Limits to Regulation Due to Interaction of the Patent and Commerce Clauses

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The U.S. Constitution was written with the market revolution in England in mind, in which the power of the Crown to establish economic monopolies, then known generally as patents, was severely restricted by the 1624 *Statute of Monopolies*. The patent power then was a very general power to intervene in commerce and allocate markets. Thus, the commerce clause, the patent clause, and the welfare language have a common origin. Following the 1624 Parliament's precedent, the Constitution gives the federal government only the highly restricted patent power that we know today by that name. This result implies that much of the commerce power as currently understood was specifically proscribed. These arguments suggest that much current federal economic regulation requires exercise of a general patent power that the federal government does not possess, and may thus be unconstitutional.

The "General Patent Power": A Definition

Federal economic regulation assumes existence of a general regulatory power of the federal government, including to issue licenses or certificates, define market territories, and otherwise control and allocate markets. For historic reasons explained below, this general power is referred to here as the "general patent power," the power to allocate economic privileges. However, except in specific cases where the federal government has direct plenary jurisdiction such as interstate waters, the general patent power is one that the Founding Fathers quite expressly prohibited to the federal government.

Today, the term "patent" refers to the exclusive right given to inventors to sell their creations for a limited period of time. The word "patent" does not appear in the Constitution. Instead, the ability of

Cato Journal, Vol. 20, No. 3 (Winter 2001).

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Congress to grant exclusive rights to authors or inventors is specifically enumerated in Article 1, section 8, the so-called "patent clause." That clause reads: "The Congress shall have the power . . . To promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors the exclusive rights to their respective writings and discoveries."

Why was the word "patent" not used when the "patent power" was expressed? When the Constitution was written, the word "patent" had a much different and broader meaning than today. Associate Justice Joseph Story, an ardent nationalist (the then-used term for advocates of expanded federal powers), sat on the Supreme Court from 1811 to 1845. In a work explaining the Constitution to a general audience, Story (1840: 346) defined the term "patent" as

> an abbreviated expression, signifying letters-patent, or open letters, or grants of the government, under the seal thereof, granting some right, privilege, or property, to a person who is thence called the Patentee. Thus, the government grants the public lands, by a patent, to the purchaser. So, a copy-right in a book, or an exclusive right to an invention, is granted by a patent. When the word patent is used in conversation, it ordinarily is limited to a patent-right for an invention.

Justice Story was reflecting the centuries-old accepted use of the term in English law. William Blackstone's classic work on English law of the 18th century (Blackstone [1766] 1977: 346) tells us that: "The King's grants are a matter of public record. . . . These grants, whether of lands, honors, liberties, franchises . . . are contained in charters, or letters *patent*, that is, open letters, *literae patentes*: so called because they are not sealed up, but exposed to view." The term "general patent power" as used here therefore refers to the meaning of the term "patent" as used in the 16th to 18th centuries, a grant of any economic right by government.

No "patent clause" exists in this sense in the Constitution. There is no general explanation of federal powers using either the term or the general expression of such broad power. Instead, the explicit definition of a specific power is used. Since Article I, section 8 listing the powers of Congress is a specific enumeration of powers, and since the only constitutional text that uses any part of the possible powers described by "patent" enumerates only a specific form of that power, we must logically conclude that the Constitution intended that the federal government would have no such general patent power. The added presence of the Tenth Amendment reinforces this conclusion.

The Drafters Knew English History

It is not surprising that the American colonials would write a constitution that specifically denies to the national government the general patent power, prevents the national government from allocating economic rights, and grants only the ability to make limited term exclusive rights for authors and inventors. That very policy had been law in England for over 150 years, and had been adopted by colonial governments in their own actions. The colonists were not merely fully abreast of, they were fully involved with, political and economic developments in the home country (Phillips 1988). The Constitution simply embodied accepted English law, not only as to the form of what we today call patents, but also as to the concurrent concept of limiting the general patent power of the most remote form of government by careful proscription.

The English Parliament's pro-market revolution occurred in 1624. King James I, following his predecessor, made a habit of granting—indeed selling—rights for all manner of economic activity. Typically rights, called "patents," were for patents of monopoly of economic activity, but they were also sold as rights for the exercise of government offices or other activities. Patents were sold for their revenue benefit to the Crown, whatever the commercial merits as monopolized services. The sale of patents for government offices was so widespread and abused that the practice was criticized at the time as being "government by patentees" (Coward 1980: 133; Brewer 1990: 17; Kishlanski 1996: 98–100).

Perhaps the sale of these rights was good business for the Crown, but eventually the Parliament no longer accepted rampant monopolization created by what today we would call "the administration." The period 1621 through 1624 was dominated by issues of how to control the Crown's powers, especially those in finance, and, thus, focused heavily on the issue of sales and use of monopoly patents. In 1624 Parliament passed one of the first statutes specifically limiting the prerogatives of the Crown (Cooper 1970: 546–53). In contrast to modern anti-monopoly laws, Parliament's *Statute of Monopolies* of 1624 was specifically directed at limiting government grants. According to the *Statute* (21 and 22 Jac. Ic):

> Upon misinformations and untrue pretenses of the public good many such grants . . . [of monopoly patents from the Crown] have been unduly obtained and unlawfully put into execution, to the great grievance and inconvenience of your Majesty's subjects and contrary to the laws of your realm. To prevent the like in time to come, be it enacted that all monopolies heretofore or hereafter to

> be granted to any person or persons, bodies politic or corporate, for the sole buying, selling, making, working or using any thing within this realm, or any other monopolies, are and shall be utterly void and of no effect and in no wise to be put into execution.

