SUPREME COURT OF THE UNITED STATES

No. 93–1260

UNITED STATES, PETITIONER *v.*
ALFONSO LOPEZ, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[April 26, 1995]

JUSTICE THOMAS, concurring.

The Court today properly concludes that the Commerce Clause does not grant Congress the authority to prohibit gun possession within 1,000 feet of a school, as it attempted to do in the Gun-Free School Zones Act of 1990, Pub. L. 101–647, 104 Stat. 4844. Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.

We have said that Congress may regulate not only "Commerce . . . among the several states," U. S. Const., Art. I, §8, cl. 3, but also anything that has a "substantial effect" on such commerce. This test, if taken to its logical extreme, would give Congress a "police power" over all aspects of American life. Unfortunately, we have never come to grips with this implication of our substantial effects formula. Although we have supposedly applied the substantial effects test for the past 60 years, we *always* have rejected readings of the Commerce Clause and the scope of federal power that would

permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power. See *New York* v. *United States*, 505 U. S. ___, ___ (1992) (slip op., at 7) ("[N]o one disputes the proposition that `[t]he Constitution created a Federal Government of limited powers'") (quoting *Gregory* v. *Ashcroft*, 501 U. S. 452, 457 (1991); *Maryland* v. *Wirtz*, 392 U. S. 183, 196 (1968); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 37 (1937). Cf. *Chisholm* v. *Georgia*, 2 Dall. 419, 435 (1793) (Iredell, J.) ("Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them"). Indeed, on this crucial point, the majority and JUSTICE BREYER agree in principle: the Federal Government has nothing approaching a police power. Compare *ante*, at 7–9 with *post*, at 10–11.

While the principal dissent concedes that there are limits to federal power, the sweeping nature of our current test enables the dissent to argue that Congress can regulate gun possession. But it seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce. Any interpretation of the Commerce Clause that even suggests that Congress could regulate such matters is in need of reexamination.

In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.

Today, however, I merely support the Court's conclusion with a discussion of the text, structure, and history of the Commerce Clause and an analysis of our early case law. My goal is simply to show how far we have departed from the original understanding and to demonstrate that the result we reach today is by no means "radical," see *post*, at 1 (STEVENS, J., dissenting). I also want to point out the necessity of refashioning a coherent test that does not tend to "obliterate the distinction between what is national and what is local and create a completely centralized government." *Jones & Laughlin Steel Corp*, *supra*, at 37.

At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes. See 1 S. Johnson, A Dictionary of the English Language 361 (4th ed. 1773) (defining commerce as "Intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick"); N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789) ("trade or traffic"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("Exchange of one thing for another; trade, traffick"). This understanding finds support in the etymology of the word, which literally means "with merchandise." See 3 Oxford English Dictionary 552 (2d ed. 1989) (com—"with"; merci—"merchandise"). In fact, when Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably. See The Federalist No. 4, p. 22 (J. Jay) (asserting that countries will cultivate our friendship when our "trade" is prudently regulated by Federal Government);[1] *id.,* No. 7, at 39–

[1]All references to The Federalist are to the Jacob

40 (A. Hamilton) (discussing "competitions of commerce" between States resulting from state "regulations of trade"); *id.,* No. 40, at 262 (J. Madison) (asserting that it was an "acknowledged object of the Convention . . . that the regulation of trade should be submitted to the general government"); Lee, Letters of a Federal Farmer No. 5, in Pamphlets on the Constitution of the United States 319 (P. Ford ed. 1888); Smith, An Address to the People of the State of New-York, in *id.*, at 107.

As one would expect, the term "commerce" was used in contradistinction to productive activities such as manufacturing and agriculture. Alexander Hamilton, for example, repeatedly treated commerce, agriculture, and manufacturing as three separate endeavors. See, *e.g.*, The Federalist No. 36, at 224 (referring to "agriculture, commerce, manufactures"); *id.,* No. 21, at 133 (distinguishing commerce, arts, and industry); *id.,* No. 12, at 74 (asserting that commerce and agriculture have shared interests). The same distinctions were made in the state ratification conventions. See *e.g.,* 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 57 (J. Elliot ed. 1836) (hereinafter Debates) (T. Dawes at Massachusetts convention); *id.,* at 336 (M. Smith at New York convention).

