THE COMMERCE CLAUSE REVISITED—THE FEDERALIZATION OF INTRASTATE CRIME

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The Supreme Court decisions of the early 1940's[1] established that Congress has plenary power under the commerce clause to regulate substantially[2] all aspects of the interrelated American economy. The commerce clause as interpreted over the years has enabled business to develop and to organize itself with little regard for state lines. Even those business transactions which occur within a single state seldom lack some interstate connection or effect. Or they may be part of a larger body of transactions which in total has such an effect.

United States v. Darby[3] and *Wickard v. Filburn*[4] and the other cases of that period made it clear that the regulatory power of Congress applied to these transactions. They reemphasized the concept of the commerce clause originally articulated by Chief Justice Marshall in *Gibbons v. Ogden* as extending to "that commerce which concerns more states than one."[5] The story of how the Supreme Court finally

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1. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); United States v. Darby, 312 U.S. 100 (1941). *See also* United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460 (1949); United States v. Sullivan, 332 U.S. 689 (1948). In each of these cases the author participated in preparing briefs or oral argument on behalf of the United States.

2. The qualification, "substantially," is a concession, out of abundance of caution, to my inability to envisage all possible situations. No such reservation appears in the recent statement of Mr. Justice Douglas that "[u]nder the modern decisions . . . the power of Congress was recognized as broad enough to reach all phases of the vast operations of our national industrial system." Flood v. Kuhn, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting). Nothing in the majority opinion in *Flood* suggests any disagreement with this statement.

3. 312 U.S. 100 (1941).

4. 317 U.S. 111 (1942).

5. 22 U.S. (9 Wheat.) 1,194 (1824); *see* Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335 (1934), 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW (A.A.L.S. ed. 1938).

arrived at this conclusion has been told at length elsewhere, by me and others.[6]

In recent years the few significant challenges to the exercise of the commerce power have arisen when it was used for noneconomic purposes. The public accommodation provision of the Civil Rights Act of 1964[7] presented one simple and one difficult commerce problem. Insofar as it prohibited racial discrimination by hotels, restaurants or other establishments which receive transients or interstate travelers,[8] it obviously was directed at a practice which substantially handicapped many persons in interstate commerce and inhibited their interstate movement.[9] The prohibition also extended to restaurants which (whether or not they served travelers) sold food which had moved in interstate commerce.[10] The theory of the latter provision was that the failure to serve Negroes would reduce the amount of food moving in commerce—or perhaps that a restaurant which obtained goods from outside the state was thereby subject to federal regulation of all of its practices. The relationship of interstate food purchases to racial discrimination among customers seems pretty tenuous. The need for preventing discrimination by all restaurants because of the inevitable uncertainty as to which interstate travelers might choose to patronize, and the fact that the discrimination in itself would discourage interstate travel, would seem to provide a more easily defensible commerce argument.

The Supreme Court, in *Heart of Atlanta Motel, Inc. v. United States* and *Katzenbach v. McClung*, adopted all of these theories,[11] both those related to interstate travel and to interstate food purchases, apparently without great difficulty. Acceptance of the latter theory suggests that the slightest interstate connection can provide an adequate basis even for a federal statute which serves a noneconomic national purpose. These cases also reaffirmed the power of Congress to regulate acts which in isolation have no significant effect on interstate commerce but which were part of a class which as a whole could be

6. *See* Stern, *The Scope of the Phrase Interstate Commerce*, 41 A.B.A.J. 823 (1955), SELECTED ESSAYS ON CONSTITUTIONAL LAW 298 (A.A.L.S. ed. 1963); Stern, *The Problems of Yesteryear—Commerce and Due Process*, 4 VAND. L. REV. 446 (1951); Stern, *The Commerce Clause and the National Economy* 1933-46 (pts. I & II), 59 HARV L. REV. 645, 883 (1946), SELECTED ESSAYS ON CONSTITUTIONAL LAW 218 (A.A.L.S. ed. 1963); Stern, *supra* note 5. The subject is covered at greater length and updated in P. BENSON, JR., THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970 (1970).

7. 42 U.S.C. §§ 2000a *et seq.* (1970).

8. *Id.* §§ 2000a(b)(1), (c).

9. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 254-58 (1964).

