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KATZENBACH V. McCLUNG Revisited: How The Renquist and Roberts Courts Would Have Decided The Case

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I. Introduction

Consider the following hypothetical.

A vegetarian living in a small coastal New England town decides to open a restaurant, named Veggies, that only serves salads and soups. The freshness of these menu options is going to be Veggie’s biggest selling point and it advertises accordingly: nothing processed, canned or shipped from out of state will do. To ensure freshness, Veggies negotiates supply contracts with local farmers all within the state.

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***This article arose from an Independent Study conducted by Attorney Jannetty who is the primary author of this article. Dr. McEvoy suggested the topic which arose out of a discussion in the course The Supreme Court in the 1960’s. McEvoy presented the paper at the 2012 NEALS meeting and edited the article for publication.
The restaurant is going to be based in an old farmhouse on private property that is visible from the road, but several miles from the closest highway. All of the furniture and décor is purchased locally.

There’s just one snag: Veggies will not serve customers who are known for being racist. It is located in rural area with parochial racial views, and as certain clientele have been turned away, claims have started swirling that Veggies is engaging in discriminatory practices. As claims have grown to harassment, Veggies files a lawsuit seeking declaratory judgment that it has the right to decline service at its sole discretion. Miraculously, the case has made its way to the Supreme Court and will be heard in the upcoming session. What will the outcome be?

Counsel for the protestors rely heavily upon the 1964 Supreme Court decision of Katzenbach v. McClung in which the owner of Ollie’s BBQ sought a declaratory judgment that he did not have to serve blacks in his privately owned, local restaurant despite the passage of the Civil Rights Act of 1964.\(^1\)

Since its opening, Ollie's had a policy of only allowing whites to be served indoors, restricting service for blacks to a take-out window. The restaurant was located 11 blocks from an interstate on a state highway and even further away from any railroad or bus station.\(^2\) In the year prior to passage of the Act, Ollie’s had purchased approximately $150,000 of food locally, 46% of which was meat purchased from a local retailer who had obtained it from an out of state third party supplier.\(^3\) Despite passage of the law, Ollie’s announced its intent to continue its discriminatory practices, believing that forced compliance would result in the loss of business, as it catered to mainly local, white families who would decline to eat with blacks in the dining room.\(^4\)

The Supreme Court unanimously held that Ollie’s BBQ’s refusal to serve blacks was unconstitutional and in violation of the Civil Rights Act of 1964, which barred racial discrimination at any restaurant that serves or offers to serve food to interstate travelers or that obtains a substantial amount of food that has moved in interstate commerce.\(^5\) The Court stated that the Act was enforceable against Ollie’s because it was participating in interstate commerce, which fell under Congress’s power to regulate through the Commerce Clause.\(^6\) Counsel for Veggie’s would argue that the Katzenbach decision correctly assigned an overly expansive view of the Commerce Clause for purposes of remedying a social ill and that Ollie’s operated on a primarily local basis and therefore should not have been subject to regulation by Congress, whose regulatory power is limited to interstate economic activities. Because Veggies is operating in a similar fashion, it should be exempt from regulation by Congress under a proper interpretation of the Commerce Clause. That the holding in Katzenbach is specious is strengthened by subsequent cases where Congress’s ability to legislate policy through the Commerce Clause was denied by the Court, in United States v. Lopez and United States v. Morrison, in which the Supreme Court struck down acts of Congress holding that the Commerce Clause did not grant Congress a police power to regulate any economic activity that it could only tenuously connect to interstate commerce.

While many scholars concede that Katzenbach played a critical role in combating the rampant racism in America at that time, others argue the decision ranks among the most flawed in Supreme Court history. Would the outcome be the same if the Supreme Court decided Katzenbach today? The thesis of this article is the Katzenbach was wrongly decided based on the clear meaning of the Commerce Clause, which does not allow Congress to regulate economic activities that are local in nature. This article will examine the legal missteps of the Warren
Court in improperly expanding the Commerce Clause to regulate local economic activity.

