

Testimony of
Professor John Harrison

June 3, 2004

Statement of
John C. Harrison
Professor of Law
University of Virginia

Committee on the Judiciary
United States Senate

Commerce Clause Issues Associated With S. 851

June 3, 2004

The Committee has asked that I testify concerning Congress' power to enact S. 851, the Child Custody Protection Act.

The proposed legislation would make it a federal crime knowingly to transport across a state line "an individual who has not attained the age of 18 years . . . with the intent that such individual obtain an abortion, and thereby in fact [to abridge] the right of a parent under a law requiring parental involvement in a minor's abortion decision, in force in the State where the individual resides."

S. 851 is a regulation of commerce among the several States. Commerce, as that term is used in the Constitution, includes travel whether or not that travel is for reasons of business. E.g., *Caminetti v. United States*, 242 U.S. 470 (1917). To transport another person across state lines is to engage in commerce among the States. There is thus no need to address the scope of Congress' power to regulate activity that is not, but that affects, commerce among the States, see, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *United States v. Lopez*, 514 U.S. 549 (1995).

Under the Supreme Court's current doctrine, Congress can adopt rules concerning interstate commerce, such as this one, for reasons related primarily to local activity rather than commerce itself. *United States v. Darby*, 312 U.S. 100 (1941). Hence even if S. 851 reflected a substantive congressional policy concerning abortion and domestic relations it would be a valid exercise of the commerce power because it is a regulation of interstate commerce.

Even under the more limited view of the commerce power that has prevailed in the past, S. 851 would be within Congress' power. This legislation, unlike the child labor statute at issue in *Hammer v. Dagenhart*, does not rest primarily on a congressional policy independent of that of the State that has primary jurisdiction to regulate the subject matter involved. Rather, in

legislation like this Congress would be seeking to ensure that the laws of the State primarily concerned, the State in which the minor resides, are complied with. In doing so Congress would be dealing with a problem that arises from the federal union, not making its own decisions concerning local matters such as domestic relations or abortion.

S. 851 in this regard resembles the Webb-Kenyon Act, Act of March 1, 1913, 37 Stat. 699, which dealt with a problem posed by then-current dormant commerce clause doctrine for States with strong prohibition laws. Such States, under *Leisy v. Hardin*, 135 U.S. 100 (1890), were limited in their power to regulate liquor that was shipped from out of state. Under the Webb-Kenyon Act, liquor was "deprived of its interstate character" (to use the old terminology) and its introduction into a dry State prohibited. The Court upheld the Webb-Kenyon Act in *Clark Distilling Company v. Western Maryland Railway Company and State of West Virginia*, 242 U.S. 311 (1917).

My testimony is concerned with the Commerce Clause, not with the limitations on the regulation of abortion that the Court has found in the Due Process Clauses of the Fifth and Fourteenth Amendments. That focus is appropriate, I think, because S. 851 does not raise any questions concerning the permissible regulation of abortion that are independent of the state laws that it is designed to effectuate. To the extent that a state rule is inconsistent with the Court's doctrine, that rule is ineffective and this bill would not make it effective. Hence it is unnecessary to ask, for example, whether subsection (b)(1) of proposed section 2431 of title 18 would constitute an adequate exception to a rule regulating abortion. Because constitutional limits on the States' regulatory authority are in effect incorporated into proposed Section 2431, subsection (b)(1) is in addition to any exceptions required by the Court's doctrine.

This testimony on legal issues associated with S. 851 is provided to the Committee as a public service. It represents my own views and is not presented on behalf of any client or my employer, the University of Virginia.