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A Visual Guide to NFIB v. Sebelius

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COMPETING COMMERCE CLAUSE OPINION LINES 1789-2012

MAP EXPLANATION
Though Chief Justice Roberts ultimately provided the fifth vote upholding the Affordable Care Act (ACA) under the Tax Power in National Federation of Independent Businesses v. Sebelius, 132 S. Ct. 2566 (2012), his was also one of five votes finding the ACA exceeded Congress’ power under the Commerce Clause.

While Roberts argued that the ACA’s purported exercise of Commerce power “finds no support in our precedent,” id. at 2590, Justice Ginsburg accused the Chief Justice of failing to “evaluate[s] the constitutionality of the minimum coverage provision in the manner established by our precedents.” Id. at 2618 (Ginsburg, J., concurring).

These conflicting perspectives on “precedent” might prompt observers to ask whether Roberts and Ginsburg considered the same cases as controlling. This Visual Guide shows that though the justices agreed on relevant cases, they disagreed on which opinions within those cases properly stated the law.

Both Roberts and Ginsburg implicitly adopted the reasoning of prior dissenters and concurrences as well as majority opinions. The map illustrates how competing lines of Commerce Clause opinions constitute a long-running doctrinal dialectic that culminated – for now – in NFIB v. Sebelius.

Note: This map is not the territory. This Guide does not purport to represent every case in the Commerce Clause dialectic. Rather, it highlights representative and influential opinions that define the basic genealogy of the current doctrinal debate.

COMPETING LINES IN NFIB

Roberts relied on the majority tradition of Morrison and Lopez as anticipated by Rehnquist in his Hodel concurrence. His understanding of the limits of Commerce power traces back to Cardozo’s admonitions in Schechter and Carter Coal and is consonant with O’Connor’s dissent in Raich.

Ginsburg relied on the majority tradition running from Raich back to Heart of Atlanta, Wickard, and Darby. Her vision of a strong Commerce power traces back to Holmes’s expansive view of the Commerce Clause expressed in his Hammer dissent and is consonant with the dissent in Lopez and Morrison.

Gibbons v. Ogden, 22 U.S. 1 (1824) (9-0). Chief Justice Marshall’s majority opinion upholding Congressional power to regulate navigable waters is the foundation of Commerce Clause jurisprudence. Both sides in the ACA debate claim fidelity to Marshall’s vision.

Hammer v. Dagenhart, 247 U.S. 251 (1918) (5-4). The majority struck down a federal law prohibiting the interstate sale of goods produced by child labor. Though typical of pre-1937 doctrine, Justice Holmes wrote a prescient and blistering dissent that promoted a vision of strong federal power.


Carter v. Carter Coal Co., 298 U.S. 238 (1936) (6-3). The majority struck down a federal law regulating production and labor relations in the coal industry. Justice Cardozo dissented and argued the law conformed to the pragmatic limits on Commerce power he advocated in Schechter.


United States v. Darby, 312 U.S. 100 (1941) (9-0). A unanimous Court upheld the Fair Labor Standards Act of 1938 and overruled Hammer. Justice Stone’s opinion specifically cited Holmes’ Hammer dissent and stated that Carter Coal had been abrogated.

Chief Justice Marshall’s vision of strong Commerce power and is a bedrock for contemporary Commerce debate.

The Court unanimously upheld the Civil Rights Act of 1964 against a Commerce Clause challenge. The strong Commerce tradition remained unopposed.

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (9-0). Justice Clark’s opinion for a unanimous Court upheld the foundation of Commerce Clause jurisprudence.


Chief Justice Rehnquist’s majority opinion built on the decision of Hodel and struck down a portion of the Violence Against Women Act. Justice Souter invoked his prior dissent from Hodel. The dialectic was in full swing.

Although a majority upheld the federal government’s power to criminalize personal cultivation of medical marijuana, only four justices joined Stevens’ plurality opinion (Justice Scalia concurred in judgment only). In dissent, Justice O’Connor invoked the Lopez-Morrison counter tradition.

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