Let Them Eat . . . Broccoli?

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I. INTRODUCTION

“DEWEY DEFEATS TRUMAN” the Chicago Tribune headline read.\(^1\) It was November 3, 1948. The political atmosphere was charged, and the editors were under pressure to get a story out quickly.\(^2\) Little did they know, it would become one of the most famous headlines in history.\(^3\)

Fast forward sixty-four years, and while a great many things have changed, some things remain the same. For example, while news can now be shared across the globe almost instantaneously, reporters and editors still want to be the first and the fastest to report new information. In the summer of 2012, it seemed as though more attention than ever before turned to the Supreme Court of the United States.\(^4\) For media outlets, there was even more pressure: the eyes and ears of the nation were waiting for a quick and simple answer to a complex question—from a forum that is anything but quick. Or simple.

When the time came to announce the fate of the key components of the Patient Protection and Affordable Care Act (“Affordable Care Act”), several major news sources, including CNN, Fox News, NPR, Time, and the Huffington Post, got ahead of themselves. In a move reminiscent of the Tribune’s, these sources informed the public that the Supreme Court ruled the individual mandate unconstitutional.\(^5\)

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2. Tim Jones, *Dewey Defeats Truman: Well, Everyone Makes Mistakes*, Chi. Tr., (last visited Oct. 11, 2013), http://www.chicagotribune.com/news/politics/chi-chicagodaysdeweeydefeats-story,0,6484067.story (“Like most newspapers, the Tribune . . . was lulled into a false sense of security by polls that repeatedly predicted a Dewey victory. Critically important, though, was a printers' strike, which forced the paper to go to press hours before it normally would.”).
3. See id.
4. To illustrate, SCOTUS Blog, a blog focused on Supreme Court activity, had approximately 520,000 live contemporaneous readers at the time of the decision, and by 10:22 AM—minutes after the decision was issued—there were approximately 866,000 live-blog readers. See Adrienne LaFrance, *Anatomy of a Spike: How SCOTUS Blog Dealt with its Biggest Traffic Day Ever*, Nieman Journalism Lab (June 28, 2012, 5:18 PM), http://www.niemanlab.org/2012/06/anatomy-of-a-spike-how-scotus-blog-dealt-with-its-biggest-traffic-day-ever/. In just over four hours the blog had 2.9 million hits. *Id.* As put in one of their tweets early that morning, “Probably more traffic today than in SB’S first 5 years, combined. So grateful; a little scared. #teamlyle #dontcrash.” *Id.*
But why? Given the era and the circumstances, the Tribune’s gaffe, while unfortunate, is at least understandable. And yet, what excuse would news agencies in 2012 provide? While it may initially appear to be a simple case of rushing to be the first to report, it could also be because many thought the individual mandate was constitutional only through the Commerce Clause. Thus, the Affordable Care Act’s constitutionality as an entire statutory scheme, appeared to also rely on the Clause.6

Indeed, if one looks at some of the things Congress has passed “in the name of commerce” so to speak—such as forbidding the hunting of animals by airplane;7 asserting that those who flee a state from prosecution or giving testimony are committing a federal offense;8 or punishing via fines or imprisonment anyone who attempts to impede a woman from entering an abortion clinic9—requiring the public to either purchase minimum essential health insurance coverage or be penalized10 seems something very close to a regulation of commercial activity.

But, this was not the case. As it turned out, the imposition of minimum essential coverage, that is, requiring individuals to purchase and maintain health insurance, exceeded Congressional power under the Commerce

post-and-time-get-supreme-court-story-exactly-wrong/ (showing a Fox Television news banner titled “SUPREME COURT FINDS HEALTH CARE INDIVIDUAL MANDATE UNCONSTITUTIONAL,” and a CNN webpage displaying the following ticker: “Breaking News: The Supreme Court has struck down the individual mandate for health care.” Id. On Twitter, CNN’s original tweet read: ”Supreme Court strikes down individual mandate portion of health care law.”). Id.

6. See, e.g., Joan McCarter, Affordable Care Act unconstitutional? Not according to law professors, D AILY KOS (Jan. 19, 2011, 8:00 AM), http://www.dailykos.com/story/2011/01/19/937279/-affordable-care-act-unconstitutional-not-according-to-law-professors?detail=hide (comparing GOP arguments for the Act’s unconstitutionality with a joint statement provided by one-hundred law professors asserting the opposite.) To illustrate, take for example Congressman Lungren’s comment that “[c]ertainly the Commerce Clause lacks the elasticity that would accommodate a requirement that every American buy health insurance which conforms to the dictates of the federal government as the federal government would change it on a yearly basis.” Compare this with an excerpt from the law professors’ statement which notes that “[t]he problems facing the modern healthcare system today are precisely the sort of problems beyond the reach of individual states that led the Framers to give Congress authority to regulate interstate commerce.” Id.

10. See 26 U.S.C. § 5000A(a) (“An 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 for such month.”). Further, “If a taxpayer . . . fails to meet the requirement of subsection (a) for 1 or more months, then, [unless otherwise provided,] there is hereby imposed on the taxpayer a penalty with respect to such failures . . . .” Id.
Clause. According to the controlling opinion, this turned on the difference between regulating existing commercial activity, and compelling individuals to participate in commerce (by purchasing a product). By not participating (not purchasing this product), the Court reasoned there is no commercial activity to regulate. Thus it is not within the scope of Congress’s control.

Taking this distinction into consideration, then, how does it change the current understanding of Commerce Clause jurisprudence, if at all? To answer this question, this note first explores the intentions and meanings of the early courts regarding the Commerce Clause, and thereafter, follows this understanding as it progresses through New Deal legislation and various other legislative attempts. Next, the “four corners” of the Commerce Clause are established by discussing the four cases widely considered to comprise the outer bounds of the issue. Then, an overview of federal appellate treatment of the Commerce Clause’s specific applicability to the individual mandate is provided. This is followed by a discussion of the Chief Justice’s controlling opinion, as well as Justice Ginsburg’s concurring opinion regarding the matter. Finally, this note compares and contrasts how the Supreme Court’s treatment of congressional use of the Commerce Clause in the healthcare ruling fits within the previous understanding of the Clause, what it might mean for existing or future legislation, and ultimately concludes that even though this was a decision that likely received the most attention of any Supreme Court case to date, the law itself, essentially remains unchanged.

II. CONGRESS MAY REGULATE

The Constitution grants Congress the power to “regulate Commerce . . . among the several States,” and to “make all Laws which shall be necessary and proper” to the execution of that power. This authority is broad. Congress may “regulate the channels of interstate commerce”; it may “regulate and protect the instrumentalities of interstate commerce, and persons or
things in interstate commerce”; and it may “regulate activities that substantially affect interstate commerce.”

A. The Meanings of a Word

Whenever a situation arises that requires interpreting the meanings of Congress, or the meanings of the Framers, or the meanings of the parties, simply looking at words and definitions is hardly enough for proper consideration. Thus, when searching for interpretations or understandings, one must look beyond the words themselves, and instead look more closely into the consensus of what truly comprises the meaning of a word. This is well-portrayed in an essay by critically-acclaimed novelist and distinguished professor, Gloria Naylor:

I'm not going to enter the debate here about whether it is language that shapes reality or vice versa . . . I will simply take the position that the spoken word, like the written word, amounts to a nonsensical arrangement of sounds or letters without a consensus that assigns “meaning.” And building from the meanings of what we hear, we order reality. Words themselves are innocuous; it is the consensus that gives them true power.

