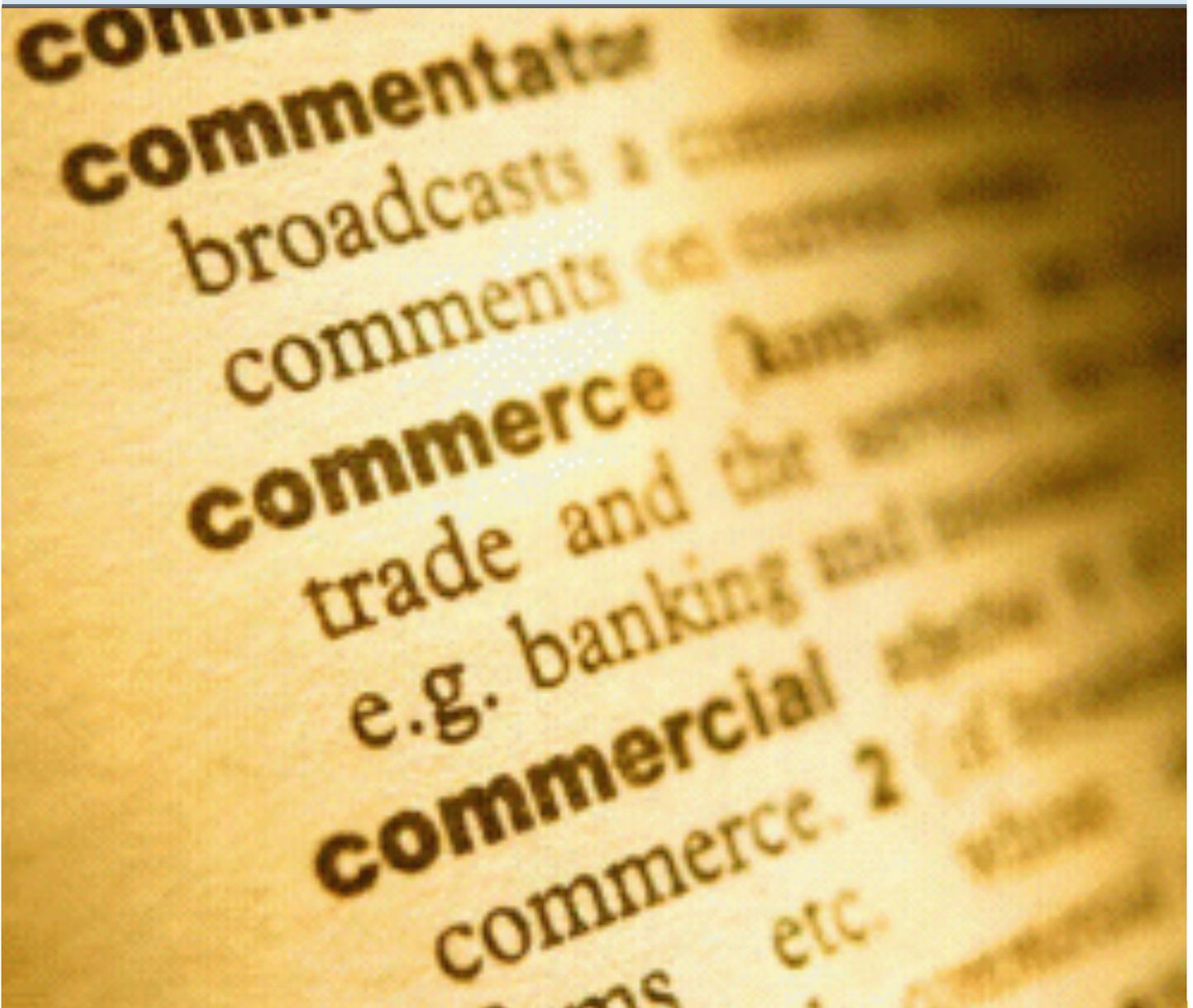


# The True Spirit of the Union:

*How the Commerce Clause Helped Build America  
and Why the Corporate Right Wants to Shrink It Today*



**JUSTICE FOR ALL.  
NO EXCEPTIONS.**

*That's the American Way*



***“No society can surely be flourishing and happy, of which the far greater part of the members are poor and miserable.”***

***--Adam Smith,  
The Wealth of Nations***

## Introduction

If you ask people what part of the U.S. Constitution has been most critical for advancing social progress, many would say the First Amendment’s Free Speech Clause or the Fourteenth Amendment’s equal protection guarantee. But a powerful case can be made that the most important constitutional instrument for social progress in our history has been the Commerce Clause.

Without it, Congress could not have passed the National Labor Relations Act, the Fair Labor Standards Act, the Clayton and Sherman Anti-Trust Acts, the Civil Rights Act of 1964’s prohibition of race discrimination in hotels, restaurants and other places of public accommodation, the Occupational Safety and Health Act, the Equal Pay Act, the Clean Air Act, the Clean Water Act and dozens of other federal statutes protecting the environment and establishing the rights of citizens in the workplace and the marketplace.

Why, then, does the Commerce Clause seem pale and dull next to the Free Speech and Equal Protection Clauses?

Perhaps it is because these provisions clearly declare radiant principles of liberty and equality that translate into easily understood and intuitively attractive protections against arbitrary government power.

