University of Oregon

Department of Political Science

A Healthy Doctrine

Examining Sebelius's Effects on Congressional Regulatory Powers

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Honors Thesis, Political Science

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Winter/Spring 2013

Submitted April 29, 2013

To My Parents

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I. Introduction

Months before Chief Justice John Roberts cast his swing vote in *National Federation of Independent Business v. Sebelius*, a storm was brewing within the legal punditry. Forecasts were cast and predictions were made. Dire warnings were promulgated from either side of the political spectrum, and in an already polarized political landscape, the debate surrounding the Patient Protection and Affordable Care Act (ACA), with its individual mandate at the forefront of the conflict, permeated virtually every political channel and seemed to bring the two parties even farther apart.

In the summer of 2012, the magnitude of the Supreme Court decision was epitomized by the media coverage surrounding the case – both in its anticipation, and in its aftermath. In predicting the Court's ruling, a significant part of the legal punditry seemed convinced that the case presented an exclusive Commerce Clause issue, coupled with the expectation that the Justices would strike down the mandate, while upholding the remaining provisions of the ACA (Reinhardt, Denniston). Other media legal heavyweights, such as analyst Jeffrey Toobin, predicted that the law, in its entirety, was certain to be struck down, referring to it as a "train wreck" (Strauss). Furthermore, the apparent consensus among the media was that the decision would be decided by Justice Kennedy's vote (Esposito). The pundits, however, were wrong. The decision, which was written by the man who cast the deciding vote, namely Chief Justice John Roberts, upheld the ACA and its individual mandate in a most unorthodox manner. While striking down the Government's Commerce Clause argument, the Chief Justice held that the Act was constitutional under Congress's powers to lay and collect taxes. Controversially, Justice Roberts ruled that the individual mandate is a tax, and not a penalty. As such, he argued, the ACA fell within Congress's established powers.

The immediate aftermath of the decision saw a bombardment of media predictions, this time on the significance, and the effects of the decision. Brown University Professor and legal author James Monroe, for instance, argues that Roberts's decision will come to serve the same function as

Justice Marshall's famed ruling in *Marbury v. Madison* – namely, by offering a verdict which seems to appease one side (the liberals, in Roberts's case), he in fact shaped jurisprudence for the foreseeable future, along his own convictions (in limiting the reach of the Commerce Clause) (Monroe). Finally, in his analysis of the decision, Toobin critiqued Roberts's rationale in *Sebelius* (while albeit lauding the Chief Justice's vote). Toobin argues that Roberts has inevitably altered Commerce Clause jurisdiction for the long-term, and that his treatment of the clause was "retrogressive," setting the Court back several years in its reading of the doctrine (Toobin).

This multitude of opinions surrounding the Commerce Clause's weight, role, and place as a legal doctrine – as demonstrated by the multiple divergent voices in the media – is nothing new. In fact, the Court has wrestled with this issue since the mid-19th Century. The core of the issue is the inherent vagueness of the Commerce Clause – in sum, the Clause is but a few short words that have come to define what the Government can, and cannot do. Furthermore, the nature of the Clause is such that it always pits state versus federal power. As such, it is no surprise that to this day, the Court still struggles with deciphering the line between national and state rights, between large and small Government, and in deciphering the line for where the Government ought to be enabled to improve the welfare of its citizens, or when its powers are so vast that it suppresses liberty. *Sebelius* marks the culmination of this struggle in the 21st Century. It has directed the course of Congress's regulatory powers for the foreseeable future. And in order to grasp this course, set by the Court, an understanding of the role of the Interstate Commerce Clause and the Taxing and Spending Clause is imperative.

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Although many questions abound, one of the most immediate ones we can answer is whether Chief Justice Roberts's ruling in *NFIB v. Sebelius* (2012) is consistent with the Court's established doctrines on the Interstate Commerce[1] and Taxing and Spending Clauses.[2] Only after

[1] Under the Commerce Clause; Article 1, Section 8, Clause 3. [Congress shall have Power] "To regulate Commerce with Foreign Nations, and among the several States, and with the Indian tribes;"

examining this can we examine *Sebelius's* effect on congressional regulatory powers. As such, this paper seeks to achieve two goals. First, I will inquire into the pattern of the doctrines in commerce and taxation. I will research how the Court's jurisprudence on these issues has differed throughout the judiciary's history. This is significant because the degree to which *Sebelius* is significant as a doctrine-changing decision is contingent upon the broad jurisprudential context. Secondly, I seek to determine how Roberts's decision fits within this broader history. The main argument in this paper is that Justice Roberts's decision is, while unorthodox, not inconsistent with the established Commerce Clause doctrine. Rather, the logic in *Sebelius* marks a return to the Obstructionist Court, which is demonstrated as Roberts grants limited deference to Congress in determining the scope of the commerce power. This breaks with the other categories of Commerce Clause jurisprudence, and shows how Roberts is taking it upon the Court to reign in a power, which, according to the Chief Justice, has expanded far beyond the Framers' intentions. Moreover, this paper argues that Roberts is continuing Rehnquist's legacy by eschewing the established three-pronged test for solely the "Substantial Effects" requirement, which is, significantly, substantially more limited now. The significance of this, I argue, is that *Sebelius* will come to limit congressional regulatory powers.

This paper begins with an overview of the methodology used in arranging the cases. Next, in the third section, I will provide a thorough review of Commerce Clause and Taxing Clause history. Here, I will *thematically* arrange the most significant cases according to the line of reasoning used by the Court. In order to properly situate *Sebelius*, and in order to parse out the true complexity of the decision, it becomes evident that the contextual framework for this analysis cannot simply be chronological. This approach, although standard practice in political science scholarship, does not teach us anything about the nuanced differences in the jurisprudence which has been shaped and altered throughout the history of the Court. In order to properly understand the legal context surrounding the Commerce Clause and *Sebelius*, we need a new approach. With this in mind, I have

[2] Under the Taxing and Spending Clause; Article 1, Section 8, Clause 1. "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;"

arranged the cases based on the different readings of the Commerce Clause by the Court. This will allow us to understand precisely how Roberts's argument in *Sebelius* fits, and where it does not.

In section four I will delve into a detailed analysis of *Sebelius* itself, focusing on both the majority opinion, as well as Justice Ginsburg's concurring opinion. This sets up the scope of the fifth section, where I will seek to situate *Sebelius* in the narrative set forth in section three.

II. Methodology

In order to truly understand the Commerce Clause we, as political science scholars, need a new approach. In attempting to parse out *Sebelius's* language on the Commerce Clause, it became evident that the conventional framework for contextualizing the Supreme Court's decisions dealing with Congress's commerce power was wholly insufficient. A typical chronological framework does not provide us with the analytical tools required to truly understand the full complexity of the Commerce Clause. In sum, the insufficiencies of the standard chronological approach demonstrated the need for a new method for Commerce Clause scholarship altogether.

This new approach and methodology is a move away from the standard approach[3] to organizing Commerce Clause cases, toward a more analytic and *thematic* method of classification. Specifically, I have devised a framework that emphasizes doctrinal patterns over the traditional linear chronological approach. The reason for this is simple – when viewed chronologically, one is only able to view the decisions on a prima facie level. The significance for analyzing doctrinal trends and consistencies is not *when* the decision took place, but rather *how* it was decided. By emphasizing the former, one misses the relationship between precedents and lines of reasoning that have nothing to do with temporal considerations. Thereby, by simply organizing the cases chronologically, one invariably loses track of the latter. Let me illustrate this through an example. If one were to view the outcome of *Sebelius* through a chronological context, it may seem as a

[3] To see this, one needs only to look at scholarly research dealing with the Commerce Clause, and how the cases are organized. In fact, every scholar cited in this paper – such as O'Brien, Gunther and Sullivan, and Coenen – have simply applied a chronological arrangement of the Commerce Clause cases.

jurisprudential reversal by the Court, as it upheld Congress's commerce power to criminalize homegrown marijuana in *Gonzales v. Raich,* the preceding Commerce Clause case.[4] To complicate matters further, the chronological approach would tell the tale of an erratic Court, as it struck down the Government's Commerce Clause justification for the Violence Against Women Act in *United States v. Morrison*, the case which preceded *Raich*. The truth, however, is much more complicated than this framework shows. Specifically, the three cases mentioned invoke different legal tests and precedents. As such, in order to be properly contextualized, a chronological approach *is by itself* insufficient.[5]

To avoid this fallacy, I have arranged the vast history of the Commerce Clause according to the tests and legal lines of reasoning that decided the cases. Specifically, I have devised four categories to *thematically* arrange the Commerce Clause cases post-*McChulloch* and *Gibbons*. The first is the Obstructionist Court reasoning, where the Court attempted to find a "bright line" between what commerce *is*, and what it *is not*. This reasoning manifested itself in a manufacturing/production v. commerce distinction. Here, the Court separated production or manufacturing from commerce, and held that Congress could not regulate the former two areas, as they were left to the States. The second category is the so-called "Substantial Effects" rationale. This line of reasoning saw the Court open up the scope for what Congress could regulate. Significantly, the Court, using a three-pronged test, held that if a regulated activity "substantially affected" commerce, it could constitutionally be regulated by Congress. The third category is the "flow of commerce theory." Together with Substantial Effects, the flow of commerce theory marked the two apexes of Federal commerce power. The fourth and final category is simply the Rehnquist Court. It stands apart from other eras precisely because it draws on all the aforementioned categories, but this time guided by a strong federalist sentiment. Significantly, by arranging the pre-Rehnquist cases according to this thematic rubric, we can wee how the former Chief Justice altered the established jurisprudence.

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[4] Naturally, all cases referenced here will be analyzed and assessed at substantially greater depth in the next chapter.
[5] *Raich, Morrison*, and *Sebelius* certainly pose substantial jurisprudential challenges for the doctrinal consistency of the Commerce Clause, but these are, as I will show, grounded in wholly different reasons.

I have employed a criteria-system based on four stipulations to arrange the cases. Specifically, I have identified certain jurisprudential trends that determine which cases belong to which category. The figure below illustrates these criteria.

	Obstructionist Court	**Substantial Effects**	**Flow of Commerce**	**Rehnquist Court**
Court's Logic/Line of Inquiry	Distinguishing between Production/ Manufacturing and commerce.	Focus of decision is inquiry into whether the regulated activity exerts a "substantial effect on commerce."	Focus on commerce *as a whole*, i.e., as broader than merely the regulated activity.	Case decided by Rehnquist Court. *Revisits* broad commerce power.
Court's Philosophy on Role and Size of Congress	Limited deference to Congress. Court takes it upon itself to determine what commerce is.	Larger degree of deference to Congress.	Substantial to unbridled degree of deference to Congress. Court withdraws itself from determining *what* commerce is.	Guided by a strong sense of federalism. With it comes scrutiny by the Court toward the expanded role of Government in commerce.
Mode of Constitutional Interpretation	Originalist/Textualism.	Structuralism/Prudentialism.	Prudentialism.	Original Intent/Originalism.
Primary Case(s) of Precedent	*United States v. E.C Knight* & *Hammer v. Dagenhart.*	*Gibbons v. Ogden* & *Wickard v, Filburn*	*Wickard v. Filburn*	n/a.

As the figure shows, there are indeed clear jurisprudential patterns which can be used to categorize the Commerce Clause cases in a more precise way that simply chronology. Importantly, these criteria are not mutually exclusive, nor do they constitute a finite list of indicators for delineating doctrinal categories. The first criteria is the Court's line of inquiry. This is mainly determined by the Court's question in the case. The question sets the scope and the frame for the subsequent inquiry, and as such, parsing out the question hones us in on *what* the Court is looking for.

The second criteria looks at what role the Court sees itself playing vis-a-vis Congress. As stated in the introduction, Commerce Clause cases are fundamentally centered on the balance of power between the Federal and State Governments. As such, the degree of deference shown by the Court – in other words, the degree to which the Court determines that setting clear lines to the

commerce power belongs to it as opposed to Congress – is contingent upon how far it will go in its analysis. For instance, a Court that gives limited deference to Congress will be more forward in establishing new tests and methods for its analysis. On the other hand, a Court that defers substantially to Congress will take the opposite approach, and hold that the commerce power is shaped by the legislative, as opposed to the judicial process.

The criterion that views the model of constitutional interpretation does so in a loose rather than strict manner. In other words, what is asked for here is not a deep analysis into the values of the deciding Justices, and their respective views of how the Constitution should be read. Rather, this criterion examines the contours of the mode of interpretation. For instance the Obstructionist Court is classified as applying originalism (when judges apply the "original meanings" of the Framers to their analysis) with Textualism (when judges invoke the "actual" language, i.e., the language of the Framers). The Substantial Effects criterion, on the other hand, is construed as applying structuralism (when judges find the meaning of constitutional provisions by reading it against the larger "structure" and context of the Constitution) and prudentialism (when judges view the Constitution as an evolving and "living" document, and set up broad rules for future cases). This is contrasted by the Rehnquist Court, which is viewed as applying originalism and original intent (when judges apply the Framers' intentions behind the constitutional provisions). Again, it must be stressed that these determinations are not necessarily deep and rigid analysis of constitutional interpretation. Rather, they are aggregations of the contours of the Court's respective tests throughout the decisions.

Finally, the fourth criterion examines the main case of precedent in the decisions. Note that the Rehnquist Court is not guided by the rationale in a particular case, as for instance, the Substantial Effect category is. This is because, as I will show, the Rehnquist Court was, unlike any other Court, guided by the view that its role was to reign in the expanded Commerce Clause. This is different from the Obstructionist Court, which sought to prevent the commerce power *from* expanding. As such, the Rehnquist Court is more reactionary, and it is acting "after the fact."

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These four criteria form the new thematic framework from contextualizing the Court's Commerce Clause decisions. This approach is, as I will show, necessary in order to truly understand *Sebelius's* impact on the doctrine, and on Congress's regulatory powers in general. This is made clear in the fifth section, where I situate *Sebelius* in the doctrinal history of the Commerce Clause. What this thematic framework, guided by the criteria allows for, is a *logical* classification of the cases. Through this approach, we can analyze *Sebelius's* unorthodoxy in a more thorough manner.

III. A Thematic Analysis of Doctrinal History

A. The Power to Decide – McCulloch and Gibbons

Even though the Court's power to decide was explicated in *Marbury v. Madison* through the creation of judicial review, the newly formed judiciary was demonstrably hesitant to exercise this power. Much of this hesitancy is attributed to the contested nature of the Court, and the ongoing political battles between the Federalists and Anti-Federalists – in order to secure its needed legitimacy and weight as a branch of Government, the Court could not afford to be viewed as a political institution. As such, commerce became a critical weapon for confronting these political divergences between federal and state power – issues that are fundamentally at odds, and that would inevitably have to be addressed as the nation progressed. In determining how exactly to act in its role as the proverbial umpire between the competing sides, commerce became one of the main resources for the Court.

The Court's grappling with the question of Congress's regulatory powers generally, and its powers to regulate commerce and to tax specifically, is nothing new. In fact, this very legal question dates back to the first years of the nation, and was at the core one of the first landmark cases of the Supreme Court, namely *McCulloch v. Maryland*. The case, dealing with Congress's chartering of The Second Bank of the United States in 1816, was arisen when the state of Maryland passed legislation imposing taxes on the bank. More specifically, however, the Act of 1816 established a

federally regulated bank that directly competed with existing banks chartered by states. Thus, in refusing to pay the taxes levied on them, the stand taken by the state was an act of defiance exceeding merely not paying; it was an ideological stand against the Federal Government, and against federal regulation trumping that of the sovereign states.

In the case, Chief Justice Marshall identified two main questions that were at stake. The first was whether Congress possessed the constitutional power to enact a national bank. On this count, Marshall affirmed the federal Government, finding that the Necessary and Proper Clause granted this power.[6] However, the most significant aspect of Marshall's opinion was the language by which he justified this power. By explicating the supremacy of the Federal Government, and by purporting that *all* means are appropriate by the Government in reaching an legitimate end,[7] Marshall, in a convincing fashion, blew open the door for federal regulation. The second question facing the Court was whether the State of Maryland possessed the power to tax an institution created by Congress. Following the established path established by Marshall, the Court found that Maryland did not. The Court's reasoning was that the states have no power to impede, obstruct, or interfere with any of the constitutional means employed by the Federal Government.

