THE COMMERCE POWER AS A SOURCE OF LAW: AN INTERSTATE COMMERCE BURDEN ON ENVIRONMENTAL LAW?

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INTRODUCTION

One thing that strikes a novice in the study of American Environmental Law is that the whole federal legal system that seeks to protect the nation's environment is constitutionally rooted on that same regulatory power – the Commerce Power – that seeks to enhance the nation's economy.[1] The undisputed fact that environmental protection and economic expansion have hardly found advocates inclined to compromising in the political arena brings about an apparent paradox that is deeply felt in the innermost entrails of the American legal system. The Union's authority to protect the environment is recognized only to the extent that the environmental activity to be regulated affects commerce among States. It appears that while a traditional commonplace is that economic prosperity is inherently environmentally unfriendly, the federal environmental legal system is constitutionally predicted precisely on the opposite assumption – that commerce among States cannot be maintained and enhanced unless the environment is preserved. Indeed, under a broader perspective there is no doubt that the maintenance of the Earth's life supporting natural system is a precondition to the very continuance of human life and, a fortiori, of the general social welfare achievable through the unencumbered practice of commerce. However, under a more immediate perception – and one that is considerably more present in the political debate – it is accepted as a matter of fact, particularly under the scientific paradigm introduced by Lavoisier,[2] that no social wealth can be created and no economic undertaking can take place without exerting any effect on the ambient environment.

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[1] My debts of gratitude to Professor Catherine Tinker for her guidance in writing this paper.

[2] Lavoisier is often quoted for saying that in nature "nothing is lost, nothing is created, everything is transformed", as he referred to that matter is conserved through any chemical reaction, the weight of reagents equaling that of products.

The Commerce Power-based constitutional structure of federal Environmental Law places at the very cradle of the entire environment-protective framework – i.e. at the its constitutional source level – environment-versus-economy-like tensions, in such a manner that pro-development propositions can take the form of constitutional attacks on environment-oriented measures. Such structure raises[3] questions as to whether the constitutional forum is an apt one for the discussion of such tensions, whether the structure does not put the whole system under the mercy of changing political will to a counter-effective extent, whether it reasonably reconciles or unduly exacerbates such tensions and whether it does not subdue environmental values to the prevailing economic interests of the nation in such a way that a proper balance, instead of stricken, is easily tipped in the industry lobbyists' favor. Ultimately one could ask whether such a structure does not pose a limit to the development of environmental law in the sense that the state of the law tends not to accurately represent the democratic proclivities of the American people.

Issues as those involved in such inquiries are tentatively approached in this paper in a way that does not purport to be comprehensive neither novel. The paper deals generally with the Commerce Power and specifically with the federalist principle (Section 1), the Commerce Clause in the United States Constitution (Section 2), and the Supreme Court's interpretation of the Commerce Power through history (Section 3).

1. THE FEDERALIST SYSTEM: A DOUBLE SECURITY AGAINST TYRANNY

The protection of citizens' fundamental liberties against tyranny was a strong concern of the Founding Fathers of the American democracy and its Constitution's Framers. Accordingly, the exercise of the power delegated by the people to the Union was limited geographically, as the States surrendered only a portion of their original sovereignty, and structurally, as it was entrusted to three independent and coordinate branches. Madison explicated the Founders' design:[4]

> "In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."

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[3] At least from the viewpoint of a beginner in the studies of American Environmental Law or even of a beginner in the studies of American Law as well as social and political institutions, particularly of one having a Brazilian background as is the author's case.

[4] The Federalist No. 51, at 350-51 (J. Cooke ed. 1961).

A principle of division of power was thus embodied in the Constitution,[5] particularly in its provisions setting up the federalist system of government and the system of checks and balances,[6] as a "double security" intended to guard the people's rights.[7] Justice O'Connor made the following remark:[8]

> "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

This essay is primarily concerned with the federalist aspect. Advantages that the "federalist structure of joint sovereigns preserves to the people" were pointed out by Justice O'Connor:[9]

> "It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry ... Perhaps the principal benefit of the federalist system is a check on abuses of government power... In the tension between federal and state power lies the promise of liberty."

However persuasive the proposition in favor of a federalist system may have been, federalism in the United States "was born as a political compromise" – between the people's attachment to their State and the convenience, demonstrated by the challenges experienced under the Confederation, of a stronger central government – "rather than as a theoretical ideal."[10]

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[5] The Constitution of the United States of America, written in 1787, ratified in 1788, and in operation since 1789, is the world's longest surviving written charter of government.

[6] For instance, "Congress may pass laws but the President can veto them. The President can veto laws but Congress can override the veto with a 2/3 vote. The President and Congress may agree on a law but the Supreme Court can declare a law unconstitutional. The President can appoint Judges and other government officials but Senate must approve them. Supreme Court judges have life terms but they can be impeached." http://www.socialstudieshelp.com/Lesson_13_Notes.htm

[7] *See* Chief Justice Rehnquist in United States v. Morrison, 529 U.S. 598, 616 (2000).

[8] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[9] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[10] Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3 (1988).

Federalism[11] basically consists of a "system of dual sovereignty"[12] that mandates a "balance of power between the States and the Federal Government"[13] and respects the portion of the States' sovereignty which they enjoyed before and retained with their joining the Union.[14] Indeed, the Amendment X (of 1791) of the Constitution reads that "[t]he 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." Consequently, the powers delegated to the Federal Government are limited to those expressly enumerated in the Constitution. As Madison put it, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[15] Chief Justice Marshall artfully poetized the matter in *Marbury v. Madison*:[16]

> "[The people's] original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."