Accordingly, this inquiry of “words” will be brief. While the actual text is a logical starting place in constitutional analysis—and indeed, attempting to understand what sort of power words are given at their formation is an excellent tool—in order to determine how the most recent commerce clause decision truly affects the understanding of the scope of the Clause, the focus here will be to first determine how the meaning has evolved.

B. The Meaning of Commerce

“We first inquire, then—What is commerce? The term, as this court many times has said, is one of extensive import. No all-embracing definition has ever been formulated.”

To begin, “commerce” is “the activity embracing all forms of the purchase and sale of goods and services” and originates from the Latin

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22. Gloria Naylor, Mommy, What Does Nigger Mean?, in NEW WORLDS OF LITERATURE: WRITINGS FROM AMERICA’S MANY CULTURES 344, 344–35 (Jerome Beaty & J. Paul Hunter eds., 2d ed. 1994). In a textbook display of situational irony, the essay was renamed the more polite “The Meanings of a Word” when used in later collections.
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“commercium,” meaning “trade.” Further, within the text of the Constitution, this “commerce” may be regulated “among the several states.” “Among,” a preposition, may encompass “in, into, or through the midst of,” as well as “in association or connection with,” and “surrounded by.” When considered together, within the text of the Constitution, then, this indicates that Congress may regulate the interstate transport of goods and services.

1. Early Interpretations

One of the first cases dealing with commerce, Gibbons v. Ogden, demonstrates this point. In Gibbons, the New York legislature granted an exclusive right to the use of the waterways in the state to one person. Gibbons, a New Jersey citizen, challenged the grant. Chief Justice Marshall concluded that this commerce power logically must extend to navigation, as “[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse.”

After Gibbons, several decades passed without the Court significantly addressing Congress’s exercise of the Commerce power. Instead, the Court dedicated more attention to considering and developing the dormant Commerce Clause. By the close of the nineteenth century, the understanding of “commerce” had not expanded far beyond the concepts of those enumerated in Gibbons: intercourse, traffic, transportation, navigation, trading, purchasing, and selling. Congress’s commerce power correlated to this under-
standing, and thus extended insofar as the ability to determine conditions, restrictions, or requirements under which commerce may be conducted, and “the means by which it may be aided and encouraged.”

2. The Progressives, Depression, and a New Deal

Understandably, in the beginning, the states naturally attempted to maintain their independence. This was due in part to politics, but also arose out of geographic, economic, and social conditions. And yet, to avoid the bigotries that often accompany staunch protectionism, and to promote uniform trade and travel, the Founders explicitly insisted that Congress maintain control of commerce and its regulation.

Despite these original conditions, however, the end of the nineteenth century brought with it less distinction between local and national economics. According to the Progressives of the time, national issues commanded national responses, and existing Commerce Clause jurisprudence was a barrier to their concept of government. President Roosevelt’s New Deal quickly illustrated this just a few years later: a series of economic programs designed to help America recover from the Great Depression.

between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities.

Id.

33. Id. at 203–04.

34. See, e.g., Frank J. Goodnow, Social Reform and the Constitution 9 (1911).

35. See id.


38. See id. at 417–23. Further, as mentioned in Newberry v. United States, “It is settled . . . that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacture, mining, etc., commerce could not exist but this fact does not suffice to subject them to the control of Congress.” 256 U.S. 232, 257 (1921).

39. See generally Barry Cushman, Rethinking the New Deal Court, 80 Va. L. Rev. 201 (1994) (discussing the political and legal history surrounding New Deal legislation).
Economists still debate the precise cause of the Great Depression. In the 1920’s, the speculative stock market flourished. Federal regulation of commercial activity was sparse. These things, coupled with low transactional costs and access to information, created a speculative bubble within the market. Thus, while the fundamental failure of the system was due to the “volume of investment,” there were also very “few tools available to policymakers to counter this essential fact.”

The breadth and depth of the Great Depression’s devastation to the American economy was unparalleled. After roughly four years of “unrelenting economic meltdown,” the 1932 presidential election came to center on the function of federal government within the economics of the nation. President-elect Roosevelt rejected the concept that uncontrolled economy could lead to prosperity or that the economy could correct itself over time. He proposed economic reform and regulation through the New Deal, through which a “better ordered system of national economy” might be forged.

3. A Brave New Society?

Most New Deal advocates identified with Progressive principals of government and social reform. Some idealists thought that if the true nature of politics was “to facilitate social reform” and it was “constitutional institutions such as separation of powers and federalism” that prevented the realization of reform, then, would it not be better to candidly admit the antiquation of the institutions, and instead forge new constitutional interpretations? Bureaucrats (and their attorneys) were aware of these viewpoints, but while generally sympathetic to what society felt like it needed at the

41. See id.
42. See id.
43. See id.
44. Id.
45. See Ramirez, supra note 40, at 530.
46. Id.
47. Id. at 531.
50. Claeys, supra note 37, at 426.
51. Id. See also SCHLESINGER, supra note 49, at 392–95.
time, they still retained reservations about essentially attacking the foundations of constitutional understanding to achieve such ends.52

a. The National Industrial Recovery Act

As stated in the preamble of the National Industrial Recovery Act, the Great Depression “burden[ed] interstate and foreign commerce, affect[ed] the public welfare, and undermine[d] the standards of living of the American people.”53 A largely unpopular act,54 it intended to establish fair-competition codes in trades or industries as identified by the President.55 In A.L.A. Schechter Poultry Corp. v. United States,56 Chief Justice Hughes wrote how this not only violated the separation of powers doctrine, but how it also exceeded congressional authority under the Commerce Clause, as the Constitution does not provide province to the Supreme Court “to consider the economic advantages or disadvantages of such a centralized system.”57 Instead, he explained:

Our growth and development have called for wide use of the commerce power of the federal government in its control over the expanded activities of interstate commerce and in protecting that commerce from burdens, interferences, and conspiracies to restrain and monopolize it. But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce “among the several States” and the internal concerns of a state.58

b. The Bituminous Coal Conservation Act

The next year, another portion of New Deal legislation reached, and failed, the Supreme Court’s review.59 In Carter v. Carter Coal Company, Congress attempted to set price controls for the nation’s coal market, as well as regulate hours and wages for coal workers, as it was “affected with a national public interest.”60 According to the majority, however, the “notion

52. Id.
54. See Cushman, supra note 40, at 42.
57. Id. at 549–50.
58. Id.
that Congress, entirely apart from those powers delegated by the Constitution, may enact laws to promote the general welfare, have never been accepted but always definitely rejected by this court.61

Regarding the commerce issue, attorneys from seven coal-producing states filed briefs supporting the Act’s validity.62 To support their argument, they pointed out how coal-producing states could not regulate wages or prices without disadvantaging its own producers against outside competitors.63 Further, they asserted that the Commerce Clause precluded states from protecting their citizens against outside competition.64 Upon review, the Court could not, nor did it, deny the effects of labor disputes in the coal industry on interstate commerce. Instead, it attempted to emphasize the need to preserve state power, even when facing the problem that the states may legislate inharmoniously, or not at all.65

c. The Switch

“Where the First New Deal contemplated government, business, and labor marching hand in hand toward a brave new society, the Second New Deal proposed to revitalize the tired old society by establishing a framework within which enterprise could be set free.”66

By 1935, the next set of New Deal legislative drafters were ready to tackle the challenges of crafting legislation within the scope of Supreme Court precedent.67 Where the first—guided by passion for social reformation—“wanted to draft laws and fight cases in terms of prophetic affirmations,” and generally “resented the whole notion of pussy-footing around to avoid offending the stupid prejudices of reactionary judges,” the second found it more important to actually have the statute work, instead of promoting a crusade.68 Described as the difference between “sweeping and rhetori-

61. Carter, 298 U.S. at 291. The thought that Congress was under the impression that it could regulate in such a way was so egregiously offensive to Justice Sutherland that it actually provoked what amounted to a nine-page lecture expounding upon why Congress lacked this power. See id. at 289–97.
63. Id.
64. Id.
66. SCHLESINGER, supra note 49, at 392.
67. See, e.g., id. at pt. 2. Titled “The Coming of the Second New Deal,” Schlesinger discusses the differences of First and Second New Deal legislation, including judicial politics, legal theories, and the addition of several new lawyers and thinkers to the legislative drafting process. See id. at 209.
68. Id. at 395.
cal legal strokes,” and “exquisite craftsmanship,” “[t]he laws drawn by the First New Deal tended to perish before the courts because of loose draftsmanship and emotional advocacy. The laws drawn by the Second New Deal were masterpieces of the lawyer’s art; and they survived.”

