The commerce clause threat to state abortion rights

Overview

In September 2022 Senator Lindsay Graham proposed a federal law that would ban abortions after 15 weeks into pregnancy.[1] This sets up a constitutional conflict with states that now have express state constitutional protections for abortion rights (California, Michigan, and Vermont). This article considers whether congressional power under the U.S. Constitution's commerce clause "to regulate commerce" among states allows the federal government to override statewide abortion protections and enact a nationwide abortion ban. The answer is unclear because the U.S. Supreme Court's commerce clause cases are inconsistent. Past decisions read congressional power over economic activity expansively, which suggests that a federal abortion ban could override state abortion protections. But the Court sometimes requires a stronger showing by Congress of economic activity substantially affecting interstate commerce, and medical abortion services may not meet that bar. Regardless, states interested in protecting abortion rights could try to avoid the commerce clause by making abortion a non-economic activity.

Analysis

The commerce clause caselaw is inconsistent

Senator Graham's bill maintains that congressional power to regulate abortion stems from the commerce clause.[2] The problem with determining whether he's right, and Congress can regulate abortion through the commerce clause, is that decisions defining congressional commerce clause powers are inconsistent, and the doctrine is currently in flux.

Until 1995, the U.S. Supreme Court interpreted the commerce clause expansively, reading it to grant Congress power to regulate three broad categories: the channels of interstate commerce,[3] the instrumentalities of interstate commerce,[4] and

activities that substantially affect interstate commerce.[5] The Court has used this last category to extend Congress's authority to solely intrastate activities, rejecting the argument that this invaded reserved state powers over their local concerns because "intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control . . . ."[6] On that reasoning, the Court allowed Congress to ban interstate shipment of certain products even though the whole business of manufacturing them occurred in one state.[7] And in *Wickard v. Filburn*, the Court expanded the federal government's reach under the commerce clause to wheat for personal consumption at home because even that had an effect on interstate commerce.[8] This expansive view of the commerce clause was unquestioned for over half a century.

Yet starting in 1995 with *Lopez* and again in *Morrison* in 2000, the Court seemed to retreat from the expansive commerce clause doctrine expressed in *Wickard*.[9] In *Lopez*, the Court held that Congress exceeded its commerce power in legislating gun-free zones in schools, dismissing congressional findings about the effect on interstate commerce of carrying firearms in schools.[10] The Court reasoned that growing wheat at home for personal use (as in *Wickard*) "involved economic activity in a way that the possession of a gun in a school zone does not."[11] Soon after, *Morrison* reached a similar result: gender-motivated crimes of violence, for which Congress sought to provide a federal civil remedy, were "not, in any sense of the phrase, economic activity."[12] As in *Lopez*, "the noneconomic, criminal nature of the conduct at issue was central to" the outcome.[13] Thus, in *Morrison* the Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[14] After 50 years of unquestioned commerce clause authority, the Court appeared to be pivoting to restricting Congress's attempts to regulate intrastate activity.

But just five years later, the Court pivoted again — back toward *Wickard*. In *Gonzales v. Raich*, the Court held that the commerce clause empowers Congress to prohibit state-law-permitted individual marijuana cultivation for personal medical

purposes.[15] The Court relied on the potential commoditization of marijuana as a fungible good despite its use as a legitimate medical treatment under California law.[16] The Court emphasized that Congress had a rational basis to conclude that, as a fungible commodity, home-grown marijuana would have an effect on marijuana prices and market conditions, and allowing home-grown marijuana to enter the market (through homegrown use, as in *Wickard*) would frustrate Congress's goal of eliminating the interstate market for marijuana entirely.[17]

This back-and-forth makes it difficult to predict where the Court will go with this doctrine, particularly given the potential impact of political views on outcome preferences.

Evaluating S.4840 under these commerce clause examples

Our best synthesis of these cases is that they define a spectrum of activity, from obvious commodities (wheat and marijuana) to obvious not-commodities (carrying chattel or committing crime) with a medical procedure lying somewhere in between. The question here is what constitutes the dispositive factor: that one pays for abortions (economic activity), or that it's a noneconomic medical procedure. In evaluating S.4840, the Court would have to distinguish between abortion's marketplace effect and its nature as a very personal medical procedure. For example, in *Lopez* the existence of a substantial market for firearm sales was not dispositive — instead the Court focused on the individual possession-and-carrying aspect.

