The Contractarian Commerce Clause: The Significance of the Social Contract, Property Rights, and the Execution of Commerce in the Foundation of American Government

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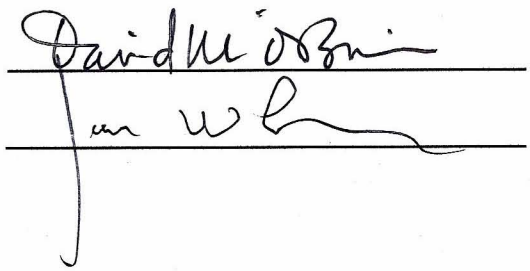

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Abstract

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This thesis examines the impact and significance of the inclusion of the commerce clause in the United States Constitution. In examining this brief and seemingly unassuming clause, I demonstrate that the foundations of commerce and the role of the commerce clause in the founding of the United States were a distinct departure from contemporary forms of republican government. Had the clause not been included in the Constitution, the United States would have developed in a markedly different manner. This is a largely theoretical work focusing on foundational political theory and Supreme Court jurisprudence. I focus on five different themes: (1) the development of the social contract in English history, (2) the critical nature of private property, individual agency, and free trade within the social contract through Hobbes, Locke, and Montesquieu, (3) broad statements of commerce and private property within the English Rights tradition, (4) the importation and modification of these ideas by the American colonists which led to the abandonment of mercantilism and the adoption of a free-market economic system, and (5) the ruling of the Supreme Court concerning the commerce clause and the significance of those findings. This thesis challenges the idea that commerce and free-market behavior are detrimental to the sustainment of democracy and argues that the commerce

clause and its theoretical foundations should not be overlooked or ignored in the study of the development of the United States.

The Commerce Clause, in Article I, Section 8, Clause 3 of the United States Constitution, states:

> [the Congress shall have Power] to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.

This brief statement of enumerated power has created numerous opportunities for the expansion of the federal government's power through the rulings of the Supreme Court and congressional legislation. More importantly, the statement of the Commerce Clause is unique in the way that it grants the federal government explicit power over commerce. An examination of constitutions contemporary to the US Constitution – the French Constitution being perhaps the most notable example – demonstrates a conspicuous lack of articulation of the unified state's power over commerce.

In other contemporary monarchical states, there was no need for an articulation of the role of commerce in relation to the government's authority. Economic policy was, both in practice and in fact, a unitary concept. What was best for the sovereign was best for the state. As a result, the monarch executed his or her authority over commercial acts in whatever manner deemed most appropriate.

It is striking that the US Constitution grants such sweeping power to the federal government, especially when the Constitution was the product of a people who fought so hard and long to be free of a system of government that exerted absolute control over

commerce. The new Americans were the product of a rich heritage of rights inherited over five centuries of philosophy, political theory, and individual rights within the social contract.

It is from these rights that the foundational ideas of the United States are derived. Unsurprisingly, individual ownership and exercise of one's rights over property are fundamental to the American understanding of freedom. Moreover, the preeminence of property rights is considered integral to a vibrant democracy. The ability of the individual to exert unrestricted control over his private property within the open market is at its core, though not in the legal sense which we understand today, commerce. Individual control over private property became essential to American democracy. Thus without a stated understanding of the importance of private property in the American tradition and the commercial undertakings which result from the possession of private property, the root causes for the Revolutionary War become elusive. Commerce, not simply commercial activity for the sake of profit, but a specific economic policy embraced in the Constitution was essential to the creation of the United States. The foundations of commerce and the role of the commerce clause in the founding of the United States represented a distinct departure from other 18th century forms of republican government.

To understand the significance of the commerce clause's foundations, it is first necessary to examine the role of the social contract since it serves as the most significant foundation for private property. The fundamental idea of the social contract comes from the enlightenment definitions by political philosophers such as Thomas Hobbes and John

Locke. Hobbes wrote extensively about the state of nature – most importantly that it is a chaotic, dangerous condition. Without first understanding what contractarian society entails, it is impossible to understand why the statement of the commerce clause is unique and why the clause signals a very different kind of founding document than had ever been written before.

This consideration of the commerce clause's foundations will examine several major themes. The initial understanding of the clause, derived from Supreme Court cases, indicates how the Founding Fathers understood the role of property and commerce within the young republic. This understanding was informed by specific ideas, in particular the evolution of contract theory from Hobbes to Locke, focusing on property rights and the effects of the property on rights and individual freedoms. These themes must be examined in order to understand the context of the clause, the necessity of its inclusion in the Constitution, and the clause's effect on the formation of the nation.

In order to understand the clause, it is essential to examine the idea of commerce as a distinct entity through statements of property rights and the role of the social contract as it regards property. These twin claims will be examined and, through this consideration, I argue that the commerce clause is unique to the American Constitution as it is the first statement of free market economics in any founding document. Furthermore, without the peculiar affect of commerce though the evolution of the social contract and private property rights, the Constitution and the ideas of freedom that it articulates would not have developed in the same manner.

Hobbes' Social Contract

The foundation of the modern democratic state is the social contract. Without the movement away from the divine right of kings toward the social contract, democracy as it was understood in the 18th century would have never come to fruition. The ideas which result from the contract are woven into the Articles of Confederation and the Constitution. To understand fully the significance of the commerce clause within the overall scheme of American democracy, it is first important to understand the underlying contract theory that created liberal society.

Social contract theory, or contractarianism, is composed of several elements. The foundation of a state's internal and external sovereignty is the social contract. Implicit to the existence of the social contract is the idea of a willing transfer of power and certain rights, and, therefore, the administration of those rights, to an absolute "sovereign power."

A prior of contract theory is the initial bargaining position in which all individuals find themselves outside of the contract. This transfer occurs because, in the state of nature, individuals are unable to govern themselves and live in a way that moves them beyond a natural and constant state of war as they compete for resources and a better life, or worse, simply for existence. Individuals enter into a social contract, abrogating their claim on the right to self-governance and instituting a commonwealth executed by a sovereign when all individuals acknowledge that, as Thomas Hobbes wrote, "*I Authorize*

and give up my Right of Governing my selfe, to this Man, or to thie Assembly of men, on this condition, that thou give up thy Right to him, and Authorize all his Actions in the like manner."[1]

Hobbes' definition of the sovereign suggests two implicit capabilities allowed to the sovereign. First, the sovereign has absolute power within the scope of his realm. There are no external forces which could compel behavior or pass any kind of judgment on the sovereign; if this were not the case, the sovereign could not uphold his obligations under the contract. Second, the sovereign is indivisible and shares his authority with no one. If the power of the sovereign were divisible, it would lead to the degradation of his power and an inability to protect the contract. Hobbes created the first statement of contract theory, one that weighed heavily upon the English system of government and served as a precursor for the rights tradition in England. Hobbes' contract theory is not the only foundation on which American republicanism was created, though his influence is undeniable in the English rights tradition.