10. Katzenbach v. McClung, 379 U.S. 294 (1964); 42 U.S.C. §§ 2000a(b)(2), (c) (1970).

11. *See* 379 U.S. at 299-300.

said to have such an effect.[12]

In the last few years the scope of the commerce power has been presented to the Supreme Court, and the lower federal courts, in a criminal law context. The Court had long sustained criminal laws prohibiting interstate transportation of such things as lottery tickets, stolen vehicles and women for immoral purposes.[13] Other criminal laws based on the commerce power applied only to conduct which had a direct tie-in to commerce, such as the laws prohibiting theft from interstate shipments or racketeering which "obstructs, delays, or affects commerce."[14]

A series of recent statutes, however, has gone further in prohibiting all conduct of a specific type, whether or not an interstate connection of effect is established for the particular crime. Federal statutes now prohibit all extortionate credit transactions,[15] engaging in a "gambling business" illegal under state law,[16] all distribution of LSD,[17] and unauthorized transactions in "controlled" drugs.[18] Arguably, Congress also prohibited the possession of firearms by all persons who had been convicted of felonies.[19]

The pivotal decision approving this extension of the commerce power to intrastate crime is *Perez v. United States*.[20] It upheld the application of the loan shark statute[21] to a purely intrastate extortionate credit transaction without requiring the government to demonstrate any interstate nexus. Cases decided in the wake of *Perez* also sustained the gambling[22] and "controlled drug" statutes[23] on the ground that

12. *See id.* at 300-01.

13. *Cf.* Brooks v. United States, 267 U.S. 432 (1925) (interstate transportation of stolen motor vehicles); Caminetti v. United States, 242 U.S. 470 (1917) (interstate transportation of women for immoral purposes); Lottery Case (Champion v. Ames), 188 U.S. 321 (1903) (sale of lottery tickets).

14. *See* 18 U.S.C. § 659 (1970) (theft from interstate shipments); *id.* § 1951(a) (interference with commerce by threats or violence). The federal legislation is reviewed in Comment, *The Scope of Federal Criminal Jurisdiction Under the Commerce Clause*, 1972 ILL. L. FORUM 805 (1973).

15. 18 U.S.C. §§ 891-96 (1970).

16. *Id.* § 1955.

17. 21 U.S.C. §§ 331 *et seq.* (1970). Formerly, *id.* §§ 330a(b), 331(a)(2) (Supp. I, 1965), proscribed distribution of "any depressant or stimulant drug." *Id.* § 321 (v)(3) listed hallucinogens as a "depressant or stimulant." LSD-25 was added to the list as a hallucinogen in 21 C.F.R. 166.3 (1966).

18. 21 U.S.C. § 841 (1970).

19. *See* 18 U.S.C. APP. § 1202(a) (1970). *See* text accompanying notes 55-64 *infra*.

20. 402 U.S. 146 (1971).

21. 18 U.S.C. §§ 891-96 (1970).

22. 18 U.S.C. §§ 1511, 1955 (1970); United States v. Becker, 461 F.2d 230 (2d Cir.), *petition for cert. filed*, 41 U.S.L.W. 4082 (U.S. July 28, 1972) (No. 72-158); United States v. Harris, 460 F.2d 1041 (5th Cir.), *cert. denied*, 409 U.S. 877 (1972); United States v. Riehl, 460 F.2d 454 (3rd Cir. 1972); Schneider v. United States, 459 F.2d 540 (8th Cir.), *cert. denied*, 409 U.S. 877 (1972).

23. 21 U.S.C. §§ 841(a), 846 (1970); United States v. Lopez, 459 F.2d 949 (5th Cir.), *cert. denied sub nom.* Llerena v. United States, 409 U.S. 878 (1972).

Congress had the power to proscribe a class of criminal activity if it found that as a whole this activity substantially influenced the nation's economy. The LSD statute was upheld by several courts of appeals, and the Supreme Court recently denied certiorari in two of the cases.[24] These decisions would appear to give Congress broad authority to federalize criminal activity which has traditionally been within the exclusive competence of the states.

These recent developments in the federalization of intrastate crime which appear to extend the commerce power beyond previous limits raise important constitutional questions under the commerce clause. First, under what conditions may Congress use the commerce power to reach intrastate criminal activity? Second, does this recent extension of the commerce power constitute a threat to the sensitive federal-state balance traditionally the cornerstone of our federal system?

