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Straying from the Constitution: "Commerce" and the Supreme Court's October 2017 Term

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Abstract

One of the limited powers that the U.S. Constitution grants to Congress is the authority to regulate commerce "with foreign nations," "among the Indian Tribes," and "among the several states." But three cases that the Court declined to review in its October 2017 term show how the government now treats those provisions as though they are virtually limitless. Fortunately, Justice Clarence Thomas pointed out the flaw in that thinking in two of those three cases (in dissents from the denial of certiorari*). The third case earned a victory for property rights at the trial court that was overturned on appeal; still it illustrates how far government can intrude into people's daily lives under the guise of regulating "commerce." These three cases are reminders that courts must be vigilant in holding Congress to its limited powers according to the Constitution's original meaning.*

Introduction

The U.S. Supreme Court's October 2017 term has featured several cases that show just how broadly the Court and Congress interpret the word "commerce" as it appears in the U.S. Constitution. That document empowers Congress to regulate commerce "with foreign nations," "among the Indian Tribes," and "among the several states."[1] But three cases which the Court declined to review this term—*Damion St. Patrick Baston v. United States*, *Upstate Citizens v. United States*, and *P.E.T.P.O. v. U.S. Fish & Wildlife Service*—show how the government treats those provisions as if they were virtually limitless.

Fortunately, Justice Clarence Thomas pointed out the flaw in that thinking in two of those three cases, both times in a lone dissent

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Key Points

- Authority to regulate commerce has too often been misused and abused—particularly to regulate purely local affairs that no reasonable person would consider to be commerce among states, Indian tribes, or with foreign nations.
- The U.S. Supreme Court's 2017 term has featured several cases that show just how broadly the Court and Congress interpret the word "commerce" as it appears in the U.S. Constitution.
- Three cases which the Court declined to review this term—*Damion St. Patrick Baston v. United States*, *Upstate Citizens v. United States*, and *P.E.T.P.O. v. U.S. Fish & Wildlife Service*—show how the government treats those provisions as if they were virtually limitless.
- These cases are reminders that courts must be vigilant in holding Congress to its limited powers according to the Constitution's original meaning.

from the denial of a petition for a writ of "certiorari" (the Latin term for "send up the record" of a case for review). The third case, *P.E.T.P.O.*, attracted neither enough votes for review nor a dissent from denial of *certiorari*. It did, however, earn a victory for property rights at the trial court (which was overturned on appeal)—and helps illustrate how far government can intrude into people's daily lives under the guise of regulating "commerce." These cases are reminders that courts must be vigilant in holding Congress to its limited powers according to the Constitution's original meaning.

I. The Foreign Commerce Clause and *Damion St. Patrick Baston v. United States*

Last March, the Supreme Court refused to hear *Damion St. Patrick Baston v. United States*,[2] an appeal from the Eleventh Circuit Court of Appeals, which involved Congress' power to regulate international commerce. In his lone dissent from denial of *certiorari*, Justice Thomas argued that the Court should reconsider its jurisprudence on Congress' power to regulate global trade and provided new insight for scrutinizing relevant statutes.

Baston arose out of the federal sex-trafficking conviction of a Jamaican citizen, Damion St. Patrick Baston, for directing an international prostitution ring. After his conviction, the trial judge ordered him to repay one of his victims the money that she earned as a prostitute in the United States, $78,000, as well as an additional $400,000 which she earned under his control in Australia. The issue before the Court was whether the second restitution order covering prostitution abroad was constitutional.

The Foreign Commerce Clause. The Foreign Commerce Clause of the U.S. Constitution, Article 1, Section 8 states that "Congress shall have power to... regulate commerce with foreign nations." This provision was designed to limit the power to regulate international commerce that states enjoyed under the Articles of Confederation (such as raising tariffs on imported goods) and to protect other economic concerns reflected in the Constitution.[3] In *Board of Trustees of University of Illinois v. United States* (1933), the Court explained that in "international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power."[4]

The Foreign Commerce Clause, however, was not designed for the federal government to involve itself in the laws of other countries. Federal courts, including the Eleventh Circuit in *Baston*, have typically interpreted Congress' power to regulate international commerce broadly. And in *Baston*, the government argued that, according to those cases, "Congress' power under the Foreign Commerce Clause includes at least the power to regulate...activities that have a 'substantial effect' on commerce between the United States and other countries."[5]

But in his dissent, Justice Thomas wrote the following:[6]

> Taken to the limits of its logic, the consequences of the Court of Appeals' reasoning are startling. The Foreign Commerce Clause would permit Congress to regulate any economic activity anywhere in the world, so long as Congress had a rational basis to conclude that the activity has a substantial effect on commerce between this nation and any other.

