

Sec. 8—Powers of Congress

Cl. 3—Power to Regulate Commerce

required nexus in this case was sufficient because competitive significance is to be measured by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which the surgeon was being excluded.⁷⁷⁵

Limitations on the Commerce Clause

The Court has several times expressly noted that Congress' exercise of power under the Commerce Clause is akin to the police power exercised by the states.⁷⁷⁶ It should follow, therefore, that Congress may achieve results unrelated to purely commercial aspects of commerce, and this result in fact has often been accomplished. Paralleling and contributing to this movement is the virtual disappearance of the distinction between interstate and intrastate commerce. Yet there remain cases where legislation lacking a sufficient nexus to commerce has been struck down as beyond Congress' power.

Requirement that Regulation be Economic.—In *United States v. Lopez*⁷⁷⁷ the Court, for the first time in almost sixty years,⁷⁷⁸ invalidated a federal law as exceeding Congress' authority under the Commerce Clause. The statute made it a federal offense to possess a firearm within 1,000 feet of a school.⁷⁷⁹ The Court reviewed the doctrinal development of the Commerce Clause, especially the effects and aggregation tests, and reaffirmed that it is the Court's responsibility to decide whether a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce when a law is challenged.⁷⁸⁰ As noted previously, the Court evaluation started with a consideration of whether the legislation fell within the three broad categories of activity that Congress may regulate or protect under its commerce power: (1) use of the chan-

⁷⁷⁵ 500 U.S. at 330–32. The decision was 5-to-4, with the dissenters of the view that, although Congress could reach the activity, it had not done so.

⁷⁷⁶ *E.g.*, *Brooks v. United States*, 267 U.S. 432, 436–437 (1925); *United States v. Darby*, 312 U.S. 100, 114 (1941). See Cushman, *The National Police Power Under the Commerce Clause*, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 62 (1938).

⁷⁷⁷ 514 U.S. 549 (1995). The Court was divided 5-to-4, with Chief Justice Rehnquist writing the opinion of the Court, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, with dissents by Justices Stevens, Souter, Breyer, and Ginsburg.

⁷⁷⁸ *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down regulation of mining industry as outside of Commerce Clause).

⁷⁷⁹ 18 U.S.C. § 922(q)(1)(A). Congress subsequently amended the section to make the offense jurisdictionally to turn on possession of "a firearm that has moved in or that otherwise affects interstate or foreign commerce." Pub. L. 104–208, 110 Stat. 3009–370.

⁷⁸⁰ 514 U.S. at 556–57, 559.