Institutional Influences on the Supreme Court’s Interstate Commerce Clause Jurisprudence

Clark L. Hildabrand

Honors Thesis
Politics Department
Submitted May 9, 2013
First Reader: Professor Morel
Second Reader: Professor Connelly
Table of Contents

Introduction 3
Theory 9
The Marshall Court 18
The Taney Court 26
The New Deal Court 33
The Rehnquist Court 41
The Roberts Court: Other Opinions and Future Direction 60
Conclusion 69
Works Cited 74
Introduction:

On the morning of June 28, 2012, the nation fixed its gaze on the nine individuals in Washington, D.C., who controlled the fate of President Obama’s signature legislative achievement: the Patient Protection and Affordable Care Act (PPACA). The Democratic-controlled legislature managed to steer the bill through Congress after avoiding a filibuster in the Senate with the narrowest of margins and persuading enough pro-life Democratic representatives to support the measure (Stupak, 2012). Nevertheless, as a consequence of numerous lawsuits filed after President Obama signed the bill into law, the unelected and virtually unimpeachable justices of the Supreme Court had the power to uphold or strike down the law mere months before a presidential election. The conservatives on the court technically had a five to four advantage; speculation abounded about the potential for a compromise ruling. Although the four liberal justices would almost certainly vote to uphold the PPACA in opposition to the staunchly conservative Justices Alito and Thomas, the other conservative justices had the potential to flip sides. While Chief Justice Roberts was not on the Court for the Commerce Clause rulings during the Rehnquist years, in *Gonzales v. Raich* (2005) “swing voter” Justice Kennedy and even originalist Justice Scalia had displayed sympathy for the regulation of noneconomic activities when necessary for maintaining Congress’s regulation of interstate commerce. In short, the country was left to wonder what was transpiring inside the walls of our temple to “equal justice under law.”
Citizen activists gathered outside the courthouse in the early morning hours waving banners and leading chants both in support and in opposition to the PPACA. The hour came. The court came to order. Chief Justice Roberts delivered his opinion. Immediately, reporters rushed to break the news. On first impression, the Supreme Court seemed to find the individual mandate, the controversial cornerstone of the PPACA requiring individuals to acquire health insurance, not justified under the Interstate Commerce Clause and thus unconstitutional as CNN and Fox News initially reported (Stelter, 2012). However, on closer examination, the true complexity of the case was revealed for, although Chief Justice Roberts and the four dissenting conservatives found the individual mandate not justified under the Commerce Clause, the mandate survived as a valid exercise of the Taxing Power (Liptak, 2012). The Interstate Commerce Clause, part of the general Commerce Clause in Article I, Section 8, Clause 3 of the United States Constitution, grants Congress the ability to regulate “commerce among the several States,” and supporters of federal power had relied on this clause to grant increasingly expansive regulatory powers to Congress. Besides Solicitor General Don Verrilli, whose shaky performance during oral arguments had originally drawn harsh criticism in the legal community, few commentators had put much stock in the Taxing Power argument, but Chief Justice Roberts relied on this line of reasoning to uphold the individual mandate while at the same time allowing states to abstain from the PPACA’s expansion of Medicaid (Toobin, 2012, p. 284).

This apparent compromise decision left numerous questions unanswered in the mind of the nation. First of all, the seemingly strained reasoning of the controlling opinion held that the PPACA was not a tax for statutory purposes but was in fact a tax for constitutional purposes. The Anti-Injunction Act, which Congress originally enacted in 1867, prohibits bringing lawsuits “for the purpose of restraining the assessment or collection of any tax” and would have thus
prohibited the Supreme Court from ruling on the PPACA until the individual mandate actually came into effect (Roberts, 2012, p. 12). The Chief Justice correctly pointed to the sections of the PPACA that clearly defined the payment for not obtaining health insurance as a penalty, an issue President Obama and both parties in Congress were in agreement over (Tau, 2012). At this point in his opinion, Chief Justice Roberts unexpectedly made a crucial distinction between taxes for statutory and constitutional purposes. Although Congress can define a tax in any way it chooses for statutory purposes, the Chief Justice claimed that the judiciary reserved the right to judge the essence of the individual mandate “penalty” and found that it is a tax for constitutional purposes primarily because the Secretary of the Treasury Department must “use the same ‘methodology and procedures’ to collect the penalty that he uses to collect taxes” (Roberts, 2012, p. 14). Although this novel distinction may carry some weight as a legal technicality, the apparent contradiction of a penalty which is both a tax and not a tax at the same time left countless citizens confused.

Furthermore, conservative analysts and Republicans wondered how they had come so close to victory only to have it slip out of their fingers. Justice Kennedy had seemed like the conservative most likely to jump ship and forge a compromise with the liberals on the court, yet he signed onto the forceful joint dissent even when his defection would have created a 6-3 verdict and thus a stronger precedent. The controlling opinion even seems to use Justice Kennedy’s words during oral argument in an apparent attempt to court his support (Toobin, 2012, p. 289). Nevertheless, Chief Justice Roberts, a clear conservative who had worked for both the Reagan and George H.W. Bush administrations, chose to uphold the PPACA when he could have just as easily struck down this seminal achievement of the Obama administration. Several weeks before the Supreme Court delivered its verdict, gossip (potentially from Supreme Court
clerks themselves) had begun to spread that the Chief Justice had reconsidered an initial decision to strike down the PPACA in its entirety (Crawford, 2012). Conservative commentators such as George Will had been complaining about political pressure on the Chief Justice from Democrats ranging from Senator Leahy (D-VT) of the Senate Committee on the Judiciary to President Obama himself, and their efforts ultimately appeared successful in Chief Justice Roberts’ final opinion. (Will, 2012).

The final major question lingering in the mind of the nation was how National Federation of Independent Business (NFIB) v. Sebelius (2012) would affect future decisions of the Supreme Court. During the years of the Rehnquist Court, narrow 5-4 majorities had managed to reestablish significant limitations on the exercise of the Commerce Clause for the first time since the New Deal. In United States v. Lopez (1995) and United States v. Morrison (2000), the Supreme Court had stricken down the Gun-Free School Zones Act of 1990 and the Violence Against Women Act of 1994 respectively since the problems addressed in these federal laws did not substantially relate to interstate commerce and were non-economic in nature. However, Gonzales v. Raich (2005) had put a temporary end to the federalist current in Commerce Clause jurisprudence. In the aftermath of NFIB v. Sebelius, commentators struggled to understand whether Chief Justice Roberts’ opinion revealed a deep unwillingness to further limit federal powers or merely reflected his desire to avoid embroiling the Supreme Court in the broader political debate surrounding the PPACA. For example, on the day of the decision, Professor Randy Barnett of the Georgetown University Law Center noted that the case represented a “weird victory for federalism” since the Supreme Court found the individual mandate unconstitutional under the Interstate Commerce Clause and recognized the need for some limitations to the federal government’s powers (Barnett, 2012). In addition, Ilya Shapiro, a senior
fellow at the libertarian Cato Institute who had filed *amicus curiae* briefs regarding this case, claimed the day after the decision that liberals had merely won a Pyrrhic victory and that federalists had “won everything but the case” with even liberal Justices Breyer and Kagan ruling that states could opt-out of the Medicaid expansion (Shapiro, 2012). From a strictly legal standpoint, Chief Justice Roberts’ opinion still established significant precedents for future limitations of federal power.

In addition to the immediate legal concerns of *NFIB v. Sebelius*, Chief Justice Roberts may have reaffirmed the Supreme Court’s nonpolitical orientation and given it substantial institutional sway for future cases. This concern may explain why the Chief Justice may have temporary struck a deal with the liberal justices in order to gain a firm position in future disputes over the limits of federal power. Liberal commentator Jeffrey Toobin, the senior legal analyst at CNN, claims that Chief Justice Roberts has “dual goals for his tenure as chief justice—to push his own ideological agenda but also to preserve the Court’s place as a respected arbiter of the nation’s disputes” (Toobin, 2012, p. 286). Although the case briefly granted victory to Obama and congressional Democrats, the Chief Justice preserved his image as an unbiased umpire in the mind of the nation which could give the Supreme Court the leeway necessary for more conservative rulings in the future. Perhaps for this reason, Justice Thomas, whose dissent clearly shows his jurisprudential disagreement with the controlling opinion, stated at a dinner in Washington for Yale Law School alumni on the very night of the ruling that Chief Justice Roberts “handled it just right” (Toobin, 2012, p. 296). However, if Chief Justice Roberts’ opinion does not solely represent his own legal beliefs and is in some way influenced by institutional concerns, one must consider whether or not such considerations are appropriate or advisable in such divisive cases.
To address these questions regarding the impact of institutional factors on the Supreme Court in *NFIB v. Sebelius*, this thesis will first examine two competing academic theories on how judges decide cases: the attitudinal and strategic views. While the attitudinal view claims justices only rule based on their deeply held political beliefs and legal philosophies, the strategic view factors in the influence of institutional factors such as the Supreme Court’s relationship with Congress, the presidency, and the states. After briefly considering and contrasting these competing theories, this thesis will apply them to several cases significant in the development of Interstate Commerce Clause jurisprudence. The first case-study delves into precedents set by the Marshall Court, such as *Gibbons v. Ogden* (1824), *Brown v. Maryland* (1827), and *Willson v. Black-Bird Creek Marsh Company* (1829), to explore the Federalist Chief Justice’s struggle to empower the national government while at the same time respecting the dominant position of the states. This struggle between the states and federal government continued with the development of the Dormant Commerce Clause doctrine in the Passenger Cases (1849) and *Cooley v. Board of Wardens* (1852) as individual justices seemed to modify their opinions enough to avoid a constitutional struggle over slavery and other issues. The next major shift in Interstate Commerce Clause jurisprudence occurred with the defection of a different Justice Roberts in *National Labor Relations Board (NLRB) v. Jones & Laughlin Steel Corporation* (1937) which sharply contrasted with the majority opinion he signed onto just a year previously in *Carter v. Carter Coal Company* (1936). Franklin Delano Roosevelt’s landslide electoral victory in 1936 and pressure on the Supreme Court resulted in an expansive interpretation of the Interstate Commerce Clause which was not challenged until the Rehnquist Court. As a final historic case-study, this thesis attempts to explain how attitudinal and institutional factors played a role both in the Rehnquist Court’s initial limitation of federal power and Justices Kennedy and Scalia’s qualified support of
the use of the Commerce Clause in *Gonzales v. Raich*. This theoretical and historic approach establishes the necessary and vital role institutional factors play in Interstate Commerce Clause cases and elucidates Chief Justice Roberts’ opinion in *NFIB v. Sebelius* and his vision for the future of the Court. Although institutional factors likely contributed to his unwillingness to sacrifice the Supreme Court’s reputation for political independence for the short-term victory of overturning a major success of President Obama and a Democratic Congress, the Chief Justice’s controlling opinion indicates his long-term commitment to curbing, at least slightly, the expansion of federal power through the Interstate Commerce Clause.

**Theory:**

In basic civics courses students often learn a simple demarcation of the duties of the different branches: the legislature makes the laws, the executive enforces the laws, and the judiciary interprets the laws. This delineation of roles places a strong emphasis on the necessity for judges to approach cases evenhandedly and without bias. One early expression of this interpretation of a judge’s role comes from Francis Bacon, who served as the Attorney General and Lord Chancellor of England, when he wrote: “Judges ought to remember that their office is *jus dicere*, and not *jus dare*—to interpret law, and not to make law, or give law” (Whately, 1857, p. 511). The entire layout and procedure of a courtroom tend to emphasize the commanding position of the august judge clothed in a black robe to interpret the law and pass its judgment on those before him. While this civics-class view of the judiciary may effectively describe the behavior of trial judges applying the collective wisdom of common law and precedents to relatively straightforward cases, legal scholars tend to acknowledge the greater levels of subtlety in the appellate court decision-making process. The two primary academic theories addressing judicial decision-making are the attitudinal view and the strategic view. Although the attitudinal
view helps explain how deeply-held value preferences influence judges’ decisions, the strategic view goes a step further and claims that institutional concerns may make the difference in extremely close and contentious cases.

The attitudinal model claims that judges’ ingrained legal and political beliefs and values determine their decisions regardless of strategic considerations. Although the civics-class view may lead us to think otherwise, for better or worse judges are still individuals with unique idiosyncrasies, aspirations, and worldviews. While deep knowledge of the law, a sterling reputation, and legal experience are all common traits of a judge, the key cases before a judge often require more than a simple consultation of law books or a straightforward interpretation of a statute. Instead, judges must often make value judgments as they reconcile conflicting statutes and explicate vague constitutional amendments. Many of the most famous cases in U.S. legal history, such as *McCulloch v. Maryland* (1819) and *Brown v. Board of Education* (1954), required judges to make value judgments about the distribution of economic power between the states and the federal government and the treatment of minorities.

In such precedent-setting cases, the justices of the Supreme Court did not merely interpret the law but redefined aspects of our republic’s political and social order. The choices involved in overturning precedents or resolving an issue of first impression often boil down to the justices’ values. Although previous cases may offer insight into potential solutions, the very decision of which precedents to rely on depends on the justices’ values and legal philosophy. Jeffery Segal and Harold Spaeth, two key proponents of the attitudinal view, described it succinctly in their book *The Supreme Court and the Attitudinal Model*: “[The attitudinal model] holds that Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely
conservative; [Thurgood] Marshall voted the way he did because he is extremely liberal” (Segal and Spaeth, 1993, p. 65).

This attitudinal view of Supreme Court decisions accounts for the value judgments of the different personalities on the Court, but flies in the face of the public’s impression of the judiciary. Recognizing the political opinions of the Supreme Court justices logically leads to the realization that the judiciary is not only a legal institution but also a political one. In many cases involving “political questions,” the Supreme Court has deferred to the political branches which often possess more specialized knowledge in certain fields and can aggregate the preferences of the nation (Rogers, 2006, p. 24). However, in many precedent-setting cases the buck stops at the Supreme Court in order to resolve pressing constitutional disputes and reconcile conflicting opinions of inferior courts. In such cases the Supreme Court makes more than simple legal interpretations and becomes involved in contentious political questions as explained by Robert Dahl: “The Court cannot act strictly as a legal institution. It must, that is to say, choose among controversial alternatives of public policy by appealing to at least some criteria of acceptability on questions of fact and value that cannot be found in or deduced from precedent, statute, and Constitution. It is in this sense that the Court is a national policy-maker” (Dahl, 1957, p. 281). At the same time, the legitimacy of the Supreme Court’s decisions depends on the “fiction” that it is exclusively a legal institution (Dahl, 1957, p. 280).

