, Roosevelt had difficulty selling his proposal to the legislature. Chief Justice Hughes wrote a public letter criticizing the proposal to Senator Burton Wheeler of Montana, a leader of Democrats opposing the president. The press expressed sharp disapproval.

In spite of the general support the people gave Roosevelt and the New Deal, they did not appreciate his tampering with the structure of government to get his way. Roosevelt’s response to this unexpected criticism was to go directly to the people to press his case, and in doing so he became a little more open about his objectives. In his radio broadcast the president explained his proposal and urged the American public to support it (see Box 7-5).

**The Switch in Time That Saved Nine**

The battle in Congress over the president’s plan was closely fought. A continuation of the confrontation, however, was averted in large measure by the actions of the justices themselves. On March 29, 1937, just twenty

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Constitution as written—that will refuse to amend the Constitution. That means a Supreme Court that will enforce the judiciary as proposed by the framers of the Constitution. Courts we want a government of laws and not of men. We do justice under the Constitution—not over it. In our Constitution itself. We want a Supreme Court which will prove the public policy written into these laws. The law that the Justices have called it—reading into the Constitution words and implications which are not there, and which we were never intended to be there. The words and implications which are not there, and which the Justices have called it—reading into the Constitution words and implications which are not there, and which were never intended to be there. We have, therefore, reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself. We want a Supreme Court which will do justice under the Constitution—not over it. In our Courts we want a government of laws and not of men. I want—as all Americans want—an independent judiciary as proposed by the framers of the Constitution. That means a Supreme Court that will enforce the Constitution as written—that will refuse to amend the Constitution by the arbitrary exercise of judicial power—amendment by judicial say-so. It does not mean a judiciary so independent that it can deny the existence of facts universally recognized. . . . What is my proposal? It is simply this: whenever a Judge or Justice of any Federal Court has reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the President then in office, with the approval, as required by the Constitution, of the Senate of the United States.

That plan has two chief purposes. By bringing into the Judicial system a steady and continuing stream of new and younger blood, I hope, first, to make the administration of all Federal justice speedier and, therefore, less costly; secondly, to bring to the decision of social and economic problems younger men who have had personal experience and contact with modern facts and circumstances under which average men have to live and work. This plan will save our national Constitution from hardening of the judicial arteries.

The number of Judges to be appointed would depend wholly on the decision of present Judges now over seventy, or those who would subsequently reach the age of seventy.

If, for instance, any one of the six Justices of the Supreme Court now over the age of seventy should retire as provided under the plan, no additional place would be created. Consequently, although there never can be more than fifteen, there may be only fourteen, or thirteen, or twelve. And there may be only nine.

There is nothing novel or radical about this idea. It seeks to maintain the Federal bench in full vigor. It has been discussed and approved by many persons of high authority ever since a similar proposal passed the House of Representatives in 1869. . . .

The statute would apply to all the Courts in the Federal system. There is general approval so far as the lower Federal courts are concerned. The plan has met opposition only so far as the Supreme Court of the United States itself is concerned. If such a plan is good for the lower courts it certainly ought to be equally good for the highest Court from which there is no appeal.

(Continued)
Those opposing this plan have sought to arouse prejudice and fear by crying that I am seeking to “pack” the Supreme Court and that a baneful precedent will be established.

What do they mean by the words “packing the Court”?

Let me answer this question with a bluntness that will end all honest misunderstanding of my purposes.

If by that phrase “packing the Court” it is charged that I wish to place on the bench spineless puppets who would disregard the law and would decide specific cases as I wished them to be decided, I make this answer—that no President fit for his office would appoint, and no Senate of honorable men fit for their office would confirm, that kind of appointees to the Supreme Court.

But if by that phrase the charge is made that I would appoint and the Senate would confirm Justices worthy to sit beside present members of the Court who understand those modern conditions—that I will appoint Justices who will not undertake to override the judgment of the Congress on legislative policy—that I will appoint Justices who will act as Justices and not as legislators—if the appointment of such Justices can be called “packing the Courts,” then I say that I and with me the vast majority of the American people favor doing just that thing—now.

Is it a dangerous precedent for the Congress to change the number of the Justices? The Congress has always had, and will have, that power. The number of Justices has been changed several times before—in the Administrations of John Adams and Thomas Jefferson—both signers of the Declaration of Independence—Andrew Jackson, Abraham Lincoln and Ulysses S. Grant.

We think it so much in the public interest to maintain a vigorous judiciary that we encourage the retirement of elderly Judges by offering them a life pension at full salary. Why then should we leave the fulfillment of this public policy to chance or make it dependent upon the desire or prejudice of any individual Justice?

It is the clear intention of our public policy to provide for a constant flow of new and younger blood into the Judiciary. Normally every President appoints a large number of District and Circuit Judges and a few members of the Supreme Court. Until my first term practically every President of the United States had appointed at least one member of the Supreme Court. President Taft appointed five members and named a Chief Justice—President Wilson three—President Harding four including a Chief Justice—President Coolidge one—President Hoover three including a Chief Justice.

Such a succession of appointments should have provided a Court well-balanced as to age. But chance and the disinclination of individuals to leave the Supreme bench have now given us a Court in which five Justices will be over seventy-five years of age before next June and one over seventy. Thus a sound public policy has been defeated.

I now propose that we establish by law an assurance against any such ill-balanced Court in the future. I propose that hereafter, when a Judge reaches the age of seventy, a new and younger Judge shall be added to the Court automatically. In this way I propose to enforce a sound public policy by law instead of leaving the composition of our Federal Courts, including the highest, to be determined by chance or the personal decision of individuals.

If such a law as I propose is regarded as establishing a new precedent—is it not a most desirable precedent? Like all lawyers, like all Americans, I regret the necessity of this controversy. But the welfare of the United States, and indeed of the Constitution itself, is what we all must think about first. Our difficulty with the Court today rises not from the Court as an institution but from human beings within it. But we cannot yield our constitutional destiny to the personal judgment of a few men who, being fearful of the future, would deny us the necessary means of dealing with the present.

This plan of mine is no attack on the Court; it seeks to restore the Court to its rightful and historic place in our system of Constitutional Government and to have it resume its high task of building anew on the Constitution “a system of living law.”

During the past half century the balance of power between the three great branches of the Federal Government has been tipped out of balance by the Courts in direct contradiction of the high purposes of the framers of the Constitution. It is my purpose to restore that balance. You who know me will accept my solemn assurance that in a world in which democracy is under attack, I seek to make American democracy succeed.

Source: Fireside Chat, March 9, 1937.
days after the president's broadcast, the Court signaled that changes were in the making. The first indication was the 5–4 decision in *West Coast Hotel v. Parrish* (1937) (excerpted in Chapter 10), which upheld the validity of a Washington State law regulating wages and working conditions for women and children.

Although this case involved a state law rather than a federal statute and concerned issues of substantive due process rather than the commerce clause, it had great significance. Aside from the doctrinal importance of the case, discussed in Chapter 10, it signaled a change in the Court's voting coalitions. Justice Roberts, so long an ally of the Four Horsemen, deserted the conservatives and voted with the liberal bloc to approve the legislation. Just months earlier Roberts had voted with the conservatives in a 5–4 decision striking down a New York law that was nearly identical to the one he now approved.14

Two weeks later Roberts proved that his *West Coast Hotel* vote was not an aberration. On April 12 the Court issued its ruling in *National Labor Relations Board v. Jones & Laughlin Steel Corporation*. Once again Roberts joined Hughes, Brandeis, Cardozo, and Stone to form a majority, this time upholding a major piece of New Deal legislation. The decision may be the most important economic ruling of the twentieth century. In it the Court announced a break from the past and ushered in a new era in the constitutional relationship between the government and the economy.

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**National Labor Relations Board v. Jones & Laughlin Steel Corporation**

301 U.S. 1 (1937)

https://caselaw.findlaw.com/us-supreme-court/301/1.html

Vote: 5 (Brandeis, Cardozo, Hughes, Roberts, Stone)

4 (Butler, McReynolds, Sutherland, Van Devanter)

**OPINION FOR THE COURT**: Hughes

**DISSENTING OPINION**: McReynolds

**FACTS:**

In 1935 Congress passed the National Labor Relations Act, more commonly known as the Wagner Act. The purpose of the legislation was to help workers achieve gains in wages and working conditions through the collective bargaining process. The act's primary aim was to protect the rights of employees to organize and join labor unions and to provide a means for the enforcement of those rights. The law authorized the creation of the National Labor Relations Board (NLRB), which was empowered to hear complaints of unfair labor practices and impose certain corrective measures. The act was based on the power of Congress to regulate interstate commerce and on the assertion that labor unrest and strikes ("industrial strife") caused interruptions in such commerce that Congress had the right to prevent.

Jones & Laughlin was one of the nation's largest steel producers. Its operations were fully integrated, extending into many states and involving every aspect of steel production, from mining through production and distribution. Complaints were filed against the company for engaging in unfair labor practices at its plant in Aliquippa, Pennsylvania. The charges included discriminating against workers who wanted to join a labor union. The NLRB ruled against the company and ordered it to reinstate ten workers who had been dismissed because of their union activities. The company refused, claiming that the Wagner Act was unconstitutional. Steel production facilities, according to the company, were engaged in a manufacturing activity that had been declared by the

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Supreme Court to be intrastate commerce and thus outside Congress's regulatory authority. The lower courts, applying existing Supreme Court precedent, ruled in favor of the company, and the NLRB appealed.

ARGUMENTS:

For the petitioner, National Labor Relations Board:

- The act is a legitimate exercise of preventive power: it deals with the causes of the burden (here, industrial strife) on interstate commerce in anticipation of their probable effect, in much the same way as did the act at issue in *Stafford v. Wallace*. The law attempts to eliminate only those practices “affecting commerce.” This phrase “affecting commerce” is defined in the law as “in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.” These words are patterned on language from the Court’s commerce clause decisions.

- *Schecter Poultry* and *Carter Coal* do not apply here. In *Schecter* the Court rejected arguments that wages and hours in local industry affected interstate commerce through an intricate chain of economic causes and effects; any effect was indirect. In *Carter Coal* the Court held that the effect of wage cutting on interstate commerce was also indirect. The law at issue in *Carter Coal* also had collective bargaining provisions, which were included mostly to provide a means for regulating wages. The National Labor Relations Act, in contrast, is designed solely to eliminate the burden on interstate commerce caused by industrial strife, which affects commerce directly, without an intervening condition.

For the respondent, Jones & Laughlin Steel Corporation:

- The act, although disguised as a regulation of interstate commerce, is a regulation of labor. Under *Schecter Poultry*, the commerce clause cannot be used to legislate labor relations, which do not constitute a part of interstate commerce.

- Congress has tried to evade this distinction by limiting the act to transactions “affecting commerce,” although the provisions are broad enough to cover almost every employment relation.

To reach the conclusion that firing a few production employees has a consequential effect on interstate commerce, the government must pile assumption on assumption. This statute is a labor law, not a regulation of commerce, and it does not help to sustain the pretext that an indirect connection exists between the two.

- Decisions such as *Stafford v. Wallace* are not applicable here. Stockyards are instrumentalities of interstate commerce in much the same way as are the actual carriers of interstate commerce. The regulated activities in this and other cases were in the stream of commerce and exerted a direct effect on its flow. This doctrine does not apply to production activities that may indirectly affect the stream of commerce, as *Carter Coal* makes clear.

**MR. CHIEF JUSTICE HUGHES DELIVERED THE OPINION OF THE COURT:**

First. The Scope of the Act.—The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It is asserted that the references in the Act to interstate and foreign commerce are colorable at best; that the Act is not a true regulation of such commerce or of matters which directly affect it but on the contrary has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation.

If this conception of terms, intent and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce “among the several States” and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. The jurisdiction conferred upon the Board, and invoked in this instance, is found in §10 (a), which provides:
"Sec. 10 (a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 . . . ) affecting commerce. The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are 'affecting commerce.' The Act specifically defines the 'commerce' to which it refers (§2 (6) . . . ):

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

There can be no question that the commerce thus contemplated by the Act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The Act also defines the term "affecting commerce" (§2 (7) . . . ):

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate and foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. It is the effect upon commerce, not the source of the injury, which is the criterion. Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the statute to be determined as individual cases arise. We are thus to inquire whether in the instant case the constitutional boundary has been passed.

Second. The Unfair Labor Practices in Question.— . . . [T]he statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.

That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority. Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union was essential to give laborers opportunity to deal on an equality with their employer. We reiterated these views when we had under consideration the Railway Labor Act of 1926. Fully recognizing the legality of collective action on the part of employees in order to safeguard their proper interests, we said that Congress was not required to ignore this right but could safeguard it. Congress could seek to make appropriate collective action of employees an instrument of peace rather than of strife. We said that such collective action would be a mockery if representation were made futile by interference with freedom of choice. Hence the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, "instead of being an invasion of the constitutional right of either, was based on the recognition
of the rights of both.” We have reasserted the same principle in sustaining the application of the Railway Labor Act as amended in 1934.

Third, The Application of the Act to Employees Engaged in Production.—The Principle Involved.—Respondent says that whatever may be said of employees engaged in interstate commerce, the industrial relations and activities in the manufacturing department of respondent’s enterprise are not subject to federal regulation. The argument rests upon the proposition that manufacturing in itself is not commerce.

The Government distinguishes these cases. The various parts of respondent’s enterprise are described as interdependent and as thus involving “a great movement of iron ore, coal and limestone along well-defined paths to the steel mills, thence through them, and thence in the form of steel products into the consuming centers of the country—a definite and well-understood course of business.” It is urged that these activities constitute a “stream” or “flow” of commerce, of which the Aliquippa manufacturing plant is the focal point, and that industrial strife at that point would cripple the entire government. Reference is made to our decision sustaining the Packers and Stockyards Act.

We 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 or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact “all appropriate legislation” for “its protection and advancement”; to adopt measures “to promote its growth and insure its safety”; “to foster, protect, control and restrain.” That power is plenary and may be exerted to protect interstate commerce “no matter the source of the dangers which threaten it.” 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.

It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved.

Fourth, Effects of the Unfair Labor Practice in Respondent’s Enterprise.—Giving full weight to respondent’s contention with respect to a break in the complete continuity of the “stream of commerce” by reason of respondent’s manufacturing operations, the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent’s far-flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation 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 interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances. These questions have frequently engaged the attention of Congress and have been the subject of many inquiries. The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point. The Government aptly refers to the steel
strike of 1919–1920 with its far-reaching consequences. The fact that there appears to have been no major disturbance in that industry in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and to exercise its protective power to forestall. It is not necessary again to detail the facts as to respondent’s enterprise. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and we have no doubt that Congress had constitutional authority to safeguard the right of respondent’s employees to self-organization and freedom in the choice of representatives for collective bargaining.

Reversed.

MR. JUSTICE MCREYNOLDS delivered the following dissenting opinion in the cases preceding:

MR. JUSTICE VAN DEVANTER, MR. JUSTICE SUTHERLAND, MR. JUSTICE BUTLER and I are unable to agree with the decisions just announced.

Considering the far-reaching import of these decisions, the departure from what we understand has been consistently ruled here, and the extraordinary power confirmed to a Board of three [the NLRB], the obligation to present our views becomes plain.

The precise question for us to determine is whether in the circumstances disclosed Congress has power to authorize what the Labor Board commanded the respondents to do. Stated otherwise, in the circumstances here existing could Congress by statute direct what the Board has ordered?

The argument in support of the Board affirms: “Thus the validity of any specific application of the preventive measures of this Act depends upon whether industrial strife resulting from the practices in the particular enterprise under consideration would be of the character which Federal power could control if it occurred. If strife in that enterprise could be controlled, certainly it could be prevented.”

Manifestly that view of Congressional power would extend it into almost every field of human industry. With striking lucidity, fifty years ago, Kidd v. Pearson declared: “If it be held that the term [commerce with foreign Nations, and among the several States] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human activity.” This doctrine found full approval in United States v. E. C. Knight Co., Schechter Poultry Corp. v. United States, and Carter v. Carter Coal Co., where the authorities are collected and principles applicable here are discussed.

The Constitution still recognizes the existence of states with indestructible powers; the Tenth Amendment was supposed to put them beyond controversy.

We are told that Congress may protect the “stream of commerce” and that one who buys raw material without the state, manufactures it therein, and ships the output to another state is in that stream. Therefore it is said he may be prevented from doing anything which may interfere with its flow.

This, too, goes beyond the constitutional limitations heretofore enforced. If a man raises cattle and regularly delivers them to a carrier for interstate shipment, may Congress prescribe the conditions under which he may employ or discharge helpers on the ranch? The products of a mine pass daily into interstate commerce; many things are brought to it from other states. Are the owners and miners within the power of Congress in respect of the miners’ tenure and discharge? May a mill owner be prohibited from closing his factory or discontinuing his business because so to do would stop the flow of products to and from his plant in interstate commerce? May employees in a factory be restrained from quitting work in a body because this will close the factory and thereby stop the flow of commerce? May arson of a factory be made a Federal offense whenever this would interfere with such flow? If the business cannot continue with the existing wage scale, may Congress command a reduction? If the ruling of the Court just announced is adhered to these questions suggest some of the problems certain to arise.

There is no ground on which reasonably to hold that refusal by a manufacturer, whose raw materials come from states other than that of his factory and whose products are regularly carried to other states, to bargain collectively with employees in his manufacturing plant, directly affects interstate commerce. In such business, there is not one but two distinct movements or streams in interstate commerce.
transportation. The first brings in raw material and there
ends. Then follows manufacture, a separate and local activ-
ity. Upon completion of this, and not before, the second dis-
tinct movement or stream in interstate commerce begins
and the products go to other states. Such is the common
course for small as well as large industries. It is unreason-
able and unprecedented to say the commerce clause con-
fers upon Congress power to govern the relations between
employers and employees in these local activities. In
Schechter’s case we condemned as unauthorized by the
commerce clause assertion of federal power in respect of
commodities which had come to rest after interstate trans-
portation. And, in Carter’s case, we held Congress lacked
the power to regulate labor relations in respect of commod-
ities before interstate commerce has begun.

It is gravely stated that experience teaches that if an
employer discourages membership in “any organization
of any kind” “in which employees participate, and which
exists for the purpose in whole or in part of dealing with
employers concerning grievances, labor disputes, wages,
rates of pay, hours of employment or conditions of work,”
discontent may follow and this in turn may lead to a strike,
and as the outcome of the strike there may be a block in
the stream of interstate commerce. Therefore Congress
may inhibit the discharge! Whatever effect any cause of
discontent may ultimately have upon commerce is far
too indirect to justify Congressional regulation. Almost
anything—marriage, birth, death—may in some fashion
affect commerce.

That Congress has power by appropriate means, not
prohibited by the Constitution, to prevent direct and ma-
terial interference with the conduct of interstate commerce
is settled doctrine. But the interference struck at must be
direct and material, not some mere possibility contingent
on wholly uncertain events; and there must be no impair-
ment of rights guaranteed.

The things inhibited by the Labor Act relate to the
management of a manufacturing plant—something
distinct from commerce and subject to the author-
ity of the state. And this may not be abridged because
of some vague possibility of distant interference with
commerce. . . .

The right to contract is fundamental and includes the
privilege of selecting those with whom one is willing to
assume contractual relations. This right is unduly abridged
by the Act now upheld. A private owner is deprived of power
to manage his own property by freely selecting those to
whom his manufacturing operations are to be entrusted.
We think this cannot lawfully be done in circumstances like
those here disclosed.

It seems clear to us that Congress has transcended
the powers granted.

The decisions in West Coast Hotel v. Parrish and
NLRB v. Jones & Laughlin Steel took the energy out
of Roosevelt’s drive to pack the Court. It no longer
appeared necessary, as the Court now was looking with
greater approval at state and federal legislation to cor-
rect the failing economy. In addition, on May 18, 1937,
Justice Van Devanter, a consistent foe of Roosevelt’s New
Deal programs, announced that he would retire from the
Court at the end of the term. At long last the president
would have an opportunity to put a justice of his own
choosing on the Court.

On June 7 the Senate Judiciary Committee recom-
manded that the Court-packing bill not be passed. To the
president’s great displeasure, seven of the ten senators
As for Roberts's own explanation, he maintained traditional judicial silence. When asked in a 1946 interview why he had altered his position, he deflected the question by responding, “Who knows what causes a judge to decide as he does? Maybe the breakfast he had has something to do with it.” Whatever the reasons for his switch, it broke the conservatives’ domination of the Court.

**Consolidating the New Interpretation of the Commerce Power**

Justice Van Devanter's retirement was followed over the next four years by the retirements of Justices Sutherland and Brandeis and the deaths of Justices Cardozo and Butler. By 1940 Franklin Roosevelt had appointed a majority of the sitting justices. And in 1941 Justice McReynolds, the last of the Four Horsemen, also retired.

With *NLRB v. Jones & Laughlin Steel* showing the way, the increasingly liberal Court upheld a number of New Deal programs. It also continued to expand the concept of interstate commerce. Gone were the old notions that production, manufacturing, mining, and processing were exclusively intrastate affairs with insufficient direct effects on interstate commerce to activate federal commerce powers. Precedents such as *E. C. Knight, Hammer, Panama Refining, Schechter Poultry,* and *Carter Coal* were substantially overruled or discredited, or severely limited (see Box 7-6).

Of all the cases during this period, two are considered among the Court's most important statements on congressional commerce power: *United States v. Darby* (1941) and *Wickard v. Filburn* (1942). Not only do they provide insight into modern-era commerce clause doctrine, but they also illustrate how far the Court had moved from its pre-1937 idea of interstate commerce. As you read *Darby,* keep in mind decisions such as *Hammer v. Dagenhart,* in which the Court struck down an act prohibiting the shipment in interstate commerce of products made by children. Regulating child labor, the Court reasoned, was not “expressly” delegated to the federal government and so, by virtue of the Tenth Amendment, belonged to the states. As you compare *Wickard* to earlier rulings, recall that in *E. C. Knight* a

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12 See, for example, his opinion for the Court in *Nebbia v. New York* (1934).


