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 SOUTER, dissenting.

In reviewing congressional legislation under the Commerce Clause, we defer to what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce "if there is any rational basis for such a finding." *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 276 (1981); *Preseault* v. *ICC*, 494 U. S. 1, 17 (1990); see *Maryland* v. *Wirtz*, 392 U. S. 183, 190 (1968), quoting *Katzenbach* v. *McClung*, 379 U. S. 294, 303–304 (1964). If that congressional determination is within the realm of reason, "the only remaining question for judicial inquiry is whether `the means chosen by Congress [are] reasonably adapted to the end permitted by the Constitution.'" *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*, at 276, quoting *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 262 (1964); see also *Preseault* v. *ICC*, *supra*, at 17.[1]

The practice of deferring to rationally based legislative judgments "is a paradigm of judicial restraint." *FCC* v.

[1]In this case, no question has been raised about means and ends; the only issue is about the effect of school zone guns on commerce.

Beach Communications, Inc., 508 U. S. ___, ___ (1993) (slip op., at 6). In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices. See *id.*, at ___ (slip op., at 5–8); *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*, at 276; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 147, 151–154 (1938); cf. *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 488 (1955).

It was not ever thus, however, as even a brief overview of Commerce Clause history during the past century reminds us. The modern respect for the competence and primacy of Congress in matters affecting commerce developed only after one of this Court's most chastening experiences, when it perforce repudiated an earlier and untenably expansive conception of judicial review in derogation of congressional commerce power. A look at history's sequence will serve to show how today's decision tugs the Court off course, leading it to suggest opportunities for further developments that would be at odds with the rule of restraint to which the Court still wisely states adherence.

Notwithstanding the Court's recognition of a broad commerce power in *Gibbons* v. *Ogden*, 9 Wheat. 1, 196–197 (1824) (Marshall, C. J.), Congress saw few occasions to exercise that power prior to Reconstruction, see generally 2 C. Warren, The Supreme Court in United States History 729–739 (rev. ed. 1935), and it was really the passage of the Interstate Commerce Act of 1887 that opened a new age of congressional reliance on the Commerce Clause for authority to exercise general police powers

at the national level, see *id.*, at 729–730. Although the Court upheld a fair amount of the ensuing legislation as being within the commerce power, see, *e.g.*, *Stafford* v. *Wallace*, 258 U. S. 495 (1922) (upholding an Act regulating trade practices in the meat packing industry); *The Shreveport Rate Cases*, 234 U. S. 342 (1914) (upholding ICC order to equalize inter- and intrastate rail rates); see generally Warren, *supra*, at 729–739, the period from the turn of the century to 1937 is better noted for a series of cases applying highly formalistic notions of "commerce" to invalidate federal social and economic legislation, see, *e.g.*, *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 303–304 (1936) (striking Act prohibiting unfair labor practices in coal industry as regulation of "mining" and "production," not "commerce"); *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 545–548 (1935) (striking congressional regulation of activities affecting interstate commerce only "indirectly"); *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918) (striking Act prohibiting shipment in interstate commerce of goods manufactured at factories using child labor because the Act regulated "manufacturing," not "commerce"); *Adair* v. *United States*, 208 U. S. 161 (1908) (striking protection of labor union membership as outside "commerce").

These restrictive views of commerce subject to congressional power complemented the Court's activism in limiting the enforceable scope of state economic regulation. It is most familiar history that during this same period the Court routinely invalidated state social and economic legislation under an expansive conception of Fourteenth Amendment substantive due process. See, *e.g.*, *Louis K. Liggett Co.* v. *Baldridge*, 278 U. S. 105 (1928) (striking state law requiring pharmacy owners to be licensed as pharmacists); *Coppage* v. *Kansas*, 236 U. S. 1 (1915) (striking state law prohibiting employers from requiring their employees to agree

not to join labor organizations); *Lochner* v. *New York*, 198 U. S. 45 (1905) (striking state law establishing maximum working hours for bakers). See generally L. Tribe, American Constitutional Law 568–574 (2d ed. 1988). The fulcrums of judicial review in these cases were the notions of liberty and property characteristic of laissez-faire economics, whereas the Commerce Clause cases turned on what was ostensibly a structural limit of federal power, but under each conception of judicial review the Court's character for the first third of the century showed itself in exacting judicial scrutiny of a legislature's choice of economic ends and of the legislative means selected to reach them.

