Constitutional Hinderance

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Constitutional Hindrance: The History behind Federal Overreach and Constitutional Safeguards

According to media outlets, the federal government has become the poster child for "Failure to Help the States" during this present crisis. It is nearly impossible to find an article or news segment that does not blame the federal government for the current pandemic. If the media is correct in blaming the federal government then why doesn't the federal government just take over all COVID-19 related problems throughout the nation that would make everything easier according to the media. There are countless reasons why the federal government can't take over, the ultimate reason being the Constitution, the law of the land. The Founders had experienced what happens when a government is given too much power and they determined that in this new country the states would never have to worry about the federal government coming in and taking over. Despite Congress trying to use the Commerce Clause to overstep, the federal government is still limited in their reach. Despite their best efforts, the Constitution and the Supreme Court continues to ensure that the federal government is handcuffed so the state governments are empowered to do their job.

Article 1 section 8 of the United States Constitution lists all of the powers granted to the Legislative Branch. One of the most important, and yet misused, powers given to Congress, is derived from the Commerce Clause. This clause states Congress has the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[1] This power was given to Congress for a variety of reasons. Under the Articles of Confederation, each state had individual sovereignty when it came to most actions relating to commerce. Since they had this power, they were able to erect:

> an assortment of trade barriers to protect their own businesses from competing firms in neighboring states. And, because state legislatures controlled their own commerce, the federal Congress was unable to enter into credible trade agreements with foreign powers to open markets for American goods, in part, by threatening to restrict foreign access to the American market.[2].

When the founders wrote the Articles of Confederation, they framed it on a foundation built on fear of a central government which could be strong enough to enslave and stifle people similar to the taxation without representation the British empire had employed. Based on this foundation, they created a limited government so that no foreign power would respect the United States, and no state would fear the federal Congress. Each state held all the power while the federal Congress had little to no power or leverage.

Since Congress was unable to make trades or treaties with any foreign powers, "the result of all this was a nationwide economic downturn that rightly or not, was blamed on ruinous

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[1] U. S. Constitution, art. 1, sec. 8, cl. 3

[2] Randy E. Barnett, and Andrew Koppelman, *Common Interpretation: The Commerce Clause*, (Philadelphia: National Constitution Center),

politics enacted by democratically-elected legislatures."[3] It seems it is inherent in all politics, or perhaps in our human nature, to blame democratically-elected members of Congress for problems that come from a number of different problems, not just one person. As a result, when creating the Constitution, the founders had lengthy debates about how much power the federal government should be given. A number of people were so concerned with how the Articles of Confederation turned out that they wanted to give the federal government limitless power in order to protect the people. James Madison was one of the strongest supporters of a strong central government. When each colony made suggestions for either a new Constitution or a revised Articles of Confederation, Madison suggested what is now called the Virginia Plan. Article 6 of the Virginia Plan stated:

> that the National Legislature ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislature; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union against. any Member of the Union failing to fulfill its duty under the articles thereof.[4]

This article would have given the federal government unlimited power, thereby removing the need for the state governments. When the "committee of detail"[5] completed the first drafts of the Constitution, there was a heated debate over the wording of Article 6. During these debates between Madison and the other delegates, Madison began to see how the wording of the Article would give way to unlimited government power. He realized that Article 6 of the "Virginia Plan was setting forth a formula for virtually open-ended federal governmental power. Unlike the Articles of Confederation, the provision referred to heads of power rather than specified, enumerated powers."[6] Mr. Butler, a delegate for South Carolina, "apprehended that the taking so many powers out of the hands of the States as was proposed, tended to destroy all that balance {and security} of interests among the States which it was necessary to preserve."[7] Southern states eventually won the debate and Article 6 was removed from the Virginia Plan.