2. THE COMMERCE POWER: A GOVERNMENT OF ENUMERATED POWERS

Although the principle that the federal government is one of enumerated powers and exercises only the powers constitutionally granted to it is plain and universally accepted, "the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist".[17] Furthermore, it is the

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[11] Federalism, rather than an "invention" exclusively American, is a unique blend of "national systems – like the French – and confederate systems – like the ancient Greek and early modern Dutch". Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1492 (1987).

[12] Justice O'Connor in Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

[13] Justice Powell in Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

[14] "... [T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and . . . "without the States in union, there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." Chief Justice Chase in Tex. v. White, 74 U.S. 700, 725 (1868) (quoting Lane County v. Or., 74 U.S. 71).

[15] The Federalist No. 45, at 313 (J. Cooke ed. 1961).

[16] 5 U.S. 137, 176 (1803).

[17] Chief Justice Marshall in McCulloch v. Maryland, 17 U.S. 316, 405 (1819).

"the province and duty of the judicial department to say what the law is".[18] "The federal judiciary is supreme in the exposition of the law of the Constitution";[19] and the Supreme Court is the ultimate interpreter[20] and expositor[21] of the text of the Constitution.

Among the federal government's enumerated powers, the "Commerce Clause is one of the most prolific sources of national power".[22] It reads that "[t]he Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[23] The essence of this paper's discussion derives from the words "commerce among the States"; as simple as they look, an unadvised reader would not suspect the greatly expanded meaning Congress and the Supreme Court have given these words in order to establish and uphold federal authority to regulate many of this country's most important activities. Perhaps through the judicial history of such clause one is even able to explore the peculiar nature of legal construction and constitutional interpretation – many times, a game consisting of straining words' meanings at the pleasure of the political climate – particularly in light of a constitution whose language, in relevant part, has not changed for over two centuries, whereas humankind in the meantime of its operation has undergone the most radical life-changing transformations since it has appeared on Earth's face and at the speediest pace ever. Undoubtedly, by observing the evolution of such clause's constitutional interpretation one could even question the very nature of law and uncover behind its apparent veil of rationality a realm of inconsistency and arbitrariness that inescapably negates any pretense of (legal) scientificity; one could even asks herself whether such a law's character does not merely mirror human beings' unsettled and erratic disposition of spirit[24] and reflects the unavoidable hypocrisy of any appearance of self-confidence and resolve.

But let's start with the plain language. What is commerce? Chief Justice Marshall, in *Gibbons v. Ogden*,[25] suggested that commerce is traffic and intercourse: "It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." And what about "among states"; isn't its

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[18] Marbury v. Madison, 5 U.S. 137, 177 (1803).

[19] Cooper v. Aaron, 358 U.S. 1, 17 (1958).

[20] Baker v. Carr, 369 U.S. 186, 211 (1962).

[21] United States v. Morrison, 529 U.S. 598, 616 (2000).

[22] H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 534 (1949).

[23] Article 1, Section 8, Clause 3 of the U.S. Constitution.

[24] Perhaps in this sense no one has penetrated so deeply into the human soul and expressed its nature so dramatically as Shakespeare in Macbeth: "Tomorrow, and tomorrow, and tomorrow, creeps in this petty pace from day to day to the last syllable of recorded time, and all our yesterdays have lighted fools the way to dusty death. Out, out, brief candle! Life's but a walking shadow, a poor player that struts and frets his hour upon the stage and then is heard no more: it is a tale told by an idiot, full of sound and fury, signifying nothing." (Act V, Scene V, Macbeth speaks as he learns from Seyton that the queen, Lady Macbeth, has just been found dead within the castle).

[25] 22 U.S. 1, 190-91 (1824).

meaning so plain as to foil any intelligible elaboration on them? Apparently not! This is what Chief Justice Marshall had to say about those innocent words in that same judgment:[26]

> "Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself."[27]

In a later case – *The Daniel Ball*[28] – Justice Field stressed the same point:

> "There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce "among the several States," with foreign nations, and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated, and of course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States."

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[26] Gibbons v. Ogden, 22 U.S. 1, 194-95 (1824).

[27] Chief Justice Marshall is said to have articulated in his opinion an organic theory of interstate commerce, pursuant to which the question is whether commerce affects more that one State, rather than a territorial one, where the question is whether commerce crosses a state line. The organic theory, though initially ignored by the Supreme Court, would be revisited and expanded as of the New Deal and onwards. JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 69 (West, 5th ed. 2003).

[28] 77 U.S. 557, 564-65 (1870).

What has been stated so far seems to suffice as for one to perceive that the two crucial questions one has to ask to ascertain federal jurisdiction under the Commerce Clause is whether the would-be regulated activity is an activity in the nature of commerce and whether such activity is not so locally restricted to the domain of a single State as to prevent federal interference.

