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The Growth of the Commerce Clause as Mechanism of Control

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By:

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Abstract

Article 1, Section 8, clause 3 of the United States Constitution states that "Congress shall have the power… To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". This short and simple statement has been progressively used, in combination with a few other powers both granted and assumed by various federal actors, to take greater and broader powers over the states and private citizenry. The original judicial understanding of the so-called C*ommerce Clause* (differentiated from original intent) comes from the 1824 case of *Gibbons v. Ogden*, 22 U.S. 1. Through subsequent cases, the judicial understanding of the commerce clause is clarified. Then during the administration of Franklin Roosevelt, there seemed to be a change in attitude toward using an enumerated power to infringe on a police power, which is properly the role of the individual states. Through this new understanding of the power of the commerce clause, 20th century America sees unprecedented growth in federal regulation and criminalization on numerous fronts of civil society. This understanding continued until about 1995, when the Supreme Court struck down the Gun Free School Zones Act as unconstitutional. This began a shift in the way the Court saw the power of the commerce clause as elements of the federal government began to temper what they perceived their powers to be.

The Constitution of the United States explicitly separates the powers of the federal government. Also, it explicitly enumerates the powers of the federal government, and those that are not enumerated within the Constitution are relegated to the states (see U.S. Constitution, Tenth Amendment). An example of this would be police powers. The federal government, according to the Constitution, only has police powers within the District of Columbia, federally owned property, "Forts, Magazines, Arsenals, Dock-yards, and other such needful buildings." (Art. I, Sect. 8, Cl. 17). Yet, people are charged with federal crimes that did not occur in those locations frequently. From where does the federal government derive this authority? As George Terwilliger aptly points out, "Through much of our history, Congress' use of this power was limited to *affirmative acts* designed to facilitate commerce: the construction and improvement of roads and other means of transportation, later the means of interstate communication and the widespread availability of power and energy. A prime example of this was the enactment of legislation following the Civil War to enable the construction of the Transcontinental Railroad which facilitated the settlement of the West." (2000, para. 11) (emphasis added).

The Constitution only declares the federal government able to "punish as crimes, committed on state territory, only a limited number of subjects: (1) treason (Art. III Sec. 3 Cl. 2); (1) counterfeiting (Art. I Sec. 8 Cl. 6); (3) piracy or felonies on the high seas; (4) offenses against the "laws of nations" (Art. I Sec. 8 Cl. 10); or (5) violations of discipline by military or militia personnel (Art. I Sec. 8 Cl. 14)" (Roland, 2002, para. 11). The federal government, to obtain more power and control than the Constitution provided for, has re-interpreted the Constitution accordingly, to increase its power and control over the states and individual freedom. It did this primarily through two methods; the first, through the due process clause of the Fourteenth Amendment and the second, through the Commerce Clause of the Constitution.

The Commerce Clause, found in Article I, Section 8, Clause 3 of the Constitution, empowers Congress “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." It continues to authorize Congress “To make all laws which shall be necessary and proper for carrying into execution the foregoing powers….” There are two areas of focus within this phrase that should be considered; the meanings of “regulate” and “commerce.”

The first case to deal with the Commerce clause was *Gibbons v. Ogden,* 22 U.S. 1 (1824). The ruling rejected a narrow reading of the Constitution as argued in the case by the State of New York. Chief Justice Marshall wrote "The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more--it is intercourse.” “Intercourse” was qualified by the term “commercial” keeping it strictly related to monetary transactions (Findlaw.com, “Commerce Clause”).

There is some contention set forth, that the understanding of “regulate” in the Commerce Clause combined with “all laws necessary and proper” can not legitimately be interpreted as an outright ban on certain items. Banning by definition negates the understanding commerce. According to Jon Roland, originally, the Commerce Clause did not give

> …the power to prohibit, nor did it imply the power to impose criminal penalties for violations. While a "regulation" might be considered as the prohibition of some modalities of something, like packaging, labeling, handling, routing, or scheduling, it could not be prohibition of all modalities. There must always be some modalities that are permitted. The restriction must be reasonable, and must serve a

public purpose, and not favor one segment of the market over another (2002, para. 7).

