An Essay on Commerce Clause

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Topic: We have seen the expansion of the scope of Congressional power under the Commerce Clause starting roughly around 1937. Some are appalled by it, some think that the expansion is perfectly constitutional. Based on the cases from the midterm onwards, does the expansion make the federal power under the Commerce Clause virtually limitless as to undermine the states' sovereignty? Pay special attention to the structural limit, if there is any, inherent in the Commerce Clause and/or the "aggregate effect" argument.

In his concurring opinion for *United States v. Lopez*, Justice Clarence Thomas expressed his concern that Congress is in danger of having the power beyond its constitutional provision under the Commerce Clause. He referred to the Court's trend of reading the Commerce Clause more broadly since the New Deal, evidenced by such opinions that upheld the adoption of the aggregate effect doctrine first explicitly conceptualized in *Wickard v. Filburn.* He further stipulated that the substantial effect principle coupled with the aggregate effect doctrine would put virtually "every aspect of human existence" under the federal government control.[1] He was not alone in his apprehensiveness; among others, Chief Justice Hughes in *Shechter Poultry Corp v. United States* had previously warned the public of the danger of reading the Commerce Clause too broadly since at its face value, there seems to be no structural limit built into the Clause. However, this paper will show the Court has consistently acknowledged and remained faithful to the Clause's inherent structural limits through a careful examination of the Supreme Court opinions regarding the following: unconstitutionality of the delegation of Commerce power, the nature of the legislative procedure of Congress, and the Court's three concentric expansions of the reading of the scope of the Commerce Clause.

One of the most pervasive limits inherent in the Commerce Clause is the limitation put on the delegation of the power to regulate interstate commerce. The limit here has been a rather strict one. The Court not only struck down the delegation of *lawmaking* power to the executive regarding the regulation of interstate commerce in *Panama Refining Co. et al. v. Ryan et al.,* but, as evident in Justice Hughes' opinion for *Schechter,* it also deemed that it is unconstitutional to "delegate legislative power to the President to exercise an unfettered *discretion*..." (emphasis added).[2] As far as the Commerce Clause is concerned, even during the days of broader readings of the Commerce Clause (1937 - 1994), the Court remained steadfast to this limit on delegation of the Commerce power.

But it begs the question whether the exclusivity of the Commerce power imposes any actual or realizable limit on the scope of Commerce Clause. Put it another way, will not the broader readings of the Commerce Clause from 1937 onward overpower any impact of the restriction on delegation of power would impose and render the federal government powerful enough to regulate everything and anything it wants? Two Court opinions suggest otherwise. First, in *United States v. Lopez,* Justice Kennedy contended that the restrictive effect of no- power-delegation policy is an enduring one for the Commerce Clause because it clarifies "discernible lines of political accountability".[3] After all, the ever expansive reading of the Commerce Clause is of concern to Justice Thomas and like-minded individuals in part due to the abstraction of who gets to exercise the power to regulate. It is not difficult to sympathize in concern if we were to take for granted that a nebulous central government official,

1 Howard Gillman, Mark A. Graber, and Keith E. Whittington, <u>American Constitutionalism; Structures of Government</u>, Vol. 1, compiled casebook, 611.

2 Ibid, 525.

3 Ibid, 609.

who is obscured from accountability, makes unguided regulatory decisions about various aspects of our lives. It is important to recognize here, then, that the Court has effectively addressed this concern by continuously sustaining that the power to exercise the interstate commerce regulatory power is exclusive to Congress and nontransferable without specified parameters. Such a limitation makes Congress, and only Congress, responsible for interstate commerce regulations and, in effect, increases the transparency and accountability. Secondly, Justice Blackmun's opinion regarding the nature of legislative process in *Garcia v. San Antonio Metropolitan Transit Authority, et al.*, shows that by reserving the Commerce power exclusively for Congress, the Constitution fully integrates the States' interest into the federal decision making process. Echoing Justice Brennan's dissenting opinion for *National League of Cities v. Usery*, Justice Blackmun specified that because the members of Congress are elected and re-elected by citizens of each State, "the principal and basic limit on the federal commerce power is that inherent in all congressional action–the built-in restraints that our system provides through state participation in federal governmental action".[4] In other words, before exercising the "dangerous" power to regulate interstate commerce, Congress, as *representatives*, must deliberate by examining the issue at hand with respect to varying interests of each member's constituencies. Even under the most expansive reading of the Commerce Clause, in this sense, the Court has fully acknowledged that Congress is limited in exercising its regulatory powers; the Constitution has provided the citizenry with procedural safeguards against the potentially despotic, unchecked federal regulation.

