First PRINCIPLES SERIES

No. 5
January 18, 2011

Constitutional Guidance for Lawmakers

Commerce, Commerce, Everywhere: The Uses and Abuses of the Commerce Clause

Over the course of the last decades, the commerce clause has been used as a primary source for the regulatory expansion of the national government. This reading of the clause, granting virtually unlimited regulatory power over the economy to the federal government, came out of a series of Supreme Court decisions at the time of the New Deal. In its original meaning, the clause functioned primarily as a constraint upon state interference in interstate commerce. Of the nearly 1,400 pre–20th century Supreme Court cases concerning this clause, the overwhelming proportion arose from state legislation. In recent years, the Supreme Court has for the first time since the New Deal begun to rein in Congress's power under the commerce clause. While such developments are welcome, Congress, as a co-equal branch of government, need not take its cues from the Supreme Court and should take the lead in restoring its own limits to the commerce power. This essay is adapted from The Heritage Guide to the Constitution *for a new series providing constitutional guidance for lawmakers.*

"The Congress shall have Power To...regulate Commerce...among the several States...."
— Article I, Section 8, Clause 3

The Commerce Among the States Clause operates both as a power delegated to Congress and as a constraint upon state legislation. No clause in the 1787 Constitution has been more disputed, and it has generated more cases than any other.

To this day, the debate over the extent of the commerce power centers on the definitions of "to regulate," "Commerce," and "among the several States."

The narrowest definition of "to regulate" is to "make regular," that is, to facilitate the free flow of goods, but not, except in cases of danger, to prohibit the flow of any good. The Supreme Court has never accepted this narrow definition. From the beginning, Chief Justice John Marshall in *Gibbons v. Ogden* (1824) saw the power to regulate as coextensive with the other delegated powers of Congress. He declared: "This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." The manner in which Congress decides to

Published by The Heritage Foundation LEADERSHIP FOR AMERICA

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Washington, DC 20002-4999
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regulate commerce, Marshall said, is completely at the discretion of Congress, subject only to the political check of the voters. This power, as it later turned out, includes the power to prohibit the transportation of articles, as well as to control their exchange and transportation. *Champion v. Ames* (1903).

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In generally ascending order of breadth, various writers and Justices have defined "commerce" as

1. The trafficking and trading of economic commodities
2. The trafficking and trading of economic commodities and the modes of their transportation
3. The trafficking and trading of any kind of commodity and the mode of its transportation
4. The movement of any thing or any person and its mode of transportation
5. Economic activity that substantially or causally impacts on the trafficking, trading, or transportation of commodities
6. Any human activity or other phenomenon that has any ultimate impact on activities in more states than one.

In *Gibbons*, Marshall held that commerce is "something more" than traffic. The term, he said, "describes the commercial intercourse between nations, and parts of nations, in all its branches." His description of the term did not settle matters, for the issue of what constitutes commerce was to exercise the Court from his time until the present.

Some commentators have defined "among the several States" as the trading and movement of goods between two or more states. But Chief Justice Marshall (again in *Gibbons*) thought *among* had a wider purview than would the word *between*: "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one." Although this was a broader concept, Marshall nonetheless saw that there is some commerce that Congress cannot reach: "The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State." Purely local activities, therefore, remain outside of the reach of Congress under the Commerce Among the States Clause.

After *Gibbons v. Ogden*, there was little occasion for the Supreme Court to investigate the breadth of federal commerce power until the late nineteenth century and the advent of national economic legislation. (However, the Court considered many cases involving the so-called dormant commerce power: the power of the states to enact legislation that affects interstate commerce when Congress is silent, i.e., has not enacted any legislation.) From 1895 on, the Court experimented with differing notions of the commerce power until 1938, when it signaled that it was abdicating any serious role in monitoring Congress's exercise of this delegated power.