This was not the only debate over the wording and powers granted to the federal Congress within the Virginia Plan. One significant debate was over the powers granted to the executive branch and the President. All the Virginia Plan stated originally was the executive

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[3] Ibid.
[4] Shlomo Slonim, *Delimiting the Scope of National Authority*, Forging the American Nation (New York: Palgrave Macmillan, 2017)
[5] *The Committee of Detail Report*, (Ohio: Teaching American History)
[6] Shlomo, *Delimiting the Scope of National Authority*
[7] Ibid.

branch would have "a general authority to execute the national laws."[8] After thorough debates, the delegates decided the executive powers would work with a committee to review and veto various laws passed through Congress but added Congress would be able to still override the President with a two-thirds vote.[9] Another important debate happened over the slave trade and the powers of Congress to control trade. When the slave trade was brought up in the discussion, the southern states presented two propositions; first, that Congress would be banned from taxing exports. They desired this proposition because a large part of the southern economy came from exporting agriculture products such as cotton and sugar. The northern delegates believed that restricting Congress from taxing exports would "take away from the government 'half of the regulation of trade!'"[10] The southern delegates realized that taxes on exports would affect the southern states more than the northern states thereby giving the federal government more power over the southern states' economies than what they desired.

Second, the southern states proposed Congress be forbidden from banning the importation of slaves. This caused great debate among the delegates. It was less of a political issue, rather a moral one: "Luther Martin of Maryland said that forbidding Congress from banning the importation of slaves was "inconsistent with the principles of the revolution and dishonorable to the American character."[11] After being at an impasse for a few days the northern delegates realized the slavery issue would be the dividing factor which could end the new United States before it really became a true nation. In order to create a "more perfect union" the delegates worked out a compromise. They agreed that Congress could not tax exports and that no law could be passed to ban the slave trade until 1808."[12]

There were many people within the Constitutional Convention who believed the new United States would not survive unless there was emphasis put on the sovereignty of the states. In fact, there are only a few countries which have a true emphasis on "states" having true sovereignty, "Switzerland, and Australia, the powers of the regional governments are those that remain after the powers of the central government have been enumerated in the constitution."[13] Throughout history the definition of "states' rights" has changed repeatedly. Before and immediately following the American Civil War, many people were under the impression "states' rights" referred to the concept that each state was sovereign and should have final say over important affairs that affect it.[14] At its essence, the idea of "states' rights" is the state governments are closer to the people than the federal government and can, therefore, better represent the citizens with a greater understanding of the needs, wants, and desires of the people.

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[8] Constitutional Rights Foundation, *The Major Debates at the Constitutional Convention*, Vol 25, Issue 2 (California: Civics Renewal Network)
[9] Ibid.
[10] Constitutional Rights Foundation, *The Major Debates at the Constitutional Convention*
[11] Ibid.
[12] Ibid.
[13] Frederick Drake, *States' Rights*, Encyclopedia Britannica, Jan 6, 2020.
[14] Ibid.

Considering the competing ideals of the Founding Fathers, the vision to create a new framework for government and the desire to empower the people, the brilliance of the constitutional writers is on display in the Commerce Clause. It was written to give the federal government enough power to make trade agreements and treaties with foreign nations and to make sure the states do not become divided over trade agreements and commerce. There are three main concerns which arise with the wording of the Commerce Clause. "What is the meaning of 'commerce'? What is the meaning of 'among the several states'? And what is the meaning of 'to regulate'?"[15] These concerns are what the Supreme Court has deliberated on several occasions. The main debate is centered around the idea: "Is the US federal government using the Commerce Clause to regulate something that does not necessarily fall under the category of commerce?"

The first problem with the Commerce Clause is the definition of commerce. There are generally two ways to define commerce. First, "might be limited to the trade, exchange or transportation of people and things, which would exclude, for example, agriculture, manufacturing, and other methods of production."[16] Second, "might expansively be interpreted to refer to any gainful activity or even to all social interaction."[17] Since there are multiple ways commerce can be defined, there have been multiple cases brought to the Supreme Court in order to determine if the federal government has overstepped the limits put on it by the Constitution by referring to the Commerce Clause for justification.