Thus, the Parliament created a general policy that the government may not grant exclusive rights, known as "patents" according to the usage of the term at the time. The law then made an exception for what today we refer to as "patents": "provided never the less that the above [prohibition] shall not [be] extended to any letters patents and grants of privilege for the term of 21 years or under, . . . to the first true inventor of such manufacture" (*Statute of Monopolies,* chap. V). The statute also enumerated some other very specific exceptions, such as to allow some patents for certain military ordnance.

The *Statute of Monopolies* was a critical document in the evolution of the American theory of limited government. The charters of the colony companies themselves were often general patents, and the colonial governments often issued patents for their own purposes in economic development. But by 1641 the Massachusetts General Court had begun the practice, following the *Statute of Monopolies*, of granting only limited term specific patents of monopoly and only for new economic development. Indeed, one of the more detailed histories of the *Statute of Monopolies* is found in a book not on English history, but on New England colonial history (Innes 1995: chap. 5). Until recently, the issues addressed by the *Statute of Monopolies* were rather familiar to European analysts of Western society. Even Max Weber (1981: 284) noted that:

> In the 16th and 17th centuries an additional force working for the rationalization of the financial operations of rulers appeared in the monopoly powers of princes. In part they assumed monopoly powers themselves and in part they granted monopolistic concessions, involving of course the payment of notable sums to the political authority. . . . The policy was most extensively employed in England and was developed in an especially systematic manner by the Stuarts, and there it also first broke down, under the protests of Parliament. Each new industry and establishment of the Stuart period was for this purpose bound up with a royal concession and granted a monopoly. . . . But these industrial monopolies established for fiscal purposes broke down almost without exception after the triumph of Parliament.

These lessons were certainly not forgotten at the time of the American Revolution. Shortly after, Justice Story told us that a patent is a "grant of the government . . . granting some right . . . to a person . . . ," which is to say, a government grant of any economic right, including

therefore the general patents specifically prohibited to the Crown by the English Parliament. In contrast, the "patent clause" of the Constitution confers only a limited ability to create economic rights, restricted to exclusive grants to writers and inventors for limited times, the same exception to denial of a general patent power made in 1624 by Parliament. Thus, when the U.S. Constitution does not use the word "patent" at all, we must regard this as a significant and intentional omission. People of the time understood the word as having a broader meaning than given today, and, therefore, by specifically failing to use that word they also intentionally and specifically denied such broad power to the newly created national federal government.[1]

Now consider the Commerce Clause (Article 1, section 8), which says that Congress has the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Congress can regulate commerce among the several States, but has no general patent power except the very limited ability to grant rights to inventors and authors. Therefore, because it was not one of the specific powers given to the federal government when only a more limited form of that power was granted, Congress also has no power to regulate commerce among the several States by the use of an exclusive federal grant of markets, or indeed to allocate those markets, because to do so in that form would be to exercise a power not granted.

Drafting the Patent Clause

Careful attention to drafting explains many issues. For example, the power to create a corporation is a remnant today of the instruments used to effect the general patent power of the Crown circa 1600. In part through the *Statute of Monopolies,* Parliament partially assumed this power itself. The power to charter corporations is not among the enumerated powers of the Congress, and thus remained with the States. In fact, in the debates at the Constitutional Convention, the power to charter corporations was among the specific economic powers proposed on August 18, 1787, and rejected, as documented by

[1]Contemporary historians of England also recognize this broader meaning of patent as including any government-granted monopoly. For example, in the index of a recently published British history (Russell 1991), the word "monopoly" is listed with several page citations, but the word "patent" does not appear at all. But on one of the cited pages for monopoly (Russell 1991: 81), the word monopoly does not appear; instead that page refers to an action of the King to recall a number of "unpopular patents" as amelioration of other actions desired by the Crown. In the index to Innes (1995) on New England history this identity is even more explicit: the citation under patent simply says "see monopoly."

James ([1787] 1987; see also Sorensen 1995). One version of specific language considered and rejected on this point was: "To grant charters of incorporation in cases where the public good may require them, and the authority of a single State may be incompetent." The failure of the Convention to adopt this language, or anything similar, tells us several important things.

There Is No Federal "General Welfare Power"

One of the more pervasive sources of federal regulation is the claim that the Commerce Clause enables Congress to legislate essentially anything in the name of the "general welfare." This enumerated power allegedly exists because the Preamble to the Constitution reads, in part, "We the people of the United States, in order to . . . promote the general welfare . . . do ordain and establish this Constitution," and because Article I, section 8 has similar language also in the initial paragraph of that section.

