CONSTITUTIONAL STRUCTURE

EDITORIAL ADVISORS

Aspen Casebook Series

CONSTITUTIONAL STRUCTURE

Cases in Context

Fourth Edition

Randy E. Barnett
Patrick Hotung Professor of Constitutional Law
Georgetown University Law Center

Josh Blackman
Professor of Law
South Texas College of Law Houston

Wolters Kluwer

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

Credit for the art: Keithley & Associates/Rita Lascaro; **Front cover image credits:** Charles Wilson Peale, from the collection of Gilcrease Museum, Tulsa, Oklahoma; Collection of the New-York Historical Society, USA/The Bridgeman Art Library; Collection of the Supreme Court of the United States; Historical & Special Collections, Harvard Law School Library; Independence National Historic Park; Library of Congress; National Archives; National Gallery of Art, Washington; North Carolina Collection, University of North Carolina Library at Chapel Hill; Philip Mould Ltd., London/The Bridgeman Art Library; Robert D. Farber University Archives & Special Collections Department, Brandeis University; The Granger Collection; University of Washington Libraries, Special Collections; **Back cover image credit:** Matt Wood

To contact Customer Service, e-mail customer.service@wolterskluwer.com,
call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-5438-3904-3

Library of Congress Cataloging-in-Publication Data

Library of Congress Cataloging-in-Publication Data application is in process.

About Wolters Kluwer Legal & Regulatory U.S.

Wolters Kluwer Legal & Regulatory U.S. delivers expert content and solutions in the areas of law, corporate compliance, health compliance, reimbursement, and legal education. Its practical solutions help customers successfully navigate the demands of a changing environment to drive their daily activities, enhance decision quality and inspire confident outcomes.

Serving customers worldwide, its legal and regulatory portfolio includes products under the Aspen Publishers, CCH Incorporated, Kluwer Law International, ftwilliam.com and MediRegs names. They are regarded as exceptional and trusted resources for general legal and practice-specific knowledge, compliance and risk management, dynamic workflow solutions, and expert commentary.

To those whose vision of the Constitution is not limited to that of the Supreme Court

To my wife, Beth — Randy Barnett

To Militza, Miriam, and Clara — Josh Blackman

Summary of Contents

Contents

PART II

THE LEGISLATIVE POWER

CHAPTER 4

Enumerated Powers

ASSIGNMENT 1

Article I, Section 1 of the Constitution reads, "All legislative powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The phrase "herein granted" qualifies the "legislative powers" of Congress. Article II, Section 1, which defines the "executive power," does not have any comparable qualifications. Nor does Article III, Section 1, which defines "the judicial power." Unsurprisingly, in *Marbury v. Madison* (Chapter 2), Chief Justice Marshall pronounced that the federal government was one of "defined and limited" powers:

> This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.
>
> The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

This chapter considers the scope of Congress's "defined and limited powers."

A. THE CHASE COURT

Prigg v. Pennsylvania held that the Constitution gave Congress the authority to enforce the Fugitive Slave Clause. Even after *Prigg*, however, Political and Constitutional Abolitionists maintained that Congress had the power to end slavery wherever it exercised its own power. This view was represented in the political platforms of the Liberty Party, the Free Soil Party, and the Republican Party. Historians credit Chase with writing the constitutional platforms of all three parties. In an 1845 speech to the Liberty Party convention, Chase proposed an antislavery program with five principal elements:

1. "repealing all legislation, and discontinuing all action, in favor of slavery, at home and abroad";
2. "prohibiting the practice of slaveholding in all places of exclusive national jurisdiction, in the District of Columbia, in American vessels upon the seas, in forts, arsenals, navy yards";
3. "forbidding the employment of slaves upon any public work";
4. "adopting resolutions in Congress, declaring that slaveholding, in all States created out of national territories, is unconstitutional, and recommending to the others the immediate adoption of measures for its extinction within their respective limits"; and
5. electing and appointing to public office only those who "openly avow our principles, and will honestly carry out our measures."

Chase maintained that the "constitutionality of this line of action cannot be successfully impeached."[1] He advocated his positions with a moral and constitutional fervor equal to that of Lysander Spooner. According to historian Eric Foner, "because of Chase's efforts," the antislavery interpretation of the Constitution, "eventually came to form the constitutional basis of the Republican party program."[2]

Chase's political prominence continued to grow. In 1849, he was elected Senator from Ohio as a member of the Free Soil Party. As the leader of the Free Soilers, Chase had made a deal with the Ohio Democrats. The Free Soilers would support the Democrats in the Ohio legislature, giving that party the majority. In exchange, the Democrats would repeal the racially discriminatory Ohio Black Code, and select Chase as the U.S. Senator. (Prior to the ratification of the Seventeenth Amendment, state legislatures selected Senators.) Six years later, Chase was elected governor of Ohio, the first Republican governor in the nation.

At the 1860 Republican National Convention in Chicago, Chase was a serious candidate for the Republican presidential nomination. But his deal with the Democrats in 1849 undercut his candidacy. Most of those Northern Ohio Whigs who lost out on that deal had joined the Ohio Republican Party, which was founded in 1854. Some of them had not forgotten Chase's earlier maneuver. At the Chicago convention, they were pledged to

[1] Salmon P. Chase, The Address of the Southern and Western Liberty Convention, held at Cincinnati, June 11 and 12, 1845, in Salmon P. Chase & Charles D. Cleveland, Anti-Slavery Addresses of 1844 and 1855 (1867), p. 100.

[2] Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War 75 (1970).

Chase on the first ballot. But they made it known among the delegates that they would support other candidates in future ballots. On the first several rounds of voting, all of the more prominent antislavery candidates split the votes, and none could gain a majority. Eventually, Abraham Lincoln, an amiable figure who was personally popular with many of the delegates, secured the nomination.

The presidential election of 1860 would alter the course of our republic. There were four presidential candidates, two in the North and two in the South. As a result, Lincoln managed to win the election without receiving a single electoral vote from the South. Chase was once again elected to the Senate by the Ohio state legislature. But he resigned after three days to accept Lincoln's appointment as Secretary of the Treasury. In that position, Chase would face the enormous challenge of financing the Civil War without raising taxes. He was also Lincoln's liaison with the more radical Republicans in the Congress.

The victory of Lincoln and the Republicans in 1860 provoked the Southern states to secede from the Union even before the Republicans could take office. The Republican platform expressly affirmed its respect for states' rights under the Constitution. Lincoln insisted that he would not interfere with the practice of slavery in the existing states. Despite these assurances, Southerners shared Chase's judgment that the Republican program would hasten the elimination of slavery throughout the United States. Indeed, immediately upon taking control of Congress, Republicans moved to abolish slavery wherever their textualist interpretation of the Constitution said they could.[5]

When Chief Justice Taney died in October 1864, President Lincoln nominated Salmon P. Chase to be the sixth Chief Justice. It was significant that the lawyer who had been dubbed by his racist foes "the attorney-general of fugitive slaves" had replaced the author of *Dred Scott* as Chief Justice. In 1865, upon Lincoln's reelection, Chase administered the oath of office to Lincoln, his former political rival. Chase would serve on the Court until his death in 1873.

Chase served as the Secretary of Treasury from 1861 to 1864. "[He] alone among cabinet heads hired thousands of blacks and females as civil servants and even placed an impressive number of black males in supervisory positions over white females."[3] As Chief Justice, Chase agreed to the admission of the first black lawyer to be a member of the Supreme Court bar. Massachusetts attorney John Rock had been denied admission the previous year by the Taney Court on the basis of his race. Now, upon the motion of Massachusetts Senator Charles Sumner, Rock was admitted with Chase's approval. *Harper's Weekly* observed that this event represented an "extraordinary reversal" of *Dred Scott*, and would "be regarded by the future historian as a remarkable indication of the revolution which is going on in the sentiment of a great people."[4]

In *United States v. Dewitt*, Chief Justice Chase addressed the scope of Congress's enumerated powers to criminalize local conduct.

[3] Harold M. Hyman, The Reconstruction Justice of Salmon P. Chase 81 (1997).
[4] See Doris Kearns Goodwin, Team of Rivals 681 (2006).
[5] See generally James Oakes, Freedom National: The Destruction of Slavery in the United States, 1861-1865 (2012).

The Chase Court (1865-1867). Seated, from left to right: David Davis, Noah Swayne, Robert C. Grier, James M. Wayne, Chief Justice Salmon P. Chase, Samuel Nelson, Nathan Clifford, Samuel F. Miller, Stephen J. Field.

STUDY GUIDE

1. In *Dewitt*, the Court held that Congress's power to regulate commerce does not allow it to prohibit conduct that takes place solely within a single state. How does it reach this conclusion?
2. If Congress can ban the local sale of lamp oil, even if a state has permitted it, could it also ban the local slave trade where a state has permitted it?

United States v. Dewitt

76 U.S. (9 Wall.) 41 (1869)

Video on CasebookConnect.com

[In 1867, Congress enacted a law providing:

That no person shall mix for sale naphtha and illuminating oils, or shall knowingly sell or keep for sale, or offer for sale such mixture, or shall sell or offer for sale oil made from

> petroleum for illuminating purposes, inflammable at less temperature or fire-test than 110 degrees Fahrenheit; and any person so doing, shall be held to be guilty of a misdemeanor, and on conviction thereof by indictment or presentment in any court of the United States having competent jurisdiction, shall be punished by fine, &c., and imprisonment, . . .

"Under this section one Dewitt was indicted, the offence charged being the offering for sale, at Detroit, in Michigan, oil made of petroleum of the description specified." — Eds.]

Mr. Chief Justice Chase delivered the opinion of the court.

The questions certified resolve themselves into this: Has Congress power, under the Constitution, to prohibit trade within the limits of a State?

That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

It has been urged in argument that the provision under which this indictment was framed is within this exception; that the prohibition of the sale of the illuminating oil described in the indictment was in aid and support of the internal revenue tax imposed on other illuminating oils. And we have been referred to provisions, supposed to be analogous, regulating the business of distilling liquors, and the mode of packing various manufactured articles; but the analogy appears to fail at the essential point, for the regulations referred to are restricted to the very articles which are the subject of taxation, and are plainly adapted to secure the collection of the tax imposed; while, in the case before us, no tax is imposed on the oils the sale of which is prohibited. If the prohibition, therefore, has any relation to taxation at all, it is merely that of increasing the production and sale of other oils, and, consequently, the revenue derived from them, by excluding from the market the particular kind described.

This consequence is too remote and too uncertain to warrant us in saying that the prohibition is an appropriate and plainly adapted means for carrying into execution the power of laying and collecting taxes.

There is, indeed, no reason for saying that it was regarded by Congress as such a means, except that it is found in an act imposing internal duties. Standing by itself, it is plainly a regulation of police; and that it was so considered, if not by the Congress which enacted, it, certainly by the succeeding Congress, may be inferred from the circumstance, that while all special taxes on illuminating oils were repealed by the act of July 20th, 1868, which subjected distillers and refiners to the tax on sales as manufacturers, this prohibition was left unrepealed.

As a police regulation, relating exclusively to the internal trade of the State, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as for example, in the District of Columbia. Within State limits, it can have no constitutional operation. This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion. . . .

During the Civil War, the United States faced great challenges to pay for the war effort. At this time, the supply of gold and silver was limited. Congress sought to address these problems with the Legal Tender Act of 1862. This law made paper currency a "legal tender" for the payment of all public and private debts. Without question, Congress has the power to issue paper notes as currency. But the Legal Tender Act did more: the statute required everyone to accept the government's paper currency as payment for a debt, even if a contract called for payment with gold or silver. Salmon Chase, the Secretary of the Treasury who was charged with financing the war, supported the passage of the law. The federal government even put his face on the $1 bill, known as a greenback.

In a series of cases known as the *Legal Tender Cases*, the Supreme Court considered the constitutionality of the Legal Tender Act. In *Hepburn v. Griswold* (1870), Chief Justice Chase wrote the majority opinion holding the Act was beyond Congress's enumerated powers and unconstitutional. Then, less than two years later, with the addition of two new Justices, the Court reversed itself in *Knox v. Lee* (1871). The opinions in these two cases are a surprisingly early harbinger of the twentieth-century debates over the scope of implied federal powers.

STUDY GUIDE

1. Chief Justice Chase cites Chief Justice Marshall's constitutional analysis from *McCulloch v. Maryland* (Chapter 2). What does this citation suggest about the close connection between the Commerce Clause and the Necessary and Proper Clause?
2. Does Chief Justice Chase find that Congress has an implied power under the Necessary and Proper Clause to enact the Legal Tender Act? How does he distinguish between the power to issue paper notes as currency, and the power to make those notes a "legal tender" in satisfaction of debts? Where does Chase locate the power to define legal tender?

Hepburn v. Griswold

The Legal Tender Cases, 75 U.S. 603 (1870)

Video on CasebookConnect.com

[The Legal Tender Act of 1862 was enacted to issue paper money to finance the Civil War without raising taxes. The paper money depreciated as compared to stable gold coins. As a result, the so-called greenbacks became the subject of controversy because debts contracted earlier could be paid with this cheaper currency. This lawsuit originated when Mrs. Hepburn attempted to pay a debt due to Mr. Griswold on a promissory note using paper notes issued by the United States. Griswold refused Hepburn's "tender" of U.S. notes to satisfy the debt, and sued her in the Louisville Chancery Court (i.e., a court of equity). Hepburn then tendered the notes to the chancery court, which declared her debt satisfied. The Court of Errors of Kentucky reversed the chancery court's judgment. Hepburn then appealed to the U.S. Supreme Court. Chief Justice Salmon P. Chase would

decide the constitutionality of the legal tender laws he had supported as treasury secretary. This support was reluctant, however, as he had long been an advocate of "hard money." — Eds.]

Mr. Chief Justice Chase delivered the opinion of the court.

The question presented for our determination by the record in this case is, whether or not the payee or assignee of a note . . . is obliged by law to accept in payment United States notes, equal in nominal amount to the sum due according to its terms, when tendered by the maker or other party bound to pay it? . . . We are thus brought to the question, whether Congress has power to make notes issued under its authority a legal tender in payment of debts, which, when contracted, were payable by law in gold and silver coin. . . .

It is generally, if not universally, conceded, that the government of the United States is one of limited powers, and that no department possesses any authority not granted by the Constitution.

It is not necessary, however, in order to prove the existence of a particular authority to show a particular and express grant. The design of the Constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and, at the same time, to mark, by sufficiently definite lines, the sphere of its operations. To this end it was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. These powers are necessarily extensive. It has been found, indeed, in the practical administration of the government, that a very large part, if not the largest part, of its functions have been performed in the exercise of powers thus implied.

But the extension of power by implication was regarded with some apprehension by the wise men who framed, and by the intelligent citizens who adopted, the Constitution. This apprehension is manifest in the terms by which the grant of incidental and auxiliary powers is made. All powers of this nature are included under the description of "power to make all laws necessary and proper for carrying into execution the powers expressly granted to Congress or vested by the Constitution in the government or in any of its departments or officers."

The same apprehension is equally apparent in the tenth article of the amendments, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or the people."

We do not mean to say that either of these constitutional provisions is to be taken as restricting any exercise of power fairly warranted by legitimate derivation from one of the enumerated or express powers. The first was undoubtedly introduced to exclude all doubt in respect to the existence of implied powers; while the words "necessary and proper" were intended to have a "sense," to use the words of Mr. Justice Story, "at once admonitory and directory," and to require that the means used in the execution of an express power "should be bona fide, appropriate to the end." [2 Story on the Constitution p. 142 §1253.] The second provision was intended to have a like admonitory and directory sense, and to restrain the limited government established under the Constitution from the exercise of powers not clearly delegated or derived by just inference from powers so delegated.

It has not been maintained in argument, nor, indeed, would any one, however slightly conversant with constitutional law, think of maintaining that there is in the Constitution any express grant of legislative power to make any description of credit currency a legal tender in payment of debts. We must inquire then whether this can be done in the exercise of an implied power.

The rule for determining whether a legislative enactment can be supported as an exercise of an implied power was stated by Chief Justice Marshall, speaking for the whole court, in the case of *McCullough v. The State of Maryland*; and the statement then made has ever since been accepted as a correct exposition of the Constitution. . . . It must be taken then as finally settled, so far as judicial decisions can settle anything, that the words "all laws necessary and proper for carrying into execution" powers expressly granted or vested, have, in the Constitution, a sense equivalent to that of the words, laws, not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects intrusted to the government.

The question before us, then, resolves itself into this: "Is the clause which makes United States notes a legal tender for debts contracted prior to its enactment, a law of the description stated in the rule?"

It is not doubted that the power to establish a standard of value by which all other values may be measured, or, in other words, to determine what shall be lawful money and a legal tender, is in its nature, and of necessity, a governmental power. It is in all countries exercised by the government. In the United States, so far as it relates to the precious metals, it is vested in Congress by the grant of the power to coin money. But can a power to impart these qualities to notes, or promises to pay money, when offered in discharge of pre-existing debts, be derived from the coinage power, or from any other power expressly given?

It is certainly not the same power as the power to coin money. Nor is it in any reasonable or satisfactory sense an appropriate or plainly adapted means to the exercise of that power. Nor is there more reason for saying that it is implied in, or incidental to, the power to regulate the value of coined money of the United States, or of foreign coins. This power of regulation is a power to determine the weight, purity, form, impression, and denomination of the several coins, and their relation to each other, and the relations of foreign coins to the monetary unit of the United States.

Nor is the power to make notes a legal tender the same as the power to issue notes to be used as currency. The old Congress, under the Articles of Confederation, was clothed by express grant with the power to emit bills of credit, which are in fact notes for circulation as currency*; and yet that Congress was not clothed with the power to make these bills a legal tender in payment. . . . Indeed, we are not aware that it has ever been claimed that the power to issue bills or notes has any identity with the power to make them a legal tender. On the contrary, the whole history of the country refutes that notion. The States have always been held to possess the power to authorize and regulate the issue of bills for circulation by banks or individuals, subject, as has been lately determined, to the control

* [Article 12 of the Articles of Confederation provided: "All bills of credit emitted, monies borrowed, and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged." — Eds.]

of Congress, for the purpose of establishing and securing a National currency; and yet the States are expressly prohibited by the Constitution from making anything but gold and silver coin a legal tender. This seems decisive on the point that the power to issue notes and the power to make them a legal tender are not the same power, and that they have no necessary connection with each other. . . .

[T]here is abundant evidence, that whatever benefit is possible from that compulsion to some individuals or to the government, is far more than outweighed by the losses of property, the derangement of business, the fluctuations of currency and values, and the increase of prices to the people and the government, and the long train of evils which flow from the use of irredeemable paper money. It is true that these evils are not to be attributed altogether to making it a legal tender. But this increases these evils. It certainly widens their extent and protracts their continuance.

We are unable to persuade ourselves that an expedient of this sort is an appropriate and plainly adapted means for the execution of the power to declare and carry on war. If it adds nothing to the utility of the notes, it cannot be upheld as a means to the end in furtherance of which the notes are issued. Nor can it, in our judgment, be upheld as such, if, while facilitating in some degree the circulation of the notes, it debases and injures the currency in its proper use to a much greater degree. And these considerations seem to us equally applicable to the powers to regulate commerce and to borrow money. Both powers necessarily involve the use of money by the people and by the government, but neither, as we think, carries with it as an appropriate and plainly adapted means to its exercise, the power of making circulating notes a legal tender in payment of pre-existing debts. . . .

But there is another view, which seems to us decisive, to whatever express power the supposed implied power in question may be referred. In the rule stated by Chief Justice Marshall, the words appropriate, plainly adapted, really calculated, are qualified by the limitation that the means must be not prohibited, but consistent with the letter and spirit of the Constitution. Nothing so prohibited or inconsistent can be regarded as appropriate, or plainly adapted, or really calculated means to any end. Let us inquire, then, first, whether making bills of credit a legal tender, to the extent indicated, is consistent with the spirit of the Constitution. [Discussion of the "cardinal principles" embodied in the Contracts, Takings, and Due Process Clauses omitted. — Eds.] . . .

We confess ourselves unable to perceive any solid distinction between such an act and an act compelling all citizens to accept, in satisfaction of all contracts for money, half or three-quarters or any other proportion less than the whole of the value actually due, according to their terms. It is difficult to conceive what act would take private property without process of law if such an act would not.

We are obliged to conclude that an act making mere promises to pay dollars a legal tender in payment of debts previously contracted, is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress; that such an act is inconsistent with the spirit of the Constitution; and that it is prohibited by the Constitution.

It is not surprising that amid the tumult of the late civil war, and under the influence of apprehensions for the safety of the Republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts; many

who did not doubt were silent. Some who were strongly averse to making government notes a legal tender felt themselves constrained to acquiesce in the views of the advocates of the measure. Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace, and under the influence of the calmer time, reconsidered their conclusions, and now concur in those which we have just announced. These conclusions seem to us to be fully sanctioned by the letter and spirit of the Constitution. . . .

Altering the Size of the Supreme Court

The Constitution does not specify the number of Supreme Court Justices. Instead, it lets Congress organize the federal courts by passing what are called "judiciary acts." The Judiciary Act of 1789 set the number of Justices at six. The number was decreased to five in 1801 (as part of the Federalist's Midnight Judge's Act), increased to seven in 1807, increased to nine in 1837, and increased to ten in 1863. This last change allowed President Lincoln to appoint Stephen Field to the Court. (The power of Congress to set the number of Justices played an important role in President Franklin Roosevelt's so-called *court-packing scheme*. We will discuss this history later in the chapter.)

Courtroom in Philadelphia's Old City Hall where the Supreme Court sat from 1791 to 1800 [Photo: Randy Barnett]

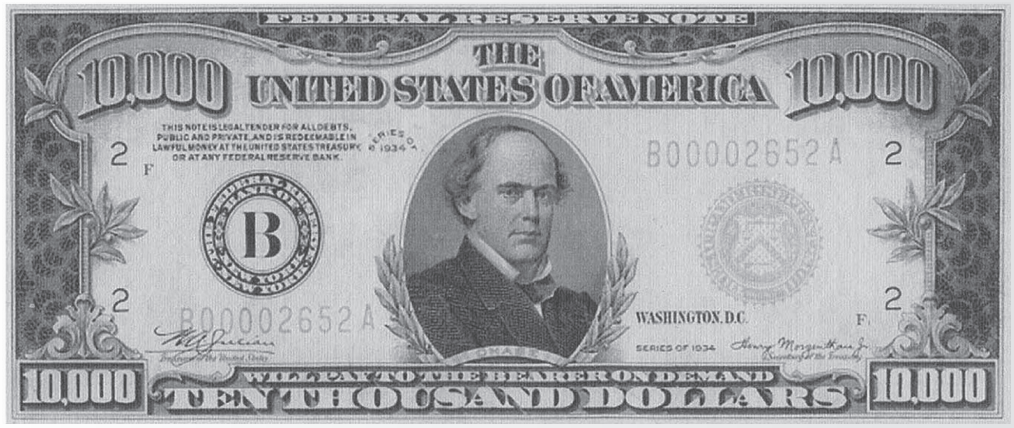
Mr. Justice Miller (with whom concurred Swayne and Davis, JJ.), dissenting.

In 1863, there were ten members on the Supreme Court. In 1865, Congress passed a judiciary act providing that the next three Justices to leave the bench by retirement or death would not be replaced. In this way, the size of the Court would be reduced by attrition from ten to seven. With the deaths of Justice John Catron in 1865 and Justice James Moore in 1867, the Court was left with eight members. That was the number of Justices when *Hepburn v. Griswold* was argued in November 1869. After arguments, the vote in conference was 5-3. The majority concluded that the Legal Tender Act was unconstitutional. However, in January 1870, Justice Grier resigned due to his poor health before the decision was formally announced. This vacancy made the final vote 4-3. Around the same time, Congress passed another judiciary act restoring the number of Justices to nine, where it had been before the war.

After *Hepburn* was decided, President Grant appointed Justices Strong and Bradley, bringing the number of Justices to nine. They were known to support paper money as legal tender, which Grant also favored. When their votes were combined with the three dissenters in *Hepburn*, five Justices now thought that the Legal Tender Act was constitutional. Just two days after being confirmed, Strong and Bradley, together with the three *Hepburn* dissenters, attempted to rehear the case. After a long and very bitter internal struggle, that motion was denied. But the new five-Justice majority quickly agreed to hear *Knox v. Lee* as a vehicle to reverse *Hepburn*. "It is I think a sad day for the [country]," Chase wrote in his diary after the reversal, "& for the cause of constitutional government. The consequences of the sanction this day given to irredeemable paper currency may not soon manifest themselves but are sure to come."

Chase on a greenback

As treasury secretary, Salmon Chase had his picture placed on the one-dollar greenback. Chase's picture appeared on the $10,000 bill.



Chase on a $10,000 bill

STUDY GUIDE

1. How did the *Knox* majority justify its reversal of a one-year-old precedent?
2. Contrast Chief Justice Chase's method of evaluating a claim of implied power with that of the *Knox* majority.
3. Notice how the *Knox* Court relied on a presumption of constitutionality. It also heavily relied on the "purpose" for granting enumerated powers to the federal government as well as for recognizing implied powers.
4. James Wilson and the Federalists warned about the dangerousness of a bill of rights. Does the Court's invocation of the Constitution's amendments vindicate that warning?
5. Which enumerated power was the legal tender law a necessary and proper means of carrying into execution?
6. What role does the concept of an "emergency" play? Does the Court say what happens to unenumerated powers after the emergency passes? Might the Civil War have distorted how people viewed limited congressional power in a federalist constitutional system? Does the end of the emergency caused by the Civil War entail the end of the power to enact legal tender laws under nonemergency situations? Or is something less than a true emergency needed to justify such powers?
7. In his opinion for the majority, Justice Strong refers to Chase's opinion as Secretary of the Treasury that the legal tender law was necessary. Chief Justice Chase then replies to this point in his dissent.

Knox v. Lee

The Legal Tender Cases, 79 U.S. 457 (1871)

Video on CasebookConnect.com

Mr. Justice Strong delivered the opinion of the court. . . .

If it be held by this court that Congress has no constitutional power, under any circumstances, or in any emergency, to make treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every independent sovereignty other than the United States), the government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable, even if they were not when the acts of Congress now called in question were enacted. It is also clear that if we hold the acts invalid as applicable to debts incurred, or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, widespread distress, and the rankest injustice. . . .

A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress — all the members of which act under the obligation of an oath of fidelity to the Constitution. Such has always been the rule. . . . It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show

clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt.

Nor can it be questioned that, when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose and so as to subserve it. In no other way can the intent of the framers of the instrument be discovered. And there are more urgent reasons for looking to the ultimate purpose in examining the powers conferred by a constitution than there are in construing a statute, a will, or a contract. We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines. . . .

If these are correct principles, if they are proper views of the manner in which the Constitution is to be understood, the powers conferred upon Congress must be regarded as related to each other, and all means for a common end. Each is but part of a system, a constituent of one whole. No single power is the ultimate end for which the Constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinate object, but that object is itself a means designed for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or to provide for and maintain a navy, are instruments for the paramount object, which was to establish a government, sovereign within its sphere, with capability of self-preservation, thereby forming a union more perfect than that which existed under the old Confederacy.

The same may be asserted also of all the non-enumerated powers included in the authority expressly given "to make all laws which shall be necessary and proper for carrying into execution the specified powers vested in Congress, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof." It is impossible to know what those non-enumerated powers are, and what is their nature and extent, without considering the purposes they were intended to subserve. Those purposes, it must be noted, reach beyond the mere execution of all powers definitely intrusted to Congress and mentioned in detail. They embrace the execution of all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. It certainly was intended to confer upon the government the power of self-preservation. . . .

That would appear, then, to be a most unreasonable construction of the Constitution which denies to the government created by it, the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfilment of its acknowledged duties. Such a right, we hold, was given by the last clause of the eighth section of its first article. The means or instrumentalities referred to in that clause, and authorized, are not enumerated or defined. In the nature of things enumeration and specification were impossible. But they were left to the discretion of Congress, subject only to the restrictions that they be not prohibited, and be necessary and proper for carrying into execution the enumerated powers given to Congress, and all other powers vested in the government of the United States, or in any department or officer thereof.

And here it is to be observed it is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions. This is well illustrated in its language respecting the writ of habeas corpus. The power to suspend the privilege of that writ is not expressly given, nor can it be deduced from any one of the particularized grants of power. Yet it is provided that the privileges of the writ shall not be suspended except in certain defined contingencies. This is no express grant of power. It is a restriction. But it shows irresistibly that somewhere in the Constitution power to suspend the privilege of the writ was granted, either by some one or more of the specifications of power, or by them all combined. And, that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments. The first ten of these were suggested in the conventions of the States, and proposed at the first session of the first Congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the "conventions of a number of the States had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added." This was the origin of the amendments, and they are significant. They tend plainly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. . . . Under the power to establish post-offices and post-roads Congress has provided for carrying the mails, punishing theft of letters and mail robberies, and even for transporting the mails to foreign countries. Under the power to regulate commerce, provision has been made by law for the improvement of harbors, the establishment of observatories, the erection of lighthouses, breakwaters, and buoys, the registry, enrolment, and construction of ships, and a code has been enacted for the government of seamen. Under the same power and other powers over the revenue and the currency of the country, for the convenience of the treasury and internal commerce, a corporation known as the United States Bank was early created. . . . Its incorporation was a constitutional exercise of congressional power for no other reason than that it was deemed to be a convenient instrument or means for accomplishing one or more of the ends for which the government was established, or, in the language of the first article, already quoted, "necessary

and proper" for carrying into execution some or all the powers vested in the government. Clearly this necessity, if any existed, was not a direct and obvious one. . . .

Happily the true meaning of the clause authorizing the enactment of all laws necessary and proper for carrying into execution the express powers conferred upon Congress, and all other powers vested in the government of the United States, or in any of its departments or officers, has long since been settled. . . . It was . . . in *McCulloch v. Maryland* that the fullest consideration was given to this clause of the Constitution granting auxiliary powers, and a construction adopted that has ever since been accepted as determining its true meaning. . . . Suffice it to say, in that case it was finally settled that in the gift by the Constitution to Congress of authority to enact laws "necessary and proper" for the execution of all the powers created by it, the necessity spoken of is not to be understood as an absolute one. On the contrary, this court then held that the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. . . .

With these rules of constitutional construction before us, settled at an early period in the history of the government, hitherto universally accepted, and not even now doubted, we have a safe guide to a right decision of the questions before us. Before we can hold the legal tender acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited.

This brings us to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect, or executing any of the known powers of Congress, or of any department of the government. Plainly to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times.

We do not propose to dilate at length upon the circumstances in which the country was placed, when Congress attempted to make treasury notes a legal tender. They are of too recent occurrence to justify enlarged description. Suffice it to say that a civil war was then raging which seriously threatened the overthrow of the government and the destruction of the Constitution itself. It demanded the equipment and support of large armies and navies, and the employment of money to an extent beyond the capacity of all ordinary sources of supply. Meanwhile the public treasury was nearly empty, and the credit of the government, if not stretched to its utmost tension, had become nearly exhausted. Moneyed institutions had advanced largely of their means, and more could not be expected of them. They had been compelled to suspend specie payments. Taxation was inadequate to pay even the interest on the debt already incurred, and it was impossible to await the income of additional taxes. The necessity was immediate and pressing. The army was unpaid. There was then due to the soldiers in the field nearly a score of millions of dollars. The requisitions from the War and Navy Departments for supplies exceeded fifty millions, and the current expenditure was over one million per day. The entire amount of coin in the country, including that in private hands, as well as

that in banking institutions, was insufficient to supply the need of the government three months, had it all been poured into the treasury. Foreign credit we had none. We say nothing of the overhanging paralysis of trade, and of business generally, which threatened loss of confidence in the ability of the government to maintain its continued existence, and therewith the complete destruction of all remaining national credit.

It was at such a time and in such circumstances that Congress was called upon to devise means for maintaining the army and navy, for securing the large supplies of money needed, and, indeed, for the preservation of the government created by the Constitution. It was at such a time and in such an emergency that the legal tender acts were passed. Now, if it were certain that nothing else would have supplied the absolute necessities of the treasury, that nothing else would have enabled the government to maintain its armies and navy, that nothing else would have saved the government and the Constitution from destruction, while the legal tender acts would, could any one be bold enough to assert that Congress transgressed its powers? Or if these enactments did work these results, can it be maintained now that they were not for a legitimate end, or "appropriate and adapted to that end," in the language of Chief Justice Marshall? That they did work such results is not to be doubted. Something revived the drooping faith of the people; something brought immediately to the government's aid the resources of the nation, and something enabled the successful prosecution of the war, and the preservation of the national life. What was it, if not the legal tender enactments?

But if it be conceded that some other means might have been chosen for the accomplishment of these legitimate and necessary ends, the concession does not weaken the argument. It is urged now, after the lapse of nine years, and when the emergency has passed, that treasury notes without the legal tender clause might have been issued, and that the necessities of the government might thus have been supplied. Hence it is inferred there was no necessity for giving to the notes issued the capability of paying private debts. At best this is mere conjecture. But admitting it to be true, what does it prove? Nothing more than that Congress had the choice of means for a legitimate end, each appropriate, and adapted to that end, though, perhaps, in different degrees. What then? Can this court say that it ought to have adopted one rather than the other? Is it our province to decide that the means selected were beyond the constitutional power of Congress, because we may think that other means to the same ends would have been more appropriate and equally efficient? That would be to assume legislative power, and to disregard the accepted rules for construing the Constitution. The degree of the necessity for any congressional enactment, or the relative degree of its appropriateness, if it have any appropriateness, is for consideration in Congress, not here. . . .

It is plain to our view, however, that none of those measures which it is now conjectured might have been substituted for the legal tender acts, could have met the exigencies of the case, at the time when those acts were passed. We have said that the credit of the government had been tried to its utmost endurance. Every new issue of notes which had nothing more to rest upon than government credit, must have paralyzed it more and more, and rendered it increasingly difficult to keep the army in the field, or the navy afloat. It is an historical fact that many persons and institutions refused to receive and pay those notes that had been issued, and even the head of the Treasury represented to Congress the necessity of making the new issues legal tenders, or rather, declared it impossible to avoid the necessity. . . .

It may be conceded that Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they make the government stronger. There must be some relation between the means and the end; some adaptedness or appropriateness of the laws to carry into execution the powers created by the Constitution. But when a statute has proved effective in the execution of powers confessedly existing, it is not too much to say that it must have had some appropriateness to the execution of those powers. The rules of construction heretofore adopted, do not demand that the relationship between the means and the end shall be direct and immediate. . . .

We are accustomed to speak for mere convenience of the express and implied powers conferred upon Congress. But in fact the auxiliary powers, those necessary and appropriate to the execution of other powers singly described, are as expressly given as is the power to declare war, or to establish uniform laws on the subject of bankruptcy. They are not catalogued, no list of them is made, but they are grouped in the last clause of section eight of the first article, and granted in the same words in which all other powers are granted to Congress. . . .

[In holding] the acts of Congress constitutional as applied to contracts made either before or after their passage . . ., we overrule so much of what was decided in *Hepburn v. Griswold*, as ruled the acts unwarranted by the Constitution so far as they apply to contracts made before their enactment. That case was decided by a divided court, and by a court having a less number of judges than the law then in existence provided this court shall have. These cases have been heard before a full court, and they have received our most careful consideration. The questions involved are constitutional questions of the most vital importance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right. We are not accustomed to hear them in the absence of a full court, if it can be avoided. Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error. And it is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made. We agree this should not be done inconsiderately, but in a case of such far-reaching consequences as the present, thoroughly convinced as we are that Congress has not transgressed its powers, we regard it as our duty so to decide and to affirm both these judgments.

The Chief Justice, dissenting:

We dissent from the argument and conclusion in the opinion just announced. . . .

The rule by which the constitutionality of an act of Congress passed in the alleged exercise of an implied power is to be tried is no longer, in this Court, open to question. It was laid down in the case of *McCulloch v. Maryland*, by Chief Justice Marshall, in these words:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional.

And it is the plain duty of the Court to pronounce acts of Congress not made in the exercise of an express power nor coming within the reasonable scope of this rule, if made

in virtue of an implied power, unwarranted by the Constitution. Acts of Congress not made in pursuance of the Constitution are not laws.

Neither of these propositions was questioned in the case of *Hepburn v. Griswold*. The judges who dissented in that case maintained that the clause in the Act of February 25, 1862, making the United States notes a legal tender in payment of debts, was an appropriate, plainly adapted means to a constitutional end, not prohibited but consistent with the letter and spirit of the Constitution. The majority of the court as then constituted, five judges out of eight, felt obliged to conclude that an act making mere promises to pay dollars a legal tender in payments of debts previously contracted is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress, is inconsistent with the spirit of the Constitution, and is prohibited by the Constitution.

In the case of the *United States v. De Witt*, we held unanimously that a provision of the internal revenue law prohibiting the sale of certain illuminating oil in the states was unconstitutional, though it might increase the production and sale of other oils, and consequently the revenue derived from them, because this consequence was too remote and uncertain to warrant the court in saying that the prohibition was an appropriate and plainly adapted means for carrying into execution the power to lay and collect taxes.

We agree, then, that the question whether a law is a necessary and proper means to execution of an express power, within the meaning of these words as defined by the rule — that is to say, a means appropriate, plainly adapted, not prohibited but consistent with the letter and spirit of the Constitution — is a judicial question. Congress may not adopt any means for the execution of an express power that Congress may see fit to adopt. It must be a necessary and proper means within the fair meaning of the rule. If not such it cannot be employed consistently with the Constitution. Whether the means actually employed in a given case are such or not, the court must decide. The court must judge of the fact, Congress of the degree of necessity.

A majority of the Court, five of four, in the opinion which has just been read, reverses the judgment rendered by the former majority of five to three, in pursuance of an opinion formed after repeated arguments, at successive terms, and careful consideration, and declares the legal tender clause to be constitutional. . . . And this reversal, unprecedented in the history of the Court, has been produced by no change in the opinions of those who concurred in the former judgment. One closed an honorable judicial career by resignation after the case had been decided, after the opinion had been read and agreed to in conference, and after the day when it would have been delivered in court had not the delivery been postponed for a week to give time for the preparation of the dissenting opinion. The Court was then full, but the vacancy caused by the resignation of Mr. Justice Grier having been subsequently filled and an additional justice having been appointed under the act increasing the number of judges to nine, which took effect on the first Monday of December, 1869, the then majority find themselves in a minority of the Court, as now constituted, upon the question.

Their convictions, however, remain unchanged. We adhere to the opinion pronounced in *Hepburn v. Griswold*. Reflection has only wrought a firmer belief in the soundness of the constitutional doctrines maintained, and in the importance of them to the country. . . .

We perceive no connection between the express power to coin money and the inference that the government may, in any contingency, make its securities perform the functions of coined money, as a legal tender in payment of debts. We have supposed that the power to exclude from circulation notes not authorized by the national government might perhaps be deduced from the power to regulate the value of coin, but that the power of the government to emit bills of credit was an exercise of the power to borrow money, and that its power over the currency was incidental to that power and to the power to regulate commerce. . . .

