The Principle of Federalism: How Has The Commerce Clause Mattered?

Overview
The principle of federalism – and the battle between the power of the federal government and state governments – has been debated throughout our history. Congress’s power to regulate interstate commerce, granted in the Commerce Clause, is often invoked as justification for laws regulating a wide variety of economic activities. Supporters of federalism often object to this argument. How much power does the Commerce Clause allow the federal government to have over the states? These questions have been addressed by the Supreme Court, but with varying results. With a couple of notable exceptions, the Court’s decisions after the New Deal resulted in expansion of the federal government’s power under the Commerce Clause. The results for federalism are still being debated.

Recommended Time
One 45-minute class period

Objectives
Students will:
- Analyze the Founders’ intentions in giving Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”
- Understand the ways power granted to Congress in the Commerce Clause has been interpreted by the Supreme Court through American history.
- Evaluate arguments for and against federalism as a principle.
- Determine whether federalism helps or harms freedom.

Materials
Background Essay: What Is the Purpose of the Commerce Clause?
Handout A: Attitude Inventory
Handout B: Federalism: For or Against?
Handout C: Commerce Clause Timeline

Lesson Plan

Background/Homework [10 Minutes the day before]
On the day prior to class, have students read the Background Essay: “How Has the Supreme Court Interpreted the Commerce Clause?”

Warm-Up [10 – 15 minutes]
A. Distribute Handout A: Attitude Inventory and do a think-pair-share. If students wish to change their answers after discussing with their partner, they should feel free to do so.
B. Reconvene the class and ask for a few volunteers to share their responses. Which items let to the most discussion? Did anyone change their mind? Why?

C. Ask students how they responded to the questions that asked about their understanding of concepts (#s 1-2). What information do students need to increase their understandings? Make a list on the board and refer to it through the activities.

Activity [20 – 25 minutes]

A. Divide students into groups of three or four and have them complete **Handout B: Federalism: For or Against?**

B. Go over the chart and clarify any questions students have.
   - Arguments in favor of federalism: 2, 3, 5
   - Arguments against federalism: 1, 4, 6
   - Could be both/neither: 7, 8, 9

Wrap-Up [10-15 minutes]

A. Wrap up with a large group discussion.
   - What arguments of their own did students write in the chart?
   - Which arguments are most convincing?
   - Recalling their analysis of Federalist 39 (lesson one), how much power did the Founders believe the national government would have to act on individuals? Why?
   - What trade-offs are involved in giving the federal government increased power over states and individuals? Are they worth it? Why or why not?

B. Have students begin compose a journal response to the question: Does federalism help or harm freedom? They should finish for homework.

*Homework and Extension Options*
A. Have students complete **Handout C: Commerce Clause Timeline**.

B. Have students find additional examples of Commerce Clause rulings and add them to a larger version of the graph in **Handout C**. Using this background knowledge and observation of current events, predict what direction Commerce Clause rulings are likely to take in the near future. What kinds of variables are likely to affect these rulings? How do these issues reflect the issues of federalism and limited government?

C. The Fourteenth Amendment in 1868, as well as the Sixteenth and Seventeenth Amendments in the early twentieth century, dramatically changed the structure of our federal republic. State
powers were diminished, and greater power shifted to the national government. Have students complete the readings and activities on Incorporation to learn more about how this has affected the principle of federalism.
Background Essay: How Has the Supreme Court Interpreted the Commerce Clause?

When the Founders drafted a new Constitution in Philadelphia in 1787, they set out to address the economic problems of the 1780s by creating a national government that would have the authority to impose taxes, regulate foreign trade, and, most importantly, create a common commercial policy between the various state governments. In the Federalist Papers, James Madison and Alexander Hamilton argued forcefully that the federal government needed these expanded powers in order to create a large free trading area within the continental United States. They also argued for a strong commercial policy to open up markets for foreign trade.

