LIBERTY TREE

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Judges and the Commerce Power:

Trading Your Independence for THEIRS

Editorial by Dick Greb

The Congress shall have power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; ...
U.S. Constitution, Article 1, §8, Clause 3

Congress sure does love the Commerce Clause! In fact, it wouldn't surprise me one bit if three-quarters of all federal legislation was predicated on the power to regulate interstate commerce. That's assuming — naively, perhaps — that Congress actually connects the enactment of any law to one or another of their enumerated powers. And why is it such a popular power? Because over the years, with the willing help of the judiciary, the government has redefined that power; or maybe it would be more correct to say that they've *undefined* it. So much so that, as it now stands, there is virtually no object or activity that can't be regulated or even outright prohibited under Congress' conception of regulating interstate commerce.

STATION UPDATE

As reported by John Kotmair, Fiduciary, in the last Liberty Tree, the radio station in Florida is under attack by a tax-exempt corporation, Citrus County Association for Retarded Citizens, Inc. CCARC won a money judgment from a state court against Nature Coast Broadcasting, Inc., the corporation that owns WOGF, without any proof of their claim, and the court-appointed receiver proceeded to seize all the studio broadcasting equipment, putting the station off the air.

Nature Coast Broadcasting immediately filed a Chapter 11 (reorganization) bankruptcy in federal court and gave notice to everyone involved. A petition for bankruptcy operates as an automatic stay against all actions to enforce judgments while bankruptcy is pending, so the receiver *should* have turned over the studio equipment so that WOGF could continue to operate.

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In 1942, the Supreme Court upheld federal penalties against a farmer for growing wheat for his personal use on the reasoning that growing wheat for his own use *affected* interstate commerce because it prevented him from having to buy the wheat he needed through interstate commerce: "But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce." *Wickard v. Filburn*, 317 U.S. 111, 128 (1942). Here's an interesting quote from that case concerning regulation in general: "It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated, and that *advantages from the regulation commonly fall to others*." (*Wickard*, pg. 129.) This is quite an admission from the court. If the essence of regulation is that some are disadvantaged so that others may obtain advantages, then regulation is inherently incompatible with the equal rights of all men, as well as the equal protection of the laws.

Repeating their errors *ad infinitum*

In 2005, this same rationale was used against some folks who were growing medical marijuana in California for their personal consumption, where it was legal under state law to do so.

"While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because *production of the commodity meant for home consumption*, be it wheat or marijuana, *has a substantial effect on supply and demand in the national market for that commodity*." *Gonzales v. Raich*, 545 U.S. 1, 19 (2005). In other words, your

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personal entry into, or withdrawal from the general market is deemed to have a *substantial* effect on supply and demand, thereby warranting federal regulatory authority over you. This is the standard the court is using to establish the boundaries of Congress' power to regulate interstate and foreign commerce.

Where does this end? Consider that there are basically three ways to fill one's desires for goods and services: produce the thing yourself, buy it in the general marketplace, or do without. If Filburn could be prohibited from growing extra wheat for his personal use, on the theory that thus removing himself from the general market would affect interstate commerce, then it would be no different to prohibit him from voluntarily withdrawing from the market by doing without the extra wheat.

On that principle, Filburn could be forced to participate in the market, against his will, to buy his allotment of wheat, or health care insurance, as the case may be.

Judicial "independence" and insistence upon their own "precedents" (case law) often disconnects the Supremes from the reality of the Constitution's enumerated and limited powers It may even disconnect them from reality *entirely*, as Charles A. Bragg depicted in "Court Supreme," above.

A miniscule breath of clarity

Even so, every now and again, the Supremes throw us commoners a bone, such as with the *Lopez* decision in 1995, where the court struck down federal "gun free school zones." The government's argument was so weak on the nexus between possession of a firearm in a school zone and interstate commerce (possibly because they are so rarely called upon to clarify such a nexus), that apparently even the court wouldn't swallow it: "The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well being. As a result, the Government argues that Congress could rationally have concluded that §922(q) substantially affects interstate commerce." *United States v. Lopez*, 514 U.S. 549, 563 (1995).

The court responded: "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.*" (*Lopez*, page 567.) Luckily for us, the court refused to acquiesce this time, but the amazing thing is how far the government will go to justify doing what it is plainly not authorized to do.

The result of the *Lopez* case was the establishment of the "substantial effects" test. In my opinion, that decision also went a long way to clarifying the scope of the commerce clause, and yet abuses are still rampant. (In fact, the *Gonzales* case above was decided 10 years after *Lopez*.) Chief Justice Rehnquist, writing for the court in *Lopez*, describes the test this way:

> Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the *use of the channels of interstate commerce.* Second, Congress is empowered to regulate and *protect the instrumentalities of interstate commerce, or persons or things in interstate commerce*, even though the threat may come only from intrastate activities. Finally,

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Operation Stop Thief IV

April 15, 2011

Truth Attack

Come join the fun!