Moreover, interjecting a modern sense of commerce into the Constitution generates significant textual and structural problems. For example, one cannot replace "commerce" with a different type of enterprise, such as manufacturing. When a manufacturer produces a car, assembly cannot take place "with a foreign nation" or "with the Indian Tribes." Parts may come from different States or other nations and hence may have been in the flow of commerce at one time, but manufacturing takes place at a discrete site. Agriculture and manufactur-

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E. Cooke 1961 edition.

ing involve the production of goods; commerce encompasses traffic in such articles.

The Port Preference Clause also suggests that the term "commerce" denoted sale and/or transport rather than business generally. According to that Clause, "[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." U. S. Const., Art. I, §9, cl. 6. Although it is possible to conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports.

The Constitution not only uses the word "commerce" in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that "substantially affect" interstate commerce. The Commerce Clause[2] does not state that Congress may "regulate matters that substantially affect commerce with foreign Nations, and among the several States, and with the Indian Tribes." In contrast, the Constitution itself temporarily prohibited amendments that would "affect" Congress' lack of authority

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[2]Even to speak of "the Commerce Clause" perhaps obscures the actual scope of that Clause. As an original matter, Congress did not have authority to regulate all commerce; Congress could only "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U. S. Const., Art. I, §8, cl. 3. Although the precise line between interstate/foreign commerce and purely intrastate commerce was hard to draw, the Court attempted to adhere to such a line for the first 150 years of our Nation. See *infra*, at ___.

to prohibit or restrict the slave trade or to enact unproportioned direct taxation. U. S. Const., Art. V. Clearly, the Framers could have drafted a Constitution that contained a "substantially affects interstate commerce" clause had that been their objective.

In addition to its powers under the Commerce Clause, Congress has the authority to enact such laws as are "necessary and proper" to carry into execution its power to regulate commerce among the several States. U. S. Const., Art. I, §8, cl. 18. But on this Court's understanding of congressional power under these two Clauses, many of Congress' other enumerated powers under Art. I, §8 are wholly superfluous. After all, if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to "punish Piracies and Felonies committed on the high Seas," cl. 10. It might not even need the power to raise and support an Army and Navy, cls. 12 and 13, for fewer people would engage in commercial shipping if they thought that a foreign power could expropriate their property with ease. Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify that Congress can regulate international trade and commerce with the Indians. As the Framers surely understood, these other branches of trade substantially affect interstate commerce.

Put simply, much if not all of Art. I, §8 (including portions of the Commerce Clause itself) would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the

rest of §8 superfluous simply cannot be correct. Yet this Court's Commerce Clause jurisprudence has endorsed just such an interpretation: the power we have accorded Congress has swallowed Art. I, §8.[3]

Indeed, if a "substantial effects" test can be appended to the Commerce Clause, why not to every other power of the Federal Government? There is no reason for singling out the Commerce Clause for special treatment. Accordingly, Congress could regulate all matters that "substantially affect" the Army and Navy, bankruptcies, tax collection, expenditures, and so on. In that case, the clauses of §8 all mutually overlap, something we can assume the Founding Fathers never intended.

Our construction of the scope of congressional authority has the additional problem of coming close to turning the Tenth Amendment on its head. Our case law could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution. Taken together, these fundamental textual problems should, at the very least, convince us that the "substantial effects" test should be reexamined.

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[3]There are other powers granted to Congress outside of Art. I, §8 that may become wholly superfluous as well due to our distortion of the Commerce Clause. For instance, Congress has plenary power over the District of Columbia and the territories. See U. S. Const., Art. I, §8, cl. 15 and Art. IV, §3, cl. 2. The grant of comprehensive legislative power over certain areas of the Nation, when read in conjunction with the rest of the Constitution, further confirms that Congress was not ceded plenary authority over the *whole* Nation.