Professor Barnett researched and wrote extensively about the original meaning of the Commerce Clause and the original intention behind the Commerce Clause. His research determined "the term 'commerce' was consistently used in the narrow sense and that *there is no surviving example of it being used in either source in any broader sense*. The same holds true for the use of the word 'commerce' in *The Federalist Papers*."[18] Barnett goes through the Constitution, the convention debates, and *The Federalist Papers* in order to determine what definition of "commerce", "regulation", and "among the several states" was according to the Founders. Using Samuel Johnson's *Dictionary of the English Language* the 1785 edition, Barnett defines commerce as "intercourse; exchange of one thing for another; interchange of anything; trade; traffick."[19] This means commerce would have referred to the narrower definition in the commerce clause. Going even deeper, Barnett went through the Constitutional Convention debates and the *Federalist Papers* noting all the times "commerce" was used and how it was used in context. In the Constitutional Convention there were 34 times the delegates used "commerce."[20] Eight of those times the terms were used as "unambiguous reference to

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[15] Barnett and Koppelman, *Common Interpretation: The Commerce Clause*
[16] Ibid.
[17] Ibid.
[18] Randy E. Barnett, *The Original Meaning of the Commerce Clause* (Washington D.C: Georgetown University Law Center, 2001)
[19] Ibid.
[20] Ibid.

commerce with foreign nations which can only consist of trade."[21] He went through each term and determined "in no instance is the term 'commerce' clearly used to refer to 'any gainful activity' or anything broader than trade."[22] In the sixty-three times that the term "commerce" is found throughout all of the *Federalist Papers* not once is it used to "unambiguously refer to any activity beyond trade or exchange."[23] Federalist number 11, by Alexander Hamilton, talks extensively about the idea of adding a Commerce Clause to the Constitution. Hamilton states, "If we continue united, we may counteract a policy so unfriendly to prosperity in a variety of ways. By prohibitory regulations, extending, at the same time, throughout the States, we may oblige foreign countries to bid against each other, for the privileges of our markets."[24] Every time Hamilton uses the term "commerce" within the *Federalist Papers,* it is in reference to the trade or exchange of goods. Despite all the evidence Barnett has provided showing that the commerce clause should only be used to regulate the circulation of goods across the United States, there have been several instances of Congress using the Commerce Clause as the reason behind new regulations they put in place. Some of these regulations have been brought to the Supreme Court in order to determine if they are Constitutional.

In *Gibbons v. Ogden,* the Supreme Court ruled that "intrastate activity could be regulated under the Commerce Clause, provided that the activity is part of a larger interstate commercial scheme."[25] This summary was delivered in 1824, in what was to become one of the first cases to pass through the Supreme Court about the possible overreach of the federal government. Justice Marshall concluded that "regulation of navigation by steamboat operators and others for purposes of conducting interstate commerce was a power reserved to and exercised by the Congress under the Commerce Clause."[26] While this case focused on interstate navigation, and regulation on naval ships, it is important because the conclusion of this case has been used repeatedly as precedent for congress to use the Commerce Clause to "regulate" a number of different activities and to keep the states from "interfering" in federal regulations.

In the following years there were several cases to rise questioning the authority of the Congress to write or pass laws and regulations using the Commerce Clause, but it wasn't until 1894 when the Supreme Court deemed an Act of Congress to be unconstitutional under the Commerce Clause. In *United States v. E. C. Knight Co.,* the Supreme Court was asked to determine if the Sherman Anti-Trust Act from 1890 was unconstitutional. In summary "The act was constitutional, but it did not apply to manufacturing. Manufacturing was not commerce, declared [Justice] Fuller for the majority; the law did not reach the admitted monopolization of manufacturing."[27] While the Commerce Clause was ratified in 1787, it wasn't until 1894 that Congress had truly overstepped the powers given to it by the commerce clause.