Locke articulates a very similar understanding of the social contract in his *Second Treatise on Government*. Departing from the dismal (nasty, brutish, and short) theoretical articulation of Hobbes' state of nature, Locke says of the state of nature that the "want of a common judge, with authority, puts all persons in a state of nature." He continues,

[1] Thomas Hobbes, *Leviathan*, Chapter XVII.

"…men living according to reason, without a common superior on earth, to judge between them, is properly the state of nature."[2]

To transcend the state of nature, governments are instituted with the explicit consent of the governed. This recalls the signing of the Declaration of Independence and the Constitution – both were created with the explicit consent of those who were to be governed under the contract.[3] The purpose of the government moves beyond the Hobbesian understanding to a specific idea of the "civic interests" of the individual under the contract. These were, as Locke wrote, "life, liberty, health, and indolency of body, and the possession of outward things."[4] Two of those ideas were inculcated directly into the Declaration of Independence. The specific interest in property does not appear in either the Declaration or the Constitution, but it was undoubtedly present in the mind of the authors and ratifying members who signed the Constitution. The word "property" occurs in the Federalist Papers 65 times, only surpassed by words of similar significance: liberty, which occurs 146 times, and commerce, which appears 76 times.[5]

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[2] John Locke, *Second Treatise on Government*, Chapter 3, Section 19.

[3] Locke, *Second Treatise*, Chapter 8, Section 97, Section 112. Section 112 answers the challenge that not all have consented (such as those born into a system of government) to be governed.

[4] John Locke, "A Letter Concerning Toleration." 1689.

[5] This data was derived from full text search of the *Federalist Papers*. The search terms and count were, "liberty:" 146 times, "commerce:" 76 times, "property:" 65 times, "life:" 31 times, "equality:" 28 times, "freedom:" 8 times.

Locke creates a place for property in the contract that ties it inexorably to liberty. Property is the result of an individual's labor through the extraction of natural resources from the common environment. In Chapter 5 of the *Second Treatise on Government*, he defined labor rights theory:

> every man has a property in his own person: this nobody has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.

Under the labor theory, property, resources taken from nature and used for his betterment, cannot be taken from the individual – they are the cumulative result of agency and effort. No one else under the contract can make a claim on this property as long as the individual does not violate the limits on property in the state of nature.[6] The limits on property specify that nothing goes to waste and that a right to property exists as

[6] Locke, *Second Treatise*, Chapter 5, Section 26.

long as it does not exclude others from the opportunity to gather the resources needed for subsistence.[7] This formulation of property rights suggests a society in a state of nature with a low population and high resource density. However, this was not reflective of contemporary society. As a result, he suggested a further formulation of property rights that overcame the limits on individual property. Individuals, through their labor, can collect property in excess of what they can reasonably use. The item most commonly traded and the most durable will become the standard of trade: money. Through the use of money as a foundation for trade, the excess property of an individual can be commoditized. This is the foundation for the creation of wealth and the means of escaping the state of nature.[8]

The cumulative effect of escaping the state of nature through the accumulation of property necessarily leads to the creation of government. This occurs because the use of money enables those who are most motivated and rational to create wealth at a rate which would outstrip less motivated individuals.[9] As the amassing of land and physical property increased, common property would become scarcer. This, Locke argued, would result in civil unrest, population growth, and an increasing scarcity of resources. The need for the social contract and civil society emerges out of this synergy.

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[7] *Ibid*, Section 31.

[8] Locke, *Second Treatise*, Chapter 5, Section 42.

[9] *Ibid*, Section 26.

This is the reason that men form governments with the specific purpose of protecting their life, liberty, and property. Without private property as the causal factor, the state would not be specifically necessary. However, Locke argued, once the state was formed, its purpose was to rule in the interest of the public good and not in the interest of the government as its own entity. Should the government cease to protect the interests of those under the contract, those under the contract retain the right to dissolve the contract and create a new government.

Charles de Montesquieu, in *The Spirit of the Laws*, continued to develop the concept of the social contract. He was interested in defining the role of social institutions and the laws which they create. Montesquieu created a distinction between natural laws, which he asserted were granted to men by God, and positive human law and the institutions necessary to implement those laws. Positive law, being created by man, was naturally fallible and subject to a great number of conditional restrictions.[10] These conditional restrictions would result in an institutional and legal system which was largely incongruent or, more dangerously, fundamentally unstable because of the fallibility of man's wisdom.

However, there was some hope to be taken from this slightly dismal view of institutional governance. Montesquieu believed that laws and institutions could be used effectively if they were properly calibrated:

[10] Charles de Montesquieu, *The Spirit of Laws*, 1748, Book 1, Section 1.

> they [laws] should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another. They should be in relation to the nature and principle of each government; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions. They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs. In fine, they have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered.[11]

The laws, once defined, should be applied fairly, rationally, and deliberately. As a result, the individual state – with sets of defined laws and institutions calibrated specifically to their particular need – would be more just and equitable than that of a large nation possessing a set of universal laws which were subject to a greater degree of arbitration in their application.

[11] Montesquieu, *The Spirit of Laws*, Book 2, Section 3.

