Background Essay—Expansion of Congressional Power

Directions

Read the following essay on the constitutional powers of Congress and answer the critical thinking questions.

Through most of the first century of the republic, the exercise of congressional power was generally limited to the enumerated powers found in Article I, Section 8 of the Constitution though there were debates over the constitutionality of internal improvements and tariffs for revenue. However, the nation’s economy mostly operated according to market principles and was free from government interference.

This began to change in the decades following the Civil War. Congress would come to regulate and legislate in ways the Founders could never have imagined. Much of the expansion of federal power was justified by a new understanding of the Commerce Clause in Article I, section 8, which empowered Congress to, “regulate interstate commerce with foreign nations, and among the several states.” James Madison had clarified the Founders’ intent in crafting the Commerce Clause in a letter to Joseph Cabell in 1829:

“It was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.”

With the passage of the Commerce Act of 1887, Congress began to impose more national control over the economy. It specifically allowed Congress and an executive branch agency, the Interstate Commerce Commission (ICC), to regulate private railroads engaged in interstate commerce. However, the ICC could not set railroad rates or take action unilaterally against railroads. U.S. attorneys had to bring suits alleging specific violations of the law, and independent courts typically decided cases under the Act.

Congress’ power to regulate would continue to grow when the Supreme Court interpreted the Commerce Clause to allow a greater latitude for the meaning of the Commerce Clause. In 1905, in the case of *Swift v. U.S.*, the Court would establish the important precedent that the CommerceClause did not necessarily only refer to actions of direct interstate commerce. The *Swift* case allowed the regulation of meatpackers, who operated only within specific states, because they were part of a “current of commerce,” that flowed between parties in multiple states.

One area over which the Court did not cede power to Congress was the regulation of the employee/employer relationship. Starting with the case of *Lochner v. New York* (1905), the Court ruled that individuals had the liberty to sell their labor for any rate they deemed acceptable, preserving a free market in labor. In *Lochner*, the court invalidated a New York state law that restricted the number of hours that bakery employees could work. In what would
be referred to as the “Lochner Era” the Court would throw out minimum wage and working conditions legislation as an unconstitutional infringement of the individual liberty of employees. Even during this period, however, the courts upheld more restrictions on the liberty of contract than they overturned.

During the 1930s New Deal, the Supreme Court instituted a constitutional revolution with a fundamentally new understanding of the Commerce Clause. The Court had invalidated key pieces of New Deal legislation as unconstitutional congressional regulation of commerce within states. However, in the case of *West Coast Hotel v. Parrish* (1937), the Supreme Court upheld a Washington State minimum wage law. This ended the judicial resistance to New Deal legislation, which opened the floodgates to expanded congressional power under the Commerce Clause, and to the development of the modern administrative state. The case effectively ended the *Lochner* Era. In his opinion, Charles Evans Hughes clearly threw out the laissez-faire interpretation that protected an individual’s right to contract their labor without congressional oversight:

> “Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty... But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people.”

Further, Hughes justified expanding congressional power because of what he saw as an unequal relationship between employers and employees:

> “The proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting...In such cases, self-interest is often an unsafe guide, and the legislature may properly interpose its authority.”

The regulatory interpretation of the Commerce Clause would be taken further by the case of *U.S. v. Darby Lumber* (1941). By upholding the Fair Labor Standards Act of 1938, the Supreme Court set a precedent allowing Congress to regulate any production process of any goods that would be eventually shipped across state lines. In the majority opinion of an 8-0 decision, Justice Harlan Stone took the interpretation a step further by affirming that congressional authority under the Commerce Clause was virtually unlimited:

> “The power of Congress over interstate commerce “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.”

The doctrine explained by Stone would deny the courts a power to review any exercise of power under the Commerce Clause, unless it was an explicit violation of one of the denied powers of Congress in the Constitution. This was a great expansion of congressional power over interstate commerce beyond that authorized by the enumerated powers of the Constitution.
These precedents would lead to a tremendous growth of congressional power during the second half of the twentieth century. Congress would take on regulatory oversight of areas previously thought to be left in the domain of the states. It would create the Department of Health, Education, and Welfare in 1953 and the Department of Housing and Urban Development in 1965. These changes led to Congress having authority not only over what was previously left to the states but now to the local and individual spheres under the expansive understanding of the Commerce Clause.

In 1977, Congress created the Department of Education, giving unprecedented federal control over how the states delivered public education. The Congress would even apply the Commerce Clause to local gun control laws. It was this overreach that would lead the Supreme Court to change course after half of a century of expanded congressional powers in the name of the Commerce Clause.