69.

The National Labor Relations Act

The National Labor Relations Act passed July 5, 1935.70 The Act established the National Labor Relations Board, as well as a federal right to collective bargaining for American employees.71 This time, the drafters were very careful. Instead of proclaiming that labor relations were affected with any sort of national interest, it alternatively provided that “[t]he denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining” can cause “certain substantial obstructions to the free flow of commerce” that should be eliminated.72 Litigation ensued.

As the case wound its way to the Supreme Court, two prominent events took place that likely affected the ultimate outcome.73 The first was President Roosevelt’s reelection in November of 1936.74 Construing this victory as a sign of tremendous public support for his initiatives even in the face of Supreme Court disapproval, the president sought to thwart what he felt as a reactionary interpretation of the Constitution.75 To this end, the President proposed the second event, the “Court-Packing” plan. While ultimately unsuccessful, this likely got the attention of a few of the justices, as it sought to appoint an additional justice to the bench for every justice over seventy years of age.76 Not surprisingly, when the issue finally did reach the Court in National Labor Relations Board v. Jones & Laughlin Steel Corporation,77 many were eager to hear exactly how the decision would play out:78 The

69. Id. Interestingly, to foreshadow, Schlesinger draws another analogy between the two rounds of legislation: “The First New Deal characteristically told business what it must do. The Second New Deal characteristically told business what it must not do.” Id. at 392.


71. Id. at §§ 3-7, 49 Stat. at 451-52.

72. Id at § 1, 49 Stat. at 449; see also NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 23, n.2 (1937).

73. See Stern, supra note 62, at 677.

74. See id.

75. See id.

76. See generally Cushman, supra note 39, at 208-09; Stern, supra note 62, at 677.

77. 301 U.S. 1 (1937).

78. Stern, supra note 63, at 679 (“The courtroom was jammed on Monday, April 12, 1937 . . . . The suspense was great as Chief Justice Hughes began to read his opinion in the Jones & Laughlin case.”).
Act, as a whole, was valid.\textsuperscript{79} The Court approved of the Act’s language, and concluded that it only reached activities that affected commerce.\textsuperscript{80} Determining that the definition of “affecting commerce” indicated Congress’s intent to exercise “control within constitutional bounds, the Court held this was an appropriate use of the commerce power”\textsuperscript{81} Thus, the question in the case became whether or not the “constitutional boundary” was exceeded.\textsuperscript{82}

After reviewing the cases upholding federal exercise of power over interstate activities, the Chief Justice determined that “[t]he close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local.”\textsuperscript{83} The Court distinguished the case from \textit{Carter}, asserting that there were multiple reasons as to the failure of the Coal Act, not just because the production provisions were “beyond any sustainable measure of protection of interstate commerce.”\textsuperscript{84} Accordingly, the analysis here hinged on whether or not the labor relations in Jones & Laughlin’s steel organization sufficiently affected interstate commerce; thus, the Court concluded that stopping such an operation “by industrial strife would have a most serious effect upon interstate commerce.”\textsuperscript{85}

Perhaps more interestingly, though, is that here the Court fully considered the futility of attempting to “consider direct and indirect effects [on commerce] in an intellectual vacuum.”\textsuperscript{86} “Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country,” the Court reasoned, “it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern.”\textsuperscript{87} Further, if an industry is organized on a national scale, “making their relation to interstate commerce the dominant factor in their activities,” then denying Congress the ability to regulate even “when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war” seems not only impractical, but also illogical.\textsuperscript{88} Instead, the Court concluded that, since “interstate com-

\textsuperscript{79} Jones & Laughlin, 301 U.S. at 31.
\textsuperscript{80} Id. at 30–31 (“We think it clear that the National Labor Relations Act may be construed so as to operate within the sphere of constitutional authority . . . . The critical words of [the act], prescribing the limits of the Board’s authority in dealing with the labor practices, are ‘affecting commerce.’”).
\textsuperscript{81} Id. at 31.
\textsuperscript{82} Id. at 32.
\textsuperscript{83} Id. at 38.
\textsuperscript{84} Id. at 41 (discussing Carter v. Carter Coal Co., 298 U.S. 238 (1936)).
\textsuperscript{85} Jones & Laughlin, 301 U.S. at 41.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 41–42.
merce itself is a practical conception,” then “it is equally true that interfer-
ences with that commerce must be appraised by a judgment that does not
ignore actual experience.” 89 It was with this that “actual experience,” that is,
“actual relation to commerce,” became the benchmark of review. 90

e. The Fair Labor Standards Act

Before discussing The Fair Labor Standards Act and its role in United
States v. Darby, 91 one case, in particular, warrants brief discussion. In 1918
the Supreme Court held, just barely, that Congress could not exclude from
interstate commerce the products of child labor. 92 While comfortable with
the idea of congressional powers limiting deleterious or harmful product
entering interstate commerce, 93 the Court did not think the commerce power
was an appropriate vehicle through which to regulate something so inherent
to the states. 94 As put by the Hammer majority, this would be an “invasion
by the federal power of the control of a matter purely local in its charac-
ter.” 95 The holding was never subsequently followed, and the distinction was
soon abandoned. 96 By the time of the United States v. Darby decision in
1941, Hammer’s precedent had “long since been exhausted,” 97 and thus the
Court explicitly overruled the case. 98

The significance of United States v. Darby, particularly, is that it genu-
inely signifies the close of an era of Constitutional thought. 99 What the Court
started in Jones & Laughlin was made implicitly clear in Darby—the earlier,
more traditional interpretations of the Commerce Clause are obsolete. 100

The Fair Labor Standards Act prohibited both the shipment of goods
produced in substandard labor conditions across state lines, and substandard
labor conditions generally—whether or not the goods produced ever crossed

89. Id. at 42.
90. Stern, supra note 63, at 681 (emphasis added).
91. 312 U.S. 100 (1941).
93. Id. at 279–80.
94. Id. at 270–71.
95. Id. at 276. Discussion of Hammer at this point in the analysis is particularly insight-
ful, as it illustrates the evolution of the meanings of the Commerce Clause to this point thus
far.
96. Darby, 312 U.S. at 116.
97. Id. at 116–17.
98. Id. at 117.
the expansion of the definition of “commerce” under which Congress can regulate).
100. Id. at 42 (“If an area of concern has significant spillover effects on other states, or
begins to do so, it shouldn’t matter that it was the traditional concern of state regulation.”).
state lines. In a unanimous decision, the Court held that the congressional power over interstate commerce is not simply confined to regulation among the states. Rather, “[i]t 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.”

