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Analyzing the Evolution of the Commerce Clause

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I. Introduction

The Interstate Commerce Clause, hereinafter "Commerce Clause" or "Clause," which permits Congress to regulate commercial activity, was passed in 1887. For a century and decades since then, numerous interpretations of its capacity have progressively given rise to a social imbalance that saw Congress, via an expansion of the range of powers granted to them, expand its regulations on American citizens.

During the Marshall Court era, federal actors who at first seldom invoked the Clause began to seek supervision of intrastate and interstate commerce in addition to what was not traditionally regarded to fall under the broad regulation of state and private activities.[1] Thus, Congress in the mid-twentieth century began to enact laws on the basis of the Clause to control the conditions of general life.[2]

Insofar as the government consistently upheld legislation, federal-state interrelations remained static until 1995, when the Supreme Court, hereinafter "Court," historically ruled in *United States v. Lopez* that Congress had overstepped its authority regarding gun possession in public schools. In *National Federation of Independent Business* (NFIB) *v. Sebelius* in 2012, the Court employed a framework similar to its precedent but upheld the constitutionality of a Congressional commerce power exertion on a healthcare mandate, owing to its redefinition of the penalty thereof to a tax that Congress could then regulate under the Taxing Clause.

[1] https://plus.lexis.com/api/permalink/92e18262-9b79-4769-81a1-f7cc18dff19f/?context=1530671
[2] https://billofrightsinstitute.org/activities/handout-h-how-has-the-supreme-court-interpreted-the-commerce-clause

This paper will review the Clause's history, including its differing interpretations during various time periods, as well as its applications in two specific cases: *Lopez* and *Sebelius*. Next, it will contextualize those cases and compare analogous facts to compare the decision-making processes of the Court. This paper finds that in light of the historical trend in which Congress has misused the power of the Clause, the Court has begun to reign in Congress' overextension of the Clause through its ruling in *United States v. Lopez* and *NFIB v. Sebelius*.

II. History of the Commerce Clause

A. No One Interpretation

Article 1, Section 9, Clause 3 of the U.S. Constitution explicitly permits Congress "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[3] In 1824, Congress extended this regulatory responsibility to include the management of intrastate activity deemed to be a part of a larger interstate commercial scheme. Soon after, in 1905, Congress characterized local commerce as a regulated activity by claiming that it could become part of the continuous "current" of commerce that involved the interstate movement of goods and services.[4] Additionally, the Court broadened grounds on which the Clause could be used to regulate state activity. The earliest such example was the 1937 National Labor Relations Board decision regarding the unconstitutional ban of company unions via the Wagner Act, which sustained Congress' power to regulate employers whose operations affected interstate commerce, even though they were not directly engaged in commerce themselves.[5] The Court noted the effects of a 1919 steel strike on the flow of goods in interstate commerce, and further determined that economic activity is commerce if it has a "substantial economic effect" on interstate

[3] https://www.law.cornell.edu/wex/commerce_clause
[4] https://www.law.cornell.edu/supremecourt/text/11-393
[5] https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1937-act-held-constitutional

commerce or if the "cumulative effect" of one act could have an effect on such commerce.[6] Moreover, in 1941, the Court in *United States v. Darby* held that the Fair Labor Standards Act is constitutional forasmuch as "it relates to the federal government's power to regular interstate commerce" and "provides uniform labor standards across the states."[7] Congress thereafter recognized that the development of an integrated national economy called for the broad interpretation of commerce, assuming that local activity will likely affect the larger interstate commercial system. This ruling remained unfixed until 1995, during which the Court finally invalidated the law with its stricter interpretation of the Clause.[8]

B. An Unlikely Pivot: Guns, School, and Lopez

Alfonso Lopez, Jr. was a high school senior in 1992 in San Antonio, Texas when he decided to conceal carry a .38-caliber handgun and five bullets to his high school.[9] After school officials received an anonymous tip, they confronted Lopez, who admitted that he carried a gun on school grounds. Lopez was initially charged with violating a Texas statute, but the state charge was replaced with a federal charge under the Gun-Free School Zones Act (GFSZA), which made it unlawful for a person to possess a firearm in a school zone. Lopez entered a plea of not guilty, and his attorneys "moved to dismiss the charge on the grounds that Congress had exceeded its authority by passing the act."[10] The federal government, they asserted, had "no authority to regulate firearms in local schools."

