The Meaning of the Commerce Power and Congress's and the Courts' Use (And Abuse) Of It

by

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Knowing about our Constitution requires us to understand that it created a federal government of fairly limited scope. This might seem a basic fact of which every citizen should be aware, but many are not. When I was teaching the Constitution to law students, I discovered that many, perhaps even most, of my students had managed to get through high school, college, and a year of law study without ever learning it.

Nevertheless, the limits on federal power remain a fundamental aspect of the Founders' achievement. In the words of Justice Anthony Kennedy, the Founders "split the atom of sovereignty." That is, they not only divided power between the three branches of the central government, as the British had done before them; but they also allocated responsibilities between two levels of government: Washington, D.C. and the states. Why did they do this? As Justice Sandra Day O'Connor has observed, the principal purpose was not "states' rights." The principal purpose was to preserve individual liberty.

The Founders sought to accomplish this division of power in three ways. First, they consciously rejected the British system of the unwritten, common-law type of constitution. Instead, they adopted a written document that marked the federal government's jurisdiction in clear language. And that language was clear: Some of the terms in the Constitution may seem obscure today, but during the Founding Era most of them were readily comprehensible by laypeople, while the rest were common legislative and legal terms with established meanings: Examples of these legislative and legal terms include "privileges and immunities," "habeas

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corpus," "the recess of the Senate," and "necessary and proper."

The second way the Founders divided power was by itemizing the areas the federal government could address. They did so by listing, or enumerating, federal powers. The best-known enumeration appears in Article I, Section 8, but the Constitution includes others as well. Some of these bestow authority on Congress, some on the President, some on the courts, and some on conventions and state legislatures.

Next, the Founders adopted the Ninth and Tenth Amendments to reinforce the message that the authority of the federal government was limited to the Constitution's enumerated grants.

Obviously, understanding how this system was supposed to work requires knowing what the words of the Constitution actually mean.

To a remarkable degree, the rules and limitations in the Constitution are still generally honored. But some are not. Among them are the two provisions that together comprise what constitutional lawyers refer to as Congress's "Commerce Power."

One of the two provisions is Article I, Section 8, Clause 3. It is called the Commerce Clause. It states that "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The portion of the Commerce Clause we are concerned with today is the portion that grants Congress authority to "regulate Commerce . . . among the several States." The other component of the Commerce Power is Article I, Section 8, Clause 18. We call it the *Necessary and Proper Clause*, because it grants to Congress authority to "make all Laws which shall be necessary and proper for carrying into Execution" its other powers, including the power to regulate commerce.

Several years ago, I undertook an investigation into the Founding-Era meaning of the phrase "to regulate Commerce." I did some of my work in America, and some of it at libraries in England. I traveled to England because during the 18th century, American constitution-writers and lawyers closely followed English legal terminology and precedent, and England was the best

place to study those subjects.

Before embarking on my research, I knew that some libertarian legal writers claimed that in the 18th century the word "commerce" had a very narrow meaning—that it pertained only to buying and selling among merchants, and that Congress could facilitate that trade, but not obstruct or prohibit it. On the other hand, I also knew that more liberal writers had claimed that "commerce" had a very broad meaning—that any and all economic activity was "commerce," and that Congress could promote or ban almost any economic activity it wished. Finally, I knew that a handful of prominent liberal professors were arguing that "commerce" encompassed human relations of every kind, and that the commerce power was nearly unlimited.

To get at the truth, I dug into 18th century documents discussing "commerce" and the regulation thereof. I looked at English and American court cases decided before the year 1790, and found over 470 uses of the word "commerce." I also found a vast number of usages and explanations in 18th century legal and lay dictionaries, treatises, histories, and many other Founding-Era sources.

Here is what I learned:

First, I learned that the prevailing meaning of "to regulate Commerce" was not quite limited to governing trade among merchants. It also included certain activities tightly connected to that trade. These included cargo insurance, commercial finance, international brokerage, market-places, navigation, and other forms of commercial transportation.