C. Wickard, Lopez, Morrison, & Racial: The “Four Corners” of the Commerce Clause

Once into the 1940’s, the Court would settle comfortably into this “newer” sort of application and meaning of commerce power. In fact, until recently with the Affordable Care Act decision, there arose but four cases that overly modified this understanding. These cases, when considered individually, initially come across as somewhat juxtaposed but when analyzed aggregately they comprise the outer boundaries of modern commerce clause jurisprudence.

Accordingly, Wickard v. Filburn is first and foremost among modern Commerce Clause discussion, and the most analogous case to apply to the question of the individual mandate. In 1938, Congress passed the Agricultural Adjustment Act in an effort to stabilize the price of wheat nationally, by limiting the area farmers could devote to wheat production. Roscoe Filburn, however, ignored these restrictions. He planted and harvested...
almost double his allotment, 109 but he argued this was permissible because he used the excess wheat solely for private consumption. 110 As the excess wheat never entered commerce, let alone interstate commerce, the logic followed, it was not subject to federal regulation under the Commerce Clause. 111 The Supreme Court disagreed. 112

Had Filburn not grown excess wheat at home, the Court reasoned, he would have had to purchase wheat on the open market. 113 Although the Court did acknowledged that the excess production of one farmer would have a trivial effect on the market, it nevertheless found that “his contribution, taken together with that of many others similarly situated” would have an aggregate effect on the market that would be “far from trivial.” 114

Accordingly, non-commercial intrastate activity was within the reach of Congress, if such activity—in the aggregate—would have a substantial effect on interstate commerce. 115 This decision, especially when considered alongside Darby from the previous year seems to depict a Court very grounded when considering this more modern concept of what Congress’s commerce power may encompass.

Much later, in the Gun-Free School Zones Act of 1990, Congress made it a federal offense to knowingly possess a firearm in a school zone. 116 Two years later, Alfonzo Lopez, Jr., a twelfth grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38-caliber handgun. 117 School officials were tipped off, and Lopez confessed to the act. 118 The district court sentenced him to six months of imprisonment and two years of supervised release, 119 but Lopez appealed under the argument that Congress had exceeded the bounds of the Commerce Clause. And here, the Supreme Court agreed that Congress had indeed exceeded its power. 120

In its analysis, the Court first identified three categories of activity that Congress could regulate under the Commerce Clause: (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) those activities

109. Id.
110. Id. at 118–19.
111. Id.
112. Id. at 128–29.
113. Wickard, 317 U.S. at 128.
114. Id. at 127–28.
115. See id. at 128–29.
117. Id.
118. Id.
119. Id. at 552.
120. Id. at 551.
having a substantial effect on or relation to interstate commerce.\textsuperscript{121} Dismissing the first two categories as inapplicable, the Court opined on whether possessing a firearm in a school zone had a substantial effect on interstate commerce.\textsuperscript{122}

Here, the government argued, that possession of firearms in school zones may result in violent crime which would create a substantial cost to the economy through insurance, “[reduce] the willingness of individuals to travel to areas within the country that are perceived to be unsafe,” and disrupt the learning environment—resulting in a “less productive citizenry.”\textsuperscript{123} The Court, even though it held Congress need only have a rational basis for believing substantial effects exist,\textsuperscript{124} was less than impressed with the government’s reasoning.\textsuperscript{125}

Instead, the Court reasoned, the “possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”\textsuperscript{126} As such, to uphold such a contention here, it would require the Court to “pile inference upon inference” in such a way that would very well convert Congress’s commerce powers into something more akin to “a general police power of the sort retained by the States.”\textsuperscript{127} That it simply would not do.

A few years later, the Violence Against Women Act, passed in 1994, provided a federal civil remedy to victims of gender-based violence.\textsuperscript{128} That same fall, a Virginia Tech student, Christy Brzonkala, was allegedly assaulted and raped by two members of the school’s football team, Antonio Morrison and James Crawford.\textsuperscript{129} Brzonkala believed her failure to preserve physical evidence foreclosed the ability to press criminal charges.\textsuperscript{130} When Virginia Tech’s administrative system failed to take action against her alleged assailants, she filed suit under the Violence Against Women Act.\textsuperscript{131} Signaling a distressing trend for Congress, the Supreme Court again reigned in Congress’s commerce powers.\textsuperscript{132}

\textsuperscript{121} Id. at 558–59.
\textsuperscript{122} Lopez, 514 U.S. at 559.
\textsuperscript{123} Id. at 563–64.
\textsuperscript{124} Id. at 557.
\textsuperscript{125} Id. at 567–68.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} United States v. Morrison, 529 U.S. 598, 605 (2000).
\textsuperscript{129} Id. at 602.
\textsuperscript{131} Morrison, 529 U.S. at 603–04.
\textsuperscript{132} Morrison, 529 U.S. at 617.
Citing Lopez, the Court found that gender-motivated crimes of violence were not, in any sense, economic activity. Further, while acknowledging Congress did its due diligence in establishing the serious impact of gender-motivated violence on victims and their families, the Court rejected the “but-for” causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States’ police power) to every attenuated effect upon interstate commerce. Further, the Court noted, “[p]etitioners’ reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in Lopez, be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.” Thus, the Court held, Congress cannot regulate noneconomic, violent criminal conduct based solely on the aggregate effect of that conduct on interstate commerce.

Finally, when California voters passed the Compassionate Use Act of 1996, they became the first State to authorize limited use of marijuana for medicinal purposes. The Federal Controlled Substances Act, however, allowed for no such exception. Federal Drug Enforcement Administration agents made this fact painfully clear to Angel Raich and Diane Monson when they seized and destroyed all six of Monson’s cannabis plants. Raich and Monson brought action against the Attorney General of the United States and the head of the Drug Enforcement Administration seeking injunctive and declaratory relief prohibiting the enforcement of the Federal Controlled Substances Act to the extent it prevents them from possessing, obtaining, or manufacturing cannabis for their personal medical use.

Here, the Court found the facts in Raich strikingly similar to those in Wickard, and it reiterated 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.” Further, citing “the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere and concerns about diversion...”

133. Id. at 612–13.
134. Id. at 615–17.
135. Id. at 615–16 (emphasis added).
136. Id. at 617.
137. Gonzales v. Raich, 545 U.S. 1, 5–6 (2005).
138. Id. at 14.
139. Id. at 7 (“Indeed, Raich’s physician believes that forgoing cannabis treatments would certainly cause Raich excruciating pain and could very well prove fatal.”).
140. Id.
141. Id.
142. Raich, 545 U.S. at 18.
143. Id.
into illicit channels,” the Court found that Congress clearly had a rational basis for believing that “failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the [Controlled Substances Act],” undermining the “federal interest in eliminating commercial transactions in the interstate [marijuana] market in their entirety.”

D. The Four Corners of Commerce

These four cases, or corners, ostensibly provide a tidy square—or at least parallelogram—in which the modern legal understanding of Commerce Clause jurisprudence is contained. As mentioned earlier, taken individually, these cases provide little guidance, but it is Raich that really brings this modern commerce interpretation together; that is, with Wickard there emerges what could come across as unlimited congressional power through the Commerce Clause, but as demonstrated by Lopez and Morrison this is not so. In Raich however, we see that the Court did something interesting, that is, it confined Morrison and Lopez to instances of recently enacted federal statutes that attempt to reach activity that cannot be plausibly characterized as “commercial,” either by itself or as part of some greater economic regulatory scheme. Furthermore, as Lopez and Morrison were striking down more-or-less symbolic statutes that duplicate existing state legislation, it becomes easier to distinguish these cases from the more expansive language of Wickard and Raich. Accordingly, in short, “[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”

Of course, Congress—that prognostic body of innovators and visionaries—is rarely idle. In 2010, the Patient Protection and Affordable Care Act was conceived on the heels of a promise of change, and change’s constant bedfellow, upheaval, was not far behind.