As Coenen writes, *McCulloch* "launched the two great themes that have echoed throughout the Court's efforts to mark the proper balance of state and federal power under the Commerce Clause"[8] (Coenen, 23-24). The outcome of the case was, on the one hand, a view that the judiciary was not able to handle the vast nature of Congress's regulatory and legislative powers. In a sense, *McCulloch* instilled a sense of judicial reluctance in questions dealing with federal regulation – a sentiment which would persist throughout many of the Court's future dealings with the Commerce Clause. On the other hand, *McCulloch*, somewhat paradoxically, affirmed that the Court did in fact

[6] Section 1, Article 8, Clause 18 of the U.S. Constitution, which reads: "The Congress shall have Power - To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof."
[7] In *McCulloch v, Maryland*, Marshall famously wrote: "If the end be legitimate, and within the scope of the Constitution, all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may constitutionally be employed to carry it into effect."
[8] Coenen proceeds to identify these two themes as he writes: "First, the ruling left no doubt that federal lawmaking authority, though limited in some nebulous way, was expansive and largely beyond the power of the judiciary to constrain. Second, *McCulloch* recognized the possibility of implying from the 'web' and 'texture' of the Constitution judicially enforceable constraints on both state and federal power" (Coenen, 24).

have the power and capability of drawing a line in the sand, and establishing that it was after all able to discern the constraints on both state and federal Government, as established by the Constitution. It is the struggle between the judiciary's reluctance to face the issue and its duty and capability to solve it, which has marked the legal discussion Commerce Clause throughout history.

In *Gibbons v. Ogden* (1824), the Court was faced with the question as to the scope of Congress's powers to regulate interstate commerce, and of *what* Congress may regulate under its commerce power. The subject at issue in *Gibbons* was the operation of steamboats. More specifically, New York State had granted Robert Livingston and Robert Fulton monopoly on steamboat operation within the state. Subsequently, Livingston and Fulton granted Aaron Ogden with exclusive rights to operate a ferry between New York City and New Jersey. As a result of this, Ogden sought an injunction against Thomas Gibbons, who ran a competing ferry business along the same route as Ogden. The case was brought in a New York court, and Ogden's claim was upheld. Upon this, Gibbons appealed to the Supreme Court. His claim was that the monopoly granted by New York interfered with Congress's powers to regulate interstate commerce.

In a unanimous decision, the Supreme Court reversed the New York court's ruling, and sided with Gibbons. Staying true to the course set in *McCulloch*, Marshall upheld the view of a large Federal Government, which clearly trumps state power. In doing this, the Chief Justice applied a broad reading of what constitutes commerce in the first place. Marshall writes:

> The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word…Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It described the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.[9]

The significance of this passage is Marshall's explication of *what* commerce is. It is more than items, or objects of trade. Rather, it is the "intercourse" – the entire process of commerce; the navigation, the flow, and the transportation. For Marshall, regulating the navigation of commerce

[9] *Gibbons v. Ogden*, 22 U.S. 1 (1824).

for the purpose of conducting interstate commerce was a power clearly within the constitutional limits of Congress.

In addition to providing this initial definition of commerce, Marshall promulgated two additional ideas with *Gibbons* that have come to be crucial in developing Commerce Clause jurisprudence. The first is Marshall's description of the commerce power as "plenary." Significantly, he understood the power as having no limitations, other than those expressed in the Constitution. The second idea is Marshall's view that "as long as Congress acted pursuant to this power, protection of the people from the risk of its abuse must come not from the judiciary but from 'the wisdom and discretion of Congress's" (Coenen, 26). Essentially, Marshall's legacy vis-a-vis Commerce Clause jurisprudence, established through *McCulloch* and *Gibbons*, and manifested in these two ideas, is a jurisprudence emphasizing the federal Government, with substantial latitude being given to it in matters dealing with the Commerce Clause and regulating interstate commerce.[10]

B. The Obstructionist Court – Manufacturing/Production v. Commerce

The increased federal power in regulating commerce resulted in an enlarged view of the Federal Government in general. Some would even argue, that the years following *McCulloch* and *Gibbons* leading up to the turn of the Twentieth Century saw federal authority grow far past the size envisioned by the Founding Fathers, and even John Marshall.[11] This view of the Commerce Clause, however, and the judiciary's deference to the supremacy of the federal Government came to an end in the early Twentieth Century with the Lochner Court. Commonly named by its famous decision in

[10] This reading of Marshall's legacy, and view of the federal Government as totalizing state Government is further strengthened by Charles Benson. He writes: "In *McCulloch v. Maryland* and *Gibbons v. Ogden*, Marshall had expressed the view that the federal Government was supreme in its own sphere, that it, that the enumerated powers of Congress had been delegated in their entirety and could be exercised as if they belonged to a single Government. This meant that Congress could constitutionally enter and occupy the sphere of authority ordinarily reserved to the states whenever necessary in order to control matters which affected a legitimate national interest" (Benson, 64-65).

[11] This view is, for instance, expressed by Coenen, who writes: "Neither Madison nor Marshall, however, envisioned such an enlargement of federal power that it would do away with a constitutional system built around the existence of two distinct Governments, including state Governments that retained numerous and indefinite powers" (Coenen, 28). While Coenen's claim is undoubtedly contentious, and whether the effects of *McCulloch* and *Gibbons* were as Coenen asserts could be debated, and is, quite frankly, of little import for my purposes here. What Coenen demonstrates is the clash between federalism and federal authority; between the Tenth Amendment and the Supremacy Clause; which is so closely connected to any discussion on the Commerce Clause. This inevitable and overarching discussion, closely tied to political vision and ideology, is also a reason behind the constant fluctuations in the Clause's treatment.

Lochner v. New York, where a New York State legislation seeking to regulate the amount of hours bakers could work was struck down in favor of "freedom of contract" and state's rights, the Lochner Court reversed the established trajectory in respect to its jurisprudence. Although *Lochner* was about substantive due process, it is emblematic of the Court's approach as a whole, over several different doctrines. The Lochner Court was guided by a concern over a case-by-case process of deciding constitutional questions. As such, it set out to find a decision matrix, a test for how the Court should act, regardless of the specific circumstances of the cases. This struggle was happening on several fronts, and across several constitutional doctrines – most notably perhaps, with commerce.

During this period, the Court grappled with the question of *what* commerce was – and what it was not. Guided by a firm belief of a limited Federal Government and expanded individual rights (such as the freedom of contracts), the Court, recognizing the almost unlimited potential for a definition of commerce without limits sought to separate it from other concepts, which it could easily be conflated with. Perhaps paradoxically given the obstructionist nature of the Court, this period was arguably the most significant for the development of a Commerce Clause doctrine. For in determining where Congress could regulate, and where it could not, the Court devised several different rationales. Some scholars have argued that the Court took two paths. The first was the pursuit of a "bright line" for where Congress could regulate. Specifically, the Court attempted to find a set rubric for which fields the Commerce Clause applied to. This manifested itself in decisions as to the nature of the product being legislated upon. Most notably, through a series of landmark cases, the Court distinguished commerce from production and manufacturing. The second path is a limit on the nature of the regulation. This meant an examination by the Court on the legislation's overall impact on the market, an on commerce.[12]

The first case of major significance dealing with the bright line of commerce during this period was *United States v. E.C. Knight Company* (1895). At stake here was the Sherman Anti-

[12] This path is discussed in sections *C* and *D*.

Trust Act. Passed in 1890 as a response to the increased concern in the growth of large companies that controlled transportation, industry and commerce, the Act sought to control the concentration of wealth. More specifically, the Sherman Act outlawed monopolies in any part of trade or commerce. The question for the Court was whether Congress exceeded its constitutional authority under the Commerce Clause by enacting the Act.

In an 8-1 decision, the Court upheld the Sherman Anti-Trust Act, while holding that it did not apply to manufacturing. Writing for the Majority, Justice Fuller stated that "the regulation of commerce applies to the subjects of commerce, and not to matters of individual police…The fact that an article is manufactured for export to another state does not itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce."[13] This distinction, between commerce and manufacture, would persist throughout this era of the Supreme Court.

This line of reasoning, of carving out commerce from the production and manufacture, and thus limiting the reach of Congress's regulatory powers, was continued in *Hammer v. Dagenhart* (1918). The case arose in response to the Keating-Owen Child Labor Act of 1816, a federal statute that prohibited the interstate shipment of goods produced by child labor. The suit was brought by Roland Dagenhart, who sought to enjoin enforcement of the law in order for his sons to work with him in a cotton mill. The question for the Court was rather simple; whether the Keating-Owen Act violated the Commerce Clause, the Tenth Amendment, or the Fifth Amendment. And in a 5-4 decision in favor of Dagenhart, the Court held the child labor law to be unconstitutional. The majority invalidated the act on two grounds. First it found that production was not commerce, and consequently, outside the regulatory powers of Congress. This argument is especially noteworthy, as it on the one hand departs from Marshall's "intercourse" definition of commerce, and, on the other, because this debate, as to *what* can be regulated under the Commerce Clause, was signature of the Lochner Court as a whole. Secondly, the Court found that regulating production of commerce

[13] *United States v. E.C. Knight Company*, 156 U.S. 1 (1895).

was a power reserved by the Tenth Amendment, and thus by the states as opposed to the federal Government. Writing for the majority, Justice William Day stated that "the powers not *expressly* [emphasis added] delegated to the national Government are reserved" to the states and to the people.[14] Significantly, Justice Day modified the wording of the Tenth Amendment. The word "expressly" does not appear in the Bill of Rights, and according to Oyez, the Framers purposely left it out, because "they believed they could not possibly specify every power that might be needed in the future to run the Government."[15]

In *Carter v. Carter Coal Company* (1935), the Court dealt with a challenge to the Bituminous Coal Conservation Act. Passed in 1935, the Act regulated prices, minimum wages, and maximum hours of the coal industry. Carter, a stockholder, who was forced to pay a tax for noncompliance against the Act, brought the suit. The question for the Court was whether the Act exceeded Congress's powers under the Commerce Clause. In a 5-4 decision, the Court deemed the Act unconstitutional. Furthering the line of reasoning which was set forth in *E.C. Knight* and *Dagenhart*, the Court held that commerce was plainly distinct from production. As such, the Court argued, regulations such as those in the Act were outside the scope of that Congress was constitutionally allowed to regulate.

In the final landmark case of this era, *Schechter Poultry Corp v. United States* (1935), the Court was faced with the National Industry Recovery Act, a New Deal measure that authorized the President to regulate industry, in an attempt to stimulate economic recovery following the Great Depression. At issue in *Schechter Poultry* was Section 3 of the NIRA, which permitted the enactment of industrial codes, implemented by the President, which regulated weekly employment hours and wages of employees. In this specific case, the regulated industry was the Schechter Poultry Slaughterhouse, which shipped and slaughtered chickens. The question for the Court was whether the delegation of legislative power from Congress to the President – as shown by the Executive Branch drafting and implementing codes of a legislative function – was unconstitutional.

[14] *Hammer v. Dagenhart*, 247 U.S. 251 (1918).
[15] HAMMER v. DAGENHART. The Oyez Project at IIT Chicago-Kent College of Law. 16 December 2012.

The Court unanimously found that Section 3 was unconstitutional. It held that Congress possessed no power under the Commerce Clause to authorize the enactment of codes. The Court argued that while the act of shipping chickens might have an indirect effect upon interstate commerce, thus affecting the stream of commerce, this was not enough to render the NIRA constitutional. In sum, the Court's decision to pronounce the statute unconstitutional was twofold: first, it held that the Commerce Clause did not permit Congress to centralize its regulatory powers with the Executive, and second, it argued that the delegation of power itself was an unconstitutional exercise of legislative authority.

C. The Substantial Effects Rationale

During FDR's early days as President, as he was attempting to pass the pieces of legislation which would come to form the core of his New Deal plan, the Obstructionist Court acted as a barrier for his progress, buttressing any strides he made. Suffice it to say, Roosevelt did not take these judicial challenges to his New Deal plan lightly. His solution was the famous court-packing plan of 1937. During the President's first term, a number of his integral New Deal provisions had been invalidated by a 5-4 margin. As a response, after his second reelection – which was won by an even wider margin that his first election – FDR decided that a change to the Court was necessary. David O'Brien writes:

> After his landslide reelection in November 1936, FDR proposed in February 1937 that Congress expand the size of the Court from nine to fifteen justices and thereby give him the chance to secure a majority sympathetic to his policies…But that same month, while the Senate Judiciary Committee was considering his proposal, Justice Owen Roberts, who had previously cast the crucial vote for overturning progressive legislation, switched sides an voted to uphold New Deal legislation. The Court's proverbial 'switch-in- time-that-saved-nine' then contributed to the Democrat-dominated Senate's defeat of FDR's proposal. (O'Brien, 57-58)

Whether Justice Roberts's switch was in direct response to FDR's threat to pack the Court, or whether his ideological shift had been brewing for some time is widely debated. What is certain, however, is that 1937 marked a key turning point in the Court's view of the Commerce Clause, the Taxing and Spending Clause, and Congress's economic regulatory powers.

After the court-packing plan, the Court began to apply a different line of reasoning when dealing with Congress's regulatory powers. More specifically, the Court transitioned from "checking" Congress by striking down legislation and by trying to delineate the nature of commerce, to granting deference to the legislature. The first doctrinal shift was the "substantial effect" requirement, wherein the Court gave credence to Congress, and upheld legislation, if it regulated an activity that impacted interstate commerce in some substantial way. The vagueness of this requirement subsequently led to a significant increase in federal regulatory powers.

The first case of this "new" Court was *United States v. Darby Lumber Company* (1941). At issue in this case was the Fair Labor Standards Act (FLSA). Passed in 1938, the Act was an attempt to regulate several aspects of employment, such as minimum wage, maximum hours restrictions, and child labor. Fred Darby, the owner of a Georgia lumber company, was indicted for violating provisions of the FLSA. After the lower courts had overturned his indictment, the Department of Justice appealed to the Supreme Court.

The question for the Court in *Darby* was whether the FLSA was a legitimate exercise of Congress's powers to regulate interstate commerce. Unanimously, the Court affirmed this power, and upheld the Act. In his majority opinion, Justice Stone significantly expanded Congress's regulatory powers. He wrote that "the power of Congress over interstate commerce is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than prescribed by the constitution' [Stone citing *Gibbons v. Ogden*]. That power can neither be enlarged nor diminished by the exercise or non-exercise of state power."[16] Significantly, Stone, as exemplified by this passage, did more than simply affirm Congress's power. Arguably, by citing *Gibbons*, Stone ushered in a new line of rhetoric and thinking vis-a-vis the Court's reading of the Commerce Clause, and the role of the Federal Government in respect to states rights and the Tenth Amendment. Stone brought back Marshall's legacy, as promulgated in *McCulloch* and *Gibbons* – that of a dominant Federal Government, standing supreme over the states.

[16] *United States v. Darby*, 312 U.S 100 (1941).

Even more significant on the landscape of Commerce Clause jurisprudence, however, was the Court's decision in *Wickard v. Filburn* (1942) that, like *Butler*, dealt with the Agricultural Adjustment Act. Under the AAA, the Secretary of Agriculture was permitted to set national agricultural quotas, which were limits for what could be produced. This was motivated by the Great Depression, and the fact that overproduction led to the decrease of prices. The quotas were implemented to drive the prices up, thereby aiding the ailing economy. Filburn, a dairy farmer in Ohio, was found in violation of the AAA, as he had been overproducing wheat, and exceeding his quota. Refusing to pay his fine, Filburn filed an injunction with the federal district court, which was granted. The Government subsequently appealed to the Supreme Court.

The task for the Court was to determine whether the production quotas under the AAA were unconstitutional, as Congress "had no power to *regulate activities local in nature.*"[17] In a unanimous decision, the Court ruled in favor of the Government, and upheld the AAA. In his majority opinion, Justice Robert Jackson outlined Congress's constitutional legitimacy to regulate activities that are purely local in nature. The question behind this task being, of course, how Congress could use its powers under *inter*state commerce to regulate *intra*state activity? In *Wickard*, the Court explicated a criterion for determining this. Justice Jackson wrote: "It [a regulated activity] may still, whatever the nature, be reached by Congress if it exerts a substantial economic effort on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"[18] This passage, which represents the Court's reading of the Commerce Clause in not only this specific ruling, but throughout the entire decade of the 1940s, is highly significant – the Court explicitly stated its view of Congress's regulatory powers vis-a-vis matters such as federalism, states rights, the Supremacy Clause versus the Tenth Amendment, and of the definition of commerce, and the stream of commerce. Namely, the Court purported the view that Congress can, under the powers of interstate commerce, regulate *any* activity, regardless of its impact on commerce *between* states, as long as the activity is deemed to have a "substantial" effect on

[17] WICKARD v. FILBURN. The Oyez Project at IIT Chicago-Kent College of Law. 17 December 2012. <http://www.oyez.org/cases/1940-1949/1942/1942_59>.
[18] *Wickard v. Filburn*, 317 U.S. 111 (1942).

interstate commerce. Naturally, a promulgation of such a vague nature has come to be expanded and reigned in throughout the course of Commerce Clause jurisprudence. *Wickard's* true significance was precisely this: the seemingly unlimited reach of the "affecting-commerce prong."[19] This prong is partly what has made the Commerce Clause so variable throughout time, and it is criteria like this one that make doctrinal consistency so difficult; the reading and definition on such a requirement will unequivocally vary with the ideological compositions of the Court.