Second, I learned that regulation of commerce could, and commonly did, include restrictions on trade. It could include tariffs, embargoes, and flat bans on certain kinds of goods and transactions.

On the other hand, I also learned that "regulating commerce" was a distinct legal concept, separate from governing other kinds of activities, both economic and non-economic. "Regulating commerce" was different from controlling morals or crime or naturalization. It also was different

from regulating economic subjects such as bankruptcy, intellectual property, land use, roads, manufacturing, health care and most other services, business ownership, insurance other than cargo insurance, labor relations, agriculture, or mining. None of these was included in "commerce." The Constitution did grant Congress power over some of those items—such as bankruptcy and intellectual property—but it did so by grants separate from the Commerce Power. The remainder, including most economic regulation, was left exclusively to the states.

I further discovered that the Constitution's line between federal and state jurisdiction was closely akin to a division that American colonial writers had advocated before the Revolution. In the 1760s and 1770s, American lawyers such as John Dickinson had argued that Britain should regulate commerce and navigation among units of the British Empire, but otherwise should permit the colonies to govern themselves. When writing the Constitution after the war, Dickinson and the other Framers gave Congress a limited taxing power, but for the most part they duplicated the division of authority they had promoted before the War. In other words, they granted to the federal government what they had rhetorically conceded to Britain, and left to the states what they had claimed for the colonial governments.

In the course of my investigation, I learned that this division was reinforced during the public debates over whether the Constitution should be ratified. The Constitution's supporters repeatedly re-assured the American people that the states would retain exclusive jurisdiction over most areas of life. The Constitution's supporters were very specific about this. In a series of essays and speeches, they told the public that the federal government would have little or no power over any of the following activities within state boundaries: manufacturing, agriculture, real estate, inheritance, licensing, most civil lawsuits, criminal law, regulation of local businesses, religion, social services, and education. Those making these representations included James Madison, Alexander Hamilton, Tench Coxe, James Wilson, and others.

Finally, I learned that the Founders did not erect walls between federal and state authority because they thought that that these activities were sealed off from each other in tight little boxes. On the contrary, they repeatedly talked about how commerce, manufacturing, agriculture, personal behavior, and other activities were interconnected. Yet for purposes of government

regulation, they decided to separate them.

This was a conscious decision. The Constitutional Convention actually had considered two proposals to empower Congress to regulate any activities with interstate effects. But the delegates emphatically rejected both of them. Instead, their Constitution deliberately divided jurisdiction over interconnected activities between different levels of government, and this arrangement was confirmed explicitly during the ratification.

The basic idea was that power had to be divided in order to secure liberty and the benefits of local control. They gave the federal government considerable authority to deal with spill-over effects from state to state, but not total authority. If a problem arose that was outside the enumerated powers, then it would have to be dealt with in a different way—by, for example, interstate compact or constitutional amendment.

In addition to the Commerce Clause, the other component of Congress's Commerce Power is the Necessary and Proper Clause.

In modern times, the Necessary and Proper Clause has been the subject of much misunderstanding. Some have called it an "elastic clause" that grants Congress "vast power"—this despite the fact that numerous Founders affirmed that the Necessary and Proper Clause actually doesn't grant any power at all. Others have gone to the opposite extreme, and claimed that the Necessary and Proper Clause is entirely meaningless.

These misunderstandings arise from failure to study adequately the record of the Founding Era.

The historical record tells us that the Necessary and Proper Clause was only one example of a very common kind of phrase used in 18th century legal documents—particularly legal documents by which some people granted authority to other people. You can find the sisters of this clause---and its brothers and its cousins and its aunts—in trust instruments, in powers of attorney, in statutes and ordinances, in commissions and instructions to agents, and in court

documents. You can also find 18th century court cases explaining the meaning of the language.

What the Necessary and Proper Clause does is to tell us how to interpret the Constitution's grants to Congress. It says, "When you interpret the language granting authority to Congress, please don't read those words too narrowly. Instead, read them to further the intent behind the document. For example, don't limit the authority of Congress to regulate 'commerce' only to trade among merchants. We also intend that "regulating commerce" may include laws governing navigation, cargo insurance, commercial finance, international brokerage, and so forth."