The opinion of the then minority affirmed the power on the ground that it was a necessary and proper means, within the definition of the Court in the case of *McCulloch v. Maryland*, to carry on war, and that it was not prohibited by the spirit or letter of the Constitution, though it was admitted to be a law impairing the obligation of contracts and notwithstanding the objection that it deprived many persons of their property without compensation and without due process of law.

We shall not add much to what was said in the opinion of the then majority on these points.

The reference made in the opinion just read, as well as in the argument at the bar to the opinions of the Chief Justice when Secretary of the Treasury, seems to warrant, if it does not require, some observations before proceeding further in the discussion.

It was his fortune at the time the legal tender clause was inserted in the bill to authorize the issue of United States notes and received the sanction of Congress, to be charged with the anxious and responsible duty of providing funds for the prosecution of the war. In no report made by him to Congress was the expedient of making the notes of the United States a legal tender suggested. . . . In his report of December, 1862, he said that . . . "[t]he Secretary recommends, therefore, no mere paper money scheme, but on the contrary a series of measures looking to a safe and gradual return to gold and silver as the only permanent basis, standard, and measure of value recognized by the Constitution."

At the session of Congress before this report was made, the bill containing the legal tender clause had become a law. He was extremely and avowedly averse to this clause, but was very solicitous for the passage of the bill to authorize the issue of United States notes then pending. He thought it indispensably necessary that the authority to issue these notes should be granted by Congress. The passage of the bill was delayed, if not jeoparded, by the difference of opinion which prevailed on the question of making them a legal tender. It was under these circumstances that he expressed the opinion, when called upon by the Committee of Ways and Means, that it was necessary, and he was not sorry to find it sustained by the decisions of respected courts, not unanimous indeed, nor without contrary decisions of state courts equally respectable. Examination and reflection under more propitious circumstances have satisfied him that this opinion was erroneous, and he does not hesitate to declare it. . . .

It is unnecessary to say that we reject wholly the doctrine, advanced for the first time, we believe, in this Court by the present majority that the legislature has any "powers under the Constitution which grow out of the aggregate of powers conferred upon the government or out of the sovereignty instituted by it." If this proposition be admitted, and it be also admitted that the legislature is the sole judge of the necessity for the exercise of such powers, the government becomes practically absolute and unlimited. . . .

Until recently, no one in Congress ever suggested that that body possessed power to make anything else a standard of value.

Statesmen who have disagreed widely on other points have agreed in the opinion that the only constitutional measures of value are metallic coins, struck as regulated by the authority of Congress. . . .

The present majority of the Court say that legal tender notes "have become the universal measure of values," and they hold that the legislation of Congress substituting such measures for coin by making the notes a legal tender in payment is warranted by the Constitution.

But if the plain sense of words, if the contemporaneous exposition of parties, if common consent in understanding, if the opinions of courts avail anything in determining the meaning of the Constitution, it seems impossible to doubt that the power to coin money is a power to establish a uniform standard of value, and that no other power to establish such a standard, by making notes a legal tender, is conferred upon Congress by the Constitution.

My brothers Clifford and Field concur in these views, but in consideration of the importance of the principles involved, will deliver their separate opinions. My brother Nelson also dissents.

STUDY GUIDE

1. Does *Juilliard* rely on the emergencies created by the Civil War as a justification for implied powers under the Necessary and Proper Clause? Or does the Court move beyond this justification?
2. Is there a difference between "implying" a power pursuant to the Necessary and Proper Clause and finding that a power is "inherent" in sovereignty?

Juilliard v. Greenman

110 U.S. 421 (1884)

Justice Gray. . . .

The constitutional authority of congress to provide a currency for the whole country is now firmly established. . . . The power, as incident to the power of borrowing money, and issuing bills or notes of the government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adopting of the constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. . . .

The power of issuing bills of credit, and making them, at the discretion of the legislature, a tender in payment of private debts, had long been exercised in this country by

the several colonies and states; and during the revolutionary war the states, upon the recommendation of the congress of the confederation, had made the bills issued by congress a legal tender. The exercise of this power not being prohibited to congress by the constitution, it is included in the power expressly granted to borrow money on the credit of the United States. . . .

Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question, to be determined by congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts. To quote once more from the judgment in *McCulloch v. Maryland*: "Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

B. PROGRESSIVE ERA CASES

ASSIGNMENT 2

At the end of the nineteenth century, two emerging social and political movements advocated for increased government intervention in both economic and personal affairs: the progressive and populist movements. The progressive movement is difficult to define without distorting its complexity. Some understanding of its ideology is needed, however, to grasp the political climate that produced many of the laws that the Supreme Court reviewed during this period. Here is one sympathetic description of progressivism:

> Progressivism [was] a broadly based reform movement that reached its height early in the 20th century. In the decades following the Civil War rapid industrialization transformed the United States. A national rail system was completed; agriculture was mechanized; the factory system spread; and cities grew rapidly in size and number. The progressive movement arose as a response to the vast changes brought by industrialization.
>
> *Urban Reform.* Progressivism began in the cities, where the problems were most acute. Dedicated men and women of middle-class background moved into the slums and established settlement houses. Led by women such as Jane Addams in Chicago and Lillian Wald in New York City, they hoped to improve slum life through programs of self-help. Other reformers attacked corruption in municipal government; they formed nonpartisan leagues to defeat the entrenched bosses and their political machines. During the 1890s, reform mayors such as Hazen Pingree in Detroit, Samuel Jones in Toledo, and James Phelan in San Francisco were elected on platforms promising municipal ownership of public utilities, improved city services, and tenement housing codes. Urban reformers were often frustrated, however, because state legislatures, controlled by railroads and large corporations, obstructed the municipal struggle for home rule.
>
> *Reform on the State Level.* Reformers turned to state politics, where progressivism reached its fullest expression. Robert La Follette's term as governor of Wisconsin (1901-6) was a model of progressive reform. He won from the legislature an antilobbying law directed

at large corporations, a state banking control measure, and a direct primary law. Taxes on corporations were raised, a railroad commission was created to set rates, and a conservation commission was set up.

In state after state, progressives advocated a wide range of political, economic, and social reforms. They urged adoption of the secret ballot, direct primaries, the initiative, the referendum, and direct election of senators. They struck at the excessive power of corporate wealth by regulating railroads and utilities, restricting lobbying, limiting monopoly, and raising corporate taxes. To correct the worst features of industrialization, progressives advocated workers' compensation, child labor laws, minimum wage and maximum hours legislation (especially for women workers), and widows' pensions.

Reform on the National Level. As progressives gained strength on the state level, they turned to national politics. Little headway was made, however, since conservatives controlled the Senate. Some progress was made against the trusts during [Republican] Theodore Roosevelt's administration, and Congress passed two bills regulating railroads, the Elkins Act (1903) and the Hepburn Act (1906). The exposés of business practices by the muckrakers aroused public opinion. The Pure Food and Drug Act and the Meat Inspection Act were passed (1906) to eliminate the worst practices of the food industry. Although Roosevelt supported the progressive drive for regulation of corporations and for social-welfare legislation, Congress remained adamant.

Roosevelt's [Republican] successor, William Howard Taft, was a determined opponent of progressive reform; in 1911 progressives, whose ranks had been swelled by middle-class professionals, small businessmen, and farmers, formed the National Progressive Republican League to prevent Taft's renomination. When this failed, progressives united in a third party and nominated (1912) Roosevelt for President. Although Roosevelt was defeated, the new President, [Democrat] Woodrow Wilson, sponsored many progressive measures. The Federal Reserve Act of 1913 reformed the currency system; the Clayton Antitrust Act and the Federal Trade Commission Act (1914) extended government regulation of big business; and the Keating-Owen Act (1916) restricted child labor.

Progressivism's Legacy. America's entry into World War I diverted the energy of reformers, and after the war progressivism virtually died. Its legacy endured, however, in the political reforms that it achieved and the acceptance that it won for the principle of government regulation of business. Most of the social-welfare measures advocated by progressives had to await the New Deal years for passage.[1]

Though progressivism and populism both favored the increased use of government power, there was a tension between these two movements. Progressives tended to support reforms based on the wisdom of scientifically enlightened experts. In contrast, populism was based on the "belief that greater popular participation in government and business is necessary to protect individuals from exploitation by inflexible bureaucracy and financial conglomerates."[2] Or, put more colorfully, populism can be defined as "an ideology which pits a virtuous and homogeneous people against a set of elites and dangerous 'others' who are together depicted as depriving (or attempting to deprive) the sovereign people of their rights, values, prosperity, identity and voice."[3]

---

[1] The Columbia Encyclopedia (6th ed. 2001-2005).

[2] The New Dictionary of Cultural Literacy (3d ed. 2002).

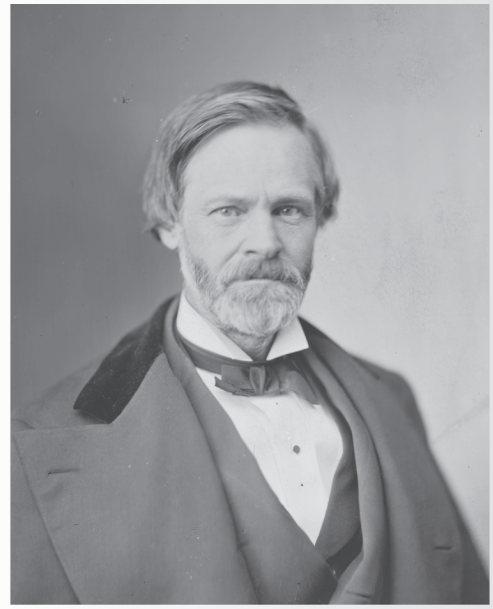
[3] Daniele Albertazzi & Duncan McDonnell, Twenty-First Century Populism: The Spectre of Western European Democracy (2007).

Was the progressive political program consistent with the constraints of the Constitution? Keep in mind that the Constitution itself was amended four times in seven years to reflect the growing appeal of progressivism and populism:

1. The Sixteenth Amendment (1913) authorized a national income tax to facilitate the growth of government programs. It reversed a Supreme Court decision holding such a tax to be unconstitutional.
2. The Seventeenth Amendment (1913) required the direct popular election of senators. Under the original Constitution, senators were elected by state legislatures. This amendment could therefore be viewed as populist as well as progressive.
3. The Eighteenth Amendment (1919) empowered Congress to prohibit the manufacture, sale, and transportation (but not the possession) of alcohol. Progressivism was not limited to relying on expertise. This movement also had an evangelical, religious, and moral element.[4]
4. The Nineteenth Amendment (1920) gave women the right to vote. The long-developing movement for women's suffrage was largely distinct from either progressivism or populism. It tended to have more support from Republican officeholders than from Democrats.

A strong argument can be made that the first two of these amendments fundamentally altered the American form of government more than any judicial decision.

Most "progressive" legislation originated at the state level. But the federal Sherman Antitrust Act of 1890 tested the limits of congressional power. *United States v. E.C. Knight* (1895) considered the constitutionality of this federal law. This case marked the beginning of the judicial resistance to Progressive Era legislation.



The Sherman Antitrust Act was authored by John Sherman (above), who had succeeded Salmon Chase as senator from Ohio. Sherman wrote the Act after leaving the Senate for a time to serve as Secretary of the Treasury. Sherman's older brother was Union General William Tecumseh Sherman.

[4] See Thomas Leonard, Illiberal Reformers: Race, Eugenics, and American Economics in the Progressive Era (2016).

STUDY GUIDE

1. Chief Justice Fuller wrote the majority opinion in *United States v. E.C. Knight*. What authority does he rely on to interpret the word "commerce"? If there was evidence from the founding era as to intent or understanding, why didn't he cite it?
2. The Court reads the Sherman Antitrust Act narrowly to avoid finding that it is unconstitutional on its face. This approach is sometimes called a "saving construction." Chief Justice Roberts would utilize this same device in *NFIB v. Sebelius* (2012).
3. In 1790, 90 percent of the labor force worked in agriculture. Most manufacturing was local in nature. The Delaware and Hudson Canal Company was the first private corporation that capitalized at one million dollars. That firm was not formed until 1825. U.S. Steel, formed in 1901, was the first billion-dollar corporation. There were tremendous changes in the economy from the Founding to the Progressive Era. Should this shift affect how the Court interprets the Commerce Clause?
4. Emphasizing the Commerce Clause leads in one direction, while emphasizing the Necessary and Proper Clause leads in another. How so?
5. Justice Harlan's dissent in *United States v. E.C. Knight* relies on the Necessary and Proper Clause. Does he cite the Marshall Court precedents? The *Legal Tender Cases*?

United States v. E.C. Knight Co.

156 U.S. 1 (1895)

Video on CasebookConnect.com

[Defendants were charged with violating the Sherman Antitrust Act of 1890. This law provided "that every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade and commerce among the several states is illegal, and that persons who shall monopolize or shall attempt to monopolize, or combine or conspire with other persons to monopolize trade and commerce among the several states, shall be guilty of a misdemeanor." The indictment alleged that the E.C. Knight Company, the Franklin Sugar Company, the Spreckels Sugar Refining Company, and the Delaware Sugar House "were independently engaged in the manufacture and sale of sugar" and "the product of their refineries amounted to 33 percent of the sugar refined in the United States." These four companies were competitors with the American Sugar Refining Company, which had "obtained the control of all the sugar refineries of the United States with the exception of the Revere of Boston and the refineries of the four defendants above mentioned."

"The bill then alleged that, in order that the American Sugar Refining Company might obtain complete control of the price of sugar in the United States, that company . . . entered into an unlawful and fraudulent scheme to purchase the stock, machinery, and real estate of the other four corporations defendant, by which they attempted to control all the sugar refineries for the purpose of restraining the trade thereof with other states as theretofore carried on independently by said defendants. . . . It was further averred that the American Sugar Refining Company monopolized the manufacture and sale of

refined sugar in the United States, and controlled the price of sugar; that in making the contracts, . . . the American Sugar Refining Company combined and conspired with the other defendants to restrain trade and commerce in refined sugar among the several states and foreign nations. . . ." — Eds.]

Mr. Chief Justice Fuller, after stating the cases, delivered the opinion of the court. . . .

The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill.

It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, "the power to govern men and things within the limits of its dominion," is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with, and this court has recognized their possession of that power even to the extent of holding that an employment or business carried on by private individuals, when it becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, is subject to regulation by state legislative power. On the other hand, the power of Congress to regulate commerce among the several states is also exclusive. . . . That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State. *Gibbons v. Ogden* (1824). . . .

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce.

It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our

dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce, and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold, or exchanged for the purposes of such transit among the states, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce. . . .

[As] Mr. Justice Lamar remarked [in *Kidd v. Pearson* (1888)]:

> No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation — the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling, and the transportation incidental thereto, constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock-raising, domestic fisheries, mining — in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the states, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests — interests which in their nature are, and must be, local in all the details of their successful management. . . . The demands of such supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable, and utterly inconsistent. Any movement towards the establishment of rules of production in this vast country, with its many different climates and opportunities, would only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement towards the local, detailed, and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. [. . .] A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the states, and less likely to have been what the framers of the constitution intended, it would be difficult to imagine.

In *Gibbons v. Ogden* (1824), *Brown v. Maryland* (1827), and other cases often cited, the state laws, which were held inoperative, were instances of direct interference with, or regulations of, interstate or international commerce; yet in *Kidd v. Pearson* the refusal of a State to allow articles to be manufactured within her borders, even for export, was held

not to directly affect external commerce; and state legislation which, in a great variety of ways, affected interstate commerce and persons engaged in it, has been frequently sustained because the interference was not direct. . . .

It was in the light of well-settled principles that the [Sherman Act] was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. . . .

Decree [dismissing the bill filed by the United States against E.C. Knight Company] *affirmed.*

Mr. Justice Harlan, dissenting. . . .

It is the Constitution, the supreme law of the land, which invests Congress with power to protect commerce among the States against burdens and exactions arising from unlawful restraints by whatever authority imposed. Surely, a right secured or granted by that instrument is under the protection of the government which that instrument creates. Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other States, or to be carried to other States — a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition — affects, not incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all. *McCulloch v. Maryland* (1819). . . .

In my judgment, the citizens of the several States composing the Union are entitled of right to buy goods in the State where they are manufactured, or in any other State, without being confronted by an illegal combination whose business extends throughout the whole country, which, by the law everywhere, is an enemy to the public interests, and which prevents such buying, except at prices arbitrarily fixed by it. I insist that the free course of trade among the States cannot coexist with such combinations. When I speak of trade I mean the buying and selling of articles of every kind that are recognized articles of interstate commerce. Whatever improperly obstructs the free course of interstate intercourse and trade, as involved in the buying and selling of articles to be carried from one State to another, may be reached by Congress under its authority to regulate commerce among the States. The exercise of that authority so as to make trade among the States in all recognized articles of commerce absolutely free from unreasonable or illegal restrictions imposed by combinations is justified by an express grant of power to Congress, and would redound to the welfare of the whole country. I am unable to

perceive that any such result would imperil the autonomy of the States, especially as that result cannot be attained through the action of any one State. . . .

In committing to Congress the control of commerce with foreign nations and among the several States, the Constitution did not define the means that may be employed to protect the freedom of commercial intercourse and traffic established for the benefit of all the people of the Union. It wisely forbore to impose any limitations upon the exercise of that power except those arising from the general nature of the government, or such as are embodied in the fundamental guaranties of liberty and property. It gives to Congress, in express words, authority to enact all laws necessary and proper for carrying into execution the power to regulate commerce; and whether an act of Congress, passed to accomplish an object to which the general government is competent, is within the power granted, must be determined by the rule announced through Chief Justice Marshall three-quarters of a century ago, and which has been repeatedly affirmed by this court. That rule is: "The sound construction of the Constitution must allow to the national legislature the discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." *McCulloch v. Maryland*. The end proposed to be accomplished by the Act of 1890 is the protection of trade and commerce among the States against unlawful restraints. Who can say that that end is not legitimate or is not within the scope of the Constitution? The means employed are the suppression, by legal proceedings, of combinations, conspiracies, and monopolies which, by their inevitable and admitted tendency, improperly restrain trade and commerce among the States. Who can say that such means are not appropriate to attain the end of freeing commercial intercourse among the States from burdens and exactions imposed upon it by combinations which, under principles long recognized in this country, as well as at the common law, are illegal and dangerous to the public welfare? What clause of the Constitution can be referred to which prohibits the means thus prescribed in the act of Congress? . . .

To the general government has been committed the control of commercial intercourse among the States, to the end that it may be free at all times from any restraints except such as Congress may impose or permit for the benefit of the whole country. The common government of all the people is the only one that can adequately deal with a matter which directly and injuriously affects the entire commerce of the country, which concerns equally all the people of the Union, and which, it must be confessed, cannot be adequately controlled by any one State. Its authority should not be so weakened by construction that it cannot reach and eradicate evils that, beyond all question, tend to defeat an object which that government is entitled, by the Constitution, to accomplish. . . .

For the reasons stated, I dissent from the opinion and judgment of the court.

As early as the 1820s, legislation at the state level attempted to control the sale and use of alcohol and lottery tickets. At first, some state courts found these laws were invalid. But over time, the courts began to recognize a broader conception of the state's police

power to regulate in the interest of health, safety, and morals. The courts would later cite these early state court precedents to uphold progressive legislation.[1] In addition to arguments based on "public morals," the progressive movement justified such legislation as "public health" measures.[2]

Despite this expanded conception of *state* power, most judges continued to find that the federal government lacked this authority. Court decisions from this era held that the Commerce Clause and the Necessary and Proper Clause did not give Congress the power to regulate or prohibit the wholly intrastate sale or transportation of alcohol. For this reason, the temperance movement supported and ultimately achieved the ratification of the Eighteenth Amendment. This provision gave Congress the enumerated power to prohibit "the manufacture, sale, or transportation of intoxicating liquors." Even before the ratification of the Eighteenth Amendment, however, Congress did prohibit the interstate transportation of lottery tickets. That law was challenged in *Champion v. Ames*. Here Justice Harlan wrote the majority opinion, which upheld the federal statute. *Champion v. Ames*, also known as the *Lottery Case*, is still relied upon by the courts.

STUDY GUIDE

1. *Champion v. Ames* held Congress's power to "regulate" commerce includes the power to prohibit it as well. To this day, the Supreme Court still cites *Champion* to support this proposition. Under modern jurisprudence, the word "regulate" is commonly understood to mean prohibit or ban. This usage is so widespread that it is hard to conceive of any distinction between the two phrases. Can you think of any other meaning of the word "regulate" that would exclude complete prohibition?
2. Both the government and the challengers agree that Congress may regulate the *transporting* of lottery tickets from one state to another state under the Commerce Clause. In Chapter 2 we discussed how the transportation of articles was within the core original meaning of "commerce." In *Champion v. Ames*, the parties disputed the meaning and scope of the word "regulate."
3. What limitations on Congress's power does Justice Harlan identify? When *Champion v. Ames* is cited, however, these limitations are generally ignored. What does this failure tell us about the wisdom of making "exceptions" to prohibitions on governmental powers?
4. Justice Harlan wrote that "the possible abuse of a power is not an argument against its existence." Do you agree? Notice his reference to "public health or morality."

[1] See John W. Compton, The Evangelical Origins of the Living Constitution (2014).

[2] See Ronald Hamowy, Preventive Medicine and the Criminalization of Sexual Immorality in Nineteenth Century America, in Assessing the Criminal: Restitution, Retribution, and the Legal Process 33-95 (Randy E. Barnett & John Hagel, III eds., 1977) (describing Progressive Era laws against masturbation and providing state-by-state data on the origins of age of consent, sodomy, and prostitution laws).

Champion v. Ames

The Lottery Case, 188 U.S. 321 (1903)
Video on CasebookConnect.com

[In 1895, Congress prohibited the sending of lottery tickets from one state to another by any means. Appellants were indicted for conspiring to transport tickets of the Pan-American Lottery Company, which was based in Paraguay, from Texas to California. Appellants shipped them by railroad with the Wells Fargo Express Company. — Eds.]

Mr. Justice Harlan delivered the opinion of the court.

The appellant insists that the carrying of lottery tickets from one State to another State by an express company engaged in carrying freight and packages from State to State, although such tickets may be contained in a box or package, does not constitute, and cannot by any act of Congress be legally made to constitute, *commerce* among the States within the meaning of the clause of the Constitution of the United States. . . .

The Government insists that express companies when engaged, for hire, in the business of transportation from one State to another, are instrumentalities of commerce among the States; that the carrying of lottery tickets from one State to another is commerce which Congress may regulate; and that as a means of executing the power to regulate interstate commerce Congress may make it an offense against the United States to cause lottery tickets to be carried from one State to another.

The questions presented by these opposing contentions are of great moment, and are entitled to receive, as they have received, the most careful consideration.

What is the import of the word "commerce" as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one State to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several States include something more? Does not the carrying from one State to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified, also constitute commerce among the States? . . . We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States.

But it is said that the statute in question does not regulate the carrying of lottery tickets from State to State, but by punishing those who cause them to be so carried Congress in effect prohibits such carrying; that in respect of the carrying from one state to another of articles or things that are, in fact, or according to usage in business, the subjects of commerce, the authority given Congress was not to *prohibit*, but only to *regulate*. This view was earnestly pressed at the bar by learned counsel, and must be examined. . . .

In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2, 1895, to suppress cannot be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court.

In *Phalen v. Virginia* (1850), after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of Government,

this court said: "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; this, for the reason that no state may bargain away its power to protect the public morals, nor excuse its failure to perform a public duty by saying that it had agreed, by legislative enactment, not to do so.

If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals? We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from State to State except the one providing that no person shall be deprived of his liberty without due process of law. We have said that the liberty protected by the Constitution embraces the right to be free in the enjoyment of one's faculties; "to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper." *Allgeyer v. Louisiana* (1897). But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals.

If it be said that the act of 1895 is inconsistent with the Tenth Amendment, reserving to the States respectively or to the people the powers not delegated to the United States, the answer is that the power to regulate commerce among the States has been expressly delegated to Congress.

Besides, Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any State, but has in view only commerce of that kind among the several States. It has not assumed to interfere with the completely internal affairs of any State, and has only legislated in respect of a matter which concerns the people of the United States. As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States — perhaps all of

them — which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. . . .

It is said, however, that if, in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity, or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another. It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the States. We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several States. But, as often said, the possible abuse of a power is not an argument against its existence. There is probably no governmental power that may not be exerted to the injury of the public. If what is done by Congress is manifestly in excess of the powers granted to it, then upon the courts will rest the duty of adjudging that its action is neither legal nor binding upon the people. . . .

The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that under its power to regulate commerce among the several States Congress — subject to the limitations imposed by the Constitution upon the exercise of the powers granted — has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.

The judgment is *Affirmed*.

Mr. Chief Justice Fuller, with whom concur Mr. Justice Brewer, Mr. Justice Shiras, and Mr. Justice Peckham, dissenting. . . .

The power of the State to impose restraints and burdens on persons and property in conservation and promotion of the public health, good order, and prosperity is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive, and the suppression of lotteries as a harmful business falls within this power, commonly called, of police.

It is urged, however, that because Congress is empowered to regulate commerce between the several States, it, therefore, may suppress lotteries by prohibiting the carriage of lottery matter. Congress may indeed make all laws necessary and proper for carrying the powers granted to it into execution, and doubtless an act prohibiting the carriage of lottery matter would be necessary and proper to the execution of a power to suppress lotteries; but that power belongs to the States and not to Congress. To hold that Congress has general police power would be to hold that it may accomplish objects not intrusted to the general government, and to defeat the operation of the Tenth Amendment. . . .

[T]his act cannot be brought within the power to regulate commerce among the several States, unless lottery tickets are articles of commerce, and, therefore, when carried across State lines, of interstate commerce; or unless the power to regulate interstate commerce includes the absolute and exclusive power to prohibit the transportation of anything or anybody from one State to another. . . . It cannot be successfully contended that either Congress or the States can, by their own legislation, enlarge their powers, and the question of the extent and limit of the powers of either is a judicial question under the fundamental law. If a particular article is not the subject of commerce, the determination of Congress that it is, cannot be so conclusive as to exclude judicial inquiry.

When Chief Justice Marshall said that commerce embraced intercourse, he added, commercial intercourse, and this was necessarily so since, as Chief Justice Taney pointed out, if intercourse were a word of larger meaning than the word commerce, it could not be substituted for the word of more limited meaning contained in the Constitution.

Is the carriage of lottery tickets from one State to another commercial intercourse?

The lottery ticket purports to create contractual relations, and to furnish the means of enforcing a contract right.

This is true of insurance policies, and both are contingent in their nature. Yet this court has held that the issuing of fire, marine, and life insurance policies, in one state, and sending them to another, to be there delivered to the insured on payment of premium, is not interstate commerce. . . . In *Paul v. Virginia*, Mr. Justice Field, in delivering the unanimous opinion of the court, said:

> Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect — are not executed contracts — until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce

between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.

. . .

If a lottery ticket is not an article of commerce, how can it become so when placed in an envelope or box or other covering, and transported by an express company? To say that the mere carrying of an article which is not an article of commerce in and of itself nevertheless becomes such the moment it is to be transported from one State to another, is to transform a non-commercial article into a commercial one simply because it is transported. I cannot conceive that any such result can properly follow.

It would be to say that everything is an article of commerce the moment it is taken to be transported from place to place, and of interstate commerce if from State to State.

An invitation to dine, or to take a drive, or a note of introduction, all become articles of commerce under the ruling in this case, by being deposited with an express company for transportation. This in effect breaks down all the differences between that which is, and that which is not, an article of commerce, and the necessary consequence is to take from the States all jurisdiction over the subject so far as interstate communication is concerned. It is a long step in the direction of wiping out all traces of State lines, and the creation of a centralized Government.

Does the grant to Congress of the power to regulate interstate commerce import the absolute power to prohibit it? . . .

It will not do to say . . . that State laws have been found to be ineffective for the suppression of lotteries, and therefore Congress should interfere. The scope of the commerce clause of the Constitution cannot be enlarged because of present views of public interest. In countries whose fundamental law is flexible it may be that the homely maxim, "to ease the shoe where it pinches" may be applied, but under the Constitution of the United States it cannot be availed of to justify action by Congress or by the courts. The Constitution gives no countenance to the theory that Congress is vested with the full powers of the British Parliament, and that, although subject to constitutional limitations, it is the sole judge of their extent and application; and the decisions of this court from the beginning have been to the contrary.

"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" asked Marshall, in *Marbury v. Madison*. "Should Congress," said the same great magistrate in *McCulloch v. Maryland*, "under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the Government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land." . . .

It is argued that the power to regulate commerce among the several States is the same as the power to regulate commerce with foreign nations, and with the Indian tribes. But is its scope the same? . . . [T]he power to regulate interstate commerce . . . was intended to secure equality and freedom in commercial intercourse as between the States, not to permit the creation of impediments to such intercourse; while the [power to regulate commerce with foreign nations] clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the States. The laws

which would be necessary and proper in the one case would not be necessary or proper in the other. . . .

The power to prohibit the transportation of diseased animals and infected goods over railroads or on steamboats is an entirely different thing, for they would be in themselves injurious to the transaction of interstate commerce, and, moreover, are essentially commercial in their nature. And the exclusion of diseased persons rests on different ground, for nobody would pretend that persons could be kept off the trains because they were going from one State to another to engage in the lottery business. However enticing that business may be, we do not understand these pieces of paper themselves can communicate bad principles by contact.

The same view must be taken as to commerce with Indian tribes. There is no reservation of police powers or any other to a foreign nation or to an Indian tribe, and the scope of the power is not the same as that over interstate commerce. . . .

I regard this decision as inconsistent with the views of the framers of the Constitution, and of Marshall, its great expounder. Our form of government may remain notwithstanding legislation or decision, but, as long ago observed, it is with governments, as with religions, the form may survive the substance of the faith. . . .

Children working in Cherryville Mfg. Co. cotton mill, Cherryville, North Carolina

STUDY GUIDE

1. Is *Hammer v. Dagenhart* consistent with *Champion v. Ames*?
2. How does *Hammer* distinguish *Champion*? Are you persuaded by this distinction?
3. *Hammer* recognized certain limits on Congress's powers. The Supreme Court would later reject these limits in *United States v. Darby* (1941).

Hammer v. Dagenhart

247 U.S. 251 (1918)


Video on CasebookConnect.com

Mr. Justice Day delivered the opinion of the court.

A bill was filed in the United States District Court for the Western District of North Carolina by a father in his own behalf and as next friend of his two minor sons, one under the age of fourteen years and the other between the ages of fourteen and sixteen years, employees in a cotton mill at Charlotte, North Carolina, to enjoin the enforcement of the act of Congress intended to prevent interstate commerce in the products of child labor. . . . The District Court held the act unconstitutional and entered a decree enjoining its enforcement. This appeal brings the case here. The first section of the act is in the margin.*

The controlling question for decision is: Is it within the authority of Congress in regulating commerce among the states to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock P.M. or before the hour of six o'clock A.M.?

The power essential to the passage of this act, the Government contends, is found in the commerce clause of the Constitution which authorizes Congress to regulate commerce with foreign nations and among the States. . . . [I]t is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate.

The first of these cases is *Champion v. Ames* (1903), the so-called *Lottery Case*, in which it was held that Congress might pass a law having the effect to keep the channels of commerce free from use in the transportation of tickets used in the promotion of lottery schemes. In *Hipolite Egg Co. v. United States* (1911), this court sustained the power of Congress to pass the Pure Food and Drug Act, which prohibited the introduction into the States by means of interstate commerce of impure foods and drugs. In *Hoke v. United States* (1913), this court sustained the constitutionality of the so-called "White Slave Traffic Act," whereby the transportation of a woman in interstate commerce for

---

* That no producer, manufacturer, or dealer shall ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any mine or quarry, situated in the United States, in which within thirty days prior to the time of the removal of such product therefrom children under the age of sixteen years have been employed or permitted to work, or any article or commodity the product of any mill, cannery, workshop, factory, or manufacturing establishment, situated in the United States, in which within thirty days prior to the removal of such product therefrom children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen years and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of seven o'clock postmeridian, or before the hour of six o'clock antemeridian. . . .

the purpose of prostitution was forbidden. . . . In *Caminetti v. United* States (1917), we held that Congress might prohibit the transportation of women in interstate commerce for the purposes of debauchery and kindred purposes. In *Clark Distilling Co. v. Western Maryland Railway Co.* (1917), the power of Congress over the transportation of intoxicating liquors was sustained. . . .

In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the States who employ children within the prohibited ages. The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power. . . .

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other States where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the state of production. In other words, that the unfair competition, thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in those states where the local laws do not meet what Congress deems to be the more just standard of other States.

There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may cooperate to give one state, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions. In some of the states laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such States may be at an economic disadvantage when compared with States which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other States and approved by Congress.

The grant of power of Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution. . . . Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. "This," said this court in *United States v. Dewitt* (1869), "has been so frequently declared by this court, results

so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion." See . . . Cooley's Constitutional Limitations (7th Ed.) p. 11. . . .

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every state in the Union has a law upon the subject, limiting the right to thus employ children. In North Carolina, the State wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

It may be desirable that such laws be uniform, but our Federal Government is one of enumerated powers; "this principle," declared Chief Justice Marshall in *McCulloch v. Maryland*, "is universally admitted." . . . In interpreting the Constitution it must never be forgotten that the nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. The power of the States to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. *New York v. Miln*, *Slaughter-House Cases*. To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the States. . . .

In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities to regulate the hours of labor of children in factories and mines within the States, a purely state authority. Thus the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.

Affirmed.

Mr. Justice Holmes, with whom Mr. Justice McKenna, Mr. Justice Brandeis, and Mr. Justice Clarke concur, dissenting. . . .

The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States

which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. If, as has been the case within the memory of men still living, a State should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion v. Ames*. Yet in that case it would be said with quite as much force as in this that Congress was attempting to intermeddle with the State's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

The Schechter brothers were immigrants who ran two kosher butcher shops in Brooklyn. Fittingly, in Hebrew, the word *schecht* means "to slaughter meat." Under Kashrut (Kosher) religious dietary laws, which also served as an informal health code in the Jewish community, the lungs of chickens were examined by rabbinical inspectors to ensure that they were free of illnesses or other blemishes. Under Jewish law, buyers — both retailers and individual customers — had the right to refuse a specific animal. However, the federal regulations in place prohibited customers from rejecting the animal offered. After repeated inspections by federal authorities, the Schechters told their clientele that they could not reject individual birds, causing their deeply religious customer base to dwindle.

STUDY GUIDE

1. The vote in *Schechter Poultry Corp. v. United States* (1935) was unanimous. Justices Brandeis and Cardozo (who almost always voted to uphold New Deal legislation) and Chief Justice Hughes (who sometimes did) all voted to set aside the law.
2. *Schechter Poultry* found that the National Industrial Recovery Act gave the President the authority to "establish[] the standards of legal obligation." This Act, the Court

found, violated the so-called *nondelegation doctrine*. That doctrine bars Congress from delegating its legislative powers to the executive branch.

3. Since 1935, the Supreme Court has not found any law to have violated the nondelegation doctrine. However, in *Gundy v. United States* (2019), four Justices indicated that they were willing to revive the nondelegation doctrine.

Schechter Poultry Corp. v. United States

295 U.S. 495 (1935)


Video on CasebookConnect.com

Mr. Chief Justice Hughes delivered the opinion of the Court. . . .

New York City is the largest live poultry market in the United States. Ninety-six percent of the live poultry there marketed comes from other States. . . . A.L.A. Schechter Poultry Corporation and Schechter Live Poultry Market are corporations conducting wholesale poultry slaughterhouse markets in Brooklyn, New York City. . . . Defendants ordinarily purchase their live poultry from commission men at the West Washington Market in New York City or at the railroad terminals serving the City, but occasionally they purchase from commission men in Philadelphia. They buy the poultry for slaughter and resale. After the poultry is trucked to their slaughterhouse markets in Brooklyn, it is there sold, usually within twenty-four hours, to retail poultry dealers and butchers who sell directly to consumers. The poultry purchased from defendants is immediately slaughtered, prior to delivery, by *schochtim* [Kosher butchers in Hebrew — Eds.] in defendants' employ. Defendants do not sell poultry in interstate commerce.

The "Live Poultry Code" was promulgated under §3 of the National Industrial Recovery Act. That section . . . authorizes the President to approve "codes of fair competition."[4]

. . . The "Live Poultry Code" was approved by the President on April 13, 1934. . . . The Code is established as "a code of fair competition for the live poultry industry of the metropolitan area in and about the City of New York." . . . The Code fixes the number of hours for workdays. It provides that no employee, with certain exceptions, shall be permitted to work in excess of forty (40) hours in any one week, and that no employee, save as stated, "shall be paid in any pay period less than at the rate of fifty (50) cents per hour." The article containing "general labor provisions" prohibits the employment of any person under sixteen years of age, and declares that employees shall have the right of "collective

[4] CODES OF FAIR COMPETITION

Sec. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants. . . .

(f) When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense.

bargaining," and freedom of choice with respect to labor organizations, in the terms of §7(a) of the Act. The minimum number of employees who shall be employed by slaughterhouse operators is fixed, the number being graduated according to the average volume of weekly sales. . . . The seventh article, containing "trade practice provisions," prohibits various practices which are said to constitute "unfair methods of competition." . . .

Of the eighteen counts of the indictment upon which the defendants were indicted, aside from the count for conspiracy, two counts charged violation of the minimum wage and maximum hour provisions of the Code, and ten counts were for violation of the requirement (found in the "trade practice provisions") of "straight killing." This requirement was really one of "straight" selling. The term "straight killing" was defined in the Code as "the practice of requiring persons purchasing poultry for resale to accept the run of any half coop, coop, or coops, as purchased by slaughterhouse operators, except for culls." The charges in the ten counts, respectively, were that the defendants, in selling to retail dealers and butchers, had permitted "selections of individual chickens taken from particular coops and half-coops." . . .

First. Two preliminary points are stressed by the government with respect to the appropriate approach to the important questions presented. We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power.[8] The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extraconstitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment — "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." . . .

Second. The Question of the Delegation of Legislative Power. We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. *Panama Refining Company v. Ryan* (1935). The Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Article 1, §1. And the Congress is authorized "To make all Laws which shall be necessary and proper for carrying into Execution" its general powers. Article 1, §8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly. We pointed out in the *Panama Refining Company* case that the Constitution has never been regarded as denying to Congress the necessary resources

[8] See *Ex parte Milligan* (1866); *Home Building & Loan Assn. v. Blaisdell* (1934).

of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.

Accordingly, we look to the statute to see whether Congress has overstepped these limitations — whether Congress in authorizing "codes of fair competition" has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others. . . .

The question, then, turns upon the authority which section 3 of the Recovery Act vests in the President to approve or prescribe. If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. See *Panama Refining Company v. Ryan*. . . .

To summarize and conclude upon this point: Section 3 of the Recovery Act is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in section 1. In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.

