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Two Early Events that Can Help Us Better Understand the Commerce Clause

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The commerce clause has been called the "primary source for the regulatory expansion of the national government" that courts have read to grant "virtually unlimited regulatory power over the economy to the federal government."[1] Article I, Section 8, Clause 3 of the Constitution provides Congress with the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Courts today hold that the commerce clause enables Congress to regulate beyond "the channels of interstate commerce" and beyond "persons or things in interstate commerce," and that it even reaches "those activities that

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The views expressed in this Article are exclusively those of the author and do not necessarily represent the views of the author's current employer or any former employer or the forum where it is published.

[1] David F. Forte, *Commerce, Commerce, Everywhere: The Uses and Abuses of the Commerce Clause*, THE HERITAGE FOUND. (Jan. 18, 2011), http://www.heritage.org/research/reports/2011/01/commerce-commerce-everywhere-the-uses-and-abuses-of-the-commerce-clause ("[V]arious writers and Justices have defined 'commerce' as . . . [a]ny human activity or other phenomenon that has any ultimate impact on activities in more states than one.").

substantially affect interstate commerce."[2] The Supreme Court has further stated that the commerce power can reach activities that are "local" and those that "may not be regarded as commerce."[3]

One of the ways we can better understand whether the commerce clause was intended to be broadly understood as it is viewed by many today, or much more narrowly instead, is to examine some of the earliest applications of the federal commerce power and the debates associated with those efforts. There exist two early debates that have not garnered much attention in academic literature. In the 1790s and early 1800s, Congress debated, first, whether the federal government could build a national highway and, second, the federal government's role in responding to major seaport epidemics. The debates and commentary associated with both of these examples support the view that modern commerce clause jurisprudence is wayward from what this power originally was and truly is.

I. THE ORIGINAL DOMESTIC PURPOSE OF REGULATING COMMERCE

Originally, the primary domestic purpose of the commerce clause was to prevent States from imposing unfair taxes on other States. Of particular concern to the Framers were the taxes that States with major seaports imposed on their neighboring States. As E. Parmalee Prentice and John G. Egan wrote in 1898, the Framers "had prominently in mind the regulation of foreign commerce[, and] so far as concerned interstate commerce, nothing more was immediately intended than to enable Congress to prevent the imposition of duties by particular States upon articles imported from or through other States."[4] In 1791, for example, Edmund Randolph, who was then the Attorney General of the United States, wrote to President George Washington that the federal commerce power was intended "little more than to establish the forms of commercial intercourse between the States" and "to prevent taxes on imports or exports; preferences to one port over another, by any regulation of commerce or revenue; and duties upon the

[2] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2578 (2012) (citing U.S. v. Morrison, 529 U.S. 598, 608 (2000)).

[3] Wickard v. Filburn, 317 U.S. 111, 125 (1942); *see also* United States v. Darby, 312 U.S. 100, 118 (1941) ("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.").

[4] E. PARMALEE PRENTICE & JOHN G. EGAN, THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION 2 (1898).

entering or clearing of the vessels of one State in the ports of another."[5] Thus, the commerce power was never intended to reach internal state affairs. The Federal Farmer (presumed to be Richard Henry Lee or Melancton Smith), writing in 1788 before the ratification of the Constitution, asserted the power to "regulate trade between the states" is a power that "may be exercised without essentially affecting the internal police of the respective states."[6]

For States with significant debt from the Revolutionary War, taxation by the States with major sea ports was no small matter. James Madison wrote that the need to regulate commerce among the several States "grew out of the abuse of the power by the importing States" such as New York, which taxed goods entering its ports that were destined to other States.[7] Noah Webster further illustrated the problem, writing that "*a few*" States "command *all* the advantages of commerce."[8] For example, "Connecticut pa[id] in duties, at least 100,000 dollars annually, on goods consumed by its own people, but imported by New York. New Jersey and some other states [were] in the same situation."[9] Webster explained that because of the burden imposed by New York's taxes, Connecticut was "unable to discharge its debts," although it might have been able to gradually climb out of debt with the imports gone.[10]

The power to regulate "foreign commerce" enabled Congress to stop New York from taxing goods arriving at its ports from foreign nations. Likewise, the power to regulate commerce "among the States" enabled Congress to stop New York from taxing the goods as they traveled from its ports to other states.[11] Congress' power to regulate commerce "among the

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[5] *Id.* at 12–13; *see also* JOHN TAYLOR, NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES 267 (1823) ("The power of regulating commerce was given to the federal government for two purposes; to prevent foreign nations from obtaining unjust advantages over the United States, and to prevent one state from making another tributary to itself.").

