

from
**Upholding the Law
and Other Observations**
by
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The Mouse That's Roaring
(With apologies to Leonard Wibberley)



Although one might easily wish that it had been taken on behalf of a more comely issue, the stand on principle taken by many libraries across the country in the wake of the Supreme Court's recent opinion on the 'Children's Internet Protection Act' (CIPA) should be appreciated by all. Faced with the act's provisions for the withholding of federal funds from libraries that refuse to install internet filters restricting access to pornographic content, these local community organs have manfully told the feds to peddle their diktats elsewhere. In response, the feds have... done nothing. There is a valuable lesson to be gleaned from this apparent David-and-Goliath confrontation.

First, though, don't misunderstand. I am not cheering subsidized-- or simply facilitated-- access to either pornography or the internet. In fact, those aspects of this topic simply make clear to me that I am not capable of identifying a modern library's mission. In the past, I understood that mission to be making available as a community resource a collection of general interest literature and research materials too bulky,

expensive, or occasional-in-utility to be reasonably acquired and maintained by individual citizens. The provision of smut would seem to me to be outside this scope. Even leaving aside the 'general interest' thing, from what I have seen, smut is cheap, compact, and insufficiently nuanced to require a great deal of variety for the full enjoyment of its "benefits". As for internet access, now that decent computers and internet services cost less than the televisions and cable services delivering passive-access garbage into most homes far too many hours a day, what is really being provided by the libraries in this regard is nothing more or less than a subsidy of the bad choice to have the one in the home in lieu of the other.

What I *am* cheering is the peek behind the curtain at the extreme limitation of federal authority made possible by the libraries' challenge of the CIPA in court and their subsequent reaction to the results of that challenge. Both elements of this little tempest-in-a-teapot combine to reveal an important truth that is usually more difficult to perceive.

First, in challenging the CIPA, the libraries obliged the Supreme Court to point out authoritatively that the act is Constitutionally sound without consideration of its dramatically limited application to recipients of federal grants. The act, after all, has nothing to do with content creation or distribution. It is designed to have no meaningful impact on adult access to even disfavored speech or information. Its only effect is upon access to such material for minors, restrictions on which have never suffered even a moment of peril in an American courtroom.

Consequently, as long as the federal government remained within its jurisdictional limits in crafting the act, it was good solid law, a fact which was known to its drafters. They had had two previous attempts wordily shot down by the court within the last decade (the 'Child Online Pornography Act' and

the 'Communications Decency Act'), and were therefore working off a blueprint.

Reacting to the court's ruling, the libraries offer us the second part of the picture. Across the country these targets of the act are telling the federal government to keep its money (which for the most part was insignificant in amount) and are continuing with business as usual. That this is happening is a surprise to no one, including Congress-- libraries have made their intentions in this regard perfectly clear over recent years.

Considered together, these two aspects of the Child Internet Protection Act-- the lawfulness of the federal government's requirement that those within its jurisdictional reach deploy internet filters; and the guaranteed futility of that requirement when its application is limited to those receiving federal grants-- invoke a couple of questions. The answer comprises the unusually clear glimpse of the truth with which we are graced by our bevy of bellicose librarians.

The questions are these: Why did Congress construct this safe-as-houses act around the toothless federal funding connection? Indeed, why did Congress not simply equip the act with general application, and make it a federal crime to defy its protocol, thereby not only eliminating the opt-out being exercised by the libraries, but imposing its requirements upon every internet café, bookstore, and other venue at which equally hazardous internet access is made available?

The inescapable answer is simple: Because it can't, of course. The federal government *has no jurisdiction* in any union-state library, internet café, bookstore, etc. Not because it is prohibited by something in the Constitution, such as a First Amendment conflict, or the like; but because it has never been granted such jurisdiction.

The whole concept of limitations to federal jurisdiction seems alien to many people. Playing along when the big kid on the block claims to be King of America has become so habitual that such people have forgotten that it's just play. Nonetheless, the truth is still honored in the mechanics of legislation, and, for the most part, in the courts. Every act of Congress contains either explicit or implicit acknowledgement of its limited scope of authority, and when judicial attention is properly drawn to those limits, even extreme legislative efforts to confuse or conceal the difference between what-is-desired and what-is-permitted fails.

