Constitutional Perspectives in a Regulatory Environment: Reasonable Regulation or Regulation "Gone Amok"?

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Abstract

Today, regulation is seen by many as a deterrent to growth in the American economy as the Trump Administration seeks to devolve into a self or limited-regulatory environment. This article is a study of the constitutional basis of regulation and of the limitations placed on regulation placed by various provisions of the United States Constitution. The study leaves for future consideration questions relating the place of regulation in checking some of the more egregious abuses of the capitalist system. Has regulation really "gone amok"?

Keywords: Regulation; Preemption; Commerce Clause; Due Process; Regulatory Takings

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1. Introduction and Overview

The Trump Administration has touted itself as an opponent of government regulation, boasting that it would cut government regulations by as much as 75 percent (Arnold, 2017). For the Administration, diminishing the influence of the bureaucracy, which the President refers to as a part of the "deep state" (Lofgren, 2016; Grandin, 2017), through a reduction in regulation has been an "article of faith" as it begins its second year in office. For most of America's history, the American economy was based on the philosophy of *laissez faire* (Fine, 1964). Writes Antonik (2008): "Laissez-faire capitalism has a definite meaning - a politico-economic system based on private ownership of the means of production and in which the powers of the state are limited to the protection of the individual's rights against the initiation of physical force."

Beginning with the turn of the 20th century, however, the government began to assume a greater role and thus a greater degree of control in the American economy, ostensibly to benefit the working class. Today, however, regulation itself is seen by many as a deterrent to economic growth, as the Trump Administration attempts to devolve from a highly regulatory environment to one based essentially on the self-regulation of American businesses. Unlike discussions in the past which centered on the wisdom of a *particular* regulation, the current debate goes to the heart of the nature of regulation itself and the place of regulation in a capitalist economy.

This study is not about the politics of regulation or a discussion of the effect of a particular regulation on the economy as a whole or of a particular segment of the economy. These questions are left to future research. Rather, this study is a discussion of the constitutional basis of regulation and the genesis of the expansion of the government's regulatory powers beginning with the 1930s in the United States. In addition, we will discuss the limitations on regulation found in the due process clause and the takings clause of the Constitution. This study addresses this question: *Has government regulation of the American economy "gone amok"?*

The study will review the salient portions of the United States Constitution, major cases decided by the United States Supreme Court and other federal courts, and several law reviews and other research articles relating to the topic, including seminal works by Brown (1927), Fine (1964), Frankfurter (1965), Chemerinsky (1999, 2015), Barnett (2011), Tribe (2000), and Hunter and Lozada (2010). Future research may yield a response to a more philosophical and policy question: *Is regulation an effective and necessary check on the excesses and abuses found in an unbridled capitalist system?* But we leave that question for another day.

2. The Constitutional Implications

As the "supreme law of the land," the Constitution of the United States outlines the structure of the government by creating its three main branches and by allocating and then separating powers among the branches (Gwyn, 1965; see also, e.g., *Perez v. Mortgage Bankers Association*, 2015). The Constitution prevents the federal government from undertaking certain actions, most particularly those which would violate the individual rights of citizens, without providing what is known as *due process of law* (Brown, 1927). The Constitution also provides protections for certain "artificial persons" such as *corporations* (Maltz, 1999; Garrett, 2014; Greenfield, 2015). As Azad (2017, p. 463) notes: "It was so held in *Santa Clara County v. Southern Pacific Railroad* … . Corporations can invoke the benefits of provisions of the Constitution and laws which guarantee to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it."

The United States operates under a *federal system* where the national government and the governments of each of the states coexist within the political system. The federal government is one of limited or enumerated powers wherein the three branches of the government exercise those powers specifically granted to them by the U.S. Constitution (Lawson, Miller, Natelson, and Seidman, 2010; Harrison, 2011). As Primus (2016) writes: "The 'enumerated powers,' on that understanding, are the powers expressly described in the eighteen sections of Article I, Section 8, as well as in about two dozen other constitutional clauses." As a result, whenever the constitutionality of a congressional statute or regulation is at issue, some relationship to a specifically enumerated power in the constitutional text must be shown—no matter how tenuous.

On the other hand, a state government possesses a general *"police power,"* i.e., a broad power to enact regulations or legislation relating to the "health, safety, morals, and general welfare" of its state residents (Barnett, 2003/2004; Legarre, 2007). Any regulation by a state (or local) government enacted under its "police power" is generally valid provided it does not violate some specific limitation imposed by the United States Constitution or by the Constitution of a given state.

However, in addition to the specific powers found in the Constitution, the Congress is given the power to "make all laws which shall be *necessary and proper for carrying into execution*" the specific powers (Barnett, 2013). Accordingly, if Congress is seeking an objective that is within its specifically enumerated powers, then it can use a means that is rationally related to the objective it is trying to achieve (*McCulloch v. Maryland*, 1819). As Chief Justice Marshall stated in *McCulloch v. Maryland* (1819) : "To its enumeration of powers is added that of making 'all laws which shall be necessary and proper for carrying out the foregoing powers, and all other powers vested by the constitution, in the government of the United States or in any department thereof.'" The "necessary and proper clause" greatly expanded the practical scope of congressional power in the area of regulation in connection with exercising its constitutional authority.

3. Supremacy and Federal Authority

Article VI, Clause 2 of the Constitution is called the *Supremacy Clause*. It provides that the Constitution, any statutory law enacted by Congress, and treaties entered into by the United States are the "supreme law of the land." Once again, Chief Justice Marshall provides the proper context: "The government of the United States, then, though limited in its powers, is supreme, and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding'" (*McCulloch v. Maryland*, 1819). The Supremacy Clause is the keystone in establishing order in the relationship between the federal and state governments. The Supremacy Clause provides that when a direct conflict exists between a federal law and a state law, the state law is invalid and the federal law is supreme. As Professor Tribe (2000, p. 1178) noted: "Such actual conflict is most clearly manifest when the federal statute and state enactments are directly and facially contradictory. Federal regulation obviously supersedes state regulation where compliance with both is a literal impossibility…."