The exchanges during the ratification campaign reveal the relatively limited reach of the Commerce Clause and of federal power generally. The Founding Fathers confirmed that most areas of life (even many matters that would have substantial effects on commerce) would remain outside the reach of the Federal Government. Such affairs would continue to be under the exclusive control of the States.

Early Americans understood that commerce, manufacturing, and agriculture, while distinct activities, were intimately related and dependent on each other—that each "substantially affected" the others. After all, items produced by farmers and manufacturers were the primary articles of commerce at the time. If commerce was more robust as a result of federal superintendence, farmers and manufacturers could benefit. Thus, Oliver Ellsworth of Connecticut attempted to convince farmers of the benefits of regulating commerce. "Your property and riches depend on a ready demand and generous price for the produce you can annually spare," he wrote, and these conditions exist "where trade flourishes and when the merchant can freely export the produce of the country" to nations that will pay the highest price. A Landholder No. 1, Connecticut Courant, Nov. 5, 1787, in 3 Documentary History of the Ratification of the Constitution 399 (M. Jensen ed. 1978) (hereinafter Documentary History). See also The Federalist No. 35, at 219 (A. Hamilton) ("[D]iscerning citizens are well aware that the mechanic and manufacturing arts furnish the materials of mercantile enterprise and industry. Many of them indeed are immediately connected with the operations of commerce. They know that the merchant is their natural patron and friend"); *id.*, at 221 ("Will not the merchant . . . be disposed to cultivate . . . the interests of the mechanic and manufacturing arts to which his commerce is so nearly allied?"); A Jerseyman: To the Citizens of New Jersey, Trenton Mercury,

Nov. 6, 1787, in 3 Documentary History 147 (noting that agriculture will serve as a "source of commerce"); Marcus, The New Jersey Journal, Nov. 14, 1787, *id.,* at 152 (both the mechanic and the farmer benefit from the prosperity of commerce). William Davie, a delegate to the North Carolina Convention, illustrated the close link best: "Commerce, sir, is the nurse of [agriculture and manufacturing]. The merchant furnishes the planter with such articles as he cannot manufacture himself, and finds him a market for his produce. Agriculture cannot flourish if commerce languishes; they are mutually dependent on each other." 4 Debates 20.

Yet, despite being well aware that agriculture, manufacturing, and other matters substantially affected commerce, the founding generation did not cede authority over all these activities to Congress. Hamilton, for instance, acknowledged that the Federal Government could not regulate agriculture and like concerns:

> "The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction." The Federalist No. 17, at 106.

In the unlikely event that the Federal Government would attempt to exercise authority over such matters, its effort "would be as troublesome as it would be nugatory." *Ibid.*[4]

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[4]Cf. 3 Debates 40 (E. Pendleton at the Virginia convention) (the proposed Federal Government "does not intermeddle with the local, particular affairs of the states. Can Congress legislate for the state of Virginia? Can [it] make a law altering the form of transferring property, or the rule of

The comments of Hamilton and others about federal power reflected the well-known truth that the new Government would have only the limited and enumerated powers found in the Constitution. See, *e.g.*, 2 Debates 267–268 (A. Hamilton at New York convention) (noting that there would be just cause for rejecting the Constitution if it would enable the Federal Government to "alter, or abrogate . . . [a state's] civil and criminal institutions [or] penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals"); The Federalist No. 45, at 313 (J. Madison); 3 Debates 259 (J. Madison) (Virginia convention); R. Sherman & O. Ellsworth, Letter to Governor Huntington, Sept. 26, 1787, in 3 Documentary History 352; J. Wilson, Speech in the State House Yard, Oct. 6, 1787, in 2 *id*., at 167–168. Agriculture and manufacture, since they were not surrendered to the Federal Government, were state concerns. See The Federalist No. 34, at 212–213 (A. Hamilton) (observing that the "internal encouragement of agriculture and manufactures" was an object of *state* expenditure). Even before the passage of the Tenth Amendment, it was apparent that Congress would possess only those powers "herein granted" by the rest of the Constitution. U. S.