Eighteenth century lawyers referred to this intent-based rule of interpretation as the *doctrine of incidental powers*. Our first constitution, the failed Articles of Confederation, had denied Congress any incidental powers. So the Framers drafted the Necessary and Proper Clause to give Congress some wiggle room.

But not too much wiggle room. The room we are talking about here is a parlor, not a stadium. There were well-recognized rules that limited the doctrine of incidental powers. Incidental powers had to be subordinate, of lesser importance, than enumerated powers. Congress could require manufacturers to affix labels to items about to be shipped in interstate commerce, but Congress could not seize control of the entire manufacturing process. Also, Congress had to use its incidental powers for the purpose of executing its enumerated powers. To use a modern example, Congress could mandate labels to assist in regulating commerce, but it could not order labels affixed simply to subsidize the paper industry or promote the general welfare. Founding-Era lawyers would call that a "pretext," and as the great Chief Justice John Marshall warned, the Necessary and Proper Clause does not authorize laws adopted on pretext.

Another limit on incidental powers was that there had to be a genuine reason for believing that the makers of a document intended an incidental power to go with the enumerated one. For example, when the First Congress considered whether Congress had incidental power to incorporate a national bank, bank advocates tried to show that a national bank was a customary way to enable a government to borrow money and to do other things the Constitution authorized.

Advocates also tried to show that, apart from custom, not having a bank would make exercise of the express powers very difficult or impossible. These were accepted ways of showing that a lesser power had been granted with a greater.

Now, the Founders said repeatedly that the courts would have the job of policing the boundaries between the federal government and the states. From the time of the Founding until the 1940s, the Supreme Court conscientiously did that job. You see this, for example, when you read carefully the opinions of Chief Justice Marshall—not just the shortened versions appearing in law school case books, but the entire opinions, including the language that case book editors tend to omit. Many Supreme Court cases decided before 1940 contain language that law professors sometimes mock, such as "current of commerce" (*Swift v. U.S.* [1905]), "flow of commerce (*Stafford v. Wallace* [1922]), and "direct and indirect effects" *(U.S. v. E.C. Knight Co* [1895]). But as the case opinions make clear, these were just colorful ways of telling us when Congress was acting within its incidental powers and when it was not.

In the course of its duties, inevitably the Supreme Court made mistakes. For example, in 1918, in a case called *Hammer v. Dagenhart*, the Court construed the Commerce Power too narrowly. It imposed a limit that the Constitution doesn't impose. And in 1937, in a case called *National Labor Relations Board v. Jones & Laughlin*, the Court construed congressional authority too broadly: It forgot that for Congress to exercise a power under the Necessary and Proper Clause, that power has to be subordinate to, or less important than, a specifically-enumerated power.

Still, these cases were bona fide efforts to try to enforce the boundaries between federal and state jurisdiction.

In later years, however, the wiggle-room offered by the Necessary and Proper Clause became first a stadium, and later something akin in size to the Bonneville Salt Flats.

In discussing just when the Supreme Court abdicated its responsibility to police the limits on the Commerce Power, many writers point to the 1937 *Jones & Laughlin* case. Others focus on

a 1942 case called *Wickard v. Filburn*. But I believe the key turning point was the 1941 decision in *United States v. Darby*.

In the *Darby* case, the justices ruled that Congress could use its Commerce Power to regulate the manufacturing process of a relatively small company. The justices adopted what constitutional lawyers call the so-called *substantial effects test*: This "test" is that if Congress has any rational basis for thinking that an economic activity might "substantially affect" interstate commerce, then Congress can regulate it. In the real world, it is not much of a test at all.

Darby also adopted another rule usually identified with the later case of *Wickard v. Filburn*: the "aggregation principle." This allows Congress to control tiny in-state enterprises, such as Ma-and-Pa stores, that have virtually no effect on interstate commerce. Congress can do so if it drafts its laws broadly enough to include a mass of enterprises that, all together, have a substantial effect on interstate commerce. Thus, the "aggregation principle" creates positive incentives for Congress to over-regulate, and helps explain why our land of the free has become the land of the regimented.