And finally what is the power originating from the Commerce Clause – the Commerce Power? Chief Justice Marshall went that far:[29]

> "We are now arrived at the inquiry — What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

Perhaps in this early decision the Supreme Court already acknowledged the magnitude such power could potentially come to reach, especially if aided by the creative minds of lawyers, as a source of federal power over the States. It may be that by the first time the profound warning made by Justice Kennedy in *United States v. Lopez*[30] – that "[i]n a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence" – was, even if unconsciously, felt within the Supreme Court's chambers, as it was grasped by the genius of Justice Marshall. However, in *United States v. Morrison*[31] Chief Justice Rehnquist reminded us that political accountability, while not a negligible

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[29] Gibbons v. Ogden, 22 U.S. 1, 196-97 (1824).
[30] 514 U.S. 549, 580 (1995).
[31] 529 U.S. 598, 616 and 619 (2000).

restraint on congressional exercise of the Commerce Power, is a limit only "within that power's outer bounds" and that "*Gibbons* did not remove from this Court the authority to define that boundary", especially because "the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate".

Moreover, the Supreme Court's task of defining that boundary is not merely a matter of grammatical construction; to the contrary, it is primarily a matter of policy – a balancing exercise between the competing interests of a strong economic unit and the fear of "economic Balkanization",[32] on the one hand, and of a federalist security against government's abuse of power and the fear of tyranny, on the other – as Justice Jackson put it:[33]

> "Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution."

Finally, the Commerce Power cases have been analyzed under one of two contrasting inquiries that virtually mirror one another: an Act of Congress to survive a constitutionality attack must be either "authorized by one of the powers delegated to Congress in Article I of the Constitution"[34] or not evasive of "the province of the state sovereignty reserved by the Tenth Amendment"[35]. In the end, as just O'Connor said "just as a cup may be half empty or half full, it makes no difference whether one views the question . . . as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment."[36] The proposition that the powers which are not conferred to the Federal Government are indeed withheld by the States or that the States retain their pre-Union sovereignty "to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government"[37] is a tautological truism reasonably inferable from the constitutional scheme and redundantly reaffirmed by

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[32] Hughes v. Oklahoma, 441 U.S. 322, 325 (1979), Justice Brennan: "The few simple words of the Commerce Clause – "The Congress shall have Power ... To regulate Commerce ... among the several States ..." – reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."

[33] H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949).

[34] *See* Perez v. United States, 402 U.S. 146 (1971); McCulloch v. Maryland, 17 U.S. 316 (1819).

[35] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Hammer v. Dagenhart, 247 U.S. 251 (1918) (federal statute restricting the interstate shipping of goods produced by child labor was held unconstitutional as invasive of the reversed powers of the States). Lane County v. Or., 74 U.S. 71 (1869); the Tenth Amendment.

[36] New York v. United States, 505 U.S. 144, 155-57 (1992).

[37] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985), *per* Justice Blackmun.

the Tenth Amendment.[38] Ironically, while this proposition could not have been spelt out clearer by both the Tenth Amendment and the Supreme Court, it helps little as one attempts to draw the precise constitutional line between the federal and the state powers or to determine, primarily as a matter of degree, what specific powers or incidents thereof were actually granted or withheld and to what extent, notwithstanding the importance and delicacy of the matter (discussed at least as far back as 1816 in *Martin v. Hunter's Lessee*[39]).[40]

3. THE COMMERCE POWER IN HISTORICAL PERSPECTIVE: DEFYING OR REWRITING THE FEDERALIST SYSTEM?

Bearing in mind the political nature of constitutional interpretation, as alluded to in the preceding section, it should look natural that the Supreme Court's interpretation of the scope of the Commerce Clause has changed over time; indeed varying political circumstances – from the foundation of the Union and the late 19th century's industrialization to the Great Depression and the recent past – have legitimately warranted differing positions.

In the first century of the Republic,[41] the Commerce Clause served less as an affirmative ground on which Congress asserted jurisdiction than as a negative limit on the States' powers, every time its exercise amounted to a discrimination against or a burden on interstate commerce.[42] But the thriving economic conditions of the late 19th century prompted Congress to pass innovative legislation such as the Interstate Commerce Act of 1887[43], the Sherman Anti-Trust Act of 1890[44], and many others as from 1903. These statutes found a safe harbor – as against constitutionality attacks – on the Commerce Clause and drew Congress' attention to this clause's great potential as a source of federal power; thereafter, a new phase in the Supreme Court's Commerce Clause adjudication ensued.[45]

Initially, however, the Court refused to accord the Clause's words a scope greater than that warranted by their natural sense. In *Kidd v. Pearson*,[46] where an Iowa statute prohibited instate manufacture of intoxicating liquor[47] and did not exclude from the

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[38] "The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology." New York v. United States, 505 U.S. 144, 156-57 (1992), *per* Justice O'Connor.

[39] 14 U.S. 304.

[40] New York v. United States, 505 U.S. 144, 155 (1992).

[41] The following historical account on how the Supreme Court has constructed the Commerce Clause over time is a summary of, and heavily based on, the one offered by Justice Jackson in Wickard v. Filburn, 317 U.S. 111 (1942).

[42] Veazie v. Moor, 55 U.S. 568 (1852).

[43] 24 Stat. 379.

[44] 26 Stat. 209, as amended, 15 U.S.C. § 1 *et seq.*

[45] Wickard v. Filburn, 317 U.S. 111, 121 (1942).

[46] 128 U.S. 1, 20-21 (1888).