In *The Spirit of the Laws*, three forms of government are defined: republican governments, monarchies, and despotisms. The distinction between each form of government was the manner in which the laws were applied. Governments could be corrupted if they were not ruled by "fixed and established laws."[12] Following the reasoning of Locke, Montesquieu argued that it was the people themselves who were sovereign. Power may be acquitted to individuals, but their role was to govern within the will of the sovereign people. For a republican democracy to function, it was necessary that "a constant preference of public to private interests" be maintained.[13] In order for the supremacy of public over private interests to succeed, a strict education of all the citizens was required. Through this education it would be possible to sustain the republican government and prevent it from corrupting itself. However, for optimal effectiveness, the state should be small and its fundamental principles both well known and universally espoused. If these recommendations were not followed, then republicanism could be corrupted in one of two ways. First, it could be corrupted as a result of "the spirit of inequality."[14] This occurs when the citizens of a republic do not identify their individual interests with the interests of the state, and instead begin to pursue their own personal interests to the detriment of other state citizens. In doing this, those who pursue their own interests seek to increase their political power over their fellow citizens.[15] The second corruption of republicanism comes in the form of "the

[12] *Ibid*, Book 2, Section 1.

[13] *Ibid*, Book 4, Section 5.

[14]Montesquieu, *The Spirit of Laws*, Book 8, Section 2.

[15] *Ibid.*

spirit of extreme equality" in which citizens are dissatisfied with simply being equal before the law and seek to be equal in all areas.[16] From the theoretical foundations of Locke, Hobbes, and Montesquieu emerged a cohesive set of ideas which had a dramatic effect on the evolution of individual rights within the liberal system.

The Rights of Englishmen

These rights were claimed by the people in a series of negative-rights documents that served as contracts between the English people and the crown. As a result, the social contract gradually became enmeshed into British culture. This would lead to the eventual discord between and separation from England by the American Colonies, stemming from the violation of the contract through the crown's encroachment on the rights of private property and commerce.

The theoretical foundations became more than simply articulations of an idea as the strong integration of property rights was engendered in the English tradition. The Magna Carta was the first English document which begins to hint at the idea of a social contract that delineated the responsibilities of the sovereign. While Locke would not write his *Second Treatise on Government* for another 400 years, present in the Magna Carta is the acknowledgement that the holding of property imbues the possessor with specific rights. These rights, when not violated by the sovereign, enable private citizens to engage in commerce.

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[16] *Ibid,* Book 3, Section 3.

In a close reading of the 1215 Magna Carta, there are three observations to be made concerning commerce, based on the clauses of the charter. First, there is a tacit statement of property rights in clauses 28, 30, and 31. These sections deal with compensation for the seizure of private property – specifically wood, food, and horses, items which were critical to subsistence and livelihood in the 13th century. These items were, Locke would later articulate, the most basic forms of property which individuals could extract from their natural surroundings.

The next statement of property rights and commerce is in clause 41, which outlines the freedom of movement for merchants as well as the freedom from excessive and illegal taxes as they conduct business throughout the nation. This clause reaches beyond the simple extraction of resources from the environment and acknowledges that, within the contract, it is beneficial to society for individuals in possession of an excess of goods to trade with others for different goods.

The third statement is in clause 35, where the requirement for uniform weights and measurements is established – which suggests that individuals were interested in protecting their private property and furthering the ability to conduct commerce. While none of these clauses suggest or constitute a thorough understanding of commerce, they do create a foundation from which a more refined understanding would be developed of the connection between private property, commerce, and freedom.

The next example is the First Charter of the Virginia Company (1606), which reflects a form of commerce: mercantilism. This charter sets forth the goal of bringing

Christianity to the new world. However, within the charter are explicit directions to mine gold, silver, and copper and establish a currency within the colonies for the "ease of traffique and barganining between and amoungest them and the natives there." The Charter continues to establish some basic mercantile protections for the colonies. In terms of tracing the extension of natural rights, however, it is very important to note that the Charter extends all the rights of Englishmen to those who emigrated to the colony and to their children. The most significant element of the Virginia Company Charter is that, while it is phrased as a charter setting out noble goals encompassing a liberal tradition, it is ultimately a mercantilist venture approved by the crown naming specific individuals who are commissioned to act on the behalf of the king's interests.

There are several other significant documents, including the English Petition of Rights, the Concessions and Agreements of West New Jersey, and the Virginian Declaration of Rights, which all share a common theme. First, they embrace the social contract and, particularly the American documents, seize on the Lockean notion of property-based rights. Second, they articulate a statement of commercial activity with a preference for a system of free markets as opposed to a more controlled mercantile system. In fact, one of the primary objections noted in the first paragraph of the 1774 Resolution of the Continental Congress regards the effects of the mercantile system imposed on the Colonies by England. This theme is repeated multiple times throughout the document.

Cumulative readings of these documents suggest two trends. First, the concept of natural rights took root and flourished in the English legal and political tradition. Second, for numerous reasons, the American colonists diverged from the broad English tradition and focused specifically on the Lockean construction of natural rights working in concert with property rights based on contract theory government. This notion only grew stronger and more dominant in the American tradition leading up to the Revolutionary War, and is claimed as a causal factor in the Revolution as a whole. Commerce is the natural manifestation of these ideas and the inclusion of a specific clause addressing commerce within the Constitution is the logical result of this heritage.

The Commerce Clause in Original Context

Modern conceptions of commerce are often associated intellectually with the idea of buying and selling – conducting trade – in a free market. [17] Ostensibly, given the evolution of the free market and Supreme Court rulings over the past 200 years, those who wrote the commerce clause would understand a different definition of the word commerce than is understood today.

Resultantly, a deconstruction of the clause would aid significantly in comprehending what the drafters of the Constitution understood the clause to mean and

[17] This section draws heavily upon the ideas presented in Randy E. Barnett's article "The Original Meaning of the Commerce Clause." *University of Chicago Law Review.* Winter, 2001. Available from http://www.bu.edu/rbarnett/Original.htm; accessed 6 December 2010; Internet and Michael Conant's, *Constitutional Structure and Purposes* (Westport: Greenwood Press, 2001).

its scope. Specifically, how was the clause and its language differentiated from continental statements of commerce or commercial activity? To answer this question, an examination is needed of the critical words in the clause and their historical definitions: "commerce," "regulate," and "among."