Third. The Question of the Application of the Provisions of the Live Poultry Code to Intrastate Transactions. — Although the validity of the codes (apart from the question of delegation) rests upon the commerce clause of the Constitution, §3(a) is not, in terms, limited to interstate and foreign commerce. From the generality of its terms, and from the argument of the Government at the bar, it would appear that §3(a) was designed to authorize codes without that limitation. But, under §3(f), penalties are confined to violations of a code provision "in any transaction in or affecting interstate or foreign commerce." This aspect of the case presents the question whether the particular provisions of the Live Poultry Code, which the defendants were convicted for violating and for having conspired to violate, were within the regulating power of Congress.

These provisions relate to the hours and wages of those employed by defendants in their slaughterhouses in Brooklyn, and to the sales there made to retail dealers and butchers.

(1) Were these transactions "*in*" interstate commerce? Much is made of the fact that almost all the poultry coming to New York is sent there from other States. But the code

provisions, as here applied, do not concern the transportation of the poultry from other States to New York, or the transactions of the commission men or others to whom it is consigned, or the sales made by such consignees to defendants. When defendants had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the City, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers who, in turn, sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce.

The undisputed facts thus afford no warrant for the argument that the poultry handled by defendants at their slaughterhouse markets was in a "*current*" or "*flow*" of interstate commerce, and was thus subject to congressional regulation. The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived, and has become commingled with the mass of property within the State, and is there held solely for local disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce, and was not destined for transportation to other States. Hence, decisions which deal with a stream of interstate commerce — where goods come to rest within a State temporarily and are later to go forward in interstate commerce — and with the regulations of transactions involved in that practical continuity of movement, are not applicable here.

(2) Did the defendants' transactions directly "*affect*" interstate commerce, so as to be subject to federal regulation? The power of Congress extends not only to the regulation of transactions which are part of interstate commerce, but to the protection of that commerce from injury. It matters not that the injury may be due to the conduct of those engaged in intrastate operations. Thus, Congress may protect the safety of those employed in interstate transportation "no matter what may be the source of the dangers which threaten it." *Southern Ry. Co. v. United States* (1911). We said in *Second Employers' Liability Cases* (1912), that it is the "effect upon interstate commerce," not "the source of the injury," which is "the criterion of congressional power." We have held that, in dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their intrastate operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service. And combinations and conspiracies to restrain interstate commerce, or to monopolize any part of it, are nonetheless within the reach of the Anti-Trust Act because the conspirators seek to attain their end by means of intrastate activities. . . .

The instant case is not of that sort. This is not a prosecution for a conspiracy to restrain or monopolize interstate commerce in violation of the Anti-Trust Act. Defendants have been convicted not upon direct charges of injury to interstate commerce or of interference

with persons engaged in that commerce, but of violations of certain provisions of the Live Poultry Code and of conspiracy to commit these violations. Interstate commerce is brought in only upon the charge that violations of these provisions — as to hours and wages of employees and local sales — "*affected*" interstate commerce.

In determining how far the federal government may go in controlling intrastate transactions upon the ground that they "affect" interstate commerce, there is a necessary and well established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases . . . as, *e.g.*, the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprise and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control. . . .

[T]he distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power, and, for all practical purposes, we should have a completely centralized government. We must consider the provisions here in question in the light of this distinction.

The question of chief importance relates to the provisions of the Code as to the hours and wages of those employed in defendants' slaughterhouse markets. It is plain that these requirements are imposed in order to govern the details of defendants' management of their local business. The persons employed in slaughtering and selling in local trade are not employed in interstate commerce. Their hours and wages have no direct relation to interstate commerce. The question of how many hours these employees should work and what they should be paid differs in no essential respect from similar questions in other local businesses which handle commodities brought into a State and there dealt in as a part of its internal commerce. This appears from an examination of the considerations urged by the Government with respect to conditions in the poultry trade. Thus, the Government argues that hours and wages affect prices; that slaughterhouse men sell at a small margin above operating costs; that labor represents 50 to 60 percent of these costs; that a slaughterhouse operator paying lower wages or reducing his cost by exacting long hours of work translates his saving into lower prices; that this results in demands for a cheaper grade of goods, and that the cutting of prices brings about a demoralization of the price structure. Similar conditions may be adduced in relation to other businesses.

The argument of the Government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is, in itself, the permitted object of federal control, the extent of the regulation of cost would be a question of discretion, and not of power.

The Government also makes the point that efforts to enact state legislation establishing high labor standards have been impeded by the belief that, unless similar action is taken generally, commerce will be diverted from the States adopting such standards, and that this fear of diversion has led to demands for federal legislation on the subject of wages and hours. The apparent implication is that the federal authority under the commerce clause should be deemed to extend to the establishment of rules to govern wages and hours in intrastate trade and industry generally throughout the country, thus overriding the authority of the States to deal with domestic problems arising from labor conditions in their internal commerce.

It is not the province of the Court to consider the economic advantages or disadvantage of such a centralized system. It is sufficient to say that the Federal Constitution does not provide for it. Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce, and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. . . .

We are of the opinion that the attempt, through the provisions of the Code, to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power. . . .

On both the grounds we have discussed, the attempted delegation of legislative power and the attempted regulation of intrastate transactions which affect interstate commerce only indirectly, we hold the code provisions here in question to be invalid and that the judgment of conviction must be reversed.

Mr. Justice Cardozo, concurring.

. . . If [the federal government's position] shall prevail, anything that Congress may do within the limits of the commerce clause for the betterment of business may be done by the President upon the recommendation of a trade association by calling it a code. This is delegation running riot. No such plenitude of power is susceptible of transfer. The statute, however, aims at nothing less, as one can learn both from its terms and from the administrative practice under it. Nothing less is aimed at by the code now submitted to our scrutiny. . . .

The Hughes Court (1932-1937). Seated, from left to right: Justices Louis D. Brandeis and Willis Van Devanter, Chief Justice Charles Evans Hughes, and Justices James C. McReynolds and George Sutherland. Standing, from left to right: Justices Owen J. Roberts, Pierce Butler, Harlan Fiske Stone, and Benjamin N. Cardozo.

C. THE NEW DEAL COURT

ASSIGNMENT 3

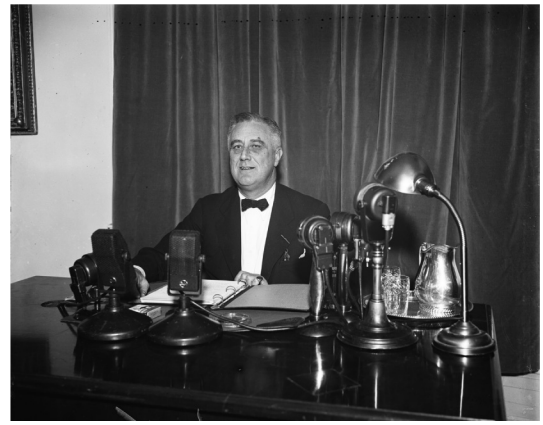
In 1932, President Franklin D. Roosevelt was elected in a landslide on the promise that he would bring the United States out of the Great Depression. He called his economic recovery program the "New Deal." Once in office, Roosevelt sought to vastly expand the powers of the federal government, which led to clashes between the executive branch and the judiciary.

Until recently, most students learned what has become the conventional account of the Supreme Court's transition during the early twentieth century. According to this narrative, during the Progressive Era, the Supreme Court engaged in conservative "judicial activism" by frequently holding popularly enacted progressive economic legislation unconstitutional. In these cases, the Supreme Court read Congress's federal powers too narrowly, but read the Fourteenth Amendment's Due Process Clause's limits on the state's

police power too broadly. In the 1970s, this period came to be known as the *Lochner* era, after *Lochner v. New York* (1905).

During the early years of the Roosevelt administration, Congress enacted the first planks of the New Deal agenda. The Supreme Court, however, found portions of the legislation unconstitutional. For example, in *Schechter Poultry*, the Court declared unconstitutional part of the National Industrial Recovery Act.

In February 1937, President Roosevelt responded to these decisions with the so-called *court-packing scheme*. This legislation would have increased the number of Supreme Court Justices. (Congress has set the size of the Supreme Court from as low as six members to as many as ten.) Roosevelt defended his plan under the guise that the oldest members of the Court could not handle the workload. However, everyone knew this justification was a pretext. Roosevelt's true purpose was to fill these new vacancies with Justices sympathetic to the New Deal.



President Roosevelt delivers a fireside chat on his Supreme Court reform plan.

In 1936, one year before the court-packing scheme was announced, the Court declared unconstitutional New York's minimum wage for women. The vote in *Morehead v. New York ex rel. Tipaldo* was 5-4 (1936). Justice Owen Roberts (no relation to Chief Justice John Roberts) joined the four conservative Justices to set aside New York's law. Then, in March 1937, just one month after the court-packing scheme was made public, the Justices announced their decision in *West Coast Hotel Co. v. Parrish*. In that case, a five-Justice majority upheld the constitutionality of Washington state's minimum wage for women. This decision reversed *Adkins v. Children's Hospital* (1923), in which the Court set aside a nearly identical federal law. At the time, many people looked at this sequence of events and concluded that the shift was made in response to Roosevelt's recently announced plan. It was thus dubbed "the switch in time that saved nine," a take-off on the adage "a stitch in time saves nine" (in other words, if you mend a small hole now, you won't need to mend a bigger hole later).

Although no one denies that a seismic change in constitutional law did indeed occur, the conventional account of how and when it occurred has been contested.[1] Here are some countervailing facts:

1. The change in the Court's jurisprudence did not occur abruptly after the court-packing plan was announced in February 1937. In fact, the transition began gradually. In 1930, President Hoover nominated Charles Evans Hughes and Owen

[1] The pathbreaking revisionist work can be studied in Barry Cushman, Rethinking the New Deal Court (1998).

Roberts to fill two vacancies on the Supreme Court. Though a Republican, Hoover was a political progressive. His two appointments began to shift the Court to the left.

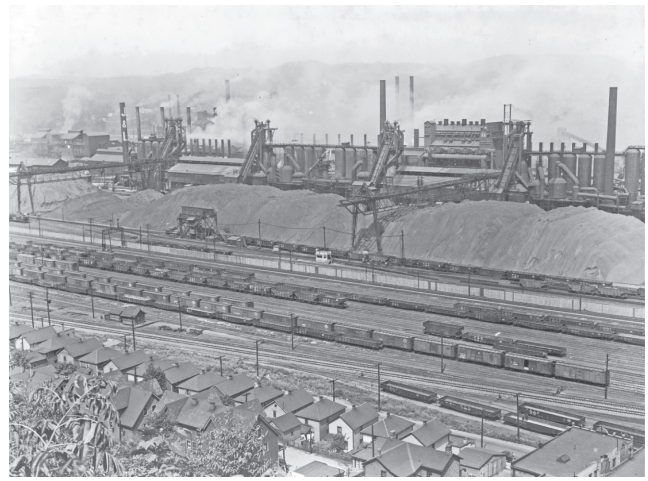
2. The conference vote following oral arguments in *West Coast Hotel* took place one month *before* the court-packing scheme was publicly announced. Based on the records in the "docket books," we know that Justice Roberts voted to uphold the Washington law in December 1936 — nearly three months before President Roosevelt announced his court-packing plan.
3. There is a far more mundane explanation for Justice Roberts's switch: In *Morehead*, the Court was not asked to overrule *Adkins*. However, *Parrish* asked the Court to expressly overrule *Adkins*. And so it did.
4. Because key Democrats in Congress were vocal in their opposition to the court-packing plan, it was not perceived as a realistic threat to the Court.
5. The shift in constitutional law started well before 1937 and initially concerned only the Due Process Clauses of the Fifth and Fourteenth Amendments. In contrast, the Court's shift with respect to the Commerce Clause happened well after 1937 and with considerable hesitance.
6. The constitutional sea change took until at least 1942 to be completed. By that point, President Franklin D. Roosevelt had appointed seven out of the nine Justices.
7. Many doctrines limiting federal and state power that were developed during the Progressive Era — including important features of the Court's approach to the due process of law — were never repudiated by the New Deal or Warren Courts. These doctrines remain good law today.

How should we characterize the New Deal Court's change of constitutional law? Did it represent a *restoration* of the original Constitution? Or did the New Deal Court effect a genuine constitutional *revolution*? At the time, some scholars claimed that the change restored the original meaning of the Constitution as reflected in early Marshall Court decisions such as *Gibbons v. Ogden* and *McCulloch v. Maryland*.[2] However, many prominent contemporary scholars, even those who favor the wisdom and legitimacy of the change, now disagree. They freely accept that the New Deal transformation was indeed a revolutionary departure from a 150-year-old constitutional tradition.[3] Indeed, Rexford Tugwell, a member of President Roosevelt's so-called *Brain Trust*, admitted that New Deal programs could only be reconciled with the Constitution through "tortured interpretations of a document intended to prevent them." Finally, some advocates, who sought *even greater change* than the New Deal Court was willing to accept, may have exaggerated the scope of the Court's revolution. The doctrines actually enunciated by the Court may not have been quite so radical.

[2] See, e.g., Walton H. Hamilton & Douglass Adair, The Power to Govern: The Constitution — Then and Now 184-194 (1937).

[3] See Bruce Ackerman, We the People: Foundations (1991); Howard Gillman, The Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers Jurisprudence (1993).

Pay careful attention to the actual reasoning of the New Deal cases when you consider how constitutional law developed during the New Deal. And try to keep the different doctrinal areas distinct: the cases concerning federal power are separate from cases concerning state power. This chapter only considers cases that involve the Commerce and Necessary and Proper Clauses. These decisions reversed much — but not all — of the doctrine developed during the Progressive Era. We will begin our study with *NLRB v. Jones & Laughlin Steel Corp.* (1937).



Jones & Laughlin Steel Factory

1. The Substantial Effects Doctrine

STUDY GUIDE

1. What limits, if any, did *Jones & Laughlin* place on Congress's Commerce and Necessary and Proper Clause powers?
2. How does *Jones & Laughlin* depart from the Court's interpretation of the Commerce Clause in *Schechter Poultry*?

NLRB v. Jones & Laughlin Steel Corp.

301 U.S. 1 (1937)

Video on CasebookConnect.com

Mr. Chief Justice Hughes delivered the opinion of the Court.

In a proceeding under the National Labor Relations Act of 1935 the National Labor Relations Board found that the respondent, Jones & Laughlin Steel Corporation, had violated the act by engaging in unfair labor practices affecting commerce. . . . The unfair labor practices charged were that the corporation was discriminating against members of the union with regard to hire and tenure of employment, and was coercing and intimidating its employees in order to interfere with their self-organization. . . .

The scheme of the National Labor Relations Act — which is too long to be quoted in full — may be briefly stated. The first section sets forth findings with respect to the injury to commerce resulting from the denial by employers of the right of employees to organize and from the refusal of employers to accept the procedure of collective bargaining. There follows a declaration that it is the policy of the United States to eliminate

these causes of obstruction to the free flow of commerce. . . . It creates the National Labor Relations Board and prescribes its organization. . . . The Board is empowered to prevent the described unfair labor practices affecting commerce and the act prescribes the procedure to that end. . . .

The facts as to the nature and scope of the business of the Jones & Laughlin Steel Corporation have been found by the Labor Board and, so far as they are essential to the determination of this controversy, they are not in dispute. The Labor Board has found: The corporation is organized under the laws of Pennsylvania and has its principal office at Pittsburgh. It is engaged in the business of manufacturing iron and steel in plants situated in Pittsburgh and nearby Aliquippa, Pennsylvania. It manufactures and distributes a widely diversified line of steel and pig iron, being the fourth largest producer of steel in the United States. With its subsidiaries — nineteen in number — it is a completely integrated enterprise, owning and operating ore, coal and limestone properties, lake and river transportation facilities and terminal railroads located at its manufacturing plants. It owns or controls mines in Michigan and Minnesota. It operates four ore steamships on the Great Lakes, used in the transportation of ore to its factories. It owns coal mines in Pennsylvania. It operates towboats and steam barges used in carrying coal to its factories. It owns limestone properties in various places in Pennsylvania and West Virginia. It owns the Monongahela connecting railroad which connects the plants of the Pittsburgh works and forms an interconnection with the Pennsylvania, New York Central and Baltimore & Ohio Railroad systems. It owns the Aliquippa & Southern Railroad Company, which connects the Aliquippa works with the Pittsburgh & Lake Erie, part of the New York Central system. Much of its product is shipped to its warehouses in Chicago, Detroit, Cincinnati and Memphis — to the last two places by means of its own barges and transportation equipment. In Long Island City, New York, and in New Orleans it operates structural steel fabricating shops in connection with the warehousing of semifinished materials sent from its works. Through one of its wholly owned subsidiaries it owns, leases, and operates stores, warehouses, and yards for the distribution of equipment and supplies for drilling and operating oil and gas wells and for pipe lines, refineries and pumping stations. It has sales offices in twenty cities in the United States and a wholly owned subsidiary which is devoted exclusively to distributing its product in Canada. Approximately 75 per cent of its product is shipped out of Pennsylvania. . . .

The Act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It is asserted that the references in the Act to interstate and foreign commerce are colorable at best; that the act is not a true regulation of such commerce or of matters which directly affect it, but on the contrary has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation. The argument seeks support in the broad words of the preamble and in the sweep of the provisions of the Act, and it is further insisted that its legislative history shows an essential universal purpose in the light of which its scope cannot be limited by either construction or by the application of the separability clause.

If this conception of terms, intent and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. The authority of the federal government may not be pushed to such

an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.

But we are not at liberty to deny effect to specific provisions, which Congress has constitutional power to enact, by superimposing upon them inferences from general legislative declarations of an ambiguous character, even if found in the same statute. The cardinal principle of statutory construction is to save and not to destroy. . . .

We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority. The jurisdiction conferred upon the Board, and invoked in this instance, is found in section 10(a), which provides:

> SEC. 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice [. . .] affecting commerce.

The critical words of this provision, prescribing the limits of the Board's authority in dealing with the labor practices, are "affecting commerce." The act specifically defines the "commerce" to which it refers:

> The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

There can be no question that the commerce thus contemplated by the act (aside from that within a Territory or the District of Columbia) is interstate and foreign commerce in the constitutional sense. The act also defines the term "affecting commerce":

> The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes. It is the effect upon commerce, not the source of the injury, which is the criterion. . . .

The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a "flow" of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement" to adopt measures "to promote its growth and insure its

A photograph secretly taken of the Supreme Court in 1937. Photographer Erich Salomon faked a broken arm, and hid a camera in his cast.

safety" "to foster, protect, control and restrain." That power is plenary, and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. Undoubtedly the scope of this power must be considered in the light of our dual system of government, and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree. . . .

Our conclusion is that the order of the Board was within its competency and that the Act is valid as here applied. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

STUDY GUIDE

1. How does *Darby* depart from the Court's interpretation of the Commerce Clause in *Jones & Laughlin*?
2. *Darby* considered the constitutionality of the Fair Labor Standards Act. The Court separately evaluates two provisions of that statute, and applies a different test to each. Did the Court rely solely on Congress's authority under the Commerce Clause? Or did the Court also rely on Congress's authority under the Necessary and Proper Clause?
3. What role does the Court see for evaluating the "motive and purpose" of Congress? Can its approach be reconciled with Chief Justice Marshall's discussion of pretextual legislation in *McCulloch* (Chapter 2) and his later defense of that opinion?
4. *Darby* describes the Tenth Amendment as a "truism." Is this characterization consistent with how Madison described the Tenth Amendment in his Bill of Rights speech? How do you think Madison would respond to *Darby*?

United States v. Darby

312 U.S. 100 (1941)


Video on CasebookConnect.com

Mr. Justice Stone delivered the opinion of the Court.

The two principal questions raised by the record in this case are, *first*, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, *second*, whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours. . . .

The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy in §2(a) of the Act, and the reports of Congressional committees proposing the legislation, is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. . . .

While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden* (1824). It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles; stolen articles; kidnapped persons, and articles such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination.

But it is said that the present prohibition falls within the scope of none of these categories; that while the prohibition is nominally a regulation of the commerce its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states and upon which Georgia and some of the states of destination have placed no restriction; that the effect of the present statute is not to exclude the prescribed articles from interstate commerce in aid of state regulation . . . , but instead, under the guise of a regulation of interstate commerce, it undertakes to regulate wages and hours within the state contrary to the policy of the state which has elected to leave them unregulated.

The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed by the Constitution." *Gibbons v. Ogden*. That power can neither be enlarged nor diminished

by the exercise or non-exercise of state power. Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.

The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. . . . Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

In the more than a century which has elapsed since the decision of *Gibbons v. Ogden*, these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer v. Dagenhart* (1918). In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

Hammer v. Dagenhart has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property — a distinction which was novel when made and unsupported by any provision of the Constitution — has long since been abandoned. The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. . . .

The conclusion is inescapable that *Hammer v. Dagenhart* was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled. . . .

There remains the question whether such restriction on the production of goods for commerce is a permissible exercise of the commerce power. The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It

extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch v. Maryland* (1819).

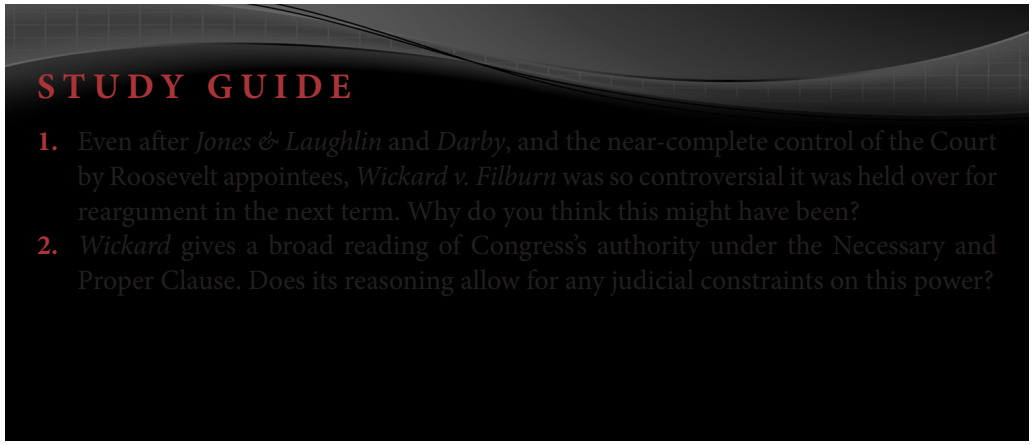
In the absence of Congressional legislation on the subject, state laws which are not regulations of the commerce itself or its instrumentalities are not forbidden even though they affect interstate commerce. But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. . . .

The means adopted by [the Act] for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power. Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. The legislation aimed at a whole embraces all its parts. . . .

Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. *Martin v. Hunter's Lessee* (1816); *McCulloch v. Maryland* (1819); . . . *Lottery Case* (1903). . . . Whatever doubts may have arisen of the soundness of that conclusion they have been put at rest by the decisions under the Sherman Act and the National Labor Relations Act which we have cited. . . .

2. The Aggregation Principle



Wickard v. Filburn

317 U.S. 111 (1942)

Video on CasebookConnect.com

Mr. Justice Jackson delivered the opinion of the Court.

The appellee . . . sought to enjoin enforcement against himself of the marketing penalty imposed by the . . . Agricultural Adjustment Act of 1938, upon that part of his 1941 wheat crop which was available for marketing in excess of the marketing quota established [pursuant to the Act] for his farm. He also sought a declaratory judgment that the wheat marketing quota provisions of the Act as amended and applicable to him were unconstitutional because not sustainable under the Commerce Clause. . . .

The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding. . . .

Ohio farmer Roscoe Filburn (above) challenged the constitutionality of the Agricultural Adjustment Act of 1938. After the Supreme Court ruled against him, he changed his name to Filbrun, which was how his father spelled the family name.

In July of 1940, pursuant to the [Act,] there were established for the appellee's 1941 crop a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He was given notice of such allotment in July of 1940 before the Fall planting of his 1941 crop of wheat, and again in July of 1941, before it was harvested. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or $117.11 in all. The appellee has not paid the penalty. . . .

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. Within prescribed limits and by prescribed standards the Secretary of Agriculture is directed to ascertain and proclaim each

year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms. . . .

The Act provides further that whenever it appears that the total supply of wheat as of the beginning of any marketing year, beginning July 1, will exceed a normal year's domestic consumption and export by more than 35 per cent, the Secretary shall so proclaim not later than May 15 prior to the beginning of such marketing year; and that during the marketing year a compulsory national marketing quota shall be in effect with respect to the marketing of wheat. Between the issuance of the proclamation and June 10, the Secretary must, however, conduct a referendum of farmers who will be subject to the quota to determine whether they favor or oppose it; and if more than one-third of the farmers voting in the referendum do oppose, the Secretary must prior to the effective date of the quota by proclamation suspend its operation.

On May 19, 1941, the Secretary of Agriculture made a radio address to the wheat farmers of the United States in which he advocated approval of the quotas. . . . Pursuant to the Act, the referendum of wheat growers was held on May 31, 1941. According to the required published statement of the Secretary of Agriculture, 81 per cent of those voting favored the marketing quota, with 19 per cent opposed. . . .

It is urged that under the Commerce Clause of the Constitution, Article I, §8, Clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in *United States v. Darby* (1941), sustaining the federal power to regulate production of goods for commerce except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm. The Act includes a definition of "market" and its derivatives so that as related to wheat in addition to its conventional meaning it also means to dispose of "by feeding (in any form) to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or to be so disposed of." Hence, marketing quotas not only embrace all that may be sold without penalty but also what may be consumed on the premises. . . .

But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."

The parties have stipulated a summary of the economics of the wheat industry. Commerce among the states in wheat is large and important. Although wheat is raised in every state but one, production in most states is not equal to consumption. Sixteen states on average have had a surplus of wheat above their own requirements for feed, seed, and food. Thirty-two states and the District of Columbia, where production has been below consumption, have looked to these surplus-producing states for their supply as well as for wheat for export and carryover.

The wheat industry has been a problem industry for some years. . . . The decline in the export trade has left a large surplus in production which in connection with an abnormally large supply of wheat and other grains in recent years caused congestion in a

number of markets; tied up railroad cars; and caused elevators in some instances to turn away grains, and railroads to institute embargoes to prevent further congestion. . . . In the absence of regulation the price of wheat in the United States would be much affected by world conditions. During 1941 producers who cooperated with the Agricultural Adjustment program received an average price on the farm of about $1.16 a bushel as compared with the world market price of 40 cents a bushel. . . .

The effect of consumption of homegrown wheat on interstate commerce is due to the fact that it constitutes the most variable factor in the disappearance of the wheat crop. Consumption on the farm where grown appears to vary in an amount greater than 20 per cent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

The maintenance by government regulation of a price for wheat undoubtedly can be accomplished as effectively by sustaining or increasing the demand as by limiting the supply. The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and practices affecting such prices. One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm where grown if wholly outside the scheme of regulation would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

It is said, however, that this Act, forcing some farmers into the market to buy what they could provide for themselves, is an unfair promotion of the markets and prices of specializing wheat growers. It is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do. . . .

Reversed.

BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998)*

STUDY GUIDE

1. Professor Barry Cushman authored the following excerpt. He describes the judicial anguish surrounding *Wickard*. Cushman concludes that "while the published opinion repudiated the first of Jackson's proposed alternative holdings, and refrained from a clear embrace of the second, it similarly avoided the frank recognition that he had called for in his memorandum." How does this observation affect our understanding of constitutional law?
2. Is *Wickard* a precedent for something more than what even the ardently pro–New Deal Justices were willing to say in print?

. . . [*Wickard v. Filburn*] was initially docketed for the 1941 term and was argued May 4, 1942. At the initial conference, every participating justice except Roberts agreed with Stone's view that "this is a regulation of commerce." Justice Roberts passed, however, saying he was "in doubt" over whether the commerce clause authorized such a far-reaching regulation. Yet eventually a majority of the court came to share Roberts's reservations with respect to the commerce power issues the case presented. The growth of wheat for home consumption was not itself interstate commerce, nor was it intended for interstate commerce. Only if the activity produced a substantial effect on interstate commerce, therefore, was it properly subject to federal regulation. In spring of 1942, the Court was not prepared to find such an effect. Justice Jackson produced two drafts of an opinion, in each of which the Court refused to reach the commerce clause issue. In each he remanded the case to the district court for additional factual findings that might better enable the Court to determine whether such an effect on commerce existed. . . .

The legislative history and the facts on the record did not demonstrate to Jackson's satisfaction that the growth of wheat for home consumption exerted a substantial effect on interstate commerce, and he and his colleagues were unprepared to assume without proof that it did. The legislative findings had merely declared the necessity of the Act's provisions for effective regulation of interstate commerce in wheat. This, Jackson wrote, was clearly an inadequate constitutional foundation. "A mere finding of convenience will not sustain federal invasion of the intrastate field. Undivided power is usually exercised more conveniently than divided power, but our federal system is not to be disposed of for the convenience of federal administrators."

The absence of factual findings bearing on the effect of Filburn's activity on interstate commerce, Jackson concluded, "have left us without adequate materials for confident judgment that an affirmative answer to the question of power would not 'effectively

* Reprinted with permission from Oxford University Press.

obliterate the distinction between what is national [and what is local] and create a completely centralized government.' " The source of this quotation was, of course, Hughes's opinion in *Jones & Laughlin*.

Justices Roberts, Frankfurter, Murphy, and Byrnes each agreed to this draft. This opinion, however, never saw the light of day. At a subsequent conference the justices reached a tentative agreement that the case be set for reargument rather than remanded. . . . The order directed counsel "to discuss the question whether the Act in question in so far as it deals with wheat consumed on the farm of the producer is within the power of Congress to regulate interstate commerce."

The shift from a decision to remand to a decision to order reargument was substantial. . . . The decision to remand in Jackson's draft opinion had been based on the proposition that a factually detailed analysis of the effects on interstate commerce of production of wheat for home consumption was required in order to decide the case. Now no such analysis was requested or even mentioned. By the end of the term it was apparent that what the justices wanted was more time to think, not more facts to think about. The earlier decision to remand may have been in reality a device to buy the time the justices thought they needed. In any event, the decision to order reargument testifies to the uncertainty that a majority of the justices felt in the spring of 1942 concerning the scope of the commerce power. . . .

During the summer of '42 Jackson wrote two memoranda to his law clerk in which he attempted to think his way through the commerce clause issue. Jackson confessed at the outset that the question in *Filburn* "presents a good deal of a problem to me. It seems idle to disguise it, for it appears to be a regulation of production and of production not for commerce either actually or in contemplation." Such a regulation penetrated "the domain ordinarily reserved to the states to an extent not sustained by any prior precedent of this Court." Under these circumstances, wrote Jackson, there were three possible holdings. First, the Court might hold that "production and consumption not for commerce is exclusively within the control of the state." Such a holding would be consistent with the line of cases descending from [*E.C.*] *Knight*, which held that local activities of production were presumptively subject solely to state control. Second, the Court might hold that such production "is normally within the control of the state but is transferred to federal control upon judicial findings that it is necessary to protect exercises of the commerce power." This holding would have been consistent with the line of cases descending from *Swift* and *Shreveport*, which stood for the proposition that particular facts could transform what was otherwise a local activity into a national one subject to federal control. But Jackson's third alternative was without precedent: "That it is normally within the control of the state but that it is transferred to federal control upon a mere Congressional assumption of control." . . .

Jackson recognized that it was this case that had brought the Court to a jurisprudential Rubicon. [To cross a "Rubicon" is to pass a point of no return. — Eds.] "If we sustain the present Act, I don't see how we can ever sustain states' rights again as against a Congressional exercise of the commerce power." "If we sustain the present case, the judicial shibboleths as to limitation of the commerce power are without practical meaning, and that is within the commerce power which Congress desires to regulate."

That summer, Jackson was ready to cross that Rubicon at high noon. "It is perhaps time that we recognize that the introduction of economic determinism into constitutional law of interstate commerce marked the end of judicial control of the scope of federal activity," he wrote.

> A frank holding that the interstate commerce power has no limits except those which Congress sees fit to observe might serve a wholesome purpose. In order to be unconstitutional by the judicial process if this Act is sustained, the relation between interstate commerce and the regulated activity would have to be so absurd that it would be laughed out of Congress.
>
> . . .
>
> Adopting the third alternative made the case simple rather than troubling. No additional factual information was necessary.
>
> Congress has seen fit to regulate small and casual wheat growers in the interest of large and specialized ones. It has seen fit to extend its regulation to the grower of wheat for home consumption. Whether this is necessary, whether it is just, whether it is wise, is not for us to say. We cannot say that there is no economic relationship between the growth of wheat for home consumption and interstate commerce in wheat. As to the weight to be given the effects, we have no legal standards by which to set our own judgment against the policy judgment of Congress.

Paraphrasing Hughes's oft-quoted remark about the judges and the Constitution, Jackson concluded that the growth of wheat for home consumption "is within the federal power to regulate interstate commerce, if for no better reason than the commerce clause is what the Congress says it is."

In Jackson's view, "[a] candid recognition that the extent of the commerce power depends upon the facts of each case and that Congress is the primary and final judge of the meaning of those facts can be objectionable only because of its candor, and not because of its result." Jackson's colleagues were apparently prepared for the result, but not for the candor. For while the published opinion repudiated the first of Jackson's proposed alternative holdings and refrained from a clear embrace of the second, it similarly avoided the frank recognition he had called for in his memoranda. Nevertheless, it appears that the justices in fact selected the third alternative. . . .

STUDY GUIDE

1. *Jones & Laughlin*, *Darby*, and *Wickard* did not expand the meaning of the word "commerce" in the Commerce Clause. Instead, the New Deal Court found that the Necessary and Proper Clause gave Congress the power to regulate intrastate activity, whether it be commerce or not, so long as that activity in the aggregate has a substantial effect on interstate commerce. Does *South-Eastern Underwriters* expand the original meaning of the word "commerce"? Does it adopt an updated meaning to accommodate changing times?
2. *United States v. South-Eastern Underwriters* provides important background information to assess the constitutionality of the Patient Protection and Affordable Care Act of 2010.

3. Does the Court's analysis of the meaning of "commerce" comport with the evidence considered in Chapter 2? How did the Court's previous decisions from the Progressive and New Deal eras comport with that evidence?
4. How did *Paul v. Virginia* interpret the word "commerce"? How does the *South-Eastern Underwriters* distinguish *Paul*, and similar cases?
5. Does the Court consider itself bound by *stare decisis* or "precedent"? How does the Court treat the previous line of cases?
6. The case references Congress's power "to govern intercourse among the states." Does this statement have exactly the same meaning as the power "to regulate commerce among the several states"? Why substitute one set of words for the other?

United States v. South-Eastern Underwriters

322 U.S. 533 (1944)

Mr. Justice Black delivered the opinion of the Court.

For seventy-five years, this Court has held, whenever the question has been presented, that the Commerce Clause of the Constitution does not deprive the individual states of power to regulate and tax specific activities of foreign insurance companies which sell policies within their territories. Each state has been held to have this power, even though negotiation and execution of the companies' policy contracts involved communications of information and movements of persons, moneys, and papers across state lines. Not one of all these cases, however, has involved an Act of Congress which required the Court to decide the issue of whether the Commerce Clause grants to Congress the power to regulate insurance transactions stretching across state lines. Today, for the first time in the history of the Court, that issue is squarely presented, and must be decided.

Appellees — the South-Eastern Underwriters Association (SEUA), and its membership of nearly 200 private stock fire insurance companies, and 27 individuals — were indicted in the District Court for alleged violations of the Sherman Anti-Trust Act. . . . [D]o fire insurance transactions which stretch across state lines constitute "Commerce among the several States" so as to make them subject to regulation by Congress under the Commerce Clause? . . .

Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written. To hold that the word "commerce," as used in the Commerce Clause, does not include a business such as insurance would do just that. Whatever other meanings "commerce" may have included in 1787, the dictionaries, encyclopedias, and other books of the period show that it included trade: business in which persons bought and sold, bargained and contracted.[8] And this meaning has persisted to modern times. Surely, therefore, a heavy burden is on him who asserts that the plenary power which the Commerce Clause grants to Congress to regulate "Commerce among the several States" does not include the power to regulate trading in insurance to

[8] See *Gibbons v. Ogden*, 9 Wheat. 1; also, Hamilton and Adair, The Power to Govern (1937), pp. 53-63.

the same extent that it includes power to regulate other trades or businesses conducted across state lines.[9]

The modern insurance business holds a commanding position in the trade and commerce of our Nation. Built upon the sale of contracts of indemnity, it has become one of the largest and most important branches of commerce. . . . Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States.

This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. A large share of the insurance business is concentrated in a comparatively few companies located, for the most part, in the financial centers of the East. Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office — the risks it insures, the premiums it charges, the investments it makes, the losses it pays — concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state. . . .

Despite all of this, despite the fact that most persons, speaking from common knowledge, would instantly say that, of course, such a business is engaged in trade and commerce, the District Court felt compelled by decisions of this Court to conclude that the insurance business can never be trade or commerce within the meaning of the Commerce Clause. We must therefore consider these decisions.

In 1869, this Court held, in sustaining a statute of Virginia which regulated foreign insurance companies, that the statute did not offend the Commerce Clause because "issuing a policy of insurance is not a transaction of commerce." [*Paul v. Virginia* (1868).][17]

---

[9] Alexander Hamilton, in 1791, stating his opinion on the constitutionality of the Bank of the United States, declared that it would "admit of little if any question" that the federal power to regulate foreign commerce included "the regulation of policies of insurance." Speaking of the need of a federal power to regulate "commerce," Hamilton had earlier said,

> It is, indeed, evident on the most superficial view that there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence.

Federalist No. XXII.

[17] "The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between

Since then, in similar cases, this statement has been repeated, and has been broadened. In *Hooper v. California*, decided in 1895, the *Paul* statement was reaffirmed, and the Court added that, "The business of insurance is not commerce." In 1913, the New York Life Insurance Company, protesting against a Montana tax, challenged these broad statements, strongly urging that its business, at least, was so conducted as to be engaged in interstate commerce. But the Court again approved the *Paul* statement and held against the company, saying that "contracts of insurance are not commerce at all, neither state nor interstate." *New York Life Ins. Co. v. Deer Lodge County* (1913).

In all cases in which the Court has relied upon the proposition that "the business of insurance is not commerce," its attention was focused on the validity of state statutes the extent to which the Commerce Clause automatically deprived states of the power to regulate the insurance business. Since Congress had at no time attempted to control the insurance business, invalidation of the state statutes would practically have been equivalent to granting insurance companies engaged in interstate activities a blanket license to operate without legal restraint. As early as 1866, the insurance trade, though still in its infancy, was subject to widespread abuses. To meet the imperative need for correction of these abuses, the various state legislatures, including that of Virginia, passed regulatory legislation. *Paul v. Virginia* upheld one of Virginia's statutes. To uphold insurance laws of other states, including tax laws, *Paul v. Virginia*'s generalization and reasoning have been consistently adhered to.

Today, however, we are asked to apply this reasoning not to uphold another state law, but to strike down an Act of Congress which was intended to regulate certain aspects of the methods by which interstate insurance companies do business, and, in so doing, to narrow the scope of the federal power to regulate the activities of a great business carried on back and forth across state lines. But past decisions of this Court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause.[22] Furthermore, the reasons given in support of the generalization that "the business of insurance is not commerce" and can never be conducted so as to constitute "Commerce among the States" are inconsistent with many decisions of this Court which have upheld federal statutes regulating interstate commerce under the Commerce Clause.