While that power may seem desirable for awarding money damages to the victim in *Baston*, consider other contexts. "Congress would be able not only to criminalize prostitution in Australia," Thomas wrote, "but also to regulate working conditions in factories in China, pollution from power plants in India, or agricultural methods on farms in France."[7] The Founders did not intend for Congress' power to extend so far.[8] Instead, "whatever the correct interpretation of the foreign commerce power may be," Thomas wrote, "it does not confer upon Congress a virtually plenary power over global economic activity."[9]

The Lacey Act. While the concerns about Chinese factories and French farming are hypotheticals, the scenario that Thomas describes is real. For example, the Lacey Act[10] regulates commercial trade in plants and animals and makes it a crime in this country for U.S. citizens to violate, or to contract with parties who violate, the relevant laws of other countries. That reality is arguably worse than Justice Thomas's hypotheticals, because the Lacey Act leaves otherwise law-abiding parties criminally liable in the United States for violating foreign rules that they never voted for, have possibly never heard of, and probably cannot read without translation. Although federal courts have read the Lacey Act as merely excluding "wildlife unlawfully taken abroad... from the stream of foreign commerce," the word

"unlawfully" there means that a violation of foreign law is an element of a crime under the Lacey Act.[11] And the statute's "standardless incorporation of foreign law enforced by criminal penalties is unsound as a matter of criminal justice policy and impermissible as a matter of constitutional law."[12]

Thomas' dissenting opinion in *Baston* shows that he considers the current scope of the Foreign Commerce Clause to be worth the Court's attention. And it may prove helpful, if and when an appropriate case arises, for the Court to consider constitutional questions surrounding statutes that regulate conduct abroad: either "legislation of extraterritorial operation which purports to regulate conduct inside foreign nations"[13] or legislation that reaches conduct within foreign nations through dynamic incorporation of foreign law into the U.S. Code.[14] Americans who unwittingly violate laws regulating foreign commerce may find such an opinion helpful.

II. The Indian Commerce Clause and *Upstate Citizens v. United States*

In November, the U.S. Supreme Court declined review in *Upstate Citizens v. United States* and *Town of Vernon v. United States*, which involved the power of the federal government to take land from a state and place it under the sovereignty of an Indian tribe.[15] The Second Circuit Court of Appeals held that the federal government lawfully placed 13,000 acres of land in New York under the jurisdiction of the Oneida Indian Nation of New York without the consent of the state or local governments.[16] Again dissenting from the Court's denial of *certiorari*, Justice Thomas argued that Congress' power under the Indian Commerce Clause is also overgrown.

This case arose out of a land dispute between the Oneida Tribe and New York over state-owned property that falls within the Tribe's original homeland and reservation. By the 1920s, the tribe owned only 32 acres of its original 300,000-acre reservation. The rest was purchased from them and largely resold. The Oneidas repurchased some of it and established businesses there, including a casino—and then claimed to be exempt from property taxes because the land was part of their original reservation.[17] In *City of Sherrill, N.Y. v. Oneida Indian Nation of New York* (2005), the Supreme Court ruled that the Oneidas still owed taxes because state and local governments had exercised sovereignty there for two centuries. But Justice Ruth Bader Ginsburg, writing the majority opinion which Thomas joined, pointed the tribe to the Indian Reorganization Act. That statute "authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land 'shall be exempt from State and local taxation.'"[18] That act, Ginsburg wrote, was "the proper avenue for [the Oneida Tribe] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago."[19]