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descents, in Virginia?"); *id.*, at 553 (J. Marshall at the Virginia convention) (denying that Congress could make "laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state"); The Federalist No. 33, at 206 (A. Hamilton) (denying that Congress could change laws of descent or could pre-empt a land tax); A Native of Virginia: Observations upon the Proposed Plan of Federal Government, Apr. 2, 1788, in 9 Documentary History 692 (States have sole authority over "rules of property").

Const., Art. I, §1.

Where the Constitution was meant to grant federal authority over an activity substantially affecting interstate commerce, the Constitution contains an enumerated power over that particular activity. Indeed, the Framers knew that many of the other enumerated powers in §8 dealt with matters that substantially affected interstate commerce. Madison, for instance, spoke of the bankruptcy power as being "intimately connected with the regulation of commerce." The Federalist No. 42, at 287. Likewise, Hamilton urged that "[i]f we mean to be a commercial people or even to be secure on our Atlantic side, we must endeavour as soon as possible to have a navy." *Id.,* No. 24, at 157 (A. Hamilton).

In short, the Founding Fathers were well aware of what the principal dissent calls "`economic . . . realities.'" See *post,* at 11–12 (BREYER, J.) (citing *North American Co.* v. *SEC,* 327 U. S. 686, 705 (1946)). Even though the boundary between commerce and other matters may ignore "economic reality" and thus seem arbitrary or artificial to some, we must nevertheless respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce.

If the principal dissent's understanding of our early case law were correct, there might be some reason to doubt this view of the original understanding of the Constitution. According to that dissent, Chief Justice Marshall's opinion in *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824) established that Congress may control all local activities that "significantly affect interstate commerce," *post*, at 1. And, "with the exception of one wrong turn subsequently corrected," this has been the "traditiona[l]" method of interpreting the Commerce Clause. *Post*, at 18 (citing *Gibbons* and *United States* v. *Darby,* 312 U. S. 100, 116–117

(1941)).

In my view, the dissent is wrong about the holding and reasoning of *Gibbons*. Because this error leads the dissent to characterize the first 150 years of this Court's case law as a "wrong turn," I feel compelled to put the last 50 years in proper perspective.

In *Gibbons*, the Court examined whether a federal law that licensed ships to engage in the "coasting trade" pre-empted a New York law granting a 30-year monopoly to Robert Livingston and Robert Fulton to navigate the State's waterways by steamship. In concluding that it did, the Court noted that Congress could regulate "navigation" because "[a]ll America . . . has uniformly understood, the word `commerce,' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed." 9 Wheat., at 190. The Court also observed that federal power over commerce "among the several States" meant that Congress could regulate commerce conducted partly within a State. Because a portion of interstate commerce and foreign commerce would almost always take place within one or more States, federal power over interstate and foreign commerce necessarily would extend into the States. *Id.*, at 194–196.

At the same time, the Court took great pains to make clear that Congress could *not* regulate 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." *Id.*, at 194. Moreover, while suggesting that the Constitution might not permit States to regulate interstate or foreign commerce, the Court observed that "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal

commerce of a State" were but a small part "of that immense mass of legislation . . . not surrendered to a general government." *Id.*, at 203. From an early moment, the Court rejected the notion that Congress can regulate everything that affects interstate commerce. That the internal commerce of the States and the numerous state inspection, quarantine, and health laws had substantial effects on interstate commerce cannot be doubted. Nevertheless, they were not "surrendered to the general government."