Close reading of *Darby* and later decisions of the same kind reveal that they were not decided under the Commerce Clause, as commonly assumed, but actually under the Necessary and Proper Clause. With the exception of a 1944 case expanding the definition of "commerce" to include all kinds of insurance, the Court still follows the relatively narrow Founding-Era definition of "commerce." Indeed, the Court has admitted repeatedly that federal laws governing labor relations, manufacturing, agriculture, crime, and marijuana plants in the window box are not really "regulations of commerce." Instead, they are regulations of *other activities* that the Court thinks *substantially affect* commerce. For this reason, the *Darby* case, and many later cases, lean on the Necessary and Proper Clause.

However, applying the Necessary and Proper Clause that way is to mutilate its meaning. That Clause encapsulates the doctrine of incidental powers. It grants no authority by itself. It simply acknowledges Congress's powers should be read as the Founders intended rather in their strictest sense. And the intent of the Founders is no mystery here: As I mentioned earlier, they

repeatedly represented to the American public that activities such as manufacturing, agriculture, land use, and garden-variety crime were outside federal jurisdiction. Moreover, the doctrine of incidental powers specifically excludes laws adopted merely as *pretexts* for achieving unenumerated goals, and much federal legislation is really adopted for reasons unrelated to commerce.

In fact, the Court's re-write of the incidental power doctrine not only contradicts the way that doctrine is supposed to apply in the Constitution; it also contradicts every other way the doctrine is used throughout the law!

But there is a more fundamental problem: By stretching the Commerce Power this way, the federal government has not interpreted the Constitution, but staged a kind of coup d'état. It has imposed on us a Constitution by which federal politicians can regulate almost anything with interstate effects—which, as a practical matter, means almost anything of significance. Yet this is precisely the formula our Founders emphatically rejected, in favor of a list of enumerated powers.

Originally, the re-writing of the Commerce Power was hailed as a development mandated by modern realities. Most of us now know better. The complexity of modern life is far too great for any government to control it centrally, even if that were otherwise desirable. Vain efforts to centrally control a modern economy is one reason for the collapse of the Soviet Union, and throughout the 1990s the failure of such efforts forced radical changes in much of the rest of the world as well. Since that time, global trends have continued toward decentralization and freedom. The efforts in the United States to move in the opposite direction—to swim upstream against modern realities—have led to widespread disgust with the federal government and public distress of the kind surrounding the Affordable Care Act.

Last year the Supreme Court, speaking through Chief Justice Roberts, upheld the Affordable Care Act's penalty for not buying insurance as a form of "tax." Before reaching that decision, however, Justice Roberts had some very interesting things to say about the Commerce Power.

He concluded that the individual insurance mandate was outside the Commerce Clause because the mandate "does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product." He also concluded that the Necessary and Proper Clause did not support the mandate either.

We at the Independence Institute had filed a brief with the Court on the Necessary and Proper Clause issue. The brief was based closely on a 2010 book I co-authored called *The Origins of the Necessary and Proper Clause*, published by Cambridge University Press. Justice Roberts did not cite our brief specifically, but much of his language tracks it closely. The result is an opinion that seems to signal a shift back toward the Founders' understanding.

For example, Roberts wrote that the Clause pertains to incidental powers. He wrote that it does not actually grant Congress any additional authority but is "merely a declaration, for the removal of all uncertainty." He wrote that incidental powers generally are "narrow in scope," that they must be "exercises of authority derivative of, and in service to, a granted power." And he added that they must be of smaller consequence than the "great substantive and independent powers" actually conferred by the Constitution.

And he said that congressional enactments that exceed the scope of constitutional authority are "merely acts of usurpation," which the judiciary will declare unconstitutional.

Perhaps Chief Justice Roberts was telling us that he is finally prepared to reinstate some of the intended limits on the Commerce Power. That remains to be seen.