The Oneidas took the Court's advice. They petitioned the Secretary of the Interior, who, in 2008, placed 13,000 acres of state land under tribal jurisdiction. Although New York State and two counties settled challenges to the transfer in 2014,[20] several upstate New Yorkers, two towns, and a civic group took their dispute all the way to the Supreme Court, arguing that, among other concerns, the transaction exceeded the federal government's power under the Indian Commerce Clause. Because the U.S. Supreme Court denied review, the Second Circuit's contrary conclusion stands.[21]

The Indian Commerce Clause. The Indian Commerce Clause empowers Congress to "regulate Commerce...with the Indian Tribes." Delegates to the Constitutional Convention debated several ways of incorporating American Indians into the constitutional framework, ultimately deciding that the "power to regulate trade and commerce with the Indian tribes passed naturally from the Crown to the federal government after the Revolution."[22] The Court has "acquiesced in Congress' assertion of a 'plenary power to legislate in the field of Indian affairs,'" according to Justice Thomas, "[b]ut 'neither the text nor the original understanding of the [Indian Commerce] Clause supports Congress' claim to such "plenary" power.'"[23]

As Thomas wrote in his concurring opinion in *Adoptive Couple v. Baby Girl* (2013) (concerning Congress' authority to regulate adoption proceedings under the Indian Child Welfare Act), the Indian Commerce Clause was intended to put Congress in charge of "regulat[ing] trade with Indian tribes—that is, Indians who had not been incorporated into the body-politic of any State."[24] On the regulatory land grab in *Upstate Citizens*, Thomas wrote that the Founders "would have been shocked to find...lurking in a Clause they understood to give Congress the limited authority 'to regulate trade with Indian tribes living beyond state borders'...the power to take any state land and strip the State of almost all

sovereign power over it 'for the purpose of providing land for Indians.'"[25]

That kind of transaction under the Indian Reorganization Act does "not resemble 'trade with Indians,'" wrote Thomas, but "Congress, the Executive, and the lower courts stray[ing] further and further from the Constitution."[26] If the Court does revisit its jurisprudence in this area, Justice Thomas' concurrence in *Adoptive Couple* and dissent in *Upstate Citizens* should be its lodestars.

III. The Interstate Commerce Clause and *P.E.T.P.O. v. U.S. Fish & Wildlife Service*

In January, the Court refused to hear *People for the Ethical Treatment of Property Owners (P.E.T.P.O.) v. U.S. Fish & Wildlife Service*,[27] which involved a constitutional challenge to federal regulatory protections for the Utah prairie dog, a species of invasive rodent that lives exclusively within one area of Utah and that serves no economic purpose. But its presence, accompanied by heavy-handed federal protection, has lessened many Utahans' ability to enjoy their property.[28] While the rodents damaged grave sites, runway and taxiway areas of the Cedar City Regional Airport, sports fields, and a golf course; blocked commercial and residential construction projects; and jeopardized public health, federal law forced residents to sit by and watch.[29] Although the Tenth Circuit's ruling for the government stands, and none of the justices dissented from denial to review the case, this case helps to illustrate the costs of federal overreach.

In *P.E.T.P.O.*, the Pacific Legal Foundation, a prominent public interest legal organization, argued on behalf of more than 200 landowners in Utah that federal regulatory protections for the Utah prairie dog—which forbid anyone to "take" or "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" the species[30]—exceeded Congress' authority under the Interstate Commerce Clause.

Judge Dee Benson of the U.S. District Court for the District of Utah ruled for the land owners, holding that "the Commerce Clause does not authorize Congress to regulate takes of Utah prairie dogs on non-federal land."[31] That ruling barred enforcement of the federal regulations, thereby allowing Utah to set its own protections for the species, which led to record highs for its population. And although the Tenth Circuit Court of Appeals reversed the district court and reinstated the federal rules, Utah's successful conservation efforts led the U.S. Fish and Wildlife Service to propose preserving Utah's successful policies.[32]

The Interstate Commerce Clause. The Interstate Commerce Clause of Article 1, Section 8—the greatest of the commerce triumvirate—states that "Congress shall have power to...regulate Commerce... among the several States."[33] The Supreme Court has defined "commerce" as "the production, distribution, and consumption of commodities."[34] Georgetown Law Professor Randy Barnett has described the original meaning of the Commerce Clause as follows:[35]

> Congress has power to specify rules to govern the manner by which people may exchange or trade goods from one state to another [and] to remove obstructions to domestic trade erected by states.

