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The Commerce Clause and its Effect on Federalism

An honors thesis presented to the
Department of Political Science
University at Albany, State University of New York
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Abstract

The issue of federalism has been one that has plagued our nation since its inception. There are many things that affect the state, federal government relationship and this paper focuses on the Commerce Clause. Looking at a series of cases and discussing the judicial opinions and rulings that came out of them it is concluded that there is a negative correlation between the Commerce Clause and federalism. In other words when the Commerce Clause is utilized powers are taken away from the states. From the time of *Gibbons v. Ogden* all the way to 2012 with *National Federation of Independent Business v. Sebelius* the Commerce Clause has evolved with our nation and proved an instrumental tool in the belt of the federal government. The intention of the founders could never have known that the country would grow and industrialize the way it has.

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Introduction

Federalism, or the relationship between state and federal government, is an issue that has plagued our country since its birth. When creating state governments many states did not give the executive branch much power, in fact our first guiding document left little to the federal government. The Articles of Confederation were formed and the very words painted a picture, "each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated" (Section 2, Articles of Confederation). The colonists feared a strong and unified central government, the very reason the revolution began. Due to this fear they created their new government with a weak central body. A few years after the passage of the Articles of Confederation it was clear that this document did not allow for a strong country, especially in economic terms. The issue with the Articles of Confederation was that each state had control over its own commerce and this led to various amounts of debt from states and the Confederation Congress. When it came to paying back these debts the lack of a central entity to deal with the country as a whole became a considerable issue.

The Constitution was the next step, but getting there would not be easy. While the Constitution was being drafted there was a divide, the sides were known as the Federalists and the Anti-Federalists. The Federalists wanted a strong central government, in order to unite the country and be stronger on an international level. The Anti-Federalists still held onto their fear of monarchy, therefore they wanted to give the majority of the power to the individual states. This conflict became evident in the authorship of the Federalist Papers as well as the Anti-Federalist Papers. These

papers were written by many of the founding fathers expressing concerns with the plans, as well as defending their reasons.

The main theme within the Federalist papers is that the Union needs to be united and strong. The Federalist papers claim that a united strong front is necessary for reasons of security, economic prosperity and personal liberty. They also make various arguments defending the Constitution, saying that it doesn't give too much power to a central authority. One of the most famous lines that represents this is in regards to the judicial branch that doesn't have the power of "the sword nor the purse" (Federalist No.78). The system of checks and balances between the branches were used as the foundation of the Federalist argument that this would not turn into the monarchy they recently succeeded from. Federalist No. 42 looks largely at the commercial system and the result the Constitution would have on that. The issue of foreign commerce, which stemmed from the inability of the Articles of Confederation to deal with the war debt, was front and center. The argument was made that this new Constitution would solve that problem, with the Commerce Clause.

On the other hand the Anti-Federalists were not agreeable to the Federalist papers and produced their own in response. They argued that this Constitution would create an opening for a new tyranny. The colonists mistrust of government was shown in considerable amounts throughout the Anti-Federalist Papers. The Anti-Federalists also called for what would become the Bill of Rights. The Bill of Rights were their way of protecting the individual, while still being able to ratify the Constitution.

This debate would last far longer than the lives of the original debaters. The struggle of the power between state and federal government has and will continue to be the center of many political conflicts. Federalism touches so many aspects of government, much like the commerce clause. The Commerce Clause can be found in Article 1, Section 8, Clause 3 of the Constitution. It reads, “The Congress shall have power... to regulate commerce with foreign nations, and among several states, and with the Indian tribes”(Constitution). While this may be a very brief section of the Constitution it has proved to be one of the most utilized clause in history. Though the clause may be short, the words were carefully chosen. It is important to recognize that it is among several states, not between or involving. This wording will come to create the way the clause is understood by the courts. Until *Gibbons v. Ogden*, the first Supreme Court case to involve the Commerce Clause, there wasn't much to discuss. This case would transform the clause into a significant legal argument. Over the years the courts have created copious amounts of precedent, guidelines and rules to follow in regards to the Commerce Clause.

“"Commerce" was defined in the early years of the Union as trade, intercourse, navigation, traffic, and transportation for profit” (Bork p. 861). This broad definition of the word commerce is what has led to the interpretation of the clause. Anything that has to do with buying and selling, can ultimately be argued as part of the Commerce Clause. Bork and Troy discuss what commerce is and what it is not. The interesting part is when they discuss what commerce is not, and mainly the point they make that this is much clearer than what commerce is. Looking at the connection between federalism and the commerce clause has a lot to do with how

broadly the Commerce Clause can be interpreted, and the fact that scholars such as Bork and Troy are more apt to know what commerce isn't shows that this truly is a very broad clause, leaving it up to interpretation.