THE FIRST PARTIAL STEP—*United States v. Five Gambling Devices*

The first partial step taken by Congress in the direction of regulating all intrastate transactions in the criminal area reached the Supreme Court in *United States v. Five Gambling Devices.*[25] Although the statute in question substantively prohibited only interstate commerce in gambling devices,[26] read literally it required every manufacturer or dealer in such devices to register and file information with the Attorney General as to the devices sold and delivered. Indictments were brought against certain dealers who failed to comply with the reporting provision, but the indictments did not allege that these gambling devices had moved or would move in interstate commerce.

Six justices, four in dissent, would have construed this reporting provision to mean what it said, and therefore to apply to all transactions in gambling devices, intrastate or interstate. Two of these six, Justices Black and Douglas, expressed no doubts as to the commerce question but found the statute so construed to be unconstitutionally vague as to where the reports were to be filed.[27] With Justices Jackson, Frankfurter and Minton, who refused to interpret the statute as ap-

24. United States v. Cerrito, 413 F.2d 1270 (7th Cir. 1969), *cert. denied*, 396 U.S. 1004 (1970); Deyo v. United States, 396 F.2d 595 (9th Cir. 1968); White v. United States, 395 F.2d 5 (1st Cir.), *cert. denied*, 393 U.S. 928 (1968).

25. 346 U.S. 441 (1953).

26. *See* Act of Jan. 2, 1951, ch. 1194, §§ 1-7, 64 Stat. 1134, *as amended*, 15 U.S.C. §§ 1171-77 (1970).

27. 346 U.S. 441, 451-54 (1953). The Act required registration with the Attorney General "in such districts" without indicating what "such" referred to. The wording inadvertently resulted from the substitution of "Attorney General" for "Collector of Internal Revenue for each District in which such business is to be carried on." *Id.* at 445 n.6.

plying to purely intrastate matters, they formed a majority in favor of dismissing the indictments.

The plurality opinion of Justices Jackson, Frankfurter and Minton deemed the constitutionality of the literal construction sufficiently doubtful to justify interpreting the statute so as to avoid the problem.[28] Mr. Justice Jackson's opinion stated that in no previous instance had Congress attempted to go that far: "No precedent of this Court sustains the power of Congress to enact legislation penalizing failure to report information concerning acts not shown to be in, or mingled with, or found to affect commerce."[29] The maxim that statutes will if possible be construed to avoid "serious constitutional questions" was therefore invoked. The opinion accordingly did "not intimate any ultimate answer to the appellees' constitutional questions other than to observe that they cannot be dismissed as frivolous, nor as unimportant to the nature of our federation."[30]

The dissenting opinion of Mr. Justice Clark, in which three other Justices joined, first concluded in answer to Justices Black and Douglas that no one would doubt where to file reports required to be filed with the Attorney General; the Court's "function is not to discipline Congress" for bad draftsmanship when the meaning of a statute is clear.[31] With respect to the commerce power, the opinion then found that to require information as to all transfers of gambling devices was a reasonable means of effectuating the prohibition of interstate transportation, which was unquestionably constitutional. In language prophetic of cases to come, the dissent pointed out that the Act intended "to eliminate one of the major sources of income to organized crime"[32] and that the federal law "was actively sought by local and state law enforcement officials"[33] as an effective means of assisting local law enforcement.

In retrospect, the *Gambling Devices* case would seem to have presented a pretty simple constitutional question. Undoubtedly, requiring all manufacturers and dealers to register and file reports as to their sales would facilitate the determination of which devices were transported interstate; indeed, effective enforcement might well de-

28. *Id.* at 446, 450.
29. *Id.* at 446. It should be remembered that Justice Jackson was no hide-bound conservative as to the scope of the commerce power. As Solicitor General and as Attorney General he had fought vigorously for a broad interpretation of the powers of Congress, and later wrote for the Court in Wickard v. Filburn, 317 U.S. 111 (1942), which held that agricultural quota limitations extended to wheat consumed on the farm on which it was produced. Many have regarded *Wickard* as perhaps the most extreme application of the commerce clause to intrastate transactions.
30. 346 U.S. at 446.
31. *Id.* at 456.
32. *Id.* at 459.
33. *Id.* at 463.

pend upon the availability of such information. In the absence of the escape routes utilized in the opinions of Justices Jackson and Black, which together commanded five votes, it may be surmised that the Supreme Court of 1953 would have sustained the provision. Certainly the relationship of the reporting requirement, even for intrastate transactions, to the enforcement of the substantive interstate prohibition was closer than the effect upon intersate commerce of the substantive prohibition of completely intrastate transactions in the more recent loan shark and firearms statutes to be discussed.

