THE COMMERCE CLAUSE-AND MORE

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I have chosen to present a study of the Commerce Clause of The United States Constitution because I believe that there is no provision of our Constitution that has been more vital to the growth and development of our modern society and to our place in the world than this Clause. In a real sense, I believe the Clause has made us, whether you approve or not, what we are today and will be influential in what we may become in the not too distant future. At the same time the commerce power of the Congress is one of the least understood and most under the radar parts of that document. This study is by no means exhaustive and is not presented as a legal brief or law review article. It is intended only to bring the Clause out into the open and to the attention of a thoughtful body such as this.

The relationship between commerce and government goes back probably at least 6000 thousand years. Even then that relationship allowed for, fostered and encouraged the kind of societies that grew and developed. Beginning in ancient times in the Middle East, Greece and Rome state control or regulation of commerce was instrumental in the growth of cities and states, the increased complexity of societies, the wealth and welfare of the citizens, establishment of colonies, wars of trade and conquest, and armies, navies and merchant maritime power, through the medieval period to the renaissance. Our modern world probably began around the 16th century with the developing mercantile or mercantilist system of commerce. Mercantilism, an economic theory and practice, was dominant in Europe from the 16th to the 18th centuries. It promoted governmental regulation of a nation's economy. Its purpose was to increase state power at the expense of rival state powers. It sought to increase monetary reserves through a positive balance of trade. This required policies of establishing and exploiting overseas colonies, forbidding those colonies to trade with other nations, monopolizing markets and many other very restrictive measures which often prompted wars with competing countries.

This British mercantilist system was at the root of the problems with the American colonies. The system of strict regulations was used to protect and maximize profits from its colonies and avoid any loss to rival states. During the period from 1651 to 1774 the British Parliament enacted a series of "navigation acts" and other legislation that severely defined and restricted the nature and methods of trade by the American colonies. The effect was to cause unrest in the various American colonies. The Stamp Act of 1765 was one of the most unpopular acts passed in Parliament The opposition to this act was so strong that it was repealed in 1766. The Townshend Act of 1767 imposed duties on so many essential goods that the colonists entered into a boycott of English goods that proved so effective that those acts were repealed with the exception of the tax on tea in 1770. The Tea Act of 1773 which provoked the famous Boston Tea Party and The Coercive Acts of 1774 played their part in the soon to follow colonial revolution against Britain.

After the separation from Britain the newly formed states adopted The Articles of Confederation on March 1, 1781. It soon became apparent that, simply put, that

document was not going to work as the central framework for the governance of the new nation. Among other weaknesses it did not provide for an independent executive or federal court system. All laws were to be enforced by state courts. The congress, which consisted of one body composed of one member from each state, had no taxing power and only specific delegated powers. But, most relevant to this discussion, Congress had no power over interstate or foreign commerce. The national government had no power to conduct a uniform international trade policy and had no power to regulate interstate commerce, powers needed to promote foreign commerce and the domestic free trade so essential to economic growth. Federal regulation was deemed necessary to promote those vital interests. This question and others were addressed by many of that body often referred to as "the founding fathers," notably James Madison and Alexander Hamilton. Madison recognized early on that the failure of the Articles to grant control over national commerce to a federal government had to be corrected.

At the Constitutional Convention which convened in the spring of 1787 James Randolph, James Monroe and other delegates supported a proposed Commerce Clause sponsored by James Madison. Madison, John Jay and Alexander Hamilton started a series of essays called the Federalist Papers to answer the attacks by Anti-Federalists against the assertion of federal power in the Constitution. In Federalist no. 42, dated 22 January, 1788, Madison made out his case for a Commerce Clause vesting permanent power in the federal government to regulate commerce between the states and foreign commerce. Ultimately the Commerce Clause as we know it was adopted and set forth in Article I, Section 8 Clause (3) of the Constitution as follows: (The Congress shall have power ….) To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;.