The Emergence of the Commerce Clause

Gibbons v. Ogden was the first time that the Commerce Clause was really brought into question. It is the landmark case that began the use of the Commerce Clause in many debates between state and federal control. The narrative of this case is that Ogden asked the New Jersey government for a monopoly on the use of steamboats on the Hudson. Later Livingston and Fulton, who had a monopoly on the New York side of the Hudson sold their share to Ogden. The New Jersey Legislature takes away Ogden's monopoly. Gibbons has a federal license to have a monopoly in New York and New Jersey. These licenses conflict and a case is brought to the Supreme Court. The main question in this case is do the states have concurrent power to regulate interstate commerce? Justice Marshall delivers the opinion of the court ruling that the states do not have the power to regulate interstate commerce because the federal government has supremacy. He also defines commerce as "commercial intercourse between states". This case is so important because it opened the door to use the Commerce Clause to give the federal government more power to regulate the states.

Evolution of the Commerce Clause

In order to understand the importance of the Commerce Clause and how it comes to have such a large impact on federalism, one must look at a variety of cases. While the outcomes of these cases are important, what really must be looked at is the content of the

majority opinion. A study of cases varying in the specific target, but all relating to the Commerce Clause is vital to understand the connection. The Commerce Clause cases are a diverse set of cases, which is the reason it affects federalism to such an extent.

Shortly after the emergence of the Commerce Clause in *Gibbons v. Ogden* another case was brought to the Supreme Court with the same clause at the center, *Cherokee Nation v. Georgia*. In 1831 the Cherokee nation which lies within Georgia's borders brought a case to the Court stating that certain acts enacted by the state legislature of Georgia should not affect the tribe. This case was tricky because the Cherokee nation is not technically a state or a foreign nation, and it does lie within Georgian territory. The Commerce Clause ends up being the best course of action because it specifically mentions Indian tribes. With this mindset Justice Marshall delivered the opinion of the court stating, "considerable aid is furnished by that clause in the eighth section of the third article which empowers Congress to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes" (*Cherokee Nation v. Georgia*). While they used the Commerce Clause in a different sense, to deliberate jurisdiction, they still utilized the clause in a way pursuant to the relationship with federalism. The Court ruled that they did not have grounds to file the injunction. This did not take power away from the states, but it did take it away from the Cherokee nation showing that this clause does in fact have the ability to change the side that the power lies on. It was also the beginning of the use of the Commerce Clause for more than just addressing commercial regulations.

Champion v Ames is considered the "turning point" of the Commerce Clause (Bork and Troy). This case deals with the sale and mailing of lottery tickets. This is the first case where a ban is in consideration with respect to the Commerce Clause. The majority ruled

that Congress was within its powers to ban the mailing of tickets across state lines. The part that is interesting about this case is the dissenting opinion's warning of the slippery slope this may ensue. Justice Fuller along with three other Justices dissented stating, "an act prohibiting the carriage of lottery matter would be necessary and proper to the execution of a power to suppress lotteries; but that power belongs to the states and not to Congress. To hold that Congress has general police power would be to hold that it may accomplish objects not entrusted to the general government, and to defeat the operation of the 10th Amendment" (Champion v. Ames). The fear is that a national police power is being developed by allowing Congress to create a ban. Under the Constitution the states have the police power and the dissenters in this case are weary of the federalism issue.

Hammer v. Dagenhart took place in 1918 in regards to child labor laws. This time period followed Reconstruction and the state's rights issue was prominent. Leading up to, during and especially after the Civil War the states were concerned about their power. The issue of slavery had divided the states, with the southern states worried that they would be left with no power. This led to an even greater fear of a unified central government that had the ability to control states with varying interests. The Keating-Owen Act was put into place to ban the shipment of products, produced by child labor, between states. The act was put into effect because there was a belief that state laws were not doing enough to solve the problem, so the federal government stepped in. This is the exact problem facing federalism. The states are passing laws regarding child labor, while these laws vary they do so because different states have different needs. The federal government wanting to take over this power is concerning to many, who in 1918 are still concerned with the federal government having too much power. Due to this conflict the constitutionality of this act

