THE HUNTING OF THE SHARK: AN INQUIRY INTO THE LIMITS OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE

*David S. Bogen**

Alexis Miranda wanted his own butcher shop in New York. Regular lending institutions closed their doors to the young butcher's dream, but a gentleman named Alcides Perez offered him the necessary $3,000 capital. The vague interest rate Perez requested was obviously large, but the initial repayment rate was only $105 per week. It did not stay so low for long. Perez raised it, first to $130, then to $205, and finally to $330. When Miranda complained that he could not make the payments, Perez threatened to hospitalize him. Perez also threatened to harm Alexis' family, or, still more terrorizing, to bring Miranda to the attention of persons higher up in the moneylending chain. Frightened, Miranda tried to make payments by obtaining meat on short term credit and then delaying payment to his suppliers. Having paid Perez $6,500, Miranda owed him $6,700 more. The dream had become a nightmare. Desperate, unable to pay his suppliers or the loan shark, Alexis fled to Puerto Rico. The shark patiently awaited his return. When he did, the shark found him and pounced.[1]

The predictable ending to his scenario occurred.[2] The police caught the loan shark and he was convicted for his crime. Stories of crime and retribution rarely concern themselves with legal niceties, but the conviction of this crook had a curious twist. It occurred in federal court under a federal statute. This is unusual because Congress was given no general power to enact criminal law. Normally, that is a function for the states. Here, the crime was perpetrated in New York by a New York resident on another New York resident. There was no showing that the borrowed money came from interstate commerce or that the repayment was used for transactions in interstate commerce. Congress had found that organized crime had substantial interstate relationships and used loan sharking as a crucial step in its operations, but the statute did not require a finding that the loan shark be a part of organized crime, nor was there

* B.A., Harvard University; LL.B. Harvard Law School; LL.M., New York University Law School; Associate Professor of Law, University of Maryland.

1. United States v. Perez, 426 F.2d 1073 (2d Cir. 1970).

2. Assuming the scenario was written for television. In an age of enormous complexity, the movie villain seems as likely to escape.

such a finding as to Perez.[3] Thus, Justice Stewart concluded:

> Because I am unable to discern any rational distinction between loan sharking and other local crime, I cannot escape the conclusion that this statute was beyond the power of Congress to enact.[4]

To a student of the Court, however, the most surprising aspect of this case is not that Congress decided to prohibit loan sharking, but that a justice of the Supreme Court should find they did not have the power to do so. Justice Stewart admits that loan sharking may be a national problem which has an adverse impact on interstate business.[5] As in this case, the high rate of interest may force a business into insolvency and thus hurt all its creditors. They in turn will be forced to charge higher prices and the effect will then spread throughout the national economy.

For almost thirty years, the Court has recognized that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[6] For thirty years the Court has stated that if Congress has power under the commerce clause, its power is not limited by the Tenth Amendment. "The amendment states but a truism that all is retained which has not been surrendered."[7] Yet Stewart bases his opinion on the proposition that "[t]he definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments."[8] Even Justices Black and Douglas, selected for the Court to assure wide scope for the exercise of Congressional power, referred to the Tenth Amendment in connection with attempts to limit governmental power.[9] When the Court

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3. Although such a finding would have had some basis in the evidence, particularly in view of Perez' reference to persons higher up in the moneylending chain.

4. Perez v. United States, 402 U.S. 146, 158 (1971) (dissenting opinion). Apparently Justice Stewart thought that if the representatives of the several states banded together in Congress to catch this shark, they would discover it was a Boojum and the states as political entites would softly and suddenly vanish away.

> "But oh, beamish nephew, beware of the day
> If your Shark be a Boojum! For then
> You will softly and suddenly vanish away,
> And never be met with again!"

Lewis Carroll, *The Hunting of the Shark*, Fit the Third, The Baker's Tale.

5. *Id.* at 157.

