Subject:	Marijuana -- The Exclusive Power of Congress over Interstate Commerce
From:	"Gordon Epperly" <enter7740@14th-amendment.com>
Sent:	1/12/2015 3:37:26 PM
To:	"Alaska Legislature" <gov.alllegislators@alaska.gov>
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Attachments:	The Exclusive Power of Congress over Interstate Commerce.pdf

An Open Letter

Honorable Members of the Alaska State Legislature

There appears to be no end to the "*Articles*" addressing the use of "*Marijuana*." Here is a listing of "*Articles*" in e-book format that may be "*printed*" into PDF Files. You must be connected to the "*Internet*" to view these files. If this listing does not make your head spin, nothing will.

Please keep in mind that there is only one question before this "*Legislature*" to address and that is the "*Constitutional Question*" of law: "***Who Has The Power To Regulate 'Marijuana' And Is That 'Power' Exclusive***?" To the best of my knowledge, this "*Constitutional Question*" of law was never addressed by those "*States*" that passed "*Mraijuana Ballot Initiatives*" into law. The "*Pros*" and "*Cons*" on the use of "*Marijuana*" is not at issue.

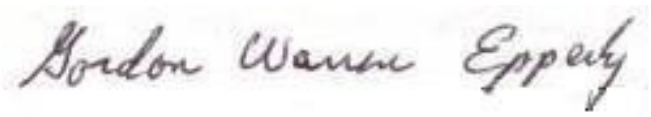
I realize that most of the members of the "*Alaska State Legislature*" are not familiar with "*Constitutional Law*" especially the law of "*Interstate*" and "*Intrastate*" Commerce. Here is a quick overview of the "*Interstate Commerce Clause*" of the "*U.S. Constitution*" (Internet Links Enclosed):

The Commerce Clause

> Allocation of power to the federal government probably reached its zenith under the Supreme Court's expansive interpretation of congressional lawmaking power exercised pursuant to the **Commerce Clause**, which gives Congress authority to **regulate matters affecting** interstate commerce. In **Gibbons v. Ogden**, 22 U.S. 1, 6 L.Ed. 23, 9 Wheat. 1(U.S. 1824), the Supreme Court ruled that the Commerce Clause power of Congress is "***supreme, unlimited, and plenary***," acknowledging "***no limitations, other than those prescribed in the Constitution***." More than a hundred years later Congress applied this plenary power to regulate a farmer's personal consumption of his own privately grown wheat because Congress had found that the effects of such use, when aggregated with that of other farmers, would have a substantial effect on prices in the national wheat market. The Supreme Court ruled that Congress had not exceeded the bounds of its authority under the Commerce Clause. ***Wickard v. Filburn***, 317U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (U.S. 1942). [Empasis added]

For more in-depth discussion of the U.S. Congress's "*Power*" to regulate "*Interstate Commerce*" and thus the exclusive authority of the "*U.S. Congress*" to regulate "*Marijuana*," I have attached a "*Columbia Law Review*" entitled: "***The Exclusive Power of Congress over Interstate Commerce***." I hope the attached "*Article*" and the listing of e-books on "*Marijuana*" will be helpful to this "*Legislative Session*" in addressing the "*Alaska Marijuana Ballot Initiative*" that was passed into law by the "*People*" this past "*November*" (2014).

Respectfully Submitted



Gordon Warren Epperly

THE EXCLUSIVE POWER OF CONGRESS OVER INTERSTATE COMMERCE.

Mr. Justice Strong said that the line between the limits of state sovereignty and the power of the Federal Government to regulate commerce is always difficult to be traced.[1] In the *Passenger Cases*,[2] Mr. Justice McLean said:

"No one has yet drawn the line clearly, because, perhaps, no one can draw it, between the commercial power of the Union and the municipal power of a State."

