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Congress's Authority to Regulate Interstate Commerce

Clause 3 of Article I Section 8 of the U.S. Constitution, generally referred to as the *Commerce Clause*, is one of the enumerated powers under which Congress may legislate. The clause states that Congress shall have the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

Congress may only act pursuant to its enumerated powers. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The scope of those powers informs the kinds of laws Congress may enact. Congress frequently invokes the Commerce Clause, and specifically the so-called Interstate Commerce Clause that addresses commerce “among the several states,” as the authority for a variety of legislation regulating domestic activity. The Supreme Court has often interpreted the scope of Congress’s authority to regulate interstate commerce under the Commerce Clause, and that interpretation has evolved over time.

Prior to the 1930s, the Supreme Court took a relatively constrained view of the scope of the Commerce Clause, holding, for instance, that “the production of articles, intended for interstate commerce, is a matter of local regulation” to which Congress’s Commerce Clause authority did not extend. *Hammer v. Dagenhart*, 247 U.S. 251, 272 (1918), *overruled by United States v. Darby*, 312 U.S. 100, 117 (1941). Through most of the latter half of the twentieth century, the Court adopted a more expansive conception of Commerce Clause authority, allowing Congress to regulate activities that largely occurred intrastate if there was a rational basis to believe the activity, in aggregate, would have a substantial effect on interstate commerce. Beginning in the 1990s, the Court issued several opinions confirming the existence of outer limits to congressional power under the Commerce Clause and striking down laws that transgressed those limits by regulating certain purely intrastate, noneconomic activities.

Modern Scope of Congress's Commerce Clause Authority

The Supreme Court’s modern jurisprudence has interpreted the Commerce Clause to allow Congress to regulate a wide range of activities. The Court has, however, found that the Commerce Clause does not authorize Congress to regulate inactivity. In *National Federation of Independent Business v. Sebelius*, which challenged the individual mandate aspect of the Affordable Care Act, the Supreme Court concluded that “compel[ling] individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce” exceeded Congress’s authority under the Commerce Clause. 567 U.S. 519, 551-58 (2012).

The Supreme Court has identified three general categories of activities that Congress can regulate pursuant to its Commerce Clause authority over interstate commerce. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress can protect instrumentalities of interstate commerce, or persons or things in commerce. Third, congressional authority under the Commerce Clause reaches activities that substantially affect interstate commerce.

Channels of Interstate Commerce

This category encompasses physical conduits of interstate commerce such as highways, waterways, railroads, airspace, and telecommunication networks, as well as the use of such interstate channels for ends Congress wishes to prohibit. As the Eleventh Circuit explained in *United States v. Ballinger*, the commerce power includes the power to prevent use of the channels of commerce to consummate harmful acts, even where those acts are themselves outside the flow of commerce. 395 F.3d 1218, 1228 (11th Cir. 2005). The defendant in *Ballinger* was prosecuted for traveling along interstate highways to burn churches in four different states. The Eleventh Circuit affirmed the constitutionality of the statute he violated, which prohibits intentionally damaging or destroying religious real property because of the religious character of that property, where the offense occurs in or affects interstate or foreign commerce. As another example, under this category of permissible regulation, the federal courts have uniformly upheld a federal prohibition on traveling across state lines to commit intimate-partner abuse, reasoning that the prohibition regulates “the use of the interstate transportation routes through which persons and goods move.” *United States v. Morrison*, 529 U.S. 598, 613 n.5 (2000).

Instrumentalities, Persons, or Things

The Commerce Clause extends as well to *means* of commerce such as airplanes, trains, or automobiles, and to persons or things that are transported interstate by these instrumentalities. Thus, for instance, the Supreme Court has cited the federal prohibition on destruction of aircraft (18 U.S.C. § 32) as an example of regulation of an instrumentality of interstate commerce. The Court has also cited the prohibition on thefts from shipments moving in interstate or foreign commerce (18 U.S.C. § 659) as an example of regulation of persons or things in commerce. *Perez v. United States*, 402 U.S. 146, 150 (1971).

Intrastate Activities That Substantially Affect Interstate Commerce

The Commerce Clause also permits Congress to regulate wholly local, intrastate economic activities that in the aggregate “substantially affect” interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). In the

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seminal case establishing the breadth of Congress's Commerce Clause authority, the Supreme Court upheld a law imposing quotas on wheat "marketing" that reached both wheat production intended for commerce and for private "consumption on the farm," concluding that "even if . . . activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce[.]" *Wickard v. Filburn*, 317 U.S. 111, 118, 125 (1942). In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court reaffirmed *Wickard* in upholding application of the Controlled Substances Act to the growth of marijuana for intrastate personal use, noting that the regulated activities relate to the production and consumption of a commodity for which there is an established (albeit illegal) interstate market, and that failure to regulate cultivation of marijuana for intrastate personal use would undercut the regulation of that interstate market.