But this "general welfare clause" is not even an enumerated power. It is instead a general introduction explaining the exercise of the enumerated powers set forth in Article I, section 8. For example, Justice Story in his earlier cited work devoted his entire mention of the "welfare" language to a discussion of how the commerce power is necessary to prevent states from interfering with commerce through the adoption of non-uniform import duties. If a more general federal power had been intended, surely "nationalist" justices like Story, seeking to justify central power, would have made such arguments. A general welfare power, if it existed, would dwarf the highly limited authority that flows from the Commerce Clause; Article I, section 8 would be superfluous. It is clear that Justice Story knew the history of the *Statute of Monopolies*, and understood it in exactly the sense described here, since Story (1987: 402) says that the "right to useful inventions seems . . . to belong to inventors . . . [and thus] has been saved out of the statute of monopolies in the Reign of King James the First."

Support for this view comes from *The Federalist Papers*, especially Nos. 41–43, authored by James Madison. In *Federalist* No. 41, Madison summarizes the relationship of the Constitution's Preface, including the welfare language, to the subsequent more detailed enumeration of specific powers. He treats with derision the claim that the "welfare clause" is a general grant of power:

> For what purpose could the enumeration of particular powers be inserted, if these and all others were meant to be included in the preceding general power? Nothing is more natural or more com-

> mon than first to use a general phrase, and then to explain and qualify by an enumeration of the particulars. But the idea of an enumeration of particulars which neither explain nor qualify the general meaning, and can have no other effect than to confound and mislead, is an absurdity . . . what would have been thought of that assembly, if, attaching themselves to these general expressions and disregarding the specifications which limit their import, they had exercised an unlimited power of providing for the general welfare?

In *Federalist* No. 41, Madison grouped the powers granted the federal government into six classes: "1. Security against foreign danger; 2. Regulation of the intercourse with foreign nations; 3. Maintenance of the harmony and proper intercourse among the States; 4. Certain miscellaneous objects of general utility; 5 Restraint of the states from certain injurious acts; 6. Provisions for giving due efficacy to all of these powers." Consistent with the above citation there is no listing of "general welfare" as one of these general classes of power.

In *Federalist* No. 42, Madison discusses his third class: "Under this head might be included the particular restraints imposed on the authority of the States." Thus, class 3, which sounds like a grant to intervene, is actually a listing of things the states cannot do, coupled to a very specific list of things the federal government is specifically authorized to do, such as to establish posts and roads, or a uniform system of weights and measures. Promoting welfare is not in Madison's list of things that promote harmony among the states in *Federalist* No. 42. As to class 5, like Justice Story, due to "the necessity of superintending authority over the reciprocal trade" of states, Madison saw the Commerce Clause as a restraint on the powers of the states. *Federalist* No. 42 follows the theme of derision of No. 41, showing that an enumerated list of constraints on the states is certainly not anything like a general grant to do anything in the name of the general welfare.

Madison discusses his fifth class of federal powers, "restraint of the states from certain injurious acts," in *Federalist* No. 41. Here also he merely enumerated ways in which the Constitution constrains states. For example, regarding the constitutional restraint on states from laying duties for imports or exports except "what may be absolutely necessary for executing its inspection laws," he explains: "The manner in which the restraint is qualified seems well calculated at once to secure to the States a reasonable discretion in providing for the convenience of their imports and exports, *and to the United States a reasonable check against the abuse of this discretion*" (emphasis added).

In *Federalist* No. 43, Madison discusses other powers including the

"power to promote the progress of science and the useful arts by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries," without any use of the word "patent," although he does allow himself use of the words "copyright of authors." The importance of the omission of the word patent from the Constitution or even from discussions of the Constitution should be by now apparent, and is consistent with Madison's explanation.

It is thus abundantly clear that the Constitution does not contain a grant of power to the federal government in the form of a "welfare clause," and especially that there is no grant of a general patent power for the Congress to allocate commerce freely, not even if based on a claim of benefit to the general welfare.

Other General Patent Powers also Rejected

The Convention also specifically considered other aspects of the general patent power and rejected them. One text not adopted included a power to create universities: "To secure to literary authors their copy rights for a limited time, To establish a University, To encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries" (Cohen 1995: 237–43, and Madison's *Notes* for August 18, 1787). Note that this language uses the term "copy rights" but not the term "patent." This proposed language, by virtue of its rejection, indicates that the Convention clearly decided not only against giving the federal government power to create a national university but also denied the federal government the power to use "proper premiums and provisions" to encourage science.[2]

Another rejected text also would have allowed more expansive powers: "To establish seminaries for the promotion of literature and the arts and sciences, To grant charters of incorporation, To grant patents for useful inventions, To secure to Authors exclusive rights for a certain time, To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades and manufactures" (Cohen 1995: 239). This version uses the term patents, but the term occurs with the modifier "for useful inventions," a reference to a similar exception in the *Statute of Monopolies*. This added phrase would have been unnecessary if the term patent had only the modern meaning. The text does not use the term copy right but instead

[2]The "National Science Foundation Act" and similar statutes, therefore, are also probably unconstitutional.

defines the specific right, the same approach of enumerating a power also eventually adopted for granting the power of patent rights for inventions, and exactly the approach of the *Statute of Monopolies* for permitting exceptions of allowed powers in a general policy of denial of power. This particular rejected text also omits granting a power to "create public institutions, rewards and immunities" to promote various economic objectives. This wording is entirely consistent with the similar rejections of promoting science with "proper premiums and provisions," and with declining to grant a power to create universities or seminaries or to issue corporate charters.

