



- Lee Burgess: Welcome back to the Law School Toolbox podcast. Today we are trying something new. We're introducing a series of podcast episodes called "Listen and Learn", where we're going to review substantive areas of the law, and apply some of that law to facts. Today we're going to talk about the Commerce Clause. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you'll be the best law student and lawyer you can be.
- Lee Burgess: We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.
- Lee Burgess: Welcome back to the Law School Toolbox podcast. The point of our "Listen and Learn" series is to talk through substantive areas of the law that we find students struggle with, and explain how this law is applied to a fact pattern. Today, we are talking about Constitutional Law. Enjoy.
- Lee Burgess: Most first-year Constitutional Law classes are separated into two discrete areas of study. The first is a structural approach to Con Law, and the second is the study of individual rights. Today, we are going to focus on structural Con Law. This is where students learn about the separation of powers among the three branches of government, how those powers came to be and the scope of those powers, and what it looks like when those powers are abused, limited, or expanded.
- Lee Burgess: Typically, classes will start out with the judiciary's seminal meta-analysis of its own power, found in Marbury v. Madison. Then, to avoid the risk of overthinking the Court's power to decide its own power, we tend to quickly move on to Congressional power, and the most plenary of those powers, the power to regulate interstate commerce.
- Lee Burgess: The Commerce Clause can tend to overwhelm students, because there is a slow crawl through a series of cases before you get to the modern formulation. Then you have a few more cases after that, which add nuance to the rule. If you have a professor who wants you citing cases, your rule statement for the Commerce Clause may have as many as five or six different case citations in order to present a complete rule.
- Lee Burgess: Today, we are going to look at a fact pattern that asks whether a particular activity falls within Congressional power, and we'll build a case-based rule section together before working through analysis.



- Lee Burgess: So, let's go to a fact pattern: Congress was presented with a compelling study reporting that office employees across the country were experiencing unprecedented bouts of sluggishness after taking lickable wallpaper breaks. Lickable wallpaper is candy-flavored wallpaper that is packed with so much sugar per square inch that the average American will inevitably sugar crash within 30 minutes of a five-minute wallpaper session. In order to avoid a wallpaper-induced economic slump, Congress banned the production, distribution, sale, and consumption of lickable wallpaper.
- Lee Burgess: Willy Wonka is a retired candy company mogul whose company specialized in linkable wallpaper prior to the ban. The company, now fully owned by the Oompa Loompas as a worker-run cooperative that operates on a consensus model, complied with the statute. However, Willy Wonka himself had a personal stash of wallpaper that covered every inch of his mansion, and which he used regularly to balance his sugar-fueled hyperactivity with regular afternoon naps. The feds caught wind of his stash and confiscated it, finding Willy Wonka to be in violation of the ban. Willy Wonka sued, claiming that the ban was unconstitutional under the Commerce Clause.
- Lee Burgess: Now, using our series of cases, let's build out a Commerce Clause rule. First, we state the basics. Congress has the power to regulate interstate commerce under the Commerce Clause of the Constitution. This can be found in Article I, Section 8, Clause 3 of the Constitution, specifically. The modern formulation of the commerce power, which was developed in *The United States v. Lopez*, tells us that Congress may regulate, one, channels of commerce, two, instrumentalities of commerce, and three, activities that have a substantial effect on commerce.
- Lee Burgess: The "activities that have a substantial effect on commerce" part is where we find the most nuance, which means, for the purpose of exams, the most testability or ambiguity. The exception is really important in civil rights cases, like *Heart of Atlanta*. For the purpose of this exercise, we're going to spend our time on number three – substantial effects.
- Lee Burgess: Another quick thing to note – the *Lopez* formulation is an "or" situation, meaning you don't need to find a law that governs channels AND instrumentalities AND has a substantial effect on commerce, in order to be constitutional. It only takes one category to make the Commerce Clause work.
- Lee Burgess: Okay, so adding to our rule, we are now complicating our substantial effects test. Under *Wickard v. Filburn*, a foundational Commerce Clause case, activity that affected interstate commerce would be contemplated in the aggregate. However, the Court in *Lopez* narrowed limited aggregation somewhat, emphasizing that the activities contemplated by subsection three, or C, depending on how you're numbering them, must be directly economic in nature. *Lopez* added that, in order to classify an activity as economic, one could



not pile inference upon inference, meaning Congress cannot rely exclusively on the indirect economic consequences of an activity. In *Morrison*, we saw the Rehnquist Court interpret this to mean that violence against women was not directly economic in value, and that the aggregate effect on commerce was too attenuated from the economic activity to uphold the relevant section of the Violence Against Women Act.