II. Expansive Interpretations of the Commerce Clause

In the 1942 decision of Wickard v. Filburn, the Court determined that Congress had the authority to regulate economic activity through the Commerce Clause. This Clause applies only to economic activities if they are interstate in nature, that is, if they involve activities that cross state lines. An Ohio wheat farmer, Roscoe Filburn, brought suit against Secretary of Agriculture, Claude R. Wickard, contesting the constitutionality of the Agricultural Adjustment Act of 1938 and its penalties. The law mandated limitations on the amount of wheat each farmer could produce, calculated on a per acreage basis, to prevent overages or shortages that would cause market prices to fluctuate.

Prior to passage of the law, Filburn had planned a winter crop of wheat for personal and commercial use. As required by law, he was notified prior to the 1941 planting that his assigned wheat crop was fixed at 20.1 bushels for each of his 11.1 allotted acres. Ignoring this restriction, he sowed 23 acres in the winter of 1940, resulting in an “overproduction” of 239 bushels. Under the Act, this overproduction constituted “marketing excess” which resulted in a penalty of 49 cents per excess bushel.

Filburn refused to pay the penalty and to deliver the excess wheat to the Secretary of Agriculture. He filed a lawsuit to enjoin enforcement of the Act and sought a declaratory judgment that the law unconstitutionally exceeded Congress’s power to regulate commerce. The federal district court determined that Filburn was not subject to the amended Act because it would impose retroactive penalties in violation of the Fifth Amendment and thus found them unenforceable. The decision was based primarily on comments made by Wickard during a mid-day radio address to wheat farmers which few heard because of the time it was broadcast. The Secretary appealed to the Supreme Court.

Filburn argued that his production of wheat for personal consumption was beyond the power of Congress to regulate through the Commerce Clause, as his production was “local” in character and any effect that his production had on interstate commerce was “indirect” at best. The government countered that the Act was aimed at regulating the sale and prices of wheat, and not its production or consumption, which it could do under the Commerce Clause. In addition, it argued that the Act was “sustainable as a ‘necessary and proper’ implementation of the power of Congress over interstate commerce.”

After a lengthy analysis of the Commerce clause, the Court determined that economic activities appearing local in nature could still be subject to legislative regulation if they have an impact on interstate commerce through repetition. What if other farmers ignored the law as Filburn did? The Court noted that Filburn’s act of growing excess wheat for personal consumption, if considered in the aggregate, could substantially affect both the price and availability of wheat on the market.

The Warren Court relied heavily upon Wickard in Katzenbach. Like Filburn, McClung, the owner of Ollie’s BBQ, sought a declaratory judgment that an Act of Congress based on the Commerce Clause was unconstitutional. McClung sued to enjoin the government from forcing him to comply with Title II of the Civil Rights Act of 1964, which states that persons could not be turned away on discriminatory grounds from restaurants that served or offered to serve food to interstate travelers or if they obtained a substantial amount of food through interstate commerce.

The district court determined that Ollie’s was not subject to regulation by the Act, as Congress had “legislated a conclusive presumption that a restaurant affects interstate commerce.
commerce if it serves or offers to serve interstate travelers or if a substantial portion of the food which it serves has moved in commerce." The Court determined that such legislation was inappropriae because Congress had failed to establish a "demonstrable connection" between the meat obtained from out of state by the third party retailer and the conclusion that Ollie's discriminatory practices would affect interstate commerce. Thus, Ollie's was granted the injunction and declaratory judgment that its policy of race-based service was not subject to regulation by the Civil Rights Act of 1964.

