

What is the Commerce Clause and Why is it Important?

by

Gary Marbut

During colonial times in America, there was a problem with commerce that crossed lines between colonies. More specifically, some colonies would practice predatory taxation upon goods passing through enroute from colony A to colony B. For example, suppose the Carolinas were shipping tobacco to market in New York. Suppose that enroute Virginia placed such a heavy tax on the goods passing through that they would not be marketable, pricewise, upon reaching New York markets.

This was an issue that the Continental Congress and the framers of the U.S. Constitution felt Congress must have the power to address. Therefore, the original Constitution contained the provision at Article II, Section 8:

"The Congress shall have power ... To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

Congress's power to "regulate commerce ... among the states" is now often referred to as done under the "interstate commerce clause" or just the "commerce clause."

Commerce clause power was not much used by Congress until the New Deal and the administration of President Franklin D. Roosevelt (FDR). During that administration, Roosevelt attempted to assert a lot of federal power that had not been previously asserted by the federal government. However, a number of such laws pressed through Congress were found by the U.S. Supreme Court to lack constitutional authority. For many of these pet endeavors, FDR claimed commerce clause authority.

Upon being rebuffed by the Supreme Court, Roosevelt threatened to expand the number of justices on the Court in order to be able to pack the Court with sympathizers and thereby gain court approval of his threatened New Deal programs. That created something of a standoff between Roosevelt and the Supreme Court.

It was into this politically-charged situation that the legal case of *Wickard v. Filburn* came to the Supreme Court. Because of the real threat of Court-packing by Roosevelt, the Supreme Court blinked on *Wickard*.

Wickard was a wheat farmer in Illinois and Filburn was the Secretary of Agriculture. In order to maintain wheat prices, Congress had instituted price supports for Wheat markets, along with quotas for growing wheat. Wickard was not only growing wheat for market, but he also grew an extra acre of wheat to harvest to give to his wife to grind into flour to make bread for the Wickard family. The Department of Agriculture, tasked to enforce the wheat quotas, asserted that the acre of wheat Wickard grew for his family was a violation of the quotas.

Wickard sued. The Department of Agriculture claimed that Congress had commerce clause authority under the Constitution to prohibit Wickard's practice of growing wheat for his family. Even though it was admitted that the wheat Wickard grew for his family never left the farm, the Department of Agriculture claimed that this practice *affected* interstate commerce. If Wickard had not given this wheat to his wife, the government argued, it might have traveled across a state line and could have *affected* interstate commerce. Further, the government argued, if Wickard had not given farm-grown wheat to his wife to feed the family, his wife would have bought bread at the store - bread that might have crossed a state line and might have *affected* interstate commerce.

Thus, the government argued, Congress had sufficient constitutional authority under the commerce clause to impose the wheat quotas on Wickard and prohibit him from growing extra wheat to feed his family.

When presented with this argument and the Roosevelt threat to expand and pack the Supreme Court, the Court upheld the government's arguments in Wickard, thereby dramatically expanding the power of Congress to "regulate commerce ... among the states."

Since the New Deal, a large proportion of laws enacted by Congress are theoretically founded on commerce clause power.

Fast forward to current times. California passed a law in 1996 allowing the cultivation, distribution and consumption of marijuana for medicinal purposes. Notwithstanding this state law, the federal Drug Enforcement Administration continued a practice of raiding medical marijuana clinics in California, and charging those involved criminally with possession and distribution of "dangerous drugs," a violation of federal law. It was assumed that this power was available to Congress under the commerce clause

In 2005, a legal case about this, *Gonzales v. Raich*, reached the U.S. Supreme Court, which upheld the power of Congress to enforce federal anti-marijuana laws despite state law approval of medical marijuana. The Court held that medical marijuana grown and consumed in California was indistinguishable from marijuana transported across the state line, and therefore *affected* interstate commerce, even in the absence of any legal market in marijuana.

Some legal scholars say that under this wide-open interpretation of commerce clause authority, there is absolutely nothing that Congress cannot regulate as *affecting* interstate commerce. The air you breathe, for example, was once in another state. The pencil you write with, even if made from wood and graphite from your state, was made possible by loggers who cut the trees for the pencil, and who had coffee for breakfast that was transported across a state line (See *U.S. v. Stewart*, Judge Kozinski's first opinion).

The Firearms Freedom Act (FFA) is a direct challenge to federal commerce clause authority because it declares that any firearms made and retained in a state are not subject to federal commerce clause authority. Further, firearms made under the authority of the FFA must be stamped "Made in [state name]", making them distinguishable from other firearms, unlike the indistinguishable medical marijuana in *Raich*.

Proponents for the FFA say that it is about states' rights. Firearms are the object, but states' rights are the subject. They also argue that the commerce clause was amended, by the Tenth Amendment, and that the Tenth Amendment, being the most recent expression of the enacting authority, must prevail over an unlimited interpretation of commerce clause authority to regulate firearms made and retained in a state.

If FFA proponents' view prevails, it may affect a great deal of congressional authority other than for firearms.

The renewed debate over states rights and the pending litigation over the FFA have set the stage for a general re-examination of the scope of federal commerce clause authority. And while it is still unclear exactly where this re-examination will end up, the eventual outcome could drastically change application of federal authority in effect since the New Deal.

End

For further reference see:

Wikipedia - Commerce Clause

http://en.wikipedia.org/wiki/Commerce_Clause

Wikipedia - *Wickard v. Filburn*

http://en.wikipedia.org/wiki/Wickard_v._Filburn

Wikipedia - *U.S. v. Lopez*

http://en.wikipedia.org/wiki/Us_v._lopez

Wikipedia - *U.S. v. Stewart*

[http://en.wikipedia.org/wiki/United_States_v._Stewart_\(2003\)](http://en.wikipedia.org/wiki/United_States_v._Stewart_(2003))

Wikipedia - *Gonzales v. Raich*

http://en.wikipedia.org/wiki/Gonzales_v._Raich

Wikipedia - Dormant Commerce Clause

http://en.wikipedia.org/wiki/Dormant_Commerce_Clause

Professor Rob Natelson

Tempering the Commerce Power, 68 Mont. L. Rev. 95 (2007).

<http://www.umt.edu/law/faculty/natelson/articles/Tempering%20the%20Commerce%20Power.pdf>

The Legal Meaning of "Commerce" In the Commerce Clause, 80 St. John's L. Rev. 789 (2006).

<http://www.umt.edu/law/faculty/natelson/articles/Commerce%20Clause.pdf>