14 Ibid., 106.
BOX 7-6

Supreme Court Expansion of the Commerce Powers, 1937–1942

<table>
<thead>
<tr>
<th>Decision</th>
<th>Ruling</th>
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<tr>
<td><em>Steward Machine v. Davis</em> (1937)</td>
<td>Unemployment provisions of the Social Security Act are constitutional.</td>
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<tr>
<td><em>Helvering v. Davis</em> (1937)</td>
<td>Old-age benefits provisions of the Social Security Act are constitutional.</td>
</tr>
<tr>
<td><em>Santa Cruz Fruit Packing v. NLRB</em> (1938)</td>
<td>The National Labor Relations Act applies to a fruit-packing company even though only 37 percent of its product is sold in interstate commerce.</td>
</tr>
<tr>
<td><em>Consolidated Edison Company v. NLRB</em> (1938)</td>
<td>The National Labor Relations Act applies to a power company even though all of its power is sold in state.</td>
</tr>
<tr>
<td><em>NLRB v. Fainblatt</em> (1939)</td>
<td>The National Labor Relations Act applies to a small garment manufacturer even though all of its goods are sold in state.</td>
</tr>
<tr>
<td><em>United States v. Rock Royal Cooperative</em> (1939)</td>
<td>Legislation allowing the secretary of agriculture to set milk prices paid to farmers is constitutional.</td>
</tr>
<tr>
<td><em>Mulford v. Smith</em> (1939)</td>
<td>Tobacco production quotas set by the secretary of agriculture under the Agricultural Adjustment Act of 1938 are constitutional.</td>
</tr>
<tr>
<td><em>United States v. Darby</em> (1941)</td>
<td>Congressional action prohibiting shipment in interstate commerce of goods in violation of federal wage and hour laws is constitutional.</td>
</tr>
<tr>
<td><em>Wickard v. Filburn</em> (1942)</td>
<td>The provision of the Agricultural Adjustment Act allowing the secretary of agriculture to regulate an individual’s planting wheat on his own property for on-farm consumption is constitutional.</td>
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</table>

sugar trust that controlled 98 percent of the nation’s sugar refining was considered to be operating in intra-state commerce. And in *Carter v. Carter Coal*, the entire coal mining industry was said to be outside the power of Congress to regulate interstate commerce. How do these industries compare with Roscoe Filburn’s farm (see p. 454)?

**United States v. Darby**

312 U.S. 100 (1941)

https://caselaw.findlaw.com/us-supreme-court/312/100.html

Vote: 8 (Black, Douglas, Frankfurter, Hughes, Murphy, Reed, Roberts, Stone)

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**OPINION OF THE COURT:** Stone
FACTS:
In 1938 Congress, under its power to regulate interstate commerce, enacted a major piece of New Deal legislation, the Fair Labor Standards Act (FLSA). It provided that all employers “engaged in interstate commerce, or in the production of goods for that commerce” must pay all their employees a minimum wage of twenty-five cents per hour and not permit employees to work longer than forty-four hours per week without paying them one and one-half times their regular pay for their overtime hours. In November 1939 the federal government sought and obtained an indictment against Fred W. Darby for violating the FLSA. The indictment alleged that Darby, the owner of a lumber company, was engaged in the production and manufacturing of goods shipped out of state, but that he had not abided by either of the FLSA’s principal pay requirements.
Darby did not dispute the charges but invoked the logic of *Hammer v. Dagenhart* and other pre-1937 cases. The government responded with legal and pragmatic arguments.

ARGUMENTS:
For the appellant, United States:
- The meaning of the phrase *interstate commerce* at the time the commerce clause was drafted included manufacturing and the entire economy. Therefore, Congress is empowered by the Constitution to regulate all of these areas.
- Due to interstate commercial competition, no one state can require higher labor standards in the absence of a uniform federal law. Employers with lower labor standards would have an unfair advantage in interstate competition, and only the national government can pragmatically act on the problem. The lumber industry well illustrates the problem of the inability of the states to ensure adequate labor conditions: more than 57 percent of the lumber produced enters into interstate commerce from forty-five of the states.
- The commerce clause power should be assessed by what it regulates, not by what it affects. Intrastate acts lie within the power of Congress when it is necessary to effectively control interstate transactions, and Congress need not wait until transportation begins to protect the flow of commerce.
- Since *McCulloch* the Court has recognized that the Tenth Amendment is not a limit on the powers of the federal government. That doctrine has not been overruled, and it cannot be overruled by implication by the recent cases suggesting otherwise.

For the appellee, Fred W. Darby:
- The act is an unconstitutional attempt to regulate the conditions surrounding the production of goods and commodities; it is not a regulation of interstate commerce within the delegated power to Congress under the commerce clause.
- The government’s argument is an indirect attack upon the dual system of government established by the framers. Allowing the federal government to control anything related to economic issues is directly contrary to the doctrine that the federal government is a government of limited and enumerated powers. The Tenth Amendment guarantees that certain powers are reserved to the states and the people.
- The mere fact that individual states cannot adequately protect the markets outside their borders for the sale of their products does not give the national government unqualified power to regulate competition in those interstate markets.

MR. JUSTICE STONE DELIVERED THE OPINION OF THE COURT.
The two principal questions raised by the record in this case are, first, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum [Section 15(1)], and, second, whether it has power to prohibit the employment of workmen in the production of goods “for interstate commerce” at other than prescribed wages and hours [Section 15(a)(2)]. . .
The prohibition of shipment of the proscribed goods in interstate commerce. Section 15(a)(1) prohibits, and the indictment charges, the shipment in interstate commerce, of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to the requirements of the Act. [T]he only question arising under the commerce clause with respect to such shipments is whether Congress has the constitutional power to prohibit them.
While manufacture is not, of itself, interstate commerce, the shipment of manufactured goods interstate is such commerce, and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is governed." Gibbons v. Ogden. It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles, Lottery Case, Hoke v. United States . . ., kidnapped persons and articles, such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination.

But it is said that the present prohibition falls within the scope of none of these categories; that, while the prohibition is nominally a regulation of the commerce, its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states. . . . [It is said that] under the guise of a regulation of interstate commerce, [Congress] undertakes to regulate wages and hours within the states contrary to the policy of the state which has elected to leave them unregulated.

The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution" Gibbons v. Ogden. That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination, and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.

The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction, and over which the courts are given no control . . .

In the more than a century which has elapsed since the decision of Gibbons v. Ogden, these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in Hammer v. Dagenhart. In that case, it was held by a bare majority of the Court, over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court’s opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

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. . . .

The conclusion is inescapable that Hammer v. Dagenhart was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision, and that such vitality, as a precedent, as it then had, has long since been exhausted. It should be, and now is, overruled.

Validity of the wage and hour requirements. Section 15(a)(2) [requires] employers to conform to the wage and hour provisions with respect to all employees engaged in the production of goods for interstate commerce. As appellee’s employees are not alleged to be "engaged in interstate commerce," the validity of the prohibition turns on the question whether the employment, under other than the prescribed labor standards, of employees engaged in the production of goods for interstate commerce is so related to the commerce, and so affects it, as to be within the reach of the power of Congress to regulate it . . .

PART THREE • NATION-STATE RELATIONS

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The obvious purpose of the Act was not only to prevent the interstate transportation of the proscribed product, but to stop the initial step toward transportation, production with the purpose of so transporting it. Congress was not unaware that most manufacturing businesses shipping their product in interstate commerce make it in their shops without reference to its ultimate destination, and then, after manufacture, select some of it for shipment interstate and some intrastate, according to the daily demands of their business, and that it would be practically impossible, without disrupting manufacturing businesses, to restrict the prohibited kind of production to the particular pieces of lumber, cloth, furniture or the like which later move in interstate, rather than intrastate, commerce.

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. 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 *McCulloch v. Maryland*.

While this Court has many times found state regulation of interstate commerce, where uniformity of its regulation is of national concern, to be incompatible with the Commerce Clause even though Congress has not legislated on the subject, the Court has never implied such restraint on state control over matters intrastate not deemed to be regulations of interstate commerce or its instrumentalities even though they affect the commerce. In the absence of Congressional legislation on the subject, state laws which are not regulations of the commerce itself or its instrumentalities are not forbidden, even though they affect interstate commerce.

But it does not follow that Congress may not, by appropriate legislation, regulate intrastate activities where they have a substantial effect on interstate commerce. A recent example is the National Labor Relations Act for the regulation of employer and employee relations in industries in which strikes, induced by unfair labor practices named in the Act, tend to disturb or obstruct interstate commerce. See *National Labor Relations Board v. Jones & Laughlin Steel Corp.* But, long before the adoption of the National Labor Relations Act, this Court had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it. In such legislation, Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. . . . In passing on the validity of legislation of the class last mentioned, the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.

Congress having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers other than the commerce power granted to the national government when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. *Shreveport Case*.

We think also that §15(a)(2), now under consideration, is sustainable independently of §15(a)(1), which prohibits shipment or transportation of the proscribed goods. As we have said, the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions, and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. The Act is thus directed at the suppression of a method or kind of competition in interstate commerce which it has, in effect, condemned as “unfair,” . . . made effective through interstate commerce.

The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce. . . .

The means adopted by §15(a)(2) for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so
related to the commerce, and so affects it, as to be within the reach of the commerce power. Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that, in present day industry, competition by a small part may affect the whole, and that the total effect of the competition of many small producers may be great. The legislation, aimed at a whole, embraces all its parts.

So far as Carter v. Carter Coal Co. is inconsistent with this conclusion, its doctrine is limited in principle by the decisions under the Sherman Act and the National Labor Relations Act, which we have cited and which we follow. 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 that all is retained which has not been surrendered. 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.

From the beginning and for many years, the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. McCulloch v. Maryland. . . .

Reversed.

Wickard v. Filburn
317 U.S. 111 (1942)
Vote: 9 (Black, Byrnes, Douglas, Frankfurter, Jackson, Murphy, Reed, Roberts, Stone)

OPINION OF THE COURT: Jackson

FACTS:
The 1938 Agricultural Adjustment Act, as amended, allowed the secretary of agriculture to establish production limits for various grains. Under these limits, acreage allotments were assigned to the individual farmer. The purpose of the law was to stop wild swings in grain prices by eliminating surpluses and shortfalls.

Roscoe Filburn owned a small farm in Montgomery County, Ohio. For many years he raised dairy cattle and chickens, selling the milk, poultry, and eggs the farm produced. He also raised winter wheat on a small portion of his farm. He sold some wheat and used the rest to feed his cattle and chickens, make flour for home consumption, and produce seeds for the next planting.

In July 1940 Secretary of Agriculture Claude R. Wickard set the wheat production limits for the 1941 crop. Filburn was allotted 11.1 acres to be planted in wheat with a yield of 20.1 bushels per acre. He planted not only his allotted acres but also some other land to produce the wheat for home consumption. In total Filburn planted 23 acres in wheat, from which he harvested 239 bushels more than the government allowed him. For this excess planting Filburn was fined $117.11. He refused to pay the fine, claiming that Congress had exceeded its powers under the commerce clause by regulating the planting by an individual of wheat on his own property for on-farm consumption. The lower court ruled in Filburn’s favor, and Secretary Wickard appealed.

ARGUMENTS:
For the appellant, Claude R. Wickard, secretary of agriculture, et al.:

- The quota on wheat is a valid exercise of the commerce power. That the law penalizes excess wheat, which is available for marketing but is consumed as feed, seed, or household food, does not make it invalid. Because excessive wheat affects national price and supply, Congress reasonably concluded that orderly interstate marketing and reasonable interstate prices could best be achieved if the quota system applied to all wheat available for marketing and not just to that actually sold.

- The quota system was also adopted because of the practical difficulties in devising an enforcement system limited to wheat sold. It would be impossible for the government to check on all sales by the more than 1 million wheat producers. Under the current system, enforcement is feasible because all
the government needs to know is the amount of acreage planted by the farmer and the average yield per acre.

- Under the Constitution, Congress can choose whatever means it deems appropriate and necessary to carry out its policy of keeping excess wheat off the interstate market under its commerce clause power.

For the appellee, Roscoe Filburn:

- Neither interstate nor intrastate commerce, nor an intermingling between the two, is at issue here. It involves wheat that a farmer may consume on his own farm for food, seed, or feed. It at no time moves into commerce between the states, nor even in a state. It is under the control of the farmer and has not moved into any channel of trade; it is private property.

- The government insists that wheat used on a farm for the farmer’s own purposes is in competition with commercial feed and seeds. This is too absurd to take seriously. This is akin to saying that because person A manufactures a radio, A cannot use the radio in his own home but must instead buy a radio from person B so that B can continue his business. Neither party can have the benefit of his own product.

It is urged that under the Commerce Clause of the Constitution, Article I, §8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in United States v. Darby sustaining the federal power to regulate production of goods for commerce, except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm. The Act includes a definition of “market” and its derivatives, so that as related to wheat, in addition to its conventional meaning, it also means to dispose of “by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of.” Hence, marketing quotas not only embrace all that may be sold without penalty but also what may be consumed on the premises. Wheat produced on excess acreage is designated as “available for marketing” as so defined, and the penalty is imposed thereon. Penalties do not depend upon whether any part of the wheat, either within or without the quota, is sold or intended to be sold. The sum of this is that the Federal Government fixes a quota including all that the farmer may harvest for sale or for his own farm needs, and declares that wheat produced on excess acreage may neither be disposed of nor used except upon payment of the penalty, or except it is stored as required by the Act or delivered to the Secretary of Agriculture.

Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are at most “indirect.” In answer the Government argues that the statute regulates neither production nor consumption, but only marketing; and, in the alternative, that if the Act does go beyond the regulation of marketing it is sustainable as a “necessary and proper” implementation of the power of Congress over interstate commerce.
The Government’s concern lest the Act be held to be a regulation of production or consumption, rather than of marketing, is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as “production,” “manufacturing,” and “mining” are strictly “local” and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as matter of law, only “indirect.” Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof. We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress are not to be decided by reference to any formula which 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.

At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. *Gibbons v. Ogden*. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes.

For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period there was perhaps little occasion for the affirmative exercise of the commerce power, and the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision the point of reference, instead of being what was “necessary and proper” to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood. Certain activities such as “production,” “manufacturing,” and “mining” were occasionally said to be within the province of state governments and beyond the power of Congress under the Commerce Clause.

It was not until 1887, with the enactment of the Interstate Commerce Act, that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder.

When it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress. *United States v. Knight Co.* These earlier pronouncements also played an important part in several of the five cases in which this Court later held that Acts of Congress under the Commerce Clause were in excess of its power.

Even while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*.

Whether the subject of the regulation in question was “production,” “consumption,” or “marketing” is... not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of Congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. 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.”...

The effect of consumption of home-grown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the
amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many other similarly situated, is far from trivial.

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. 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. Homegrown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or limitations thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in “defeating and obstructing” the congressional regulatory scheme of stabilizing prices. As Jackson put it, that Filburn’s “own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many other similarly situated, is far from trivial.” Under this approach very little commercial activity could be defined as purely intrastate. For, as Darby, Wickard, and the commerce clause cases to come in the 1960s and 1970s suggest, as long as the local activities are part of a class of activities that Congress decides in the aggregate have a substantial effect on interstate commerce, Congress may regulate. Finally, as our emphasis on “Congress decides” suggests, no longer would the Court decide whether the local activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether Congress reasonably thinks it does (or whether it has a “rational basis” for so concluding, as more-modern Courts have termed it). This approach sat comfortably with the Court’s new approach to economic legislation, whether passed by Congress or by the states (see Chapter 10).

Note too Darby’s return to the Court’s approach in Gibbons, that the power of Congress over interstate commerce “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution.” To the Darby Court, Congress was free to use its commerce power as a federal police power, excluding from “commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare.” A law falling into this category, as Stone wrote, is “not a forbidden invasion of state power merely because

Reversed.

THE ERA OF EXPANSIVE COMMERCE CLAUSE JURISPRUDENCE

With the Darby and Wickard decisions, the Court entered a new era of commerce clause interpretation. The justices no longer considered relevant issues such as direct versus indirect effects, manufacturing/production versus distribution, or stream of commerce concerns. They made clear, as Stone wrote in Darby, that “[t]he 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.”

Why would the Court allow Congress to regulate activities that were purely local in nature when the commerce clause speaks only of activities “among the several States”? Stone’s invocation of the language of McCulloch provides the answer. For Congress to regulate the interstate activities, it may be “necessary and proper” for it to regulate the local activities. This, according to Stone, was the case in Darby, and according to Jackson it held in Wickard, too. If every farmer acted as Filburn did, it would affect demand for wheat, which, in turn, would have a substantial effect in “defeating and obstructing” the congressional regulatory scheme of stabilizing prices. As Jackson put it, that Filburn’s “own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many other similarly situated, is far from trivial.” Under this approach very little commercial activity could be defined as purely intrastate. For, as Darby, Wickard, and the commerce clause cases to come in the 1960s and 1970s suggest, as long as the local activities are part of a class of activities that Congress decides in the aggregate have a substantial effect on interstate commerce, Congress may regulate. Finally, as our emphasis on “Congress decides” suggests, no longer would the Court decide whether the local activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether Congress reasonably thinks it does (or whether it has a “rational basis” for so concluding, as more-modern Courts have termed it). This approach sat comfortably with the Court’s new approach to economic legislation, whether passed by Congress or by the states (see Chapter 10).

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either its motive or its consequence is to restrict the use of articles of commerce within the states of destination, and is not prohibited unless by other Constitutional provisions.” But, to Stone, other “constitutional provisions” do not include the Tenth Amendment. In contrast to the Court’s approach in *Hammer*, the Tenth Amendment is not an enclave to which the litigants can turn when Congress is making constitutional use of its commerce power; it is but a “truism.”

Taken together, these cases gave Congress substantial authority to regulate under the commerce clause without fear of the Court invalidating its legislation. Congress took great advantage of this new deference by enacting a vast number of laws that earlier Courts might have considered outside the definition of interstate commerce and thus federal purview.

Many of these were in the economic realm, but with the expansive definition of interstate commerce that occurred after 1937 came a commensurate expansion of the federal police powers. These changes gave Congress sufficient power to combat social problems that it otherwise would have been unable to fight effectively.

Modern civil rights laws provide a good example. The constitutional protections against discrimination are found primarily in the equal protection clause of the Fourteenth Amendment and the due process clause of the Fifth, which have erected powerful barriers against invidious discrimination. But their exclusive target is discrimination perpetuated by the government. The words of the Fourteenth Amendment are clear: “Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.” Nothing in the Fifth or Fourteenth Amendments prohibits discrimination by private parties. These amendments were not intended to prohibit a private citizen from being discriminatory, but only to bar discriminatory government action. Although the Fourteenth Amendment includes a clause giving Congress the authority to enforce the provision with appropriate legislation, the Supreme Court has ruled that such enforcement legislation may not extend beyond the scope of the amendment itself. Consequently, the amendment does not empower Congress to regulate private discriminatory behavior.

When the civil rights activists of the 1950s and 1960s campaigned for the elimination of discriminatory conditions, high on their list was the eradication of discrimination by private parties who operated public accommodations. The movement targeted the owners of hotels, restaurants, movie theaters, recreation areas, and transportation systems. With the decision in *Brown v. Board of Education* (1954), governments could no longer maintain laws mandating segregation of such facilities, but private operators could still impose discrimination on their own. In the South, where segregation was the way of life, no one expected the states to pass civil rights statutes prohibiting private parties from discriminating. Therefore, civil rights advocates pressured Congress to act.

Congress responded by enacting the Civil Rights Act of 1964, the most comprehensive legislation of its type ever passed. The act, as amended, is still the nation’s strongest statute aimed at eliminating discrimination. The primary authority for passing this groundbreaking legislation, however, was not a clause in the Bill of Rights or one of the Civil War amendments, but the commerce clause. Because the Court had treated commerce clause legislation favorably since 1937, members of Congress had confidence that the Civil Rights Act would withstand a legal challenge. Opponents of the legislation argued that Congress had misused its power to regulate commerce by invoking it to justify a civil rights law. Obviously, they said, the framers, many of whom owned slaves, did not intend the power to regulate commerce among the states to be used to enact civil rights legislation.

Was Congress on solid ground in doing so? The primary test of the law’s constitutionality was *Heart of Atlanta Motel, Inc. v. United States* (1964). As you read this case, note Justice Tom C. Clark’s description of how racial discrimination has a negative impact on interstate commerce. Also note the Court’s expansive view of interstate commerce and its conclusion that the commerce clause can be used to combat moral wrongs.

**Heart of Atlanta Motel, Inc. v. United States**

379 U.S. 241 (1964)


Oral arguments are available at https://www.oyez.org/cases/1964/515.

**Vote:** 9 (Black, Brennan, Clark, Douglas, Goldberg, Harlan, Stewart, Warren, White)

**OPINION OF THE COURT:** Clark

**CONCURRING OPINIONS:** Black, Douglas, Goldberg

**FACTS:** Title II of the 1964 Civil Rights Act in its original form prohibited discrimination on the basis of race, color, religion, or national origin by certain public accommodations that operated in or affected interstate commerce.
The accommodations specifically included were as follows:

1. Inns, hotels, motels, or other lodging facilities of five rooms or more. Because they served the traveling public, these facilities were considered part of interstate commerce by definition.

2. Restaurants and cafeterias, if they served interstate travelers or if a substantial portion of their food or other products had moved in interstate commerce.

3. Motion picture houses, if they presented films that had moved in interstate commerce.

4. Any facility physically located within any of the other covered accommodations, which included operations such as hotel shops and theater snack bars.

The Heart of Atlanta Motel was a 216-room facility in Atlanta, Georgia, owned by a group of investors led by Moreton Rolleston Jr. Located near the commercial center of the city, it had easy access to two interstate highways and two major state roads. The motel advertised for business in national publications and maintained more than fifty billboards and highway signs around the state. Both the government and the motel agreed that the facility met the act’s definition of a public accommodation in interstate commerce.

The motel admitted that prior to the enactment of the civil rights law it practiced a policy of racial discrimination. Furthermore, it acknowledged that it intended to continue its policy of not serving African Americans. To secure its right to do so, the motel filed suit to have the 1964 Civil Rights Act declared unconstitutional.

ARGUMENTS:

For the appellant, Heart of Atlanta Motel, Inc.:
• The Court should not construe the Constitution in the way it thinks the framers of the Constitution, if living, would today. The Court should construe the Constitution in accord with the intentions of the framers at the time it was drawn and with the intentions of those who adopted it at the time.
• The framers’ intentions were clear: to limit the powers of the federal government to those delegated in the Constitution with all others reserved to the states. If the Court allows this broad use of commerce power, there is no limit on Congress. It can regulate every person and every business as it sees fit.
• Congress has not even established any standards to determine if a motel is in or materially affects interstate commerce. It might just as well have confiscated all motels and nationalized them on the ground that they are in interstate commerce.

For the appellees, United States et al.:
• Based on the Court’s decision in NLRB v. Jones & Laughlin Steel Corporation, Congress has the power to regulate local activities that might have a substantial and harmful effect on interstate commerce. Based on Wickard v. Filburn, the effect on commerce need not be determined solely by the effect on the parties to the litigation. Congress (and the Court) may consider whether the party’s contribution, aggregated with others similarly situated, will have an adverse effect on commerce.
• As Champion v. Ames makes clear, Congress, in exercising its power to foster interstate commerce, may touch on subjects of social or moral wrong, in addition to their adverse economic effects.
• Congress’s fact-finding shows that, under these precedents, Title II is a valid exercise of Congress’s power to regulate interstate commerce. Discrimination in public accommodations imposes a burden on movement in interstate commerce, and discrimination in hotels and motels serving transient guests imposes burdens on interstate travel.
• Race discrimination is not only a social and moral issue but also a national and economic issue. Testimony shows that because African Americans may be forced to find lodging in places far removed from their route of travel due to discrimination by hotels, the number of persons engaging in interstate travel is diminished.

MR. JUSTICE CLARK DELIVERED THE OPINION OF THE COURT.