[6] Letter III of the Letters from the Federal Farmer to the Republican (Oct. 10, 1787), *available at* http://www.constitution.org/afp/fedfar03.htm.

[7] Letter from James Madison to Joseph C. Cabell (Feb. 13, 1829) [hereinafter Letter from James Madison], *in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 1829–1836, at 15 (1884) . *See generally* RONALD D. ROTUNDA & JOHN E. NOWAK, 1 TREATISE ON CONSTITUTIONAL LAW, SUBSTANCE AND PROCEDURE 609 (5th ed. 2012).

[8] NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION, PROPOSED BY THE LATE CONVENTION, HELD AT PHILADELPHIA, WITH ANSWERS TO THE PRINCIPAL OBJECTIONS THAT HAVE BEEN RAISED AGAINST THE SYSTEM, BY A CITIZEN OF AMERICA (1787), *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787 –1788, at 62 (Paul Leicester Ford ed., 1888) (emphasis in original).

[9] *Id.* at 62.

[10] *Id.*

[11] THE FEDERALIST NO. 42 (James Madison).

States" also enabled Congress to stop retaliatory taxes imposed by other States on New York and their neighbors. Thus, both powers—"to regulate Commerce with foreign Nations" and "among the several States"—worked hand in hand to create the power to eliminate "improper contributions levied" by the States on sister States.[12] Madison said that without both powers working together, one would have been "incomplete" and "ineffectual" to stop the unfair imposts.[13] Justice Joseph Story agreed, writing in 1833 that if domestic commerce could not be regulated by Congress, then "ways would be found out to load the articles of import and export . . . with duties" as the articles passed through various jurisdictions.[14] "The very laws of the Union" with regard to foreign trade, he wrote, could be "evaded at pleasure, or rendered impotent" by the States, whether "for revenue, for restriction, for retaliation, or for encouragement of domestic products or pursuits."[15] Such restraints caused by the States upon sister States would cause the United States to cease acting "as a nation in regard to foreign powers."[16]

II. TWO CASE STUDIES REGARDING EARLY EFFORTS TO APPLY THE COMMERCE CLAUSE

A. The First Case Study: The Cumberland Road

During the early years following ratification of the Constitution, "the subject of internal improvements relative to the building of roads and canals was one of the foremost political questions of the day."[17] Of particular significance was the Cumberland Road, which connected Ohio to the eastern States.

In April 1802, Congress barely passed, by a few votes,[18] an act enabling the people of Ohio to form a State and seek admission into the Union (the "Enabling Act"). The Enabling Act provided that five percent of the proceeds of sales of land by Congress in the State of Ohio would be set aside for the construction of public roads to connect Ohio to the Atlantic

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[12] *Id.*

[13] *Id.*

[14] JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION § 1066 (5th ed. 1891).

[15] *Id.*

[16] *Id.*

[17] ARCHER BUTLER HULBERT, THE CUMBERLAND ROAD 60 (1904).

[18] HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF THOMAS JEFFERSON 728 (1986).

Ocean.[19] By 1806, a separate federal statute was passed "[t]o regulate the laying out and making [of] a road from Cumberland, in the state of Maryland, to the state of Ohio."[20] After receiving plans for the route of the road, President Thomas Jefferson "took measures to obtain consent, for making the road of the States of Pennsylvania, Maryland, and Virginia, through which the commissioner propos[ed] to lay it out."[21]

The concept of federal involvement in a road project initially was acceptable to many of our nation's leaders for a few principal reasons, none of which related to the commerce clause:

1. The agreement to build the road was between the federal government and a federally-controlled region.

In 1802—the year of the Enabling Act that permitted Ohio to petition to become a State—the Ohio region was controlled by Congress under the Northwest Ordinance, which the continental government had ratified on July 13, 1787. Congress did not recognize Ohio as a State until the following year in 1803.[22] As a federal territory, "Congress appointed all the chief territorial officials" of the region.[23] The governor "had the power to lay out counties and townships, subject to subsequent alteration by the territorial legislature, which consisted of the governor and the three judges appointed by Congress."[24]

Early leaders viewed the Enabling Act of 1802 as a "compact" by which "the United States were bound," if not legally then at least in good faith.[25] Importantly, the Enabling Act expressly called for a road, such as the Cumberland Road. Because this "compact" was an agreement between the federal government and a federal territory governed by congressional appointments, there was no separate sovereign involved, except the other States that would share the road, and from whom permission for the road

[19] HULBERT, *supra* note 17, at 18.

[20] Act of Mar. 29, 1806, ch. 19, 2 Stat. 357 (1806).

[21] Letter from Thomas Jefferson Regarding the Cumberland Road Communicated to Congress (Jan. 31, 1807) [hereinafter Letter from Thomas Jefferson], *in* 1 AMERICAN STATE PAPERS 1789–1838: MISCELLANEOUS, at 474 (1834), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llsp&fileName=037/llsp037.db&recNum=481 (last visited Mar. 15, 2015).

[22] Act of Feb. 19, 1803, ch. VII, 2 Stat. 201 (1803).

[23] DAVID M. GOLD, DEMOCRACY IN SESSION: A HISTORY OF THE OHIO GENERAL ASSEMBLY 3 (2009).

[24] *Id.* at 4.

[25] 1 REG. DEB. 649 (1825), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llrd&fileName=001/llrd001.db&recNum=328; *see also* HENRY ADAMS, *supra* note 18, at 728 (noting the "road was the result of a contract to which Congress had pledged its faith").

was sought. Thus, the Cumberland Road compact was essentially an agreement between the federal government and itself.

2. The federal government sought permission from the States.

President Jefferson treated the States through which the roads would chart—Maryland, Pennsylvania, and Virginia—as sovereigns whose consent the federal government needed before plunging the first federally-funded shovel into their soils. He stated in 1807:

> I have received acts of the Legislatures of Maryland and Virginia, giving the consent desired; that of Pennsylvania has the subject still under consideration, as is supposed. Until I receive full consent to a free choice of route through the whole distance, I have thought it safest neither to accept nor reject finally the partial report of the commissioners.[26]

Jefferson's restraint was shared by others at the time. The Secretary of the Treasury, Albert Gallatin, commented that without a constitutional amendment, "[i]t is evident that the United States cannot, under the constitution, open any road or canal, without the consent of the State through which such road or canal must pass."[27]

3. The road would put Ohio on equal terms with its eastern neighbors.

Another reason for accepting federal involvement in the Cumberland Road was that the road to Ohio was designed to put Ohio on equal terms with its eastern neighbors. Following the Revolutionary War, the rapid growth of the European populations in Ohio caused the federal government to explore options to link Ohio with the coastal States.[28] Many believed that without a link to these eastern, coastal States, Ohio would be at an economic and political disadvantage. This purpose was apparent from the governing documents for the region. For example, Article V of the Northwest Ordinance provided that new States within the territory "shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever, and shall be

[26] Letter from Thomas Jefferson, *supra* note 21.

[27] Albert Gallatin, Report on Roads and Canals (Apr. 6, 1808), *in* SELECTED WRITINGS OF ALBERT GALLATIN 238 (E. James Ferguson ed., 1967).