The government appealed, and the case went to the Supreme Court. In evaluating whether Ollie's was subject to the Act, Justice Clark, writing for the majority, discussed the findings of the extensive congressional hearings, which included an abundance of testimony indicating that racial discrimination at restaurants had acted as a deterrent for many blacks, who then choose to spend their money elsewhere resulting in lower profits for certain restaurants. In turn, these restaurants purchased less food from the market. There was also testimony that discrimination in restaurants had a significant impact on interstate travel, as blacks were prevented from purchasing food while traveling except at undesirable locations, and would avoid travel rather than risk being subjected to discrimination. In addition, both new businesses and black, skilled workers were deterred from settling in areas where racial discrimination at restaurants was rampant because, as the Court pointed out, "one can hardly travel without eating."

Despite these findings, counsel for Ollie's argued that Congress had overstepped its bounds by attempting to regulate the activity of all restaurants rather than evaluating each on a case-by-case basis. Instead, Ollie's argued that Congress "arbitrarily created a conclusive presumption that all restaurants meeting the criteria set out in the Act 'affect commerce,‴ which, it argued, was inappropriate in this instance because Ollie's was operating solely on a local basis.

The Court was not persuaded and reversed the lower court's decision. Based on Wickard v. Filburn, it determined that the economic impact of the food purchased by Ollie's was insignificant, but if other restaurants followed suit, the effect on interstate commerce would be great.

The Court determined that as long as Congress had a rational basis for its legislation, it could act in a preventative manner. Because the record of congressional hearings was replete with indications that racial discrimination in restaurants already existed and was spreading and would presumably have a negative effect on interstate commerce, the Court specifically noted that "Congress was not required to await the total dislocation of commerce" prior to taking action. Thus, the Court held that "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." Furthermore, the Court reiterated its prior holding in Wickard v. Filburn, specifically stating that the power of Congress did extend to local activities "even if [the] activity [is] local and though it may not be regarded as commerce...if it exerts a substantial economic effect on interstate commerce."

III. Controlling the Breadth of the Commerce Clause

Consider what the outcome of Katzenbach would have been had it been decided by the Supreme Court thirty-one years later. In 1995, the Court issued a ruling in U.S. v. Lopez, striking down the Gun-Free School Zone Act of 1990, a law that prohibited the possession of a gun on school grounds or within 1,000 feet of a school, as unconstitutional. The law was premised upon the notion that the presence of guns in school zones negatively affects the interstate commerce in two ways: 1) necessitating higher insurance premiums that must be
carried by the population, and 2) deterring travel to parts of the country deemed as unsafe.\textsuperscript{41}

The Supreme Court rejected these contentions, determining that gun possession within a school zone could not even remotely be classified as an economic activity subject to regulation by Congress through the Commerce Clause because such possession, even when considered in the aggregate, does not substantially affect interstate commerce.\textsuperscript{42} The majority opinion, authored by Chief Justice Rehnquist and joined by Justices O'Connor, Scalia, Kennedy and Thomas, noted the danger in allowing Congress to legislate through the Commerce Clause where the connection to interstate commerce is tenuous, writing "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."\textsuperscript{43}

The Court analyzed the enumeration of powers among the separate branches of government, cautioning that giving Congress free rein to legislate any activity it deemed vaguely connect to interstate commerce would "effectually obliterate the distinction between what is national and what is local and create a completely centralized government."\textsuperscript{44} In addition to warning against acts of Congress that would foster the creation of a centralized, rather than enumerated, national government, the Court also made the significant point that if it were to allow Congress to invoke the power of the Commerce Clause in an unchecked manner, it would be "hard pressed to posit any activity by an individual that Congress is without power to regulate," such as selling local restaurants whom it must serve.\textsuperscript{45} Consequently, the Gun-Free School Zone Act of 1990 was declared unconstitutional.