It was not merely coincidental, then, that sea changes in the Court's conceptions of its authority under the Due Process and Commerce Clauses occurred virtually together, in 1937, with *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 and *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1. See Stern, The Commerce Clause and the National Economy, 1933–1946, 59 Harv. L. Rev. 645, 674–682 (1946). In *West Coast Hotel*, the Court's rejection of a due process challenge to a state law fixing minimum wages for women and children marked the abandonment of its expansive protection of contractual freedom. Two weeks later, *Jones & Laughlin* affirmed congressional commerce power to authorize NLRB injunctions against unfair labor practices. The Court's finding that the regulated activity had a direct enough effect on commerce has since been seen as beginning the abandonment, for practical purposes, of the formalistic distinction between direct and indirect effects.

In the years following these decisions, deference to legislative policy judgments on commercial regulation became the powerful theme under both the Due Process and Commerce Clauses, see *United States* v. *Carolene Products Co.*, 304 U. S., at 147–148, 152;

United States v. *Darby*, 312 U. S. 100, 119–121 (1941); *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 118–119 (1942), and in due course that deference became articulate in the standard of rationality review. In due process litigation, the Court's statement of a rational basis test came quickly. See *United States* v. *Carolene Products Co.*, *supra*, at 152; see also *Williamson* v. *Lee Optical Co.*, 348 U. S., at 489–490. The parallel formulation of the Commerce Clause test came later, only because complete elimination of the direct/indirect effects dichotomy and acceptance of the cumulative effects doctrine, *Wickard* v. *Filburn*, 317 U. S. 111, 125, 127–129 (1942); *United States* v. *Wrightwood Dairy Co.*, *supra*, at 124–126, so far settled the pressing issues of congressional power over commerce as to leave the Court for years without any need to phrase a test explicitly deferring to rational legislative judgments. The moment came, however, with the challenge to congressional Commerce Clause authority to prohibit racial discrimination in places of public accommodation, when the Court simply made explicit what the earlier cases had implied: "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Katzenbach* v. *McClung*, 379 U. S. 294, 303–304 (1964), discussing *United States* v. *Darby*, *supra;* see *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 258–259 (1964). Thus, under commerce, as under due process, adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments, and for the past half-century the Court has no more turned back in the direction of formalistic Commerce Clause review (as in deciding whether regulation of commerce was sufficiently direct) than it has inclined

toward reasserting the substantive authority of *Lochner* due process (as in the inflated protection of contractual autonomy). See, *e.g.*, *Maryland* v. *Wirtz*, 392 U. S., at 190, 198; *Perez* v. *United States*, 402 U. S. 146, 151–157 (1971); *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S., at 276, 277.

There is today, however, a backward glance at both the old pitfalls, as the Court treats deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged regulation. See *ante*, at 10–13. The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly. And the act of calibrating the level of deference by drawing a line between what is patently commercial and what is less purely so will probably resemble the process of deciding how much interference with contractual freedom was fatal. Thus, it seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago. The answer is not reassuring. To be sure, the occasion for today's decision reflects the century's end, not its beginning. But if it seems anomalous that the Congress of the United States has taken to regulating school yards, the act in question is still probably no more remarkable than state regulation of bake shops 90 years ago. In any event, there is no reason to hope that the Court's qualification of rational basis review will be any more successful than the efforts at substantive economic review made by our predecessors as the century began. Taking the Court's opinion on its own terms, JUSTICE BREYER has explained both the hopeless

porosity of "commercial" character as a ground of Commerce Clause distinction in America's highly connected economy, and the inconsistency of this categorization with our rational basis precedents from the last 50 years.

Further glosses on rationality review, moreover, may be in the offing. Although this case turns on commercial character, the Court gestures toward two other considerations that it might sometime entertain in applying rational basis scrutiny (apart from a statutory obligation to supply independent proof of a jurisdictional element): does the congressional statute deal with subjects of traditional state regulation, and does the statute contain explicit factual findings supporting the otherwise implicit determination that the regulated activity substantially affects interstate commerce? Once again, any appeal these considerations may have depends on ignoring the painful lesson learned in 1937, for neither of the Court's suggestions would square with rational basis scrutiny.