Nevertheless, evidence from both justices’ words and deeds supports the attitudinal view’s claim that the Supreme Court is also a political institution. Justices on the Supreme Court often have an extensive record of political involvement, and presidents are careful to appoint justices expected to uphold their broad political agendas (Dahl, 1957, p. 285). While presidents used to tap Senators and other prominent politicians for the Court quite frequently, recent
Supreme Court appointees have often served in presidential administrations. For example, Justice Kagan was the Solicitor General in the Obama administration before he nominated her for the Supreme Court. Past justices have also testified to the role played by political values and legal philosophies in the judicial decision-making process. Justice Benjamin Cardozo for instance once wrote that:

“There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them— inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs. ... In this mental background every problem finds it setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own” (Cardozo, 1921, p. 12-13).

The inability of judges to escape their own worldviews lends credence to the attitudinal view since even Supreme Court justices cannot decide cases except through the lenses of their political and legal philosophies.

Wizened political and legal commentators recognize this fact and base predictions of judicial outcomes not solely on complex legal arguments but also on the ideological makeup of the Court for “all justices have a political ideology as well as a legal philosophy” (Toobin, 2012, p. 285). For example, originalist Justice Scalia is unlikely to suddenly base his opinions on international legal precedents rather than an interpretation of the Founding Fathers and his conservative political beliefs. Furthermore, originalist and semi-libertarian Justice Thomas has often dissented vociferously or consistently advanced legal ideas which find little support from the rest of the Court. One of many examples of Justice Thomas’ willingness to cast aside commonly-accepted precedent came in Morse v. Frederick (1997) when he relied on a nineteenth-century concept that school officials act in the place of parents (in locis parentis) as
justification for his rejection of *Tinker v. Des Moines Independent Community School District* (1969), a precedent both the majority opinion and the dissent relied upon. Such behavior on the part of these current Supreme Court justices supports the attitudinal view’s claim that judges decide cases based on political and legal philosophies regardless of other actors’ responses.

While this attitudinal view provides substantial insight into the judicial decision-making process, if judges are generally committed to a political ideology or legal philosophy, they may be willing to temper their opinions in order to achieve more desirable policy results. This idea that judges’ actions are predicated on the expected behavior of other actors and institutions forms the basis for the strategic view of judicial decision-making as John Ferejohn states: “The federal judiciary is institutionally dependent on Congress and the president, for jurisdiction, rules, and the execution of judicial orders” (Ferejohn, 1999, p. 355). Not only will radical or lone opinions fail to exert the same precedential force as majority opinions, but justices also face the possibility of the political branches ignoring their rulings. Walter Murphy, the pioneering scholar for the strategic view, and others have noted the myriad of ways Congress and the presidency can undermine or overrule unpopular Supreme Court rulings such as through the withdrawal of jurisdiction, the passage of new legislation, the addition of constitutional amendments, and the refusal to enforce such decisions (Murphy, 1964). Although judges are still “policy-seeking political actors” in the strategic view, other institutional factors constrain their available policy options (Martin, 2006, p. 4).

Examples of the institutional factors constraining the judiciary stretch all the way back to one of the earliest Supreme Court cases: *Chisholm v. Georgia* (1793). In this case, a citizen of South Carolina sued the state of Georgia for the value of goods he had supplied during the Revolutionary War, but Georgia claimed sovereign immunity and refused to appear before the
Supreme Court. The Federalists on the Supreme Court, such as Chief Justice John Jay and Associate Justice James Wilson, advanced their fiercely nationalist agenda by claiming sovereignty resided in the people of the United States as a whole and granted the federal judiciary the power to hear suits between private citizens and the states (Hobson, 1999, p. 54). Antifederalists and even moderate Federalists throughout the country were shocked by this interpretation of the Constitution and quickly proposed what would become the 11th Amendment, which was quickly passed by Congress on March 17, 1974 and ratified by the necessary twelve states less than one year later (Clark, 2010, p. 1893). The 11th Amendment effectively overturned the Court’s ruling in *Chisholm v. Georgia* and limited the federal courts’ jurisdiction. This case also reveals the important role played by states as institutional actors. Not only was the state of Georgia a key participant in the case, but seven state legislatures also took action on resolutions either explicitly or implicitly criticizing the Supreme Court’s ruling (Clark, 2010, p. 1890). By pressuring the political branches, bringing cases in the federal court system, and threatening to ignore unfavorable rulings the states can also act as an institutional force limiting the Supreme Court’s policy options.

The balance of power between the states and the federal government has played an integral role in many of the Supreme Court’s Interstate Commerce Clause decisions, but the relative strength of the Supreme Court in comparison to the political branches and the states has varied during the years. Despite the concerns of the Antifederalists about the judiciary’s antidemocratic nature, the Founding Fathers intended the judiciary to be the weakest of the three branches of the federal government as Alexander Hamilton writes in *The Federalist*, No. 78: “The judiciary on the contrary has no influence over either sword or the purse, no direction either of the strength or wealth of the society, and can take no active resolution whatever. … The
The early Supreme Court’s continued deference to Congress in divisive political issues was one manifestation of its inability to overcome the power of the political branches, and until *Dred Scott v. Sandford* (1957), only the landmark *Marbury v. Madison* (1803), which achieved the results desired by the Jefferson administration although President Jefferson strongly disagreed in the Court’s reasoning, had held an act of Congress unconstitutional (U.S. Government Printing Office, 2002, p. 2119). Several studies on the Supreme Court have supported the idea that the Supreme Court uses deference to Congress and the refusal to grant *certiorari* as tools to avoid fighting losing battles with the political branches and the states (Vanberg, p. 91, 2006). Due to the myriad of weapons at the disposal of the political branches, the Supreme Court is not only likely to lose such a direct institutional struggle, but it also jeopardizes its legitimacy as a legal institution “if it flagrantly opposes the major policies of the dominant alliance” (Dahl, 1957, p. 293). While federal judges are in little to no risk of impeachment, even they must feel at least some concern for their public image as Justice Robert H. Jackson stated in *Craig v. Harney* (1947): “I do not know whether it is the view of the Court that a judge must be thick-skinned or just thick-headed, but nothing in my experience or
observation confirms the idea that he is insensitive to publicity. Who does not prefer good to ill report of his work?” (Jackson, 1947, p. 396). Justices of the Supreme Court would certainly rather see a positive public response to their contributions to policy making, and the reputation of the Court is one sign either of their success or failure, especially for the Chief Justice who must lead the Supreme Court and serve as the embodiment of the judiciary.

Over the years, the Supreme Court bided its time and slowly built up its legitimacy in the eyes of the American people. This ascendency view of the Court’s history claims that, through the exercise of such discretion, the Supreme Court “as an institution has steadily grown in authority and prestige” in the words of Chief Justice Rehnquist (Rehnquist, 2001, p. 279-280). The power vacuum following President Lincoln’s death along with the expansive Reconstruction amendments reinvigorated the Supreme Court, and from 1865 to 2002, the Supreme Court held 156 acts of Congress unconstitutional (Government Printing Office, 2002). While the Supreme Court may be on the ascendency historically, this development only enhances it position relative to other institutions and does not entirely negate the many limits on its policy-setting power. Although proponents of strong judicial independence may at times criticize its unwillingness to confront the democratic branches and administer ideologically pure rulings, the overall weakness of the Supreme Court ensures that our government remains responsive to the people and does not lag too far behind the will of the majority. One potential explanation of the Supreme Court’s apparent ascendency is that the Court is usually allied ideologically with at least one political branch and can thus overturn past legislation without fear of significant reprisal. Due to the political nature of the appointment process, the Supreme Court is inevitably part of the dominant national alliance “except for short-lived transitional periods,” such as the New Deal, and can
facilitate the creation of new legislative paradigms by ruling older statutes unconstitutional (Dahl, 1957, p. 293).

Especially in Interstate Commerce Clause cases, the Court is likely to find itself as the actor determining the proper balance between the states and the political branches of the federal government. Although the political and legal attitudes of the Supreme Court justices offer starting points for determining the Court’s judgments, the Court’s location in this debate relative to the other institutions has also affected its ability to shift the ideological equilibrium. Throughout the rest of this thesis, I will show how the relative strength and popularity of the institutions has affected the Supreme Court’s available policy options. The Court is by no means entirely consistent in its jurisprudence and has at times been the most nationalist institution, such as during the Jay and Marshall Courts, and at other times the sole holdout in favor of limiting the federal government, such as during the New Deal before the Supreme Court’s acquiescence to FDR and the popular Democratic Congress. For some justices, the attitudinal view serves as the best model for their uncompromising devotion to political and legal philosophies while certain justices willing to assent to institutional factors and uphold the Court’s reputation as a legal body have cast the key votes necessary to resolve ideological disagreements within the Supreme Court. Despite the commonly held civics-class view of the Supreme Court, simple interpretation alone is not enough to resolve these fundamental disagreements, and justices have relied at least in part on value judgments and respect for democratically-elected institutional actors. The analysis which follows attempts to unravel the effects of attitudes and institutions on historic Interstate Commerce Clause decisions and applies this knowledge to *NFIB v. Sebelius* in order to understand Chief Justice Roberts’ controlling opinion and the future direction of the Court. I do not claim some telepathic insight into the justices’ minds and cannot be entirely certain of their
thought processes, but the justices’ opinions often reveal the competition of various political and
legal values along with the consideration of other institutions’ perspectives and powers.

The Marshall Court

In its early years, the Supreme Court proved as weak an institution as the Founders had
predicted. A constitutional amendment had overturned the Jay Court’s first significant case,
*Chisholm v. Georgia*, and the brief tenures of subsequent Chief Justices John Rutledge, who was
simply a recess appointment rejected by the Senate, and Oliver Ellsworth left the Court with an
uncharacteristic degree of instability. President George Washington appointed a total of three
Chief Justices to the Supreme Court while not a single president since then has appointed more
than one Chief Justice. When the time came for President John Adams to nominate a Chief
Justice to replace Chief Justice Ellsworth, John Jay turned down the offer despite his
confirmation by the Senate with the statement that the Supreme Court lacked “energy, weight
and dignity” (Fox, 2006). For a former Chief Justice to remark so disparagingly on the Supreme
Court surely signifies one of the lowest ebbs in the Court’s institutional power and reputation.
However, the nomination of John Marshall, who had developed his commitment to the nation
through service in the Continental Army including at Valley Forge, as a Federalist satisfactory
enough for Senate confirmation would work a sea change in the operation of the Supreme Court
(Frankfurter, 1937, p. 14). This longest-serving Chief Justice would strengthen both the Supreme
Court and the federal government itself as instruments capable of checking and overruling state
power. In the realm of the Interstate Commerce Clause, Chief Justice Marshall carefully left his
nationalistic mark through cases such as *Gibbons v. Ogden* (1824) and *Brown v. Maryland*
(1827) while at the same time refraining from sparring with the states too frequently as *Willson
v. Blackbird Marsh Company* (1829) demonstrates. Although Chief Justice Marshall at times
expressed his nationalistic attitudes, his narrow legal reasoning avoided prompting the states to contest the will of the Court.

_Gibbons v. Ogden_ was the first case involving the Interstate Commerce Clause to reach the Supreme Court and thus left Chief Justice Marshall with the perplexing difficulty of deciding this matter of first impression (Frankfurter, 1937, p. 12). The state of New York had granted a monopoly of steam navigation to Robert Fulton which prohibited non-state-licensed steam boats from operating on state waters. Thomas Gibson, who operated steamboats between New Jersey and Manhattan with a federal license, brought a suit against Aaron Ogden, who operated with a Fulton-Livingston license (Baxter, 1972, p. 104). This lawsuit forced the Supreme Court finally to consider the relationship between state and federal power over interstate commerce. Although even conservative commentators such as Randy Barnett now accept federal supremacy in the realm of interstate navigation, the issue was contentious for the fledging republic (Barnett, 2001, p. 16). One of the primary impetuses behind the replacement of the Articles of Confederation with the Constitution had been the tendency of states to pass restrictions on trade designed to support local industries and businesses. Failure to pass statutes responsive to other states’ regulations would weaken the state’s relative position. Although this passage of such laws restricting interstate commerce made sense for each state from a game theory perspective, their overall effect was to hinder commercial growth throughout the confederation (Carruba and Rogers, 2006, p. 102). For purposes of free trade and regulatory simplicity, Federalists pushed for the adoption of the Interstate Commerce Clause as Alexander Hamilton states in _The Federalist_ No. 11: “An unrestrained intercourse between the States themselves will advance the trade of each, by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in
every part will be replenished, and will acquire additional motion and vigour” (Hamilton, 1787, p. 63). From the perspective of Federalists such as Hamilton and Chief Justice Marshall, the grant of interstate regulatory power to the federal government would strengthen both the states and the entire nation.