One reason advanced for the rule in the *Paul* case has been that insurance policies "are not commodities to be shipped or forwarded from one State to another." But both before and since *Paul v. Virginia*, this Court has held that Congress can regulate traffic though it consist of intangibles.[25] Another reason much stressed has been that insurance policies are mere personal contracts subject to the laws of the state where executed. But this reason rests upon a distinction between what has been called "local" and what "interstate," a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power. Cf. *Wickard v. Filburn* (1942). . . .

We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce. But it does not follow

---

parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect — are not executed contracts — until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law." [*Paul v. Virginia.*]

[22] See, e.g., *Wickard v. Filburn*. . . .

[25] See, for illustration, *Gibbons v. Ogden*, *Lottery Case* (*Champion v. Ames*).

from this that the Court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce. Only by treating the Congressional power over commerce among the states as a "technical legal conception," rather than as a "practical one, drawn from the course of business" could such a conclusion be reached. *Swift & Co. v. United States* (1905). In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce. . . .

The real answer to the question before us is to be found in the Commerce Clause itself, and in some of the great cases which interpret it. Many decisions make vivid the broad and true meaning of that clause. It is interstate commerce subject to regulation by Congress to carry lottery tickets from state to state. So also is it interstate commerce to transport a woman from Louisiana to Texas in a common carrier; to carry across a state line in a private automobile five quarts of whiskey intended for personal consumption; to drive a stolen automobile from Iowa to South Dakota. Diseased cattle ranging between Georgia and Florida are in commerce, and the transmission of an electrical impulse over a telegraph line between Alabama and Florida is intercourse, and subject to paramount federal regulation. Not only, then, may transactions be commerce though noncommercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information. These activities having already been held to constitute interstate commerce, and persons engaged in them therefore having been held subject to federal regulation, it would indeed be difficult now to hold that no activities of any insurance company can ever constitute interstate commerce so as to make it subject to such regulation; — activities which, as part of the conduct of a legitimate and useful commercial enterprise, may embrace integrated operations in many states and involve the transmission of great quantities of money, documents, and communications across dozens of state lines.

The precise boundary between national and state power over commerce has never yet been, and doubtless never can be, delineated by a single abstract definition. The most widely accepted general description of that part of commerce which is subject to the federal power is that given in 1824 by Chief Justice Marshall: "Commerce, 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. . . ." *Gibbons v. Ogden* (1824). Commerce is interstate, he said, when it "concerns more States than one." No decision of this Court has ever questioned this as too comprehensive a description of the subject matter of the Commerce Clause. To accept a description less comprehensive, the Court has recognized, would deprive the Congress of that full power necessary to enable it to discharge its Constitutional duty to govern commerce among the states.[35]

The power confined to Congress by the Commerce Clause is declared in *The Federalist* to be for the purpose of securing the "maintenance of harmony and proper intercourse among the States." But its purpose is not confined to empowering Congress with the

[35] ". . . A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people." *Federalist No. 30.* [The opinion incorrectly cited *Federalist No. 30*. It should have cited *No. 31*. — Eds.]

negative authority to legislate against state regulations of commerce deemed inimical to the national interest. The power granted Congress is a positive power. It is the power to legislate concerning transactions which, reaching across State boundaries, affect the people of more states than one; — to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing. This federal power to determine the rules of intercourse across state lines was essential to weld a loose confederacy into a single, indivisible Nation; its continued existence is equally essential to the welfare of that Nation.

Our basic responsibility in interpreting the Commerce Clause is to make certain that the power to govern intercourse among the states remains where the Constitution placed it. That power, as held by this Court from the beginning, is vested in the Congress, available to be exercised for the national welfare as Congress shall deem necessary. No commercial enterprise of any kind which conducts its activities across state lines has been held to be wholly beyond the regulatory power of Congress under the Commerce Clause. We cannot make an exception of the business of insurance. . . . Having power to enact the Sherman Act, Congress did so; if exceptions are to be written into the Act, they must come from the Congress, not this Court. . . .

Reversed.

Mr. Justice Roberts and Mr. Justice Reed took no part in the consideration or decision of this case.

Mr. Chief Justice Stone, dissenting. . . .

If an insurance company in New York executes and delivers, either in that state or another, a policy insuring the owner of a building in New Jersey against loss by fire, no act of interstate commerce has occurred. True, if the owner comes to New York to procure the insurance or, after delivery in New York, carries the policy to New Jersey, or the company sends it there by mail or messenger, such would be acts of interstate commerce. Similarly, if the owner pays the premiums by mail to the company in New York, or the company's New Jersey agent sends the premiums to New York, or the company in New York sends money to New Jersey on the occurrence of the loss insured against, acts of interstate commerce would occur. But the power of the Congress to regulate them is derived not from its authority to regulate the business of insurance, but from its power to regulate interstate communication and transportation. And such incidental use of the facilities of interstate commerce does not render the insurance business itself interstate commerce. Nor is the nature of a single insurance transaction or a few such transactions not involving interstate commerce altered in that regard merely because their number is multiplied. The power of Congress to regulate interstate communication and transportation incidental to the insurance business is not any more or any less because the number of insurance transactions is great or small. . . . The contract of insurance makes no stipulation for the sale or delivery of commodities in interstate commerce or for any other interstate transaction. It provides only for the payment of a sum of money in the event of the loss insured against. . . .

The conclusion seems inescapable that the formation of insurance contracts, like many others, and the business of so doing, is not, without more, commerce within the protection of the commerce clause of the Constitution and thereby, in large measure, excluded from state control and regulation. This conclusion seems, upon analysis, not only correct on principle and in complete harmony with the uniform rulings by which this Court has held that

the formation of all types of contract which do not stipulate for the performance of acts of interstate commerce, are likewise not interstate commerce, but it has the support of an unbroken line of decisions of this Court beginning with *Paul v. Virginia*, seventy-five years ago, and extending down to the present time. . . . [T]he immediate and only practical effect of the decision now rendered is to withdraw from the states, in large measure, the regulation of insurance, and to confer it on the national government, which has adopted no legislative policy and evolved no scheme of regulation with respect to the business of insurance. . . .

The judgment should be *Affirmed*.

In 1945, Congress responded to *United States v. South-Eastern Underwriters Ass'n* by enacting the McCarran-Ferguson Act. 15 U.S.C. §§1011-1015. This law exempted the business of insurance from most federal regulation, including, to a limited extent, federal antitrust laws. Under the Act, laws that did not expressly purport to regulate the "business of insurance" would not preempt state laws or regulations that regulate the "business of insurance." As a result of McCarran-Ferguson, the business of insurance was largely regulated by state insurance commissions. The Patient Protection and Affordable Care Act of 2010 would alter this balance.

D. THE WARREN COURT

ASSIGNMENT 4

The Civil Rights Movement of the 1950s and 1960s is sometimes referred to as the Second Reconstruction. This era ushered in monumental improvements for the rights and equality of African Americans in the United States. The elected branches, and not the courts, were the primary drivers in this revolution. When this story is told, however, the importance of the role played by the courts is often exaggerated.* In particular, the Civil Rights Act of 1964, and its ensuing enforcement by the executive branch, played an important role to reduce segregation. Title II of the law guaranteed "full and equal enjoyment . . . of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." Title II applied to a business "if its operations affect commerce."

In many respects, the Civil Rights Act of 1964 closely resembled the largely forgotten Civil Rights Act of 1875. However, the *Civil Rights Cases* (1883) found that Congress lacked the authority under Section 5 of the Fourteenth Amendment to prohibit racial discrimination in private business transactions. In part, based on this precedent, Congress relied on its expanded powers under the Commerce and Necessary and Proper Clauses to support the Civil Rights Act of 1964. Congress made many findings about the "burdens that discrimination by race or color places upon interstate commerce." For

* This argument was most prominently advanced in Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991). A second edition of the book was published in 2008.

example, segregationist policies impeded interstate travel. The Green Book listed hotels and restaurants African Americans could use while traveling.

Soon, opponents of the Civil Rights Act filed two test cases: *Heart of Atlanta Motel v. United States* (1964) and *Katzenbach v. McClung* (1964).

Moreton Rolleston, Jr., who owned the Heart of Atlanta Motel, argued the case on his own behalf before the Supreme Court. The United States was represented by Solicitor General Archibald Cox, who was on leave from the Harvard Law School faculty. Cox later served as the first Watergate special prosecutor. The Heart of Atlanta Motel was torn down in 1976, and was replaced by the Atlanta Hilton.

STUDY GUIDE

1. *Heart of Atlanta Motel v. United States* upheld Title II of the Civil Rights Act of 1964. Does the Court expand the meaning of the word "commerce"?
2. Assume that the *Civil Rights Cases* (1883) were wrongly decided. Would there be any advantage if the Civil Rights Act of 1964 was premised on Congress's powers under Section 5 of the Fourteenth Amendment, rather than on its powers under the Commerce and Necessary and Proper Clauses? If the *Civil Rights Cases* were correctly decided, does *Heart of Atlanta* justify an expansive nonoriginalist interpretation of the Commerce Clause to support the 1964 Act?
3. Does *Heart of Atlanta* define what "affects commerce" more broadly than the New Deal Court had? Or does the Civil Rights Act of 1964 instead regulate what the Court later comes to call the "channels" and "instrumentalities" of commerce?

Heart of Atlanta Motel v. United States

379 U.S. 241 (1964)


Video on CasebookConnect.com

Mr. Justice Clark delivered the opinion of the Court.

This is a declaratory judgment action, attacking the constitutionality of Title II of the Civil Rights Act of 1964. . . .

1. The Factual Background and Contentions of the Parties

The case comes here on admissions and stipulated facts. Appellant owns and operates the Heart of Atlanta Motel which has 216 rooms available to transient guests. The motel is located on Courtland Street, two blocks from downtown Peachtree Street. It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State. Prior to passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.

The appellant contends that Congress in passing this Act exceeded its power to regulate commerce under Art. I, §8, cl. 3, of the Constitution of the United States; [and] that the Act violates the Fifth Amendment because appellant is deprived of the right to choose its customers and operate its business as it wishes, resulting in a taking of its liberty and property without due process of law. . . .

The appellees counter that the unavailability to Negroes of adequate accommodations interferes significantly with interstate travel, and that Congress, under the Commerce Clause, has power to remove such obstructions and restraints; [and] that the Fifth Amendment does not forbid reasonable regulation. . . . At the trial the appellant offered no evidence, submitting the case on the pleadings, admissions and stipulation of facts; however, appellees proved the refusal of the motel to accept Negro transients after the passage of the Act. . . .

2. The History of the Act

Congress first evidenced its interest in civil rights legislation in the Civil Rights or Enforcement Act of April 9, 1866. There followed four Acts, with a fifth, the Civil Rights Act of March 1, 1875, culminating the series. In 1883 this Court struck down the public accommodations sections of the 1875 Act in the Civil Rights Cases. No major legislation in this field had been enacted by Congress for 82 years when the Civil Rights Act of 1957 became law. It was followed by the Civil Rights Act of 1960. Three years later, on June 19, 1963, the late President Kennedy called for civil rights legislation in a message to Congress to which he attached a proposed bill. Its stated purpose was

> to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in . . . public accommodations through the exercise by Congress of the powers conferred upon it . . . to enforce the provisions of the fourteenth and fifteenth

amendments, to regulate commerce among the several States, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution.

. . .

Bills were introduced in each House of the Congress, embodying the President's suggestion. . . . However, it was not until July 2, 1964, upon the recommendation of President Johnson, that the Civil Rights Act of 1964, here under attack, was finally passed. . . .

3. Title II of the Act

This Title is divided into seven sections beginning with §201(a) which provides that:

> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

There are listed in §201(b) four classes of business establishments, each of which "serves the public" and "is a place of public accommodation" within the meaning of §201(a) "if its operations affect commerce, or if discrimination or segregation by it is supported by State action." The covered establishments are:

> (1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
>
> (2) any restaurant, cafeteria . . . [not here involved];
>
> (3) any motion picture house . . . [not here involved];
>
> (4) any establishment . . . which is physically located within the premises of any establishment otherwise covered by this subsection, or . . . within the premises of which is physically located any such covered establishment . . . [not here involved].

Section 201(c) defines the phrase "affect commerce" as applied to the above establishments. It first declares that "any inn, hotel, motel, or other establishment which provides lodging to transient guests" affects commerce *per se*. Restaurants, cafeterias, etc., in class two affect commerce only if they serve or offer to serve interstate travelers or if a substantial portion of the food which they serve or products which they sell have "moved in commerce." Motion picture houses and other places listed in class three affect commerce if they customarily present films, performances, etc., "which move in commerce." And the establishments listed in class four affect commerce if they are within, or include within their own premises, an establishment "the operations of which affect commerce." Private clubs are excepted under certain conditions. See §201(e).

Section §201(d) declares that "discrimination or segregation" is supported by state action when carried on under color of any law, statute, ordinance, regulation or any custom or usage required or enforced by officials of the State or any of its subdivisions.

In addition, §202 affirmatively declares that all persons "shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof."

Finally, §203 prohibits the withholding or denial, etc., of any right or privilege secured by §201 and §202 or the intimidation, threatening or coercion of any person with the purpose of interfering with any such right or the punishing, etc., of any person for exercising or attempting to exercise any such right. . . .

4. Application of Title II to Heart of Atlanta Motel

It is admitted that the operation of the motel brings it within the provisions of §201(a) of the Act and that appellant refused to provide lodging for transient Negroes because of their race or color and that it intends to continue that policy unless restrained.

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the Act indicates that Congress based the Act on §5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, §8, cl. 3, of the Constitution.

The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." At the same time, however, it noted that such an objective has been and could be readily achieved "by congressional action based on the commerce power of the Constitution." Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone. . . .

5. The *Civil Rights Cases* (1883), and Their Application

In light of our ground for decision, it might be well at the outset to discuss the *Civil Rights Cases*, which declared provisions of the Civil Rights Act of 1875 unconstitutional. We think that decision inapposite, and without precedential value in determining the constitutionality of the present Act. Unlike Title II of the present legislation, the 1875 Act broadly proscribed discrimination in "inns, public conveyances on land or water, theaters, and other places of public amusement," without limiting the categories of affected businesses to those impinging upon interstate commerce. In contrast, the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people, except where state action is involved. Further, the fact that certain kinds of businesses may not in 1875 have been sufficiently involved in interstate commerce to warrant bringing them within the ambit of the commerce power is not necessarily dispositive of the same question today. Our populace had not reached its present mobility, nor were facilities, goods and services circulating as readily in interstate commerce as they are today. Although the principles which we apply today are those first formulated by Chief Justice Marshall in *Gibbons v. Ogden* (1824), the conditions of transportation and commerce have changed dramatically, and we must apply those principles to the present state of commerce. The sheer increase in volume of interstate traffic alone would give discriminatory practices which inhibit travel a far larger impact upon the Nation's commerce than such practices had on the economy of another day. Finally,

there is language in the *Civil Rights Cases* which indicates that the Court did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power. Though the Court observed that "no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments [Thirteenth, Fourteenth, and Fifteenth]," the Court went on specifically to note that the Act was not "conceived" in terms of the commerce power and expressly pointed out:

> Of course, these remarks [as to lack of congressional power] do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, among the several States, and with the Indian tribes. . . . In these cases Congress has power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof.

. . . [S]uch a limitation renders the opinion devoid of authority for the proposition that the Commerce Clause gives no power to Congress to regulate discriminatory practices now found substantially to affect interstate commerce. We, therefore, conclude that the *Civil Rights Cases* have no relevance to the basis of decision here where the Act explicitly relies upon the commerce power, and where the record is filled with testimony of obstructions and restraints resulting from the discriminations found to be existing. We now pass to that phase of the case.

6. The Basis of Congressional Action

While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. This testimony included the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight; and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself "dramatic testimony to the difficulties" Negroes encounter in travel. These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is "no question that this discrimination in the North still exists to a large degree" and in the West and Midwest as well. This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. This was the conclusion not only of the Under Secretary of Commerce but also of the Administrator of the Federal Aviation Agency who wrote the Chairman of the Senate

Commerce Committee that it was his "belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations." We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

7. The Power of Congress over Interstate Travel

The power of Congress to deal with these obstructions depends on the meaning of the Commerce Clause. Its meaning was first enunciated 140 years ago by the great Chief Justice John Marshall in *Gibbons v. Ogden* (1824). . . . In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is "commerce which concerns more States than one" and has a real and substantial relation to the national interest. Let us now turn to this facet of the problem.

That the "intercourse" of which the Chief Justice spoke included the movement of persons through more States than one was settled as early as 1849, in the *Passenger Cases*, where Mr. Justice McLean stated: "That the transportation of passengers is a part of commerce is not now an open question." Again in 1913 Mr. Justice McKenna, speaking for the Court, said: "Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property." *Hoke v. United States* (1913). And only four years later in 1917 in *Caminetti v. United States*, Mr. Justice Day held for the Court:

> The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.

Nor does it make any difference whether the transportation is commercial in character. . . .

The same interest in protecting interstate commerce which led Congress to deal with segregation in interstate carriers and the white-slave traffic has prompted it to extend the exercise of its power to gambling, *Lottery Case* (1903); to criminal enterprises; to deceptive practices in the sale of products; to fraudulent security transactions; to misbranding of drugs; to wages and hours, *United States v. Darby* (1941); to members of labor unions, *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937); to crop control, *Wickard v. Filburn* (1942); to discrimination against shippers; to the protection of small business from injurious price cutting; to resale price maintenance; to professional football; and to racial discrimination by owners and managers of terminal restaurants.

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation,

and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Mfrs. Assn.* (1949). See *NLRB v. Jones & Laughlin Steel Corp.*, *supra*. As Chief Justice Stone put it in *United States v. Darby* (1941), *supra*:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See McCulloch v. Maryland, 4 Wheat. 316, 421.

Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may — as it has — prohibit racial discrimination by motels serving travelers, however "local" their operations may appear.

Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. If they are, appellant has no "right" to select its guests as it sees fit, free from governmental regulation. . . .

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce may be removed — what means are to be employed — is within the sound and exclusive discretion of the Congress. It is subject only to one caveat — that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

Affirmed.

Mr. Justice Douglas, concurring.*

Though I join the Court's opinions, I am somewhat reluctant here . . . to rest solely on the Commerce Clause. My reluctance is not due to any conviction that Congress lacks

* This opinion applies also to *Katzenbach v. McClung*.

power to regulate commerce in the interests of human rights. It is rather my belief that the right of people to be free of state action that discriminates against them because of race, like the "right of persons to move freely from State to State," *Edwards v. California* (1941), "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines." Moreover, . . . the result reached by the Court is for me much more obvious as a protective measure under the Fourteenth Amendment than under the Commerce Clause. For the former deals with the constitutional status of the individual not with the impact on commerce of local activities or vice versa.

Hence I would prefer to rest on the assertion of legislative power contained in §5 of the Fourteenth Amendment which states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article" — a power which the Court concedes was exercised at least in part in this Act.

A decision based on the Fourteenth Amendment would have a more settling effect, making unnecessary litigation over whether a particular restaurant or inn is within the commerce definitions of the Act or whether a particular customer is an interstate traveler. Under my construction, the Act would apply to all customers in all the enumerated places of public accommodation. And that construction would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American history. . . .

I think the Court is correct in concluding that the Act is not founded on the Commerce Clause to the exclusion of the Enforcement Clause of the Fourteenth Amendment.

In determining the reach of an exertion of legislative power, it is customary to read various granted powers together. As stated in *McCulloch v. Maryland* (1819):

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

The "means" used in the present Act are in my view "appropriate" and "plainly adapted" to the end of enforcing Fourteenth Amendment rights as well as protecting interstate commerce. . . .

Thus while I agree with the Court that Congress in fashioning the present Act used the Commerce Clause to regulate racial segregation, it also used (and properly so) some of its power under §5 of the Fourteenth Amendment.

I repeat what I said earlier, that our decision should be based on the Fourteenth Amendment, thereby putting an end to all obstructionist strategies and allowing every person — whatever his race, creed, or color — to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate.

Ollie's Barbecue closed in 2001.

Professor Blackman purchased a matchbook from Ollie's Barbecue that was manufactured in Atlanta. Is this out-of-state matchbook proof that the restaurant engaged in interstate commerce?

MR. JUSTICE GOLDBERG, concurring.*

I join in the opinions and judgments of the Court, since I agree "that the action of the Congress in the adoption of the Act as applied here . . . is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years." . . .

In my concurring opinion in *Bell v. Maryland* (1964), however, I expressed my conviction that §1 of the Fourteenth Amendment guarantees to all Americans the constitutional right "to be treated as equal members of the community with respect to public accommodations," and that "Congress [has] authority under §5 of the Fourteenth Amendment, or under the Commerce Clause, Art. I, §8, to implement the rights protected by §1 of the Fourteenth Amendment. In the give-and-take of the legislative process, Congress can fashion a law drawing the guidelines necessary and appropriate to facilitate practical administration and to distinguish between genuinely public and private accommodations." The challenged Act is just such a law and, in my view, Congress clearly had authority under both §5 of the Fourteenth Amendment and the Commerce Clause to enact the Civil Rights Act of 1964.

STUDY GUIDE

1. *Katzenbach v. McClung* was a "companion case" decided on the same day as *Heart of Atlanta*. Should these cases be understood as simple discussions about Congress's powers to regulate interstate commerce? Or do these cases implicate fundamental rights of citizenship?
2. Did the Civil Rights Act of 1964 truly address "a national commercial problem of the first magnitude"? Is there a price to be paid for using this type of rationale? What if there is simply no other viable option?

* This opinion applies also to *Katzenbach v. McClung*.

Katzenbach v. McClung

379 U.S. 294 (1964)


Video on CasebookConnect.com

Mr. Justice Clark delivered the opinion of the Court.

This case was argued with *Heart of Atlanta Motel v. United States*, decided this date, in which we upheld the constitutional validity of Title II of the Civil Rights Act of 1964 against an attack by hotels, motels, and like establishments. This complaint for injunctive relief against appellants attacks the constitutionality of the Act as applied to a restaurant. . . .

Ollie's Barbecue is a family-owned restaurant in Birmingham, Alabama, specializing in barbecued meats and homemade pies, with a seating capacity of 220 customers. It is located on a state highway 11 blocks from an interstate one and a somewhat greater distance from railroad and bus stations. The restaurant caters to a family and white-collar trade with a take-out service for Negroes. It employs 36 persons, two-thirds of whom are Negroes.

In the 12 months preceding the passage of the Act, the restaurant purchased locally approximately $150,000 worth of food, $69,683 or 46% of which was meat that it bought from a local supplier who had procured it from outside the State. The District Court expressly found that a substantial portion of the food served in the restaurant had moved in interstate commerce. The restaurant has refused to serve Negroes in its dining accommodations since its original opening in 1927, and since July 2, 1964, it has been operating in violation of the Act. The court below concluded that if it were required to serve Negroes it would lose a substantial amount of business.

On the merits, the District Court held that the Act could not be applied under the Fourteenth Amendment because it was conceded that the State of Alabama was not involved in the refusal of the restaurant to serve Negroes. It was also admitted that the Thirteenth Amendment was authority neither for validating nor for invalidating the Act. As to the Commerce Clause, the court found that it was "an express grant of power to Congress to regulate interstate commerce, which consists of the movement of persons, goods or information from one state to another"; and it found that the clause was also a grant of power "to regulate intrastate activities, but only to the extent that action on its part is necessary or appropriate to the effective execution of its expressly granted power to regulate interstate commerce." There must be, it said, a close and substantial relation between local activities and interstate commerce which requires control of the former in the protection of the latter. The court concluded, however, that the Congress, rather than finding facts sufficient to meet this rule, had legislated a conclusive presumption that a restaurant affects interstate commerce if it serves or offers to serve interstate travelers or if a substantial portion of the food which it serves has moved in commerce. This, the court held, it could not do because there was no demonstrable connection between food purchased in interstate commerce and sold in a restaurant and the conclusion of Congress that discrimination in the restaurant would affect that commerce.

The basic holding in *Heart of Atlanta Motel*, answers many of the contentions made by the appellees. There we outlined the overall purpose and operational plan of Title II and found it a valid exercise of the power to regulate interstate commerce insofar as it requires hotels and motels to serve transients without regard to their race or color. In this

case we consider its application to restaurants which serve food a substantial portion of which has moved in commerce. . . .

As we noted in *Heart of Atlanta Motel* both Houses of Congress conducted prolonged hearings on the Act. And, as we said there, while no formal findings were made, which of course are not necessary, it is well that we make mention of the testimony at these hearings the better to understand the problem before Congress and determine whether the Act is a reasonable and appropriate means toward its solution. The record is replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants. A comparison of per capita spending by Negroes in restaurants, theaters, and like establishments indicated less spending, after discounting income differences, in areas where discrimination is widely practiced. This condition, which was especially aggravated in the South, was attributed in the testimony of the Under Secretary of Commerce to racial segregation. This diminutive spending springing from a refusal to serve Negroes and their total loss as customers has, regardless of the absence of direct evidence, a close connection to interstate commerce. The fewer customers a restaurant enjoys the less food it sells and consequently the less it buys. In addition, the Attorney General testified that this type of discrimination imposed "an artificial restriction on the market" and interfered with the flow of merchandise. In addition, there were many references to discriminatory situations causing wide unrest and having a depressant effect on general business conditions in the respective communities.

Moreover there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. This resulted, it was said, because discriminatory practices prevent Negroes from buying prepared food served on the premises while on a trip, except in isolated and unkempt restaurants and under most unsatisfactory and often unpleasant conditions. This obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating. Likewise, it was said, that discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there.

We believe that this testimony afforded ample basis for the conclusion that established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it. Hence the District Court was in error in concluding that there was no connection between discrimination and the movement of interstate commerce. The court's conclusion that such a connection is outside "common experience" flies in the face of stubborn fact.

It goes without saying that, viewed in isolation, the volume of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in *Wickard v. Filburn* (1942):

> That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

. . . Article I, §8, cl. 3, confers upon Congress the power "[t]o regulate Commerce . . . among the several States" and Clause 18 of the same Article grants it the power "[t]o

make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers. . . ." This grant, as we have pointed out in *Heart of Atlanta Motel* "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States v. Wrightwood Dairy Co.* (1942). Much is said about a restaurant business being local but "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . ." *Wickard v. Filburn*. The activities that are beyond the reach of Congress are "those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Gibbons v. Ogden* (1824). This rule is as good today as it was when Chief Justice Marshall laid it down almost a century and a half ago.

This Court has held time and again that this power extends to activities of retail establishments, including restaurants, which directly or indirectly burden or obstruct interstate commerce. We have detailed the cases in *Heart of Atlanta Motel*, and will not repeat them here. . . .

The appellees contend that Congress has arbitrarily created a conclusive presumption that all restaurants meeting the criteria set out in the Act "affect commerce." Stated another way, they object to the omission of a provision for a case-by-case determination — judicial or administrative — that racial discrimination in a particular restaurant affects commerce.

But Congress' action in framing this Act was not unprecedented. In *United States v. Darby* (1941), this Court held constitutional the Fair Labor Standards Act of 1938. There Congress determined that the payment of substandard wages to employees engaged in the production of goods for commerce, while not itself commerce, so inhibited it as to be subject to federal regulation. The appellees in that case argued, as do the appellees here, that the Act was invalid because it included no provision for an independent inquiry regarding the effect on commerce of substandard wages in a particular business. But the Court rejected the argument, observing that:

> [S]ometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.

Here, as there, Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. The only remaining question — one answered in the affirmative by the court below — is whether the particular restaurant either serves or offers to serve interstate travelers or serves food a substantial portion of which has moved in interstate commerce. . . .

Confronted as we are with the facts laid before Congress, we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. Insofar as the sections of the Act here relevant are concerned, §§201(b)(2) and (c), Congress prohibited discrimination only in those establishments having a close tie to interstate commerce, *i.e.*, those, like the McClungs', serving food that has come from out of the State. We think in so doing that Congress acted well within its power to protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce.

The absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food, a factor on which the appellees place much reliance, is not, given the evidence as to the effect of such practices on other aspects of commerce, a crucial matter.

The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere. The Civil Rights Act of 1964, as here applied, we find to be plainly appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude. We find it in no violation of any express limitations of the Constitution and we therefore declare it valid.

The judgment is therefore *Reversed*.

E. THE REHNQUIST COURT

The Rehnquist Court (1994-2005). Seated, from left to right: Antonin Scalia and John Paul Stevens, Chief Justice William H. Rehnquist, and Justices Sandra Day O'Connor and Anthony M. Kennedy. Standing, from left to right: Ruth Bader Ginsburg, David H. Souter, Clarence Thomas, and Stephen G. Breyer.

ASSIGNMENT 5

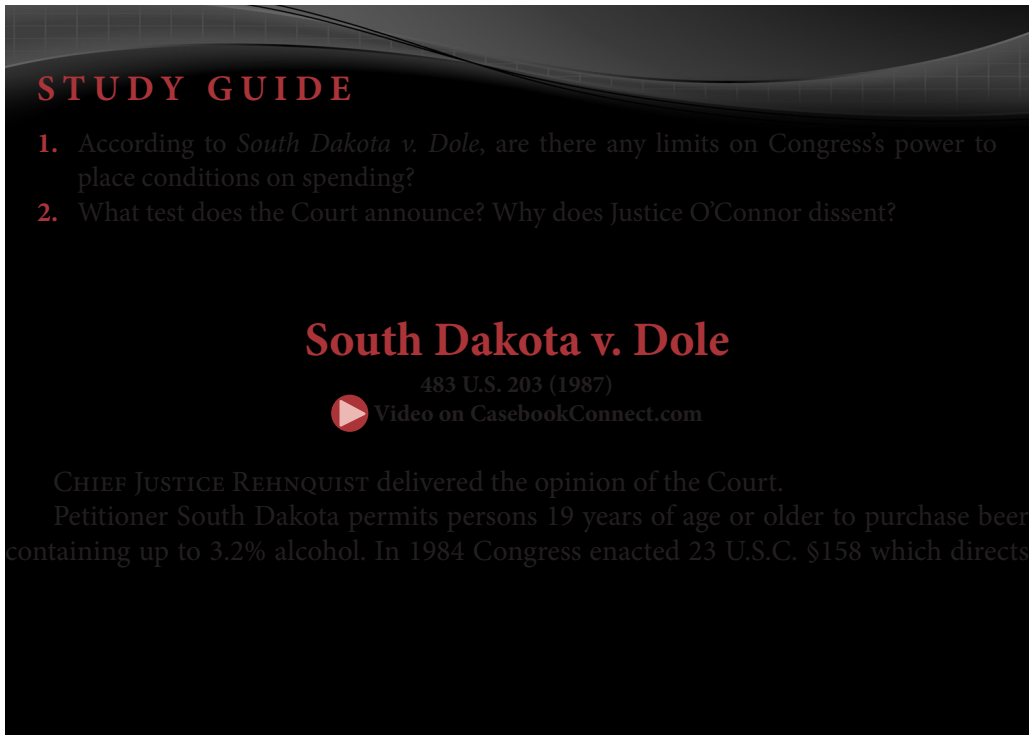
1. The Spending Power

The Constitution gives Congress the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." This authority is known as the taxing power. However, this provision is also known as the *Spending Clause*, even though the text affords Congress no explicit authority to spend money. The absence of an expressly enumerated spending power gave rise to a constitutional debate in the early days of our Republic: Are there any limits on what Congress can spend money on?

Alexander Hamilton argued that Congress could spend money in a broad fashion in order to "provide for the common defense and general welfare of the United States." In other words, this portion of the Spending Clause identified the appropriate *purpose* of federal spending.

James Madison, however, took a narrower view. He argued that the "common defense and general welfare" portion of the clause limited Congress's power. Taxes, duties, imposts, and excises could only be used to benefit the whole country, rather than to benefit a faction. Madison contended that Congress's spending power stemmed from, and was limited by, the Necessary and Proper Clause. This provision empowered Congress to spend money as a necessary and proper means to execute its *other* enumerated powers in Article I, Section 8, such as the power to establish courts or post offices. Madison thought that Hamilton's alternative reading of the Spending Clause would undermine the enumerated powers scheme on which our federalism is based.

United States v. Butler (1936) essentially adopted the Hamiltonian approach. This case upheld a very broad exercise of the spending power. The Supreme Court, however, has also acknowledged Madison's federalism concerns. The Justices have imposed certain limits on Congress's power to attach strings on money given to the states. *South Dakota v. Dole* (1987) summarized these limitations.



the Secretary of Transportation to withhold a percentage of federal highway funds otherwise allocable from States "in which the purchase or public possession . . . of any alcoholic beverage by a person who is less than twenty-one years of age is lawful." The State sued in United States District Court seeking a declaratory judgment that §158 violates the constitutional limitations on congressional exercise of the spending power. . . . The District Court rejected the State's claims, and the Court of Appeals for the Eighth Circuit affirmed. . . .

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Art. I, §8, cl. 1. Incident to this power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power "to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *Fullilove v. Klutznick* (1980) (opinion of Burger, C.J.). The breadth of this power was made clear in *United States v. Butler* (1936), where the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Thus, objectives not thought to be within Article I's "enumerated legislative fields," may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of "the general welfare." In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Pennhurst State School and Hospital v. Halderman* (1981). Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." *Massachusetts v. United States* (1978) (plurality opinion). Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

South Dakota does not seriously claim that §158 is inconsistent with any of the first three restrictions mentioned above. We can readily conclude that the provision is designed to serve the general welfare, especially in light of the fact that "the concept of welfare or the opposite is shaped by Congress. . . ." *Helvering v. Davis* (1937). Congress found that the differing drinking ages in the States created particular incentives for young persons to combine their desire to drink with their ability to drive, and that this interstate problem required a national solution. The means it chose to address this dangerous situation were reasonably calculated to advance the general welfare. The conditions upon which States receive the funds, moreover, could not be more clearly stated by Congress. And the State itself, rather than challenging the germaneness of the condition to federal purposes, admits that it "has never contended that the congressional action was . . . unrelated to a national concern in the absence of the Twenty-first Amendment." Brief for

Petitioner. Indeed, the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended — safe interstate travel.

This goal of the interstate highway system had been frustrated by varying drinking ages among the States. A Presidential commission appointed to study alcohol-related accidents and fatalities on the Nation's highways concluded that the lack of uniformity in the States' drinking ages created "an incentive to drink and drive" because "young persons commut[e] to border States where the drinking age is lower." Presidential Commission on Drunk Driving, Final Report 11 (1983). By enacting §158, Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended. . . .

Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which "pressure turns into compulsion." *Steward Machine Co. v. Davis* (1937). Here, however, Congress has directed only that a State desiring to establish a minimum drinking age lower than 21 lose a relatively small percentage of certain federal highway funds. Petitioner contends that the coercive nature of this program is evident from the degree of success it has achieved. We cannot conclude, however, that a conditional grant of federal money of this sort is unconstitutional simply by reason of its success in achieving the congressional objective.

When we consider, for a moment, that all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds otherwise obtainable under specified highway grant programs, the argument as to coercion is shown to be more rhetoric than fact. . . .

Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in §158 is a valid use of the spending power. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice O'Connor, dissenting. . . .

My disagreement with the Court is relatively narrow on the spending power issue: it is a disagreement about the application of a principle rather than a disagreement on the principle itself. I agree with the Court that Congress may attach conditions on the receipt of federal funds to further "the federal interest in particular national projects or programs." *Massachusetts v. United States* (1978). I also subscribe to the established proposition that the reach of the spending power "is not limited by the direct grants of legislative power found in the Constitution." *United States v. Butler* (1936). Finally, I agree that there are four separate types of limitations on the spending power: the expenditure must be for the general welfare, the conditions imposed must be unambiguous, they must be reasonably related to the purpose of the expenditure, and the legislation may not violate any independent constitutional prohibition. Insofar as two of those limitations are concerned, the Court is clearly correct that §158 is wholly unobjectionable. Establishment of a national minimum drinking age certainly fits within the broad concept of the general welfare and the statute is entirely unambiguous. . . .

But the Court's application of the requirement that the condition imposed be reasonably related to the purpose for which the funds are expended is cursory and unconvincing. We have repeatedly said that Congress may condition grants under the spending power only in ways reasonably related to the purpose of the federal program. In my view, establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose.

In support of its contrary conclusion . . . the Court asserts the reasonableness of the relationship between the supposed purpose of the expenditure — "safe interstate travel" — and the drinking age condition. The Court reasons that Congress wishes that the roads it builds may be used safely, that drunken drivers threaten highway safety, and that young people are more likely to drive while under the influence of alcohol under existing law than would be the case if there were a uniform national drinking age of 21. It hardly needs saying, however, that if the purpose of §158 is to deter drunken driving, it is far too over- and under-inclusive. It is over-inclusive because it stops teenagers from drinking even when they are not about to drive on interstate highways. It is under-inclusive because teenagers pose only a small part of the drunken driving problem in this Nation.

When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety. Indeed, if the rule were otherwise, the Congress could effectively regulate almost any area of a State's social, political, or economic life on the theory that use of the interstate transportation system is somehow enhanced. If, for example, the United States were to condition highway moneys upon moving the state capital, I suppose it might argue that interstate transportation is facilitated by locating local governments in places easily accessible to interstate highways — or, conversely, that highways might become overburdened if they had to carry traffic to and from the state capital. In my mind, such a relationship is hardly more attenuated than the one which the Court finds supports §158.

There is a clear place at which the Court can draw the line between permissible and impermissible conditions on federal grants. It is the line identified in the Brief for the National Conference of State Legislatures et al. as *Amici Curiae*:

> Congress has the power to *spend* for the general welfare, it has the power to *legislate* only for delegated purposes. . . .
>
> The appropriate inquiry, then, is whether the spending requirement or prohibition is a condition on a grant or whether it is regulation. The difference turns on whether the requirement specifies in some way how the money should be spent, so that Congress' intent in making the grant will be effectuated. Congress has no power under the Spending Clause to impose requirements on a grant that go beyond specifying how the money should be spent. A requirement that is not such a specification is not a condition, but a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers.

This approach harks back to *United States v. Butler* (1936), the last case in which this Court struck down an Act of Congress as beyond the authority granted by the Spending

Clause. There the Court wrote that "[t]here is an obvious difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced." The *Butler* Court saw the Agricultural Adjustment Act for what it was — an exercise of regulatory, not spending, power. The error in *Butler* was not the Court's conclusion that the Act was essentially regulatory, but rather its crabbed view of the extent of Congress' regulatory power under the Commerce Clause. The Agricultural Adjustment Act was regulatory but it was regulation that today would likely be considered within Congress' commerce power. See, e.g., *Katzenbach v. McClung* (1964); *Wickard v. Filburn* (1942).

While *Butler*'s authority is questionable insofar as it assumes that Congress has no regulatory power over farm production, its discussion of the spending power and its description of both the power's breadth and its limitations remain sound. The Court's decision in *Butler* also properly recognizes the gravity of the task of appropriately limiting the spending power. If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." *United States v. Butler*. This, of course, as *Butler* held, was not the Framers' plan and it is not the meaning of the Spending Clause.