III. AN INTERLUDE: DOCTORS, LAWYERS, AND POLITICIANS (OH MY)

The Affordable Care Act is likely the most widely known, and most widely misunderstood piece of federal legislation to date. The goal of the Act is to increase the number of Americans covered by health insurance

144. Id. at 22.
145. Id. at 19.
146. See Raich, 545 U.S. at 15–32.
148. Raich, 545 U.S. at 18 (quoting United States v. Morrison, 529 U.S. 598, 610 (2000)).
while decreasing the cost of health care.\textsuperscript{149} The law is expansive, in fact, its “ten titles stretch over 900 pages and contain hundreds of provisions.”\textsuperscript{150}

In order to satisfy its goal, the Act requires insurance companies to not only extend coverage to those who would not otherwise be able to obtain insurance due to preexisting conditions or other health-related issues, but also forbids companies from charging higher premiums to the same.\textsuperscript{151} On their own, these provisions would not only result in significantly increased premiums across the board,\textsuperscript{152} but would actually provide a direct incentive to delay the purchase of health insurance until one becomes sick.\textsuperscript{153}

Such a system would scarcely resemble insurance at all.

Congress’s solution to this problem came in the form of the individual mandate.\textsuperscript{154} “By requiring individuals to purchase health insurance,” the logic follows that this would then prevent “cost-shifting by those who would otherwise go without it.”\textsuperscript{155} Additionally, the mandate would force more healthy individuals into the insurance pool, in turn allowing “insurers to subsidize the costs of covering the unhealthy individuals the reforms require them to accept.”\textsuperscript{156}

On March 23, 2010, President Barack Obama signed the Affordable Care Act into law. That same day, thirteen states filed a complaint in the Federal District Court for the Northern District of Florida. Joined by several individuals, the National Federation of Independent Business, and thirteen more states, “the plaintiffs alleged, among other things, that the individual mandate provisions of the Act exceeded Congress’s powers under Article I of the Constitution.”\textsuperscript{157}

\begin{itemize}
  \item \textsuperscript{149} NFIB, 132 S. Ct. 2566, 2580 (2012).
  \item \textsuperscript{150} Id.
  \item \textsuperscript{151} Id. at 2650.
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} Id.
  \item \textsuperscript{154} NFIB, 132 S. Ct. at 2585. “The individual mandate requires most Americans to maintain ‘minimum essential’ health insurance coverage.” Id. at 2580 (citing 26 U.S.C. § 5000A). If an individual is not exempt and does not “receive health insurance through a third party,” then he or she must “purchase insurance from a private company,” or be subject to a penalty payment to the Internal Revenue Service when it comes time to pay taxes. Id. at 2580.
  \item \textsuperscript{155} Id. at 2585.
  \item \textsuperscript{156} NFIB, 132 S. Ct. at 2585.
  \item \textsuperscript{157} Id.
\end{itemize}
III. LOWER COURT’S TREATMENT OF THE VALIDITY OF THE INDIVIDUAL MANDATE THROUGH THE COMMERCE CLAUSE

A great many lower courts heard, and continue to hear, issues surrounding the constitutionality of the Affordable Care Act. There were at least 26 district court cases on the matter, and another seven made it to the federal appellate court level. There were, however, only three appeals court cases that decided the case on the merits. And consequently, only three appeals court decisions addressed the commerce clause argument. In order to fully comprehend how the National Federation of Independent Business v. Sebelius (“NFIB v. Sebelius”) decision fits within the current understanding of Commerce Clause jurisprudence, it naturally follows to first examine what these appellate courts understood the law to be before the case reached Supreme Court review.

1. Thomas More Law Center v. Obama

First, the Sixth Circuit held, as the Supreme Court eventually would, that the Tax Anti-Injunction Act did not divest it of jurisdiction, after which it began its discussion of the Commerce Clause. So politically charged was the issue that the court made explicit note of the conflict, and affirmed that it rules merely on the constitutionality of the act—not the wisdom. Additionally, the court deemed it necessary to note “[t]he minimum coverage provision, like all congressional enactments, is entitled to a ‘presumption of constitutionality,’” and will be invalidated only upon a “plain show-
ing that Congress has exceeded its constitutional bounds.” Following this was a history of Supreme Court Commerce Clause jurisprudence, after which the court’s analysis ensued.

To begin, the court sought to determine what class of activities the minimum coverage provision regulates. The question, the court determined, was whether the Act regulates activity in the market of health insurance or in the market of health care. Citing Congress’s intent, the court found that Congress clearly intended to regulate the broader healthcare market. Having identified the type of economic activity regulated, the court determined that “the minimum coverage provision is facially constitutional under the Commerce Clause.” Citing two reasons, the court first determined that there was regulation of “economic activity that Congress had a rational basis to believe has substantial effects on interstate commerce,” and second, “Congress had a rational basis to believe that the provision was essential to its larger economic scheme [of] reforming the interstate markets in health care and health insurance.”

Upon addressing whether the Act constituted an impermissible regulation of inactivity, the court expressed that “[a]s long as Congress does not exceed the established limits of its Commerce Power, there is no constitutional impediment to enacting legislation that could be characterized as regulating inactivity.” Here, the court determined that the minimum coverage provisions regulate individuals who are, in the aggregate, already active in the health care market. Thus, the court upheld the minimum coverage

164. Id. (quoting United States v. Morrison, 529 U.S. 598, 607 (2000)).
165. Id. at 541–42.
166. Id. at 542–43.
167. Id. at 543.
168. Thomas More, 651 F.3d at 543 (“The Act considered as a whole makes clear that Congress was concerned that individuals maintain minimum coverage not as an end in itself, but because of the economic implications on the broader health care market.”).
169. Id. at 544.
170. Id. Here, the court was under the impression that “Congress had a rational basis for concluding that leaving those individuals who self-insure for the cost of health care outside federal control would undercut its overlying economic regulatory scheme.” Id. at 547. The opinion cited the fact-finding Congress undertook, and determined it reasonable to conclude that failure “to regulate those who self-insure would ‘leave a gaping hole’ in the Act” Cf. Raich, 545 U.S. at 22 . . . (holding that Congress had a rational basis to conclude that failing to regulate intrastate manufacture and possession of marijuana would ‘leave a gaping hole’ in the Controlled Substances Act).” Id.
171. Id.
172. Id. at 548 (“The vast majority of individuals are active in the market for health care delivery because of two unique characteristics of this market: (1) virtually everyone requires health care services at some unpredictable point; and (2) individuals receive health care services regardless of ability to pay.”).
provisions by finding the provision a constitutional exercise of commerce clause power.173

C. Florida ex rel. Attorney General v. U.S. Department of Health & Human Services

The Eleventh Circuit was the only court of appeals to find the individual mandate outside the bounds of the Constitution. In an act foreshadowing the Supreme Court’s, it began the discussion by espousing the dangers of the Commerce Clause.174 Here, instead of focusing strictly on a commerce analysis, the court framed its decision in terms of the entirety of the Constitution.175

First, while ostensibly more favorable to the idea that the Commerce Clause may not be used to regulate inactivity, the court still found no precedent for that assertion.176 Accordingly, it moved to the substantial effects doctrine, but determined that “[i]f an individual's decision not to purchase an expensive product is subject to the sweeping doctrine of aggregation, then that purchase decision will almost always substantially affect interstate commerce,” and thus it could not be applicable, here.177

