CHAPTER 5

CONGRESSIONAL POWER: THE COMMERCE CLAUSE

5.1 INTRODUCTION TO THE COMMERCE CLAUSE POWER

In Article I, section 8, clause 3, the 1789 Constitution of the United States grants Congress power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Under the Commerce Clause power, the three questions of subject matter, limitations or scope of the power, and standards of review (see chapter 4) work out roughly as follows:

1. *Subject matter:* Power to regulate the channels and means of interstate commerce, the people or things in interstate commerce, and activity that has a substantial effect on interstate commerce.
2. *Constitutional limits:* (1) The actor being subjected to regulation must be a willing participant in an existing market; and (2) the regulation must not unduly interfere with state sovereignty.
3. *Standard of review:* Deferential rational basis such that as long as the ends are legitimate, Congress is free to choose any means to accomplish those ends subject to express and structural constitutional limits.

The Commerce Clause power allows the federal government to regulate a wide range of activities, including transportation, education, agriculture, social security, employment conditions, the environment, health care, food and drug safety, and much more.

Themes of federalism, separation of powers, the role of the Supreme Court, and methods of interpretation are integral to understanding the reach of the Commerce Clause power. Race and the Reconstruction Amendments together with the Court's early responses to those amendments also affect the power of Congress under the Commerce Clause albeit less directly. For example, the decisions of the Court in *The Slaughterhouse Cases* (1873) and *The Civil Rights Cases* (1883) (see chapter 2) limiting congressional power under the Fourteenth Amendment are at least partially responsible for the Civil Rights Act of 1964 being supported by the Commerce Clause power. *Heart of Atlanta v. United States*, 379 U.S. 241 (1964) (section 5.5.1 below).

The term "legitimate end" is used in two related but somewhat distinct ways: (1) whether the purpose of Congress in enacting the regulation is proper, and (2) whether the target of the regulation is within the subject matter of the granted

power. For the Commerce Clause, a legitimate end for Congress is one that targets one of the following three categories:

1. The channels and instrumentalities of interstate commerce;
2. The people, things, and services moving in and through interstate commerce; and
3. Activities that substantially affect interstate commerce.

Once the legitimate-end requirement is met, almost all means to accomplish the end are permissible. The Court uses the highly deferential rational basis standard of review under which it merely determines whether Congress could rationally have believed that the means it chose could accomplish the legitimate end.

Application of the Commerce Clause arises in two distinct, albeit related, settings. The first is when Congress enacts legislation under the Commerce Clause power. The question then arises over whether the legislation falls within the range of matters encompassed by the Commerce Clause. For example, does the Commerce Clause grant Congress the power to enact a statute that prohibits discrimination in private and government employment on the basis of race or sex? In other words, is such a prohibition a legitimate purpose or end under the Commerce Clause? (The answer in the employment setting is "yes." *See Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964) (upholding the public accommodations provisions of the Civil Rights Act of 1964 as a proper exercise of power under the Commerce Clause).)

The second setting involves a state or local government regulating commerce. The Interstate Commerce Clause issues in that setting are either (1) preemption when Congress has spoken, or (2) the limits placed on state and local governments merely from the existence of plenary federal power over interstate commerce (the so-called Dormant Commerce Clause). (Preemption and the Dormant Commerce Clause are considered in chapter 11.)

The history of the Supreme Court's Commerce Clause jurisprudence is long and complicated, with inconsistent rules adopted and applied at various times. That complexity derives (1) from applying the broad, general constitutional language grant of power to ever-changing economic and political conditions, and (2) from deeper foundational questions at the heart of constitutional interpretation.

The meaning of words like "commerce" and even "interstate" are not self-defining. Over time, for purposes of constitutional interpretation, two possible meanings of commerce developed: one narrow, cramped, and limiting; and the other broad, expansive, and permissive. The narrowest interpretation would limit commerce to the specific act of parties exchanging or trading goods or services. The expansive interpretation in force today treats as commerce almost any and all economic activity. In other words, the first interpretation would limit commerce essentially to the sale and purchase of goods and services, whereas the second expands commerce to include every step and every action in the process by which goods and services are produced, financed, tested, manufactured, stored, transported, conveyed, sold, and ultimately disposed of. Since the 1940s through today, all of the justices on the Supreme Court except one (Justice Clarence Thomas) have adhered to the expansive view of the meaning of "commerce." For a period of time known as the *Lochner* Era (1897–1937) in the latter part of the nineteenth and into the twentieth century a majority of the Court followed a version of

the narrow definition and insisted that Congress's power over commerce was limited accordingly.

With respect to the meaning of *interstate,* a range of interpretations are also possible. For example, under one narrow interpretation only actions that actually cross state lines qualify as interstate activity. The broader interpretation of interstate followed today for purposes of granting power to Congress covers any activity that substantially affects interstate commerce, even if it takes place intrastate and never crosses state lines

5.2 FOUNDATIONAL COMMERCE CLAUSE CASES

Chapter 2, "Foundational Principles and Cases," includes two cases that established enduring principles for interpreting the Interstate Commerce Clause: *Gibbons v. Ogden,* 22 U.S. 1 (1824), page 83, and *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1851), page 93. In *Gibbons v. Ogden* (1824), the Court established the broad test that evolved into today's version of the standard of review under which Congress has power over "those activities that substantially affect interstate commerce." *National Federation of Independent Business v. Sebelius,* 567 U.S. ___ (2012).

In *Cooley v. Board of Wardens of the Port of Philadelphia* (1851), the Court held that states retain some power over local aspects of interstate commerce provided the states do not unduly burden or discriminate against interstate commerce. These two principles became the two tests for whether a state action violates the "Dormant Commerce Clause." In *Cooley* the Court also ruled that state laws conflicting with federal law are preempted under the Supremacy Clause. (The modern understanding of preemption and of the Dormant Commerce Clause are considered in chapter 11.)

5.3 INTRODUCTION TO *NATIONAL FEDERATION OF INDEPENDENT BUSINESS V. SEBELIUS* (2012)

We start our exploration of the modern understanding of the Commerce Clause power with *National Federation of Independent Business v. Sebelius,* 567 U.S. ___ (2012). This chapter includes excerpts from *National Federation* on the jurisdictional statute and the Commerce Clause power.

The Spending and Taxing Clause powers and the issue of severability are considered in chapter 6.

The lead opinion by Chief Justice Roberts begins with an excellent and seemingly neutral summary of fundamental and agreed-upon constitutional principles. It is only "seemingly" and not truly neutral because his ordering of material, sentence structure, case selection, and word choices all work to emphasize the structural limits of the commerce power based on late twentieth-century and early twenty-first-century federalism theories regarding limits on federal power. Chief Justice Roberts uses this introduction to set up treating the mandate to purchase health insurance as outside the scope of the commerce power. This is good writing, and to properly evaluate the substance of the arguments lawyers should learn to spot these sorts of rhetorical devices and to distinguish the style from the substance.

After summarizing Commerce Clause jurisprudence, Chief Justice Roberts then summarizes some of the major provisions and purposes of the Affordable Care Act (ACA). (C.J. Roberts's opinion part I.) He focuses on the main provisions at issue before the Court, of course, but also shows how they fit into the overall ACA regulatory scheme.

The first substantive section (C.J. Roberts's opinion part II) explains the majority's rationale in interpreting the Anti-Injunction Statute as not barring the Court from considering the other substantive issues. The Court rules that it has jurisdiction to consider the case. (The Anti-Injunction Statute section of the opinion is included in the taxing power section of chapter 6.)

The next part of the opinion (C.J. Roberts's opinion part III.A.1) addresses the constitutionality of the mandate under the Commerce Clause. The essential dispute is whether Congress can require someone to participate in the health insurance market. Chief Justice Roberts and the four dissenters say "no," while Justice Ginsburg and the other three justices say "yes."

Chief Justice Roberts then considers whether one aspect of the particular means chosen by Congress to improve the health care system and its affordability, that is, the mandate to have insurance, is supported by the Necessary and Proper Clause. (C.J. Roberts's opinion part III.A.2.) As you read that section, pay particular attention to how Chief Justice Roberts ports into the Necessary and Proper Clause the modern federalist view of the balance of state and federal power. He concedes, as he must, that the means (the mandate) is closely related to the ends (regulating the health insurance industry), and that the ends are well within the power of Congress to try to achieve under the commerce power. But he then applies a version of early twenty-first-century ideas of federalism and concludes that the mandate is not, using the words of Chief Justice Marshall from *McCulloch v. Maryland* (1819), "consist[ent] with the . . . spirit of the constitution." *National Federation of Independent Business v. Sebelius,* 567 U.S. ___, ___ (2012).

After the extended excerpt from Chief Justice Roberts's opinion, the portion of Justice Ginsburg's concurrence in which she dissents on the issue of the Commerce Clause and the Necessary and Proper Clause is presented, followed by the four-justice dissent on the Commerce Clause issue and Justice Thomas's dissent on the Commerce Clause issue.

National Federation of Independent Business v. Sebelius

567 U.S. ___ (2012)

Chief Justice Roberts announced the judgment of the Court and delivered the opinion of the Court *[i.e., five justices: Roberts, Breyer, Kagan, Ginsburg, and Sotomayor]* **with respect to**

- Parts I *[summary of procedural posture]*,
- II *[interpretation of the jurisdiction-limiting Anti-Injunction Statute]*, and

- III–C *[interpretation of the mandate as a constitutional exercise of the taxing power]*,

an opinion with respect to

- Part IV *[concerning the spending clause]*, **in which Justice Breyer and Justice Kagan join**, and

an opinion with respect to

- Parts III–A *[mandate under commerce clause power]*,
- III–B *[saving construction method of interpretation of statute under the taxing power]*, and
- III–D *[C.J. Roberts arguing that the Commerce Clause portion of the opinion is not dicta]*.

This is an example of a Supreme Court decision for which one must count votes by issue, not just by who signed onto which opinion. In these sorts of splintered-opinion, multi-issue cases, one must count votes quite carefully to properly assess the precedential value of any particular line of reasoning. Only those issues actually receiving five or more votes and supporting the result are part of the binding opinion of the Court, i.e., Parts I, II, and III-C. The substantive *result* in Part IV on the Spending Clause received seven votes (four dissenters plus Breyer, Kagan, and Roberts), but the dissenters did not join in Roberts's opinion, and so that portion of the opinion is really just a plurality opinion on that issue.

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*, 4 Wheat. 316, 405 (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*, 9 Wheat. 1, 195 (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, supra*, at 405.

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." The Federalist No. 84, p. 515 (C. Rossiter ed. 1961). 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. . . .

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." . . .

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,* 505 U.S. 144, 181 (1992) (internal quotation marks omitted). 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. The Federalist No. 45, at 293 (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*, 564 U.S. ___, ___ (2011) (slip op., at 9–10).

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, supra*, at 609 (internal quotation marks omitted). 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,* 317 U.S. 111 (1942); *Perez v. United States,* 402 U.S. 146 (1971) [respectively].