Of course, the principal dissent is not the first to misconstrue *Gibbons*. For instance, the Court has stated that *Gibbons* "described the federal commerce power with a breadth never yet exceeded." *Wickard* v. *Filburn,* 317 U. S. 111, 120 (1942). See also *Perez* v. *United States,* 402 U. S. 146, 151 (1971) (claiming that with *Darby* and *Wickard*, "the broader view of the Commerce Clause announced by Chief Justice Marshall had been restored"). I believe that this misreading stems from two statements in *Gibbons*.

First, the Court made the uncontroversial claim that federal power does not encompass "*commerce*" that "does not extend to or affect other States." 9 Wheat., at 194 (emphasis added). From this statement, the principal dissent infers that whenever an activity affects interstate commerce, it necessarily follows that Congress can regulate such activities. Of course, Chief Justice Marshall said no such thing and the inference the dissent makes cannot be drawn.

There is a much better interpretation of the "affect[s]" language: because the Court had earlier noted that the commerce power did not extend to wholly intrastate commerce, the Court was acknowledging that although the line between intrastate and interstate/foreign commerce would be difficult to draw, federal authority could not be construed to cover purely intrastate commerce. Commerce that did not affect another State could *never* be said to be commerce "among the several

States."

But even if one were to adopt the dissent's reading, the "affect[s]" language, at most, permits Congress to regulate only intrastate *commerce* that substantially affects interstate and foreign commerce. There is no reason to believe that Chief Justice Marshall was asserting that Congress could regulate *all* activities that affect interstate commerce. See *Ibid*.

The second source of confusion stems from the Court's praise for the Constitution's division of power between the States and the Federal Government:

> "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." *Id.,* at 195.

In this passage, the Court merely was making the well understood point that the Constitution commits matters of "national" concern to Congress and leaves "local" matters to the States. The Court was *not* saying that whatever Congress believes is a national matter becomes an object of federal control. The matters of national concern are enumerated in the Constitution: war, taxes, patents, and copyrights, uniform rules of naturalization and bankruptcy, types of commerce, and so on. See generally U. S. Const., Art. I, §8. *Gibbons*' emphatic statements that Congress could not regulate many matters that affect commerce confirm that the Court did not read the Commerce Clause as granting Congress control over matters that "affect the States generally."[5] *Gibbons*

[5]None of the other Commerce Clause opinions during Chief Justice Marshall's tenure, which

simply cannot be construed as the principal dissent would have it.

I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century.

Even before *Gibbons*, Chief Justice Marshall, writing for the Court in *Cohens* v. *Virginia,* 6 Wheat. 264 (1821), noted that Congress had "no general right to punish murder committed within any of the States," *id*., at 426, and that it was "clear that congress cannot punish felonies generally," *id*., at 428. The Court's only qualification was that Congress could enact such laws for places where it enjoyed plenary powers—for instance, over the District of Columbia. *Id.*, at 426. Thus, whatever effect ordinary murders, or robbery, or gun possession might have on interstate commerce (or on any other subject of federal concern) was irrelevant to the question of congressional power.[6]

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concerned the "dormant" Commerce Clause, even suggested that Congress had authority over all matters substantially affecting commerce. See *Brown* v. *Maryland*, 12 Wheat. 419 (1827); *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245 (1829).

[6]It is worth noting that Congress, in the first federal criminal Act, did not establish nationwide prohibitions against murder and the like. See Act of April 30, 1790, ch. 9, 1 Stat. 112. To be sure, Congress outlawed murder, manslaughter, maiming, and larceny, but only when those acts were either committed on United States territory not

United States v. *Dewitt*, 9 Wall. 41 (1870), marked the first time the Court struck down a federal law as exceeding the power conveyed by the Commerce Clause. In a two-page opinion, the Court invalidated a nationwide law prohibiting all sales of naphtha and illuminating oils. In so doing, the Court remarked that the Commerce Clause "has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States." *Id.*, at 44. The law in question was "plainly a regulation of police," which could have constitutional application only where Congress had exclusive authority, such as the territories. *Id.*, at 44–45. See also *License Tax Cases*, 5 Wall. 462, 470–471 (1867) (Congress cannot interfere