The Commerce Clause is not so sexy. It is not a source of “negative” rights against the national government, but rather is a source of “positive” regulatory authority for the people acting through their national government. It empowers Congress to pass laws that regulate the “channels” of interstate commerce, the “instrumentalities” or things that enter the flow of interstate commerce and any activities that “substantially affect” interstate commerce (See *United States v. Lopez*, 514 U.S. 549 (1995).) The Commerce Clause thus enshrines no single rights-based principle like freedom of speech or religious exercise or equality under law but protects the process value of the people maintaining regulatory power over the economic life of the society through their national representatives.

Because the Commerce Clause establishes a structural power in government rather than an individual right of the people, it empowers the people to respond collectively to various economic crises and, since the Industrial Revolution, to a problem that did not exist in 1789: the rise of large corporations that have amassed staggering amounts of wealth and power over the nation’s social and economic life. As a result, for more than a century the people’s elected representatives have deftly used the Commerce Clause as a tool for advancing social justice, fair competition, equal rights in the marketplace and workplace democracy. From anti-trust policy to union organizing, from consumer rights, to civil rights and environmental protection, progressives have enacted legislation that conforms corporate commerce to the agenda and values of society rather than accepting the conservative claim that society must conform itself to the agenda and values of corporate commerce. Our robust Commerce Clause reflects the genius of the Framers, who considered well-regulated national commerce on fair terms to be a crucial constitutional value and a social and economic imperative.

Because the Commerce Clause has been a powerful instrument of social reform over the last century, its meaning has periodically provoked deep jurisprudential controversy. This is ironic since the Court routinely and unanimously upheld congressional assertion of a comprehensive federal commerce power before broad democratic purposes entered the picture. The commerce power became the target of virulent attack by corporate conservatives when progressives and labor gained political influence and used this power as the constitutional basis upon which to regulate and improve the character, terms and conditions of the American workplace and marketplace in favor of large numbers of the American people.

The Commerce Clause first became a terrain of political struggle in the clash over Progressive-era and New Deal legislation. During the so-called *Lochner* era named after the Supreme Court’s 1905 decision in *Lochner v. New York*, which struck down minimum wage and maximum hour legislation for bakery shop workers in New York--the Court was busy invalidating social and economic reforms on the grounds that they violated a right of free contract under the Due Process Clause. The same justices that put the Due Process Clause on steroids to get rid of progressive laws put the Commerce Clause in a straitjacket to accomplish the same purpose.

Conservative justices developed a variety of precious doctrinal distinctions—commerce/production, direct effects/indirect effects, harmful cargo/harmless cargo—to invalidate progressive social and economic legislation. These

doctrines thwarted Congress' power to regulate the national commercial economy in the interests of fairness, justice, equity, safety and health and imperiled the success of the New Deal. An emasculated Commerce Clause threatened to leave Congress and the people helpless to control national corporate power. After tremendous political ferment over these decisions and President Franklin D. Roosevelt's (failed) proposal to enlarge the size of the Supreme Court, the Court reversed itself and reestablished the broad and effective power of Congress to act on questions of interstate commerce. At its high point, in *Wickard v. Filburn*, 311 U.S. 111 (1942), a case involving agricultural quotas relating to wheat production and consumption, the Court affirmed the power of Congress to regulate even individual private economic decisions and contracts that do not affect interstate commerce, so long as the "aggregate" effect of such decisions across the country would affect interstate commerce.

This expansive understanding of the Commerce Clause lasted for more than a half-century, a period which produced active and creative federal legislation in the public interest. Then, during a period of growing conservative political and judicial activism, the Rehnquist Court, in 5-4 decisions in *Lopez v. United States*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), revived the project of constricting Congress' power to regulate commerce. It knocked down, with some justification, the Gun-Free School Zones Act and then eliminated, with no plausible justification, the private civil action remedy provisions of the Violence Against Women Act. The Court declared that it would skeptically scrutinize congressional efforts to regulate "non-economic" activity even if the total aggregate of such activity did substantially affect interstate commerce.

We are still living through this period of resurgent conservative judicial activism to shrink the scope of the Commerce Clause. The key test of the meaning of the Commerce Clause today relates to national health care reform, the Affordable Care Act (or "Obamacare," if you prefer). The lynchpin provision of the law, which requires all citizens to purchase health insurance, is under attack by conservatives. They allege that Congress' undisputed power to regulate the national health care system does not extend so far as to authorize enactment of an individual health insurance mandate. This case will not only decide the fate of national health care policy but will determine whether we will have a robust Commerce Clause consistent with the Founders' intentions and up to the task of governing a complex national economy, or a pinched Commerce Clause construed to deny the American people effective regulatory power over our own economic and social life.