[28] HULBERT, *supra* note 17, at 17–18.

at liberty to form a permanent constitution and State government."[29] Similarly, the Enabling Act provided that five percent of the proceeds from the sale of federal land in the region "shall be applied to the laying out and making [of] public roads" to help enable admission "into the Union on an equal footing with the original States."[30]

4. The region was at risk of becoming separated and lost to other nations.

The Cumberland Road was also important to national interests. George Washington observed that the "West stood on a pivot" and could become controlled by Spain or England.[31] Indeed, among the States, communication and connection were often lacking. The "transportation difficulties" of the age "formed an important social, commercial, and political barrier to the union of the states."[32] Topography was especially significant, and the Allegheny Mountains in particular was a "wedge" that threatened to separate the east from the west.[33]

5. The road was thought to be important to the commercial interests of all States.

Lastly, the Cumberland Road was viewed by many as a commercial route of great importance for the entire nation. One United States Senator later commented in 1823:

> On the great value and importance of this road, Mr. President, it would be superfluous, for me to descant. There is surely none so dull or so blind to the true interests of this nation, and to its Government, to the perpetuation of its prosperity and its liberties, as not to see, and, perceiving, not to appreciate.
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> In a commercial point of view, this noble highway, for the transportation of the goods and merchandise from the mercantile cities, on the Atlantic border, to the West, with the corresponding transfer of the agricultural and other

[29] The Organic Laws of the United States of America, Ordinance of 1787: The Northwest Territorial Government, U.S.C.A. § Northwest Ordinance, art. V (West 2015).

[30] Enabling Act of 1802, ch. 40, § 7, 2 Stat. 173 (1802), *available at* http://www.ohiohistorycentral.org/w/Enabling_Act_of_1802_(Transcript).

[31] JEREMIAH SIMEON YOUNG, A POLITICAL AND CONSTITUTIONAL STUDY OF THE CUMBERLAND ROAD 17 (1902).

[32] *Id.* at 15, 17.

[33] *Id.* at 15.

> productions of the vast regions beyond the Allegany mountains to the market of the East.[34]

Albert Gallatin wrote in 1807 that: "Good roads and canals will shorten distances, facilitate commercial and personal intercourse, and unite, by a still more intimate community of interests, the most remote quarters of the United States."[35] Gallatin also asserted that the lack of available capital and the unprofitability of internal roads were obstacles to the States and private industries that the federal government "can alone" overcome.[36]

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In time, resistance to the Cumberland Road grew and leaders began questioning whether the federal government had any authority to build a domestic road, even one that connected several States. This opposition largely arose from the proposed expansion of the Cumberland Road from Ohio to the Mississippi River in 1825 and from similar building projects in eastern States, including canals and other roads that were made at the time.[37] In many instances, no longer was there a justification that the projects were a compact between the federal government and a federal territory. Particularly for improvements proposed in the eastern States, no longer was there the argument that the projects were needed to put Ohio (or another potential State) on equal footing with the eastern States. The Cumberland Road was a unique project with justifications that these new projects did not have.[38]

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[34] 17 ANNALS OF CONG. 90 (1823), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=040/llac040.db&recNum=42.

[35] Gallatin, *supra* note 27, at 232.

[36] *Id.*

[37] 1 REG. DEB. 649 (1825), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llrd&fileName=001/llrd001.db&recNum=328.

[38] *See, e.g.*, *id.* (statement of Senator Cobb) ("What was said when the Cumberland Road was first undertaken? The sole object was to form a connection, by a permanent and durable road across the Mountains, between the Atlantic Coast and the navigable waters of the West. This was effected by constructing the road from Cumberland to Wheeling."); 3 REG. DEB. 1418 (1827), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llrd&fileName=004/llrd004.db&recNum=720 (statement of Representative Wood) ("The power to make internal improvement was a power the most strictly local of any in existence; it involved local jurisdiction, local superintendence, local powers to keep it in repair."); 17 ANNALS OF CONG. 707 (1823), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=040/llac040.db&recNum=351 (statement of Representative Wood) ("The acts of Congress occasionally passed, *sub silentio*, making appropriations for opening roads in the new States and Territories . . . . [The acts] proceeded on the ground of ownership by the United States, and with a view to the sale and settlement of public lands. They do not involve the question relative to the power over internal improvements, and are referrible [sic] to the power expressly granted to Congress over the public territory.").