Today, however, this provision of the Constitution is routinely abused to enact legislation that has nothing to do with trade—and often regulates matters that were traditionally looked upon as state and local concerns. For example, 196 U.S. Representatives co-sponsored the yet-unpassed Pet and Women Safety Act of 2017, which contains a provision that would make it a federal crime "to harass or intimidate any person's pet in a way that causes 'substantial emotional distress.'"[36] That measure is misguided because animal abuse is already criminally punished in every state. While lawmakers cite Article I, Section 8 as constitutional authority for the bill—presumably referring to the commerce clause—they define "pet" as "a domesticated animal, such as a dog, cat, bird, rodent, fish, turtle, horse, or other animal that is *kept for pleasure rather than for commercial purposes*."[37] Congress cannot treat Jane harassing John's pet that serves no commercial purpose as "Commerce... among the several states" without destroying a "distinction between what is truly national and what is truly local."[38]

Two Supreme Court cases help to explain how it has become possible for Congress to regulate local, non-commercial activity under the Interstate Commerce Clause. In *Wickard v. Filburn* (1942), the Supreme Court ruled that the U.S. Secretary of Agriculture could penalize a small Ohio farmer for growing excess wheat for personal consumption because, if aggregated with the output of other excess wheat producers, it might interfere with Congress' broader effort to limit nationwide wheat production.[39]

More recently, in *Taylor v. United States* (2016),[40] the Supreme Court affirmed a federal conviction for a local robbery under the Hobbs Act—which proscribes "robbery or extortion" that in any way "obstructs, delays, or affects commerce"—despite no demonstrable effect on interstate commerce. As Justice Ruth Bader Ginsburg noted at oral argument, "It's very odd that this is a Federal case. I mean, they—in fact, they took, what, a couple of cell phones, $40?"[41]

Today, some prominent academics, judges, and Members of Congress agree that the authority to regulate commerce has too often been misused and abused, particularly to regulate purely local affairs that no reasonable person would consider to be commerce among states, Indian tribes, or with foreign nations.[42] Although the Court rejected the opportunity to say as much in *P.E.T.P.O.*, the district court's opinion in that case cast some light on this darkened corner of the Constitution. And Justice Thomas's work has provided a deeper understanding of the meaning of "commerce" for litigants to use in future cases.

Conclusion: Straying from the Commerce Clause

The Court has not always let Congress get away with regulating anything under the sun that lawmakers deem or pretend to be commerce. Consider three cases. In *National Federation of Independent Businesses v. Sebelius*, the Supreme Court rejected the government's expansive theory that the Commerce Clause authorized Congress to enact the individual-mandate provision of "Obamacare," saying that Congress may regulate the commercial health care market, but it cannot regulate a person's failure to buy health care as "commerce."[43] In *United States v. Lopez* (1995), the Court nullified a federal statutory ban on possessing a gun near a school.[44] And in *United States v. Morrison* (2000), it struck a federal cause of action for sexual assault victims.[45] In these three cases, the Court reasoned that the commerce clause does not reach purely local, non-economic activity like gun possession or sexual assault. In *Lopez*, the Court refused to conclude "that there never will be a distinction between what is truly national and what is truly local."[46] And in *Morrison*, the Court rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[47] It is difficult to square cases like the Tenth Circuit Court of Appeals' decision in *P.E.T.P.O.* with *Sebelius*, *Morrison*, and *Lopez*. Those three Supreme Court decisions remain good law.

One case to watch that might present the Court an opportunity to reinvigorate *Lopez* and *Morrison* is *United States v. Forsythe*.[48] That case involves Andrea Forsythe's Commerce Clause challenge to the federal arson statute, which provides:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both.