Commerce, as originally understood, does not apply broadly until *Gibbons* develops the initial judicial understanding, which is arguably broader than Roland suggests original popular understanding was. Commerce was related to industry, but they are not the same. Commerce according to *County of Mobile v. Kimball*, 102 U.S. 691 (1881) when "…strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." The "strict understanding" in *Kimball* was the broad understanding in *Gibbons.* There was no understanding of the commerce clause reaching into the realms of manufacturing and production, as illustrated by the Supreme Court in 1888;

> If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining -- *in short, every branch of human industry* (*Kidd v. Pearson*, 128 U.S. 1) (emphasis added).

The Court continues in *Kidd* to recognize the broad power of Congress under the Commerce Clause to regulate, saying "All commodities are subject to a proper exercise of the police power of the States, and all commodities in their relation to inter-state and foreign commerce are subject to the paramount and exclusive authority of Congress." This understanding

combined with the decision in *McCulloch v. Maryland,* 17 U.S. 316 (1819), defining the "necessary and proper" clause not as a limitation, but as an enumerated power of Congress[1] sets the stage for broad expansion of federal power under the Commerce Clause in the early and mid-1900s.

According to Bork & Troy (2002), referencing *Welton v. Missouri*, 91 U.S. 275 (1876), "In short, 'commerce' does not seem to have been used during the founding era to refer to those acts that *precede* the act of trade. Interstate commerce seems to refer to interstate trade — that is, commerce is "intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the ... citizens of different States." The court maintains a more or less historic understanding of what commerce entails; it did not include production.

Again, in *Carter v. Carter Coal Co.,* 298 U.S. 238 (1936), the Court ruled in that historic manner, holding that "Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mines is not brought into being by force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it." (Citations omitted). The Supreme Court rejects the notion that manufacture or production (mining coal) is commerce, but only in dealing for disposal of what has been produced.

In the late 1930s, after FDR's threat to pack the judiciary, and the "switch in time that saved nine" had occurred, there was a marked difference in the direction of the court as it related to the New Deal (which it had previously struck down several parts of as unconstitutional) (Wikipedia Online Encyclopedia, "Commerce Clause"). The court became friendly to the idea that

[1] *McColloch v. Maryland,* 17 U.S. 316 (1819). The opinion by Mr. Chief Justice Marshall states, "The clause is placed among the powers of Congress, not among the limitations on those powers. Its terms purport to enlarge, not to diminish the powers vested in the government. In purports to be an additional power, not a restriction on those already granted." (Citations omitted).

the Commerce Clause be used for all sorts of policy making and regulation within industry, even if it precedes the actual negotiation or trade of formerly regulated items.

In 1937, the *Kidd* ruling was overturned in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, by upholding the National Labor Relations Act if 1935. The argument against the NLRB was basically that it took away property rights in the form of the right to manage one's own business. The Court upheld the powers of the NLRB saying that the "…Act may be construed so as to operate within the sphere of constitutional authority. The jurisdiction conferred upon the Board, and invoked in this instance, is found in § 10 (a), which provides: 'The Board is empowered… to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." This ruling also creates a new right; the right of employees to organize and bargain with their employer collectively. But, this watershed case "departed from the distinction between 'direct' and 'indirect' effects on interstate commerce" (*U.S. v. Lopez,* 514 U.S. 549 (1995)).

Finally, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Supreme Court reached its broadest interpretation of the power of the Commerce Clause. It ruled that a wheat farmer was not allowed to farm his annual acreage of wheat that year, but could only grow 11.1 acres. He planted 11.9 acres over the allotted amount, totaling 23 acres planted. He was fined for the overage production and would not pay the fine amount. The court held that this was within the scope of the Commerce Clause as it affects the wheat market, "…marketing quotas not only embrace all that may be sold without penalty but also what may be consumed on the premises." Essentially, the overage produced by Filburn to feed his cattle and poultry affected commerce in that he was not purchasing it from the market while a quota was in force. This affected interstate commerce according to the courts. This is an amazing stretch of power, the seeds of which had been laid down in the preceding 100 years of Supreme Court cases.