Under the modern Commerce Clause doctrine announced in *Wickard* and affirmed in *Raich*, Congress has relied on its power over intrastate economic activities that substantially affect interstate commerce to enact laws regulating activities in a number of areas. This constitutional authority supports federal regulation of activities that affect the environment, quarantine and other sanitary or health activities, telecommunications and the internet, agriculture and stockyards, insurance, and sports and entertainment. Courts have generally upheld these and other laws as a valid exercise of Congress's Commerce Clause authority.

In general, courts have identified four factors to consider when assessing whether Congress may regulate an activity that in the aggregate has a substantial effect on interstate commerce:

- (1) the economic nature of the activity; (2) a jurisdictional element limiting the reach of the law to a discrete set of activities that has an explicit connection with, or effect on, interstate commerce; (3) express congressional findings regarding the regulated activity's effects on interstate commerce; and (4) the link between the regulated activity and interstate commerce.

Norton v. Ashcroft, 298 F.3d 547, 555-56 (6th Cir. 2002); see also *United States v. Morrison*, 529 U.S. 598, 610-19 (2000).

Economic Nature. Courts have used a variety of metrics to determine whether activity is economic in nature. For example, the Fifth Circuit concluded in *United States v. Ho* that asbestos removal is an economic activity because it has a commercial purpose, because many businesses exist solely to remove asbestos, and because the activity itself involves many commercial considerations. 311 F.3d 589, 602 (5th Cir. 2002). In another example, the Second Circuit observed in *Freier v. Westinghouse Electric Corporation* that "it is clear that the generation and disposal of waste material by companies in connection with the manufacture or processing of products is a business activity, and that the storage of such wastes by others is economic activity." 303 F.3d 176, 202 (2d Cir. 2002). By contrast, the Supreme Court in *United States v. Lopez*, 514 U.S. 549 (1995), struck

down a federal prohibition on possessing guns in local school zones, reasoning (among other things) that mere possession of a firearm, standing alone, is not economic in nature. Similarly, in *United States v. Morrison*, 529 U.S. 598 (2000), the Court invalidated a provision establishing a federal civil remedy for the victims of gender-motivated violence, based, in part, on the conclusion that gender-motivated crimes of violence are not economic activity.

Jurisdictional Element. Though not sufficient in itself to establish Congress's Commerce Clause authority, an express jurisdictional element that limits the applicability of the law to those regulated activities with ties to interstate commerce may be a significant consideration. For instance, following the Supreme Court's decision in *Lopez*, Congress added a jurisdictional element to the firearm-possession prohibition that the Court had struck down, limiting the law's reach to firearms that have moved in or that otherwise affect interstate or foreign commerce. Although the Supreme Court has not revisited this provision, lower federal courts generally have held that the amended law is constitutional under the Commerce Clause. *E.g.*, *United States v. Hill*, 927 F.3d 188, 206 (4th Cir. 2019).

Findings. Likewise, Congress may strengthen the Commerce Clause foundation for particular legislation by including explicit findings in the legislation regarding its impact on interstate commerce, particularly when the connection to commerce is not self-evident. *Gonzales v. Raich*, 545 U.S. 1, 21 (2005). Such findings are not essential to a court finding legislation a valid exercise of Commerce Clause authority. See, *e.g.*, *Lopez*, 514 U.S. at 562-63; *Freier*, 303 F.3d at 202. The Court has advised that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Morrison*, 529 U.S. at 614.

Link to Interstate Commerce. Finally, courts have looked at the regulated activity's connection to interstate commerce in reviewing the constitutionality of laws challenged on Commerce Clause grounds. For example, the D.C. Circuit upheld the constitutionality of the Endangered Species Act's prohibition against "take" of endangered species located solely within one state because, among other things, the protection of endangered species "regulates and substantially affects commercial development activity which is plainly interstate." *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1058 (D.C. Cir. 1997) (Henderson, J., concurring); see *id.* at 1046 n.3, 1056 (Wald, J.). See also *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1068-80 (D.C. Cir. 2003). Similarly, in *Voggenthaler v. Maryland Square LLC*, the Ninth Circuit rejected a Commerce Clause challenge to federal regulation of contaminated soil and groundwater located exclusively in Nevada. 724 F.3d 1050, 1059-61 (9th Cir. 2013). The court held that a commercial operation had created the contamination and the resulting cleanup cost burdened commerce. *Id.*

Michael A. Foster, Legislative Attorney
Erin H. Ward, Legislative Attorney

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