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[21] Ibid.
[22] Ibid.
[23] Ibid.
[24] Alexander Hamilton, *Federalist No. 11*, (New York: Independent Journal, 1787),
[25] *Commerce Clause*, (Cornell: Legal Information Institute)
[26] "Gibbons v. Ogden", *Oyez*, https://www.oyez.org/cases/1789-1850/22us1.
[27] "United States v. E. C. Knight Company" *Oyez, www.oyez.org/cases/1850-1900/156us1*.

Just a few years after *United States v. E. C. Knight Co*, another case related to the use of the Commerce Clause was brought before to the Supreme Court. This case also came in the aftermath of the Sherman Anti-Trust Act. In 1905, the case *Swift and Company v. United States* arose with the main issue being about a "beef trust" which had "developed in Chicago, in which the "Big Six" leading meatpackers agreed not to bid against one another in order to control prices. The trust also pressured the railroads into charging them lower-than-normal rates."[28] Justice Holmes Jr. wrote for the majority and the result was a broadening of "the meaning of 'interstate' commerce to include actions that were part of the 'stream of commerce' where the stream was clearly interstate in character."[29] It was because of this conclusion that the federal government felt empowered enough to create the Pure Food and Drug Act and the Meat Inspection Acts in 1906.

A few decades later and another significant Supreme Court decision about congressional powers under the Commerce Clause would be found in *United States v. Lopez*. This case followed the creation of Gun-Free School Zones under the Gun-Free School Zone Act of 1990, and the power of Congress to regulate these school zones. The main question to answer was whether "forbidding individuals from knowingly carrying a gun in a school zone"[30] was unconstitutional. Chief Justice Rehnquist wrote the Act was indeed unconstitutional, "the possession of a gun in a local school zone is not an economic activity that might, through repetition elsewhere, have a substantial effect on interstate commerce."[31] This decision was made in 1994, and has since stood uncontested.

In 2000, the Supreme Court took on *United States v. Morrison* which dealt with the Violence Against Women Act of 1994. Congress tried to pass the Act using the powers granted to them by either the Commerce Clause or the 14th Amendment which states

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[32]

After deliberation, Justice Rehnquist wrote the conclusion for the majority opinion stating "that Congress lacked the authority to enact a statute under the Commerce Clause or the Fourteenth Amendment since the statute did not regulate an activity that substantially affects interstate commerce."[33] All of these are important examples of Congress abusing the powers granted to it

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[28] "Swift and Company v. United States", *Oyez*, https://www.oyez.org/cases/1900-1940/196us375.
[29] *Swift and Company v. United States*, Oyez
[30] "United States v. Lopez", *Oyez*, https://www.oyez.org/cases/1994/93-1260.
[31] Ibid.
[32] U. S. Constitution, amend. 14, sec. 1
[33] "United States v. Morrison", *Oyez*, https://www.oyez.org/cases/1999/99-5.

by the Congress in the name of protecting the people, insinuating state governments are incapable of protecting the people individually.

The most recent case of Congress using the Commerce Clause to overstep into the States' authority is found in *National Federation of Independent Business v. Sebelius.* In this case, the court ruled that "the Commerce Clause allows Congress to regulate existing commercial activity but not to compel individuals to participate in commerce."[34] Likewise, when Congress passed the Affordable Care Act, it mandated that every individual without health insurance be required to buy health insurance in an effort to keep the insurance business afloat. While the Act itself was not unconstitutional, the individual mandate was.

The use of the Commerce Clause to regulate a variety of interstate activities is a normal and fitting thing for Congress to do. In recent years the Supreme Court has reined in Congress from using the Commerce Clause more often than when the Commerce Clause was first ratified. Each time Congress has tried to overstep their Constitutional powers, it has been in the name of protecting the people. *United States v. Lopez* occurred after a mass school shooting, the gun-free zones were created to help prevent another mass murder from happening.[35] *United States v. Morrison* happened after a number of rape cases arose across the country.[36] *NFIB v. Sebelius* happened to try and help the "common man" get health care no matter what.[37] This is when Congress tries to convince both the people and the courts, that an unconstitutional act or statute needs to be passed in order to protect the people.