However, the Supreme Court’s verdict in the case was less than certain due to the conflict between various interpretations of federal jurisdiction. On one extreme was the idea that jurisdiction is exclusive to the federal government, which means that only Congress can make laws and regulations regarding certain subjects. Federalists clearly understood the jurisdiction of the federal government as exclusive at least for some areas the Constitution specifically delineated. For example, Alexander Hamilton argues in The Federalist: No. 32 that the relinquishment of partial sovereignty by the states gives the federal government exclusive jurisdiction specifically over imports and exports and more broadly “where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally contradictory” (Hamilton, 1788, p. 182). At the same time, states retained a good deal of sovereignty with the possibility of concurrent jurisdiction in some cases where the state and federal government might share authority. Even Alexander Hamilton acknowledged that concurrent jurisdiction was a “necessity” in some cases, and Thomas Emmet, one of Aaron Ogden’s attorneys, claimed during oral argument that the states should have fully concurrent jurisdiction over interstate commerce due to continued state legislation on the subject (Hamilton, 1788, p. 184) (Baxter, 1972, p. 104).
In support of Thomas Gibbons, the renowned orator Daniel Webster provided the Court with three viable arguments in favor of enhanced federal authority over interstate commerce. The most restrained argument was that, pursuant to Article VI, Section 2 of the Constitution, federal laws were supreme over conflicting state laws (Frankfurter, 1937, p. 23). However, Webster believed that a reliance on concurrent jurisdiction would lead to a confusing array of conflicting local, state, and federal regulations and therefore also argued for exclusive federal jurisdiction in the “higher branches of commerce” or, even more ambitiously, for exclusive federal jurisdiction even in the absence of current congressional legislation for all commercial activities (Baxter, 1972, p. 104). Even though Chief Justice Marshall nominally dismisses this exclusivity argument in his opinion, he clearly favors this idea throughout his opinion (Marshall, 1824, p. 200). For example, at one point the Chief Justice argues that the state laws regulating navigation at the time of the Constitution’s ratification are of no effect without congressional approval as he states: “The existing system would not be applicable to the new state of things unless expressly applied to it by Congress” (Marshall, 1824, p. 208). Simply put, sovereignty over interstate commerce was ceded to the federal government with the ratification of the Constitution. Furthermore, the expansive definition of commerce to include even intrastate navigation reveals Chief Justice Marshall’s broad view of federal authority (Baxter, 1972, p. 104). The Chief Justice held that any activity (in this case navigation) was under the regulatory power of the federal government if it “may be in any manner connected with ‘commerce with foreign nations, or among the several States, or with the Indian tribes’” (Marshall, 1824, p. 208). These sections of the Chief Justice’s opinion would serve as precedents for more expansive regulatory doctrines including the Dormant Commerce Clause doctrine and later the substantial effects test (Frankfurter, 1937, p. 16).
However, the Chief Justice avoided deciding the case with the idea of an implicit exclusivity and instead relied on the direct conflict between the state law and the congressional Coastal Licensing Act of 1793. Such a holding rendered Chief Justice Marshall’s discussion of exclusivity “logically irrelevant” according to Justice Frankfurter and leaves commentators puzzled as to why the Chief Justice would rule in a manner inconsistent with his true attitudes on the Interstate Commerce Clause (Frankfurter, 1937, p. 18). Further complicating this question was Justice William Johnson’s concurrence stridently supporting Daniel Webster’s argument “in favour of the exclusive grants to Congress of power over commerce” (Johnson, 1824, p. 236). Similar to Chief Justice Marshall’s statements regarding exclusivity, Justice Johnson claimed that state commercial regulations “dropped lifeless from their statute books for want of the sustaining power that had been relinquished to Congress” upon ratification of the Constitution (Johnson, 1824, p. 226). Given Chief Justice Marshall’s renowned sway over his Associate Justices and “the popular disfavor of the steamboat monopoly,” he likely could have persuaded at least two of them to join with Justice Johnson and him in support of exclusive federal jurisdiction (Frankfurter, 1937, p. 16). Instead the Chief Justice’s pragmatism superseded his underlying attitudes toward the Commerce Clause, and he avoided holding based on exclusivity. The Supreme Court as an institution was still too weak to challenge the power of the states even with the support of Congress. In addition, a ruling for exclusive federal jurisdiction even regarding intrastate behavior might have sparked fear that the Supreme Court had the potential to rule on slavery within the states as well (Baxter, 1972, p. 104). Chief Justice Marshall’s opinion indeed notes the controversial issue of slavery and acknowledges that Article I, Section 9 of the Constitution granted Congress the ability to regulate the importation of slaves beginning in 1808 (Marshall, 1824, p. 206-207). Slave states would have responded vociferously against *Gibbons v.*
had they thought the ruling opened the door for the Supreme Court to rule on interstate or intrastate slave trade activities. This institutional check on the Supreme Court’s power likely encouraged the Chief Justice to rule on the narrow conflict between the state law and the Coastal Licensing Act.

Chief Justice Marshall did not want to shock the states with a sudden expansion of the powers of both the federal government and the Supreme Court and instead progressed his nationalist view of the Interstate Commerce Clause gradually through subsequent decisions such as *Brown v. Maryland*. The case focused on the question of “whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state before he shall be permitted to sell a bale or package so imported” (Marshall, 1827, p. 436). Importers advanced the arguments that such licenses effectively acted as import tariffs, which Article I, Section 10 of the Constitution specifically banned, and that such state licenses interfered with the federal government’s Commerce Clause powers (Steamer, 1999, p. 36). After holding that such licenses did in fact violate Article I, Section 10, Chief Justice Marshall could have refrained from commenting on the Commerce Clause argument, but instead he cited the precedent of *Gibbons v. Ogden* and repeated the claim that the federal government’s ability to regulate international and interstate commerce “was declared to be complete in itself and to acknowledge no limitations other than are prescribed by the Constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior” (Marshall, 1827, p. 446). To provide his reasoning on the Commerce Clause question with a little more force, the Chief Justice once again relied on an allegedly conflicting federal statute (Marshall, 1827, p. 448). However, legal scholars such as Justice Frankfurter have criticized this attempt to find a conflict between the state licensing
statute and federal tariffs as he states: “Chief Justice Marshall first construed the federal tariff act as conferring upon the importer the right to sell his goods in the original packages free of local taxes, and then found the state Act in conflict with this gloss upon the federal tariff. Here again, as in Gibbons v. Ogden, Marshall reaches important constitutional results by esoteric statutory construction” (Frankfurter, 1937, p. 20). Even though Chief Justice Marshall was not required to rule on the Commerce Clause question, he took the opportunity provided by Brown v. Maryland to reiterate his nationalist views while still avoiding a holding based on federal exclusivity.

However, the Chief Justice’s opinions on the Interstate Commerce Clause, even when expressed more temperately than his underlying attitudes, began to face harsher criticism, and he began to pursue his judicial aims by granting a seeming victory to the states. Justice Smith Thompson, a Democratic-Republican who had not participated in the Gibbons v. Ogden decision, harshly critiqued the Chief Justice’s opinion in a lone dissent. The Associate Justice’s primary concern was that Chief Justice Marshall’s exposition of the Commerce Clause left little power to the state governments as Justice Thompson indicates with the question: “If such be the division of power between the general and state governments in relation to commerce, where is the line to be drawn between internal and external commerce?” (Thompson, 1827, p. 453). The lack of a bright line threatened intrastate commerce and was a far cry from The Federalist No. 32, which Justice Thompson interpreted as only granting the federal government exclusive jurisdiction with regard to import and export duties (Thompson, 1827, p. 456). Indeed, subsequent Supreme Court decisions, including Woodruff v. Parham (1869) and Michelin Tire Corporation v. Wages (1976), would later overturn Chief Justice Marshall’s “original package” doctrine as it applied to interstate commerce (Steamer, 1999, p. 36-37). The Chief Justice was
Clark L. Hildabrand 25

surely not oblivious to the criticism of Justice Thompson or the states infuriated at the
invalidation of yet another commercial regulation.

Indeed, his next major Interstate Commerce Clause decision upheld a Delaware statute
while at the same time providing the basis for significant future expansion of federal regulatory
unanimous court that a Delaware statute allowing a company to construct a dam across a minor
navigable stream for purposes of draining a swamp was constitutional (Wiecek, 1999, p. 334).
Seemingly in opposition to his earlier nationalist decisions, this ruling supported the developing
idea that states retained police powers to further the health and safety of their inhabitants
(Frankfurter, 1937, p. 27). For example, Chief Justice Marshall mentions that “the health of the
inhabitants probably improved” thanks to the draining of the swamp (Marshall, 1829, p. 251).
Such a holding likely appeased the Chief Justice’s critics and the states who were worried about
his tendency to strike down state laws. In this case, Chief Justice Marshall chose not to interpret
the federal Coastal Licensing Act as broadly as in *Gibbons v. Ogden* and instead found that the
Delaware statute was not in conflict with any extant federal law (Wiecek, 1999, p. 334). While
this decision dismisses the idea of completely exclusive federal jurisdiction which the Chief
Justice had alluded to in earlier cases, *Willson v. Black Bird Creek Marsh Co.* more firmly
establishes the idea that a state or local statute can still run afoul of Congress’s “dormant”
Commerce Clause power. In the crucial crystallization of the holding, Chief Justice Marshall
states that the Delaware law cannot “be considered as repugnant to the power to regulate
commerce in its dormant State, or as being in conflict with any law passed on the subject”
(Marshall, 1829, p. 252). Thus, as the Supreme Court would later hold in several cases following
the development of the Dormant Commerce Clause doctrine, state and local regulations may in
fact hamper interstate commerce to such an extent that they are unconstitutional despite the lack of congressional action. Although the Chief Justice’s opinion seemingly placates advocates of states’ concurrent jurisdiction, it in fact provides an avenue for the further expansion of federal power.

As these cases from the Marshall Court indicate, Chief Justice Marshall was not unmindful of the concerns of other institutional actors. The Chief Justice cautiously and gradually advanced the power of the national government to regulate interstate commerce through opinions focused on the allegedly direct conflict between state and national statutes. In such cases, the supremacy of federal regulations provided a relatively uncontroversial method for the Chief Justice to ensure the acceptance of his opinions. When *Brown v. Maryland* sparked criticism for the potential for federal jurisdictional exclusivity even in intrastate commerce, the Chief Justice seemingly backtracked and actually upheld a state law in *Willson v. Black Bird Creek Marsh Co.*, but even such a decision provided the Chief Justice with an opportunity for expanding federal jurisdiction when Congress had not legislated regarding an aspect of interstate commerce.

**The Taney Court**

Although originally President Andrew Jackson intended to appoint Roger Taney as an Associate Justice of the Supreme Court, the death of Chief Justice Marshall in 1835 left the Supreme Court in need of new leadership (Frankfurter, 1937, p. 46). While unable to control the Court as firmly as his predecessor, Chief Justice Taney would serve the second-longest term in that position’s history from 1836 to 1864. The issue of slavery would linger over the national government during his tenure as Chief Justice: first as an issue avoided at all costs and later as a
cause of insurrection in the Chief Justice’s native Maryland and civil war throughout the entire
country following his infamous decision in Dred Scott v. Sandford (1857). The issue of slavery
was so volatile at the start of Chief Justice Taney’s tenure that the U.S. House of Representatives
had recently passed a gag rule in 1836 preventing debate on antislavery issues (Lightner, 2006, p.
100). Despite the tendency of some historians to contrast Chief Justice Taney unfavorably in
light of his predecessor’s greatness, Chief Justice Taney truly represented a legitimate viewpoint
emphasizing the role of democracy at a state and local level and often found pragmatic
compromises with the Associate Justices, such as Justice John McLean, “for whom Marshall’s
views represented orthodoxy” (Frankfurter, 1937, p. 48-49). While Dred Scott v. Sandford
effectively brought the conflict between slave- and free-states to a boiling point, the normally
temperate and pragmatic Chief Justice Taney simply hoped to avert war as Justice Frankfurter
describes him: “Least of all was he a ‘pro-slavery’ man in any invidious sense; he was merely
concerned lest the Union be broken by extreme action, and the South become the economic
vassal of Northern capitalism” (Frankfurter, 1937, p. 49). As a string of Interstate Commerce
Clause cases during the Taney Court years demonstrate, the Supreme Court was cognizant of the
struggle between state and federal power and cautiously constructed compromises to free
interstate commerce from excessive restraints by the state governments while at the same time
avoiding the powder keg of slavery.

The License Cases (1847), the collective name for three similar cases heard by the
Supreme Court on the issue of the taxation and regulation of alcoholic beverage imports to the
states, were the first major Interstate Commerce Clause cases heard during the Taney Court and
demonstrate the Court’s reluctance to overturn state statutes when such a decision might
encourage and allow sweeping federal action on the slave trade (Lightner, 2006, p. 65). Each of
the three License Cases (Thurlow v. Massachusetts, Fletcher v. Rhode Island, and Peirce v. New Hampshire) involved state laws favoring local retailers through regulations and taxes designed to raise the prices on alcoholic beverages produced by breweries and distilleries located in other states (Freyer, 1999, p. 160). When the counsel for Rhode Island mentioned the slavery issue during oral arguments, the Supreme Court splintered in its understanding of the case, and although the Court unanimously upheld the state regulations, six different justices wrote opinions with no single opinion representing a majority of the Court. Precedent and the emergent Dormant Commerce Clause doctrine provided some guidance in the case, but Chief Justice Taney seemed to use Chief Justice Marshall’s reliance on federal statutes in Brown v. Maryland as a method for narrowing the scope of congressional power (Frankfurter, 1937, p. 62). In order to avoid conflict with the states, Chief Justice Taney held that “Congress has clearly the power to regulate such importations under the grant of power to regulate commerce among the several states, yet as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the state” (Taney, 1847, p. 586). Even Associate Justice John McLean, typically one of the Chief Justice’s strongest opponents on the Court, admitted that the state laws were a justifiable “discretion” in the absence of congressional legislation specifically touching on this aspect of interstate commerce (McLean, 1847, p. 597). However, the trenchant unwillingness of the Supreme Court to strike down state regulations clearly infringing on the freedom of interstate commerce and favoring local interests at expense of the nation demonstrates the strong influence of the states over the Taney Court’s decisions.