Some powers, however, are shared by the states and the federal government. These are called *concurrent* powers (see *Gibbons v. Ogden*, 1824). In cases of shared or concurrent powers, it may be necessary to determine which law or regulation—federal or state—should prevail. As a general rule, when concurrent federal and state powers are involved, a state law that conflicts with a federal law is invalid. However, when Congress has chosen to act in an exclusive manner, it may be said that Congress has exercised its power of *preemption* in this area (Merriam, 2017). Newell (2017, p. 1353) notes that "The preemption doctrine arises out of the Constitution's Supremacy

Clause, which provides that federal law is the 'Supreme Law of the Land,' such that federal law supersedes conflicting state laws."

In the case of preemption, a federal regulatory scheme would preempt state regulation not only if there is a direct conflict between the two, but also where the state regulation interferes with a federal objective, as where "it encourages conduct the absence of which would aid in the effectuation of the federal scheme as interpreted and applied" (Tribe, 2000, p. 1884).

Thus, in *City of Burbank v. Lockheed Air Terminal Inc.* (1973), the Supreme Court concluded that a city ordinance making it unlawful for jet aircraft to take off from the privately owned city airport between 11 p.m. and 7 a.m. was found to be in conflict with the purposes of the *Federal Aviation Act* (1958) because local "control of takeoffs and landings would severely limit the flexibility of the FAA to control air traffic control" (*City of Burbank*, 1973, p. 639). Similarly, in *Jones v. Rath Packing Co.* (1977), the Court had invalidated the California regulation relating to the labeling of packaged flour sold in the state because to do would frustrate the purpose of the federal *Fair Packaging and Labeling Act* (1967).

In fact, however, Congress rarely expresses its clear an unambiguous intent to preempt an entire subject area against state regulation. As a result, it is the responsibility of the courts to determine whether Congress intended to exercise exclusive jurisdiction over the area in question. Such an intention may be found where the federal regulation is so "pervasive, comprehensive, or detailed" that the states have no room to augment or add to it. Under these circumstances, it may be said that the federal law *"occupies the field"* (Chemerinsky, Forman, Hopper, and Kamin, 2015). As noted by Professor Tribe (2000, p. 1205): "For if Congress has validly decided to 'occupy the field' for the federal government, state and local regulations within the field must be invalidated no matter how well they comport with substantive federal policies."

In two cases, the United States Supreme Court invalidated a state regulation limiting the length of trailer trucks traveling on interstate highways on the basis of federal preemption. In *Raymond Motor Transportation, Inc. v. Rice* (1978), the Supreme Court determined that the regulations adopted by the State of Wisconsin "place[d] a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to highway safety." In *Kassel v. Consolidated Freightways Corp. of Delaware* (1981), the Supreme Court concluded that an Iowa law prohibiting 65-foot double trailers from entering the state *discriminated* against interstate commerce and was therefore invalid. In both cases, the Supreme Court had determined that these state laws had been preempted through an application of the Supremacy Clause.

In a third case, *Cipollone v. Liggett Group, Inc.* (1992), a case which is important as well from an historical point of view—outlining the history of the required warnings on cigarette packages and the evolving form of the warning itself so as not to minimize the danger of smoking—the United States Supreme Court held that federal law preempts only those actions that *related to the required warnings, advertising, or promotion of cigarettes*. Other actions or theories of recover offered by the plaintiffs, with the exception of those based on the required warnings, were *not preempted* and could proceed.

Finally, federal "occupation of the field" may be seen in the direct regulation of safety designs for nuclear power plants which precluded state regulation (*Silkwood v. KerrMcGee Corp.*, 1984).

4. Congressional Regulatory Authority Under the Commerce Clause

Article I, Section 8 of the Constitution provides that Congress has the power to regulate commerce, including commerce among and between the states, to lay and collect taxes, and to spend money for the general welfare (generally, Conant, 2008).

It may be argued that the most important of the express powers of Congress set forth in Article I, Section 8 is the commerce power found in what is known as the "Commerce Clause." The Commerce Clause serves two distinct functions: (1) it acts as the *source* of Congressional regulatory authority; and, (2) it acts, implicitly, as an *independent check on state regulation* that unduly restricts interstate commerce (generally, Hunter, Shannon, O'Sullivan-Gavin, and Amoroso, 2011).

During most of the 19th century, reflecting the philosophy of *laissez faire*, Congress uniformly refused to exercise its power under the Commerce Clause except in highly discreet areas, most notably in the enactment of the *Interstate Commerce Act of 1887*, the burgeoning area of antitrust (for example, the *Sherman Antitrust Act of 1890*), or in matters generally relating to the railroads.

Federal regulation was occasional and fairly limited during that period, as the prevailing economic theory of *laissez faire* dominated. The latter part of the 19th century and the early part of the 20th century, however, brought a change in perspective and a rise in federal regulation (Fine, 1964).

As a result, the Supreme Court was increasingly called upon to define the limits and reaches of the commerce power. By the late 1930s, however, the Supreme Court had removed almost all constitutional limitations on the regulation of interstate commerce and began to uphold vast federal regulatory authority. Since the late 1930's, the tentacles of the Commerce Clause have become so pervasive that critics argue that it has been transformed into an all-encompassing police power, allowing Congress to reach a wide swath of economic activities, even those within a state's borders, so long as they broadly "affect" interstate commerce.

5. Expansion of the Commerce Clause: The Substantial Effect Doctrine

How was this regulatory expansion accomplished? Does the Trump Administration have a point that regulation has "run amok" or that it is a vestige of the "deep state"? The expansion of regulatory power was accomplished mainly through a series of Supreme Court decisions handed down during the presidency of Franklin Roosevelt.