Then in 1964, in *Katzenbach v. McClung,* 379 U.S. 294, known as the "Ollie's Barbeque" case (Burke, 2001, para. 4), the Court stretched sensibility and finds that although the restaurant owned and operated by a private individual, McClung, unlawfully discriminated against blacks by refusing to serve in the restaurant even though they did allow carry-out for blacks. The Civil Rights Act of 1964 was forcing McClung to serve blacks and he argued that it would affect his business negatively and wanted Title II of the Act struck down as unconstitutional. McClung operated an admittedly local restaurant that only catered to the local population. He purchased half of the meat for the restaurant locally, but the local distributor purchased it via interstate commerce. The Court held that this indirect connection to interstate commerce substantially affected commerce enough that the Act could rightly regulate, and force McClung to serve blacks in his restaurant in accordance with the Civil Rights Act. The Clause no longer was used to regulate goods in commerce, but to extend power to compel individual compliance with legislation, because of some miniscule connectivity to commerce (Burke, 2001, para. 4).

In 1995, *U.S. v. Lopez,* 514 U.S. 549, the Supreme Court finally stepped away from the broad understanding that had been promulgated and in the first lines of the Court's opinion stated that,

> In the Gun-Free School Zones Act of 1990, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "to regulate Commerce . . . among the several States . . ." (citations omitted).

Chief Justice Rehnquist in delivering the opinion discusses the historical development of Commerce Clause power. Rehnquist notes three areas wherein the Court has deemed Congress possesses Commerce Clause powers;

> 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, *i.e.*, those activities that *substantially affect* interstate commerce… (citations omitted) (emphasis added).

The Court was strict specifically over its determination of what "substantially affect" means. They decided that it did not solely mean "affect" and stated "the Court has never declared that 'Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities'" (*U.S. v. Lopez*). In his dissent to the *Lopez* ruling, Justice Stevens clarifies his opinion that Congress should have this broad power because guns come into possession *through* commerce and are used *after* commerce, and hence Congressional regulation is justified;.

> Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because

> of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession in particular markets. The market for the possession of handguns by school-age children is, distressingly, substantial. Whether or not the national interest in eliminating that market would have justified federal legislation in 1789, it surely does today (citations omitted).

Although the Court restrained itself and Congressional power in *Lopez*, there is still a strong segment within the Court that would broaden those powers if possible. Justice Stevens was attempting to stretch the meaning of "commerce" to include regulation *after* commerce, just as arguments in *Carter* had attempted to do *preceding* commerce (regulation of manufacturing). Then again in *City of Boerne v. Flores,* 521 U.S. 507 (1997) the Court succeeded in limiting the powers of Congress by declaring the Religious Freedom Restoration Act of 1993 as beyond its authority to enact.

In 1999, in *Brzonkala v. Morrison,* 529 U.S. 598, the Court struck down a part of the Violence Against Women Act (VAWA) which allowed rape victims to sue their attackers in federal court (Kopel & Reynolds, 1999). The law was based largely on the Commerce Clause and the Court found that "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." Since all laws Congress enacts must be based on one of their powers, and VAWA in *Brzonkala* was largely argued under Congress's ability to regulate commerce, based on *Lopez* and *Boerne,* the Supreme Court rightly struck it down.

The Constitution specifically attempts to restrain the powers of the federal government. Personal freedom, not solely societal order, was considered paramount; the founders in the instance of the Commerce Clause failed in their objective, by allowing their overarching goal to be subverted through a lack of clarity. This subversion took place slowly, as attitudes and perceived

political, economic, and social needs, evolved within American society. The expansion with regards to the Commerce Clause was coincident with the expansion of Due Process understanding; much of the problem being exacerbated by Roosevelt's twelve year administration and appointment of nine Supreme Court Justices. More recently, the Court has ruled that the Congress is limited in its authority. These rulings are a fortunate victory for limited government proponents and for the historic understanding of the U.S. Constitution. With Chief Justice Rehnquist battling cancer and rumors of his stepping down before year's end, and a non-cooperative mood in Congress with respect to judicial nominees, President Bush will have a difficult time keeping a conservative on the bench. To enable the Court to keep ruling in a quasi-constitutional manner, a Supreme Court nominee with strict constructionist view of the Constitution needs to pass muster with the Senate. It will be an interesting year.

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