

Beware of Government responding to crisis

Death rattles of the 10th
amendment or Resurrection?

10th Amendment

- “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”
- **Commerce Clause** (Article I, Section 8, Clause 3) states that the United States Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes".

Loose interpretations of constitution
used to address at Federal level -
social, economic, and
environmental issues

- [Preamble to the United States Constitution](#)
- [Taxing and Spending Clause](#)
- [Necessary and Proper Clause](#)
- [Commerce Clause](#)

History of the demise of the 10th Amendment

- The federal government initially controlled navigatable waters & international trade
- Railroad baron days of the late 1800s and the beginning of interstate telephony was the genesis.

Interstate Commerce Act in 1887
Sherman Antitrust Act in 1890.

- The necessarily monopolistic nature of major interstate infrastructures tightly linked by government assistance begged for uniform controls or regulation.

“To Make Regular”

- Both of those key acts had one intended effect – to make regular the commerce in such a way as to level the playing field promote competition.
- Quasi utility- The precedence however in the interstate Commerce Act 1887 of price controls was the camel’s nose in the economic tent

Roosevelt Tries to Pack the Court

- Court struck down virtually every element of the New Deal legislation : minimum-wage laws, child labor laws, agricultural relief laws and others.
- Roosevelt floats plan to pack the court with 5 more justices of his liking to “relieve the ‘older overworked’ justices”

A “switch” in time, saves nine!

- Justice Robert’s unexpectedly changed positions in 1937 voting to support all FDR's new deal pieces of legislation from then on even though he had previously consistently been against New Deal legislation.

War Crisis and a Subdued Court

- Concentration camps interned thousands
- Expansive economic controls extend influence even to crops grown and consumed on one's own farm

***Wickard v. Filburn*, [317 U.S. 111](#) (1942)**

- The Supreme Court, decided that, because Filburn's private wheat growing activities reduced the amount of wheat he would buy for chicken feed on the open market, and because wheat was traded nationally, Filburn's production of more wheat than he was allotted was affecting interstate commerce, and so could be regulated by the federal government!

***Wickard v. Filburn* arguably marked the near death of the 10th Amendment**

- **Ended almost any limits on Congress's Commerce Clause powers.**
- Almost every federal bureaucracy, the FDA, Energy, Education, ATF, Agriculture ... owe their existence and power from a single act of subterfuge by Roosevelt.

Gonzales v. Raich

(previously *Ashcroft v. Raich*), [545 U.S. 1](#) (2005)

- [Justice Thomas](#) also wrote a separate dissent, stating in part:
“If the Federal Government can regulate growing a half-dozen cannabis plants for personal consumption (not because it is interstate commerce, but because it is inextricably bound up with interstate commerce), then Congress' Article I powers -- as expanded by the Necessary and Proper Clause -- have no meaningful limits.
Whether Congress aims at the possession of drugs, guns, or any number of other items, it may continue to "appropriate state police powers under the guise of regulating commerce." and further:

“If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. **This makes a mockery of Madison's assurance to the people of New York that the "powers delegated" to the Federal Government are "few and defined", while those of the States are "numerous and indefinite."**”

What's in a Verb

- Previous cases focused on what was Commerce (Subject)
- Propose to focus on the Predicate;
What “**Regulate**” means
- Avoid ‘stari-decisis’ (a direct attack on previous decisions) which courts are loath to do

Regulate & Regulated

- “a well regulated militia” in the vernacular of the time actual addresses the uniformity of dress, discipline and commonality and fitness for duty of the equipment
- Regulate, was frequently used by the founders generation to resolve non-uniformity
- A water pressure regulator, still has this earlier definition of making regular or uniform.

The Colonies

- Had a clumsy patchwork of tariffs and taxes.
- The constitutional provision was intended to prohibit states from tariffing each other
- Never intended to micro-manage the myriads of businesses inside the states.

Interstate Insurance

- To "Make Regular,"
 - eliminating state restrictions to interstate insurance offerings would be a constitutionally valid regulatory action that could reasonably be presented.

Monroe on duties & Tarriffs

- *“...The goods and vessels employed in the trade are the only subjects of regulation. It can act on none other. A power, then, to impose such duties and imposts in regard to foreign nations and to prevent any [tarriffs] on the trade between the States was the only power granted.*
- **In Federalist No. 42,**
- **Madison explains the objective behind the regulation of commerce among the States as to prevent the laying of duties on other States imports and exports:**

Mr. Madison on Commerce clause

- “...it was “very certain” that the power to regulate commerce among the States “grew out of the abuse of the power by the importing States in taxing the non-importing, and 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,**”
....

No implied power to manage intra-state activity ever found in the convention record

- True meaning was to prevent the laying of duties by one State on another States imports,
- Then there can be no implied power over commercial activities within a State that might be deemed to affect the trade of another State.

Role of the political process

- Courts have yeileded the scope of 10th ammenment restrictions to legislative discession.
- Chief Justice Marshall ... warning that effective restraints on its [commerce clause] exercise must proceed from political rather than from judicial processes."

Who Decides now?

- The Court have abandoned the constitutional restriction feeding instead the tyranny of majority –
- Claiming remedy from unwise exercise of Commerce Clause must be found at the ballot box rather than in the Federal courts.

It's up to us

- “The political process ensures that laws that unduly burden the States will not be promulgated.” Garcia v. San Antonio 469 [U.S. 528](#) (1985),
- Where do our “conservative” candidates stand on enumerated powers?
 - School vouchers
 - Reduction or elimination of whole federal departments?

**SEND
PORK PATTY
PACKING**

DUMP MURRAY

The Other White Meat