In a concurring opinion, Justices Kennedy and O'Connor took the majority position one step further arguing that to allow Congress to legislate through the Commerce Clause, despite a weak connection between the regulated activity and interstate commerce, would result in the destruction of government accountability. Permitting Congress to legislate in an unimpeded manner would not only "[blur] the boundaries between the spheres of federal and state authority," but it would also result in the "inability to hold either branch of the government answerable to the citizens [which is] more dangerous even than devolving too much authority to the remote central power."\textsuperscript{46} Justice Kennedy also discussed at length the Framers' intent in crafting the Constitution by creating a government marked by separation of powers and checks and balances, not a centralized government controlled by Congress.\textsuperscript{47} The Court therefore should, through judicial review, protect the enumeration of powers prescribed by the Constitution, which it failed to do in Wickard and Katzenbach.\textsuperscript{48}

In another concurring opinion, Justice Thomas observed "our case law has drifted far from the original understanding of the Commerce Clause," remarking the hope that "in a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to ... that Clause."\textsuperscript{49} That jurisprudence would make clear that Congress does not have regulatory police power and, in fact, that there are real limits to the scope of its power to legislate.\textsuperscript{50} Importantly, he reminded that where the Constitution was meant to grant authority to Congress to regulate interstate commerce, it contains a specifically enumerated power, such as the power to coin money and the power to establish post offices and roads.\textsuperscript{51} Had the Framers intended for Congress to regulate nearly all economic activities, they would have delineated such intentions along with the other powers specifically reserved for Congress. The fact that the Constitution contains no such enumeration is both paramount and instructive. Congress should be prevented
from acting as though it has the police power under the guise of regulating interstate commerce.

Without question the Katzenbach decision would have been decided differently by the Lopez Court. Certainly those Justices that joined in the majority opinion in Lopez would agree, that just as one would be hard pressed to find a connection between guns in school zones and interstate commerce, one would be similarly hard pressed to find a connection between a small town restaurant that caters to a local clientele and interstate commerce. The Lopez majority specifically rejected the argument that guns in school zones negatively affected travel and deterred new settlement as a means of classifying guns in school zones as an economic activity. These same arguments regarding travel and settlement were accepted by the Warren Court in Katzenbach. In 1995, they would have been rejected by the Renquist court.

The only potential connection between Ollie’s BBQ and interstate commerce was that some of its meat was procured from a local buyer who received it from an out of state third party. This connection is just as tenuous, if not more, than the contention that guns school zones will result in higher insurance premiums and a decrease in travel. Ollie’s owner did not travel out of state to purchase any food nor did he knowingly contract with any out of state suppliers. The fact that a local supplier with whom he had a relationship tended to secure meat from out of state was not a conscious act by Ollie to conduct business across state lines.

Furthermore, as highlighted by Justice Thomas’s concurring opinion in Lopez, Congress’ action would surely be likened to a police power if afforded the power to dictate who restaurateurs are required to serve on their private property absent any substantial connection between the restaurant’s activity and interstate commerce. Even if considered in the aggregate, a restaurant’s selection of patrons does not rise to the level necessary for Congress to have the authority to regulate in protection of interstate commerce. At worst, those local patrons that know they will not be permitted to dine in one restaurant will either spend their money at a grocery store or go to a different restaurant. The fact that everyone needs to eat was a point that was ironically and mistakenly used by the Warren Court in support of its decision to uphold the Act against Ollie’s BBQ. Either way, money spent on food is entering a market, leading to the conclusion that interstate commerce is not substantially affected by a local restaurant’s practices, however discriminatory they may be. The Rehnquist Court would not have maintained the connection recognized by the Warren Court between the meat and interstate commerce and, if the same line of reasoning applied in Lopez was applied in Katzenbach, the Civil Rights Act of 1964 would have been struck down as applied to Ollie’s BBQ.

The Rehnquist Court’s 2000 decision in U.S. v. Morrison reached a conclusion similar to that in Lopez regarding Congress’s ability to legislate through the Commerce Clause. In Morrison, Rehnquist writing for the majority and joined by O’Connor, Scalia, Kennedy and Thomas, struck down the Violence Against Women Act of 1994 as unconstitutional, determining that the violent act of rape was not an economic activity and Congress’s attempt to regulate it exceeded its power.