The Basis of Congressional Action.

While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. This testimony included
the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight; and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself “dramatic testimony to the difficulties” Negroes encounter in travel. These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is “no question that this discrimination in the North still exists to a large degree” and in the West and Midwest as well. This testimony indicated a qualitative as well as a quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler’s pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. This was the conclusion not only of the Under Secretary of Commerce but also of the Administrator of the Federal Aviation Agency who wrote the Chairman of the Senate Commerce Committee that it was his “belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations.” We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

**The Power of Congress over Interstate Travel.**

The power of Congress to deal with these obstructions depends on the meaning of the Commerce Clause. Its meaning was first enunciated 140 years ago by the great Chief Justice John Marshall in *Gibbons v. Ogden* (1824), in these words:

“The subject to be regulated is commerce; and . . . to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities . . . but it is something more: it is intercourse . . . between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.

“To what commerce does this power extend? The constitution informs us, to commerce ‘with foreign nations and among the several States, and with the Indian tribes.’

“It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse. . . . No sort of trade can be carried on . . . to which this power does not extend.

“The subject to which the power is next applied, is to commerce ‘among the several States.’ The word ‘among’ means intermingled.” . . .

In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is “commerce which concerns more States than one” and has a real and substantial relation to the national interest. Let us now turn to this facet of the problem.

That the “intercourse” of which the Chief Justice spoke, included the movement of persons through more States than one was settled as early as 1849, in the *Passenger Cases*, where Mr. Justice McLean stated: “That the transportation of passengers is a part of commerce is not now an open question.” Again in 1913 Mr. Justice McKenna, speaking for the Court, said: “Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. . . . Nor does it make any difference whether the transportation is commercial in character.” . . .

The same interest in protecting interstate commerce which led Congress to deal with segregation in interstate carriers and the white-slave traffic has prompted it to extend the exercise of its power to gambling; to criminal enterprises; to deceptive practices in the sale of products; to fraudulent security transactions; to misbranding of drugs; to wages and hours; to members of labor unions; to crop control; to discrimination against shippers; to the protection of small business from injurious price cutting; to resale price maintenance; to professional football; and to racial discrimination by owners and managers of terminal restaurants.

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the
disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

It is said that the operation of the motel here is of a purely local character. But ... the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may—as it has—prohibit racial discrimination by motels serving travelers, however “local” their operations may appear. . . .

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other means to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed—what means are to be employed—is within the sound and exclusive discretion of the Congress. It is subject only to one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

Affirmed.

Employing the same sweeping language as the Court used in Wickard and especially Darby, Justice Clark's opinion gave Congress broad powers to use the commerce clause as authority to regulate moral wrongs that occur in interstate commerce. The Heart of Atlanta Motel complied with the Court's decision (see Box 7-7), and a new era of civil rights in public accommodations began. The Court's interpretation of the commerce clause turned that provision into one of the most powerful weapons in the federal government's regulatory arsenal.

Although this broad interpretation of Congress's regulatory powers under the commerce clause had become generally accepted, it is important to note that, even in the 1960s and 1970s, individual justices occasionally expressed doubts about the expansiveness of the modern definitions of interstate commerce. An example is Hugo Black's reaction to the Court's decision in Daniel v. Paul (1969). At issue was the application of federal regulations to the Lake Nixon Club, a small recreational facility located in a rural area of Arkansas on county roads far from any interstate highway. To avoid having to comply with desegregation laws, owner Euell Paul operated it as a private club, charging a nominal membership fee of twenty-five cents for participation in activities such as swimming, dancing, picnicking, and boating. The club served a local clientele: there was no evidence that any interstate traveler had ever used it. The Court ruled that the club operated in interstate commerce for the following reasons: (1) it advertised for business in publications known to be read by some interstate travelers; (2) it leased fifteen paddleboats from an Oklahoma company; (3) it owned a jukebox and records that, while purchased from an Arkansas company, had been manufactured out of state; and (4) three out of the four items sold at the snack bar (e.g., bread and soft drinks) contained ingredients from out of state.

This reasoning was too much for Justice Black. Although he opposed the racial policies of the club, Black refused to accept the conclusion that this “sleepy hollow” was engaged in interstate commerce. The Court's decision, he argued, was “stretching the Commerce Clause so as to give the Federal Government complete control over every little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 states. This goes too far for me.” His dissent was ironic given that Black was the first of the ardent New Deal justices.

Justice Potter Stewart had a similar reaction in Perez v. United States (1971). This case involved the Consumer Credit Protection Act, which Congress passed under its commerce clause power to criminalize extortionate means to collect payments on loans. Congress based its use of the commerce clause on its conclusion that “loan sharks”—lenders who use threats of violence to ensure the repayment of loans—are in a class largely controlled by organized crime, which exerts an adverse effect on interstate commerce. Alcides Perez was convicted under the act for attempting to extort money from the owner of a butcher shop. Perez challenged the law, claiming that Congress may not use its commerce power to regulate purely local loan-sharking.
BOX 7-7
Aftermath . . . Heart of Atlanta Motel

THE HEART OF ATLANTA MOTEL, built in 1956, was owned by a group of Atlanta investors. One of the co-owners was Moreton Rolleston Jr., a former lieutenant commander in the U.S. Navy and a longtime Atlanta lawyer. Rolleston was a strong supporter of racial segregation. It was no coincidence, therefore, that the Heart of Atlanta Motel refused to serve black customers and that the motel did not cooperate with a consortium of fourteen downtown hotels whose owners agreed in 1963 to accommodate conventions that included blacks.

When it appeared certain that Congress would pass the 1964 Civil Rights Act, Rolleston, who also served as the motel’s attorney, prepared a lawsuit to challenge its constitutionality. He filed the suit just two hours after President Lyndon Johnson signed the bill into law.

In August 1964, after losing in the district court, the owners complied with the court’s ruling and began operating the motel on an integrated basis. At the same time, they pressed an appeal to the U.S. Supreme Court. Rolleston, arguing before the justices, claimed that the Civil Rights Act was an unconstitutional intrusion by the federal government into an area reserved to the states and a violation of the rights of business owners. When the Supreme Court unanimously upheld the law on December 14, 1964, Rolleston lamented, “The decision opens the frightful door to unlimited power of a centralized government in Washington, in which the individual citizen and his personal liberty are of no importance.”

Several years later Rolleston bought out his fellow investors and became the motel’s sole owner. In 1973 the motel was sold and razed. A large, modern hotel now occupies the land where the Heart of Atlanta Motel once stood.

Rolleston continued to practice law in Atlanta well into his eighties. In 2000 he was briefly a Republican candidate for the U.S. Senate. Seven years later, the Georgia Supreme Court disbarred the eighty-nine-year-old Rolleston for abusing the legal process by excessive litigation in a property dispute that was ongoing for more than two decades. The legal battle included Rolleston’s attempts to stop film producer and actor Tyler Perry from building a 30,000-square-foot mansion on a seventeen-acre riverfront parcel of land that Rolleston claimed to own, a claim that the courts repeatedly rejected. In addition, Rolleston lost a $5.4 million malpractice ruling in 1995, and he suffered a $4.1 million judgment in 1998. In defiance of the disbarment action, Rolleston pledged to continue practicing law.

Rolleston died on August 19, 2013, at the age of ninety-five.

Second, protection of the instrumentalities of interstate commerce. Third, those activities affecting commerce. It is with this last category that we are here concerned.

By “channels... being misused,” Douglas meant, for example, using airline routes to ship stolen goods or interstate highways to transport people who have been kidnapped. (Champion v. Ames provides another example.) The “instrumentalities” of interstate commerce follow from, among other cases, the Shreveport Rate Case and include things (or even persons) that move in the channels of interstate commerce. Neither of these ideas is especially controversial. Even in E. C. Knight the Court held that “transportation and its instrumentalities” are appropriate subjects of the commerce power.

The chief concerns in Perez, as in so many cases, are raised by Douglas’s last category. How do we know whether an activity that seems local, such as the activity at issue here, affects commerce? For Douglas, the answer lay in the Court’s post–New Deal decisions in NLRB v. Jones & Laughlin Steel, Wickard v. Filburn, and United States v. Darby. Congress had concluded that loan-sharking, although a purely local activity, had, by virtue of being part of a “class of activities,” a substantial effect on interstate commerce, and that was enough to sustain the law.

Justice Stewart cast the lone dissent in the case. He agreed that Congress can use its commerce clause power to protect the instrumentalities and channels of commerce and to regulate intrastate activities that have a substantial effect on interstate commerce. But, echoing Black in Daniel v. Paul, he was concerned that under this law “a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce.” He continued, “The Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws.” This power, in Stewart’s view, belonged to the states unless Congress could “rationally have concluded that loan-sharking is an activity with interstate attributes that distinguish it in some substantial respect from other local crime.” In short, it was not enough for Stewart to say simply that loan-sharking has some interstate characteristics because “all crime is a national problem” and Congress cannot regulate “all crime.”

Still, in spite of these occasional complaints that the Court had erased the distinction between inter- and intrastate commerce, the justices remained wedded to a broad interpretation of the congressional commerce power. The post–New Deal approach reflects Justice Cardozo’s dissent in Carter v. Carter Coal Company, in which he said the commerce power is “as broad as the need that evokes it.”

**LIMITS ON THE COMMERCE POWER: THE REPUBLICAN COURT ERA**

As the nation entered the 1990s, commerce clause jurisprudence seemed to be a settled matter. Since the 1937 decision in NLRB v. Jones & Laughlin Steel Corporation, the Court had persevered in its commitment to cooperative federalism and loyalty to an expansive view of the federal government’s commerce powers. As late as 1985, the Court in Garcia v. San Antonio Metropolitan Transit Authority (SAMTA) (excerpted in Chapter 6) had made a major statement supportive of continuing in this vein.

Under the surface, however, the prospects for change were mounting. The Court’s vote in Garcia was 5–4 and, therefore, vulnerable to the impact of personnel changes. The four justices who dissented in Garcia were all Republican appointees, and the nation had turned decidedly in the direction of the Republicans by electing presidents of that party in three successive elections (1980, 1984, and 1988). Republican President Ronald Reagan had the opportunity to appoint four new justices to the Court and George H. W. Bush added two more. The most consequential of those appointments was Bush’s 1991 selection of conservative justice Clarence Thomas to replace the retiring Thurgood Marshall, a member of the Garcia majority. This appointment tipped the scales in favor of justices who were sympathetic to the interests of the states and less supportive of expansive federal regulation. Table 7-1 illustrates the effect of those personnel changes, beginning with the decision in Garcia and continuing over six subsequent major federalism/commerce decisions through 2012.

The first indication that the balance of power had shifted occurred in New York v. United States (1992), just one year after the appointment of Justice Thomas. You may recall from our reading of that case in Chapter 6 that the majority struck down a federal law that mandated...

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19 As Justice Antonin Scalia wrote in Gonzales v. Raich (2005), “The first two categories are self-evident, since they are the ingredients of interstate commerce itself. See Gibbons v. Ogden (1824).”

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that states adopt a particular radioactive waste policy. The justices held that the Constitution does not allow the federal government to command the states to pass legislation to implement federally preferred policies. The Court’s decision in New York signaled that those sympathetic to preserving the traditional role of the states now formed a majority.

Even so, the Court’s decision in United States v. Lopez (1995) came as somewhat of a surprise. For the first time since the battles over the New Deal, the justices invalidated a federal statute as falling outside the authority granted to Congress by the commerce clause.\(^{20}\) In addition to explaining the rationale for this outcome, Chief Justice Rehnquist’s majority opinion nicely reviews the evolution of the Court’s commerce clause doctrine.

### United States v. Lopez


Vote: 5 (Kennedy, O’Connor, Rehnquist, Scalia, Thomas)
4 (Breyer, Ginsburg, Souter, Stevens)

**OPINION OF THE COURT: Rehnquist**

**CONCURRING OPINIONS: Kennedy, Thomas**

**Dissenting Opinions: Breyer, Souter, Stevens**

**Facts:**

On March 10, 1992, Alfonso Lopez Jr. came to Edison High School carrying a concealed .38 caliber handgun.

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### Table 7-1  Support for Expansive Federal Commerce Power in Key Cases after Garcia

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**Note:** Justices whose names appear in bold generally support a more expansive view of the commerce power than do those whose names are in plain font. Justices whose names are underlined were in the majority. Arrows indicate personnel changes. Votes in Sebelius are classified on the basis of the Commerce Clause portion of the decision. R = Republican appointee; D = Democratic appointee.

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\(^{20}\) Keep in mind that in National League of Cities v. Usery (1976) and New York v. United States (1992) the Court invalidated the federal laws not because they were beyond Congress’s power to regulate interstate commerce but because they violated the Tenth Amendment.
and five rounds of ammunition. Acting on an anonymous tip, officials at the San Antonio school confronted the twelfth-grade student, and he admitted to having the weapon. Lopez claimed that he had been given the gun by an individual who instructed him to deliver it to a third person. The gun was to be used in gang-related activities. Lopez was arrested for violating the federal Gun-Free School Zones Act of 1990.

Lopez, who had no record of previous criminal activity, was convicted in federal district court and sentenced to six months in prison, two years of supervised release, and a $50 fine. His attorneys appealed to the Fifth Circuit Court of Appeals, claiming that Congress had no constitutional authority to pass the Gun-Free School Zones Act. Attorneys for the United States countered by arguing that the law was an appropriate exercise of congressional power to regulate interstate commerce. The appeals court held in favor of Lopez, and the government asked the Supreme Court to review that ruling.

Congress passed the Gun-Free School Zones Act—section 922(q) of chapter 18 of the United States Code—in 1990. In passing the act, Congress did not issue any findings showing a relationship between gun possession on school property and commerce. The federal government argued that such findings should not be required, that it would be sufficient if Congress could rationally have concluded that gun possession on or near school premises affects interstate commerce. The appeals court held in favor of Lopez, and the government asked the Supreme Court to review that ruling.

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ARGUMENTS:

For the petitioner, United States:

- Under the commerce clause and based on past decisions, Congress is empowered to regulate even intrastate, noneconomic activity that, in the aggregate, exerts a substantial impact on interstate commerce.
- All Congress must show is that it could rationally have concluded that gun possession on or near school premises affects interstate commerce.
- There is an abundant basis from which Congress could reasonably determine that the conduct regulated in the law affects interstate commerce. For example, the need for insurance spreads the economic consequences of violent crime throughout the nation. In addition, violent crime affects interstate commerce by reducing the willingness of people to travel to areas they think are unsafe.
- Congress also had grounds for concluding that the presence of guns in schools poses an unacceptable threat to the proper functioning of primary and secondary education. For the last decade or so, the importance of education to national productivity and economic competitiveness was the subject of extensive national concern and debate.

For the respondent, Alfonso Lopez Jr.:

- Under the Supreme Court’s decision in Perez v. United States (1971), congressional jurisdiction under the commerce clause reaches, in the main, three categories: (1) the use of channels of interstate or foreign commerce; (2) protection of the instrumentalities of interstate commerce; and (3) those activities affecting interstate commerce. This case involves only the third Perez category.
- Congress must demonstrate a substantial link between the object of its regulation and interstate commerce. Here, Congress failed to provide any link between interstate commerce and possession of a firearm.
- Even if the Court finds that Congress need not have made formal or informal findings or even have concrete evidence of an effect on commerce when passing the Gun-Free School Zones Act, the act is still unconstitutional. In Gibbons, Chief Justice Marshall recognized that Congress’s power under the commerce clause does not extend to “exclusively internal commerce of a State.” The power to regulate commerce, however broad, is not unlimited. Because it regulates internal, noneconomic activity without a substantial connection to interstate commerce, the Gun-Free School Zones Act exceeds those limits.
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.” . . .

We start with first principles. The Constitution creates a Federal Government of enumerated powers. 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.” This constitutionally mandated division of authority “was adopted by the Framers to ensure protection of our fundamental liberties.” *Gregory v. Ashcroft* (1991). . . .

. . . The Court, through Chief Justice Marshall, first defined the nature of Congress’ commerce power in *Gibbons v. Ogden* (1824):

“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.* . . .

For nearly a century thereafter, the Court’s Commerce Clause decisions dealt but rarely with the extent of Congress’ power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce. . . . Under this line of precedent, the Court held that certain categories of activity such as “production,” “manufacturing,” and “mining” were within the province of state governments, and thus were beyond the power of Congress under the Commerce Clause. See *Wickard v. Filburn* (1942) (describing development of Commerce Clause jurisprudence).

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. When cases involving these laws first reached this Court, we imported from our negative Commerce Clause cases the approach that Congress could not regulate activities such as “production,” “manufacturing,” and “mining.” See, e.g., *United States v. E. C. Knight Co.* (1895); *Carter v. Carter Coal Co.* (1936). Simultaneously, however, the Court held 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. See, e.g., *Houston, E. & T. R. Co. v. United States* (1914) (Shreveport Rate Cases).

In *A. L. A. Schechter Poultry Corp. v. United States* (1935), 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.* (1937), 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 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* (1941), 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.”
In *Wickard v. Filburn*, the Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown 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.” See also *Darby* (Congress may regulate intrastate activity that has a “substantial effect” on interstate commerce); *Wickard* (Congress may regulate activity that “exerts a substantial economic effect on interstate commerce”). 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.

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.

Within this final category, admittedly, our case law has not been clear whether an activity must “affect” or “substantially affect” interstate commerce in order to be within Congress’ power to regulate it under the Commerce Clause. 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 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, 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.

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. For example, in United States v. Bass (1971), the Court interpreted former 18 U.S.C. 1202(a), which made it a crime for a felon to “receive[ ], possess[ ], or transpor[t] in commerce or affecting commerce...any firearm.” The Court interpreted the possession component of 1202(a) to require an additional nexus to interstate commerce both because the statute was ambiguous and because “unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.”... Unlike the statute in Bass, 922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

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 affects interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here,...

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,...

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress’ authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender “legal uncertainty”....

These are not precise formulations, and in the nature of things they cannot be. But we think they point the way to a correct decision of this case. The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.
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. 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. For the foregoing reasons the judgment of the Court of Appeals is

Affirmed.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

The issue in this case is whether the Commerce Clause authorizes Congress to enact a statute that makes it a crime to possess a gun in, or near, a school. In my view, the statute falls well within the scope of the commerce power as this Court has understood that power over the last half-century.

In reaching this conclusion, I apply three basic principles of Commerce Clause interpretation. First, the power to “regulate Commerce . . . among the several States” encompasses the power to regulate local activities insofar as they significantly affect interstate commerce. . . . I use the word “significant” because the word “substantial” implies a somewhat narrower power than recent precedent suggests. But, to speak of “substantial effect” rather than “significant effect” would make no difference in this case.

Second, in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (i.e., the effect of all guns possessed in or near schools).

Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words “rational basis” capture this leeway. Thus, the specific question before us, as the Court recognizes, is not whether the “regulated activity sufficiently affected interstate commerce,” but, rather, whether Congress could have had “a rational basis” for so concluding.

I recognize that we must judge this matter independently. “[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” And, I also recognize that Congress did not write specific “interstate commerce” findings into the law under which Lopez was convicted. Nonetheless, as I have already noted, the matter that we review independently (i.e., whether there is a “rational basis”) already has considerable leeway built into it. And, the absence of findings, at most, deprives a statute of the benefit of some extra leeway. This extra deference, in principle, might change the result in a close case, though, in practice, it has not made a critical legal difference. . . .

Applying these principles to the case at hand, we must ask whether Congress could have had a rational basis for finding a significant (or substantial) connection between gun-related school violence and interstate commerce. . . . As long as one views the commerce connection, not as a “technical legal conception,” but as “a practical one,” Swift & Co. v. United States (1905), the answer to this question must be yes. . . .

For one thing, reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious. . . . Congress obviously could have thought that guns and learning are mutually exclusive. And, Congress could therefore have found a substantial educational problem—teachers unable to teach, students unable to learn—and concluded that guns near schools contribute substantially to the size and scope of that problem.

Having found that guns in schools significantly undermine the quality of education in our Nation’s classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation’s economy. . . .

In recent years the link between secondary education and business has strengthened, becoming both more direct
and more important. Scholars on the subject report that technological changes and innovations in management techniques have altered the nature of the workplace so that more jobs now demand greater educational skills. . . .

Increasing global competition also has made primary and secondary education economically more important. . . . Indeed, Congress has said, when writing other statutes, that "functionally or technologically illiterate" Americans in the work force "erode[e]" our economic "standing in the international marketplace," and that "our Nation is. . . paying the price of scientific and technologically illiteracy, with our productivity declining, our industrial base ailing, and our global competitiveness dwindling."

Finally, there is evidence that, today more than ever, many firms base their location decisions upon the presence, or absence, of a workforce with a basic education. . . .

The economic links I have just sketched seem fairly obvious. Why then is it not equally obvious, in light of those links, that a widespread, serious, and substantial physical threat to teaching and learning also threatens the commerce to which that teaching and learning is inextricably tied? That is to say, guns in the hands of six percent of inner-city high school students and gun-related violence throughout a city's schools must threaten the trade and commerce that those schools support. The only question, then, is whether the latter threat is (to use the majority's terminology) "substantial." And, the evidence of (1) the extent of the gun-related violence problem, (2) the extent of the resulting negative effect on classroom learning, and (3) the extent of the consequent negative commercial effects, when taken together, indicate a threat to trade and commerce that is "substantial." At the very least, Congress could rationally have concluded that the links are "substantial."

Specifically, Congress could have found that gun-related violence near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low paying jobs, and (2) to communities and businesses that might (in today's "information society") otherwise gain, from a well-educated work force, an important commercial advantage, of a kind that location near a railroad or harbor provided in the past. . . . The violence related facts, the educational facts, and the economic facts, taken together, make this conclusion rational. And, because under our case law, the sufficiency of the constitutionally necessary Commerce Clause link between a crime of violence and interstate commerce turns simply upon size or degree, those same facts make the statute constitutional.

The majority's holding—that 922 falls outside the scope of the Commerce Clause—creates three serious legal problems. First, the majority's holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence. . . .

The second legal problem the Court creates comes from its apparent belief that it can reconcile its holding with earlier cases by making a critical distinction between "commercial" and noncommercial "transaction[s]." That is to say, the Court believes the Constitution would distinguish between two local activities, each of which has an identical effect upon interstate commerce, if one, but not the other, is "commercial" in nature. . . .

The third legal problem created by the Court's holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled. . . .

In sum, to find this legislation within the scope of the Commerce Clause would permit "Congress . . . to act in terms of economic. . . realities." . . . Upholding this legislation would do no more than simply recognize that Congress had a "rational basis" for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten. For these reasons, I would reverse the judgment of the Court of Appeals. Respectfully, I dissent.