The limit on the Commerce Clause discussed above appears to have one major shortcoming. Although the effect of non-delegation of Commerce power remains restrictive, the Supreme Court's decisions in *Lopez* and *United States v. Morrison* suggest that standing alone, the Commerce Clause does not *adequately* protect the citizenry from Congress' unconstitutional exercise of Commerce power. The Note from Harvard Law Review regarding the implications of *Lopez* explains why this may be the case: the political safeguards of federalism is diffused by such externalities as political compromises between many interest groups and the political actors' ties to political ideologies.[5] Indeed, the limitation we have discussed is not of the power itself but merely of the process in which that power may be exercised. The next logical step in exploring the landscape of the Commerce Clause, then, is to examine if the Supreme Court has recognized any inherent structure within the Clause that would provide further guidance in drawing a more definitive boundary around the regulatory power itself.

The scope of the regulatory power of Congress over interstate commerce has been contested mainly because of the ambiguity laden in the Commerce Clause. In Article I, Sec. 8, the Constitution reads "The Congress shall have Power...To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes".[6] By specifically enumerating powers that could presumably be incorporated within a broader reading of "the power to regulate commerce among the several States"–such as the power to coin money and create post offices–the Constitution imposes a vague sense of limitation, but it actively avoids defining with precision the exact scope of that power. Just how much can Congress regulate? Can it regulate only the commerce that occurs strictly between States, or any regulation that affects interstate commerce? It is obvious that the structural limit of the Commerce Clause is that it should not be used as a blank check of infinite powers and that at the end of the day, the legislation has to be done for the sake of interstate commerce. The Court has abided by this limit as evidenced by the fact that each successive concentric expansion refers directly to how far the activity regulated and interstate commerce could be in order for the regulation to be considered *for* interstate commerce.

The expansion occurred in three concentric circles where the latter one captured the aspects of the prior ones and expanded upon them. The innermost of these was the inclusion of activities

4 Ibid, 626.

5 Harvard Law Review. Note: The Lesson of Lopez: The political Dynamics of Federalism's Political Safeguards. December 2005. LexisNexis. 2.

6 Howard Gillman, Mark A. Graber, and Keith E. Whittington, American Constitutionalism; Structures of Government, Vol. 1, compiled casebook, 743.

(interstate or otherwise) that have "direct effect" on interstate commerce as can be observed in the majority opinions of *Schechter* and *Carter v. Carter Coal Co*. In *Carter,* Justice Sutherland made an explicit reference to this principle when he established that the Bituminous Coal Conservation Act of 1935 was unconstitutional because the activity meant to be regulated was neither interstate in nature nor did it directly affect interstate commerce.[7] But another question arises: with the Court deciding to strike down the congressional regulation in both *Schechter* and *Carter*, did the direct effect principle signal any real expansion? It is a tricky question to answer. The domain of the Commerce power was expanded in so much as that the Court admitted that Congress could now regulate non-interstate activities as long as those activities *directly* affect the interstate commerce. On the other hand, opinions offer very little help in delineating at what point an intrastate commercial activity is deemed to have a direct effect on interstate commerce as opposed to an indirect one. What is telling, however, is the forcefulness of the emphasis Justice Sutherland and Hughes placed on the importance of distinguishing those activities with direct effect from those with indirect effect on interstate commerce for the "maintenance of our constitutional system." The only reasonable conclusion we can arrive at, it seems, is that the first phase of the expansive reading of the Commerce Clause was theoretical at best. And by assuming a more literalist approach to the words of the Constitution than later expansions, the Court convincingly limited the scope of the Commerce Clause to those activities that had a plainly obvious relationship to interstate commerce.

The second expansion introduced a more actionable extension than the direct effect doctrine and let go of more – although some argue too much – of those limitations reinstated before 1937. From 1937 decisions onwards, we see the Court adopting what Justice Clarence called the "substantial effect" principle. Unlike with the direct effect principle where the close "proximity" of the activity to be regulated to interstate commerce was of utmost concern, the substantial effect principle provides no explicit guideline as to how intimately the to-be-regulated activity needs to be related to the interstate commerce. Instead, as is evident in Justice Hughes' opinion in *National Labor Relations Board v. Jones & Laughlin Steel Corp.* the validity of regulation appears to be wholly dependent on the size of the impact that the activity to be regulated will have on interstate Commerce.[8] Furthermore, whereas the ambiguity of "direct effect" worked to limit Congress, the ambiguity of what constitutes "substantial" worked to enlarge the scope of the Commerce Clause to the point where, at its face value, Congress could assume all sorts of power under the pretext of the Commerce Clause. The majority opinion of the landmark case of *US v. Darby* only aggravates the growing apprehension. Here, Justice Stone went as far as to say that