EXTENSION TO INTRASTATE ACTS HAVING NO INTERSTATE EFFECT—*Perez v. United States*

The loan shark provisions of Title II of the Consumer Credit Protection Act of 1968[34] prohibit any "extortionate extensions of credit" —which in plain English means loans at exorbitant and unlawful interest rates which are collectible by threats of violence. No connection between the particular offense and interstate commerce was required, though, as will be shown, the congressional findings baldly stated that there was such a connection.

Perez was convicted of violating the statute. After loaning $1,000 and then $2,000 more to a Brooklynite named Miranda (to be distinguished from his better known namesake in Arizona, who was not the victim of a crime but the defendant) at about 50 percent interest, he gradually raised the required weekly payments from $205 to $1,000, for an unspecified number of weeks. Miranda was repeatedly warned that paying was better than being hospitalized or castrated. Although presumably Perez could have been prosecuted under the New York laws prohibiting extortion,[35] he was charged with violating the federal statute.

The Supreme Court decision sustaining Perez's conviction[36] did not point to any interstate element in the particular transaction, to any interstate effect it might have had or, indeed, to Perez being associated with "organized crime." The opinion of Mr. Justice Douglas, in which all but Mr. Justice Stewart joined, relied for factual support on the findings of Congress that "organized crime is interstate and international in character," that it obtains a substantial part of its income from "extortionate credit transactions" in which violence was threatened, and that "[e]xtortionate credit transactions are carried on to a sub-

34. 18 U.S.C. §§ 891-96 (1970).
35. *See* N.Y. PENAL LAW § 155.05(2)(e) (McKinney 1967).
36. Perez v. United States, 402 U.S. 146 (1971), *aff'g* 426 F.2d 1073 (2d Cir. 1970).

stantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce."[37]

The Court found that the case came within the last mentioned category, of transactions affecting interstate commerce, noting in explanation only that loan sharks provide funds for other criminals, that the victims come from all classes of persons, that the organized underworld was loan sharking to obtain control of legitimate businesses, and that "[i]n the setting of the present case there is a tie-in between local loan sharks and interstate crime."[38] This "tie-in" is not described and (so far as appears from the opinions of the Supreme Court or the Court of Appeals) was not proved in the particular case. The Court concluded that "loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations."[39] In short, organized crime is interstate business, and uses funds from loan sharks to support its operations throughout the nation.

In answer to the opposing argument—based in part upon the *Five Gambling Devices* case—that the statute could not be validly applied to Perez because there was no proof that his individual crime had any interstate effect, the Court replied that the test was whether "the *class* of activities regulated" was within the reach of federal power; if so, individual instances which in isolation had no significant interstate effect need not be exempted.[40] In the classic case standing for that proposition, *Wickard v. Filburn*,[41] each bushel of wheat produced, even though consumed on the farm of its producer, contributed to the total supply of wheat which determined the interstate price level; the grower who consumed his own wheat would otherwise have purchased it on the open market. Thus, the total of the wheat produced and consumed locally affected the interstate market. Since the total was comprised of its parts, regulation of each part, however small, was justified.

Similarly in the public accommodations cases[42] upon which the *Perez* opinion relied, the inability of Negroes to obtain food and lodg-

37. Congressional Findings and Declaration of Purpose in Pub. L. 90-321 § 201, 82 Stat. 159 (1968), *quoted in* 402 U.S. at 147 n.1.
38. 402 U.S. at 155.
39. *Id.* at 157.
40. *Id.* at 154.
41. 317 U.S. 111 (1942).
42. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); *see* text accompanying notes 7-12 *supra.*

ing in the course of interstate travel rested on the discriminatory practices of a great many proprietors, no one of whom alone might have had any significant or noticeable effect. Here again there is a substantial total interstate effect which consisted of the total effect of the conduct of many small parts.

Many loan shark transactions, however, might not be tied into interstate gangs or to organized crime. There may, of course, be loan-sharking which is itself interstate, as when the money crosses the state line. Or there may be an intrastate extortion which in itself or when combined with similar transactions benefits an interstate gang or criminal organization. In the absence of an interstate connection or nexus of this sort, local extortions even as a class would not seem to affect commerce in any way. This was the situation in *Perez*.