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,* 5 Wall. 462, 471 (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.,* 527 U.S. 666, 686 (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,* 483 U.S. 203–206 (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,* 4 Wheat. at 421 [(1819)}.

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,* 106 U.S. 629, 635 (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,* 1 Cranch 137, 176 (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, in John Marshall's Defense of *McCulloch v. Maryland* 190–191 (G. Gunther ed. 1969). 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 v. Madison, supra,* at 175–176.

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, 124 Stat. 119. 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. §5000A(d). Many individuals will receive the required coverage through their employer, or from a government program such as Medicaid or Medicare. See §5000A(f). 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. §5000A(b)(1). 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. . . .

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. . . .

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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. *See* 42 U.S.C. §1396a(a)(10). 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. See §1396a(a)(10)(A)(i)(VIII). 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. §1396d(y)(1). 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. *See* §1396c.

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We granted certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit with respect to both the individual mandate and the Medicaid expansion. . . . Because no party supports the Eleventh Circuit's holding that the individual mandate can be completely severed from the remainder of the Affordable Care Act, we appointed an amicus curiae to defend that aspect of the judgment below. And because there is a reasonable argument that the Anti-Injunction Act deprives us of jurisdiction to hear challenges to the individual mandate, but no party supports that proposition, we appointed an amicus curiae to advance it.

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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.

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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, . . . 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,* 312 U.S. 100–119 (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,* 317 U.S., at 127–128 [(1942)].

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. . . . 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. . . .

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. . . .

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. . . .

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* [(1942)] 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. 317 U.S., at 114–115, 128–129. 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. *Id*., at 127–129.

Wickard has long been regarded as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S., at 560, 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. . . . 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,* 392 U.S. 183, 196 (1968). . . . 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. . . . As we have explained, "the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men, dealing with the facts of

political life as they understood them, putting into form the government they were creating, and prescribing in language clear and intelligible the powers that government was to take." *South Carolina v. United States,* 199 U.S. 437, 449 (1905). 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 Government sees things differently. It argues that because sickness and injury are unpredictable but unavoidable, "the uninsured as a class are active in the market for health care, which they regularly seek and obtain." Brief for United States 50. The individual mandate "merely regulates how individuals finance and pay for that active participation—requiring that they do so through insurance, rather than through attempted self-insurance with the back-stop of shifting costs to others." *Ibid*.

The Government repeats the phrase "active in the market for health care" throughout its brief, see *id*., at 7, 18, 34, 50, but that concept has no constitutional significance. An individual who bought a car two years ago and may buy another in the future is not "active in the car market" in any pertinent sense. . . .

. . .

Everyone will likely participate in the markets for food, clothing, transportation, shelter, or energy; that does not authorize Congress to direct them to purchase particular products in those or other markets today. The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.

. . .

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, Art. I, §8, cl. 18, vests Congress with authority to enact provisions "incidental to the [enumerated] power, and conducive to its beneficial exercise," *McCulloch*, 4 Wheat., at 418. 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.*, at 411, 421. 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,* 361 U.S. 234, 247 (1960) (quoting VI Writings of James Madison 383 (G. Hunt ed. 1906)).

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*, 560 U.S., at ___ (slip op., at 5) [(2010)] (quoting *McCulloch*, supra, at 413, 418). 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*, supra, at 421, 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,* 521 U.S. 898, 924 (1997) (alterations omitted) (quoting The Federalist No. 33, at 204 (A. Hamilton)); see also *New York,* 505 U.S., at 177; *Comstock*, supra, at ___ (slip op., at 5) (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. . . . 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," . . . or "incidental" to the exercise of the commerce power. . . . 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.

. . .

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 re-forms. The commerce power thus does not authorize the mandate. *Accord, National Federation* (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

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 portions of the opinion upholding the mandate under the taxing power are included in chapter 6 on the federal government's spending and taxing powers.]

IV

A

The States also contend that the Medicaid expansion exceeds Congress's authority under the Spending Clause.

[The portion of the opinion holding that states cannot be compelled to participate in the Medicaid expansion under the Spending Clause is included in chapter 6 on the power to spend and to tax for the general welfare.]

* * *

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 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.

5.3.1 Introduction to Justice Ginsburg's Concurrence and Dissent and to the Four Justices' Joint Dissent

At least eight of the nine justices agreed that the Commerce Clause power is broad and empowers Congress to regulate the health care system. All of the justices agreed that most of provisions of the Affordable Care Act, including in particular the community rating and guaranteed issue regulations of health insurance, would be constitutional. These aspects were not part of the challenge to the ACA in this case and no direct ruling was made on them, but their constitutionality is not in doubt.

The four justices' joint dissent starts this way:

> 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 joint dissent then attacks the constitutionality not of the end—regulating the health care system—but rather of one of the means used, the individual mandate.

The Commerce Clause issue in *National Federation* was thus narrowed to whether Congress has power to require that uninsured people either obtain health insurance or pay an amount to the federal government to cover inclusion in Medicaid. Chief Justice Roberts essentially agrees that the non-activity affects interstate commerce, but decides that the non-activity cannot be regulated: that people cannot be forced to participate.

Ginsburg dismisses the "inactivity" theory of the joint dissent and of Chief Justice Roberts in part because she asserts that the proper focus is on the group, not the individual in it, and in part because she considers the "uninsured" as self-insured and that a self-insured person is actually engaging in commercial activity. She further contends that treating this individual as participating in commerce is fair in part because the uninsured as a group do participate (many members of the uninsured group do get health care, but do not pay for it), and in part because, eventually, nearly everyone will perforce participate in the health care system. Ginsburg argues that the means chosen by Congress, requiring people to obtain health insurance, is an appropriate means to address the problem of cost-shifting, the problem of ever-increasing health care costs, and the problems stemming from a lack of insurance for many.

Justice Ginsburg's Concurrence and Dissent in National Federation of Independent Business v. Sebelius

567 U.S. ___ (2012)

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.

[Only Ginsburg and Sotomayor would uphold the expansion of Medicaid without modification. All four justices on this opinion agreed the mandate was constitutional under the Commerce Clause and Necessary and Proper Clause.]

I agree with The Chief Justice that the Anti-Injunction Act does not bar the Court's consideration of this case, and that the minimum coverage provision is a proper exercise of Congress' taxing power. I therefore join Parts I, II, and III–C of The Chief Justice's opinion. Unlike The Chief Justice, however, 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,* 312 U.S. 100, 115 (1941) (overruling *Hammer v. Dagenhart,* 247 U.S. 251 (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*., 301 U.S. 1, 37 (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" (internal quotation marks omitted)). 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.

A

In enacting the Patient Protection and Affordable Care Act (ACA), Congress comprehensively reformed the national market for health-care products and services. By any measure, that market is immense. Collectively, Americans spent $2.5 trillion on health care in 2009, accounting for 17.6% of our Nation's economy. . . . Within the next decade, it is anticipated, spending on health care will nearly double. . . .

The health-care market's size is not its only distinctive feature. Unlike the market for almost any other product or service, the market for medical care is one in which all individuals inevitably participate. Virtually every person residing in the United States, sooner or later, will visit a doctor or other health-care professional. . . . Most people will do so repeatedly. . . .

. . .

D

Aware that a national solution was required, Congress could have taken over the health-insurance market by establishing a tax-and-spend federal program like Social Security. Such a program, commonly referred to as a single-payer system (where the sole payer is the Federal Government), would have left little, if any, room for private enterprise or the States. Instead of going this route, Congress

enacted the ACA, a solution that retains a robust role for private insurers and state governments. To make its chosen approach work, however, Congress had to use some new tools, including a requirement that most individuals obtain private health insurance coverage. . . . As explained below, by employing these tools, Congress was able to achieve a practical, altogether reasonable, solution.

. . .

To ensure that individuals with medical histories have access to affordable insurance, Congress devised a three-part solution. First, Congress imposed a "guaranteed issue" requirement, which bars insurers from denying coverage to any person on account of that person's medical condition or history. . . . Second, Congress required insurers to use "community rating" to price their insurance policies. . . . Community rating, in effect, bars insurance companies from charging higher premiums to those with preexisting conditions.

But these two provisions, Congress comprehended, could not work effectively unless individuals were given a powerful incentive to obtain insurance.

. . .

In sum, Congress passed the minimum coverage provision as a key component of the ACA to address an economic and social problem that has plagued the Nation for decades: the large number of U.S. residents who are unable or unwilling to obtain health insurance. Whatever one thinks of the policy decision Congress made, it was Congress' prerogative to make it. Reviewed with appropriate deference, the minimum coverage provision, allied to the guaranteed-issue and community-rating prescriptions, should survive measurement under the Commerce and Necessary and Proper Clauses.

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,* 460 U.S. 226 , n. 1 (1983) (Stevens, J., concurring) (citing sources). 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. . . .

What was needed was a "national Government . . . armed with a positive & compleat authority in all cases where uniform measures are necessary." . . . 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." . . .

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*, 4 Wheat. 316, 407 (1819), and that its provisions

included broad concepts, to be "explained by the context or by the facts of the case". . . . "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." The Federalist No. 34, pp. 205, 206 (John Harvard Library ed. 2009). See also *McCulloch*, 4 Wheat., at 415 (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.". . . . We afford Congress the leeway "to undertake to solve national problems directly and realistically.". . . .

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,* 545 U.S. 1, 17 (2005). This capacious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce. . . .

Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. . . . 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." . . . 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. . . .

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 healthcare 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, as earlier explained, 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"; it is, instead, an economic decision Congress has the authority to address under the Commerce Clause. . . .

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.

. . .

"[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*, 379 U.S., at 303–304. 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.

The Chief Justice does not dispute that all U.S. residents participate in the market for health services over the course of their lives. . . . But, The Chief Justice insists, the uninsured cannot be considered active in the market for health care, because "[t]he proximity and degree of connection between the [uninsured today] and [their] subsequent commercial activity is too lacking."

This argument has multiple flaws. First, more than 60% of those without insurance visit a hospital or doctor's office each year. Nearly 90% will within five years. An uninsured's consumption of health care is thus quite proximate: It is virtually certain to occur in the next five years and more likely than not to occur this year.

Equally evident, Congress has no way of separating those uninsured individuals who will need emergency medical care today (surely their consumption of medical care is sufficiently imminent) from those who will not need medical services for years to come. No one knows when an emergency will occur, yet emergencies involving the uninsured arise daily. To capture individuals who unexpectedly will obtain medical care in the very near future, then, Congress needed to include individuals who will not go to a doctor anytime soon. Congress, our decisions instruct, has authority to cast its net that wide. . . .

Second, it is Congress' role, not the Court's, to delineate the boundaries of the market the Legislature seeks to regulate. The Chief Justice defines the health-care market as including only those transactions that will occur either in the next instant or within some (unspecified) proximity to the next instant. But Congress could reasonably have viewed the market from a long-term perspective, encompassing all transactions virtually certain to occur over the next decade, see supra, at ___, not just those occurring here and now.