All of these cases prove the Founders were wise in their design of the Constitution. After the Articles of Confederation failed to give enough power to the federal government, the Founders had to choose one of two options: give unlimited power to the federal government in order to ensure that the government had to the power to do whatever was necessary in future years, or to give limited power to the federal government, keeping most power with the state governments. The Founders chose to keep state sovereignty a priority. Since the ratification of the Constitution, the United States has gone through many "crises." Despite multiple world wars, the great depression, terrorist attacks, border issues, and global pandemics, the Constitution has stood the test of time because there are checks and balances put in place to allow for a give and take between the federal government and the state governments. Congress has been given limited powers in the Constitution and it is the Supreme Court's job to make sure those powers are not abused. Each state is able to reach out to the federal government for help when they deem it necessary, generally seen during natural disasters or in the midst of a once-in-a-century pandemic.

There have been instances where Congress passes a constitutional law, act or statute in order to provide assistance to the nation as a whole. The most common type of federal assistance is emergency management. While there have been natural disasters since the beginning of time,

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[34] "National Federation of Independent Business v. Sebelius", *Oyez*, https://www.oyez.org/cases/2011/11-393.
[35] *United States v. Lopez*, Oyez
[36] *United States v. Morrison*, Oyez
[37] *National Federation of Independent Business v. Sebelius*, Oyez

it wasn't until the Portsmouth fires in 1803 that "Congress passed legislation that provided relief for Portsmouth merchants. More importantly, the Congressional Act of 1803 contained the first piece of national disaster legislation ever to be passed by a United States Congress."[38] While Congress did not do much for the next hundred years after the Portsmouth fires, it did create a precedent for Congress to pass natural disaster relief legislation.

In the 1930s, Congress began creating different agencies, organizations, administrations and programs to help with the types of natural disasters faced by Americans across the nation. The Reconstruction Corporation was given the power to issue loans to different places affected by earthquakes in order to fund the rebuilding of various public structures. The Bureau of Public Road was given the power to provide funding for highway and bridge repairs after natural disasters.[39] In 1950 the Disaster Relief Act was passed which gave the "president authority to issue disaster declarations, authorizing federal agencies to provide direct assistance to state and local governments."[40] It wasn't until 1978 when the National Governors Association reached out to the President requesting the several dozens of agencies and programs that had been created be merged into one agency. President Carter passed an executive order that created FEMA, Federal Emergency Management Agency in 1979. FEMA

> absorbed: the Federal Insurance Administration, the National Fire Prevention and Control Administration, the National Weather Service Community Preparedness Program, the Federal Preparedness Agency of the General Services Administration and the Federal Disaster Assistance Administration activities from HUD. Civil defense responsibilities were also transferred to the new agency from the Defense Department's Civil Preparedness Agency.[41]

Finally, in 2003, in response to the attacks on September 11, 2001, FEMA and roughly twenty-two different agencies and programs were merged to create the Department of Homeland Security.[42] This is proof that, legislatively, Congress is able to constitutionally pass bills, statutes and acts that help the people without overstepping their powers given by the Constitution.

Hurricane Katrina devastated "the southeastern United States in late August 2005. The hurricane and its aftermath claimed more than 1,800 lives and it is ranked as the costliest natural disaster in U.S. history."[43] Louisiana was hit the hardest losing 1,500 people at least. While the federal government had created FEMA and other disaster organizations in order to help during disasters such as this one, the relief efforts shown were subpar at best. It seems that "some of the major problems encountered during the response to Katrina stemmed from breakdowns in the

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[38] *History of Emergency Management*, (Massachusetts: Anna Maria College)
[39] Emergency Management History, http://www.phillipsburgnj.org/wp-content/uploads/2015/01/ACF4A8.pdf
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Britannica, Editors of Encyclopaedia, *Hurricane Katrina*, (Encyclopaedia Britannica, Sept 2020)

administrative elements of the governmental emergency management system."[44] In order for FEMA to come and help states with natural disasters, the governors of each state have to reach out and ask for help from the federal government, otherwise it would be considered government overreach. There is a process that local, state and federal government officials must go through in order to get FEMA involved in relief efforts. This process

