

TEACHING THE COMMERCE CLAUSE: A PROBLEM APPROACH

The commerce clause is not one of the most thrilling areas of constitutional law. Issues of congressional power have long since been definitively settled, and now even the tenth amendment (at least temporarily) has been laid to rest. The “dormant” commerce clause remains significant, but is difficult to teach in a way that captures students’ interest, even if one omits taxation of interstate commerce. Alas, we professors are often as bored by the commerce clause as our students.

Yet simply ignoring the clause seems wrong. The judicial struggle to define the congressional commerce power is a crucial part of constitutional history. The dormant commerce clause is one of the most frequently litigated areas, which students should probably know something about. Anyway, it is traditional to cover these matters, and your colleagues are apt to disapprove if you simply skip them.

The following syllabus presents an alternative approach to covering the commerce clause issues. It is designed for use in the first semester of a first-year constitutional law course. Besides attempting to cover the basic legal doctrines, it offers a series of writing exercises. These exercises are intended to develop basic analytical skills (identifying holdings, distinguishing cases, etc.) as well as giving beginning students some experience in writing about legal issues. The exercises supplement the conventional legal writing program by giving the students highly defined tasks, which should ready them for more ambitious memo and brief writing.

Using this approach, my class sessions were largely devoted to a discussion of the students’ writing. I didn’t try to give individual feedback, but instead read and commented on a random sample of papers each day. Remaining class time was spent summarizing doctrines, to assuage the students’ anxiety about whether they were “learning the law.” A couple of classes were devoted to background lectures about the Supreme Court and judicial review.

The purpose of this approach (apart from avoiding the tediousness of conventional classes on the commerce clause) was to get the students up to speed by giving them basic legal skills and some initial exposure to the major controversies and viewpoints in contemporary constitutional law. Compared to previous years, my classes

were certainly more interesting; whether the students learned more is difficult to say, but I doubt that they learned any less than usual.

For the benefit of those who are either interested in this approach on the merits or simply bored with teaching the commerce clause, here is my assignment sheet.

ASSIGNMENTS: INTRODUCTORY UNIT

These introductory assignments are designed to get you up to speed quickly, to give you experience in legal writing and analysis, and to transmit substantive legal information. The assignments refer to the casebook, *Modern Constitutional Law*, by Ronald Rotunda (2d ed. 1985). If you find that you're having difficulty with the substance, you should not be too concerned. If you are still confused at the end of this unit, the Nowak, Rotunda & Young hornbook may be helpful.

THE SCOPE OF FEDERAL POWER

Class 1. Read pp. 141-50 of the casebook. Brief *United States v. Knight* (p. 143) and *The Shreveport Case* (p. 147). *Lecture:* Supreme Court history in a nutshell.

Class 2. Read pp. 151-63. Congress has passed a statute making it a federal crime to transport child pornography (i.e., pornography made with children as actors or models) in interstate commerce. Write a memorandum that (1) describes the facts and holding of *Hammer v. Dagenhart*, and (2) explains whether the child pornography law is within congressional power under *Hammer*. In short, the question you are to address is whether *Hammer* is distinguishable. (Ignore any first amendment issues.) Two hundred fifty to three hundred words should be plenty.

Class 3. Read pp. 162-73. Suppose that Congress wanted to comprehensively regulate the operations of law schools. You are working for Senator Shoben, who is unsure of congressional power in this area. Write a two-page memo to the Senator detailing the effect of law schools on interstate commerce, and explaining the relevance of these impacts under the test established in *Wickard v. Filburn*.

Class 4. Read pp. 187-98. The Senator (see previous assignment) has decided to support a bill that would set uniform national admissions standards for law schools. She has asked you to write a short memo (which will be distributed to other senators) proving that such a law is within the commerce power. Don't forget that

your audience consists largely of intelligent laymen. Maximum length should be three pages, less is better.

Class 5. Read pp. 55-65, 182-87; skim 173-82. Despite your brilliant memo, Senator Shoben informs you that Senator Carswell, a key member of the committee, is still worried about congressional power under the commerce clause. The Senator would like to know whether Congress could just cut off all funding to law schools that fail to comply (including state law schools, and also including all scholarship and loan money to students). This time, in order to avoid confusing Senator Carswell (who isn't terribly bright), please leave out discussion of individual cases. Just tell Senator Carswell what the rules are and how they would apply here. Keep it short; he doesn't have much of an attention span.

Class 6. Read pp. 198-211. Senator Shoben is now in the White House. She can't decide who to appoint to a Supreme Court vacancy. Two excellent candidates, Alstynne and Field, differ only in one respect: Alstynne has said in writing that *Garcia* should be overruled; Field has said the opposite. Write a short memo advising the President about which position is better. Does respect for precedent have any relevance here? Keep this one under one page—Presidents are much busier than Senators.

THE "DORMANT" COMMERCE CLAUSE

Class 7. For historical background, read pp. 66-80. Brief these cases, but take a day off from writing. *Lecture:* theories of judicial review.

Class 8. Read 81-90. As an exercise rewrite the last two paragraphs of Justice Stone's opinion in *Southern Pacific Co. v. Arizona*. See if you can improve their clarity and readability—test yourself by having a non-law student read your version.

Class 9. Read pp. 90-103. The following is a mock exam question, so give yourself no more than one hour to write an answer (closed book):

The State of Maxisota has enacted a statute regulating airport noise. The statute prohibits any plane from landing at any Maxisota airport between 10 p.m. and 8 a.m., except for emergencies or unavoidable delays. For purposes of this problem, assume that no relevant federal statute exists. Is the Maxisota statute valid?

Class 10. Read pp. 103-16; also read the law review article* on reserve. (You should find the first portion of the article, summarizing current law, particularly useful.) No writing assignment.

* Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMM. 395 (1986).

Class 11. Read pp. 116-24. The Maxisota welfare department has promulgated a regulation denying welfare benefits to any individual who has not lived in the state for six months. You are a summer law clerk, working for the MCLU (Maxisota Civil Liberties Union). The MCLU has decided to challenge the law, and (for reasons we will discuss next semester) thinks there is an excellent chance of prevailing in a challenge based on the equal protection clause of the fourteenth amendment. To play it safe, however, the MCLU is also thinking of including a challenge under the article IV privileges and immunities clause. Write your boss Deborah Sears a memo advising whether such a challenge has a reasonable prospect of success under the Supreme Court cases.

Class 12. Read pp. 125-32. Consider the following problem:

The Federal Aviation Agency, by federal statute, is charged with regulating airplanes in flight to ensure their safety. Under *Silkwood v. Kerr-McGee Corp.* and other preemption cases, does the FAA statute preempt the Maxisota statute in the "exam question" (see assignment for class 9)?

This time, instead of writing about the issue, you may be asked to discuss it orally in testimony before a congressional committee, or else to serve on the committee and ask questions.

Class 13. No assignment—you deserve a break if you've been doing all this.

END OF INTRODUCTORY UNIT

The regular class assignments will begin on p. 1 of the text with *Marbury v. Madison*.

D.A.F.