This Commerce Clause itself raises three questions that must be answered: What is the meaning of "Commerce"? What is the meaning of "among the several states"? And, what is the meaning of "To regulate"? Because there were conflicts as to its objectives among supporters of the Clause as well as between supporters and opponents of it, it is difficult to make a definitive determination of the "original intent, meaning and understanding" of the Clause. "Commerce" may be as defined as narrowly as simply "trade or exchange of goods" or more broadly to include agriculture, manufacturing and other methods of production, or it might, in its broadest definition, refer to "any gainful activity." "Among the several states" might be limited to commerce that takes place between the states or between people of different states, that is, interstate, as opposed to commerce that takes place between persons of the same state, that is, intrastate. Or it might be interpreted more broadly to mean commerce "among the people of the states" whether it occurs between people in the same state or in different states. "To regulate" might be limited to "make regular" which would subject a particular type of commerce to a rule and would exclude prohibitions on trade as an end in itself, or it might be so expanded as to mean "to govern" including prohibitions as well as pure regulations.

These questions were the subjects of debate in the Constitutional Convention and the Ratification conventions and they are still the subject of debate. The Supreme Court has considered the meaning of them and the extent of the power granted by the Clause to the Congress in cases before it beginning in 1824 and as recently as in the Affordable Care Act decision of 2012.

In *Gibbons v. Ogden,* (1824), the Supreme Court considered the question of

whether navigation was included in the power of Congress to regulate commerce among the states. The case involved a conflict between competing licenses granted for traffic on waterways within the State of New York. Both New York and the Federal government had issued licenses to two different persons. New York denied access to the person licensed by the Federal Government. Chief Justice John Marshall held that it was the clear intent of the Constitution that Congress rather than the states have the power to regulate interstate commerce. The question of whether navigation could be regulated under this Clause had been debated in the conventions. Marshall's opinion sustained the nationalist definition of federal power. He ruled that Congress has the power to regulate many activities that affect interstate commerce and, further, that federal law takes precedence over state laws. This case seems to have empowered the federal government to expand its jurisdiction over a wide range of the economic life of this nation.

The Supreme Court in subsequent cases resisted expanding federal regulatory powers and defended the concept of federalism, that is, the power of the individual states against the federal government. In *United States v. Dewitt*, decided in 1869, the court held invalid a federal statute making it a misdemeanor to sell a particular chemical mixture that could be dangerous if flammable below a certain temperature. The Court held that the law was a "police regulation" rather than a proper use of the commerce power. The Court continued to hold to a narrow interpretation of the Clause in *Veazie v. Moor* in 1852 and *Kidd v. Pearson* in 1888, requiring a direct burden or direct interference with interstate commerce to order to invoke the power to regulate it.

But, as Congress sought to promote the economic growth and development of the nation, federal power grew. The Court ultimately began to recognize that a modern economy demands centralized regulation to foster growth and address the problems of industrialization for workers and the market power of large corporations.

In 1887 Congress passed the Interstate Commerce Act which made the railroads the first industry subject to federal regulation. That act also created a five member enforcement board, the Interstate Commerce Commission. Up to that time the railroads were privately owned and entirely unregulated and held monopolies in the areas that only they served. State controls over railroad monopolies were upheld by the Supreme Court in *Munn v. Illinois,* (1877). But State regulations were often ineffective or regulators corrupt. In *Wabash, St. Louis Railway Company v,. Illinois, (1886),* known as the *Wabash* case, the Court held the Illinois statute regulating railway rate charges was unconstitutional and involved a matter of "commerce among the states" which was properly regulated by the Commerce Clause and the Necessary and Proper Clause, Article I, Section 8, Clause 18. The ICC was unique. It challenged the laissez-faire philosophy by clearly providing Congress the right to regulate private corporations engaged in interstate commerce. The ICC would become the model for other regulatory agencies. This act remains one of this country's most important and a model for later government regulation of private business.