Third, contrary to The Chief Justice's contention, our precedent does indeed support "[t]he proposition that Congress may dictate the conduct of an individual today because of prophesied future activity." . . . In *Wickard*, the Court upheld a penalty the Federal Government imposed on a farmer who grew more wheat than he was permitted to grow under the Agricultural Adjustment Act of 1938 (AAA). 317 U.S., at 114–115. He could not be penalized, the farmer argued, as he was growing the wheat for home consumption, not for sale on the open market. *Id.*, at 119. The Court rejected this argument. *Id.*, at 127–129. Wheat intended for home consumption, the Court noted, "overhangs the market, and if induced by rising prices, tends to flow into the market and check price increases [intended by the AAA]." *Id.*, at 128.

Similar reasoning supported the Court's judgment in *Raich*, which upheld Congress' authority to regulate marijuana grown for personal use. 545 U.S., at 19. Homegrown marijuana substantially affects the interstate market for marijuana, we observed, for "the high demand in the interstate market will [likely] draw such marijuana into that market." *Ibid*.

Our decisions thus acknowledge Congress' authority, under the Commerce Clause, to direct the conduct of an individual today (the farmer in *Wickard*, stopped from growing excess wheat; the plaintiff in *Raich*, ordered to cease cultivating marijuana) because of a prophesied future transaction (the eventual sale of that wheat or marijuana in the interstate market). Congress' actions are even more rational in this case, where the future activity (the consumption of medical care) is certain to occur, the sole uncertainty being the time the activity will take place.

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.

Nor is it accurate to say that the minimum coverage provision "compel[s] individuals . . . to purchase an unwanted product," ante, at ___, or "suite of products," post, at ___, n. 2 (joint opinion of Scalia, Kennedy, Thomas, and Alito, JJ.). If unwanted today, medical service secured by insurance may be desperately needed tomorrow. . . .

The Chief Justice also calls the minimum coverage provision an illegitimate effort to make young, healthy individuals subsidize insurance premiums paid by the less hale and hardy. . . .

In the fullness of time, moreover, today's young and healthy will become society's old and infirm. Viewed over a lifespan, the costs and benefits even out: The young who pay more than their fair share currently will pay less than their fair share when they become senior citizens. And even if, as undoubtedly will be the case, some individuals, over their lifespans, will pay more for health insurance than they receive in health services, they have little to complain about, for that is how insurance works. Every insured person receives protection against a catastrophic loss, even though only a subset of the covered class will ultimately need that protection.

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. Indeed, as the D.C. Circuit observed, "[a]t the time the Constitution was [framed], to 'regulate' meant," among other things, "to require action." See *Seven-Sky v. Holder,* 661 F.3d 1, 16 (D.C. Cir. 2011).

. . . 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. . . . 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. *Id*., at 127–129. "[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. *Id*., at 128–129. In another context, this Court similarly upheld Congress' authority under the commerce power to compel an "inactive" landholder to submit to an unwanted sale. . . .

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. . . . 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." . . . 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. . . .

These line-drawing exercises were untenable, and the Court long ago abandoned them. . . . 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.

. . .

2

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. . . . The joint dissenters express a similar apprehension. . . . This concern is unfounded.

First, the Chief Justice could certainly uphold the individual mandate without giving Congress carte blanche to enact any and all purchase mandates. As several times noted, the unique attributes of the health-care market render everyone active in that market and give rise to a significant free-riding problem that does not occur in other markets.

Nor would the commerce power be unbridled, absent 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. . . .

An individual's decision to self-insure, I have explained, is an economic act with the requisite connection to interstate commerce. . . . Other choices individuals make are unlikely to fit the same or similar description. . . .

. . .

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]," . . . 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. . . .

. . .

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.

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*, 545 U.S., at 39 (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." [*Hodel v.*] *Indiana*, 452 U.S. [314], at 329, n. 17 [(1981)]. "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). . . .

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. . . .

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. . . . 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. . . .

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,* 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992). The statutes at issue in both cases, however, compelled state officials to act on the Federal Government's behalf. . . . "[Federal] laws conscripting state officers," the Court reasoned, "violate state sovereignty and are thus not in accord with the Constitution." *Printz*, 521 U.S., at 925, 935; *New York*, 505 U.S., at 176.

The minimum coverage provision, in contrast, acts "directly upon individuals, without employing the States as intermediaries." *New York*, 505 U.S., at 164. The provision is thus entirely consistent with the Constitution's design. . . .

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. . . . . 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 . . . 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, *see, e.g., United States v. Fox*, 95 U.S. 670, 672 (1878); the power to imprison, including civil imprisonment, *see, e.g., Comstock*, 560 U.S., at ___ (slip op., at 1); and the power to create a national bank, see *McCulloch*, 4 Wheat., at 425. . . .

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" one . . . ? 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.

It is more than exaggeration to suggest that the minimum coverage provision improperly intrudes on "essential attributes of state sovereignty." *Ibid*. (internal quotation marks omitted). First, the Affordable Care Act does not operate "in [an] are[a] such as criminal law enforcement or education where States historically have been sovereign." *Lopez*, 514 U.S., at 564. As evidenced by Medicare, Medicaid, the Employee Retirement Income Security Act of 1974 (ERISA), and the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Federal Government plays a lead role in the health-care sector, both as a direct payer and as a regulator.

Second, and perhaps most important, the minimum coverage provision, along with other provisions of the ACA, addresses the very sort of interstate problem that made the commerce power essential in our federal system. The crisis created by the large number of U.S. residents who lack health insurance is one of national dimension that States are "separately incompetent" to handle. . . . Far from trampling on States' sovereignty, the ACA attempts a federal solution for the very reason that the States, acting separately, cannot meet the need. Notably, the ACA serves the general welfare of the people of the United States while retaining a prominent role for the States. . . .

IV

. . .

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." Art. I, §8, cl. 1; ante, at 43–44. I concur in that determination, which makes the Chief Justice's Commerce Clause essay all the more puzzling.

V

[The portion of Justice Ginsburg's opinion addressing the Spending Clause issue is included in chapter 6 on the spending power.]

. . .

Joint Dissent in National Federation of Independent Business v. Sebelius

567 U.S. ___ (2012)

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.

. . .

. . . 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.

. . .

I
The Individual Mandate

Article I, §8, of the Constitution gives Congress the power to "regulate Commerce . . . among the several States." The Individual Mandate in the Act commands that every "applicable individual shall for each month beginning after 2013 ensure that the individual, and any dependent of the individual who is an applicable individual, is covered under minimum essential coverage." 26 U.S.C. §5000A(a) (2006 ed., Supp. IV). If this provision "regulates" anything, it is the failure to maintain minimum essential coverage. One might argue that it regulates that failure by requiring it to be accompanied by payment of a penalty. But that failure—that abstention from commerce—is not "Commerce." To be sure, purchasing insurance is "Commerce"; but one does not regulate commerce that does not exist by compelling its existence.

. . .

We do not doubt that the buying and selling of health insurance contracts is commerce generally subject to federal regulation. But when Congress provides that (nearly) all citizens must buy an insurance contract, it goes beyond "adjust[ing] by rule or method," *Johnson, supra,* or "direct[ing] according to rule," *Ash, supra*; it directs the creation of commerce.

In response, the Government offers two theories as to why the Individual Mandate is nevertheless constitutional. Neither theory suffices to sustain its validity.

A

First, the Government submits that §5000A is "integral to the Affordable Care Act's insurance reforms" and "necessary to make effective the Act's core reforms." . . .

. . .

The Government presents the Individual Mandate as a unique feature of a complicated regulatory scheme governing many parties with countervailing incentives that must be carefully balanced. . . .

. . .

. . . If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power. . . .

. . . The lesson of these cases is that the Commerce Clause, even when supplemented by the Necessary and Proper Clause, is not carte blanche for doing whatever will help achieve the ends Congress seeks by the regulation of commerce. . . . [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.

. . .

. . . [T]here 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.

. . .

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,". . . . But it must be activity affecting commerce that is regulated, and not merely the failure to engage in commerce. . . . 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," ante, at ___. 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.

. . .

[Portions of the dissent addressing the taxing power, the spending power, and severability are omitted.]

. . .

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.

. . . 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.

. . .

Justice Thomas's Separate Dissent in National Federation of Independent Business v. Sebelius

567 U.S. ___ (2012)

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. . . . 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." . . .

5.3.2 The Commerce Clause Power after *National Federation v. Sebelius* (2012)

National Federation (2012) explains the current scope of the Commerce Clause grant of power through summarizing and applying numerous past cases. A few of the key cases are presented here in edited form, as well as notes on a few more.

Under the three-prong test articulated during the New Deal of the late 1930s and subsequently refined, the Commerce Clause gives Congress the power to regulate the following:

1. The channels (e.g., rivers, highways, communications networks, airspace) and instrumentalities (e.g., ships, trucks, telephones, airplanes) of interstate commerce;
2. The people, things, and services moving in and through interstate commerce; and
3. Activities that substantially affect interstate commerce.

For the third category, either the local activity standing alone must substantially affect interstate commerce or the local activity must be economic in nature, in which case many local economic activities of that type can be aggregated to find the substantial effect. The substantial effects test is essentially the same standard of review Chief Justice John Marshall articulated two centuries ago in *Gibbons* (1824).

In addition to the core three-prong test, the Court has recognized two other tests of power under the Commerce Clause coupled with the Necessary and Proper Clause. First, if a regulation is part of a comprehensive scheme regulating an aspect of interstate commerce that Congress otherwise has the power to regulate, the regulation may be upheld under the Necessary and Proper Clause as a proper means to regulate the end sought by the comprehensive scheme. (Justice Scalia previously noted this test approvingly in *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (concurrence), as had the majority in that case, and it forms one of the arguments made by Justice Ginsburg in her dissent in *National Federation* (2012).) However, neither Chief Justice Roberts nor the justices in the joint dissent treat the mandate as proper under this test. They do not focus on the Affordable Care Act as a whole and the mandate as one part of the means used in a comprehensive scheme in service of a goal they admit Congress could reach under the Commerce Clause. Instead they focus narrowly on the one provision, the mandate, in isolation. Despite the five justices' treatment of this test in *National Federation* (2012), it seems highly likely that it remains a valid test. Their essential point in voting not to uphold the individual mandate on Commerce Clause grounds had more to do with generalized principles of federalism and the limits of enumerated powers than with the application of this rule per se.

The second test beyond the three-prong assessment is that activity can be regulated provided a nexus or connection exists between the particular activity targeted and interstate commerce, even if the activity targeted is itself non-economic. For example, Congress cannot criminalize carrying a gun while walking near a school unless a nexus to interstate commerce is established. *United States v. Lopez*, 514 U.S. 549 (1995). Such a nexus can be established by adding as an element of the crime that the prosecutor must prove the gun had moved in interstate commerce. Indeed, this nexus approach was Congress's response to the *Lopez* decision: Congress amended the statute found unconstitutional in *Lopez* , so it now specifically requires proof of that nexus as an element of the crime.

All of the justices except Justice Thomas not only agree with the modern three-prong version of the test, including the substantial affects test, but they also agree the power is very broad and Congress is to be granted great deference in exercising it. Much of our modern regulatory state is based on the power of the federal government to regulate such diverse matters as employment discrimination (and civil rights more generally), the environment, the banking system, securities, workplace safety, labor relations, the health care system, food production and distribution, education, and trademarks. The power to regulate those matters (and more) stems largely from, and in many instances exclusively from, the Commerce Clause.