The obscurity of this line has been the cause of much apparent diversity in the opinions of the judges in cases where the States, or the municipalities within the States, have taken action affecting foreign and interstate commerce. Mr. Justice Miller observed:

"It is said, however, that, under the decisions of this court, there is a kind of neutral ground, especially in that covered by the *regulation* of commerce, which may be occupied by the State, and its legislation be valid so long as it interferes with no act of Congress, or treaty of the United States. Such a proposition is supported by the opinions of several of the judges in the *Passenger Cases*. * * * But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent."[3]

In other opinions of the Supreme Court it has been stated that there is *concurrent* jurisdiction over a part of interstate commerce. These views have tended to encourage the States to take legislative action affecting interstate commerce, and has left the agents of commerce,—rebelling somewhat against supervision—in doubt as to whether these state regulations were valid.

The obscurity of the line of delimitation between the powers of the Federal Government and the States is due largely, if not wholly, to the reluctance of publicists and jurists to declare unequivocally that the whole power of regulating foreign, interstate and Indian commerce is vested by the Constitution *exclusively* in the Federal Government, and that this particular sovereign power does not exist in the States except over their own intrastate commerce.

In the great opinion of Chief Justice Marshall,[4] he approaches

[1] Case of the State Freight Tax (1872) 15 Wall. 232.
[2] (1849) 7 How 283.
[3] Henderson *v.* Mayor of N. Y. (1875) 92 U. S. 259.
[4] Gibbons *v.* Ogden (1824) 9 Wheat. 1.

the question with a logic which we may sincerely regret was not carried to a conclusion and applied to the solution of this problem, and

"In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress has exercised the power."

This fatal suggestion has bred a disturbing progeny of *obiter dicta* and in some instances, we believe, unsound law.

While it must be admitted that in later opinions we find declarations that the power of Congress is exclusive, as in the *Knight* case, when Mr. Chief Justice Fuller, speaking of the sovereignty of the States over internal affairs, said: "On the other hand, the power of Congress to regulate commerce among the several States is also exclusive,"[5]—yet, when the validity of some particularly doubtful state regulation has come up, this declaration has been obscured by quoting a doctrine first stated by Mr. Justice Curtis, and which, later, crystallized into a rule. This doctrine is to the effect that where the *subject* of the power of regulation of interstate commerce, is *national,* or admits of one uniform system, or plan of regulation, the power of the Federal Government is exclusive, but where the subject is *local,* the States may *regulate,* if Congress has not exercised its power, and their action will be valid until Congress regulates. This if carried to its logical conclusion, would certainly limit the *exclusive* power of Congress to a comparatively narrow field. A careful analysis of this ruling will, I think, show that it is unsound and that it is not a rule that can be applied with any certainty in many cases.

If we examine carefully the opinion of Mr. Justice Curtis, we find him dealing with a state law requiring the use of pilots by ships in the Delaware River and harbor of Philadelphia; he treats this law as the exercise by the State of the sovereign power to *regulate commerce,* and, admittedly, as affecting foreign and interstate commerce. He does not say a *police regulation,* but *regulation,* and then proceeds to discuss the question whether the State may, to some degree, *regulate* interstate commerce. Referring to the power to regulate, contained in the Commerce Clause of the Constitution, he says:

"If the States were divested of the power to legislate on this subject by the grant of the commercial power to Congress, it is

[5]U. S. *v.* E. C. Knight Co. (1894) 156 U. S. 1.

plain this act [Congressional] could not confer upon them the power thus to legislate. If the Constitution excluded the States from making any law regulating commerce, certainly Congress cannot regrant, or in any manner reconvey to the States that power. * * * We are brought directly and unavoidably to the consideration of the question, whether the grant of the commercial power to Congress, did *per se* deprive the States of all power to *regulate* pilots."

