

## A Thought Experiment: The Commerce Power and the 18th Amendment

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A rhetorical device that was heavily relied upon during the New Deal transformation was that the Supreme Court was simply “returning” the commerce power to the broad grant of legislative power that it had always been. For example, in *Wickard v. Filburn*, 317 U.S. 111, 120 (1942), the court wrote that “at the beginning [in *Gibbons v. Ogden*] Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded,” and proceeded to hold that the commerce power granted Congress the authority to regulate the amount of wheat a farmer grew for his own in-state consumption on the basis that his failure to resort to the market for wheat affected interstate commerce.

Although legal realists have acknowledged that the New Deal was indeed a period of radical constitutional transformation with regard to the scope of the commerce power, the notion that the commerce power was always as broad as it became after the New Deal is still advanced by some. The following “thought experiment” addresses that argument.

In 1919, two decades before the New Deal transformation, the 18th Amendment was ratified despite the overwhelming difficulty of amending the U.S. Constitution. The 18th Amendment initiated that darkly colorful period in American history known as “Prohibition” by granting Congress the power to enact legislation banning the manufacture, sale, and transportation of alcoholic beverages. However, under the commerce power as it would come to be interpreted by the time of *Wickard v. Filburn*, Congress would easily have had the power to enact a federal statute banning the manufacture, sale, and transportation of alcoholic beverages on the basis of the effect of such activities on commerce. Indeed, federal drug laws have been subsequently enacted on just that basis. Thus, if the New Deal rhetoric were valid, constitutional amendment should have been unnecessary to enact the Prohibition laws. Ordinary legislation under the commerce power would have sufficed.

Considering the difficulty of amending the U.S. Constitution, the fact that this method was universally believed to have been necessary must mean either: (1) that the commerce power around 1919 was indeed much narrower than it was to become after the New Deal; or (2) that the Supreme Court in its decisions before 1919 had, by striking down a few federal statutes as beyond the commerce power, succeeded in inducing a sort of mass hypnosis comparable to the experience of Dorothy in the 1939 film, *The Wizard of Oz*. Throughout the movie, Dorothy goes to extraordinary efforts to find a way to return home to Kansas, all the while quite unaware that the ruby slippers that she has been wearing since her arrival in Oz have the capacity to return her home if only she clicks her heels together and says the magic words (“There’s no place like home.”).

Similarly (if proposition (2) is the correct one), Congress, by clicking its two houses together and saying the magic words (“Alcohol production and consumption affects interstate commerce.”), ought to have been able to achieve Prohibition without having had to follow the long and arduous “yellow brick road” of constitutional amendment. Like Dorothy, they just didn’t know that they had the power all along. Either that must be the case or the scope of the federal commerce power must truly have expanded significantly during the New Deal (proposition (1))—without any textual constitutional amendment whatsoever to support or guide that change.

I shall leave it to the reader to decide which is the case.



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