The court instead found it most “perilous” that “the individual mandate does not wait for market entry.”178 Which, despite several flowery para-

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173. See Thomas More, 651 F.3d at 549.
174. See Fla. ex rel. Atty. Gen. v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235, 1283 (11th Cir. 2011), cert. granted, 132 S. Ct. 603 (2011), and cert. granted, 132 S. Ct. 604 (2011), and cert. granted in part, 132 S. Ct. 604 (2011), and aff’d in part, rev’d in part sub nom. NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)) (“Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.” It is this dualistic nature of the Commerce Clause power—necessarily broad yet potentially dangerous to the fundamental structure of our government—that has led the Court to adopt a flexible approach to its application, one that is often difficult to apply.” (internal citations omitted)).
175. Id. at 1284 (“Therefore, in determining if a congressional action is within the limits of the Commerce Clause, we must look not only to the action itself but also its implications for our constitutional structure.”).
176. Id. at 1286 (“Nevertheless, we are not persuaded that the formalistic dichotomy of activity and inactivity provides a workable or persuasive enough answer in this case. Although the Supreme Court’s Commerce Clause cases frequently speak in activity-laden terms, the Court has never expressly held that activity is a precondition for Congress’s ability to regulate commerce—perhaps, in part, because it has never been faced with the type of regulation at issue here.”).
177. Id. at 1311 (emphasis removed).
178. Id.
graphs on federalism, effectively brought the court back to the original distinction it earlier purported to reject: activity versus inactivity. Caged in terms of compelled entry, the Court held the individual mandate unconstitutional under the Commerce Clause.

Finally, after finding the individual mandate also impermissible under the federal taxing power, the court held the individual mandate to be unconstitutional in its entirety. This case served as the entry point for the Supreme Court’s foray into the Affordable Care Act litigation, as it granted certiorari on Nov. 14, 2011. Before that, however, one more appeal would be handed down.

C. Seven-Sky v. Holder

In the last of three cases to be discussed, Seven-Sky v. Holder, the Court of Appeals for the District of Columbia wasted little time getting to the point. Correctly concluding that the issues presented “[would] almost surely be decided by the Supreme Court,” the court largely skipped the ceremonious litany of factual exposition, and delved straight into its interpretation of the law.

As the Sixth Circuit and the Supreme Court did, the D.C. Circuit Court, too, held that the Tax Anti-Injunction Act did not divest it of jurisdiction. From there the court, again with little ceremony, began its Commerce Clause analysis. Mirroring the Sixth Circuit, the court here found no reason why inactivity could not be regulated. Beyond that, rather than continue to discuss whether individuals were active in the market, the court held

179. See id. at 1312–13 (“The federal government’s assertion of power, under the Commerce Clause, to issue an economic mandate for Americans to purchase insurance from a private company for the entire duration of their lives is unprecedented, lacks cognizable limits, and imperils our federalist structure.”).
180. See Florida, 648 F.3d at 1311 (“Congress may regulate commercial actors. It may forbid certain commercial activity. It may enact hundreds of new laws and federally-funded programs, as it has elected to do in this massive 975-page Act. But what Congress cannot do under the Commerce Clause is mandate that individuals enter into contracts with private insurance companies for the purchase of an expensive product from the time they are born until the time they die.” (emphasis added)).
181. Id. at 14.
182. Id. at 1320, 1328.
184. Id. at 4.
185. Id. at 14.
186. Id.
187. Id. at 17 (“In short, we do not believe these cases endorse the view that an existing activity is some kind of touchstone or a necessary precursor to Commerce Clause regulation.”).
that activity itself was irrelevant. \textsuperscript{188} Instead, the court looked to employ the substantial effect doctrine, \textsuperscript{189} finding it wholly applicable. \textsuperscript{190} As discussed earlier, the D.C. Circuit also thought that the shift to this doctrine early in the twentieth century occurred in recognition of the reality that the nation’s “economic problems are often the result of millions of individuals engaging in behavior that, in isolation, is seemingly unrelated to interstate commerce.” \textsuperscript{191} This is pivotal, the court imparted, because the very premise of the doctrine “is that the magnitude of any one individual's actions is irrelevant; the only thing that mattered was whether the national problem Congress had identified was one that substantially affects interstate commerce.” \textsuperscript{192} Taking that into consideration, then, the court found the individual mandate well within Congress’s power under the Commerce Clause, \textsuperscript{193} thus resolving the constitutionality of the Affordable Care Act on those grounds. \textsuperscript{194}

\textbf{V. NFIB \textit{v.} Sebelius}

\textbf{A. The Controlling Opinion}

When the time came for the Supreme Court to render judgment on the issue, Justice Roberts set the tone early:

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 pow-

\textsuperscript{188}. \textit{Id.} (“To be sure, a number of the Supreme Court’s Commerce Clause cases have used the word “activity” to describe behavior that was either regarded as within or without Congress’s authority. But those cases did not purport to limit Congress to reach only existing activities. They were merely identifying the relevant conduct in a descriptive way, because the facts of those cases did not raise the question—presented here—of whether “inactivity” can also be regulated.”).

\textsuperscript{189}. \textit{Id. at} 19.

\textsuperscript{190}. \textit{Seven-Sky}, 661 F.3d at 19.

\textsuperscript{191}. \textit{Id.}

\textsuperscript{192}. \textit{Id.}

\textsuperscript{193}. \textit{Id. at} 20 (“Similarly, it is irrelevant that an indeterminate number of healthy, uninsured persons will never consume health care, and will therefore never affect the interstate market. Broad regulation is an inherent feature of Congress’s constitutional authority in this area; to regulate complex, nationwide economic problems is to necessarily deal in generalities. Congress reasonably determined that as a class, the uninsured create market failures; thus, the lack of harm attributable to any particular uninsured individual, like their lack of overt participation in a market, is of no consequence.”).

\textsuperscript{194}. \textit{Id.}
er to compel individuals not engaged in commerce to purchase an unwanted product.\textsuperscript{195}

According to the Chief Justice, the answer was actually quite elementary. Under the Constitution, Congress may “regulate commerce.”\textsuperscript{196} The provision itself presupposes the existence of commerce to be regulated.\textsuperscript{197} Indeed, it draws a stark contrast to other constitutional provisions such as the power to “raise and support Armies” and to “provide and maintain a Navy,” and, using the logic that “if the power to ‘regulate’ something also encompassed the power to create something, then would these other provisions of the Constitution not be superfluous?”\textsuperscript{198} Further, the Chief Justice explained, while the scope of the commerce power is expansive, this power is uniformly construed as one that reaches “activity.”\textsuperscript{199}

The problem, he argued further, was that the individual mandate did not regulate existing activity, but “instead compels individuals to become active in commerce by purchasing a product.”\textsuperscript{200} This ability to compel activity not yet in existence seemed too far a stretch for the Commerce Clause, and the consequences of allowing such a level of control to exist in the

\textsuperscript{195.} NFIB v. Sebelius, 132 S. Ct. 2566, 2586 (2012) (internal footnote omitted). Justices Scalia, Thomas, Kennedy, and Alito issued dissenting opinions, but reached the same conclusion as the Chief Justice in regards to the Commerce Clause through slightly different reasoning.

\textsuperscript{196.} Id. (quoting U.S. Const. art. I, § 8, cl. 3) (emphasis omitted).

\textsuperscript{197.} See id.

\textsuperscript{198.} See id.