[47] Except for mechanical, medicinal, culinary or sacramental purposes; *see* 128 U.S. 1, 15 (1888).

prohibition that portion of the production that was intended to be exported out state, it was held that the statute did not embody an attempt to unduly interfere with the regulation of interstate commerce and that its effect on interstate commerce was too indirect to warrant federal authority; furthermore, a staying distinction between manufacture and commerce – that influenced the Court's position for many years – was drawn by Justice Lamar:

> "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation — the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term, as given by this court in *County of Mobile v. Kimball*, 102 U.S. 691, 702, is as follows: "Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining – in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests – interests which in their nature are and must be, local in all the details of their successful management."

In *United States v. E. C. Knight Co.*,[48] where the acquisition of the four Philadelphia sugar refineries by American Sugar Refining Company were alleged to constitute a combination in restraint of trade, a similar reasoning was given by Chief Justice Fuller: "An attempt to monopolize, or the actual monopoly of, the manufacture was [not] an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked." After all, "[c]ommerce succeeds to manufacture, and is not a part of it."[49] These cases were followed by many others in which the Court found the challenged statutes exceeded Congress' power under the Commerce Clause.[50]

Moreover, while what precedes commerce is beyond Congress' reach, that which relates to it only indirectly also is. The employment of individuals by an intrastate business was held to be related only indirectly to interstate commerce in *A. L. A. Schechter Poultry Corp. v. United States*[51], where the Supreme Court struck down as unconstitutional regulations that fixed the hours and wages of "intrastate" employees. Indeed, as Chief Justice Hughes stated, "the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal completely centralized government."[52]

The tide, nevertheless, slowly began to change in 1914 with *Houston, E. & W. T. R. Co. v. United States*,[53] where the Interstate Commerce Commission ordered three railroad carriers not to discriminate against carriage as between Texas and Louisiana by means of charging rates higher than those generally charged for transportation within Texas. The Court upheld the Commission's order and stated:[54]

> "[Congress'] authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a *close and substantial relation to interstate traffic* that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance...

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[48] 156 U.S. 1, 17 (1895).

[49] 156 U.S. 1, 12 (1895). *See* Carter v. Carter Coal Co., 298 U.S. 238, 304, *per* Justice Sutherland ("Mining brings the subject matter of commerce into existence. Commerce disposes of it").

[50] Wickard v. Filburn, 317 U.S. 111, 122 (1942).

[51] 295 U.S. 495 (1935).

[52] 295 U.S. 495, 548 (1935).

[53] 234 U.S. 342.

[54] *Per* Justice Hughes at 351-52.

> Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field." (emphasis added)

It appears that in Justice Hughes' judgment in *Houston* the Court has taken its first effective step towards its modern construction of the Commerce Clause – the recognition that a "close and substantial relation to interstate traffic" is enough for an activity to be federally regulated under the Commerce Clause. Thus, "the mechanical application of legal formulas",[55] such as manufacture-commerce and direct-indirect-effect dichotomies, gave way to an economic measure of substantial impact on interstate trade. Commerce among states was no longer a "technical legal conception", tied to its grammatical meaning, but rather a "practical one, drawn from the course of business",[56] particularly one that incorporates a considerable economic component.[57] Indeed, Chief Justice Stone in *United States v. Wrightwood Dairy Co.*[58] could not have put it more plainly:

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce... [N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."

The main argument in favor of this broadened view appears to be that the power to govern interstate commerce would be unduly prostrated could it not reach those intrastate activities that ultimately amount to trade among the states, particularly because there seems to be no trade among states that cannot be at the same time trade within one state. The point was remarkably stressed by Chief Justice Hughes in *NLRB v. Jones & Laughlin Steel Corp.*:[59]

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[55] Wickard v. Filburn, 317 U.S. 111, 124 (1942).
[56] Swift & Co. v. United States, 196 U.S. 375, 398 (1905), *per* Justice Holmes.
[57] Wickard v. Filburn, 317 U.S. 111, 124 (1942).
[58] 315 U.S. 110, 119 (1942).
[59] 301 U.S. 1, 37 (1937).

> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. Undoubtedly, the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree."

The decision in *United States v. Darby*[60] was predicted on the similar grounds:

> "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."

Likewise in *United States v. Wrightwood Dairy Co.*:[61]

> "... [N]o form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."

The practical effect of these decisions is that a given activity needs no longer be *commerce* – it can pretty much be anything – neither *among states* – it can be local – to be constitutionally subject to federal regulation, as long as "it exerts a substantial economic effect on interstate commerce", even if such effect is indirect.[62]

Such an interpretation of the Commerce Clause was classically endorsed by the Supreme Court in *Wickard v. Filburn* – "perhaps the most far reaching example of Commerce Clause authority over intrastate activity"[63]. In that case, Mr. Filburn, a small farmer in Ohio,

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[60] 312 U.S. 100, 119 (1941), *per* Justice Stone.
[61] 315 U.S. 110, 119 (1942), *per* Chief Justice Stone.
[62] Wickard v. Filburn, 317 U.S. 111, 125 (1942).
[63] United States v. Lopez, 514 U.S. 549, 560 (1995), *per* Chief Justice Rehnquist.