The key to the *Perez* decision may be found in the difficulty of proving in each individual case that the loan shark had an interstate connection even when it existed. A sweeping prohibition may, therefore, have been the only, or at least the most effective, means of combatting an interstate evil—even though a particular episode may have no effect upon or relation to interstate commerce whatsoever.[43] As a commentator upon the decision of the Court of Appeals in *Perez* stated:

> With respect to loansharks associated with organized crime, therefore, a relatively clear relationship, though indirect, might be found between their activities and interstate commerce through the impact of the criminal organization. For the 'independent' loanshark, who maintains no visible or provable connection to organized crime, the link to interstate commerce seem obscure. Consequently, while Congress 'finds and declares' that purely intrastate extortionate extensions of credit affect interstate commerce, it fails to specify *how* interstate commerce is affected by those transactions. The court in the instant case notes the difficulty of tracing the connection between the loanshark on the street and the organization behind him. Although not clearly enunciated, the principle implicit in this observation is that this inherent difficulty in establishing a connection between the loanshark and organized crime necessitates regulation of *all* loansharks, in order to be certain of reaching those that *do* affect commerce through their link to organized crime.[44]

43. *See* 402 U.S. at 147 n.1, *quoting* Congressional Findings and Declaration of Purpose in Pub. L. 90-321 § 201, 82 Stat. 159 (1968). For support of the thesis that the Extortionate Credit Transactions Act was a congressional attempt to accomplish what previous federal extortion statutes could not—because of problems of proof of interstate connections—see Malcomb & Curtin, *The New Federal Attack on the Loan Shark Problem*, 33 LAW & CONTEMP. PROB. 765 (1968).

44. 49 TEX. L. REV. 568, 573 (1971).

The significance in *Perez*, therefore, is that it is the first case in which the Court upheld federal regulation of a well-defined but possibly overinclusive class of substantive criminal activity on the grounds that in order to exercise effectively the commerce power over an interstate evil, individual acts unconnected with that evil must also be reached.[45]

An all-encompassing federal prohibition could thus be justified, as the Court said in language harking back to *McCulloch v. Maryland*,[46] as an "appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce,"[47] which could not be fully achieved in any other way.

The same rationale had been employed by the courts of appeals prior to *Perez* in sustaining the federal prohibition against all distribution of LSD.[48] Since it would have been difficult if not impossible to identify the drugs which had moved, or would move, interstate, a ban upon all distribution was a reasonable way of effectuating a prohibition upon interstate movement. The more recent decisions sustaining the prohibitions against transactions in controlled drugs and illegal gambling businesses[49] are based upon congressional findings of effect upon interstate commerce, and, of course, the Supreme Court's reasoning in the *Perez* case.

The doctrines invoked in those cases, which ultimately are derived from the necessary and proper clause, were not novel. As Mr. Justice Holmes, for a unanimous Court, had stated in *Westfall v. United States*, "[w]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so."[50] The Court had held on several occasions "that the power to prohibit the traffic in intoxicating liquors includes, as an appropriate means of making that prohibition effective, power to prohibit traffic in similar liquors, although non-intoxicating."[51] Similarly, Congress may require inspection and preventive treatment of "all cattle in disease infected areas in order to prevent shipment in interstate commerce of some of

45. The Court did not attempt to relate the activity of the subclass of "strictly local" loan sharks to an independent effect on commerce apart from the adverse effect of organized crime.

46. 17 U.S. (4 Wheat.) 316, 421 (1819).

47. Perez v. United States, 402 U.S. 146, 151 (1971); *see* United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942); United States v. Darby, 312 U.S. 100, 118 (1941).

48. *See* cases cited note 24 *supra.*

49. *See* cases cited notes 22-23 *supra.*

50. 274 U.S. 256, 259 (1927).

51. Everard's Breweries v. Day, 265 U.S. 545, 560 (1924), *citing* Jacob Ruppert, Inc. v. Caffey, 251 U.S. 264 (1919); Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192 (1912).

the cattle without the treatment."[52] This was the precise argument urged in Mr. Justice Clark's dissenting opinion in *Five Gambling Devices*.[53] Congress and the court of appeals in the controlled drug case similarly found that it was impossible to determine whether a drug had an interstate or intrastate origin or destination.[54] The principle inherent in these cases which emerges in *Perez* is that Congress may regulate local acts which in themselves have no interstate nexus or effect if as a practical matter it is difficult to distinguish such transactions from others which may have some relation to interstate commerce.