Congress May Not Act Merely Because the States Cannot

As noted, the Convention considered a form of power that allowed Congress to act when it deemed some matter of public good to exist and when "the authority of a single State may be incompetent." But the Convention rejected that language. Congress has no power to act merely because some public good is involved or because it is believed the states cannot act. This deliberate omission suggests that the Convention foresaw—from knowledge of history—the kinds of justifications often used today for creating statutes under the (nonexistent) welfare power, such as claims of the "general good," and intentionally excluded them.

That these various powers were considered and rejected suggests that the federal power to create, guarantee, promote, or limit economic rights was intentionally granted only in a very narrow form, that of the grant of limited term exclusive rights to writers and inventors. In contrast, as discussed below in analyzing of the *Gibbons v. Odgen* case, the federal jurisdiction to exercise its power to obstruct certain state use of general patent powers is broad.

General Patent Powers of the States

The above historical facts related to limits on the English Crown were the foundation for the American constitutional theory of limits on federal powers, but have apparently been forgotten in the subsequent development of federal regulation. But what about the development of regulatory power by the states? The states regularly issue various general patents typically called licenses, certificates, charters, or franchises. The Supreme Court upheld the power of states to engage in economic regulation in the *Slaughter-House Cases* (1872: 83 U.S. 36) and in *Munn v. Illinois* (1877: 94 U.S. 113). The significant issue for the present study, however, is that both cases dealt with

state, not federal, power. Thus, even though states can exercise certain general patent powers, there is no justification for the federal government to exercise similar powers.

By the late 19th century, grain elevators and railroads had become vital parts of the agricultural and commercial landscape. Both industries were the focus of political activism. The then powerful political movement, the Grange, had as a political objective price control for railroads and other businesses serving prairie farmers (Magrath 1964, Hofstadter and Hofstadter 1982). The worst accusations against Ira Munn, a Chicago grain elevator operator, would probably amount today to fraud in the sale of negotiable instruments, and if so proven would have civil remedy based on both contract law and perhaps tort claims. Other accusations, such as the charge that Munn and other operators conspired in their business practices, would today be seen as antitrust violations.

In 1870, the federal government lacked the power to affect intrastate commerce, but the state legislatures were not so confined. So state legislatures, especially in the prairie states, directly regulated the business practices of railroads and elevators.

Not surprisingly, Munn, like other operators, did not like regulation of his business. He appealed his conviction for failure to comply with the state regulation but lost (see Fairman 1987: chap. 7). The Supreme Court found that the operation of a grain elevator was a business "affected with a public interest," and, therefore, was within the power of the State of Illinois to regulate. *Munn* also initiated the two-part conceptual framework of modern utility regulation: (1) the granting of a "certificate," and (2) the regulation of price for services offered under that certificate. Such certificates are government grants to conduct business, often as an exclusive right—a practice that is clearly an exercise of the state's general patent power.

The Supreme Court said its decision in *Munn* was an extension of pre-existing English common law under which the Parliament could regulate a business "affected with a public interest." The Court stated that, if an operator was unhappy with regulation, he "may withdraw his grant by discontinuing his use; but so long as he maintains the use, he must submit to the control" (95 U.S. at 126). The grant in question here is the offer by Munn of the use of his private facilities to the public. The Court decided that this combination of licensing of entry and prices was constitutional when exercised by the states. It is clear from Justice Field's famous dissenting opinion in *Munn* that the issues covered were about state powers. The case dealt with federal powers only insofar as it dealt with: (1) an improper taking of private property under the Fifth Amendment by the state of Illinois (Field

thought it was), and (2) the right of due process in the course of such takings under the Fourteenth Amendment. The history of constitutional law following *Munn*, including that reviewed here and much else as applied especially to antitrust law and regulatory law generally, essentially deals only with these two issues (Keynes 1996, Rohr 1986, Arkes 1994.) The published analyses are conspicuous by the absence of any discussion of the "general patent power" issue raised here, as well as recognition that the critical cases such as *Slaughter-house* and *Munn* affirmed only state, not federal power.[3]

Just as the presence of vigorous competition did not protect Munn from regulation (the Munn and Scott Elevator was but one of a dozen similarly sized major storage services in Chicago), after the *Munn* decision state regulation of market entry and price proliferated in other politicized markets. Massachusetts created the first state electric regulatory commission in 1887, and by 1934 all but eight states had such bodies. Natural gas services, which had existed in many cities from as early as 1816, generally also were brought under the control of these same bodies. In 1935, Congress, after finding in the Federal Power Act that electricity was a business "affected with a public interest," and thus adopting the *Munn* language applied by the Court to state regulation, brought electricity pricing regulation under the Federal Power Commission. In 1939 the Natural Gas Act expanded Federal Power Commission authority to both certification and pricing of natural gas companies. The interaction of political purpose with economic means pervades the history of regulation.[4] Despite the enormous implications of legislatures delegating important powers to regulatory commissions (Lowi 1960, McConnell 1966), the legal issues brought to the courts after *Munn* were about more mundane matters: procedure (such as the conditions under which particular regulatory decisions reflected due process), or about "takings" (whether particular regulations took private property for public

[3]Perhaps it was not entirely without historical significance that the *Munn* case was decided within days of resolution of the contested presidential election of 1876 by the extra-constitutional means of a commission including members of the same Supreme Court that decided *Munn*. The commission advised which state electors were to be accepted by Congress. The country seemed to lose its critical ability to separate state from federal power during the Reconstruction era. Thus today, academic and political analysis does not always grasp the depth of expansion of federal powers beyond their allocated constitutional limits in the 19th century.