Just how far-reaching was United States v. Lopez? How did it fit into the Court's evolving commerce clause jurisprudence? Some commentators interpreted it quite narrowly, simply as a warning to Congress that it must justify its legislation by showing the relationship between the activities regulated and interstate commerce. Had Congress explicitly demonstrated that it was responding to the negative impact school violence has on the economy, they asserted, it is likely that the Court would have found no fault with the law. These commentators saw the decision as little more than a detour and not a full-scale retreat from the body of commerce clause jurisprudence that flows almost seamlessly from NLRB v. Jones & Laughlin Steel Corporation onward (the Tenth Amendment cases of National League of Cities v. Usery [1976] and New York v. United States [1992] being the chief exceptions).
Others viewed the decision as more sweeping, and as a signal that the Court would no longer allow Congress to regulate whatever it wished on the ground that all activities somehow affect interstate commerce. These critics concluded that Lopez was not an isolated ruling; rather, it should be considered in conjunction with New York v. United States and Printz v. United States (1997) (both excerpted in Chapter 6)—other decisions in which a majority of the Court ruled against federal action that was seen as encroaching on the states.

The justices themselves seemed divided on what the case represented. In their concurring opinions, Justice Anthony Kennedy called Lopez a “limited holding,” but Justice Clarence Thomas declared that it was time “to modify our Commerce Clause jurisprudence.” The Court’s 5–4 vote contributed additional uncertainty. Whether Lopez was an aberration or a signal that the Court was following Thomas’s advice became clearer five years later, when the Court issued its decision in United States v. Morrison.

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**United States v. Morrison**

529 U.S. 598 (2000)


Vote: 5 (Kennedy, O’Connor, Rehnquist, Scalia, Thomas)

4 (Breyer, Ginsburg, Souter, Stevens)

**OPINION OF THE COURT:** Rehnquist

**CONCURRING OPINION:** Thomas

**DISSenting OPINIONS:** Breyer, Souter

**FACTS:**

Not long after Christy Brzonkala enrolled at Virginia Polytechnic Institute (Virginia Tech) in the fall of 1994, she met Antonio Morrison and James Crawford, members of the university’s varsity football team. Brzonkala alleged that within thirty minutes of meeting Morrison and Crawford, she was assaulted and repeatedly raped by the two young men. She claimed that the attack caused her to become severely emotionally disturbed and depressed. In early 1995 she filed a complaint under Virginia Tech’s sexual assault policy. At the subsequent hearing Morrison admitted having sexual contact with Brzonkala and claimed that even though she had twice told him no, the sexual activity was ultimately consensual.

The Judicial Committee found insufficient evidence against Crawford, but it found Morrison guilty of sexual assault and sentenced him to an immediate suspension from the university for two semesters. Morrison appealed this decision, and, because of procedural technicalities, the university retried Morrison under its abusive conduct policy. This time Morrison was found guilty of “using abusive language” and sentenced once more to a two-semester suspension. Morrison again appealed. The university provost set aside Morrison’s punishment. She concluded that it was “excessive” when compared with other convictions under the abusive conduct policy. Morrison’s final punishment was probation and minimal counseling.

Brzonkala then filed suit in federal district court against Morrison, Crawford, and Virginia Tech under 1994, which provided a federal civil remedy for the victims of gender-motivated violence. The district court held that Congress lacked the authority to pass this particular provision under either the commerce clause or the Fourteenth Amendment. A divided court of appeals affirmed that conclusion. The United States intervened in the suit to defend the validity of the statute. Because the court of appeals had invalidated a federal statute on constitutional grounds, the Supreme Court granted certiorari.

The justices concluded that Congress did not have the power to enact the challenged statute under the Fourteenth Amendment. In the portion of the decision excerpted here, the Court addresses Congress’s authority to enact this legislation under the commerce clause.

**ARGUMENTS:**

For the petitioner, United States:

- The law is an appropriate exercise of Congress’s power under the commerce clause. After four years of investigation, Congress found that gender-motivated violence burdens the national economy and interstate commerce by making women fear for their safety in the workplace and by imposing increased medical and other costs on victims, their employers and insurers, and state and local governments. All of those burdens were documented in the extensive legislative record.

- Congress’s commerce power is not confined to the regulation of those intrastate activities that are “commercial” or “economic” in nature. It is not the character of the activity but the substantiality of its impact on interstate commerce that determines whether the activity may be regulated under the commerce clause.
commerce clause, as was suggested in *Lopez*. Even so, the act is connected to economic activity because the gender-motivated violence remedied occurs at, or en route to, workplaces, retail establishments, and interstate transportation terminals as well as in other settings.

For the respondent, Antonio J. Morrison:

- Congress cannot regulate felonious conduct under its commerce power because the activity being regulated is wholly noneconomic in nature. In *Lopez* the Court emphasized the noneconomic nature of the activity being regulated.

- Petitioner's arguments would give Congress the power to pass virtually any legislation at all because all human activity has economic consequences of one kind or another. That was the federalism concern at the core of *Lopez*. Ultimately, the government's argument amounts to the proposition that Congress should be able to regulate any problem it deems sufficiently important. Morrison has a right to be free from an overreaching Congress, just as he has the right to be free from a Congress that would pass a law abridging freedom of speech.

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**Chief Justice Rehnquist Delivered the Opinion of the Court.**

Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. With this presumption of constitutionality in mind, we turn to the question whether §13981 falls within Congress' power under Article I, §8, of the Constitution. Brzonkala and the United States rely upon the third clause of the Article, which gives Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

As we discussed at length in [*United States v. Lopez* (1995)], our interpretation of the Commerce Clause has changed as our Nation has developed. We need not repeat that detailed review of the Commerce Clause's history here; it suffices to say that, in the years since *NLRB v. Jones & Laughlin Steel Corp.* (1937), Congress has had considerably greater latitude in regulating conduct and transactions under the Commerce Clause than our previous case law permitted.

*Lopez* emphasized, however, that even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds.

“[E]ven [our] 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.’”

As we observed in *Lopez*, modern Commerce Clause jurisprudence has “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, . . . i.e., those activities that substantially affect interstate commerce.”

Petitioners do not contend that these cases fall within either of the first two of these categories of Commerce Clause regulation. They seek to sustain §13981 as a regulation of activity that substantially affects interstate commerce. . . .

Since *Lopez* most recently canvassed and clarified our case law governing this third category of Commerce Clause regulation, it provides the proper framework for conducting the required analysis of §13981. In *Lopez*, we held that the Gun-Free School Zones Act of 1990, which made it a federal crime to knowingly possess a firearm in a school zone, exceeded Congress' authority under the Commerce Clause. Several significant considerations contributed to our decision.

First, we observed that [the Gun-Free School Zones Act] was “a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” . . .
...Lopez’s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.

The second consideration that we found important ... was that the statute contained “no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.” ... 

Third, we noted that neither [the Gun-Free School Zones Act] “nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.” While “Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce,” the existence of such findings may “enable us to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect [is] visible to the naked eye.”

Finally, our decision in Lopez rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated. The United States argued that the possession of guns may lead to 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 argued that the presence of guns at schools poses a threat to the educational process, which in turn threatens to produce a less efficient and productive workforce, which will negatively affect national productivity and thus interstate commerce.

We rejected these “costs of crime” and “national productivity” arguments because they would permit Congress to “regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce.” ...

"...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.” [Lopez.]

With these principles underlying our Commerce Clause jurisprudence as reference points, the proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

Like the Gun-Free School Zones Act at issue in Lopez, §13981 contains no jurisdictional element establishing that the federal cause of action is in pursuit of Congress’ power to regulate interstate commerce. ... 

In contrast with the lack of congressional findings that we faced in Lopez, §13981 is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in Lopez, “[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” Rather, “[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.”

... Congress’ findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution’s distinction between national and local commerce...

“by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; ... by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.”

Given these findings and petitioners’ arguments, the concern that we expressed in Lopez that Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local commerce...
authority seems well founded. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded §13981 from being used in the family law context. Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

Petitioner Brzonkala's complaint alleges that she was the victim of a brutal assault. If the allegations here are true, no civilized system of justice could fail to provide her a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States. The judgment of the Court of Appeals is

Affirmed.

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The Court says both that it leaves Commerce Clause precedent undisturbed and that the Civil Rights Remedy of the Violence Against Women Act of 1994 exceeds Congress's power under that Clause. I find the claims irreconcilable and respectfully dissent.

Our cases, which remain at least nominally undisturbed, stand for the following propositions. Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the Courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact. Any explicit findings that Congress chooses to make, though not dispositive of the question of rationality, may advance judicial review by identifying factual authority on which Congress relied. Applying those propositions in these cases can lead to only one conclusion.

One obvious difference from *United States v. Lopez* (1995) is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce. Passage of the Act in 1994 was preceded by four years of hearings, which included testimony from physicians and law professors; from survivors of rape and domestic violence; and from representatives of state law enforcement and private business. The record includes reports on gender bias from task forces in 21 States, and we have the benefit of specific factual findings in the eight separate Reports issued by Congress and its committees over the long course leading to enactment.

Congress thereby explicitly stated the predicate for the exercise of its Commerce Clause power. Is its conclusion irrational in view of the data amassed? True, the methodology of particular studies may be challenged, and some of the figures arrived at may be disputed. But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned.

The Act would have passed muster at any time between *Wickard* [v. Filburn] in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper
Clause, extended to all activity that, when aggregated, has a substantial effect on interstate commerce.

The fact that the Act does not pass muster before the Court today is therefore proof, to a degree that Lopez was not, that the Court's nominal adherence to the substantial effects test is merely that. Although a new jurisprudence has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them. These devaluations are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review.

All of this convinces me that today's ebb of the commerce power rests on error, and at the same time leads me to doubt that the majority's view will prove to be enduring law. There is yet one more reason for doubt. Although we sense the presence of [Carter v.] Carter Coal [1936], Schechter [Poultry v. United States, 1935], and [National League of Cities v.] Uesy [1976] once again, the majority embraces them only at arm's-length. Where such decisions once stood for rules, today's opinion points to considerations by which substantial effects are discounted. Cases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived. The Court's thinking betokens less clearly a return to the conceptual straitjackets of Schechter and Carter Coal and Uesy than to something like the unsteady state of obscenity law between Redrup v. New York (1967) and Miller v. California (1973), a period in which the failure to provide a workable definition left this Court to review each case ad hoc. As our predecessors learned then, the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative, and this Court, in any event, lacks the institutional capacity to maintain such a regime for very long. This one will end when the majority realizes that the conception of the commerce power for which it entertains hopes would inevitably fail the test expressed in Justice Holmes's statement that "[t]he first call of a theory of law is that it should fit the facts." The facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation much affected by their respective treasuries and constitutional modifications adopted by the people. The federalism of some earlier time is no more adequate to account for those facts today than the theory of laissez-faire was able to govern the national economy 70 years ago.

The importance of United States v. Morrison extended far beyond the main participants in the dispute (see Box 7–8). By the same 5–4 vote as occurred in Lopez and using the same reasoning, the Supreme Court struck down the challenged provisions of the Violence Against Women Act. Four months later the justices in Jones v. United States (2000) held that a federal criminal statute against arson, passed pursuant to the interstate commerce power, could not be applied to a man who tossed a Molotov cocktail into his cousin's house. Because the target of the arson was a private residence not used in any commercial activity, the Court concluded that Congress under the commerce clause had no authority to regulate.

The opinions in Lopez, Morrison, and Jones, taken together with other Rehnquist Court federalism and taxation decisions, provide some indication of the Court's modified commerce clause jurisprudence (see Box 7–9). Following the New Deal revolution, the federal government was given wide latitude to regulate in the name of interstate commerce, but now the Court seemed to be cautioning that the commerce clause does not give Congress a blank check to regulate all activity in the name of commerce. In contrast to the New Deal case of Darby, the Court asserted that the Tenth Amendment could stand as a barrier to laws passed under the commerce clause if they commandeered the states, as in Printz. And in contrast to a case like Garcia, the Court in Lopez and Morrison now suggested that a federal law may be constitutionally suspect if it does not regulate...
CHRISTY BRZONKALA, a former high school basketball player, arrived at Virginia Tech in 1994 with the goal of becoming a sports nutritionist. Antonio Morrison and James Crawford were members of the highly ranked Virginia Tech football team. They had dreams of careers in athletics, perhaps even in professional football. The ambitions of all three were shattered as the result of an incident in a dorm room on a September evening just one month after the school year began, when, as Brzonkala claimed, Morrison and Crawford gang-raped her. What followed was a tangled legal battle ending in the Supreme Court’s decision in United States v. Morrison (2000). By the time the Supreme Court issued its opinion, the case had evolved into a federalism controversy over the extent to which Congress can regulate under its interstate commerce powers. Left behind were the lives of the three principals in the case.

Brzonkala initially failed to tell anyone about the alleged assault. After several months of rarely leaving her room, performing poorly in her courses, and abusing thyroid medication, she came forward with her story. The university refused to expel Morrison and Crawford, and Brzonkala dropped out of college and moved back to her family’s home in Fairfax County, Virginia. She resumed her academic career at George Mason University, but remained there only briefly. She then moved to Washington, D.C., and found work as a waitress. Brzonkala’s suit against the university for sex discrimination was settled out of court. Virginia Tech agreed to pay her $75,000 but admitted no wrongdoing.

In 2000 the National Organization for Women, which had supported Brzonkala’s legal efforts, bestowed on her its Women of Courage Award.

The football players argued that they were unfairly charged. Morrison claimed that his sexual encounter with Brzonkala was consensual, and Crawford said that he left the room before any sexual activity occurred. Although police investigated the incident, neither Morrison nor Crawford was charged with any criminal offense.

The university placed Morrison on probation, but he was allowed to remain in school. Not long thereafter he was suspended from the football team following his arrest during a bar brawl. He transferred to Hampton University but returned to Virginia Tech a semester later. He did not play football again. He ultimately received a degree in human nutrition, foods, and exercise. After graduating, Morrison pursued a career as an athletic trainer but found it difficult to find employment. He claimed that racial factors were partially responsible for the unfair treatment he received and the damage his reputation suffered.

Crawford was later convicted of an unrelated sexual assault and disorderly conduct after an altercation in a parking lot. He was stripped of his football scholarship and left the university. He returned to his home state of Florida and began working in retail.

Although the Supreme Court held that the federal government had acted unconstitutionally in passing the challenged provisions of the Violence Against Women Act, Brzonkala was free to take her suit against Morrison and Crawford to state court. Brzonkala and her attorneys, however, said there was little chance that they would do so. Such a suit would be for monetary damages, and even if it were successful, Morrison and Crawford had little means of satisfying any judgment against them.

# Evolution of Interstate Commerce Doctrine

## Marshall Interpretation

- **Gibbons v. Ogden** (1824)  
  Marshall opinion for a 6–0 Court  
  Commerce begins in one state and ends in another. It does not stop when the act of crossing a state border is completed. Commerce occurring within a state may be part of a larger interstate process.

## Shreveport Doctrine

- **Shreveport Rate Case** (1914)  
  Hughes opinion for a 7–2 Court  
  Congress may regulate intrastate commerce when it is intertwined with interstate commerce and when a failure to regulate intrastate commerce would injure interstate commerce.

## Stream of Commerce Doctrine

- **Swift & Company v. United States** (1905)  
  Holmes opinion for a 9–0 Court  
  Stafford v. Wallace (1922)  
  Taft opinion for a 7–1 Court  
  An article in interstate commerce does not lose its status until it reaches its final destination. Stopping along the way to its terminal sale does not remove an article from the stream of interstate commerce.

## Manufacturing Excluded from Interstate Commerce

- **United States v. E. C. Knight Co.** (1895)  
  Fuller opinion for an 8–1 Court  
  Schechter Poultry v. United States (1935)  
  Hughes opinion for a 9–0 Court  
  Carter v. Carter Coal Co. (1935)  
  Sutherland opinion for a 5–4 Court  
  Manufacturing, processing, and mining activities are local by nature and not a part of interstate commerce. Their effect on interstate commerce is indirect. That an article is intended for interstate commerce does not make its manufacture part of interstate commerce. “Commerce succeeds to manufacture, and is not a part of it.”

## Modern Interpretation of Interstate Commerce

- **NLRB v. Jones & Laughlin Steel Corporation** (1937)  
  Hughes opinion for a 5–4 Court  
  Congress may enact all appropriate legislation to protect, advance, promote, and ensure interstate commerce. “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.”

- **United States v. Darby** (1941)  
  Stone opinion for an 8–0 Court  
  “The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those intrastate activities that so affect interstate commerce or the exercise of the commerce power.”

(Continued)
an economic activity that, in the aggregate, substantially affects interstate commerce.

The importance of this evolution in doctrine remains to be seen. Although the Court has enunciated a revised interpretation of the commerce power, its application of that standard in no way resembles the breadth of the Court's attack on federal authority in the period prior to 1937. In fact, some of its decisions have been quite consistent with its earlier post–New Deal jurisprudence. One example is *Gonzales v. Raich* (2005), a controversial ruling on the validity of state laws that allow the medical use of marijuana. Under vigorous attack from the dissenters, the majority applied the precedent of *Wickard v. Filburn* and other post–New Deal doctrine.

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**Modern Interpretation of Interstate Commerce**

| Case (Year) | Decision |
|-------------|----------|---|
| *Wickard v. Filburn* (1942) | Jackson opinion for a 9–0 Court | Even if an activity is local and not 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 is irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’ . . . That [an individual’s] own contribution [to interstate commerce] may be trivial by itself is not enough to remove him from the scope of federal regulation where [his] contribution, taken together with that of many others similarly situated, is far from trivial.” |

**Modern Commerce Power Limitations**

| Case (Year) | Decision |
|-------------|----------|---|
| *United States v. Lopez* (1995) | Rehnquist opinion for a 5–4 Court | Federal legislation is constitutionally suspect if it does not regulate an economic activity that, in the aggregate, substantially affects interstate commerce. |
| *United States v. Morrison* (2000) | Rehnquist opinion for a 5–4 Court | “The power to regulate commerce presupposes the existence of commercial activity to be regulated.” Congress cannot compel individuals “to become active in commerce by purchasing a product,” even if their failure to do so affects interstate commerce. |

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**Gonzales v. Raich**

545 U.S. 1 (2005)

[https://caselaw.findlaw.com/us-supreme-court/545/1.html](https://caselaw.findlaw.com/us-supreme-court/545/1.html)

Oral arguments are available at [https://www.oyez.org/cases/2004/03-1454](https://www.oyez.org/cases/2004/03-1454).

Vote: 6 (Breyer, Ginsburg, Kennedy, Scalia, Souter, Stevens) 3 (O’Connor, Rehnquist, Thomas)

**OPINION OF THE COURT:** Stevens

**OPINION CONCURRING IN JUDGMENT:** Scalia

**DISSENTING OPINIONS:** O’Connor, Thomas

**FACTS:**

In 1996 California voters passed Proposition 215, commonly known as the Compassionate Use Act. The law allowed seriously ill state residents to use marijuana for...
Californian Angel Raich suffered from more than ten serious and possibly life-threatening medical conditions, including an inoperable brain tumor. On the advice of her doctor she used marijuana to help ease her suffering. Too ill to produce her own supply, Raich depended on two caregivers to grow and provide marijuana without charge.

Diane Monson, another California resident following her physician’s advice, had been using marijuana in compliance with the Compassionate Use Act for about five years to combat chronic back pain caused by a degenerative disease of the spine. She grew about six cannabis plants to maintain a supply of the drug.

In 2002 county deputy sheriffs and federal drug agents came to Monson’s home. After an investigation, the local officials found no evidence of illegal activity under California law. The federal agents, however, concluded that Monson’s possession of marijuana violated the federal Controlled Substances Act. They seized and destroyed her marijuana plants.

Raich and Monson brought a lawsuit against Attorney General Alberto Gonzales and the head of the U.S. Drug Enforcement Administration to bar enforcement of the Controlled Substances Act to the extent that it prevented them from obtaining and possessing marijuana for medical purposes. The federal government claimed that its constitutional power to regulate commerce was sufficiently broad to regulate the use of the substance. Raich and Monson argued that the federal commerce power does not extend to the medical use of marijuana, a purely local and noncommercial activity regulated by state law. They further claimed that their marijuana plants were grown and processed only with water, nutrients, supplies, and equipment originating in California. The court of appeals ruled in favor of Raich and Monson, and the federal government asked the Supreme Court to reverse.

ARGUMENTS:
For the petitioners, Alberto R. Gonzales, attorney general, et al.:

- Congress has the power under the commerce clause, coupled with the necessary and proper clause, to regulate local activity that substantially affects interstate commerce (see Wickard v. Filburn and United States v. Darby). Congress’s determination that local activity with respect to a product substantially affects interstate commerce or could interfere with Congress’s objective in
regulating the interstate market of that product is entitled to substantial deference.

- Because marijuana trafficking is a commercial activity that occurs in interstate and foreign commerce and affects interstate commerce, Congress has the power under the commerce clause to regulate all commercial marijuana activity, including commercial possession, manufacture, and distribution that occurs wholly intrastate (see United States v. Lopez).

- The act also constitutionally regulates intrastate manufacture and possession of marijuana for personal use and the distribution of those substances without charge. Congress has concluded that regulation of all intrastate drug activity “is essential to the effective control” of interstate drug trafficking and that regulation of intrastate drug activity was a reasonably necessary means to accomplish its comprehensive regulation of the interstate market in controlled substances.

For the respondents, Angel McClary Raich et al.:

- This case is and always has been about state sovereignty and federalism. The issue is whether the federal government may criminalize wholly intrastate, noncommercial conduct that is expressly authorized by the state in an exercise of its broad powers to define criminal law, regulate medical practice, and protect the lives of its citizens. In Lopez and United States v. Morrison the Court invalidated federal statutes that were consistent with achievement of goals shared by all the states.

- The government’s argument goes beyond the outer limits of Wickard, which involved regulation of commercial farming activity. The respondents’ activity is not commercial, and the link between it and interstate commerce is, at best, attenuated. In addition, prohibiting respondents’ activity is not essential to a larger regulation of interstate economic activity.

Justice Stevens Delivered the Opinion of the Court.

California is one of at least nine States that authorize the use of marijuana for medicinal purposes. The question presented in this case is whether the power vested in Congress by Article I, §8, of the Constitution “[t]o make all Laws which shall be necessary and proper for carrying into Execution” its authority to “regulate Commerce with foreign Nations, and among the several States” includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

Respondents in this case do not dispute that passage of the CSA [Controlled Substances Act], as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress’ commerce power. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents’ challenge is actually quite limited; they argue that the CSA’s categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress’ authority under the Commerce Clause.

In assessing the validity of congressional regulation, none of our Commerce Clause cases can be viewed in isolation. As charted in considerable detail in United States v. Lopez [1995], our understanding of the reach of the Commerce Clause, as well as Congress’ assertion of authority thereunder, has evolved over time.

... [We have now] identified three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. Perez v. United States (1971). Second, Congress has authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Ibid. Third, Congress has the power to regulate activities that substantially affect interstate commerce. Ibid.; NLRB v. Jones & Laughlin Steel Corp. (1937). Only the third category is implicated in the case at hand.

Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic “class of activities” that have a substantial effect on interstate commerce. See, e.g., Perez; Wickard v. Filburn (1942). As we stated in Wickard, “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.” We have never required Congress to legislate with scientific exactitude. When Congress decides that the “total incidence” of a practice poses a threat to a national market, it may regulate the entire class. In this vein, we have reiterated that when “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.”

Our decision in Wickard is of particular relevance. . . . Wickard . . . establishes that Congress can regulate purely intrastate activity that is not itself “commercial,” in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

The similarities between this case and Wickard are striking. Like the farmer in Wickard, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed “to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . .” and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. In Wickard, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress’ commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity. . . .

In assessing the scope of Congress’ authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a “rational basis” exists for so concluding. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in Wickard, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to “make all Laws which shall be necessary and proper” to “regulate Commerce . . . among the several States.” That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases. In their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents’ creation, they read those cases far too broadly. Those two cases, of course, are Lopez and [United States v.] Morrison [2000]. . . .

Unlike those at issue in Lopez and Morrison, the activities regulated by the CSA are quintessentially economic. “Economics” refers to “the production, distribution, and consumption of commodities.” Webster’s Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. . . . Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in Morrison casts no doubt on its constitutionality. . . .

The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients’ medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious. Moreover, that the national and international narcotics trade has thrived in the face of vigorous criminal enforcement efforts suggests
that no small number of unscrupulous people will make use of the California exemptions to serve their commercial ends whenever it is feasible to do so. Taking into account the fact that California is only one of at least nine States to have authorized the medical use of marijuana, . . . Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.

. . . Thus the case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning foreclose that claim. . . .

. . . [T]he judgment of the Court of Appeals must be vacated. The case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

**JUSTICE SCALIA,** concurring in the judgment.

I agree with the Court’s holding that the Controlled Substances Act (CSA) may validly be applied to respondents’ cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced.

Since *Perez v. United States* (1971), our cases have mechanically recited that the Commerce Clause permits congressional regulation of three categories: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in interstate commerce; and (3) activities that “substantially affect” interstate commerce. The first two categories are self-evident, since they are the ingredients of interstate commerce itself. See *Gibbons v. Ogden* (1824). The third category, however, is different in kind, and its recitation without explanation is misleading and incomplete.

It is misleading because, unlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone. Rather, as this Court has acknowledged since at least *United States v. Coombs* (1838), Congress’s regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. And the category of “activities that substantially affect interstate commerce,” *Lopez,* is incomplete because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

**JUSTICE O’CONNOR,** with whom the CHIEF JUSTICE and **JUSTICE THOMAS** join . . ., dissenting.

We enforce the “outer limits” of Congress’ Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. One of federalism’s chief virtues, of course, is that it promotes innovation by allowing for the possibility that “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.” *New State Ice Co. v. Liebmann* (1932) (Brandeis, J., dissenting).

This case exemplifies the role of States as laboratories. The States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, with out any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation. In so doing, the Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision. That rule and the result it produces in this case are irreconcilable with our decisions in *Lopez* and *United States v. Morrison* (2000). . . .
The Court’s definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities. And it appears to reason that when an interstate market for a commodity exists, regulating the intrastate manufacture or possession of that commodity is constitutional either because that intrastate activity is itself economic, or because regulating it is a rational part of regulating its market. . . . [T]he Court’s definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.

The Court uses a dictionary definition of economics to skirt the real problem of drawing a meaningful line between “what is national and what is local.” It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. . . .

The Government has not overcome empirical doubt that the number of Californians engaged in personal cultivation, possession, and use of medical marijuana, or the amount of marijuana they produce, is enough to threaten the federal regime. Nor has it shown that Compassionate Use Act marijuana users have been or are realistically likely to be responsible for the drug’s seeping into the market in a significant way.

Relying on Congress’ abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one’s own home for one’s own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California’s experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case. For these reasons I dissent.

JUSTICE THOMAS, dissenting.

Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers.

Even the majority does not argue that respondents’ conduct is itself “Commerce among the several States.” Monson and Raich neither buy nor sell the marijuana that they consume. They cultivate their cannabis entirely in the State of California—it never crosses state lines, much less as part of a commercial transaction. Certainly no evidence from the founding suggests that “commerce” included the mere possession of a good or some purely personal activity that did not involve trade or exchange for value. In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana. . . .

Moreover, even a Court interested more in the modern than the original understanding of the Constitution ought to resolve cases based on the meaning of words that are actually in the document. Congress is authorized to regulate “Commerce,” and respondents’ conduct does not qualify under any definition of that term. The majority’s opinion only illustrates the steady drift away from the text of the Commerce Clause. There is an inexorable expansion from “commerce,” to “commercial” and “economic” activity, and finally to all “production, distribution, and consumption” of goods or services for which there is an “established . . . interstate market.” Federal power expands, but never contracts, with each new locution. The majority is not interpreting the Commerce Clause, but rewriting it. . . .

. . . . The majority’s rush to embrace federal power “is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union.” Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens. I would affirm the judgment of the Court of Appeals. I respectfully dissent.

Although the decision in Raich allows federal agents to prosecute medical marijuana cases, in October 2009 the Obama administration announced that it would no longer prosecute such cases if the individuals involved are
in compliance with state law. When the Trump administration took office in 2017, the Justice Department announced that it would begin enforcing the federal law against marijuana possession and distribution. The president, however, quickly reversed that policy as it pertained to activities that are legal under state law. The decision of an increasing number of states, beginning with Colorado and Washington, to remove bans on recreational use of marijuana certainly widens the policy gap between the legalizing states and federal statutes. Clearly, under Gonzales v. Raich the federal government can enforce federal laws prohibiting the distribution and possession of marijuana no matter what state law provides. For the present, federal authorities have chosen not to prosecute such violations. Whether that nonenforcement policy will continue for the long term remains to be seen.

Raich demonstrates that Lopez, Morrison, and Jones should not be seen as a wholesale repudiation of commerce clause jurisprudence as it has developed since 1937. Rather, the six-justice majority in Raich, which included conservatives Antonin Scalia and Anthony Kennedy, held fast to the precedent set in Wickard v. Filburn: the production of commercially viable items, when considered in the aggregate, has a sufficiently substantial relationship with interstate commerce to trigger the use of congressional regulatory authority. But when Congress under the commerce clause attempts to regulate noneconomic activity (such as gun possession, rape, or arson) without showing that the regulation is a necessary part of a broader regulation of interstate commerce, it may impermissibly infringe on powers reserved for the states.

The justices were faced with a legal dispute in 2012 that required them to go well beyond the distinction between economic and noneconomic activity. In National Federation of Independent Business v. Sebelius, the Court considered whether Congress has the power to regulate economic inactivity. At issue was the constitutionality of the Patient Protection and Affordable Care Act of 2010. The attacked legislation imposed comprehensive reforms on the nation’s medical care and health insurance sectors. The law was exceptionally controversial
and became a political issue that affected the 2010 and 2012 congressional and presidential elections. A core question in the case was whether Congress constitutionally can require unwilling individuals to purchase health insurance.

In deciding the case the justices examined congressional powers under the commerce clause, the necessary and proper clause, and the taxing and spending clauses. In the following excerpt, we provide the Court’s analysis of congressional authority to enact the health care law under the commerce clause and the necessary and proper clause. As you will see, the majority concluded that these constitutional provisions do not empower Congress to regulate commercial inactivity. But the commerce clause ruling did not settle the case. As we will see in Chapter 8, the health insurance purchase requirement, while not constitutional under the commerce power, was found to be a valid regulation under Congress’s authority to tax and spend.

**National Federation of Independent Business v. Sebelius**

567 U.S. 519 (2012)


Oral arguments are available at https://www.oyez.org/cases/2011/11-393

Vote on the commerce clause challenge to the Affordable Care Act:

5 (Alito, Kennedy, Roberts, Scalia, Thomas)

4 (Breyer, Ginsburg, Kagan, Sotomayor)

**OPINION ANNOUNCING THE JUDGMENT OF THE COURT AND THE OPINION OF THE COURT: Roberts**

**OPINION CONCURRING IN PART AND DISSenting IN PART: Ginsburg**

**JOINT OPINION CONCURRING ON THE COMMERCE CLAUSE ISSUE BUT DISSenting FROM THE FINAL CASE OUTCOME: Alito, Kennedy, Scalia, and Thomas**

**DISSenting OPINION: Thomas**

In 2010 Congress passed the Patient Protection and Affordable Care Act (ACA). The purpose of the law was to increase the number of Americans covered by health insurance and to decrease the cost of health care. The law was passed along partisan lines, with Democrats supporting the bill and Republicans opposed. The American public also was closely divided over the policy, with the statute running more than nine hundred pages in length. It introduced major changes in the health insurance industry, expanded insurance coverage and benefits, eliminated coverage limitations for preexisting conditions, and significantly expanded Medicaid.

At the heart of the ACA was a requirement known as the “individual mandate” (also known as the “minimum coverage” requirement). This provision directed that most Americans purchase “minimum essential” health insurance coverage for themselves and their dependents if they did not receive such coverage from their employers. Those who did not comply with this provision were required to make a “shared responsibility” payment to the federal government. The act provided that this “penalty” be paid to the Internal Revenue Service and that it “shall be assessed and collected in the same manner” as tax penalties. The mandate was intended to ensure that health costs were evenly distributed throughout the population and to prohibit individuals from refusing to buy health insurance until they developed medical conditions requiring treatment.

Almost immediately after President Obama signed the bill into law, a series of lawsuits were filed challenging the constitutionality of the ACA. The lower federal courts reached differing opinions on the validity of the law. To resolve this conflict, the Supreme Court granted a petition to review a decision of the Eleventh Circuit Court of Appeals striking down portions of the law but allowing the balance of the statute to remain in effect. The appealed decision involved a suit initiated by the National Federation of Independent Business, twenty-six state governments, and several individuals against Kathleen Sebelius, then secretary of health and human services.

Challengers of the law argued that Congress exceeded its commerce clause powers by compelling individuals to purchase insurance when they may not wish to do so. Commercial inactivity, they argued, is not commerce. Secretary Sebelius responded that health care is an integral part of the national economy. Therefore, the commerce clause and the necessary and proper clause give Congress ample authority to enact a comprehensive health-care law that includes an individual mandate. She asserted that the ACA was also a legitimate action under Congress’s constitutional power to tax and spend. In another line of attack, the challengers claimed that the expansion of the federal Medicaid program unconstitutionally infringed on the powers of the states.

In the excerpted material appearing here, we focus exclusively on the question of whether the individual mandate provision can legitimately rest on Congress’s power to regulate interstate commerce and the necessary
and proper clause. In Chapter 8 we will return to this decision and highlight arguments related to the authority of Congress to tax and spend.

ARGUMENTS:

For the petitioners, National Federation of Independent Business et al.:

- The individual mandate is an unprecedented law that rests on an extraordinary and unbounded assertion of federal power.
- The Constitution grants Congress the power to regulate commerce, not the power to compel individuals to enter into commerce.
- The federal government may not save the individual mandate by resorting to the necessary and proper clause. The mandate is not a law for carrying into execution the commerce power. It is a law for carrying into execution an independent power that the Constitution does not grant to the federal government.

For the respondents, Health and Human Services Secretary Kathleen Sebelius et al.:

- Congress has authority under the commerce and necessary and proper clauses to enact the minimum coverage provision. The Affordable Care Act expands access to health care services and controls health care costs. The minimum coverage provision plays a critical role in that comprehensive regulatory scheme by regulating how health care consumption is financed.
- The act’s minimum coverage provision is a particularly well-adapted means of accomplishing Congress’s concededly legitimate ends. It is necessary to effectuate Congress’s comprehensive reforms of the insurance market and is itself an economic regulation of the timing and method of financing health care services. This provision regulates economic activity that substantially affects interstate commerce. Its links to interstate commerce are tangible, direct, and strong.
- There is no textual support in the commerce clause for the opponents’ “inactivity” limitation. Furthermore, the uninsured as a class are active in the market for health care, which they regularly seek and obtain.

In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. Nearly two centuries ago, Chief Justice Marshall observed that “the question respecting the extent of the powers actually granted” to the Federal Government “is perpetually arising, and will probably continue to arise, as long as our system shall exist.” McCulloch v. Maryland (1819). In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess. Resolving this controversy requires us to examine both the limits of the Government’s power, and our own limited role in policing those boundaries.

The Federal Government is acknowledged by all to be one of enumerated powers.” Ibid. That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government’s powers. Congress may, for example, “coin Money,” “establish Post Offices,” and “raise and support Armies.” Art. I, §8, cl. 5, 7, 12. The enumeration of powers is also a limitation of powers, because “[t]he enumeration presupposes something not enumerated.” Gibbons v. Ogden (1824). The Constitution’s express conferral of some powers makes clear that it does not grant others. And the Federal Government “can exercise only the powers granted to it.” McCulloch.

... If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.

... The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions. See, e.g., United States v. Comstock (2010). The same does not apply to the States, because the Constitution is not the source of their power. ... The States thus can and do perform many of the vital functions of modern government—punishing street crime, running public schools, and zoning property for development, to name but a few—even though the Constitution’s text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the “police power.” See, e.g., United States v. Morrison (2000). ...
This case concerns . . . powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Our precedents read that to mean that Congress may regulate “the channels of interstate commerce,” “persons or things in interstate commerce,” and “those activities that substantially affect interstate commerce.” Morrison. The power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer’s decision to grow wheat for himself and his livestock, and a loan shark’s extortionate collections from a neighborhood butcher shop. See Wickard v. Filburn (1942); Perez v. United States (1971). . . .

The reach of the Federal Government’s enumerated powers is broader still because the Constitution authorizes Congress to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.” We have long read this provision to give Congress great latitude in exercising its powers: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” McCulloch.

Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation’s elected leaders. . . .

Our deference in matters of policy cannot, however, become abdication in matters of law. “The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.” Marbury v. Madison (1803). Our respect for Congress’s policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. . . . And there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits. Marbury v. Madison.

The questions before us must be considered against the background of these basic principles. . . .

The Government’s . . . argument is that the individual mandate is a valid exercise of Congress’s power under the Commerce Clause and the Necessary and Proper Clause. According to the Government, the health care market is characterized by a significant cost-shifting problem. Everyone will eventually need health care at a time and to an extent they cannot predict, but if they do not have insurance, they often will not be able to pay for it. Because state and federal laws nonetheless require hospitals to provide a certain degree of care to individuals without regard to their ability to pay, hospitals end up receiving compensation for only a portion of the services they provide. To recoup the losses, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policy holders in the form of higher premiums. Congress estimated that the cost of uncompensated care raises family health insurance premiums, on average, by over $1,000 per year. . . .

The Government contends that the individual mandate is within Congress’s power because the failure to purchase insurance “has a substantial and deleterious effect on interstate commerce” by creating the cost-shifting problem. . . .

Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product. Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes “the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent” for Congress’s action. Free Enterprise Fund v. Public Company Accounting Oversight Bd. (2010). At the very least, we should “pause to consider the implications of the Government’s arguments” when confronted with such new conceptions of federal power. Lopez.

The Constitution grants Congress the power to “regulate Commerce.” The power to regulate commerce presupposes the existence of commercial activity to be regulated. If the power to “regulate” something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to “coin Money,” in addition to the power to “regulate the Value thereof,” and it gives Congress the power to “raise and support Armies” and to “provide and maintain a Navy,” in addition to the power to “make Rules for the Government and Regulation of the land and naval Forces.” If the power to regulate the armed forces or the value of money included the power to bring the subject
of the regulation into existence, the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated.

Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching “activity.” . . .

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could potentially make within the scope of federal regulation, and—under the Government’s theory—empower Congress to make those decisions for him.

Applying the Government’s logic to the familiar case of Wickard v. Filburn shows how far that logic would carry us from the notion of a government of limited powers. In Wickard, the Court famously upheld a federal penalty imposed on a farmer for growing wheat for consumption on his own farm. That amount of wheat caused the farmer to exceed his quota under a program designed to support the price of wheat by limiting supply. The Court rejected the farmer’s argument that growing wheat for home consumption was beyond the reach of the commerce power. It did so on the ground that the farmer’s decision to grow wheat for his own use allowed him to avoid purchasing wheat in the market. That decision, when considered in the aggregate along with similar decisions of others, would have had a substantial effect on the interstate market for wheat.

Wickard has long been regarded as “perhaps the most far-reaching example of Commerce Clause authority over intrastate activity,” Lopez, but the Government’s theory in this case would go much further. . . . The farmer in Wickard was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government’s theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.

Indeed, the Government’s logic would justify a mandatory purchase to solve almost any problem. To consider a different example in the health care market, many Americans do not eat a balanced diet. That group makes up a larger percentage of the total population than those without health insurance. The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance. Those increased costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government’s theory, Congress could address the diet problem by ordering everyone to buy vegetables.

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government’s logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

That is not the country the Framers of our Constitution envisioned. . . . Congress already enjoys vast power to regulate much of what we do. Accepting the Government’s theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.

To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were “practical statesmen,” not metaphysical philosophers. . . . The Framers gave Congress the power to regulate commerce, not to compel it, and for over 200 years both our decisions and Congress’s actions have reflected this understanding. There is no reason to depart from that understanding now.

The Government sees things differently. It argues that because sickness and injury are unpredictable but unavoidable, “the uninsured as a class are active in the market for health care, which they regularly seek and obtain.” The individual mandate “merely regulates how individuals finance and pay for that active participation—requiring that they do so through insurance, rather than through
attempted self-insurance with the back-stop of shifting costs to others.”

The individual mandate’s regulation of the uninsured as a class is, in fact, particularly divorced from any link to existing commercial activity. The mandate primarily affects healthy, often young adults who are less likely to need significant health care and have other priorities for spending their money. It is precisely because these individuals, as an actuarial class, incur relatively low health care costs that the mandate helps counter the effect of forcing insurance companies to cover others who impose greater costs than their premiums are allowed to reflect. If the individual mandate is targeted at a class, it is a class whose commercial inactivity rather than activity is its defining feature.

The Government, however, claims that this does not matter. The Government regards it as sufficient to trigger Congress’s authority that almost all those who are uninsured will, at some unknown point in the future, engage in a health care transaction.

The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions.

The Government says that health insurance and health care financing are “inherently integrated.” But that does not mean the compelled purchase of the first is properly regarded as a regulation of the second. No matter how “inherently integrated,” health insurance and health care consumption may be, they are not the same thing: They involve different transactions, entered into at different times, with different providers. And for most of those targeted by the mandate, significant health care needs will be years, or even decades, away. The proximity and degree of connection between the mandate and the subsequent commercial activity is too lacking to justify an exception of the sort urged by the Government. The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to “regulate Commerce.”

The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an “integral part of a comprehensive scheme of economic regulation.”

The power to “make all Laws which shall be necessary and proper for carrying into Execution” the powers enumerated in the Constitution vests Congress with authority to enact provisions “incidental to the [enumerated] power, and conducive to its beneficial exercise.” McCulloch. Although the Clause gives Congress authority to “legisl ate on that vast mass of incidental powers which must be involved in the constitution,” it does not license the exercise of any “great substantive and independent power[s]” beyond those specifically enumerated. Instead, the Clause is “merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant.” Kinsella v. United States ex rel. Singleton (1960).

As our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress’s determination that a regulation is “necessary.” We have thus upheld laws that are “‘convenient, or useful’ or ‘conducive’ to the authority’s ‘beneficial exercise.’” Comstock. But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not “consistent” with the letter and spirit of the Constitution, McCulloch, are not “proper [means] for carrying into Execution” Congress’s enumerated powers. Rather, they are, in the words of The Federalist, ‘merely acts of usurpation’ which ‘deserve to be treated as such.” Printz v. United States (1997).

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. For example, we have upheld provisions permitting continued confinement of those already in federal custody when they could not be safely released, Comstock. The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.

This is in no way an authority that is “narrow in scope,” Comstock, or “incidental” to the exercise of the commerce power, McCulloch. Rather, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those
who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it. Even if the individual mandate is “necessary” to the Act’s insurance reforms, such an expansion of federal power is not a “proper” means for making those reforms effective. . . .

Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a “necessary and proper” component of the insurance reforms. The commerce power thus does not authorize the mandate.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER and JUSTICE KAGAN join . . . concurring in part, concurring in the judgment in part, and dissenting in part.

Unlike The Chief Justice, . . . I would hold . . . that the Commerce Clause authorizes Congress to enact the minimum coverage provision. . . .

Since 1937, our precedent has recognized Congress’ large authority to set the Nation’s course in the economic and social welfare realm. See United States v. Darby (1941); NLRB v. Jones & Laughlin Steel Corp. (1937). The Chief Justice’s crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress’ efforts to regulate the national economy in the interest of those who labor to sustain it. It is a reading that should not have staying power.

In enacting the Patient Protection and Affordable Care Act (ACA), Congress comprehensively reformed the national market for health-care products and services. By any measure, that market is immense. Collectively, Americans spent $2.5 trillion on health care in 2009, accounting for 17.6% of our Nation’s economy. Within the next decade, it is anticipated, spending on health care will nearly double.

The health-care market’s size is not its only distinctive feature. Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. Virtually every person residing in the United States, sooner or later, will visit a doctor or other health-care professional. . . .

When individuals make those visits, they face another reality of the current market for medical care: its high cost. In 2010, on average, an individual in the United States incurred over $7,000 in health-care expenses. Over a lifetime, costs mount to hundreds of thousands of dollars. . . .

Although every U.S. domiciliary will incur significant medical expenses during his or her lifetime, the time when care will be needed is often unpredictable. . . .

To manage the risks associated with medical care—its high cost, its unpredictability, and its inevitability—most people in the United States obtain health insurance. . . .

Not all U.S. residents, however, have health insurance. In 2009, approximately 50 million people were uninsured, either by choice or, more likely, because they could not afford private insurance and did not qualify for government aid. As a group, uninsured individuals annually consume more than $100 billion in health-care services, nearly 5% of the Nation’s total. Over 60% of those without insurance visit a doctor’s office or emergency room in a given year.

The large number of individuals without health insurance, Congress found, heavily burdens the national health-care market. . . . Unlike markets for most products, however, the inability to pay for care does not mean that an uninsured individual will receive no care. Federal and state law, as well as professional obligations and embedded social norms, require hospitals and physicians to provide care when it is most needed, regardless of the patient’s ability to pay.

As a consequence, medical-care providers deliver significant amounts of care to the uninsured for which the providers receive no payment. In 2008, for example, hospitals, physicians, and other health-care professionals received no compensation for $43 billion worth of the $116 billion in care they administered to those without insurance.

Health-care providers do not absorb these bad debts. Instead, they raise their prices, passing along the cost of uncompensated care to those who do pay reliably; the government and private insurance companies. In response, private insurers increase their premiums, shifting the cost of the elevated bills from providers onto those who carry insurance. The net result: Those with health insurance subsidize the medical care of those without it. As economists would describe what happens, the uninsured “free ride” on those who pay for health insurance.