D. The Flow of Commerce Theory

Subsequent to the development of the substantial effect requirement was another test – the so-called "flow of commerce" theory. Specifically, this entailed that legislation would be construed as within Congress's regulatory powers under the Commerce Clause if the regulated activity affected interstate commerce *holistically*. Interstate commerce, it was held, is not merely singular activities – rather, it is a network of activities, act affecting the market as a whole. The first significant case that specifically dealt with this theory was *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (1937). Here, the Court dealt with a challenge to the National Labor Relations Act of 1935, which held that labor-management disputes and collective bargaining were directly related to the flow of interstate commerce. In a 5-4 decision, the Court held that the Act was in fact constitutional. Significantly, the Justices moved away from the previously held notion that industrial activities only have an indirect effect on commerce. Rather, the Court argued that bargaining is an essential condition of interstate commerce, and of industrial peace. As such, it was held, regulating this, and ensuring bargaining, was within the flow of commerce, as it affected the cumulative effect and health of interstate commerce.

It is important to note, however, that the flow of commerce theory was not created in *Jones & Laughlin*; rather, it had been brewing for many decades prior to this case. In *Champion v. Ames* (1900), the Court dealt with the transportation of lottery tickets. In an attempt to regulate this,

[19] This view is further promulgated by Coenen, who writes: "Its [The Court's] embrace of aggregation analysis [left no doubt that the affecting-commerce prong of the commerce power had a long reach – so long, in fact, that the Court would find no law beyond its grasp for the next half-century" (Coenen, 87).

Congress passed an Act that barred the sale and transportation of tickets across state lines. The Court upheld the Act, holding that lottery tickets, as "subjects of traffic" were within Congress's regulatory powers under the Commerce Clause.[20] Similarly, in *Hipolite Egg Company v. United States* (1911), the Court sustained a federal legislation that barred the shipment of mislabeled foods. Here, the Court argued that interstate shipment is subject for regulation, as Congress can, within its powers under the Commerce Clause, ban the transportation of products that would have a deleterious effect on interstate commerce.

A more significant instance of the flow of commerce theory, applied during the era of the Obstructionist Court was *Stafford v Wallace* (1922). Decided four years after *Dagenhart*, the Court yet again dealt with the issue of Congress attempting to legislate unfair labor practices. At stake in *Stafford* was the Packers and Stockyards Act of 1921, which regulated discriminatory activities of meat packers. Here, the Court was faced with the same question as in *Dagenhart* – namely whether Congress had the power to pass the act under the Commerce Clause. However, in this case, the Court upheld the act by a 7-1 margin. Writing for the majority, Justice Taft wrote that "the stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to the current from the West to the East, and from one state to another."[21] In this case, the Court held that stockyards were an essential and integral part of interstate commerce, and thus within Congress's purview for regulation. This distinction, of how the regulated activity plays with interstate commerce as a whole is quintessential of the flow of commerce theory.

Furthermore, it is important to note that *Stafford's* affirmation of the Commerce Clause powers, and the Court's upholding of the legislation, in no way invalidated or compromised the decision in *Dagenhart*. Rather, the issue is precisely how the regulated activity, or in other words, *what* is being regulated, fits with the flow of commerce. As Gerald Gunther and Kathleen Sullivan write:

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[20] CHAMPION v. AMES. The Oyez Project at IIT Chicago-Kent College of Law. 20 January 2013. <http://www.oyez.org/cases/1851-1900/1900/1900_2>.
[21] *Stafford v. Wallace*, 258 U.S. 495 (1922).

> While the Court's emphasis on 'practical considerations' [i.e., the nature of what is being regulated] was providing one type of rationale for demonstrating the impact of the local on the interstate, several other decisions [speaking of *Southern Railway Co v. United States* (1911)] were sketching an alternate basis for arguing that an intrastate activity could be reachable under the commerce power. The 'current of commerce' rationale suggested that some local activities were controllable not because of their effects of commerce, but because they could themselves be viewed 'in' commerce or as an integral part of the 'current of commerce.' (Gunther & Sullivan, 168)

Thus, the main question for the court after Taft's explication of the stream of commerce theory was whether the activity is essential to interstate commerce. And even though the Court of this era viewed a limited Federal Government as of paramount importance, it did, perhaps inadvertently, begin to carve out the flow of commerce theory. It is interesting to note that even during this period of judicial intervention, a reading of interstate commerce as holistic – that is, commerce as a larger scheme of interconnected activities – seemed to be inescapable.

The true significance of the flow of commerce theory was demonstrated during the Civil Rights Era, where commerce became Congress's main instrument for fighting racial segregation and discrimination. In 1964, Congress, reluctantly and in an opposed manner, passed the Civil Rights Act, which was wide in scope, and encompassed several aspects of society. Title II prohibited racial discrimination in public accommodation (such as hotels, motels, inns, sports stadiums, and restaurants), Title IV outlawed discrimination in public education, and Title VII dealt with racial discrimination in the workplace, and in hiring and firing. These provisions, which were unsurprisingly regularly and highly contested, were repeatedly challenged in the courts. It has in these conflicts that the true reach of the affecting-commerce prong was demonstrated under the Warren Court, which used the Interstate Commerce Clause as a mechanism for implementing social justice, and fighting racial segregation.

In *Heart of Atlanta Motel v. United States* (1964), the Court dealt with a challenge to Title II of the Civil Rights Act. Moreton Rolleston, the owner of the Heart of Atlanta Morel, brought the case. Rolleston's motel was found in violation of the Act, as it refused to provide accommodation for blacks. The challenge for the Court was to determine whether the passage of Title II was an unconstitutional violation of Congress's Commerce Clause powers, and whether they were

depriving owners of public accommodations the right to choose their customers, without constitutional grounds. The Court decided, unanimously, that Title II was a constitutional exercise of legislative powers. Writing for the majority, Justice Clark argued that Title II was "carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and people."[22] Restricting blacks from being able to stay at public accommodations, furthermore, impacted their ability to travel, this having a substantial economic effect in interstate commerce.

According to Benson, *Heart of Atlanta Motel* continued the rhetoric used in *Wickard*, and further eradicated the distinction for activities that are purely local. Benson writes:

> Congress clearly included the movement of people interstate. Congress had used its commerce power in many and varied ways and had its enactments upheld. It made no difference that Congress was attempting to reach and rectify a moral wrong; that fact did not 'detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse.' Similarly it was immaterial that the motel claimed its activities were local. Clark quoted the late Justice Jackson: 'if it is interstate commerce that feels the pinch, it does not patter how local the operation which applies the squeeze.' (Coenen, 216)

This passage, especially the quote by Justice Jackson demonstrates a shift of emphasis by the Court. Whether the activity is local or not does not matter as much now. Rather, the significance is *how* the regulated activity affects interstate commerce. Arguably, the Marshall Court continued a more adaptable reading of the Commerce Clause, which was set forth in the 1940s through *Wickard* and *Darby*. Thus, it moved away from a more literal reading of the Clause, and abandoned a strict textual "*inter*state/ *intra*state distinction in determining whether Congress had the authority to regulate an activity. Now, the Court applied a more holistic view of the economy, and paid more credence to the affecting-commerce prong.

The next landmark Commerce Clause case under the Warren Court was *Katzenbach v. McClung* (1964). The case was brought when the owner of Ollie's Barbecue, a restaurant in Birmingham, Alabama, refused to serve blacks. Similar to the Heart of Atlanta Motel, Ollie's Barbecue was found in violation of the Civil Rights Act, as restaurants are places of public accommodation, wherein racial discrimination was outlined under Title II of the Act. The issue for

[22] *Heart of Atlanta v. United States*, 379 U.S. 251 (1964).

the Court was whether a restaurant's refusal to serve blacks places a burden on the Commerce Clause so substantial that Congressional prohibition is constitutionally warranted. In his majority opinion, Justice Clark stated that "refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally…we must conclude that it [Congress] had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce."[23] The Court's inquiry was into the effect on the flow of food and the movement of products *generally* – in other words, the Court stayed true to the stream of commerce theory. It is also noteworthy that the Court held, as it did in *Darby*, that purely local activities were subject to federal regulation. The Civil Rights era, much like the period after the "Switch in time," represented an apex in Congress's regulatory powers under the Commerce Clause. And given the lack of any significant decisions using the Taxing and Spending Clause, while Congress was consistently passing large and expansive legislations (such as the Civil Rights Act) demonstrates that the regulatory powers under Interstate Commerce was the dominant avenue for implementing economic and social regulation.

E. The Rehnquist Court – Reviving Federalism

Since the early cases in the Lochner Court, the judicial branch had eschewed the question of *what* Congress can regulate. Rather, the period following the "Switch in time" up until the Civil Rights cases saw the Court operating on a hands-off approach. In other words, throughout much of the Twentieth Century, the Court did not form or apply a standard test for determining whether the advanced federal regulation was constitutional. This approach, however, changed with the Rehnquist Court. With justices like the Chief Justice, and Justice Sandra Day O'Connor, the Court yet again took up the task of determining the nature of what the federal Government could regulate under the Interstate Commerce Clause. However, unlike the Obstructionist Court, which sought to find a bright line for where Congress could regulate, the Rehnquist Court focused on the role of

[23] *Katzenbach v. McClung*, 379 U.S. 294 (1964).

State and Federal Government in determining the scope of federal regulatory powers. The first instance of this was the case *United States v. Lopez* (1995).

Lopez dealt with a challenge to the Gun-Free School Zones Act of 1990, which made it a federal crime to possess a firearm within 1,000 feet of public or private schools. Alfonso Lopez Jr., a high school student, was found in violation of the Act when he was caught possessing a firearm on school grounds. The question for the Court was whether the Act exceeded Congress's constitutional powers under the Commerce Clause, thus making it unconstitutional. In a 5-4 decisions along party lines, the Court struck down the law. In his majority decision, Chief Justice Rehnquist argued that the possession of a gun in a school zone is not an economic activity. Furthermore, Rehnquist held that the activity is not one that might have a substantial effect on interstate commerce. Rehnquist writes:

> 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…Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce…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.[24]

Rehnquist's move here is significant. By prioritizing one prong over the other two, he essentially shifts the entire scope of inquiry. The "stream of commerce" is of less import now. Rather, as a result of Rehnquist's frame, what matters is in what way the specific activity substantially affects interstate commerce. In other words, the emphasis lies on the nature of the activity itself, rather than its role on the overall economy. The more "holistic" and encompassing approach of the Civil Rights era has been traded with a narrower frame vis-a-vis Congress's regulatory powers under the Commerce Clause. And evidently, this switch has meant a narrower scope of constitutionality as well.

[24] *United States v. Lopez*, 514 U.S. 549 (1995).

The four opposing Justices unsurprisingly contested Rehnquist's approach. In his dissent, Justice Breyer criticized the Chief Justice for not considering the third prong of the test, which which deals with the substantial effect on interstate commerce. Breyer writes:

> 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…We must ask whether Congress could have had a rational basis for finding a significant (or substantial) connection between gun-related school violence and interstate 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.[25]

Another part of Breyer's critique is that the Chief Justice did not take into account the standard for which the legislation should be held to. With neither a fundamental right, not a suspect classification being at stake here, the Gun-Free School Zones Act should have been acceptable as long as Congress could have been shown to have a rational basis behind it. Breyer's worry is that in striking down the law, the majority, led by the Chief Justice, applied the wrong standard for judging its constitutionality.

The next landmark case dealing with the Commerce Clause was decided five years after *Lopez*. In *United States v. Morrison* (2000), the issue was the Violence Against Women Act of 1994 (VAWA). The legislation, which provided a federal civil remedy for gender-motivated violence, imposed an automatic and mandatory restituted on the convicted offenders, and provided the option of a civil redress for unprosecuted cases. The facts of the case that led up to *Morrison* are as follows: In 1994, Christy Brzonkala, a student at Virginia Polytechnic Institute (more known as Virginia Tech), alleged that Antonio Morrison and James Crawford, two football players at the university, raped her. Morrison was found guilty by Virginia Tech's Sexual Assault Policy, and suspended from the university. Later, however, Morrison would have his punishment set aside, as it was found to be "excessive." Upon this, Brzonkala withdrew herself from Virginia Tech, and sued Morrison, Crawford, and her former university in Federal District Court, alleging that the attack that she suffered violated the VAWA. The court, however, held that Congress did not possess the authority to enact the Act or its civil remedy provision under the Commerce Clause. Upon appeal,

[25] *United States v. Lopez*, 514 U.S. 549 (1995). Justice Breyer Dissenting.

the question for the Supreme Court was whether the Commerce Clause did, in fact, authorize the passage of the VAWA.

In another 5-4 decision along party lines, the Court struck down the VAWA. Writing for the majority, Chief Justice Rehnquist held that the activity being regulated – gender-motivated violence – was outside the purview of interstate commerce. Relying on *Lopez*, Rehnquist yet again focused exclusively on the third prong of the established Commerce Clause test, namely, whether the activity itself substantially affects interstate commerce. He writes:

> As we discussed at length in *Lopez*, our interpretation of the Commerce Clause has changed as our Nation has developed. We need not repeat that detailed review of the Commerce Clause history here; it suffices to say that in the years since *NLRB v. Jones & Laughlin Steel Corp*., Congers has had considerably greater latitude in regulating conduct an transactions under the Commerce Clause that our previous case law permitted…With these principles underlying our Commerce Clause jurisprudence as reference points. The proper resolution of the present cases is clear. Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity.[26]

Like *Lopez*, the Chief Justice's line of reasoning is equally erratic, set to the larger context of Commerce Clause jurisprudence, as well as his methodology for deeming the Act unconstitutional. Again, Rehnquist did not pay credence to the rational basis standard; the established constitutional hurdle for Commerce Clause decisions. Echoing Breyer's concerns from *Lopez*, the fear is that Rehnquist is, through his reading of the clause, substantially, and in an unwarranted manner, limiting Congress's constitutional mechanisms for passing legislation.

Furthermore, the alarming reality in the Rehnquist Court's decisions on the Commerce Clause is that they have, as it were, "reformulated" the judicial test for judging Congress's regulatory powers. *Lopez* and *Morrison* have in effect limited the long-established three-pronged test (channels of commerce, instrumentalities and persons involved in interstate commerce, and the activity itself) to solely focus on the nature of the activity that is being regulated. This concern is further purported by legal scholar Mark Hall, in his article "Commerce Clause Challenges to Health Care Reform." Here, he writes:

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[26] *United States v. Morrison*, 529 U.S. 598 (2000).

> Other commentators have commented on, and criticized, Rehnquist's doctrinal transformation in *Lopez* from inquiring into whether the regulated activity has a substantial economic effect on commerce to whether the activity itself is economic… the Supreme Court had based the scope of Congress's regulatory power on whether the underlying activity was characterized as 'economic.' (Hall, 17)

Rehnquist's new line of reasoning vis-a-vis the Commerce Clause, and the test for which legislation passed under it, raises a series of alarming issues about the Court. Most significantly, perhaps, is the question of what the Court actually is doing when it is examining the activity as "economic?" If the activities are viewed as "activities-in-themselves," how is the Court going about considering it as an economic one? There is a very real and poignant fear of judicial activism at stake here. If the Court is simply judging on issues as themselves, they have most certainly overstepped their bounds as the judicial branch, and become more of a policy-making, and policy-judging institution.

The final significant interstate commerce case pre-*Sebelius* was *Gonzales v. Raich* (2005). The case, dealing with medicinal marijuana, pitted a state law against a federal statute. In 1996, the state of California, through a referendum, passed the Compassionate Use Act (CUA), which legalized marijuana for medical purposes. The state law, however, was in direct conflict with the federal Controlled Substances Act (CSA), which entails a total ban on the possession and consumption of marijuana. In 2002, the Drug Enforcement Administration (a federal department) performed a raid of a California resident's home, seizing doctor-prescribed medical marijuana. The patient, Diana Monson, subsequently sued the Drug Enforcement Agency. She asserted that by enforcing the CSA, the Federal Government violated the Commerce Clause, the Due Process Clause of the Fifth Amendment, and the Ninth and Tenth Amendments. The question for the Court was whether the CSA[27] exceeded Congress's power under the Commerce Clause.[28]

In a 6-3 decision, the Court affirmed Congress's regulatory powers in this instance, and upheld the CSA. Writing for the majority, Justice Stevens affirmed the regulatory powers of the federal Government in this instance. He writes:

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[27] Note here that it was the *federal* statute which was at issue in *Raich*, not the California law.