How much more fun can you have on April 15th, the IRS day of terror, than to pleasantly confront people with the nasty truth about the IRS?

For "Truth Troopers" — members of TruthAttack.org[1] — and patriots of every stripe, April 15th is the best day of all to exercise your free speech!

Here's the plan: from every corner of the Freedom Movement, gathered at post offices across the country, patriots hold up "What Income Tax?" signs and hand out flyers to last-minute tax filers — flyers that let them know there is a REAL issue regarding the IRS's (mis)-application of the income tax. Flyers that some filers, feeling the pinch of the current economic disaster, and the pain exacted by the IRS, may now *read.*

Operation Stop Thief covered over 1,200 post offices in 2009, but fell back to half of that last year, due to late organization and inadequate publicity.

This year, however, Attorney Tom Cryer, organizer, hopes that the 1,200 number can be reached and bested again —

Tea Party gatherings are also great places to hold signs and hand out fliers. As Tom has noted before:

"All patriots, no matter what their particular issues, are needed in this once-a-year opportunity to awaken Americans to the IRS's illicit theft of American labor."

Join the fun by registering yourself or your group at truthattack.org by April 5th. A "group" does not have to be a formal organization. Two people can easily carry out an OST event, although the more people involved the more effective (and fun) the event will be. Even a single family can be a group — and what better way to teach your children how to exercise their freedom!

Truth Attack will email you a free materials packet with instructions for making your OST event great (including how to deal with postal employees, police, the press and the public), a sample press release, signs, and a flyer to distribute.

We only get this opportunity once a year. Please join in and *do* something to make a difference in saving our country from our government and our government from itself.

Finally, take pictures of your group in action and send it to Truth Attack to encourage others!

Don't have internet? Questions can be directed to (318) 795-2030.

1. Joining is easy and free, just go to www.truthattack.org.

STATION UPDATE

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Instead, the receiver and CCARC have openly defied the bankruptcy laws.

Here is the good news: the bankruptcy judge has ordered that the FCC license belongs to Nature Coast Broadcasting (WOGF), and that it can continue to transmit radio waves.

But here is the bad news: at a hearing to determine whether the studio equipment should be returned to WOGF, CCARC relied on the state court's judgment that "title and possession" of the equipment was given to CCARC. In other words, they claim all studio and transmission equipment is owned by them and not a part of the bankruptcy, and that due to the "Rooker-Feldman" doctrine, the judge cannot review the lower court's decision. The validity of this may yet be questioned in an adversary proceeding before the bankruptcy court, but for the time being, Nature Coast Broadcasting (WOGF) and CCARC are ordered into mediation over the seized equipment. The judge even encouraged CCARC to seize the equipment at the tower site (which they did the same week), *despite* the automatic stay, and suggested they could sell it back to Nature Coast Broadcasting!

Given the receiver's egregious behavior to date, and the state court's judgment awarding equipment "whether owned *or hereafter acquired*, relating to the operation of the Station" to CCARC, it appears the receiver would be emboldened to seize any equipment WOGF might reinstall to continue to operate.

For this reason, it is necessary to wait until mediation is concluded to attempt to start broadcasting again, which means that WOGF, LWRN's flagship affiliate, may be able to be on the air again in April. In the meantime, LWRN will assist Sabatino Cupelli where it can with expenses, as revenue from advertisers (many of whom are waiting for WOGF to go back on the air!) has been cut off.

We will not give up!! And many thanks to those who continue to financially support the LWRN effort. If you are not giving to this effort, please do so to keep *your* voice alive! Liberty Works Radio Network is still streaming over the internet at www.lwrn.net. We are also restreaming the Saturday hosts' shows between 3 and 5 pm on weekdays, giving them greater exposure. Our Sunday hosts are also being restreamed throughout the day Sunday, meaning 24 hours of opportunity to hear the Word of God preached and applied to our world today. We're streaming Alex Jones in the afternoons, and have added Radio Liberty host Dr. Stanley Monteith from 7 to 11 pm weekdays. See the schedule on the website for details.

We cannot afford to let the enemies of our constitutional republic win this desperate battle in which we are engaged. Fellow Patriots, we CAN save this Constitutional Republic! That is, if we all stand and work together.