The Court may reason in line with *Lopez* and *Morrison* and find that the true purpose of S.4840 is regulating non-economic medical procedures. As an individual medical procedure, abortions better resemble personal possession of a firearm or individual criminal acts than creating a commodity that can be sold on the market. Although medical services are a part of a larger economic market, *Lopez* and *Morrison* established that the commerce clause does not extend to regulating essentially noneconomic individual conduct. And S.4840 would do just that — it attempts to criminalize an individual medical procedure that is not a fungible commodity capable of entering and affecting a commodities market.

Another way that S.4840 resembles the statutes in *Lopez* and *Morrison* is the lack of congressional findings suggesting a substantial effect on interstate commerce. In *Lopez*, the statute (and its legislative history) lacked "express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone."[18] By contrast, even "numerous findings" in the statute in *Morrison* were inadequate — the Court held that no findings could overcome the fact that validating the attenuated effect upon interstate commerce of something always subject to the state's police power (crime) would allow Congress to regulate any crime.[19] The nine pages of legislative findings in S.4840 are even more deficient: none establish a connection between an intrastate individual medical procedure and interstate commerce.[20] Under *Morrison*, that's inadequate.

And S.4840 is far from the comprehensive scheme contemplated by *Raich*. While the Controlled Substances Act was designed as a "comprehensive regime to combat the international and interstate traffic in illicit drugs,"[21] S.4840 is a stand-alone prohibition on abortions after the 15-week mark. It does nothing further to regulate or control the administration of abortions or reproductive healthcare. In fact, S.4840 allows states to impose even earlier restrictions on abortions, which suggests that Congress has no intent to establish field preemption.[22]

But the whiplash from *Lopez*-and-*Morrison* and back to *Raich* makes predictions difficult here. The Court could reason that medical providers are compensated for abortion procedures. If home-grown medical marijuana for personal use can qualify as economic activity, a medical procedure that involves exchanging funds similarly qualifies as an economic activity that substantially affects interstate commerce. Abortion does have economic impacts: in one estimation restrictive abortion laws cost the economy $105 billion annually by reducing labor force participation and earning levels while increasing time away from work for women ages 15 to 44.[23] So given the plausible economic effect and the doctrinal opacity here, betting on one of these alternate outcomes seems foolish.

Whenever a doctrinal area is this confused one should ask: is the Court's current interpretation wrong?

The Court's current interpretation of the commerce clause may be wrong

The dissenters in *Raich* argued that its expansive reading of the commerce clause wrongly transforms nearly any intrastate activity into commercial activity subject to regulation by Congress.[24] That allows the commerce clause to swallow state police powers, a concern once thought remedied by *Lopez* and *Morrison*.[25] Yet here we are again, seemingly back to *Wickard* where anything falls under commerce clause regulation, not matter how attenuated its effect on interstate commerce.

The dissenters in *Raich* rightly called out this flaw in the expansive *Wickard* view of the commerce clause. As the Court observed in *Morrison*, applying a but-for causation analysis would permit "every attenuated effect upon interstate commerce" to justify congressional regulation — bringing nearly everything under the commerce clause and destroying both the constitutional enumeration of powers and federalism itself.[26]

The better approach is the one proposed by Justice O'Connor: requiring Congress to make actual, substantiated findings that directly link the regulation to economic activity.[27] Because the Tenth Amendment reserves police powers to the states, the Court should require "something more than mere assertion" when Congress regulates local activity with no self-evident connections to an interstate market.[28] This is a clearer, more principled approach to analyzing commerce clause powers.

On that analysis S.4840 (which would attempt to regulate intrastate abortion procedures without self-evident connections to an interstate market) likely would not pass muster. Most of its findings relate to the pain capacity of a fetus at 15 weeks, which only evidences a purported state interest in protecting unborn life. These findings are unsubstantiated "bare assumptions" that devolve into a sidebar about complications associated with second trimester abortions.[29] Applying Justice O'Connor's suggested approach here will provide a reasoned, principled answer, and lead to more consistent results in future cases.