While the Supreme Court narrowly struck down parts of state laws taxing incoming passengers and immigrants in the Passenger Cases (1849), which consisted of Smith v. Turner and Norris v. Boston, the cases demonstrated the lack of an overarching framework for deciding
Commerce Clause cases as well as the division on the Supreme Court. The Court failed to coalesce around a single opinion, and instead a total of eight opinions each tried to sort out the conflicting jurisdictions of the state and federal governments with Justices McLean, Wayne, Catron, McKinley, and Grier holding parts of the New York and Massachusetts regulations unconstitutional with their five votes (Roper, 1999, p. 232). The lack of a majority opinion capable of gaining the assent of a majority of justices gave the Passenger Cases significantly less precedential weight and possibly encouraged justices to rethink their opinions in future cases. Justice McLean represented one extreme and favored nearly exclusive federal jurisdiction over interstate commerce as he states: “But foreign commerce and commerce among the several states, the regulation of which, with certain constitutional exceptions, is exclusively vested in Congress, no state can regulate” (McLean, 1849, p. 400). Among the four dissenting justices, Chief Justice Taney espoused an entirely different conception of the relationship between the federal government and the states and argued that “a tax upon the instrument of commerce is not forbidden” in the absence of a congressional act (Taney, 1849, p. 481). The issue of slavery contributed substantially to the dissension in the Passenger Cases with the opinions mentioning slavery a combined ninety-eight times. Even the opinions in favor of finding the state laws unconstitutional are careful to avoid extending their arguments to the issue of slavery as Justice Wayne’s opinion demonstrates: “The Constitution was formed by states in which slavery existed. … The undisturbed continuance of that difference between the states at that time, unless as it might be changed by a state itself, was the recognized condition in the Constitution for the national union” (Wayne, 1849, p. 428). Clearly, the Taney Court was wary of stepping in the middle of a potential political battle between Congress and the state governments and instead decided to respect the concerns of the slave states to avoid upsetting the status quo.
However, such an unstable arrangement led to the need for a more comprehensive framework for deciding Interstate Commerce Clause cases with Justice Benjamin Curtis crafting a majority opinion in *Cooley v. Board of Wardens* (1852), a similar case involving pilots’ fees for ships entering or leaving Philadelphia, capable of receiving support from four additional justices. Justice Curtis argued that, although Congress had the ability to legislate on pilotage fees, it had decided specifically to cede this regulatory power to the states until further federal legislation as he states: “Although Congress may legislate upon the subject of pilotage throughout the United States, yet they have manifested an intention not to overrule the State laws except in one instance. The law of Pennsylvania, not being overruled, is not repugnant to the Constitution of the United States” (Curtis, 1852, p. 300). This idea was a further development of the Dormant Commerce Clause doctrine. Since Pennsylvania’s pilotage laws did not interfere with the national system of interstate commerce too severely, the states could exercise selective jurisdiction over this local subject area pending future congressional action. While states’-rights enthusiast Justice Daniel only concurred and nationalist Justices McLean and Wayne dissented, the pragmatic opinion of Justice Curtis swayed four of the other seven justices taking part in the case including Chief Justice Taney (Roper, 1999, p. 62). Such a solution enabled the Court to sidestep the slavery issue since it arguably might fall under the category of local issues Congress had specifically left to the states. At the same time, fervent abolitionists in Congress could accept the Court’s ruling in *Cooley v. Board of Wardens* due to the possibility for future federal action on the subject.

In addition to the arguments in favor of the strategic view’s interpretation of *Cooley v. Board of Wardens*, the case also displays how the justices on the Supreme Court do not always rule based on preset attitudes and opinions. The abundance of opinions in the *Passenger Cases*
provides a rare opening into nearly every justice’s thoughts on the Interstate Commerce Clause before the landmark decision in *Cooley v. Board of Wardens*. If Justice McKinley had participated in the case, the majority coalition from the *Passenger Cases* (1849) could have repeated the same outcome from just three years prior to *Cooley v. Board of Wardens* (1852), and the four other members of the previous majority coalition still represented half of the participating justices. However, Justices Catron and Grier completely changed their views and provided the votes necessary to make Justice Curtis’s opinion the majority opinion. The opinions forming the majority coalition in the *Passenger Cases* had emphasized the exclusivity of federal jurisdiction over interstate commerce, and Justice Catron’s opinion in *Smith v. Turner* (which Justice Grier specifically concurs with) agrees that the states lack the jurisdiction to tax vessels and passengers in interstate commerce since the Constitution grants such power to Congress instead as he states: “The states cannot lay export duties, nor duties on imports, nor tonnage duties on vessels. If they tax the master and crew, they indirectly lay a duty on the vessel. If the passengers on board are taxed, the protected goods – the imports – are reached” (Catron, 1849, p. 452). Surely under this logic, the fee imposed by Pennsylvanina on vessels refusing to employ a local pilot would “lay a duty on the vessel,” affect the “protected goods,” and interfere with interstate commerce. In addition, although Justice Grier’s opinion in *Norris v. City of Boston*, which Justice Catron concurs with, expresses sympathy for the police power argument and refuses to address the exclusivity argument directly, Justice Grier ultimately claims that Congress intends to maintain free trade among the states and refuses to grant states the ability to hinder interstate commerce: “That Congress has regulated commerce and intercourse with foreign nations and between the several states, by willing that it shall be free, and it is therefore not left to the discretion of each state in the Union either to refuse a right of passage to persons or
property through her territory, or to exact a duty for permission to exercise it” (Grier, 1849, p. 464). The attitudes Justices Catron and Grier expressed in the Passenger Cases clearly conflicted with the selective exclusivity of Cooley v. Board of Warrens just three years later, yet these justices were willing to modify their opinions in favor of a pragmatic solution that mollified the states and avoided a confrontation over the issue of slavery in the context of the Commerce Clause.

The Taney Court’s internal reluctance to challenge the states reveals the Supreme Court’s weakness during these years and its deference to other institutional factors. Although the Taney Court continued in the jurisprudential heritage of the Marshall Court, the Taney Court lacked strong institutional leadership and was only able to rule against the states in the Passenger Cases with no actual majority opinion and over the dissent of the Chief Justice and several others. While the Dormant Commerce Clause doctrine solidified the idea that Congress had exclusive rather than concurrent jurisdiction in at least a selected array of national issues, such a compromise as Carruba and Rogers state “was not the product of an imperial judiciary foisting free trade upon recalcitrant states. Rather, the doctrine is more plausibly the product of an institutionally weak Court as it strategically accommodated the conditional interests of the states in free trade” (Carruba and Rogers, 2006, p. 119). The Supreme Court’s prestige may have grown since the early days of the Republic, but it still lacked the institutional force the ascendency view usually attributes to it. Furthermore, the switch in opinions of Justices Catron and Grier between the Passenger Cases and Cooley v. Board of Warrens demonstrates the attitudinal flexibility of the justices in the face of institutional pressures. Although the Taney Court eventually addressed the slavery issue in Dred Scott v. Sandford, such a decision was an
aberration for the justices who had avoided ruling on the controversial slavery issue throughout their prior Interstate Commerce Clause decisions.

The New Deal Court

Following the bitter and bloody Civil War, the topic of slavery disappeared from the Supreme Court’s Interstate Commerce Clause disputes thanks to the Thirteenth, Fourteenth, and Fifteenth Amendments with the issue of federal economic regulations taking its place in the minds of the Court and the public. Inventors such as Thomas Edison and industrialists such as Cornelius Vanderbilt, Henry Ford, John D. Rockefeller, and Andrew Carnegie paved the way for national systems of energy, lighting, communication, heating, and transportation. The innovations of these men along with the labor of countless other businessmen and workers created corporations which transcended state boundaries and challenged traditional methods of deciding Interstate Commerce Clause cases. The Supreme Court initially adopted a *laissez-faire* approach and struck down state and federal economic regulations in cases such as *Lochner v. New York* (1905) in order to protect a supposed “liberty of contract” as Justice Peckham held in that case: “The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution” (Peckham, 1905, p. 53). However, the seeming failure of the free market during the Great Depression led President Franklin Delano Roosevelt to propose a radical expansion of the federal government’s economic regulatory powers. His New Deal programs repeatedly fell under the scrutiny of the Supreme Court and sparked one of the most intense conflicts between the Court and the political branches. As seen through the Supreme Court’s changing Commerce Clause jurisprudence, FDR’s overwhelming popularity combined with his aggressive Court-packing plan managed to bend the opinions of a couple key justices to support federal regulation of expansive economic regulation.
The Supreme Court’s initial handling of the New Deal Interstate Commerce Clause cases indicated that the justices felt free to rule based on their political and legal attitudes with little deference to the institutional power of the political branches. Although the Supreme Court occasionally granted victories to the Roosevelt administration, its rulings mostly undermined key pieces of New Deal legislation. The Supreme Court itself was internally divided with Justices Devanter, McReynolds, Sutherland, and Butler (the “four horsemen”) consistently voting against New Deal legislation while Justices Brandeis, Stone, and Cardozo (the “three musketeers”) reliably supported such pieces of economic regulation (Rehnquist, 2001, p. 122). Chief Justice Hughes and Justice Owen Roberts often acted as swing votes, but at least one of them would usually join with the four horsemen. As a further frustration for FDR, no member of the Court had retired or died since the start of his presidency, and he would have to wait until his second term in office to begin reshaping the Supreme Court through the appointment process. The Court’s overall opposition to the New Deal came to a head on May 27, 1935, a day New Dealers termed “Black Monday,” when the Supreme Court issued three rulings against FDR and his New Deal programs (Rehnquist, 2001, p. 117-119). In the most significant of these three cases, *Schechter Poultry Company v. United States* (1935), the Supreme Court unanimously ruled that the National Industrial Recovery Act was too vague and an unconstitutional attempt to regulate local businesses through the Interstate Commerce Clause.

The Court’s opposition to an expansive reading of the Interstate Commerce Clause continued into 1936 with *Carter v. Carter Coal Co.* (1936). This case involved the Bituminous Coal Conservation Act of 1935 which “created local boards to set minimum prices for coal and also provided for collective bargaining to achieve minimum wage and hour agreements” (Maleson, 1999, p. 48-49). The four horsemen and Justice Owen Roberts voted to strike down
the Bituminous Coal Conservation Act with Justice Sutherland’s majority opinion drawing a clear line between local production and interstate commerce: “The effect of the labor provisions of the act … primarily falls upon production, and not upon commerce, and confirms the further resulting conclusion that production is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in, or forms any part of, interstate commerce” (Sutherland, 1936, p. 304). Even though Chief Justice Hughes dissented in part from the majority opinion, his opinion still agreed that the Bituminous Coal Conservation Act exceeded Congress’s authority under the Interstate Commerce Clause: “Production – in this case, mining – which precedes commerce, is not itself commerce, and that the power to regulate commerce among the several States is not a power to regulate industry within the State” (Hughes, 1936, p. 317). If this case is an accurate account of the justices underlying attitudes toward the Commerce Clause, a majority, if not two-thirds, of the justices distinguished intrastate from interstate commerce and would refuse to uphold economic legislation in the absence of a direct effect of on interstate commerce (Holland, 2004, p. 84).

Nevertheless, less than one year after *Carter v. Carter Coal Co.*, Chief Justice Hughes and Justice Owen Roberts would vote against their apparent political and legal attitudes and begin to uphold New Deal legislation much more frequently. The first case indicative of the Supreme Court’s sea change with regard to economic regulation was *West Coast Hotel Co. v. Parrish* (1937). While this case dealt with a state minimum wage law for women and thus did not directly affect the Supreme Court’s Commerce Clause jurisprudence, it marked the end of the dominant “liberty of contract” idea and ushered in an era of acceptance of economic regulations. The three horsemen and Justice Owen Roberts joined Chief Justice Hughes’s majority opinion and directly overturned the precedent set in *Adkins v. Children’s Hospital* (1923) and the more
recent *Morehead v. New York ex rel. Tipaldo* (1936), which had both held minimum wage laws as an unconstitutional violation of an individual’s freedom to enter into labor contracts under the Due Process Clause of the Fifth Amendment (Dudziak, 1999, p. 329). Suddenly, the Supreme Court had abandoned one of its core legal principles and opened the door for upholding the New Deal programs.

The sudden change in the opinions of Chief Justice Hughes and especially Justice Owen Roberts sparked concern that institutional pressure from the popular president had overcome their underlying legal attitudes. On February 5, 1937, less than two months before the decision in *West Coast Hotel Co. v. Parrish*, President Roosevelt announced a radical and previously secret proposal to appoint up to six additional justices for each member of the Supreme Court over the age of seventy who elected not to retire (Rehnquist, 2001, p. 119-122). With each of the four horsemen over the qualifying age and Justice Brandeis as the only qualifying musketeer, the Judicial Procedures Reform Bill of 1937 threatened to dilute the power of the conservative bloc and allow FDR to “re-make the Court in his own image” (Tribe, 1985, p. 134). Although the Chief Justice had given at least some indication in previous cases that he was willing to hold such minimum wage regulations constitutional, the defection of Justice Owen Roberts came as a shock and led to speculation that his agreement with the majority was intended to protect the Court from such a radical reorganization: a “switch in time that saved nine” (Dudziak, 1999, p. 329). While such an aggressive piece of legislation certainly might influence the Court’s decisions, the timing of the case suggests that some other factor swayed the vote of Justice Roberts. As Chief Justice Hughes notes reveal, Justice Roberts had already voted in favor of the minimum wage law in conference deliberations on December 19, 1936 (McKenna, 2002, p. 414). Justice Stone, one of the three musketeers and thus a lock for supporting the economic
regulation, was sick at the time, and thus Chief Justice Hughes pushed the case pack until Justice Stone returned to the Court in February to avoid a four-to-four deadlock which would have no precedential authority. Following the announcement of the Court-packing plan, the justices delayed the announcement of the decision to avoid the appearance of instantly acquiescing to the political branches. As further evidence of his earlier change in opinion, Justice Roberts delivered a memorandum to Justice Frankfurter in 1945 explaining his ruling in *Parrish*. While Justice Roberts claimed that he had simply not had an opportunity to review the principle of *Adkins* previously and that “no action taken by the President in the interim had any causal relation to my action in the Parrish case,” *Morehead v. New York ex rel. Tipaldo* had given him that chance (Roberts, 1945). Although the Court-packing plan did not directly affect Justice Roberts in *Parrish*, he had truly switched sides in the debate surrounding economic regulations (Solomon, 2009, p. 210).