The first major expansion of the Commerce Clause power was accomplished under the "*substantial economic effect"* doctrine, which provides that Congress may regulate activities having a "substantial economic effect" upon interstate commerce. The Court's decision in *NLRB v. Jones & Laughlin Steel Corp.* (1937) marks an important step in loosening the nexus between the regulation of an intrastate activity and interstate commerce and the genesis of the expansion of federal regulatory authority under the commerce clause. Four years later, as Tribe (2000, p. 812) noted, "In *United States v. Darby* (1941), the Court held that an activity which took place wholly intrastate could now be subjected to congressional regulation entirely because of the activity's impact on other states—regardless of whether the activity *itself* occurred before, during or after interstate movement." *Darby* was a wholesale departure from an earlier time where the Supreme Court had held in *Hammer v. Dagenhart* (1918): "Commerce 'consists of intercourse and traffic… and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.' The making of goods and the mining of coal are not commerce, nor does the fact that these things are afterwards shipped, or used in interstate commerce, make their production a part thereof…."

5.1. An Expansion Through The "Cumulative Effect" Doctrine

The second theory upon which the Court has expanded congressional power under the Commerce Clause is the *"cumulative effect"* doctrine. This doctrine provides that Congress may not only regulate activities that would have a substantial economic effect on interstate commerce, but also the Congress has the authority to regulate a *class* of acts, if the *class*, on the whole, has a substantial effect in interstate commerce or a "substantial national consequence" (Tribe, 2000, p. 813). In *Wickard v. Filburn* (1942) (Barnes, 2017), the Supreme Court upheld federal legislation regulating the most local of all activities—production of wheat for personal consumption on the family farm—on the theory that these individual activities *cumulatively* would have an effect on interstate commerce (Blue, 2010).

5.2. Commerce-Prohibiting Technique: Burdening Interstate Commerce

The third theory by which the Court expanded congressional power under the Commerce Clause is the *"commerce-prohibiting"* doctrine**,** which allows Congress to regulate *intrastate* (local) activities that have a *negative effect* on interstate commerce or which place a *burden* on interstate commerce. The power of the federal government to regulate intrastate commerce prevents states from *interfering with* federal regulation or *burdening* interstate commerce.

An application of the "commerce-prohibiting" theory may be seen in the case of *Heart of Atlanta Motel v. United States* (1964). Weinberg (2013, p. 1088) writes: "Yet surely a widespread failure of the states at the time to secure the civil rights of all persons within their borders was part of the justification for the national civil rights legislation of the 1960s, and a more plausible basis for the legislation than any consumption of sister-state produce, just as it was a widespread failure of state justice that empowered Congress to enact the Civil Rights Act of 1871."Having taken judicial notice that approximately 75% of the Heart of Atlanta Motel's clientele came from out-of-state, and that it was strategically located near Interstates 75 and 85 as well as two major Georgia highways, the Court found that the business clearly affected interstate commerce. The United States Supreme Court upheld Congress' power to prohibit racial discrimination and to "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments" (defined by the *Civil Rights Act* *of 1964* as "any inn, hotel, motel, or other establishment which provides lodging to transient guests") because acts of discrimination would in fact burden interstate commerce and the ability of citizens to engage in protected interstate travel.

6. The Dormant Commerce Clause

It can be seen that Congress' power to regulate commerce has been greatly expanded through the application of various theories advanced by the United States Supreme Court. However, what would be the result if the federal government chooses *not* to regulate or legislate in an area in which it may constitutionally do so, but a *state* nevertheless decides to enact a regulation relating to a particular activity in that area? Under what is known as *"dormant commerce*" clause (*Cooley v. Board of Wardens*, 1852; Knoll and Mason, 2017), since only Congress has the power to regulate interstate commerce, a state statute negatively affecting interstate commerce may be declared unconstitutional, even in the absence of federal regulation in that particular area. While it may be argued that the dormant commerce clause has lost much of its constitutional impetus and is in "remarkable decline" (Francis, 2017), it still has a limited vitality in checking the power of states to interfere with federal prerogatives.
For example, in *Huish Detergents, Inc. v. Warren County, Kentucky, et al.* (2000), the Sixth Circuit Court of Appeals held an ordinance enacted by Warren County, Kentucky, restricting the collection and processing of waste generated by the city of Bowling Green to a single contractor, violated the Dormant Commerce Clause. Huish Detergents, a manufacturer of laundry detergent, sued in federal district court claiming that the county could not force it to use and pay only the county approved company to dispose of its waste and no one else. Huish alleged that as a result of the county ordinance, other contractors, including those from other states, could not enter the market and compete in order to collect and dispose of solid waste. The Sixth Circuit held the ordinance requiring the waste only be processed at the city's transfer station and nowhere else violated the dormant commerce clause. It was an impermissible intrusion into the authority of Congress even though Congress had failed to exercise that authority in this particular instance.

7. A Changing and Restrictive View of the Commerce Clause

A number of cases decided by the U.S. Supreme Court under then Chief Justice William Rehnquist began to reign-in unlimited Congressional authority under its expansive commerce clause analysis—and may have in fact presaged the hostility of the Trump Administration's towards regulation. In sum, in a series of highly controversial rulings, the Supreme Court held that the activity which is the subject of regulation must itself be *commercial* in nature; and secondly, *the activity must be conducted in interstate commerce*. Two cases exemplify this change in perspective.