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part of a State or on the high seas. *Ibid*. See U. S. Const., Art. I, §8, cl. 10 (authorizing Congress to outlaw piracy and felonies on high seas); Art. IV, §3, cl. 2 (plenary authority over United States territory and property). When Congress did enact nationwide criminal laws, it acted pursuant to direct grants of authority found in the Constitution. Compare Act of April 30, 1790, *supra*, §§1 and 14 (prohibitions against treason and the counterfeiting of U. S. securities) with U. S. Const., Art. I, §8, cl. 6 (counterfeiting); Art. III, §3, cl. 2 (treason). Notwithstanding any substantial effects that murder, kidnaping, or gun possession might have had on interstate commerce, Congress understood that it could not establish nationwide prohibitions.

Likewise, there were no laws in the early Congresses that regulated manufacturing and agriculture. Nor was there *any* statute which purported to regulate activities with "substantial effects" on interstate commerce.

with the internal commerce and business of a State); *Trade-Mark Cases*, 100 U. S. 82 (1879) (Congress cannot regulate internal commerce and thus may not establish national trademark registration).

In *United States* v. *E. C. Knight Co.*, 156 U. S. 1 (1895), this Court held that mere attempts to monopolize the manufacture of sugar could not be regulated pursuant to the Commerce Clause. Raising echoes of the discussions of the Framers regarding the intimate relationship between commerce and manufacturing, the Court declared that "[c]ommerce succeeds to manufacture, and is not a part of it." *Id.*, at 12. The Court also approvingly quoted from *Kidd* v. *Pearson*, 128 U. S. 1, 20 (1888):

> "`No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce . . . . If it be held that the term [commerce] 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 . . . with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry.'" *E. C. Knight*, 156 U. S., at 14.

If federal power extended to these types of production "comparatively little of business operations and affairs would be left for state control." *Id.*, at 16. See also *Newberry* v. *United States*, 256 U. S. 232, 257 (1921) ("It is settled . . . that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacturing, mining, etc., commerce could not exist, but this fact does not suffice to subject

them to the control of Congress"). Whether or not manufacturing, agriculture, or other matters substantially affected interstate commerce was irrelevant.

As recently as 1936, the Court continued to insist that the Commerce Clause did not reach the wholly internal business of the States. See *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 308 (1936) (Congress may not regulate mine labor because "[t]he relation of employer and employee is a local relation"); see also *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 543–550 (1935) (holding that Congress may not regulate intrastate sales of sick chickens or the labor of employees involved in intrastate poultry sales). The Federal Government simply could not reach such subjects regardless of their effects on interstate commerce.

These cases all establish a simple point: from the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the Commerce Clause.[7] Moreover, there

[7]To be sure, congressional power pursuant to the Commerce Clause was alternatively described less narrowly or more narrowly during this 150-year period. Compare *United States* v. *Coombs*, 12 Pet. 72, 78 (1838) (commerce power "extends to such acts, done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate [interstate and international] commerce" such as stealing goods from a beached ship) with *United States* v. *E. C. Knight Co.,* 156 U. S. 1, 13 (1895) ("Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities . . . may be regulated, but this is because they form part of interstate trade or

was no question that activities wholly separated from business, such as gun possession, were beyond the reach of the commerce power. If anything, the "wrong turn" was the Court's dramatic departure in the 1930's from a century and a half of precedent.

Apart from its recent vintage and its corresponding lack of any grounding in the original understanding of the Constitution, the substantial effects test suffers from the further flaw that it appears to grant Congress a police power over the Nation. When asked at oral argument if there were *any* limits to the Commerce Clause, the Government was at a loss for words. Tr. of Oral Arg. 5. Likewise, the principal dissent insists that there are limits, but it cannot muster even one example. *Post*, at 10–11. Indeed, the dissent implicitly concedes that its reading has no limits when it criticizes the Court for "threaten[ing] legal uncertainty in an area of law that . . . seemed reasonably well settled." *Post*, at 17–18. The one advantage of the dissent's standard is certainty: it is certain that under its analysis everything may be regulated under the guise of the Commerce Clause.