was taken up to the Supreme Court. The majority ruling struck down the act. They said that it was clear that the intent of the act was to hinder manufacturing by child labor, not the shipment across state lines. Therefore, the manufacturing that was happening in single states could not be regulated by the federal government, which is precisely what the act did. The dissenting opinion by Justice Holmes argued that the Commerce Clause did allow the federal legislators to intervene, because they specifically mentioned that the shipment was the part being regulated. This argument and the federal governments want to have the power to regulate child labor led to a similar case, *Bailey v. Drexel Furniture Company* in 1922. In 1922 the issue was now a tax on all products made by means of child labor. Again the court ruled against the federal government saying that this was too similar to *Hammer v. Dagenhart*. Justice Taft in the opinion of the court states, “In the light of these features of the act, a court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed” (*Bailey v. Drexel Furniture Company*). The majority did not believe that Congress was simply using their power to tax, but rather trying to regulate the commerce within state borders. This was due to the historical context. The major cases heard in the Court before this mainly dealt with slavery issues, such as *Plessy v. Ferguson*. The Court was in a time period that they felt weary of the federal government who has been passing acts that continuously put the state’s power into question.

These cases both favored the states and allowed federalism to thrive, but they ultimately show that there is a correlation between the two. The cases were brought to the Supreme Court for sole reason of states feeling like their power is being taken away from them. The tenth amendment of the Constitution gives all power to the states that is not

otherwise listed in the Constitution. This amendment is the reason that the commerce clause is cited so often to take power away from the states. In further cases we will see times that the federal government does succeed, even when the Commerce Clause is not the clear path.

Wickard v. Filburn is a case that is continuously cited as precedent for other cases involving the Commerce Clause. The case was brought to the Supreme Court in 1942 by the Secretary of Agriculture, Wickard. Congress had passed the Agricultural Adjustment Act that put a penalty on farmers that grew more wheat than the quota of what they were allowed. During the time of this Act the Country was struggling to get out of an economic depression. With Franklin D. Roosevelt in office the New Deal was in full swing. The act was a part of the New Deal and like many other New Deal legislation found its way to the courts. This was a reoccurring theme of Roosevelt's administration because in order to pull our economy back from the crash years later he felt that the federal government needed to take action. This case was brought to the Court after Roosevelt's attempt at a "court-packing plan", the turning point in the Supreme Court's rulings on the New Deal legislation. Seeing the ability these acts appeared to have on pulling the country back from depression the Court was much more willing to allow the federal government to take charge with the national crisis. When the case was brought Filburn's argument was that the extra wheat was only for his family and their animals, not to sell. Ultimately the court rules in favor of Wickard, the federal government. The act was upheld because Filburn growing extra wheat for his family means that he still has more to sell and this has an impact on the wheat market throughout the country. The key to the majority opinion is the way they explain local activities and their impact on interstate commerce. Justice Jackson delivered the opinion of the court stating, "In answer, the Government argues that the statute regulates neither production nor

consumption, but only marketing, and, in the alternative, that, if the Act does go beyond the regulation of marketing, it is sustainable as a "necessary and proper" implementation of the power of Congress over interstate commerce" (*Wickard v. Filburn*). This created a precedent where even if an activity is local, it is not immune from federal regulation because it can have a substantial effect on interstate commerce. "Federal intervention constitutionally authorized because of matters having such a close and substantial relation to interstate traffic" (*Wickard v. Filburn*). This substantial relation will become a standard for future Commerce Clause cases. The reason this is so important is due to the vagueness of the wording "substantial relation". As long as the federal government can make an argument that there is an effect on interstate commerce, they have the ability to regulate.

This ability to regulate with the argument of substantial effect comes into accord in 1964 when the *Heart of Atlanta Motel v. US* came to the Supreme Court. This case dealt with a motel that only operated in Atlanta, Georgia; nowhere close to another state. So the question becomes; how does this fall under the federal government's jurisdiction? The issue began in 1964 with the passage of the Civil Rights Act that prevented private discrimination in public accommodations. After 1883 Civil Rights cases didn't allow the use of the fourteenth amendment as justification for federal intervention. The fourteenth amendment which was adopted during the Civil Rights era granted all United States citizens "equal protection under the law"(Constitution). During a series of cases leading up to *The Heart of Atlanta* the fourteenth amendment, equal protection, argument began to fail. The states made claims that it was within their police power (Benson). The Heart of Atlanta Motel was refusing service to African Americans, a direct violation of the 1964 act. When brought to court they argued that the act was unconstitutional because they were a hotel that only operated within Georgia, therefore they were not involved in interstate