In *United States v Lopez* (1995), the Court invalidated the federal *Gun-Free School Zone Act of 1990.* The Act had made it a crime to knowingly possess a firearm in areas around schools. Alfonso Lopez, Jr. had carried a handgun and cartridges near Edison high school in San Antonio, Texas, in violation of the Act. Lopez's defense maintained that the federal government had no authority to regulate firearms in school zones, and that the federal law under which Lopez was convicted was unconstitutional as a violation of the Commerce Clause. In defending the constitutionality of the statute, the government relied upon a traditional and expansive *post-Jones & Laughlin analysis* and argued that possession of a firearm in a school zone leads to violent crime, *affecting the general economic condition* by potentially limiting travel in the area. The government also suggested that the presence of firearms in a school zone would prevent people from learning effectively due to the constant fear of violent crime, leading to a weaker economy. Thus, the government contended that the possession of a firearm at a school fell within the reaches of the Commerce Clause under the broad "affectation doctrine." The Supreme Court disagreed and rejected the application of the Commerce Clause under these facts. Finding the Act neither regulated a commercial activity nor was the possession of a gun conducted in interstate commerce, the Supreme Court held that passing the Act exceeded the authority of Congress "[t]o regulate Commerce ... among the several States..." (Althouse, 1996). The Supreme Court ruled that the act was unconstitutional because possession of a gun is a criminal act and not an economic act.

In writing for the *Lopez* Court, Chief Justice Rehnquist dismissed the government's argument, reasoning that if Congress could regulate something so far removed from commerce as the *possession* of a gun, then it could regulate anything; and since the Constitution clearly creates Congress as a body with enumerated, i.e., *limited*, powers, this could not be so. Otherwise, the Chief Justice declared that it would be "… hard pressed to posit *any activity* by an individual that Congress is without power to regulate" (*Lopez*, 1995, p. 564).

The Chief Justice wrote: “To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action.

The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so 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” (*Lopez*, 1995, pp. 567).

Five years later, in deciding *United States v. Morrison* (2000), the Supreme Court noted that the Constitution distinguishes between national and local interests and that the police power is a power that generally belongs to the states. The Court ruled that Congress had no authority to regulate non-economic, criminal conduct based solely on the conduct’s *aggregate effect on interstate commerce* (Jost, 2001). The Court explained that the need to distinguish between economic activities that directly affect interstate commerce and those that indirectly affect interstate commerce was due to "the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority…" (*Morrison*, 2000, p. 615).

Referencing *Lopez*, the Court said: "Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur" (*Morrison*, 2000, p, 611). The majority further stated, "[I]t is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign" (*Morrison*, 2000, p 613). Justice Thomas's concurring opinion also expressed the concern that "Congress [was] appropriating state police powers under the guise of regulating commerce" (*Morrison*, 2005, p. 627). The majority, quoting from *Jones & Laughlin Steel*, said that the scope of the interstate commerce power “… must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them…” (*Morrison*, 2000, p. 608). The majority concluded that upholding the *Violence Against Women Act* (1994) on the basis of the Commerce Clause “in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government” (*Morrison*, p. 608). The Court held that, “simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. Rather, whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by the Court” (*Morrison*, 2000, p. 614).

Did *Lopez* and *Morrison* signal the death or at least a significant diminishing of the powers of Congress under the “substantial effects” doctrine? Barnet (2010, p. 600) states: “By limiting the substantial effects doctrine to economic intrastate activity, the Supreme Court provided the modern legal ‘test’ or’ criterion of constitutionality' for whether a regulation of intrastate activity is what ‘may truly be said' to be necessary under the Necessary and Proper Clause. By this doctrine Congress is held within its enumerated powers and denied the ‘right to do merely what it pleases.'”

8. The Taxing and Spending Powers as They Relate to Regulation

Regulation can also be accomplished *indirectly* through the exercise of other constitutional powers (Barnett and Yandle, 2005, pp. 217-236; Sidhu, 2015). As Tribe (2000, p. 841) noted: “The power to tax is an independent source of federal authority. Congress may tax subjects that it may not be authorized to regulate directly under any of its enumerated powers.” In January of 2018, while addressing the *World Economic Forum* in Davos, Switzerland, President Trump said: “Regulation is taxation.” Congress can exercise its *taxing* authority under the Constitution as a “necessary and proper” means for effectuating one of its delegated powers. Congress' power to spend is very broad; it can be used to promote regulatory ends for the general welfare and sometimes for particular purposes. Article I, section 8 of the Constitution states that “The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises.” However, nearly any measure enacted in the form of a tax will have at least an incidental regulatory effect.

For instance, if an excise tax on cigarettes is enacted, people may smoke fewer cigarettes (Lanoie and Leclair, 1998) or if the tax on alcohol is raised, fewer Americans might consume alcohol. If the regulatory impact of the tax is one that could be achieved directly by use of one of the other enumerated powers (e.g., through the Commerce Clause), the fact that the tax has a regulatory effect is not of constitutional significance. Conversely, if the regulation is one that could *not* have been achieved directly, then the tax may be stricken as an invalid regulation, disguised as a tax.

Since the 1940s, the United States Supreme Court has consistently upheld broad congressional regulation carried on as an incident to its spending power. However, the exercise of the spending power must serve a general public purpose. When Congress conditions the receipt of federal funds on specific requirements, it must do so constitutionally. Moreover, any conditions imposed upon a recipient must be reasonably related to the purpose for which the federal monies are spent. Arguably, regulation associated with federal spending power is not as intrusive as other forms of federal regulation since a state has the option of not complying with a spending regulation and can decide not to accept federal funds (Corbelli, 1988, commenting on *North Dakota v. Dole,* 1987). What is clear is that the spending power has become an important part of congressional regulatory powers.

9. The Due Process Clause Provides Limitations on Regulation

Are there any limitations on the reaches of federal regulations under the commerce clause or its taxing and spending powers? The crux of the Trump Administration's critique of regulation is rooted in its economic philosophy to unleash American businesses from unnecessary regulatory burdens. The Administration believes that it is a fundamental right of businesses to conduct their operations free from unnecessary and burdensome governmental regulation that increases costs and picks economic "winners and losers," without any identifiable societal benefit or demonstrable results. Regulations are often attacked as being based on "junk science" or political considerations. However, from the legal standpoint, there is also a strong argument that many regulations violate the due process rights of U.S. businesses and citizens.