[28] While the respondent, as stated, advanced a series of constitutional violations by the federal Government, the Court only truly grappled with the Commerce Clause challenge. The other arguments were swiftly dismissed.

> As we stated in *Wickard*, 'even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.' We have never required Congress to legislate with scientific exactitude. When Congress decides that the 'total incidence' of a practice poses a threat to a national market, it may regulate the entire class…*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.[29]

There are several aspects of this passage that obscures, and makes opaque, the Court's Commerce Clause jurisprudence. First, while Stevens did focus on the substantial effect-prong of the test, his scope was substantially wider than Rehnquist's in *Lopez* and *Morrison.*[30] Stevens' claim that "scientific exactitude" is not a necessary requirement by Congress detracts from the very narrow requirement set in the previous two cases under the Rehnquist Court, where this seemed to be the precise standard. Stevens' claim arguably stays more true to the rational basis test, as it lowers the hurdle of constitutionality that Congress must pass. Second, Stevens' rhetoric of the "total incidence" of a practice, in affirming the regulation of a purely local activity, also moves away from *Lopez* and *Morrison*. There, the issue was that the regulated activity *itself*, viewed separately from the overall market, was beyond Congress's purview. This line by Stevens seems to be a return to the "stream of commerce" theory of the past.

The Rehnquist Court left Commerce Clause jurisprudence in a state of uncertainty and flux. *Raich* makes the task of finding judicial coherence between the Court's Commerce Clause rulings very complicated. The Rehnquist Court in many ways undid decades of established jurisprudence on the Clause – from the "stream of commerce" theory, the three distinct prongs of the test, the purely local distinction, and the total effects on interstate commerce. What it has done is reinstitute a strong sense of federalism, and a limited view of the federal Government, almost reminiscent of the pre-New Deal Court. As the Court moved into *Sebelius*, however, *Gonzales* raised many questions as to how the Court would vote. What at face value looked like a closed case – with the recent precedent limiting the reach of the Commerce Clause – *Gonzales* generated a sliver of hope

[29] *Gonzales v. Raich*, 545 U.S. 1 (2005).
[30] Unsurprisingly, perhaps, Chief Justice Rehnquist voted against the federal Government, and joined Justice O'Connor's dissent.

for those hoping for the survival of the ACA. What further shaped the debate over the outcome of *Sebelius* was that for the first time in a long time, the Court's stance on federal economic regulation, and on its reading on the Commerce Clause,[31] was in a state of flux. In many ways, the state of the Commerce Clause heading into *Sebelius* was one of aporia and uncertainty.

The reason for this is, quite simply, that in its three major Commerce Clause decisions, the Rehnquist Court fluctuated between several different readings of the doctrine. *Lopez* hinged on whether the possession of guns in school-zones was an economic activity. Rehnquist's reasoning was a subtle shift away from the Substantial Effects requirements. However, the Chief Justice's move came to become hugely important, as it determined the outcome of the case. His reading was – at least when stated explicitly as the main question for the Court – unprecedented. The economic activity test is removed from the holistic view of commerce found in the flow of commerce theory. Rather, the condition that the specific activity, in other words, that which is being regulated in the legislation, must be "economic" raises the bar for what Congress can reach through its Commerce Clause powers. Furthermore, given the vagueness of this requirement (what "economic" exactly means is highly debatable), the test is even more difficult to discern.

In *Morrison*, the application of the Commerce Clause, and the rationale for striking down the VAWA was different. While the Court did use the economic activity test to some degree, the Act ultimately failed because gender-motivated violence did not bear a substantial effect on interstate commerce. Even though this rationale, at face value, suggests a return to the post-New Deal era where the Court granted Congress a substantial degree of deference in their usage of the Commerce Clause, the Rehnquist Court applied the test differently. Gone was the rational basis requirement (at least when the test was applied). Rather, in *Morrison*, the hurdle for a substantial effect was raised, arguably far higher than in prior eras of the Court. The significance of the ruling in *Morrison* was, inter alia, that henceforth, resting on *Wickard* and *Darby* in passing legislation through the Commerce Clause would not be as straightforward as before.

[31] As I will show, the Taxing and Spending Clause was, leading into *Sebelius*, not seriously considered. After all, it had been dormant as a mechanism for regulation for over half a century, since the ruling in *Steward Machine*.

Finally, in relying on a rationale reminiscent of the flow of commerce theory, *Raich* created more questions that it answered in respect to the Commerce Clause. More specifically, by stating that Congress can regulate the "total incidence" of commerce, what does this mean for the economic activity requirement used in *Lopez*? And what does this imply for the substantial effect test used in *Morrison*? In many ways, the Rehnquist Court, and the Chief Justice's legacy in respect to the Commerce Clause is filled with uncertainty – a state that persisted, and followed the Roberts Court heading in to *Sebelius*.

F. The Taxing and Spending Clause

In contrast to the Commerce Clause, the history of the Taxing and Spending Clause is rather meager and limited. And while an inquiry into *why* it is that congressional regulatory powers under taxation have been severely underused in substantial legislations is outside the scope of this paper, it is fruitful to parse out the trajectory of the Court's reading of this doctrine.

In the pre-1937 Obstructionist period, the Court applied a similar stance when hearing cases dealing with Congress's regulatory powers under the Taxing and Spending Clause as it did with its commerce powers. In *Bailey v. Drexel Furniture Co.* (1921), the Court for the first time faced a major case dealing with Congress's powers to lay and collect taxes. At issue here was the Revenue Act of 1919, also called the Child Labor Tax Law. Under this law, companies employing children under fourteen years old would be taxed ten percent of their annual profits.[32] Drexel Furniture, a North Carolina manufacturing company, was found in violation of the Act.

The Court was faced with the question of whether Congress violated the Constitution in drafting the Child Labor Tax Law, and whether regulating child labor was a power reserved to the states. Unsurprisingly, given the time of its decision, the Court found the law to be unconstitutional. In his majority opinion, Chief Justice Taft argued that the tax law, in effect, did more than simply

[32] It is important to take note of the timing of this Act, and of this case in general. The Child Labor Tax Act, passed in 1919, was passed the year after *Hammer v. Dagenhart*, which denied Congress the ability to outlaw child labor under the commerce clause. Unsurprisingly, Congress's response was to attempt to achieve the same end through its other regulatory mechanism – the power to tax. The Commerce Clause and Taxing and Spending Clause should be understood in this was; not as separate constitutional provisions, but as connected channels of the same operating mechanism.

impose a restraint on companies in their hiring practices. Rather, Taft argued, the Child Labor Tax Law imposed a *regulatory* penalty on the use of child labor, rather than simply being a tax.[33] Moreover, Taft's additional concern was that the law, if upheld, would eradicate state sovereignty and devastate "all constitutional limitation of the powers of Congress."[34] Significantly, the Chief Justice feared that taxation could serve as a disguise for future regulatory legislation.

Four years later, in *Linder v. United States* (1925), the Court yet again faced the regulatory aspect of taxation. Here, the Court was faced with the constitutionality of the Harrison Narcotics Act. Passed in 1914, the Act regulated and taxed the production, importation, and distribution of opiates. While intended as a taxing measure on drugs such as morphine and cocaine – drugs frequently used for medical practice – the Act progressed into a prohibition on these drugs. In this case, Dr. Charles Linder, who prescribed the drugs to addicts, was prosecuted and convicted under the Act. In the decision, however, the Court overturned the conviction, and invalidated the Act. Writing for the majority, Justice McReynolds, famous for his promulgation of federalism, argued that the federal Government overstepped its regulatory powers by regulating medicine. Significantly, McReynolds held that "obviously, direct control of medical practice is beyond the power of the federal Government."

The most significant of the Court's early decisions on the Taxing and Spending Clause was *United States v. Butler* (1935). Decided the year after President Roosevelt's setback in *Schechter Poultry*, the decision in *Butler* added insult to injury. This case dealt with the 1933 Agricultural Adjustment Act, wherein Congress implemented a processing tax on agricultural commodities. The funds from the taxes would be redistributed to farmers who promised to reduce their acreage. The intention of the Act was to provide a remedy for the crisis in agricultural commodity prices, which was responsible for the demise of many farmers.

In *Butler*, the question for the Court was whether Congress exceeded its constitutional taxing and spending powers with the Act, and in a 6-3 decision, processing taxes under the

[33] O'Brien, 671.
[34] BAILEY v. DREXEL FURNITURE CO.. The Oyez Project at IIT Chicago-Kent College of Law. 11 December.

Agricultural Adjustment Act were found to be unconstitutional. The Court held that the taxes failed to pass constitutional muster because they attempted to regulate and control agricultural production. This area was, according to the Court, reserved to the States. In his majority opinion, Justice Owen Roberts argued that while Congress does have the power to tax and appropriate funds, the power applied here was "but means to an unconstitutional end,"[35] and in violation of the Tenth Amendment. *Butler*, in combination with the decision in *Schechter Poultry*, came to be substantial obstacles for President Roosevelt in his New Deal recovery plan.

In terms of decisions dealing with the Taxing and Spending Clause, the period following the "Switch in time" saw one significant case – *Steward Machine v. Davis* (1937). In *Steward Machine*, the Court dealt with a challenge to a tax imposed by the Security Act. The Act, passed in 1935 as an integral component of FDR's New Deal, established a federal payroll tax on employers. The direct question for the Court was whether the Act by imposing taxes, subverted principles of federalism. And in a 5-4 decision, the Court found that imposing the payroll tax was, in fact, within Congress's constitutional powers. The significance of *Steward Machine* is that it represents a significant break with previous taxing precedent. In many ways reversing the trajectory set by the decisions in *Drexel Furniture*, *Linder*, and *Butler*, where the Court applied a very narrow view of Congress's powers to tax. And given the timing of *Steward Machine*, the switch in the Court's reading of the Taxing and Spending Clause transcends the face-value reading of the case itself. It is part of a larger shift in jurisprudence, where the Court granted the federal Government a higher degree of deference in its regulatory powers. The Commerce Clause and the Taxing and Spending Clause are not two distinct doctrines – rather, they are both two sides of the same coin. They are both means to the same end, and should be understood as two *avenues* for regulation.

The final major case dealing with the Taxing and Spending Clause prior to *Sebelius* is *United States v. Kahriger* (1953). At issue in this case was the Gamblers' Occupational Tax Act. Passed in 1951, the Act required gamblers to register with the collector of the IRS, which would

[35] UNITED STATES v. BUTLER. The Oyez Project at IIT Chicago-Kent College of Law. 19 December 2012.

levy a tax on the gambling income. The issue for the Court was whether Congress possessed the power, under the Taxing and Spending Clause, to enact a tax on a particular profession if the tax also has a regulatory effect that appears to infringe on the states' police power under the 10th Amendment.

Following on the course set in *Steward Machine,* the Court held the taxation at issue in *Kahriger* to be constitutional. Significantly, it argued that a federal excise tax is not invalid simply because it discourages or deters the activities taxed. Rather, the Court contended that Congress merely established certain conditions for those who sought to engage in certain practices, such as gambling. Crucially, the Court relied on an "opt-in" rationale. In other words, the significance of taxing practices which one partakes in voluntarily is that there is no element of coercion involved – it one objects to the conditions set up surrounding the activity, one can simply choose not to engage in it.

Since *Kahriger*, the Taxing and Spending Clause has had a rather dormant role, insofar as it being invoked as a regulatory mechanism for major legislations. This is what adds to the opaqueness of Chief Justice Roberts's ruling in *Sebelius*. Not only did he choose to uphold the ACA and the individual mandate through the Government's secondary argument, but his decision to do so unequivocally stands on shaky legal footing – by basing a decision on a precedent which has been largely unaddressed for almost a half-century, Roberts invariably makes himself susceptible to claims questioning the validity and soundness of his decision. Moreover, it is crucial to inquire into what is truly at stake in Roberts's unorthodox move, and what jurisprudential elements and aspects are gained and lost in this.

IV. Assessing *Sebelius*

A. The Debate surrounding the Commerce Clause

Before examining the debate surrounding the ACA as Commerce Clause legislation, it is significant to preface this inquiry with a broader question – namely, why was commerce used at all by the Federal Government?

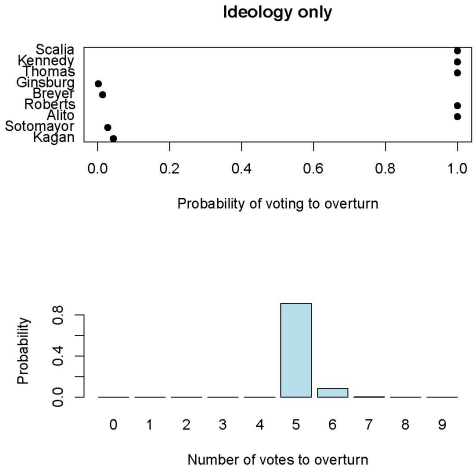
The answer to this question is rather convoluted, and by no means straightforward. One argument is that the process of expanding commerce as a regulatory mechanism has been the result of an unintended and incremental process. As shown in the previous chapter, the history of how the Court has regarded commerce has been shifting between narrow and wide definitions. As such, one could well argue that the Court, in its cases dealing with the Commerce Clause responded to various factors and circumstances, both legal and economical. And after the Obstructionist Court, when the Great Depression hit, a more expanded definition of commerce was necessary to salvage the economy. Consequently, the Court, in the early Twentieth Century, started rolling the proverbial ball, which is the meaning and scope of commerce. Subsequently, by the 1960s and 70s, what was created was this encompassing regulatory mechanism which regarded as such, was used to pass legislations such as the Civil Rights Act of 1964. By this time, Congress was able to use the wide scope that was created by the Court over the course of four decades.

When the ACA was passed, Congress was able to rest its case on substantial precedent. For those who are sympathetic to a broad definition of commerce, the ACA's constitutionality as a valid exercise of congressional commerce power was nearly a fait accompli. As Laurence Tribe writes:

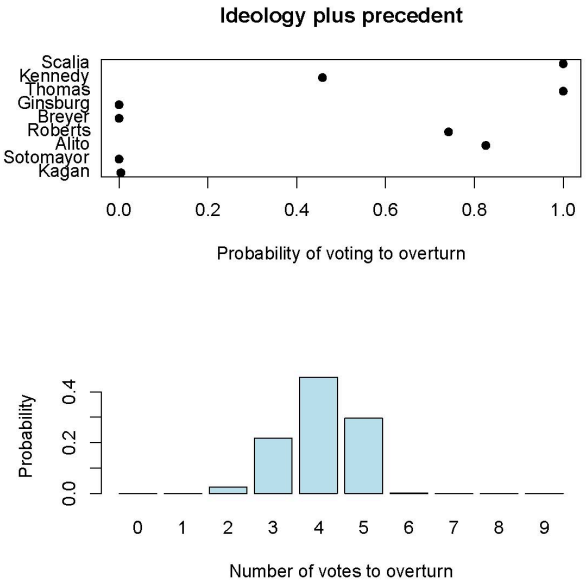
> Since the New Deal, the court has consistently held that Congress has broad constitutional power to regulate interstate commerce. This includes authority over not just goods moving across state lines, but also the economic choices of individuals within states that have significant effects on interstate markets. By that standard, this law's constitutionality is open and shut. Does anyone doubt that the multitrillion-dollar health insurance industry is an interstate market that Congress has the power to regulate? (Tribe)

While Tribe's prediction rests on an ardent interpretation of judicial doctrine and legal precedent, other scholars took a more "hardline-empirical" approach to predicting the outcome in *Sebelius*. For instance, political scientists Michael Bailey and Forest Maltzman made predictions based on two models of judicial decision-making, the attitudinal model and a model based on statistics calculated through precedent.

Under the attitudinal model, Bailey and Maltzman calculated the probability of how each justice would vote *if ideology were the only factor*. In this scenario, Sides argues that "based on preferences alone, 5 justices, including the "swing" justice Anthony Kennedy, are predicted to vote to overturn the PPACA...The most likely scenario is a 5-4 decision overturning the PPACA. Under this scenario, the Court would be a lock to overturn. Goodbye Obamacare" (Sides). As shown in the graph,[36] an ideological take on *Sebelius*, such as one based on the attitudinal model, the ACA would have been struck down along party-lines.