The proximate cause of Justice Roberts’s abandonment of his prior legal attitudes was likely President Roosevelt’s landslide election victory and the further strengthening of the Democrats in Congress. The magnitude of FDR’s victory was extraordinary by modern political standards. He won the Electoral College 523 to 8, losing only Maine and Vermont (Office of the Federal Register, 2013). Not since the unopposed election of President Monroe in 1820 had a candidate won the presidency in such a lopsided manner (Solomon, 2009, p. 2). While recent presidents have claimed narrow reelection margins as evidence of a popular mandate, President Roosevelt’s resounding victory was a clear sign of public support for his New Deal programs. As constitutional scholar Laurence Tribe notes, the topic of Supreme Court appointments had even been a major campaign issue especially for Republicans anxious to maintain their hold on at least one branch of the federal government (McKenna, 2002, p. 264). Although President Roosevelt
may have delayed announcing his Court-packing plan until after the election to avoid an electoral backlash, the clear majority of Americans supported his New Deal regulatory programs and understood that he would appoint economically liberal justices to the Supreme Court. The 1936 election strengthened the institutional power of the presidency and provided the Democrats with even stronger majorities in Congress, and this reaffirmed institutional balance of power likely swayed Chief Justice Hughes and Justice Roberts. The Chief Justice noted in 1936 that the Court weakened the power of its rulings when it left its “fortress in public opinion,” and Justice Roberts later stated: “Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country–for what in effect was a unified economy” (Devins, 1996, p. 254). The overwhelming support for the Roosevelt administration strengthened its institutional power beyond the ability of the Supreme Court to resist, and the Court gave way shortly after the 1936 election. Indeed, Justice Sutherland’s dissent “practically accused the majority of kowtowing to the popular will” and begins with an exhortation for each justice not to “surrender his deliberate judgment” (Solomon, 2009, p. 210) (Sutherland, 1937, p. 402). Clearly, Chief Justice Hughes and especially Justice Roberts ruled more along the lines of the strategic model rather than the attitudinal model in this and several future Commerce Clause cases.

While the strengthened institutional power of Congress and the presidency likely influenced the Supreme Court’s decision in *Parrish*, the Court-packing plan probably helped the Roosevelt administration achieve its long-sought legal victories in the realm of the Interstate Commerce Clause on April 12, 1937, when the Supreme Court upheld the National Labor Relations Act, commonly known as the Wagner Act, in five separate cases (Cortner, 1999, p. 209). The most significant of these cases was *National Labor Relations Board v. Jones &
Laughlin Steel Corp. (1937) since it laid the groundwork for the principle that Congress can regulate any economic activity that affects interstate commerce, even if the link is only indirect. The Wagner Act was widely regarded as one of the most radical and constitutionally dubious pieces of New Deal legislation since it regulated labor negotiations and guaranteed unions the right to organize even in businesses which only tangentially affected interstate commerce (Cortner, 1999, p. 209). Although Carter v. Carter Coal Co. (1936) had just reaffirmed the idea that the federal government lacked the jurisdiction to regulate collective bargaining and labor negotiations in such cases, Jones & Laughlin brought the question back before the Court for oral argument on February 10-11, less than a week following the announcement of the Court-packing plan. The case was of existential importance for the Supreme Court and involved issues of federalism and legal precedents much deeper than the liberty of contract in the state minimum wage cases (Solomon, 2009, p. 180-182) (Corley, 2004, p. 53). Furthermore, the economic crisis of the Great Depression added to the significance of Jones & Laughlin since it would affect the federal government’s ability to intervene in time of crisis.

Although Chief Justice Hughes gives nominal respect to the interstate versus intrastate distinction in the majority opinion, which Justice Roberts and the three musketeers joined, and notes how the Wagner Act may seemingly violate this principle, he references the Court’s responsibility to interpret a statute in a manner which upholds its constitutionality and then proceeds to broadly interpret the meaning of the term “affecting commerce” in the Wagner Act: “It purports to reach only what may be deemed to burden or obstruct that commerce, and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power” (Hughes, 1937, p.
The four horsemen opposed this interpretation but in vain. The Court continued granting victory after victory in Interstate Commerce Clause cases such as *United States v. Carolene Products Co.* (1938) which limited judicial review of federal economic regulation. By 1942 each of the four horsemen had died or retired from the Supreme Court, and their economically liberal successors crystallized the principle that any economic activity even indirectly affecting interstate commerce in a substantial manner, such as the production of wheat for personal consumption, fell under the jurisdiction of Congress under the Interstate Commerce Clause in *Wickard v. Filburn* (1942) during the additional crisis of World War II. The opinion of the Court upheld the federal government’s ability to interfere with the economy in times of crisis, but its jurisprudential implications are vital in the state-private sector relationship of the modern economy.

Since the Supreme Court’s entire adjudication of *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, from oral arguments to the announcement of the decision, took place during the time when Congress was considering the Court-packing plan, the justices must have at least considered how its ruling would impact the bill’s legislative fate. In addition to the institutional power wielded by the New Deal Democrats in Congress and FDR himself, which had likely influenced the Court’s vote in *Parrish* following the landslide election, the tangible threat of legislative action to weaken the current justices’ power and dampen its institutional prestige probably encouraged the Chief Justice and Justice Roberts to continue their newly realized support for New Deal economic regulations. The Court even decided to announce its rulings in favor of the Wagner Act while the Senate Judiciary Committee was considering the Court-packing plan, and the decisions likely persuaded several wavering committee members that legislative action was not needed to check the branch most isolated from democratic
pressures (Rehnquist, 2001, p. 129). Three committee Democrats announced their opposition to the original Court-packing plan which forced the President to seek a less-radical compromise. Eventually, the plan was defeated in the Senate on July 22, but at the cost of Chief Justice Hughes and Justice Roberts bending their legal attitudes in the face of the immense institutional power of President Roosevelt and Congress (Rehnquist, 2001, p. 132).

The Rehnquist Court

Following the Supreme Court’s concession of such expansive regulatory power to the political branches in *Jones & Laughlin Steel Corp.* and *Wickard v. Filburn*, Congress continued to expand the extent of its regulations on the national economy and society via the Interstate Commerce Clause and the substantial effects test. Virtually any behavior could in the aggregate have a substantial effect on interstate commerce so the Court’s New Deal precedents prevented it from limiting the reach of the federal political branches as Laurence Tribe notes: “[T]he conventional wisdom was that, since 1937, there have been no judicially enforceable limits on congressional power which derive from considerations of federalism. The sole protections for the states, it was said, were political” (Tribe, 1978, p. 300). However, under the guidance of Chief Justice Rehnquist, the Supreme Court would reaffirm at least some of the limitations of Congress’s Interstate Commerce Power through *United States v. Lopez* (1995) and *United States v. Morrison* (2000). Although the legal attitudes of the individual conservative justices were crucial in reigning in congressional power, the broader institutional setting explains how the justices managed to do so without insuperable public or political opposition. In addition, such an institutional perspective combined with an appreciation of the legal and political attitudes of Justices Scalia and Kennedy explains their decision to buck the federalist trend and support
congressional regulation of marijuana via the Interstate Commerce Clause in *Gonzales v. Raich* (2005).

The Supreme Court’s decision to strike down a congressional statute in *Lopez* may have come as a shock to some commentators but was ultimately the culmination of a rejuvenated emphasis on federalism throughout the federal government. The specific statute involved was the Gun-Free School Zones Act, a piece of legislation making the possession of a firearm in a school zone a federal offense (Hall, 1999, p. 164). While a broad range of state and local politicians would likely oppose allowing guns in school zones, congressional regulation of this issue led to the implication that the federal government could legislate on even street crime, an area of the law typically under the authority of the states and local governments. Justifying the Gun-Free School Zones Act under the Interstate Commerce Clause via the substantial effects test would undermine the historic police powers of the sovereign state governments and further disrupt the constitutional balance as Chief Justice Rehnquist noted in his majority opinion: “It is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate” (Rehnquist, 1995, p. 164). Since the behavior in this case was non-economic in nature with insufficient congressional findings linking the possession of firearms to interstate commerce, the majority opinion ruled the legislation unconstitutional.

Other conservative justices, specifically Justice Thomas, were willing to go even further than the Chief Justice. In his concurrence, Justice Thomas expressed his opinion that the Court “must be willing to reconsider the substantial effects test in a future case” if it is to provide firm checks on the power of the political branches and undo this “blank check” for federal regulatory oversight.
These opinions reveal the strong attitudinal preferences of the conservative justices in favor of federalism and judicial checks on congressional power.

The attitudes expressed by these conservative justices arose gradually, and the broader success of conservative Republicans allowed this previously minority viewpoint to become the majority opinion of the Supreme Court. Since his appointment to the Court as an Associate Justice in 1972, Rehnquist had been expressing his concern with the expansiveness of the Supreme Court’s Commerce Clause jurisprudence. For example, in *Hodel v. Virginia Surface Mining and Reclamation Association* (1981), then-Justice Rehnquist was the only justice not to sign on to the majority opinion and instead emphasized the requirement to show that the Surface Mining Control and Reclamation Act of 1977 truly had a substantial effect on interstate commerce. While he criticized the Court’s broad interpretation of the Commerce Clause, the overwhelming majority in favor of upholding the federal law forced him to accept the relevant precedents: “Though there can be no doubt that Congress, in regulating surface mining, has stretched its authority to the "nth degree," our prior precedents compel me to agree with the Court's conclusion” (Rehnquist, 1981, p. 311). Rehnquist was committed “to shift power away from the federal government toward more extensive, independent authority for the states,” and the addition of conservative-leaning justices gave him the votes necessary to pursue such a goal (Davis, 1989, p. 149). In *Gregory v. Ashcroft* (1991) the conservatives began to exercise their voting power with Chief Justice Rehnquist and conservative Justices Scalia, Kennedy, and Souter (who would become much more liberal later in his tenure on the Court) joining Justice O’Connor’s majority opinion which upheld Missouri’s constitutional requirement for its justices to retire at the age of seventy in opposition to the federal Age Discrimination in Employment Act on Tenth Amendment grounds. George H.W. Bush’s appointment of Justice Thomas to the
Supreme Court would solidify the conservative bloc of justices and enabled them to reestablish limits to the Commerce Clause power of Congress.

Such a development was not the result of random appointments of like-minded conservative justices to the Court but rather the product of a renewed emphasis on federalism throughout all areas of national politics. Pickerill and Clayton trace the stages of the renewed emphasis on federalism, primarily in the Republican Party, back to President Nixon’s New Federalism back in 1969 which expanded the federal government but enhanced state flexibility (Pickerill and Clayton, 2004, p. 238). With President Nixon came the appointment of Rehnquist to the Supreme Court, and Ronald Reagan in the 1980’s pushed for devolution and limitation of the federal government with his famous statement in his first inaugural address that “government is not the solution to our problem; government is the problem” (Reagan, 1981). Republican control of the presidency during the 1980’s allowed them to shape the ideological composition of the Supreme Court. Presidents Reagan and George H.W. Bush had either appointed or (in the case of Chief Justice Rehnquist) promoted each of the five conservative justices on the Court (Pickerill and Clayton, 2004, p. 243). The Republicans even managed to regain Congress in the 1994 election, on the same day as oral arguments for *Lopez* in fact, for the first time in decades. When the Supreme Court struck down the largely bipartisan Gun-Free School Zones Act, the Court faced “virtually no congressional criticism” since this act was not part of the core values of either Republicans or Democrats and duplicated many state laws (Pickerill and Clayton, 2004, p. 240). Instead of acting as a counter-majoritarian force, the Supreme Court was actually following the broader tendencies of the national government and only challenged the political institutions on minor policy points.
The conservatives on the Supreme Court felt free to expand on their gains in *U.S. v. Morrison* (2000) due to congressional Republican support despite criticism from liberal legal scholars. *Morrison* dealt with the constitutionality of the part of the Violence Against Women Act (VAWA) which granted the right to seek “federal civil remedy for the victims of gender-motivated violence” (Rehnquist, 2000, p. 601-602). Granting such a right to sue in federal courts would allow the federal government to expand its regulatory power into the realm of the traditional state police power in such cases as rape and domestic violence. Unlike in *Lopez*, Congress had gathered substantial evidence that such gender-motivated violence could have effects on interstate commerce as Chief Justice Rehnquist admits in his majority opinion, joined by the four conservative justices: “In contrast with the lack of congressional findings that we faced in Lopez, [the VAWA] is supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families. … But the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation” (Rehnquist, 2000, p. 614). Despite the congressional evidence, the Court borrowed from *Jones & Laughlin* and held the “‘effects upon interstate commerce so indirect and remote’” that they would remove the last vestiges of state power (Rehnquist, 2000, p. 608). Instead, Congress was limited to regulation of the channels and instrumentalities of interstate commerce and activities with a more substantial effect on interstate commerce (Rehnquist, 2000, p. 609). Justice Souter’s dissent harshly criticized the majority for ignoring “mountain of data” gathered by Congress “whose institutional capacity for gathering evidence and taking testimony far exceeds” that of the Supreme Court (Souter, 2000, p. 628). Nevertheless, the conservative majority had little fear of congressional reprisal with Republicans controlling both houses of Congress. Some House Republicans had even tried to defund the VAWA following their return
to power (Cooper, 1995). Given the institutional support for restrictions on federal power, the majority on the Supreme Court was able to exercise its legal attitudes and reassert limitations on Congress’s Interstate Commerce Clause power.