IMPLICATIONS OF *Perez*

How far can the *Perez* rationale be extended? Can Congress forbid the possession or transfer of all pills, or of all white pills, because of the difficulty of distinguishing dangerous pills from others and because some might move interstate? Could it prohibit all distribution of milk because some might be infected and because it would be difficult to tell the good from the bad and the interstate from the intrastate? Since Congress is unlikely to interject the federal government into local transactions without good reason, such extreme but logical applications of the principle are unlikely to arise.

The recent cases interpreting the Firearms Act[55] presented an opportunity for the Court to go even further than in *Perez*. In the Firearms Act, the stated connections between commerce and the possession of firearms by persons who had been convicted of felonies were that hijacking and robbery of banks and other businesses impaired commerce; that crime is generally harmful to business, including intrastate business; that less business is conducted in areas where crime is prevalent; and that the murder of Martin Luther King, Jr. caused rioting and looting which injured businesses in interstate commerce.[56] Such offenses usually involved the use of firearms, frequently by persons who had been previously convicted of felonies. Hence, a reasonable method of protecting interstate commerce against the effects of such crimes is to prevent convicted felons from possessing or receiving firearms, whether or not the particular possessor or weapon had

52. United States v. Darby, 312 U.S. 100, 121 (1941), *discussing* Thornton v. United States, 271 U.S. 414 (1926).

53. *See* United States v. Five Gambling Devices, 346 U.S. 441, 461 (1953) (Clark, J., dissenting).

54. United States v. Lopez, 459 F.2d 949, 953 (5th Cir. 1972).

55. 18 U.S.C. APP. § 1202(a) (1970).

56. The statute was introduced and passed the Senate within weeks after the King assassination in 1968. It passed the House the day after Senator Robert Kennedy was murdered. See Stevens v. United States, 440 F.2d 144, 147, 149 (6th Cir. 1971).

moved interstate.[57]

Four courts of appeals, with only one dissenting judge, accepted these arguments.[58] The Eighth Circuit thought the impact upon interstate commerce of firearm-related crimes "self-evident."[59] The Sixth Circuit found that "[t]here can be no serious doubt that the possession of firearms by convicted felons is a threat to interstate commerce."[60] A less attenuated chain of reasoning would justify direct federal prohibition of all crimes which affected or were likely to affect businesses engaged in or dependent upon interstate transactions. This would cover at least all crimes against business or property, and probably much more.[61]

Only the Second Circuit had doubts. Because it believed "there is serious doubt in the present case whether the statute, if given the interpretation for which the Government contends, could withstand consitutional scrutiny," that court, in *United States v. Bass*,[62] construed the statute to apply only to the possession of firearms shown to be in or affecting interstate commerce. The statute subjected to punishment a convicted felon[63] "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm . . . ."[64]

There was ample room for judges to disagree, as they have, as to whether the commerce qualification in the above provision applied to receipt and possession, as well as to transportation. It is unnecessary to delve into the question of statutory construction here. Suffice it to say, on the basis of the reasoning of the various opposing opinions, that the legislative history looked one way and the logic and structure of the statute another, while the language was not clear.

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57. The above examples and reasoning are from the opinion of the Courts of Appeals in Stevens v. United States, 440 F.2d 144 (6th Cir. 1971), and United States v. Synnes, 438 F.2d 764 (8th Cir. 1971), *vacated*, 404 U.S. 1009 (1972), and from the legislative history of the statute quoted in full in the appendix to *Stevens*.

58. Stevens v. United States, 440 F.2d 144 (6th Cir. 1971) (one judge dissenting); United States v. Crow, 439 F.2d 1193 (9th Cir. 1971), *vacated*, 404 U.S. 1009 (1972); United States v. Taylor, 438 F.2d 774 (8th Cir. 1971), *vacated*, 404 U.S. 1009 (1972); United States v. Wiley, 438 F.2d 773 (8th Cir. 1971), *vacated*, 404 U.S. 1009 (1972); United States v. Synnes, 438 F.2d 764 (8th Cir. 1971), *vacated*, 404 U.S. 1009 (1972); United States v. Mullins, 432 F.2d 1003 (4th Cir. 1970), *vacated*, 404 U.S. 1008 (1972); United States v. Daniels, 431 F.2d 697 (9th Cir. 1970); United States v. Cabbler, 429 F.2d 577 (4th Cir.), *cert. denied*, 400 U.S. 901 (1970).