Under the second model which views ideology combined with precedent, Bailey and Maltzman examined the Justices' behavior in the most recent Commerce Clause cases. They explain their method as they write that "given that precedent established by *Wickard* and *Gonzales* is supportive of upholding the law, we then calculated the predicted vote of each justice based not only on their policy preferences but based on their tendency to defer to precedent. Deference to precedent varies by justice: Kennedy does so much more than Thomas, for example" (Sides). Under this model, the prediction was quite different, as demonstrated by the graph to the left.[37] Consequently, based on the Justices' tendency to defer to precedent, Bailey and Maltzman calculated that the outcome in *Sebelius* would be either 6-3 or 7-2 for upholding the ACA.



[36] http://themonkeycage.org/blog/2011/11/21/forecasting-the-supreme-court-vote-on-obamacare/.
[37] http://themonkeycage.org/blog/2011/11/21/forecasting-the-supreme-court-vote-on-obamacare/.

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While outspoken liberals such as Tribe may have taken for granted that the Court would, in one way or another, uphold the ACA, it is impossible to not notice the controversial and politically polarizing nature of the Government's Commerce Clause argument. As legal scholar Maxwell Stearns writes, "the Commerce Clause has long been a source of contention between liberal and conservative jurists in large part because the commerce power is broader in reach that virtually any other delegated congressional power. The Tenth Amendment notwithstanding, congressional regulation under the Commerce Clause has highlighted the tension between a model of limited and delegated federal powers...and presumed and plenary state police powers on the other" (Stearns, 4).[38] Upholding legislation under the Commerce Clause is always pitted against concerns of an ever-expanding Federal Government, and this worry is always at play in the judicial and congressional debates over the commerce power. The significance of *Sebelius* is that it assessed these directly, through Chief Justice Roberts's majority opinion.

B. The Facts of the Case

When President Barack Obama signed into law the Patient Protection and Affordable Care Act on March 23, 2010, he passed the most comprehensive healthcare legislation of recent memory. Enacted as a measure to decrease the large amount of uninsured Americans who yet actively participated in the healthcare market, and reducing the overall cost of healthcare, the ACA provides reforms toward the insurance industry. Most notably, the ACA provides coverage for patients with pre-existing conditions, who can no longer be denied insurance coverage by their providers. It allows children and young adults to be covered by their parents' plans until they turn 26 years old. It subsidizes small businesses in covering their employees. At heart of the legal struggle, however, is the ACA's "shared responsibility payment," more known as the individual mandate.[39] Under this (formally known as 26 U.S.C. §5000A), all (non-tax exempt) individuals not covered by an employer sponsored healthcare plan, Medicaid, Medicare, or other public insurance program, are

[38] What is at stake in this debate over federalism will be addressed toward the end of Chapter 3.
[39] http://www.healthcare.gov/law/features/index.html.

required to obtain an approved private insurance plan. The mandate was an amendment to the tax code, and required the purchase minimum level health insurance. If one fails in doing this, the person is, under the ACA, forced to pay a penalty to the Internal Revenue Service (IRS). A polarizing provision of a controversial and politically loaded legislation, the individual mandate became the lynchpin of the legal challenge to the ACA.

The initial suit against the federal Government and the ACA was brought by Florida, and 25 other states. They argued before the United States District Court for the Northern District of Florida that the ACA was unconstitutional on several grounds – most notably however, that the individual mandate was an unconstitutional exercise of Congress's Commerce Clause powers, as well as its powers to lay and collect taxes. On January 11, 2011, The District Court, under Judge Vinson ruled that the ACA in its entirety was unconstitutional. He held that the mandate – which indeed was beyond Congress's regulatory powers – could not be severed from the rest of the provisions, thus rendering the entire ACA unconstitutional.[40] Upon appeal, the Eleventh Circuit upheld the District Court's ruling, while disagreeing on one point. The panel of three judges held that the individual mandate could, in fact, be severed from the ACA as a whole. Nonetheless, when the case reached the Supreme Court, the ACA was declared unconstitutional.

C. Chef Justice John Robert's Majority Opinion

The main question for the Court was whether Congress, under Article I, Section 8 of the Constitution, and more specifically, under the Commerce Clause or Taxing and Spending Clause, possessed the power to pass the individual mandate. Stripped down, the Court's inquiry was whether the federal Government could require most Americans to purchase a product, in this instance, health insurance. In his majority opinion, Chief Justice John Roberts summarizes the Government's arguments as he writes:

> 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

[40] The District Court did uphold the Medicaid expansion, finding insufficient support that this was unconstitutionally coercive. The Medicaid expansion is, however, not at issue in this paper.

> 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.[41]

It must be noted that the Commerce Clause argument was the Government's principal claim – signaled by the "if" in the previous passage. This word signifies the weight afforded to the promulgated claims by the Government. Namely, the Taxing Clause argument is conditional, contingent upon the rejection of the Commerce Clause claim. For all intents and purposes, before the decision was delivered, *Sebelius* was by all means a Commerce Clause case.

Chief Justice Roberts' inquiry into the constitutionality of the individual mandate was unorthodox, and controversial. After conceding the wide scope that the Court has traditionally afforded to the Commerce Clause as a vehicle for federal regulation, and that the clause has been used to justify a vast array of legislations, Roberts delved into his justification for why the clause does not support the mandate. He writes:

> 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 conserve to purchase an unwanted product…The Constitution grants Congress the power to 'regulate Commerce, Art. I §8, cl 3. The power to regulate commerce presupposes the existence of commercial activity to be regulated.[42]

In the Chief Justice's eyes, the feature that separated the ACA's individual mandate from cases such as *Filburn*, *Darby*, and *Raich* – cases where Congress's application of the Commerce Clause as a regulatory tool was upheld – was that in those instances, the regulated activity already existed. Robert's fear was that if Congress was granted the power to "compel" people to engage in a market in which they were passive under the "guise" of their own well being, the Commerce Clause would reach new limits, which were never intended by the Framers.[43]

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[41] *National Federation of Independent Business v. Sebelius*, 567 U.S. _ (2012).
[42] [42] *National Federation of Independent Business v. Sebelius*, 567 U.S. _ (2012).
[43] Roberts specified this when he stated that: "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

The second part of Chief Justice Roberts' argument was the distinction between regulated *activities*, and regulated *individuals*. He writes:

> The Government repeats the phrase 'active in the market for health care' throughout its brief, but that concept has no constitutional significance…The phrase 'active in the market' cannot obscure the fact that most of those regulated by the individual mandate are not currently engaged in any commercial activity involving health care, and that fact is fatal to the Government's effort to 'regulate the uninsured as a class'…Our precedents recognize Congress's power to regulate 'classes of *activities*,' not classes of *individuals*, apart from any activity in which they are engaged.[44]

Essentially, Roberts' objection is that through the Government's broad definition of market activity, everyone becomes a part of interstate commerce. Implicit in the Chief Justice's reasoning is the assumption that one is capable of "sitting out" of the health care market, and the mandate, if allowed, would remove this choice. Roberts' fear here is similar to that exhibited in the first part of his reasoning. Namely, if everyone is susceptible to be considered as partaking in a market – even though one is not, per se, a customer in it – there would be no limit to who Congress could regulate through interstate commerce. Significantly, this expansive Federal Government would, in Roberts' eyes, be far beyond what the Framers intended, and under this view, *commerce* would have taken on a whole new meaning and significance. Now, commerce would be a totalizing concept, without limits, which could potentially eradicate the principles of federalism and states rights.

While the failure of the Commerce Clause argument may have been unsurprising, the next component of Chief Justice Roberts' majority opinion was. In a bold move, he upheld the ACA's individual mandate through the Taxing and Spending Clause. Roberts writes:

> Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes. That, according to the Government, means the mandate can be regarded as establishing a condition – not owing health insurance – that triggers a tax – the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it makes going without insurance just another thing the Government taxes, like buying gasoline or earning income And if the mandate is in effect just a tax

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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…Under the Government's theory, Congress could address the diet problem by ordering everyone to buy vegetables" (*National Federation of Independent Business v. Sebelius*, 567 U.S. _ (2012)).

[44] *National Federation of Independent Business v. Sebelius*, 567 U.S. _ (2012).

> hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax.[45]

For Roberts, the crucial question in respect to the mandate's constitutionality is that of coercion. More specifically, the determining factor is whether Congress is requiring or compelling purchase of health insurance through the individual mandate. For Roberts, in viewing the Shared Responsibility Payment as a tax, the Government circumvents this – the individual is simply faced with an option; purchase insurance, or pay a tax. And a tax of this nature is unequivocally within Congress's purview. This reasoning is clearly extrapolated from *Kahriger*, where the Court similarly upheld taxation on activities that one could choose not to partake in.

One of the most significant aspects of Chief Justice Roberts's decision to sustain the individual mandate under Congress's taxing powers is that this reading, some would argue, is inconsistent with Congress's own reasoning in passing the ACA. Specifically, Congress, and the Obama administration, consistently maintained during the debates over the ACA that the Shared Responsibility Payment ought to be correctly construed as a *penalty*, rather than a tax.[46] This distinction is significant – Article 1, Section 8, Clause 1 authorizes Congress to lay and collect taxes for the general welfare of the nation. Congress is not, however, authorized to impose financial sanctions on the American people.

Furthermore, Chief Justice Roberts's decision to forego the stated legislative intent and uphold the mandate as a tax raises a series of crucial question about the role of the legislative and

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[45] *National Federation of Independent Business v. Sebelius*, 567 U.S. _ (2012).

[46] The Cornell Legal Institute nicely sums up this viewpoint, that the mandate is in fact a penalty, staunchly purported by the opponents of the ACA. Their report states that the opposition view was that: "the individual mandate is, in fact, a penalty, and not a tax. These parties make this argument: not only is the punishment for violation of the individual mandate a "penalty" by the Act's plain language, but it also acts like a penalty because it "enforces a separate legal command." Further, they argue, even if the individual mandate's penalty were considered to be a "tax," it exceeds the Congressional taxing power. Some scholars also argue that the penalty is unconstitutional because it is essentially "commandeering"; they argue that Congress is using this tax to get states to do their bidding" (Schmidt, 2012). Moreover, throughout the proceedings in hearing the case, the four liberal Justices on the Court, as well as the Obama administration, were adamant over the mandate's reading as a penalty *rather* than a tax. Bill Mears of CNN writes: "In an unusual twist, the Obama administration is now siding with the law's opponents and strongly argued the mandate is not a tax. The high court actually designated a Washington private attorney, Robert Long, to argue in favor of the tax question. Four mostly liberal members of the court -- including Obama appointees Sonia Sotomayor and Elena Kagan -- were aggressive in saying there was no tax at play here. 'Congress has nowhere used the word 'tax'. What it says is 'penalty',' noted Justice Stephen Breyer. 'Moreover, this is not in the Internal Revenue Code but for purposes of collection. And so why is this a tax? I know you point to certain sentences that talk about taxes within the Code. This is not a tax to a tax. This is a tax to a health care requirement.'" (Mears, 2012)

judicial branches' role vis-a-vis the people. Specifically, in the name of democracy and a transparent and accountable Government, is it not beholden to its *stated* legislative intent, and its *given* justification for its laws? *If* we are to believe that the people are sovereign, and that the elected officials and their appointed Justices are representing and protecting the people, is it not integral that there is no ambiguity as to *why* the public servants act as they do? There is a very compelling argument to be made for the fact that in reading between the lines, as it were, in Congress's promulgated reasoning for the individual mandate, Chief Justice Roberts may in fact have acted in a problematic manner.

On the other hand, some argue that the true nature of the mandate – i.e., whether it is a tax or a penalty – can be discerned based on its *effects*. In other words, it may well be the case that the legislative intent is wholly irrelevant. Legal scholars Robert Cooter and Neil Siegel make this argument:

> What is the correct constitutional interpretation of mixed exactions[47]? When interpreting an exaction, should expressive characteristics trump material characteristics or should materiality trump expression? Our answer depends on the exaction's effect. If it has the effect of a penalty by preventing conduct, then it should be interpreted as a penalty. If it has the effect of a tax by dampening conduct and raising revenue, then it should be interpreted as a tax... According to longstanding legal doctrine, the Constitution authorizes Congress to impose pure taxes to promote the general welfare. Congress does not lose its power to tax for the general welfare by *referring* [emphasis added] to an exaction as a 'regulation' or a 'penalty'... Whatever Congress says, the effect of the exaction – how it works – matters most. (Cooter and Siegel, 34-36)

Under this view,[48] the Chief Justices' decision to overlook the purported legislative intent (which, it must be noted, stressed the penalty over tax distinction, as this is more politically viable) was clearly the correct approach. Clearly, the effects of the Shared Responsibility Payment are consistent with that of a tax – the mandate *dampens* the conduct of not purchasing health insurance and raises revenue through the payment to the IRS. Significantly, the mandate does not *prevent*

[47] To clarify, a mixed exaction is one that has elements of a "true tax" (a tax that according to Cooter and Siegel "is an exaction with all the usual characteristics and effects of a tax. A pure tax permits the assessed conduct, exacts a low cost relative to the gain from the assessed conduct for many people, and does not enhance the rate for intentional or repeated conduct" (32)), and a "true penalty" (the authors' phrase for en exaction that "with all the usual characteristics and effects of a penalty. A pure penalty condemns the assessed conduct, exacts a high cost relative to the gain from the forbidden conduct for almost everyone, and enhances the rate for intentional or repeated violations" (32)).

[48] Importantly, Cooter and Siegel's article predates *Sebelius*. In other words, Roberts' ruling fits with this view, rather than the other way around.

conduct; one can still choose to not purchase insurance, as long as one pays the fine. In sum, by viewing the effects of the mandate, it clearly *is* a tax, rather than a penalty.

D. The Ginsburg Concurrence

As a dissenter in both *Lopez* and *Morrison*, and as a member of the majority in *Raich*, Justice Ruth Bader Ginsburg's reading of, and commitment to, the Commerce Clause has been steadfast. Throughout her tenure on the Court, Ginsburg has repeatedly arbitrated for not only the Government's broad regulatory powers of interstate commerce, but also for a wide definition of what commerce is. While voting with the majority in *Sebelius*, Justice Ginsburg wrote a concurring opinion wherein she criticized the Chief Justice's treatment of the Commerce Clause.

Ginsburg's first critique of Roberts was in regards to his argument of market inactivity. Ginsburg contended that "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 of heath-care professional."[49] Ginsburg's claim here is integral, as it serves as a premise for her main critique of Robert's reasoning on the Commerce Clause. Namely, a distinction wherein one asserts that Congress cannot reach those inactive in the healthcare market is ultimately fallacious as, Ginsburg shows, there is no such thing as market inactivity in this issue. Not only will everyone eventually become patients and active in the healthcare market, but their decision not to purchase insurance now unequivocally affects the market today.

Next, Justice Ginsburg moved to dispel the central core of the Chief Justice's argument – the prong that Congress could not constitutionally "compel" market activity. Ginsburg writes:

> 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 'compel individuals to become active in commerce by purchasing a product,' The Chief Justice's novel constraint on Congress' commerce power gains no force from our precedent and for that reason alone warrants disapprobation.[50]

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[49] *National Federation of Independent Business v. Sebelius*, 567 U.S. _ (2012), Opinion of Ginsburg, J.
[50] *National Federation of Independent Business v. Sebelius*, 567 U.S. _ (2012), Opinion of Ginsburg, J.

Here, Ginsburg points out the true unorthodoxy of Roberts's reasoning. Significantly, the rationale used to strike down the Government's Commerce Clause argument is precisely a "novel constraint;" as Ginsburg referred to it as. Roberts built the foundation of his argument on a foundation that does not exist. And regardless of whether his reasoning "makes sense," it is unsupported, and therefore judicially unsound.

In addition to asserting that Roberts's reasoning was unsupported by precedent, Ginsburg proceeded to argue that it was inconsistent with the Constitution itself. She wrote that "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...Nothing in this language implies that Congress' commerce power is limited to regulating those actively engaged in commercial transactions...Nor does our case law toe the activity versus inactivity line."[51] Essentially, Justice Ginsburg's argument can be summed up in the following way: there is no such thing as market inactivity when it comes to health insurance and the overall healthcare market. Moreover, Congress's has a long-recognized power to regulate interstate commerce. Given the legislature's clear goal of limiting the number of uninsured Americans coupled with the fact that the only way to incentivize people to purchase insurance is through an individual mandate, the Shared Responsibility Payment unequivocally passes the rational basis test, and is a constitutional exercise of Congress's powers to regulate interstate commerce. Claiming "inactivity" in the healthcare market is thus not a valid justification for striking down the individual mandate.