> The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control...The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which *so* affect interstate commerce or the exercise of 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 of Congress to regulate interstate commerce... (emphasis added) [9]

In effect, the Court declared itself unfit to pass judgment about legislations that have ulterior motives or purposes as long as their main objectives are to substantively protect and/or promote

7 Ibid, 466-467.

8 Ibid, 470.

9 Ibid, 472.

interstate commerce. The critics of the substantial effect principle pointed out that the Court's deference to Congress signifies an alarming expansion in Commerce Clause because the principle, as so understood, does not specify whether the activities even have to be commercial in nature to be legitimately regulated by Congress.[10] Such a broad interpretation of the Commerce Clause, they argue, is tantamount to passively granting extra powers to Congress since the legislative branch is now equipped with the means with which to usurp of power once thought to be exclusively reserved for the States.

A further examination, however, reveals that the second expansion was consistently restricted by an important practical limit recognized in the first expansion. Namely, just as it holds true for the direct effect principle, the caveat of substantial effect principle is that the overarching objective of regulating an activity has to be *for* the protection and advancement of the interstate commerce.[11] Furthermore, whereas the direct effect principle observed the structural limit of the Commerce Clause by mandating physical proximity between the regulated activity and interstate commerce, the substantial effect principle observed the limit by mandating sufficient (measured in magnitude) effect-relationship. As John Alexander notes, the magnitude requirement was observed strictly.[12] Take for instance *Lopez* and *Morrison.* In both cases, justices reasoned that because the gun-control or discrimination-protection had "attenuated" effects on interstate commerce at best, legislations used the regulatory power over interstate commerce as a mere means to addressing the central concern – the police power. The limit, again, imposed a very realizable restriction on congressional action.

As Anthony Varona and Kevin Layton suggested in their symposium piece, however, the method of determining whether the magnitude of effect is sufficient seems to be too ambiguous to survive anything other than the infamous "I know it when I see it" test.[13] Would it not be just as easy to argue that the *Heart of Atlanta Hotel* ultimately used to legally protect African Americans from the segregation as opposed to serving the interest of interstate commerce? It is important to note here how John Alexander further qualified the aggregate effect principle. He argued that faithful to the limitation the Court previously recognized, the Court seems to utilize a minimal proximity test in conjunction to the magnitude test to determine whether the regulation is for the benefit of interstate commerce or for something else entirely. For instance, Justice Rehnquist's criterion stated that all of the regulated activities have to be at least "economic in nature".[14] By restricting the congressional regulatory power of non-commercial activities to those that are at least economic in nature, Justice Rehnquist effectively excluded the inclusion of powers that were traditionally reserved for the States (i.e. internal police power over criminal matters). Again, consistent with its precedents, the Court strictly observed the structural limits of the Commerce Clause.

The last of these expansions was the adoption of the aggregate effect principle, first championed in *Wickard*. Whereas the substantial effect principle was implied to apply to an activity that, standing alone, could substantially impact interstate commerce, the aggregate effect doctrine allows for the regulation of activities (commercial or otherwise) that may be insignificant by itself as long as that activity, if committed by many, can presumably affect interstate commerce. As duly noted in Justice Steven's opinion for *Raich*, this principle is controversial for two main reasons. First, it explicitly expands the domain of Commerce Clause to those activities like growing your own wheat that are not only private but that also

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10 Ibid, 615 - 616.

11 The direct effect's emphasis on the "proximity" of the regulated activity and interstate commerce is a stricter interpretation of what it means to regulate activities *for the sake of* interstate commerce.

12 John P. Alexander. "In Your FACE": Congressional Encroachment Under the Commerce Clause. Georgetown Journal of Law & Public Policy. Winter 2007. LexisNexis. 3.

13 Anthony Varona and Kevin Layton. Symposium: Anchoring Justice: The Constitutionality of the Local Law Enforcement Enhancement Act in United States v. Morrison's Shifting Seas. Stanford Law & Policy Review. Winter 2001. LexisNexis. 4.