It will be observed that he does not refer to, or use the phrase *police regulation,* but uses the word *regulate* with reference to its use in the Commerce Clause of the Federal Constitution. He then proceeds to say:

"The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the *subjects* of that power, and to say they are of *such a nature* as to require exclusive legislation by Congress. Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States *in every port;* and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. * * * Whatever subjects of this power are *in their nature* national, or admit only of one uniform system, or plan of regulation, may justly be said to be *of such a nature* as to require exclusive legislation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain."[6]

Here, a rule of interpretation is laid down which seems to disregard the plain language of the Constitution—"Congress shall have power to regulate," etc., without any words of limitation—and to permit the court to say, "the field of foreign and interstate and Indian commerce being large, and the subjects diversified, we will construe the grant to be exclusive only as to those subjects which the court, in the exercise of judicial discretion determines to be most happily controlled by Congressional legislation, while those subjects, which, in the opinion of the court can be better controlled by the States, are eliminated from the exclusive list of subjects contained, but not expressly specified, in the general power granted to the Federal Government." The reasoning in

[6]Cooley *v.* Board of Wardens of Philadelphia (1851) 12 How. 299. The italics are the writer's.

Mr. Justice Curtis' opinion would be forceful in a constitutional convention where the grant was to be made and a sovereign discretion was to be exercised. It would be within the proper function of the constitutional convention, exercising the powers of the sovereign, to consider whether the grant of power to the Federal Government to regulate interstate commerce should be limited to subjects that admit of one uniform regulation over the entire Union, or whether the grant should be general and convey the power to *regulate* foreign and interstate commerce in the whole field, and in every part of the field of such commerce. But can the court create such a limitation upon a grant of power where the grant is without words of limitation? It should be observed that Mr. Justice Curtis in limiting the exclusive power to those regulations which he denominates as *national,* describes them as such regulations as operate *"equally on the commerce of the United States in every port,"* thus restricting the exclusive grant to a small number of subjects within the large field of regulation.

There are two fundamental principles in political science that should not be lost sight of in the discussion of this question: (1) that sovereignty is *original, absolute, unlimited, universal* power over the subject; therefore, (2) there can be but one independent sovereign over a particular subject matter at the same time.

If we apply the first proposition to the subject of interstate commerce, the real sovereign over it has the power of regulating its conduct and may determine its life. It may say whether interstate commerce by particular instrumentalities, or by particular agents, shall be permitted; under what conditions and rules it may be conducted; what shall be, and what shall not be, subjects of this commerce; and under what conditions these subjects may pass through the channels of interstate commerce. The power to *regulate,* if once admitted to exist in a government, is an absolute power over the very life of the commerce itself. In this respect it is like the power of taxation, from which power of the States interstate commerce has been carefully protected. The court has said, regarding this power, no matter how small the tax may be, admit that the power exists, political discretion then controls, and it may be carried to any extent, even to the destruction of the commerce. So the power to "regulate," if it exists to any degree in the States of the Union as sovereignties, may be carried to any extent whenever and wherever the State may exercise the regu-

lating power. This would lead to a conclusion that there are two sovereigns over the subject matter of interstate commerce, within the so-called "neutral ground"—the State and the Federal Government. To be sure, there is a provision that if Congress has regulated, or does regulate, the state action shall become inoperative. But this does not touch the fundamental question. If the State may regulate at all, the extent to which it may go is a matter of legislative discretion. And when Congress does act, there must be a construction by the courts as to the actual effect of that action, and the diversified opinions relating to particular regulations by the States, create uncertainty as to what the conclusion may be in a specific case. While a citizen must obey Federal and state laws in the conduct of his affairs, there should not be *concurrent* jurisdiction over a particular subject. Such a view seems contrary to every sound theory of political science; the subject at every point must be accountable to only one sovereign. In a complex government like ours, it is most desirable therefore that a clear delimitation be made of the Federal and state powers. It tends to create a proper respect, and ready obedience on the part of the citizen, to both the Federal and state laws, and adds dignity and strength to each government. To say that there is *concurrent* power, is a constant suggestion for encroachment by the States into the field of interstate commerce, creating friction, not to say hostility, between the contending sovereigns.