The word "commerce" in the late 18th century had numerous meanings. In common usage, it was understood to mean the exchange of materials or labor for money, the bartering of goods for other goods, the exchange of commodities and currency, international trade or any other type of commercial exchange. However, as is congruent with the definitions of key principles throughout the Federalist Papers, it is reasonable to assume that when the word "commerce" was utilized, it was understood through the most basic definition – behavior directed specifically towards trade, exchange, or barter, the activities specifically defined and protected in the English tradition. Alexander Hamilton wrote:

> an unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished and will acquire additional motion and vigor from a free circulation of the commodities of every

> part. Commercial enterprise will have much greater scope from the diversity in the productions of different States.[18]

This critical definition offers key insight into the founders' understanding of commerce. The competing interpretation of commerce drew its definitions from mercantilism and attempted to supplant this original understanding with an idea that commerce is any "gainful activity," to include not just trade but imports and exports, shipping, agricultural activity, and manufacturing.[19] If this definition seems familiar, this is not coincidental as it was again claimed by the progressive movement in the early 20th century as they reshaped the definition of commerce. This subtle definitional shift dramatically changed the reading of the commerce clause and its impact on individual freedom and liberty.

When the clause is read to mean strictly trade and exchange, the power afforded to the federal government is a negative power in which its role is to protect the execution of commerce in the interest of the individual. Resultantly there are few restrictions upon commerce (to be addressed more fully in short order) and, in the interest of the government, commerce is used to present a unified economy which was of particular significance because of the debt burden upon the young nation following the Revolutionary War.

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[18] Alexander Hamilton, "Federalist No. 11," in *the Federalist Papers*, ed. Benjamin F. Wright (Boston: Harvard University Press, 1961), p. 140-141.

[19] Michael Conant, *Constitutional Structure and Purposes* (Westport: Greenwood Press, 2001), p. 35.

The degree of federal control over the commerce clause was tied directly to the strength of the Union. It was again Hamilton who remarked that "a unity of commercial, as well as political, interests, can only result from a unity of government."[20] Furthermore, he wrote, "the aggregate balance of the commerce of the United States would bid fair to be much more favorable than that of the thirteen states without union or with partial unions."[21]

Defining commerce as "gainful activity," to include elements of agriculture and manufacturing, extends the power of the federal government beyond reasonable bounds and is not found in the original understanding of commerce. Defined in this manner, commerce would be a tool of the federal government to orchestrate and control the distribution and creation of commodities. Because of the power structure present in the mercantile economy, the focus of commerce would move away from a negative understanding, protecting the opportunity for individual agency in the pursuit of commercial opportunities, to a positive, protectionist definition discouraging commercial pursuits to all but those who already held significant wealth – principally the aristocracy and the merchant class.

The next element of the commerce clause to be considered is the phrase "among the several states." The obvious interpretation of this phrase is that it refers to commerce,

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[20] Alexander Hamilton, "Federalist No. 11," in *The Federalist Papers*, ed. Benjamin F. Wright (Boston: Harvard University Press, 1961), p. 141.

[21] *Ibid*, p. 141.

understood as exchange and trade, between states. Alternatively, it could be read as "between individuals of different states." This raise the question of why it was necessary to distinguish that it is commerce "among the several states." If the phrase were simply understood to mean "between people," taken to its logical end this interpretation would have enabled the federal regulation of commerce between individuals of the same state. As a result, the conclusion can only be that specific verbiage of "among the several states" was adopted as a limit upon the power of the federal government's regulation of the clause. Again, this suggests that the clause is not just an articulation of the negative rights of the individual but a statement of federal control over the excesses of state power under the articles such that the individual is granted a greater degree of economic freedom.[22]

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[22] This conclusion is drawn from Federalist 42, where Madison states that the purpose of the clause was to regulate commerce between the states and stabilize international trade. He wrote:

> the defect of power in the existing Confederacy to regulate the commerce between its several members is in the number of those which have been clearly pointed out by experience…without this *supplemental provision*, the great and essential power of regulating foreign commerce would have been incomplete and ineffectual. A very material object of this power was the relief of the States which import and export through other States from the improper contributions levied on them by the latter. Were these at liberty to *regulate the trade between State and State*, it must be foreseen that ways would be found

The last major component of the clause was the power "to regulate." There are two possible interpretations of the word "regulate." From Samuel Johnson's 1785 dictionary, the two definitions were, "1. To adjust by rule or method, 2. To direct."[23] To aggregate these two definitions from Johnson, one could reasonably say that to "regulate" means to standardize in a specific sense. Applied to the clause, "to regulate" would mean

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> out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former.

However, he wrote in Federalist 45 that there was a limit to the power of the federal government such that it could not regulate or control intrastate commerce:

> the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

[23] Samuel Johnson. *A Dictionary of the English Language*. London: 1785. The Internet Archive [Online] available from http://www.archive.org/stream/dictionaryofengl02johnuoft#page/n483/mode/2up; accessed 6 December 2010; Internet.

to standardize and only standardize, not regulate or prohibit in favor one state over another, the commercial activity between the states.[24]

When the clause is deconstructed in this manner, what emerges is an understanding of Congress's power that is both narrow and specific. This is not accidental – the clause represents an intentional statement of negative rights grounded in the protection of individual freedom based on property rights. The clause was designed to facilitate, through standardization and open competition both between states and other nations, an idea of a free market in which all actors have the opportunity to create wealth. In this way the statement of the commerce clause represents a dramatic shift, a culmination of ideas over 500 years in the making, in economic theory – particularly an economic theory that eschews a high degree of manipulation to favor the indigenous markets and instead focuses on creating a free market with few restrictions. This shift was a reaction to the economic theory of the period which was based on theories that were discordant with the American understanding of individual rights and freedoms.

The Destructive Effects of Mercantilism on the Colonies

[24] See the US Constitution, Art 1, Section 8. Clause 1. "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." The latter half of this clause prevents Congress from making any kind of favorable regulatory or prohibitory restrictions against a particular state.

The dominant economic theory of the 18th century was mercantilism, the goal of which was to bring about a "favorable" balance of trade in which nations would attempt to import and accumulate significant amounts of gold and silver bullion, while simultaneously increasing exports, decreasing or heavily taxing imports, creating monopolistic domestic market conditions, and maintaining a stable level of domestic employment.[25] Those goals served several larger purposes.