Limitations against governmental interference with the rights of its citizens are found in the first ten amendments of the Constitution, commonly known as the *Bill of Rights*. The main purpose of the Bill of Rights is to protect individuals (and in some cases, businesses) against various forms of interference by the federal government. Today, virtually all the fundamental guarantees of the Bill of Rights (with the exception of the mandatory use of a Grand Jury in state prosecutions and the requirement of a twelve-person jury in a state criminal case (see *Hurtado v. California,* 1884) have been *incorporated* into the Fourteenth Amendment, and therefore have been made applicable to the states (Frankfurter, 1965; Hunter and Lozada, 2010). In quoting *Duncan v. Louisiana* (1968), Professors Lockhart, Kamisar, and Chopper (1989, p. 299) noted, these rights include:

"the Fourth Amendments rights to be free from unreasonable searches and seizures and to be have excluded from criminal trials any evidence illegally seized (see *Mapp v. Ohio,* 1961); *Kerr v. California,* 1963); the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination (see *Malloy v. Hogan,* 1964); and the Sixth Amendments rights to counsel (see *Gideon v. Wainwright* (1963)), and to a speedy (see *Klopfer v. North Carolina,* 1967) and public trial (see *Estes v. Texas,* 1965); … to confrontation of opposing witnesses (see *Pointer v. Texas,* 1965), and to compulsory process for obtaining witnesses (see *Washington v. Texas*, 1967)." Other rights that were later guaranteed as fundamental and held applicable to the states (Barrett and Bruton, 1973, pp. 674-676) include the right against double jeopardy (see *Benton v. Maryland,* 1969), the right to a jury trial (see *Duncan v. Louisiana,* 1968), and "notice of charge" (see *Cole v. Arkansas,* 1948); *In re Gault,* 1967). The due process rights of parties affected by regulation are important considerations in assessing the constitutionality of any regulatory regime. The due process clause may be seen as critical in assessing the validity of government regulation.

9.1. Substantive Due Process

Substantive due process focuses on the content or substance of a law or regulation (Chemerinsky, 1999a; Fenster, 2014; Musgrove, 2018). If a law or a regulation is incompatible with the Constitution, it is said to violate substantive due process. In the context of economic regulations, a statute or regulation must be enacted in furtherance of a legitimate governmental objective and there must be a rational relationship between the means chosen by the legislature and the objective of the regulation. In reality, on the state level, virtually any statute dealing with "health, safety, or general welfare" comes within the state's police power and is thus "legitimate" under a substantive due process analysis.

Today, such statutes are presumed to be constitutional, unless the legislation is completely arbitrary and irrational. Federal regulation, however, must be rooted in specific provisions of the Constitution, as described above.

Ironically, under the Supreme Court's view of individual liberties, the doctrine of substantive due process had been used to protect private property rights and the freedom of contract (Hawley, 2014) against government intrusion during the early part of the 20th century. As Armistead (1995, p. 769) had noted:

"The Court's most extensive use of substantive due process came in the early 1900s in the widely criticized line of cases following *Lochner v. New York* (1905), in which the Court frequently invalidated legislative acts regulating industry on the ground that such regulation infringed upon liberty and property protected by the Fourteenth Amendment's Due Process Clause… . See, e.g., *Adkins v. Children's Hosp.* (1923) (invalidating minimum wage law for women); *Coppage v. Kansas* (1915) (striking down law prohibiting yellow dog contracts); *Lochner v. New York* (1905) (striking down maximum hour law for bakers). After departing from this line of cases in *West Coast Hotel v. Parrish* (1937), the Court avoided applying substantive due process for many years."

By the later 1930's, the vestiges of *Lochner* had largely disappeared (White, 2000) to the extent that Farber (2002, p. 985) wrote: *"Who Killed Lochner?*"

9.2. Procedural Due Process

Procedural due process focuses on the manner in which the government acts and the enforcement mechanisms and procedures it uses (e.g., Chemerinsky, 2009b). When the government deprives a person of "life, liberty or property," the Due Process Clauses of the Fifth and Fourteenth Amendments mandate procedural fairness. Procedural due process requires that individuals must be accorded adequate prior *notice* of any government action to be instituted and then to some form of *hearing* before any action can follow. Due process creates an expectancy that a right will not be arbitrarily terminated or interfered with without "due process of law." Judge Henry Friendly (1975) outlined the fundamental elements of the hearing requirement:

1. An unbiased tribunal.
2. Notice of the proposed action and the grounds asserted for it.
3. Opportunity to present reasons why the proposed action should not be taken.
4. The right to present evidence, including the right to call witnesses.
5. The right to know opposing evidence.
6. The right to cross-examine adverse witnesses.
7. A decision based exclusively on the evidence presented.
8. Opportunity to be represented by counsel.
9. Requirement that the tribunal prepare a record of the evidence presented.
10. Requirement that the tribunal prepare written findings of fact and reasons (conclusions of law) for its decision (Hunter and Alexander, 2007, pp. 191-192, note 3; Hunter, Shannon, O'Sullivan-Gavin, and Blodgett, 2011).

Because a corporation has been determined to be a "person" under the Constitution, it is entitled to due process of law when its property is the subject of regulation (Pollman, 2016). The definition of *property* or of a *property interest* is very broad (Hugenberger, 2006). Property can include real property, personal property, intellectual property, and other intangible rights such as a person's reputation, certain employment rights (e.g., providing for termination of a public employee only for good cause), and even a student facing expulsion or suspension from a public educational institution is entitled to the protections of due process" (Mott, 2017, p. 670).

The concept of *"liberty"* embodies freedoms that lie at the roots of our legal system. Liberty interests generally fall under one of the following headings: (1) freedom from bodily restraint or "physical liberty"; (2) substantive constitutional rights; and, (3) other fundamental freedoms.