The case of U.S. v. Lopez (1995) invalidated the Gun-Free School Zone Act of 1990. That act, in legislation that had nothing to do with interstate commerce, had forbidden the possession of firearms near schools. The Court rejected the constitutionality of the law and looked at the Commerce Clause through a new lens after fifty years. The Court stated that since there is no connection between interstate commerce and firearms possession, Congress could not regulate guns near schools based upon the Commerce Clause. As Chief Justice William Rehnquist wrote in the majority opinion:

> “We would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”

There has been a movement to further constrain the powers of Congress in the House of Representatives to ensure that legislation is based upon constitutional powers in Article I. In the 2011 “GOP Pledge to America,” Republican members promised to include a clause on any new bill, citing the section of the Constitution that had authorized it. After winning a majority, Republicans in Congress implemented a rules change for the House of Representatives of the 114th Congress.

> “Clause 7 of Rule XII requires that each bill or joint resolution introduced in the House be accompanied by a Constitutional Authority Statement citing the power(s) granted to Congress in the Constitution to enact the proposed law.”

Although there are some signs of a change of course, the U.S. Congress remains empowered to take action in areas that have profound effect on the lives of American citizens and business under the Commerce Clause. Congressional powers significantly increased during the course of the twentieth century and were often exercised beyond constitutional authority.
CRITICAL THINKING QUESTIONS

1. What was the original understanding of the Commerce Clause by the Founders?

2. How did the original understanding of the Commerce Clause change during the twentieth century, especially during the New Deal? What did it mean for the expansion of congressional power?

3. What changes during the last few decades have narrowed congressional power?
# Timeline of Changing Commerce Powers of Congress

**Directions**

For each of the following, explain what was decided and whether it expanded or decreased the powers of Congress under the Commerce Clause.

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<th>Case</th>
<th>What was Decided</th>
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<td>Commerce Act of 1887</td>
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The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.
Excerpts from *U.S. v. Darby Lumber* (1941)

Opinion by Justice Harlan Stone:

“The two principal questions raised by the record in this case are, first, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, second, whether it has power to prohibit the employment of workmen in the production of goods “for interstate commerce” at other than prescribed wages and hours. A subsidiary question is whether, in connection with such prohibitions, Congress can require the employer subject to them to keep records showing the hours worked each day and week by each of his employees including those engaged “in the production and manufacture of goods, to-wit, lumber, for ‘interstate commerce...the only question arising under the commerce clause with respect to such shipments is whether Congress has the constitutional power to prohibit them.

While manufacture is not, of itself, interstate commerce, the shipment of manufactured goods interstate is such commerce, and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power to prescribe the rule by which commerce is governed...

The power of Congress over interstate commerce “is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution...

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination, and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states...

Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause...

The reasoning and conclusion of the Court’s opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution...”
Opinion by Chief Justice William Rehnquist:

“In the Gun-Free School Zones Act of 1990, Congress made it a federal offense “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone...

The Constitution delegates to Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...For nearly a century thereafter, the Court’s Commerce Clause decisions dealt but rarely with the extent of Congress’ power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce...

_Darby_, and _Wickard_ ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause...the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce...our case law has not been clear whether an activity must “affect” or “substantially affect” interstate commerce in order to be within Congress’ power to regulate it under the Commerce Clause...We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity “substantially affects” interstate commerce...Even _Wickard_, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not...

Under the Government’s “national productivity” reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Thus, if we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate...

To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States... to do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local, this we are unwilling to do.”
For each of the fictional scenarios below, decide if the law is a constitutional use of the power to “regulate interstate commerce.” You will be interpreting these scenarios three times: once as if it were 1850, once as if it were 1950, and once as if it were 2000. Use Handouts A, B, C, D, and E to guide your decision making.

Scenario 1

Congress passes a law requiring all boys from ages 6-15 to participate in Little League Baseball. The law calls for using the commerce power to promote both youth health and patriotism, through participation in the national pastime. The family of any boy who does not participate will be found in violation of this federal statute and fined $1000 that will be used to support youth baseball.

A. Would this have been considered constitutional in 1850? Explain why, and include evidence to support your position.

B. Would this have been considered constitutional in 1950? Explain why, and include evidence to support your position.

C. Would this have been considered constitutional in 2000? Explain why, and include evidence to support your position.

Scenario 2

Congress passes a law using the commerce power to promote public safety by regulating the health of horses used on public lands, roads, and highways within the borders of a state. Any horse that is ridden, or used to pull a cart, wagon, or vehicle of any kind must receive a full physical from a veterinarian licensed by the U.S. federal government. Horses will be evaluated to see if they are fit for the use for which they are to be employed. All horses ridden, or used for riding, to pull a cart, wagon, or any vehicle must have a certificate of health kept with it at all times. The certificate must be made available on demand to an inspector from the Department of Agriculture. Failure to do so will result in a $500 fine.