6. Wickard v. Filburn, 317 U.S. 111, 125 (1942).

7. United States v. Darby, 312 U.S. 100, 124 (1941).

8. Perez v. United States, 402 U.S. 146, 158 (1971).

9. Black in South Carolina v. Katzenbach, 383 U.S. 301, 358-59 (1966).

> "One of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no

held that the Civil Rights Act of 1964 applied to a recreational area in Arkansas because some of the products served at the snack bar and the paddleboats used on the lake moved in interstate commerce, Black said:

> [t]his would be stretching the Commerce Clause so as to give the Federal Government complete control over every little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 states. This goes too far for me.[10]

Why does it go too far? Why have three justices of the Supreme Court recently sought to limit the power of Congress to regulate commerce? The exploration of this question forms the burden of the first half of this paper. The second half states the thesis that the Court should force Congress explicitly in the law or in debate to articulate the connection between its legislation and the commerce power unless the connection is sufficiently obvious as to require no discussion. Where Congress fulfills this duty, however, the Court should defer to Congressional judgment as to the necessity for adopting the law.

I. LINGUISTIC LIMITATIONS

The Constitution grants to Congress the power "to regulate Commerce . . . among the several States."[11] Present day dictionary definitions provide a maze of possible ways to interpret these simple words. Regulate can mean "to govern or direct according to rule," "to bring under control of constituted authorities," "to make uniform," "to fix the amount, degree or rate of, by adjusting, rectifying, etc."[12] "Commerce" runs a similar lexicographical gamut from "business intercourse" through "social intercourse" to "mental or spiritual intercourse" and even "sexual intercourse."[13] This array of alternatives makes mystifying any reference to the "plain meaning" of the provision divorced from considerations of intent and policy. But assuming that the most frequently used meaning is accepted as the "plain" meaning, problems remain. Does "governing business intercourse according to rule"

> others, and all other power was to be reserved either 'to the states respectively, or to the people.' "

Douglas with Stewart in Maryland v. Wirtz, 392 U.S. 183, 201 (1968).

> "[W]hat is done here [extending Fair Labor Standards Act to employees of state schools and hospitals] is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism."

10. Daniel v. Paul, 395 U.S. 298, 315 (1969).
11. U.S. Const. art. I, § 8.
12. WEBSTERS NEW COLLEGIATE DICTIONARY, 713 (1951).
13. *Id.* at 165.

require the rule to operate directly on commerce, or may it operate on the market forces which determine the nature of the business intercourse? In the absence of interference, the market "governs" what business intercourse consists of. Regulation of market forces results in some degree of control over the business transactions. Thus interstate commerce is regulated by laws whose direct operation is on intrastate incidents. And this approach to interpreting the commerce clause was set forth in the earliest cases.

> The genius and character of the whole government seems to be, that its action is to be applied to all external concerns of the nation, and to those internal concerns which affect the states generally.[14]

The present interpretation of the commerce clause to include regulation of matters "affecting" interstate commerce arose out of the experience of the thirties. It is enormously difficult to regulate the sale of wheat and its price solely by regulations at the market place. Fix a high price and the wheat will not be sold, fix a low price and the farmers would not grow wheat for market. Thus, the government attempted to limit the amount of wheat sold as a check on the market price. Even if the commerce clause were read to permit a direct regulation of intrastate as well as interstate commerce,[15] the growth and home consumption of wheat would not be subject to regulation. But since the language of the Constitution does not compel such a restricted result, it was easy for the Court to hold that regulation of home wheat consumption affected interstate commerce and was within Congressional power.[16]

Interpreted in this fashion, the language of the Constitution does not compel considerations of degree; it only compels a relationship between Congressional legislation and interstate commerce. In today's interdependent economy and social structure, every activity within any of the states will "affect the states generally" even if only tenuously.[17] Thus, at least in the context of modern society, the power to regulate commerce has no practical inherent linguistic limitations.

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14. Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 195 (1824).