While the Supreme Court limited the power of the federal government in *Lopez* and *Morrison*, this trend of narrowly interpreting the Interstate Commerce Clause suddenly stopped in *Gonzales v. Raich* (2005), a case regarding whether or not Congress could ban the cultivation of marijuana by individuals for medicinal use, as Justice Kennedy joined the liberal justices in the majority with Justice Scalia concurring. The judges’ political beliefs on the issue of marijuana legalization clearly conflicted with their interpretations of the Commerce Clause as they decided whether or not to strike down California’s Compassionate Use Act due to its conflict with the federal Controlled Substances Act (CSA), Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. On the right, most of the conservative justices were probably personally opposed to the legalization of marijuana as Justice O’Connor, the one justice at the time who had served as a legislator, states in her dissent which Chief Justice Rehnquist and Justice Thomas joined in part: “If I were a California legislator, I would not have supported the Compassionate Use Act. But whatever the wisdom of California’s experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case” (O’Connor, 2005, p. 57). Similarly, while generally in favor of the federal government’s regulatory power, the liberal justices would probably have been more supportive of the legalization of marijuana. Nevertheless, the subject matter at hand likely persuaded moderately conservative Justice Kennedy to join ranks with the liberal justices in a “cross-ideological judicial coalition” to uphold the federal government’s War on Drugs (Somin, 2006, p. 48). Justice Kennedy had always been one of the least enthusiastic
supporters of the Court’s limitation of the congressional Commerce Power. In his concurrence in
_Lopez_ for example, Justice Kennedy had expressed “some pause” in deciding to restrict federal
power under the Interstate Commerce Clause for the first time in decades and stated that “the
substantial element of political judgment” left the Court’s “institutional capacity to intervene
more in doubt” in such Commerce Clause Cases (Kennedy, 1995, p. 568; p. 579). Similar to the
Court’s reasoning in _Wickard_, Justices Kennedy and Scalia were persuaded by the need to
regulate even personal production of marijuana in order to maintain the national regulations of
marijuana. Such a decision in favor of the federal regulations of marijuana upheld the political
branches’ War on Drugs, perennially supported by Republicans and some Democrats as well,
and was “substantively conservative” despite its impact on Interstate Commerce Clause

While Justice Kennedy’s decision to join the liberal bloc and uphold the federal statute
was less surprising giving his tepid support for _Lopez_ and _Morrison_, Justice Scalia’s concurrence
seemed a substantial departure from his deeply held attitudes regarding the Interstate Commerce
Clause and other issues of federalism. However, Justice Scalia’s tendency to defer to Congress
likely combined with his political attitudes on the issue of marijuana legalization to move him
toward support of the CSA. As Conlan and Dudley (2005) noted soon before the Court
announced its holding in _Gonzales v. Raich_, Justice Scalia “has demonstrated a keen appetite in
the preemption cases [cases involving a related federal statute preemptively taking regulatory
authority away from a state] for a stronger role for the national government” (Conlan and
Dudley, 2005, p. 365). On the national political stage, Republicans similarly have not
relinquished federal regulatory power in some areas, especially in the realm of social policy
(Pickerill and Clayton, 2004, p. 239). The War on Drugs, an effort to crack down on the illegal
drug trade, certainly has enjoyed bipartisan support since its inception in the Nixon administration. Both President Clinton and President George W. Bush continued and reemphasized this federal priority so there was little doubt for Justice Scalia and the rest of the Court in 2005 in determining which side the president as well as mainstream Republicans and Democrats in Congress would support.

Justice Scalia’s commitment to textualism, looking specifically at the text of a statute or piece of the Constitution to determine its true meaning as opposed to using outside sources such as legislative history, would have encouraged his continued support of enhanced federalism in Gonzales v. Raich, but his respect for separation of powers conflicted with these legal attitudes as Rossum states referencing Justice Scalia’s respect for the “double security” for the rights of citizens which Hamilton originally described in the Federalist No. 51: “Scalia appears so committed to preserving this double security that he will protect federalism as vigorously as he protects separation of powers, whether or not the text requires him to do so” (Rossum, 2006, p. 126). When a state or local law conflicts with a federal regulation, especially one so broadly supported as the CSA, Justice Scalia tends to defer to the democratic will of Congress since it is more directly representative of the people than the Supreme Court (Rossum, 2006, p. 23). Especially in previous preemption cases such as Boyle v. United Technologies Corp. (1988), Morales v. Trans World Airlines (1992), and Cipollone v. Liggett Group, Inc. (1992), his deference to Congress has shifted the balance back toward the federal government as Brisbin describes Justice Scalia’s principle in these cases: “When Congress clearly preempts or where there is a clear conflict of laws, federal preemption should be deferentially or broadly read by the Court. … His federalism opinions thus have rested on the concept of federal supremacy, but he
has not indicated that federal supremacy should encroach on all state powers” (Brisbin, 1997, p. 134).

In Justice Scalia’s concurrence in Gonzales v. Raich, he was careful to avoid backtracking on the limitations imposed on the Commerce Clause in Lopez and Morrison and distinguished the current case: “Unlike the power to regulate activities that have a substantial effect on interstate commerce, the power to enact laws enabling effective regulation of interstate commerce can only be exercised in conjunction with congressional regulation of an interstate market, and it extends only to those measures necessary to make the interstate regulation effective” (Scalia, 2005, p. 38). In Justice Scalia’s perspective, allowing the California law to stand would have strengthened the interstate marijuana market and rendered federal regulation entirely ineffective. However, he avoids making this policy decision for himself and instead defers to the judgment of Congress: “I thus agree with the Court that, however the class of regulated activities is subdivided, Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market “could be undercut” if those activities were excepted from its general scheme of regulation. … That is sufficient to authorize the application of the CSA to respondents” (Scalia, 2005, p. 42). This deference to Congress gives Justice Scalia the ability to rule without political kick back. Although he achieves his policy goal with respect to marijuana, Justice Scalia avoids ruling as an activist judge and instead upholds the federal law. Thus, Justice Scalia resolved his internal conflict between federalism and marijuana legalization by deferring to the judgment of Congress and the Necessary and Proper Clause. As NFIB v. Sebelius recently confirmed, his concurrence in Gonzales v. Raich should not be interpreted as a shift in his legal attitudes toward the Interstate Commerce Clause but rather as a unique confluence of various personal interests. The political branches did not play a decisive role in the
decision of Justices Kennedy and Scalia to support the federal government’s exercise of its Commerce Power, but the clear preference of both Congress and the president helped them resolve internal attitudinal issues. In the broader history of the Rehnquist Court, the transformation of national politics enabled its marginal limitations of the Interstate Commerce Clause in cases such as Lopez and Morrison since the resurgence of federalism and the Republican Party meant that the Court had little to fear in terms of congressional reprisal. Even the simple process of replacing justices allowed conservative presidents to reshape the Court’s Commerce Clause jurisprudence in favor of federalism and state power, but the conservative majority on the Court was less than certain due to the moderate opinions of Justice Kennedy with respect to the Interstate Commerce Clause.


The setback in Gonzales v. Raich and the death of Chief Justice Rehnquist later in 2005 were not enough to quell the hopes of conservatives that the Supreme Court would return to limiting the power of Congress via the Interstate Commerce Clause as in Lopez and Morrison. As a replacement for the venerable Chief Justice Rehnquist, President George W. Bush nominated Judge John Roberts, whom he had previously appointed to the U.S. Court of Appeals for the D.C. Circuit and later nominated to replace Justice O’Connor before the Chief Justice’s death. Due to his involvement in previous Republican administrations, John Roberts’s conservative credentials were not in doubt, and Republican control of the Senate seemed to guarantee the confirmation of such an uncontroversial and well-qualified nominee (Toobin, p. 289, p. 2012).
Nevertheless, Judge Roberts still ran the gauntlet of questioning in the Senate Judiciary Committee with composure and skill. In his opening statement before the Committee, Roberts described his view of the judiciary’s limitations using the purely American imagery of baseball: “Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire” (Roberts, 2005). While such an exposition of a justice’s role in our political system seems consistent with the civics-class view of the judiciary, several senators on the Judiciary Committee expressed doubt that any judge can rule without influence from emotions, biases, and legal attitudes as then-Senator Biden applied the baseball analogy to search and seizure cases: “As much as I respect your metaphor, it's not very apt, because you get to determine the strike zone. What's unreasonable? Your strike zone on reasonable/unreasonable may be very different than another judge's view of what is reasonable or unreasonable search and seizure. And the same thing prevails for a lot of other parts of the Constitution” (Morningside Partners/FDCH, 2005). Despite the probing questions of Democratic and Republican senators alike, Judge Roberts deftly avoided revealing his opinions and attitudes on controversial legal topics and expressed his disapproval of judicial activism. The Senate quickly confirmed the adroit John Roberts as the Chief Justice on September 29, 2005, by a 78-22 vote (U.S. Senate, 2005).

The newly appointed Chief Justice was left with the difficulty of convincing the nation that the Supreme Court truly is a legal rather than merely a political branch. Key constitutional law cases, such as the three key Interstate Commerce Clause decisions of the Rehnquist Court, hinged on the opinions of one or two swing justices and were decided by narrow 5-4 or 6-3
majorities. The most controversial of these partisan 5-4 decisions was easily *Bush v. Gore* (2000), the case that effectively ended the presidential election in George W. Bush’s favor. Such a case had damaged the Court’s reputation since it removed the veil of political impartiality as the justices divided on broader attitudinal commitments rather than substantive legal differences. (Jacobi, 2012, p. 19). Similar to this earlier controversial case, *NFIB v. Sebelius* came in the midst of a presidential election. A strong opinion one way or the other from an institution still respected by many Americans could have swayed the election in either President Obama or Governor Romney’s favor. Furthermore, the Roberts Court’s partisan 5-4 decision in *Citizens United v. Federal Election Commission* (2010) had recently granted a victory to Republican politicians and campaigns by allowing not-for-profit organizations to broadcast messages closer to election time. While the Court’s decision freed both unions and corporations, conservative-leaning corporations and businesses have more resources to spend in comparison to terminally declining unions. In addition to the legal questions in *NFIB v. Sebelius*, Chief Justice Roberts faced the difficulty of constructing his Court’s legacy and image as Tonja Jacobi states: “To the extent that the Court’s legitimacy would have suffered had Roberts not compromised in *NFIB v. Sebelius*, in what would have been perceived by many as a partisan electoral gift, it would be the “Roberts Court” that would be considered a failure. Ultimately it would be Roberts’s legacy that was damaged if the Court’s reputation suffered” (Jacobi, 2012, p. 25). Chief Justice Robert’s station on the Court encouraged him not only to consider his own legal attitudes but also how the Court’s decision would impact the institution in light of its recent history.

Looking at the Chief Justice’s controlling opinion in more detail further demonstrates his attempts to reconcile personal convictions with the need to maintain the Court’s institutional prestige as a non-political branch. As explained earlier, Chief Justice Roberts ultimately held that
the individual mandate was not justified under the Interstate Commerce Clause but instead qualified as a tax for constitutional purposes (not for statutory purposes with respect to the Anti-Injunction Act however) and thus fell under Congress’s Taxing Power. On the other hand, the Chief Justice ruled that the PPACA’s expansion of Medicaid could only be optional for the states since it exceeded the original agreement between the states and the federal government, the first limitation of Congress’s Spending Power, but he severed this aspect of the PPACA from the rest of the law so it did not fall in its entirety. From a substantive viewpoint, the Chief Justice’s opinion seemed an ideological compromise: the Obama administration and other Democrats won the overall battle over the individual mandate with the Medicaid expansion still as a possibility while the states and Republicans won the Interstate Commerce Clause aspect of the individual mandate issue and gained the ability to opt out of the Medicaid expansion (Metzger, 2012, p. 103).

The Chief Justice’s arguments with regard to the status of the individual mandate as either a tax or penalty especially support the idea that he desired to reach a specific result (i.e. not holding the individual mandate unconstitutional) and retroactively adjusted his legal reasoning accordingly. No other lawsuit regarding the constitutionality of the PPACA’s individual mandate had been resolved using the Taxing Power argument, and the U.S. Court of Appeals for the Eleventh Circuit strongly asserted that “both the statutory text and the Act’s legislative history ‘overwhelmingly establish[ed] that the individual mandate is not a tax, but rather a penalty’” (Harvard Law Review, 2012, p. 75). Simply put, the Chief Justice’s distinction between taxes for statutory and constitutional purposes was a novel and unexpected legal construction with little to no precedent. Such a distinction somewhat undermines the power of Congress to define the judiciary’s jurisdiction under Article III Sections 1 and 2 of the U.S. Constitution since Congress
had previously limited the judiciary’s ability to review taxes under the Anti-Injunction Act. However, by interpreting Congress’s Taxing Power broadly and upholding the PPACA’s individual mandate, the Chief Justice precluded an institutional challenge from Congress, especially from congressional Democrats in favor of such an interpretation.

Some scholars have pointed to the stylistic dissonance of the Chief Justice’s reasoning as yet another proof of his attempts to forge a compromise, but his resolutions of the individual mandate and the Medicaid expansion issues still reveal underlying legal and political attitudes from which he started working. The Chief Justice focused on the formal distinction between activity and inactivity for his analysis of the constitutionality of the individual mandate under the Interstate Commerce Clause as Gillian Metzger states: “Formalism was triumphant in his commerce power analysis. His rejection of the mandate under the Commerce Clause rested on conceptual categories and abstract principles. Activity is something that is fundamentally different from inactivity and Congress can only regulate the former” (Metzger, 2012, p. 96). Consistent with this interpretation of the Chief Justice’s arguments, his opinion argues: “To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers” (Roberts, 2012, p. 24). According to the Chief Justice’s interpretation, even the practical Founding Fathers would have made a categorical distinction between activity and inactivity, and expanding Congress’s Interstate Commerce authority into the realm of inactivity would amount to “fundamentally changing the relation between the citizen and the Federal Government” by providing Congress regulatory authority over the citizen’s entire existence (Roberts, 2012, p. 23). However, the rest of Chief Justice Roberts’s opinion relies on a more pragmatic understanding of the Constitution as Metzger
states: “When it came to Congress’s taxing and spending authority, the Chief Justice adopted a far more realist and pragmatic stance. In the tax context, he insisted that the Court’s precedents ‘confirm [a] functional approach,’ one that emphasizes the ‘practical characteristics’ of the measure at issue over the form it takes” (Metzger, 2012, p. 96).