The reach of the Commerce Clause, found in Article I, Section 8 of the Constitution, is an important focus of debate about federal power and the principle of federalism. It states, “Congress shall have the power...to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The first Supreme Court case on this part of the Constitution was Gibbons v. Ogden in 1824. The Court held that the Commerce Clause granted Congress “the power to regulate; that is, to prescribe the rule by which commerce is to be governed.” That power extended to interstate commerce: “Comprehensive as the word ‘among’ is, it may very properly be restricted to that commerce which concerns more States than one.”

One of the first twentieth century cases to deal with the Commerce Clause was Hammer v. Dagenhart in 1918. The Court ruled that the federal government could not outlaw child labor in manufacturing activities where the process took place in one state and did not cross state lines. The Justices might have agreed that it was a worthy goal to protect young children from long work hours. However, the Court did not agree that the federal government had the power to legislate on this issue. The Court found that the Tenth Amendment left this power to the states and that Congress could not make rules related to the production of goods.

The New Deal
Midway through the twentieth century, Congress started using the Commerce Clause as the grounds for the enactment of many new types of laws. The Commerce Clause has been a significant basis for the expansion of federal power. The Supreme Court changed its way of thinking in the 1930s under great political stress. President Franklin Delano Roosevelt proposed, and Congress passed, many new programs called the “New Deal.” One program was Social Security, which gave pensions and aid to the disabled and elderly through taxes paid by younger citizens. Other programs regulated the stock market. At first, the Supreme Court ruled in several cases that Congress had no authority to enact such laws. In 1937, President Roosevelt spoke out against the Supreme Court for its actions on the New Deal legislation. He wanted to be able to add one new justice for every current justice over the age of 70. Most experts now view his idea as a political plan to help his legislation. Some of the political conflict eased when one justice began voting to support the New Deal. Another justice retired and was replaced by a supporter of the New Deal programs.

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The new majority found the increased federal power of New Deal legislation constitutional. The Supreme Court was going in a new direction. Congress was now able to create laws regulating, banning, and supporting a wide range of activities, and it did. Laws would be upheld as long as the Court was convinced that the regulated activities had a close and substantial relation to interstate commerce. Federal power expanded dramatically for over fifty years.

**Lopez, Morrison, and Raich**

After 59 years of upholding legislation, the Court ruled that Congress had gone too far under the Commerce Clause in 1995. In *United States v. Lopez* (1995), the Court struck down a federal law that created gun-free school zones. Congress had argued that because schools prepared people for the business world, there was a connection between schools and interstate commerce. Therefore, Congress argued, it could regulate guns in school. However, the Court ruled that the law dealt only with possession of arms and not interstate commerce. The Court appeared to be continuing in this direction when it overturned parts of the Violence Against Women Act in the 2000 case of *U.S. v. Morrison*. The Court held that the Commerce Clause did not give Congress the power to allow rape victims to sue their attackers in federal court for money damages. In *Gonzalez v. Raich* (2005), however, the Court did not continue this trend. It ruled Congress could ban marijuana throughout the nation even when an individual state had laws allowing individuals to grow their own marijuana for medicinal purposes. The Court reasoned that the policy within that single state would affect supply and demand, and therefore Congress’s ban was sufficiently related to interstate commerce.

**The Affordable Care Act**

In *NFIB v. Sebelius*, decided in June 2012, the Supreme Court upheld most of the 2010 Affordable Care Act (ACA). The case involved a lawsuit by 26 state governments and multiple private plaintiffs, including the National Federation of Independent Business – the nation’s largest small business organization. They challenged the constitutionality of two key parts of the ACA: the individual health insurance mandate, which requires most Americans to purchase government-approved health insurance by 2014, and a provision forcing state governments to greatly expand the Medicaid health care program for the poor, or risk losing all their existing Medicaid funds.

The federal government claimed that the individual mandate was authorized by the Commerce Clause, the Necessary and Proper Clause, and the Tax Clause – which gives Congress the power to impose taxes. In a 5-4 decision, the Supreme Court rejected the first two arguments, but upheld the mandate on the third. In other words, the Court ruled that the Commerce Clause did not give Congress the power to force Americans to buy health insurance. But the mandate was a constitutional by virtue of its taxing power. Though the text of the ACA refers to a “penalty” and not a “tax,” Chief Justice Roberts reasoned that it was not a real penalty because it was “not
a legal command to buy insurance.” It was merely a requirement that violators pay a fine. He also argued that the Court had a duty to construe the law as a tax, if such an interpretation were at all plausible, so as to give Congress the benefit of the doubt and avoid ruling that one of its laws was unconstitutional.