15. W. CROSSKEY, POLITICS AND THE CONSTITUTION (1953).

16. Wickard v. Filburn, 317 U.S. 111 (1942).

17. A tenuous effect on commerce might be thought to be an insufficient basis for Congressional power according to the maxim "de minimis non curat lex." But the law does deal with trivial matters if the lawmakers so desire. The maxim only indicates that intent may be important in countering an overliteral reading of a statute. But the framers' intent here is not a clear guide. *See* text accompanying footnotes 25-29, *infra*. Further, the maxim ordinarily applies where the court alone passes on whether a matter is de minimis. Here the legislature by enacting the statute indicates its opinion that the matter is significant enough to deal with. *See* text accompanying footnotes 33-37, *infra*.

Congress' power is, of course, limited by the specific prohibitions on its exercise contained in the Constitution, but those prohibitions do not by their terms import considerations of degree into Congressional power to regulate commerce. When the Court sought limits for the commerce power during the early part of this century, it employed the Tenth Amendment. But the Amendment by its terms is not a limitation of power. Thus, Congressional power to enact statutes such as the loan sharking law—or to enact an entire code of criminal justice, for that matter—cannot be denied solely by reference to the language of the Constitution.

II. STRUCTURAL LIMITATIONS

Professor Black has suggested that the Court too often has depended on textual exegesis, and that it would be preferable in many cases to infer constitutional commands "from the structures and relationships created by the Constitution in all its parts or in some principal part."[18] The Constitution makes constant reference to the states. Equality of states in the Senate is the only provision of the Constitution which may not be amended.[19] The state legislatures are given specific functions in the Constitution with respect to electors for president and vice-president.[20] The Tenth Amendment refers to powers "reserved to the States."[21] The Eleventh Amendment prohibits suits against a State by citizens of another state.[22] Thus the structure of the Constitution assumes that states operate as governmental entities sovereign in their sphere. This reasoning is the basis for numerous decisions on intergovernmental immunities.[23]

But saying that states must be sovereign in their sphere does not decide the extent of that sphere. Black's argument for the use of structural reasoning is not that it is more precise but that it turns attention to practical and policy concerns. "We will have to deal with policy and

18. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969) [hereinafter cited as BLACK].

19. U.S. CONST. art. I, §§ 2, 3 and 4.

20. U.S. CONST. art. II, §§ 2 and 3.

21. U.S. Const. amend. X.

22. U.S. Const. amend. XI.

23. Collector v. Day, 78 U.S. (11 Wall.) 113 (1870). *Cf.* New York v. United States, 326 U.S. 572 (1946) and Maryland v. Wirtz, 392 U.S. 183, 201 (1968) (Justice Douglas dissenting). It was this concern that the federal government was limiting the state acting in its sovereign capacity that led Douglas to raise the Tenth Amendment. Perez v. United States, 402 U.S. 146 (1971) in dicates that Justice Douglas would have no trouble sustaining federal legislation when a state institution is not involved.

not with grammar."[24] We find no difficulty in accepting limitations on state sovereignty in regulation of commerce where it is clear that the regulation has a significant and direct impact on commerce, even though without federal legislation, the state might be free to act. A commerce clause interpretation that would include regulation of all intrastate activity would still leave intact a state legislature with powers of discussion as a forum for the people of the state, with powers to tax and build structures for carrying out state functions, and with powers to legislate in many areas where the national government has not acted. The states, as states, would still have a significant impact on the federal political process, and the guarantees of sovereign immunity and limitations on state power would remain important in those areas where the state was left free to legislate. While it may be argued that the system of federalism established by the Constitution requires greater sovereignty for the states, that position is not compelled by the structure of the Constitution. By placing emphasis on the supremacy clause and the scope of the taxing and spending clauses, it may be argued that the states' political effect on national policy exists only through electoral qualifications and the institution of the Senate.

III. LIMITATIONS DERIVED FROM THE INTENT OF THE FRAMERS

In interpreting the commerce clause, it is fundamental that the intention of the framers of the clause be considered. It is universally recognized that the commerce clause was adopted in order to give the federal government power to prevent state tariff barriers.