5.4 THE NARROW INTERPRETATION OF "COMMERCE AMONG THE STATES" (1865–1937)

Before considering a few of the many cases illustrating the breadth of the Commerce Clause power as it exists today, a step back to review some of the historical aspects of Commerce Clause interpretation would be helpful. Originally, the Court gave the Commerce Clause a broad interpretation in *Gibbons v. Ogden* (1824) (included in chapter 2, page 83). Then, for an extended period following the Civil War (1861–65) and up through the *Lochner* Era (1897–1937), it interpreted the Commerce Clause more restrictively than it had previously or has since.

In a series of cases in the latter part of the nineteenth century during which the Court interpreted the Commerce Clause more narrowly than it does now, it did so primarily by interpreting the word *commerce* to be limited to the exchange or trade of goods or services. For example the Court held that insurance was not commerce. *Paul v. Virginia*, 75 U.S. 168 (1869). (*Paul v. Virginia* (1869) was overturned in *United States v. South-Eastern Underwriters Association,* 322 U.S. 533 (1944), as part of the post–*Lochner* Era change in Commerce Clause interpretation.)

In that period the Court had similarly held that Congress could not regulate manufacturing, which was seen as being entirely local and not "commerce," even for antitrust laws purposes. *See Kidd v. Pearson,* 128 U.S. 1 (1888); *United States v. E.C. Knight,* 156 U.S. 1 (1895) ("Commerce succeeds to manufacture, and is not part of it."). Similar decisions were issued with regard to agriculture, mining, oil production, and generation of electricity. Consequently, during that time, production and producers generally could not be regulated under the Interstate Commerce Clause.

The close study of these cases and the inconsistencies and problems of constitutional interpretation in the *Lochner* Era are beyond the scope of this introductory text. Nonetheless, some degree of familiarity with the approach of the *Lochner* Era Court informs interpretation today.

The restrictive view of the Commerce Clause is exemplified in three cases: *United States v. E.C. Knight*, 156 U.S. 1 (1895); *A.L.A. Schechter Poultry Corp. v United States*, 295 U.S. 495 (1935); and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). In these cases the Court restricted the reach of the Commerce Clause primarily by attempting to distinguish between actions with an indirect versus a direct effect on commerce. These cases are no longer good law. In them the Court still recited the broad substantial effects language from *Gibbons* (1824), but it added an evaluation of indirect/direct effects. If the activity had an indirect effect on interstate commerce, Congress could not reach it, regardless of substantiality. The majority in *E.C. Knight* (1895) held that manufacturing was not itself commerce and that it only indirectly affected commerce; thus Congress could not reach manufacturers.

Even though the constrictive approach continued throughout the *Lochner* Era (1897–1937) and many state and federal laws were held unconstitutional, not all regulation of manufacturing or processing was prohibited. For example, in a case involving price-fixing, federal regulation of meatpackers was permitted because the meatpackers had a substantial effect on the "current of commerce." *Swift v. United States,* 196 U.S. 375, 399 (1905). Similarly, direct regulation of stockyards was permitted to ensure safe food, because the stockyard industry was part of the interstate commerce of

beef, starting with ranchers and extending to dinner tables, or in the words of the court, the stockyards "are but a throat through which the current [of commerce] flows," *Stafford v. Wallace*, 258 U.S. 495, 516 (1922).

Justice Kennedy critiqued the restrictive interpretation of the Commerce Clause in his concurring opinion in *United States v. Lopez,* 514 U.S. 549 (1995), writing:

> Though that [formalistic] approach likely would not have survived even if confined to the question of a State's authority to enact legislation [under the Dormant Commerce Clause], it was not at all propitious when applied to the quite different question of what subjects were within the reach of the national power when Congress chose to exercise it.

Id. at 570.

5.5 POST-1937 INTERPRETATION OF THE INTERSTATE COMMERCE CLAUSE

In the midst of the Great Depression of the 1930s, the Court applied its *Lochner* Era (1897–1937) restrictive view of Commerce Clause power and its expansive view of individual property rights to block a significant social welfare and economic stimulus legislation proposed by President Franklin D. Roosevelt and adopted by Congress as well as much social and economic legislation enacted in states. *E.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). In response to those Court decisions, President Roosevelt and Congress proposed the Judicial Procedures Reform Bill of 1937. The bill, which came to be known as the "Court Packing Plan," would have granted the president the power to appoint one additional justice up to a maximum of six for every member of the Court over the age of seventy. The purpose of the plan was to cancel out the votes of the four justices over seventy, who held the most restrictive view of the Commerce Clause and the most expansive view of constitutional protection for individual property rights.

Carter Coal Co. (1936) was a five to four decision, one of the last decisions in which the restrictive approach to the Commerce Clause prevailed. Soon after the bill was introduced in Congress, and one year after *Carter Coal* (1936), one justice switched sides in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), and, by a vote of five to four the other way, the *Lochner* Era (1897–1937) came to an end. This became known as the "switch in time that saved nine" because it forestalled President Franklin Roosevelt from pushing his Court packing plan. After *West Coast Hotel v. Parrish* (1937), the Court largely got out of the way of most state and federal regulation of social and economic matters.

Among the Court's early post–*Lochner* Era Commerce Clause decisions, the three most foundational are: *NLRB v. Jones Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941); and *Wickard v. Filburn*, 317 U.S. 111 (1942). In their several *National Federation* (2012) opinions, the justices took pains to analogize to or distinguish the individual mandate requirement from the reach of *Wickard* (1942).

Wickard v. Filburn

317 U.S. 111 (1942)

Mr. Justice Jackson delivered the opinion of the Court.

. . .

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. The intended disposition of the crop here involved has not been expressly stated.

In July of 1940, pursuant to the Agricultural Adjustment Act of 1938, as then amended, 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 as amended on May 26, 1941, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or $117.11 in all. . . .

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. . . .

. . .

II

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,* 312 U.S. 100 [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. . . .

Appellee says that this is a regulation of production and consumption of wheat. Such activities are, he urges, beyond the reach of Congressional power under the Commerce Clause, since they are local in character, and their effects upon interstate commerce are, at most, "indirect." In answer, the Government argues that the statute regulates neither production nor consumption, but only marketing, and, in the alternative, that, if the Act does go beyond the regulation of marketing, it is sustainable as a "necessary and proper" implementation of the power of Congress over interstate commerce.

The Government's concern lest the Act be held to be a regulation of production or consumption, rather than of marketing, is attributable to a few dicta and decisions of this Court which might be understood to lay it down that activities such as "production," "manufacturing," and "mining" are strictly "local" and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as matter of law, only "indirect." Even today, when this power has been held to have great latitude, there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof. We believe that a review of the course of decision under the Commerce Clause will make plain, however, that questions of the power of Congress 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.

At the beginning, Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. *Gibbons v. Ogden,* 9 Wheat. 1, 22 U.S. 194-195 [(1824)]. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political, rather than from judicial, processes. *Id.* at 22 U.S. 197.

For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period, there was perhaps little occasion for the affirmative exercise of the commerce power, and the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision, the point of reference, instead of being what was "necessary and proper" to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood. Certain activities such as "production," "manufacturing," and "mining" were occasionally said to be within the province of state governments and beyond the power of Congress under the Commerce Clause.

It was not until 1887, with the enactment of the Interstate Commerce Act, that the interstate commerce power began to exert positive influence in American law and life. This first important federal resort to the commerce power was followed in 1890 by the Sherman Anti-Trust Act and, thereafter, mainly after 1903, by many others. These statutes ushered in new phases of adjudication, which required the Court to approach the interpretation of the Commerce Clause in the light of an actual exercise by Congress of its power thereunder.

When it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress. *United States v. [E.C.] Knight Co.,* 156 U.S. 1 [(1895)]. These earlier pronouncements also played an important part in several of the five cases in which this Court later held that Acts of Congress under the Commerce Clause were in excess of its power.

Even while important opinions in this line of restrictive authority were being written, however, other cases called forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden, supra*.

. . .

In the *Shreveport Rate Cases,* 234 U.S. 342 [(1914)], the Court held that railroad rates of an admittedly intrastate character and fixed by authority of the state might, nevertheless, be revised by the Federal Government because of the economic effects which they had upon interstate commerce. The opinion of Mr. Justice Hughes found federal intervention constitutionally authorized because of

> "matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance."

Id. at 351.

The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause, exemplified by this statement, has made the mechanical application of legal formulas no longer feasible. Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be "production," nor can consideration of its economic effects be foreclosed by calling them "indirect." The present Chief Justice has said in summary of the present state of the law:

> "The commerce power is not confined in its exercise to the regulation of commerce among the states. It 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. . . . The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no

> limitations other than are prescribed in the Constitution. . . . It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence, the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power."

United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 [(1942)].

. . .

The effect of consumption of home-grown 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 percent of average production. The total amount of wheat consumed as food varies but relatively little, and use as seed is relatively constant.

. . . 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. . . .

. . . 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.

5.5.1 Post-*Wickard* Applications of Commerce Clause Power

Beginning in 1937, when it abandoned the *Lochner* Era approach, and for the next fifty-eight years, the Court upheld every congressional exercise of the Commerce Clause power. In doing so, the Court recognized that dramatic economic, social, and cultural changes necessitated a national response. The federal Commerce Clause power not only covers a wide swath of national economic matters, it also covers matters that at first glance would not appear to be economic or commercial in nature but that in fact substantially affect national commerce, for example, civil rights. *E.g., Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (Civil Rights Act of 1964 banning

discrimination is places of public accommodation upheld under the Commerce Clause power).

Heart of Atlanta Motel, Inc. v. United States (1964) is an extremely significant case. Not only did the Court defer to Congress and allow a very broad application of the Commerce Clause power, in doing so the Court also upheld the constitutionality of the single most significant twentieth-century civil rights legislation the United States: the Civil Rights Act of 1964. The significance of *Heart of Atlanta Motel* (1964) and the Civil Rights Act of 1964 comes into sharp relief when compared to the Court's frustration of attempts by Congress after the Civil War to give life to the Reconstruction Amendments through legislation. (See the discussion of this topic in chapter 2, section 2.5.)

In enacting the Civil Rights Act of 1964, Congress proposed to accomplish what the Court in *The Civil Rights Cases* (1883) declared Congress could not do in the Civil Rights Act of 1875: prohibit private discriminatory behavior. But, whereas Congress had relied upon Section 5 of the Fourteenth Amendment in enacting the 1875 Act, it relied on the Commerce Clause as well as the Fourteenth Amendment as its sources of power to enact the Civil Rights Act of 1964 (the Commerce Clause to reach private conduct and the Fourteenth Amendment to reach states).

As you read the remaining cases in this chapter, keep in mind and consider how the Court and the individual justices use some of the great recurring themes in United States constitutional history:

- The proper limits of federal power in a federal system
- The roles of Congress, the executive branch, and the courts
- The role of race in the development of constitutional law
- The responsiveness, or lack thereof, of the political branches of government at all levels to broad social movements.