When physical freedom is curtailed by imprisonment or commitment to an institution, liberty interests are burdened, thus requiring extensive procedural protections (generally, Markowitz, 2017). Similarly, liberty interests also include other rights such as freedom of expression and freedom of religion, as well as substantive rights including free association and belief and the right to privacy. Finally, "liberty" also encompasses a variety of fundamental interests relating to personal autonomy and choice (see *Griswold v. Connecticut*, 1965). Liberty interests have been extended to corporations in a variety of ways when the government is seeking to regulate business interests or the uses of property by business.

10. Takings Clause

An important constitutional protection of a private economic interest and a limitation on regulatory power is the prohibition on taking private property without just compensation. As Levy (2017, pp. 1299-1230) noted: "The Framers sought to prevent the Government from forcing some people alone to bear public burdens and to protect expectations of exclusivity deriving from property.

It appears the Framers specifically feared that private citizens would be deprived of their property, subjected to intrusive government interference, or denied the opportunity to use property to their competitive advantage." This power is known as the power of *"eminent domain"* and the clause in the Constitution is referred to as the "Takings Clause." There is a strong relationship between regulation and takings.

Both the federal and state governments have the right to take private property for *public use.* In 2005, the Supreme Court continued its expansion of the Takings Clause that had begun with the 1954 case of *Berman v. Parker* (1954), in which the Supreme Court had literally changed the criteria found in the Constitution from "public use" to a broad "public purpose." In *Kelo v. City of New London* (2005), the City of New London, Connecticut argued that the disposition of petitioners' property for the purposes of affecting a development plan qualified as a "public use" within the meaning of the Takings Clause of the Fifth Amendment in order to provide "deference to legislative judgments as to what public needs justify the use of the takings power."

Under the Takings Clause, the government must pay reasonable or just compensation for any taking (Rubenfeld, 1993). On the other hand, if the government merely "regulates" property under its police power, then it does not need to pay compensation even if the owner's use of the property or its value may be substantially diminished in an economic sense. Many disputes revolve around what is a "public use" and whether the governmental action is in fact a compensable "regulatory taking" (Miceli and Segerson, 1994; Best, 2001; Greil, 2018) or is it merely a non-compensable "regulation." Some would argue that this is a "distinction without a difference," since in either case, the government may have severely interfered with the right of a business to conduct its operation as it sees fit or as the market would dictate, thus effectively engaging in a "taking" of the property through regulation.

In many cases, the issue whether there has been a taking will arise in the context of land-use (Peterson, 1998), environmental (Marzulla, 1995), or more generalized property regulation. For a regulation to avoid being classified as an unconstitutional taking, the regulation must *"substantially advance legitimate state interests"* and it must not deny an owner the "viable use" of the property in an economic sense. At the focal point of the Trump Administration's critique are regulations designed to protect the environment, which the Administration maintains have the effect of denying an owner the right to build a dwelling on the property, or conducting *any economic activity,* or restricting a specific type of activity (such as prohibiting the use of a specific type of energy such as coal). Such regulations might qualify as a taking, triggering the payment of reasonable compensation or, in the realm of politics, opposition to the regulation by the Administration on more general policy grounds.

11. Some Final Thoughts and Ideas for Future Consideration

In the wake of persistent criticisms by the Trump Administration, which has argued alternatively that federal regulation has been a detriment to economic growth and job creation and that regulation is a representative of the "deep state," this study has offered a historical review of the constitutional basis of regulation most especially since the New Deal and its constitutional limitations.

Only by understanding the reaches and limits of regulation can the American public engage in a critical analysis of the proper role of regulation in the economy. In this manner, the drum beat of criticism directed against regulation can be moved from the realm of politics to a more balanced and practical one.

It is clear that just as the 1930s saw a fundamental change in the attitude of the American public and in the courts towards regulation, there is a decidedly negative view of regulation today among some in our society. Future study will be necessary to decipher if this change operates to the benefit or detriment of American society as a whole or only to the economic advantage to the few in society who wish to return to the days of a rejuvenated *laissez faire* to the benefit of its capital class.

References

Althouse, Ann. (1996). Enforcing federalism after United States v. Lopez. *Arizona Law Review*, 38: 793-823.

Antonik, Kitt. (2008). Laissez faire capitalism and the current world financial mess, November 24, 2008. Available: https://www.opednews.com/articles/Laissez-Faire-Capitalism-a-by-Kitty-Antonik-Wakf-081023-185.html.

Armistead, David H. (2015). Substantive due process limits on public officials' power to terminate state-created property interests. *Georgia Law Review*, 29: 769-817.

Arnold, Chris. (2017). President Trump to cut regulations by '75 percent'—how real is that? *NPR*, January 24, 2017. Available: https://www.npr.org/2017/01/24/511341779.

Azad, Ryan. (2017). Can a tailor mend the analytical hole? A framework for understanding corporate constitutional rights. *University of California at Los Angeles Law Review*, 42: 452-507.

Barnes, James B. (2017). The font of federal power: Wickard v. Filburn and the aggregation principle. *Journal of Supreme Court History*, 42(1): 49-66.

Barnett, Andy and Yandle, Bruce. (2005). Regulation by taxation, in *Handbook of public finance*, pp. 217-236 (Jurgen G. Backhaus and Richard E. Wagner, eds.). New York: Springer.

Barnett, Randy E. (2003). The original meaning of the necessary and proper clause. *University of Pennsylvania Journal of Constitutional Law*, 6: 183-221.

Barnett, Randy E. (2003/2004). The proper scope of the police power. *Notre Dame Law Review*, 79: 429-495.

Barnett, Randy E. (2010). The sixth annual Friedrich A. Von Hayek lecture: commandeering the people: why the individual health insurance mandate is unconstitutional. *New York University Journal of Law and Liberty*, 5: 581-637.