\textsuperscript{199.} Id. at 2587 (“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.’”). Interestingly, Roberts not only clarified decades of precedent, he also contradicted every appeals Court to rule on the individual mandate; all of which determined, in some form, that the Supreme Court had never expressly said that activity was a precondition to commercial regulation. See, e.g., Seven-Sky v. Holder, 661 F.3d 1, 16 (D.C. Cir. 2011), cert. denied, 133 S. Ct. 63 (2012), and abrogated by NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (“No Supreme Court case has ever held or implied that Congress’s Commerce Clause authority is limited to individuals who are presently engaging in an activity involving, or substantially affecting, interstate commerce.”); Fla. ex rel. Atty. Gen. v. U.S. Dep’t of Health & Human Servs., 648 F.3d 1235, 1286 (11th Cir. 2011), and cert. granted, 132 S. Ct. 604 (2011) and cert. granted, 132 S. Ct. 604 (2011) and cert. granted in part, 132 S. Ct. 604 (2011), and aff’d in part, rev’d in part sub nom. NFIB v. Sebelius, 132 S. Ct. 2566 (2012) (“Although the Supreme Court’s Commerce Clause cases frequently speak in activity-laden terms, the Court has never expressly held that activity is a precondition for Congress’s ability to regulate commerce—perhaps, in part, because it has never been faced with the type of regulation at issue here.”); Thomas More Law Ctr. v. Obama, 651 F.3d 529, 547 (6th Cir. 2011), cert. denied, 133 S. Ct. 61 (2012), and abrogated by NFIB v. Sebelius, 132 S. Ct. 2566, (2012) (“The Supreme Court has never directly addressed whether Congress may use its Commerce Clause power to regulate inactivity, and it has not defined activity or inactivity in this context.”).

\textsuperscript{200.} NFIB, 132 S. Ct. at 2587.
hands of Congress would, in the eyes of the Chief Justice, produce a parade of horribles more terrifying than broccoli to a preschooler. 201 Indeed, if Congress could address a national insurance problem by “ordering everyone to buy insurance,” then, under this theory, “Congress could address the [national] diet problem by ordering everyone to buy vegetables.” 202

Justice Roberts then went on to contend that the Framers would never have envisioned a Congress empowered with an ability to “compel citizens to act as the Government would have them act”: 203

“Congress already enjoys vast power to regulate much of what we do. Accepting . . . [a] theory [that] would give Congress the same license to regulate what we do not do, [would] fundamentally [change] the relation between the citizen and the Federal Government.” 204

Chief Justice Roberts rejected this as being incongruent with existing Commerce Clause jurisprudence, and thus, he was not willing to extend the Commerce Clause argument to the individual mandate as it existed in the Affordable Care Act. 205

B. The Concurring Opinion

Justice Ginsburg, writing concurrently, joined by Justices Breyer, Sotomayor, and Kagan, considered the Chief Justice’s rigid reading of the Commerce Clause “stunningly retrogressive” and lacking in sense. 206 To begin, she discussed the inevitability of an individual participating in the healthcare market at some point. 207 She then discussed the high costs of healthcare, 208 the large number of Americans that did not have health insurance, 209 how healthcare institutions like hospitals are legally prohibited from

201. Id. at 2588–89.
202. Id.
203. Id. at 2589.
204. Id.
205. Id. at 2591 (“The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to ‘regulate Commerce.’”).
206. Id. at 2609 (Ginsburg, J., concurring in judgment but dissenting on the Commerce Clause issue).
208. Id. (“In 2010, on average, an individual in the United States incurred over $7,000 in health-care expenses. Over a lifetime, costs mount to hundreds of thousands of dollars.”) (internal citations omitted).
209. Id. (“In 2009, approximately 50 million people were uninsured, either by choice or, more likely, because they could not afford private insurance and did not qualify for government aid.”) (citation omitted).
turning away those in need of medical attention but unable to pay, and how the displacement of the medical fees of those unable to pay has resulted in higher medical expenses for the government and the consumers.

After evaluating the causal connections that comprise the foundation of the problem the Affordable Care Act—and thus the individual mandate—were designed to repair, she then looks to Raich, Jones & Laughlin, and Wickard, for the underlying principles that would apply. Quoting Raich and reiterating Congress’s power to regulate economic activities “that substantially affect interstate commerce,” Justice Ginsberg paired this with the rule from Wickard that the commerce power may be even extended to activities that may not individually pose a substantial effect on commerce, but when “viewed in the aggregate” would “have a substantial impact on interstate commerce.” She concluded that under this analysis there is no logical reason as to why this commerce power should not be applicable to the individual mandate.

Further, when enacted legislation touches on economic or social policy, Congress is given great deference in this area, and the question then becomes “(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.’” To Justice Ginsburg, with a “[s]traightforward application of these principals” the minimum essential coverage provision is proper, as “Congress had a rational basis for concluding that the uninsured,


211. Id. at 2611 (“As a consequence, medical-care providers deliver significant amounts of care to the uninsured for which the providers receive no payment. In 2008, for example . . . health-care professionals received no compensation for $43 billion worth of the $116 billion in care . . . administered to those without insurance.”). Further, healthcare providers do not absorb these bad debts and the costs are shifted to those who can pay: the private insurance companies (who subsequently increase their premiums) and the government. Id.

212. Gonzales v. Raich, 545 U.S. 1, 17 (2005).


215. NFIB, 132 S. Ct. at 2616 (Ginsburg, J., concurring in judgment but dissenting on the Commerce Clause issue).

216. Id. (quoting Raich, 545 U.S. at 17).

217. Id. (citing Raich, 545 U.S. at 17; Wickard, 317 U.S. at 125).

218. Id. at 2617–18.

219. Id. at 2616 (quoting Hodel v. Ind., 452 U.S. 314, 323–24 (1981)).
as a class, substantially affect interstate commerce,” and this rational basis should have been beyond dispute.220

VI. THE TRUE MEANING OF COMMERCE

A. The Commerce Power is Extraordinarily Flexible

Congress’s power to legislate via the commerce power is broad, especially the power as understood since Roosevelt’s New Deal. When looking at the interpretation of the Clause since Gibbons, and more importantly, how that interpretation shifts over time, the provision’s malleable nature becomes even more pronounced. Each Court interpretation on the issue, of course, molds and shapes that understanding. Sometimes these changes are minute, other times they are considerably large. To illustrate, take the Court’s interpretations in Hammer v. Dagenhart, Jones & Laughlin, and Darby.

Conceptually, the holdings between Jones & Laughlin and Darby, appear almost indistinct from each other. To refresh, in Jones & Laughlin, the Court concluded that determining the consequences of indirect or direct effects on commerce cannot be considered within a vacuum. To do so would be impractical, and thus, even if an industry can be separately viewed as a local industry, if that industry is active in commerce, then it is in the reach of federal power.221 Compare this with the Darby holding, where the Court determined that Congress’s commerce power is not simply confined with regulation among the states specifically, but instead that it extends to activities that affect interstate commerce such that it makes “regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.”222 Indeed, the message between the two seems so interrelated that one only complements the other. But when they are contrasted with the much older Hammer v. Dagenhart, the case the Court in Darby had to first overrule, and the dissimilitude becomes more marked.

This flexibility is important, specifically because it helps answer the question of how the Affordable Care Act decision impacts the understanding of Commerce Clause jurisprudence. The first critical step was to understand the evolution of this understanding to this point. When taking a step back and looking at the expansive scope of the Clause in this light, what appears is a fluid, flexible legal concept that reflects the consensus of the society in which it is interpreted.