commerce. The majority of the Justices disagreed and upheld the act. The act was upheld because the federal government was able to make the argument that this hotel had a substantial effect on interstate commerce. In the same year the Supreme Court also heard the case of *Katzenbach v. McClung*. This case was about a family-owned barbeque that argued they did not apply to them because the “affect commerce” part of the act applied only to operations of the establishment, of which were only within state boundaries. Justice Clark did not agree with this argument because “even if appelle’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” (Benson). These two cases deal with the same statute and both rule in favor of the federal government. In regards to *Heart of Atlanta* the Court’s argument was made because a significant amount of the people that would be staying at the motel, would in fact be from another state. Not allowing African Americans to stay at their motel would hinder their ability to travel and therefore their ability to participate in interstate commerce. “The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate “the deprivation of personal dignity that surely accompanies denials of equal access to public establishments” was the reasoning that the Court gave for saying that Congress did their due diligence in stating their specific intent of the act (*Heart of Atlanta Motel v. US*).

The Fair Labor Standards Act was brought to the Supreme Court again in 1968 with the case *Maryland v. Wirtz*. In 1961 the Fair Labor Standards Act was expanded to encompass more employees including schools and hospitals. Maryland and 27 other states along with a school district brought their case to Court claiming that this act violates the eleventh amendment. The eleventh amendment deals with the sovereign immunity of the states. The eleventh amendment

argument did not work in this case because the states were not the only ones affected by this act. The Court declared that this case did not warrant an eleventh amendment argument. The Court ruled to uphold the act because they did not believe that the eleventh amendment argument was valid due to the fact that this fell within the realm of the Commerce Clause. "Congress had found that substandard wages and excessive hours, when imposed on employees of a company shipping goods into other States, gave the exporting company an advantage over companies in the importing States. Having so found, Congress decided as a matter of policy that such an advantage in interstate competition was an "unfair" one," Justice Harlan said in response to whether or not the act had a substantial effect on interstate commerce (*Maryland v. Wirtz*). Now the door has been opened to anything that can be seen to give one company an advantage over another in their industry. It also has a large impact on federalism, because the federal government is now directly controlling the actions of state governments and their entities.

National League of Cities v. Usery brought into question the Fair Labor Standards Act. This was a case of the New Deal area that took place in the final years of the depression. During this time the issues of the workplace and wages were of great importance to all Americans. Roosevelt was trying to step in by implementing numerous acts that would place the federal regulations. The Fair Labor Standards Act was upheld in this case, but the Court did rule that the act did not have the authority to span to state governments.

In 1984 *Garcia v. San Antonio Transit Authority* was brought in front of the Supreme Court. The issue at hand was the wages of the bus operators. Again we have a case similar to the Heart of Atlanta Motel, where the business in question is only operating within the boundaries of singular state. The Fair Labor Standards Act (FLSA) required a minimum wage as well as overtime requirements for workers, the Wage and Hour Administration within the Department of

Labor said the San Antonio Transit Authority was subject to these requirements. When the case was brought in front of the Court the Transit Authority claimed that a previous case, *National League of Cities v. Usery*, declared that the federal government could not use the Commerce Clause to force states to abide by this act. In this case the majority ruled to uphold FLSA. The opinion of the court discusses how because they are bus operators and therefore affect transportation, they have a substantial effect on interstate commerce. Now the interesting part of this case is the argument between the majority and the dissenting opinions. Both opinions have a large focus on the balance between state and federal interests, which directly relates to the concept of federalism. “Nonetheless, it long has been settled that Congress' authority under the Commerce Clause extends to intrastate economic activities that affect interstate commerce” Justice Blackmun said in response to Congress' ability to regulate business that operates within state borders in his opinion of the court (*Garcia v. San Antonio Transit Authority*). On the contrary Justice O'Connor's dissenting opinion he states “due to the emergence of an integrated and industrialized national economy, this Court has been required to examine and review a breathtaking expansion of the powers of Congress” (*Garcia v. San Antonio Transit Authority*). The dissenting Justices delve deeply into the realm of federalism, discussing how the majority's decision and opinion is acting in a manner that is taking away state powers. Justice O'Connor even goes into the origin of the commerce clause stating, “This perception of a narrow commerce power is important not because it suggests that the commerce power should be as narrowly construed today. Rather, it explains why the Framers could believe the Constitution assured significant state authority even as it bestowed a range of powers, including the commerce power, on the Congress. In an era when interstate commerce represented a tiny fraction of economic activity and most goods and services were produced and consumed close to home, the interstate