In the first few decades of the nineteenth century, many leading voices opposed any further federal involvement in road building and other internal projects, often citing the limitations of the commerce clause. Thus, the commerce clause was relied on as a justification *against* additional federal expansion. By way of example, during the debates over the expansion of the Cumberland Road, one Senator stated:

> [T]he Federal Constitution[] was one entered into between sovereign states, wherein each relinquished a portion of its sovereignty. Common sense would teach us that such a compact should be so strictly expounded, as to take from the grantors no more of their sovereignty than is absolutely necessary to effect the great objects of the compact. . . . [T]he power to construct roads and canals is nowhere to be found in the constitution.[39]

The Senator also warned that it would be "a monstrous stretch of power" to assume that the commerce clause enabled Congress to build roads.[40] Instead, he said, the intent of the commerce clause was to make uniform the regulations for trade:

> [E]ach state had her own, and consequently different regulations as regards this commerce. Hence, the regulations were attended with discrepancies, a want of uniformity, irregularities, and frequently great injustice, which could not well be amended or prevented. It was, therefore, proper to transfer the power of regulating, that is, adjusting by uniform rules, the commerce among the states to the Federal Government, as a common and impartial arbiter upon the subject, who alone could avoid the pre-existing evils.[41]

In 1833, Justice Joseph Story wrote that "inspection laws, health laws, [and] laws regulating turnpikes, roads, and ferries, . . . when exercised by a state, are legitimate, arising from the general powers belonging to it," and that such powers are either "police" powers or, if related to commerce at all, then "purely internal" to the States and not within the authority of

[39] *Id.* at 650.
[40] *Id.* at 654.
[41] *Id.*

Congress.[42] Justice William Johnson, in his concurring opinion in *Gibbons v. Ogden*, wrote that "laws affecting ferries, turnpike roads, and other subjects of the same class, so far from meriting the epithet of commercial regulations, . . . are, in fact, commercial facilities."[43] Even the ardently federalist Chief Justice John Marshall penned in a letter in 1828: "I have no doubt . . . that a general power to make internal improvements would not have been granted by the American people."[44]

In 1822, President James Monroe vetoed an act allocating spending for "the preservation and repair of the Cumberland Road" because "[a] power to establish turnpikes, with gates and tolls, and to enforce the collection of tolls by penalties" could not be "derived" from the power to "regulate commerce."[45] In Monroe's first inaugural address in 1817, he said that "the improvement of our country by roads and canals" was an interest of "high importance," but it needed to proceed "with a constitutional sanction."[46] Similar to Monroe's veto, President Andrew Jackson vetoed a bill in 1830 that would have allowed the federal government to purchase stock in a company that had been organized to build a major road in Kentucky that was to connect with the Cumberland Road in Ohio.[47]

Thomas Jefferson likewise opposed further federal involvement in road projects. In 1806, in his Sixth Annual Message to Congress, he suggested that a federal surplus be applied to "roads, . . . canals, and such other objects of public improvement."[48] Jefferson, nevertheless, noted that "an amendment to the Constitution [would be] necessary, because the objects now recommended are not among those enumerated in the Constitution."[49]

In 1825, in a document titled *Draft Declaration and Protest of the Commonwealth of Virginia*, Jefferson penned a harsh rebuke of expansion of federal authority over commerce. He wrote that when the States

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[42] STORY, *supra* note 14, at 368.

[43] Gibbons v. Ogden, 22 U.S. 1, 235 (1824) (Johnson, J., concurring).

[44] Letter from John Marshall to Timothy Pickering (Mar. 18, 1828), *in* JOHN MARSHALL WRITINGS 694 (Charles F. Hobson et al. eds., 2010).

[45] 17 ANNALS OF CONG. 1803–04 (1822), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=039/llac039.db&recNum=279.

[46] President James Monroe, First Inaugural Address (Mar. 4, 1817), *available at* http://www.bartleby.com/124/pres20.html.

[47] *Summary of Bills Vetoed, 1789-present: Andrew Jackson*, U.S. SENATE, http://www.senate.gov/reference/Legislation/Vetoes/Presidents/JacksonA.pdf (last visited Mar. 15, 2015) (summarizing the Maysville Road veto); *see also* 6 REG. DEB. 820–21 (1830), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llrd&fileName=009/llrd009.db&recNum=159 (stating that the road would connect with the Cumberland Road in Ohio).

