Lesson 27 Article 1, Section 8

The powers given to congress – Part III (Commerce)

What is commerce? In a free market, it's the voluntary exchange of something of value between two parties – to the benefit of both.

The economic system employed by most of Europe at the time was mercantilism. The creation of colonies around the globe to supply raw materials for the home country, which built factories to make use of these raw materials. The finished products would be sold to the colonists. Although mutually beneficial, this process was not completely voluntary; colonists were forbidden from buying goods from any other source. Colonial markets couldn't shop around for the best products or the best price.

After the Revolutionary war, James Monroe witnessed the destructiveness of each state trying to profit through imposts and tariffs on goods imported from other states – as well as foreign sources. The practice was tearing the United States apart as each state set up isolated economic fiefdoms. He tried to get a commerce clause added to the Articles of Confederation. Failing that, he made the suggestion to James Madison, who was "secretly" working on the Constitution at the time.

It was the Americans who put Adam Smith's system of free markets in practice. This is another aspect, like a Constitutional Republic, that was revolutionary – never tried before.

I'm not going to follow the three commerce phrases as written in the Constitution; since two are similar, I'll cover them first, then the more important provision as it relates to us today.

Provision 82

The people empower the Congress to regulate commerce with foreign nations.

Provision 84

The people empower the Congress to regulate commerce with Indian tribes. (Question 10)

Of course a sovereign nation can regulate commerce with foreign nations. Making treaties and regulating what goods may flow between those nations is part and parcel of national sovereignty. Note, that the Founders considered Indian tribes to also be sovereign so the same rules would apply. (Indians were made citizens of the United States in 1924 – so even this provision was, in a way, negated.)

It wouldn't be very productive for a foreign nation to have to negotiate one trade treaty with each state. Or each county in a state.

How far does this power extend? Can the government lay arbitrary import and export taxes? Of course, we studied that two lessons ago. Can the feds ban certain items from importation? Yes, from French post cards to opium. Can the government shut off trade with another country? Yes. (Question 2)

Provision 83

The people empower the congress to regulate commerce between the states.

During debate at the Constitutional convention, the Southern states were strongly opposed to giving the central government the power to regulate trade; they had a highly profitable trade with certain European countries for their cotton and feared interference from the New England states, which had textile mills. They assumed little would change from the predatory practices of the individual states at the time, and had to be convinced that in a free market, that cotton could be sold where it brought the highest price – whether that meant selling to England or New England. (Question 1)

The emphasis was on commerce, not regulation. All the Founders meant by "regulation" was to make all interstate commerce REGULAR; No irregularities, such as special provisions or taxes here or there. No obstacles at the ports or the borders. Their goal was free and open *common market* nationwide. (Question 3) Insuring a free flow of commerce between and among the several states, (Question 4) for the mutual benefit of all. Remember that commerce itself means a voluntary exchange for the benefit of both. This was the highest ideal for allowing each individual his God given right to pursue happiness. From farms and mines and mills, goods could flow freely to where they would produce the greatest effect for the greatest number of people. Along the way teamsters drove horses and oxen pulling wagons or barges. Manufacturers and retailers would all benefit as much as the consumers.

For the most part, the federal government stayed out of the way. It did assist with roads and canals – again to facilitate this massive flow of goods. After all, of what use are goods if they can't be moved to where the markets are?

After 1828, what better way to move goods domestically than by railroad? But railroads were, generally piecemeal affairs – especially in the South, stretching from, say a cotton-growing region to the nearest river or sea port. In the North, a main line was created between Chicago and New York to facilitate mid-western goods such as grain, hogs, and cattle.

This is when the interpretation of the commerce clause was first challenged; when the emphasis switched from commerce to regulation. (Question 5) You see, shipping goods or people between New York and Chicago was cheaper and faster than from New York to Buffalo, for example. There was a direct line to Chicago, but a train car might have to sit in a siding in Pennsylvania for a while until enough cars destined for Buffalo were gathered to make that trip worthwhile.

People complained about the inequities. Worse, financial panics in 1873 and 1885 forced many small railroad companies into bankruptcy. Congress stepped in with the Interstate Commerce Act of 1887. (Question 6) The government was now authorized to set prices for the railroads – even if that railroad was wholly contained within one state. Just to make sure everything was fair. For your own good, don't you know.

Once the feds had this power, they were content and didn't do anything else... OF COURSE NOT! Once they had power over the railroads, they decided to take control over every form of transportation they could get their mitts on. They began regulating ALL transportation systems whether rail, motor, water, or air. Not just prices either, they control how these companies may issue stocks and securities, approve proposed mergers, or starting new enterprises.

You know that this heavy hand of government regulation forced rail passenger service in this country into extinction. In 1971 all passenger service was thrown into the government-run Amtrack. Because we all know that only the government knows how to properly run a railroad.

The government has done the same thing with electric and telephone lines. The government determines what price you will be charged. Same for oil and natural gas. Same for radio waves. For your own good, don't you know.

When is big business too big?