220. Id. at 2617.
221. See also supra notes 77 through 82 and accompanying discussion.
222. United States v. Darby, 312 U.S. 100, 118 (1941) (citations omitted); see also supra notes 99 through 101 and accompanying discussion.
Like a Pendulum

To place this more intangible concept in perspective, imagine that the law of the Commerce Clause is like a pendulum. A pendulum, in its basic form, is a weight suspended from a fixed point. When set in motion, the pendulum swings in an arc as determined by momentum and gravity. Gravity is the force that accelerates the weight back to the center (the equilibrium point), and the time it takes for the weight to swing fully to one side and then back to the other (a left swing and a right swing) is called a period.

If the Clause’s interpretation is viewed as a pendulum, then let society be the gravity pulling that weight back to a point of equilibrium. The Clause, and thus its interpretation, may “swing” what may seem far to the left, or far to the right, but that space in between the left and the right, the period, that is what comprises the consensus. It is there we find this meaning in the Clause. When viewed in their entirety, the cases that string together the Court’s jurisprudence find themselves directly in the middle, at the very bottom point of the pendulum’s movement.

We know this is the meaning, because whenever society does vehemently disagree with a Supreme Court interpretation, commerce or otherwise, that interpretation seldom becomes the last word on the matter. Similar cases are brought at later times to challenge those initial interpretations Congress amends statutory language in such a way that it may be more palatable to the Court, and it is arguable that at least five of the twenty-six current Amendments to the Constitution arose as a direct result of a Supreme Court case with which the public vocally disagreed. Thus, whenever such additional measures are not taken, then it can be fairly safely inferred that society, as a whole, approves of—or at least does not disapprove of—the decision. Put another way, that decision, interpretation, or understanding of the law falls within the scope of societal consensus.

223. The author would like to express an immense gratitude to Claude Skelton, Managing Attorney at the United States Department of Agriculture’s Office of the General Counsel for this section’s inspiration. Few possess his wealth of knowledge and even fewer his willingness to spend an hour or more deliberating the finer points of constitutional theory with an upstart law clerk; this article would not be half of what it is without his contribution.

VII. WHERE DOES NFIB v. SEBELIUS FIT IN?

Despite being one of the most well-known and most-followed Supreme Court decisions to date, a decision that may even be labeled as one of the most important Supreme Court decisions yet, it is doubtful that NFIB v. Sebelius, at least in respect to modern Commerce Clause jurisprudence, will pose any great significance to the current understanding or state of the law. When considering what constitutes a great “change” or “shift” in interpretation or understanding of the commerce power, the interpretation and understanding as seen before and after the New Deal era seems the most apposite, and by comparison, the implications of the Affordable Care Act decision do not seem so extensive. Thus, for what amounted as to close to mass pandemonium on that morning in late June of 2012, the decision itself changed very little.

A. The Commerce Issue Presented by the Individual Mandate is Unique

To begin, even if the Chief Justice’s commerce analysis is deemed anything more than dicta, it is unlikely to receive more than a mention or two in the long history and development of the understanding of commerce power. To demonstrate, compare the core message of this portion of Chief Justice Robert’s opinion—Congress may not force individuals into commerce through the commerce power—with other uses of Congress’s commerce power. Indeed, how many times has Congress actually attempted to “force” individuals into commerce? The Chief Justices tells us—never.

Next, the individual mandate demonstrates an attempt at a legislative solution to a problem that is so unique that it warranted the argument that even if the authority to legislate did not fall within the scope of the Commerce Clause, it should be afforded its own exception, anyway. Further-

226. Id. (“We have said that Congress can anticipate the effects on commerce of an economic activity . . . . But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce. Each one of our cases, including those cited by Justice Ginsburg, post, at 2619–2620, involved preexisting economic activity . . . . 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.” (internal citations omitted)).
227. Id. at 2591 (“The Government argues that the individual mandate can be sustained as a sort of exception to this rule, because health insurance is a unique product.”). See also id. at 2623 (Ginsburg, J., concurring in judgment but dissenting on the Commerce Clause issue) (“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.”).
more, if the Commerce Clause argument for the validity of the individual mandate were to have failed, and not be upheld on other grounds, it would only present Congress with the task of attempting to craft a similar solution in a different manner. It would not be the first time drafters were posed with the challenge of crafting language in such a way as to address a greater problem as well as concerns of the Court.

B. Not Forcing People to Buy Broccoli is Not That Novel

Perhaps most interestingly, though, is that the core concern of the Chief Justice is not as novel as he purports it to be. As discussed supra, the majority of his analysis hinges on the distinction between activity and inactivity, but this is actually a concern that has been addressed before in commerce clause history.

In fact, over fifty years ago, late American historian and legal philosopher, Arthur Schlesinger, noted this very detail in a discussion of the challenges faced by the drafters of New Deal legislation on the heels of Schechter Poultry Corp. and Carter. There, Schlesinger explained that in order to both achieve the goals the laws sought and to survive judicial review, the legislation could be nothing short of “masterpieces of the lawyer’s art,” as one of the principal failures between the first set of legislation and the second was due partly to something very akin to the activity versus inactivity distinction that so worried the Chief Justice. As noted by Mr. Schlesinger, “The First New Deal characteristically told business what it must do. The Second New Deal characteristically told business what it must not do.”

It seems then, that since essentially the same concern was voiced and addressed by an earlier Court and Congress, it demonstrates how the Commerce Clause coming out of NFIB v. Sebelius, is not so foreign a concept after all.

VIII. CONCLUSION

The November 3, 1948 Chicago Tribune headline regarding election results stemmed from a culmination of factors—as did the headlines from major news sources around the country when it came time to announce the Supreme Court’s ruling on the Affordable Care Act. At the root of both mistakes, it seems, is a desire to report breaking news as quickly as possible and a reliance on what they thought they already knew—with the Tribune, polls and pundits agreed that Dewey was it—and with the Affordable Care Act most scholars thought it was the Commerce Clause upon which the decision hinged. And yet, Truman was President and the Affordable Care Act was

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228. Schlesinger, supra note 50, at 392 (footnote omitted).
Constitutional, but this is where the two depart—that is—understanding constitutionality is far more difficult a task than understanding a final tally of votes.

In Gloria Naylor’s essay Mommy, What Does Nigger Mean? Ms. Naylor explores how one word can hold a myriad of connotations. She does this through the allegory of a young girl coming to understand that a single word could be an insult or a complement, just based on the speaker or his or her intonation. The child had heard the word numerous times, and in numerous ways, but when confronted with a word’s use in a way that was unfamiliar, the girl realizes that words hold a certain power—a power given to them by society. The theme of the story, however, is not simply this one realization, but rather, that it matters less what a word is or what it may mean on a superficial level, but how it is understood and used by society that gives it additional—often tacit—meaning.

This concept can be applied to constitutional interpretation. As demonstrated through an overview of the history and evolution of the commerce power, the initial words chosen by the Framers certainly play a role, but the construal is shaped around a multitude of other factors. Thus, what the Commerce Clause means is also dependent on what society thinks it should mean.

This is further illustrated by comparing commerce clause interpretation before and after the New Deal era with the recent Affordable Care Act decision. What took place during the New Deal is an example of a major change—a shift in what society thought the Commerce Clause should encompass, or mean—but, the controlling and concurring opinions in *NFIB v. Sebelius* are still heavily influenced by the more modern understanding of commerce clause interpretation.

Additionally, as neither opinion actually present any overtly unique analysis, then it stands to reason that the Court’s decision to affirm does not pose any substantial effect, if you will, on the current state or understanding of modern commerce clause jurisprudence. Accordingly, even though this case was one of the most-followed, and tweeted, and talked-about decisions to date, insofar as the Commerce Clause is concerned, the law itself—and therefore the interpretation of it—essentially remains unchanged.

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