Understanding the Commerce Clause

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In the last couple of weeks, we’ve gone over a number of historical commerce clause cases to see the development of the doctrine. Here, I’ll distill some key questions and takeaways from our reading, some black-letter rules, and the relationship between the history and current developments in the doctrine.

Historical Periods

There are several distinct periods of commerce clause doctrine:

1. The end of the 19th and beginning of the 20th century featured a Court that took a fairly restrictive view of the commerce power.

2. The mid-20th century Court, from roughly *Wickard v. Filburn* to *United States v. Lopez*, took a very expansive view of the commerce power; essentially anything Congress wanted to do was acceptable. The Court struck down no laws as exceeding Congress’s commerce power between 1937 and 1994.

3. The late 20th century and contemporary court, from *Lopez* onward, has been rolling back the earlier commerce clause expansion. In consequence, the doctrine is currently unsettled: it’s unclear where the limits lie, or to what extent we might anticipate a return to some of the ideas from the earlier period.

In order to sort out where the contemporary court might go, we need to understand the contours of the doctrine and its controversies as it has developed.

Key Questions

Congress has power to regulate (1) “commerce” (2) “among the several states.” Observe that there are at least two textual elements necessary in order to be a valid exercise of the commerce clause power.¹

The cases we’ve seen thus far have touched on four key questions:

¹We’ll see that Chief Justice Roberts’s opinion in *NFIB v. Sebelius* suggests a third element as well: the Congressional enactment must be a regulation, where that means a rule governing existing commercial activity as opposed to commanding new commercial activity.
1. What’s commerce?
2. What’s “among the several states”?
3. How much deference do we give Congress about what substantially affects interstate commerce?
4. To what extent can Congress use the commerce power to get at noneconomic or intrastate policy ends?

What’s Commerce?

From Gibbons v. Ogden, we learned that commerce isn’t just limited to buying and selling of goods—at the very least, commercial interstate transportation (aka: the buying and selling of services) is covered.

Once you have transportation as well as buying and selling, the rest follows pretty easily: “commerce” means interstate economic activity in general, and also sweeps in some noneconomic activity using facilities (like the roads) that are also used in interstate commerce. Often we summarize this last idea by saying that Congress may regulate the channels and instrumentalities of interstate commerce. This means things like transportation networks are subject to Congressional regulation.

What’s interstate?

The Court in E.C. Knight interpreted an antitrust law as not applying to manufacturing in order to make it constitutional. The theory was that manufacturing is not interstate commerce. This is no longer good law, but it’s a good case to highlight the question: how is a regulation of manufacturing a regulation of interstate commerce? Possible arguments include:

1. Manufacturing happens with materials that have travelled in interstate commerce.
2. Manufacturing affects interstate commerce because if you make something, you don’t have to buy it, and it affects the interstate market (this was a key idea in Wickard v. Filburn, albeit about agriculture rather than manufacturing).
3. Manufacturing affects interstate commerce because manufacturers compete with one another across state lines, so what a manufacturer in one state can get away with changes what a manufacturer in another state can get away with (this was a key idea in United States v. Darby).

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1 This is an important general principle of constitutional adjudication: if the Court can find a limiting interpretation of a statute that makes it constitutional, they’ll choose it.
Interlude: The Substantial Effects Test

Ultimately, the first and second issues were resolved in the cases we’ll read at the start of week 6 with the substantial effects test. *NLRB v. Jones* and *United States v. Darby* capture the development of this doctrine, with *Wickard v. Filburn* being its high point. If some activity has a substantial effect on interstate commerce, Congress can regulate it. **This is extremely important.**

The substantial effects test is really a necessary and proper kind of idea: much like Congress’s power over currency and such gives it the power to make a national bank in order to achieve its currency (etc.) policy, Congress’s power over commerce gives it power over some intrastate/non-commercial activity in order to effectuate its commerce policy. Therefore, for example, Congress can reach activities that aren’t clearly commerce or aren’t clearly interstate if its regulation of interstate trade would be less effective without also regulating that activity.

Another important element of the substantial effects test is that the effects can be **aggregate**. In *Wickard* and in *Heart of Atlanta*, it wasn’t relevant that one farmer’s wheat production or one hotel owner’s racial discrimination wouldn’t affect the overall market for wheat or hotels; because discrimination in public accommodations in general affected the ability of African-Americans to participate in interstate commerce, and because wheat-growing in general affected the stability of the system of price controls Congress was imposing, Congress could regulate individual activity in those areas.

The substantial effects test was dominant through most of the 20th century, and is still good law today, although, as we’ll see, in cases like *Lopez* and *Morrison*, the Court has reined it in somewhat.

**How Much Deference?**

Now that we have a substantial effects test, we have to answer the question: who gets to decide what counts as a substantial effect?

The mid-20th-century cases show a substantial amount of deference, that resembles something like a rational basis test, i.e., if Congress could have rationally thought that some activity had a substantial effect on interstate commerce, it can regulate it. *Lopez* and *Morrison* are somewhat less deferential.³

**Indirect Regulation?**

Here’s a not-really-a-hypo hypo: assuming that wages and hours aren’t themselves regulable under the commerce clause (i.e., because employment is intrastate), can Congress regulate them by prohibiting the transport of goods in interstate commerce where those goods have been made under working conditions that violate the Congressional policy?

³In particular, there’s now some talk about whether Congress must have evidence and/or formal Congressional findings to support the notion that some activity substantially effects interstate commerce. It’s not clear yet how far the Court will go in this direction.
The early 20th century Court struggled to answer this question. Sometimes we saw the argument that Congress either has to have a commercial motive, as opposed to something like a motive to carry out morals regulation (e.g., as the dissent argued in Champion v. Ames). Sometimes we saw the argument that the law had to have commercial or economic effects (Hammer).