The opinion made several references to the decision in Lopez, specifically noting that it applied to the fact that the Commerce Clause could not be used by Congress to regulate activities that were noneconomic in nature, even if when considered in the aggregate, it could have an indirect economic impact. Although the government relied upon evidence compiled in congressional hearings indicating that rape deterred interstate travel and business, diminished national productivity, and resulted in increased medical costs, the Court
rejected these findings as virtually having the effect of classifying rape as an economic activity.\textsuperscript{55}

In his concurring opinion, Justice Thomas again stressed that the state of modern case law with respect to defining the scope of the Commerce Clause had diverged greatly from its original understanding and early case law.\textsuperscript{56} He referred to his opinion in \textit{Lopez} to note that “[u]ntil this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.”\textsuperscript{57}

Following this line of reasoning it is clear that Congress does not have the police power to remedy social ills such as gun violence in school zones, violence against women, or the discriminatory actions of a private, local restaurant. The Commerce Clause does not grant Congress the ability to disregard the Constitution’s enumeration of powers. Nor does it afford Congress the authority to legislate in areas that are specifically reserved for regulation by the states, or that are not subject to legislation at all, such as the activities of a business such as Ollie’s BBQ.

The majority in \textit{Morrison} thus would likely overturn the holding of the Warren Court in \textit{Katzenbach}. A local restaurant’s activities, irrespective of whether it deterred travel, incidentally resulted in lower profits that led to fewer purchases by the restaurant, or resulted in deterred settlement to the area, are just that: local. They cannot be viewed as an interstate economic activity if its practices, so far as conducted by the restaurant, are local. Nor can they be viewed in the aggregate so as to elevate their practices from being local in nature to being interstate.

Even more persuasive is the \textit{Morrison} majority’s reference to the Civil Rights Cases, five cases heard collectively by the Supreme Court in 1883.\textsuperscript{58} Several African-Americans filed suit claiming discrimination by theatres, hotels, and transit companies in violation of the Civil Rights Act of 1875. The Supreme Court held that Congress lacked the authority to outlaw racial discrimination by private individuals and organizations or to regulate any non-state based discrimination.\textsuperscript{59} Writing for the majority, Justice Bradley directed that “[i]t would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.”\textsuperscript{60} While laws can be enacted to protect against discrimination by a state or federal body or agency, such as discrimination by police officers or on public transportation, no such law can dictate whether one chooses to discriminate on their own property, such as in their home or car. This decision has never been overturned. In fact, the majority in \textit{Morrison} notes its “enduring viability.”\textsuperscript{61}

It is safe to say that if the \textit{Morrison} majority had decided \textit{Katzenbach}, the result would have been different. It is doubtful that the Court would determine that the business of Ollie’s BBQ affected interstate commerce or that the Court would instruct Ollie’s, a privately owned, local restaurant, about whom it must accept as patrons. Although Ollie’s practices were morally objectionable, they were not illegal or subject to regulation by Congress. The Warren Court failed to appreciate, or perhaps refused to acknowledge, these differences, choosing instead to issue a unanimous decision not based on the controlling principles outlined in the Constitution.

IV. The Roberts Court

What if the Roberts Court were to hear \textit{Katzenbach} today? Would the outcome have been similar to that reached by the Rehnquist Court in \textit{Lopez} and \textit{Morrison}? Justices Scalia, Thomas and Kennedy, who all joined in the majority opinions in \textit{Lopez} and \textit{Morrison}, are still on the Court. Thus, only two more votes would be needed to overturn \textit{Katzenbach}. 


Justice Roberts would be one of these votes because he indicated his agreement with the Lopez decision during the hearings before the Judiciary Committee in 2003, during which he stated "[i]t's not a question of an abstract fact, does this affect interstate commerce or not, but has his body, the Congress, demonstrated the impact on interstate commerce that drove them to legislate? That's a very important factor. It wasn't present in Lopez at all." It would seem that he, too, would agree that a tenuous connection between the regulated activity and interstate commerce is not enough to support legislation under the Commerce Clause.