Heart of Atlanta Motel, Inc. v. United States

379 U.S. 241 (1964)

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 . . . [prohibiting discrimination in places of public accommodation such as hotels and restaurants] . . . A three-judge court . . . sustained the validity of the Act. . . . We affirm the judgment.

1. The Factual Background and Contentions of the Parties.

. . . 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; 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 and a taking of its property without just compensation; and, finally, that, by requiring appellant to rent available rooms to Negroes against its will, Congress is subjecting it to involuntary servitude in contravention of the Thirteenth Amendment.

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; that the Fifth Amendment does not forbid reasonable regulation, and that consequential damage does not constitute a "taking" within the meaning of that amendment; that the Thirteenth Amendment claim fails because it is entirely frivolous to say that an amendment directed to the abolition of human bondage and the removal of widespread disabilities associated with slavery places discrimination in public accommodations beyond the reach of both federal and state law.

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. The District Court sustained the constitutionality of the sections of the Act under attack (§§201(a), (b)(1) and (c)(1)) and issued a permanent injunction on the counterclaim of the appellees. It restrained the appellant from "[r]efusing to accept Negroes as guests in the motel by reason of their race or color" and from

> [m]aking any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities, privileges, advantages or accommodations offered or made available to the guests of the motel, or to the general public, within or upon any of the premises of the Heart of Atlanta Motel, Inc.

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,* 109 U.S. 3 [(1883)]. 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.

H.R.Doc. No. 124, 88th Cong., 1st Sess., at 14.

. . . [I]t 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.

. . .

The Act as finally adopted was most comprehensive, undertaking to prevent, through peaceful and voluntary settlement, discrimination in voting as well as in places of accommodation and public facilities, federally secured programs, and in employment. Since Title II is the only portion under attack here, we confine our consideration to those public accommodation provisions.

. . .

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." S. Rep. No. 872, *supra,* at 16-17. 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, 109 U.S. 3 (1883), and their Application.

In light of our ground for decision, it might be well at the outset to discuss the *Civil Rights Cases* (1883), 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,* 9 Wheat. 1 (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.

Id. at 18. Since the commerce power was not relied on by the Government and was without support in the record, it is understandable that the Court narrowed its inquiry and excluded the Commerce Clause as a possible source of power. In any event, it is clear that such 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. . . . 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,* 9 Wheat. 1 (1824), in these words:

. . .

> It 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. They are the restraints on which the people must often rely solely, in all representative governments.

[22 U.S. 196-197.]

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,* 7 How. 283 [(1849)], where Mr. Justice McLean stated: "That the transportation of passengers is a part of commerce is not now an open question." At 48 U.S. 401.

. . .

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,* 188 U.S. 321 (1903); to criminal enterprises, *Brooks v. United States,* 267 U.S. 432 (1925); to deceptive practices in the sale of products, *Federal Trade Comm"n v. Mandel Bros., Inc.,* 359 U.S. 385 (1959); to fraudulent security transactions, *Securities & Exchange Comm"n v. Ralston Purina Co.,* 346 U.S. 119 (1953); to

misbranding of drugs, *Weeks v. United States,* 245 U.S. 618 (1918); to wages and hours, *United States v. Darby,* 312 U.S. 100 (1941); to members of labor unions, *Labor Board v. Jones & Laughlin Steel Corp.,* 301 U.S. 1 (1937); to crop control, *Wickard v. Filburn,* 317 U.S. 111 (1942); to discrimination against shippers, *United States v. Baltimore & Ohio R. Co.,* 333 U.S. 169 (1948); to the protection of small business from injurious price-cutting, *Moore v. Mead's Fine Bread Co.,* 348 U.S. 115 (1954); to resale price maintenance, *Hudson Distributors, Inc. v. Eli Lilly & Co.,* 377 U.S. 386 (1964), *Schwegmann v. Calvert Distillers Corp.,* 341 U.S. 384 (1951); to professional football, *Radovich v. National Football League,* 352 U.S. 445 (1957), and to racial discrimination by owners and managers of terminal restaurants, *Boynton v. Virginia,* 364 U.S. 454 (1960).

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.,* 336 U.S. 460, 464 (1949). *See Labor Board v. Jones & Laughlin Steel Corp., supra*. As Chief Justice Stone put it in *United States v. Darby, 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.

Id. at 312 U.S. 118. 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.

There is nothing novel about such legislation. Thirty-two States now have it on their books either by statute or executive order, and many cities provide such regulation. Some of these Acts go back four-score years. It has been repeatedly held by this Court that such laws do not violate the Due Process Clause of the Fourteenth Amendment.

. . .

We find no merit in the remainder of appellant's contentions, including that of "involuntary servitude." . . . We could not say that the requirements of the Act in this regard are in any way "akin to African slavery." *Butler v. Perry,* 240 U.S. 328, 332 (1916).

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.

5.5.2 The Modern Interpretation of the Commerce Clause Power

At the same time that the court upheld the Civil Rights Act of 1964 and its application to the hotel for interstate travelers, the Court also upheld the application of the Act to Ollie's Barbecue in *Katzenbach v. McClung*, 397 U.S. 294 (1964). The Court summarized the facts in *Katzenbach v. McClung* as follows:

> 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.

Katzenbach v. McClung, 397 U.S. 294, 296-97 (1964). The Court held that under the rules announced in *Wickard* (1942) and *Heart of Atlanta* (1964), Ollie's Barbecue was sufficiently involved with interstate commerce through its purchase of meat procured from another state.

In *Perez v. United States*, 402 U.S. 146 (1971) the Court upheld a statute making loansharking a federal crime under the Commerce Clause power. The Court wrote:

> Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce. . . . It appears . . . that loan sharking in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations.

Perez v. United States, 402 U.S. 146, 154-157 (1971).

The reach of the Commerce Clause power is vast, and the power of Congress to decide what to regulate is subject to few judicial constraints.

5.6 THE IMPACT OF THE EXPANSION OF THE FEDERAL POWER UNDER THE COMMERCE CLAUSE

Congressional power over economic activities that when aggregated substantially affect interstate commerce is well established. Congress is given broad latitude to determine the appropriate means of furthering interstate commerce. Congress need only choose means with a rational relationship to facilitating interstate commerce. Congress's reasons for action other than to facilitate interstate commerce, for example, to reduce private racial discrimination, even if they are in themselves neither commercial nor economic nor intimately connected to commerce, do not invalidate the law if the law regulates economic activity. *E.g., Heart of Atlanta* (1964). Thus the Civil Rights Act of 1964 was upheld because interstate commerce was substantially affected by racial discrimination; this was so even though the primary purpose of and motivation for the legislation was not commercial, but rather social and moral: the end of racial discrimination in education, employment, and places of public accommodation.

The Court referred to the congressional record demonstrating the link between discrimination and commerce. Under the Court's traditional approach, deferring to Congress on such matters requires no record. Nonetheless, when Congress exercises its power under the substantial effects test, it is well advised to make a record showing the relationship between what it seeks to regulate and commerce. *See United States v. Darby Lumber Co.*, 312 U.S. 100 (1941).

Consider the role of Congress in social change. The Commerce Clause has been stretched to encompass diverse initiatives, some of which are at least somewhat related to economic or commercial matters, such as supporting unions, addressing working conditions generally, establishing minimum wages and maximum work hours, regulating the safety of consumer products, safeguarding retirement pensions, and

adopting the original Social Security Act. Others are less obviously or closely related to commerce, such as setting standards for a cleaner environment and protecting women and minorities from discrimination. Consider the propriety of using the Commerce Clause for these sorts of action. Surely the Civil Rights Act of 1964 ranks as the most important, transformative legislation of the twentieth century. Was the Court correct in allowing congressional action in each of these areas to be constitutional exercises of federal power under the Interstate Commerce Clause? If there is no other power granted to Congress that would allow it to regulate the environment or private discrimination should the Court defer to Congress and find the power under the Interstate Commerce Clause? Or should the Court require the people to amend the Constitution to grant Congress that power explicitly?

5.7 HYPOTHETICALS: COMMERCE CLAUSE

Assess the constitutionality of the following actions:

1. Congress enacts a law prohibiting the sale of firearms over the Internet.
2. Congress enacts a law requiring airlines to allow musicians to carry musical instruments free of charge in the passenger compartment of the airplane.
3. Congress enacts a law requiring all private employers to carry minimum health insurance with specified coverage for all employees.
4. The Food and Drug Administration (FDA) issues regulations defining what constitutes organic food.
5. The FDA establishes a process for certifying food that meets its standards as organic.
6. The Interstate Commerce Commission requires that all producers, sellers, and transporters of food not advertise food as organic unless it is certified as organic by the FDA.
7. Congress enacts a law requiring all businesses engaged in business via the Internet to register with the Federal Communications Commission.
8. Congress enacts a law requiring all businesses engaged in business via the Internet to report to the Commerce Department on a quarterly basis what products and services were sold, the unit price (on average) of each product or service, and the total sales.
9. Congress enacts a law requiring all sales of comic books to include their provenance or a label that says "provenance unknown." Sam's Comix is a small, urban, hole-in-the-wall sort of shop; it has no Internet presence, sells only to walk-in customers, and deals only in cash. Sam claims this law, as applied to him, is unconstitutional.
10. Congress enacts a law setting water and air pollution standards for all businesses.
11. Is the Endangered Species Act constitutional? Explain.

5.8 THE COURT SHIFTS AGAIN: FEDERALISM-BASED LIMITATIONS ON FEDERAL POWER OVER INTERSTATE COMMERCE

In a few recent cases the Court applied federalism principles to trim federal power under the Commerce Clause. The federal government is one of enumerated powers,

and the Interstate Commerce Clause is not a general grant of power over everything. Consequently, the idea that federalism imposes some limit on the exercise of that power "consist[ent] with the spirit" of the Constitution has some force. The problems are where to draw the line and just who—the elected members of Congress or the appointed justices of the Supreme Court—should draw it.

The four most important cases addressing the newly imposed limits are *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Gonzales v. Raich*, 545 U.S. 1 (2005); and *National Federation of Independent Business v. Sebelius,* 567 U.S. ___ (2012). The Commerce Clause portion of *National Federation* was covered earlier in the chapter, and it included discussion of *Lopez*, *Morrison*, and *Raich*. Edited versions of *Lopez* (1995) and *Raich* (2005) appear below.

Two limits to the Commerce Clause power arise from these four cases. First, Congress can aggregate many small effects on commerce only if Congress is regulating commercial or economic activity. That is, the substantial effects prong of the Commerce Clause power is still good law, but only economic activity can be aggregated. *Morrison* (2000).

Second, the target of the regulation must be someone who is already active in the relevant commercial or economic matter: Congress cannot require someone to participate in a particular aspect of the economy, such as health care. *National Federation* (2012). This limitation is unlikely to have much impact on the power of Congress under the Commerce Clause because the health care system, including health insurance, is unique.

