Congress, under the Commerce Clause, has the power to regulate a number of interstate activities. With the constitutional challenges still wending their way through the judiciary, it is worth a look at the premise under which the Obamacare is based.

This is the first in a short series of documents. First, it briefly outlines the history of Commerce Clause jurisprudence. Second, it briefly analyzes Commerce Clause evolution and Congressional power under the Commerce Clause. And finally, it will briefly address and analyze the new Obamacare legislation under the Commerce Clause.

The Commerce Clause, U.S. Const., Art. 1, § 8, cl. 3, says in its entirety that Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." In 1824, Chief Justice Marshall's defined the term by saying it "undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." (Gibbons v. Ogden)[1]

Initially, the commerce clause was limited. For instance, the Chief Justice went on to say, "[I]t is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary."[2]

The Chief Justice also provided an explanation as to what limited the Commerce Clause. "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State."[3]

Later, under *Wikard v. Filburn*[4] Congress gained a great deal more power to regulate activity under the commerce clause. In that case, a farmer who grew wheat was found to have grown an amount which surpassed the newly regulated allotment to which he was entitled. In other words, the farmer grew too much wheat and he got in trouble. The Court basically said the Commerce Clause gave Congress the power to regulate activities, which although were wholly *intrastate* economic, might have some aggregate effect on *interstate* activity.

For years, the Court continued to expand the power of Congress under the Commerce Clause. The Court, however, continued to set a limit by pointing out that without careful checks on it the Federal government could become too centralized.[5] In 1995 in *U.S. v. Lopez*[6], the Court finally put the breaks on the seemingly perpetually expanding power of Congress under Commerce Clause. In that case, a wholly criminal statute was promulgated under the Commerce Clause; the Court rejected it because they found the law did affect commerce.

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1 , 9 Wheat. 1, 189-190, 6 L.Ed. 23 (1824)
2 Id.
3 Id.
4 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942)

5 See U.S. v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, L.Ed.2d 626 (1995). A good overview of the history of the Commerce Clause cases. For the sake of time, I limit this article to the cases above.
6 See FN 5

Essentially, the Court said there was nothing about the law in question that had anything to do with Commerce.

Although, brief the above history of the Commerce Clause in the United States shows how the Court's attitude toward the Commerce Clause has changed over the years. In the next installment we will look at the latest cases under the Commerce Clause and analyze how the Commerce Clause has changed Congressional power.