> New Jersey, placed between Philadelphia and New York, was likened to a cask tapped at both ends; and North Carolina, between Virginia and South Carolina, to a patient bleeding at both arms. Merchants and commercial bodies were at their wits' end to carry on business and petitioned for a general power over commerce.[25]

But was the commerce clause adopted merely to remedy the problem of state tariff barriers or were the barriers just an example of a more fundamental problem of state legislation interfering with other states or being inadequate for problems of national impact? The debate as to intent revolved around the Virginia Plan of John Randolph which stated:

> Resolved: That the Legislature of the United States ought to possess the

24. BLACK, *supra* notes 18 and 23.
25. A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 311 (1916).

> legislative rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interest of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.[26]

Resolutions based on this Plan were approved twice by the Convention and more restrictive proposals were twice defeated. But the Committee on Detail reported a draft enumerating the powers of the Congress rather than using the general language of Randolph. The shift from general to particular was not objected to nor was the commerce power as such discussed.[27] From this, one scholar concluded, "[i]t was obvious that the Convention believed that the enumeration conformed to the principles set forth for the guidance of the Committee in the resolution previously adopted."[28]

The authors of the Federalist Papers seem to have read that intent differently.

> The plan of the convention declares that the power of Congress, or, in other words, of the 'national legislature,' shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended.[29]

These views may be reconciled by positing that the framers thought they had enumerated all the areas in which the general interests of the Union were concerned and did not want general language which might permit unnecessary federal power. The adoption of the Tenth Amendment indicates that the framers saw a distinction between the powers necessary to a federal government and the preservation of state sovereignty in control of its internal affairs. The existence of such a line may have been apparent to an agricultural society where communication and transportation were still by horse or sail, and where tools of economic analysis were just beginning to be developed. The fantastic increase in swiftness and circulation of modes of communication—telephone, telegraph, radio, television—and the extraordinary speed and ease of transportation—car, railroad, jet plane—coupled with the interdependent nature of our economic structure make such a distinction impossible

26. 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 21 (1911) and 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 131 (1911).

27. 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 308 (1911).

28. Stern, *The Scope of the Phrase Interstate Commerce*, 41 A.B.A.J. 823, 872 (1955).

29. THE FEDERALIST No. 83, at 460 (The Colonial Press 1901) (A. Hamilton).

today. There is common area where the necessary power of the federal government coexists with the sovereignty of the state regarding matters occurring within it. Since this common area was not a part of the framers' conceptions, it is impossible to look to the framers' intent to discover how it would be resolved. To the extent that such an overlap was perceived, the wording of the Tenth Amendment as a residual clause suggests it was resolved in favor of national power. However, the framers probably did not foresee that such a resolution could eventually lead to federal power to control all conduct within a state.

IV. Limitations Based on Policy Considerations

Although neither the history, the language nor the structure of the Constitution compels a limitation on the scope of Congressional power under the commerce clause, they do not foreclose it. Judicial decision then is based on other considerations. Limitation surely is not based on protecting the individual from any particular legislation, since the state could enact it even if Congress could not. Nor is a limitation on Congressional power necessary in order to achieve flexibility in government. Even if Congress had power to reach wholly local matters, existence of the power would not compel Congress to utilize it. Congress could decide in any particular case that different rules in different areas would be productive methods of dealing with problems. They could decide to leave such rules to the creation of the state legislatures. Thus decisions on the regulation of local matters would be based on the view of the majority of people in the United States through their representatives as to the relative advantages or disadvantages of leaving the matter for state experimentation or diversity.

The true basis for limiting Congressional power is that it prevents the people of a group of states from enforcing their will on the people of one state where the interest of the group of states is weak but the interest of the dissenting state is strong because the subject matter is local. It is unfair for an outsider with little concern over what occurs within a state to make the rules governing such matters. Further, such a limit on Congressional power assists in preserving the harmonious workings of the federal system. Subject matter which produces strong dissension by a state will be left for that state to regulate unless it is essential to the health and well-being of the nation to override the state objections.