## The Origins and Original

## Interpretations of the Commerce Clause

It is clear that the Framers who met in Philadelphia wanted the new Constitution to establish a comprehensive national legislative power to rationalize the fraught field of interstate commerce. Under the loose and centrifugal dynamics of the Articles of Confederation, the states not only had their own currencies and protectionist laws but were engaged in constant trade wars and conflicts. They were making a mess of the liberal promise of a market in national commerce that would serve a common good. This was an important promise articulated at the time by Enlightenment liberals like Scottish economist Adam Smith, whose *Wealth of Nations* was published in 1776; Revolutionary democratic leaders like Ben Franklin and Tom Paine who sought to marry the public-spirited virtues of republican institutions with the peaceful energies of a vibrant national marketplace; and conservative nationalists like Alexander Hamilton, who had predicted in *Federalist* No. 22, that, if "not restrained by national controul," all of the tariffs and hostile trade rules imposed by various states—the "interfering and unneighbourly regulations of some States contrary to the true spirit of the Union"—would spiral downward into "serious sources of animosity and discord." *The Federalist Papers by Hamilton, Madison, and Jay*, p.104 (Bantam, 1982.)

Against this backdrop of turbulent economic conflict among the states and in the hope of creating a well-regulated and integrated national market, Article I, Section 8, Clause 3 of the Constitution established the power of the United States Congress "To Regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes."

From the beginning, the Supreme Court understood this power in the most comprehensive and expansive terms. In *Gibbons v. Ogden* (1824), the first major decision expounding on the Commerce Clause, the great conservative Chief Justice John Marshall rejected an attack on Congress' power to license interstate steamboat operators to operate in the face of hostile state laws. He dismissed the claim that the Commerce Clause empowered Congress only to regulate the commercial traffic in goods—"buying and selling"—as opposed to commercial navigation and transportation. "Commerce, undoubtedly, is traffic, but it is something more—it is intercourse," he wrote.

More generally, Chief Justice Marshall took the opportunity to declare that the commerce power is,

"The power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in

itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. [...] The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse.”

This emphatic beginning for Commerce Clause jurisprudence in the Supreme Court became the foundation for decisions upholding robust federal laws that not only regulated interstate commercial traffic and transportation but intrastate commercial traffic and transportation that were closely connected to interstate activity. Thus, in *Swift & Co. v. U.S.* (1905), a unanimous Court upheld an injunction under the Sherman Act against local price fixing by meat producers because such price fixing, even if taking place all within a single state, is still part of a stream or “current of commerce” that runs across state lines.

In the famous *Shreveport Case* (1914), the Court upheld the power of the Interstate Commerce Commission (ICC) to regulate railroad prices set within the state of Texas that reflected, in context, unfair price discrimination against passengers and business cargo flowing into Texas from other states.

In *Shreveport*, Justice Hughes, writing for a seven-justice majority, rejected the claim that Congress and its designated administrative agency, the ICC, lacked constitutional authority to regulate the “intrastate charges of an interstate carrier.” He wrote:

“The fact that carriers are instruments of intrastate commerce, as well as interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter, or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Whenever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field.”

Furthermore, the Court declared that the power to regulate something under the Commerce Clause is so complete as

to also include the power to ban it. Rejecting the claim that the power to regulate is only a power to set the terms of an activity and not prohibit it altogether, the Court, in the so-called Lottery case *Champion v. Ames* (1903), upheld the constitutionality of the Federal Lottery Act of 1895, which criminalized the interstate shipment of lottery tickets. The Court reasoned that, just as a state could use its essential regulatory “police power” to ban lottery tickets locally, Congress could use its Commerce power to ban the traffic in lottery tickets in the stream of interstate commerce.

## The First Wave of Decisions Targeting Reform Legislation in the *Lochner* Era

Yet all of these expansive principles lost their power and clarity for the Court, which has generally been a profoundly conservative institution in American life, when it turned to consider corporate attacks on progressive social and economic legislation in the industrial age.

The first serious sign that the Court would cast a wary, more political eye on progressive measures came in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), a decision blocking federal government action under the Sherman Anti-Trust Act to prevent the American Sugar Refining Company from acquiring four other sugar refineries and thus controlling the nation’s entire sugar refining market. In the course of sharply confining the national government’s power to police conspiracies in restraint of interstate trade, Chief Justice Fuller set forth several key doctrines that would come to infuse efforts to straitjacket the commerce power. He wrote that the power to regulate interstate “commerce” did not extend to the regulation of local “manufacture,” which is only related to interstate commerce in an “indirect” way. As he put it, “Commerce succeeds to manufacture, and is not a part of it. [...] 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.”

In his dissenting opinion, Justice John Harlan struck the themes that would answer this formalistic and tautological approach of dividing “commerce” from “manufacture” and “direct effects” on interstate trade from “indirect” ones. He observed that any conspiracy that “obstructs freedom in buying and selling articles manufactured to be sold to persons in other States or to be carried to other States [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 [the national government].”

He also warned that the Court majority's constricted view of the Commerce Clause "leaves the public, so far as national power is concerned, entirely at the mercy of combinations which arbitrarily control the prices of articles" in the stream of interstate commerce. In other words, a Congress shorn of its proper commerce powers is a nation unable to protect its citizens against the economic power of corporations.

Yet, the conservative gloss on the Commerce Clause proved to be tenacious indeed. The Court majority proceeded to strike down federal laws regulating the manufacture of liquor and the production of oil and electricity generation on the grounds that the regulated entities were all part of "local production," not interstate commerce. In the first three decades of the 20th Century, the Court's majority expanded and embellished this effort to isolate "commerce" from "industry" and national trade from local production.