[4]See, for example, the review of Horwitz (1962) by Frenzen (1994). Horwitz analyzes how the legal system expresses political choices. Frenzen's review stresses how these choices by legislatures, and the subsequent need to confine administrators to respect the limits of the political choices thus made, are related, in turn, to development of administrative law. For my own analysis of the issues raised by Horwitz see Ballonoff (1994).

use without just compensation). Two famous sets of cases in the Supreme Court's October Term in 1912 show the need to set rates that took account of business realities, not merely political ones. The *Minnesota Rate Cases* (230 U.S. 352, 434–35) decided complaints about how Minnesota set railroad rates and required that rate-making decisions be factually based. On the same day, the *Missouri Rate Cases* (230 U.S. 474) reached a similar conclusion. The question of whether the federal government had the power to regulate market entry, allocate market shares, grant exclusive territories in the same manner as states, or set rates at all, is conspicuous for its absence (Fiss 1993).

The Commerce Clause and State General Patent Power

The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The general patent power was not one of the powers prohibited to the states or reserved (except in a specific form) to the federal government. Therefore, the people of Illinois could empower the state to exercise such general patent power if they so wished, and so long as that power was not otherwise preempted by some other federal action, which, in 1877 in the *Munn* case, it was not. The situation may be different today. At the very least, the case law to date indicates that a company does not obtain federal antitrust immunity merely because its right of entry, prices, and services are subject to state regulation (*Cantor v. The Detroit Edison Company* 1976: 428 U.S. 579). The notion that utility practices are immune from antitrust liability because they have been subject to some form of regulatory process is simply wrong.

Of course, the question of how the existence of exclusive state certificates affects interstate markets is an empirical one: Do they restrict entry? Under the classical view—that utilities are natural monopolies—the answer might be "no." One might argue that the exclusive grant does nothing to restrict a market that would not have occurred in any event. But if utilities are not natural monopolies, then exercise of the state patent power surely does restrict entry to a market (Ballonoff 1997: chaps. 1–4). That power could therefore be preempted as an unacceptable restriction on interstate commerce. Thus, some academic authors seem to believe traditional utility regulation is justified by *Munn* because utilities are purportedly natural monopolies (Gegax and Nowotny 1993, or the footnotes to traditional

economics texts cited in note 43 of Cudahy 1994). Others argue that *Munn* justifies regulation despite the presence of natural monopoly, indeed, that *Munn* creates a "public interest exception" that permits or even requires regulation by either federal or state government despite the presence of "unfettered competition" (Cudahy 1994: 360–61). But neither side is correct. It is increasingly accepted that energy production, distribution, and transmission are not a natural monopoly. Moreover, the *Munn* case found that states had plenary power to regulate common carriers based on the Supreme Court's understanding of English common law, not on some appreciation of a "special exception" to the antitrust laws that permits states to regulate despite the presence of competition.

Notwithstanding *Munn*, the states are constitutionally limited from interference with interstate commerce, for which purpose the Commerce Clause grants legislative powers to Congress. At the time of *Munn*, antitrust laws did not exist, but today they do. Therefore, despite *Munn*, states cannot close markets that federal powers have opened. With or without natural monopoly, the effect of traditional state regulation is to close utility markets. But without natural monopoly, the only thing that keeps them closed is state regulation. Thus, despite *Munn*, traditional state utility regulation might today be unconstitutional as a preempted restraint on interstate commerce.

Demonstration that federal commerce power can preempt state general patents was given in John Marshall's 1824 opinion in *Gibbons v. Ogden* (22 U.S. 1). The case is of historic interest if for no other reason than that it involved state licenses for the use of steamboats operating between New York and New Jersey originally granted in part to Robert Fulton, the American inventor of steam-powered ships (Dangerfield 1963). By the time the dispute reached the Supreme Court, federal coastal licenses had also been issued for steamboats for certain purposes. Interstate waters of course then and since are in federal jurisdiction.

The issue in *Gibbons* was whether a federal coastal license permitted the holder to operate in New York, without a New York license, and within the exclusive territory of the grant given by New York. In arguing for Gibbons, attorney William Wirt posed questions related to the existence of a specific state patent power similar to that defined for the federal Congress in Article I, section 8, paragraph 8 (White 1991: chap. 8). The Court decided the case as follows:

> This [federal] act demonstrates the opinion of Congress, that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can be no more restrained from navigating waters and entering ports which

> are free to such vessels, than if they were wafted on their voyage by winds, instead of being propelled by agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a state prohibiting the use of either to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act.
>
> As this decides the cause, it is unnecessary to enter in an examination of that part of the Constitution which empowers Congress to promote the progress of science and the useful arts [9 Wheat. 221].