14 Howard Gillman, Mark A. Graber, and Keith E. Whittington, American Constitutionalism; Structures of Government, Vol. 1, compiled casebook, 616.

have "trivial" effect–cannot be deemed to have substantial economic impact–on the market by itself.[15] [16] Secondly, under this principle, the Court does not need to *determine* that non-commercial activities under regulation will have a substantial effect on the interstate commerce in aggregation but simply that there exist a "rational basis" for thinking so. Frankly, this is the broadest reading of the Commerce Clause thus examined; it is not at all difficult to sympathize with critics who take this principle to imply that most, if not all, of our daily activities are within the congressional power to regulate since in aggregate, anything can be presumed to have a notable impact on the interstate commerce.[17]

Justice Stevens, however, was quick to deny such a "sweeping implication" and contended that just as it was with the substantial effect principle, the aggregate effect principle limits its applicability to those that have reasonable ties to interstate commerce.[18] He specified what constitutes this "reasonable tie" in his opinion for *Raich*: the regulated activity, in aggregate, has to impose direct economic consequences on interstate commerce. Specifically, he reasoned that the Controlled Substance Act in question in *Raich* was "quintessentially economic"–and hence proved its tie to interstate commerce–since it regulated an activity that in aggregate "competed" with the heavily-regulated interstate marijuana market. Applied to *Filburn*, farmer Filburn's action was "economic" in a sense that his home-grown wheat, together with those grown by other farmers following Filburn's example, competed with the wheat market the price of which Agricultural Adjustment Act of 1938 was trying to control. Moreover, the "reasonable-tie" limit provides an important guideline for understanding the aggregate principle since it can, consistent to the precedent, curb Congress from attempting to regulate whatever private activities it wishes such as sleeping. In particular, even in aggregate, whether people sleep one more hour or less cannot be reasonably argued to directly compete with some other regulatory policy on interstate commerce. But perhaps as a way of quelling further worries, the Court has also implicitly adopted the view that the activity, once conceptualized in aggregate, has to impose direct, reasonable impact on the interstate commerce.[19] Such an implication is reflected in Justice Scalia's concurring opinion to *Raich.* He stated that unlike in *Lopez,* the regulation of private cultivation or possession of marijuana is "necessary and proper for the regulation of interstate commerce" as *failure to do so* will seriously jeopardize "the legitimate end of eradicating Schedule I substances from interstate commerce". In other words, the relationship between the activities to be regulated (imagined in aggregate) and interstate commerce has to be direct in so much as failure to regulate such an activity will *harm* interstate commerce. As it has been for more restrictive circles of expansion, the Court again established the necessity to prove the strength of the tie between the activity Congress enacted to regulate and interstate commerce in order to safeguard the States from the federal government's despotic usurpation of power.

As can be observed in the close-examination of the discrete expansions of the reading of the Commerce Clause, at no point did the Court attempt to endow Congress, under the pretext of Commerce Clause, the power it was not originally guaranteed by the Constitution. In each concentric expansion, we see the Court adopting more liberal interpretations of the extent to which Congress can regulate activities *in order to* protect and advance interstate commerce. Yet, from the most restrictive reading–regulation of interstate activities and intrastate commercial activities that have direct effect on the interstate commerce-

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15 Ibid, 613.

16 Activity is private in a sense that it was never meant to enter into commerce (buying, selling ,distributing, etc.)

17 Martin D. Carcieri. Gonzalez v. Raich: Congressional Tyranny and Irreverence in the War on Drugs. University of Pennsylvania Journal of Constitutional law. September 2007. LexisNexis. 8.

18 Howard Gillman, Mark A. Graber, and Keith E. Whittington, American Constitutionalism; Structures of Government, Vol. 1, compiled casebook, 614.

19 Aelx Kreit. Why is Congress Still Regulating Noncommercial Activity? Harvard journal of Law & Public Policy. Fall 2004. LexisNexis. 9-10.

20 Howard Gillman, Mark A. Graber, and Keith E. Whittington, American Constitutionalism; Structures of Government, Vol. 1, compiled casebook, 614.

-to the most liberal reading–regulation of private, non-commercial activities that in aggregate can be reasonably assumed to have a substantive effect on interstate commerce–the Court paid its dues to the limit that lies at the heart of the Commerce Clause. It has readily recognized that the Commerce Clause was not a blank check under which Congress can enact laws that regulated activities such as those that are strictly criminal in nature. It also has consistently emphasized that the relationship between the regulated activity and interstate commerce has to be substantial at the minimum. Furthermore, as noted by Justice Jackson in *Wickard*, the Court trusted that the effective restraints on the exercise of the Commerce Clause will also be instituted by the political process inherent in the congressional deliberation and legislation. This paper does not deny that the attitude toward the Commerce Clause has evolved since 1935. Rather, it questions whether worries prominently expressed by Justice Thomas are justified and whether the Court's precedents show certain stability in its interpretation of the Clause. We have seen that there does exist a connecting thread; the Court has continuously held that Congress may regulate only interstate commerce and those activities that strongly affected interstate commerce. As far as we can see, there is no indication that the Court has ever been willing to entirely compromise the State sovereignty for the benefit of creating the ever-more powerful central government.