Barrett, Edward L., Jr. and Bruton, Paul W. (1973). *Constitutional law* (Fourth edition). New York: Foundation Press.

Best, Robert K. (2001). Regulatory takings: a brief history. Available at SSRN: https://ssrn.com/abstract=701322 or http://dx.doi.org/10.2139/ssrn.701322 (accessed February 3, 2018).

Brown, Ray A. (1927). Due process of law, police power, and the Supreme Court. *Harvard Law Review*, 40(7): 943-968.

Chemerinsky, Erwin. (1999a). Substantive due process. *Touro Law Review*, 15: 1501-1534.

Chemerinsky, Erwin. (1999b). Procedural due process claims. *Touro Law Review*, 16: 871-893.

Chemerinsky, Erwin, Forman, Jolene, Hopper, Allen, and Kamin, Sam. (2015). Cooperative federalism and marijuana regulation. *University of California at Los Angeles Law Review*, 62: 74-122.

Conant, Michael. (2008). *The constitution and economic regulation: commerce clause and the fourteenth amendment*. New York: Taylor & Francis Group (Transaction Press).

Corbelli, James. (1988). Tower of power: South Dakota v. Dole and the strength of the spending power. *University of Pennsylvania Law Review*, 49: 1097-1125.

Farber, Daniel A. (2002). Who killed Lochner? *Georgia Law Journal*, 90: 985. Book review of White, Edward (2000). *The constitution and the new deal*. Cambridge, Mass.: Harvard University Press.

Fenster, Mark. (2014). Substantive due process by another name: Koontz, exactions, and the regulatory takings doctrine. *Touro Law Review*, 30: 403-419.

Fine, Sidney. (1964). *Laissez faire and the general-welfare state: a study of conflict in American thought, 1865-1901*. Ann Arbor, Michigan: University of Michigan Imprints.

Francis, Daniel. (2017). The decline of the dormant commerce clause. *Denver Law Review*, 94: 255-318.

Frankfurter, Felix. (1965). Memorandum on "incorporation" of the bill of rights into the due process clause of the fourteenth amendment. *Harvard Law Review*, 78(4): 746-783.

Friendly, Henry J. (1975). "Some kind of hearing." *University of Pennsylvania Law Review*, 123: 1267-1317.

Garrett, Brandon. (2014). The constitutional standing of corporations. *The University of Pennsylvania Law Review*, 163(1): 95-164.

Grandin, Gregg. (2017). What is the deep state? *The Nation*, February 17, 2017. Available: https://www.thenation.com/article/what-is-the-deep-state/.

Greenfield, Kent. (2015). In defense of corporate persons. *Constitutional Commentary*, 30: 309-333.

Greil, John. (2016). Second-best originalism and regulatory takings. *Harvard Journal of Law and Public Policy*, 41: 373-408.

Gwyn, William B. (1965). *The meaning of the separation of powers: an analysis of the doctrine from its origins to the adoption of the United States constitution*. New Orleans, La.: Tulane University Press.

Harrison, John. (2011). Enumerated federal power and the necessary and proper clause. *The University of Chicago Law Review*, 78(3): 1101-1131. Book Review of Lawson, Gary L., Miller, Geoffrey P., Natelson, Robert G., and Seidman, Guy I. (2010). *The origin of the necessary and proper clause*. New York: Cambridge University Press.

Hawley, Joshua D. (2014). The intellectual origins of (modern) substantive due process. *Texas Law Review*, 93: 275-350.

Hugenberger, Joel. (2006). Redefining property under the due process clause: Town of Castle Rock v. Gonzales and the demise of the positive law approach. *Boston College Law Review*, 47: 773-814.

Hunter, Richard J., Jr. and Alexander, Paula Becker. (2007). Is it time to revisit the doctrine of "state action" in the context of intercollegiate and interscholastic sports? *Villanova Sports and Entertainment Law Journal*, 12: 191-232.

Hunter, Richard J., Jr. and Lozada, Hector R. (2010). A nomination of a Supreme Court justice: the incorporation doctrine revisited. *Oklahoma City Law Review*, 35: 365-385.

Hunter, Richard J., Jr., Shannon, John H., O'Sullivan-Gavin, Susan, and Blodgett, Mark, S. (2011). Regulation: a historical perspective and discussion of the impact of the commerce clause and the fourteenth amendment and the move to deregulate the American economy. *University of Laverne Law Review*, 32: 137-164.

Jost, Lamar F. (2001). Constitutional law- the commerce clause in the new millennium: enumeration still presupposes something not enumerated. United States v. Morrison, 120 S. Ct. 1740. *Wyoming Law Review*, 1: 195-229.

Knoll, Michael and Mason, Ruth. (2017). Dormant commerce clause: the economic foundation of the dormant commerce clause. *Virginia Law Review*, 103: 309-358.

Lanoie, Paul and Leclair, Paul. (1998). Looking for a good anti-smoking policy. *Economic Letters*, 58(1): 85-89.

Legarre, Santiago. (2007). The historical background of the police power. *University of Pennsylvania Journal of Constitutional Law,* 9: 745-796.

Levy, Mark S. (2017). Holding the FBI accountable for hacking Apple's software under the takings clause. *American University Law Review*, 66: 1293-1321.

Lofgren, Mike. (2016). *The deep state: the fall of the constitution and the rise of a shadow government*. New York: Penguin Books.

Maltz, Earl M. (1999). The concept of incorporation. *University of Richmond Law Review*, 33: 525-536.

Markowitz, Peter L. (2017). Prosecutorial discretion power at its zenith: the power to protect liberty. *Boston University Law Review*, 97: 489-549.

Marzulla, Nancie G. (1995). State private property rights initiatives as a response to "environmental takings." *South Carolina Law Review*, 46: 613-640.