The chief purpose was to consolidate economic power for the competitive hegemonic states. The means by which this was accomplished was through merchants acting at the behest and under the protection of the state. As a result of this relationship, it was in the interest of the state to protect the commercial ventures of the merchant class through mechanisms designed to disrupt external competition. These protectionist trends were exhibited in different manners domestically than they were externally. Domestic mercantilism took shape through the state sponsorship of industry and preferential treatment towards newly established ventures. On a more regional level, monopolies would be created favoring the domestic producers or, more aggressively, a particular

[25] Laura LaHaye. "Mercantilism." *The Concise Encyclopedia of Economics.* David R. Henderson, ed. Liberty Fund, Inc. 2008. Library of Economics and Liberty [Online] available from http://www.econlib.org/library/Enc/Mercantilism.html; accessed 6 December 2010; Internet and Adam Smith. *An Inquiry into the Nature and Causes of the Wealth of Nations*. Edwin Cannan, ed. London: Methuen & Co., Ltd. 1904. Library of Economics and Liberty [Online] available from http://www.econlib.org/library/Smith/smWN12.html; accessed 6 December 2010; Internet.

manufacturer (often supported by the state) which would, in turn, destroy all competition.[26]

External trade was affected by the creation of stiff tariffs, quotas, taxes and by blocking importation of goods that competed with indigenous industry. Furthermore, skilled craftsmen and the particular tools of their trade were prohibited from emigrating to colonies.[27] Beyond controls on industry were the controls on shipping, the only means of importation and exportation from the areas of the world which possessed the items most coveted in England. As a result, strong professional navies were created, trade monopolies developed, and heavy controls placed on shipping such as the English Navigation Acts, forcing the colonies to ship their goods to England prior to selling them anywhere, or requiring that the colonists purchase imported goods rather than the same goods made in the colonies. The Navigation Acts, in particular, caused additional challenges for the Colonies, as only British-owned and operated or licensed vessels could export and import goods.

The effect of mercantilism on the economy of the newly formed United States was not lost. Prior to the Revolutionary War, trade to and from the colonies was balanced in favor of England. Through the use of taxes on specific items such as stamps and molasses, England forced the Colonies to generate revenue for the crown while

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[26] Adam Smith. *An Inquiry into the Nature and Causes of the Wealth of Nations*. Edwin Cannan, ed. London: Methuen & Co., Ltd. 1904. Library of Economics and Liberty [Online] available from http://www.econlib.org/library/Smith/smWN12.html; accessed 6 December 2010; Internet.

[27] *Ibid*, IV.2

preventing them from having adequate representation in Parliament. The previously mentioned Navigation Acts were an extension of mercantilism policies that enriched England at the cost of the Colonies.

After the Revolutionary War, the economic system, though now severed from England, changed only slightly. The Articles of Confederation did little to mitigate or reduce the domestic effects of mercantilism. So profound was the effect of mercantilism in the states that Alexander Hamilton remarked that through protectionism the states had "fettered, interrupted and narrowed" commerce and the opportunity for commercial activity between states. Following the Revolution, without a strong federal government to protect the interests of the people, the individual states along with particular individuals, mainly merchants who had some influence at the state level, continued to embrace mercantilism. Several states enacted strong import tariffs against other states, established shipping monopolies, and demonstrated, as Chief Justice John Marshall would later articulate, a "dangerous indifference to private property."[28]

The Failure of the Articles and Foundations of Commerce

The commerce clause grew out of failures of the Articles of Confederation to regulate potentially tenuous interstate commerce and questions of foreign commerce instigated by the influence of mercantilism. Under the Articles, each individual state retained "its sovereignty, freedom, and independence, and every Power, Jurisdiction, and

[28] Felix Frankfurter, *The Commerce Clause* (Chapel Hill: University of North Carolina Press, 1937), p. 14.

right."[29] Resultantly, newly independent citizens of the United States were less citizens of the United States than they were citizens of Massachusetts, New York, South Carolina, and Virginia. Invoking ideas much older than the colonies, intrinsic to the English tradition of rights, the Articles guaranteed certain rights such as the freedom of movement, freedom of trade and commerce, and the protection of private property and means of enterprise.[30] While there was a stated negative right of commerce, the United States Congress effectively had no ability to protect this right. Article IX stated that:

> Congress assembled, shall have the sole and exclusive right and power on…entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subject to.

Congress had no substantive claim on the power to regulate interstate commerce or commerce with foreign nations. The business and commercial enterprises of the states were their own purview and not subject to federal control. This led to the raising of tariffs and taxes among states and attempts by several states to create monopolistic conditions benefitting the state alone, and not union. This risked creating trade wars between the

[29] The Articles of Confederation, Article II.

[30] *Ibid,* Article IV.

states, as one of the easiest ways to raise income was to impose state-line tariffs on interstate goods.[31]

A crucial failure of the Articles of Confederation, perhaps the critical failure, which led to the dissolution of the Articles and the drafting and ratifying of the Constitution, was the way the power to levy taxes was stated. In the Articles, Congress was granted no power over taxes, though Congress could request that states provide money from their own tax base to pay for national expenditures such as defense and "general welfare."[32] The Revolutionary War had created a massive debt burden on all the states. In an attempt to reduce this debt, the various states had adopted mercantilist practices which discouraged interstate trade and greatly inhibited individual commercial activity.

This mercantile behavior was the cause of Shay's Rebellion in 1787. The impetus for the uprising was collection of debts by the wealthy against numerous veterans who had fought in and departed the Continental Army unpaid, and returned to find their farms, places of business, and homes threatened with confiscation. The debts became a point of difficulty because the creditors demanded repayment in hard currency, of which there was an insufficient amount present in Massachusetts. As a result, the lenders, mainly merchants and other wealthy individuals in Boston, confiscated any and all assets from

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[31] James Madison, "Federalist No. 42," in *The Federalist Papers*, ed. Benjamin F. Wright (Boston: Harvard University Press, 1961), p. 305.

[32] *Articles,* Article VIII.

their debtors who in turn rioted and attempted to seize the Springfield Armory.[33] The behavior on the part of both the creditors and debtors in Massachusetts was extreme, but it was indicative of the stress put on the states to repay the debts from the Revolutionary War. The states themselves embraced mercantilism and acted in a manner that discouraged the broad development of commerce.