commerce power left a broad range of activities beyond the reach of Congress” (*Garcia v. San Antonio Transit Authority*). He talks about how the commerce clause originally didn’t have the effect that it does now with the United States booming industries. The key component of the dissenting opinion is the in depth consideration of federalism and Justice O’Connor explicitly says, “A conflict has now emerged, and the Court today retreats rather than reconcile the Constitution's dual concerns for federalism and an effective commerce power”, recognizing that there has become a real problem dealing with the balance between allowing the states to have the significant amount of power and following Article 1, Section 8 of the Constitution. The Justices of the dissenting opinion are really in tune with this issue and while that is a good thing to be aware of the question becomes; is that part of their job? The Justices are appointed to interpret the law and while this is a clear problem, did it warrant their vote against the act. This is the part that is especially difficult because the clause is so broadly written, that in almost any case the argument can be made in either direction. This ability to argue in either direction has had a noteworthy impact on the relationship between federalism and the Commerce Clause.

Another case involving wages, a very popular area with the Commerce Clause, was *Schechter Poultry Corporation v. United States*. This case came before the Court in 1935 and was in regards to the National Industrial Recovery Act (NIRA), which was part of the New Deal plan. A slaughter house, Schechter Poultry Corp, was in violation of the NIRA agreement. This is another case about the constitutionality of an act passed by Congress, in which Congress cited their powers under the Commerce Clause as justification. The importance of this particular case was not the ruling in favor of the Poultry Corporation, but in the opinion the Court states that they have the right to determine the power of Congress. The reason this becomes interesting is because the Supreme Court is a federal institution. So while the Court is denying the federal

government power, they are actually giving themselves the power to determine, therefore the federal government more power in the long run. The Court is saying that they have the power to decide the limits of Congress' power. This ruling came at a time where Congress and the Executive branch were trying to implement various new laws to help the country out of the depression. The Judicial branch at this time held a lot of power with their ability to strike down legislation. This case took place at a time where the Court was weary of all the legislation being passed and the control the federal government was trying to gain.

Another piece of New Deal legislation was The National Labor Relations Board (NLRB), which was established to allow the federal government to interfere with capital-union disagreements. Roosevelt wanted the federal government to have as much control as possible in order to help the economy. The NLRB allowed them to shorten the time that it took to handle disagreements with unions, getting the factories back up and running. In 1937 the case of *The National Labor Relations Board v. Jones & Laughlin Steel Corporation* was brought to the highest court. During a conflict within the steel industry the NLRB stepped in to negotiate and make a ruling that Jones & Laughlin did not like. In turn Jones & Laughlin sued on the grounds that the creation of the NLRB by Congress was unconstitutional. In the final ruling the Wagner Act that established the NLRB was upheld. The grounds on which the court made their decision were that because tensions between unions and the companies affect production, it in turn affects interstate commerce. The wording of the opinion of the Court allow Congress more power than they had in previously been given by Court rulings. "The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (*NLRB v. Jones*). This is a broad definition that the Court is utilizing and now setting

precedent with. The term affecting commerce is the basis for which Congress must argue that their actions fall under their powers derived from the Commerce Clause. Justice Hughes in the opinion of the court also talks about how just because an argument can be made that the act effects more than commerce, it does not create automatic immunity for the states. As long as commerce is being affected the Courts ruling says that Congress has the power. This is historically significant because this was the case that followed the court-packing plan and the Court began to rule in favor of the federal government more often.