Thus, Congress preempted state licenses or general patents because Congress had opened markets among the several states. Since interstate waters were then as now subject to federal jurisdiction, the issue in *Gibbons* was whether the *subject matter* was in some other way limited. It was not. It was not even necessary for the Court to inquire further whether there was a limited state patent power similar to the limited federal patent power; the fact that Congress had exercised commerce power to open markets was sufficient. In 1877, more than 50 years later, when the Court in *Munn v. Illinois* found for the existence of a state licensing authority, which implied the use of a more general state patent power, there was no conflicting federal regulation of the same subject matter, and, therefore, no preemption.

Modern analysts often cite the finding in *Gibbons* that the commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed," but they often fail to recognize that *Gibbons* related to voiding the effect of a grant of an exclusive territory by a state. The Commerce Clause gives Congress *plenary subject matter jurisdiction* over matters in interstate commerce. While this is indeed a broad result, it is simply misreading to assert that *Gibbons* found that the Commerce Clause gave Congress *unlimited powers* over commerce.[5]

The history of federal powers after *Munn* shows that overextension of federal regulatory power predates the programs of the New Deal by a half century. Progressive misreading of *Gibbons* extended the

[5]One exception to currently accepted use of *Gibbons v Ogden* as the basis for modern expansive federal commerce powers is an analysis offered by Pilon (1994):

> Chief among those chinks [in the Constitution found by New Deal lawyers] was the Commerce Clause, which had been written, ironically, not to facilitate regulation but to enable Congress to override protectionist regulations that states had passed under the Articles of Confederation. Written thus to "make regular" commerce among the states—much as the court used it in the first great Commerce Clause case, *Gibbons v. Ogden*—the Clause was seen by Progressives as affording Congress the power to affirmatively "regulate" commerce for all manner of social ends.

use of nonexistent federal general patent powers. Once a few states found that the idea of economic regulation was legally viable, the federal government pushed the idea along. Congress had already created its own early regulators, starting with the Interstate Commerce Commission created by the Act to Regulate Commerce in 1887. Congress also encouraged states to form regulatory bodies by placing clauses in territorial rail rate legislation that devolved federal rate authority to new states as soon as they were able to assume this duty. Because territories are not states, a common law argument, such as in *Munn*, might permit the federal government to regulate business "affected with a public interest" by direct and exclusive grants within those territories. So while Congress has no enumerated general patent power, it does have plenary powers similar to the states when exercising direct federal jurisdiction on federal territory. The ability of territorial politicians to assume regulatory authority was used to encourage more rapid formation of state governments for these territories.

Thus, there has been a long history of the expansion of federal authority through promotion of regulation at the state level. The New Deal resulted in the expanded application of federal and state administrative powers, but did not create the basis for that application. Neither did *Gibbons v. Ogden.* Those powers were given birth by *Munn v. Illinois* and subsequent decisions built on that language, even though the *Munn* decision was only about the power of states. But as *Munn* dealt only with state power, that case cannot be a justification for federal exercise of similar powers.

Views of the Modern Court

There seems to have been no case that considers the general patent power applications of federal regulation of market entry and price by commissions. The 1906 Hepburn Act permitted the Interstate Commerce Commission to regulate interstate oil pipelines in the same fashion as Illinois regulated grain elevators. The 1913 decision in the *Pipe Line Cases* (234 U.S. 548) found that the powers of Congress to regulate interstate commerce extended to the power to regulate the manner in which a private business in interstate commerce could conduct that business. The Supreme Court found that the Hepburn Act was valid because the effect of its application was to prevent the pipeline in question from requiring sale of oil to the pipeline before the line would carry that oil. In essence, this says that because the commission used an antitrust-type analysis related to market structure, and in the end opened a market, that the result of that analysis

was also valid within the federal commerce power. The case also did not reach the general patent power issues discussed here. Like many decisions, it presumes that the antitrust powers rest on an actual enumerated power of the federal government, and merely discusses whether due process was found in the exercise of that "power."

However, two modern cases have considered important aspects of the issues raised here, and have reached results approaching the present analysis. In 1995, the Court, in *U.S. v. Lopez* (115 S. Ct. 1624), surprised observers by finding the Gun-Free School Zones Act of 1990 unconstitutional. The plurality opinion examined the history of cases under the Commerce Clause, starting with the famous "rules" citation from the 1824 *Gibbons* decision. The Court noted that the first century of Commerce Clause cases focused on limiting state exercises of power, but that in the second century the scope broadened immeasurably. Thus, in 1995 the Court found itself deciding whether a federal law limiting children's access to guns near schools was a matter affecting interstate commerce. In an argument dealing with subject-matter jurisdiction, the Court concluded that by proposing a test that only if the subject matter of a congressional act "substantially affects" interstate commerce is the subject matter within the intended reach of the Commerce Clause.

This argument therefore recognizes, by its form, that the import of the *Gibbons* case was to *subject-matter jurisdiction* of the Commerce Clause, which is of course very different from the specification of powers that may be applied to that subject matter. It also parallels the above distinction that abandonment of recognition of limits on federal general patent powers began after the 1870s, which is to say, after the *Munn* decision and concurrently with the Western expansion.