A New Economic Theory

The problem of the national debt weighted heavily upon the states, which rapidly proved incapable of addressing the challenge. Under the Articles of Confederation, the commercial enterprises of states in relation to foreign and domestic trade were not subject to federal oversight and the state in which the port or transaction was located would have been entitled to the revenue. As a result, there was no national control of American ports and no revenue generated upon foreign vessels trading in American waters by the federal government. The federal government needed the power to regulate navigation and build a navy, as revenue could be generated through the control of navigation and the ports; this was a major defect of the Articles of Confederation.[34] If the power to regulate commerce were to be established formally under the Constitution, the federal government would be entitled to this revenue source and the resulting revenue would be applied not to regional

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[33] Calvin Johnson, *Righteous Anger at the Wicked States* (New York: Cambridge University Press, 2005), p. 220.

[34] Alexander Hamilton, "Federalist No. 11," in *The Federalist Papers*, ed. Benjamin F. Wright (Boston: Harvard University Press, 1961), p. 137.

or local interests, but to federal interests – namely addressing the debt incurred from the Revolutionary War.[35] As Chief Justice Marshall would later state, when remarking upon the Constitutional Convention and the advent of the Constitution:

> it may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolutions which introduced the [modern constitutional] system, than the deep and general conviction, that commerce ought to be regulated by Congress.[36]

Thus, at the Constitutional Convention, the addition of a strong commerce clause was considered critical to the success of the young nation. As Alexander Hamilton wrote in *Federalist* 6:

> the spirit of commerce has a tendency to soften the manner of men and to extinguish those inflammable humors which have so often tended into wars. Commercial republics, like ours…will be governed by mutual interest and will cultivate a spirit of mutual amity and concord.

Continuing upon this point, Hamilton argued in *Federalist* 22 that because trade and interstate relations would appear to inhibit complications between states, there was

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[35] John G. Egan and Parmalee E. Prentice, *Commerce Clause of the Federal Constitution* (Chicago: Callaghan and Company, 1898), p. 3.

[36] *Brown v. Maryland*, 25 U. S. 419 (1827).

"no object, either as it respects the interest of trade or finance, that more strongly demands a federal superintendence."

The degree of authority which was granted to Congress under the clause and the foundational ideas implicit to the clause caused James Monroe to comment that it constituted a "radical change in the whole system of our government."[37]

Despite the perceived breadth of power acquitted to the federal government over the states, skeptics maintained that the commerce clause would not have any significant impact upon the interaction between the states and federal government. President Washington's attorney general, Edmund Randolph, wrote concerning the powers granted by the clause that they "are little more than to establish the forms of commercial intercourse between the states."[38] This sentiment was reflected by Alexander Hamilton, who, while supportive of the clause, was skeptical about the real significance of any limitations on the State's ability to regulate commerce.[39] This skepticism was well founded, as it took thirty-five years for a case challenging the reach of the federal government's ability to enforce the commerce clause to reach the Supreme Court.

Commerce Clause Jurisprudence

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[37] George Bancroft, *History of the United States* (Boston: Little, Brown and Company, 1857), p. 143.

[38] Egan, Prentice, p. 12.

[39] *Ibid.*

McCulloch v. Maryland was the first Supreme Court case to examine, in an oblique manner, the constitutionality of Congress' power under the commerce clause. In 1816, a second charter for the Bank of the United States was established by Congress. Objections to the charter were focused on the scope of Congress' powers over states' rights as delineated in the Constitution.[40] Central to the argument was the notion that powers not specifically delegated to the federal government were necessarily reserved for the people of the states to delegate in whatever manner they saw fit. It is out of this debate that *McCulloch* arose. Maryland passed a law imposing a $15,000 tax on all banks in the state not chartered by the state legislature. The cashier for the Maryland branch of the Bank of the United States, James McCulloch, refused to pay the tax. The state of Maryland successfully sued McCulloch and he, in turn, appealed to the Supreme Court. The Court ruled unanimously that, though the Constitution does not grant Congress the express ability to create a national bank, it does allow Congress to control matters of national economic policy, under which the establishment of a national bank would fall.[41] Furthermore, the Court held that Maryland could not tax the national bank because to do so would place the Maryland Legislature in a position of superiority to the federal government.[42]

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[40] *McCulloch v. Maryland*, 17 U.S. 316 (1819).

[41] *McCulloch v. Maryland*, 17 U.S. 316 (1819).

[42] *Ibid.*

Chief Justice Marshall's decision in *McCulloch* relied principally on a structural analysis of the Constitution. By examining the Constitution's allocation of power and the structure of the federal government, the Court determined that the federal government possessed the power to make laws. This decision did not rest upon the enumerated power of Congress to make all necessary and proper laws, but upon the broad plenary granted by the Constitution.[43] By making a passing reference to the "necessary and proper clause," the Court incorporated the plenary basis of power into future interpretations of the clause and its ability to enable Congress to pass ever-expansive legislation.

The Marshall Court effectively expanded the Court's capability of judicial review, and defined a broad standard for the application of Congress' powers on the grounds that the Constitution supplies Congress with implied powers outside of the expressly permitted powers for the creation and maintenance of the federal government. This is hinged upon the idea that Congress may make laws that are "necessary and proper" as long as they are not in violation of the Constitution, or adopted to accomplish an objective that is not the responsibility of the government.[44]

While unmentioned in Marshall's opinion, the commerce clause played a silent yet integral role in the second finding of *McCulloch* as well as in setting the foundation

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[43] David O'Brien, *Constitutional Law and Politics, Sixth Edition, Volume 1* (New York: W.W. Norton and Company, 2005), p. 525.

[44] David O'Brien, *Constitutional Law and Politics, Sixth Edition, Volume 1* (New York: W.W. Norton and Company, 2005), p. 525.

for future exercise of the commerce clause. The Court ruled, in the spirit of the commerce clause, that states might not interpose themselves into legitimate constitutional exercise of power by the federal government. The clause, though unmentioned, is significant because the causal question of *McCulloch* was focused around commerce in the form of bank taxes. As a result of this case, the powers of Congress were reinforced as well as the supremacy of the national government over the states, and the framework was established for subsequent cases to apply the commerce clause. *McCulloch* was significant because, recalling the mercantilist disposition of the states, it created the opportunity for the Court to challenge and override protectionist behavior by the states. Such an opportunity would present itself a brief nine years later.