Lee Burgess: Now, what if an activity is economic, but limited to intrastate activity? Well, under *Raich*, Congress may still regulate that activity if it is rationally related to a broader Federal regulatory scheme. Additionally, while economic activity includes distribution and consumption of commodities, it does not necessarily need to include commercial sale. *Raich* gave us that rule as well.

Lee Burgess: Now, finally, Congress is limited to regulating actual activity, not inactivity, and may not, therefore, compel activity. That's from *NFIB v. Sebelius*.

Lee Burgess: So, let's come up with an analytical stepladder before we dive into the fact pattern. First, who passed the law – Congress, or a state? If it's Congress, then does it fall within their Commerce Clause power – meaning, does it relate to, one, channels of interstate commerce, two, instrumentalities of interstate commerce, and three, activities that have a substantial effect on interstate commerce? Let's say we think we're in category three – activities that have a substantial effect on interstate commerce. Is the activity directly economic in nature? For example, does it relate to the distribution and consumption of commodities? Or does it have an indirect effect on interstate commerce?

Lee Burgess: Also, where is the activity taking place? If it is only happening in one state, does it share a jurisdictional nexus – meaning, is it rationally related to a Federal regulatory scheme? Finally, are we sure that Congress is regulating activity? Or is it trying to compel activity in the face of inactivity?

Lee Burgess: Now that we've got our rules put together, let's go back to our *Willy Wonka* situation. So, who passed the law? Congress. And why? Well, because they've correlated lickable wallpaper with an impending economic downturn. What are they regulating? Not channels and not instrumentalities. That leaves us with the third and most dynamic category – activities that substantially affect interstate commerce. And what is the exact activity being regulated? Now, don't get confused and say workplace productivity. That may be the State interest, but that's not the activity itself. So, if you're needing to identify an economic activity, don't get led astray by distractors that seem more connected to economics than the activity itself.

Lee Burgess: Here, the activity being regulated is production, distribution, sale, and possession of lickable wallpaper. Is this an economic activity? This is another place where you may find yourself wanting to argue that, no, the licking of



wallpaper is an improper attenuation under Lopez and Morrison, and is not an economic activity in itself. However, Congress is actually banning commercial activity related to lickable wallpaper, not just the use. So, Congress may prevail on this point, and therefore we can check off the requirements under the Lopez formulation.

Lee Burgess: Now, something you always want to do when you're looking at an exam fact pattern is identify whether the facts are pretty closely analogous to a case you've learned. Here, you may have heard echoes of Raich as you thought through these facts. So, Willy Wonka is going to argue that Congress exceeded the scope of its power as applied to him, because he was not putting the wallpaper into the stream of interstate commerce, but rather just enjoying it for his personal use in the State of X. Depending on how his use affects the supply and demand of this product, Congress would likely counter that, as in Raich, his continued personal use of lickable wallpaper still has a substantial effect on interstate commerce because it shares a jurisdictional nexus with a Federal regulatory scheme, which here is the total ban of lickable wallpaper for the purpose of bolstering the economy.

Lee Burgess: So, where do you land in this argument? Remember, a lot of the facts you come across in your exams will be intentionally ambiguous in order to get you arguing. What's often less important than the conclusion is how engaged and thoughtful your reasoning was on your way to that conclusion. So, feel free to go ahead and play with these facts as you consider the Commerce Clause.

Lee Burgess: And with that, we're out of time. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website [contact form](#) at LawSchoolToolbox.com. Thanks for listening, and we'll talk soon!

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