[48] John C. Eastman, *Lessons from the Past*, 5 GREEN BAG 2d 207, 215 (2002) (book review) (quoting Thomas Jefferson, Sixth Annual Message to Congress (Dec. 2, 1806)).

[49] *Id.* at 215.

"entered into a compact, (which is called the Constitution of the United States of America[])," the States "retained at the same time, each to itself, the other rights of independent government, comprehending mainly their domestic interests."[50] He wrote that since the ratification of the Constitution, "the federal branch has assumed in some cases, and claimed in others, a right of enlarging its own powers by constructions, inferences, and indefinite deductions from those directly given."[51] These actions were "usurpations of the powers retained" by the States and "direct infractions of [the Constitution]". Included in these actions, the federal government claimed "a right to construct roads, open canals, and effect other internal improvements within" the jurisdictions of the states.[52] He stated that such authority "remains to each State among its domestic and unalienated powers, exercisable within itself and by its domestic authorities alone."[53]

Jefferson warned against probable "abuses, compromises, and corrupt practices" that would follow if the already runaway power to build roads was not stopped or otherwise curtailed and defined in a constitutional amendment.[54] In other words, if the federal excess was not stopped, Congress would become a place of deals and alliances, where national money went to one local pet project after another.[55] Jefferson presciently saw what could and eventually would become pork barrel politics.

Like Jefferson, Madison also warned about the consequences of misinterpretation of the commerce clause. As President in 1817, Madison vetoed an internal improvements bill that "set[] apart and pledge[d] funds 'for constructing roads and canals.'"[56] In his message to Congress delivering the veto, Madison stated: "'The power to regulate commerce among the several States' cannot include a power to construct roads and canals."[57] And, in 1829, he wrote that the commerce power "was intended as a negative and preventive provision against injustice among the States

[50] Thomas Jefferson, Draft Declaration and Protest of the Commonwealth of Virginia, on the Principles of the Constitution of the United States of America, and on the Violations of them (Dec. 1825), *in* THOMAS JEFFERSON: WRITINGS 482 (1984).

[51] *Id.* at 483.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 485.

[55] *See* TAYLOR, *supra* note 5, at 269 ("[A] single road evinces the capacity of local powers in Congress for squandering the money of the United States.").

[56] James Madison, Veto Message to Congress (Mar. 3, 1817), *in* JAMES MADISON: WRITINGS 718 (1999).

[57] *Id.* at 719.

themselves."[58] The commerce power was not intended "to be used for the positive purposes of the General Government."[59]

There can be little doubt that the majority of the other Framers who participated in the constitutional convention agreed with Jefferson and Madison that the commerce power did not extend to the construction of roads and canals. By way of example, during the constitutional convention, Benjamin Franklin moved that the Constitution should give Congress the power "to provide for cutting canals where deemed necessary."[60] James Wilson of Pennsylvania seconded the motion. Although Pennsylvania, Virginia, and Georgia voted for the addition, eight States opposed it. One of the opponents argued that while the expense would fall on the United States, only the States with the improvements would benefit.[61] Certainly, if the Framers believed that authority to build canals was within the federal commerce power, then there would have been no need for Franklin to make his proposal.[62]

B. The Second Case Study: The Pestilence Crises

In the late 1790s and early 1800s, America witnessed a number of epidemics, particularly in its crowded seaports. In 1793, a yellow fever epidemic struck Philadelphia, killing thousands and terrorizing the city to such an extent that many of its inhabitants fled.[63] New York City was also stricken with outbreaks of yellow fever. Because the sicknesses spread through heavily populated port cities, it was thought that the epidemics arrived from ships travelling from foreign shores. In 1805, Jefferson wrote: "A vessel going from the infected quarter, and carrying its atmosphere in its hold into another State, has given the disease to every person who entered her there."[64]

The States and afflicted cities led the responses to the epidemics. New York enacted quarantine laws and legislation that granted New York City authority to enact sanitary ordinances. New York City spent money caring