The federal government is provided with general legislative authority only over its territories and possessions (among which are included areas ceded to that government by explicit union-state action). As was declared by counsel for the United States before the Supreme Court in *United States v. Bevans*, 16 U.S. 336 (1818):

"The exclusive jurisdiction which the United States have in forts and dock-yards ceded to them, is derived from the express assent of the states by whom the cessions are made. It could be derived in no other manner; because without it, the authority of the state would be supreme and exclusive therein,"

with the court, in its ruling agreeing:

"What, then, is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory;"

In *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 737 (1836), the court reiterates this principle:

"Special provision is made in the Constitution for the cession of jurisdiction from the States over places where the federal government shall establish forts or other

military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction."

In 1956, the Eisenhower administration commissioned the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas within the States. The pertinent portion of its report points out that,

"It scarcely needs to be said that unless there has been a transfer of jurisdiction (1) pursuant to clause 17 by a Federal acquisition of land with State consent, or (2) by cession from the State to the Federal government, or unless the Federal Government has reserved jurisdiction upon the admission of the State, the Federal Government possess no legislative jurisdiction over any area within a State, such jurisdiction being for exercise entirely by the States, subject to non-interference by the State with Federal functions, and subject to the free exercise by the Federal Government of rights with respect to the use, protection, and disposition of its property".

In addition, the federal government has administrative jurisdiction over its own organs and instrumentalities, and the authority to condition receipt of federally-dispensed funds pretty much as it wishes, as long as it is not egregiously discriminatory. It is also granted authority to regulate 'commerce among the states', which is Constitutionally meant as interactions between union-state governments-- a meaning which had suffered some misunderstanding during the middle part of the 20th century. Imaginative demagoguery during that period had briefly succeeded in floating the notion that 'commerce among the states' should be construed as meaning economic activity across state lines, or, in a still greater flight of fancy, as activity in one state which might theoretically affect

economic activity in another state. But even laws written with the intention of exploiting this short-lived popular extravagance contain properly limiting language-- the opportunistic legislators relied upon the courts to overlook the limits, or for those opposed to the extra-legal ambitions of such acts to be unable to identify or articulate those limits.

The judiciary was indeed somewhat cooperative in these endeavors for a period of time; however, it is no longer so. Recent Supreme Court rulings striking down gun control, arson and domestic violence laws which sought to claim authority under these misconstructions serve to demonstrate this fact. Frankly, though, what has enabled legislative overreach has more commonly been poor performance in the ranks of those victimized by congressional excesses. As I noted above, while few federal enactments are as straightforward in acknowledging the government's jurisdictional limits as, for instance, the following anti-discrimination act:

Title 18 USC Sec. 244. - Discrimination against person wearing uniform of armed forces

Whoever, being a proprietor, manager, or employee of a theater or other public place of entertainment or amusement in the District of Columbia, or in any Territory, or Possession of the United States, causes any person wearing the uniform of any of the armed forces of the United States to be discriminated against because of that uniform, shall be fined under this title,

even the most egregiously un-straightforward legislation nonetheless typically contains direct language confining it to its proper place. Where this is not the case, laws will at least lack any language which legally attempts a claim to the contrary, and are therefore, under fundamental doctrine, equally confined. As the Supreme Court has put it:

"All legislation is prima facie territorial.' Ex parte Blain, L. R. 12 Ch. Div. 522, 528; State v. Carter, 27 N. J. L. 499; People v. Merrill, 2 Park. Crim. Rep. 590, 596. Words having universal scope, such as 'every contract in restraint of trade,' 'every person who shall monopolize,' etc., will be taken, as a matter of course, to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch."
American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909)

Look at a simple example of the 'hidden language' approach, in the federal law purporting to require FDA approval of new drugs, at Title 21 USC, Section 355. Rather than acknowledging its limitations openly, the act deploys definitions which incorporate such an acknowledgement while concealing the fact from immediate view. This method allows the legislators to wave what appears to be a robust exercise of authority in the public interest before voters, and leaves the inconvenient limitations to be revealed only later in obscure courtroom contests.

Sec. 355. - New drugs

(a) Necessity of effective approval of application

No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application filed pursuant to subsection (b) or (j) of this section is effective with respect to such drug.