The Sherman Antitrust Act of 1890, based upon the Commerce Clause, was the first law passed by Congress to prohibit trusts. Trusts had come to dominate a number of important industries and destroyed competition. The Sherman Act authorized the Federal Government to proceed against trusts in order to dissolve them. Any combination "in the form of trust or otherwise that was in restraint of trade or commerce

among the several states or with foreign nations" was declared illegal. The Act provided for fines and possible jail sentences. Persons and companies who suffered losses because of trusts could sue in a Federal Court for triple damages

In *United States v. E.C. Knight Company*, (1895), the Supreme Court found that the American Sugar Refining Company, one of the defendants in the case, had not violated the law although it controlled about 98% of all sugar refining in the U.S. reasoning that the company's control of manufacture did not constitute a restraint of trade. The Court held that "manufacturing" is not commerce, and affects commerce only incidentally and indirectly." Despite this decision the Sherman Act was used with considerable success during President Theodore Roosevelt's campaign against trusts. In 1904 The Court upheld the government's suit to dissolve the Northern Securities Company, and by 1911 President Taft had used the Act against the Standard Oil Company and the American Tobacco Company. In 1998 The Department of Justice filed suit under the Sherman Act against the Microsoft Corp. This was ultimately settled by way of a consent decree in which Microsoft agreed to alter some of its business practices.

Following the Sherman Act came the Clayton Act of 1914. Some courts had interpreted the Sherman Act on cartels and trusts as applying to trade unions. This had a negative effect on unions trying to organize workers. That Act launched a wave of mergers as businesses realized that instead of organizing a cartel or trust they could simply merge into a single corporation and have all the benefits of market power that a cartel or trust would have. A commission on Industrial Relations was established at the end of the Taft administration and the start of the Woodrow Wilson presidency. The Clayton Act passed in October 1914.

The Clayton Act made substantive and procedural changes to federal antitrust law by supplementing the Sherman Act. Briefly, it considers some of the following conduct that becomes illegal if it lessens competition or tends to create a monopoly in any line of commerce: unilateral price discrimination between different purchasers; sales on the condition of exclusive dealing or tying to other purchases; mergers and acquisitions where the effect may be to substantially lessen competition; prohibit any person from being a director of two or more competing corporations if doing so would violate antitrust criteria. The Act is enforced by the Federal Trade Commission which was created during the Wilson administration, and by the Antitrust Division of the U.S. Department of Justice.

The Federal Reserve Act of 1913 established our present Federal Reserve System. The First Bank of the United States was established in 1791. Alexander Hamilton had recommended to President George Washington that the Commerce Clause would support the establishment of a central bank. The function and history of central banks in American is a subject in itself and I will not go into it at this time.

In 1916 the Keating-Owen bill was passed. It used the commerce clause to regulate child labor by banning the sale of products of industries that employed children under sixteen in mines or any other industry that employed them at night or for more than eight hours during the day. The Supreme Court held that law to be unconstitutional because it went beyond the purpose of the clause. The Court delineated between the government's power to regulate production and commerce. A second child labor law was passed in 1919 based upon the government's power to levy taxes. It was also struck

down as unconstitutional. The Court held that "The power of Congress to regulate interstate commerce does not extend to curbing the power of the states to regulate local trade."

Federal protection of children would not be obtained until passage of the Fair Labor Standards Act in 1938. The Court challenge to that act resulted in the reversal of the decision which struck down the act of 1916 and the upholding of the constitutionality of the Fair Labor Standards Act.

Courts continued to draw a distinction for commerce clause purposes between manufacturing and commerce although there was a slight loosening and the beginning of a recognition of a ground for finding a "close and substantial relation to interstate traffic." It was not until 1935 in A.L.A. *Schechter Poultry Corp. v. United States*, that the Court began to develop a distinction between direct and indirect effects on interstate commerce. It laid the foundation for the extension of the "substantial effects test" shortly to follow. Without going through the details or the fact situation, the Court applied a distinction between "direct" and "indirect" effects and held that federal legislation that regulated wages and hours was beyond the commerce clause power to regulate because the wages and hours of the employees were wholly intrastate in character. This case invalidated the National Recovery Act of 1933 that had been passed in an effort to assist the nation's economic recovery during the Great Depression. In *Carter v. Carter Coal Co.,* (1936), the Court found that regulation of working conditions and prices of coal produced in mines which it held to be intrastate activity and beyond Commerce Clause authority. The mining operations had at best only an "indirect" effect on interstate commerce.

While very formalistic, these cases did open the door to regulate intrastate activities where it is shown to have a direct effect on interstate commerce. It became a test of the nature of the effect on commerce rather than simply the intrastate or interstate character of the activity itself that subjects the activity to congressional regulation.