The principle of preventing a majority from enforcing its will on a minority, where the interest of the majority is slight and that of the minority is strong, is not inherently limited to states. In fact, states are

less likely to represent cohesive interest groups than are other groups united by occupation, natural resources or geographical features. As a practical matter, there are so many bases for classifying interest groups that it is impossible for a governmental system to formally recognize and defer to all of them. The states then retain their function as identifiable interest groups by virtue of history and the difficulty of replacing them in serving this function.

Recognizing that the policy is to protect the interests of the state suggests that only the state can object that Congress is without power to enact a statute. This would have enabled the Court to dispose of many of the cases in the thirties without discussion on the merits of Congressional power.[30] However, federal statutes adversely affect individuals, and the interest of the state may be violated although the state pragmatically cannot raise this objection.[31]

First, the federal legislation may prohibit a practice which is so obnoxious that the officers of the state politically cannot object to federal intervention. If the Attorney General of New York argued that Perez should be freed, he might be associated in the public mind with a condonation of loan sharking. Lawyers condemn any association of a lawyer with the acts of his client, but the public has not entirely followed the precepts of the legal profession, and every politician worth his salt knows it. But federal legislation wherever consensus among the states finds an item or activity to be evil would require the federal government to use a great amount of resources. This in turn depletes the resources to which a state could look for use in the implementation of local policy. Thus, while no one law would harm state interest so clearly as to enable a state to effectively object, the totality of unobjected laws could severely harm the state's ability to deal with local evils.

Second, the state may be divided over the wisdom of a certain law. The proponents may be willing to advocate and adopt it within the state, but not in the face of a declared national policy to the contrary. For example, proponents of legalized prostitution might gain control in Nevada, arguing that it would better be regulated by the state than considered illegal and left unregulated. However, if federal law forbade prosti-

30. Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); and Railroad Retirement Board v. Alton R. Co., 295 U.S. 330 (1935). Under this view, the individuals who raised issue of congressional power in these cases would have had no standing.

31. This suggests, though it does not compel, the granting of standing to affected individuals. Griswold v. Connecticut, 381 U.S. 479 (1956); Barrows v. Jackson, 346 U.S. 249 (1953).

tution, the Nevada authorities might find it politically difficult to place Nevada in the role of invalidating the moral dictates of other states.

Even if it were concluded that the state interest is not strong enough to be worth protecting where the state refuses to assert it, such a rule, requiring state objection before passing on the constitutionality of legislation as exceeding Congressional power could produce difficult problems. There seems to be a presumption in Congress at present against passing local legislation. There must be a strong national need which may be tied to a constitutional power before Congress will act.[32] If the Court made it clear that Congress had unlimited power unless the states object, the focus of discussion could switch from need for national legislation to likelihood of local objection. For the reasons given above, this could result in taking away power from the local units to govern themselves.

Further, the statute would be applied even though it seems a clear violation of constitutional powers. It seems unfair to punish someone by an unconstitutional statute simply because the state did not make its objection until a later case. For example, using Nevada again, the state may legalize and regulate prostitution. The federal government might then make it a crime. Thus, a lady of the evening could find herself arrested as she leaves the state inspection station. If the state did not intervene, she would be jailed for doing what the state condoned. If the state later objects and court strikes down the federal law, what happens to our first *fille de joie*? If she is released because the law under which she was convicted is invalid, is she entitled to restitution? What does it do to the morale and operation of the court to punish people who the judge believes acted within their legal rights? The uncertainty could be eliminated by requiring the state to intervene in the first test of the statute or be foreclosed from thereafter objecting. But such a rule would penalize the state which desires to change its policy after the federal rule is adopted.