All in all, in the recent cases employing federalism to constrict federal power, the Court has limited the power of Congress under the Commerce Clause only slightly. Even after *Lopez* (1995) and *Morrison* (2000), Congress can still criminalize carrying a gun near a school or violence against women in compliance with the Constitution by requiring proof of an explicit nexus between interstate commerce and the offending action. For example, Congress could criminalize carrying a gun near a school if the gun had moved in interstate commerce. Since Congress can regulate things moving in commerce, it can regulate the gun and what is done with it. This regulation of the thing, the gun, provides a sufficient nexus to interstate commerce for Congress to regulate the person's conduct. That is, in fact, exactly how Congress amended the statute after *Lopez* (1995) was decided. The availability of this nexus approach renders the *Lopez* and *Morrison* limitations largely formalistic and ultimately symbolic. *Lopez* (1995) and *Morrison* (2000) are thus examples of formalism trumping functionalism in constitutional interpretation, as it sometimes does, even in as practical a field as interstate commerce.

As you read the following cases, especially the first part of *Lopez* (1995), notice how the Court characterizes the post–New Deal cases of *Jones and Laughlin Steel,* (1937), *Darby* (1941), and *Wickard* (1942) as expansions of the commerce power rather than as a return to interpretations it had given it under *Gibbons* (1824). In contrast, in *Heart of Atlanta* (1964) the Court had characterized those same cases as a return to the law as it was 140 years earlier in *Gibbons* (1824).

The late twentieth-century and early twenty-first-century Court began viewing the Commerce Clause power differently than it had for the previous fifty-eight years. Nevertheless, even as the Court trimmed the Commerce Clause power in *Lopez* (1995),

Morrison (2000), and *National Federation* (2012), it explicitly reaffirmed the post–*Lochner* Era expansive, deferential approach, justifying it as an appropriate response to the development of the integrated national economy.

The recognition of the integrated national economy and of other seismic changes in society and culture contributed in part to the court's reasoning in *Heart of Atlanta* (1964) and other post–*Lochner* Era cases. What changes in the economic reality of the nation, if any, or what other broad-based national developments is the Court responding to in *Lopez* (1995), *Morrison* (2000), and *National Federation* (2012)?

Use of federalism principles to limit federal power over states under the Commerce Clause is presented in chapter 12, Federalism and State Power.

United States v. Lopez

514 U.S. 549 (1995)

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." . . . 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. . . ." U.S. Const. art. I, §8, cl. 3.

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 . . . found . . . guilty. . . .

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 Art. I, §8. . . . This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serve 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." *Ibid.*

. . .

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. In *Jones & Laughlin Steel,* the Court warned that the scope of the interstate commerce 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." 301 U.S., at 37. . . .

. . .

Consistent with this structure, we 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. . . . 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 . . . 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.

. . . [I]f §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; *Hodel, supra,* intrastate extortionate credit transactions, *Perez, supra,* restaurants utilizing substantial interstate supplies, *McClung, supra,* inns and hotels catering to interstate guests, *Heart of Atlanta Motel, supra,* and production and consumption of homegrown wheat, *Wickard v. Filburn,* 317 U.S. 111 (1942). 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. . . . §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. . . . 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.

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3. . . . 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.' " . . . The Government acknowledges that §922(q) "displace[s] state policy choices in . . . that its prohibitions apply even in States that have chosen not to outlaw the conduct in question." . . .

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 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 posits that there might be some limitations on Congress' commerce power, such as family law or certain aspects of education. . . . These suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance. . . .

Justice Breyer rejects our reading of precedent and argues that "Congress . . . could rationally conclude that schools fall on the commercial side of the line." . . . . 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,* 4 Wheat. 316 (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." *Id.,* at 405.

See also Gibbons v. *Ogden,* 9 Wheat., at 195 ("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 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,* 1 Cranch 137, 177 (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. . . .

For the foregoing reasons the judgment of the Court of Appeals [overturning the conviction in district court] 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.

. . .

The history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first, as stated at the outset, is the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause. The second, related to the first but of even greater consequence, is that the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

. . . 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, [1] separation of powers, [2] checks and balances, [3] judicial review, and [4] 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. Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances. . . . These standards are by now well accepted. Judicial review is also established beyond question, *Marbury v. Madison,* 1 Cranch 137 (1803), and though we may differ when applying its principles, . . . its legitimacy is undoubted. Our role in preserving the federal balance seems more tenuous.

. . .

To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process. . . . Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance.

. . .

The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required.

. . .

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.

. . .

Justice Stevens, dissenting.

. . .

Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession in particular markets. The market for the possession of handguns by school-age children is, distressingly, substantial. Whether or not the national interest in eliminating that market would have justified federal legislation in 1789, it surely does today.

Justice Souter, dissenting.

In reviewing congressional legislation under the Commerce Clause, we defer to what is often a merely implicit congressional judgment that its regulation

addresses a subject substantially affecting interstate commerce "if there is any rational basis for such a finding." . . . If that congressional determination is within the realm of reason, "the only remaining question for judicial inquiry is whether 'the means chosen by Congress [are] reasonably adapted to the end permitted by the Constitution.' " . . .

The practice of deferring to rationally based legislative judgments "is a paradigm of judicial restraint." . . . In judicial review under the Commerce Clause, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices.

. . .

Because Justice Breyer's opinion demonstrates beyond any doubt that the Act in question passes the rationality review that the Court continues to espouse, today's decision may be seen as only a misstep, its reasoning and its suggestions not quite in gear with the prevailing standard. . . .

. . .

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

The issue in this case is whether the Commerce Clause authorizes Congress to enact a statute that makes it a crime to possess a gun in, or near, a school. . . . 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.

I

In reaching this conclusion, I apply three basic principles of Commerce Clause interpretation. First, the power to "regulate Commerce . . . among the several States," U.S. Const., Art. I, §8, cl. 3, encompasses the power to regulate local activities insofar as they significantly affect interstate commerce. . . . I use the word "significant" because the word "substantial" implies a somewhat narrower power than recent precedent suggests. . . . But to speak of "substantial effect" rather than "significant effect" would make no difference in this case.

Second, in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (*i.e.,* the effect of all guns possessed in or near schools). *See, e.g., Wickard, supra,* 317 U.S., at 127-128. As this Court put the matter almost 50 years ago:

> [I]t is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate economy that requires preventative regulation.

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (citations omitted).

Third, the 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. . . .

I recognize that we must judge this matter independently. "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel, supra,* at 311 (Rehnquist, J., concurring in judgment). And, I also recognize that Congress did not write specific "interstate commerce" findings into the law under which Lopez was convicted. Nonetheless, as I have already noted, the matter that we review independently (*i.e.,* whether there is a "rational basis") already has considerable leeway built into it. And, the absence of findings, at most, deprives a statute of the benefit of some *extra* leeway. This extra deference, in principle, might change the result in a close case, though, in practice, it has not made a critical legal difference.

. . .

The statute does not interfere with the exercise of state or local authority. . . .

II

Applying these principles to the case at hand, we must ask . . . [c]ould 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," . . . 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.

. . .

Based on reports such as these, Congress obviously could have thought that guns and learning are mutually exclusive. . . .

. . .

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.

5.8.1 Introduction to *Gonzales v. Raich* (2005)

In *Lopez* (1995) and *Morrison* (2000), as in some other cases decided from the late twentieth and early twenty-first centuries, the Court restricted federal power in favor of the states, often at the expense of the ability of individuals to vindicate their rights. In *Morrison* (2000) a portion of the federal Violence Against Women Act was declared unconstitutional because it, like the law at issue in *Lopez* (1995), regulated a matter of local, not federal concern. Because violence against women is not an economic activity, it could not be aggregated to find a substantial effect on interstate commerce. The law at issue did not require a specific nexus to interstate commerce, and so it was not constitutional under that theory. In *Morrison* (2000), the Court took pains to note that the lack of a federal remedy did not necessarily leave the victim without recourse: State law should provide civil causes of action for assault, kidnapping, and battery that the woman could pursue in state court. It is difficult to discern how a non-preempting federal civil cause of action significantly undermined state power. Nonetheless, the Court was concerned about preserving state power against federal intrusion even where the on-the-ground impact would be minimal.

In terms of result and some of the rhetoric regarding state protection of individual rights, *Morrison* (2000) echoes *Cruikshank* (1876) chapter 2, page 121.

In some ways both *Lopez* and *Morrison* were easy cases for a majority seeking to curtail federal power using a federalism theory because the actual impact on congressional power of the Court declaring the laws unconstitutional is in both instances negligible. Furthermore, on a practical, on-the-ground level, Congress can reach these sorts of activities using the nexus-to-commerce theory.

After *Lopez* and *Morrison,* questions remained as to what is "economic activity," as distinguished from other activity, and what standard of review should be followed, particularly with respect to the amount of deference to be given to Congress in regulating economic activity.

The first answers to those questions came in the next case, *Gonzales v. Raich*, 545 U.S. 1 (2005). In *Raich* (2005) the Court held that growing marijuana even for personal consumption for medical reasons was economic activity. Thus the hyper-local action of a person growing marijuana for personal use, as the state allowed, could be criminalized by the federal government under the substantial effects aggregation theory.

Notice the split among the justices. Justice Stevens, a dissenter in *Lopez* and *Morrison*, writes the five-justice majority decision in *Raich*. Scalia, in the majority on *Lopez* and *Morrison,* also concurs in the result here. Justice O'Connor writes a dissent in which Chief Justice Rehnquist and Justice Thomas join. The gist of the dissent is that even though this is economic activity, it is so local that Congress should not be able to reach it. The all-but-necessary implication of the three dissenters would be to overrule *Wickard* (1942) and perhaps significantly circumscribe the substantial effects test. The fact that six justices chose not to do so shows that the Commerce Clause power is still vast and that *Lopez* and *Morrison* placed only modest restrictions on it.

As to the second issue, the proper standard of review after *Lopez* and *Morrison*, the Court seems to shift from a highly deferential rational basis to less deferential rational basis. Under the former standard, deferential rational basis, the decision as to the

existence and strength of the connection to commerce is made by Congress, and the Court examines only whether Congress could rationally have discerned such a connection. Under the arguably revised standard, the Court takes a more independent, less deferential approach: The Court, not Congress, decides whether the target of congressional regulation is properly considered a commercial one. This sort of nondeferential rational basis review is not very intrusive, but it is less deferential than prior to *Lopez*. Thus actions merely affecting education or involving sexual violence are defined by the Court as being non-economic activity, and, because these decisions limit the rule in *Wickard*, such actions cannot be aggregated, but are rather to be treated as solely local or state-level problems. This same lack of deference to Congress contributed to the division of the justices in *National Federation* (2012). In her concurrence and dissent, Justice Ginsburg advocated deference to Congress's determinations. In contrast, Chief Justice Roberts in his lead opinion and the four justices in their dissent conducted a completely independent examination of the mandate as a Commerce Clause issue, without deferring to congressional decision-making on the issue of the scope of the Commerce Clause power.