The Gun Free School Act may appear to be an uncontroversial act that has nothing to do with commerce, but when *United States v. Lopez* came to the Supreme Court in 1994 the Court used the Commerce Clause to justify its decision. The argument of the government was that guns in schools affect education, which in turn affects interstate commerce. Lopez, a man who in high-school brought a concealed firearm in and was charged with violation of the act, argued that this argument was invalid. If Lopez was deemed correct, then the act was unconstitutional and he cannot be charged with violating it. Surprisingly the majority of the Justices did believe in Lopez's argument and struck down the Gun Free School Act on the grounds that it did not have a sizeable effect on interstate commerce and Congress did not have the power to pass this act. While this decision may seem to give the states power and not allow the federal government to overstep its boundaries, the key to this case is the three conditions the majority used to make their decision. These are three categories that the Court says fall under the Commerce Clause. "First, Congress may regulate the use of the channels of interstate commerce... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities... Finally, Congress' commerce authority includes the power to regulate those activities

having a substantial relation to interstate commerce, *Jones & Laughlin Steel*, 301 U. S., at 37, *i.e.*, those activities that substantially affect interstate commerce” (*US v. Lopez*). These guidelines are important because future cases can and do use these as precedent when deciding if something may fall under the Commerce Clause.

United States v. Morrison is another case that at first glance seems uncontroversial and unrelated to commerce. This case is in regards to the constitutionality of the Violence Against Women Act. In a shocking decision the Court ruled that the part of the act that provided a federal civil remedy was unconstitutional, not because they thought that violence against women should be allowed, but because they said that Congress did not have the authority to place this criminal act under federal regulation. Congress passed the act and when in court claimed that it fell under their Commerce Clause powers because women who are victims are at an economic disadvantage and therefore will be deterred from traveling, inherently affecting interstate commerce. “Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature” (*US v. Morrison*).

The opinions of *Gonzales v Raich* cite *Lopez* as precedent that they followed to get the dissenting outcome. *Gonzales* is a case involving the Controlled Substance Act and in 2005 it was brought to the Supreme Court. The issue at the front of this case was that California legalized medical marijuana and Raich was growing cannabis for medical purposes. The Drug Enforcement Administration, a federal agency, seized Raich’s plants. This case is extremely important in the discussion of federalism because there are two laws that directly oppose each

other, one at the state level and the other on the federal. So now the question becomes; did the federal government have the Constitutional right to pass the Controlled Substance Act under their powers held within the Commerce Clause? The ruling of the Court upheld the Controlled Substance Act and therefore the actions of the Drug Enforcement Administration. This was a clear overruling of the state's power and the power was given directly to the federal government because they said the act fell under the Commerce Clause. The majority said that the sale of drugs have an economic impact, even if they are in the black market. Justice Stevens delivered the opinion of the Court stating, "We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding"(Gonzales v. Raich). The majority opinion cites numerous cases previously discussed. They reference *Lopez*, *Morrison* and *Wickard* multiple times throughout their opinion. The amount of precedent used in this case proves that when discussing the Commerce Clause, past cases and opinions are extremely important. The Commerce Clause's broadness requires Justice's to look at the development of the clause over time through other cases. *Gonzales* relies heavily on these precedents because without them the decision is not clear. The dissenting opinion uses the same precedent, but to come to a different outcome. Justice O'Connor's dissenting opinion utilizes the three guidelines set forth in *Lopez* and says that when using these the act is unconstitutional because it doesn't fall under the guidelines of the Commerce Clause. An important part of his dissent captures the test set forth in previous cases "that our "substantial effects" cases generally have upheld federal regulation of economic activity that affected interstate commerce" (*Gonzales v. Raich*). This relates to the previous case of *Wickard v. Filburn* where the substantial effect test originated. Since this time it has been the

main test used in cases involving the Commerce Clause and as O'Connor points out it has led to the federal government largely being favored in cases, which takes power away from the states.

One of the most recent cases involving the Commerce Clause was the controversial Affordable Care Act. The constitutionality of this act was brought to the Court in 2012 during the *National Federation of Independent Businesses v. Sebelius* case. There were two parts of the act in question during this case, the individual mandate and the Medicaid expansion. The part that deals with the Commerce Clause is the individual mandate. "Congress may order individuals to buy health insurance because the failure to do so affects interstate commerce" (*NFIB v. Sebelius*). *Bailey* is also cited in the majority opinion with the use of the tax and what the intent of Congress really is. Justice Roberts delivered the opinion of the court in which he declares that this is not the case, but the concurring opinions by Ginsburg, Breyer, Kagan and Sotomayor believe that this does fall under the commerce clause. The final ruling in a 5-4 decision by the Court upheld the individual mandate. The majority opinion states that it is upheld because it is a tax, while the concurring opinions are the ones that should be looked at in discussing the Commerce Clause. Justice Ginsburg, who wrote the concurring opinion, states "According to The Chief Justice, the Commerce Clause does not permit that preservation. This rigid reading of the Clause makes scant sense and is stunningly retrogressive" (*NFIB v. Sebelius*). The fact that the concurring opinion, containing 4 of the Justices, criticizes a strict reading of the Commerce Clause is interesting. Also the use of the term "retrogressive" lends to the conversation about the evolution of the clause. In wanting a more fluid reading of the clause Justice Ginsburg shows that the history of the Court has led to a much broader view and that there are many things that have the ability to fall under the protection of the Commerce Clause. The word retrogressive also shows that the Court over time has broadened the clause even further. This case is extraordinary