A "new era" of Commerce Clause jurisprudence began with *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, (1937). In 1935 the National Labor Relations Act was passed by Congress with the intention to guarantee to most workers involved in interstate commerce the right to organize and bargain collectively. It created the National Labor Relations Board to arbitrate labor-management disputes, penalize unfair labor practices and guarantee democratic union elections. In the *Jones & Laughlin* decision the Court upheld the Constitutionality of the NLRA. The Court set forth the proposition that "although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control" The Court found that such a close and substantial relation existed in the prospect of industrial strife that could occur if the right to bargain collectively was not protected by Congressional legislation. This was the birth of the "substantial effects" test for Commerce Clause legislation that has been applied to a broad range of regulation that, in effect, leaves almost no intrastate economic activity beyond the reach of the commerce power. In *United States v. Darby,* (1941) in upholding the Fair Labor Standards Act, the Court held that the commerce power "extends to those activities which so affect interstate commerce or the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power to Congress to regulate

interstate commerce." The Court left such judgments to Congress and declined to inquire into the motive and purpose of the regulation. In 1942 The Court upheld the right of Congress to regulate the price of milk produced and sold intrastate because that price affected the price of milk in interstate commerce. The test was the effect rather than the character of the activity to be regulated. This test reached probably its high point in *Wickard v. Filburn,* (1942), when a farmer was penalized under the Agricultural Adjustment Act of 1938 for raising wheat for use as feed for his livestock on his farm since such activities could affect the price of wheat in interstate commerce. *Wickard* was used to justify Congress in regulating intrastate hotel businesses under the Civil Rights Act of 1964, and to enact criminal laws prohibiting intrastate "loan sharking.

Other policies and legislation of the era included the Tennessee Valley Authority Act of 1933; the Social Security Act of 1935; and the Works Progress Administration (WPA). Also, Congress passed important legislation such as creating the Federal Deposit Insurance Corporation and the Glass-Steagall Act regulating banks, (1933.)

Moving now to contemporary courts we see that recently the Court has attempted to impose limits on the substantially affects test to constrain activities that the Congress can regulate by distinguishing between "economic" and "noneconomic" activities so that only "economic" activities are within the proper reach of the commerce power.

United States v. Lopez, (1995), was the first case since 1937 to invalidate an entire statute enacted under the Commerce Clause. It was the Court's effort to place some limitation on the commerce power by limiting its application to "economic activity" that substantially affects interstate commerce. Specifically the Court held that possession of a firearm in a school zone was not an economic activity substantially affecting interstate commerce so as to be properly regulated under the commerce power.

The Court later used the *Lopez* decision as precedent for holding that provisions of the Violence Against Women Act that offered a civil remedy for gender-based violence exceeded Congress' commerce power in *United States v. Morrison*, (2000).

But, in *Gonzalez v. Raich*, (2005) the Court used the decision in *Wickard* to hold that the cultivation by persons who raised their own marijuana for their medicinal purposes to be subject to the Commerce Clause.

Now, of course we have the decision in The Affordable Healthcare Act which held that the requirement for the individual mandate is does not regulate existing commercial activity. Instead it compels individuals to become active in commerce by purchasing a product on the ground that their failure to do so would affect interstate commerce. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would, under the Government's theory, empower Congress To make decisions for the individual.

I have tried to show the still developing nature of the Commerce Clause and the profound influence this Clause has had on the growth of our nation. I believe that an adherence to the most narrow of interpretations would have made that growth virtually impossible. I believe America today under such interpretation would be vastly different and without the progress industrially, economically, politically, socially and internationally than we have made. Imagine our country without the commercial regulation we have had. Imagine an even greater concentration of political and economic power than we have today, a country ruled by unregulated trusts, without meaningful banking regulation or protection of food and drugs, or of working conditions or wages

and the other social legislation made possible under this power created by our Constitution and expanded by the Court. What will be the future of this power and government regulation has yet to be seen. We are now in a time when the latest attempt at bank regulation under the *Dodd-Frank Act* is being severely attacked I fear we are in for a contraction of that power to regulate that could return us as a society to less happy days.