Nonetheless, a federal district court denied the motion to dismiss on the grounds that "the act was a constitutional exercise of the well-defined power of Congress 'to regulate activities in and affecting commerce, and the 'business' of elementary, middle and high schools…affects

[6] *Ibid.*
[7] https://supreme.justia.com/cases/federal/us/312/100/
[8] https://www.law.cornell.edu/wex/commerce_clause
[9] https://www.britannica.com/topic/United-States-v-Lopez
[10] *Ibid.*

interstate commerce.'"[11] Additionally, since possession of a firearm in school would lead to violent crime, thereby affecting general economic conditions, the Clause could be invoked.[12] Lopez, who had waived his right to jury trial, was then convicted and sentenced to a half-year in prison. However, he successfully appealed his conviction to the Fifth Circuit Court of Appeals, which reversed his case on the issue of Congressional authority, stating that "the law was invalid because it went beyond the powers of Congress under the commerce clause."[13] [1].

On November 8, 1994, *United States v. Lopez*, 514 U.S. 549 (hereinafter "*Lopez*"), was brought suit and argued before the Supreme Court. In 1995, the Court affirmed the order of the Fifth Circuit by insisting that Congress had gone too far in *Lopez*. Writing for the majority, Chief Justice William Rehnquist reasoned that "because the Gun-Free School Zones Act was neither a regulation of the channels of interstate commerce nor an attempt to prohibit interstate transportation of a commodity through those channels, it could withstand judicial scrutiny only if it affected interstate commerce in some substantial way."[14] In addition to marking the GFSZA as an unconstitutional overreach, the Court also ruled that Congress should regulate strictly "the channels of commerce, the instrumentalities of commerce, and action that substantially affects interstate commerce." Furthermore, it was unwilling to expand the Clause as "to do so would require [the Court] to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local.[15]

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[11] *Ibid.*
[12] https://plus.lexis.com/api/permalink/92e18262-9b79-4769-81a1-f7cc18dff19f/?context=1530671
[13] https://www.britannica.com/topic/United-States-v-Lopez
[14] *Ibid.*
[15] https://plus.lexis.com/api/permalink/92e18262-9b79-4769-81a1-f7cc18dff19f/?context=1530671

C. NFIB v. Sebelius

Fifteen years after the *Lopez* ruling, Congress enacted the Affordable Care Act (hereinafter "ACA"), which sought to necessitate via the Commerce Clause that besides those qualifying for an exemption, individuals must purchase insurance from private businesses and maintain minimum essential medical coverage. Those who did not comply with the ACA were forced to "make a shared responsibility payment to the Federal Government," a difficult expense for many Americans.[16] Hence, the mandate to buy healthcare rallied opposition, who opined that the mandate was an unconstitutional use of the Clause since health insurance is fundamentally unrelated to interstate commerce, and that the ACA compels participation in, but does not regulate commerce. NFIB – along with twenty-six states and several individuals – challenged the constitutionality of both the individual mandate and the Medicaid expansion in *NFIB v. Sebelius*, 567 US. 519 (2012) (hereinafter "*Sebelius*") in the Court of Appeals for the Eleventh Circuit. Although the District Court (hereinafter "District") affirmed Congress' spending power as sufficient for an ACA-driven Medicaid expansion, it ruled invalid the enactment of the ACA mandate for individuals.[17]

By invalidating the individual mandate in *Sebelius,* the District limited Congress' power through the use of the Commerce clause. Insofar as the distinction between participators and bystanders in a market governed by law was left undefined, the Clause would let the government control both the actions and inactions – practically every activity – of Americans. However, the Court proposed that a reasonable construction could reverse the ruling of the District if the mandate "is construed as imposing a tax on those who do not have health insurance."[18] The penalty, owing to its shared features with a tax in that "its amount is determined by income,

[16] https://www.lexisnexis.com/community/casebrief/p/casebrief-nat-l-fed-n-of-indep-bus-v-sebelius
[17] *Ibid.*
[18] *Ibid.*

number of dependents, and filing status, and it is paid into the treasury when filing income tax," would be deemed constitutional by the Taxing Clause.[19]

Ultimately, the Supreme Court, in a 5-4 vote, reversed the District Court decision[20] and found that the individual mandate was not within the commerce power, but that Congress could nonetheless collect the mandate by categorizing it as a tax. As per Chief Justice John Roberts, "The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity. But from its creation, the Constitution has made no such promise with respect to taxes."[21] The Court also brought forth that the purchase of healthcare was not illegal, so the penalty was not a punishment for an illegal action.[22] It thus ruled the individual mandate to be contained by the Taxing Clause, and therefore a constitutional use of power by Congress.