Throughout American history, the Commerce Clause has been the source of increased power—and increased controversy. Understanding this history is important for understanding the principle of federalism, and evaluating the way that principle applies today.

**Comprehension and Critical Thinking Questions**

1. What was the purpose of the Commerce Clause?

2. Why is *Gibbons v. Ogden* (1824) an important federalism case?

3. Describe the shift that began around the time of the New Deal in the Supreme Court’s interpretation of the Commerce Clause.

4. Do you think the Founders thought the Commerce Clause would be used to expand the power of the federal government? Why or why not?

5. What trade-offs are involved in giving the federal government increased power over states and individuals?
Handout A: Attitude Inventory

Directions: For each statement, circle the number that best describes your response.

1. I understand the constitutional principle of federalism.
   1 2 3 4 5 6 7 8 9 10

2. I understand how federalism works today.
   1 2 3 4 5 6 7 8 9 10

3. Federalism is helpful in protecting freedom.
   1 2 3 4 5 6 7 8 9 10

4. It is important for the national government to have more power than the states, because the national government will better protect peoples’ rights.
   1 2 3 4 5 6 7 8 9 10

5. It is important for state governments to have more power than the national government, because state governments are closer to the people in those states.
   1 2 3 4 5 6 7 8 9 10

6. When considering whether a certain level of government should have the power to do something, the principle of federalism should guide the answer.
   1 2 3 4 5 6 7 8 9 10

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Handout B: Federalism – For or Against?

Read the following arguments. Then classify them by putting them in the correct column. Finally, fill in the chart with at least one additional argument of your own on each side.

<table>
<thead>
<tr>
<th>Argues in favor of federalism (Criticisms of a strong national government)</th>
<th>Both/Neither?</th>
<th>Argues against federalism (Criticisms of strong state power)</th>
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1. Throughout U.S. history, states have a long history of violating the rights of their citizens.
2. Throughout world history, national governments have a long history of violating the rights of their citizens.
3. State governments are closer to the people and can enact laws that allow the people there to govern themselves.
4. A patch-work of laws makes it difficult for people who move from state to state.
5. The division of power in the Constitution enables the national government to perform necessary functions while leaving the several states free to control their own affairs.
6. If some states have education policies that promote better outcomes, it leaves people in other states with a disadvantage.
7. Individuals are free to move to states where laws better reflect their preferences.
8. After the Civil War, every Southern state, as well as many in the North, enacted Jim Crow laws.
9. The federal government did very little to stop every Southern state, as well as many in the North, from enacting Jim Crow laws.

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Handout C: Commerce Clause Timeline

Place a dot and the corresponding number for each of the events listed in the boxes below in the correct position on the graph. Then draw a line to connect the dots to indicate the historical trend with respect to the power of the national government based on the Commerce Clause rulings.

1. Hammer v. Dagenhart, 1918
2. Early New Deal Legislation
3. New Deal Legislation after 1937
4. Post New Deal Legislation regulating a wide range of activities
5. U.S. v. Lopez, 1995
7. Gonzalez v. Raich, 2005
8. NFIB v. Sebelius, 2012

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Answer Key

Background Essay:
1. The Commerce Clause was intended to create a common commercial policy between the various state governments, encouraging free trade within the continental U.S. and with foreign markets.
2. The case of *Gibbons v. Ogden* established that the national government had the power to make rules for commerce between more than one state.
3. The Court began interpreting the Commerce Clause as permitting national regulation of wide variety of activities that had not previously been understood as “interstate commerce.”
4. Accept reasoned answers.
5. Accept reasoned answers.

Handout B: Commerce Clause Timeline

Accept reasoned answers; a sample timeline might look like this.

Depending on student analysis of the Affordable Care Act case, federal power to regulate activities on the basis of the Commerce Clause may stayed the same, while power to regulate through taxing power may have increased.