Sec. 321. - Definitions; generally

(b) The term "interstate commerce" means

(1) commerce between any State or Territory and any place outside thereof, and

(2) commerce within the District of Columbia or within any other Territory not organized with a legislative body.

Clearly, any drug maker that wished could set up shop in California, for instance, and sell to its heart's content within the 5th largest economy in the world without sending so much as a birthday card to the FDA. (Indeed, one has to wonder why the various state governments are not luring drug manufacturers to spin off units into their individual jurisdictions, so that the next innovation can be marketed to each state's citizens at far lower prices than is possible under the FDA regimen). But wait, there's more. Actually, the limitations on federal authority in this, and any similar case, is even more circumscribed than is apparent in the hidden, limiting language. As the Supreme Court points out in *Eisner v. Macomber*, 252 U.S. 189 (1920):

"...it becomes essential to distinguish between what is, and what is not 'income'...Congress may not, by any definition it may adopt, conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone, that power can be lawfully exercised."

Under this common-sense doctrine, Congress lacks the authority to define or determine the extent of jurisdiction conveyed under Constitutional grants of authority. In the gun control case mentioned earlier, *United States v. Lopez* 514 U.S. 546 (1995), the court, in striking down the legislation, makes clear that the same principle expressly applies to the meaning of the term "commerce":

"Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.

Under the theories that the Government presents in support of 922(q) [the law in question], it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate."

The court explicitly rejects the most expansive misconstructions of the recent past, citing John Marshall's ancient delineation of the meaning and limitations of the commerce clause in *Gibbons v. Ogden*, 9 Wheat 1, (1824):

"It is not intended to say that these words comprehend that [type of] 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."

...

"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."

Five years after *Lopez*, in the 'Morrison' domestic violence case, the court reiterates this doctrine while nullifying another overreach by Congress:

"Congress found that gender-motivated violence affects interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with

business, and in places involved in interstate commerce;... " Given these findings and petitioner's arguments, the concern that we expressed in Lopez that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well founded" United States v. Morrison, 99-5 (2000)

At the very least, with these recent rulings the court is saying that regardless of what Congress might declare its intended meaning of "commerce" to be, the term cannot be extended to convey jurisdiction except insofar as, and during the time that, the object of legislative attention crosses state lines. The court's growing impatience with congressional ambitions in this regard is unsurprising. Look at another recent law, even more optimistic in the sort of overreach which the court is no longer prepared to tolerate: The Clean Water Act.

The 'Clean Water Act' provides, among other things, for supervision of matters affecting "navigable waters". "Navigable waters" are defined within the act to mean "waters of the United States including the territorial seas". This language is commonly cited as representing a claim of authority under the act to dictate behavior by anyone with respect to anything wet that is more substantial than a temporary puddle left on the sidewalk after a thunderstorm.

When we look at the regulations under which this authority is implemented, we find, as expected, what purports to be the requisite limiting language. However, that language dramatically fails the tests of both common sense and the increasingly bright line being laid down by the court in regard to the meaning of "commerce":

33 CFR §328.3 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean

Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Little further comment or analysis than the mere recitation of these definitions themselves is necessary. They are self-evidently absurd, and self-evidently unlawful. The 'principle' informing them could as readily be deployed to place every square foot of land in America, and every thing else as well, under federal jurisdiction.

Nonetheless, lives have been ruined through the invocation of these ridiculous pretenses, because the victims, being so much in the habit of playing along when the big kid on the block claims to be King of America, didn't even think to read the law by which they were being railroaded. It must be imagined that the Supreme Court is longing for an appropriate litigant who has read, and will argue against, this abominable legislative fantasy before the kid has accumulated so much control during play that he really *is* king.

Librarians, rightly or wrongly, are seldom thought of as forceful personalities. Indeed, they have long been stereotyped as quiet, shy, *mousy* ladies, at their most militant when raising a finger to lip and issuing a peremptory "Shhhh!". Today, it's a different finger entirely that is on display, and the "shhh!" directed at that big noisy kid in the Fantasy section is more of a, "*Put a sock in it!*" It may be overstating it to call their expression a roar, but they're not whispering either. The rest of us will do well to listen.