V. REMOVING THE LIMITS—ALMOST

The foregoing discussion suggests reasons why a majority of the Court in the thirties and at least one member of the present Court have sought to place a judicial limit on Congressional power even in cases brought by private individuals. But it is the experience of the thirties which warns against adopting such a policy. There is an important

32. Wechsler, *Political Safeguards of Federalism* in SELECTED ESSAYS ON CONSTITUTIONAL LAW 185, 188 (1963) [hereinafter cited as Wechsler].

interest in keeping Congress out of local matters. There is no adequate judicial procedure for assuring that this interest will be protected unless the Court permits anyone injured by Congressional legislation to raise the issue and applies consistent standards for establishing the boundaries of Congressional power. But the creation of such standards calls for an awareness of their function—they operate as a judicial statement that the state's concern with an activity is greater than the national need to regulate that activity. Any judgment on the necessity of national legislation inevitably leads to judgments as to the wisdom of passing such laws. Thus the Court passes on the wisdom of the legislature in the guise of a constitutional decision, although democratic theory would suggest that the wisdom of legislation is for the people through their elected representatives to decide.

This observation, which has often been made of substantive due process,[33] does not dispose of the problem. For the Court is often forced to make judgments in constitutional questions which are ultimately judgments as to the wisdom of legislation. For example, restrictions on speech will be upheld if they are necessary to the security of order in the community, but they will be invalidated if the Court finds the interest protected too insignificant or the chances of disorder too small. Similarly, definitions of reasonableness in search and seizure under the fourth amendment require judicial concern with "wisdom" of legislation.

Where the Court passes on legislation in conflict with specific prohibitions, however, it is using its judgment to protect an interest explicitly stated in the Constitution. As discussed above, the limitation of Congressional power under the commerce clause is not inherent in the language or the history of that clause and comes instead from a separate policy consideration.

Further, the interest of the state in resisting national legislation on local matters is protected by institutions other than the courts. Of course the good sense which underlies constitutional guarantees offers some likelihood that they will be respected in the legislative process, but Congressmen are unlikely to picture themselves as representing any such interests in opposition to other social concerns. The Congressman does, however, often behave as a representative of the state from which he is

33. Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955).

"The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

elected, protecting the interests of the state as a political entity. Where a majority does not have a very significant interest in obtaining passage of a law, the state's representatives are well situated to block passage of the law. Congressmen can use their ability to do favors or to obstruct votes on issues important to others in order to persuade their colleagues not to adopt a bill which would significantly affect a state's local interest but which does not have a significant national import. The veto power of the state is most effective in Congress. The same concerns which serve as a focus for judicial opposition to Congressional power serve as a focus for legislative opposition to extensive Congressional power as well.[34] The difficult job of weighing the importance of the national concern reflected in legislation against the value of local control over local activities is not really suitable for the judiciary. The strength of these interests is much more likely to be reflected in the political process by which bills are adopted. Thus, the Court may be playing a wise role in upholding the statutes with which it is presented and not freezing some restricting conception of state sovereignty into constitutional doctrine.

While the Court should sustain legislation by deferring to Congressional judgment as to the weight of national and local issues, this does not mean the Court should abandon reference to the commerce clause as a touchstone to constitutionality. The Court must always find that the regulation affects commerce, but in the modern world it is inevitable that virtually any legislation will have such an effect.[35] Further, where the relationship of the law to interstate commerce is not readily apparent, the Court should require Congress to relate the law to its impact on interstate transactions. This could assist in focusing Congressional concern on the proper issues.

Forcing Congress to face the issue does not guarantee it will resolve it on the basis of an appreciation of local interest as opposed to slightness of effect on interstate commerce.[36] The local interest may be dis-

34. Wechsler, *supra* note 32, at 189.

35. The point here about interstate commerce is similar to Professor Black's comment on state action, "time and thought will make it even clearer that this requirement is always satisfied." Black, *Foreword: "State Action" Equal Protection, and California's Proposition* 14 81 HARV. L. REV. 69, 100 (1967).

36. Despite the bellman's claim, "what I say three times is true," Carroll, *supra* note 4, it is obvious that Congress' claim that the national interest outweighs local interest may not be objectively accurate. It is surely problematic how far Congress will concern itself with basic constitutional concerns. *See* Frank, *Review and Basic Liberties*, SUPREME COURT AND SUPREME LAW 122-29 (E. Cahn ed. 1954). The point is not that Congress' decision is objectively correct, but that assuming the existence of a tie to interstate commerce, Congress is the appropriate body to have final say on the strength or importance of that relationship.

counted for the reasons given in discussing the weakness of requiring the state to be a party in commerce clause cases. Effect on commerce may be a minor consideration in view of moral condemnation of practices.[37] But if, as suggested, the legislative body is a more accurate and, in a democracy, more appropriate body for determining the strength of the national interest, the Court should not interfere with its decision. Any review of legislative motivation where the formal ties of legislation to interstate commerce are made will become inevitably a judicial decision on the weight of national interest in affecting commerce.