59. United States v. Synnes, 438 F.2d 764, 768 (8th Cir. 1971).

60. Stevens v. United States, 440 F.2d 144, 151-52 (6th Cir. 1971).

61. United States v. Synnes, 438 F.2d 764 (8th Cir. 1971), referred to homicides and assaults as well as to robbery, larceny, burglary and auto theft as having "a substantial impact on interstate commerce." *Id.* at 768.

62. 434 F.2d 1296, 1299 (2d Cir. 1970).

63. The statute also covers persons dishonorably discharged from the Armed Forces, those adjudged mentally incompetent, persons who have renounced United States citizenship and aliens unlawfully in the United States. 18 U.S.C. APP. §§ 1202 (a)(2)-(5) (1970).

64. *Id.* § 1202(a).

In December 1971, the Supreme Court affirmed the Second Circuit's decision in *Bass*.[65] Significantly, however, Mr. Justice Marshall noted at the beginning of his opinion that the Court did so "for substantially different reasons" which made it unnecessary to reach the constitutional question.[66] Since the Supreme Court made most of the same points as the Second Circuit with respect to the language of the statute, its structure and its legislative history, it is obvious that what the Court was *not* accepting from the Second Circuit was the suggestion of substantial constitutional doubt upon which that court also relied.

Instead, the Supreme Court referred to the somewhat different principle that federal statutes will not be construed to "mark a major inroad into a domain traditionally left to the States" unless Congress conveys its purpose clearly,[67] as well as to the familiar rule that in construing criminal statutes "doubts are resolved in favor of the defendant."[68] Mr. Justice Marshall's opinion then went on to discuss the required nexus with interstate commerce. In any individual case, for example, a person "possesses . . . [a firearm] in commerce or affecting commerce":

> if at the time of the offense the gun was moving interstate or on an interstate facility, or if the possession affects commerce. Significantly broader in reach, however, is the offense of 'receiv[ing] . . . in commerce or affecting commerce,' for we conclude that the Government meets its burden here if it demonstrates that the firearm received has previously traveled in interstate commerce.[69]

Although conceding that this was not the "narrowest possible reading of the statute," he thought it gave effect to the legislative purpose, and that "consistent with our regard for the sensitive relation between federal and state criminal jurisdiction, our reading preserves as an element of all the offenses a requirement suited to federal criminal jurisdiction alone."[70]

Mr. Justice Brennan joined in all of the majority opinion but the last portion, which he thought unduly advisory with respect to matters not before the Court. And Mr. Justice Blackmun and the Chief Justice, dissenting on the issue of statutory construction because they thought the language and legislative history pointed in the opposite direction, concluded that "the Court should move on and decide the constitutional issue present in this case."[71]

65. United States v. Bass, 404 U.S. 336 (1971).
66. *Id.* at 339 & n.4.
67. *Id.* at 339, 349.
68. *Id.* at 348.
69. *Id.* at 350 (citation omitted).
70. *Id.* at 351.
71. *Id.* at 356.

Where does *Bass* leave the power of Congress over ordinary intrastate crimes, such as robbery, theft, possessing firearms and drugs, which have no demonstrable interstate tie? The *Bass* opinions on their face leave the constitutional question undecided. But *Perez*, the gambling business decision in the Third Circuit and the views of 19 out of 20 circuit judges applying the firearms statute strongly suggest that possession of firearms without proof of an interstate connection could constitutionally have been prohibited. Indeed, where the language of a different statutory provision[72] was unambiguous, Circuit Judge Hays, who had expressed the constitutional doubt of the Second Circuit in *Bass*, had no difficulty after *Perez* in sustaining federal licensing of all dealings in firearms, interstate or intrastate.[73] If the premise of these rulings is, as at least the lower court firearm decisions imply, that generally crimes which harm business injure interstate commerce, a direct federal prohibition of all such offenses would be at least as easy to justify as a prohibition against possession of firearms by convicted felons. For obviously to stamp out all such crimes would better protect interstate commerce than merely to prevent some of them, those committed by ex-felons with guns. And the problems of proof would often make it difficult to differentiate those offenses which affected commerce from those which did not, just as in *Perez*. "Indeed, since the total economic impact of almost any class of criminal activity substantially injures interstate business, most traditionally local crimes could be federalized under a broad construction of the commerce power."[74]

Congress has not yet gone that far, and perhaps it never will. It is not unreasonable for the Court to require—as it did in *Bass*—that Congress clearly manifest its intention to do so, if that is what it wants. Since Congressmen and Senators come from the states and are usually not anxious to impinge unduly on local prerogatives, there may be little reason to fear that Congress will undermine local authority without good cause.[75] "Good cause" in this context means that the states and their citizens need federal law enforcement assistance in areas where both federal and state governments are seeking to effectuate the same policies. The Court may thus never face an exercise of fed-

72. 18 U.S.C. § 922(a)(1) (1970).