Another macro issue here is that the analysis likely runs in both directions: if medical procedures are noneconomic acts then the commerce clause doesn't cover

them at all, so concluding that Congress lacks power to ban abortion probably also precludes congressional power to protect abortion. This is arguably consistent with Justice Alito's position in *Dobbs* that decisions regarding abortion should be left to the states.[30] If abortion is a policy issue that should be decided by the states through the political process, and the commerce clause does not apply, then states can go either direction. California can adopt Proposition 1 establishing a state constitutional right to abortion; other states can adopt abortion bans as Texas did.

But until the Court picks a lane here, predicting outcomes is a mug's game. So our proposal below is to avoid the game entirely.

State grants to no-fee providers are a possible solution

States interested in legislating on abortion rights could try to avoid the commerce clause issue by making abortions a non-economic activity. States could do so by issuing block grants to abortion providers who offer no-fee services. States would then be providing public funding for medical services broadly, and not for abortion procedures specifically. Because they would involve no marketplace exchange of funds for services between the patient and the provider this system arguably would prevent abortion procedures from being commercial activity covered by the commerce clause.

California has already taken steps toward this. In March 2022 Governor Newsom signed the Abortion Accessibility Act (SB 245), which eliminates out-of-pocket costs for abortion services.[31] The law prohibits insurers from imposing a co-pay, deductible, or other cost-sharing requirement on abortion and abortion-related services. But it arguably falls short of evading the commerce clause because it still allows health plans and insurers to require providers to maintain fees for services, which the insurer then completely covers. Abortions still might qualify as commercial activity even under SB 245.

This remaining problem of service fees can be solved with a budget provision. In May 2022 Governor Newsom proposed in his Reproductive Health Package $40 million in grants to health care providers who provide care to low- and moderate-income individuals who cannot pay for abortion care services and do not have health

care coverage.[32] This results in no commercial activity because the medical services provided are no-fee to the patients. There is no effect on interstate commerce (it's free), nor is the activity itself economic (it's a medical procedure).

Dean Chemerinsky is right, of course, that in general medical procedures clearly fall within the commerce clause.[33] But abortion specifically is often discussed as a moral rather than a healthcare issue, and its nature remains an open question given the ongoing debate between a mother's choice right and a state interest in the unborn. Abortion services do not substantially affect an interstate market for abortion services (to the extent there is such a market) given how many states ban abortion and bar their citizens for traveling to get them. In fact, Congress thus far has left the question of availability of contentious medical procedures to states to decide.[34] And our proposal will have little effect on an interstate market for abortion procedures because only the payor changes. Neither does our proposal violate a comprehensive federal regulatory regime because S.4840 (even if it passes) only touches on one aspect of abortion procedures. Generally regulating the overall healthcare market through a comprehensive statutory scheme is a far cry from S.4840's targeted attack.

Again, this solution cuts both ways. If states can avoid the commerce clause by removing any economic activity from the equation, then anti-abortion states will argue that their abortion bans are also noneconomic activity. Whether the U.S. Supreme Court would see those as identical in principle is uncertain.

Conclusion

Given the uncertainty in commerce clause doctrine, no one can predict whether no-fee abortions would be considered economic activity. Block grants to no-fee abortion providers may be the safest way for pro-choice states to avoid the commerce clause. But those states should weigh the fact that establishing this principle will also permit pro-life states to evade federal regulation. And the high court could yet return commerce clause doctrine to its expansive *Wickard* version and make nearly anything subject to commerce clause regulation. The Court's inconsistency leaves matters uncertain, but states have some avenues to pursue that can compel

clarification.