Merriam, Jesse. (2017). Preemption as a consistency doctrine. *William & Mary Bill of Rights Journal*, 25: 981-1045.

Miceli, Thomas J. and Segerson, Kathleen. (1994). Regulatory takings: when should compensation be paid? *Journal of Legal Studies*, 23: 749-776.

Mott, Dalton. (2017). The due process clause and students: the road to a single approach of determining property interests in education. *Kansas Law Review*, 65: 651-684.

Musgrove William R. (2018). Substantive due process: a history of liberty in the due process clause. *University of St. Thomas Journal of Law and Public Policy*, 2: 125-140.

Newell, Lauren A. (2017). Up in smoke? Unintended consequences of retail marijuana laws for partnerships. *Cardozo Law Review*, 38: 1343-1395.

Pollman, Elizabeth. (2016). Constitutionalizing corporate law. *Vanderbilt Law Review*, 69: 639-693.

Primus, Richard (2016). Why enumeration matters. *Michigan Law Review*, 15: 1-46.

Rubenfeld, Jed. (1993). Usings. *Yale Law Journal*, 102: 1077-1163.

Sidhu, Jonathan S. (2015). For the general welfare: finding a limit on the taxing power after NFIB v. Sebelius. *California Law Review*, 103: 103-139.

Tribe, Laurence H. (2000). *American constitutional law.* (Third edition). New York: Foundation Press.

Weinberg, Louise. (2013). A general theory of governance: due process and lawmaking power. *William & Mary Law Review*, 54: 1057-1121.

Statutes

Civil Rights Act of 1964. (1964). Public Law 88-352.
Fair Packaging and Labeling Act. (1967). 15 U.S.C. Chapter 39, Sections 1451-1461.
Federal Aviation Act. (1958). Public Law 85-726.
Gun Free School Zone Act. (1990). Public Law 101-647.
Interstate Commerce Act. (1887). 24 Stat. 379.
Sherman Act. (1890). 26 Stat. 209.
Violence Against Women Act. (1994). Public Law 103-332.

Cases

Adkins v. Children's Hospital (1923). 261 U.S. 525 (United States Supreme Court).
Benton v. Maryland (1969). 395 U.S. 784 (United States Supreme Court).
Berman v. Parker (1954). 348 U.S. 26 (United States Supreme Court).
Cipollone v. Liggett Group, Inc. (1992). 505 U.S. 504 (United States Supreme Court).
City of Burbank v. Lockheed Air Terminal Inc. (1973). 411 U.S. 624 (United States Supreme Court).
Cole v. Arkansas (1948). 333 U.S. 196 (United States Supreme Court).
Cooley v. Board of Wardens (1852). 53 U.S. (12 How.) 299 (United States Supreme Court).
Coppage v. Kansas (1915). 236 U.S. 1 (United States Supreme Court).
Duncan v. Louisiana (1968). 391 U.S. 145 (United States Supreme Court).
Estes v. Texas (1965). 381 U.S. 532 (United States Supreme Court).
Gibbons v. Ogden (1824). 22 U.S. 1 (United States Supreme Court).
Gideon v. Wainwright (1963). 372 U.S. 335 (United States Supreme Court).
Griswold v. Connecticut (1965). 381 U.S. 479 (United States Supreme Court).
Hammer v. Dagenhart (1918). 247 U.S. 251 (United States Supreme Court).
Heart of Atlanta Motel v. United States (1964). 379 U.S. 241 (United States Supreme Court).
Huish Detergents, Inc. v. Warren County Kentucky, et al. (2000). 214 F. 3d 707 (Sixth Circuit Court of Appeals).
Hurtado v. California (1884). 110 U.S. 516 (United States Supreme Court).
In re Gault (1967) 387 U.S. 1 (United States Supreme Court).
Jones v. Rath Packing Co. (1977). 430 U.S. 519 (United States Supreme Court).
Kassel v. Consolidated Freightways (1981). 450 U.S. 662 (United States Supreme Court).
Kelo v. City of New London (2005). 545 U.S. 469 (United States Supreme Court).
Klopfer v. North Carolina (1967). 386 U.S. 213 (United States Supreme Court).
Lochner v. New York (1905). 198 U.S. 45 (United States Supreme Court).
Malloy v. Hogan (1964). 378 U.S. 1 (United States Supreme Court).
Mapp v. Ohio (1961). 367 U.S. 643 (United States Supreme Court).
McCulloch v. Maryland (1819). 17 U.S. 316 (United States Supreme Court).
NFIB v. Sebelius (2012). 567 U.S. 519 (United States Supreme Court).
NLRB v. Jones & Laughlin Steel Corp. (1937). 301 U.S. 1 (United States Supreme Court).
North Dakota v. Dole (1987). 483 U.S. 203 (United States Supreme Court).
Perez v. Mortgage Bankers Association (2015). 135 S. Ct. 1199 (United States Supreme Court).
Pointer v. Texas (1965). 380 U.S. 400 (United States Supreme Court).
Raymond Motor Transportation, Inc. v. Rice (1978). 434 U.S. 429 (United States Supreme Court).
Santa Clara County v. Southern Pacific Railroad (1886). 118 U.S. 394 (United States Supreme Court).
Silkwood v. KerrMcGee (1984). 464 U.S. 238 (United States Supreme Court).
Town of Castle Rock v. Gonzales (2005). 545 U.S. 748 (United States Supreme Court).
United States v. Darby Lumber Co. (1941). 312 U.S. 100 (United States Supreme Court).
United States v. Lopez (1995). 514 U.S. 549 (United States Supreme Court).
United States v. Morrison (2000). 529 U.S. 598 (United States Supreme Court).
Washington v. Texas (1967). 388 U.S. 14 (United States Supreme Court).
West Coast Hotel v. Parrish (1937). 300 U.S. 379 (United States Supreme Court).
Wickard v. Filburn (1942). 317 U.S. 111 (United States Supreme Court).