Legal scholar Mark Hall supports Justice Ginsburg's reasoning. In his article "Commerce Clause Challenges to Health Care Reform,"[52] he writes:

> In *Wickard*, Congress regulated commerce in wheat by limiting consumption of home-grown wheat. By the same token, Congress might have considered simply barring people from seeking care if they lacked insurance. Rather than adopt a measure so draconian Congress chose to require people to obtain insurance or pay a moderate penalty. Based on plausible meanings of 'regulate,' there is no reason why a mandate to engage in commerce could not be considered the *regulation* of commerce...The [commerce] clause does not say that action must precede federal intervention, only that federal power may be used to

[51] *National Federation of Independent Business v. Sebelius*, 567 U.S. _ (2012), Opinion of Ginsburg, J.
[52] As was the case with Cooter and Siegel's article, Hall's piece was published before the decision in *Sebelius* was handed down.

> regulate something that can be called commerce. Insurance is commerce... Because regulation includes mandating as well as prohibiting behavior related to products, it follows logically that 'regulating commerce' can include mandating a purchase. (Hall, 1834)

Hall points out a crucial aspect of Roberts's reasoning in the first part of this passage – namely, the meaning of "regulation." As Hall shows, based on the Constitution, there is no reason why regulation of commerce is different from a mandate to participate in commerce. While one might argue, as Roberts did, that regulation presumes that there is an activity present to regulate, Ginsburg's argument that not purchasing health insurance *is* an activity, if accepted, dismantles Roberts's position.

Finally, Justice Ginsburg addressed Chief Justice Roberts's slippery-slope argument that by upholding the ACA under the Commerce Clause, The Court would afford Congress nearly unlimited powers to regulate interstate commerce. Ginsburg writes:

> 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 Chief Justice could certainly uphold the individual mandate without giving Congress *carte blanche* to enact any and all purchase mandates...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.[53]

Here, Justice Ginsburg attempts to quell the commonly held fear of the conservative opposition to the Government's commerce power argument, namely that upholding the individual mandate under the Commerce Clause would break the proverbial dam standing between the Federal Government and unlimited regulatory powers. However, as she points out, this leap is illogical. Surely, upholding the commerce power in this instance would not, by itself, erode legally recognized principles of federalism. Rather, the Federal Government would be authorized to step in where the States could not.[54]

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[53] [53] *National Federation of Independent Business v. Sebelius*, 567 U.S. _ (2012), Opinion of Ginsburg, J.

[54] This view, of the Federal Government *aiding* rather than trumping the States is expressed by Justice Ginsburg as she writes: "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

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While *Sebelius* is unequivocally a landmark case that will be debated for many years to come, this initial period after the ruling is crucial in terms of correctly situating the decision in the vast Commerce Clause precedent. For surely, the early stages of interpretation and scholarly debate surrounding *Sebelius* will ultimately come to shape the frame in which it will be situate in as we move forward.

How do we make sense of the Chief Justice's reading of the Commerce Clause – Did he pick up where Rehnquist left off, or does *Sebelius* signal the birth of the "Roberts Doctrine?" Is *Sebelius*, in respect to the discussion on the Commerce Clause, a return to the Obstructionist Court of pre-1937, or has it broken new ground? It is these questions that I seek to cast light on in the next chapter.

V. *Sebelius's* Place in History

In the aftermath of *Sebelius*, one critical question is: "what does the decision mean for the Court's role as a constitutional check on Congress? More specifically, the task at hand is to contextualize the Court's recent landmark decision in light of its previous themes of jurisprudence dealing with federal regulatory powers. Arguably, what makes *Sebelius* significant is precisely that it does not fall neatly into any given category. As I will show in this chapter, Chief Justice Roberts, in striking down the Government's Commerce Clause argument, limited the reach of the clause in three principal manners. First, by returning, in some respects, to the Rehnquist Court's "economic activity" test from *Lopez*, Roberts further subverted the previous three-pronged test for the Commerce Clause. Second, Roberts limited the meaning of "regulation." His rhetoric in *Sebelius* suggests that the Chief Justice put in place an additional hurdle for Congress to pass - namely, whether there *already exists* commercial activity within the *precise* economic activity advanced in the legislation at hand. Finally, the Chief Justice's decision could very well be construed as a return

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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."

to the days of the obstructionist Court, as he continued the legacy left by Rehnquist of limited deference by the Court to the legislative.

A. Sebelius's Place in History - A Return to the Obstructionist Court

Much of the analysis of *Sebelius's* projected impact is insufficient. Specifically, by viewing *Sebelius* within a truncated chronological framework, it is easy to view it as a stark departure from *Raich*, and as Roberts blazing a new path entirely. However, this framework ignores the details of the doctrinal history. If one focuses on how Commerce Clause jurisprudence has evolved on a micro-level, as outlined in the first chapter, one can see that Roberts's decision, albeit unorthodox, fits within the historical framework of the doctrine.

If one were to focus on a broad look at the differences in the Court's treatment of the Commerce Clause pre-1937 as opposed to after the switch in time the converging element between the two is a varied degree of deference to Congress by the Court. Specifically, while the Court, during the period from the switch in time until the Rehnquist Court, deferred to Congress and granted the legislature a wide degree of latitude in its use of the Commerce Clause, the pre-1937 Court was substantially more stringent. Thus, in situating *Sebelius* within the vast history of the interstate commerce doctrine, it evidently falls within the framework of the Obstructionist Court pre-1937.

Perhaps most significantly, much like the cases decided in the Obstructionist Court, the Government's advanced Commerce Clause argument in *Sebelius* was struck down based on principles of federalism. At the core of this pursuit, of delineating what commerce in actuality is, lies the concern that by expanding the definition of commerce past the Framers' intentions, the Federal Government would grow unconstitutionally large and powerful vis-a-vis the states. This fear is precisely what is displayed through the Court's slippery-slope arguments, such as Roberts's in *Sebelius*. Implicit in the arguments that by conflating manufacturing and production with commerce, as in *E.C. Knight* and *Carter Coal*, and by allowing Congress to reach those who choose to remain inactive in the market as in *Sebelius*, the Court is attempting to find a sustainable and

constitutional equilibrium between the Federal Government and the States, and indeed, between the Supremacy Clause and the Tenth Amendment.

There are those, however, who criticize the Court's emphasis on federalism. In his article "The Commerce Clause, American Democracy, and the Affordable Care Act," legal scholar Scott Boykin argues that this legal balancing act has a deleterious effect on the democracy of this nation. Boykin writes:

> The Court forestalled a public debate about the meaning and value of federalism by amending the Constitution itself with the Substantial Effects test. The Court's decisions creating and applying that test reflect a political, rather than a legal, judgment that a modern economy requires extensive regulation by the central Government. Whether or not that judgment is an accurate one, it is not the task of the judiciary to make such judgments. The Court's approach in its Commerce Clause decisions has deprived Congress and the American public of the opportunity for a vigorous and honest public discussion about the role of the federal Government in our society and the proper balance between federal and state authority. (Boykin, 113)

Boykin argues that by addressing the question of federalism through its Commerce Clause decision, the Court has removed the issue from the public forum and onto the bench. This is a very cogent argument. Surely, it is, at least in the first instance, the role of the people to step in when their democracy is being infringed. Central to the democratic process is the right of the people to decide not only who represents them, but also the scale of the Federal and State Governments. By deciding what is and what is not the rightful size of the Government, the Court is for all intents and purposes using its voice to replace that of the people's.

Even though one could argue that since the suit in *Sebelius* was filed by twenty-six states, it was thereby brought by the people through their representatives, this argument does not suffice. The point is that the role of the judiciary, constitutionally speaking, is to serve as a check on the legislative and executive branches. The task of the Supreme Court is to judge legislation in light of the Constitution, and strike down or uphold the law at hand. Once the Court becomes the maker of policy, this role is thrown out the window, and the system of checks and balances is disintegrated. As such, by deciding what is and what is not consistent with the principles of federalism (which is not, in itself, by any means a straightforward classification), and by holding when the Federal

Government hold too much leverage against the States, The Court is undoubtedly venturing into the realm of policymaking. And the significant consequence of this is, as Boykin shows, that the Court removes the say of the people.

In sum, it is these two themes – the limited deference to the legislature, and the increased emphasis on principles of federalism – that suggest that the correct space for situating *Sebelius's* treatment of the Commerce Clause is in fact with the pre-1937 Obstructionist Court. However, this analysis captures but half the story; for the second significant component of the decision was Roberts's turn, whereby he upheld the mandate as a constitutional tax. Given the unprecedented rationale used by Roberts, we are unable to *situate* this reasoning in a larger doctrinal history, per se. Rather, the significant task here is to examine how *Sebelius* affected Congress's powers under the Taxing and Spending Clause.

B. Reigning in "Substantial Effects"

Recalling the pre-Rehnquist cases dealing with interstate commerce, there were three concrete and established categories of regulation that Congress was authorized to reach with its Commerce Clause powers. These categories came to be used as a test for determining whether legislation invoking these powers was constitutional. As written in Justice Stevens' majority opinion in *Raich*:

> In response to rapid industrial development and an increasingly interdependent national economy, Congress 'ushered in a new era of federal regulation under the commerce power...which now spans more than a century, have identified three general categories of regulation in which Congress is authorized to engage under its commerce power. First, Congress can regulate the channels of interstate commerce. Second, Congress gas authority to regulate and protect the instrumentalities of interstate commerce, and persons or things in interstate commerce. Third, Congress has the power to regulate activities that substantially affect interstate commerce.[55]

Essentially, Chief Justice Roberts's decision in *Sebelius* picks up where *Lopez* left off in limiting the scope of the substantial affects category and shifting its emphasis to a new point - whether the regulated activity is economic in nature. However, this requirement is certainly not apparent from a prima facie reading of the categories, and its derivation is rather unclear.

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[55] *Gonzales v. Raich*, 545 U.S. 1 (2005).

Significantly, this requirement was introduced with *Lopez*. Here, Rehnquist writes:

> Within this final [third] 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 have upheld a wide variety of congressional Acts regulating intrastate *economic* activity [emphasis added] where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of ...restaurants utilizing substantial interstate supplies, inns and hotels catering to interstate guests, and production and consumption of home grown wheat. 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.[56]

Consequently, Chief Justice Rehnquist signaled clearly that the decision in *Lopez* would come down to whether the possession of a gun in a school zone constituted a substantial affect on an *economic activity*. In striking down the Act, and in rejecting the Government's advanced Commerce Clause argument, Rehnquist raised the bar for what can constitutionally be regulated, as he honed in on a narrow definition of what constitutes an economic activity. Specifically, Rehnquist narrowed the inquiry to whether the regulated activity itself was economic.

Justice Breyer highlighted this move by the Chief Justice in his dissent. Here we writes:

> 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...In *Katzenbach v. McClung*, this Court upheld, as within the commerce power, a statute prohibiting racial discrimination at local restaurants, in part because that discrimination discouraged travel by African Americans and in part because that discrimination affected purchases of food and restaurant supplies from other States. In *Daniel v. Paul*, this Court found an effect on commerce caused by an amusement park located several miles down a country road in the middle of Alabama -- because some customers (the Court assumed), some food, 15 paddleboats, and a juke box had come from out of State. In both of these cases, the Court understood that the specific instance of discrimination (at a local place of accommodation) was part of a general practice that, considered as a whole, caused not only the most serious human and social harm, but had nationally significant economic dimensions as well...like the local racial discrimination at issue in McClung and Daniel, the local instances here, taken together and considered as a whole, create a problem that causes serious human and social harm, but also has nationally significant economic dimensions.[57]

What Justice Breyer demonstrates here is that Rehnquist's move of simply viewing the isolated act, of possessing a gun in a school, in disjunction from the broader economic context, is a fallacious move. What makes the majority decision even more pernicious is that Rehnquist misuses the

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[56] *United States v. Lopez*, 514 U.S. 549 (1995).

[57] *United States v. Lopez*, 514 U.S. 549 (1995). Justice Breyer Dissenting.

Court's precedent for substantial affects. In relying on *McClung* and *Daniel*, the Chief Justice is ignoring the broad dimensions of the substantial affects category. By focusing on the lone activity, and judging its economic nature, Rehnquist has put in place a significant jurisprudential obstacle, not only for Congress in employing its regulatory powers under the Commerce Clause, but also, for the substantial affects test of years passed, and for the flow of commerce theory in general.

Furthermore, it is crucial to note the gap in Rehnquist's logic, and one cannot overlook the importance of the Chief Justice's explication, even though it may seem minor. As Maxwell Stearns shows:

> Commentators have commented on and criticized Rehnquist's doctrinal transformation in *Lopez* from inquiring into whether the regulated activity has a substantial economic effect of commerce to whether the activity itself is economic... Instead of relying upon this line of cases for the new non-economic activities test, Rehnquist cited *Heart of Atlanta Hotel v. United States, Katzenbach v. McClung,* and *Wickard*, cases in which Congress regulated private actors and in which the Supreme Court had applied the traditional Substantial Effects test without inquiring into the nature of the regulated activity. (Stearns, 17-18)

Significantly, Rehnquist cites *Heart of Atlanta Hotel* and *McClung* as valid instances of congressional usage of the substantial affects, and economic activity tests. In other words, these regulations were, Rehnquist argues, upheld because the activities *themselves* - the refusal to accommodate and serve blacks - were economic. But the reality of these decisions is far more complicated than this. Specifically, as I have shown, these activities were regarded as having a substantial affect on interstate commerce because they fell within the flow of commerce theory. In other words, whether of not the activities were economic in themselves was not the issue, but rather, whether the consequences of them were.

Shifting the emphasis of the third category of regulation, as Rehnquist did in *Lopez*, is undoubtedly a pernicious move as to the current role of the Commerce Clause. Specifically, by redefining substantial effects as whether the activity itself is economic, Rehnquist has been able to narrow the scope of constitutionality for legislation passed under Congress's interstate commerce powers. The rationale the Court used for its decision in *Lopez* epitomizes this - the Court did not find that guns in schools is an activity within the flow of commerce, or that the Act substantially

affects interstate commerce as *a whole*. Rather, the Court, quite simply, found that the activity itself was not *economic*. Furthermore, given the fact that no credence was given to the two previous categories of regulation - even though, conceivably, one could well argue that regulating the possession of firearms in schools falls within both the channels of interstate commerce and within the power to regulate persons in interstate commerce - all the weight has been placed on this derivation of the third category. As such, Chief Justice Roberts was able to rest his entire discussion on the Commerce Clause on *Lopez*, and determine that regulating the purchase of health insurance is beyond the scope of Congress's interstate commerce powers. In some ways, moreover, Roberts extended Rehnquist's inquiry. While his predecessor focused on whether the Act regulated something that was *economic*, Roberts focused on whether it wan an *activity* which could be regulated.

C. Reigning in "Regulation"

This economic activity requirement, set up by Rehnquist in *Lopez*, is ultimately what allowed Chief Justice Roberts to strike down the Government's advanced Commerce Clause argument for the individual mandate. As shown in chapter two, Roberts argued that while the Commerce Clause encompasses a wide scope for regulation, it cannot justify compelled entry into a market through legislation. In other words, interstate commerce is premised on market activity, and constitutionally, the Government cannot legislate individuals to be active in the market. Significantly, however, Roberts assesses the very meaning of the word "regulation" in his opinion. He writes:

> The Constitution grants Congress the power to '*regulate* Commerce.' 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...The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated...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.[58]

[58] *National Federation of Independent Business v. Sebelius*, 567 U.S. _ (2012).

At the core of Roberts's reasoning lies a narrow definition of commerce.[59] Namely, in distinguishing the economic activity and the existence of market activity from "commerce," Roberts departs from a more holistic notion of the term, as advanced in cases such as *Heart of Atlanta Motel*, *McClung*, and more significantly, in *Wickard*. In fact, if we analyze Roberts's rationale in terms of judicial consistency, it becomes evident that his reading of the Constitution vis-a-vis the meaning of "regulation" departs from the established Commerce Clause precedent.

