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Idaho Common Sense®



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Unlimited power – Part IV

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*"If you can't dazzle them with
brilliance, baffle them with bull."*

– W. C. Fields

Though I hope this quote refers to the following Supreme Court rulings, some might suggest it better refers to my assessment of the rulings.

After giving Congress the power to do whatever it determined was for the "general Welfare of the United States," the Supreme Court had to wait 5 years for President Franklin Roosevelt's next constitutional target, the opportunity to give Congress control within the states and control over individuals.

As he did with the "general Welfare" clause, Roosevelt refused to accept the limitations of the commerce clause because it only gave the government control over interstate commerce, limiting it "to regulating Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Since this clause does not mention regulating commerce within states or controlling individuals, according to the Tenth Amendment, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." But President Roosevelt refused to tolerate this constitutional constraint, expecting the Supreme Court to again change the Constitution.

And the court got the opportunity to accede to his demands in 1942 with *Wickard v. Filburn*. The court's bench of "nine old men," as the editorial cartoonists

referred to the justices, was still fearful of President Roosevelt and once again ignored the Constitution to accommodate his demands.

What could possibly bring Roscoe Filburn, a poor farmer, before the United States Supreme Court? His crime? He dared to grow 23 acres of wheat to feed his family, 23 acres beyond what the federal government ordered him to grow.

And the Supreme Court ruled against Mr. Filburn, claiming that his "wheat supplied a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in that sense competes with wheat in (interstate) commerce."

Commenting on the absurdity of this ruling, University of Chicago Law School Professor Richard Allen Epstein said, "Could anyone say with a straight face that the consumption of home-grown wheat is 'commerce among the several States'?" Yes, justices willing to dishonor the Constitution and violate their oath of office.

The court affirmed this unconstitutional power in another 1942 case. In *United States v. Wrightwood Dairy Co.*, the court ruled that "the national power to regulate the price of milk moving interstate . . . includes authority to regulate the price of intrastate milk, the sale of which, in competition with interstate milk, affects adversely the price structure and federal regulation (of interstate commerce)." Confused?

The Supreme Court gutted the Constitution, ruling that anything we produce or anything we purchase

falls under the government's power to regulate "commerce among the several states."

But what was the purpose of the commerce clause? Was it this complicated and convoluted? Before the Constitution was ratified, the states erected protectionist barriers that interfered with free trade between the states. In fact, one of the reasons for the Constitutional Convention was to address this very issue.

With this in mind, what did the founding fathers intend Congress to regulate? What did they mean by the words "regulate" and "among?" They simply intended the federal government to "make regular" free trade "between" the states. Nothing more. Not complicated. No law degree needed.

Does any of the language of the commerce clause suggest they intended the government to regulate or prohibit production within a state or to set prices? Are there any words in the commerce clause suggesting that the government has the authority to tell us what we can do with our own land, what we can produce, how much we can produce or what we can charge?

Perhaps rather than considering expertise on constitutional law a prerequisite to appointment to the Supreme Court, we should demand expertise in farming and ranching so the justices learn common sense and learn how to recognize manure before they step in it.

(Next week – What are we? – Part V)