

## Sec. 8—Powers of Congress

## Cl. 3—Power to Regulate Commerce

on occasion serve interstate travelers, and therefore it is permissible to impose regulations that prevent or deter racial discrimination.<sup>749</sup>

An example of how expansive this category can be is seen in *Pierce County v. Guillen*.<sup>750</sup> In *Pierce County*, the Court considered a program adopted by Congress to provide state and local governments funding to improve the most dangerous sections of their roads. In order to facilitate information-gathering by the states, congress prohibited the introduction of highway data collected for such programs, such as accident rates and locations, into evidence in state or federal court proceedings. The Court found that “Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement . . . would result in more diligent efforts [by states] to collect the relevant information” and thus would lead to “greater safety on our Nation’s roads.”

***Instrumentalities, Persons or Things.***—The second category, relating to instrumentalities of commerce<sup>751</sup> and persons or things traveling in commerce, is implied in Marshall’s opinion in *Gibbons v. Ogden*,<sup>752</sup> where the regulation of passenger ferries on the waters of New York was found to be within Congress’ authority over interstate commerce. The same opinion recognizes that in “the progress of things,” new and other instruments of commerce will make their appearance and be amenable to regulation under this clause. For instance, the Court saw no difference in Congress’ traditional regulation of sailing vessels and the regulation of vessels powered by steam.<sup>753</sup>

A little over half a century later the principle embodied in this holding was given its classic expression in the opinion of Chief Justice Waite in *Pensacola Telegraph Co. v. Western Union Telegraph Co.*,<sup>754</sup> a case closely paralleling *Gibbons v. Ogden*.<sup>755</sup>

<sup>749</sup> *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Daniel v. Paul*, 395 U.S. 298 (1969).

<sup>750</sup> 537 U.S. 129, 147 (2003).

<sup>751</sup> Examples of laws addressing instrumentalities of commerce include prohibitions on the destruction of an aircraft, 18 U.S.C. § 32, or on theft from interstate shipments. *Accord Perez v. United States*, 402 U.S. 146, 150 (1971).

<sup>752</sup> 22 U.S. (9 Wheat.) 1, 217, 221 (1824).

<sup>753</sup> When the law at issue in *Gibbons*, the Licensing Act of 1793, was passed, the only craft to which it could apply were sailing vessels. But, the statute and the power by which it was enacted were, Marshall asserted, indifferent to the “principle” by which vessels were moved. 22 U.S. (9 Wheat.) at 218.

<sup>754</sup> 96 U.S. 1 (1878). *See also* *Western Union Telegraph Co. v. Texas*, 105 U.S. 460 (1882).

<sup>755</sup> 96 U.S. at 9. “Commerce embraces appliances necessarily employed in carrying on transportation by land and water.” *Railroad Co. v. Fuller*, 84 U.S. (17 Wall.) 560, 568 (1873).