Our later cases are consistent with the notion that, under the spending power, the Congress may only condition grants in ways that can fairly be said to be related to the expenditure of federal funds. For example, in *Oklahoma v. CSC* (1947), the Court upheld application of the Hatch Act to a member of the Oklahoma State Highway Commission who was employed in connection with an activity financed in part by loans and grants from a federal agency. This condition is appropriately viewed as a condition relating to how federal moneys were to be expended. Other conditions that have been upheld by the Court may be viewed as independently justified under some regulatory power of the Congress. Thus, in *Fullilove v. Klutznick* (1980), the Court upheld a condition on federal grants that 10% of the money be "set aside" for contracts with minority business enterprises. But the Court found that the condition could be justified as a valid regulation under the commerce power and §5 of the Fourteenth Amendment.

This case, however, falls into neither class. As discussed above, a condition that a State will raise its drinking age to 21 cannot fairly be said to be reasonably related to the expenditure of funds for highway construction. The only possible connection, highway safety, has nothing to do with how the funds Congress has appropriated are expended. Rather than a condition determining how federal highway money shall be expended, it is a regulation determining who shall be able to drink liquor. As such it is not justified by the spending power. . . .

The immense size and power of the Government of the United States ought not obscure its fundamental character. It remains a Government of enumerated powers. *McCulloch v. Maryland* (1819). Because 23 U.S.C. 158 cannot be justified as an exercise of any power delegated to the Congress, it is not authorized by the Constitution. The Court errs in holding it to be the law of the land, and I respectfully dissent.

PRESIDENT JAMES MADISON, VETO OF FEDERAL PUBLIC WORKS BILL (MARCH 3, 1817)

STUDY GUIDE

1. Is there any difference between President Madison's view of the spending power and that of the Court in *Dole*?
2. Madison viewed the spending power much more narrowly than did Alexander Hamilton, his former *Federalist* coauthor.

To the House of Representatives of the United States: Having considered the bill this day presented to me entitled "An act to set apart and pledge certain funds for internal improvements," and which sets apart and pledges funds "for constructing roads and canals, and improving the navigation of water courses, in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defense," I am constrained by the insuperable difficulty I feel in reconciling the bill with the Constitution of the United States to return it with that objection to the House of Representatives, in which it originated.

The legislative powers vested in Congress are specified and enumerated in the eighth section of the first article of the Constitution, and it does not appear that the power proposed to be exercised by the bill is among the enumerated powers, or that it falls by any just interpretation with the power to make laws necessary and proper for carrying into execution those or other powers vested by the Constitution in the Government of the United States.

"The power to regulate commerce among the several States" can not include a power to construct roads and canals, and to improve the navigation of water courses in order to facilitate, promote, and secure such commerce without a latitude of construction departing from the ordinary import of the terms, strengthened by the known inconveniences which doubtless led to the grant of this remedial power to Congress.

To refer the power in question to the clause "to provide for common defense and general welfare" would be contrary to the established and consistent rules of interpretation, as rendering the special and careful enumeration of powers which follow the clause nugatory and improper. Such a view of the Constitution would have the effect of giving to Congress a general power of legislation instead of the defined and limited one hitherto understood to belong to them, the terms "common defense and general welfare" embracing every object and act within the purview of a legislative trust. It would have the effect of subjecting both the Constitution and laws of the several States in all cases not specifically exempted to be superseded by laws of Congress, it being expressly declared "that the Constitution of the United States and laws made in pursuance thereof shall be the supreme law of the land, and the judges of every state shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." Such a view of the Constitution, finally, would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative

powers of the General and the State Governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decision.

A restriction of the power "to provide for the common defense and general welfare" to cases which are to be provided for by the expenditure of money would still leave within the legislative power of Congress all the great and most important measures of Government, money being the ordinary and necessary means of carrying them into execution.

If a general power to construct roads and canals, and to improve the navigation of water courses, with the train of powers incident thereto, be not possessed by Congress, the assent of the States in the mode provided in the bill can not confer the power. The only cases in which the consent and cession of particular States can extend the power of Congress are those specified and provided for in the Constitution.

I am not unaware of the great importance of roads and canals and the improved navigation of water courses, and that a power in the National Legislature to provide for them might be exercised with signal advantage to the general prosperity. But seeing that such a power is not expressly given by the Constitution, and believing that it can not be deduced from any part of it without an inadmissible latitude of construction and reliance on insufficient precedents; believing also that the permanent success of the Constitution depends on a definite partition of powers between the General and the State Governments, and that no adequate landmarks would be left by the constructive extension of the powers of Congress as proposed in the bill, I have no option but to withhold my signature from it, and to cherishing the hope that its beneficial objects may be attained by a resort for the necessary powers to the same wisdom and virtue in the nation which established the Constitution in its actual form and providently marked out in the instrument itself a safe and practicable mode of improving it as experience might suggest.

2. The Commerce Clause and Necessary and Proper Clause

ASSIGNMENT 6

United States v. Dewitt (1869) was the first case in which the Court set aside a federal statute that exceeded Congress's Commerce Clause powers. Chief Justice Chase wrote:

> But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.

During the Progressive Era, the Court distinguished between national and local activity. Such decisions paid close attention to the definitions of "commerce" and "among the several states." However, the New Deal Court effectively withdrew from this endeavor.

The Supreme Court's position would begin to shift in the 1970s. Justice William H. Rehnquist, and other members of the Court, began to reinvigorate the idea of federalism in several doctrinal areas. Some of these cases declared federal laws unconstitutional; other cases achieved less long-lasting success, at least to date. These cases include:

1. *United States v. Lopez*, *United States v. Morrison*, and *NFIB v. Sebelius*: Defined judicially enforceable limits on the scope of Congress's powers under the Commerce Clause and Necessary and Proper Clause;
2. *South Dakota v. Dole* and *NFIB v. Sebelius*: Limited Congress's powers under the Spending Clause to condition grants given to states;
3. *National League of Cities v. Usery*: Limited Congress's power to regulate state and local laws of general applicability (*Usery* was overturned by *Garcia v. San Antonio Metropolitan Transit Authority*, and was qualified by *Gregory v. Ashcroft*);
4. *New York v. United States* and *Printz v. United States*: Developed the "anti-commandeering" principle, which was used to declare unconstitutional laws that direct, or commandeer, state officers to take certain actions;
5. *Seminole Tribe of Florida v. Florida* and *Alden v. Maine*: Expanded the idea of sovereign immunity. The Court has explained this concept derives from the underlying "principles" of the Eleventh Amendment, rather than its text;
6. *Allen v. Wright*: Emphasized the federalism aspects of standing.

The Supreme Court decided *United States v. Lopez* in 1995. For the first time in nearly six decades, the Supreme Court found that a law exceeded Congress's enumerated powers under the Commerce and Necessary and Proper Clauses.

STUDY GUIDE

1. How does *Lopez* approach the scope of Congress's enumerated powers? Why does the Gun-Free School Zones Act exceed Congress's enumerated powers? How does Chief Justice Rehnquist reconcile this stance with the cases decided since the New Deal? What facts must Congress establish for its laws to pass constitutional scrutiny?
2. Chief Justice Rehnquist observes that "even *Wickard* . . . involved economic activity. . . ." Was *Wickard*'s analysis limited to "economic activity"?
3. Justice Kennedy wrote a concurring opinion. How does his approach compare with the majority's approach? Does the distinction between "external" and "internal" limitations on federal power help distinguish these two approaches?
4. Justice Thomas also wrote a concurring opinion. Does his approach differ from the majority's approach?
5. Justice Breyer wrote a dissenting opinion. Does he identify any limits to Congress's powers?
6. Assume that Justice Thomas is right about the narrow, original meaning of the Commerce Clause. Also assume that the Supreme Court has adopted a long-standing, broad understanding of the Commerce Clause. If Justice Thomas (or any Justice) thinks his interpretation is "more correct," what should that Justice do? Vote and write the way Thomas did in the case? Should a Justice defer to those precedents, under the doctrine of *stare decisis*, even if the Justice feels they are "incorrect"? If so, what factors should the Justice take into account in deviating from his or her own convictions?

United States v. Lopez

514 U.S. 549 (1995)


Video on CasebookConnect.com

Chief Justice Rehnquist delivered the opinion of the Court.

In the Gun-Free School Zones Act of 1990, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. §922(q)(1)(A). The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "[t]o regulate Commerce . . . among the several States. . . ."

On March 10, 1992, respondent, who was then a 12th-grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38 caliber handgun and five bullets. Acting upon an anonymous tip, school authorities confronted respondent, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises. The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the Gun-Free School Zones Act of 1990.[1] . . . On appeal, respondent challenged his conviction based on his claim that §922(q) exceeded Congress' power to legislate under the Commerce Clause. . . .

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See U.S. Const., Art. I, §8. As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Federalist No. 45*. This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft* (1991). "Just as the separation and independence of the coordinate branches of the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." . . .

For nearly a century [after *Gibbons v. Ogden* (1824),] the Court's Commerce Clause decisions dealt but rarely with the extent of Congress' power, and [instead] almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce. Under this line of precedent, the Court held that certain categories of activity such as "production," "manufacturing," and "mining" were within the province of state governments, and thus were beyond the power of Congress under the Commerce Clause.

In 1887, Congress enacted the Interstate Commerce Act, and in 1890, Congress enacted the Sherman Antitrust Act. These laws ushered in a new era of federal regulation under the commerce power. When cases involving these laws first reached this Court, we imported from our negative Commerce Clause cases the approach that Congress could not regulate activities such as "production," "manufacturing," and "mining." See, e.g., *United States v. E.C. Knight Co.* (1895). Simultaneously, however, the Court held that, where the interstate and intrastate aspects of commerce were so

[1] The term "school zone" is defined as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school."

mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation. . . .

Jones & Laughlin Steel, *Darby*, and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.

But even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits. . . . [W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. See, e.g., *Darby*, *Heart of Atlanta Motel*. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *Jones & Laughlin Steel*, i.e., those activities that substantially affect interstate commerce.

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

We now turn to consider the power of Congress, in the light of this framework, to enact §922(q). The first two categories of authority may be quickly disposed of: §922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can §922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. Thus, if §922(q) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, *McClung*, inns and hotels catering to interstate guests, *Heart of Atlanta Motel*, and production and consumption of home-grown wheat, *Wickard v. Filburn*. These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. . . . Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however

broadly one might define those terms.[3] Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Second, §922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. For example, in United States v. Bass (1971), the Court interpreted former 18 U.S.C. §1202(a), which made it a crime for a felon to "receiv[e], posses[s], or transpor[t] in commerce or affecting commerce . . . any firearm." . . . Unlike the statute in *Bass*, §922(q) has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

Although as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, the Government concedes that "[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here. . . .

The Government's essential contention, *in fine*, is that we may determine here that §922(q) is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs of violent crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. Cf. *Heart of Atlanta Motel*. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that §922(q) substantially affects interstate commerce.

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless

[3] Under our federal system, the "States possess primary authority for defining and enforcing the criminal law." When Congress criminalizes conduct already denounced as criminal by the States, it effects a "change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Enmons* (1973).

of how tenuously they relate to interstate 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), 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.

Although Justice Breyer argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not. . . . Justice Breyer focuses, for the most part, on the threat that firearm possession in and near schools poses to the educational process and the potential economic consequences flowing from that threat. Specifically, the dissent reasons that (1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce. This analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education.

For instance, if Congress can, pursuant to its Commerce Clause power, regulate activities that adversely affect the learning environment, then, *a fortiori*, it also can regulate the educational process directly. Congress could determine that a school's curriculum has a "significant" effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom learning," and that, in turn, has a substantial effect on interstate commerce.

Justice Breyer rejects our reading of precedent and argues that "Congress . . . could rationally conclude that schools fall on the commercial side of the line." Again, Justice Breyer's rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial. Under the dissent's rationale, Congress could just as easily look at child rearing as "fall[ing] on the commercial side of the line" because it provides a "valuable service — namely, to equip [children] with the skills they need to survive in life and, more specifically, in the workplace." We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.

Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender "legal uncertainty." As Chief Justice Marshall stated in *McCulloch v. Maryland* (1819): "Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will

probably continue to arise, as long as our system shall exist." See also *Gibbons v. Ogden* (1824) ("The enumeration presupposes something not enumerated"). The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. See U.S. Const., Art. I, §8. Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the judiciary's duty "to say what the law is." *Marbury v. Madison* (1803) (Marshall, C.J.). Any possible benefit from eliminating this "legal uncertainty" would be at the expense of the Constitution's system of enumerated powers. . . .

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local, cf. *Jones & Laughlin Steel*. This we are unwilling to do.

For the foregoing reasons the judgment of the Court of Appeals is
Affirmed.

Justice Kennedy, with whom Justice O'Connor joins, concurring.

The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause about today's decision, but I join the Court's opinion with these observations on what I conceive to be its necessary though limited holding. . . .

This case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution. Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the judiciary to play a significant role in maintaining the design contemplated by the Framers. . . . There is irony in this, because of the four structural elements in the Constitution just mentioned, federalism was the unique contribution of the Framers to political science and political theory. Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. . . .

The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the federal and state governments are to control each other, see *Federalist No. 51*, and hold each other in check by competing for the affections of the people, see *Federalist No. 46*, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. . . .

Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power. . . .

For these reasons, it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. . . . At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far. . . .

The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes. But our cases do not teach that we have no role at all in determining the meaning of the Commerce Clause. . . .

The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term. . . . This is not a case where the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy, or to organize its governmental functions in a certain way. While the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant. Absent a stronger connection or identification with commercial concerns that are central to the Commerce Clause, that interference contradicts the federal balance the Framers designed and that this Court is obliged to enforce.

For these reasons, I join in the opinion and judgment of the Court.

Justice Thomas, concurring.

. . . Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.

We have said that Congress may regulate not only "Commerce . . . among the several states," but also anything that has a "substantial effect" on such commerce. This test, if taken to its logical extreme, would give Congress a "police power" over all aspects of American life. Unfortunately, we have never come to grips with this implication of our substantial effects formula. Although we have supposedly applied the substantial effects test for the past 60 years, we *always* have rejected readings of the Commerce Clause and

the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power. . . .

In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.

Today, however, I merely support the Court's conclusion with a discussion of the text, structure, and history of the Commerce Clause and an analysis of our early case law. My goal is simply to show how far we have departed from the original understanding and to demonstrate that the result we reach today is by no means "radical." I also want to point out the necessity of refashioning a coherent test that does not tend to "obliterate the distinction between what is national and what is local and create a completely centralized government." *Jones & Laughlin Steel Corp*.

At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes. See 1 S. Johnson, *A Dictionary of the English Language* 361 (4th ed. 1773) (defining commerce as "Intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick"); N. Bailey, *An Universal Etymological English Dictionary* (26th ed. 1789) ("trade or traffic"); T. Sheridan, *A Complete Dictionary of the English Language* (6th ed. 1796) ("Exchange of one thing for another; trade, traffick"). This understanding finds support in the etymology of the word, which literally means "with merchandise." See 3 *Oxford English Dictionary* 552 (2d ed. 1989) (com — "with"; merci — "merchandise"). In fact, when Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably. See *Federalist No. 4* (J. Jay) (asserting that countries will cultivate our friendship when our "trade" is prudently regulated by Federal Government); *id.*, *No. 7* (A. Hamilton) (discussing "competitions of commerce" between States resulting from state "regulations of trade"); *id.*, *No. 40* (J. Madison) (asserting that it was an "acknowledged object of the Convention . . . that the regulation of trade should be submitted to the general government"). . . .

As one would expect, the term "commerce" was used in contradistinction to productive activities such as manufacturing and agriculture. Alexander Hamilton, for example, repeatedly treated commerce, agriculture, and manufacturing as three separate endeavors. See, e.g., *Federalist No. 36* (referring to "agriculture, commerce, manufactures"); *id.*, *No. 21* (distinguishing commerce, arts, and industry); *id.*, *No. 12* (asserting that commerce and agriculture have shared interests). The same distinctions were made in the state ratification conventions. . . .

Moreover, interjecting a modern sense of commerce into the Constitution generates significant textual and structural problems. For example, one cannot replace "commerce" with a different type of enterprise, such as manufacturing. When a manufacturer produces a car, assembly cannot take place "with a foreign nation" or "with the Indian Tribes." Parts may come from different States or other nations and hence may have been in the flow of commerce at one time, but manufacturing takes place at a discrete site. Agriculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles.

The Port Preference Clause also suggests that the term "commerce" denoted sale and/or transport rather than business generally. According to that Clause, "[n]o Preference

shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." U.S. Const., Art. I, §9, cl. 6. Although it is possible to conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports.

The Constitution not only uses the word "commerce" in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that "substantially affect" interstate commerce. The Commerce Clause does not state that Congress may "regulate matters that substantially affect commerce with foreign Nations, and among the several States, and with the Indian Tribes." In contrast, the Constitution itself temporarily prohibited amendments that would "affect" Congress' lack of authority to prohibit or restrict the slave trade or to enact unproportioned direct taxation. [U.S. Const.,] Art. V. Clearly, the Framers could have drafted a Constitution that contained a "substantially affects interstate commerce" clause had that been their objective.

In addition to its powers under the Commerce Clause, Congress has the authority to enact such laws as are "necessary and proper" to carry into execution its power to regulate commerce among the several States. U.S. Const., Art. I, §8, cl. 18. But on this Court's understanding of congressional power under these two Clauses, many of Congress' other enumerated powers under Art. I, §8 are wholly superfluous. After all, if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, or coin money and fix the standard of weights and measures, or punish counterfeiters of United States coin and securities. Likewise, Congress would not need the separate authority to establish post-offices and post-roads, cl. 7, or to grant patents and copyrights, or to "punish Piracies and Felonies committed on the high Seas." It might not even need the power to raise and support an Army and Navy, for fewer people would engage in commercial shipping if they thought that a foreign power could expropriate their property with ease. Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify that Congress can regulate international trade and commerce with the Indians. As the Framers surely understood, these other branches of trade substantially affect interstate commerce.

Put simply, much if not all of Art. I, §8 (including portions of the Commerce Clause itself) would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An interpretation of cl. 3 that makes the rest of §8 superfluous simply cannot be correct. Yet this Court's Commerce Clause jurisprudence has endorsed just such an interpretation: the power we have accorded Congress has swallowed Art. I, §8.

Indeed, if a "substantial effects" test can be appended to the Commerce Clause, why not to every other power of the Federal Government? There is no reason for singling out the Commerce Clause for special treatment. Accordingly, Congress could regulate all matters that "substantially affect" the Army and Navy, bankruptcies, tax collection, expenditures, and so on. In that case, the clauses of §8 all mutually overlap, something we can assume the Founding Fathers never intended.

Our construction of the scope of congressional authority has the additional problem of coming close to turning the Tenth Amendment on its head. Our case law could be read

to reserve to the United States all powers not expressly *prohibited* by the Constitution. Taken together, these fundamental textual problems should, at the very least, convince us that the "substantial effects" test should be reexamined. . . .

Early Americans understood that commerce, manufacturing, and agriculture, while distinct activities, were intimately related and dependent on each other — that each "substantially affected" the others. After all, items produced by farmers and manufacturers were the primary articles of commerce at the time. If commerce was more robust as a result of federal superintendence, farmers and manufacturers could benefit. Thus, Oliver Ellsworth of Connecticut attempted to convince farmers of the benefits of regulating commerce. "Your property and riches depend on a ready demand and generous price for the produce you can annually spare," he wrote, and these conditions exist "where trade flourishes and when the merchant can freely export the produce of the country" to nations that will pay the highest price. William Davie, a delegate to the North Carolina Convention, illustrated the close link best: "Commerce, sir, is the nurse of [agriculture and manufacturing]. The merchant furnishes the planter with such articles as he cannot manufacture himself, and finds him a market for his produce. Agriculture cannot flourish if commerce languishes; they are mutually dependent on each other."

Yet, despite being well aware that agriculture, manufacturing, and other matters substantially affected commerce, the founding generation did not cede authority over all these activities to Congress. Hamilton, for instance, acknowledged that the Federal Government could not regulate agriculture and like concerns: "The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction." *Federalist No. 17*. . . .

In short, the Founding Fathers were well aware of what the principal dissent [by Justice Breyer] calls "economic . . . realities." Even though the boundary between commerce and other matters may ignore "economic reality" and thus seem arbitrary or artificial to some, we must nevertheless respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce. . . .

I am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century. . . . As recently as 1936, the Court continued to insist that the Commerce Clause did not reach the wholly internal business of the States. . . . [F]rom the time of the ratification of the Constitution to the mid 1930's, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the Commerce Clause. Moreover, there was no question that activities wholly separated from business, such as gun possession, were beyond the reach of the commerce power. If anything, the "wrong turn" was the Court's dramatic departure in the 1930's from a century and a half of precedent.

Apart from its recent vintage and its corresponding lack of any grounding in the original understanding of the Constitution, the substantial effects test suffers from the further flaw that it appears to grant Congress a police power over the Nation. When asked at oral argument if there were any limits to the Commerce Clause, the Government was at a loss for words. Tr. of Oral Arg. 5. Likewise, the principal dissent insists that there are limits, but it cannot muster even one example. Indeed, the dissent implicitly concedes that its reading has no limits when it criticizes the Court for "threaten[ing] legal

uncertainty in an area of law that . . . seemed reasonably well settled." The one advantage of the dissent's standard is certainty: it is certain that under its analysis everything may be regulated under the guise of the Commerce Clause.

The substantial effects test suffers from this flaw, in part, because of its "aggregation principle." Under so-called "class of activities" statutes, Congress can regulate whole categories of activities that are not themselves either "interstate" or "commerce." In applying the effects test, we ask whether the class of activities *as a whole* substantially affects interstate commerce, not whether any specific activity within the class has such effects when considered in isolation.

The aggregation principle is clever, but has no stopping point. Suppose all would agree that gun possession within 1,000 feet of a school does not substantially affect commerce, but that possession of weapons generally (knives, brass knuckles, nunchakus, etc.) does. Under our substantial effects doctrine, even though Congress cannot single out gun possession, it can prohibit weapon possession generally. But one *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce. Under our jurisprudence, if Congress passed an omnibus "substantially affects interstate commerce" statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional. Even though particular sections may govern only trivial activities, the statute in the aggregate regulates matters that substantially affect commerce.

This extended discussion of the original understanding and our first century and a half of case law does not necessarily require a wholesale abandonment of our more recent opinions.[8] It simply reveals that our substantial effects test is far removed from both the Constitution and from our early case law and that the Court's opinion should not be viewed as "radical" or another "wrong turn" that must be corrected in the future. . . .

At an appropriate juncture, I think we must modify our Commerce Clause jurisprudence. Today, it is easy enough to say that the Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school.

Justice Breyer, with whom Justice Stevens, Justice Souter, and Justice Ginsburg join, dissenting. . . .

In my view, the statute falls well within the scope of the commerce power as this Court has understood that power over the last half century. . . . [T]he Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce — both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words "rational basis" capture this leeway. Thus, the specific question before us, as the Court recognizes, is not whether the "regulated activity sufficiently affected interstate commerce," but, rather, whether Congress could have had "a *rational basis*" for so concluding. . . . [W]e must ask whether Congress could have had a *rational basis*

[8] Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean.

for finding a significant (or substantial) connection between gun-related school violence and interstate commerce. . . . Or, to put the question in the language of the *explicit* finding that Congress made when it amended this law in 1994: Could Congress rationally have found that "violent crime in school zones," through its effect on the "quality of education," significantly (or substantially) affects "interstate" or "foreign commerce"? As long as one views the commerce connection, not as a "technical legal conception," but as "a practical one," *Swift & Co. v. United States* (1905) (Holmes, J.), the answer to this question must be yes. Numerous reports and studies — generated both inside and outside government — make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts. . . .

Specifically, Congress could have found that gun-related violence near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low-paying jobs, and (2) to communities and businesses that might (in today's "information society") otherwise gain, from a well-educated work force, an important commercial advantage of a kind that location near a railhead or harbor provided in the past. Congress might also have found these threats to be no different in kind from other threats that this Court has found within the commerce power, such as the threat that loan sharking poses to the "funds" of "numerous localities," and that unfair labor practices pose to instrumentalities of commerce. . . . The violence related facts, the educational facts, and the economic facts, taken together, make this conclusion rational. And, because under our case law, the sufficiency of the constitutionally necessary Commerce Clause link between a crime of violence and interstate commerce turns simply upon size or degree, those same facts make the statute constitutional. . . .

The majority's holding — that §922 falls outside the scope of the Commerce Clause — creates three serious legal problems. First, the majority's holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence. . . .

The second legal problem the Court creates comes from its apparent belief that it can reconcile its holding with earlier cases by making a critical distinction between "commercial" and noncommercial "transaction[s]." That is to say, the Court believes the Constitution would distinguish between two local activities, each of which has an identical effect upon interstate commerce, if one, but not the other, is "commercial" in nature. As a general matter, this approach fails to heed this Court's earlier warning not to turn "questions of the power of Congress" upon "formula[s]" that would give "controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." *Wickard*.

Moreover, the majority's test is not consistent with what the Court saw as the point of the cases that the majority now characterizes. Although the majority today attempts to categorize . . . *McClung* and *Wickard* as involving intrastate "economic activity," the Courts that decided each of those cases did not focus upon the economic nature of the activity regulated. Rather, they focused upon whether that activity affected interstate or foreign commerce. In fact, the *Wickard* Court expressly held that Wickard's consumption of homegrown wheat, "*though it may not be regarded as commerce*," could nevertheless be regulated — "*whatever its nature*" — so long as "it exerts a substantial economic effect on interstate commerce." (emphasis added).

More importantly, if a distinction between commercial and noncommercial activities is to be made, this is not the case in which to make it. . . . Schools that teach reading,

writing, mathematics, and related basic skills serve both social and commercial purposes, and one cannot easily separate the one from the other. . . . In 1990, the year Congress enacted the statute before us, primary and secondary schools spent $230 billion — that is, nearly a quarter of a trillion dollars — which accounts for a significant portion of our $5.5 trillion Gross Domestic Product for that year. . . . Why could Congress, for Commerce Clause purposes, not consider schools as roughly analogous to commercial investments from which the Nation derives the benefit of an educated work force?

The third legal problem created by the Court's holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled. . . .

Upholding this legislation would do no more than simply recognize that Congress had a "rational basis" for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten. For these reasons, I would reverse the judgment of the Court of Appeals. Respectfully, I dissent.

STUDY GUIDE

1. Does *United States v. Morrison* address any issues left open by *Lopez*?
2. Why does the *Morrison* Court base its Commerce Clause doctrine on the distinction between "economic" and "noneconomic" activity?

United States v. Morrison

529 U.S. 598 (2000)

Chief Justice Rehnquist delivered the opinion of the Court.

In these cases we consider the constitutionality of 42 U.S.C. §13981, which provides a federal civil remedy for the victims of gender-motivated violence. . . . Section 13981 was part of the Violence Against Women Act of 1994. It states that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." To enforce that right, subsection (c) declares:

> A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

. . .

Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution. "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written." *Marbury v. Madison* (1803). Congress explicitly identified the sources of federal authority on which it relied in enacting §13981. It said that a "federal civil rights cause of action" is established "[p]ursuant to the affirmative power of Congress . . . under section 5 of the

Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution." We address Congress' authority to enact this remedy under each of these constitutional provisions in turn.

Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. With this presumption of constitutionality in mind, we turn to the question whether §13981 falls within . . . the third clause of the Article, which gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

As we discussed at length in *Lopez*, . . . even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds. . . . Reviewing our case law, we noted that "we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce." . . . [A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case. . . .

Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.

Like the Gun-Free School Zones Act at issue in *Lopez*, §13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce. Although *Lopez* makes clear that such a jurisdictional element would lend support to the argument that §13981 is sufficiently tied to interstate commerce, Congress elected to cast §13981's remedy over a wider, and more purely intrastate, body of violent crime.

In contrast with the lack of congressional findings that we faced in *Lopez*, §13981 *is* supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Rather, "[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."

In these cases, Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers. 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; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products." Given these findings and petitioners' 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. The reasoning that petitioners advance seeks to follow the but-for

causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part. . . .

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims. . . .

Justice Thomas, concurring.

The majority opinion correctly applies our decision in *United States v. Lopez* (1995), and I join it in full. I write separately only to express my view that the very notion of a "substantial effects" test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce.

Justice Souter, with whom Justice Stevens, Justice Ginsburg, and Justice Breyer join, dissenting. . . .

[This] Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause, Art. I., §8, cl. 18, extended to all activity that, when aggregated, has a substantial effect on interstate commerce. The fact that the Act does not pass muster before the Court today is therefore proof, to a degree that *Lopez* was not, that the Court's nominal adherence to the substantial effects test is merely that. Although a new jurisprudence has not emerged with any distinctness, it is clear that some congressional conclusions about obviously substantial, cumulative effects on commerce are being assigned lesser values than the once-stable doctrine would assign them. These devaluations are accomplished not by any express repudiation of the substantial effects test or its application through the aggregation of individual conduct, but by supplanting rational basis scrutiny with a new criterion of review.

Thus the elusive heart of the majority's analysis in these cases is its statement that Congress' findings of fact are "weakened" by the presence of a disfavored "method of

reasoning." This seems to suggest that the "substantial effects" analysis is not a factual enquiry, for Congress in the first instance with subsequent judicial review looking only to the rationality of the congressional conclusion, but one of a rather different sort, dependent upon a uniquely judicial competence. . . .

[W]ickard applied an aggregate effects test to ostensibly domestic, noncommercial farming. . . . If we now ask why the formalistic economic/noneconomic distinction might matter today, after its rejection in *Wickard*, the answer is not that the majority fails to see causal connections in an integrated economic world. The answer is that in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. Just as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism. It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit. The legitimacy of the Court's current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of the national economy. The essential issue is rather the strength of the majority's claim to have a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power. . . .

All of this convinces me that today's ebb of the commerce power rests on error, and at the same time leads me to doubt that the majority's view will prove to be enduring law. . . . As our predecessors learned then, the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative, and this Court, in any event, lacks the institutional capacity to maintain such a regime for very long. This one will end when the majority realizes that the conception of the commerce power for which it entertains hopes would inevitably fail the test expressed in Justice Holmes's statement that "[t]he first call of a theory of law is that it should fit the facts." The facts that cannot be ignored today are the facts of integrated national commerce and a political relationship between States and Nation much affected by their respective treasuries and constitutional modifications adopted by the people. The federalism of some earlier time is no more adequate to account for those facts today than the theory of laissez-faire was able to govern the national economy 70 years ago.

Justice Breyer, with whom Justice Stevens joins, and with whom Justice Souter and Justice Ginsburg join as to Part I-A, dissenting. . . .

The majority holds that the federal commerce power does not extend to such "noneconomic" activities as "noneconomic, violent criminal conduct" that significantly affects interstate commerce only if we "aggregate" the interstate "effect[s]" of individual instances. . . . [T]he majority's holding illustrates the difficulty of finding a workable judicial Commerce Clause touchstone — a set of comprehensible interpretive rules that courts might use to impose some meaningful limit, but not too great a limit, upon the scope of the legislative authority that the Commerce Clause delegates to Congress.

Consider the problems. The "economic/noneconomic" distinction is not easy to apply. Does the local street corner mugger engage in "economic" activity or "noneconomic" activity when he mugs for money? Would evidence that desire for economic domination underlies many brutal crimes against women save the present statute?

The line becomes yet harder to draw given the need for exceptions. The Court itself would permit Congress to aggregate, hence regulate, "noneconomic" activity taking

place at economic establishments. See *Heart of Atlanta Motel, Inc. v. United States* (1964) (upholding civil rights laws forbidding discrimination at local motels); *Katzenbach v. McClung* (1964) (same for restaurants). And it would permit Congress to regulate where that regulation is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*; cf. Controlled Substances Act, 21 U.S.C. §801 *et seq.* (regulating drugs produced for home consumption). Given the former exception, can Congress simply rewrite the present law and limit its application to restaurants, hotels, perhaps universities, and other places of public accommodation? Given the latter exception, can Congress save the present law by including it, or much of it, in a broader "Safe Transport" or "Workplace Safety" act?

More important, why should we give critical constitutional importance to the economic, or noneconomic, nature of an interstate-commerce-affecting *cause*? If chemical emanations through indirect environmental change cause identical, severe commercial harm outside a State, why should it matter whether local factories or home fireplaces release them? The Constitution itself refers only to Congress' power to "regulate Commerce . . . among the several States," and to make laws "necessary and proper" to implement that power. Art. I, §8, cls. 3, 18. The language says nothing about either the local nature, or the economic nature, of an interstate-commerce-affecting cause. . . .

Angel Raich after oral argument, with Diane Monson and Randy Barnett

Professor Randy Barnett represented Angel Raich (pronounced "raytch") before the Supreme Court. Paul Clement, the acting solicitor general, represented the federal government, and defended the Controlled Substances Act. In October 2004, Chief Justice Rehnquist announced that he had been diagnosed with thyroid cancer. He was not present for oral argument two months later in *Raich*. He most likely participated in the conference vote by telephone. Rehnquist died in September 2005, marking the end of the "Rehnquist Court."

STUDY GUIDE

1. How does *Gonzales v. Raich* cite *Webster's* 3rd Edition dictionary? Does this citation keep *Raich* within the doctrine established by *Lopez* and *Morrison*?
2. Justice Scalia wrote a concurring opinion. Does he offer a more nuanced analysis of Congress's powers under the Necessary and Proper Clause? Did the Necessary and Proper Clause also affect the analyses in *Lopez* and *Morrison*? Justice Scalia joined both of those decisions.
3. Justice Scalia wrote, "Congress could reasonably conclude . . . ." This statement echoes the extremely deferential standard of scrutiny known as "rational basis review." How does this deferential standard affect his conclusion that the statute was constitutional under the Necessary and Proper Clause?
4. Can you explain Justice Kennedy's shift from *Lopez* and *Morrison*? In both of those cases, he voted to declare unconstitutional two federal laws.
5. What part of Justice O'Connor's dissent did Chief Justice Rehnquist and Justice Thomas not join?

Gonzales v. Raich

545 U.S. 1 (2005)

Video on CasebookConnect.com

JUSTICE STEVENS delivered the opinion of the Court.

California is one of at least nine States that authorize the use of marijuana for medicinal purposes. The question presented in this case is whether the power vested in Congress by Article I, §8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States" includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

I

. . . In 1996, California voters passed Proposition 215, now codified as the Compassionate Use Act of 1996. The proposition was designed to ensure that "seriously ill" residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps towards ensuring the safe and affordable distribution of the drug to patients in need. The Act creates an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician. A "primary caregiver" is a person who has consistently assumed responsibility for the housing, health, or safety of the patient.

Respondents Angel Raich and Diane Monson are California residents who suffer from a variety of serious medical conditions and have sought to avail themselves

of medical marijuana pursuant to the terms of the Compassionate Use Act. They are being treated by licensed, board-certified family practitioners, who have concluded, after prescribing a host of conventional medicines to treat respondents' conditions and to alleviate their associated symptoms, that marijuana is the only drug available that provides effective treatment. Both women have been using marijuana as a medication for several years pursuant to their doctors' recommendation, and both rely heavily on cannabis to function on a daily basis. Indeed, Raich's physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal.

Respondent Monson cultivates her own marijuana, and ingests the drug in a variety of ways including smoking and using a vaporizer. Respondent Raich, by contrast, is unable to cultivate her own, and thus relies on two caregivers, litigating as "John Does," to provide her with locally grown marijuana at no charge. These caregivers also process the cannabis into hashish or keif, and Raich herself processes some of the marijuana into oils, balms, and foods for consumption.

On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) came to Monson's home. After a thorough investigation, the county officials concluded that her use of marijuana was entirely lawful as a matter of California law. Nevertheless, after a 3-hour standoff, the federal agents seized and destroyed all six of her cannabis plants. . . .

III

Respondents in this case do not dispute that passage of the Controlled Substances Act (CSA), as part of the Comprehensive Drug Abuse Prevention and Control Act, was well within Congress' commerce power. Nor do they contend that any provision or section of the CSA amounts to an unconstitutional exercise of congressional authority. Rather, respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause. . . .

Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic "class of activities" that have a substantial effect on interstate commerce. As we stated in *Wickard*, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." We have never required Congress to legislate with scientific exactitude. When Congress decides that the "'total incidence'" of a practice poses a threat to a national market, it may regulate the entire class. . . . In this vein, we have reiterated that when "'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Lopez*.

Our decision in *Wickard*, is of particular relevance. In *Wickard*, we upheld the application of regulations promulgated under the Agricultural Adjustment Act of 1938 which

were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices. . . . *Wickard* . . . establishes that Congress can regulate purely intrastate activity that is not itself "commercial," in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.

The similarities between this case and *Wickard* are striking. Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. Just as the Agricultural Adjustment Act was designed "to control the volume [of wheat] moving in interstate and foreign commerce in order to avoid surpluses . . ." and consequently control the market price, a primary purpose of the CSA is to control the supply and demand of controlled substances in both lawful and unlawful drug markets. In *Wickard*, we had no difficulty concluding that Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions. Here too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.

More concretely, one concern prompting inclusion of wheat grown for home consumption in the 1938 Act was that rising market prices could draw such wheat into the interstate market, resulting in lower market prices. The parallel concern making it appropriate to include marijuana grown for home consumption in the CSA is the likelihood that the high demand in the interstate market will draw such marijuana into that market. While the diversion of homegrown wheat tended to frustrate the federal interest in stabilizing prices by regulating the volume of commercial transactions in the interstate market, the diversion of homegrown marijuana tends to frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety. In both cases, the regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.

Nonetheless, respondents suggest that *Wickard* differs from this case in three respects: (1) the Agricultural Adjustment Act, unlike the CSA, exempted small farming operations; (2) *Wickard* involved a "quintessential economic activity" — a commercial farm — whereas respondents do not sell marijuana; and (3) the *Wickard* record made it clear that the aggregate production of wheat for use on farms had a significant impact on market prices. Those differences, though factually accurate, do not diminish the precedential force of this Court's reasoning.

The fact that Filburn's own impact on the market was "trivial by itself" was not a sufficient reason for removing him from the scope of federal regulation. That the Secretary of Agriculture elected to exempt even smaller farms from regulation does not speak to his power to regulate all those whose aggregated production was significant, nor did that fact play any role in the Court's analysis. Moreover, even though Filburn was indeed a commercial farmer, the activity he was engaged in — the cultivation of wheat for home consumption — was not treated by the Court as part of his commercial

farming operation.[30] And while it is true that the record in the *Wickard* case itself established the causal connection between the production for local use and the national market, we have before us findings by Congress to the same effect.

Findings in the introductory sections of the CSA explain why Congress deemed it appropriate to encompass local activities within the scope of the CSA. The submissions of the parties and the numerous *amici* all seem to agree that the national, and international, market for marijuana has dimensions that are fully comparable to those defining the class of activities regulated by the Secretary pursuant to the 1938 statute. Respondents nonetheless insist that the CSA cannot be constitutionally applied to their activities because Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market. Be that as it may, we have never required Congress to make particularized findings in order to legislate absent a special concern such as the protection of free speech. While congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate.