The Supreme Court of the United States has held that as to all matters within the exclusive jurisdiction of the Federal Government inaction by Congress is "equivalent to a declaration that interstate commerce shall be free and untrammelled."[7] This doctrine rests upon sure foundations in constitutional law. It becomes, therefore, of the most vital importance to determine by some reasonable and workable rule, to what subjects this exclusive jurisdiction applies.

The doctrine discriminating subjects of regulation as either "national" or "local" does not give a workable rule by which we can determine whether a particular act of the State is constitutional or not, unless we adopt the full statement of Mr. Justice Curtis and say that those subjects are *national* which imperatively demand a "single uniform rule operating equally on the commerce of the United States in every port." This would put a very decided limitation upon the exclusive grant to Congress and reserve

[7]Welton *v.* Missouri (1875) 91 U. S. 275; Brown *v.* Houston (1885) 114 U. S. 622.

to the States a large part of the field of original regulation. No one can read the more recent decisions of the Supreme Court of the United States and believe that any such sweeping limitation upon the exclusive powers of Congress is intended by that court.

But the rule is not workable. What is a "local" subject? Is the fixing of the rate of toll on a bridge or ferry wholly within a State, but which constitutes a part of an interstate line, a "local" or is it a "national" subject?

Is the fixing of freight rates for shipments within the State, for citizens of the State, a "local" or a "national" subject, when it affects interstate carriage?

Is a matter "local" only when it applies to a single port or may it apply to all ports and stations within the State? These are moot questions, within the regulating power, not the police power, which show how difficult it is to apply this doctrine of a concurrent sovereignty, upon the theory that some subjects in interstate commerce are local and some are national.

In cases where the States have attempted to exercise the power of taxation, and where the Sherman Act has been under consideration, it has been held that because certain acts affected the flow of interstate commerce, the commerce being national, therefore, the acts were void. But it will be observed that all actions complained of affect interstate commerce and have some direct bearing upon the flow of that commerce. If the interference with the natural flow of interstate commerce makes the subject a national one, there is almost nothing left to be regarded as local. This doctrine lacks that positive character and clear definition that should exist in a rule of interpretation and construction.

What then is the true delimitation of state and Federal powers affecting interstate commerce? This question cannot be answered clearly without a brief reference to our constitutional history.

All of the sovereign powers now possessed by the Federal and state governments first existed in the original thirteen States. These powers were absolute. Whatever any sovereign in the world could do, the people of a given State could do, acting through their state government.

These several sovereignties—that is, the people in each of the States—acting together, withdrew from their several state governments certain sovereign powers and vested them in a Federal state which they then created; the Federal state consisting of all the people of all the States. The governmental powers thus withdrawn

are stated in *generalizations;* that is to say, a power is stated in a general phrase, not in its particulars. A generalization is not a limitation. If the parts and particular functions in and under each power had been stated in the Constitution, it would have operated as a limitation to some extent. Wherever, therefore, a power, stated in a general phrase is vested in the Federal Government, that whole power, in all of its particulars, and all of the functions necessary to its exercise, is absolutely withdrawn from the individual State, and is absolutely vested in the Federal Government, unless there are expressed words of limitation in the Federal Constitution.

The Commerce Clause vests in Congress the "power to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." This is clearly a generalization; there are no words of limitation in the grant; and there are no words of limitation in other parts of the Constitution which affect the question now under consideration. We must, therefore, conclude that the power to *regulate* the commerce described, is a sovereign power, exclusively vested in the Federal Government. This power to "regulate" is a distinct sovereign power, as much so as is the police power.

While the power to regulate foreign, interstate and Indian commerce is vested absolutely in the Federal Government, the States retain the exclusive power to "regulate" their own intrastate commerce and the *police power* within the State.