With the industrial revolution came profound changes to commerce. Opportunities arose for a few men to not only prosper in an age of prosperity, but to exploit new systems for their own gain. How did John D. Rockefeller, for example, create Standard Oil (known as Esso, now Exxon) into a giant monopoly? JD knew there was no chance to get rich in the oil fields; every time a new well struck oil, the price would fall. So he set his sights on the refining of crude oil – buying into a successful refinery in Cleveland. He could have been satisfied, but he wasn't. He saw that getting the oil to the refinery and getting refined products to market was the real secret to success. So he leased every single railroad tank car in the country. He paid the approved government price, but had a secret deal set up to get kickbacks every time a tank car delivered its load. Once he had control of the distribution network, he made an offer to other refiners that they couldn't refuse – to coin a phrase. Either fold your company into mine, or be destroyed. The umbrella companies handling the financial aspects of the deals were called "Trusts."

Rockefeller saw himself as a guardian angel to the oil business. Instead of hundreds of independent refiners making small, unprofitable transportation deals, every aspect of the operation could be standardized and streamlined. Instead of companies springing up and falling into bankruptcy, all could operate in unison.

But a monopoly is a bad thing, right? They fix prices and gouge their customers. The one-percent get richer and everyone else gets poorer.

Remember that Standard Oil was actually competing against whale oil for lamps – this was in 1872, there were no automobiles. Customers were getting a bargain – even at the height of Esso's power. Furthermore, we have no way of knowing what would have happened to Esso when oil was discovered in Oklahoma and Texas years later. Would a new conglomerate have taken over Esso or run in parallel?

We have no way of knowing because of the Sherman Anti-Trust Act of 1890. The trusts were dismantled. Some of the fragmented parts of the company eventually became quite large. But the government just HAD to interfere.

A more modern look would involve Microsoft. Fifteen years ago Microsoft operating systems powered 97% of the computers on the planet. The government tried to evoke the same Sherman Anti-Trust Act in 1998 against them. And lost. The result? Today Microsoft runs less than 50% of computers. What the heavy-handed government tried to do by force, the market has done -- naturally and effectively. Today the Android operating system powers 42% of all tablets and smart phones, Apple runs 3%. All without the federal government sticking its nose into the process.

This is a PERFECT example of why central planning doesn't work. No one – not even our omnipotent federal government could have foreseen in 1998 the eventual outcome for Microsoft.

When you buy a new car from a dealership, does the transaction include the guy sitting next to the assembly line who puts the lug nuts on the left-hand side of every vehicle? How about the guy who mined the iron ore in Wyoming? How about the trucker who delivered the lug nuts to the factory?

No. Those are all separate instances of commerce. Separate transactions having nothing to do with you.

Then why does the federal government insist otherwise?

As the industrial revolution was gearing up, as factories were built, civilization clustered around these huge factory complexes because of the many employees needed. This created localized transportation problems: the need for subways, trollies, even sidewalks. Just as factories forced the clustering of employees, the federal government became the centralized factory of political power. This was necessary as both unions and companies grew beyond states' borders. What should have been only urban or industrial concerns: mass transit, public health, building codes, retirement benefits, etc. were addressed more and more by a federal government determined to catch up during the economic and cultural upheaval. Of course, this, again, started with the railroads.

Congress passed the Safety Appliance Act of 1893. This brought all locomotives and train cars under the scrutiny of the feds. This was expanded in 1903 to include every piece of railroad equipment whether used in-state or interstate. Since safety of the equipment could be overseen by the government, why not the safety of the railroad employees as well?

Heck, if the well-being of railroad employees deserved government supervision, why not every employee everywhere? They all contribute to interstate commerce, don't they?

Common sense tells you that a private business transaction (voluntary exchange of something of value) is local in nature. You purchase a doughnut from a local bakery. Do you care where the flour, eggs and sugar came from? No, those transactions – while contributing to your expanding waistline – are part of a wonderful system we call the free market. Each transaction along the way was local in nature. Each one of mutual benefit to the parties involved.

This, however, is not how the government sees your doughnut. It's seen as one piece of a gigantic, interwoven web of interstate commerce. A web that needs constant oversight by a benign and loving government.

The Supreme Court for a long time, sided with the states in this regard: (Question 8) Chief Justice Roger B. Taney argued that all production is local – thus under the authority of the states. Interstate commerce does not begin until a product starts the final journey from state of origination to its final destination. Justice George Sutherland further explained that wages are paid for local work. Working conditions during that work are also local. Local workers are not involved in commerce, they are involved in producing a commodity.

But gradually the states' rights withered away as (especially during the Franklin Roosevelt administration) the Court changed direction 180 degrees, and everything from hiring, to manufacturing, to distribution, to fixing prices, to healthcare and retirement now comes under federal authority. (Question 9)

It is important to appreciate that every single one of these federal laws and regulations were designed to provide fairness, safety, or enhance competition. Unfortunately, a century of government intervention into the free market has failed to achieve any of these desirable goals. In fact these efforts have by and large had exactly the opposite effect.

We can see the evidence for ourselves. Many of the burdensome regulations on business and industry created during the 1930's were dissolved or lessened in the 1980's. Deregulate airlines and more airlines appear – many with lower fares. Existing airlines have to compete. Relieve some restrictions on communications and you see things like cell phones, cable TV, and the internet.

There is hope, but it would take a very strong president and a compliant congress to undo 127 years of red tape.