Forsythe stole and pawned a diamond necklace, obtained renter's insurance, then burned down her rented house and filed an insurance claim that included the stolen necklace. She later admitted to burning the house and pled guilty to federal arson. In 1985, the Supreme Court said that the Commerce Clause permitted the federal arson conviction of a homeowner who "was renting his apartment building to tenants at the time he attempted to destroy it by fire."[49] Forsythe now argues, however, that under *Lopez* and *Morrison* the Commerce Clause should not be read to reach a discrete instance of local, non-economic activity like the "paradigmatic common-law state crime" of burning down a rented house.[50] The Third Circuit Court of Appeals rejected Forsythe's argument and affirmed her conviction, and her appeal is now pending before the Supreme Court.[51]

However Forsythe's case concludes, Justice Thomas has made it clear that if "proper constitutional limits on Congress' commerce power" are "to have any ongoing vitality, it is up to this Court to prevent [them] from being undermined."[52] In time, his reasoning in cases like *Baston* and *Upstate Citizens* may bear fruit.

For now, those cases serve as reminders of what the Constitution means, how far Congress has strayed from that meaning, and why the nomination of judges who respect that meaning is so vital to the longevity of our constitutional framework.

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Endnotes

1. U.S. Const. art I, § 8, cl. 3.
2. 137 S. Ct. 850 (2017).
3. David F. Forte, *Commerce with Foreign Nations*, *in* The Heritage Guide to the Constitution, *available at* https://www.heritage.org/constitution/#!/articles/1/essays/37/commerce-with-foreign-nations.
4. 289 U.S. 48, 59 (1933).
5. Brief for the United States in Opposition at 8, Baston v. United States, 137 S. Ct. 850 (2017) (No. 16-5454), *available at* http://www.scotusblog.com/wp-content/uploads/2017/01/16-5454-BIO.pdf.
6. 137 S. Ct. 850, 853.
7. *Id.*
8. It also upsets the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" EEOC v. Arabian American Oil Co. 499 U.S. 244, 248 (1991) (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).
9. 137 S. Ct. at 853.
10. 16 U.S.C. 3371–78 (2012). This statute is arguably unconstitutional insofar as it makes otherwise law-abiding businessmen liable for violating the criminal laws of foreign nations without knowledge of their wrongdoing. Paul J. Larkin, Jr., *The Constitutional Problems Raised by Domestic Convictions for Foreign Crimes*, Heritage Foundation Legal Memorandum No. 152 (Apr. 21, 2015), *available at* http://thf_media.s3.amazonaws.com/2015/pdf/LM152.pdf.
11. United States v. Molt, 599 F.2d 1217, 1219 (3d Cir. 1979).
12. Paul J. Larkin, Jr., *Why U.S. Citizens Should Not Be Branded as U.S. Criminals for Violating Foreign Law*, Heritage Foundation Legal Memorandum No. 107 (Jan. 9, 2014), https://thf_media.s3.amazonaws.com/2014/pdf/LM107.pdf.
13. 137 S. Ct. 850, 852.
14. Dynamic incorporation means incorporating whatever laws the foreign nation adopts in the future, whereas static incorporation refers to incorporating existing laws. *See* Paul J. Larkin, Jr., *The Dynamic Incorporation of Foreign Law and the Constitutional Regulation of Federal Lawmaking*, 38 Harv. J. L. & Pub. Pol'y 337 (2015).
15. Upstate Citizens for Equal., Inc. v. United States, No. 16-1320, 2017 WL 5660979 (U.S. Nov. 27, 2017).
16. Upstate Citizens for Equal., Inc. v. United States, 841 F.3d 556 (2d Cir. 2016), *cert. denied*, No. 16-1320, 2017 WL 5660979 (U.S. Nov. 27, 2017).
17. *Id.*
18. City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 220 (2005).
19. *Id.* at 221.
20. *Id.* at n.8.
21. 841 F.3d 556.
22. David F. Forte, *Indian Commerce Clause*, *in* The Heritage Guide to the Constitution, *available at* http://www.heritage.org/constitution#!/articles/1/essays/39/commerce-with-the-indian-tribes.
23. *Upstate Citizens for Equal. Inc.*, No. 16-1320, 2017 WL 5660979, at *1.
24. 133 S. Ct. 2552, 2567.
25. No. 16-1320, 2017 WL 5660979, at *3.
26. *Id.*
27. People for Ethical Treatment of Prop. Owners v. United States Fish & Wildlife Serv., 852 F.3d 990, 994 (10th Cir. 2017), *cert. denied*, No. 17-465, 2018 WL 311835 (U.S. Jan. 8, 2018).
28. *See generally*, Pacific Legal Found., *People for the Ethical Treatment of Property Owners v. Fish and Wildlife Service*, https://pacificlegal.org/case/people-for-the-ethical-treatment-of-property-owners-v-fish-and-wildlife-service/ (last visited Feb. 2, 2018).
29. *PLF Sues Feds for Giving Prairie Dogs the Run of a Small Utah Town*, Pacific Legal Found. (Apr. 18, 2013), https://pacificlegal.org/press-release/plf-sues-feds-for-giving-prairie-dogs-the-run-of-a-small-utah-town/.
30. 16 U.S.C. § 1532 (2012).
31. People for Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 57 F. Supp. 3d 1337, 1344 (D. Utah 2014), *rev'd and remanded*, 852 F.3d 990 (10th Cir. 2017).
32. *See* James Burling, *Weekly Litigation Update—January 13, 2018*, Pacific Legal Found. (Jan. 13, 2018), https://pacificlegal.org/weekly-litigation-update-january-13-2018/ (containing hyperlinks to court documents and relevant articles); Jonathan Wood, *Can States Be Trusted to Protect Rare Species?*, FREEcology (Jan. 9, 2018), https://libertarianenvironmentalism.com/2018/01/09/can-states-be-trusted-to-protect-rare-species/.