The size of this subsidy is considerable. Congress found that the cost-shifting just described “increases family [insurance] premiums by on average over $1,000 a year.” Higher premiums, in turn, render health insurance less affordable, forcing more people to go without insurance and leading to further cost-shifting. . . .
States cannot resolve the problem of the uninsured on their own.

Aware that a national solution was required, Congress enacted the ACA, a solution that retains a robust role for private insurers and state governments. To make its chosen approach work, however, Congress had to use some new tools, including a requirement that most individuals obtain private health insurance coverage. By employing these tools, Congress was able to achieve a practical, altogether reasonable, solution.

Congress passed the minimum coverage provision as a key component of the ACA to address an economic and social problem that has plagued the Nation for decades: the large number of U.S. residents who are unable or unwilling to obtain health insurance. Whatever one thinks of the policy decision Congress made, it was Congress’ prerogative to make it. Reviewed with appropriate deference, the minimum coverage provision, allied to the guaranteed-issue and community-rating prescriptions, should survive measurement under the Commerce and Necessary and Proper Clauses.

The Commerce Clause, it is widely acknowledged, was the Framers’ response to the central problem that gave rise to the Constitution itself. Under the Articles of Confederation, the Constitution’s precursor, the regulation of commerce was left to the States. This scheme proved unworkable, because the individual States, understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole.

The Framers’ solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation “in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent.”

Consistent with the Framers’ intent, we have repeatedly emphasized that Congress’ authority under the Commerce Clause is dependent upon “practical” considerations, including “actual experience.” We afford Congress the leeway “to undertake to solve national problems directly and realistically.”

Until today, this Court’s pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities “that substantially affect interstate commerce.” Gonzales v. Raich (2005). This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce.

Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. When appraising such legislation, we ask only (1) whether Congress had a “rational basis” for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a “reasonable connection between the regulatory means selected and the asserted ends.” In answering these questions, we presume the statute under review is constitutional and may strike it down only on a “plain showing” that Congress acted irrationally.

Straightforward application of these principles would require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions of dollars of health-care products and services each year. Those goods are produced, sold, and delivered largely by national and regional companies who routinely transact business across state lines. The uninsured also cross state lines to receive care. Some have medical emergencies while away from home. Others, when sick, go to a neighboring State that provides better care for those who have not prepaid for care.

Not only do those without insurance consume a large amount of health care each year; critically, as earlier explained, their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to “doing nothing”; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause.

The minimum coverage provision, furthermore, bears a “reasonable connection” to Congress’ goal of protecting the health-care market from the disruption caused by individuals who fail to obtain insurance. By requiring those who do not carry insurance to pay a toll, the minimum coverage provision gives individuals a strong incentive to insure. This incentive, Congress had good reason to believe, would reduce the number of uninsured and, correspondingly, mitigate the adverse impact the uninsured have on the national health-care market.

Congress also acted reasonably in requiring uninsured individuals, whether sick or healthy, either to obtain insurance or to pay the specified penalty. As earlier observed,
because every person is at risk of needing care at any moment, all those who lack insurance, regardless of their current health status, adversely affect the price of health care and health insurance. . . .

Rather than evaluating the constitutionality of the minimum coverage provision in the manner established by our precedents, The Chief Justice relies on a newly minted constitutional doctrine. The commerce power does not, The Chief Justice announces, permit Congress to “compe[1] individual[s] to become active in commerce by purchasing a product.”

The Chief Justice’s novel constraint on Congress’ commerce power gains no force from our precedent and for that reason alone warrants disapproval. But even assuming, for the moment, that Congress lacks authority under the Commerce Clause to “compel individuals not engaged in commerce to purchase an unwanted product,” such a limitation would be inapplicable here. Everyone will, at some point, consume health-care products and services. Thus, if The Chief Justice is correct that an insurance-purchase requirement can be applied only to those who “actively” consume health care, the minimum coverage provision fits the bill. . . .

Our decisions . . . acknowledge Congress’ authority, under the Commerce Clause, to direct the conduct of an individual today (the farmer in Wickard, stopped from growing excess wheat; the plaintiff in Raich, ordered to cease cultivating marijuana) because of a prophesied future transaction (the eventual sale of that wheat or marijuana in the interstate market). Congress’ actions are even more rational in this case, where the future activity (the consumption of medical care) is certain to occur, the sole uncertainty being the time the activity will take place. . . .

In any event, The Chief Justice’s limitation of the commerce power to the regulation of those actively engaged in commerce finds no home in the text of the Constitution or our decisions. Article I, §8, of the Constitution grants Congress the power “[t]o regulate Commerce . . . among the several States.” Nothing in this language implies that Congress’ commerce power is limited to regulating those actively engaged in commercial transactions. . . .

For the reasons explained above, the minimum coverage provision is valid Commerce Clause legislation. When viewed as a component of the entire ACA, the provision’s constitutionality becomes even plainer. The Necessary and Proper Clause “empowers Congress to enact laws in effectuation of its [commerce] pow[e]r that are not within its authority to enact in isolation.” Hence, “[a] complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal.” “It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test.”

Recall that one of Congress’ goals in enacting the Affordable Care Act was to eliminate the insurance industry’s practice of charging higher prices or denying coverage to individuals with preexisting medical conditions. The commerce power allows Congress to ban this practice, a point no one disputes.

Congress knew, however, that simply barring insurance companies from relying on an applicant’s medical history would not work in practice. Without the individual mandate, Congress learned, guaranteed-issue and community-rating requirements would trigger an adverse-selection death-spiral in the health-insurance market: Insurance premiums would skyrocket, the number of uninsured would increase, and insurance companies would exit the market. When complemented by an insurance mandate, on the other hand, guaranteed issue and community rating would work as intended, increasing access to insurance and reducing uncompensated care. The minimum coverage provision is thus an “essential par[t] of a larger regulation of economic activity”; without the provision, “the regulatory scheme would be undercut.” Raich. Put differently, the minimum coverage provision, together with the guaranteed-issue and community-rating requirements, is “reasonably adapted” to the attainment of a legitimate end under the commerce power: the elimination of pricing and sales practices that take an applicant’s medical history into account.

Asserting that the Necessary and Proper Clause does not authorize the minimum coverage provision, The Chief Justice focuses on the word “proper.” A mandate to purchase health insurance is not “proper” legislation, The Chief Justice urges, because the command “undermine[s] the structure of government established by the Constitution.” If long on rhetoric, The Chief Justice’s argument is short on substance. . . .

The Chief Justice [does not] pause to explain why the power to direct either the purchase of health insurance or, alternatively, the payment of a penalty collectible as a tax is more far-reaching than other implied powers this Court has found meet under the Necessary and Proper Clause. These powers include the power to enact criminal laws; the power to imprison, including civil imprisonment, see, e.g., Comstock; and the power to create a national bank, see McCulloch.

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In failing to explain why the individual mandate threatens our constitutional order, The Chief Justice deserves future courts. How is a judge to decide, when ruling on the constitutionality of a federal statute, whether Congress employed an “independent power” or merely a “derivative” one. Whether the power used is “substantive” or just “incidental”? The instruction The Chief Justice, in effect, provides lower courts: You will know it when you see it. 

In the early 20th century, this Court regularly struck down economic regulation enacted by the peoples’ representatives in both the States and the Federal Government. See, e.g., Carter Coal Co., Dagenhart, Lochner v. New York (1905). The Chief Justice’s Commerce Clause opinion, and even more so the joint dissenters’ reasoning, bear a disquieting resemblance to those long-overruled decisions.

Joint opinion of JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE ALITO, dissenting.

Congress has set out to remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it. It can assuredly do that, by exercising the powers accorded to it under the Constitution. The question in this case, however, is whether the complex structures and provisions of the Patient Protection and Affordable Care Act go beyond those powers. We conclude that they do. 

. . . What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power—upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. . . . That clear principle carries the day here. The striking case of Wickard v. Filburn (1942), which held that the economic activity of growing wheat, even for one’s own consumption, affected commerce sufficiently that it could be regulated, always has been regarded as the ne plus ultra of expansive Commerce Clause jurisprudence. To go beyond that, and to say the failure to grow wheat (which is not an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity. . . .

Article I, §8, of the Constitution gives Congress the power to “regulate Commerce . . . among the several States.” The Individual Mandate in the Act commands that every “applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage.” If this provision “regulates” anything, it is the failure to maintain minimum essential coverage. One might argue that it regulates that failure by requiring it to be accompanied by payment of a penalty. But that failure—that abstention from commerce—is not “Commerce.” To be sure, purchasing insurance is “Commerce”; but one does not regulate commerce that does not exist by compelling its existence. . . .

. . . Congress has impressed into service third parties, healthy individuals who could be but are not customers of the relevant industry, to offset the undesirable consequences of the regulation. Congress desire to force these individuals to purchase insurance is motivated by the fact that they are further removed from the market than unhealthy individuals with pre-existing conditions, because they are less likely to need extensive care in the near future. If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or in Hamilton’s words, “the hideous monster whose devouring jaws . . . spare neither sex nor age, nor high nor low, nor sacred nor profane.” The Federalist No. 3. . . .

Wickard v. Filburn has been regarded as the most expansive assertion of the commerce power in our history. A close second is Perez v. United States (1971), which upheld a statute criminalizing the eminently local activity of loan-sharking. Both of those cases, however, involved commercial activity. To go beyond that, and to say that the failure to grow wheat or the refusal to make loans affects commerce, so that growing and lending can be federally compelled, is to extend federal power to virtually everything. All of us consume food, and when we do so the Federal Government can prescribe what its quality must be and even how much we must pay. But the mere fact that we all consume food and are thus, sooner or later, participants in the “market” for food, does not empower the Government to say when and what we will buy. That is essentially what this Act seeks to do with respect to the purchase of health care. It exceeds federal power.

What should we make of the Court’s decision striking down a provision of federal law requiring individuals to purchase a commercial product? First, it is important to realize that while Roberts held that the mandate could not be sustained as an exercise of congressional commerce power, he did uphold it as a tax, as we will see in Chapter 8. Moreover, even the holding on the commerce
power may not be so far-reaching, because Congress has rarely forced people into commerce.\textsuperscript{22} Finally, even if Congress does pass another law of this kind, it is not altogether clear that the Court would stand by the distinction drawn by Justice Roberts: it could adopt Ginsburg’s dissenting position. For, as we have seen, commerce clause doctrine has not moved in a straight line; rather, it has varied greatly depending on the philosophies of the sitting justices.

**COMMERCE POWER OF THE STATES**

Resolving the question of federal power over interstate and foreign commerce leaves unsettled the question of state commercial regulation. Marshall wrote in *Gibbons* that commerce completely internal to the state that does not extend to or affect other states is reserved for state regulation. This grant of power was substantial prior to the Civil War, when most commercial activity was distinctly local and subject to state regulation. But with the Industrial Revolution and improved transportation systems, local business activity quickly became interstate in nature. Finally, the Supreme Court’s 1937 redefinition of interstate commerce left little that met Marshall’s notion of commerce that is “completely internal.”

If the regulation of any business activity that affects interstate commerce were the exclusive preserve of the federal government, the role of the states would be minimal indeed. But this is not the case. The decisions of the Supreme Court have left a substantial sphere of authority for the states to regulate commerce. The dividing line between federal and state power, however, has varied over time as the Court has struggled to formulate an appropriate doctrine to govern this difficult area of federal–state relations.

**Doctrine of Selected Exclusiveness**

Constructing the parameters of state power began in 1829 with the decision in *Willson v. Black-Bird Creek Marsh Company*.\textsuperscript{23} The dispute involved a Delaware law that authorized the building of a dam on a creek to stop water from entering a local marsh. Thompson Willson owned and operated a vessel that was federally licensed under the Coastal Licensing Act of 1793, the same legislation under which Thomas Gibbons had operated his steamboats. Willson objected to the dam as an impediment to commerce on a navigable stream. His ship purposefully rammed the dam, causing it considerable damage. The dam’s owner took legal action against Willson, and the state courts ruled against Willson, who appealed, claiming that the Delaware law authorizing the dam was in conflict with the Constitution. He argued that only Congress had the power to pass a law permitting the construction of an impediment to commerce on a navigable stream.

Chief Justice Marshall, speaking for the Court, rejected Willson’s position. The justices concluded that, in the absence of federal laws to the contrary, the police powers of the state to regulate for the health and general welfare of its citizens were sufficient to authorize the dam. Indeed, Congress had not enacted any legislation dealing with commercial streams and the problems associated with marshland. “If Congress had passed any act . . . the object of which was to control state legislation over those small navigable creeks into which the tide flows,” Marshall’s opinion stated, “we should feel not much difficulty in saying that a state law coming in conflict with such act would be void.” The Court’s decision in *Willson* began to carve out an area of state authority over commerce that is not purely intrastate, but where the boundaries of that authority were not yet settled.

With Marshall’s death in 1835, his successor, Chief Justice Roger Taney, was left with the task of more sharply defining the commerce powers of the states. Taney was far more sympathetic to the states than Marshall had been, and it is not surprising that the rulings of the Taney era strike a balance between federal and state authority. The Taney Court first grappled with the problem in *Mayor of New York v. Miln* (1837), a case that had been carried over from the last Marshall term.

The dispute arose over the validity of New York’s Passenger Act of 1824, which was designed to curb the flow of foreign indigents into the state. The law required the masters of incoming ships to supply the mayor of New York with comprehensive information on all passengers. This material was necessary for the city to enforce a regulation that allowed it to exclude people likely to require public assistance. Ship captains who did not comply were liable for fines and penalties of $75 per passenger. In addition, the law required that passengers who were refused entry be returned to their point of

\textsuperscript{22} Rarely is not never. For some early examples, see Einer Elhauge, “If Health Insurance Mandates Are Unconstitutional, Why Did the Founding Fathers Back Them?,” *New Republic*, April 13, 2012.

\textsuperscript{23} Disputes over the power of the states to impose taxes on interstate and foreign commerce actually had begun two years earlier in *Brown v. Maryland* (1827). We discuss the taxation issues in Chapter 8, where the fiscal authority to tax and spend is our focus.
origin at the shipowner’s expense. George Miln, who had a financial interest in a ship called *The Emily*, was fined when the ship’s master refused to comply with the law. Miln protested the stiff $7,500 penalty on the ground that regulating foreign commerce was the exclusive jurisdiction of Congress, leaving no room for state action.

The Supreme Court upheld the New York law. In doing so, the justices did everything possible to avoid the complicated commerce issues the case presented. Instead, the Court followed the lead taken by Marshall in *Willson* and focused on the state’s police powers. According to Justice Philip Barbour’s majority opinion, the states have the sovereign power to regulate for the well-being of their residents. That power is complete and unqualified. In the absence of federal commercial legislation to the contrary, there is nothing to bar the state from using its police authority, even if it affects foreign commerce as in the matter here. In fact, Barbour argued that it was the duty of the state to protect its citizens from the financial obligations that would result from admitting “multitudes of poor persons, who come from foreign countries without possessing the means of supporting themselves.” As a consequence, a state may use its police powers to ward off the “moral pestilence of paupers, vagabonds, and possibly convicts.” The Court has long since abandoned this attitude toward the poor.24

What the *Miln* decision revealed is the Taney Court’s readiness to support state regulations in the absence of federal action. This thinking was consistent with the dual federalism philosophy of that time (see Chapter 6). But because the Court relied so heavily on the police powers, it failed to develop a complete doctrine of state commercial authority.

The *License Cases* of 1847 further revealed the difficulty the Taney Court had in crafting an adequate policy for the commerce powers of the states. These appeals came from New Hampshire, Rhode Island, and Massachusetts, where the legislatures had passed statutes licensing and taxing alcoholic beverages.25 The regulations applied to domestic liquors as well as imported alcoholic beverages. Once again the Court upheld the laws as exercises of state police power, but the justices were badly divided as to rationale. No majority opinion was reached, an unusual occurrence for that time. In fact, six justices wrote opinions. All supported the state laws, but the highly fractionalized opinions provided no authoritative guidance for the states.

Two years later the Court heard arguments in *Smith v. Turner* and *Norris v. Boston*, which are known as the *Passenger Cases* (1849). These appeals tested the constitutionality of New York and Massachusetts laws seeking to regulate foreigners coming into the United States. The legislation was intended to discourage indigent immigrants and to provide for the treatment of individuals who arrived for entry in a diseased condition. The laws included provisions for taxing, bonding, and record keeping. The New York law taxed each incoming ship $1.00–$1.50 per passenger. These fees were used to fund a hospital to treat arriving immigrants. The Massachusetts law prohibited the importation of passengers who were indigent or had physical or mental disabilities. In addition, Massachusetts charged arriving ships $2.00 for each passenger, with the proceeds going to a fund for immigrants who later required public assistance. George Smith and James Norris were British shipmasters. Smith landed in New York City with 290 immigrant passengers, and Norris docked in Boston with 19. Both protests the constitutionality of the taxes on commerce clause grounds.

The Court found these cases difficult to resolve. In fact, they were argued three times, and still the justices had trouble reaching a majority decision. Finally, by a 5–4 vote, the Court struck down the laws as being in conflict with the authority of Congress to regulate foreign commerce. The five justices in the majority each wrote an opinion. The four dissenters, led by Taney, adhered to the view that such regulations to protect a state’s citizens from indigent and sick immigrants were within the states’ police powers.

The *Passenger Cases* left the law unsettled. Not only was the decision in conflict with previous rulings, but also the Court had failed to produce an opinion supported by a majority of the justices. This situation demanded a ruling that would authoritatively explain the constitutional division between federal and state commerce powers, but instead many questions remained unanswered. Did Congress have the exclusive power to regulate interstate and foreign commerce, leaving no authority for the states? Could the states regulate such commerce only if Congress had failed to enact any relevant legislation? Was the commerce power concurrent? Could Congress delegate its regulatory power to the states? Three years after the *Passenger Cases*, in *Cooley v. Board of Wardens*

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24 *Edwards v. California* (1941) effectively overruled *Miln*. In *Edwards* the justices struck down an “anti-Okie” law passed to discourage large numbers of people from Oklahoma and other states from moving into California in an effort to escape the economic depression caused by the effects of the Dust Bowl in the central states. The Court found that the law violated the right of citizens to travel freely among the various states.

25 The *License Cases* (1847) is the collective name given to the cases *Peirce v. New Hampshire*, *Fletcher v. Rhode Island*, and *Thurlow v. Massachusetts*. Copyright ©2020 by SAGE Publications, Inc. This work may not be reproduced or distributed in any form or by any means without express written permission of the publisher.
Cooley v. Board of Wardens
53 U.S. (12 How.) 299 (1852)
Vote: 7 (Catron, Curtis, Daniel, Grier, McKinley, Nelson, Taney)
2 (McLean, Wayne)

OPINION OF THE COURT: Curtis
CONCURRING OPINION: Daniel
DISSENTING OPINION: McLean

FACTS:

Based on its power over interstate and foreign commerce, Congress passed a statute in 1789 pertaining to the regulation of ports. The legislation said that until Congress acted otherwise, state and local authorities would continue to control the nation’s ports and harbors. In 1803 Pennsylvania passed a port regulation law requiring that all vessels hire a local pilot to guide ships in and out of the Port of Philadelphia. Shipowners who did not comply were fined. The money from these fines was placed in a “charitable fund for the distressed or decayed pilots, their widows and children.”

Aaron Cooley owned a vessel that sailed into Philadelphia without hiring a local pilot. The port’s Board of Wardens took legal action against him, and Cooley was fined. He responded by claiming that the Pennsylvania law was unconstitutional; only Congress, he asserted, could regulate the port because the harbor was an integral part of interstate and foreign commerce, and the states had no constitutional authority to set regulations for such commerce. By implication, Cooley also was challenging the 1789 act of Congress that had delegated the powers to the states. The Pennsylvania Supreme Court upheld the law and the fine, and Cooley pressed his case to the U.S. Supreme Court.

Philadelphia’s ordinance regulating the use of pilots in the city’s harbor was challenged as an infringement on the commerce power of the federal government. The Supreme Court upheld the ordinance in Cooley v. Board of Wardens, stating that some aspects of interstate and foreign commerce are essentially local and can be regulated locally if Congress has not already passed laws to the contrary.

(1852), the justices issued a ruling that resolved some of the confusion.
ARGUMENTS:

For the plaintiff in error, Aaron B. Cooley:

- The Pennsylvania law violates the commerce clause because the law does not regulate commerce. It was passed pursuant to the exercise of powers by the state—powers that the states never surrendered: to control their ports and to protect the property and lives of their citizens.

- The law is local in character and is an exercise of state police power designed to aid, not to regulate, commerce. See City of New York v. Miln.

- Even if the law is a regulation of commerce, the power of Congress is not exclusive. Because Congress has passed no conflicting legislation, the state law is valid.

For the defendants in error, the Board of Wardens of the Port of Philadelphia et al.:

- The Pennsylvania law does not violate the commerce clause because the law does not regulate commerce. Regulations of navigation are regulations of commerce and within the jurisdiction of Congress.

- In legislation of the type at issue here, Congress can neither confer on the states powers not given them by the Constitution nor enable them to legislate on subjects clearly within the powers of Congress.

MR. JUSTICE CURTIS DELIVERED THE OPINION OF THE COURT.

That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution. . . .

Nor should it be lost sight of, that this subject of the regulation of pilots and pilotage has an intimate connection with, and an important relation to the general subject of commerce with foreign nations and among the several States, over which it was one main object of the Constitution to create a national control. Conflicts between the laws of neighboring States, and discriminations favorable or adverse to commerce with particular foreign nations, might be created by State laws regulating pilotage, deeply affecting that equality of commercial rights, and that freedom from State interference, which those who formed the Constitution were so anxious to secure, and which the experience of more than half a century has taught us to value so highly . . .

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The act of Congress of the 7th of August, 1789, sect. 4, is as follows:

“...That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress.”

If the law of Pennsylvania, now in question, had been in existence at the date of this act of Congress, we might hold it to have been adopted by Congress, and thus made a law of the United States, and so valid. Because this act does, in effect, give the force of an act of Congress, to the then existing State laws on this subject, so long as they should continue unrepealed by the State which enacted them.

But the law on which these actions are founded was not enacted till 1803. What effect then can be attributed to so much of the act of 1789, as declares, that pilots shall continue to be regulated in conformity, “with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress”?

If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is plain this act could not confer upon them power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power. And yet this act of 1789 gives its sanction...
only to laws enacted by the States. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a State acting in its legislative capacity, can be deemed a law, enacted by a State; and if the State has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views we are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress, did per se deprive the States of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject matter. If they are excluded it must be because the nature of the power, thus granted to Congress, requires that a similar authority should not exist in the States. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to Congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the Constitution (Federalist, No. 32) and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations.

The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulations, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this act of 1789 as declares that pilots shall continue to be regulated “by such laws as the States may respectively hereafter enact for that purpose,” instead of being held to be inoperative, as an attempt to confer on the States a power to legislate, of which the Constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of Congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. How then can we say, that by the mere grant of power to regulate commerce, the States are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of Congress must be exclusive. . . .