Gibbons v. Ogden, in 1824, was the first case in which the scope of the commerce clause, Congress' ability to regulate commerce, and the Court's ability to make substantive rulings on Congress' scope of powers were tested. The case focused on the legality of the issuance, by the legislature of the state of New York, of exclusive licenses to private individuals operating steamboats on the state's waterways. Ogden, whose license allowed him to operate ferries between New York City and ports in New Jersey, sought an injunction against a competing ferry operator, Thomas Gibbons. Gibbons argued in the New York courts that his ferries were licensed under a 1793 Congressional act that protected vessels engaged in "coastal trade and fisheries." The New York courts denied Gibbons' claim on the grounds that the act only protected coastal vessels and had no provisions for the protection of steamboats. Gibbons appealed

the state court's rulings to the Supreme Court on the grounds that it prohibited Congress' regulation of interstate commerce.[45]

The Supreme Court ruled unanimously in favor of Gibbons, holding that the Constitution granted Congress the authority to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[46] Furthermore, based on the structural analysis in *McCulloch*, the Court ruled that the Constitution granted the federal government sufficient power to enable Congress to make all laws "necessary and proper" which pertained to the regulation of interstate commerce. Chief Justice Marshall stated that the Constitution allowed for the enumeration of power, not the specific delineation of individual powers. As demonstrated in *McCulloch*, the federal government has the power to regulate commerce and the New York law would limit intercourse between the states.

Recalling the discussion of the clause in the *Federalist Papers*, the Chief Justice remarked, "all Americans understand and have uniformly understood, the word 'commerce' to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed."[47] Congress, as the elected representative of the people, is empowered to act in the interests of the United States; in this situation, the interests of the United States determined that no individual state may

[45] *Gibbons v. Ogden*, 22 U.S. 1 (1824).

[46] US Constitution, art. 1, sec. 8.

[47] *Gibbons v. Ogden*, 22 U.S. 1 (1824).

limit the interstate navigation on waterways.[48] In Gibbons, the finding of the Court highlights the tension between the exercise of positive rights by the states – such that the states favored interests explicit to their benefit and the protection of the negative rights by the Federal government such that the states could not inhibit the free exercise of commerce on the part of the individual.

Gibbons has a significant impact because it is the first case to examine directly the commerce clause. It further defined Congress' power to apply the commerce clause to the states beyond what *McCulloch* allowed. No longer did the commerce clause simply apply to interactions between the federal government and the state, but it now extended the power of the federal government to regulate private individuals' and corporations' actions which, in some manner, impinged upon the exercise of free interstate commerce. More broadly, *Gibbons* marked the beginning of the expanded use of legislative power to regulate commerce in the interest of the federal government.

For the 65 years following *Gibbons,* there were no major cases heard before the Court that had any substantive effect on the commerce clause. It was not until 1895 and *U.S. v. E.C. Knight Company* that a case was heard before the Court which shifted the interpretation of the clause. [49]

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[48] *Ibid.*

[49] *United States v. E. C. Knight Co.*, 156 U.S. 1.

The effects of the industrial revolution were profound on the United States as the nation spread west and aggressively embraced industrialization and commerce. Numerous monopolies sprang up which sought to control everything from rail lines to oil production and distribution. In response to corporate monopolistic behavior, the Sherman Antitrust Act of 1890 was passed to prohibit contracts, corporations, trusts, or persons from creating a monopoly in a specific area of commerce or trade among "several States, or with foreign nations."[50] One such example of a monopoly was the American Sugar Refining Company. By 1892, the Company already owned a majority of the sugar-refining industry. In order to expand its interests, it bought enough stock in the four remaining independent refineries to have a controlling interest, allowing it to control 98% of the sugar refining industry in the United States.[51]

One of the refineries it controlled was the E. C. Knight Company. The Department of Justice tried to block the purchase of the stock and alleged that the American Sugar Refining Company, E.C. Knight, and the other three companies were conspiring to restrain free trade that would violate the Sherman Antitrust Act.[52] The Third Circuit Court denied the Justice Department's request to block the stock purchase on the grounds that the companies were not trying to restrict interstate commerce or trade

[50] 15 U.S.C. § 1.

[51] *United States v. E. C. Knight Co.*, 156 U.S. 1.

[52] *Ibid.*

and, as such, the request did not fall under the Sherman Antitrust Act. The Justice Department appealed this decision to the Supreme Court.

The Supreme Court held that it is in the national interests of the United State to assure that commerce and trade are not disturbed by the formation of monopolies that would limit free commerce. There is, however, a fine balance between assuring that free trade occurs, and excessive government involvement in business. Chief Justice Fuller wrote, "if the national power extends to all contracts and combinations [of business]…comparatively little of business corporations and affairs would be left for state control."[53] While American Sugar had acted in a manner which increased its private good, it did not attempt to control interstate commerce or limit free trade.[54] As a result, the Court found in favor of the E.C Knight Company, ruling that the control of a specific industry does not constitute the monopolization of commerce or free trade. On these grounds, the Court ruled that manufacturing, defined as production, but not interstate distribution of goods, may not be regulated by the federal government.[55] Rather, regulation of this kind is the responsibility of the states. This dichotomy between intrastate and interstate commerce set the tone for subsequent Court rulings as the Court found itself protecting intrastate state commerce from Congressional legislation and reinforcing state regulation.

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[53] *United States v. E. C. Knight Co.*, 156 U.S. 1.

[54] *Ibid.*

[55] *Ibid.*

Knight is significant because, while *Gibbons* further expanded and defined the government's control over the regulation of commerce, *Knight* constrained the expansion of the federal government's ability to exercise the commerce clause as it applied to interstate commerce. The Court's preference towards interpreting the commerce clause as an implied negative right weighed heavily in the favor of the individual right to conduct business without interference from the states. This interpretation of the clause meant that the individual states surrendered their claims on the activity of commerce within and between the states but could still exercise their power to protect their citizens so long as the object of the regulation was the protection of the individual and not discrimination against commerce.

This theory of commerce clause interpretation is known as the dormant commerce clause for the reason that even when the federal government chooses not to exercise its power over regulation, the power to regulate lies dormant with the federal government and the states cannot assume any power over commerce. Because the Court held the view that the clause was dormant and that it was a negative right not subject to impingement by either the state or the federal government but rather that the federal government functioned to guarantee the right to private enterprise the Court promoted the idea that laissez-faire capitalism was a stated policy present in the structure of the Constitution.