The police power is well understood, although the limitations of its application or exercise the courts wisely decline to define. It is that power by which a government protects the life, health, morals and property of its people. It is *protection,* not primarily *regulation.*

Regulation, applied to commerce, is the power under which the sovereign, or the government acting for the sovereign, prescribes and determines the rules of conduct to be followed by the agents of commerce in maintaining and operating the instrumentalities of commerce, in carrying on the business of commerce, in determining what may be the subjects of commerce, and the rules governing the subjects of commerce while they are in the channels of commerce.

In prescribing a rule of conduct, the regulation may have for its object, the protection of the life, health, morals and property of the people. The same object and motive may prevail in deter-

mining what may, or may not be a subject of commerce, or under what conditions or particular burdens a subject of commerce may be carried. Here the motive and the results may be the same as when a sovereign is exercising the police power. But in one case its rightfulness is determined by the fact that the particular government possesses the power to "regulate," while in the other, its rightfulness is determined by the fact that that government possesses the "police power." It may be asked why, if the results in a given case are the same, be particular about distinguishing the power of government under which the act is done? The reply is, that by using the word "regulate" in describing the power under which it is done, there is a clear inference—and in some cases it is declared—that the State possesses the *regulating* power over interstate commerce. This power is much broader than the police power when applied to commerce. Rates may be fixed, freight classified, equipment standardized, commerce destroyed and many other things done under the power to *regulate* which could not be done under the police power. The State does not possess the power to *regulate,* excepting as to its own commerce. If, therefore, there is a clear discrimination, and Federal acts are sustained on the ground that they are the exercise of the power to regulate, and in the case of state action that it is under the police power, we can readily determine whether the specific act in question is valid. We have a well understood and definite rule to apply. It gives both governments a distinctive field to say the power to *regulate* interstate commerce is exclusive in the Federal Government, and the *police power,* within state boundaries, is equally exclusive in the State.

Because of the similarity of motive and results in some matters, there will occur conflicts between the Federal and state governments, the former exercising its regulating power, and the latter its police power, or its power to regulate its own intrastate commerce. These conflicts will bring the State's action before the courts for the purpose of determining whether it is constitutional. A State, let us say, has passed a statute which in effect destroys a subject, or instrumentality of interstate commerce. The act in this case will be held void, because of an entire want of authority in the State to destroy a subject which is not under its control. It is immaterial whether the law in form attempts to destroy the subject, or instrumentality; if the State in the exercise of its police power, or in the exercise of its power to regulate its commerce,

attempts to do an act which will destroy a subject or instrumentality of interstate commerce, the act is void. If the sovereign power to destroy does not rest in the State, it cannot exist in any part of its sovereignty. To destroy a "subject" is the supreme act of sovereignty, and the subject must be under the exclusive control of the sovereign thus acting. If, as insisted, foreign, interstate and Indian commerce have been taken from the control of the States, they do not possess that supreme sovereignty over this subject that will permit the State, in the exercise of any of its powers, to destroy any part of this commerce.

Commerce consists of three constituent parts: the instrumentalities, the agents, and the subjects, of commerce. Each of these when actually engaged in foreign, interstate, and Indian commerce, are withdrawn from the supreme sovereign power of the States and are under the control and protection of the Federal Government. Thus, it was held in the liquor cases that to protect the morals of its people (the exercise of the police power) the State could not stop the movement of a lawful "subject" of interstate commerce, while it was in the channel of interstate commerce; and in the tax cases, that it could not interfere with the "agents" of commerce by taxing the occupation. The same should apply with equal force to the "instrumentalities" of commerce.

Let us suppose that the act in question does not destroy but simply burdens interstate commerce. The question then arises, under what power has the State acted. If it is the taxing power, then however small the tax may be, the act is void,[8] because the power to tax includes the power to destroy by taxation.[9] This is clearly stated in the tax case where the amount involved was very small.