It is the opinion of a majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of power to regulate pilots, and that
although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of Congress, or may be regulated by the States in the absence of all congressional legislation; nor to the general question how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the States upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to this particular subject in the state in which the legislation of Congress has left it. We go no further. . . .

We are of opinion that this State law was enacted by virtue of a power, residing in the State to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the Supreme Court of Pennsylvania in each case must be affirmed.

Justice Benjamin Curtis’s opinion in Cooley nicely outlines the basic constitutional principles governing the state’s power to regulate commerce. From this decision and those that preceded it, we can begin to build some understanding of how far the states may go in regulating commercial enterprise:

1. The states retain the power to regulate purely intrastate commerce.
2. Congress has the power to regulate interstate and foreign commerce. When it exercises this power, any contrary state laws are preempted.
3. The power of Congress to regulate interstate and foreign commerce is exclusive over those elements of commercial activity that are national in scope or require uniform regulation.
4. Those elements of interstate and foreign commerce that are not national in scope or do not require uniformity, and that have not been regulated by Congress, may be subject to state authority, including the states’ police powers.

This division of authority is known as the doctrine of selective exclusiveness. It designates certain aspects of interstate and foreign commerce over which the powers of Congress are exclusive, allowing no state action. This exclusiveness, however, is not complete; in the absence of federal legislation, states may regulate some local business activity affecting interstate commerce. The regulation of the Philadelphia port is an obvious part of interstate and foreign commerce where local harbor conditions require state supervision.

**State Burdens on Interstate Commerce: The Dormant Commerce Clause**

Under the Articles of Confederation the states often imposed protective barriers that obstructed interstate business activity and impeded the growth of the national economy. To protect against such state policies, the framers gave Congress the authority to regulate interstate and foreign commerce. The goal was to promote free and robust commercial activity. Under the doctrine of selective exclusiveness, however, the states retained some powers to regulate commerce and potentially could use those powers to thwart the purposes of the commerce clause.

In 1803 John Marshall, writing in *Marbury v. Madison*, declared, “Affirmative words are often, in their operation, negative of other objects than those affirmed.” Almost two centuries later, Justice John Paul Stevens echoed this proposition, noting in *Quill Corp. v. North Dakota* (1992), “[T]he Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well.” Over the years the justices have often applied this principle to the state regulation of commercial activity: the affirmative grant of power to the federal government to regulate interstate and foreign commerce implies that the states are prohibited from regulating in ways that are detrimental to the national economy—even if Congress does not explicitly bar them from doing so. The Court, therefore, creates a balancing situation. In the absence of federal laws to the contrary, states for valid reasons may regulate local commercial activities, but those regulations may not negatively and unreasonably affect interstate commerce.

The justices refer to this interpretation as the “dormant” or “negative” commerce clause. This jurisprudence recognizes that although the commerce clause is a positive grant of power to the federal government, it carries with it a negative command against certain state actions. The Court has been particularly concerned with
state policies that either burden interstate and foreign commerce or discriminate against them in favor of state interests. Applying the dormant commerce clause approach, such state regulations are contrary to the Constitution.

**State Burdens on Interstate Commerce.** Among the essentially local aspects of interstate commerce are matters of public safety. Interstate trucking provides a good illustration. The use of trucks for the transportation of goods is an integral part of interstate commerce, but trucks use local roads that are the state’s concern. One of the primary elements of a state’s police powers is regulation to ensure the safety of its citizens, and safety regulations may impose a burden on interstate commerce.

The Supreme Court addressed this conflict in 1938 in *South Carolina State Highway Department v. Barnwell Brothers*. For purposes of public safety and to prevent damage to the state’s highways, the South Carolina legislature passed a statute prohibiting certain trucks from using the highways. No truck with a gross weight in excess of twenty thousand pounds or a width greater than ninety inches was permitted. Barnwell Brothers Trucking Company challenged the regulation as an unreasonable burden on interstate commerce. Evidence presented at trial showed that between 85 percent and 90 percent of all interstate trucks were ninety-six inches wide and weighed more than the prescribed limit. Only four other states had weight limits as low as South Carolina’s, and none had width restrictions as severe. Based on this information, the trial court ruled that the state law was an unconstitutional burden on the flow of interstate commerce.

The Supreme Court reversed. Justice Stone’s opinion for the Court noted that “[t]he commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method.” States consequently are prohibited from giving a preference to intrastate businesses at the expense of interstate commerce or placing unreasonable burdens on out-of-state businesses. Stone, however, wrote, “There are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress.” The regulation of such matters, in the absence of federal legislation, is best left to the states. Congress has recognized this situation by allowing state and local governments to have a say in the regulation of highways, ports, harbors, rivers, and docks. Congress also has not prohibited certain quarantine laws imposed by the states. Naturally, Congress may act in any of these areas when it determines that uniform national legislation is required.

In their 7–0 decision the justices held that South Carolina’s regulation of trucks using the state highways fell into this category. Because of an absence of federal legislation over highway safety and because the state regulations applied to vehicles in intra- and interstate commerce equally, the state law was not in violation of the Constitution.

Still, *Barnwell Brothers* left a number of issues unresolved: How far may a state go in regulating interstate commerce for safety purposes? How much of a burden may be imposed on the free flow of commerce among the states to achieve greater safety? Were the highways, which the states built, owned, and maintained, a special case, or did state authority similarly extend to other areas of interstate commerce? The justices took another look at these issues in *Southern Pacific Company v. Arizona* (1945). Once again Stone wrote the opinion for the Court, but this time the outcome was different. Was *Southern Pacific* consistent with *Barnwell Brothers*, or did the Court modify its position?

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**Southern Pacific Company v. Arizona**

925 U.S. 761 (1945)


Vote: 7 (Frankfurter, Jackson, Murphy, Reed, Roberts, Rutledge, Stone)

2 (Black, Douglas)

OPINION FOR THE COURT: Stone

DISSenting opinions: Black, Douglas

**FACTS:**

On May 16, 1912, the Arizona legislature passed the Train Limit Law, making it unlawful for any individual or corporation to operate within the state a train with more than fourteen passenger cars or seventy freight cars. Violators were subject to fines. In 1940 the state brought a legal action against Southern Pacific Company, which acknowledged operating passenger and freight trains in excess of the state limits. The company argued that the state law was unconstitutional because it conflicted with the commerce clause.

The jury returned a verdict for the company, but the state supreme court reversed, holding that Arizona was free to enact such regulations because Congress had not
legislated the length of railroad trains. The Arizona law was a safety measure that could be justified as an exercise of the state's police powers to act in the interests of local health, safety, and well-being. The railroad appealed the ruling to the U.S. Supreme Court, arguing that the state law placed an undue burden on the flow of interstate commerce. In presenting its case, Southern Pacific enjoyed the support of two powerful allies: the U.S. government and the Association of American Railroads submitted amicus curiae briefs attacking the constitutionality of the state law.

ARGUMENTS:

For the appellant, Southern Pacific Company:

- The state law violates the commerce clause because it regulates a matter of national, not solely local, concern. Only Congress can determine whether a uniform system of regulation is needed, and only Congress can enact such measures. The power to regulate commerce is necessarily exclusive when it is exercised over subjects that are national in character or require a single plan of regulation.

- The Court must strike down the state law because it frustrates the principal goals of the commerce clause as outlined in previous decisions: to preserve the interests of the nation against conflicting and discriminatory state legislation and to guard against obstructions of the free flow of commerce. This law imposes a serious burden on interstate commerce by hindering efficient train service.

- The law invades a field of regulation of commerce that Congress fully occupies, as previous federal laws regulating trains indicate. Congressional silence or inaction over the matter here is the same as a declaration that interstate commerce should remain free and unobstructed.

For the appellee, state of Arizona:

- The state law does not invade a national field exclusively reserved to Congress. It has a real relation to the safety and protection of Arizona's citizens and is not an area in which Congress has regulated.

- It is up to Congress, not the courts, to determine whether a state can exercise its reserved police powers in a way that might indirectly affect interstate commerce. Congress does this by permissibly occupying a field under its commerce power, which it has not done here. But even the courts have recognized that states have legitimately regulated in areas that require regulation until Congress intervenes.

- Whether the state law imposes an impermissible burden on interstate commerce is a question Congress, not the courts, should address through appropriate legislative means. Even so, the financial burden is not as substantial as appellant contends.

Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation. Ever since Willson v. Black-Bird Creek Marsh Co. and Cooley v. Board of Wardens, it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it. Thus the states may regulate matters which, because of their number and diversity, may never be adequately dealt with by Congress. Cooley v. Board of Wardens, South Carolina Highway Dept. v. Barnwell Bros. When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority.

But ever since Gibbons v. Ogden, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority. Whether or not this long-recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself, or upon the presumed intention of Congress, where Congress has not spoken, the result is the same.

In the application of these principles some enactments may be found to be plainly within and others plainly without state power. But between these extremes lies the infinite variety of cases, in which regulation of local
matters may also operate as a regulation of commerce, in which reconciliation of the conflicting claims of state and national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved.

For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.

Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce.

But in general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn, and has been aware that in their application state laws will not be invalidated without the support of relevant factual material which will “afford a sure basis” for an informed judgment. Meanwhile Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has thus been left to the states wide scope for the regulation of matters of local state concern, even though in some measure affects the commerce, provided it does not materially restrict the free flow of commerce across state lines, or interfere with it in matters with respect to which uniformity of regulation is of predominant national concern.

Hence the matters for ultimate determination here are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference.

The findings show that the operation of long trains, that is trains of more than fourteen passenger and more than seventy freight cars, is standard practice over the main lines of the railroads of the United States, and that, if the length of trains is to be regulated at all, national uniformity in the regulation adopted, such as only Congress can prescribe, is practically indispensable to the operation of an efficient and economical national railway system. On many railroads passenger trains of more than fourteen cars and freight trains of more than seventy cars are operated, and on some systems freight trains are run ranging from one hundred and twenty-five to one hundred and sixty cars in length. Outside of Arizona, where the length of trains is not restricted, appellant runs a substantial proportion of long trains. In 1939 on its comparable route for through traffic through Utah and Nevada from 60 to 85% of its freight trains were over seventy cars in length and over 43% of its passenger trains included more than fourteen passenger cars.

In Arizona, approximately 93% of the freight traffic and 95% of the passenger traffic is interstate. Because of the Train Limit Law appellant is required to haul over 30% more trains in Arizona than would otherwise have been necessary. The record shows a definite relationship between operating costs and the length of trains, the increase in length resulting in a reduction of operating costs per car. The additional cost of operation of trains complying with the Train Limit Law in Arizona amounts for the two railroads traversing that state to about $1,000,000 a year. The reduction in train lengths also impedes efficient operation. More locomotives and more manpower are required; the necessary conversion and reconversion of train lengths at terminals and the delay caused by breaking up and remaking long trains upon entering and leaving the state in order to comply with the law, delays the traffic and diminishes its volume moved in a given time, especially when traffic is heavy. . . .

The unchallenged findings leave no doubt that the Arizona Train Limit Law imposes a serious burden on the interstate commerce conducted by appellant. It materially impedes the movement of appellant’s interstate trains through that state and interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service. Enforcement of the law in Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application. Compliance with a state statute limiting train lengths requires interstate trains
of a length lawful in other states to be broken up and reconstituted as they enter each state according as it may impose varying limitations upon train lengths. The alternative is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carriers’ operations both within and without the regulating state.

Although the seventy car maximum for freight trains is the limitation which has been commonly proposed, various bills introduced in the state legislatures provided for maximum freight train lengths of from fifty to one hundred and twenty-five cars, and maximum passenger train lengths of from ten to eighteen cars. With such laws in force in states which are interspersed with those having no limit on train lengths, the confusion and difficulty with which interstate operations would be burdened under the varied system of state regulation and the unsatisfied need for uniformity in such regulation, if any, are evident.

We think, as the trial court found, that the Arizona Train Limit Law, viewed as a safety measure, affords at most slight and dubious advantage, if any, over unregulated train lengths, because it results in an increase in the number of trains and train operations and the consequent increase in train accidents of a character generally more severe than those due to slack action. Its undoubted effect on the commerce is the regulation, without securing uniformity, of the length of trains operated in interstate commerce, which lack is itself a primary cause of preventing the free flow of commerce by delaying it and by substantially increasing its cost and impairing its efficiency. In these respects the case differs from those where a state, by regulatory measures affecting the commerce, has removed or reduced safety hazards without substantial interference with the interstate movement of trains. Such are measures abolishing the car stove, requiring locomotives to be supplied with electric headlights, providing for full train crews, and for the equipment of freight trains with cabooses.

Here we conclude that the state does go too far. Its regulation of train lengths, admittedly obstructive to interstate train operation, and having a seriously adverse effect on transportation efficiency and economy, passes beyond what is plainly essential for safety since it does not appear that it will lessen rather than increase the danger of accident. Its attempted regulation of the operation of interstate trains cannot establish nationwide control such as is essential to the maintenance of an efficient transportation system, which Congress alone can prescribe. The state interest cannot be preserved at the expense of the national interest by an enactment which regulates interstate train lengths without securing such control, which is a matter of national concern. To this the interest of the state here asserted is subordinate.

Reversed.

MR. JUSTICE BLACK, dissenting.

[T]he determination of whether it is in the interest of society for the length of trains to be governmentally regulated is a matter of public policy. Someone must fix that policy—either the Congress or the state, or the courts. A century and a half of constitutional history and government admonishes this Court to leave that choice to the elected legislative representatives of the people themselves, where it properly belongs both on democratic principles and the requirements of efficient government.

Representatives elected by the people to make their laws, rather than judges appointed to interpret those laws, can best determine the policies which govern the people. That at least is the basic principle on which our democratic society rests. I would affirm the judgment of the Supreme Court of Arizona.

MR. JUSTICE DOUGLAS, dissenting.

I have expressed my doubts whether the courts should intervene in situations like the present and strike down state legislation on the grounds that it burdens interstate commerce. My view has been that the courts should intervene only where the state legislation discriminated against interstate commerce or was out of harmony with laws which Congress had enacted. It seems to me particularly appropriate that that course be followed here. For Congress has given the Interstate Commerce Commission broad powers of regulation over interstate carriers. The Commission is the national agency which has been entrusted with the task of promoting a safe, adequate, efficient, and economical transportation service. It is the expert on this subject. It is in a position to police the field. And if its powers prove inadequate for the task, Congress, which has paramount authority in this field, can implement them.

Chief Justice Stone’s opinion in Southern Pacific is a strong declaration of how state requirements affect the flow of interstate traffic and commerce. Under the dormant commerce clause doctrine, the Constitution leaves no room for state legislation that is inimical to
national commerce, even if the subject of that regulation has not been touched by federal legislation. A state law that obstructs interstate commerce, going beyond what is clearly necessary for safety regulation, cannot stand in the face of the commerce clause.

**State Discrimination against Interstate Commerce.**
Even though the Court’s decisions in *Barnwell Brothers* and *Southern Pacific* deal with transportation and distribution activities, the principles set down in those cases also apply to state regulations that place burdens on other aspects of interstate commerce, especially a state’s attempt to protect local businesses by discriminating against interstate commerce. In *Hunt v. Washington State Apple Advertising Commission* the justices confronted a state regulation that restricted the kind of information that could be displayed on containers of out-of-state agricultural products. The state claimed that the rule was an exercise of the police powers to protect its citizens from fraud and deception. Does the state make a convincing case, or is the regulation nothing more than a way to prevent interstate commerce from having a negative impact on local producers?

**Hunt v. Washington State Apple Advertising Commission**
432 U.S. 333 (1977)

Vote: 8 (Blackmun, Brennan, Burger, Marshall, Powell, Stevens, Stewart, White)

OPIINION OF THE COURT: Burger
NOT PARTICIPATING: Rehnquist

**FACTS:**
In 1972 the North Carolina Board of Agriculture adopted a regulation that required all closed containers of apples shipped into the state to display either the U.S. Department of Agriculture (USDA) grade or nothing at all. It barred information based on the grading systems of the states in which the apples were grown. The reason for the regulation, according to North Carolina, which has a substantial apple industry, was to ensure that all apples coming into the state used the same grading system, thereby removing the danger that multiple systems would confuse purchasers and lead to deception and fraud in the market. No other state had such a regulation.

Through their industry advertising commission, apple growers in Washington State challenged the North Carolina regulations. Washington grows approximately 30 percent of the nation’s apples and is responsible for roughly half of all apples shipped in interstate commerce. Because the industry is so important to that state, it has taken steps to enhance its reputation by imposing a strict mandatory inspection and grading system. Washington’s standards are higher than the USDA’s, and the grading system has widespread acceptance in the apple trade.

The Washington commission asked North Carolina to alter its regulation or to allow certain exceptions. When North Carolina refused, the commission sued to have the regulation declared unconstitutional. The federal trial court found that the regulation violated the commerce clause, and North Carolina governor James Hunt, on behalf of the state, appealed to the U.S. Supreme Court.

**ARGUMENTS:**
**For the appellants, James B. Hunt Jr., governor of North Carolina, et al.:**
- If the law imposes burdens on the sale of Washington apples in North Carolina, the local benefits of North Carolina’s valid exercise of its police power outweigh those burdens. North Carolina is protecting its citizens—and indeed all Americans—from fraud and deception in the marketing of apples.
- The law accomplishes this goal of uniformity in an evenhanded manner because it applies to all apples sold in closed containers in the state without regard to their point of origin.
- Many Court decisions have held that not every state law imposing burdens on interstate commerce is unconstitutional. Especially when states act to protect their citizens from fraud and deception in the marketing of food, the residuum of power left to the states is particularly broad.

**For the appellee, Washington State Apple Advertising Commission:**
- The law unreasonably burdens interstate commerce in three ways. First, it clearly discriminates against interstate commerce in favor of local growers. Second, it denies Washington growers the ability to use the widely accepted quality grading system
and diminishes the marketing advantage the state’s industry has earned. Third, North Carolina’s regulation increases the cost of interstate commerce by requiring out-of-state growers to package their North Carolina–bound products differently from those being sent to the other states.

We turn . . . to the appellant’s claim that the District Court erred in holding that the North Carolina statute violated the Commerce Clause insofar as it prohibited the display of Washington State grades on closed containers of apples shipped into the State. Appellants do not really contest the District Court’s determination that the challenged statute burdened the Washington apple industry by increasing its costs of doing business in the North Carolina market and causing it to lose accounts there. Rather, they maintain that any such burdens on the interstate sale of Washington apples were far outweighed by the local benefits flowing from what they contend was a valid exercise of North Carolina’s inherent police powers designed to protect its citizenry from fraud and deception in the marketing of apples.

Prior to the statute’s enactment, appellants point out, apples from 13 different States were shipped into North Carolina for sale. Seven of those States, including the State of Washington, had their own grading system which, while differing in their standards, used similar descriptive labels (e.g., fancy, extra fancy, etc.). This multiplicity of inconsistent grades, as the District Court itself found, posed dangers of deception and confusion not only in the North Carolina market, but in the Nation as a whole. The North Carolina statute, appellants claim, was enacted to eliminate this source of deception and confusion by replacing the numerous state grades with a single uniform standard. Moreover, it is contended that North Carolina sought to accomplish this goal of uniformity in an even-handed manner as evidenced by the fact that its statute applies to all apples sold in closed containers in the State without regard to their point of origin. Nonetheless, appellants argue that the District Court gave “scant attention” to the obvious benefits flowing from the challenged legislation and to the long line of decisions from this Court holding that the State possesses “broad powers” to protect local purchasers from fraud and deception in the marketing of foodstuffs.

As the appellants properly point out, not every exercise of state authority imposing some burden on the free flow of commerce is invalid. Although the Commerce Clause acts as a limitation upon state power even without congressional implementation, our opinions have long recognized that,

“in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even . . . to some extent, regulate it.” Southern Pacific Co. v. Arizona (1945).

Moreover, as appellants correctly note, that “residuum” is particularly strong when the State acts to protect its citizenry in matters pertaining to the sale of foodstuffs. By the same token, however, a finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. Such a view, we have noted, “would mean that the Commerce Clause of itself imposes no limitations on state action . . . save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.” Dean Milk Co. v. Madison (1951). Rather, when such state legislation comes into conflict with the Commerce Clause’s overriding requirement of a national “common market,” we are confronted with the task of effecting an accommodation of the competing national and local interests. We turn to that task.

As the District Court correctly found, the challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them. This discrimination takes various forms. The first, and most obvious, is the statute’s consequence of raising the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected. As previously noted, this disparate effect results from the fact that North Carolina apple producers, unlike their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute. They were still free to market their wares under the USDA grade or none at all as they had done prior to the statute’s enactment. Obviously, the increased costs imposed by the statute would tend to shield the local apple industry from the competition of Washington apple growers and dealers.
who are already at a competitive disadvantage because of their great distance from the North Carolina market.

Second, the statute has the effect of stripping away from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system. The record demonstrates that the Washington apple-grading system has gained nationwide acceptance in the apple trade. Indeed, it contains numerous affidavits from apple brokers and dealers located both inside and outside of North Carolina who state their preference, and that of their customers, for apples graded under the Washington, as opposed to the USDA, system because of the former’s greater consistency, its emphasis on color, and its supporting mandatory inspections. Once again, the statute had no similar impact on the North Carolina apple industry and thus operated to its benefit.

Third, by prohibiting Washington growers and dealers from marketing apples under their State’s grades, the statute has a leveling effect which insidiously operates to the advantage of local apple producers. As noted earlier, the Washington State grades are equal or superior to the USDA grades in all corresponding categories. Hence, with free market forces at work, Washington sellers would normally enjoy a distinct market advantage vis-à-vis local producers in those categories where the Washington grade is superior. However, because of the statute’s operation, Washington apples which would otherwise qualify for and be sold under the superior Washington grades will now have to be marketed under their inferior USDA counterparts. Such “down-grading” offers the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit. At worst, it will have the effect of an embargo against those Washington apples in the superior grades as Washington dealers withhold them from the North Carolina market. At best, it will deprive Washington sellers of the market premium that such apples would otherwise command.

Despite the statute’s facial neutrality, the Commission suggests that its discriminatory impact on interstate commerce was not an unintended byproduct and there are some indications in the record to that effect. The most glaring is the response of the North Carolina Agriculture Commissioner to the Commission’s request for an exemption following the statute’s passage in which he indicated that before he could support such an exemption, he would “want to have the sentiment from our apple producers since they were mainly responsible for this legislation being passed...” [emphasis added]. Moreover, we find it somewhat suspect that North Carolina singled out only closed containers of apples, the very means by which apples are transported in commerce, to effectuate the statute’s ostensible consumer protection purpose when apples are not generally sold at retail in their shipping containers. However, we need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace.

When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. North Carolina has failed to sustain that burden on both scores.