In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce . . . among the several States." U.S. Const., Art. I, §8. That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.

IV

To support their contrary submission, respondents rely heavily on two of our more recent Commerce Clause cases. . . . Those two cases, of course, are *Lopez* and *Morrison*. As an initial matter, the statutory challenges at issue in those cases were markedly different from the challenge respondents pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that "[w]here the class of activities is regulated and that class is within

[30] See *Wickard* (recognizing that Filburn's activity "may not be regarded as commerce").

the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." . . .

Unlike those at issue in *Lopez* and *Morrison*, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary (1966). The CSA is a statute that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.[36] Such prohibitions include specific decisions requiring that a drug be withdrawn from the market as a result of the failure to comply with regulatory requirements as well as decisions excluding Schedule I drugs entirely from the market. Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality. . . .

Respondents . . . contend that their activities were not "an essential part of a larger regulatory scheme" because they had been "isolated by the State of California, and [are] policed by the State of California," and thus remain "entirely separated from the market." Tr. of Oral Arg. 27. The dissenters fall prey to similar reasoning. The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected. . . .

The exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious. Moreover, that the national and international narcotics trade has thrived in the face of vigorous criminal enforcement efforts suggests that no small number of unscrupulous people will make use of the California exemptions to serve their commercial ends whenever it is feasible to do so. Taking into account the fact that California is only one of at least nine States to have authorized the medical use of marijuana, a fact Justice O'Connor's dissent conveniently disregards in arguing that the demonstrated effect on commerce while admittedly "plausible" is ultimately "unsubstantiated," Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial. . . .

Justice Scalia, concurring in the judgment.

I agree with the Court's holding that the Controlled Substances Act (CSA) may validly be applied to respondents' cultivation, distribution, and possession of marijuana for personal, medicinal use. I write separately because my understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least more nuanced. . . .

---

[36] See 16 U.S.C. §668(a) (bald and golden eagles); 18 U.S.C. §175(a) (biological weapons); §831(a) (nuclear material); §842(n)(1) (certain plastic explosives); §2342(a) (contraband cigarettes).

I

Our cases show that the regulation of intrastate activities may be necessary to and proper for the regulation of interstate commerce in two general circumstances. Most directly, the commerce power permits Congress not only to devise rules for the governance of commerce between States but also to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants. See *NLRB v. Jones & Laughlin Steel Corp.* (1937). That is why the Court has repeatedly sustained congressional legislation on the ground that the regulated activities had a substantial effect on interstate commerce. *Lopez* and *Morrison* recognized the expansive scope of Congress' authority in this regard: "[T]he pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."

This principle is not without limitation. In *Lopez* and *Morrison*, the Court — conscious of the potential of the "substantially affects" test to " 'obliterate the distinction between what is national and what is local' " — rejected the argument that Congress may regulate *noneconomic* activity based solely on the effect that it may have on interstate commerce through a remote chain of inferences. "[I]f we were to accept [such] arguments," the Court reasoned in *Lopez*, "we are hard pressed to posit any activity by an individual that Congress is without power to regulate." Thus, although Congress' authority to regulate intrastate activity that substantially affects interstate commerce is broad, it does not permit the Court to "pile inference upon inference," in order to establish that noneconomic activity has a substantial effect on interstate commerce.

As we implicitly acknowledged in *Lopez*, however, Congress' authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws directed against economic activities that have a substantial effect on interstate commerce. Though the conduct in *Lopez* was not economic, the Court nevertheless recognized that it could be regulated as "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." This statement referred to those cases permitting the regulation of intrastate activities "which in a substantial way interfere with or obstruct the exercise of the granted power." . . .

Although this power "to make . . . regulation effective" commonly overlaps with the authority to regulate economic activities that substantially affect interstate commerce,[2] and may in some cases have been confused with that authority, the two are distinct. The regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself "substantially affect" interstate commerce. Moreover, as the passage from *Lopez* quoted above suggests, Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply

[2] *Wickard v. Filburn* presented such a case. Because the unregulated production of wheat for personal consumption diminished demand in the regulated wheat market, the Court said, it carried with it the potential to disrupt Congress's price regulation by driving down prices in the market. This potential disruption of Congress's interstate regulation, and not only the effect that personal consumption of wheat had on interstate commerce, justified Congress's regulation of that conduct.

whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power. . . .

II

Today's principal dissent objects that, by permitting Congress to regulate activities necessary to effective interstate regulation, the Court reduces *Lopez* and *Morrison* to "little more than a drafting guide." I think that criticism unjustified. Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective. As *Lopez* itself states, and the Court affirms today, Congress may regulate noneconomic intrastate activities only where the failure to do so "could . . . undercut" its regulation of interstate commerce. This is not a power that threatens to obliterate the line between "what is truly national and what is truly local."

Lopez and *Morrison* affirm that Congress may not regulate certain "purely local" activity within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation; *Lopez* expressly disclaimed that it was such a case, and *Morrison* did not even discuss the possibility that it was. The Court of Appeals in *Morrison* made clear that it was not. To dismiss this distinction as "superficial and formalistic," is to misunderstand the nature of the Necessary and Proper Clause, which empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation. See *McCulloch v. Maryland* (1819).

And there are other restraints upon the Necessary and Proper Clause authority. As Chief Justice Marshall wrote in *McCulloch v. Maryland* even when the end is constitutional and legitimate, the means must be "appropriate" and "plainly adapted" to that end. Moreover, they may not be otherwise "prohibited" and must be "consistent with the letter and spirit of the constitution." These phrases are not merely hortatory. For example, cases such as *Printz v. United States* (1997), and *New York v. United States* (1992), affirm that a law is not "'*proper* for carrying into Execution the Commerce Clause'" "[w]hen [it] violates [a constitutional] principle of state sovereignty."

III

The application of these principles to the case before us is straightforward. In the CSA, Congress has undertaken to extinguish the interstate market in Schedule I controlled substances, including marijuana. The Commerce Clause unquestionably permits this. The power to regulate interstate commerce "extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it." *Darby*. See also *Lottery Case* (1903). To effectuate its objective, Congress has prohibited almost all intrastate activities related to Schedule I substances — both economic activities (manufacture, distribution, possession with the intent to distribute) and noneconomic

activities (simple possession). That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress' authority to enact all of these prohibitions of intrastate controlled-substance activities depends only upon whether they are appropriate means of achieving the legitimate end of eradicating Schedule I substances from interstate commerce.

By this measure, I think the regulation must be sustained. Not only is it impossible to distinguish "controlled substances manufactured and distributed intrastate" from "controlled substances manufactured and distributed interstate," but it hardly makes sense to speak in such terms. Drugs like marijuana are fungible commodities. As the Court explains, marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market — and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State.[3] . . .

Finally, neither respondents nor the dissenters suggest any violation of state sovereignty of the sort that would render this regulation "inappropriate," — except to argue that the CSA regulates an area typically left to state regulation. That is not enough to render federal regulation an inappropriate means. The Court has repeatedly recognized that, if authorized by the commerce power, Congress may regulate private endeavors "even when [that regulation] may pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress." *National League of Cities v. Usery* (1976). At bottom, respondents' state-sovereignty argument reduces to the contention that federal regulation of the activities permitted by California's Compassionate Use Act is not sufficiently necessary to be "necessary and proper" to Congress's regulation of the interstate market. For the reasons given above and in the Court's opinion, I cannot agree.

* * *

I thus agree with the Court that, however the class of regulated activities is subdivided, Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market "could be undercut" if those activities were excepted from its general scheme of regulation. That is sufficient to authorize the application of the CSA to respondents.

Justice O'Connor, with whom The Chief Justice and Justice Thomas join as to all but Part III, dissenting.

We enforce the "outer limits" of Congress' Commerce Clause authority not for their own sake, but to protect historic spheres of state sovereignty from excessive federal encroachment and thereby to maintain the distribution of power fundamental to our federalist system of government. One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann* (1932) (Brandeis, J., dissenting).

---

[3] The principal dissent claims that, if this is sufficient to sustain the regulation at issue in this case, then it should also have been sufficient to sustain the regulation at issue in *United States v. Lopez*. This claim founders upon the shoals of *Lopez* itself, which made clear that the statute there at issue was "*not* an essential part of a larger regulation of economic activity." On the dissent's view of things, that statement is inexplicable. . . .

This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens. Exercising those powers, California (by ballot initiative and then by legislative codification) has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. Today the Court sanctions an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation. In so doing, the Court announces a rule that gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause — nestling questionable assertions of its authority into comprehensive regulatory schemes — rather than with precision. That rule and the result it produces in this case are irreconcilable with our decisions in [*United States v. Lopez*] and *United States v. Morrison*. Accordingly I dissent. . . .

II

A

. . . Today's decision allows Congress to regulate intrastate activity without check, so long as there is some implication by legislative design that regulating intrastate activity is essential (and the Court appears to equate "essential" with "necessary") to the interstate regulatory scheme. Seizing upon our language in *Lopez* that the statute prohibiting gun possession in school zones was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," the Court appears to reason that the placement of local activity in a comprehensive scheme confirms that it is essential to that scheme. If the Court is right, then *Lopez* stands for nothing more than a drafting guide: Congress should have described the relevant crime as "transfer or possession of a firearm anywhere in the nation" — thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce. Had it done so, the majority hints, we would have sustained its authority to regulate possession of firearms in school zones. Furthermore, today's decision suggests we would readily sustain a congressional decision to attach the regulation of intrastate activity to a preexisting comprehensive (or even not-so-comprehensive) scheme. If so, the Court invites increased federal regulation of local activity even if, as it suggests, Congress would not enact a *new* interstate scheme exclusively for the sake of reaching intrastate activity. . . .

B

. . . The Court's definition of economic activity is breathtaking. It defines as economic any activity involving the production, distribution, and consumption of commodities. And it appears to reason that when an interstate market for a commodity exists, regulating the intrastate manufacture or possession of that commodity is constitutional either because that intrastate activity is itself economic, or because regulating it is a rational part of regulating its market. Putting to one side the problem endemic to the Court's

opinion — the shift in focus from the activity at issue in this case to the entirety of what the CSA regulates, see *Lopez* ("depending on the level of generality, any activity can be looked upon as commercial") — the Court's definition of economic activity for purposes of Commerce Clause jurisprudence threatens to sweep all of productive human activity into federal regulatory reach.

The Court uses a dictionary definition of economics to skirt the real problem of drawing a meaningful line between "what is national and what is local," *Jones & Laughlin Steel*. It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. Home care substitutes for daycare. Charades games substitute for movie tickets. Backyard or windowsill gardening substitutes for going to the supermarket. To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic. We have already rejected the result that would follow — a federal police power. *Lopez*.

In *Lopez* and *Morrison*, we suggested that economic activity usually relates directly to commercial activity. The homegrown cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character. Everyone agrees that the marijuana at issue in this case was never in the stream of commerce, and neither were the supplies for growing it. (Marijuana is highly unusual among the substances subject to the CSA in that it can be cultivated without any materials that have traveled in interstate commerce.) *Lopez* makes clear that possession is not itself commercial activity. And respondents have not come into possession by means of any commercial transaction; they have simply grown, in their own homes, marijuana for their own use, without acquiring, buying, selling, or bartering a thing of value.

The Court suggests that *Wickard*, which we have identified as "perhaps the most far-reaching example of Commerce Clause authority over intrastate activity," *Lopez*, established federal regulatory power over any home consumption of a commodity for which a national market exists. I disagree. *Wickard* involved a challenge to the Agricultural Adjustment Act of 1938 (AAA), which directed the Secretary of Agriculture to set national quotas on wheat production, and penalties for excess production. The AAA itself confirmed that Congress made an explicit choice not to reach — and thus the Court could not possibly have approved of federal control over — small-scale, noncommercial wheat farming. In contrast to the CSA's limitless assertion of power, Congress provided an exemption within the AAA for small producers. When Filburn planted the wheat at issue in *Wickard*, the statute exempted plantings less than 200 bushels (about six tons), and when he harvested his wheat it exempted plantings less than six acres. *Wickard*, then, did not extend Commerce Clause authority to something as modest as the home cook's herb garden. This is not to say that Congress may never regulate small quantities of commodities possessed or produced for personal use, or to deny that it sometimes needs to enact a zero tolerance regime for such commodities. It is merely to say that *Wickard* did not hold or imply that small-scale production of commodities is always economic, and automatically within Congress' reach.

Even assuming that economic activity is at issue in this case, the Government has made no showing in fact that the possession and use of homegrown marijuana for medical

purposes, in California or elsewhere, has a substantial effect on interstate commerce. Similarly, the Government has not shown that regulating such activity is necessary to an interstate regulatory scheme. Whatever the specific theory of "substantial effects" at issue (i.e., whether the activity substantially affects interstate commerce, whether its regulation is necessary to an interstate regulatory scheme, or both), a concern for dual sovereignty requires that Congress' excursion into the traditional domain of States be justified.

That is why characterizing this as a case about the Necessary and Proper Clause does not change the analysis significantly. Congress must exercise its authority under the Necessary and Proper Clause in a manner consistent with basic constitutional principles. As Justice Scalia recognizes, Congress cannot use its authority under the Clause to contravene the principle of state sovereignty embodied in the Tenth Amendment. Likewise, that authority must be used in a manner consistent with the notion of enumerated powers — a structural principle that is as much part of the Constitution as the Tenth Amendment's explicit textual command. Accordingly, something more than mere assertion is required when Congress purports to have power over local activity whose connection to an intrastate market is not self-evident. Otherwise, the Necessary and Proper Clause will always be a back door for unconstitutional federal regulation. Cf. *Printz v. United States* (1997) (the Necessary and Proper Clause is "the last, best hope of those who defend ultra vires congressional action"). Indeed, if it were enough in "substantial effects" cases for the Court to supply conceivable justifications for intrastate regulation related to an interstate market, then we could have surmised in *Lopez* that guns in school zones are "never more than an instant from the interstate market" in guns already subject to extensive federal regulation, recast *Lopez* as a Necessary and Proper Clause case, and thereby upheld the Gun-Free School Zones Act of 1990. . . .

There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market — or otherwise to threaten the CSA regime. Explicit evidence is helpful when substantial effect is not "visible to the naked eye." See *Lopez*. And here, in part because common sense suggests that medical marijuana users may be limited in number and that California's Compassionate Use Act and similar state legislation may well isolate activities relating to medicinal marijuana from the illicit market, the effect of those activities on interstate drug traffic is not self-evidently substantial.

In this regard, again, this case is readily distinguishable from *Wickard*. To decide whether the Secretary could regulate local wheat farming, the Court looked to "the actual effects of the activity in question upon interstate commerce." Critically, the Court was able to consider "actual effects" because the parties had "stipulated a summary of the economics of the wheat industry." After reviewing in detail the picture of the industry provided in that summary, the Court explained that consumption of homegrown wheat was the most variable factor in the size of the national wheat crop, and that on-site consumption could have the effect of varying the amount of wheat sent to market by as much as 20 percent. With real numbers at hand, the *Wickard* Court could easily conclude that "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions" nationwide. . . .

The Court refers to a series of declarations in the introduction to the CSA. . . . [But] the CSA's introductory declarations are too vague and unspecific to demonstrate that the

federal statutory scheme will be undermined if Congress cannot exert power over individuals like respondents. The declarations are not even specific to marijuana. . . . Because here California, like other States, has carved out a limited class of activity for distinct regulation, the inadequacy of the CSA's findings is especially glaring. The California Compassionate Use Act exempts from other state drug laws patients and their caregivers "who posses[s] or cultivat[e] marijuana for the *personal* medical purposes of the patient upon the written or oral recommendation of a physician" to treat a list of serious medical conditions. The Act specifies that it should not be construed to supersede legislation prohibiting persons from engaging in acts dangerous to others, or to condone the diversion of marijuana for nonmedical purposes. To promote the Act's operation and to facilitate law enforcement, California recently enacted an identification card system for qualified patients. We generally assume States enforce their laws and have no reason to think otherwise here. . . .

The Court . . . offers some arguments about the effect of the Compassionate Use Act on the national market. It says that the California statute might be vulnerable to exploitation by unscrupulous physicians, that Compassionate Use Act patients may overproduce, and that the history of the narcotics trade shows the difficulty of cordoning off any drug use from the rest of the market. These arguments are plausible; if borne out in fact they could justify prosecuting Compassionate Use Act patients under the federal CSA. But, without substantiation, they add little to the CSA's conclusory statements about diversion, essentiality, and market effect. Piling assertion upon assertion does not, in my view, satisfy the substantiality test of *Lopez* and *Morrison*.

III

We would do well to recall how James Madison, the father of the Constitution, described our system of joint sovereignty to the people of New York: "The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." *Federalist No. 45*. . . .

If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act. But whatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case. For these reasons I dissent.

Justice Thomas, dissenting.

Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything — and the Federal Government is no longer one of limited and enumerated powers. . . .

I

. . . [N]either the Commerce Clause nor the Necessary and Proper Clause grants Congress the power to regulate respondents' conduct.

A

As I explained at length in *United States v. Lopez* (1995), the Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines. . . . Certainly no evidence from the founding suggests that "commerce" included the mere possession of a good or some purely personal activity that did not involve trade or exchange for value. In the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana.

On this traditional understanding of "commerce," the Controlled Substances Act regulates a great deal of marijuana trafficking that is interstate and commercial in character. The CSA does not, however, criminalize only the interstate buying and selling of marijuana. Instead, it bans the entire market — intrastate or interstate, noncommercial or commercial — for marijuana. Respondents are correct that the CSA exceeds Congress' commerce power as applied to their conduct, which is purely intrastate and noncommercial.

B

More difficult, however, is whether the CSA is a valid exercise of Congress' power to enact laws that are "necessary and proper for carrying into Execution" its power to regulate interstate commerce. The Necessary and Proper Clause is not a warrant to Congress to enact any law that bears some conceivable connection to the exercise of an enumerated power. Nor is it, however, a command to Congress to enact only laws that are absolutely indispensable to the exercise of an enumerated power.

In *McCulloch v. Maryland* (1819), this Court, speaking through Chief Justice Marshall, set forth a test for determining when an Act of Congress is permissible under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." To act under the Necessary and Proper Clause, then, Congress must select a means that is "appropriate" and "plainly adapted" to executing an enumerated power; the means cannot be otherwise "prohibited" by the Constitution; and the means cannot be inconsistent with "the letter and spirit of the [C]onstitution." The CSA, as applied to respondents' conduct, is not a valid exercise of Congress' power under the Necessary and Proper Clause.

1

. . . On its face, a ban on the intrastate cultivation, possession and distribution of marijuana may be plainly adapted to stopping the interstate flow of marijuana. Unregulated

local growers and users could swell both the supply and the demand sides of the interstate marijuana market, making the market more difficult to regulate. But respondents do not challenge the CSA on its face. Instead, they challenge it as applied to their conduct. The question is thus whether the intrastate ban is "necessary and proper" as applied to medical marijuana users like respondents.[3] . . . [E]ven assuming Congress has "obvious" and "plain" reasons why regulating intrastate cultivation and possession is necessary to regulating the interstate drug trade, none of those reasons applies to medical marijuana patients like Monson and Raich.

California's Compassionate Use Act sets respondents' conduct apart from other intrastate producers and users of marijuana. The Act channels marijuana use to "seriously ill Californians," and prohibits "the diversion of marijuana for nonmedical purposes." California strictly controls the cultivation and possession of marijuana for medical purposes. To be eligible for its program, California requires that a patient have an illness that cannabis can relieve, such as cancer, AIDS, or arthritis, and that he obtain a physician's recommendation or approval. Qualified patients must provide personal and medical information to obtain medical identification cards, and there is a statewide registry of cardholders. Moreover, the Medical Board of California has issued guidelines for physicians' cannabis recommendations, and it sanctions physicians who do not comply with the guidelines. . . .

These controls belie the Government's assertion that placing medical marijuana outside the CSA's reach "would prevent effective enforcement of the interstate ban on drug trafficking." Enforcement of the CSA can continue as it did prior to the Compassionate Use Act. Only now, a qualified patient could avoid arrest or prosecution by presenting his identification card to law enforcement officers. In the event that a qualified patient is arrested for possession or his cannabis is seized, he could seek to prove as an affirmative defense that, in conformity with state law, he possessed or cultivated small quantities of marijuana intrastate solely for personal medical use. Moreover, under the CSA, certain drugs that present a high risk of abuse and addiction but that nevertheless have an accepted medical use — drugs like morphine and amphetamines — are available by prescription. No one argues that permitting use of these drugs under medical supervision has undermined the CSA's restrictions. . . .

In sum, neither in enacting the CSA nor in defending its application to respondents has the Government offered any obvious reason why banning medical marijuana use is necessary to stem the tide of interstate drug trafficking. Congress' goal of curtailing the interstate drug trade would not plainly be thwarted if it could not apply the CSA to patients like Monson and Raich. That is, unless Congress' aim is really to exercise police power of the sort reserved to the States in order to eliminate even the intrastate possession and use of marijuana.

2

Even assuming the CSA's ban on locally cultivated and consumed marijuana is "necessary," that does not mean it is also "proper." The means selected by Congress to regulate

[3] Because respondents do not challenge on its face the CSA's ban on marijuana, our adjudication of their as-applied challenge casts no doubt on this Court's practice in *Lopez* and *Morrison*. In those cases, we held that Congress, in enacting the statutes at issue, had exceeded its Article I powers.

interstate commerce cannot be "prohibited" by, or inconsistent with the "letter and spirit" of, the Constitution. *McCulloch*.

In *Lopez*, I argued that allowing Congress to regulate intrastate, noncommercial activity under the Commerce Clause would confer on Congress a general "police power" over the Nation. This is no less the case if Congress ties its power to the Necessary and Proper Clause rather than the Commerce Clause. When agents from the Drug Enforcement Administration raided Monson's home, they seized six cannabis plants. If the Federal Government can regulate growing a half-dozen cannabis plants for personal consumption (not because it is interstate commerce, but because it is inextricably bound up with interstate commerce), then Congress' Article I powers — as expanded by the Necessary and Proper Clause — have no meaningful limits. . . .

Even if Congress may regulate purely intrastate activity when essential to exercising some enumerated power, see *United States v. Dewitt* (1870); but see Barnett, The Original Meaning of the Necessary and Proper Clause, 6 U. Pa. J. Const. L. 183, 186 (2003) (detailing statements by Founders that the Necessary and Proper Clause was not intended to expand the scope of Congress' enumerated powers), Congress may not use its incidental authority to subvert basic principles of federalism and dual sovereignty.

Here, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens. Further, the Government's rationale — that it may regulate the production or possession of any commodity for which there is an interstate market — threatens to remove the remaining vestiges of States' traditional police powers. This would convert the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a "pretext . . . for the accomplishment of objects not intrusted to the government."

II

. . . The majority holds that Congress may regulate intrastate cultivation and possession of medical marijuana under the Commerce Clause, because such conduct arguably has a substantial effect on interstate commerce. The majority's decision is further proof that the "substantial effects" test is a "rootless and malleable standard" at odds with the constitutional design. *Morrison* (Thomas, J., concurring).

The majority's treatment of the substantial effects test is rootless, because it is not tethered to either the Commerce Clause or the Necessary and Proper Clause. Under the Commerce Clause, Congress may regulate interstate commerce, not activities that substantially affect interstate commerce — any more than Congress may regulate activities that do not fall within, but that affect, the subjects of its other Article I powers. Whatever additional latitude the Necessary and Proper Clause affords, the question is whether Congress' legislation is essential to the regulation of interstate commerce itself — not whether the legislation extends only to economic activities that substantially affect interstate commerce.

The majority's treatment of the substantial effects test is malleable, because the majority expands the relevant conduct. By defining the class at a high level of generality (as the intrastate manufacture and possession of marijuana), the majority overlooks that individuals authorized by state law to manufacture and possess medical marijuana exert no demonstrable effect on the interstate drug market. The majority ignores that whether

a particular activity substantially affects interstate commerce — and thus comes within Congress' reach on the majority's approach — can turn on a number of objective factors, like state action or features of the regulated activity itself. For instance, here, if California and other States are effectively regulating medical marijuana users, then these users have little effect on the interstate drug trade. . . .

This Court has never held that Congress can regulate noneconomic activity that substantially affects interstate commerce. To evade even that modest restriction on federal power, the majority defines economic activity in the broadest possible terms as "the production, distribution, and consumption of commodities."[7] This carves out a vast swath of activities that are subject to federal regulation. If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison's assurance to the people of New York that the "powers delegated" to the Federal Government are "few and defined," while those of the States are "numerous and indefinite." *Federalist No. 45.*

Moreover, even a Court interested more in the modern than the original understanding of the Constitution ought to resolve cases based on the meaning of words that are actually in the document. Congress is authorized to regulate "Commerce," and respondents' conduct does not qualify under any definition of that term.[8] The majority's opinion only illustrates the steady drift away from the text of the Commerce Clause. There is an inexorable expansion from "commerce," to "commercial" and "economic" activity, and finally to all "production, distribution, and consumption" of goods or services for which there is an "established . . . interstate market." Federal power expands, but never contracts, with each new locution. The majority is not interpreting the Commerce Clause, but rewriting it.

The majority's rewriting of the Commerce Clause seems to be rooted in the belief that, unless the Commerce Clause covers the entire web of human activity, Congress will be left powerless to regulate the national economy effectively. The interconnectedness of economic activity is not a modern phenomenon unfamiliar to the Framers. Moreover, the Framers understood what the majority does not appear to fully appreciate: There is a danger to concentrating too much, as well as too little, power in the Federal Government. This Court has carefully avoided stripping Congress of its ability to regulate *inter*state commerce, but it has casually allowed the Federal Government to strip States of their ability to regulate *intra*state commerce — not to mention a host of local activities, like mere drug possession, that are not commercial. . . .

---

[7] Other dictionaries do not define the term "economic" as broadly as the majority does. See, e.g., The American Heritage Dictionary of the English Language 583 (3d ed. 1992) (defining "economic" as "[o]f or relating to the production, development, and management of *material wealth*, as of a country, household, or business enterprise" (emphasis added)). The majority does not explain why it selects a remarkably expansive 40-year-old definition.

[8] See, e.g., *id.*, at 380 ("[t]he buying and selling of goods, especially on a large scale, as between cities or nations"); The Random House Dictionary of the English Language 411 (2d ed. 1987) ("an interchange of goods or commodities, esp. on a large scale between different countries . . . or between different parts of the same country"); Webster's 3d 456 ("the exchange or buying and selling of commodities esp. on a large scale and involving transportation from place to place").

[T]oday's decision will add no measure of stability to our Commerce Clause jurisprudence: This Court is willing neither to enforce limits on federal power, nor to declare the Tenth Amendment a dead letter. If stability is possible, it is only by discarding the stand-alone substantial effects test and revisiting our definition of "Commerce among the several States." Congress may regulate interstate commerce — not things that affect it, even when summed together, unless truly "necessary and proper" to regulating interstate commerce. . . .

The majority prevents States like California from devising drug policies that they have concluded provide much-needed respite to the seriously ill. It does so without any serious inquiry into the necessity for federal regulation or the propriety of "displac[ing] state regulation in areas of traditional state concern," *Lopez* (Kennedy, J., concurring). The majority's rush to embrace federal power "is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union." *United States v. Oakland Cannabis Buyers' Cooperative* (2001) (Stevens, J., concurring in judgment). Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens. I would affirm the judgment of the Court of Appeals.

I respectfully dissent.

F. THE ROBERTS COURT

The Roberts Court (2010-2016). Seated, from left to right: Justices Clarence Thomas and Antonin Scalia, Chief Justice John G. Roberts, Jr., and Justices Anthony M. Kennedy and Ruth Bader Ginsburg. Standing, from left to right: Justices Sonia Sotomayor, Steven G. Breyer, Samuel A. Alito, and Elena Kagan.

ASSIGNMENT 7

1. The Commerce and Necessary and Proper Clauses

In 2010, Congress passed the Patient Protection and Affordable Care Act (ACA). The ACA, also known as Obamacare, regulated the private health insurance marketplace. Through the so-called individual mandate, the ACA *required* most Americans to maintain health insurance. Additionally, the law required states to make more low-income people eligible for Medicaid, a state-run insurance program. States that refused to expand their Medicaid programs would lose all the funding they were receiving for their existing Medicaid program, which was billions of dollars. The attorneys general of twenty-six states and the National Federation of Independent Business (NFIB) challenged the ACA's constitutionality.

Chief Justice John G. Roberts, Jr.

In March 2012, the Supreme Court heard more than six hours of oral argument spread over three days. This schedule was exceptional. Since the late twentieth century, oral arguments have been strictly limited to one hour. By way of comparison, the Court granted four hours of oral argument to consider the constitutionality of the McCain-Feingold campaign finance law. But it had been nearly five decades since the Court had heard as many as six hours.

The Court would consider the scope of three of Congress's enumerated powers in Article I, Section 8: the Commerce Clause, the Necessary and Proper Clause, and the taxing power from which the spending power is inferred. Since the New Deal, Congress had relied on these powers to enact the bulk of federal legislation.

This case presented a choice between two competing visions of how federal powers have expanded since the New Deal. First, did Article I give Congress the power to regulate, in its discretion, any aspect of the "national economy"? That is, could Congress address any problem that can be deemed "national" in scope, subject only to the express (or "external") limits in other parts of the Constitution? Or second, did the Constitution only allow Congress to regulate the sorts of activities identified by the New Deal cases? Did these decisions represent the "high water mark" of congressional power? Under this latter perspective, any new expansion of federal power requires a serious justification. And that justification cannot provide the basis of a limitless national police power.

Paul Clement argued *NFIB v. Sebelius* on behalf of twenty-six states before the Supreme Court. Seven years earlier, as solicitor general, Clement defended the government in *Gonzales v. Raich*. Randy Barnett, who represented Angel Raich, was one of the lawyers who represented the NFIB.

We begin our study of *NFIB v. Sebelius* with the Court's treatment of the Commerce and Necessary and Proper Clauses, as well as the taxing power.

STUDY GUIDE

1. Which vision of the New Deal is adopted by a majority of the Justices in *NFIB v. Sebelius*?
2. How does Chief Justice Roberts's analysis of the Commerce and Necessary and Proper Clauses fit with *Lopez, Morrison*, and *Raich*?
3. In *McCulloch v. Maryland*, Chief Justice Marshall drew a distinction between "incidental powers" and "great substantive and independent power[s]." This distinction was generally neglected until Chief Justice Roberts relied on this framework in *NFIB*. How does this distinction operate when Congress relies on its powers under the Necessary and Proper Clause? Is there a difference between "regulating" commerce and requiring that people engage in economic activity with a private company?
4. Did the parties contest whether the individual mandate was "necessary"? If not, what exactly did Chief Justice Roberts think was "improper" about the requirement to purchase insurance? Did the parties in *Raich* contest the necessity or the propriety of applying the Controlled Substances Act to the activity permitted by California law?
5. Two cable news networks announced that the ACA had been declared unconstitutional when their reporters quickly read the slip opinion. Why do you think they made this error? How and where did Chief Justice Roberts pivot to reach a different result?
6. What does the Chief Justice mean by a "saving construction"? How does the "saving construction" affect his analysis? In the end, did he uphold or declare unconstitutional the individual insurance mandate?
7. What was the holding or holdings of the case? Which portions of the Chief Justice's opinion were joined by four (or more) other Justices? What do those portions say about the holding of the case? Would Justice Ginsburg and those who joined her feel bound by the limits set out in *Lopez* in a future case?
8. The Court held that the individual mandate was unconstitutional under the Commerce and Necessary and Proper Clauses. Did Chief Justice Roberts rule that Congress could have enacted it under its taxing power?
9. It is commonly claimed that the Chief Justice found the individual insurance mandate to be constitutional as a tax on going uninsured. Your authors disagree.

NFIB v. Sebelius

567 U.S. 519 (2012)

Video on CasebookConnect.com

Chief Justice Roberts announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and III-C . . . and an opinion with respect to Parts III-A, III-B, and III-D.

Today we resolve constitutional challenges to two provisions of the Patient Protection and Affordable Care Act of 2010: the individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage; and the Medicaid expansion, which gives funds to the States on the condition that they provide specified health care to all citizens whose income falls below a certain threshold. We do not consider whether the Act embodies sound policies. That judgment is entrusted to the Nation's elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.

In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder. Nearly two centuries ago, Chief Justice Marshall observed that "the question respecting the extent of the powers actually granted" to the Federal Government "is perpetually arising, and will probably continue to arise, as long as our system shall exist." *McCulloch v. Maryland* (1819). In this case we must again determine whether the Constitution grants Congress powers it now asserts, but which many States and individuals believe it does not possess. Resolving this controversy requires us to examine both the limits of the Government's power, and our own limited role in policing those boundaries.

The Federal Government "is acknowledged by all to be one of enumerated powers." *Ibid*. That is, rather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers. Congress may, for example, "coin Money," "establish Post Offices," and "raise and support Armies." Art. I, §8, cls. 5, 7, 12. The enumeration of powers is also a limitation of powers, because "[t]he enumeration presupposes something not enumerated." *Gibbons v. Ogden* (1824). The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government "can exercise only the powers granted to it." *McCulloch*.

Today, the restrictions on government power foremost in many Americans' minds are likely to be affirmative prohibitions, such as contained in the Bill of Rights. These affirmative prohibitions come into play, however, only where the Government possesses authority to act in the first place. If no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution.

Indeed, the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government. As Alexander Hamilton put it, "the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS." *Federalist No. 84*. And when the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: "The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions. See, e.g., *United States v. Comstock* (2010).

The same does not apply to the States, because the Constitution is not the source of their power. The Constitution may restrict state governments — as it does, for example, by forbidding them to deny any person the equal protection of the laws. But where such prohibitions do not apply, state governments do not need constitutional authorization

to act. The States thus can and do perform many of the vital functions of modern government — punishing street crime, running public schools, and zoning property for development, to name but a few — even though the Constitution's text does not authorize any government to do so. Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power." See, e.g., *United States v. Morrison* (2000).

"State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States* (1992). Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which "in the ordinary course of affairs, concern the lives, liberties, and properties of the people" were held by governments more local and more accountable than a distant federal bureaucracy. *Federalist No. 45* (J. Madison). The independent power of the States also serves as a check on the power of the Federal Government: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond v. United States* (2011).

This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power. The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, §8, cl. 3. Our precedents read that to mean that Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *Morrison*. The power over activities that substantially affect interstate commerce can be expansive. That power has been held to authorize federal regulation of such seemingly local matters as a farmer's decision to grow wheat for himself and his livestock, and a loan shark's extortionate collections from a neighborhood butcher shop. See *Wickard v. Filburn* (1942); *Perez v. United States* (1971).

Congress may also "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const., Art. I, §8, cl. 1. Put simply, Congress may tax and spend. This grant gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control. See, e.g., *License Tax Cases* (1867). And in exercising its spending power, Congress may offer funds to the States, and may condition those offers on compliance with specified conditions. See, e.g., *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.* (1999). These offers may well induce the States to adopt policies that the Federal Government itself could not impose. See, e.g., *South Dakota v. Dole* (1987) (conditioning federal highway funds on States raising their drinking age to 21).

The reach of the Federal Government's enumerated powers is broader still because the Constitution authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Art. I, §8, cl. 18. We have long read this provision to give Congress great latitude in exercising its powers: "Let the

end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch.*

Our permissive reading of these powers is explained in part by a general reticence to invalidate the acts of the Nation's elected leaders. "Proper respect for a co-ordinate branch of the government" requires that we strike down an Act of Congress only if "the lack of constitutional authority to pass [the] act in question is clearly demonstrated." *United States v. Harris* (1883). Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation's elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.

Our deference in matters of policy cannot, however, become abdication in matters of law. "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison* (1803). Our respect for Congress's policy judgments thus can never extend so far as to disavow restraints on federal power that the Constitution carefully constructed. "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." Chief Justice John Marshall, A Friend of the Constitution No. V, *Alexandria Gazette*, July 5, 1819. And there can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits. *Marbury*.

The questions before us must be considered against the background of these basic principles.

I

In 2010, Congress enacted the Patient Protection and Affordable Care Act. The Act aims to increase the number of Americans covered by health insurance and decrease the cost of health care. The Act's 10 titles stretch over 900 pages and contain hundreds of provisions. This case concerns constitutional challenges to two key provisions, commonly referred to as the individual mandate and the Medicaid expansion. The individual mandate requires most Americans to maintain "minimum essential" health insurance coverage. 26 U.S.C. §5000A. The mandate does not apply to some individuals, such as prisoners and undocumented aliens. Many individuals will receive the required coverage through their employer, or from a government program such as Medicaid or Medicare. But for individuals who are not exempt and do not receive health insurance through a third party, the means of satisfying the requirement is to purchase insurance from a private company. Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. That payment, which the Act describes as a "penalty," is calculated as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance. In 2016, for example, the penalty will be 2.5 percent of an individual's household income, but no less than $695 and no more than the average yearly premium for insurance that

covers 60 percent of the cost of 10 specified services (e.g., prescription drugs and hospitalization). The Act provides that the penalty will be paid to the Internal Revenue Service with an individual's taxes, and "shall be assessed and collected in the same manner" as tax penalties, such as the penalty for claiming too large an income tax refund. The Act, however, bars the IRS from using several of its normal enforcement tools, such as criminal prosecutions and levies. And some individuals who are subject to the mandate are nonetheless exempt from the penalty — for example, those with income below a certain threshold and members of Indian tribes.

On the day the President signed the Act into law, Florida and 12 other States filed a complaint in the Federal District Court for the Northern District of Florida. Those plaintiffs — who are both respondents and petitioners here, depending on the issue — were subsequently joined by 13 more States, several individuals, and the National Federation of Independent Business. The plaintiffs alleged, among other things, that the individual mandate provisions of the Act exceeded Congress's powers under Article I of the Constitution. . . .

The second provision of the Affordable Care Act directly challenged here is the Medicaid expansion. Enacted in 1965, Medicaid offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. In order to receive that funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost. By 1982 every State had chosen to participate in Medicaid. Federal funds received through the Medicaid program have become a substantial part of state budgets, now constituting over 10 percent of most States' total revenue.

The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover. For example, the Act requires state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. The Act increases federal funding to cover the States' costs in expanding Medicaid coverage, although States will bear a portion of the costs on their own. If a State does not comply with the Act's new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds. . . .

III

The Government advances two theories for the proposition that Congress had constitutional authority to enact the individual mandate. First, the Government argues that Congress had the power to enact the mandate under the Commerce Clause. Under that theory, Congress may order individuals to buy health insurance because the failure to do so affects interstate commerce, and could undercut the Affordable Care Act's other reforms. Second, the Government argues that if the commerce power does not support the mandate, we should nonetheless uphold it as an exercise of Congress's power to tax. According to the Government, even if Congress lacks the power to direct individuals to buy insurance, the only effect of the individual mandate is to raise taxes on those who do not do so, and thus the law may be upheld as a tax.