The substantial effects test suffers from this flaw, in part, because of its "aggregation principle." Under so-called "class of activities" statutes, Congress can regulate whole categories of activities that are not themselves either "interstate" or "commerce." In applying the effects test, we ask whether the class of activities *as a whole* substantially affects interstate commerce, not whether any specific activity within the class has such effects when considered in isolation. See *Maryland* v. *Wirtz,* 392 U. S., at 192–193 (if class of activities is "`within the reach of

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commerce"). During this period, however, this Court never held that Congress could regulate everything that substantially affects commerce.

federal power,'" courts may not excise individual applications as trivial) (quoting *Darby*, 312 U. S., at 120–121).

The aggregation principle is clever, but has no stopping point. Suppose all would agree that gun possession within 1,000 feet of a school does not substantially affect commerce, but that possession of weapons generally (knives, brass knuckles, nunchakus, etc.) does. Under our substantial effects doctrine, even though Congress cannot single out gun possession, it can prohibit weapon possession generally. But one *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce. Under our jurisprudence, if Congress passed an omnibus "substantially affects interstate commerce" statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional. Even though particular sections may govern only trivial activities, the statute in the aggregate regulates matters that substantially affect commerce.

This extended discussion of the original understanding and our first century and a half of case law does not necessarily require a wholesale abandonment of our more recent opinions.[8] It simply reveals that our substantial effects test is far removed from both the Constitution and from our

[8]Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.

early case law and that the Court's opinion should not be viewed as "radical" or another "wrong turn" that must be corrected in the future.[9] The analysis also suggests that we ought to temper our Commerce Clause jurisprudence.

Unless the dissenting Justices are willing to repudiate our long-held understanding of the limited nature of federal power, I would think that they too

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[9]Nor can the majority's opinion fairly be compared to *Lochner* v. *New York*, 198 U. S. 45 (1905). See *post*, at 1–7 (SOUTER, J., dissenting). Unlike *Lochner* and our more recent "substantive due process" cases, today's decision enforces only the Constitution and not "judicial policy judgments." See *post*, at 5. Notwithstanding JUSTICE SOUTER's discussion, "`commercial' character'" is not only a natural but an inevitable "ground of *Commerce* Clause distinction." See *post*, at 6 (emphasis added). Our invalidation of the Gun-Free School Zones Act therefore falls comfortably within our proper role in reviewing federal legislation to determine if it exceeds congressional authority as defined by the Constitution itself. As John Marshall put it: "If [Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard . . . . They would declare it void." 3 Debates 553 (before the Virginia ratifying convention); see also The Federalist No. 44, at 305 (James Madison) (asserting that if Congress exercises powers "not warranted by [the Constitution's] true meaning" the judiciary will defend the Constitution); *id.,* No. 78, at 526 (A. Hamilton)

must be willing to reconsider the substantial effects test in a future case. If we wish to be true to a Constitution that does not cede a police power to the Federal Government, our Commerce Clause's boundaries simply cannot be "defined" as being "`commensurate with the national needs'" or self-consciously intended to let the Federal Government "`defend itself against economic forces that Congress decrees inimical or destructive of the national economy.'" *See post*, at 12–13)BREYER, J., dissenting) (quoting *North American Co.* v. *SEC,* 327 U. S. 686, 705 (1946)). Such a formulation of federal power is no test at all: it is a blank check.

At an appropriate juncture, I think we must modify our Commerce Clause jurisprudence. Today, it is easy enough to say that the Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school.

(asserting that the "courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments"). Where, as here, there is a case or controversy, there can be no "misstep", *post*, at 13, in enforcing the Constitution.