From Words We Live By

by Linda Monk

Commerce Clause

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

The Commerce Clause has become the greatest source of federal power under the Constitution. Congress had no power to regulate commerce under the Articles of Confederation, and the states acted in a variety of ways to restrict the flow of commerce between one another. The first Supreme Court case to deal with the Commerce Clause involved the power of states to grant monopolies over steamboat navigation in their waterways. In that case, *Gibbons v. Ogden* (1824), Chief Justice John Marshall defined the commerce power broadly to include transportation, rather than limiting it to buying and selling, and struck down New York's monopoly for steamboats. This ruling increased the power of Congress to regulate interstate commerce and create a national economy.

However, from the 1890s to the 1930s, the Supreme Court consistently limited the ability of Congress to regulate the economy using the commerce power. Critics charged that Congress was using the commerce power to pass laws on social welfare, an area traditionally reserved to the states. In *United States v. E.C. Knight Company* (1895), the Court held that manufacturing was not part of interstate commerce and could not be regulated under the Sherman Antitrust Act. Similarly, the Court ruled in *Hammer v. Dagenhart* (1918) that the commerce power did not authorize Congress to prohibit child labor. The Supreme Court also struck down the National Industrial Recovery Act (NIRA), a centerpiece of the New Deal legislation, as an unconstitutional use of the commerce power in *Schechter Poultry Corporation v. United States* (1935).

But in 1937, the Supreme Court began to uphold New Deal economic programs as a valid exercise of the commerce power. Some scholars speculate that this change came because President Franklin Roosevelt, frustrated by the Court's previous rulings, proposed a "court-packing" plan to expand the Court with his own nominees. For several decades the Court routinely supported the federal government's exercise of the commerce power. In *United States v. Darby Lumber Company* (1941), for example, the Court overturned *Hammer* and ruled that Congress had the power to regulate wages and hours of workers engaged in interstate commerce.

The Supreme Court even upheld the use of the commerce power to justify the Civil Rights Act of 1964, which forbade racial discrimination in public accommodations—such as hotels and restaurants—that were privately owned. Previous court rulings had established that Congress could not prohibit private discrimination under the Fourteenth Amendment. However, because hotels affected interstate commerce, the Supreme Court upheld the ban on discrimination in those facilities in *Heart of Atlanta Motel v. United States* (1964).

But the Court signaled a major shift in its application of the Commerce Clause in *United States v. Lopez* (1995). The Court held that Congress had not shown a sufficient connection with interstate commerce when it passed a 1990 law creating gun-free school zones. And in *United States v. Morrison* (2000), the Supreme Court again struck down a statute passed under Commerce Clause authority. The Court ruled that the Violence Against Women Act, which allowed victims of gender-based violence to sue for damages in federal court, did not bear a sufficient relationship to interstate commerce to be upheld, despite the fact-finding record of Congress to the contrary.

Besides regulating trade between states, the Commerce Clause is also the principal source of federal authority regarding Native Americans. The Supreme Court defined the legal status of Indian tribes in *Cherokee Nation v. Georgia* (1831), in which Georgia tried to exercise jurisdiction over Cherokee land and people. As one of the "Five Civilized Tribes," the Cherokees had adopted white people's laws and customs, including owning slaves. Chief Justice John Marshall held for the Court's majority that Indian tribes were "domestic dependent nations," and the next year in *Worcester v. Georgia* struck down Georgia's regulation of the Cherokees as unconstitutional under the Commerce and Treaty Clauses.

President Andrew Jackson refused to enforce the decision. Under the federal Indian Removal Act, the Cherokees (along with the Choctaws, Chickasaws, Creeks, and Seminoles) were forcibly marched from their homes in the Southeast to new lands in the West. About four thousand Cherokees died on the Trail of Tears to present-day Oklahoma.

Native Americans in the West fared little better. In 1867, all tribes were forced to live on reservations and abandon their traditional way of life. Uprisings were all eventually defeated. Almost three hundred years of "Indian Wars" ended with the massacre of two hundred Sioux at Wounded Knee, South Dakota, in 1890.

Since 1871, Congress has ceased making treaties with Indian tribes, although previous treaties remain in force. American Indians were given U.S. citizenship in 1924, and they remain dual citizens of both the United States and their tribe. In 1968, Congress passed the Indian Civil Rights Act,

"If it is interstate commerce that feels the pinch, it does not matter how local the operation that applies the squeeze."

—Justice Robert H. Jackson

Chief Joseph led his Nez Perce tribe on a thousand-mile march from Oregon to Montana in 1877, trying to escape to Canada, but they surrendered and were sent to Oklahoma.

"My heart is sick and sad.... I will fight no more forever."

—Chief Joseph

which made certain provisions in the Bill of Rights applicable to tribal governments. As of the 2000 census, less than one percent of the U.S. population is Native American.