A. Would this have been considered constitutional in 1850? Explain why, and include evidence to support your position.

B. Would this have been considered constitutional in 1950? Explain why, and include evidence to support your position.

C. Would this have been considered constitutional in 2000? Explain why, and include evidence to support your position.
HANDOUT G

Homestead Act of 1862

1. CHAP. LXXV. —An Act to secure Homesteads to actual Settlers on the Public Domain.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States, and who has never borne arms against the United States Government or given aid and comfort to its enemies, shall, from and after the first January, eighteen hundred and sixty-three, be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which said person may have filed a preemption claim, or which may, at the time the application is made, be subject to preemption at one dollar and twenty-five cents, or less, per acre; or eighty acres or less of such unappropriated lands, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same shall have been surveyed: Provided, That any person owning and residing on land may, under the provisions of this act, enter other land lying contiguous to his or her said land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

SEC. 2. And be it further enacted, That the person applying for the benefit of this act shall, upon application to the register of the land office in which he or she is about to make such entry, make affidavit before the said register or receiver that he or she is the head of a family, or is twenty-one years or more of age, or shall have performed service in the army or navy of the United States, and that he has never borne arms against the Government of the United States or given aid and comfort to its enemies, and that such application is made for his or her exclusive use and benefit, and that said entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever; and upon filing the said affidavit with the register or receiver, and on payment of ten dollars, he or she shall thereupon be permitted to enter the quantity of land specified: Provided, however, That no certificate shall be given or patent issued therefor until the expiration of five years from the date of such entry ; and if, at the expiration of such time, or at any time within two years thereafter, the person making such entry ; or, if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death ; shall. prove by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit aforesaid, and shall make affidavit that no part of said land has been alienated, and that he has borne true allegiance to the Government of the United States ; then,
in such case, he, she, or they, if at that time a citizen of the United States, shall be entitled to a patent, as in other cases provided for by law: And provided, further, That in case of the death of both father and mother, leaving an Infant child, or children, under twenty-one years of age, the right and fee shall ensure to the benefit of said infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children for the time being have their domicile, sell said land for the benefit of said infants, but for no other purpose; and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States, on payment of the office fees and sum of money herein specified.

SEC. 3. And be it further enacted, That the register of the land office shall note all such applications on the tract books and plats of, his office, and keep a register of all such entries, and make return thereof to the General Land Office, together with the proof upon which they have been founded.

SEC. 4. And be it further enacted, That no lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor.

SEC. 5. And be it further enacted, That if, at any time after the filing of the affidavit, as required in the second section of this act, and before the expiration of the five years aforesaid, it shall be proven, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit shall have actually changed his or her residence, or abandoned the said land for more than six months at any time, then and in that event the land so entered shall revert to the government.

SEC. 6. And be it further enacted, That no individual shall be permitted to acquire title to more than one quarter section under the provisions of this act; and that the Commissioner of the General Land Office is hereby required to prepare and issue such rules and regulations, consistent with this act, as shall be necessary and proper to carry its provisions into effect; and that the registers and receivers of the several land offices shall be entitled to receive the same compensation for any lands entered under the provisions of this act that they are now entitled to receive when the same quantity of land is entered with money, one half to be paid by the person making the application at the time of so doing, and the other half on the issue of the certificate by the person to whom it may be issued; but this shall not be construed to enlarge the maximum of compensation now prescribed by law for any register or receiver: Provided, That nothing contained in this act shall be so construed as to impair or interfere in any manner whatever with existing preemption rights: And provided, further, That all persons who may have filed their applications for a preemption right prior to the passage of this act, shall be entitled to all privileges of this act: Provided, further, That no person who has served, or may hereafter serve, for a period of not less than fourteen days in the army or navy of the United States, either regular or volunteer, under the laws thereof, during the existence of an actual war, domestic or foreign, shall be deprived of the benefits of this act on account of not having attained the age of twenty-one years.

SEC. 7. And be it further enacted, That the fifth section of the act entitled “An act in
addition to an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes,” approved the third of March, in the year eighteen hundred and fifty-seven, shall extend to all oaths, affirmations, and affidavits, required or authorized by this act.

SEC. 8. And be it further enacted, That nothing in this act shall be so construed as to prevent any person who has availed him or herself of the benefits of the first section of this act, from paying the minimum price, or the price to which the same may have graduated, for the quantity of land so entered at any time before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases provided by law, on making proof of settlement and cultivation as provided by existing laws granting preemption rights.

APPROVED, May 20, 1862.
Link to full text of law via the Government Printing Office:

http://www.gpo.gov/fdsys/pkg/BILLS-111hr3590enr/pdf/BILLS-111hr3590enr.pdf
CRITICAL THINKING QUESTIONS:

1. Compare and contrast the length of the Homestead Act of 1862 with the length of the Affordable Care Act of 2010.

2. Compare and contrast the language of the Homestead Act of 1862 with the language of the Affordable Care Act of 2010.

3. What factors might explain the differences in the length and wording of the two laws? How might this be related to the increasing powers of Congress?