This conflict between formalism with regard to “activity” and “inactivity” and pragmatism with regard to “tax” and “penalty” seems to confirm the Chief Justice’s inner turmoil, but Dean Minow of the Harvard Law School claims that the Chief Justice’s apparent compromise and seemingly inharmonious style actually reveal his attempt to resolve the dispute through a third perspective ideologically between the conservative and liberal factions. According to Dean Minow’s praise of the controlling opinion, the Chief Justice faced an internal dilemma between his unwillingness to decide a major politically-sensitive issue in the secret chambers of the Court and his commitment to conservative principles and limiting the power of the federal government (Minow, 2012, p. 138-139). The Chief Justice’s decision ultimately deferred to Congress in the most part while also enabling individual choice and some role for the states as she states: “Individuals would retain sufficient liberty to forgo health insurance even if they then faced the tax penalty. That the size of the penalty for most people would fall far short of the price of insurance provides practical indication of the sufficient scope for individual choice” (Minow, 2012, p. 138). Chief Justice Roberts’s resolution of the Medicaid issue also furthers choice by allowing the states to decide for themselves if they would like to expand Medicaid in their states in order to receive more federal funds. Such a solution echoes the Chief Justice’s underlying attitudes in favor of federalism and liberty even though his stylistic dissonance reveals how his opinion strayed into unfamiliar ideological territory.
While the opinion of Chief Justice Roberts enforced some limits on the power of Congress especially with regard to the Commerce Clause and the Medicaid expansion, the Chief Justice exhibited substantial deference to the political branches on the Taxing Power issue so that he could avoid weakening the power of the Supreme Court over this political issue. As a foreshadowing of this outcome, the Chief Justice begins his opinion with a discussion of the duties and obligations of the Supreme Court in relation to the political branches. In agreement with both Rogers (2006) and the civics-class view of the judiciary, Chief Justice Roberts notes the general weaknesses of the judiciary with respect to policy issues and stresses the need to interpret rather than to make law: “Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation’s elected leaders, who can be thrown out of office if the people disagree with them” (Roberts, 2012, p. 6). The Chief Justice clearly demonstrates a “general reticence to invalidate the acts of the Nation’s elected leaders” and refuses to “protect the people from the consequences of their political choices” even when he disagrees with those policy choices (Roberts, 2012, p. 6). At same time, Chief Justice Roberts refuses to give Congress a blank check and instead uses the opportunity to enforce some strict constitutional limits as well (Minow, 2012, p. 133-134). Citing the landmark case of Marbury v. Madison (1803), the Chief Justice restates the fundamental responsibility of the Supreme Court to check the power of the political branches: “Our deference in matters of policy cannot, however, become abdication in matters of law. … There can be no question that it is the responsibility of this Court to enforce the limits on federal power by striking down acts of Congress that transgress those limits” (Roberts, 2012, p. 6). Clearly, the Chief Justice pondered the boundary between excessive deference and unacceptable activism.
This initial discussion of the Court’s difficulty in deciding whether to defer or to check sets up the Chief Justice’s judgment which both grants Congress enhanced Taxing Power and also clearly limits the political branches’ Interstate Commerce Clause and Spending Clause authority, a substantive compromise to solidify the Court’s institutional prestige as a non-political yet vital branch of our federal government. Although Chief Justice Roberts forbade Congress from regulating inactivity under the Interstate Commerce Clause, he instead stretched the text of the statute in order to classify the individual mandate as a tax rather than as a penalty, the more plausible definition based on the PPACA’s legislative history and substance. To justify this interpretive license, Chief Justice Roberts cited the legal precedent upheld by distinguished members of the Court’s history such as Justices Story and Holmes: “If a statute has two possible meanings, one of which violates the Constitution, Courts should adopt the meaning that does not do so” (Roberts, 2012, p. 31). This same reasoning was evident in other key cases when the Supreme Court decided to defer to Congress on key constitutional questions such as Chief Justice Hughes’s majority opinion in Jones & Laughlin.

Essentially, this argument allows Chief Justice Roberts and other justices to avoid deciding between potential interpretations of the Constitution when such a decision might lead to a result contrary to their ultimate aims. Indeed, the Chief Justice notes that his decision to consider the Taxing Power argument is in spite of the clear intention for the individual mandate to act as a penalty instead: “The statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question” (Roberts, 2012, p. 44). This use of classical avoidance, the employment of any “possible saving interpretations of a statute only after the natural reading of it is
“unconstitutional” represents a stark deviation from the Court’s standard methods as Metzger states: “Classical avoidance no longer represents the Court’s approach and has not for some time. Instead the Court’s standard line is to adopt a plausible statutory interpretation that serves to avoid a constitutional question without actually holding that otherwise the statute would fail” (Metzger, 2012, p. 93). The Chief Justice could have limited himself to consideration of the Taxing Power argument if he felt that such an argument alone justified the individual mandate, but since the Taxing Power claim was such an implausible interpretation of the statute, the Chief Justice instead decided first to delineate a further limitation of the Interstate Commerce Clause as both an explanation of his ruling and a concession to Republicans and other conservatives. Although a natural reading of the PPACA would have classified the individual mandate as a penalty, the Chief Justice preferred to defer to the democratic action of the political branches and uphold the individual mandate as an expression of Congress’s Taxing Power.

Chief Justice Roberts’s controlling opinion prevented the portrayal of the Supreme Court as an activist and undemocratic institution deciding along partisan lines, but he still made a decision between two legislative alternatives and, in a sense, helped make the law. Such a perspective on the Supreme Court’s role in the history and implementation of the PPACA conflicts with the civics-class view of the judiciary but aligns well with the strategic perspective. The Chief Justice’s decisions regarding how to call balls and strikes in his controlling opinion ultimately reshaped the PPACA and affirmed a specific political agenda. Such a role for the Court is not surprising given the Court’s history of deciding disputes between majorities within some states and majorities on the national level as Steven Calabresi states regarding federalism cases: “Playing umpire between the national government and the states is simply not countermajoritarian in any way, nor is it undemocratic. Instead, the Supreme Court is simply
deciding which democratic majority – federal or state – our Constitution and history empowers to rule” (Calabresi, 2012, p. 14). The Chief Justice’s decision to defer to Congress is democratic in the sense that he is choosing to uphold a law passed by Congress and signed by President Obama, two democratically-elected institutions. However, the temporary majority of Democrats during the PPACA’s passage has since disappeared with Republicans retaking the House and substantially weakening the Democratic majority in the Senate in the 2010 elections. One of the major issues in the campaign was the PPACA, and newly-elected congressional Republicans certainly feel a mandate and a desire to overturn the PPACA. Indeed, the House has twice passed measures to overturn the PPACA since Republicans regained a majority in 2011 (Curry, 2012). Instead of deferring to the current majority in the House and the opinions of a majority of states, Chief Justice Roberts decided to defer to the majorities that enabled passage of the PPACA in 2010 and that still exist in the Senate and presidency.

In the absence of a politically-unified federal government, the Chief Justice’s opinion avoided a simple partisan outcome that could have led to constitutional strife and severely weakened the institutional prestige of the Supreme Court (Dahl, 1957). Although Gallup polls in the immediate aftermath of *NFIB v. Sebelius* showed an immediate five-point shift from “no opinion” to “disapprove” on the way the Supreme Court was handling its job, most of this shift was due to Republicans expressing disapproval of the Chief Justice Roberts’s controlling opinion (Newport, 2012). Indeed, the shift in disapproval quickly reversed with the Court’s approval rating improving by September 2012 to a level even higher than in September 2011 (Gallup, 2013). If the Chief Justice’s aim in *NFIB v. Sebelius* was to avoid the appearance of partisanship and restore the Court’s institutional reputation, he certainly succeeded where *Bush v. Gore* and *Citizens United* had failed (Jacobi, 2012, p. 18-19). However, the consideration of such
institutional factors undermined Chief Justice Roberts’s attitudinal preferences and forced an unlikely and unexpected interpretation of the individual mandate.

The Roberts Court: Other Opinions and Future Direction

While the Chief Justice’s institutional concerns constrained his viable options and overcame his attitudinal preferences, the Associate Justices with their stronger attitudinal beliefs and fewer institutional impediments were free to express their views on the issue once they realized they would not be able to sway Chief Justice Roberts further toward their respective ideological sides. An understanding of the Associate Justices’ opinions on the issue of Interstate Commerce is also necessary to determine the lasting repercussions of *NFIB v. Sebelius* and the outcome of future institutional struggles over the Interstate Commerce Clause. Neither ideological camp was entirely content with the outcome in the case. Although the opinion of Chief Justice Roberts acted as the controlling opinion of the Court, this opinion in its entirety failed to gain a majority of the Court’s votes and thus has less precedential weight than a true majority opinion. The opinions of the other justices will determine the judicial restraints under which the Chief Justice may try to craft another conciliatory opinion to resolve other divisive political issues in the future.

Justices Ginsburg, Breyer, Sotomayor, and Kagan joined the Chief Justice Roberts’s opinion in regard to the Court’s ability to rule regardless of the Anti-Injunction Act, the constitutionality of the individual mandate as a tax, and the severability of the Medicaid expansion (Syllabus, 2012). While Justices Breyer and Kagan acquiesced to the Chief Justice’s arguments with respect to the coerciveness of the Medicaid expansion, no member of the liberal bloc signed onto the part of the controlling opinion which held that the Interstate Commerce
Clause and the Necessary and Proper Clause did not justify the individual mandate. Instead, Justice Ginsburg authored a concurrence which Justice Sotomayor joined in its entirety, and Justices Breyer and Kagan also joined this opinion in part to express their support of a more “pragmatic approach to judging whether Congress validly exercised its commerce power was guided by two familiar principles” (Ginsburg, p. 60, 2012). Justice Ginsburg’s opinion openly and frequently conflicts with the Chief Justice’s which seems to indicate that her opinion was initially meant as a dissent rather than a more conciliatory concurrence. For example, Justice Ginsburg harshly criticizes the Chief Justice’s allegedly “inapt” comparison of the market for healthcare with the auto and food markets when he expounds the difference between market activity and inactivity in relation to the Interstate Commerce Clause (Ginsburg, p. 64, 2012). In contrast to Chief Justice Roberts’ clear distinction between present activity and inactivity, Justice Ginsburg’s concurrence took more of an economic perspective and considered the need to combat the free-rider problem of currently-healthy individual’s relying on the requirement for doctors to provide emergency care and the possibility of acquiring health insurance in the future (Minow, p. 128, 2012). According to Justice Ginsburg, everyone is active in the healthcare market despite the absence of current transactions since future healthcare transactions are virtually guaranteed.

On the opposite side of the ideological spectrum, the joint dissent authored by the conservative justices (minus the Chief Justice of course) expresses little sympathy for such an expansive interpretation of the Interstate Commerce Clause. This joint dissent seems as if the four conservative justices originally intended it to serve as a majority opinion before Chief Justice Roberts changed his mind, and the willingness of each of the four justices to sign rather than simply join the opinion (as is normal) indicates the seriousness of their opinion. For
example, the joint dissent fails to specifically join the aspects of the controlling opinion it is in harmony with. The joint dissenters also refer to Justice Ginsburg’s opinion thrice as a dissent rather than a concurrence. The joint dissent provides the Chief Justice with the four additional votes necessary to hold that the Interstate Commerce Clause does not justify the individual mandate. For Justices Scalia, Kennedy, Thomas, and Alito, Justice Ginsburg’s concurrence, while persuasively arguing the practical usefulness of the individual mandate in resolving a national difficulty in the healthcare market, fails to justify Congress’s decision to compel the purchase of insurance. Justice Ginsburg’s concurrence seemed to emphasize the role of the Constitution as authorizing federal involvement in national problems. In contrast, the joint dissent claims that the Constitution “enumerates not federally soluble problems, but federally available powers” and focuses on the ways the Constitution limits federal power by restricting its tasks to specifically enumerated powers (Scalia, Kennedy, Thomas, and Alito, 2012, p. 105). For the joint dissenters, *Wickard v. Filburn* and its substantial effects test mark the limits of federal interstate power. The joint dissent maintains a strong formalistic distinction between current market activity and inactivity despite the potential for future transactions and notes that Congress “has never before used the Commerce Clause to compel entry into commerce.”

Granting Congress such a power to regulate inactivity would dramatically expand its ability to influence the national economy. For example, the four conservative dissenters note that although Congress may wish to address national dietary imbalances or the weakness of domestic automobile manufacturers, compelling citizens to purchase broccoli or cars would not be a constitutionally valid method to achieve policy goals despite their efficacy (Scalia, Kennedy, Thomas, and Alito, 2012, p. 106). The four dissenters refused to join the controlling opinion’s distinction between taxes for statutory and constitutional purposes and instead claimed that the
individual mandate was truly a penalty as President Obama and Congress had previously presented it to the American public. The joint dissent also agreed with the Chief Justice with regard to the unconstitutionality of the Medicaid expansion but would have struck down the entire PPACA after finding its two main components unconstitutional (Harvard Law Review, 2012, p. 80).

However, while aspects of the joint dissent may provide Republicans hope for the future limitation of federal powers under the Interstate Commerce Clause, several elements of the joint dissent and the opinion of the Chief Justice should give pause to such aspirations. First, the Chief Justice’s controlling opinion and the joint dissent both treated the compulsion to enter interstate commerce as a novel issue distinct from issues presented in past Interstate Commerce Clause cases (Metzger, 2012, p. 98-99). Proponents of enhanced federal authority more commonly utilize the Interstate Commerce Clause to regulate existing or potential activity so future litigation on this subject will probably not focus on such national mandates. The joint dissent’s focus on the novelty of compulsion signals that the moderately conservative Justice Kennedy might revert to his liberal reading of the Interstate Commerce Clause when Congress is only regulating existing activity. His decision to join with the liberal justices in the majority opinion determined the outcome of Gonzales v. Raich, and the unique nature of NFIB v. Sebelius with respect to inactivity might explain Justice Kennedy’s temporary alliance with the starkly conservative side of the Court.

Furthermore, Congress already has an array of constitutionally valid methods to induce market activity. For example, in response to weak demand in the domestic automobile market during the Great Recession, Congress utilized tax credits and the Car Allowance Rebate System (more commonly known as “cash for clunkers”) to provide incentives for the purchase of new
automobiles (Bunkley, 2009). While the conservatives would likely rule against the constitutionality of a “car-purchase mandate,” tax credits and incentives bypass the Interstate Commerce Clause and find justification in Congress’s Taxing Power (Scalia, Kennedy, Thomas, and Alito, 2012, p. 106). Chief Justice Roberts’s opinion gives Congress yet another means to encourage activity in interstate markets by taxing those who are inactive in the relevant markets. Such taxes for refusal to purchase specific products artificially raise the costs of inactivity to the point that activity is more rational for the individual consumers and effectively act as mandates to purchase products.