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;
The original Constitution did not define citizenship. Only when the Fourteenth Amendment was added in 1868 did the Constitution promise citizenship to "all persons born or naturalized" in the United States–although that did not include Native Americans. Section 8 does give

The Constitution Put Beyond Their Reach

Protest of the Cherokee Nation

In 1836, the Cherokees sent a written protest to Congress, opposing removal from their native lands and noting the futility of their attempts to live under the Constitution.

The Cherokee were happy and prosperous under a scrupulous observance of treaty stipulations by the government of the United States, and from the fostering hand extended over them they made rapid advances in civilization, morals, and in the arts and sciences. Little did they anticipate that when taught to

to become strangers and wanderers in the land of their fathers, forced to return to the savage life, and to seek a new home in the wilds of the far west....

For more than *seven long years* have the Cherokee people been driven into the necessity of contending for their just rights, and they have struggled against fearful odds.... Their resources and means of defense have been seized and withheld. The treaties, laws, and Constitution of the United States, their bulwark and only citadel of

fortresses has been withdrawn from them. The judgments of the judiciary branch of the government in support of their rights have been disregarded and prostrated; and their petitions for relief, from time to time before Congress, have been unheeded....

The Cherokees cannot resist the power of the United States, and should they be driven from their native land, then they will look in melancholy sadness upon the golden chain presented by President Washington to the Cherokee

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

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

...

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

The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., Art. I, 8, cl. 3. The Court, through Chief Justice Marshall, first defined the nature of Congress' commerce power in Gibbons v. Ogden, 9 Wheat. 1, 189-190 (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." The Gibbons Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause.

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

> "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as `direct' or `indirect.'"

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

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

But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. In Jones & Laughlin Steel, the Court warned that the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce

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.

JUSTICE BREYER rejects our reading of precedent and argues that "Congress . . . could rationally conclude that schools fall on the commercial side of the line." Again, JUSTICE BREYER'S rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial. Under the dissent's rationale, Congress could just as easily look at child rearing as "fall[ing] on the commercial side of the line" because it provides a "valuable service - namely, to equip [children] with the skills they need to survive in life and, more specifically, in the workplace." We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.

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." As Chief Justice Marshall stated in McCulloch v. Maryland:

> "The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

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.

Majority Opinion

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.

...

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. Or, to put the question in the language of the explicit finding that Congress made when it amended this law in 1994: Could Congress rationally have found that "violent crime in school zones," through its effect on the "quality of education," significantly (or substantially) affects "interstate" or "foreign 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, , the answer to this question must be yes. Numerous reports and studies--generated both inside and outside government--make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts.

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. These materials report, for example, that four percent of American high school students (and six percent of inner city high school students) carry a gun to school at least occasionally; that 12 percent of urban high school students have had guns fired at them; that 20 percent of those students have been threatened with guns; and that, in any 6 month period, several hundred thousand schoolchildren are victims of violent crimes in or near their schools. And, they report that this widespread violence in schools throughout the Nation significantly interferes with the quality of education in those schools. Based on reports such as these, 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. ...As public school enrollment grew in the early 20th century, see Becker 218 (1993), the need for industry to teach basic educational skills diminished. But, the direct economic link between basic education and industrial productivity remained. Scholars estimate that nearly a quarter of America's economic growth in the early years of this century is traceable directly to increased schooling; that investment in "human capital" (through spending on education) exceeded investment in "physical capital" by a ratio of almost two to one; and that the economic returns to this investment in education exceeded the returns to conventional capital investment.

...

"[o]ver the long haul the best way to encourage the growth of high wage jobs is to upgrade the skills of the work force. . . . [B]etter trained workers become more productive workers, enabling a company to become more competitive and expand."

Increasing global competition also has made primary and secondary education economically more important. The portion of the American economy attributable to international trade nearly tripled between 1960 and 1980, and more than 70 percent of American made goods now compete with imports.

...

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 substantially 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, 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 railhead or harbor provided in the past. ...Congress has written that "the occurrence of violent crime in school zones" has brought about a "decline in the quality of education" that "has an adverse impact on interstate commerce and the foreign commerce of the United States." 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.

To hold this statute constitutional is not to "obliterate" the "distinction of what is national and what is local," nor is it to hold that the Commerce Clause permits the Federal Government to "regulate any activity that it found was related to the economic productivity of individual citizens," to regulate "marriage, divorce, and child custody," or to regulate any and all aspects of education. For one thing, this statute is aimed at curbing a particularly acute threat to the educational process--the possession (and use) of life threatening firearms in, or near, the classroom. The empirical evidence that I have discussed above unmistakably documents the special way in which guns and education are incompatible. This Court has previously recognized the singularly disruptive potential on interstate commerce that acts of violence may have. For another thing, the immediacy of the connection between education and the national economic well being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institutions. It must surely be the rare case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce.

...

In sum, to find this legislation within the scope of the Commerce Clause would permit "Congress . . . to act in terms of economic . . . realities." It would interpret the Clause as this Court has traditionally interpreted it, with the exception of one wrong turn subsequently corrected (holding that the commerce power extends "to all the external concerns of the nation, and to those internal concerns which affect the States generally"); 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.

Dissenting Opinion