There are also two concurring opinions to *Lopez*—those by Justice Kennedy and Justice O'Connor—that treat the federalism issues very much as implied above. The concurring opinion of Justice Thomas, however, disagrees with the "substantially affects" test used by the plurality and in doing so comes the closest to phrasing the exact issue posed here. It is useful to cite from his opinion:

> The Constitution not only uses the word "commerce" in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that "substantially affect" interstate commerce. . . . Clearly, the Framers could have drafted a Constitution that contained a "substantially affects interstate commerce" clause had that been their objective. . . . Put simply, much if not all of Art. I, sec. 8 (including portions of the Commerce Clause itself) would be surplusage if Congress had been given authority over matters that substantially affect in-

> terstate commerce. An interpretation of cl. 3 that makes the rest of sec. 8 superfluous simply cannot be correct. Yet this Court's Commerce Clause jurisprudence has endorsed just such an interpretation: the power we have accorded Congress has swallowed Art. I, sec. 8 [United States v. Lopez, 514 U.S. 549, 587–88 (1995)].

Had Justice Thomas continued by citing the rejected draft clauses of the Constitution, as above, he could have clearly strengthened his argument. His concurrence in fact differs little from the present argument. A minor difference is that he concludes Congress took a "wrong turn" with New Deal legislation in the 1930s, whereas the present argument shows the turn began a half century before (Anderson and Hill [1980] reach a similar conclustion).

While Thomas's opposition to the "substantially affects" test is clearly about substantive powers, he does not suggest a more specific test other than listing enumerated powers. In a strict constructionist view, of course, no further test is required. But modern practice tends to require additional tests. The present argument implies the test: any part of the general patent power not specifically enumerated, such as in the patent clause, is excluded.

The modern Court itself has actually specified almost exactly this position in its 1966 decision in *Graham v. John Deere Co. of Kansas City* (383 U.S. 1, 5):

> At the outset it must be remembered that the federal patent power stems from a specific constitutional provision which authorizes the Congress "To promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries [Art. I, sec. 8, cl. 8]. The clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the sixteenth and seventeenth centuries by the English Crown, is limited to the promotion of advances in the 'useful arts.' It was written against the backdrop of the practices (eventually curtailed by the *Statute of Monopolies*) of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the public. . . . The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose.

As this was a patent case (in the modern sense), the Court then went on to discuss that the Congress may not expand on the limits to the specific and limited patent power in the issue of patents. To reach the present position from *John Deere* requires only emphasizing the Court's own recognition that the *Statute of Monopolies* did not merely create the modern concept of a patent as a limited-term exclusive right, *it also excluded a large class of previously exercised powers.* The authors of the Constitution clearly understood that in making only the

specific grant they excluded all else of that general class of powers. The authors knew how to grant broad powers, and when they so desired, did so explicitly. This is clear since within the structure of enumerated carefully limited powers, the Constitution contains also two clauses that specify broad federal powers: (1) Article 4, section 3, paragraph 2, the so-called property clause, grants exclusive federal power over all territory and property belonging to the United States; and (2) Article 1, section 8, paragraph 17, grants the power of exclusive legislation over the seat of federal government and other property acquired by the national government with the consent of a state legislature.

The (Nonexistent) Federal General Patent Power

How widespread is dubious exercise of nonexistent federal general patent powers? Any federal agency that grants a license, certificate, franchise, charter, or territory (modern terms for instruments that are included in the classical notion of patent), or indeed that regulates in any form previously found acceptable under a "welfare" argument, is potentially in violation. In any particular example it would require a careful review of the specific power, and of any legislative restrictions on its use, to determine if an unconstitutional general patent was being granted. For example, federal licenses for operation of atomic power facilities might be acceptable under the present arguments, because they are nonexclusive in the relevant economic sense (42 USC Section 2133(b)) and presumably also derive from some other enumerated power, perhaps to determine standards. It is very likely, however, that a federal grant of a pipeline, telephone, or any other utility territory is unconstitutional, and when issued by a state may be voidable by the federal action under the Commerce Clause. Just as state laws could not be used to prevent steamboats from competing with sailboats (as discussed in *Gibbons v. Ogden*), state laws cannot prevent satellites from competing with copper wires, or prevent natural gas from competing with electricity. Likewise, any parts of the Federal Power Act (or any other federal act) that rely on findings in the language of M*unn*, and any part of any act that relies on a general patent power—such as for certification, licensing, or pricing authority (except when applied to interstate waters or federal territory or property)—is likely to be unconstitutional. The Energy Policy Act of 1992, or parts of it, may also be unconstitutional. That act imposes federal planning requirements on states that presume the use of state

general patent power.[6] The Supreme Court has dealt clearly with this kind of issue in *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* (1981: 452 U.S. 264, 288): "Congress may not simply commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." Also, in *New York v. United States* (1992: 488 U.S. 1041), the Court ruled that "the allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."