The proper role of the Court might be illustrated by *Oregon v. Mitchell*.[38] The government could have argued that differing age limitations for voting discouraged young people from traveling to states where they would not have the franchise, so Congress had power to eliminate this difference by statute to remove this discouragement from interstate movement.[39] But Congress did not refer to the commerce clause as a basis for the 18-year-old vote either in the statute or in the debates and committee reports. The legislation's connection with commerce is tenuous and conjectural. Consequently, even if the argument had been made, the Court would have acted appropriately in not considering the commerce clause as a basis for Congressional power. If the Court is to accept the legislature's judgment on need for legislation because of effect on commerce, it must demand that the legislature make that judgment.

Stewart dissented in *Perez* precisely because the majority opinion failed to tie the specific transaction regulated to the interstate transactions which Congress was concerned with. Douglas argued that a class of activities which affects interstate commerce may be regulated "without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce." In support of this proposition, he cites *United States v. Darby*,[40] *Katzenbach v. McClung*,[41] *Heart of Atlanta Motel v. United States*[42] and *Maryland v. Wirtz*.[43] But in each

37. *See* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964). These cases illustrate the difficulty of any attempt to disentangle motivation in legislation enacted under the commerce power. Surely condemnation of racial discrimination in public accommodations was universal in the Civil Rights Bill's supporters, but there was also an explicit recognition of the divisiveness of its effect on interstate commerce.

38. 400 U.S. 112 (1970).

39. The argument would likely lose as the Court in *Mitchell* seems to look at the power of the state to establish voting qualifications as a limitation of federal governmental powers which can only be overriden by a narrow government objective in protecting fundamental rights.

40. United States v. Darby, 312 U.S. 100, 124 (1941).

41. Note 37 *supra*.

42. Note 37 *supra*.

43. Note 9 *supra*.

of those cases, all of the activities in the class were tied to interstate commerce even though their individual effect may have been trivial. In *Perez*, Congress was concerned with the interstate transactions of organized crime, but it did not restrict the statute to participants in organized crime. In the cases Douglas cites, the characteristic used as a basis for classification has a relationship to interstate commerce. Stewart argues that the court has not shown this relationship to exist in the case of loan sharking. This point is crucial. Persons may be designated as members of a class because they share characteristic A. That class may affect interstate commerce because some of its members share characteristic B. The classification, by including persons who have characteristic A but not characteristic B, is overinclusive.[44] If there is no justification for being overinclusive, the statute should fall, since there is no need or utility in regulating individuals who have no effect on interstate commerce.

The decision in *Perez* then should turn on whether there was justification for the statute to be overinclusive. Justice Stewart does not deny the possibility that there is such a justification, he just says he does not see it. But there are sharp distinctions between loan sharking and other crimes, which justify the statute here. First, as Congress noted, loan sharking is a step in the takeover of legitimate businesses which is used to hide the illegal source of revenue of organized crime. Second, money's negotiable character makes it difficult if not impossible to trace its exact source. Since the loan sharking transaction was designed to hide connections with organized crime and its interstate nature is not readily susceptible of proof, it is necessary to prohibit all loan sharking transactions to make the regulation of loan sharking by organized crime effective. Douglas brushed by this point, quoting Holmes: ". . . when 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."[45] But the point should be the heart of the opinion. The tie to interstate commerce having been established, the Court should defer to Congressional determination as to the necessity therefore.

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44. *See* Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

45. Perez v. United States, 402 U.S. 146, 154 (1971), quoting Westfall v. United States, 274 U.S. 256, 259 (1927).