A

The Government's first argument is that the individual mandate is a valid exercise of Congress's power under the Commerce Clause and the Necessary and Proper Clause. According to the Government, the health care market is characterized by a significant cost-shifting problem. Everyone will eventually need health care at a time and to an extent they cannot predict, but if they do not have insurance, they often will not be able to pay for it. Because state and federal laws nonetheless require hospitals to provide a certain degree of care to individuals without regard to their ability to pay, hospitals end up receiving compensation for only a portion of the services they provide. To recoup the losses, hospitals pass on the cost to insurers through higher rates, and insurers, in turn, pass on the cost to policy holders in the form of higher premiums. Congress estimated that the cost of uncompensated care raises family health insurance premiums, on average, by over $1,000 per year. In the Affordable Care Act, Congress addressed the problem of those who cannot obtain insurance coverage because of preexisting conditions or other health issues. It did so through the Act's "guaranteed-issue" and "community-rating" provisions. These provisions together prohibit insurance companies from denying coverage to those with such conditions or charging unhealthy individuals higher premiums than healthy individuals. The guaranteed-issue and community-rating reforms do not, however, address the issue of healthy individuals who choose not to purchase insurance to cover potential health care needs. In fact, the reforms sharply exacerbate that problem, by providing an incentive for individuals to delay purchasing health insurance until they become sick, relying on the promise of guaranteed and affordable coverage.

The reforms also threaten to impose massive new costs on insurers, who are required to accept unhealthy individuals but prohibited from charging them rates necessary to pay for their coverage. This will lead insurers to significantly increase premiums on everyone.

The individual mandate was Congress's solution to these problems. By requiring that individuals purchase health insurance, the mandate prevents cost-shifting by those who would otherwise go without it. In addition, the mandate forces into the insurance risk pool more healthy individuals, whose premiums on average will be higher than their health care expenses. This allows insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept. The Government claims that Congress has power under the Commerce and Necessary and Proper Clauses to enact this solution.

1

The Government contends that the individual mandate is within Congress's power because the failure to purchase insurance "has a substantial and deleterious effect on interstate commerce" by creating the cost-shifting problem. The path of our Commerce Clause decisions has not always run smooth, see *United States v. Lopez* (1995), but it is now well established that Congress has broad authority under the Clause. We have recognized, for example, that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states," but extends to activities that "have a substantial effect on interstate commerce." *United States v. Darby* (1941). Congress's power, moreover, is not limited to regulation of an activity that by itself substantially

affects interstate commerce, but also extends to activities that do so only when aggregated with similar activities of others. See *Wickard*.

Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product. Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes "the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" for Congress's action. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.* (2010). At the very least, we should "pause to consider the implications of the Government's arguments" when confronted with such new conceptions of federal power. *Lopez*.

The Constitution grants Congress the power to "*regulate* Commerce." Art. I, §8, cl. 3 (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to "regulate" something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to "coin Money," in addition to the power to "regulate the Value thereof." And it gives Congress the power to "raise and support Armies" and to "provide and maintain a Navy," in addition to the power to "make Rules for the Government and Regulation of the land and naval Forces." If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated. See *Gibbons* ("[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said").

Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching "activity." It is nearly impossible to avoid the word when quoting them. See, e.g., *Lopez* ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained"); *Perez* ("Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class" (emphasis in original)); *Wickard* ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce"); *Jones & Laughlin Steel* ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control").

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide

not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could potentially make within the scope of federal regulation, and — under the Government's theory — empower Congress to make those decisions for him.

Applying the Government's logic to the familiar case of *Wickard v. Filburn* shows how far that logic would carry us from the notion of a government of limited powers. In *Wickard*, the Court famously upheld a federal penalty imposed on a farmer for growing wheat for consumption on his own farm. That amount of wheat caused the farmer to exceed his quota under a program designed to support the price of wheat by limiting supply. The Court rejected the farmer's argument that growing wheat for home consumption was beyond the reach of the commerce power. It did so on the ground that the farmer's decision to grow wheat for his own use allowed him to avoid purchasing wheat in the market. That decision, when considered in the aggregate along with similar decisions of others, would have had a substantial effect on the interstate market for wheat.

Wickard has long been regarded as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, but the Government's theory in this case would go much further. Under *Wickard* it is within Congress's power to regulate the market for wheat by supporting its price. But price can be supported by increasing demand as well as by decreasing supply. The aggregated decisions of some consumers not to purchase wheat have a substantial effect on the price of wheat, just as decisions not to purchase health insurance have on the price of insurance. Congress can therefore command that those not buying wheat do so, just as it argues here that it may command that those not buying health insurance do so. The farmer in *Wickard* was at least actively engaged in the production of wheat, and the Government could regulate that activity because of its effect on commerce. The Government's theory here would effectively override that limitation, by establishing that individuals may be regulated under the Commerce Clause whenever enough of them are not doing something the Government would have them do.

Indeed, the Government's logic would justify a mandatory purchase to solve almost any problem. To consider a different example in the health care market, many Americans do not eat a balanced diet. That group makes up a larger percentage of the total population than those without health insurance. The failure of that group to have a healthy diet increases health care costs, to a greater extent than the failure of the uninsured to purchase insurance. Those increased costs are borne in part by other Americans who must pay more, just as the uninsured shift costs to the insured. Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables.

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures — joined with the similar failures of others — can readily have a substantial effect on interstate commerce. Under the Government's logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

That is not the country the Framers of our Constitution envisioned. James Madison explained that the Commerce Clause was "an addition which few oppose and from which no apprehensions are entertained." *Federalist No. 45*. While Congress's authority under

the Commerce Clause has of course expanded with the growth of the national economy, our cases have "always recognized that the power to regulate commerce, though broad indeed, has limits." *Maryland v. Wirtz* (1968). The Government's theory would erode those limits, permitting Congress to reach beyond the natural extent of its authority, "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." *Federalist No. 48* (J. Madison). Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.

To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were "practical statesmen," not metaphysical philosophers. Industrial Union Dept., AFL-CIO v. American Petroleum Institute (1980) (Rehnquist, J., concurring in judgment). . . . The Framers gave Congress the power to *regulate* commerce, not to *compel* it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that understanding now. . . . The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to "regulate Commerce."

2

The Government next contends that Congress has the power under the Necessary and Proper Clause to enact the individual mandate because the mandate is an "integral part of a comprehensive scheme of economic regulation"—the guaranteed-issue and community-rating insurance reforms. Under this argument, it is not necessary to consider the effect that an individual's inactivity may have on interstate commerce; It is enough that Congress regulate commercial activity in a way that requires regulation of inactivity to be effective.

The power to "make all Laws which shall be necessary and proper for carrying into Execution" the powers enumerated in the Constitution, vests Congress with authority to enact provisions "incidental to the [enumerated] power, and conducive to its beneficial exercise," *McCulloch*. Although the Clause gives Congress authority to "legislate on that vast mass of incidental powers which must be involved in the constitution," it does not license the exercise of any "great substantive and independent power[s]" beyond those specifically enumerated. *Id*. Instead, the Clause is " 'merely a declaration, for the removal of all uncertainty, that the means of carrying into execution those [powers] otherwise granted are included in the grant.' " *Kinsella v. United States ex rel. Singleton* (1960) (quoting James Madison).

As our jurisprudence under the Necessary and Proper Clause has developed, we have been very deferential to Congress's determination that a regulation is "necessary." We have thus upheld laws that are " 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.' " *Comstock*. But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not "consist[ent] with the letter and spirit

of the constitution," *McCulloch*, are not "*proper* [means] for carrying into Execution" Congress's enumerated powers. Rather, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.'" *Printz v. United States* (1997) (quoting *Federalist No. 33* (A. Hamilton)); see also *New York*; *Comstock* (Kennedy, J., concurring in judgment) ("It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause. . .").

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derivative of, and in service to, a granted power. For example, we have upheld provisions permitting continued confinement of those *already in federal custody* when they could not be safely released, *Comstock*; criminalizing bribes involving organizations *receiving federal funds*, *Sabri v. United States* (2004); and tolling state statutes of limitations while cases are *pending in federal court*, *Jinks v. Richland County* (2003). The individual mandate, by contrast, vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.

This is in no way an authority that is "narrow in scope," *Comstock*, or "incidental" to the exercise of the commerce power, *McCulloch*. Rather, such a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it. Even if the individual mandate is "necessary" to the Act's insurance reforms, such an expansion of federal power is not a "proper" means for making those reforms effective.

The Government relies primarily on our decision in *Gonzales v. Raich*. In *Raich*, we considered "comprehensive legislation to regulate the interstate market" in marijuana. Certain individuals sought an exemption from that regulation on the ground that they engaged in only intrastate possession and consumption. We denied any exemption, on the ground that marijuana is a fungible commodity, so that any marijuana could be readily diverted into the interstate market. Congress's attempt to regulate the interstate market for marijuana would therefore have been substantially undercut if it could not also regulate intrastate possession and consumption. Accordingly, we recognized that "Congress was acting well within its authority" under the Necessary and Proper Clause even though its "regulation ensnare[d] some purely intrastate activity." *Raich* thus did not involve the exercise of any "great substantive and independent power," *McCulloch*, of the sort at issue here. Instead, it concerned only the constitutionality of "individual *applications* of a concededly valid statutory scheme." *Raich* (emphasis added).

Just as the individual mandate cannot be sustained as a law regulating the substantial effects of the failure to purchase health insurance, neither can it be upheld as a "necessary and proper" component of the insurance reforms. The commerce power thus does not authorize the mandate.

B

That is not the end of the matter. Because the Commerce Clause does not support the individual mandate, it is necessary to turn to the Government's second argument: that the mandate may be upheld as within Congress's enumerated power to "lay and collect Taxes." Art. I, §8, cl. 1.

The Government's tax power argument asks us to view the statute differently than we did in considering its commerce power theory. In making its Commerce Clause argument, the Government defended the mandate as a regulation requiring individuals to purchase health insurance. The Government does not claim that the taxing power allows Congress to issue such a command. Instead, the Government asks us to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product.

The text of a statute can sometimes have more than one possible meaning. To take a familiar example, a law that reads "no vehicles in the park" might, or might not, ban bicycles in the park. And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so. Justice Story said that 180 years ago: "No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution." *Parsons v. Bedford* (1830). Justice Holmes made the same point a century later: "[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." *Blodgett v. Holden* (1927) (concurring opinion).

The most straightforward reading of the mandate is that it commands individuals to purchase insurance. After all, it states that individuals "shall" maintain health insurance. Congress thought it could enact such a command under the Commerce Clause, and the Government primarily defended the law on that basis. But, for the reasons explained above, the Commerce Clause does not give Congress that power. Under our precedent, it is therefore necessary to ask whether the Government's alternative reading of the statute — that it only imposes a tax on those without insurance — is a reasonable one.

Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes. That, according to the Government, means the mandate can be regarded as establishing a condition — not owning health insurance — that triggers a tax — the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax.

The question is not whether that is the most natural interpretation of the mandate, but only whether it is a "fairly possible" one. *Crowell v. Benson* (1932). As we have explained, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California* (1895). The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the Constitution.

Granting the Act the full measure of deference owed to federal statutes, it can be so read, for the reasons set forth below.

C

The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The "[s]hared responsibility payment," as the statute entitles it, is paid into the Treasury by "taxpayer[s]" when they file their tax returns. It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which — as we previously explained — must assess and collect it "in the same manner as taxes." This process yields the essential feature of any tax: it produces at least some revenue for the Government. Indeed, the payment is expected to raise about $4 billion per year by 2017. It is of course true that the Act describes the payment as a "penalty," not a "tax." But . . . that label . . . does not determine whether the payment may be viewed as an exercise of Congress's taxing power. . . .

We have . . . held that exactions not labeled taxes nonetheless were authorized by Congress's power to tax. In the *License Tax Cases*, for example, we held that federal licenses to sell liquor and lottery tickets — for which the licensee had to pay a fee — could be sustained as exercises of the taxing power. And in *New York v. United States* we upheld as a tax a "surcharge" on out-of-state nuclear waste shipments, a portion of which was paid to the Federal Treasury. We thus ask whether the shared responsibility payment falls within Congress's taxing power, "[d]isregarding the designation of the exaction, and viewing its substance and application." *United States v. Constantine* (1935).

Our cases confirm this functional approach. For example, in *Bailey v. Drexel Furniture* (1922), we focused on three practical characteristics of the so-called tax on employing child laborers that convinced us the "tax" was actually a penalty. First, the tax imposed an exceedingly heavy burden — 10 percent of a company's net income — on those who employed children, no matter how small their infraction. Second, it imposed that exaction only on those who knowingly employed underage laborers. Such scienter requirements are typical of punitive statutes, because Congress often wishes to punish only those who intentionally break the law. Third, this "tax" was enforced in part by the Department of Labor, an agency responsible for punishing violations of labor laws, not collecting revenue.

The same analysis here suggests that the shared responsibility payment may for constitutional purposes be considered a tax, not a penalty: First, for most Americans the amount due will be far less than the price of insurance, and, by statute, it can never be more. It may often be a reasonable financial decision to make the payment rather than purchase insurance, unlike the "prohibitory" financial punishment in *Drexel Furniture*. Second, the individual mandate contains no scienter requirement. Third, the payment is collected solely by the IRS through the normal means of taxation — except that the Service is *not* allowed to use those means most suggestive of a punitive sanction, such as criminal prosecution. The reasons the Court in *Drexel Furniture* held that what was

called a "tax" there was a penalty support the conclusion that what is called a "penalty" here may be viewed as a tax.[9]

None of this is to say that the payment is not intended to affect individual conduct. Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new. Some of our earliest federal taxes sought to deter the purchase of imported manufactured goods in order to foster the growth of domestic industry. Today, federal and state taxes can compose more than half the retail price of cigarettes, not just to raise more money, but to encourage people to quit smoking. And we have upheld such obviously regulatory measures as taxes on selling marijuana and sawed-off shotguns. See *United States v. Sanchez* (1950); *Sonzinsky v. United States* (1937). Indeed, "[e]very tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky*. That §5000A seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.

In distinguishing penalties from taxes, this Court has explained that "if the concept of penalty means anything, it means punishment for an unlawful act or omission." *United States v. Reorganized CF&I Fabricators of Utah, Inc.* (1996); see also *United States v. La Franca* (1931) ("[A] penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act"). While the individual mandate clearly aims to induce the purchase of health insurance, it need not be read to declare that failing to do so is unlawful. Neither the Act nor any other law attaches negative legal consequences to not buying health insurance, beyond requiring a payment to the IRS. The Government agrees with that reading, confirming that if someone chooses to pay rather than obtain health insurance, they have fully complied with the law.

Indeed, it is estimated that four million people each year will choose to pay the IRS rather than buy insurance. We would expect Congress to be troubled by that prospect if such conduct were unlawful. That Congress apparently regards such extensive failure to comply with the mandate as tolerable suggests that Congress did not think it was creating four million outlaws. It suggests instead that the shared responsibility payment merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance. . . .

The joint dissenters argue that we cannot uphold §5000A as a tax because Congress did not "frame" it as such. In effect, they contend that even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels. An example may help illustrate why labels should not control here. Suppose Congress enacted a statute providing that every taxpayer who owns a house without energy efficient windows must pay $50 to the IRS. The amount due is adjusted based on factors such as taxable income and joint filing status,

[9] We do not suggest that any exaction lacking a scienter requirement and enforced by the IRS is within the taxing power. See (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). Congress could not, for example, expand its authority to impose criminal fines by creating strict liability offenses enforced by the IRS rather than the FBI. But the fact the exaction here is paid like a tax, to the agency that collects taxes — rather than, for example, exacted by Department of Labor inspectors after ferreting out willful malfeasance — suggests that this exaction may be viewed as a tax.

and is paid along with the taxpayer's income tax return. Those whose income is below the filing threshold need not pay. The required payment is not called a "tax," a "penalty," or anything else. No one would doubt that this law imposed a tax, and was within Congress's power to tax. That conclusion should not change simply because Congress used the word "penalty" to describe the payment. Interpreting such a law to be a tax would hardly "[i]mpos[e] a tax through judicial legislation." Rather, it would give practical effect to the Legislature's enactment.

Our precedent demonstrates that Congress had the power to impose the exaction in §5000A under the taxing power, and that §5000A need not be read to do more than impose a tax. That is sufficient to sustain it. The "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.* (1948).

Even if the taxing power enables Congress to impose a tax on not obtaining health insurance, any tax must still comply with other requirements in the Constitution. Plaintiffs argue that the shared responsibility payment does not do so, citing Article I, §9, clause 4. That clause provides: "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." This requirement means that any "direct Tax" must be apportioned so that each State pays in proportion to its population. According to the plaintiffs, if the individual mandate imposes a tax, it is a direct tax, and it is unconstitutional because Congress made no effort to apportion it among the States.

Even when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a "head tax" or a "poll tax"), might be a direct tax. Soon after the framing, Congress passed a tax on ownership of carriages, over James Madison's objection that it was an unapportioned direct tax. This Court upheld the tax, in part reasoning that apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State. See *Hylton v. United States* (1796) (opinion of Chase, J.). The Court was unanimous, and those Justices who wrote opinions either directly asserted or strongly suggested that only two forms of taxation were direct: capitations and land taxes.

That narrow view of what a direct tax might be persisted for a century. . . .

There may, however, be a more fundamental objection to a tax on those who lack health insurance. Even if only a tax, the payment under §5000A(b) remains a burden that the Federal Government imposes for an omission, not an act. If it is troubling to interpret the Commerce Clause as authorizing Congress to regulate those who abstain from commerce, perhaps it should be similarly troubling to permit Congress to impose a tax for not doing something.

Three considerations allay this concern. First, and most importantly, it is abundantly clear the Constitution does not guarantee that individuals may avoid taxation through inactivity. A capitation, after all, is a tax that everyone must pay simply for existing, and capitations are expressly contemplated by the Constitution. The Court today holds that our Constitution protects us from federal regulation under the Commerce Clause so long as we abstain from the regulated activity. But from its creation, the Constitution has made no such promise with respect to taxes. See Letter from Benjamin Franklin to M. Le Roy (Nov. 13, 1789) ("Our new Constitution is now established . . . but in this world nothing can be said to be certain, except death and taxes").

Whether the mandate can be upheld under the Commerce Clause is a question about the scope of federal authority. Its answer depends on whether Congress can exercise what all acknowledge to be the novel course of directing individuals to purchase insurance. Congress's use of the Taxing Clause to encourage buying something is, by contrast, not new. Tax incentives already promote, for example, purchasing homes and professional educations. Sustaining the mandate as a tax depends only on whether Congress has properly exercised its taxing power to encourage purchasing health insurance, not whether it can. Upholding the individual mandate under the Taxing Clause thus does not recognize any new federal power. It determines that Congress has used an existing one.

Second, Congress's ability to use its taxing power to influence conduct is not without limits. A few of our cases policed these limits aggressively, invalidating punitive exactions obviously designed to regulate behavior otherwise regarded at the time as beyond federal authority. See, e.g., *United States v. Butler* (1936); *Drexel Furniture*. More often and more recently we have declined to closely examine the regulatory motive or effect of revenue-raising measures. We have nonetheless maintained that " 'there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment.' " *Kurth Ranch* (quoting *Drexel Furniture*).

We have already explained that the shared responsibility payment's practical characteristics pass muster as a tax under our narrowest interpretations of the taxing power. Because the tax at hand is within even those strict limits, we need not here decide the precise point at which an exaction becomes so punitive that the taxing power does not authorize it. It remains true, however, that the " 'power to tax is not the power to destroy while this Court sits.' " *Oklahoma Tax Comm'n v. Texas Co.* (1949) (quoting *Panhandle Oil Co. v. Mississippi ex rel. Knox* (1928) (Holmes, J., dissenting)).

Third, although the breadth of Congress's power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs. An individual who disobeys may be subjected to criminal sanctions. Those sanctions can include not only fines and imprisonment, but all the attendant consequences of being branded a criminal: deprivation of otherwise protected civil rights, such as the right to bear arms or vote in elections; loss of employment opportunities; social stigma; and severe disabilities in other controversies, such as custody or immigration disputes.

By contrast, Congress's authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. If a tax is properly paid, the Government has no power to compel or punish individuals subject to it. We do not make light of the severe burden that taxation — especially taxation motivated by a regulatory purpose — can impose. But imposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.

The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness. . . .

D

Justice Ginsburg questions the necessity of rejecting the Government's commerce power argument, given that §5000A can be upheld under the taxing power. But the statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question. And it is only because we have a duty to construe a statute to save it, if fairly possible, that §5000A can be interpreted as a tax. Without deciding the Commerce Clause question, I would find no basis to adopt such a saving construction. The Federal Government does not have the power to order people to buy health insurance. Section 5000A would therefore be unconstitutional if read as a command. The Federal Government does have the power to impose a tax on those without health insurance. Section 5000A is therefore constitutional, because it can reasonably be read as a tax. . . .

* * *

The Affordable Care Act is constitutional in part and unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it. In this case, however, it is reasonable to construe what Congress has done as increasing taxes on those who have a certain amount of income, but choose to go without health insurance. Such legislation is within Congress's power to tax. [The Court's treatment of the Medicaid expansion appears below. — Eds.]

The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits. The Court does so today. But the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved to the people.

The judgment of the Court of Appeals for the Eleventh Circuit is affirmed in part and reversed in part.

It is so ordered.

Justice Ginsburg, with whom Justice Sotomayor joins, and with whom Justice Breyer and Justice Kagan join as to Parts I, II, III, and IV, concurring in part, concurring in the judgment in part, and dissenting in part. . . .

Unlike The Chief Justice, . . . I would hold, alternatively, that the Commerce Clause authorizes Congress to enact the minimum coverage provision. I would also hold that the Spending Clause permits the Medicaid expansion exactly as Congress enacted it.

I

The provision of health care is today a concern of national dimension, just as the provision of old-age and survivors' benefits was in the 1930's. In the Social Security Act, Congress installed a federal system to provide monthly benefits to retired wage earners and, eventually, to their survivors. Beyond question, Congress could have adopted a similar scheme for health care. Congress chose, instead, to preserve a central role for private insurers and state governments. According to The Chief Justice, the Commerce Clause

does not permit that preservation. This rigid reading of the Clause makes scant sense and is stunningly retrogressive. Since 1937, our precedent has recognized Congress' large authority to set the Nation's course in the economic and social welfare realm. See *United States v. Darby* (1941) (overruling *Hammer v. Dagenhart* (1918), and recognizing that "regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause"); *NLRB v. Jones & Laughlin Steel Corp.* (1937) ("[The commerce] power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers which threaten it."). The Chief Justice's crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted Congress' efforts to regulate the national economy in the interest of those who labor to sustain it. It is a reading that should not have staying power. . . .

II

A

The Commerce Clause, it is widely acknowledged, "was the Framers' response to the central problem that gave rise to the Constitution itself." *EEOC v. Wyoming* (1983) (Stevens, J., concurring). Under the Articles of Confederation, the Constitution's precursor, the regulation of commerce was left to the States. This scheme proved unworkable, because the individual States, understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole. See Vices of the Political System of the United States, in James Madison: Writings (As a result of the "want of concert in matters where common interest requires it," the "national dignity, interest, and revenue [have] suffered.").

What was needed was a "national Government . . . armed with a positive & compleat authority in all cases where uniform measures are necessary." See Letter from James Madison to Edmund Randolph (Apr. 8, 1787). See also Letter from George Washington to James Madison (Nov. 30, 1785) ("We are either a United people, or we are not. If the former, let us, in all matters of general concern act as a nation, which ha[s] national objects to promote, and a national character to support."). The Framers' solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation "in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent." Records of the Federal Convention of 1787.

The Framers understood that the "general Interests of the Union" would change over time, in ways they could not anticipate. Accordingly, they recognized that the Constitution was of necessity a "great outlin[e]," not a detailed blueprint, see *McCulloch v. Maryland* (1819), and that its provisions included broad concepts, to be "explained by the context or by the facts of the case," Letter from James Madison to N. P. Trist (Dec. 1831). "Nothing . . . can be more fallacious," Alexander Hamilton emphasized, "than to infer the extent of any power, proper to be lodged in the national government, from . . . its immediate necessities. There ought to be a CAPACITY to provide for future contingencies[,] as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity." *Federalist No. 34*. See also *McCulloch* (The Necessary and

Proper Clause is lodged "in a constitution[,] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.").

B

Consistent with the Framers' intent, we have repeatedly emphasized that Congress' authority under the Commerce Clause is dependent upon "practical" considerations, including "actual experience." *Jones & Laughlin Steel Corp*. We afford Congress the leeway "to undertake to solve national problems directly and realistically." *American Power & Light Co. v. SEC* (1946).

Until today, this Court's pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles. First, Congress has the power to regulate economic activities "that substantially affect interstate commerce." *Gonzales v. Raich* (2005). This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce. See also *Wickard* ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce." (emphasis added)).

Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. See *Raich*. When appraising such legislation, we ask only (1) whether Congress had a "rational basis" for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a "reasonable connection between the regulatory means selected and the asserted ends." [*Hodel v. Indiana* (1981).] See also *Raich*; *Lopez*; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* (1981); *Katzenbach v. McClung* (1964); *Heart of Atlanta Motel, Inc. v. United States* (1964); *United States v. Carolene Products Co.* (1938). In answering these questions, we presume the statute under review is constitutional and may strike it down only on a "plain showing" that Congress acted irrationally. *United States v. Morrison* (2000).

C

Straightforward application of these principles would require the Court to hold that the minimum coverage provision is proper Commerce Clause legislation. Beyond dispute, Congress had a rational basis for concluding that the uninsured, as a class, substantially affect interstate commerce. Those without insurance consume billions of dollars of health-care products and services each year. Those goods are produced, sold, and delivered largely by national and regional companies who routinely transact business across state lines. The uninsured also cross state lines to receive care. Some have medical emergencies while away from home. Others, when sick, go to a neighboring State that provides better care for those who have not prepaid for care.

Not only do those without insurance consume a large amount of health care each year; critically, . . . their inability to pay for a significant portion of that consumption drives up market prices, foists costs on other consumers, and reduces market efficiency and stability. Given these far-reaching effects on interstate commerce, the decision to forgo insurance is hardly inconsequential or equivalent to "doing nothing," *ante*; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause.

See *Wickard* ("It is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in and *practices affecting such prices*." (emphasis added)).

The minimum coverage provision, furthermore, bears a "reasonable connection" to Congress' goal of protecting the health-care market from the disruption caused by individuals who fail to obtain insurance. By requiring those who do not carry insurance to pay a toll, the minimum coverage provision gives individuals a strong incentive to insure. This incentive, Congress had good reason to believe, would reduce the number of uninsured and, correspondingly, mitigate the adverse impact the uninsured have on the national health-care market.

Congress also acted reasonably in requiring uninsured individuals, whether sick or healthy, either to obtain insurance or to pay the specified penalty. As earlier observed, because every person is at risk of needing care at any moment, all those who lack insurance, regardless of their current health status, adversely affect the price of health care and health insurance. Moreover, an insurance-purchase requirement limited to those in need of immediate care simply could not work. Insurance companies would either charge these individuals prohibitively expensive premiums, or, if community rating regulations were in place, close up shop.

"[W]here we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Katzenbach*. Congress' enactment of the minimum coverage provision, which addresses a specific interstate problem in a practical, experience-informed manner, easily meets this criterion.

D

Rather than evaluating the constitutionality of the minimum coverage provision in the manner established by our precedents, The Chief Justice relies on a newly minted constitutional doctrine. The commerce power does not, The Chief Justice announces, permit Congress to "compe[l] individuals to become active in commerce by purchasing a product." (emphasis deleted).

1

a

The Chief Justice's novel constraint on Congress' commerce power gains no force from our precedent and for that reason alone warrants disapprobation. But even assuming, for the moment, that Congress lacks authority under the Commerce Clause to "compel individuals not engaged in commerce to purchase an unwanted product," such a limitation would be inapplicable here. Everyone will, at some point, consume health-care products and services. Thus, if The Chief Justice is correct that an insurance purchase requirement can be applied only to those who "actively" consume health care, the minimum coverage provision fits the bill. . . .

Maintaining that the uninsured are not active in the health-care market, The Chief Justice draws an analogy to the car market. An individual "is not 'active in the car market,'" The Chief Justice observes, simply because he or she may someday buy a car. The

analogy is inapt. The inevitable yet unpredictable need for medical care and the guarantee that emergency care will be provided when required are conditions nonexistent in other markets. That is so of the market for cars, and of the market for broccoli as well. Although an individual might buy a car or a crown of broccoli one day, there is no certainty she will ever do so. And if she eventually wants a car or has a craving for broccoli, she will be obliged to pay at the counter before receiving the vehicle or nourishment. She will get no free ride or food, at the expense of another consumer forced to pay an inflated price. Upholding the minimum coverage provision on the ground that all are participants or will be participants in the health-care market would therefore carry no implication that Congress may justify under the Commerce Clause a mandate to buy other products and services. . . .

b

In any event, The Chief Justice's limitation of the commerce power to the regulation of those actively engaged in commerce finds no home in the text of the Constitution or our decisions. Article I, §8, of the Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." Nothing in this language implies that Congress' commerce power is limited to regulating those actively engaged in commercial transactions. . . . Arguing to the contrary, The Chief Justice notes that "the Constitution gives Congress the power to 'coin Money,' in addition to the power to 'regulate the Value thereof,'" and similarly "gives Congress the power to 'raise and support Armies' and to 'provide and maintain a Navy,' in addition to the power to 'make Rules for the Government and Regulation of the land and naval Forces.'" In separating the power to regulate from the power to bring the subject of the regulation into existence, The Chief Justice asserts, "[t]he language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated."

This argument is difficult to fathom. Requiring individuals to obtain insurance unquestionably regulates the interstate health-insurance and health-care markets, both of them in existence well before the enactment of the ACA. See *Wickard* ("The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon."). Thus, the "something to be regulated" was surely there when Congress created the minimum coverage provision.

Nor does our case law toe the activity versus inactivity line. In *Wickard*, for example, we upheld the penalty imposed on a farmer who grew too much wheat, even though the regulation had the effect of compelling farmers to purchase wheat in the open market. "[F]orcing some farmers into the market to buy what they could provide for themselves" was, the Court held, a valid means of regulating commerce. . . . *Wickard*.

In concluding that the Commerce Clause does not permit Congress to regulate commercial "inactivity," and therefore does not allow Congress to adopt the practical solution it devised for the health-care problem, The Chief Justice views the Clause as a "technical legal conception," precisely what our case law tells us not to do. *Wickard*. This Court's former endeavors to impose categorical limits on the commerce power have not fared well. In several pre-New Deal cases, the Court attempted to cabin Congress' Commerce Clause authority by distinguishing "commerce" from activity once conceived to be noncommercial, notably, "production," "mining," and "manufacturing." See, e.g.,

United States v. E. C. Knight Co. (1895) ("Commerce succeeds to manufacture, and is not a part of it."); *Carter v. Carter Coal Co.* (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it."). The Court also sought to distinguish activities having a "direct" effect on interstate commerce, and for that reason, subject to federal regulation, from those having only an "indirect" effect, and therefore not amenable to federal control. See, e.g., *A. L. A. Schechter Poultry Corp. v. United State*s (1935) ("[T]he distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one.").

These line-drawing exercises were untenable, and the Court long ago abandoned them. "[Q]uestions of the power of Congress [under the Commerce Clause]," we held in *Wickard*, "are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." Failing to learn from this history, The Chief Justice plows ahead with his formalistic distinction between those who are "active in commerce," and those who are not.

It is not hard to show the difficulty courts (and Congress) would encounter in distinguishing statutes that regulate "activity" from those that regulate "inactivity." . . . Take this case as an example. An individual who opts not to purchase insurance from a private insurer can be seen as actively selecting another form of insurance: self-insurance. The minimum coverage provision could therefore be described as regulating activists in the self-insurance market.[7] *Wickard* is another example. Did the statute there at issue target activity (the growing of too much wheat) or inactivity (the farmer's failure to purchase wheat in the marketplace)? If anything, the Court's analysis suggested the latter. At bottom, The Chief Justice's and the joint dissenters' "view that an individual cannot be subject to Commerce Clause regulation absent voluntary, affirmative acts that enter him or her into, or affect, the interstate market expresses a concern for individual liberty that [is] more redolent of Due Process Clause arguments." *Seven-Sky v. Holder* (D.C. Cir. 2011). Plaintiffs have abandoned any argument pinned to substantive due process, however, and now concede that the provisions here at issue do not offend the Due Process Clause. . . .

Underlying The Chief Justice's view that the Commerce Clause must be confined to the regulation of active participants in a commercial market is a fear that the commerce power would otherwise know no limits. This concern is unfounded. . . . [A]bsent The Chief Justice's "activity" limitation[,] Congress would remain unable to regulate noneconomic conduct that has only an attenuated effect on interstate commerce and is traditionally left to state law. See *Lopez*. . . .

As an example of the type of regulation he fears, The Chief Justice cites a Government mandate to purchase green vegetables. One could call this concern "the broccoli horrible." Congress, The Chief Justice posits, might adopt such a mandate, reasoning that an individual's failure to eat a healthy diet, like the failure to purchase health insurance, imposes costs on others.

[7] The Chief Justice's characterization of individuals who choose not to purchase private insurance as "doing nothing," is similarly questionable. A person who self-insures opts against prepayment for a product the person will in time consume. When aggregated, exercise of that option has a substantial impact on the health-care market.

Consider the chain of inferences the Court would have to accept to conclude that a vegetable-purchase mandate was likely to have a substantial effect on the health-care costs borne by lithe Americans. The Court would have to believe that individuals forced to buy vegetables would then eat them (instead of throwing or giving them away), would prepare the vegetables in a healthy way (steamed or raw, not deep-fried), would cut back on unhealthy foods, and would not allow other factors (such as lack of exercise or little sleep) to trump the improved diet.[9] Such "pil[ing of] inference upon inference" is just what the Court refused to do in *Lopez* and *Morrison*.

Other provisions of the Constitution also check congressional overreaching. A mandate to purchase a particular product would be unconstitutional if, for example, the edict impermissibly abridged the freedom of speech, interfered with the free exercise of religion, or infringed on a liberty interest protected by the Due Process Clause. . . .

Supplementing these legal restraints is a formidable check on congressional power: the democratic process. As the controversy surrounding the passage of the Affordable Care Act attests, purchase mandates are likely to engender political resistance. This prospect is borne out by the behavior of state legislators. Despite their possession of unquestioned authority to impose mandates, state governments have rarely done so.

When contemplated in its extreme, almost any power looks dangerous. The commerce power, hypothetically, would enable Congress to prohibit the purchase and home production of all meat, fish, and dairy goods, effectively compelling Americans to eat only vegetables. Yet no one would offer the "hypothetical and unreal possibilit[y]," *Pullman Co. v. Knott* (1914), of a vegetarian state as a credible reason to deny Congress the authority ever to ban the possession and sale of goods. The Chief Justice accepts just such specious logic when he cites the broccoli horrible as a reason to deny Congress the power to pass the individual mandate. . . .

To bolster his argument that the minimum coverage provision is not valid Commerce Clause legislation, The Chief Justice emphasizes the provision's novelty. . . . For decades, [however,] the Court has declined to override legislation because of its novelty, and for good reason. As our national economy grows and changes, we have recognized, Congress must adapt to the changing "economic and financial realities." Hindering Congress' ability to do so is shortsighted; if history is any guide, today's constriction of the Commerce Clause will not endure.

III

A

For the reasons explained above, the minimum coverage provision is valid Commerce Clause legislation. When viewed as a component of the entire ACA, the provision's constitutionality becomes even plainer.

---

[9] The failure to purchase vegetables in The Chief Justice's hypothetical, then, is *not* what leads to higher health-care costs for others; rather, it is the failure of individuals to maintain a healthy diet, and the resulting obesity, that creates the cost-shifting problem. Requiring individuals to purchase vegetables is thus several steps removed from solving the problem. The failure to obtain health insurance, by contrast, is the *immediate cause* of the cost-shifting Congress sought to address through the ACA. Requiring individuals to obtain insurance attacks the source of the problem directly, in a single step.

The Necessary and Proper Clause "empowers Congress to enact laws in effectuation of its [commerce] powe[r] that are not within its authority to enact in isolation." *Raich* (Scalia, J., concurring in judgment). Hence, "[a] complex regulatory program . . . can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal." *Indiana*, 452 U.S., at 329, n. 17. "It is enough that the challenged provisions are an integral part of the regulatory program and that the regulatory scheme when considered as a whole satisfies this test." Ibid. (collecting cases). See also *Raich*, 545 U.S., at 24-25 (A challenged statutory provision fits within Congress' commerce authority if it is an "essential par[t] of a larger regulation of economic activity," such that, in the absence of the provision, "the regulatory scheme could be undercut." (quoting *Lopez*)); *Raich* (Scalia, J., concurring in judgment) ("Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce. The relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power."). . . .

Recall that one of Congress' goals in enacting the Affordable Care Act was to eliminate the insurance industry's practice of charging higher prices or denying coverage to individuals with preexisting medical conditions. The commerce power allows Congress to ban this practice, a point no one disputes. See *United States v. South-Eastern Underwriters Assn.* (1944) (Congress may regulate "the methods by which interstate insurance companies do business.").

Congress knew, however, that simply barring insurance companies from relying on an applicant's medical history would not work in practice. Without the individual mandate, Congress learned, guaranteed-issue and community rating requirements would trigger an adverse-selection death-spiral in the health-insurance market: Insurance premiums would skyrocket, the number of uninsured would increase, and insurance companies would exit the market. When complemented by an insurance mandate, on the other hand, guaranteed issue and community rating would work as intended, increasing access to insurance and reducing uncompensated care. The minimum coverage provision is thus an "essential par[t] of a larger regulation of economic activity"; without the provision, "the regulatory scheme [w]ould be undercut." *Raich*. Put differently, the minimum coverage provision, together with the guaranteed issue and community-rating requirements, is " 'reasonably adapted' to the attainment of a legitimate end under the commerce power": the elimination of pricing and sales practices that take an applicant's medical history into account. See *id.* (Scalia, J., concurring in judgment).

B

Asserting that the Necessary and Proper Clause does not authorize the minimum coverage provision, The Chief Justice focuses on the word "proper." A mandate to purchase health insurance is not "proper" legislation, The Chief Justice urges, because the command "undermine[s] the structure of government established by the Constitution." If long on rhetoric, The Chief Justice's argument is short on substance. The Chief Justice cites only two cases in which this Court concluded that a federal statute impermissibly transgressed the Constitution's boundary between state and federal authority: *Printz v. United States* (1997),

and *New York v. United States* (1992). The statutes at issue in both cases, however, compelled state officials to act on the Federal Government's behalf.

The minimum coverage provision, in contrast, acts "directly upon individuals, without employing the States as intermediaries." *New York*. The provision is thus entirely consistent with the Constitution's design. See *Printz* ("[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." (internal quotation marks omitted)).*

Lacking case law support for his holding, The Chief Justice nevertheless declares the minimum coverage provision not "proper" because it is less "narrow in scope" than other laws this Court has upheld under the Necessary and Proper Clause (citing *United States v. Comstock* (2010)). . . . The Chief Justice's reliance on cases in which this Court has affirmed Congress' "broad authority to enact federal legislation" under the Necessary and Proper Clause, *Comstock*, is underwhelming.