Many federal laws toppled by the Court during this period were efforts to establish the rights of working people in dangerous and unfair workplaces. For example, in 1908, in a 5-4 vote, the Court struck down an employer liability law giving surviving spouses the right to sue railroads and other common carriers in interstate commerce for damages if the corporations were responsible for the death of their spouses. The Court found in the *Employers' Liability Cases*, 207 U.S. 463, that Congress had exceeded its commerce powers because the law applied to all accidents involving all employees of such companies, even those accidents which did not take place literally in the course of interstate commerce.

In another 1908 case, *Adair v. United States*, 208 U.S. 161, the Court struck down a federal law that made it illegal to fire workers for joining a union. The Court's majority ruled that the Commerce Clause did not empower Congress to enact such a statute because the law addressed the issue of labor, which the Court defined as being a matter of "local" commerce. Moreover, the Court found that the law offended the *Lochner* doctrine by interfering with the sacrosanct sphere of free contract under Due Process.

Even when Congress tried to tailor its laws to the fanatically shrunken Commerce Clause, the Court found ways to find congressional efforts wanting. In a child labor case, *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the Court invalidated a 1916 law that prevented the shipment in interstate commerce of any products made in factories that employed children under the age of fourteen or over-worked children between the ages of fourteen and sixteen by employing them more than eight hours a day or six days a week.

Casting aside the prior common-sense understanding from the *Lottery* case that the power to regulate includes the

power to ban, Justice Day in the *Child Labor* case ruled that Congress exceeded its commerce powers when it abolished the trade in child labor-made goods as opposed to merely regulating it. Justice Day distinguished the *Lottery Case* from cases like *Hipolite Egg*, 220 U.S. 45 (1911), which upheld the seizure of eggs that had passed through interstate commerce, and *Hoke v. United States*, 227 U.S. 308 (1913), preserving prosecutions under the Mann Act, which prohibits the transportation of women in interstate commerce for immoral purposes, by insisting that these decisions "rest upon the character of the particular subjects dealt with" and that the use of interstate commerce by defendants in these cases for the unlawful purposes produced intrinsically "harmful results."

On the other hand, Justice Day argued, spelling out the new theory, goods made from child labor "are of themselves harmless." That is, there is nothing intrinsically dangerous about them. The process of manufacturing normal and nondangerous goods is thus outside the purview of the Commerce power, according to Justice Day's opinion. Nor may Congress strike at the use of child labor as an unfair interstate trade practice by certain states against others. For good measure, Justice Day invoked federalism, describing the ban on interstate shipment of goods made with child labor as a power grab against the states: "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."

This decision set the table with all the sharp knives needed for the Supreme Court majority's slashing attack on the New Deal, which of course tried to address the nation's social and economic collapse during the Great Depression with the development of price controls, labor rights and consumer protection laws. In a series of 5-4 decisions, the Court struck down the mandatory retirement and pension provisions of the Railroad Retirement Act of 1934, *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935); the National Industrial Recovery Act of 1933, which established codes of fair trade and fair wages and hours for hundreds of industries, *Schechter Poultry Co. v. U.S.*, 295 U.S. 495 (1935); and the Bituminous Coal Conservation Act of 1935, which created a code of operations for coal producers, set coal prices, and established minimum wage and maximum hour protections for coal workers, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

In the *Carter Coal* case, Justice Sutherland, a famously reactionary jurist, turned Chief Justice Marshall's conception of the Commerce Clause on its head. He enunciated new

theories that effectively extinguished Congress' power to act effectively in the national economy, at least on behalf of workers and consumers, beginning by separating commerce and production and then classifying the former as national and the latter as local:

“[T]he effect of the labor provisions of the [Act] primarily falls upon production and not upon commerce. [P]roduction is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in or forms any part of interstate commerce.”

Although Justice Sutherland “freely” conceded that production “has some effect on” commerce, he noted that, at this point, the key question became whether the effect of factory production on interstate commerce was “direct” or “indirect.” His rambling disquisition on the subject of “directness” offers class jurisprudence dressed up as a kind of whimsical metaphysics:

“Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. The word ‘direct’ implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined. It is quite true that rules of law are sometimes qualified by considerations of degree, as the government argues. But the matter of degree has no bearing upon the question here, since that question is not—What is the extent of the local activity or condition, or the extent of the effect produced upon interstate commerce? But—What is the relation between the activity or condition and the effect?”

And so on. Gobbledygook aside, the politics was plain: there was simply no way that the reactionary conservatives on the Court would accept progressive social legislation that

curbed corporate power in the interest of workers, farmers and consumers.

The Court's attack on New Deal legislation provoked a political crisis. With the National Labor Relations Act (the Wagner Act) and the Social Security Act still hanging in the balance, President Franklin D. Roosevelt introduced the Judicial Procedures Reform Act, his infamous “Court-packing” plan, in February of 1937 to change the balance of power on the Court by adding up to six new Justices, one each for every sitting Justice aged 70-and-a-half or older. He proceeded to argue in a Radio Address that America had “reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself.” Although Congress rejected the President's scheme, the Supreme Court changed its tune soon thereafter with Justice Owen Roberts and Chief Justice Charles Evans Hughes joining the liberals to uphold key pieces of New Deal legislation. Historians are still debating what caused the famous “switch in time that saved nine,” but the Court in any event altered its Commerce Clause jurisprudence and came back from the brink of wrecking the effort by Congress and Roosevelt to save the people from permanent economic disaster.