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1. *See* Snell, *GOP Sen. Lindsay Graham Introduces 15 Week Abortion Ban in the Senate*, NPR (Sept. 13, 2022). As the bill did not pass in the 117th Congress, which adjourned in December 2022, the bill will need to be reintroduced in the 118th Congress. ↑

2. Sen. No. 4840, 117th, 2d Sess. (2022). ("Congress has authority to extend protection to pain-capable unborn children under . . . the Commerce Clause of section 8 of 14 article I of the Constitution of the United 15 States, as interpreted by the Supreme Court"). ↑

3. *Gibbons v. Ogden* (1824) 22 U.S. 1. ↑

4. *United States v. Darby* (1941) 312 U.S. 100. ↑

5. *Wickard v. Filburn* (1942) 317 U.S. 111. ↑

6. *N.L.R.B. v. Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1, 22, 37. ↑

7. *Darby*, 312 U.S. at 109, 111, 113. ↑

8. *Wickard*, 317 U.S. at 124, 127. ↑

9. *United States v. Lopez* (1995) 514 U. S. 549; *United States v. Morrison* (2000) 529 U.S. 598. ↑

10. *Lopez*, 514 U.S. at 560-63. ↑

11. *Id.* at 560. ↑

12. *Morrison*, 529 U.S. at 601-02, 613. ↑

13. *Id.* at 610. ↑

14. *Id.* at 617. ↑

15. *Gonzales v. Raich* (2005) 545 U.S. 1, 9. ↑

16. *Id.* at 18–19. ↑

17. *Id.* at 19. The Court compared the case to the facts of *Wickard v. Filburn* ((1942) 317 U.S. 111, 125), which held that an individual's growth of wheat for personal consumption was subject to Congressional regulation under the commerce clause because that wheat allowed that individual to avoid purchasing wheat in the market, substantially affecting interstate commerce when considered in the aggregate. ↑

18. *Lopez*, 514 U.S. at 562 (citation omitted). ↑

19. *Morrison*, 529 U.S. at 614–15. ↑

20. Sen. No. 4840, 117th, 2d Sess. (2022). ↑

21. *Raich*, 545 U.S. at 12. ↑

22. Were Graham's abortion bill limited only to abortions involving interstate activity, such as an individual traveling to a neighboring state for an abortion, that bill might have a higher chance of withstanding scrutiny. *See, e.g., Morrison*, 529 U.S. at 611-12 (noting that in *Lopez*, an important consideration was that the statute at issue "contained 'no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.'") (citation omitted). ↑

23. Hoffman et al., *State Abortion Bans Will Harm Women and Families' Economic Security Across the US*, Center for American Progress (Aug. 25, 2022). But there likely are countervailing positive economic effects of access to abortion, including allowing one to plan for a family when one is ready and actually increasing people's ability to remain in the workplace. Whether

an economic positive or not, these considerations could support an argument that abortion is in some sense an economic activity (or at least that abortion has a substantial effect on interstate commerce). ↑

24. *Raich*, 545 U.S. at 42 (O'Connor, J., dissenting) ("We enforce the 'outer limits' of 'Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government.") ↑

25. *Id.* at 45. ↑

26. *Morrison*, 529 U.S. at 614–15. ↑

27. In *Raich*, O'Connor specifically took issue with the government failing to show that the regulated activity in *Raich*, the possession and homegrown use of marijuana for medical purposes, had a substantial effect on interstate commerce. ↑

28. *Raich*, 545 U.S. at 52. ↑

29. *Id.*; UCSF Health, *Surgical Abortion (Second Trimester)* (2022). ↑

30. *Dobbs v. Jackson Women's Health Organization* (2022) 142 S.Ct. 2228, 2305. ↑

31. Office of Governor Gavin Newsom, *Governor Newsom Signs Legislation to Eliminate Out-of-Pocket Costs for Abortion Services* (Mar. 22, 2022). ↑

32. Office of Governor Gavin Newsom, *Governor Newsom Proposes Reproductive Health Package to Strengthen Protections, Expand Access, and Welcome Businesses from Anti-Abortion States* (May 11, 2022). ↑

33. *See* Egelko, *Politics Aren't the Only Hurdle for Any Potential Federal Abortion Legislation*, S.F. Chronicle (Nov. 25, 2022). ↑

34. Congressional Research Service, *Congressional Authority to Regulate Abortion* (July 8, 2022). ↑