Continuing the dormant view of *Knight* was *Hammer v. Dagenhart.* The legal issue in question was the constitutionality of the Keating-Owen Act of 1916 that attempted to prevent the interstate sale of products manufactured by children. The Court

ruled that the federal government had no power to regulate commerce based upon the use of child labor, and ruled the Keating-Owen Act unconstitutional. The ruling was based on the argument that the issue was not intrinsically one of morality, unlike state prohibition laws or interstate prostitution laws, because it dealt with the production of cotton which the Court argued was intrinsically "harmless."[56] Had the act of distribution been involved, which Congress could regulate, the decision likely would have gone differently. Furthermore, if the Court were to extend this protection it would expand the federal police powers and deny the states the ability to exercise their internal regulatory powers.[57]

In reaching the decision in *Dagenhart*, the Court, relying on *Knight*, made a distinction between the manufacturing of goods and the interstate distribution of goods, finding that a corporation may manufacture goods without the intention of interstate distribution.[58] With this distinction, the Court held that the federal government did not have the authority to regulate manufacturing unless it could prove interstate commerce was also affected.

This brief summary of the first 100 years of major commerce clause cases sheds light on the context of the clause and the direction in which the Court believed it should move. It suggests that, initially, the Marshall Court did not give much consideration to

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[56] *United States v. E. C. Knight Co.*, 156 U.S. 1.

[57] *Ibid*.

[58] *Ibid*.

the theoretical foundations of the commerce clause as *McCulloch* served to define the power structure between the federal government and state governments. As a result, the commerce clause was more of an articulation of legislative policy in this situation than a particular statement of liberal theory as it is applied to the agency of the individual. *Gibbons v. Ogden* suggests a different approach to the clause – an approach which would have a lasting effect on the interpretation of the clause. By acknowledging Gibbons' claim and finding in his favor against the state of New York, the Court made two statements about the nature of the clause. First, individual agency and commerce are inexorably connected. In the liberal tradition, to deny an individual the possibility to engage in commerce denies that individual's agency. The Court did not state this expressly in the opinion, as it argued that the federal government has the authority to regulate commerce between the states and the New York State injunction inhibited the free exercise of commerce which was injurious to the interests of the federal government. However, a close examination of the case suggests that there are three distinct levels of interest present. The first level (and in the eyes of the Court, the most important level) is the federal government, the second is the state, and the third is the individual. Though unstated in the opinion, by protecting the liberal freedoms of the individual from the predatory interests of the state, the federal government served as an analog for the sovereign in the social contract.

While *Gibbons* protected the interests of the federal government and the individual, *U.S. v. E.C. Knight Company* and *Hammer v. Dagenhart* did the exact

opposite. All three cases seem to favor laissez-faire commerce over protection of liberal ideas – particularity in *Knight*, as the Court failed to uphold the Keating-Owen Act and provide substantive protection for child workers. This is a very significant shift in the Court's definition of the commerce clause. Where *Gibbons* showed some inclination toward liberal ideas while supporting individual commerce, it would seem that the decision in *Hammer* is quite the opposite, as it supports ideas of capitalism and free commerce at the expense of liberal protection of the undefended laborers – in this situation, children.

There is an alternative explanation that is hinted at in *Hammer's* majority opinion. Delivering the opinion for the Court, Justice Day wrote:

> there is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions.[59]

This quote raises several questions about the nature of the commerce clause and the Court's view of the weight of ideas behind the clause. It is inferred that the Court viewed the clause as a statement of negative rights – meaning that

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[59] *Hammer v. Dagenhart*, 247 U.S. 251.

the role of the Court was to protect the private citizen and his interests from incursion by the federal government and the state. This is classically liberal in that it advances the idea that the individual may do as he or she sees fit within the scope of business. Simultaneously, in a decidedly darker light, one could argue that the Court was protecting the ability of the child workers to pursue economic ventures without external interference. At a theoretical level, this is defensible and potentially an argument that could be won. However, when the reality of the work environment and the abuse and mistreatment of children are taken into account, it is difficult to defend the position.

The Court's decisions in the 19th and early 20th century focus around two poles: first, the interest of the federal government in protecting the ability of its citizens to generate revenue and necessarily to engage in commerce, and second, the Court's seemingly subconscious interest in protecting liberal ideas but with the most libertarian understanding of those ideas. In the comprehension of the Court, the commerce clause was a negative right based in liberal property theory that insured individual freedom.

Conclusion

The rights of Englishmen were ever present in the minds of the Colonists. It was impossible to strip away the ideological and philosophical heritage of property rights and freedom that had originated with the Magna Carta. Every natural-born Englishman inherited these rights and the 1689 English Bill of Rights extended these rights to the

Colonists. The ideas of the free market and personal property took particular root in America. Over several generations these rights were augmented and expanded. The rights of property and freedom became inviolable in the minds of the Colonists, thus the violation of these rights by the sovereign represented a breach of the social contract. As demonstrated in this thesis, the idea of the free market – tied to the rights over one's property – was so significant that, combined with the violation of the social contract, it led to nothing less that the founding of a new and distinct nation unlike anything that had come before it.

After the Revolution, the Articles of Confederation proved to be incapable of fostering the economic foundation needed by the young nation, and in fact endangered the continued existence of the United States. It was obvious that a stronger, more resilient statement of national government, which integrated a strong negative right of commercial freedoms, was required. From the examination of the dominant contract theory of the period, the writings of the Founders, and English tradition emerged a theory of free market economics which had never before been integrated into the core foundations of a nation. Given the Founders' focus on individual agency, it is not surprising to find that this idea is woven into the fiber of liberty in the United States. Commerce, and most specifically the commerce clause, is a strong rejection of mercantilism, indeed any kind of centrally planned economy, and a whole-hearted endorsement of a negative understanding of commerce which favored agency and the individual accumulation of wealth to the betterment of the nation – as the first hundred years of commerce clause

jurisprudence demonstrates. The commerce clause is, as Tocqueville would later remark, the reason "that their [Americans] principles affair is to secure by themselves a government that permits them to acquire the goods they desire and that does not prevent them from enjoying in peace those they have acquired."[60] In the liberal tradition, it is from private property that the necessity for government arises, and only through commerce that democracy is sustained.

[60] Alexis de Tocqueville, *Democracy in America*, eds. Harvey C. Mansfield and Delba Winthrop (Chicago: University Of Chicago Press, 2002), p. 517.