> works sequentially from the bottom up: It starts at the local level, works through the states, and passes on to the federal government. In the case of Katrina, the response began slowly, with a general feeling of uncertainty and inconsistency. In Louisiana, local governmental units were overwhelmed with the magnitude of the disaster. Hence, they were unable to take the necessary first steps. The immediate result was chaos that erupted in New Orleans when the levees broke.[45]

No system is perfect, especially a system within a large bureaucracy, but if the states reach the point of needing support from the federal government then there are federal government programs in place to help.

The year 2020 was full of new disasters, from fires in Australia to COVID-19 ravaging the world. There has been an unprecedented amount of death and destruction. New York City has been one of the hardest hit cities with COVID-19, counting as 15% of total COVID-19 deaths within the US.[46] When New York City was at its highest death count, hospitals were at capacity and the city was severely lacking in materials. Governor Cuomo reached out to the federal government for aid, and the federal government was able to send around 4,000 ventilators to various hospitals through the states, specifically New York City.[47] The federal government has been blamed repeatedly for allowing New York to reach the level of COVID-19 hospitalizations before providing relief, but that is because the Constitution has limited the federal government from interfering in a state's response for a reason. If Congress had decided New York City was incapable of protecting the people, then they would be overstepping the limited powers that the Constitution gave them. It is primarily up to the state's government to be prepared to protect the people in times of crisis. As an example, Governor Michael Bloomberg of New York wrote a pandemic preparedness plan back in 2006 when there was an "aggressive and novel strain of the flu circulation in Asia and the Middle East."[48] The plan went to a number of experts to determine an estimation of ventilators that New York would need in the case of a pandemic, it was determined New York would need 2,000-9,000 ventilators, but after a few years the state stopped

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[44] Ibid.

[45] Saundra K. Schneider, *Administrative Breakdowns in the Governmental Response to Hurricane Katrina*, Vol 65 Issue 5, (Washington D.C: Public Administration Review, Sept 2005)

[46] Amit Uppal, David Silverstri, etc. *Critical Care And Emergency Department Response at the Epicenter of the COVID-19 Pandemic*, Vol. 39, No. 8 (Maryland: Health Affairs, June 2020)

[47]Marsh, Julia, Feis, Aaron, *Feds Shipping 4,000 more Ventilators to New York in Coronavirus Fight*, (New York: New York Post, March 2020)

[48] Elliott, Justin, Waldman, Annie, and Kaplan, Joshua, *How New York City's Emergency Ventilator Stockpile Ended Up on the Auction Block*, (Propublica, 2020)

funding the upkeep of these ventilators[49]. Although the federal government managed to send ventilators to New York, this illustrates the Constitution intended states to care for the needs of their citizens and not be reliant on the federal government. The pandemic has affected all 50 states and all 50 states are asking for help from the federal government. It is up to the states to be prepared because "the nature of a pandemic - striking in many places in rapid and devastating succession - would mean that the city, in many ways, would be on its own."[50]

The Founding Fathers were not perfect, nor did they claim to be, but they did their research and deliberated long and hard when creating the Constitution. It is highly improbable that they thought the US would have to go through a worldwide pandemic, but why should a national document be designed around a once in a century situation? There are "loopholes" that the federal government can try to use, but the checks and balances in place make sure that the federal government cannot take advantage of a national crisis to gain more power than necessary. The states hold sovereignty, which means that it is up to the states to be prepared for emergencies. The Commerce Clause can only be stretched so far before the Supreme Court reminds Congress of their powers. Disasters can happen at any time, natural or manmade, huge or microscopic. It is up to the states to be ready.

[49] Ibid.
[50] Ibid.

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