## **Revival of the Commerce Clause: *Upholding the National Labor Relations Act, the Fair Labor Standards Act, the Agricultural Adjustment Act and the Civil Rights Act of 1964***

In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court returned to its traditionally expansive view of the Commerce Clause. It upheld the power of Congress to pass the National Labor Relations Act and the power of the National Labor Relations Board to sanction unfair labor practices committed by a large steel company operating in Pennsylvania whose subsidiaries, mines, steamships, towboats and railroads operated all over America. The Court made short work of the conservatives' formalistic doctrines parsing “production” and “commerce,” and distinguishing “indirect” local effects on commerce from “direct” ones. Even if certain economic activities “may be intrastate in character when separately considered,” Chief Justice Hughes wrote, “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.”

Similarly, in *United States v. Darby*, 312 U.S. 100 (1941), the Supreme Court expressly overruled *Hammer v. Dagenhart*, the Child Labor case, and upheld two Fair Labor Standards Act (FLSA) provisions roughly parallel to those that had

been struck down in that decision. The FLSA prevented the interstate shipment of lumber manufactured by employees whose wages were below the federal minimum wage or whose hours exceeded the federal maximum limit. It also directly imposed the same wage and hour rules on all industries producing goods “for interstate commerce.”

Writing for the majority, Justice Stone found that, when it came to the first provision banning articles from interstate commerce, Congress is not confined to the exclusion of “noxious articles, stolen articles, kidnapped persons” and other intrinsically dangerous things, but is free to exclude any “articles whose use . . . it may conceive to be injurious to the public health, morals or welfare.” He wrote that the purpose of Congress in enacting the FLSA was the plainly legitimate one of preventing the stream of interstate commerce from becoming “the instrument of competition in the distribution of goods produced under substandard labor conditions.” Moreover, he observed that the legislative “motive and purpose” behind the exercise of the Commerce power “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.”

The majority also upheld the direct regulation of wages and hours in industries producing goods destined to enter the stream of interstate commerce. Citing the *Shreveport* case, Justice Stone found that the power to control interstate commerce extends to “activities intrastate which have a substantial effect” on interstate commerce. Here, he found that the FLSA’s direct regulation of wages and hours was reasonably targeted at controlling the unfair competitive edge in interstate commerce achieved by states and businesses that violate these laws.

But the post-New Deal decision that most sweepingly reaffirmed Congressional power to promote the national economic interest through the Commerce power was *Wickard v. Filburn*, 317 U.S. 111 (1942). In *Wickard*, the Court affirmed a \$117 penalty imposed on an Ohio dairy farmer who harvested 16 bushels of wheat more than he was allowed to under a wheat harvesting quota set by the Secretary of Agriculture under the Agricultural Adjustment Act of 1938. The farmer, Filburn, made an especially compelling case and sympathetic plaintiff since the wheat he harvested went not to market but to feed his livestock and family and to create seed for planting. Yet, Justice Jackson wrote for a unanimous court that one of the perfectly reasonable and valid purposes of the Act was to increase the price of wheat and therefore to limit the volume produced. Home-consumed wheat, he wrote, “would have a substantial influence on price and market conditions.”

Even if the farmer’s wheat never goes to market, Justice Jackson wrote, “it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market.” In this sense, home-grown wheat “competes with wheat in commerce” by keeping people who would otherwise be consumers from purchasing wheat on the open market. Furthermore, even if Filburn’s individual “contribution to the demand for wheat may be trivial by itself,” the key point from the Commerce Clause perspective is that “taken together with that of many others similarly situated,” his contribution to demand “is far from trivial.” This kind of analysis is what has given rise to the “aggregation” approach to analyzing the substantiality of effects on interstate commerce; what matters is not the economic effect on interstate commerce of a single actor who wants to opt out of a national regulatory scheme but the “aggregate” effect of all persons or businesses similarly situated.

The success of New Deal laws promoting the common good in the restored Commerce Clause jurisprudence of the Court emboldened a later generation of Americans not only to fight for a federal civil rights law to break the Jim Crow practices of private restaurants, luncheon counters, hotels, motels, theaters and inns, but to anchor this law, at least partially, in Congress’ power to regulate interstate commerce. Title II of the Civil Rights Act of 1964 banned race discrimination in any such place of public accommodation “if its operations affect commerce.” This statutory linkage was necessary to target apartheid practices in the private sector because the provisions of the Fourteenth Amendment could only be exercised to forbid discrimination by state actors. But the premise of the law was that commerce is, by definition, for all citizens, not just some, and Congress could act to defend the channels of commerce for everyone.

When the Heart of Atlanta Motel challenged the constitutionality of Title II, the Supreme Court in *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964), rendered a magisterial opinion reaffirming Congress’ broad Commerce power and emphasizing judicial deference to Congressional deployment of such power. Justice Tom Clark, writing for a unanimous Court, held that the only test for validity of legislation under the Commerce power was whether “the activity sought to be regulated is ‘commerce which concerns more States than one,’” and whether such activity “has a real and substantial relation to the national interest.”