used to raise each year a small acreage of wheat for feeding the poultry and livestock on the farm, making flour for home consumption and selling out the remainder.[64] In July 1940, the Secretary of Agriculture allotted him, pursuant to the Agricultural Adjustment Act of 1938 (AAA),[65] a quota limiting his 1941 crop produce to an area of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. Mr. Filburn was given notice of such allotment twice, before sowing, in July 1940, and again before harvesting, in July 1941. Nevertheless, he cultivated 23 acres and exceeded his wheat quota by 239 bushels. Therefore, he was subjected to a marketing penalty of $117.11, which he refused to pay under, among others, the allegation that the AAA was unconstitutional, since not warranted by the Commerce Clause.[66] The Court held that Congress had commerce power to regulate consumption of home-grown wheat because, even if the wheat produce is not sold out state or even in state, its production beyond the allotted quota, and consequently its consumption by the very farmer that grew it – supplying a need that otherwise probably would be supplied by purchasing wheat from other farmers – unduly abates demand for wheat available in the market, affecting negatively the commodity price nationwide. Furthermore, the Court found that that Mr. Filburn's "own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial". Justice Jackson so reasoned:[67]

> "It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat, and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be

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[64] Except for a portion that was kept for the following seeding.

[65] "The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat [was] to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce." Wickard v. Filburn, 317 U.S. 111, 115 (1942), *per* Justice Jackson.

[66] Wickard v. Filburn, 317 U.S. 111, 114-15 (1942).

[67] Wickard v. Filburn, 317 U.S. 111, 127-29 (1942).

> reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices." (emphasis added)

Even though it is clear that *Laughlin*, *Darby* and *Wickard* did not purport to foreclose the possibility of any limit as to the Commerce Power – as subsequent cases[68] persistently sought a "rational basis for concluding that an activity sufficiently effected interstate commerce"[69] – they effectively ended up expanding its scope in such a way as to relegate the limit question to a merely hypothetical level of inquiry. While conceptually no one would deny the necessity and appropriateness of a limit to congressional authority, whatever the limit may be, lest obliterate the very federalist constitutional element, in practice it became hard to devise circumstances in which the economic effect on interstate commerce of any activity – which Congress would ever be interested in regulating – would be more negligible than that traced out in *Wickard*. The question one could easily raise as against the thesis there advanced is, whereas individual activities, however localized and insignificant by themselves, when widely practiced across the nation come to exert in their aggregate a substantial economic effect on interstate commerce, whether Congress would be interested at all in regulating isolated and infrequent activities. It appears that the cumulative effect principle there adopted would place the limit to congressional power as far as where Congress would never dream of going. The bottom line then is that such limit, though theoretically existent,[70] would not in effect restrain Congress' regulatory appetite to the slightest degree; such limit would be as useful as one prohibiting people from walking through stones. Such position could hardly rebut a characterization of hypocritical and platonic.[71] Perhaps Justice Douglas's warning in his dissenting opinion in *Maryland v. Wirtz* was not completely devoid of reason if one focuses on how the ***substantial effect*** test has been applied in some instances rather than how it has been repeatedly phrased: "All activities affecting commerce, even in the minutest

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[68] *See* Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 276-280 (1981); Perez v. United States, 402 U.S. 146, 155-156 (1971); Katzenbach v. McClung, 379 U.S. 294, 299-301 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252-253 (1964).

[69] United States v. Lopez, 514 U.S. 549, 557 (1995), *per* Chief Justice Rehnquist.

[70] As alluded to in Maryland v. Wirtz, 392 U.S. 183, 196 (1968) ("This Court has always recognized that the power to regulate commerce, though broad indeed, has limits").

[71] One commentator suggests that the constitutional doctrine inaugurated with Laughlin is self-contradictory and has paid lip service to the idea that Congress' power is limited. Donald H. Regan, *How to Think about the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995).

degree, *Wickard* v. *Filburn*, 317 U.S. 111, may be regulated and controlled by Congress. Commercial activity of every stripe may in some way interfere "with the [interstate] flow of merchandise" or interstate travel."[72]

But behind such a change in doctrine lies, as usual, a change in policy, started much earlier by the political branches and now sanctioned by the judicial department. As a response to the deregulated climate charged with enabling the Great Depression, the New Deal was introduced and with it came a new regulatory paradigm that cleared the way to the emergence of the administrative state. A new set of historical circumstances also propped op that trend. Enterprises that one or two decades earlier conducted operations restricted to the local or regional level had expanded and now were national in scope.[73] Many of them purchased supply in one state, manufactured in another, and sold their products in a third. Accordingly, a considerably greater number of businesses were operating on a multi-state basis and thus were connecting intrastate markets and making them more interdependent. Finally, new economic and social conditions prompted a new ideology in the Supreme Court – one that was quick in charging the Court's preceding position as one that artificially "constrained the authority of Congress to regulate interstate commerce".[74]

Since *Wickard* took the last step in establishing the *substantial effect* test, there have been three distinguishable categories of activities that Congress has been authorized to regulate under the Commerce Power authority – activities (i) involving the channels of interstate commerce;[75] (ii) involving the instrumentalities of interstate commerce;[76] or (iii) having a substantial relation to interstate commerce.[77] Undoubtedly, it is the last category the one that has warranted the unprecedented expansion of federally regulated activities. However, it is not clear, as Chief Justice Rehnquist admitted in *Lopez v. United States*,[78] in the cases decided by the Supreme Court, how substantial – if substantial at all – the relation of an activity to interstate commerce has to be before it is regulable by Congress, although it definitely cannot be trivial.[79]

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[72] Maryland v. Wirtz, 392 U.S. 183, 204 (1968).

[73] United States v. Lopez, 514 U.S. 549, 556 (1995).

[74] United States v. Lopez, 514 U.S. 549, 556 (1995), *per* Chief Justice Rehnquist.