Most importantly, neither the controlling opinion nor the joint dissent attempts to challenge the Court’s New Deal precedents related to the Interstate Commerce Clause. *Wickard v. Filburn* (1937), the case that formally established the substantial effects test, provides justification for all sorts of regulatory measures related to both intra- and interstate activities. Chief Justice Roberts’s controlling opinion and the joint dissent both reaffirmed *Wickard v. Filburn* and only disagreed with the concurrence on whether or not this precedent justifies the regulation of inactivity (Metzger, 2012, p. 113). For example, the Chief Justice cited this high-water mark for federal authority approvingly three times before finally distinguishing the individual mandate in *NFIB v. Sebelius* from the requirement not to produce too much wheat in *Wickard v. Filburn* (Minow, 2012, p. 143). Although the Rehnquist Court decided to reimpose some minimal limits to congressional authority under the Interstate Commerce Clause, *Lopez* (1995) and *Morrison* (2000) merely dealt with peripheral political issues and marginally adjusted the Court’s Commerce Clause jurisprudence. The Rehnquist Court was unwilling to overturn *Wickard v. Filburn*, and the Roberts Court expressed the same reluctance to upset numerous precedents in *NFIB v. Sebelius*. The Supreme Court’s repudiation of *Lochner* (1905) and *Carter...
v. Carter Coal Co. (1936) and acquiescence to the New Deal programs of the political branches marked the last major paradigm shift in the Court’s economic jurisprudence and provide constitutional legitimacy to the modern welfare state (Ackerman, 1991, p. 66). Unless the Supreme Court is willing to overturn Wickard v. Filburn and amend the substantial effects test, we can expect only minor limitations to Congress’s Interstate Commerce Power.

So far, only originalist Justice Thomas advocates reconsideration of the New Deal cases and the substantial effects test. In his brief dissent to NFIB v. Sebelius, Justice Thomas cites his concurrence in Morrison that “the Court’s continued use of that test ‘has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits’” and argues for a return to an earlier and more limited interpretation of the Interstate Commerce Clause (Thomas, 2012, p. 144). Despite Justice Thomas’s continued disapproval of the substantial effects test, the other eight justices seem unwilling to overturn Wickard v. Filburn and entirely upset the Court’s Interstate Commerce Clause jurisprudence.

In addition to the justices’ attitudinal views, the political climate will impact the viable policy choices available to the Supreme Court if it hopes to maintain its institutional prestige. Public reaction to the ruling in NFIB v. Sebelius was split mainly along partisan lines (Jacobi, 2012, p. 17). Republican businessmen and corporate interests generally disapproved of the Chief Justice’s controlling opinion due to the burden the PPACA would put on employers to provide health insurance and the expansion in federal regulatory authority. For example, Andrew Puzder, the CEO of CKE Restaurants (which runs Carl’s Jr., Hardee’s, and other restaurant chains), lauded Chief Justice Roberts’s limitation of the Interstate Commerce Clause but strongly criticized the Taxing Power aspect of the controlling opinion: “After this decision, we have a federal government with – in theory anyway – virtually unlimited power provided that it artfully
uses the taxing power to achieve ends that would otherwise be forbidden” (Puzder, 2012). On the other side of the aisle, Democrats emphasized the potential policy benefits of incorporating every individual in the insurance market, and President Obama claimed the “decision was a victory for people all over this country whose lives are more secure because of this law” (Mears and Cohen, 2012). Although the Chief Justice’s controlling opinion granted some legal victories to conservatives, the overall victory for liberals in NFIB v. Sebelius will make it difficult for Democrats to claim the Roberts Court is too politically biased if it were to limit the Interstate Commerce Clause further in future cases (Toobin, 2012, p. 286). NFIB v. Sebelius grants the Chief Justice and the other conservatives on the Court more institutional maneuvering room in future cases. However, the political branches will again exert pressure on the Court in future cases regarding Congress’s Interstate Commerce Power. Inevitably, the institutional concerns of the Chief Justice will conflict with his conservative tendencies once more as Metzger states: “Any effort to constrain Congress significantly and roll back the national administrative state will again put the Court’s institutional legitimacy into question – and thus run headlong into the institution-protecting side of NFIB” (Metzger, 2012, p. 87). Given the Court’s current ideological balance and general reluctance of the Court to overturn Wickard v. Filburn, Chief Justice Roberts and the other conservatives could conceivably utilize their institutional capital to limit the Interstate Commerce Clause slightly, much as the Rehnquist Court did in Lopez and Morrison. Such a case would have to be less politically sensitive than NFIB v. Sebelius or the institutional concerns of the Chief Justice might overcome his anti-compulsion attitudes.

Of course, the death or retirement of a justice could shift the ideological balance of the closely-divided Court depending on the timing of such an occurrence. As this paper’s analysis of Interstate Commerce Clause cases has shown, Supreme Court justices have political leanings and
goals similar to actors in the political branches, even though precedence, legal texts, and the expectation of unbiased judgment may dampen expressions of the justices’ attitudinal preferences. To further their political goals, many Supreme Court justices strategically choose to retire when their favored political party is in control of the presidency if not the Senate as well. Most recently, Justices Souter and Stevens decided to retire early in President Obama’s first-term to ensure that ideologically similar replacements, liberal Justices Sotomayor and Kagan respectively, would maintain their legacy on the Court. Their appointments had little effect on the Court’s ideological balance and have not altered the Court’s internal divide over the Interstate Commerce Clause.

On the other hand, the sudden death of a justice has the potential to substantively alter the Supreme Court’s jurisprudence. Several justices are determined to continue on the job until they are no longer physically able to fulfill their responsibilities. Former Chief Justice Rehnquist was the last active justice to die after he succumbed to thyroid cancer in 2005 (Lane, 2005). If Chief Justice Rehnquist had died not during the George W. Bush administration but during the Obama administration instead, his death could have sparked an intense political struggle to determine his successor. The replacement of a conservative justice with even a moderately liberal one would almost certainly undo the changes to the Court’s Interstate Commerce Clause jurisprudence since the beginning of the Rehnquist Court. On the liberal side, several commentators have encouraged Justice Ginsburg to retire soon so that the Obama administration and the Democratic-controlled Senate can safely replace the oldest member of the Court with an ideologically-similar justice (Stolberg, 2012). Although we cannot look into the future to determine when each justice will die, Kirk and Laniel use demographic data from the Centers for Disease Control to calculate the odds of various justices dying during Obama’s final term in office (Kirk and Laniel, 2013).
Although the justices have access to high quality health services, their weighty responsibilities likely take their toll and offset this health advantage. Justice Scalia has the highest probability of dying by 2017 at a 19.13% chance of death while the probability of at least one conservative justice dying is 45.89% (Kirk and Laniel, 2013). Such grim prospects for the Court’s conservatives will be even more worrisome for Republicans if they are unable to retake the presidency in the 2016 elections.

Without the presidency, Republicans will have to turn to the Senate, where confirmation struggles have become ever more partisan in recent years, to maintain control of the Supreme Court. Our Constitution requires the Senate to confirm all Supreme Court nominees. While confirmations used to involve little debate and unanimous approval with committees coming to consensus decisions or nominating Senators from their own ranks, the failure of Robert Bork’s nomination in 1987 sparked a trend of politicized confirmation votes (Kiely, 2010). While the Senate confirmed archconservative Justice Scalia unanimously in 1986, forty-two senators voted against Justice Alito in 2006. Republicans demonstrated similar opposition to recent liberal nominees with thirty-seven senators voting against Justice Kagan in 2010 (Kiely, 2010). Of the five Republicans voting for her confirmation, two have since retired, and Senator Lugar lost to a primary challenger whom the Tea Party supported (Bernstein, 2013). Although many senators view judicial confirmations as a non-political issue and willingly vote for cloture even if they oppose the nominee’s political views, only forty-one votes are necessary to deny cloture and stall confirmation indefinitely (Bernstein, 2013).

While the denial of cloture for the confirmation of a Supreme Court nominee would be drastic, senators have demonstrated willingness to deny cloture to nominees for inferior courts. Most recently, Republicans refused to bring Caitlin Halligan’s confirmation to a vote and
effectively ended her chances of joining the U.S. Court of Appeals for the D.C. Circuit, a prestigious appointment and stepping stone to the Supreme Court bench (Bernstein, 2013). As different political action committees place more and more emphasis on such confirmation votes, senators risk losing financial support and facing primary challengers if they refuse to vote against ideological opponents. In such a partisan political climate, moderate or compromise candidates might become the only viable nominees. Justice Kennedy’s willingness to join the liberal majority in *Gonzales v. Raich* and Justice Thomas’s complete rejection of the substantial effects test demonstrate the internal attitudinal division within the conservative bloc, but the liberal justices have been more ideologically cohesive with respect to the Interstate Commerce Clause. Such an ideological spread seems to indicate that the confirmation of moderate nominees will strengthen the liberal bloc and diminish the possibility of solidarity within the conservative bloc on the issue of the Interstate Commerce Clause.

Overall, the attitudinal views expressed in the Ginsburg concurrence and dissents of the conservatives indicate the difficulty of substantive change in the Court’s Commerce Clause jurisprudence. Swayed by his concern for the institutional reputation of the Court, Chief Justice Roberts would be loath to join a radical departure from the substantial effects test without a decisive 6-3 majority, and Justice Kennedy might not agree attitudinally with such an opinion. The influence of the political branches on the composition of the Supreme Court seems to preclude the replacement of a liberal justice with a staunchly conservative one anytime in the immediate future while the addition of a fifth liberal justice would undo the gains of the Rehnquist Court.

**Conclusion:**
The history of the Supreme Court’s Interstate Commerce Clause jurisprudence reveals
the influence of various institutional factors on its decisions. Although the attitudinal view of the
Court correctly accounts for the civics course view’s neglect of the political nature of the
judiciary, the strategic view goes a step beyond mere consideration of the justice’s political
preferences and explains the malleability of justice’s opinions given the pressures of institutional
actors such as the political branches and the states. In the first major Interstate Commerce Clause
cases, Chief Justice Marshall gradually laid the groundwork for national authority through a
series of cautious decisions. The states still had significant power relative to the federal
government so Chief Justice Marshall continuously relied upon the Supremacy Clause as
additional justification for overturning state statutes, even when the conflict with national
legislation was less than obvious, and he even granted the states a nominal victory in Willson v.
Black-Bird Creek Marsh Company (1829). During the Taney Court, the Supreme Court struggled
to reach a consensus decision on the proper scope of the Interstate Commerce Clause as the
volatile issue of slavery loomed in the background. As the fallout from the Dred Scott (1857)
decision demonstrated, the Court lacked the institutional authority to arbitrate such a divisive
issue, and Justices Catron and Grier provided the attitudinal flexibility necessary for the
development of the Dormant Commerce Clause doctrine in Cooley v. Board of Wardens (1852).
Although the New Deal Court initially resisted attempts to broaden the scope of the Interstate
Commerce Clause, President Franklin Delano Roosevelt’s overwhelming victory in 1936
provided him with the institutional power necessary to force Justice Owen Roberts to modify his
opinion in West Coast Hotel Co. v. Parrish (1937), and the audacious Court-packing plan
couraged the Court to continue its expansive interpretation of the Commerce Clause in
National Labor Relations Board v. Jones & Laughlin Steel Corp. (1937). By 1942, FDR had
reconstructed the Supreme Court in his image through the nomination of economically progressive justices. *Wickard v. Filburn* (1942) formally enunciated the substantial effects test and revealed how the federal government had truly eclipsed the institutional power of the states.

The Rehnquist Court reflected the renewed emphasis on federalism and the wariness of federal power in the political branches. Additional conservative appointees and Republican control of Congress granted Chief Justice Rehnquist the votes he needed to begin reining in Congress’s Interstate Commerce power. However, even Chief Justice Rehnquist refused to challenge the substantial effects test in *Lopez* (1995) and *Morrison* (2000), and Justices Kennedy and Scalia broke ranks in *Gonzales v. Raich* (2005) when the Court faced the more politically sensitive question of legalizing marijuana. Even though these two justices returned to the conservative fold in *NFIB v. Sebelius*, Chief Justice Roberts’s concern for the institutional prestige of his Court overcame his probable attitudinal preferences. Although he agreed with the other conservatives that the Interstate Commerce Clause did not justify the PPACA’s individual mandate, the Chief Justice upheld the individual mandate under Congress’s Taxing Power.

The Chief Justice’s controlling opinion gives some hope for a future limitation of the Interstate Commerce Clause, but institutional concerns will likely prevent a drastic alteration to the Court’s Interstate Commerce Clause jurisprudence. If the conservatives hope to keep Justice Kennedy on board, marginal restrictions to the Court’s interpretation of the Interstate Commerce Clause are more likely than major modifications. However, Justice Kennedy’s participation in the joint dissent and bitter disagreement with the outcome in *NFIB v. Sebelius* might indicate a general movement to the right on the issue of Interstate Commerce. According to some reports, Justice Kennedy allegedly led efforts to bring Chief Justice Roberts back into agreement with the conservative bloc after the Chief Justice defected following the initial conference decision.
(Crawford, 2012). Despite the restrictions placed on the Interstate Commerce Clause in the controlling opinion and joint dissent, the individual mandate was still a novel question regarding inactivity, and only Justice Thomas has expressed clearly a willingness to rethink the substantial effects test, the standard determining the constitutionality of regulations affecting activity.

Time alone can reveal the future direction of the Supreme Court’s Interstate Commerce Clause jurisprudence. Beyond granting a writ of certiorari to appealed cases, the Court has little influence over the cases on its docket that will require it to resolve discrepancies related to the Commerce Clause. The four liberal justices could force the conservatives’ hands by granting certiorari to controversial political litigation, the kind most likely to draw the support of the Chief Justice and perhaps Justices Kennedy and Scalia, depending on the issue. Depending on institutional importance and political significance, these conservative justices have been willing in at least one case each to join the liberal bloc of the Court. However, the five conservatives may decide to extend the Interstate Commerce arguments of *NFIB v. Sebelius* and grant a minor offsetting victory to Republicans. These speculations rely on the current ideological distribution of the Court and may change with the appointment of an additional liberal justice or a moderate compromise candidate during the remainder of President Obama’s second term in office. Republicans might gain a sixth seat on the Court if they can retake the presidency in 2016 and replace an aging Justice Ginsburg or Justice Breyer with a more conservative justice. Even then, the legal attitudes of such a justice might be subject to strong institutional factors opposing a radical curtailment of the federal bureaucracy. Guarded from public criticism with the shield of life tenure, the justices of the Supreme Court are ultimately responsible to their own consciences and may decide for themselves whether or not they should heed the expressions of the public will found in the various institutional factors. Chief Justice Roberts himself proved the impossibility
of predicting the confluence of different factors in the minds of justices when he took his seat in
the courtroom on the morning of June 28, 2012.
Works Cited


West Coast Hotel Co. v. Parrish. 300 U.S. 379. Supreme Court of the U.S. (1937) Source for Justice Sutherland’s dissent.