Justice Clark found this to be an easy case, invoking numerous obstacles that African-Americans faced to fair and efficient enjoyment of the channels of interstate commerce because of racist business practices they confronted on the road. He cited “voluminous testimony” heard by Congress “presenting overwhelming evidence that discrimination by hotels and

motels impedes interstate travel,” both “impairing ‘the Negro traveler’s pleasure and convenience,” and “discouraging travel on the part of a substantial portion of the Negro community.” The fact that Congress saw this as a “moral problem” did not “detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse.” Similarly, the Motel’s claim that its operations were overwhelmingly of a “local character” did not nullify Congressional interstate Commerce power, which “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.”

The Court went even further in a closely related case, *Katzenbach v. McClung (Ollie’s Barbecue)*, 379 U.S. 294 (1964), that involved a challenge to application of Title II to Ollie’s Barbecue, a Birmingham, Alabama restaurant 11 blocks from an interstate highway that served a primarily local clientele and discriminated against black customers, forcing them to use carry-out from the back door. Given how little interstate traffic the restaurant enjoyed, the main nexus linking it to interstate commerce was \$70,000 worth of food that Ollie’s purchased each year from out of state. Emphasizing that while no formal findings were made on the point and such findings were “not necessary,” Justice Clark stressed again how little interstate commerce African-Americans were able to engage in because of segregation and how difficult it made it for them to travel. The legislative record, he observed, “is replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants.” Echoing the Court’s findings with respect to hotels and motels, he concluded that Congress “had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce.”

The expansive definition of the Commerce Power in *Jones & Laughlin Steel* and *Darby* and the articulation of a mild and deferential rational basis test in *Heart of Atlanta Motel* and *Ollie’s Barbecue* created the space for Congress to enter the modern era of legislation. For three decades after the cases upholding the Civil Rights Act of 1964, Congress acted with great energy and ambition to address civil rights, environmental, consumer, labor, trade, housing, public accommodations, public safety, education and occupational health and safety concerns. Congress acted with confidence that its enumerated constitutional power to regulate commerce, in conjunction with its powers under the Necessary and Proper Clause, was sufficiently expansive to protect and insulate such legislation. This confidence proved to be misplaced and, in the context of the Supreme Court’s general conservatism, perhaps even a bit sloppy and

cavalier.

## The Rehnquist Court’s Renewed Restrictions on Congressional Power under the Commerce Clause

The Supreme Court had not invalidated an exercise of Congressional Commerce power in six decades when, in 1995, it took up a San Antonio high school senior’s challenge to the Gun-Free School Zones Act of 1990. The student, Alfonso Lopez, had been convicted of carrying a loaded handgun at school in violation of the Act’s criminal prohibition against knowing possession of a firearm within a school zone. Lopez argued that the Commerce Clause did not empower Congress to regulate the merely local act of possessing a gun in the vicinity of a local public school. His challenge galvanized political conservatives, Federalist Society lawyers, and anti-gun control activists who saw in the case the chance to revive political and jurisprudential battles over the Commerce power and push the “new Federalism” that always seems to be waiting in the wings.

Writing for the majority in the 5-4 decision, Chief Justice Rehnquist recapitulated Commerce Clause jurisprudence, identifying “three broad categories of activity” that Congress may regulate under the Commerce power: (1) “the use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce”; and (3) “activities having a substantial relation to interstate commerce.”

Given that the Act did not refer at all to the channels of commerce and did not specify that the proscribed firearms had to have traveled in interstate commerce, Chief Justice Rehnquist properly disposed of the first two categories of activity. If the Court were to sustain the Act, it would have to be because Congress was regulating activities that had “a substantial relation to interstate commerce.”

Rehnquist conceded that the Court had upheld “a wide variety of congressional Acts” to govern local activity substantially affecting interstate commerce, such as laws relating to coal mining, credit cards, hotels and restaurants, and wheat farming. But he pointed out that all of these statutes regulated “intrastate economic activity” (Emphasis added). By contrast, the Gun-Free School Zones Act “is a criminal statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise.” Nor is the criminal prohibition at issue in the case “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”

Rehnquist castigated the government for offering an argument related to “substantial effects” that offered no internal limiting principles at all. The government argued that gun possession in school zones could lead to violent crime, which could lead to increased insurance costs and a reduced willingness to travel, and to reduced learning at school which could lead, in turn, to a less productive population and a reduced GNP. Under this logic, Rehnquist correctly pointed out that Congress could regulate any causes of violent crime and any forces related to economic productivity, such as family law and education. “To uphold the Government’s contentions here,” he wrote, “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.”

The Supreme Court majority’s correction of Congress was not undeserving here and its restatement of Commerce Clause doctrine was not unsound. Over the decades the legislative branch had grown a bit lazy and complacent in assuming that it could pass anything under the sun by waving the Commerce Clause wand. In any event, the law certainly could have been drafted more convincingly and appropriately to criminalize possession of a gun that had been sold and moved across state lines, which is precisely what Congress did in response to the decision in the Gun Free School Zones Act of 1995.

Thus, the *Lopez* decision alone would have been no big deal. But in *United States v. Morrison*, 529 U.S. 598 (2000), the Supreme Court took away the opportunity for victims of gender-motivated violence to sue their attackers for civil damages, a key provision of the Violence Against Women Act of 1994. Chief Justice Rehnquist’s majority decision demonstrated that the conservative bloc was not merely interested in a modest doctrinal correction but rather a sweeping attack on the federal government’s role in pushing social progress and basic rights for the whole population.