[75] *See, e.g.,* United States v. Darby, 312 U.S. 100 (1941); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[76] *See, e.g.,* Southern R. Co. v. United States, 222 U.S. 20 (1911); Houston, E. & W. T. R. Co. v. United States, 234 U.S. 342 (1914); Perez v. United States, 402 U.S. 146 (1971).

[77] *See, e.g.,* Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981) (intrastate coal mining); Perez v. United States, 402 U.S. 146, 155-156 (1971) (intrastate extortionate credit transactions); Katzenbach v. McClung, 379 U.S. 294, 299-301 (1964) (restaurants utilizing substantial interstate supplies); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252-253 (1964) (inns and hotels catering to interstate guests); Wickard v. Filburn, 317 U.S. 111 (1942) (production and consumption of homegrown wheat); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (labor relations).

[78] 514 U.S. 549, 559 (1995).

[79] Maryland v. Wirtz, 392 U.S. 183, 196 (1968) *See* generally United States v. Lopez, 514 U.S. 549, 558-60 (1995).

If *Wickard*, in 1942, started a long historical period during which no aspect of American life was sufficiently unrelated to interstate commerce to escape regulation by Congress, *United States v. Lopez*,[80] in 1995, for the first time since the New Deal held the that the Commerce Power was inadequate to sustain a law[81] and reversed the preceding trend. Lopez, a senior student at Edison High School in San Antonio, Texas, was tipped off as carrying a concealed handgun (with five bullets) within school premises. He was then arrested, charged and indicted with knowing possession of a firearm at a school zone, in violation of § 922(q) of the Gun-Free School Zones Act of 1990 (GFSZA), a federal Act. His defense, on the basis of which his conviction was reversed in appeal, posited that the GFSZA was unconstitutional since beyond Congress' reach under the Commerce Clause.[82] The Supreme Court held 5-4 that:[83]

> "Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."

The Court further held that § 922(q) had no jurisdictional element upon which to decide, on a case-by-case analysis, whether the firearm possession in question sufficiently affects interstate commerce to warrant federal outlawing. It referred to 18 U.S.C. § 1202(a) as an example of a provision that contains a jurisdictional element that limits its proscriptive reach to a discrete subset of firearm possessions that actually affect interstate commerce.[84] Finally, it held that the GFSZA legislative history included no findings as to support a legislative judgment that the regulated firearm possession had a substantial relation to interstate commerce – a relation that, if existed, was not visible to the naked eye.[85]

The Government's argument was twofold. First, it alleged that violent crimes, as those usually connected with firearm possession, bring about a substantial social cost, and that such cost, through the mechanism of insurance, spreads throughout the population; additionally, it argued that violent crimes generally discourage people from traveling to areas

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[80] 514 U.S. 549 (1995).
[81] JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 79 (West, 5th ed. 2003).
[82] United States v. Lopez, 514 U.S. 549, 551-52 (1995).
[83] 514 U.S. 549, 561 (1995), *per* Chief Justice Rehnquist.
[84] United States v. Lopez, 514 U.S. 549, 561-62 (1995).
[85] United States v. Lopez, 514 U.S. 549, 562-63 (1995).

of the country that are perceived to be unsafe. Second, the Government alleged that "the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being", substantially affecting interstate commerce.[86]

However creative and accurate – at least from a sociological perspective – the Government's arguments might have been, the Court found it was unable to go along with them for consequentialist considerations. First, the Court found – and the Government's counsel was not able to show otherwise – that if the Government's "cost of crime" argument was accepted it would become hard to perceive a limitation to federal power. Second, as the "national productivity" argument was based on "inference upon inference", and went through a long causal chain – (guns at school) – (violent crimes) – (handicapped education) – (less productive citizenry) – (economic well-being) – (interstate commerce) – its acceptance would require the acceptance, as regulable under the Commerce Clause, of all those sets of activities that made up its logical intermediary steps – including criminal law enforcement and education – some of which were traditionally understood as falling primarily within the States' sovereignty. Further, the productive citizenry argument would make even family law – Isn't an individual in a happy marriage more productive than another undergoing divorce? – subject to federal regulation.[87] It appeared to the Court that such implications would be incompatible with the standing constitutional structure:[88]

> "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. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824), and that there never will be a distinction between what is truly national and what is truly local, cf. *Jones & Laughlin Steel*, 301 U.S. 1, 30 (1937). This we are unwilling to do."

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[86] United States v. Lopez, 514 U.S. 549, 563-64 (1995).
[87] United States v. Lopez, 514 U.S. 549, 564 (1995).
[88] United States v. Lopez, 514 U.S. 549, 567-68 (1995).

If Congress' regulatory authority had any bounds, *Lopez* made them effective.[89] The enduring strength of *Lopez* and its historical significance as of closing up one era, marked by the New Deal and the expanding administrative state, and giving rise to a new one, sensitive to a revitalized conception of federalism, were shown in two cases adjudged in 2000 by the Supreme Court.