In *United States v. E.C. Knight Co.* (1895), the Supreme Court declared that the Sherman Antitrust Act could not constitutionally be interpreted to apply to monopolies in manufacturing, for the commerce power did not reach manufacturing. "Manufacturing is transformation—the fashioning of raw materials into a change of form for use....The buying and selling and the transportation incidental thereto constitute commerce." Any effect manufacturing has on commerce was merely "indirect" and could not be reached under the commerce power. This *qualitative* distinction between manufacturing and commerce held for forty years, but the Court was not ungenerous in otherwise upholding federal regulatory legislation. If companies engaged in price-fixing and marketing schemes, the Court held them to be "in commerce" and subject to Congress's power to regulate commerce. *Addyston Pipe & Steel Co. v. United States* (1899). In an expansionary gloss to the qualitative distinction, the Court also held that goods in the "stream of commerce," such as cattle at the Chicago stockyards and slaughterhouses on the way from farm to nationwide distribution, also fell under the commerce power. *Swift & Co. v. United States* (1905); *Stafford v. Wallace* (1922).

In *Champion v. Ames*, the Court also eschewed any scrutiny on whether the purpose of congressional regulation of interstate commerce was economic. So long as the good traveled across state lines, the Court held, Congress could regulate or prohibit it, even if Congress's purpose was moral. The dissenters pointed out unsuccessfully that legislation to regulate morals had been traditionally left to the states under their police power. Soon thereafter, on this basis the Court upheld the Pure Food and Drug Act, *Hipolite Egg Co. v. United States* (1911); legislation restricting interstate prostitution, *Hoke v. United States* (1913); and even personal immorality connected with interstate commerce, *Caminetti v. United States* (1917).

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Thus, the Court only applied a qualitative test to legislation, the purpose and effect of which was to regulate manufacturing, as in the laws regulating child labor, *Hammer v. Dagenhart* (1918), and railroad retirement plans, *Railroad Retirement Board v. Alton Railroad Co.* (1935), if Congress sought to regulate goods after their interstate transportation had come to rest, *A.L.A. Schechter Poultry Corp. v. United States* (1935), or before transportation had begun, *Carter v. Carter Coal Co.* (1936). As limited as the Court's use of the qualitative test was, an alternative test had begun to develop that would have approved even more congressional legislation. Traditionally ascribed to the *Shreveport Rate Case* (1914), which permitted federal regulation of intrastate railroad rates to harmonize with interstate railroad rates, this *quantitative* test asserted that Congress could regulate a local activity, even manufacturing, if that local activity had a "substantial" effect on interstate commerce. Over the next two decades, a minority of Justices continued to argue in favor of a quantitative test. The dispute between those espousing a qualitative version of the power and those supporting a quantitative interpretation increased during the 1930s as more extensive federal regulatory legislation came before the Supreme Court.

In 1935, Justice Benjamin N. Cardozo, concurring in the unanimous opinion in *Schechter*, suggested a test that would allow the government to regulate local activities if they had a proximate or foreseeable effect on interstate commerce: "The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions." The following year, in striking down the Bituminous Coal Conservation Act, the Court accepted Cardozo's proximate cause test. (Cardozo dissented from the decision on procedural grounds.) Writing for the majority, Justice George Sutherland declared: "The word 'direct' implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition."

A year later, in *NLRB v. Jones & Laughlin Steel Corp.* (1937), Chief Justice Charles Evans Hughes, in upholding the National Labor Relations Act's regulation of factory working conditions, filled his opinion with overlapping justifications, but the proximate cause language was prominent. The commerce power could not reach activities that were "indirect and remote." Federal power could reach those activities that have a "close and intimate effect" on interstate commerce. An industry organized on a national level had such an effect, he declared. Soon, however, Justice Cardozo died, and other Justices retired. By 1941, in *United States v. Darby*, it was clear that the new majority had embraced a very expansive quantitative test and, as events were to show, these Justices were able to find that any local activity, taken either separately or in the aggregate, *Wickard v. Filburn* (1942), always had a sufficiently substantial effect on interstate commerce to justify congressional legislation. By these means, the Court turned the commerce power into the equivalent of a general regulatory power and undid the Framers' original structure of limited and delegated powers, as also observed by Justice Clarence Thomas in his dissent in *Gonzales v. Raich* (2005).