What *Wickard* did, above all else, was to redefine and expand the role, scope, and meaning of Congressional *regulation*. This was explained by Justice Stevens, through his opinion in *Raich*. when he wrote that: "In *Wickard*, we upheld the application of regulations...which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices...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."[60] Significantly, the decision in *Wickard* shows the sentiment that the fact that individuals chose to "stay outside" the market is precisely what made them subject to regulation. If we were to apply Roberts's own rationale in *Wickard*, the wheat quotas would likely have been struck down. The argument would have been that Congress could not regulate homegrown wheat, because implicit in the concept of "regulation" is that there is something to regulate. Filburn's decision to grow his own wheat places him outside the market, and thus, not subject to regulation by Congress through the Commerce Clause. In this light it becomes apparent that Roberts's reasoning in *Sebelius* is diametrically opposed to this. Consequently, by defining "regulation" as narrowly as Chief Justice Roberts did in *Sebelius*, he has put in place a new and substantial hurdle for Congress advancing legislation through the Commerce Clause.

D. The Taxing Power – A Replacement for the Commerce Clause?

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[59] This narrow view lies very close to the days of the obstructionist Court. Here, the Court was, as shown in Chapter I, adamant to resolve *what* commerce actually is. As such, we ended up with the commerce versus production/manufacture distinction. It seems as though Chief Justice Robert is doing something similar here, and I will discuss the comparison between Roberts and the pre-1937 Court later in this chapter.

[60] *Gonzales v. Raich*, 545 U.S. 1 (2005).

Arguably, Chief Justice Roberts's decision in *Sebelius* served as the death knell for the Commerce Clause. By reigning in the categories and criteria already in place for using this regulatory power, in addition to implementing novel and unprecedented hurdles for Congress to overcome, the Commerce Clause is, if not pronounced dead, gutted beyond recognition. However, there is a compelling case to be made for the claim that Roberts, through his argument on the Taxing and Spending Clause, opened a different door – namely, taxation as a proxy for commerce.

Legal scholar and law professor Erik Jensen further discusses the potentially wide expansion of the Government's taxing powers through *Sebelius*. He writes:

> After *NFIB*, new fears have been raised about the scope of congressional power. Commentators, generally from the right, have expressed concern that the taxing power analysis in Roberts's opinion might have created a new route to largely unlimited congressional power (Almost everyone was surprised by the Court's reliance on the taxing clause. I certainly was.) To concerned conservatives, reining in the commerce power matters little if Congress will be able to get much the same results ― and, because Congress can tax lots of things having nothing to do with commerce, maybe even more far-reaching results ― by invoking, or relying surreptitiously on, the taxing power. (Jensen, 1310)

The concern, which Jensen highlights, is that through Roberts's decision, Congress can ostensibly circumvent the severely limited Commerce Clause, and pass legislation through the power to lay and collect taxes instead.

The passage in *Sebelius* that gives rise for this argument is when Roberts writes that "none of this is to say that the payment [the individual mandate] is not intended to affect individual conduct. Although the payment will raise considerable revenue, it is plainly designed to expand health insurance coverage."[61] The significance of this is clear: the Chief Justice is, overtly and literally, justifying Congress to affect, and thereby *regulate* individual conduct through taxation. The crucial difference for Roberts is, as discussed in the previous chapter, that regulating through taxation gives the affected individuals an "out;" for Roberts, they are not compelled or coerced into an action as they always have the option of either doing what the Government asks, or to pay the fine. Practically speaking, however, it is difficult to see how Congress, through this mechanism, could not achieve its intended result anyway. For instance, it could make the fine so steep that compliance

61 *National Federation of Independent Business v. Sebelius*, 567 U.S. _ (2012).

becomes the only reasonable option. While the de jure difference between the two rationales is plain to see, it is difficult to discern how the de facto implementation of regulation through tax would – legally speaking, anyway – be different from regulation through commerce.

For there is, based on Roberts's opinion in any event, no apparent limit as to the *type* of tax that Congress can implement as a result of *Sebelius*. The legislature could "affect" individual conduct through any number of taxes. For instance, it can regulate through taxes that punish behavior that is viewed as "bad," or adverse upon society, such as the taxation of cigarettes[62] and alcohol.[63] Alternatively, Congress has, within its power, the option to regulate through extending credits for "good," or beneficial behavior, such as tax rewards for adoption[64] or charitable donations.[65] There is a fundamental vagueness inherent in Roberts's discussion of the federal taxing powers. While he invokes Congress's indisputable powers to regulate conduct through taxation, there is much left to be said about how *Sebelius* and the constitutionality of the individual mandate affects these powers. There is, furthermore, also uncertainty as to the scope of these powers. Roberts's discussion on the Taxing and Spending Clause generated a substantial amount of questions as to the role of this doctrine given the limited Commerce Clause.

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None of this is to say, however, what the outcomes of *Sebelius* will be. For while the text of the decision tells one story, the practical implementations and political realities surrounding the Court and congressional proceedings may tell a different one entirely. Throughout the next chapter, I will discuss more closely some of the potential consequences with Roberts's decision to pass *Sebelius* as a valid exercise of congressional taxing powers.

VI. Measuring *Sebelius's* Consequences

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62 See, for instance, the Children's Health Insurance Program Reauthorization Act of 2009, which raises the federal tax rate for cigarettes. <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Childrens-Health-Insurance-Program-CHIP/Childrens-Health-Insurance-Program-CHIP.html>.

63 The Tax Policy Center, for instance, has a good chart for alcohol taxation in the U.S. <http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=399>.

64 <http://www.irs.gov/taxtopics/tc607.html>.

65 <http://taxes.about.com/od/deductionscredits/a/CharityDonation.htm>.

This analysis and contextualization of the ruling in *Sebelius* is not simply an intellectual exercise. Attempting to make sense of some of the questions that the decision invariably raises is far from a mere academic pursuit, untethered to practical realities. In reality, it is quite the opposite. There are real political implications at stake in this discussion of *Sebelius's* effects on Congress's commerce and taxing powers; the case directly affects congressional proceedings, and thus, the legislative capacity of this nation's elected officials. And while the obvious consequence of the ruling is obvious for all – that now there is, for the first time in American history, a (rather) comprehensive healthcare plan in place – one of the remaining challenges is to discern the meaning of *Sebelius's* "fine print." In this chapter I will discuss the consequences of *Sebelius* as a case passed under Congress's power to lay and collect taxes. I argue that the consequence of *Sebelius* is that Roberts, while appearing to expand Congress's taxing power, actually limited it by bringing in the political process as a check.

A. Roberts Saving the Legitimacy of the Court

One reading of Roberts's decision to uphold the individual mandate, which has gathered some traction among legal pundits, it the "legitimacy of the Court" argument. One of its advocates is scholar Charles Krauthammer, who professes his reading of *Sebelius* when he writes:

> It's the judiciary's Nixon-to-China: Chief Justice John Roberts joins the liberal wing of the Supreme Court and upholds the constitutionality of Obamacare. How? By pulling off one of the great constitutional finesses of all time. He managed to uphold the central conservative argument against Obamacare, while at the same time finding a narrow definitional dodge to uphold the law — and thus prevented the court from being seen as having overturned, presumably on political grounds, the signature legislation of this administration... National health care has been a liberal dream for a hundred years. It is clearly the most significant piece of social legislation in decades. Roberts's concern was that the court do everything it could to avoid being seen, rightly or wrongly, as high-handedly overturning sweeping legislation passed by both houses of Congress and signed by the president. (Krauthammer)

This argument is predicated on what could be called the "Roberts duality," meaning that there are two sides to the Justice – a conservative on the one hand, and the Chief Justice on the other. Ostensibly, the view that Krauthammer advances shows that Roberts combined these two sides in his opinion. Namely, the ideological side to Roberts was evidenced through his discussion on the Commerce Clause. As a constitutional originalist, and as a fiscal conservative, appointed to the

Court by a neoconservative president in George W. Bush, Roberts embraced his political ideology, and severely limited a judicial doctrine which, in his opinion, had expanded far beyond the Framers' intentions, and which had placed an unjustifiable amount of power with the Federal Government.

The argument also holds, however, that Roberts's ultimate driving force in the latter part of his opinion – i.e., that part wherein he upheld the mandate – is what determined, and in fact explains, his unorthodox move. Specifically, what separates Roberts from the other four Justices who voted to strike down the mandate is that he assumes additional responsibilities as the Chief Justice. According to Krauthammer and his ilk, is the responsibility of making sure that the Court retains its legitimacy as a branch of Government. In other words, as the Chief Justice, Roberts is tasked with making sure that the Court is not seen as a political institution, as this would undermine its force as the judicial branch. The argument here is that a politically split 5-4 decision against the individual mandate's constitutionality would severely jeopardize the legitimacy of the Court in this sense. Thus, in order to prevent this, Roberts subsequently voted to uphold the mandate, albeit as an exercise of the Government's powers to lay and collect taxes.

This argument is, however, rather unsatisfactory. In fact, during his tenure as Chief Justice, Roberts has, it seems, not been concerned with preserving the legitimacy of the Court as stated above. This is demonstrated by the Chief Justice's treatment of campaign finance cases.

In *Federal Elections Commission v, Wisconsin Right to Life* (2007), Roberts, forming a majority with fellow conservative Justices Scalia, Alito, Thomas, and Kennedy, held in a 5-4 decision that the Bipartisan Campaign Reform Act of 2002 (BCRA), in banning the Wisconsin Right to Life group's advertisements prior to 60 days before an election, was unconstitutional as it was "chilling on political speech."[66] The Wisconsin Right to Life had been running ads which urged potential voters to contact two U.S Senators in order to tell them to oppose filibustering of judicial nominees. Three years later, in *Citizens United v. F.E.C.* (2010) – what is perhaps the most politically polarizing and controversial case of the Roberts Court – the conservative majority struck

[66] FEDERAL ELECTION COMMISSION v. WISCONSIN RIGHT TO LIFE. The Oyez Project at IIT Chicago-Kent College of Law. 18 February 2013. <http://www.oyez.org/cases/2000-2009/2006/2006_06_969>.

down bans on political speech. In a 5-4 decision along party lines, the Court held that under the First Amendment corporate funding of independent political broadcasts in candidate elections cannot be limited.[67] The claim that Roberts is not, primarily, concerned with the legitimacy of the Court is not based on the amount of politically controversial cases decided by the Court. Rather, it is measured by the way the Court has shifted its approach and reading of the constitutional doctrines in certain issues; it is, in other words, inconsistency rather than simply controversy that gives rise to appeals of illegitimacy. Campaign finance jurisprudence is a quintessential example of this type of judicial inconsistency. Over the span of nearly three decades the Court has shifted drastically in its reading of what type of campaign finance is constitutional – be it no limits, only limits on indirect contributions, or some other requirement. What Roberts has shown is a willingness to change the established jurisprudence, and overturn major pieces of legislation (such as several prongs of McCain-Feingold) in the process.

It is possible, however, that the aftermath and backlash of the campaign finance cases is precisely what gave rise to Roberts's alleged concerns over the Court's legitimacy. This may well be the case, to some degree. However, the argument that this is the most deciding factor in *Sebelius* is nothing short of a fallacious unwarranted conclusion. In other words, the logic simply does not hold up.

B. Roberts Aggregating Conventional Wisdom

Another – more plausible – reading of the Chief Justice's decision to uphold the individual mandate as a tax is that he was, so to speak, "balancing the scales" between commerce and tax, and that he was, for all intents and purposes, aggregating conventional constitutional wisdom. As I have shown throughout this paper, the period between FDR's court-packing plan in 1937 and, ostensibly, up until *Lopez* in 1995 saw a massive expansion in congressional regulatory powers under commerce. At the same time, however, the legislature's powers to regulate through taxation grew

[67] CITIZENS UNITED v. FEDERAL ELECTION COMMISSION. The Oyez Project at IIT Chicago-Kent College of Law. 18 February 2013. <http://www.oyez.org/cases/2000-2009/2008/2008_08_205>.

evermore dormant.[68] In fact, the last major case dealing with Congress's Taxing powers was issued half a century before *Sebelius*. As such, it is possible that Roberts decided to realign these two powers through his decision in *Sebelius.* Observing the wide scope of commerce Roberts, following in Rehnquist's footsteps, chose to reign in this regulatory avenue. On the other hand, noting the overlooked taxing power, Roberts, through his decision in *Sebelius*, provided Congress with a mechanism to reopen this constitutional power.

Arguably, this reading is strengthened by the Chief Justice's overarching judicial philosophy – or rather, his lack thereof. As O'Neill writes:

> Roberts said he did not have an 'all-encompassing' approach to deciding cases. He said 'judges must be constantly aware that their role, while important, is limited.' He noted that 'it is not part of the judicial function to make the law.' The proper judicial temperament 'requires a degree of modesty and humility in the judge, an ability to recognize that preliminary perceptions may turn out to be wrong, and a willingness to change position in light of later insights.' Roberts's insistence that he possesses no 'all-encompassing' approach to deciding cases would seem to distinguish him from the textualism of Justice Scalia, the originalism of Justice Thomas, and the 'active liberty' of Justice Breyer. According to Posner, this refusal to embrace 'grand theory' would place Roberts within a prior generation of judges. (O'Neill)

Given the lack of a "meta-philosophy" of the Chief Justice, combined with his view that the role of a Supreme Court Judge is a limited one, and importantly, as a non-policy maker, it becomes rather conceivable that Roberts conceives his role as a judicial aggregator. Roberts's opinion, it could be argued, was guided by the precise values explicated above. Namely, while being a fiscal conservative, this view does not represent a "grand theory" for the Chief Justice. As such, recognizing the expanded scope of commerce, and the limited powers under taxation, which unequivocally is necessary as a mechanism for Congress, Roberts took it upon himself to realign the asymmetrical judicial doctrines.

C. Bringing Back The Political Process as a Check

Another reading of Roberts's decision, and one of *Sebelius's* potential consequences is that Roberts, being a legal conservative, doomed future legislations of this kind by sending the issues to

[68] Here, I am focusing on landmark pieces of legislation, such as the Agricultural Adjustment Act, the Civil Rights Act of 1964, and the Affordable Care Act. Naturally, Congress has levied all sorts of taxes, spanning across innumerable fields. The point I am making is that when it comes to these major, era-defining pieces of legislation, Congress has continually resorted to its commerce powers.

a politically polarized climate. It must be made clear that labeling the individual mandate a penalty as opposed to a tax was a conscious effort by the Obama administration. Mindful of the politics involved with the ACA in general, and the mandate in particular, overtly stating that noncompliance with the Act would be taxed would be a highly destructive move. This is why the Obama administration invariably referred to the mandate as a penalty or as a tax.

Consequently, in upholding the mandate's constitutionality under Congress's taxing powers, it is possible that Roberts was geared by two foresights. One the one hand, he could severely gut Congress's expanded commerce power, whilst providing the legislature with a constitutional mechanism which has been overlooked for a long period of time. On the other hand, Roberts was able to mitigate the reach of this new power, by situating it in a hostile political framework. This point is made by Jensen, who writes:

> Whatever the legal analysis, the ultimate check against questionable exercises of congressional power is not the Constitution, as important as that document is; the ultimate check is the political process. Many, if not most, of the floats in the parade of horribles hypothesized by critics of the Roberts opinion have no chance of making it to 34th Street; it would be a miracle if Mrs. Walker let them start down Central Park West. Is it likely after *NFIB* that Congress is going to start relying willy-nilly on the taxing power to do things it wants to do that, before *NFIB*, might not have been thought of as implicating the taxing power? I think not. Taxes are not politically popular — how's that for an insight? — and members of Congress who like their jobs aren't going to support one "tax" after another. (Jensen, 1313)

Under this view, the political process would essentially step in to mitigate the reach of Congress's revived regulatory powers through taxation. While the text of Roberts's decision seems to substantially open up the taxing power – especially when Roberts speaks of using taxing to "affect individual conduct" – the political climate, being hostile toward taxes, would limit the reach of the doctrine.

The political process here refers not only toward congressional proceedings, though one can easily picture the heated debates on CSPAN over implementing new taxes for each major piece of legislation. Rather, the political process also refers to the people; arguably, forcing Congress to resort to taxation over commerce, one also increases civiv participation. While most people are not experts in constitutional law, and while the average American is not well-versed in the workings of

the Commerce Clause, people are familiar with taxes. And to an overwhelming degree, Americans are resistant to this concept. Thus, if *Sebelius* indeed has gutted the reach of the Commerce Clause, and if Congress is forced to use its taxing power to pass regulatory legislation in the future, there is a substantially higher propensity that the public will get involved in the issue, as opposed to when Congress uses the Commerce Clause.