Congress passed the civil remedies provision of the Violence Against Women Act of 1994 for the same reason it passed Title II of the Civil Rights Act three decades earlier: to vindicate the equal place in society of a part of the population that had suffered private stigma, discrimination, coercion and violence, a form of mistreatment that substantially affected the nature and quality of social and economic life. But Congress had learned the hard lesson of the *Lopez* decision and therefore went to painstaking lengths to develop a meticulous and thick factual record about the impact of gender-based violence on the economic lives of victims. It 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” and “by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and demand for interstate commerce.”

But Rehnquist ruled that gender-motivated crimes of violence “are not, in any sense of the phrase, economic activity” and he refused to aggregate the effects of the “non-economic activity” of gender-based violence to see if Congress was right about such violence substantially affecting the ability of women to participate in national life. In striking down this provision, he sounded themes popular with Commerce Clause-constricting conservative Justices of the past: “The Constitution requires a distinction between what is truly national and what is truly local,” he wrote. “[W]e 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 Souter lodged a brilliant dissenting opinion that delivered the proper analysis of the case. He started by observing that Congress has the power to legislate over any activity that “in the aggregate” has a substantial effect on interstate commerce. The existence of such an effect “is not an issue for the courts in the first instance” but for Congress itself. By enacting legislation, Congress registers its conclusion on the matter. The courts then review the judgment “not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact.”

Surveying the “mountain of data assembled by Congress” to document the effects of violence against women on interstate commerce, Justice Souter concluded that the “sufficiency of the evidence” providing a rational basis for action “cannot seriously be questioned.” Indeed, he observed that the “legislative record here is far more voluminous than the record compiled by Congress and found sufficient in *Heart of Atlanta Motel* and *Katzenbach v. McClung*.” In purporting to set right the balance between the federal government and the states according to its own notions, the Rehnquist majority, as Justice Souter pointed out, was casting aside “the Founders’ considered judgment that politics, not judicial review, should mediate between state and national interests as the strength and legislative jurisdiction of the National Government inevitably increased through the expected growth of the national economy.”

The thoroughly opportunistic deployment of arguments restricting the commerce power became clear in *Gonzalez v. Raich*, 545 U.S. 1 (2005), when Justices Antonin Scalia

and Anthony Kennedy suddenly abandoned their hard-line opposition to aggregating the effects of local non-economic activity in doing “substantial effects” analysis. In that case, the majority affirmed federal criminal prosecutions of ill people who grew their own marijuana and used it for medical purposes under California state law. The criminal defendants followed *Morrison* to make the argument that the act of growing marijuana at one’s home and using it there was a purely “local” and non-economic act that had nothing to do with interstate commerce. Yet, the majority of Justices found that such use was validly controlled as part of a legitimate national regulatory scheme and that the aggregate effect of homegrown use was to undercut federal control of the drug in interstate commerce. Justice Scalia could see the dangerous aggregate effects of local homegrown marijuana consumption but not the dangerous aggregate effects of local violence against women in the home, the workplace and public places. Thus, judicial arguments restricting the commerce power are turned on and off selectively and strategically depending on the underlying politics of the case.

## The Corporate Court, The Affordable Care Act and the Stream of Commerce Ahead

Today the battle over the meaning of the Commerce Clause persists in the context of a surging pro-corporate jurisprudence on the Roberts Court. In a separate report, entitled “Rise of the Corporate Court: How the Supreme Court is Putting Businesses First,” People For the American Way has demonstrated that the five most reliably pro-corporate justices have been trampling the rights of victims of corporate job discrimination; undercutting the ability of victims of mass torts, like the Exxon Valdez disaster or Philip Morris’ disinformation campaigns about smoking; to collect punitive damages from big business; and trashing environmental and health safety laws. Of course, most shockingly, in *Citizens United v. FEC*, the conservative bloc swept away decades of precedents and centuries of legal understandings to invent a sweet new constitutional right for corporations: to spend unlimited amounts of corporate treasury money to elect or defeat candidates in public elections. The decision threatens to remake American politics into something like a corporate democracy.

The Court’s statutory decisions affecting citizen’s rights are harmful and pernicious, but they at least can be reversed by political and legislative mobilization. Thus, everyone remembers that Congress was able to act when the Roberts Court ruled infamously, in its familiar 5-4 lineup, in

*Ledbetter v. Goodyear Tire & Rubber Co.* (2007), that, under Title VII, the female victim of decades of pay discrimination who only learned of the gender discrimination at the end of her career could not sue since the discrimination had begun more than 180 days before her court filing and the statute of limitations had therefore run on her claim. The Court majority’s outrageous perversion of the law on behalf of the Goodyear Tire and Rubber Company caused an uproar in the 2008 presidential campaign and led to Congressional passage of the Lilly Ledbetter Fair Pay Act of 2009, which undid the damage to Title VII of the Civil Rights Act.

But when the conservative bloc on the Court hands down constitutional decisions fundamentally changing the distribution of power and rights in American society, it is much harder to contain the damage. This is why *Citizens United* continues to send shock waves through the political system.