because within the majority there is so much discord, all centered around one clause. The Commerce Clause warrants debate because of its broadness, but more importantly because of the impact it can have. The Courts are very careful in their discussions of the clause and using precedent to support their conclusions. Again in this case we see the Commerce Clause being used to create an act that would take a power previously allotted to the states and give it federal control.

Original Intent

When looking at the Commerce Clause and its wording it is curious to see how it has turned out. The founders had no idea of the industry and technology that would arise and still be governed by the document they created. So the question becomes; was this intended or has Congress with the help of the Court expanded their reach? The reason this question is important in the federalism discussion is because of the federalist versus anti-federalist debate. Was it the intention of the writers to give the federal government this broad power, or did they just not understand the way it would evolve? When looking at the original intent of the clause we can see that, “when supported by other types of evidence of original meaning, the fact that the slave trade was considered outside the power of Congress to regulate commerce "among the several States" bolsters our understanding of that phrase's public meaning” (Balkin). Looking at the discussions, the wording and the papers that surrounded the Constitutional Convention, it appears that the founders’ intent was for the Commerce Clause to regulate commerce when more than one state was involved. How did it grow to the broad, widely used clause of today? Looking at the cases the answer lies greatly in the courts. Since the Constitution grants the court the ability to interpret the law, it gives it a significant amount of power. This power is inherently geared towards the

federal government. The Supreme Court is a part of the federal government and lacks the power to execute the laws that it interprets. For this reason the Court is inclined to choose the side of the federal government to legitimize their power. If they have support from the other two branches their decisions carry more weight.

The Future of the Commerce Clause and Federalism

Another important perspective to look at this relationship is how it will progress in the future. “During the founding era, States were likely to view one another as rivals — not quite as foreign governments, but still as potential military and commercial threats. That the state of our Union has fundamentally shifted away from this direct rivalry is doubtless. States nonetheless remain capable of and responsible for pursuing their specific interests” (Bork, Troy). The relationship between states has evolved in a way that has brought them closer together. With the technology in transportation and the ease of crossing state lines, the future of the Commerce Clause will most likely be even broader and more widely used. The federalism relationship will also be put to the test. With the emergence of the commerce clause states feel power being taken away from them, and since they still have such varied interests this poses a problem.

“The dormant Commerce Clause, which the Supreme Court has inferred from the grant of power to Congress in Clause 3,” prevents states from interfering in interstate commerce (Cooter, Siegel). The evolution of the commerce clause has shown that it is in an upward movement and we do not have reason to believe this will stop. The dormant commerce clause had its first emergence in *Champion v. Ames*, but has since been used in many cases, allowing Congress to ban certain things. Overall it is clear that the Commerce Clause will continue to be broad and therefore the future of it could be vast and potentially overwhelming to the idea of federalism.

Conclusion

After close analysis of these Supreme Court cases it can be concluded that the Commerce Clause and federalism have a negative correlation. As the power of the Commerce Clause grows the power of the states decreases. The clause is necessary, but it has the unwanted side-effect of taking away state power. The reason the Commerce Clause is necessary can be found by looking at the Articles of Confederation and the state of the Union during that time. It is necessary that we have a strong federal government for international purposes as well as domestic. If the Commerce Clause was not in the Constitution there would be no remedy for economic conflicts between states.

Federalism is an important concept to all Americans. It is the reason you have government officials close to home and that have your specific interests in mind. State governments are more likely to be filled with legislators who are from the area and similar to the rest of the community. Federalism gives people the sense that government is working for them and takes away the fear of not being represented. The Commerce Clause is taking away some of this power, but it is also enabling universal statutes that allow our country to work together and be prominent on the global front. This is important for everything from travel to national security. The negative correlation between the commerce clause and federalism is evident and could potentially be dangerous to the American way of life and government, but it isn't necessarily a bad thing. The Commerce Clause will continue to effect federalism and it is the job of the government and the people to control this relationship.

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