If this is in fact what Roberts intended when he decided to uphold the individual mandate through taxation, the reality of the decision is unequivocally much more nefarious than if the Chief Justice simply intended to aggregate the two constitutional doctrines. Specifically, if this reading is true, Roberts is essentially forcing Congress to take a path certain to result in failure. The Chief Justice is not, like Obama, oblivious to the political polarization, the political media, or the public's take on taxes. He knows that Congress, should it overtly try to pass major legislations such as the ACA through the Taxing and Spending Clause, it would get lambasted by the media, scrutinized by the public, and ultimately, the representatives would likely be voted out of office. As Jensen showed in his passage, forcing Congress to use taxation would likely result in a chilling effect. Knowing that the legislation will fail, the elected officials would surely be unlikely to even attempt to bring the proposed bill to a vote, for fear of their jobs. And from the standpoint of national progression, hampering the elected officials in such a manner becomes hugely problematic. Furthermore, there are serious questions to be asked about the entire system of checks and balances, if the judiciary can accrue so much power that it can halt the workings of an entire branch of Government.

D. Implications for Congress – Roberts "Pulling a Marshall"

Operating under the assumption that the political process will substantially limit the reach of Congress's regulatory powers under the Taxing Clause, *Sebelius* significantly affects the legislature's regulatory powers as a whole. Namely, when coupling the fact that Roberts gutted the reach of the Commerce Clause with the reality of his ruling on the Taxing Clause, it becomes apparent that in a deft move, the Chief Justice, channeling Chief Justice Marshall in *Marbury v. Madison*, offered those in favor of the ACA and the mandate a defeat cloaked in victory.

This view is demonstrated by law professor Bradley Joondeph. In his piece "A Marbury for our Time," he argues that:

> The end product [in Sebelius] was—not to put too fine a point on it—brilliant. It was a brilliant act of judicial statesmanship that parallels another landmark decision, *Marbury v. Madison. Marbury* is best known for its defense of judicial review, the authority of the Court to declare acts of Congress (and the executive branch) unconstitutional. But to really understand Marbury, one has to account for the relevant political context. In February 1803, Chief Justice Marshall knew that the Jefferson administration would have defied the Court's judgment in Marbury had the justices ordered Madison to grant Marbury his commission...Thus, Marshall reached the Court's holding—that the Jefferson administration had acted unlawfully, and that the Court had the authority to say so—while ultimately concluding that the Court lacked jurisdiction, forcing it to dismiss the case. Marshall asserted the Court's authority in a muscular fashion, delineating the constitutional constraints on Congress and the President, but without actually challenging the other branches in a concrete fashion. He set down important constitutional markers while reaching an immediate result that favored the incumbent President, shielding the Court from significant political danger or the threat of retribution. (Joondeph)

What Roberts managed to accomplish in *Sebelius* is essentially similar to Chief Justice Marshall's feat in *Marbury*. Namely, he managed to achieve his intended long-term goal by appeasing the immediate interests of the opposition. To clarify, Marshall, while siding with Marbury in the case, in actuality implemented his central vision of a strong Federal Government, through the affirmation of judicial review, and thus, of the authority of the federal sphere. As such, while Jefferson and the Federalists claimed victory in the case, the true winners were Marshall, and the Anti-Federalists who envisioned a strong, centralized Federal Government, which stands superior over the States. Similarly, Chief Justice Roberts, in siding with the Obama Administration in *Sebelius,* in fact achieved three long-term victories for achieving his overarching long-term goal. First, he successfully limited the reach of Congress's commerce power. Secondly, he aggregated the asymmetrical scopes of the Commerce and Taxing Clauses. Finally, Roberts managed to stave off immediate criticism from the political left, as they did in fact receive, at least at face value, the intended outcome in the case. At the same time, Roberts was able to prevent Congress's regulatory powers from substantially expanding through taxation, as he allowed for the issue to be brought

back to the political process. Here, Congress will face resistance toward future regulative legislations, given the hostile political climate surrounding taxes.[69]

Consequently, the outcome of *Sebelius* is a substantial hampering of congressional legislative powers. Through severely limiting the scope of the Commerce Clause, coupled with the limited reach the of the Taxing and Spending Clause, albeit not apparent in Chief Justice Roberts's majority opinion, but through an analysis of the practical realities surrounding the political process, Congress is left in a state of uncertainty. Exactly what mechanisms remain, and to what capacity they do so, is highly difficult to discern given *Sebelius* and the complicated doctrinal history. It is, furthermore, uncertain as to what role the Roberts Court will play vis-a-vis its role as a check on Congress. Will it continue its line of limited deference to Congress, thus continuing its "return" to the Obstructionist Court pre-1937? Or will it blaze a new jurisprudential trail for itself, with a focus on deregulated markets? Only time will answer these questions. For now, what is certain, is that *Sebelius* has raised more questions as to doctrinal consistency and constitutional balance between the three branches of Government than it has answered.

VII. Conclusion

Situating *Sebelius* within the larger doctrinal history of the Commerce and Taxing and Spending Clauses is not a mere intellectual pursuit. Rather, the end of this inquiry is to examine and predict the consequences of the Court's recent landmark ruling on congressional proceedings.

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[69] Having said this, it is important to note that *Sebelius* could very well end up being "another *Bush v. Gore*." In other words, there is a chance that the decision in *Sebelius* is so narrowly tailored that the rationales, and the legal discussions in it only applies to the Commerce Clause and Taxing Clause challenges to the Affordable Care Act, and to the individual mandate. Furthermore, there is also a risk that the Act itself was a "one-and-done." It is noteworthy that whenever one ventures into a predictive analysis (as I am in this paper through the prediction of *Sebelius's* effects on Congress's powers under commerce and taxation), one is invariably operating under a set of assumptions. Most significantly, the assumption here is that Congress will indeed pass a substantial piece of legislation in the future that invokes the Commerce and/or the Taxing Clause. However, there is always a risk that this is not the case; the ACA, with its mandate provision may theoretically have been a one of a kind.

However, these concerns seem unlikely. It is, arguably, a safe bet to say that Congress will attempt to pass another regulative measure again in the future. Whatever the issue may be, it seems unfathomable that *Sebelius* marks the end of legislations passed as exercises of Congress's commerce or taxing powers. As such, any legal challenge to that impending legislation will have to account for *Sebelius* as precedent, one way or another. Ultimately, while *Sebelius* changed the course of Commerce Clause and Taxing Clause jurisprudence, it certainly does not represent the end of the line.

Analyzing *Sebelius* is crucial, as it directly affects Congress's regulatory powers. And as such, the decision immediately affects policy-making and legislation. By delineating the similarities between Chief Justice John Roberts's reasoning in *Sebelius*, especially with its resemblances to the era of the Obstructionist Court allows us to cast a prediction of the future jurisprudential trajectory of the still young Roberts Court, especially in matters dealing with federal legislative authority. I have situated *Sebelius* through thematically arranging the Commerce Clause cases according to the nuances of the Court's reasoning. This novel approach marks a stark departure to conventional scholarship surrounding the Commerce Clause, which typically uses a chronological analysis of the doctrinal history. Admittedly, in devising this framework, I have placed myself on the proverbial "limb" of Commerce Clause scholarship. However, I am steadfast in my conviction that we need a new way of understanding the history of the doctrine. I have intentionally eschewed the box of convention, and placed myself outside it. In doing so, I hope that my contribution to the field will not only shake the ground on which the box stands, but also redefine its lines

By striking down the Government's advanced Commerce Clause argument for the individual mandate, and instead upholding it as a tax, the Chief Justice has severely limited Congress's regulatory powers. In respect to congressional powers to regulate interstate commerce, Roberts, by introducing the novel requirement of whether there already existed economic activity, further limited the Substantial Effects rationale, which has enabled several major pieces of legislation. Moreover, Roberts's decision to limit the Commerce Clause claims forces the Government to resort to its powers to tax. This undoubtedly brings the issue into the realm of public politics. And given the political climate surrounding taxes, it seems unlikely that Congress will be able to pass substantial regulatory legislation through this polarizing, albeit constitutional, mechanism.

While only time exactly how *Sebelius* will come to impact congressional proceedings and policymaking, its immediate consequences seem to be that it limits the legislature's options. This is hugely significant, and problematic for the nation's democratic process. For in a time where

political polarization is rising, while congressional activity is declining, the Supreme Court's decision in *Sebelius* appears to perpetuate the stagnated political climate.

VII. Bibliography

Primary Sources

Bailey v. Drexel Furniture Company (1922). Cornell University Legal Information Institute. Online. <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0259_0020_ZS.html>

Carter v. Carter Coal Company (1936). Cornell University Legal Information Institute. Online. <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0298_0238_ZS.html>

Champion v. Ames (1903). casebriefs.com. Online. <http://www.casebriefs.com/blog/law/constitutional-law/constitutional-law-keyed-to-chemerinsky/the-federal-legislative-power/champion-v-ames>

Gibbons v. Ogden (1824). The Oyez Project at IIT Chicago-Kent College of Law. Online <http://www.oyez.org/cases/1792-1850/1824/1824_0>

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

Hammer v. Dagenhart (1917). The Oyez Project at IIT Chicago-Kent College of Law. Online. <http://www.oyez.org/cases/1901-1939/1917/1917_704>

Heart of Atlanta Motel v. US (1964). The Oyez Project at IIT Chicago-Kent College of Law. Online. <http://www.oyez.org/cases/1960-1969/1964/1964_515>

Hipolite Egg Company v. United States (1911). U.S. Supreme Court Center. Online. <http://supreme.justia.com/cases/federal/us/220/45/>

Katzenbach v. McClung (1964). The Oyez Project at IIT Chicago-Kent College of Law. Online. <http://www.oyez.org/cases/1960-1969/1964/1964_543>

McCulloch v. Maryland (1819). Cornell University Legal Information Institute. Online. <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0017_0316_ZS.html>

Linder v. United States (1925). U.S. Supreme Court Center. Online. <http://supreme.justia.com/cases/federal/us/268/5/case.html>

National Federation of Independent Business v. Sebelius, 567 U.S (2012). Print.

Schechter Poultry Corp. v. United States (1935). Cornell University Legal Information Institute. Online. <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0295_0495_ZS.html>

Stafford v. Wallace (1921). The Oyez Project at IIT Chicago-Kent College of Law. Online. <http://www.oyez.org/cases/1901-1939/1921/1921_687>

Steward Machine v. Davis (1937). casebriefs.com. Online. <http://www.casebriefs.com/blog/law/constitutional-law/constitutional-law-keyed-to-stone/the-powers-of-congress/steward-machine-co-v-davis/>

NLRB v. Jones & Laughlin Steel Corp (1936). The Oyez Project at IIT Chicago-Kent College of Law. Online. <http://www.oyez.org/cases/1901-1939/1936/1936_419>

United States v. Butler (1936). Cornell University Legal Information Institute. Online. <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0317_0111_ZS.html>

United States v. Darby (1940). The Oyez Project at IIT Chicago-Kent College of Law. Online. <http://www.oyez.org/cases/1940-1949/1940/1940_82>.

United States v. E.C. Knight Company (1895). Cornell University Legal Information Institute. Online. <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0156_0001_ZS.html>

United States v. Kahriger (1953). The Oyez Project at IIT Chicago-Kent College of Law. Online. <http://www.oyez.org/cases/1950-1959/1952/1952_167>

United States v. Morrison, 529 U.S. 598 (2000). Print.

United States v. Lopez (1994). The Oyez Project at IIT Chicago-Kent College of Law. Online. <http://www.oyez.org/cases/1990-1999/1994/1994_93_1260>

Wickard v. Filburn (1942). Cornell University Legal Information Institute. Online. <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0317_0111_ZS.html>

Secondary Sources

Boykin, Scott. "The Commerce Clause, American Democracy, and the Affordable Care Act." *Georgetown Journal of Law and Public Policy*. No. 1, Winter 2012. 89-114. Print.

Coenen, Dan T. *Constitutional Law: The Commerce Clause*. Foundation Press, New York, 2004.

Cooter, Robert D & Neil S. Siegel. "Not the Power to Destroy: An Effects Theory of the Tax Power." *Virginia Law Review*. Forthcoming 2012. Draft of July 2012. 1-61. Print.

Denniston, Lyle. "A Reader's Guide to Health Care Ruling." *SCOTUSblog*. June 27, 2012. Online. Date of Access: November 5, 2012. <http://www.scotusblog.com/2012/06/areaders-guide-to-health-care-ruling/>

Esposito, Lisa. "Legal Experts Offer Predictions on Fate of Health-Reform Legislation." *Yahoo HealthDay*. March 29, 2012. Online. Date of Access: November 19, 2012. <http://news.yahoo.com/legal-experts-offer-predictions-fate-health-reform-legislation-200410482.html>

Gunther, Gerald & Kathleen M. Sullivan. *Constitutional Law*, *13th ed.* Foundation Press, New York, 1997.

Hall, Mark. A. "Commerce Clause Challenges to Health Care Reform." University of *Pennsylvania Law Review*, Vol. 159, June 2011. Wake Forest Univ. Legal Studies Paper No. 1747189. 1825-1872. Print.

Jensen, Erik M. "The Taxing Power, The Sixteenth Amendment, and the Meaning of Incomes." *Arizona State Law Journal*, Vol. 33, 2001. 1057-1159. Print.

Jensen, Erik M. "Post-NFIB: Does the Taxing Clause Give Congress Unlimited Power?" *Tax Notes*, No. 136, September 10, 2012. 1309-1316. Print.

Joondeph, Bradley. "A Marbury for our Time." *SCOTUSblog*. June 29, 2012. Online. Date of Access: February 13, 2013. <http://www.scotusblog.com/2012/06/a-marbury-for-our-time/>

Krauthammer, Charles. "Why Roberts Did It." *The Washington Post*. June 28, 2012. Online. Date of Access: February 13, 2013. <http://articles.washingtonpost.com/2012-06-28/opinions/35462722_1_obamacare-health-insurance-national-health-care>

Mears, Bill. "Supreme Court Begins Debating Sweeping Health Care Law." *CNN Justice*. March 26, 2012. Online. Date of Access: November 16, 2012. <http://www.cnn.com/2012/03/26/justice/scotus-health-care>

Monroe, James. "Seven Consequences of the Health Care Ruling." *The New York Times, The Opinion Pages*. June 28, 2012. Online. Date of Access: November 19, 2012. <http://campaignstops.blogs.nytimes.com/2012/06/28/seven-consequences-of-the-health-care-ruling/>

O'Brien, David M. *Constitutional Law and Politics, Volume 1, 8th ed.* W.W. Norton & Company Publishing, 2011.

O'Neill, Timothy, P. "Harlan on My Mind: Chief Justice Roberts and the Affordable Care Act." *California Law Review.* October 21, 2012. Online. Date of Access: March 2, 2013 <http://www.californialawreview.org/articles/harlan-on-my-mind-chief-justice-roberts-and-the-affordable-care-act>

Reinhardt, Uwe. "Awaiting the Supreme Court's Health Care Ruling." *The New York Times*, *Economix Blog*. June 22, 2012. Online. Date of Access: November 19, 2012.<http://economix.blogs.nytimes.com/2012/06/22/awaiting-the-supreme-courts-health-care-ruling/>

Schmidt, Lisa. "Penalty or Tax Backgrounder." *Cornell University Legal Information Institute*. Online. Date of Access: November 16, 2012. <http://blog.law.cornell.edu/healthcarecases/penalty-v-tax/>

Sides, John. "Evaluating Forecasts of the Supreme Court's Health Care Ruling." *The Monkey Cage*. July 19, 2012. Online. Date of Access: February 13, 2012. <http://themonkeycage.org/blog/2012/07/19/evaluating-forecasts-of-the-supreme-courts-health-care-ruling/>

Stearns, Maxwell L. "The New Commerce Clause Doctrine in Game Theoretical Perspective." *Vanderbilt Law Review*, Vol. 60 no. 1. January 2007. 1-74. Print.

Strauss, Daniel. "Toobin: Obama Healthcare Reform Law 'In Grave Trouble.'" *The Hill Blog*. March 27, 2012. Online. Date of Access: November 20, 2012. <http://thehill.com/blogs/blog-briefing-room/news/218427-toobin-obama-healthcare-reform-law-in-grave-grave-trouble>

Toobin, Jeffrey. “To Your Health.” *The New Yorker*. July 9, 2012. Online. Date of Access: November 20, 2012. <http://campaignstops.blogs.nytimes.com/2012/06/28/seven-consequences-of-the-health-care-ruling/>

Tribe, Laurence H. "On Health Care, Justice Will Prevail." *The Opinion Pages, The New York Times*. February 7, 2011. Online. Date of Access: February 13, 2013. <http://www.nytimes.com/2011/02/08/opinion/08tribe.html?_r=1&>