In *Jones v. United States*,[90] Jones tossed a Molotov cocktail through a window into a home, owned and occupied by his cousin, in Fort Wayne, Indiana. Jones was convicted of arson, a federal crime,[91] for damaging by means of fire any property used in commerce-affecting activity. The issue was whether arson of an owner-occupied private residence fell within the scope of the statute.[92] The Government argued that it did as the property was used in commerce-affecting activities in three ways: (i) as a collateral to secure a mortgage from an Oklahoma lender; (ii) to obtain a casualty insurance policy from a Wisconsin insurer; and (iii) to receive natural gas from sources outside Indiana.[93] The Court held:[94]

> "Were we to adopt the Government's expansive interpretation of § 844(i), hardly a building in the land would fall outside the federal statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other trace of interstate commerce. See, *e.g.*, *FERC* v. *Mississippi*, 456 U.S. 742, 757 (1982) (observing that electric energy is consumed "in virtually every home" and that "no State relies solely on its own resources" to meet its inhabitants' demand for the product). If such connections sufficed to trigger § 844(i), the statute's limiting language, "used in" any commerce-affecting activity, would have no office."[95]

In *United States v. Morrison*,[96] Brzonkala, enrolled at Virginia Polytechnic Institute, accused Morrison, a member of the varsity football team, of sexually assaulting her and

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[89] United States v. Morrison, 529 U.S. 598, 608 (2000).

[90] 529 U.S. 848.

[91] 18 U.S.C. § 844(i), transcribed in the text in relevant part only.

[92] Jones v. United States, 529 U.S. 848, 850-51 (2000).

[93] Jones v. United States, 529 U.S. 848, 855 (2000).

[94] Jones v. United States, 529 U.S. 848, 857 (2000), per Justice Ginsburg.

[95] By so restricting the scope of "property used in commerce-affecting activity", the Court avoided a construction that would give rise to "grave and doubtful constitutional questions", in light of the principle established in *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

[96] 529 U.S. 598 (2000).

brought a suit for a federal civil remedy under the Violence Against Women Act of 1994.[97] Brzonkala alleged that this attack caused her severe emotional distress and that she had to start taking prescribed antidepressant medication. Shortly after, she withdrew from the university. Although, she was held to have stated a claim upon which relief could be granted, the trial court struck down the provision she relied on as falling without Congress' regulatory authority under the Commerce Clause as interpreted in *Lopez*.[98] The United States intervened to defend its constitutionality and, supported by congressional findings,[99] argued that gender-motivated violence affected interstate commerce

> "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; ... by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products."

The Court dismissed the Government's argument for gender-motivated violent crimes were not economic activity and held that "[w]hile we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."[100] The Court also went on to state what can be said to be the main rationale behind the current understanding that an effective limit to Congress' regulatory authority under the Commerce Clause is appropriate in a federalist system:[101]

> "If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part. Petitioners' reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of

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[97] 42 U.S.C. § 13981 was designed offer a remedy against crimes of violence motivated by gender.
[98] United States v. Morrison, 529 U.S. 598, 602-05 (2000).
[99] H. R. Conf. Rep. No. 103-711, at 385.
[100] United States v. Morrison, 529 U.S. 598, 613 (2000).
[101] United States v. Morrison, 529 U.S. 598, 615-16 (2000).

> marriage, divorce, and childrearing on the national economy is undoubtedly significant... Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace. As we have repeatedly noted, the Framers crafted the federal system of government so that the people's rights would be secured by the division of power. No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text."

As seen above, the interpretation of the Commerce Clause has evolved,[102] from a narrower construction, both closer to its grammatical and legal meaning and more loyal to the Framer's intent, to a broader one, highly elaborated and economicized, and arguably more suitable for the more interconnected and smaller world of ours. While the broadly-written constitutional text, in the relevant part, has not been altered over its 215 years of existence, the construction of its meaning has evolved, has been adapted by the Supreme Court – within the discretion the people as represented by the Framers appears to have left to it – as different historical circumstances arguably would have had the people and the Framers, with the same fundamental principals and ultimate ends in mind, written it at the present time. While amending the constitutional text in pace with history would have avoided strained and apparently illegitimate legal constructions, recurring amendments could have threatened the invaluable political stability secured by a prolonged exercise of farsighted and unselfish political self-restraint and carefully nurtured by a conservative and prudent judicial branch. Justice O'Connor associates constitutional law's evolution with the original constitutional framework's flexibility:[103]

> "This framework has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that *any* government would conduct such activities; and second, because the Framers would not have believed that the *Federal* Government, rather than the States, would assume such responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role."

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[102] United States v. Morrison, 529 U.S. 607 (2000).

[103] New York v. United States, 505 U.S. 144, 157 (1992).

Undeniably, the Commerce Clause is an illustrative example of that more general trend of evolution:[104]

> "The volume of interstate commerce and the range of commonly accepted objects of government regulation have, however, expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power.... The actual scope of the Federal Government's authority with respect to the States has changed over the years, therefore, but the constitutional structure underlying and limiting that authority has not."

Nevertheless, however interrelated our world is today that even the most local activity is not purely local and its economic repercussions may easily cross states' boundaries, the principle of federalism as a double security – along with that of checks and balances – protective of individuals' civil liberties as against tyranny cannot be overridden under the standing constitutional structure. A compromise between the competing interests of a strong economic unit and a government respectful of individuals' freedom implies a limit to the highly inflated notion of commerce among states; a limit that since *Houston* in 1914 has no longer been inherent in the provision's own words and that arguably since *Laughlin* in 1937 and *Wickard* in 1942 has been even absent from the modern construction of those words; a limit that, therefore, appears to derive instead and solely from outer, overarching constitutional principles such as federalism – as opposed to a unitary and centralized system of government; a limit that, though existent and forceful as recently shown in *Lopez*, *Jones* and *Morrison*, by virtue of its very nature does not seem sometimes to be determinable other than arbitrarily, with no objective criteria.[105] Unfortunately, an inevitable vice of standardless, subjective limits is their defenseless vulnerability as to the whims of the political climate. In the case of environmental legislation and their reach, it seems that purely developmental, anti-environmental interests could, in light of prejudicially slanted limits, be

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[104] New York v. United States, 505 U.S. 144, 158 (1992).