33. *See* David F. Forte, *Commerce Among the States*, *in* The Heritage Guide to the Constitution, *available at* https://www.heritage.org/constitution/#!/articles/1/essays/38/commerce-among-the-states.
34. Gonzales v. Raich, 545 U.S. 1, 25–26 (2005) (quoting Webster's Third New International Dictionary 720 (1966)).
35. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001); *see also* Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847 (2003).
36. John-Michael Seibler & Elizabeth Slattery, *This Bill Would Drag the Federal Government Into Disputes Over Pets*, Daily Signal (Feb. 24, 2017), http://dailysignal.com/2017/02/24/this-bill-would-drag-the-federal-government-into-disputes-over-pets/.
37. H.R. 909, 115th Cong. § 3(i)(3) (2017) (emphasis added).
38. "This we are unwilling to do." United States v. Lopez, 514 U.S. 549, 567–68 (1995); U.S. Const. art I, § 8, cl. 3.
39. Roscoe Filburn, the farmer, had raised 12 acres of wheat more than what the Agricultural Adjustment Act of 1938 allowed. 317 U.S. 111.
40. 136 S. Ct. 2074.
41. The defendants also took one marijuana cigarette, which secured federal jurisdiction. John-Michael Seibler, *Supreme Court Federalizes 'Any Robbery,' Shows Old Statute Is Ready for Change*, Daily Signal (June 24, 2016), http://dailysignal.com/2016/06/24/supreme-court-federalizes-any-robbery-shows-old-statute-is-ready-for-change/.
42. *See, e.g.,* Sen. Mike Lee, Our Lost Constitution 131–52 (2016); Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 Harv. J. L. & Pub. Pol'y 849 (2002); Barnett, *supra* note 35.
43. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549–61 (2012).
44. 514 U.S. 549 (1995).
45. 529 U.S. 598 (2000).
46. 514 U.S. at 567–68.
47. 529 U.S. at 617.
48. No. 17-1019, 2017 WL 4547371, at *1 (3d Cir. Oct. 12, 2017).
49. Russell v. United States, 471 U.S. 858, 862 (1985).
50. Jones v. United States, 529 U.S. 848, 858 (2000).
51. CertPool, Andrea Forsythe v. United States, No. 17-7417, https://certpool.com/dockets/17-7417 (accessed Feb. 16, 2018).
52. Alderman v. United States, 562 U.S. 1163 (2011) (dissenting from denial of certiorari) (upholding a federal criminal ban on felon possession of body armor against a commerce clause challenge).