But suppose we find that the act of the State was passed in the exercise of its police power, as for instance, requiring lights or pilots in a harbor, watchmen at railway crossings, a quarantine service, etc.; here we find the State exercising the police power, a power not possessed by the Federal Government within the States, but resting wholly in the state governments. This is a power which the sovereign may exercise to a certain extent over every person and thing within its territory. While it cannot use this power to *destroy* interstate commerce, it may burden it. This is

[8]Brown *v.* Maryland (1827) 12 Wheat. 419; Case of the State Freight Tax *supra*.

[9]Robbins *v.* Shelby County Taxing Dist. (1887) 120 U. S. 489, which has been followed in many subsequent cases.

incidental to the exercise of this sovereign power by the State. It would be held that such action, taken under the police power, is valid, provided Congress had not made a regulation fully covering the same matter. And the state action will continue in force, until Congress does regulate the whole matter. If Congress has acted, or does act upon the matter, then there is a conflict of law and, under that other provision of the Federal Constitution,[10] the Federal law is the supreme law, and must prevail.

The same decision and result would follow, if the State's action was taken under its power to regulate intrastate commerce, as, for instance, authorizing a bridge over a river wholly within its territory at the point of crossing, the river being a navigable water of the United States. In that case, if there was no regulation by Congress, the state action would be valid, provided that it did not destroy the interstate commerce upon the river. If the bridge had draws of sufficient size to allow the passage of boats actually plying upon the river, or was of sufficient height above high water to allow them to pass under it, there would be a burden upon interstate commerce, as the boats would have to take more time and exercise greater care in going through the draw or under the bridge, but it would not be a destruction of the commerce on the river, and, therefore, the act would be valid until Congress acted.

The extent to which the State may go in burdening interstate commerce, in the exercise of either police power or the power to regulate intrastate commerce, cannot be fixed definitely. We can only say that the State cannot *destroy* any one of the constituent parts of interstate commerce. The question of the extent to which a law may go within a rightful sphere, is for the political, not the judicial, branch of government to determine. It calls for the exercise of a political, not a judicial, discretion. So long as Congress has not acted, the state legislature is the only other political body that can act. Therefore, we must say that the state legislature is the sole judge of the extent of the burden—provided it be reasonable and does not destroy—until Congress acts. If the burden put upon interstate commerce by the State is regarded as too great, then it can be corrected by Congressional regulation of the particular matter.

We here have a clear rule of delimitation between Federal and state control. If the commerce is foreign, or interstate or with the Indian tribes, then the absolute and exclusive sovereignty over

[10]Art. 6, Sec. 2.

it is in the Federal Government. If the commerce is intrastate, then the State is the absolute and exclusive sovereign over it. The police power is solely in the State and may be exercised over all commerce within the State. In the exercise of these particular powers either government may reasonably burden, but not destroy, the commerce of the other. Such burdens enforced by a State in the exercise of its exclusive powers will have to be borne by interstate commerce until Congress regulates the particular matter.

When a state statute, or action under it by one of its municipal authorities, directly affecting interstate commerce, comes up for consideration and decision, we have to inquire, first, does this unreasonably burden or destroy the interstate commerce, or any of its constituent parts, or is it the exercise of the taxing power? If this inquiry results in an affirmative answer to either question, then the act is void. If, on the other hand, it be found that the act simply imposes a reasonable burden upon the Federal commerce, then the question is, first, has the State acted under its police power, or under its power to regulate intrastate commerce? If it has so acted, then the second question is, has Congress regulated? If Congress has not regulated the subject fully, then the state action is valid and effective until Congress does regulate.

This gives to all concerned a definite and well understood doctrine to be applied in determining the line between the state and Federal powers. It leaves no neutral ground,—concedes no concurrent sovereignty. It gives to the States and to the Federal Government the full and exclusive powers belonging to each, and requires each to act within its powers. It makes the determination of cases simple and should result in greater uniformity of opinions in this great field of constitutional law.

CHARLES W. NEEDHAM.

WASHINGTON, D. C.