However, the mid-20th-century cases abandoned these ideas. Heart of Atlanta is a good example, where it’s clear that the point and effect of the regulation weren’t to create more interstate travel but to promote racial equality.

Today, it’s generally accepted that Congress may regulate noneconomic activity by prohibiting the use of interstate commerce to carry it out. For example, the Mann Act (enacted 1910) forbade the transport of women across state lines for immoral purposes (I think it was later amended to be slightly less blatantly sexist). It’s clearly within the commerce power. Because it’s a regulation of the channels and instrumentalities of interstate commerce, it doesn’t matter that Congress was actually trying to outlaw kinds of sex it disapproves of. (Cf. Hoke v. United States, 227 U.S. 308 (1913).)

The Demand for a Limiting Principle

In Hammer we also saw an extremely important strategy of constitutional argument that comes up a lot in the commerce clause and necessary and proper cases: the demand for a limiting principle. Here’s how this goes, step by step:

1. We know that the Federal government has limited powers. In particular, it does not have a general police power.

2. Sometimes, the government claims a power under the commerce clause and/or the necessary and proper clause, to do something that looks pretty far from its enumerated powers. Examples: forbid child labor in manufacturing, civilly commit sex offenders, forbid guns in schools, require people to buy health insurance.

3. When the government claims that power, it needs a theory of how the regulated activity affects commerce, or how the regulation is necessary and proper to effectuate its enumerated powers. For example, in U.S. v. Lopez, [part of] the government’s theory could be summarized as follows: “gun violence in schools makes it harder for people to get an education, which creates a less educated workforce, which lowers national economic productivity, substantially affecting interstate commerce.”

4. The government’s theory typically can be generalized and applied to other cases. For example, a general statement of that Lopez theory might be “Congress can regulate any behavior that might, in the aggregate, make the workforce less productive.”

5. Then the government is faced with a demand: what principle limits that general theory? The Lopez theory sounds like it might entitle the government to regulate anything: command people to get 8 hours of sleep a night, to go to the gym every day, to study math in school, etc. But we know, from (1), that the government doesn’t have a
general police power. Therefore, the government must be able to state a plausible limiting principle that yields concrete cases to which their theory from (4) would not extend. If it can do so, then it has shown that its theory doesn’t “prove too much.”

The demand for a limiting principle really comes home to roost in *Lopez*: we’ll see that the solicitor general’s got slaughtered in oral argument by multiple justices repeatedly demanding he give them a limiting principle; he was unable to do so, and the majority opinion beats the government up like crazy for that. We’ll also see that Justice Ginsburg is very careful, in her sorta-concurrence sorta-dissent in *NFIB v. Sebelius*, to explain the limiting principle on the power to compel participation in commerce, against Chief Justice Roberts’s and the Joint Dissent’s claim that accepting the individual mandate gives Congress unlimited power to, for example, command the consumption of broccoli.

The demand for a limiting principle is still controversial: those in the liberal wing of the court typically argue that the commerce and necessary and proper powers should be interpreted with a rational basis test, and with the chief constraint being the democratic process, not some fixed Congressional no-go zone… but they’ve lost the last few cases.

**Where are we going?**

In general, the *Lopez-Morrison-NFIB* rollback of commerce clause power and of the substantial effects test (which, to repeat, is still good law… it’s just less clear how far it goes) seems to hinge on four ideas:

1. The demand for a limiting principle.
2. Less deference toward Congressional judgments of what has a substantial effect.
3. More caution about Congressional intrusion into areas like education, family life, and the control of violent crime that have been the traditional province of the states.
4. More caution about Congressional regulation of activities that do not seem conceptually “economic.” This is particularly important in *Morrison*, where we see the suggestion that intrastate activity that Congress regulates under the commerce power must be “economic in nature,” and the assertion that the substantial effects test does not apply to non-economic violent crimes.

Let’s also remember that the extent of the rollback is highly uncertain. *Gonzalez v. Raich*, for example, looks like a resurgence of the old mid-20th-century commerce clause doctrine in 2005. As I’ve been emphasizing, this doctrine is in flux, and it’s hard to predict where the law will go in the coming years—particularly with the death of Justice Scalia.

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1For those of you with a philosophy or a rhetoric background, this is a style of argument analogous to the *modus tollens* or *reductio ad absurdum*.

2Solicitor general: a high-ranking lawyer in the Justice Department who does the government’s major oral arguments in the Supreme Court. Often the President puts someone in this position as the job before a Supreme Court nomination.
Summary of “black-letter principles”

If you’re confronting a commerce clause question on the multistate bar exam, where you’re expected to give some kind of mechanical answer, here’s what you’d rely on:

1. Commerce is essentially all interstate economic activity. It’s not limited to “buying and selling” rather than “manufacture” or “transport.”

2. Congress clearly has the power to regulate the “channels and instrumentalities” of interstate commerce.

3. Congress has the power to regulate intrastate economic activity if that activity, taken in the aggregate, has a “substantial effect” on interstate commerce. However, it is no longer clear that Congress has the power to regulate intrastate noneconomic activity on the same grounds (Lopez, Morrison).

4. Congress may use its power over the “channels and instrumentalities of interstate commerce” to get at intrastate and/or noneconomic activity that it doesn’t like, by prohibiting, e.g., the use of interstate commerce to transport the products of forbidden goods.

5. Congress may regulate intrastate activity incidental and necessary to an interstate economic regulatory regime (Raich).

6. Congress does not have the power to compel participation in interstate commerce (NFIB).

Later, we’ll see that there’s also a “dormant commerce clause,” which is about restricting state regulation in the area.