And this is why the struggle over the Affordable Care Act has such dramatic significance. Opponents of national health care reform, including numerous state attorneys general, have targeted the Act for demolition in court and have challenged it in different federal circuits. Their key argument is that the “individual mandate” provisions obligating all citizens to purchase health insurance or be taxed for not doing so are unconstitutional because they exceed Congress’ powers under the Commerce Clause as well as its taxing powers. The central claim is that, even granting that the health care insurance system substantially affects interstate commerce and that a comprehensive national regime to expand health coverage and lower health costs is therefore a permissible exercise of the Commerce power, this power cannot extend to the act of compelling citizens to purchase health insurance against their will. Much of the opposition is couched in the rhetoric of it being unconstitutional for Congress to regulate the act of not doing something: Neither the Commerce Clause nor the Necessary and Proper Clause, it is argued, supply the government with the power to make someone buy something.

As we have seen on this tour through the twists and turns of Commerce Clause history, the underlying politics of a case often overwhelm the fine doctrinal points. For whatever it is worth, however, it should be stated that the conservative arguments assailing the individual mandate seem paper-thin from the standpoint of constitutional text, history, precedent and doctrine. Neither in the Commerce Clause nor in the Necessary and Proper Clause did the Founders prevent Congress from compelling people to perform certain economic acts. Nor is there anything remotely unconstitutional about government using its powers to compel people to do things relating to Commerce, as prior

Supreme Court decisions demonstrate. It is a nostalgic throwback to the *Lochner* period to imagine that the Constitution protects the inviolable sanctity of each person's right to do exactly whatever he or she wants whenever he or she wants.

Many of the federal laws passed under the Commerce Clause and upheld by the Supreme Court in the past have had the character of compelling people to form private contracts that obligate them financially. When the Court upheld the National Labor Relations Act in 1937 in *Jones & Laughlin Steel*, it saved a federal law that compels employers to reinstate and provide back pay and ongoing compensation to workers fired for union organizing. It also compels employers not to terminate employees for favoring a union and, of course, it forces employers to bargain in good faith and to respect the terms of collective bargaining by paying the negotiated wage. All of these provisions affirmatively require people to engage in specific economic and contractual actions.

Similarly, the statutory scheme upheld in *Wickard v. Filburn* under the Agricultural Adjustment Act essentially forced Filburn the farmer to stop harvesting so much wheat at home and to go back out into the market to buy it. In other words, to help prop up wheat prices, he was forced to purchase in the market what he easily could have produced at home. Yet, the court thought that this was a perfectly rational choice by the federal government within its national regulatory scheme to help all farmers deal with the vagaries of the market in wheat. And what was the decision in the *Heart of Atlanta Motel* about other than telling recalcitrant owners of motels, hotels, lunch counters and restaurants that they would henceforth be forced to do business with African-Americans, serve them, feed them, charge them, and keep their dollars? Indeed, the bite of all of our civil rights public accommodations laws, whether they deal with race, gender, age or religion, is that they essentially force people to engage in commercial transactions with people they otherwise would not do business with. The despised "individual mandate" provision is totally in the mainstream of federal legislation enacted under the Commerce Clause.

In the aggregate, people who fail to purchase health insurance for themselves have a substantial effect on interstate commerce; billions of dollars are spent by taxpayers and the responsible individuals who pay insurance premiums to cover the uncompensated care of the irresponsible and the daredevil as well as the destitute and the unfortunate. The health insurance market is most decidedly part of interstate commerce and the fact that tens of millions of people are without insurance has tremendous economic effects. This is plain and irrefutable.

The healthcare fight for some people, such as Massachusetts Governor Mitt Romney, is simply a political opportunity to assail the president of the other party for a policy they once agreed with. For others, it is an opportunity to attack the idea of social solidarity and national responsibility for public needs. But, for many large corporations, it is a proxy war. Although it was in exile for six decades before the *Lopez* decision, the big-business corporate agenda for the Commerce Clause has been to slice away at its meaning until it can no longer support any laws and regulations that interfere with corporate power and decision-making in the workplace, the marketplace and the environment. Thus, the opposition to use of the Commerce power by Congress in the health care law to alleviate the dangers and risks of being uninsured arises from a corporate-dominated conservatism that jealously guards private economic power and resists democratic public control over our economic life. The campaign against the "individual mandate" partakes in a wistful longing to revive the discredited *Lochner* decision, a case that propounded a theory of absolute freedom of contract that did not work for the Due Process Clause and definitely should not now be put to work for the Commerce Clause either. The Commerce Clause has been an essential instrument of market integration, economic regulation and social progress for the whole American people. Political progressives and constitutional conservatives should work together to defend it. ■

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# The True Spirit of the Union:

## *How the Commerce Clause Helped Build America and Why the Corporate Right Wants to Shrink It Today*

There's a powerful case to be made that the most important constitutional instrument for social progress in our history has been the Commerce Clause. Without it, Congress could not have passed:

- **The National Labor Relations Act**
- **The Fair Labor Standards Act**
- **The Clayton and Sherman Anti-Trust Acts**
- **The Occupational Safety and Health Act**
- **The Equal Pay Act**
- **The Clean Air Act**
- **The Clean Water Act**
- **The Civil Rights Act of 1964's prohibition of race discrimination in hotels, restaurants and other places of public accommodation,**
- **Dozens of other federal statutes protecting the environment and establishing the rights of citizens in the workplace and the marketplace.**



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