In *National Federation* the Affordable Care Act was the epitome of a "large regulatory scheme," and yet five justices ruled that the individual mandate, even though enacted as part of that massive statute, was still unconstitutional.

As you read *Raich* (2005), notice how the Court uses the reasoning from *Lopez* (1995) and *Morrison* (2000) to distinguish the situation in *Raich* and, ultimately, to decide, over dissents, that this activity was indeed reachable by Congress in exercising its Commerce Clause power. In particular, the Court latches onto the economic/non-economic distinction and highlights that the banning of marijuana is part of a large regulatory scheme.

Gonzales v. Raich

545 U.S. 1 (2005)

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 [Commerce Clause power] includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

I

. . .

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.

. . .

The obvious importance of the case prompted our grant of certiorari. . . . The case is made difficult by respondents' strong arguments that they will suffer irreparable harm because, despite a congressional finding to the contrary, marijuana does have valid therapeutic purposes. The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case. . . .

. . .

III

Respondents in this case do not dispute that passage of the 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." *Id*. at 125. 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. . . .

. . .

Wickard thus 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.

. . .

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.

. . .

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. *Lopez*, 514 U.S., at 557. . . . 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.

. . .

Second, limiting the activity to marijuana possession and cultivation "in accordance with state law" cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond

peradventure that federal power over commerce is " 'superior to that of the States to provide for the welfare or necessities of their inhabitants,' " however legitimate or dire those necessities may be.

. . .

V

. . . Perhaps even more important than . . . legal avenues is the democratic process, in which the voices of voters allied with these respondents may one day be heard in the halls of Congress. Under the present state of the law, however, the judgment of the Court of Appeals must be vacated. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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.

. . .

. . . Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause. . . . And the category of "activities that substantially affect interstate commerce," *Lopez*, *supra*, at 559, is incomplete because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

. . .

II

. . . 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.

. . .

Justice O'Connor, with whom Chief Justice [Rehnquist] 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,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

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 *Lopez*, supra, and *United States v. Morrison,* 529 U.S. 598 (2000). Accordingly I dissent.

5.8.2 The Unwilling Participant Problem

As discussed at the beginning of the chapter, the most recent limitation the Court has placed on Commerce Clause power is the notion that Congress may not compel an unwilling person to enter the market so it can regulate that person's behavior in that market. *National Federation* (2012). This is so even if bystanders to the health market do have a significant impact upon the market's functioning.

5.8.3 Commerce Clause Power after *Lopez* (1995), *Morrison* (2000), *Raich* (2005), and *National Federation* (2012)

By votes of five to four in *Lopez* (1995) and *Morrison* (2000), the divided Court trimmed congressional power under the commerce power in minor, but not meaningless,

ways. As noted in the *Lopez* dissents, prior to *Lopez* the test for constitutionality under the substantial effects prong was whether Congress in its judgment could have rationally decided that the thing being regulated affects interstate commerce. Congress was given great deference and was not required to make a record to show the relationship; limits on the exercise of that power were largely left to the people through the ballot box.

The central rulings of *Lopez* (1995) appear to be:

1. Clarification that the effects of the activities on interstate commerce had to be substantial; simply having an effect is not enough.
2. Creation of a new rule that prohibited aggregation of impacts on interstate commerce unless the targeted activity itself was commercial or economic in nature.
3. While explicitly disclaiming the creation of a requirement that congressional findings support the existence of substantial effects on interstate commerce, the Court uses the lack of such findings against the congressional exercise of power. This approach of relying upon but not requiring congressional findings indicates a lessening of the degree of deference the Court is willing give to Congress under Commerce Clause substantial effects test.
4. Federalism is a valid basis for attacking congressional exercise of the commerce power. Rather than leaving the protection of the federal structural to the political bodies, as noted by Chief Justice Marshall in *Gibbons* (1824) and as reiterated by the Court as recently as *Garcia* (1984), the Court reasserted its role in policing that boundary.

Morrison (2000) reinforced *Lopez* (1995). *Morrison* makes explicit the economic/non-economic distinction from *Lopez*. *Raich* (2005), by reaching the opposite result on the facts, highlights the distinction between regulating economic activity (growing a crop) and regulating non-economic activity (carrying a gun or violent attacks on women). This distinction was questioned by Justice Scalia in his concurrence in *Raich*, where he reads the *Lopez/Morrison* rule slightly differently and explicitly leaves open the necessary-for-realization-of-a-comprehensive-scheme theory under the substantial effects prong. According to Justice Scalia, a non-economic local activity that would undercut a comprehensive regulatory scheme that is clearly within the power of Congress to regulate under the Commerce Clause can be regulated through a combination of the application of the Necessary and Proper Clause and the Supremacy Clause. This concession by Justice Scalia illustrates the narrowness and, one could argue, frailness of the theoretical underpinning of the *Lopez* and *Morrison* economic activity restriction. In light of his position as stated in his concurrence in *Raich*, Scalia's participation in the four-justice dissent in *National Federation* (2012) seems inconsistent, because the individual mandate at issue under the Affordable Care Act was just such a small but critical piece of a very large regulatory scheme in a domain that all nine justices agreed Congress has the power to regulate. Justice Scalia distinguishes the two situations not on the basis of the economic or non-economic nature of the activity being targeted, but rather on the basis of compelled activity.

Even if the activity itself is not economic activity and so cannot be aggregated under the substantial effects prong, the Court left Congress (and itself) an escape route in both *Lopez* and *Morrison*: If the statutes had specifically made existence of a connection,

a nexus, to interstate commerce an element of the crime in *Lopez* or of the civil cause of action in *Morrison*, the statutes would have been saved. In *Morrison*, Chief Justice Rehnquist was concern with "§13981's focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce). . . ." By implication, if the cause of action were limited to women traveling in interstate commerce (on a commuter train from Connecticut to New York, for example), it would be constitutional. If the cause of action were limited to someone attacked by a tourist from another state, that too would pass constitutional muster. But absent such an interstate nexus, the congressionally created federal civil action was not approved by the Court.

In *Morrison* (2000) the justices were split along the same lines as in *Lopez,* with the dissenters seeking a return to the pre-*Lopez* deferential approach without the use of the economic/non-economic distinction. It is thus apparent that these cases are decided based not upon established constitutional law doctrine requiring particular results, but rather upon judgments informed by the justices' attitudes toward federal power, their respective federalism leanings, and their sense of the Court's proper role in this sort of regulation at the federal level. The non-majoritarian and nondeferential approach of those accepting the federalism theory are evident in both *Lopez* and *Morrison*.

In *National Federation v. Sebelius* (2012), we saw the same dynamic play out under the Commerce Clause, with five justices placing another novel limit on the Commerce Clause power such that Congress can only reach voluntary activity and cannot mandate participation in interstate commerce. Once again this would seem to be more about giving life to modern federalism theory than about applying established constitutional law doctrine in a new setting. To reach the result of limiting the federal government that the new federalism theory is supposed to achieve, a new doctrine (activity/non-activity) had to be created. In *National Federation* (2012), the Court did in fact uphold the power of Congress to mandate having health insurance, but that it did so under the taxing power rather than the Commerce Clause further exposes the formalistic nature of the dissenters' approach to something epitomizing a truly practical, functional aspect of life: commerce.

5.8.4 HYPOTHETICALS: THE *LOPEZ* (1995), *MORRISON* (2000), AND *RAICH* (2005) SHIFT IN COMMERCE CLAUSE POWER INTERPRETATION

12. Reconsider hypothetical 9 above: Congress enacts a law requiring all sales of comic books to include their provenance or a label stating "provenance unknown." Sam's Comix is a small, urban, hole-in-the-wall sort of shop, has no Internet presence, sells only to walk-in customers, and deals only in cash. Sam claims this law, as applied to him, is unconstitutional. Do the decisions and reasoning of *Lopez* (1995) and *Morrison* (2000) affect the result?
13. The Central Valley Chess Club meets each week in a space it rents from a local church. A recent exposé in the local newspaper disclosed rampant cheating involving the

surreptitious use of computers in its most recent chess tournament. Congress hears about this and to prevent such problems in the future passes the "Chess Tournament Regulatory Act of 2015" (CTRA). The CTRA makes it a federal crime to cheat in a chess tournament. Is the CTRA constitutional?

14. Same facts as in 13. Does it matter whether a cash prize is awarded for winning the tournament? Whether an entry fee is charged?
15. Same facts as in hypothetical 13 with the following addition: Congress makes an element of the crime proof that the timing clocks used in the tournament, the device (if any) used in cheating, or the game board or pieces were sold through interstate commerce.
16. Same facts as in hypothetical 13 with the following addition: Congress criminalizes the use of the Internet to cheat in a chess tournament.
17. Congress criminalizes prostitution, providing that anyone who solicits sex for pay is guilty of a misdemeanor. Constitutional?
18. Assume the statute in hypothetical 17 is not constitutional. How could Congress fix it?
19. Congress makes it a felony to make alcoholic beverages without a license. Harold Smith makes his own wine for his own consumption and does not have a federal license to do so. Does Smith have a constitutional defense that Congress exceeded its Commerce Clause power when he is convicted under the statute for making alcoholic beverages without a license? Do any other provisions of the Constitution support the action of Congress?
20. Congress holds hearings and makes findings that homosexuals have been and still are targeted specifically for violent attack. In response Congress makes it a felony to commit violence against someone on the basis of sexual orientation. Constitutional?
21. Congress passes a law making bullying on school playgrounds a federal offense. Constitutional?
22. Congress passes a law making bullying over the Internet a federal offense. Constitutional?

5.9 EXAM TIPS: COMMERCE CLAUSE

Congressional power under the Commerce Clause is a favorite area for testing by professors and on the bar exam. The substantial affects test is perhaps the most commonly tested, but watch for a "trick" question under which the federal regulation would also be supportable under one of the other prongs: things or people traveling in commerce, for example, or the channels or instrumentalities or vehicles of commerce. Setting problems in an online context sometimes presents new twists on old rules. The extent of interstate connections still matters somewhat, but after cases like *Wickard* (1942) and *Heart of Atlanta* (1964), the amount of connection is relatively slight provided the activity being targeted is in some sense economic under *Lopez* (1995) and *Morrison* (2000).

The other two main tests for federal power under the Commerce Clause, the nexus test and the regulation as part of a larger scheme on a subject matter over which Congress has power, are both readily testable subjects and ought not to be ignored when considering possible grounds to support or contest a federal regulation.

Probably more commonly tested than application of the general tests for federal Commerce Clause power are the subtler and more complex problems raised by the federalism limits on it. The material covered in chapters 11 and 12 is particularly relevant for these sorts of issues.

Commerce Clause issues can be easily combined with other issues, especially preemption, Dormant Commerce Clause, and commandeering. Sometimes a law that is not a valid exercise of power under the Commerce Clause may be supported by another power, such as by the spending or taxing powers, or as an implementation of a treaty.

The factual keys or signs that the exam question may involve a Commerce Clause issue include: Congress (or the federal government more generally) regulating almost anything; a commercial or economic setting; or facts analogous to or extensions from cases presented in this coursebook or otherwise discussed in class.