The commerce power was also invoked to expand federal criminal legislation, as well as for major social reforms such as the Civil Rights Act of 1964. But in *United States v. Lopez* (1995) and *United States v. Morrison* (2000), the Supreme Court limited Congress's power under the Commerce Among the States Clause for the first time since in the 1930s. In *Lopez*, Chief Justice William H. Rehnquist wound his way among the Court's precedents to strike down a federal law that had criminalized the possession of a gun near a school. He declared that the commerce power extends to (1) "the use of the channels of interstate commerce"; (2) the regulation of "instrumentalities of interstate commerce, or person or things in interstate commerce"; and (3) a local commercial activity having a "substantial relation" to interstate commerce. Possessing a gun is not a commercial activity, even though gun violence affects commerce. More importantly, he argued that the effects prong of the commerce power applies when the activity is a commercial activity. He insisted that the rule of *substantial* effects must be observed.

Justice Stephen G. Breyer, for the dissent, agreed that there are limits to the commerce power—it does not grant a general federal police power. But he could not find those limits. He argued that there is a sufficient connection between guns near schools, the impact on the educational process, and the eventual connection to the nation's economy to justify the regulation, but he could not, under his formula, put forward any activity that could not thus be reached by Congress under the Commerce Among the States Clause. Concurring with the majority, Justice Clarence Thomas suggested that, upon the proper occasion, the Court should reexamine some of its more expansionary precedents dealing with the "affects" test. Subsequent to the decision, Congress amended the law, requiring that the particular gun found in possession near to a school must be shown to have traveled in interstate commerce.

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In *Morrison*, the Court struck down a suit for damages for rape, even though the suit would have been permitted under the Violence Against Women Act. Here, Chief Justice Rehnquist explained *Lopez* by emphasizing that noneconomic activities (violence against women, or violence against men, or violence in general) could not be aggregated to establish a substantial connection to interstate commerce.

In recent decades, scholars have investigated anew the Framers' view of the commerce power. Randy Barnett argues that, to the Framers, commerce meant the trade or exchange of goods, including the means of transporting them. Richard Epstein finds that the commerce power includes "interstate transportation, navigation and sales, and the activities closely incident to them. All else should be left to the states." Raoul Berger opines that "the Founders conceived of 'commerce' as 'trade,' the interchange of goods by one state with another." Grant Nelson and Robert Pushaw assert a somewhat broader view. They interpret the founding documents as providing Congress the authority to regulate or prohibit "any market-based activity that affects more than one state," which includes the manufacturing, farming, environmental, safety, financial, and labor effects of commercial activity.

In the worldview of the Framers, informed by their struggle with England and their experience with the Articles of Confederation, the direction of economic policy centered on two powers: the regulation of commerce and the regulation of the money supply. (Taxation, on the other hand, was primarily for raising revenue.) The Constitution removed from the states the power of coining money and the power over interstate commerce and lodged both with the Congress, with the proviso that Congress could not discriminate against any state or region in the exercise of those powers. The Framers believed that both those powers were sufficient for the Congress to shepherd national economic policy. The Framers felt no need to give the Congress the direct power to regulate local activities not otherwise included in its delegated powers. As Justice Marshall put it in *Gibbons v. Ogden* (1824):

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

Lurking behind the debate over the commerce power and occasionally hinted at in some of the Court's opinions is the Necessary and Proper Clause (Article I, Section 8, Clause 18). In the preceding quote, Chief Justice Marshall noted that there may be some "internal concerns" with which it may be "necessary to interfere, for the purpose of executing some of the general powers of the government." Thus, even if the commerce power in and of itself cannot reach particular local activities, Congress may still be able to regulate them if to do so has an appropriate connection to commerce. As Marshall said five years before *Gibbons* in *McCulloch v. Maryland* (1819):

> Let the end be legitimate [for example, the protection of interstate commerce], let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

As Marshall stated it, the required connection between the regulation of the local activity and the protection of Congress's policy on interstate commerce produces a connection similar to the proximate cause test devised by Justice Cardozo and developed by Justice Sutherland. But the modern Court has ignored it.