III. Analysis

Before *Lopez*, it was not clear whether a Congressional activity met the "substantially affects interstate commerce" test, which would move the activity under the jurisdiction of the commerce power. When the Court decided the *Lopez* case in 1995 as outlined earlier, the limits of the "substantially affects" test were determined in a four-pronged test wholly employed in *Sebelius*:[23]

1. Whether the regulated activity is commercial or economic in nature
2. Whether an express jurisdictional element is provided in the statute to limit its reach

[19] https://journalofethics.ama-assn.org/article/constitutionality-affordable-care-act-update/2012-11
[20] https://supreme.justia.com/cases/federal/us/567/519/
[21] https://ballotpedia.org/National_Federation_of_Independent_Business_(NFIB)_v._Sebelius
[22] https://journalofethics.ama-assn.org/article/constitutionality-affordable-care-act-update/2012-11
[23] https://www.everycrsreport.com/files/20140516_RL32844_04af54dc1fff5bafa3e5ebb3627be9863fb001e1.html

3. Whether Congress made express findings about the effects of the proscribed activity on interstate commerce
4. Whether the link between the prohibited activity and the effect on interstate commerce is attenuated

In *Lopez*, the Court concluded that the possession of a gun on school grounds regulated by the GFSZA could not be classified as "economic activity."[24] At this point, *Lopez* had already failed the first criterion (1) of the "substantially affects" test, but the Court reviewed the case using the remaining features. It also found that the GFSZA contained no jurisdictional element (2) that connected the creation of a "federal cause of action for gun violence to Congress' power to regulate interstate commerce."[25] As mentioned before, the regulation of gun violence was not directed at the instrumentalities, channels or goods involved in interstate commerce (4) and was therefore beyond the scope of Congress' authority. Finally, this implies that Congress did not make many express findings about the effects of possession of guns on school grounds on interstate commerce in (3). By such lines of reasoning, the Court proclaimed that the commerce power could not be invoked in *Lopez.*

In *Sebelius*, the regulation of the purchase of health insurance was ruled to be economic in nature (1) and not under the jurisdiction of the Commerce Clause. As such, the Court did make legislative findings, unlike in *Lopez,* on the effects of the individual mandate on interstate commerce (3), in that for Congress to have the power to regulate interstate commerce, there must be economic activity to regulate in the first place. This was the condemning issue with the individual mandate, as rather than regulating existing commercial activity, the mandate "compels individuals to become active in commerce by purchasing a product on the ground that their

[24] *Ibid.*
[25] *Ibid.*

failure to do so affects interstate commerce."[26] If such a construction were allowed, the Clause would be greatly expanded beyond permissible bounds and also, "regulating individuals based on what they fail to do" would change the foundational relationship between American citizens and the federal government with respect to the Constitution.[27]

In summary, the Court conceded in *Lopez* that the possession of a gun in a school zone could result in a violent crime, which would affect the national economy because Americans would "refuse to travel to areas which they believed to be unsafe, and that the threat to learning posed by guns could result in a less-educated citizenry."[28] However, it asserted that the universal cost of insurance protecting against the byproducts of a possession of a weapon in school was not significant enough to warrant the commerce power. Additionally, the Court stated that "if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate."[29] Unlike in *Lopez*, in *Sebelius,* the Court reasoned that the economic element – a tax – was sufficient responsibility for Congress.

IV. Conclusion

The framework provided in *Lopez* and applied to *Sebelius* shows that the former weakened, and the latter clarified, the scope of the Clause, which has in the past been used both to regulate interstate commercial activity and to broadly legislate a range of activities, from gun control to healthcare.

The confusion due to the Commerce Clause could have altogether been less severe had the United States Constitution explicitly defined, to the best of its ability, all activities associated with the word "commerce." This decision allows for various open-ended interpretations of

[26] *Ibid.*
[27] *Ibid.*
[28] https://www.britannica.com/topic/United-States-v-Lopez
[29] *Ibid.*

Congress' role in regulating commerce, such as that it refers to trade or exchange or that it clarifies the broad social and commercial activities between people in different states. The definitions of commerce not only blur the line that divides federal and state authority, but also subject commercial activity within states to controversial debate.The ruling of the Court abstracts this discourse: "To expand the Clause would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do."