5.10 POWER OVER STATES UNDER THE FEDERAL COMMERCE CLAUSE POWER

As explained above, federalism concerns were central in the Commerce Clause portions of *Lopez* (1995), *Morrison* (2000), and *National Federation* (2012). In those cases, Congress was regulating private conduct and the Court held that Congress exceeded its power by intruding too deeply into matters primarily reserved to the states to regulate.

In this section we briefly address a different issue: limits on the power of Congress to regulate states themselves as distinguished from Congress regulating private economic activity. (This matter is more fully addressed in chapter 12 on federalism and state sovereignty under the Tenth and Eleventh Amendments and to some extent in chapter 11 on preemption and the Dormant Commerce Clause. They are considered here merely to round out our consideration of congressional power.)

Concerns of state sovereignty and federal power to regulate states play a central role when the federal government seeks to regulate states directly under the Commerce Clause. The Tenth Amendment to the U.S. Constitution 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." During the *Lochner* Era (1897–1937), the Court read the Tenth Amendment as imposing significant limits on the federal commerce power. In the Court's view, the Tenth Amendment barred Congress from using its commerce power to regulate matters that are traditionally the province of the states. The clearest demonstration of that reading of the Tenth Amendment was in *Hammer v. Dagenhart,* 247 U.S. 251 (1918), in which the Court held that Congress did not have the power to enact child labor laws under the commerce power because labor was tied to manufacturing, which was an inherently local activity because the manufactured products might never be sold outside of the state.

Thus child labor was subject only to regulation by the states, not by the federal government.

As the Court began to abandon its *Lochner* Era approach to state and federal regulation of social and economic matters, it cast aside the notion that the Tenth Amendment was a significant substantive bar to the Commerce Clause. For example, the Court upheld a federal statute that imposed a penalty on a California state-owned and -operated railroad for violating federal law. *United States v. California,* 297 U.S. 175 (1936). The Court wrote that "[t]he sovereign power of the states is necessarily diminished to the extend of the grants of power to the federal government in the Constitution." *Id.* at 184. While limits on the federal power to tax states had long existed, the states were still subject to regulation where the federal government was granted power over a field, such as interstate commerce.

In *United States v. Darby*, 312 U.S. 100 (1941), the court overturned *Hammer v. Dagenhart,* 247 U.S. 251 (1918), explaining:

> 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." That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. . . . Our conclusion is unaffected by the Tenth Amendment . . . 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 federal 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.

United States v. Darby, 312 U.S. 100, 114 (1941). From *Darby* (1941) until 1976, the power of Congress to regulate states directly under the Commerce Clause was recognized and upheld.

As late as 1968 and 1975 the Court had upheld the application to state governments of federal employment-related laws such as minimum wages, *Maryland v. Wirtz,* 392 U.S. 183 (1968), and maximum wage increases, *Fry v. United States,* 421 U.S. 542 (1975). Nonetheless, the majority in *Fry* acknowledged some limits on congressional power such that it could "not exercise its power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 427 U.S. at 547, n.7.

In 1976, in *National League of Cities v. Usery* 426 U.S. 833 (1976), the Court held that Congress could not apply the Fair Labor Standards Act, enacted under the Interstate Commerce Clause power, to the states, overruling *Maryland v. Wirtz* (1968), decided eight years earlier. There then followed a series of cases in which the Court struggled to develop a workable standard for when a federal exercise of power over the states was too intrusive, *e.g., Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981) (upholding application to mining of the federal environmental protection law as preempting the state government's historical power to regulate land use); *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678 (1982) (federal labor

provisions governing state-owned railroad upheld because running a railroad was not a traditional government function); and *EEOC v. Wyoming*, 460 U.S. 266 (1983) (five to four decision upholding application of federal Age Discrimination Act to state employees, thereby barring states from imposing mandatory retirement at age 55 for state game wardens).

By the time of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), nine years after *Usery*, the split decision in *Usery* had been undermined by *Hodel* (1981), *Long Island Railroad* (1982), and *EEOC v. Wyoming* (1983). In *Garcia* (1985) the Court overruled *Usery*.

Garcia (1985) was not the final word on the subject of federal power over the states under the Commerce Clause. In a series of cases after *Garcia*, for example, *New York v. United States* (1992), *Printz v. United States* (1997), and *Reno v. Condon* (2000), the Court held that although Congress may use the Commerce Clause to establish standards and rules of commerce that states must follow, it may not use that power to require states to enact specific legislation nor to conscript state officials to act as quasi-federal agents.

When you study those cases in chapter 12, be careful not to conflate congressional power to reach *private* conduct under the Commerce Clause power (or any other grant of power) with the federalism limitations placed on congressional power to reach *states as states*. The question considered in those cases is ultimately one of the extent to which state sovereignty protects states from direct regulation by the federal government. When, if ever, should the federal government be able to force state governments to act in certain ways? The matter is raised here in part to emphasize that the this chapter does not fully develop all of the contours of the Commerce Clause power.

Another federalism limit on congressional power under the Commerce Clause concerns state sovereign immunity from suit by those seeking protection by the federal law. Even if Congress has the power to require states to conform to federal law, individuals affected by those laws may not be able to sue the states to force the state to comply. See *Alden v. Maine*, 527 U.S. 706 (1999) (state is subject to federal Fair Labor Standards Act, but public employees cannot sue to enforce it because of state sovereign immunity). In these situations, only the federal government can enforce the law against the states; individuals cannot sue the states. When coupled with Congress's inability to abrogate state sovereign immunity when enacting laws under its Article I power (except bankruptcy), state sovereign immunity gives states significant protection and undermines the federal rights that regulate states, particularly with respect to matters affecting state employees. (State sovereign immunity is considered more fully in chapter 12.)

To repeat, it is important to keep in mind the distinction between congressional regulation of private conduct and congressional regulation of states as states. Narrowly considered, federalism relates to protecting states from federal power. One oft-stated theory behind this is that states are better able to protect individuals' liberty than is the national government (yet consider slavery, Jim Crow, local book banning, the response of many states to the entire Civil Rights Movement, and the rights revolution led by the Court in the mid-twentieth century, generally, for examples that counter the states-as-protectors theory).

The power of Congress vis-à-vis the states arises in the two other chapters as well. Chapter 6 presents Congress's power under the spending power to induce states to act.

Chapter 8 explores how Congress, under the Reconstruction Amendments, has explicit power to regulate states to enforce the rights included in or incorporated in those amendments (the Thirteenth, banning slavery; the Fourteenth, guaranteeing due process and equal protection; and the Fifteenth, guaranteeing the right to vote).

5.11 COMPARATIVE PERSPECTIVE ON THE NATURE OF CONSTITUTIONS AND FEDERALISM

The issue of allocation of power arises in all federal systems, including countries as diverse as Switzerland, Canada, India, and Brazil. The Brazilian Constitution explicitly places ultimate sovereignty and power in the people, providing "All power emanates from the People, who exercise it through elected representatives or directly, under this Constitution." The preamble to the Brazilian Constitution (adopted in 1998) reads as follows:

> We, the representatives of the Brazilian People, assembled in the National Constituent Assembly to institute a Democratic State for the purpose of ensuring the exercise of social and individual rights, liberty, security, well being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, based on social harmony and committed, in the internal and international spheres, to the peaceful solution of disputes, promulgate, under the protection of God, this Constitution of the Federative Republic of Brazil.

Of particular note is the explicit inclusion of social and economic rights as proper subjects for the federal government to address. The Brazilian constitution allocates power in far more detail than does the U.S. Constitution, with both general and very specific grants of power, such as taxing to pay for education. Title 8 of Brazil's constitution creates the welfare system with a specificity found only in statutes in many countries. Title 8 establishes the social security system and public health system and has provisions concerning education, culture, and sports, among many other things. Brazil separates powers into executive, judicial, and legislative branches much as the United States Constitution does.

India's constitution is even longer than Brazil's; it is the longest in the world. It was adopted in 1947 and has been amended repeatedly. India has a parliamentary system under which the executive power is accountable directly to the legislative branch. India has a federal system with many states. The states each have their own languages. While English, Hindi, and Urdu are the official national languages, the states recognize twenty-six other official languages. Some sense of the scope of India's constitution can be gleaned from the following examples of some of its major parts:

- Part XI: Relations between the Union and the States
- Part XII: Finance, Property, Contracts, and Suits
- Part XIII: Trade and Commerce within the Territory of India
- Part XIV: Services Under the Union, the States
- Part XIVA: Tribunals

- Part XV: Elections
- Part XVI: Special Provisions Relating to Certain Classes
- Part XVII: Languages

Neither Brazil nor India rely upon the judiciary to police power and federal-state boundaries to the extent the United States does. Having far more detailed provisions makes interpretation of general provisions less likely and less necessary, but it also makes the constitutions less flexible and less responsive to changing conditions. This explains in part why the Indian constitution has been amended so frequently and why Brazil has both frequently amended and irregularly replaced its constitution with a new ones.

Justice Breyer, in dissent in *Printz*, wrote:

> The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central "federal" body. . . . They do so in part because they believe that such a system interferes less, not more, with the independent authority of the "state," member nation, or other subsidiary government, and helps to safeguard individual liberty as well.

The larger point here is that the U.S. federal system including the federalism aspects of constitutional jurisprudence is not the only workable model for organizing a federal structure in a nation.

5.12 DOCTRINAL SUMMARY OF THE COMMERCE CLAUSE POWER

I. Under the Commerce Clause, Congress has the power to regulate:
   A. The channels of interstate commerce, e.g., railroads, waterways, highways, airways, and communications networks such as the Internet;
   B. The instrumentalities of interstate commerce, e.g., trains, ships, trucks, airplanes, computers, and communications devices;
   C. The people, goods, and services moving in or through interstate commerce;
   D. Activities that substantially affect interstate commerce: Activities that individually do not have a substantial effect on interstate commerce may be aggregated to constitute a substantial effect provided the activities are economic in nature; and
   E. The rules by which interstate commerce is conducted.

II. In addition, under the Necessary and Proper Clause, Congress can use means to accomplish a comprehensive regulatory scheme regulating subject matter it has the power to regulate even if those means themselves are not economic or commercial. (Compare *Raich* (2005) with *National Federation* (2012).)

III. In exercising its commerce power, Congress is subject to four primary limitations:
  A. The activity Congress seeks to regulate
    1. Must itself be economic in nature to be aggregated to find a substantial effect; or
    2. If the activity is non-economic,
      a. It must have a nexus to interstate commerce, or
      b. The activity targeted must be part of a comprehensive regulatory program.
  B. The actors whose activities Congress seeks to regulate cannot be compelled to participate in a market they are not already participating in.
  C. Congress may regulate not only private individuals and entities but also regulate state and local governments and government agencies. In doing so Congress must not interfere with state sovereignty, either
    1. By compelling states to enact legislation ("commandeering"), or
    2. By compelling state officials to act as quasi-federal agents ("deputizing") (see chapter 12).
  D. When exercising its Commerce Clause power (or any Article I power other than bankruptcy), Congress cannot abrogate state sovereign immunity (see chapter 12).