The Court observes that the Gun-Free School Zones Act operates in two areas traditionally subject to legislation by the States, education and enforcement of criminal law. The suggestion is either that a connection between commerce and these subjects is remote, or that the commerce power is simply weaker when it touches subjects on which the States have historically been the primary legislators. Neither suggestion is tenable. As for remoteness, it may or may not be wise for the National Government to deal with education, but JUSTICE BREYER has surely demonstrated that the commercial prospects of an illiterate State or Nation are not rosy, and no argument should be needed to show that hijacking interstate shipments of cigarettes can affect commerce substantially, even though the States have

traditionally prosecuted robbery. And as for the notion that the commerce power diminishes the closer it gets to customary state concerns, that idea has been flatly rejected, and not long ago. The commerce power, we have often observed, is plenary. *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 312 U. S., at 276; *United States* v. *Darby*, *supra*, at 114; see *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 549–550 (1985); *Gibbons* v. *Ogden*, 9 Wheat., at 196–197. Justice Harlan put it this way in speaking for the Court in *Maryland* v. *Wirtz:*

> "There is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other. . . . [I]t is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests . . . . As long ago as [1925], the Court put to rest the contention that state concerns might constitutionally `outweigh' the importance of an otherwise valid federal statute regulating commerce." 392 U. S., at 195–196 (citations and internal quotation marks omitted).

See also *United States* v. *Darby*, *supra*, at 114; *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991); *United States* v. *Carolene Products Co.*, 304 U. S., at 147.

Nor is there any contrary authority in the reasoning of our cases imposing clear statement rules in some instances of legislation that would significantly alter the state-national balance. In the absence of a clear statement of congressional design, for example, we have refused to interpret ambiguous federal statutes to limit fundamental state legislative prerogatives, *Gregory* v. *Ashcroft*, *supra*, at 460–464, our understanding being that such prerogatives, through

which "a State defines itself as a sovereign," are "powers with which Congress does not readily interfere," 501 U. S., at 460, 461. Likewise, when faced with two plausible interpretations of a federal criminal statute, we generally will take the alternative that does not force us to impute an intention to Congress to use its full commerce power to regulate conduct traditionally and ably regulated by the States. See *United States* v. *Enmons*, 410 U. S. 396, 411–412 (1973); *United States* v. *Bass*, 404 U. S. 336, 349–350 (1971); *Rewis* v. *United States*, 401 U. S. 808, 812 (1971).

These clear statement rules, however, are merely rules of statutory interpretation, to be relied upon only when the terms of a statute allow, *United States* v. *Culbert*, 435 U. S. 371, 379–380 (1978); see *Gregory* v. *Ashcroft*, *supra*, at 470; *United States* v. *Bass*, *supra*, at 346–347, and in cases implicating Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States, *Gregory* v. *Ashcroft, supra*, at 461; *United States* v. *Bass*, *supra*, at 349; see *Rewis* v. *United States*, *supra*, at 811–812. They are rules for determining intent when legislation leaves intent subject to question. But our hesitance to presume that Congress has acted to alter the state-federal status quo (when presented with a plausible alternative) has no relevance whatever to the enquiry whether it has the commerce power to do so or to the standard of judicial review when Congress has definitely meant to exercise that power. Indeed, to allow our hesitance to affect the standard of review would inevitably degenerate into the sort of substantive policy review that the Court found indefensible 60 years ago. The Court does not assert (and could not plausibly maintain) that the commerce power is wholly devoid of congressional authority to speak on any subject of traditional state concern; but if congressional action is not forbidden absolutely

when it touches such a subject, it will stand or fall depending on the Court's view of the strength of the legislation's commercial justification. And here once again history raises its objections that the Court's previous essays in overriding congressional policy choices under the Commerce Clause were ultimately seen to suffer two fatal weaknesses: when dealing with Acts of Congress (as distinct from state legislation subject to review under the theory of dormant commerce power) nothing in the Clause compelled the judicial activism, and nothing about the judiciary as an institution made it a superior source of policy on the subject Congress dealt with. There is no reason to expect the lesson would be different another time.