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THINK ABOUT IT!! Like our motto says: *Together We Stand, Or Separately You Will Be Stood On!* **HANG IN THERE, VICTORY IS IN SIGHT!! THE ONLY WAY WE CAN LOSE, IS FOR YOU TO IGNORE OUR PLEA FOR HELP!!!**

You can donate online at LWRN.net, or just mail your donation to: LWRN, 12 Carroll Street, Westminster, MD 21157. All questions should be directed to John Kotmair, 410-239-7621, or email john@lwrn.net.

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> Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those *activities that substantially affect interstate commerce*. [internal citations omitted] (*Lopez*, page 558.)

Although the third prong of the test starts veering off course, the first two prongs fit right in with my own understanding of the commerce clause power — the power to regulate the *means and modes of interstate commerce*, but not the commerce itself, and certainly not the individual items of commerce. In other words, the power to remove impediments and otherwise promote the orderly flow of goods throughout the country, but *not* the power to regulate in any way the goods being moved in such commerce. The *Lopez* decision shows that the Supremes know the repercussions of expanding the scope of the commerce clause; they're just so often unwilling to hold Congress to its proper scope, and Congress, like any power-mad tyrant, can't resist pushing and pushing the envelope.

Wearing body armor: a crime against commerce

And so Congress, consistent with a desire to usurp all power, enacted the *James Guelff and Chris McCurley Body Armor Act of 2002*, which makes it "unlawful for a person to purchase, own, or possess body armor, if that person has been convicted of a felony that is . . . a crime of violence." (18 U. S. C. §931(a).) The only nexus to interstate commerce was in the definition of "body armor," which had to have been "sold, or offered for sale, in interstate or foreign commerce." Clearly, Congress believed it could regulate the ownership and possession of a product, merely because it had once been involved in an interstate transaction. That is, the simple act of having once been sold by the manufacturer to a distributor in another state would forever render the product, as well as any persons who may come into contact with it anytime in the future, subject to regulation and control. Since by this standard, Congressional control would extend to *every product ever produced*, the government obviously believes it can regulate the possession of *anything* by *anybody*.

Cedrick Alderman was convicted of § 931(a), and appealed his conviction on the basis that the "substantial effects" test developed under *Lopez* was not satisfied. However, the 9th Circuit Court of Appeals upheld Alderman's conviction, deciding to ignore *Lopez*' more stringent "substantial effects" test, and instead using 30-year old precedent (*Scarborough v. United States*, 431 U.S. 563 (1977)) that upheld a federal felon-in-possession law based on the flimsy "once moved in interstate commerce" nexus. However, the constitutionality of the statute (with respect to the scope of the commerce power) was never challenged in the *Scarborough* case. So the 9th Circuit broke with the Supreme Court's *Lopez* precedent in order to uphold a federal law that would clearly fail the *Lopez* test.

Not deciding IS a decision

Naturally, the 9th Circuit's error was appealed to the Supreme Court, and not surprisingly, on January 10, 2011, the court refused to accept *certiorari* on the case, effectively giving government *carte blanche* once again to forget about constitutional boundaries. The denial of cert didn't go completely unnoticed, however, because Justice Thomas (joined by Scalia) spelled out the consequences in his dissenting opinion of the denial:

> "Recognizing the conflict between *Lopez* and their interpretation of *Scarborough*, the lower courts have cried out for guidance from this Court. This Court has a duty to defend the integrity of its precedents, and we should grant certiorari to affirm that *Lopez* provides the proper framework for a Commerce Clause analysis of this type. Further, the lower courts' reading of *Scarborough*, by trumping the *Lopez* framework, could very well remove any limit on the commerce power. The Ninth Circuit's interpretation of *Scarborough* seems to permit Congress to regulate or ban possession of any item that has ever been offered for sale or crossed state lines."[1]

The refusal to accept cert on this case establishes a tacit acceptance of the 9th Circuit's reasoning on the commerce clause, even though it directly contradicts the explicit decisions of the Supreme Court on that issue.

But if the Supremes had taken this case, and reestablished the stricter limits of commerce clause power, then there might have been broader implications, too. As noted by Bloomberg News, "The case, had the court considered it, might have affected the legal challenges to President Barack Obama's health care overhaul. Both issues turn on the scope of Congress's constitutional authority to regulate interstate commerce." [2]

And that is really the essence of the inherent injustice in government having the power to judge (or not) its own causes. Having its own court of last resort allows government to obtain any outcome it desires — but the power to merely decline to hear any case allows government to obtain those same outcomes without even having to make their rationalizations known to the people.

The ultimate judicial independence!

1. http://www.supremecourt.gov/opinions/10pdf/09-1555.pdf
2. http://www.bloomberg.com/news/2011-01-10/body-armor-restrictions-left-undisturbed-by-u-s-supreme-court.html