

Excerpt from the Decision: *United States v. Lopez* (1995)

To accompany *Modern Debate Over the Commerce Clause*

REHNQUIST, C. J., delivered the opinion of the Court, in which O’CONNOR, SCALIA, KENNEDY, and THOMAS joined. KENNEDY filed a concurring opinion, in which O’CONNOR joined. THOMAS filed a concurring opinion. STEVENS and SOUTER filed dissenting opinions. BREYER filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG joined.

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, Section 8. As James Madison wrote: “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.”

The Constitution delegates to Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Art. I, Section 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.” *Id.*, at 196. The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause.

“It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

“Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.” *Id.*, at 194-195.

Jones & Laughlin Steel [and other cases] 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.”

. . . [W]e 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 i.e., those activities that substantially affect interstate commerce.

We now turn to consider the power of Congress, in the light of this framework, to enact [the Gun-Free School Zones Act of 1990]. The first two categories of authority may be quickly disposed of. Thus, if [the Act] is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

The Government’s essential contention, in fine, is that we may determine here that [the Act] 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 [the Act] substantially affects interstate commerce.

. . . Under the theories that the Government presents in support of [the Act], 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.

For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, a fortiori, it also can regulate the educational process directly. Congress could determine that a school’s curriculum has a “significant” effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant “effect on classroom learning” and that, in turn, has a substantial effect on interstate commerce.

. . . [This] 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.

. . . 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.

Questions to consider

1. Justice Rehnquist cites three important first principles on which the decision in this case is based. What are they?
2. Justice Rehnquist says that the Jones case ushered in an era where Congress's power has greatly expanded. According to Rehnquist, what accounts for this expansion of power?
3. What limits are there on Congress's authority, according to Rehnquist?
4. What argument does the United States make to support their case that the Gun-Free School Zones Act substantially affects interstate commerce? Would you characterize this argument as a strict or a loose interpretation of the Commerce Clause power?
5. In challenging the argument of the United States, Justice Rehnquist uses the slippery slope rationale. What does Justice Rehnquist contend? Do you agree or disagree? Explain.