[58] Letter from James Madison, *supra* note 7.
[59] *Id.*
[60] YOUNG, *supra* note 31, at 37.
[61] *Id.*
[62] *See generally* Steven T. Voigt, *The General Welfare Clause: An Exploration of Original Intent and Constitutional Limits Pertaining to the Rapidly Expanding Federal Budget*, 43 CREIGHTON L. REV. 543, 550–53 (2010) (explaining that most of the Founding Fathers, including the Federalists, intended for the federal government to have limited authority and reach).
[63] DAVID BARTON, BENJAMIN RUSH: SIGNER OF THE DECLARATION OF INDEPENDENCE 81 (1999).
[64] Thomas Jefferson, Climate, Fevers, and the Polygraph, To C.F. de C. Volney (Feb. 8, 1805), *in* THOMAS JEFFERSON: WRITINGS 1156 (1984).

for the ill and enacted sanitary ordinances.[65] While Philadelphia's response was not as robust, it nevertheless enacted quarantine laws and hired a port physician, and volunteers distributed food, firewood, clothing, and medicine. Pennsylvania also enacted quarantine legislation.[66]

For its part, the federal government considered a quarantine of ships in the seas outside of port cities but settled on only a measure allowing the President to enforce state laws. In 1803, Congressman Mitchill explained the term "quarantine" as it was used at the time:

> The term quarantine is used in the commercial world to denote the detention of a ship or vessel at a convenient place, some distance from port, for the space of forty days, for the purpose of freeing her from contagion and infection, supposed to have been transported in her from foreign places.[67]

Both Presidents John Adams and Thomas Jefferson distinguished the federal power over regulating trade from state power over health laws. President John Adams in 1798 spoke about the seaport epidemics, and invited Congress to consider health regulations that would "aid . . . the health laws of the respective States" because "contagious sickness may be communicated through the channels of commerce" and Congress "alone can regulate trade."[68] In 1805, in a letter to Congress about the "late affliction of two of our cities" of the "fatal fever," President Thomas Jefferson observed the distinct responsibilities of the States and the federal government with regard to health regulations: "As we advance in our knowledge of this disease . . . the State authorities charged with the care of the public health, and Congress with that of the general commerce, will become able to regulate, with effect, their respective functions in these departments."[69] Similarly, Justice William Johnson, in his concurrence in *Gibbons v. Ogden*, wrote that "the health laws that require [a ship] to be stopped and ventilated" are distinct from regulations on commerce.[70]

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[65] Wendy E. Parmet, *Health Care and the Constitution: Public Health and the Role of the State in the Framing Era*, 20 HASTINGS CONST. L.Q. 267, 296–97 (1993).

[66] *Id.* at 297.

[67] 12 ANNALS OF CONG. 1338 (1803), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=012/llac012.db&recNum=665.

[68] President John Adams, Second Annual Message (Dec. 8, 1789), *available at* http://avalon.law.yale.edu/18th_century/adamsme2.asp.

[69] H.R. JOURNAL, 9th Cong., 1st Sess. 184 (1805).

[70] Gibbons v. Ogden, 22 U.S. 1, 235 (1824) (Johnson, J., concurring).

Importantly, the early potential federal response to the seaport epidemics was limited to involvement in the trade channels in the sea, outside of the jurisdictions of States, but even there, many viewed federal involvement as beyond the authority of the commerce clause and other federal powers. In particular, many early congressmen vociferously opposed any authority of the federal government to quarantine ships in harbor and argued that the federal government could only act, if at all, to enforce a state law because the States had governance over health issues. In 1796, for example, a chorus of objections followed a proposal for the federal government to quarantine ships. Congressman Gallatin was among those who led the charge, arguing "the regulation of quarantine had nothing to do with commerce."[71] Congressman Giles implied that "preventing the introduction of pestilence disorders" was beyond the power of legislating over articles of commerce.[72] Congressman Page argued that anything other than "the officers of the United States . . . aid[ing] the State Governments in obliging vessels to perform the necessary quarantine" would be "an attempt to extend the power of the Executive unnecessarily."[73] Congressman Heister objected to a federal quarantine power because "[i]t proposed to take power from individual States."[74] Congressman Kittera "understood that each independent State had a right to legislate on this subject for itself."[75] Congressman Williams stated that "Philadelphia and New York had had occasion to make alterations with respect to the proper places of stopping; and they were certainly the best judges as to the propriety of those alterations."[76] Congressman Lyman "believed the bill" permitting federal quarantines "was unnecessary, and that individual States had a right to make such regulations as were necessary for the preservation of the health of their citizens."[77] He also said, "Quarantine was not a commercial regulation, it was a regulation for the preservation of health."[78] Congressman Swanwick

[71] 5 ANNALS OF CONG. 1353 (1796), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=005/llac005.db&recNum=673.