Nor does The Chief Justice pause to explain why the power to direct either the purchase of health insurance or, alternatively, the payment of a penalty collectible as a tax is more far-reaching than other implied powers this Court has found meet under the Necessary and Proper Clause. These powers include the power to enact criminal laws, the power to imprison, including civil imprisonment, and the power to create a national bank.

In failing to explain why the individual mandate threatens our constitutional order, The Chief Justice disserves future courts. How is a judge to decide, when ruling on the constitutionality of a federal statute, whether Congress employed an "independent power," or merely a "derivative." Whether the power used is "substantive," or just "incidental"? The instruction The Chief Justice, in effect, provides lower courts: You will know it when you see it. . . .[11]

IV

In the early 20th century, this Court regularly struck down economic regulation enacted by the peoples' representatives in both the States and the Federal Government.

---

* [In an influential article, Professor Barnett contended that *Printz* was distinguishable. He wrote, "The very few mandates that are imposed on the people pertain to their fundamental duties as citizens of the United States, such as the duty to defend the country or to pay for its operation. A newfound congressional power to impose economic mandates to facilitate the regulation of interstate commerce would fundamentally alter the relationship of citizen and state by unconstitutionally commandeering the people." Randy E. Barnett, Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional, 5 N.Y.U. J.L. & Liberty 581, 583 (2011). Chief Justice Roberts made a very similar point: "Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government." Justices Scalia, Kennedy, Thomas, and Alito reached a similar conclusion: "Thus the dissent, on the theories proposed for the validity of the Mandate, would alter the accepted constitutional relation between the individual and the National Government." — Eds.]

[11] In a separate argument, the joint dissenters contend that the minimum coverage provision is not necessary and proper because it was not the "only . . . way" Congress could have made the guaranteed-issue and community-rating reforms work. . . . But even assuming there were "practicable" alternatives to the minimum coverage provision, "we long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be 'absolutely necessary' to the exercise of an enumerated power." *Jinks v. Richland County* 462 (2003) (quoting *McCulloch*). Rather, the statutory provision at issue need only be "conducive" and "[reasonably] adapted" to the goal Congress seeks to achieve. *Jinks*. The minimum coverage provision meets this requirement.

See, e.g., *Carter Coal Co*; *Dagenhart*; *Lochner v. New York* (1905). The Chief Justice's Commerce Clause opinion . . . bear[s] a disquieting resemblance to those long-overruled decisions.

Ultimately, the Court upholds the individual mandate as a proper exercise of Congress' power to tax and spend "for the . . . general Welfare of the United States." I concur in that determination, which makes The Chief Justice's Commerce Clause essay all the more puzzling. Why should The Chief Justice strive so mightily to hem in Congress' capacity to meet the new problems arising constantly in our ever developing modern economy? I find no satisfying response to that question in his opinion.[12]

Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito, dissenting.*

Congress has set out to remedy the problem that the best health care is beyond the reach of many Americans who cannot afford it. It can assuredly do that, by exercising the powers accorded to it under the Constitution. The question in this case, however, is whether the complex structures and provisions of the Patient Protection and Affordable Care Act (Affordable Care Act or ACA) go beyond those powers. We conclude that they do.

This case is in one respect difficult: it presents two questions of first impression. The first of those is whether failure to engage in economic activity (the purchase of health insurance) is subject to regulation under the Commerce Clause. Failure to act does result in an effect on commerce, and hence might be said to come under this Court's "affecting commerce" criterion of Commerce Clause jurisprudence. But in none of its decisions has this Court extended the Clause that far. The second question is whether the congressional power to tax and spend permits the conditioning of a State's continued receipt of all funds under a massive state-administered federal welfare program upon its acceptance of an expansion to that program. Several of our opinions have suggested that the power to tax and spend cannot be used to coerce state administration of a federal program, but we have never found a law enacted under the spending power to be coercive. Those questions are difficult.

The case is easy and straightforward, however, in another respect. What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon federal power — upon what it can prescribe with respect to private conduct, and upon what it can impose upon the sovereign States. Whatever may be the conceptual limits upon the Commerce Clause and upon the power to tax and spend, they cannot be such as will enable the Federal Government to regulate all private conduct and to compel the States to function as administrators of federal programs.

That clear principle carries the day here. The striking case of *Wickard v. Filburn* (1942), which held that the economic activity of growing wheat, even for one's own consumption, affected commerce sufficiently that it could be regulated, always has been regarded

[12] The Chief Justice states that he must evaluate the constitutionality of the minimum coverage provision under the Commerce Clause because the provision "reads more naturally as a command to buy insurance than as a tax." The Chief Justice ultimately concludes, however, that interpreting the provision as a tax is a "fairly possible" construction. That being so, I see no reason to undertake a Commerce Clause analysis that is not outcome determinative.

* [Usually, a single Justice signs an opinion, and others join it. But Justices Scalia, Kennedy, Thomas, and Alito each signed this opinion. — Eds.]

as the *ne plus ultra* ["the most extreme example" — Eds.] of expansive Commerce Clause jurisprudence. To go beyond that, and to say the failure to grow wheat (which is not an economic activity, or any activity at all) nonetheless affects commerce and therefore can be federally regulated, is to make mere breathing in and out the basis for federal prescription and to extend federal power to virtually all human activity. . . .

The Act before us here exceeds federal power both in mandating the purchase of health insurance and in denying nonconsenting States all Medicaid funding. These parts of the Act are central to its design and operation, and all the Act's other provisions would not have been enacted without them. In our view it must follow that the entire statute is inoperative. . . .

I. The Individual Mandate

A

. . . [T]he scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power.

The case upon which the Government principally relies to sustain the Individual Mandate under the Necessary and Proper Clause is *Gonzales v. Raich* (2005). That case held that Congress could, in an effort to restrain the interstate market in marijuana, ban the local cultivation and possession of that drug. *Raich* is no precedent for what Congress has done here. That case's prohibition of growing (cf. *Wickard*), and of possession (cf. innumerable federal statutes) did not represent the expansion of the federal power to direct into a broad new field. The mandating of economic activity does, and since it is a field so limitless that it converts the Commerce Clause into a general authority to direct the economy, that mandating is not "consist[ent] with the letter and spirit of the constitution." *McCulloch*.

Moreover, *Raich* is far different from the Individual Mandate in another respect. The Court's opinion in *Raich* pointed out that the growing and possession prohibitions were the only practicable way of enabling the prohibition of interstate traffic in marijuana to be effectively enforced. See also *Shreveport Rate Cases* (1914) (Necessary and Proper Clause allows regulations of intrastate transactions if necessary to the regulation of an interstate market). Intrastate marijuana could no more be distinguished from interstate marijuana than, for example, endangered-species trophies obtained before the species was federally protected can be distinguished from trophies obtained afterwards — which made it necessary and proper to prohibit the sale of all such trophies, see *Andrus v. Allard* (1979).

With the present statute, by contrast, there are many ways other than this unprecedented Individual Mandate by which the regulatory scheme's goals of reducing insurance premiums and ensuring the profitability of insurers could be achieved. For instance, those who did not purchase insurance could be subjected to a surcharge when they do enter the health insurance system. Or they could be denied a full income tax credit given to those who do purchase the insurance.

The Government was invited, at oral argument, to suggest what federal controls over private conduct (other than those explicitly prohibited by the Bill of Rights or other

constitutional controls) could not be justified as necessary and proper for the carrying out of a general regulatory scheme. See Tr. of Oral Arg. 27-30, 43-45 (Mar. 27, 2012). It was unable to name any. . . . [W]hereas the precise scope of the Commerce Clause and the Necessary and Proper Clause is uncertain, the proposition that the Federal Government cannot do everything is a fundamental precept. See *Lopez*, 514 U.S., at 564 ("[I]f 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"). Section 5000A is defeated by that proposition. . . .

C

. . . A few respectful responses to Justice Ginsburg's dissent on the issue of the Mandate are in order. That dissent duly recites the test of Commerce Clause power that our opinions have applied, but disregards the premise the test contains. It is true enough that Congress needs only a " 'rational basis' for concluding that the *regulated activity* substantially affects interstate commerce" (emphasis added). But it must be *activity* affecting commerce that is regulated, and not merely the failure to engage in commerce. And one is not now purchasing the health care covered by the insurance mandate simply because one is likely to be purchasing it in the future. Our test's premise of regulated activity is not invented out of whole cloth, but rests upon the Constitution's requirement that it be commerce which is regulated. If all inactivity affecting commerce is commerce, commerce is everything. Ultimately the dissent is driven to saying that there is really no difference between action and inaction, a proposition that has never recommended itself, neither to the law nor to common sense. To say, for example, that the inaction here consists of activity in "the self insurance market," seems to us wordplay. By parity of reasoning the failure to buy a car can be called participation in the non-private-car-transportation market. Commerce becomes everything.

The dissent claims that we "fai[l] to explain why the individual mandate threatens our constitutional order." But we have done so. It threatens that order because it gives such an expansive meaning to the Commerce Clause that all private conduct (including failure to act) becomes subject to federal control, effectively destroying the Constitution's division of governmental powers. Thus the dissent, on the theories proposed for the validity of the Mandate, would alter the accepted constitutional relation between the individual and the National Government. The dissent protests that the Necessary and Proper Clause has been held to include "the power to enact criminal laws, . . . the power to imprison, . . . and the power to create a national bank." Is not the power to compel purchase of health insurance much lesser? No, not if (unlike those other dispositions) its application rests upon a theory that everything is within federal control simply because it exists.

The dissent's exposition of the wonderful things the Federal Government has achieved through exercise of its assigned powers, such as "the provision of old-age and survivors' benefits" in the Social Security Act, is quite beside the point. The issue here is whether the federal government can impose the Individual Mandate through the Commerce Clause. And the relevant history is not that Congress has achieved wide and wonderful results through the proper exercise of its assigned powers in the past, but that it has never before used the Commerce Clause to compel entry into commerce. The dissent treats the Constitution as though it is an enumeration of those problems that

the Federal Government can address — among which, it finds, is "the Nation's course in the economic and social welfare realm," and more specifically "the problem of the uninsured." The Constitution is not that. It enumerates not federally soluble problems, but federally available powers. The Federal Government can address whatever problems it wants but can bring to their solution only those powers that the Constitution confers, among which is the power to regulate commerce. None of our cases say anything else. Article I contains no whatever-it-takes-to-solve-a-national problem power.

The dissent dismisses the conclusion that the power to compel entry into the health-insurance market would include the power to compel entry into the new-car or broccoli markets. The latter purchasers, it says, "will be obliged to pay at the counter before receiving the vehicle or nourishment," whereas those refusing to purchase health-insurance will ultimately get treated anyway, at others' expense. "[T]he unique attributes of the health-care market . . . give rise to a significant free riding problem that does not occur in other markets." And "a vegetable-purchase mandate" (or a car-purchase mandate) is not "likely to have a substantial effect on the health-care costs" borne by other Americans. Those differences make a very good argument by the dissent's own lights, since they show that the failure to purchase health insurance, unlike the failure to purchase cars or broccoli, creates a national, social-welfare problem that is (in the dissent's view) included among the unenumerated "problems" that the Constitution authorizes the Federal Government to solve. But those differences do not show that the failure to enter the health-insurance market, unlike the failure to buy cars and broccoli, is an *activity* that Congress can "regulate." (Of course one day the failure of some of the public to purchase American cars may endanger the existence of domestic automobile manufacturers; or the failure of some to eat broccoli may be found to deprive them of a newly discovered cancer fighting chemical which only that food contains, producing health-care costs that are a burden on the rest of us — in which case, under the theory of Justice Ginsburg's dissent, moving against those inactivities will also come within the Federal Government's unenumerated problem solving powers.)

II. The Taxing Power

As far as §5000A is concerned, we would stop there. Congress has attempted to regulate beyond the scope of its Commerce Clause authority, and §5000A is therefore invalid. The Government contends, however, as expressed in the caption to Part II of its brief, that "THE MINIMUM COVERAGE PROVISION IS INDEPENDENTLY AUTHORIZED BY CONGRESS'S TAXING POWER." The phrase "independently authorized" suggests the existence of a creature never hitherto seen in the United States Reports: A penalty for constitutional purposes that is also a tax for constitutional purposes. In all our cases the two are mutually exclusive. The provision challenged under the Constitution is either a penalty or else a tax. Of course in many cases what was a regulatory mandate enforced by a penalty could have been imposed as a tax upon permissible action; or what was imposed as a tax upon permissible action could have been a regulatory mandate enforced by a penalty. But we know of no case, and the Government cites none, in which the imposition was, for constitutional purposes, both. The two are mutually exclusive. Thus, what the Government's caption should have read was "ALTERNATIVELY, THE MINIMUM COVERAGE PROVISION IS NOT A MANDATE-WITH-PENALTY BUT A TAX." It is

important to bear this in mind in evaluating the tax argument of the Government and of those who support it: The issue is not whether Congress had the *power* to frame the minimum-coverage provision as a tax, but whether it *did so*.

In answering that question we must, if "fairly possible," *Crowell v. Benson* (1932), construe the provision to be a tax rather than a mandate-with-penalty, since that would render it constitutional rather than unconstitutional (*ut res magis valeat quam pereat* ["the law should be given effect rather than be destroyed" — Eds.]). But we cannot rewrite the statute to be what it is not. "'[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . .' or judicially rewriting it." *Commodity Futures Trading Comm'n v. Schor* (1986). In this case, there is simply no way, "without doing violence to the fair meaning of the words used," *Grenada County Supervisors v. Brogden* (1884), to escape what Congress enacted: a mandate that individuals maintain minimum essential coverage, enforced by a penalty.

Our cases establish a clear line between a tax and a penalty: "'[A] tax is an enforced contribution to provide for the support of government; a penalty . . . is an exaction imposed by statute as punishment for an unlawful act.'" *United States v. Reorganized CF&I Fabricators of Utah, Inc.* (1996) (quoting *United States v. La Franca* (1931)). In a few cases, this Court has held that a "tax" imposed upon private conduct was so onerous as to be in effect a penalty. But we have never held — *never* — that a penalty imposed for violation of the law was so trivial as to be in effect a tax. We have never held that *any* exaction imposed for violation of the law is an exercise of Congress' taxing power — even when the statute *calls* it a tax, much less when (as here) the statute repeatedly calls it a penalty. When an act "adopt[s] the criteria of wrongdoing" and then imposes a monetary penalty as the "principal consequence on those who transgress its standard," it creates a regulatory penalty, not a tax. *Child Labor Tax Case* (1922).

So the question is, quite simply, whether the exaction here is imposed for violation of the law. It unquestionably is. The minimum-coverage provision is found in 26 U.S.C. §5000A, entitled "*Requirement* to maintain minimum essential coverage." (Emphasis added.) It commands that every "applicable individual *shall* . . . ensure that the individual . . . is covered under minimum essential coverage." Ibid. (emphasis added). And the immediately following provision states that, "[i]f . . . an applicable individual . . . fails to meet the *requirement* of subsection (a) . . . there is hereby imposed . . . a *penalty*." §5000A(b) (emphasis added). And several of Congress' legislative "findings" with regard to §5000A confirm that it sets forth a legal requirement and constitutes the assertion of regulatory power, not mere taxing power. See 42 U.S.C. §18091(2)(A) ("The requirement regulates activity . . ."); §18091(2)(C) ("The requirement . . . will add millions of new consumers to the health insurance market . . ."); §18091(2)(D) ("The requirement achieves near-universal coverage"); §18091(2)(H) ("The requirement is an essential part of this larger regulation of economic activity, and the absence of the requirement would undercut Federal regulation of the health insurance market"); §18091(3) ("[T]he Supreme Court of the United States ruled that insurance is interstate commerce subject to Federal regulation"). . . .

Quite separately, the fact that Congress (in its own words) "imposed . . . a penalty," 26 U.S.C. §5000A(b)(1), for failure to buy insurance is alone sufficient to render that failure unlawful. It is one of the canons of interpretation that a statute that penalizes an

act makes it unlawful: "[W]here the statute inflicts a penalty for doing an act, although the act itself is not expressly prohibited, yet to do the act is unlawful, because it cannot be supposed that the Legislature intended that a penalty should be inflicted for a lawful act." *Powhatan Steamboat Co. v. Appomattox R. Co.* (1861). Or in the words of Chancellor Kent: "If a statute inflicts a penalty for doing an act, the penalty implies a prohibition, and the thing is unlawful, though there be no prohibitory words in the statute." J. Kent, Commentaries on American Law (1826).

We never have classified as a tax an exaction imposed for violation of the law, and so too, we never have classified as a tax an exaction described in the legislation itself as a penalty. To be sure, we have sometimes treated as a tax a statutory exaction (imposed for something other than a violation of law) which bore an agnostic label that does not entail the significant constitutional consequences of a penalty — such as "license" (*License Tax Cases* (1867)) or "surcharge" (*New York v. United States*). But we have never — *never* — treated as a tax an exaction which faces up to the critical difference between a tax and a penalty, and explicitly denominates the exaction a "penalty." Eighteen times in §5000A itself and elsewhere throughout the Act, Congress called the exaction in §5000A(b) a "penalty."

That §5000A imposes not a simple tax but a mandate to which a penalty is attached is demonstrated by the fact that some are exempt from the tax who are not exempt from the mandate — a distinction that would make no sense if the mandate were not a mandate. Section 5000A(d) exempts three classes of people from the definition of "applicable individual" subject to the minimum coverage requirement: Those with religious objections or who participate in a "health care sharing ministry"; those who are "not lawfully present" in the United States; and those who are incarcerated. Section 5000A(e) then creates a separate set of exemptions, excusing from liability for the penalty certain individuals who are subject to the minimum coverage requirement: Those who cannot afford coverage; who earn too little income to require filing a tax return; who are members of an Indian tribe; who experience only short gaps in coverage; and who, in the judgment of the Secretary of Health and Human Services, "have suffered a hardship with respect to the capability to obtain coverage." If §5000A were a tax, these two classes of exemption would make no sense; there being no requirement, all the exemptions would attach to the penalty (renamed tax) alone. . . .

Against the mountain of evidence that the minimum coverage requirement is what the statute calls it — a requirement — and that the penalty for its violation is what the statute calls it — a penalty — the Government brings forward the flimsiest of indications to the contrary. It notes that "[t]he minimum coverage provision amends the Internal Revenue Code to provide that a non-exempted individual . . . will owe a monetary penalty, in addition to the income tax itself," and that "[t]he [Internal Revenue Service (IRS)] will assess and collect the penalty in the same manner as assessable penalties under the Internal Revenue Code." The manner of collection could perhaps suggest a tax if IRS penalty-collection were unheard-of or rare. It is not. See, e.g., 26 U.S.C. §527(j) (2006 ed.) (IRS-collectible penalty for failure to make campaign-finance disclosures); §5761(c) (IRS-collectible penalty for domestic sales of tobacco products labeled for export); §9707 (IRS-collectible penalty for failure to make required health-insurance premium payments on behalf of mining employees). In *Reorganized CF&I Fabricators of Utah, Inc.* (1996), we held that an exaction not only enforced by the Commissioner of Internal Revenue

but even called a "tax" was in fact a penalty. "[I]f the concept of penalty means anything," we said, "it means punishment for an unlawful act or omission." Moreover, while the penalty is assessed and collected by the IRS, §5000A is administered both by that agency and by the Department of Health and Human Services (and also the Secretary of Veteran Affairs), which is responsible for defining its substantive scope — a feature that would be quite extraordinary for taxes.

The Government points out that "[t]he amount of the penalty will be calculated as a percentage of household income for federal income tax purposes, subject to a floor and [a] ca[p]," and that individuals who earn so little money that they "are not required to file income tax returns for the taxable year are not subject to the penalty" (though they are, as we discussed earlier, subject to the mandate). But varying a penalty according to ability to pay is an utterly familiar practice. See, e.g., 33 U.S.C. §1319(d) ("In determining the amount of a civil penalty the court shall consider . . . the economic impact of the penalty on the violator").

The last of the feeble arguments in favor of petitioners that we will address is the contention that what this statute repeatedly calls a penalty is in fact a tax because it contains no scienter requirement. The presence of such a requirement suggests a penalty — though one can imagine a tax imposed only on willful action; but the absence of such a requirement does not suggest a tax. Penalties for absolute-liability offenses are commonplace. And where a statute is silent as to scienter, we traditionally presume a mens rea requirement if the statute imposes a "severe penalty." *Staples v. United States* (1994). Since we have an entire jurisprudence addressing when it is that a scienter requirement should be inferred from a penalty, it is quite illogical to suggest that a penalty is not a penalty for want of an express scienter requirement.

And the nail in the coffin is that the mandate and penalty are located in Title I of the Act, its operative core, rather than where a tax would be found — in Title IX, containing the Act's "Revenue Provisions." In sum, "the terms of [the] act rende[r] it unavoidable," *Parsons v. Bedford* (1830), that Congress imposed a regulatory penalty, not a tax.

For all these reasons, to say that the Individual Mandate merely imposes a tax is not to interpret the statute but to rewrite it. Judicial tax-writing is particularly troubling. Taxes have never been popular, see, e.g., Stamp Act of 1765, and in part for that reason, the Constitution requires tax increases to originate in the House of Representatives. See Art. I, §7, cl. 1. That is to say, they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next election, which is never more than two years off. *Federalist No. 58* "defend[ed] the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue." *United States v. Munoz-Flores* (1990). We have no doubt that Congress knew precisely what it was doing when it rejected an earlier version of this legislation that imposed a tax instead of a requirement-with-penalty. See Affordable Health Care for America Act, H.R. 3962 (2009); America's Healthy Future Act of 2009, S. 1796. Imposing a tax through judicial legislation inverts the constitutional scheme, and places the power to tax in the branch of government least accountable to the citizenry.

Finally, we must observe that rewriting §5000A as a tax in order to sustain its constitutionality would force us to confront a difficult constitutional question: whether this is a direct tax that must be apportioned among the States according to their population.

Art. I, §9, cl. 4. Perhaps it is not (we have no need to address the point); but the meaning of the Direct Tax Clause is famously unclear, and its application here is a question of first impression that deserves more thoughtful consideration than the lick-and-a-promise accorded by the Government and its supporters. The Government's opening brief did not even address the question — perhaps because, until today, no federal court has accepted the implausible argument that §5000A is an exercise of the tax power. And once respondents raised the issue, the Government devoted a mere 21 lines of its reply brief to the issue. At oral argument, the most prolonged statement about the issue was just over 50 words. One would expect this Court to demand more than fly-by-night briefing and argument before deciding a difficult constitutional question of first impression. . . .

The Constitution, though it dates from the founding of the Republic, has powerful meaning and vital relevance to our own times. The constitutional protections that this case involves are protections of structure. Structural protections — notably, the restraints imposed by federalism and separation of powers — are less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil War Amendments. Hence they tend to be undervalued or even forgotten by our citizens. It should be the responsibility of the Court to teach otherwise, to remind our people that the Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment. The fragmentation of power produced by the structure of our Government is central to liberty, and when we destroy it, we place liberty at peril. Today's decision should have vindicated, should have taught, this truth; instead, our judgment today has disregarded it.

For the reasons here stated, we would find the Act invalid in its entirety. We respectfully dissent.

Justice Thomas, dissenting.

I dissent for the reasons stated in our joint opinion, but I write separately to say a word about the Commerce Clause. The joint dissent and The Chief Justice correctly apply our precedents to conclude that the Individual Mandate is beyond the power granted to Congress under the Commerce Clause and the Necessary and Proper Clause. Under those precedents, Congress may regulate "economic activity [that] substantially affects interstate commerce." *United States v. Lopez* (1995). I adhere to my view that "the very notion of a 'substantial effects' test under the Commerce Clause is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases." *United States v. Morrison* (2000) (Thomas, J., concurring); see also *Gonzales v. Raich* (2005) (Thomas, J., dissenting). As I have explained, the Court's continued use of that test "has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits." *Morrison*. The Government's unprecedented claim in this suit that it may regulate not only economic activity but also inactivity that substantially affects interstate commerce is a case in point.

Chief Justice Roberts explained in his announcement of *NFIB* that the Court's decision was not "based on our judgment about whether the Affordable Care Act is good

policy. That judgment is for the people acting through their representatives." Five years later, in December 2017, Congress made a different judgment about the ACA. Through the Tax Cuts and Jobs Act, Congress set the penalty to $0. As a result, there were no financial consequences for going uninsured.

When he signed the tax reform bill, President Trump contended that even though the Supreme Court did not declare unconstitutional the ACA's individual mandate, Congress had now done just that. "Many people thought it should have been overturned in the Supreme Court. It didn't quite make it. Almost — but didn't quite make it. But now we're overturning the individual mandate, the most unpopular thing in Obamacare. Very, very unfair."

Congress only zeroed out the penalty enforcing the individual mandate. The ACA's individual mandate, the Medicaid expansion, and many other health insurance regulations, remain on the books. In *California v. Texas* (2021), the Supreme Court held that states and private parties lacked standing to challenge the amended ACA.

ASSIGNMENT 8

2. The Spending Power

NFIB v. Sebelius

567 U.S. 519 (2012)

Chief Justice Roberts announced the judgment of the Court and delivered . . . an opinion with respect to Part IV, in which Justice Breyer and Justice Kagan join.

IV

A

The States also contend that the Medicaid expansion exceeds Congress's authority under the Spending Clause. They claim that Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid grants, unless the State accepts the new expanded funding and complies with the conditions that come with it. This, they argue, violates the basic principle that the "Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States* (1992).

There is no doubt that the Act dramatically increases state obligations under Medicaid. . . .

The Medicaid provisions of the Affordable Care Act . . . require States to expand their Medicaid programs by 2014 to cover *all* individuals under the age of 65 with incomes below 133 percent of the federal poverty line. The Act also establishes a new "[e]ssential health benefits" package, which States must provide to all new Medicaid recipients — a level sufficient to satisfy a recipient's obligations under the individual mandate. The Affordable Care Act provides that the Federal Government will pay 100 percent of the costs of covering these newly eligible individuals through 2016. In the following years, the federal payment level gradually decreases, to a minimum of 90 percent. In light of the expansion in coverage mandated by the Act, the Federal Government estimates

that its Medicaid spending will increase by approximately $100 billion per year, nearly 40 percent above current levels.

The Spending Clause grants Congress the power "to pay the Debts and provide for the . . . general Welfare of the United States." We have long recognized that Congress may use this power to grant federal funds to the States, and may condition such a grant upon the States' "taking certain actions that Congress could not require them to take." *College Savings Bank*. Such measures "encourage a State to regulate in a particular way, [and] influenc[e] a State's policy choices." *New York*. The conditions imposed by Congress ensure that the funds are used by the States to "provide for the . . . general Welfare" in the manner Congress intended.

At the same time, our cases have recognized limits on Congress's power under the Spending Clause to secure state compliance with federal objectives. "We have repeatedly characterized . . . Spending Clause legislation as 'much in the nature of a contract.' " *Barnes v. Gorman* (2002) (quoting *Pennhurst State School and Hospital v. Halderman* (1981)). The legitimacy of Congress's exercise of the spending power "thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Pennhurst*. Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. That system "rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.' " *Bond* (quoting *Alden v. Maine* (1999)). For this reason, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York*. Otherwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.

That insight has led this Court to strike down federal legislation that commandeers a State's legislative or administrative apparatus for federal purposes. *Printz* (striking down federal legislation compelling state law enforcement officers to perform federally mandated background checks on handgun purchasers); *New York* (invalidating provisions of an Act that would compel a State to either take title to nuclear waste or enact particular state waste regulations). It has also led us to scrutinize Spending Clause legislation to ensure that Congress is not using financial inducements to exert a "power akin to undue influence." *Steward Machine Co. v. Davis* (1937). Congress may use its spending power to create incentives for States to act in accordance with federal policies. But when "pressure turns into compulsion," *ibid*., the legislation runs contrary to our system of federalism. "[T]he Constitution simply does not give Congress the authority to require the States to regulate." *New York*. That is true whether Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own.

Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system. "[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *Id*. Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can

achieve its objectives without accountability, just as in *New York* and *Printz*. Indeed, this danger is heightened when Congress acts under the Spending Clause, because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers. . . .

The States . . . object that Congress has "crossed the line distinguishing encouragement from coercion," *New York*, in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States' existing Medicaid funds. The States claim that this threat serves no purpose other than to force unwilling States to sign up for the dramatic expansion in health care coverage effected by the Act.

Given the nature of the threat and the programs at issue here, we must agree. We have upheld Congress's authority to condition the receipt of funds on the States' complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the "general Welfare." Conditions that do not here govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.

In *South Dakota v. Dole*, we considered a challenge to a federal law that threatened to withhold five percent of a State's federal highway funds if the State did not raise its drinking age to 21. The Court found that the condition was "directly related to one of the main purposes for which highway funds are expended — safe interstate travel." At the same time, the condition was not a restriction on how the highway funds — set aside for specific highway improvement and maintenance efforts — were to be used.

We accordingly asked whether "the financial inducement offered by Congress" was "so coercive as to pass the point at which 'pressure turns into compulsion.' " (quoting *Steward Machine*). By "financial inducement" the Court meant the threat of losing five percent of highway funds; no new money was offered to the States to raise their drinking ages. We found that the inducement was not impermissibly coercive, because Congress was offering only "relatively mild encouragement to the States." *Dole*. We observed that "all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5%" of her highway funds. In fact, the federal funds at stake constituted less than half of one percent of South Dakota's budget at the time. In consequence, "we conclude[d] that [the] encouragement to state action [was] a valid use of the spending power." Whether to accept the drinking age change "remain[ed] the prerogative of the States not merely in theory but in fact."

In this case, the financial "inducement" Congress has chosen is much more than "relatively mild encouragement" — it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human Services may declare that "further payments will not be made to the State." A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely "a relatively small percentage" of its existing Medicaid funding, but all of it. *Dole*. Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs. The Federal Government estimates that it will pay out approximately $3.3 trillion between 2010 and 2019 in order to cover the costs of pre-expansion Medicaid. In

addition, the States have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid. It is easy to see how the *Dole* Court could conclude that the threatened loss of less than half of one percent of South Dakota's budget left that State with a "prerogative" to reject Congress's desired policy, "not merely in theory but in fact." 483 U.S., at 211-212. The threatened loss of over 10 percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion. . . .

B

Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding. . . . In light of the Court's holding, the Secretary cannot apply §1396c to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion.

That fully remedies the constitutional violation we have identified. . . . Congress has no authority to order the States to regulate according to its instructions. Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer. The States are given no such choice in this case: They must either accept a basic change in the nature of Medicaid, or risk losing all Medicaid funding. The remedy for that constitutional violation is to preclude the Federal Government from imposing such a sanction. That remedy does not require striking down other portions of the Affordable Care Act. . . .

Justice Ginsburg, with whom Justice Sotomayor joins [dissenting from this part of the judgment of the Court]. . . .

V

. . . The Spending Clause authorizes Congress "to pay the Debts and provide for the . . . general Welfare of the United States." To ensure that federal funds granted to the States are spent "to 'provide for the . . . general Welfare' in the manner Congress intended." Congress must of course have authority to impose limitations on the States' use of the federal dollars. This Court, time and again, has respected Congress' prescription of spending conditions, and has required States to abide by them. In particular, we have recognized Congress' prerogative to condition a State's receipt of Medicaid funding on compliance with the terms Congress set for participation in the program.

Congress' authority to condition the use of federal funds is not confined to spending programs as first launched. The legislature may, and often does, amend the law, imposing new conditions grant recipients henceforth must meet in order to continue receiving funds.

Yes, there are federalism-based limits on the use of Congress' conditional spending power. In the leading decision in this area, *South Dakota v. Dole* (1987), the Court

identified four criteria. The conditions placed on federal grants to States must (a) promote the "general welfare," (b) "unambiguously" inform States what is demanded of them, (c) be germane "to the federal interest in particular national projects or programs," and (d) not "induce the States to engage in activities that would themselves be unconstitutional."

The Court in *Dole* mentioned, but did not adopt, a further limitation, one hypothetically raised a half-century earlier: In "some circumstances," Congress might be prohibited from offering a "financial inducement . . . so coercive as to pass the point at which 'pressure turns into compulsion' " (quoting *Steward Machine Co. v. Davis* (1937)). Prior to today's decision, however, the Court has never ruled that the terms of any grant crossed the indistinct line between temptation and coercion. . . .

This case does not present the concerns that led the Court in *Dole* even to consider the prospect of coercion. In *Dole*, the condition — set 21 as the minimum drinking age — did not tell the States how to use funds Congress provided for highway construction. Further, in view of the Twenty-First Amendment, it was an open question whether Congress could directly impose a national minimum drinking age.

The ACA, in contrast, relates solely to the federally funded Medicaid program; if States choose not to comply, Congress has not threatened to withhold funds earmarked for any other program. Nor does the ACA use Medicaid funding to induce States to take action Congress itself could not undertake. The Federal Government undoubtedly could operate its own health-care program for poor persons, just as it operates Medicare for seniors' health care.

That is what makes this such a simple case, and the Court's decision so unsettling. Congress, aiming to assist the needy, has appropriated federal money to subsidize state health-insurance programs that meet federal standards. The principal standard the ACA sets is that the state program cover adults earning no more than 133% of the federal poverty line. Enforcing that prescription ensures that federal funds will be spent on health care for the poor in furtherance of Congress' present perception of the general welfare. . . .

The Chief Justice ultimately asks whether "the financial inducement offered by Congress . . . pass[ed] the point at which pressure turns into compulsion." The financial inducement Congress employed here, he concludes, crosses that threshold: The threatened withholding of "existing Medicaid funds" is "a gun to the head" that forces States to acquiesce.

The Chief Justice sees no need to "fix the outermost line," *Steward Machine* "where persuasion gives way to coercion." . . . When future Spending Clause challenges arrive, as they likely will in the wake of today's decision, how will litigants and judges assess whether "a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds"? Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State's budget at stake? And which State's — or States' — budget is determinative: the lead plaintiff, all challenging States (26 in this case, many with quite different fiscal situations), or some national median? Does it matter that Florida, unlike most States, imposes no state income tax, and therefore might be able to replace foregone federal funds with new state revenue? Or that the coercion state officials in fact fear is punishment at the ballot box for turning down a politically popular federal grant?

The coercion inquiry, therefore, appears to involve political judgments that defy judicial calculation. . . . At bottom, my colleagues' position is that the States' reliance on federal funds limits Congress' authority to alter its spending programs. This gets things backwards: Congress, not the States, is tasked with spending federal money in service of the general welfare. And each successive Congress is empowered to appropriate funds as it sees fit. When the 111th Congress reached a conclusion about Medicaid funds that differed from its predecessors' view, it abridged no State's right to "existing," or "pre-existing," funds. For, in fact, there are no such funds. There is only money States anticipate receiving from future Congresses. . . .

For the foregoing reasons, I disagree that any such withholding would violate the Spending Clause. . . . But in view of The Chief Justice's disposition, I agree with him that the Medicaid Act's severability clause determines the appropriate remedy. . . . The Chief Justice is undoubtedly right to conclude that Congress may offer States funds "to expand the availability of health care, and requir[e] that States accepting such funds comply with the conditions on their use." I therefore concur in the judgment with respect to Part IV-B of The Chief Justice's opinion.

Justice Scalia, Justice Kennedy, Justice Thomas, and Justice Alito, dissenting. . . .

Seven Members of the Court agree that the Medicaid Expansion, as enacted by Congress, is unconstitutional. Because the Medicaid Expansion is unconstitutional, the question of remedy arises. The most natural remedy would be to invalidate the Medicaid Expansion. However, the Government proposes — in two cursory sentences at the very end of its brief — preserving the Expansion. Under its proposal, States would receive the additional Medicaid funds if they expand eligibility, but States would keep their pre-existing Medicaid funds if they do not expand eligibility. We cannot accept the Government's suggestion.

The reality that States were given no real choice but to expand Medicaid was not an accident. Congress assumed States would have no choice, and the ACA depends on States' having no choice, because its Mandate requires low-income individuals to obtain insurance many of them can afford only through the Medicaid Expansion. Furthermore, a State's withdrawal might subject everyone in the State to much higher insurance premiums. That is because the Medicaid Expansion will no longer offset the cost to the insurance industry imposed by the ACA's insurance regulations and taxes, a point that is explained in more detail in the severability section below. To make the Medicaid Expansion optional despite the ACA's structure and design " 'would be to make a new law, not to enforce an old one. This is no part of our duty.' " *Trade-Mark Cases* (1879).

Worse, the Government's proposed remedy introduces a new dynamic: States must choose between expanding Medicaid or paying huge tax sums to the federal fisc for the sole benefit of expanding Medicaid in other States. If this divisive dynamic between and among States can be introduced at all, it should be by conscious congressional choice, not by Court-invented interpretation. We do not doubt that States are capable of making decisions when put in a tight spot. We do doubt the authority of this Court to put them there . . . .

We should not accept the Government's invitation to attempt to solve a constitutional problem by rewriting the Medicaid Expansion so as to allow States that reject it to

retain their pre-existing Medicaid funds. Worse, the Government's remedy, now adopted by the Court, takes the ACA and this Nation in a new direction and charts a course for federalism that the Court, not the Congress, has chosen; but under the Constitution, that power and authority do not rest with this Court. . . .

The Court today decides to save a statute Congress did not write. It rules that what the statute declares to be a requirement with a penalty is instead an option subject to a tax. And it changes the intentionally coercive sanction of a total cut-off of Medicaid funds to a supposedly noncoercive cut-off of only the incremental funds that the Act makes available.

The Court regards its strained statutory interpretation as judicial modesty. It is not. It amounts instead to a vast judicial overreaching. It creates a debilitated, inoperable version of health-care regulation that Congress did not enact and the public does not expect. It makes enactment of sensible health-care regulation more difficult, since Congress cannot start afresh but must take as its point of departure a jumble of now senseless provisions, provisions that certain interests favored under the Court's new design will struggle to retain. And it leaves the public and the States to expend vast sums of money on requirements that may or may not survive the necessary congressional revision.

The Court's disposition, invented and atextual as it is, does not even have the merit of avoiding constitutional difficulties. It creates them. The holding that the Individual Mandate is a tax raises a difficult constitutional question (what is a direct tax?) that the Court resolves with inadequate deliberation. And the judgment on the Medicaid Expansion issue ushers in new federalism concerns and places an unaccustomed strain upon the Union. Those States that decline the Medicaid Expansion must subsidize, by the federal tax dollars taken from their citizens, vast grants to the States that accept the Medicaid Expansion. If that destabilizing political dynamic, so antagonistic to a harmonious Union, is to be introduced at all, it should be by Congress, not by the Judiciary.

The values that should have determined our course today are caution, minimalism, and the understanding that the Federal Government is one of limited powers. But the Court's ruling undermines those values at every turn. In the name of restraint, it overreaches. In the name of constitutional avoidance, it creates new constitutional questions. In the name of cooperative federalism, it undermines state sovereignty. . . .