[105] Such arbitrariness may be expressed in other terms. For instance, one commentator suggests that Lopez sets a limit rather on the type of argument that the Government, either Congress in legislative findings or the Solicitor General in briefings before the Court, may advance in support of an Act of Congress' constitutionality. Such argument, to be acceptable, must take the doctrine of enumerated powers seriously and recognize the possibility of some limits to Congress' Commerce Power. Thus, as long as the Government's attorneys observe Lopez recipe, the Court may not really care as to whether the Act under attack actually invades any remaining province of States' exclusive sovereignty. Deborah J. Merritt, *Commerce!*, 94 MICH. L. REV. 674, 689-90 (1995).

inextricably disguised as pro-civil liberties, anti-tyrannical arguments that ultimately thwart the expansion and development of Environmental Law – perhaps even at the expense of individuals' actual and full enjoyment of their remaining freedoms.

CONCLUSION:

Can The Commerce Power Be a Burden on Environmental Law?

Does the Commerce Power pose a limit to the development of Environmental Law? Two considerations appear to be necessary for one to understand the proper scope of this question. First, if the commerce power is the main source of federal environmental law in the United States, in what sense can it curb its development? In more dramatic words, if, under the standing constitutional paradigm, federal environmental law would not there be but for the commerce power, how can the commerce power be viewed as a hindrance against, as opposed to the very source of, environmental law? Indeed, if the question posed were understood in its literal meaning, it would simply not make sense. However, the meaning intended to be attached to it is another; a meaning that could perhaps be better expressed by the following formulation: If the Constitution was amended with an Environmental Clause, in addition to the Commerce Clause, would Congress' authority to regulate the environment be enlarged, and if so, by how much? Or yet in a negative formulation: Is Congress' authority to regulate the environment contracted, and if so by how much, by the fact that its source is the Commerce Clause as opposed to a hypothetical Environmental Clause? Second, one would ask what is meant by a "hindrance" to the development of environmental law. Here is suggested a political meaning to such word: There is a hindrance[106] to the development of environmental law every time the state of environmental protection as afforded by the legal system lags behind the one democratically desired by the people of the United States. In other words, the hindrance is determined by the existence of an environment-disfavoring discrepancy between the level of protection actually achieved in legal terms and that ultimately desired in political terms. Such a divergence could be attributed to an institutional inefficiency in democratic terms, which illegitimately would favor some interests to the detriment of others and effectuates a distortion in the institutional representation of the people's political will. One of such institutional, political-representation-distorting inefficiencies could be the Commerce Clause functioning as an Environmental Clause. That is this paper's hypothesis – to be confirmed or refuted as the research proposed proceeds.

An attempt to pursue the main question posed in this paper one should consider two distinct roles the Commerce Clause has played. On the one hand, the Commerce Clause has operated as an affirmative basis for Congress to legislate, giving rise to the affirmative

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[106] Or "limit", "restraint", "encumbrance", "curb", however one want to call it.

commerce power; on the other hand, it has acted as a check on States' legislation that puts a burden on interstate commerce, constituting the negative commerce power. For federal environmental law to fall within Congress' constitutional regulatory authority, it must have a relation to interstate commerce substantial enough to satisfy the threshold set in *Lopez*. In contrast, for state environmental law not to intrude into Congress' monopolistic power over interstate commerce, it cannot amount to a discrimination against interstate commerce. In a simplistic formulation, one could say that federal environmental legislation is unconstitutional unless it affects interstate commerce, whereas state environmental legislation is unconstitutional unless it *does not* affect interstate commerce; or even more plainly, one could say that what is required of federal law – that it affects interstate commerce – is forbidden to state law. However, such proposition may be inaccurate to the extent that the effect on interstate commerce that is required for federal law may be, at least theoretically, different in nature from that that is forbidden to state law; for one could argue that even Congress would not be constitutionally empowered to pass legislation that unreasonably discriminates against one state in favor of another in interstate commerce.

Further, notwithstanding the effects' different nature qualification just made, one could think that a constitutional interpretation of the federalist system that divides the power to regulate the environment in such way that federal and state legislations do not clash or overlap, as the one referred to above, works generally to the advantage of environmental protection. Nevertheless, one would have to concede that, if that proposition is true, it may be refuted in some cases. For instance, with respect to land and water, Supreme Court cases may have indicated that the regulation of land and water resources may not have a relation to interstate commerce sufficiently substantial to warrant federal authority and, at the same time, it may effect too restrictive a burden on interstate commerce to warrant state authority. The bottom line, in cases as such, would be that neither Congress nor the States may enjoy regulatory authority over natural resources.[107] If such federalist division of powers was intended to serve a cooperative federalism, in this particular case at least it has turned out to serve a self-destructive federalism.

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[107] Christine A. Klein, The Environmental Commerce Clause, 27 HARV. ENVTL. L. REV. 1, 1-5 (2003).

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