[72] *Id.* at 1355, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=005/llac005.db&recNum=674.

[73] *Id.* at 1357, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=005/llac005.db&recNum=675.

[74] *Id.* at 1347, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=005/llac005.db&recNum=670.

[75] *Id.* at 1348, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=005/llac005.db&recNum=670.

[76] *Id* at 1352, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=005/llac005.db&recNum=672.

[77] *Id.*

[78] *Id.* at 1354.

"thought the utility of this business remaining in the State Governments was evident."[79] And he said that "the right of regulating quarantine . . . reside[d] in the State Governments."[80] Congressman Holland argued that since "[t]he Constitution [is] silent with respect to health laws, he supposed the passing of them was left to the States themselves."[81]

Ultimately, after much debate, all that the nation's early Congress passed was a measure allowing the President to enforce state quarantine laws.[82] Members of Congress who had argued that quarantine was a health law and not part of the federal commerce power had overwhelmingly prevailed.

The importance of this debate to the scope of the federal commerce power is all the more apparent when one considers that Philadelphia, at the time, was the seat of the federal government in the 1790s. With epidemics ravaging the city, the federal government's day-to-day business was essentially at the mercy of Pennsylvania. The most the federal government could do was to move its operations from a place of contagion to somewhere else.[83] And it did. In the summer of 1794, President Washington fled Philadelphia with all of his official papers because the yellow fever epidemic in the city had spread again.[84]

The debate over the federal response to the epidemics is illustrative. Early leaders contemplated, at most, a federal response limited to the sea. The requirement of a ship to remain in the waters, away from a port, is much different than the enactment of local sanitation rules. The facts that (1) there was so much debate over the ability of the federal government even to stop ships in ocean waters beyond the jurisdiction of States, and that (2) Congress only passed a bill authorizing the President to enforce state quarantine laws, reinforce the position that the modern, expansive view of the commerce clause is out of step with earlier thinking.

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[79] *Id.* at 1355, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=005/llac005.db&recNum=674.

[80] *Id.* at 1350, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=005/llac005.db&recNum=671.

[81] *Id.* at 1358, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=005/llac005.db&recNum=675.

[82] DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS, THE FEDERALIST PERIOD 1789–1801, at 228 (1997).

[83] JIM MURPHY, AN AMERICAN PLAGUE: THE TRUE AND TERRIFYING STORY OF THE YELLOW FEVER EPIDEMIC OF 1793, 93–94 (2003).

[84] *Id.* at 108.

III. CONCLUSION

In most aspects, we are not a one-size-fits-all nation. The Founding Fathers never intended this, and wisely so. Most decisions about the way we govern ourselves are best left delegated to the States, where the people have a greater say, or undelegated to the people themselves. The commerce clause does not contradict this basic principle of federalism. The two inquiries in this Article reinforce that the true scope of federal authority, particularly under the commerce clause, is much narrower than its modern application.[85]

So what should be done with the modern, overbroad reading of the commerce clause? The judiciary does not have the authority to change the meaning of the Constitution. It can only interpret what already exists. Further, repeating a power judicially-created, where there was no power in the first instance, does not make the judicial creation any more valid with each reiteration. Ten thousand repetitions of a judicially-created right, deviating from the Constitution, have just as little justification as the first iteration. Understanding this, it is long overdue to reconsider the jurisprudence of the commerce clause and find a new judicial framework that seeks consistency with the true parameters of the Constitution.

[85] *See generally* Steven T. Voigt, *The Divergence of Modern Jurisprudence from the Original Intent for Federalist and Tenth Amendment Limitations on the Treaty Power*, 12 U.N.H. L. REV. 85, 102–03 (2014) (discussing a handful of judicial efforts to place limits on the scope of the commerce clause).