Mandatory alliances for medical care services as proposed in the 1994 Clinton Health Care Initiatives would have been unconstitutional because they would have allocated markets by grant of general patents that the federal government has no power to grant. The proposal would have forced providers to sell services only to a federally franchised monopsony buyer, while forcing individuals to buy services only from the same entities, as franchised monopoly sellers.[7] There can be no more clear example of a prohibited exercise of the nonexistent federal general patent power. Nor, due to the Tenth Amendment, can the federal government require the states to form such entities, since to do so requires the states exercise a power, the general patent power, which was clearly reserved to the states.

Federal regulatory authority deriving from the use of certificates has frequently been challenged on other grounds (largely following from Field's dissent in *Munn*), resulting in much of the present administrative law framework of restrictions on procedure. For example, the application of regulatory authority has been challenged as an unconstitutional "taking" prohibited by the Fifth Amendment and by the Fourteenth Amendment, as applied to the states: "nor shall private property be taken for public use without just compensation." The courts denied these challenges, holding that price regulation of utilities holding certificates was not a prohibited taking, so long as

[6]This is not contradicted by the findings in *Federal Energy Regulatory Commission v. Mississippi* (1982: 456 U.S. 742). In that case the Public Utilities Regulatory Policies Act of 1978 required that states hold hearings to consider certain regulatory standards for electric utilities. When challenged by Mississippi, the Court found that so long as no particular outcomes were mandated as a result of such hearing, the discretion of the state was not violated. More recent legislation, such as the Energy Policy Act or the Clean Air Act Amendments, require certain forms of state planning, so the transgression into mandates of particular action by states is more clear, and therefore, probably prohibited even under the *FERC v. Mississippi* doctrine.

[7]For economic analysis of the Clinton Health Care Plan, see the *Journal of Economic Perspectives,* Summer 1994.

certain conditions on pricing were met. In one classic case the company was operating under a federal certificate granted under the Natural Gas Act, and therefore, by the present theory, was regulated pursuant to an unconstitutional federal general patent. But federal general patent power questions were neither raised nor decided in the classic cases (Ballonoff 1997: chap. 6).

Conclusion

The analysis of this paper makes it clear that the federal government may not grant general patents. No enumerated federal power exists to regulate business "affected with a public interest." No federal power exists to regulate merely because the absence of such a federal power would create a "vacuum" of regulation in interstate commerce. The federal government does not have powers just because the states lack them. Congress cannot create or exercise power not delegated to it by the federal Constitution merely by passing a law to fill that "vacuum." Thus, if the above analysis is correct, Congress ought simply remove much of the existing regulatory apparatus, or perhaps the Court may do it for them.

While the federal government lacks enumerated powers of direct economic regulation and market allocation, the Commerce Clause provides the basis for Congress to void states' exercise of their general patent powers when such exercise leads to obstruction of commerce, provided that the federal action itself is not simply an allocation of markets (which requires use of the nonexistent federal general patent power). This much at least was decided by the Supreme Court in one of the first antitrust law decisions, *United States v. E.C. Knight Company* (1895: 156 U.S. 1). The federal government already does this generally through antitrust laws. Congress could do this specifically for utilities and other state-protected industries by enacting legislation that might say: "Whereas, since any state action that has the effect of closing a market to interstate commerce may be removed by Congress, any state, territorial, or affiliated commonwealth authority grant heretofore or hereafter made of any exclusive service territory, whether by charter, franchise, license, certificate, or other device, is declared null and void." This would be a modern version of the *Statute of Monopolies.*

Some may find the simplicity of this prescription disturbing. They might prefer that Congress impose some more elaborate comprehensive solution, especially because effects of deregulation will be felt among many states, and, thus, no single state has the authority to take

comprehensive action. This argument is true but irrelevant. Advocates of uniform federal codes often seem to believe that states are not sufficiently competent to draft their own laws for their own purposes. The evidence does not support that view. For example, the Uniform Commercial Code, regulating the important commercial law of sales of goods and transactions in negotiable instruments, was drafted entirely by interests other than the federal government and enacted by most states in substantially similar form without federal mandates. Thus, not only does a federal general patent power not exist, it is also unnecessary. Interstate commerce always affects more than one state, and, thus, no one state can unilaterally control such actions.

The Constitutional Convention considered and rejected language that would have given Congress power to act on matters of the general good where a single state is incompetent to act. This was not because the federal government should not act for the public good. It is because a government that can act merely based on a claim of the public good can do almost anything. The colonists knew this from their own bitter history and from England's long abuse of power. They thoroughly understood the finding of the *Statute of Monopolies* regarding "untrue pretenses of the general good."

The Constitutional Convention considered broader language but chose instead to give the national government only specific, listed, enumerated powers, so that it could do only limited general good. Among those powers actually granted was the Commerce Clause, designed to enable Congress to stop states from creating general harm when they choose to act by closing markets based on pretenses of the general good. Under the Commerce Clause, federal jurisdiction over commerce is plenary, but Congress must act only within its enumerated powers. Thus, the effect of the clause is to confer on the federal government only the ability to remove state obstructions.

Congress is not an instrument for the reallocation of economic power. The federal government was specifically *denied* any general power to allocate markets or to broadly control the national economy. Centuries of abuse of exactly such powers by the English Crown taught the colonists why those restrictions on national power were necessary. The experience of Parliament in creating the 1624 *Statute of Monopolies* showed them how to do it.

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