The second vote would likely come from Justice Alito, who authored a lengthy dissenting opinion in United States v. Rybar during his tenure on the United States Court of Appeals for the Third Circuit. He wrote that he would have struck down congressional legislation banning private citizens from owning submachine guns on the same grounds as outlined in Lopez, noting that to regulate activities that are clearly local in nature absent any actual or established connection to interstate commerce under the guise of the Commerce Clause was an unconstitutional expansion of Congress's power. His opinion opens with the poignant, obviously rhetorical question, "Was U.S. v. Lopez a constitutional freak? Or did it signify that the Commerce Clause still imposes some meaningful limits on congressional power?" He also discussed the importance of preserving federalism as discussed in Lopez, reminding that the sensitive balance between state and federal power should be respected.

V. Conclusion

Katzenbach v. McClung was a unanimous decision based on a moral and ethical grounds regarding race, not a legal sound interpretation of the Constitution or the powers it affords to Congress. The court decision was clearly a policy-making one than one aimed at correctly interpreting the law.

The outcome of Katzenbach is unsurprising, having been before the Court only a decade after the landmark decision of Brown v. Board of Education at a time when the social ills of racism were still plaguing the country. It was one of several decisions in a decade where unanimity on issues of racial equality was of paramount concern to the Court.

However, the interpretation of the law and a government defined by separation of powers, rather than a centralized police power, should not have been sacrificed for purposes of combating racism. Congress does not have the authority to regulate private activities on private property. Just as the government cannot force a private citizen to allow persons he finds objectionable into his private home, it cannot force Ollie's BBQ to serve blacks or force Veggies to serve racists in its local, privately owned restaurant. More recent interpretations of the Commerce Clause reveal that there are limits to Congress's power to legislate, and those limitations should certainly be recognized in Veggie's case.

1 Id., 379 U.S. at 296 (1964).
2 Id.
3 Id.
4 Id.
6 Id.
8 U.S.C.A. Const. art. 1, § 8, cl. 3.
9 Id., 317 U.S. at 113 (1942).
10 Id. at 14.
11 Id., 317 U.S. at 114 (1942).
12 Id.
13 Id. The Act was amended May 26, 1941. Prior to the amendment, the penalty was fixed at 15 cents per bushel. In a national radio address to wheat farmers, the Secretary of Agriculture announced the terms of the proposed referendum, but failed to inform of the increased penalty rate one-half of the parity loan amount rate of about 98 cents. The farmers then
voted and passed the amendments by a vote of 81% to 19% and it is argued that they did so without being advised of this penalty increase.

14 Id.
15 Id., 317 U.S. at 118 (1942).
16 Id.
17 Id.
18 Id.
19 Id., 317 U.S. at 119 (1942).
20 Id.
21 Id. The Court briefly discusses the Government's reliance on "marketing" regulation versus "consumption" or "production" regulation, the former of which the Government perceived as subject to legislative regulation. The Court completely rejected any argument based on these distinctions. Id., 317 U.S. at 124 (1942).
22 Id., 317 U.S. at 124 (1942). Citing United States v. Wrightwood Dairy Co., 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726 (1942) (wherein the Court instructed "[t]he power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution ... It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."), the Court instructed "[t]he commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."
23 Id., 317 U.S. at 127 (1942).
26 Id., 379 U.S. at 297 (1964).
27 Id.
29 Id., 379 U.S. at 299-300 (1964).
30 Id.
31 Id.
32 Id., 379 U.S. at 300 (1964).
34 Id.
FINANCIAL LITERACY: EDUCATING STUDENTS TO UNDERSTAND THE BENEFITS AND RISKS OF INVESTMENTS

by

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INTRODUCTION

The financial crisis of 2007-2009 that continues to reverberate globally exposed an underlying flaw both within the financial community and among the general population. The lack of knowledge about the basic understanding of finance becomes more and more apparent. This ignorance affects not only the public at large, but also sophisticated investors who were deceived by the complex financial instruments that were a hallmark of the giddy rise of values especially in the housing market.1

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