There remain questions about legislative findings. The Court of Appeals expressed the view, 2 F. 3d 1342, 1363–1368 (1993), that the result in this case might well have been different if Congress had made explicit findings that guns in schools have a substantial effect on interstate commerce, and the Court today does not repudiate that position, see *ante*, at 13–14. Might a court aided by such findings have subjected this legislation to less exacting scrutiny (or, put another way, should a court have deferred to such findings if Congress had made them)?[2] The answer to either question must be no,

[2]Unlike the Court, (perhaps), I would see no reason not to consider Congress's findings, insofar as they might be helpful in reviewing the challenge to this statute, even though adopted in later legislation. See the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322, §320904, 108 Stat. 2125 ("[T]he occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country; . . . this decline . . . has an adverse

although as a general matter findings are important and to be hoped for in the difficult cases.

It is only natural to look for help with a hard job, and reviewing a claim that Congress has exceeded the commerce power is much harder in some cases than in others. A challenge to congressional regulation of interstate garbage hauling would be easy to resolve; review of congressional regulation of gun possession in school yards is more difficult, both because the link to interstate commerce is less obvious and because of our initial ignorance of the relevant facts. In a case comparable to this one, we may have to dig hard to make a responsible judgment about what Congress could reasonably find, because the case may be close, and because judges tend not to be familiar with the facts that may or may not make it close. But while the ease of review may vary from case to case, it does not follow that the standard of review should vary, much less that explicit findings of fact would even directly address the standard.

The question for the courts, as all agree, is not whether as a predicate to legislation Congress in fact found that a particular activity substantially affects interstate commerce. The legislation implies such a

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impact on interstate commerce and the foreign commerce of the United States; . . . Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection"). The findings, however, go no further than expressing what is obviously implicit in the substantive legislation, at such a conclusory level of generality as to add virtually nothing to the record. The Solicitor General certainly exercised sound judgment in placing no significant reliance on these particular afterthoughts. Tr. of Oral Arg. 24–25.

finding, and there is no reason to entertain claims that Congress acted ultra vires intentionally. Nor is the question whether Congress was correct in so finding. The only question is whether the legislative judgment is within the realm of reason. See *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S., at 276–277; *Katzenbach* v. *McClung*, 379 U. S., at 303–304; *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U. S. 330, 391–392 (1935) (Hughes, C. J., dissenting); cf. *FCC* v. *Beach Communications*, 508 U. S., at ___ (slip op., at 7) (in the equal protection context, "those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it; . . . it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature") (citations and internal quotation marks omitted); *Ferguson* v. *Skrupa*, 372 U. S. 726, 731–733 (1963); *Williamson* v. *Lee Optical Co.*, 348 U. S., at 487. Congressional findings do not, however, directly address the question of reasonableness; they tell us what Congress actually has found, not what it could rationally find. If, indeed, the Court were to make the existence of explicit congressional findings dispositive in some close or difficult cases something other than rationality review would be afoot. The resulting congressional obligation to justify its policy choices on the merits would imply either a judicial authority to review the justification (and, hence, the wisdom) of those choices, or authority to require Congress to act with some high degree of deliberateness, of which express findings would be evidence. But review for congressional wisdom would just be the old judicial pretension discredited and abandoned in 1937, and review for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court. Such a legislative process requirement would function merely as an

excuse for covert review of the merits of legislation under standards never expressed and more or less arbitrarily applied. Under such a regime, in any case, the rationality standard of review would be a thing of the past.

On the other hand, to say that courts applying the rationality standard may not defer to findings is not, of course, to say that findings are pointless. They may, in fact, have great value in telling courts what to look for, in establishing at least one frame of reference for review, and in citing to factual authority. The research underlying JUSTICE BREYER'S dissent was necessarily a major undertaking; help is welcome, and it not incidentally shrinks the risk that judicial research will miss material scattered across the public domain or buried under pounds of legislative record. Congressional findings on a more particular plane than this record illustrates would accordingly have earned judicial thanks. But thanks do not carry the day as long as rational possibility is the touchstone, and I would not allow for the possibility, as the Court's opinion may, *ante*, at 14, that the addition of congressional findings could in principle have affected the fate of the statute here.

Because JUSTICE BREYER'S opinion demonstrates beyond any doubt that the Act in question passes the rationality review that the Court continues to espouse, today's decision may be seen as only a misstep, its reasoning and its suggestions not quite in gear with the prevailing standard, but hardly an epochal case. I would not argue otherwise, but I would raise a caveat. Not every epochal case has come in epochal trappings. *Jones & Laughlin* did not reject the direct-indirect standard in so many words; it just said the relation of the regulated subject matter to commerce was direct enough. 301 U. S., at 41–43. But we know what happened.

I respectfully dissent.