73. United States v. Ruisi, 460 F.2d 153 (2d Cir.), *cert. denied*, 93 S.Ct. 234 (1972). *See also* United States v. Redus, 469 F.2d 185 (9th Cir. 1972); Bonnano v. United States, 467 F.2d 14 (9th Cir. 1972), *cert. denied*, 93 S.Ct. 964 (1973).

74. 49 TEX. L. REV. 1106, 1111 (1971) (footnote omitted).

75. For a discussion of practical restraints on exercise of the commerce power, see Bogen, *The Hunting of the Shark: An Inquiry Into the Limits of Congressional Power Under the Commerce Clause*, 8 WAKE FOREST L. REV. 187 (1972). *See also* Levine, *The Proposed New Federal Criminal Code: A Constitutional and Jurisdictional Analysis*, 39 BROOKLYN L. REV. 1, 43-61, 82-88 (1972).

eral power over local crimes unless substantial local benefit from having the national government deal with the problem can be established.

Whether or not such an enlargement of federal power is cause for worry, it does not appear that anyone is worrying much about it. So far as can be ascertained, *Perez* is practically an unknown case, except for constitutional law professors—and, of course, government prosecutors and lawyers defending loan sharks. It has attracted little publicity or attention in the literature.[76] It apparently surprised no one. The Court's opinion dealt with the subject cryptically, almost superficially, even though no case would seem to have gone that far in upholding the federal commerce power.

The absence of comment upon or objection to the decision may attest to the fact that prior decisions had long prepared the public and the bar for such a conclusion—or perhaps prove merely that loansharking has little editorial, scholarly or public support. And the same is probably true as to the possession of firearms by convicted felons. There might, of course, be more objection if the possession of all firearms were prohibited, even though that could be thought to be an even more effective way to reduce crimes which affect interstate commerce.

The commerce clause has come a long way since its nadir in the 1930's when strikes in the coal industry were held to affect interstate commerce only indirectly and not to be subject to congressional regulation.[77] Even a lawyer who fought for a realistic interpretation which would recognize that in commercial matters the United States was one nation finds himself surprised at where we are now—and at how readily the recent expansion is accepted. Perhaps the surprise merely reflects a recollection of what were regarded as great difficulties in the earlier litigation. And yet law students and younger lawyers now probably accept the modern commerce decisions as if they always have been "the law," as they accept *Marbury v. Madison, McCulloch v. Maryland* and *Gibbons v. Ogden*—which also presented some difficulties in their times.[78]

The ease with which the public and the judiciary now swallow the federal regulation of what were once deemed exclusively local matters undoubtedly reflects the general integration of the nation, in disre-

76. Bogen, *supra* note 75; Levine, *supra* note 75; Comment, *supra* note 14; 9 HOUSTON L. REV. 160 (1971); 17 N.Y. LAW FORUM 1132 (1972); 49 TEX. L. REV. 568 (1971); 46 TULANE L. REV. 829 (1972). *See also* Comment, *Federal Regulation of Local Activity: The Demise of the "Rational Basis" Test,* 4 L. & SOC. ORDER 683 (1972).

77. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

78. *See* WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, chs. V, XII, XV (1926).

gard of state lines. The people recognize that the national government can deal more effectively with problems which do not limit themselves to individual states. This is hardly a novel or radical concept. It underlay the assignment of powers to the federal government at the Constitutional Convention of 1787.[79] There should be no cause for alarm because the same standard is accepted and applied 186 years later.

79. The Convention had approved the Sixth Randolph Resolution which declared that "the national legislature ought . . . to legislate in all cases for the general interests of the Union, and also in those to which the states are separately incompetent." This was the standard pursuant to which the enumeration of the powers of Congress was drafted. See Stern, *supra* note 5, at 1338-40.