The several States unquestionably possess a substantial interest in protecting their citizens from confusion and deception in the marketing of foodstuffs, but the challenged statute does remarkably little to further that laudable goal at least with respect to Washington apples and grades. The statute, as already noted, permits the marketing of closed containers of apples under no grades at all. Such a result can hardly be thought to eliminate the problems of deception and confusion created by the multiplicity of differing state grades; indeed, it magnifies them by depriving purchasers of all information concerning the quality of the contents of closed apple containers. Moreover, although the statute is ostensibly a consumer protection measure, it directs its primary efforts, not at the consuming public at large, but at apple wholesalers and brokers who are the principal purchasers of closed containers of apples. And those individuals are presumably the most knowledgeable individuals in this area. Since the statute does nothing at all to purify the flow of information at the retail level, it does little to protect consumers against the problems it was designed to eliminate. Finally, we note that any potential for confusion and deception created by the Washington grades was not of the type that led to the statute’s enactment. Since Washington grades are in all cases equal or superior to their USDA counterparts, they could only “deceive” or “confuse” a consumer to his benefit, hardly a harmful result.
In addition, it appears that nondiscriminatory alternatives to the outright ban of Washington State grades are readily available. For example, North Carolina could effectuate its goal by permitting out-of-state growers to utilize state grades only if they also marked their shipments with the applicable USDA label. In that case, the USDA grade would serve as a benchmark against which the consumer could evaluate the quality of the various state grades. If this alternative was for some reason inadequate to eradicate problems caused by state grades inferior to those adopted by the USDA, North Carolina might consider banning those state grades which, unlike Washington’s, could not be demonstrated to be equal or superior to the corresponding USDA categories. Concededly, even in this latter instance, some potential for “confusion” might persist. However, it is the type of “confusion” that the national interest in the free flow of goods between the States demands be tolerated.

The judgment of the District Court is

Affirmed.

The Southern Pacific and Washington State Apple cases are but two examples from a long line of decisions in which the Court has cast a disapproving eye on state laws that discriminate against interstate commerce or place an unreasonable burden on it. Other examples are summarized in Box 7-10.

It would be a mistake to conclude, however, that all state regulations that discriminate against interstate products are unconstitutional. In several cases, including Hughes v. Oklahoma (1979) and New Energy Co. of Indiana v. Limbach (1988), the Court has allowed such unequal treatment under two conditions. First, Congress may pass legislation that permits discrimination by the states and thereby removes the restrictions imposed by the negative commerce clause. Second, the justices have allowed discrimination against interstate commerce when the states can advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.

Maine v. Taylor (1986) involves a dispute over a state law that bans importation of a commodity while allowing the sale of the same article produced within the state. Maine argues that Congress approved the prohibition and that the law is a necessary environmental health regulation. Does the state offer a sufficiently strong case that its trade barrier is not offensive to the Constitution, or is the state using the police power as a means of protecting a domestic industry against interstate competition?

Maine v. Taylor

477 U.S. 131 (1986)


Vote: 8 (Blackmun, Brennan, Burger, Marshall, O’Connor, Powell, Rehnquist, White)

1 (Stevens)

OPINION OF THE COURT: Blackmun

DISSENTING OPINION: Stevens

FACTS:

Maine passed a law prohibiting the importation of any live fish to be used as bait in any of the state’s inland waters. The state said the law was to protect indigenous fish from parasites and diseases that are common among imported baitfish and to prevent the introduction of fish that might be detrimental to the state’s ecology. Coupled with this state law was the Lacey Act, a federal statute that, among other things, made it a crime to transport any fish or wildlife in violation of state laws.

In a clear violation of the state statute, Robert J. Taylor, operator of a bait business in Maine, imported 158,000 live golden shiners. The fish were intercepted at the state border, and the federal government indicted Taylor for violating the Lacey Act. In his defense, Taylor attacked the constitutionality of the Maine law. He claimed that the ban on the interstate shipment of baitfish was a direct violation of the commerce clause. Maine intervened to defend its statute. In a hearing before a U.S. magistrate, Maine introduced testimony showing that the law served a legitimate local purpose that could not be adequately served by reasonable nondiscriminatory alternatives. The judge and later a U.S. district court agreed that the state had met its burden and upheld its law. But the court of appeals, also considering the purpose and possible alternatives, reversed.

The reversal cast doubt on the state’s claim that its law served a legitimate local purpose on the grounds that the law was unique and had an “aura of economic protectionism.” Even if it assumed the law had a legitimate local purpose, the court held that less-discriminatory alternatives existed, including the inspection of the fish before they are released into Maine waters. Maine and the United States petitioned the U.S. Supreme Court to review the case.
### BOX 7-10

**Examples of Supreme Court Decisions Striking Down State and Local Restrictions on Interstate Commerce**

<table>
<thead>
<tr>
<th>Case</th>
<th>Law Declared Unconstitutional</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Edwards v. California</em> (1941)</td>
<td>California law making it a crime to bring into the state any person known to be indigent</td>
</tr>
<tr>
<td><em>Dean Milk Company v. City of Madison</em> (1951)</td>
<td>Madison, Wisconsin, city ordinance discriminating against milk produced out of state</td>
</tr>
<tr>
<td><em>Bibb v. Navajo Freight Lines</em> (1959)</td>
<td>Illinois statute requiring a particular mud flap on all trucks and outlawing a conventional mud flap legal in forty-five other states</td>
</tr>
<tr>
<td><em>Pike v. Bruce Church</em> (1970)</td>
<td>Arizona law requiring that all Arizona-grown cantaloupes be packaged inside the state</td>
</tr>
<tr>
<td><em>Great Atlantic &amp; Pacific Tea Company v. Cottrell</em> (1976)</td>
<td>Mississippi law banning milk produced in Louisiana in response to Louisiana's refusal to sign a reciprocity agreement</td>
</tr>
<tr>
<td><em>Raymond Motor Transit v. Rice</em> (1978)</td>
<td>Wisconsin regulation prohibiting from the state's highways double trucks exceeding sixty-five feet in length</td>
</tr>
<tr>
<td><em>Hughes v. Oklahoma</em> (1979)</td>
<td>Oklahoma law outlawing the transportation of Oklahoma-grown minnows for out-of-state sale</td>
</tr>
<tr>
<td><em>Kassel v. Consolidated Freightways</em> (1981)</td>
<td>Iowa law banning sixty-five-foot double trucks from the state's highways</td>
</tr>
<tr>
<td><em>Healy v. Beer Institute</em> (1989)</td>
<td>Connecticut law requiring out-of-state beer distributors to show that the prices charged inside Connecticut are not higher than prices charged in bordering states</td>
</tr>
<tr>
<td><em>State of Wyoming v. State of Oklahoma</em> (1992)</td>
<td>Oklahoma law mandating that electrical utility companies purchase at least 10 percent of their coal from Oklahoma mining operations</td>
</tr>
<tr>
<td><em>C &amp; A Carbone, Inc. v. Town of Clarkstown, New York</em> (1994)</td>
<td>Clarkston, New York, city ordinance requiring that all nonhazardous solid waste within the town be sent to a local transfer station, forbidding such waste to be shipped to out-of-state facilities</td>
</tr>
<tr>
<td><em>Camps Newfound/Owatonna v. Town of Harrison</em> (1997)</td>
<td>Maine statute singling out institutions that served mostly state residents for beneficial tax treatment and penalizing those institutions that did primarily interstate business</td>
</tr>
<tr>
<td><em>Granholm v. Heald</em> (2005)</td>
<td>Michigan law allowing state residents to order wine from in-state wineries and have it directly shipped to their homes, but to prohibit such purchases and deliveries from out-of-state wineries</td>
</tr>
<tr>
<td><em>Comptroller of the Treasury of Maryland v. Wynne</em> (2015)</td>
<td>Maryland law that includes a county income tax system that taxes income state residents earn out of state without crediting the taxes paid to the state in which the income was earned</td>
</tr>
</tbody>
</table>
ARGUMENTS:

For the appellant, state of Maine:

- Congress, in enacting the Lacey Act, encouraged the enactment of statutes such as Maine’s.
- The law satisfies the purpose and alternative requirements, as the magistrate and later district court judge found. The court of appeals’ decision to the contrary is at odds with evidence that the lower court found persuasive. Under existing case law (and the rules of civil procedure), courts of appeals are not free to set aside findings of fact by the lower court unless they are clearly erroneous, which they are not in this case.

For the appellee, Robert J. Taylor:

- When a state law discriminates against interstate commerce in a way that is not incidental or evenhanded, the state must show that its law serves a legitimate local purpose and that no reasonable alternative exists to promote the purpose without discriminating against commerce. Because the state has shown neither, the law violates the commerce clause.
- The state has not demonstrated that its law serves a legitimate local purpose that outweighs the national interest in the free flow of commerce throughout the United States. At trial an expert indicated that the dangers posed by parasites may be overstated.
- Even if the law served a legitimate local purpose, the court of appeals was right to rule that Maine has not taken advantage of less discriminatory alternatives.

JUSTICE BLACKMUN DELIVERED THE OPINION OF THE COURT.

Once again, a little fish has caused a commotion. See Hughes v. Oklahoma (1979); TVA v. Hill (1978); Cappaert v. United States (1976). The fish in this case is the golden shiner, a species of minnow commonly used as live bait in sport fishing.

The Commerce Clause of the Constitution grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Art. I, §8, cl. 3. “Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade.” Maine’s statute restricts interstate trade in the most direct manner possible, blocking all inward shipments of live baitfish at the State’s border. Still, as both the District Court and the Court of Appeals recognized, this fact alone does not render the law unconstitutional. The limitation imposed by the Commerce Clause on state regulatory power “is by no means absolute,” and “the States retain authority under their general police powers to regulate matters of ‘legitimate local concern,’ even though interstate commerce may be affected.”

In determining whether a State has overstepped its role in regulating interstate commerce, this Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the Commerce Clause only if the burdens they impose on interstate trade are “clearly excessive in relation to the putative local benefits,” statutes in the second group are subject to more demanding scrutiny. The Court explained in Hughes v. Oklahoma that once a state law is shown to discriminate against interstate commerce “either on its face or in practical effect,” the burden falls on the State to demonstrate both that the statute “serves a legitimate local purpose,” and that this purpose could not be served as well by available nondiscriminatory means.

No matter how one describes the abstract issue whether “alternative means could promote this local purpose as well without discriminating against interstate commerce,” Hughes v. Oklahoma, the more specific question whether scientifically accepted techniques exist for the sampling and inspection of live baitfish is one of fact, and the District Court’s finding that such techniques have not been devised cannot be characterized as clearly erroneous. Indeed, the record probably could not support a contrary finding. Two prosecution witnesses testified to the lack of such procedures, and appellee’s expert conceded the point, although he disagreed about the need for such tests. That Maine has allowed the importation of other freshwater fish after inspection hardly demonstrates that the District Court clearly erred in crediting the corroborated and uncontradicted expert testimony that standardized inspection techniques had not yet been developed for baitfish.

After reviewing the expert testimony … we cannot say that the District Court clearly erred in finding that substantial scientific uncertainty surrounds the effect that baitfish parasites and nonnative species could have on Maine’s fisheries. Moreover, we agree with the District
Court that Maine has a legitimate interest in guarding against imperfectly understood environmental risks, despite the possibility that they may ultimately prove to be negligible. “[T]he constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences.”

Nor do we think that much doubt is cast on the legitimacy of Maine’s purposes by what the Court of Appeals took to be signs of protectionist intent. Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to “simple economic protectionism” consequently have been subject to a “virtually per se rule of invalidity.” But there is little reason in this case to believe that the legitimate justifications the State has put forward for its statute are merely a sham or a “post hoc rationalization.” . . .

The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to “place itself in a position of economic isolation,” it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources. The evidence in this case amply supports the District Court’s findings that Maine’s ban on the importation of live baitfish serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives. This is not a case of arbitrary discrimination against interstate commerce; the record suggests that Maine has legitimate reasons “apart from their origin, to treat [out-of-state baitfish] differently.” The judgment of the Court of Appeals setting aside appellee’s conviction is therefore reversed.

JUSTICE STEVENS, dissenting.

There is something fishy about this case. Maine is the only State in the Union that blatantly discriminates against out-of-state baitfish by flatly prohibiting their importation. Although golden shiners are already present and thriving in Maine (and, perhaps not coincidentally, the subject of a flourishing domestic industry), Maine excludes golden shiners grown and harvested (and, perhaps not coincidentally, sold) in other States. This kind of stark discrimination against out-of-state articles of commerce requires rigorous justification by the discriminating State. “[W]hen discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.” Hunt v. Washington State Apple Advertising Comm’n (1977).

. . . [T]he Court concludes that uncertainty about possible ecological effects from the possible presence of parasites and nonnative species in shipments of out-of-state shiners suffices to carry the State’s burden of proving a legitimate public purpose. The Court similarly concludes that the State has no obligation to develop feasible inspection procedures that would make a total ban unnecessary. It seems clear, however, that the presumption should run the other way. Since the State engages in obvious discrimination against out-of-state commerce, it should be put to its proof. Ambiguity about dangers and alternatives should actually defeat, rather than sustain, the discriminatory measure.

This is not to derogate the State’s interest in ecological purity. But the invocation of environmental protection or public health has never been thought to confer some kind of special dispensation from the general principle of nondiscrimination in interstate commerce. “A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no restraints on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.” If Maine wishes to rely on its interest in ecological preservation, it must show that interest, and the infeasibility of other alternatives, with far greater specificity. Otherwise, it must further that asserted interest in a manner far less offensive to the notions of comity and cooperation that underlie the Commerce Clause.

Significantly, the Court of Appeals, which is more familiar with Maine’s natural resources and with its legislation than we are, was concerned by the uniqueness of Maine’s ban. That court felt, as I do, that Maine’s unquestionable natural splendor notwithstanding, the State has not carried its substantial burden of proving why it cannot meet its environmental concerns in the same manner as other States with the same interest in the health of their fish and ecology.

I respectfully dissent.
Maine v. Taylor illustrates a successful attempt on the part of a state to gain approval of a statute that clearly discriminated against interstate commerce. Because of the implications of the Lacey Act and the environmental interests at stake, the Court found ample reason to forgo the standard prohibitions imposed by the dormant commerce clause. Such efforts, however, do not always end with victory for state interests. Granholm v. Heald (2005) provides an illustration. As you read this case, consider whether the states’ arguments are compelling. Also ask yourself, Did the precedent set in Maine v. Taylor govern this case, or did the Court find sufficient differences to justify an alternative outcome?

Granholm v. Heald
544 U.S. 460 (2005)

FACTS:
This case consolidates two appeals—one from Michigan, the other from New York—involving challenges to the constitutionality of certain wine sales regulations. Both states operate three-tier regulatory systems that separately license wine producers, wholesalers, and retailers. Although the specifics of the two schemes differ, both lead to the same result: in-state wineries may legally sell and ship their products directly to residents of that state, but, either by direct prohibition or the imposition of prohibitive costs, out-of-state wineries may not. Consequently, Michigan consumers can buy wine directly from a Michigan winery and have it delivered to their homes, but they cannot have wine purchased from an out-of-state vineyard shipped to their residences.

A coalition of several wine producers who relied on direct consumer sales and private individuals who wanted to purchase wines from out-of-state sources challenged the constitutionality of these regulations on the ground that they discriminate against interstate commerce in violation of the commerce clause. In response, the states argued that they were not attempting to promote domestic wineries but instead were legislating to protect minors from easy access to alcohol and to facilitate the collection of liquor taxes. They also claimed that the Twenty-first Amendment permits such discriminatory legislation. In addition, the states argued that Congress expressed its support for such state regulations when it passed the Webb-Kenyon Act of 1913. In that statute Congress prohibited the importation of alcohol into any state in violation of that state’s laws.

The Sixth Circuit Court of Appeals struck down the Michigan regulations, but the Second Circuit Court of Appeals upheld the constitutionality of the New York law. The U.S. Supreme Court accepted the appeals to resolve the conflict between the findings of the two lower appellate courts.

ARGUMENTS:
For the petitioners, Jennifer M. Granholm, governor of Michigan, et al.:
- The Twenty-first Amendment gives the states broad power to adopt any reasonable regulation on the importation of alcoholic beverages for use by their residents. It was designed to create an exception to the dormant commerce clause. As long as state alcohol laws bear a rational connection to their regulatory objectives and do not violate other provisions of the Constitution, they are constitutional.
- Congress reaffirmed this power by exercising its power under the commerce clause to enact and reenact the Webb-Kenyon Act.
- Michigan’s differential treatment of foreign and domestic wineries reflects an entirely rational legislative judgment. In-state wineries may ship directly to consumers because these wineries are subject to effective oversight and regulation. Michigan cannot, as a practical matter, check the backgrounds, inspect the records, or otherwise monitor the regulatory compliance of out-of-state wineries.

For the respondents, Eleanor Heald et al.:
- Michigan’s law amounts to classic discrimination within the meaning of the dormant commerce clause: “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”
- The Supreme Court has made clear that the nondiscrimination principle applies to the sale of...
alcoholic products. The Twenty-first Amendment does not allow states to violate core commerce clause principles by explicitly discriminating against out-of-state alcohol producers. The Webb-Kenyon Act does not confer upon the states the power to discriminate against interstate commerce; it merely mirrors the language of the Twenty-first Amendment.

- The Court has left open the possibility that a state may discriminate against interstate commerce “by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” Michigan has not met this test. Michigan asserts that the discrimination is necessary to prevent the sale of wine to minors, prevent loss of revenue, and protect public health and safety, but has not supported this assertion with any proof. In fact, the Federal Trade Commission has found that the twenty-six states that allow direct shipping have encountered none of these problems.

**JUSTICE KENNEDY DELIVERED THE OPINION OF THE COURT.**

Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore. (1994). This rule is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States. States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. This mandate “reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.” Hughes v. Oklahoma (1979). . . .

Laws of the type at issue in the instant cases contradict these principles. They deprive citizens of their right to have access to the markets of other States on equal terms. The perceived necessity for reciprocal sale privileges risks generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid. . . . The current patchwork of laws—with some States banning direct shipments altogether, others doing so only for out-of-state wines, and still others requiring reciprocity—is essentially the product of an ongoing, low-level trade war. Allowing States to discriminate against out-of-state wine “invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.” Dean Milk Co. v. Madison (1951). . . .

State laws that discriminate against interstate commerce face “a virtually per se rule of invalidity.” Philadelphia v. New Jersey (1978). The Michigan and New York laws by their own terms violate this proscription. The two States, however, contend their statutes are saved by §2 of the Twenty-first Amendment, which provides:

“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”

The States’ position is inconsistent with our precedents and with the Twenty-first Amendment’s history. Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers. . . .

The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time. . . .

Our more recent cases, furthermore, confirm that the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers. . . .

Our determination that the Michigan and New York direct-shipment laws are not authorized by the Twenty-first Amendment does not end the inquiry. We still must consider whether either State regime “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” New Energy Co. of Ind. [v. Limbach, 1988]. The States offer two primary justifications for restricting direct shipments from out-of-state
wineries: keeping alcohol out of the hands of minors and facilitating tax collection. . . .

The States, aided by several amici, claim that allowing direct shipment from out-of-state wineries undermines their ability to police underage drinking. Minors, the States argue, have easy access to credit cards and the Internet and are likely to take advantage of direct wine shipments as a means of obtaining alcohol illegally.

The States provide little evidence that the purchase of wine over the Internet by minors is a problem. Indeed, there is some evidence to the contrary. . . . Without concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors, we are left with the States' unsupported assertions. Under our precedents, which require the "clearest showing" to justify discriminatory state regulation, C & A Carbone, Inc. v. Clarkstown, 1994, this is not enough. . . .

The States' tax-collection justification is also insufficient. Increased direct shipping, whether originating in state or out of state, brings with it the potential for tax evasion. . . .

In summary, the States provide little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries. Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods. The “burden is on the State to show that ‘the discrimination is demonstrably justified,’” Chemical Waste Management, Inc. v. Hunt (1992) (emphasis in original). The Court has upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State’s nondiscriminatory alternatives will prove unworkable. Michigan and New York have not satisfied this exacting standard.

States have broad power to regulate liquor under §2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.

It is so ordered.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE O’CONNOR join, dissenting.

The Court devotes much attention to the Twenty-first Amendment, yet little to the terms of the Webb-Kenyon Act. This is a mistake, because that Act’s language displaces any negative Commerce Clause barrier to state regulation of liquor sales to in-state consumers.

The Webb-Kenyon Act immunizes from negative Commerce Clause review the state liquor laws that the Court holds are unconstitutional. The Act “prohibit[s]” any “shipment or transportation” of alcoholic beverages “into any State” when those beverages are “intended, by any person interested therein, to be received, possessed, sold, or in any manner used . . . in violation of any law of such State.” State laws that regulate liquor imports in the manner described by the Act are exempt from judicial scrutiny under the negative Commerce Clause, as this Court has long held. . . .

The Michigan and New York direct-shipment laws are within the Webb-Kenyon Act’s terms and therefore do not run afoul of the negative Commerce Clause. . . .

. . . [T]he state laws the Court strikes down [also] are lawful under the plain meaning of §2 of the Twenty-first Amendment, as this Court’s case law in the wake of the Amendment and the contemporaneous practice of the States reinforce.

Section 2 of the Twenty-first Amendment provides: “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” . . . [T]his language tracked the Webb-Kenyon Act by authorizing state regulation that would otherwise conflict with the negative Commerce Clause. To remove any doubt regarding its broad scope, the Amendment simplified the language of the Webb-Kenyon Act and made clear that States could regulate importation destined for in-state delivery free of negative Commerce Clause restraints. Though the Twenty-first Amendment mirrors the basic terminology of the Webb-Kenyon Act, its language is broader, authorizing States to regulate all “transportation or importation” that runs afoul of state law. The broader language even more naturally encompasses discriminatory state laws. Its terms suggest, for example, that a State may ban imports entirely while leaving in-state liquor unregulated, for they do not condition the State’s ability to prohibit imports on the manner in which state law treats domestic products. . . .

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The Court begins its opinion by detailing the evils of state laws that restrict the direct shipment of wine. . . . The Twenty-first Amendment and the Webb-Kenyon Act took those policy choices away from judges and returned them to the States. Whatever the wisdom of that choice, the Court does this Nation no service by ignoring the textual commands of the Constitution and Acts of Congress. The Twenty-first Amendment and the Webb-Kenyon Act displaced the negative Commerce Clause as applied to regulation of liquor imports into a State. They require sustaining the constitutionality of Michigan’s and New York’s direct-shipment laws. I respectfully dissent.

The authority of the states to regulate interstate commerce remains consistent with the principles set out in Cooley v. Board of Wardens (1852). The Constitution without doubt gives supremacy in this area to the national government. If Congress elects to regulate such commerce, the power of the state is preempted. But where Congress does not regulate, the states may have a role. When national uniformity is not necessary, states may pass reasonable forms of regulation to meet legitimate local needs. If these ordinances place unreasonable burdens on interstate commerce or discriminate against interstate commerce in favor of domestic business, the Court will view them with suspicion, requiring the state to meet a heavy obligation of proving their legitimacy. As Maine v. Taylor and Granholm v. Heald illustrate, however, even well-developed legal standards are subject to differing interpretations that the judiciary may be called on to resolve.

**ANNOTATED READINGS**