One should also recall Marshall's limitation, again from *McCulloch v. Maryland*, on the uses of the Necessary and Proper Clause:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

It would follow that Congress could regulate a local activity only if its purpose comports with its delegated power to regulate commerce and the regulation is plainly adapted to its interstate commerce purpose. So concluded Justice Antonin Scalia in his concurrence in *Gonzales v. Raich* (2005), upholding federal regulation of locally grown and consumed marijuana, otherwise legal under state law.

Although Justice Scalia has contested the proposition, *Tyler Pipe Industries v. Department of Revenue* (1987), the traditional view is that the Constitution grants Congress plenary power over interstate commerce. The Commerce Among the States Clause, therefore, operates as an extrinsic restraint on the legislative powers of the states. If Congress has legislated upon a subject within its commerce power, then, due to the Supremacy Clause, any state law to the contrary falls. Congress may even consent to state regulation that directly regulates interstate commerce. But to what extent may a state legislate upon a subject that impacts interstate commerce in the absence of congressional action? Does it matter if the state law *discriminates* against interstate commerce, either in purpose or effect?

The Commerce Among the States Clause operates as an extrinsic restraint on the legislative powers of the states.

It was inevitable that the states, even in the honest exercise of their police powers, would trench on interstate commerce. How far the states can even incidentally intrude upon interstate commerce has been the subject of literally hundreds of Supreme Court cases, often with inconsistent holdings. A detailed treatment of that complicated history is beyond the scope of this essay, but in 1970 in *Pike v. Bruce Church, Inc.*, the Court consolidated its dormant Commerce Clause jurisprudence into the following test: "Where the [state] statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

A few decades ago, some scholars opined that the *Pike* test was a codification of an ad hoc balancing test. More recent scholarship, however, has indicated that the Supreme Court rarely, if ever, decides a dormant Commerce Clause case on balancing grounds since it would be attempting to compare incommensurables. Rather, the *Pike* test describes a series of separate standards by which a state statute can be determined to be within its constitutional powers.

Those determinative principles are as follows:

1. The statute must have a "legitimate" and "public" purpose. It must be within the state's police power, and not designed either to regulate interstate commerce as such, or to discriminate against out-of-state economic interests in favor of private in-state interests.
2. The effect on interstate commerce must be "incidental," rather than the primary purpose of the statute.
3. The interest must be "local." It must regulate elements that are peculiar to the state, such as its harbors, and not impose a pattern of "multiple inconsistent burdens" with other states' conflicting laws on an interstate enterprise.
4. The statute must "regulate evenhandedly." The state must be regulating an activity as part of its police powers. If it is only a "market participant" similar to a private entity, the dormant Commerce Clause is not a bar to its economic decisions even if they impact or discriminate against interstate commerce, though the Privileges and Immunities Clause of Article IV may be a constraint. Moreover, if a state is, in fact, regulating even in the pursuit of a legitimate interest, the state may not discriminate against out-of-staters, absent compelling reasons.
5. The statute must "effectuate" its local public interest. If there is little evidence of such a result, the court may infer that the interstate impact was intentional and hence unconstitutional, after all.

If a state statute survives all these criteria, it will be upheld unless the burden imposed on interstate commerce is "clearly excessive" in relation to the asserted local benefits. This last clause is indeed a balancing test (weighted in favor of the state), but the Court rarely, if ever, reaches it, preferring to decide the issue on one of the antecedent principles.

Justica Scalia does not believe the Court should be monitoring the states' impact on interstate commerce, outside of discrimination against interstate commerce or creating multiple inconsistent burdens. *CTS Corp. v. Dynamics Corp. of America* (1987) (Scalia, J., dissenting.) He believes that the Constitution gives the power to the Congress to cure (or approve of) any excessive state action by legislation. Justice Thomas would rather use the Import-Export Clause to strike down state discriminations against interstate commerce. *Camps Newfound/Owatonna, Inc. v. Town of Harrison* (1997) (Thomas, J., dissenting).

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