THE SUPREME COURT'S COMMERCE CLAUSE JURISPRUDENCE THROUGH CHANGES IN POLITICS AND PUBLIC OPINION

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Abstract

The Commerce Clause, embedded in Article 1, Section 8, Clause 3 of the Constitution, has been widely debated throughout the past two centuries. When analyzing Supreme Court jurisprudence, we see that the Court's interpretation of the Commerce Clause has changed significantly over time. While the Court has been mostly consistent over the past ninety years, we must view Commerce Clause cases in their historical context - specifically the social movements of the time, the particular Justices serving on the Court, and the day's political winds. It is important to see how Commerce Clause jurisprudence has changed over time in order to understand how it might change the way the federal government operates in the future. In this area, the Court has tremendous power and could greatly alter federal power as we know it. While many Americans are unaware of its importance, the Commerce Clause is something that can affect their everyday lives.

Introduction

Article 1, Section 8, Clause 3 of the Constitution, better known as the Commerce Clause, is central to the nation's current understanding of federal power. As Congress, with the Supreme Court's endorsement, continuously uses its commerce authority to justify federal legislation, citizens of the United States are affected in ways that they might not even be aware of. For the past two centuries the Supreme Court has ruled on cases regarding the Commerce Clause and Congress' power in a multitude of ways, shifting from narrow to broad interpretations. Any shift in interpretation, however, could potentially cause disruptive consequences as such a move could alter the way in which the federal government operates and severely limit Congress' ability to regulate.

Nonetheless, as Supreme Court Justices change and public opinion and politics arise, Commerce Clause interpretations are destined to succumb to the accepted belief at the time. Many Americans wonder what this means for the future of the Commerce Clause and what kind of interpretations might justify Congress' increasing power. Recognizing factors such as politics and public opinion is important to understand how the Supreme Court can alter how the federal government operates and decide future court cases with reference to the Commerce Clause.

While there are many aspects to the Commerce Clause, it is important to understand that interstate commerce among the several states has an effect on people and businesses throughout the United States. The Commerce Clause, stating that "Congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes" [1], leads us to ask an important question: What is considered commerce, specifically interstate commerce?

[1] U.S. Const. art. I § 8.

According to the Merriam-Webster Dictionary, the definition of commerce is "the exchange or buying and selling of commodities on a large scale involving transportation from place to place", but it has evolved into much more over the past two centuries through Supreme Court rulings.[2] In *Gibbons v. Ogden*, a landmark decision written in 1824, the Supreme Court and Chief Justice Marshall outlined that commerce not only encompassed buying and selling, but also traffic, intercourse, and navigation.[3] Early on we notice the Marshall Court interpreted the Commerce Clause in a broad sense. Furthermore, *Gibbons* prohibited states from enacting legislation that might burden interstate commerce, giving the states less space to enact legislation that did not interfere with Congress' commerce authority.[4] The Supreme Court's definition, interpreting the intentions of the framers of the Constitution, gave the federal government exclusive authority over interstate commerce.

The Lochner Era

After *Gibbons*, the Supreme Court did not have the opportunity to significantly address the Commerce Clause for another 71 years. At the time of *Gibbons,* commercial infrastructure in the United States was relatively limited. As decades passed and the United States turned into an industrial powerhouse expanding its railways by over 93,000 miles, Congress began to pass more statutes and regulations under its Commerce Clause power.[5] The next major Commerce Clause case was not heard until 1895.

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[2] "Commerce Definition & Meaning." Merriam-Webster. Merriam-Webster. https://www.merriam-webster.com/dictionary/commerce.
[3] *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824).
[4] Williams R. Norman, "Why Congress May Not Overrule the Dormant Commerce Clause," UCLA Law Review 53, no. 1 (October 2005): 153-238
[5] McGimsey, Diane. "The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element Loophole." *California Law Review* 90, no. 5 (2002): 1675-1737.

In 1895, the United States brought suit against E.C. Knight Company and other sugar manufacturers for violating the Sherman Antitrust Act of 1890.[6] The Sherman Antitrust Act was passed in order to prevent monopolies and restrictive trade agreements that would affect interstate commerce.[7] After one of the defendants in the case, the American Sugar Refining Company, took manufacturing control of about 98% of sugar refining in the United States, the federal government believed that they had violated the Sherman Antitrust Act.[8] The Court held that Congress may not regulate manufacturing under their Commerce Clause powers because it only incidentally affects commerce.[9] The Sherman Antitrust Act was found unconstitutional and "the Supreme Court reasoned that the company's control of manufacture did not constitute a control of trade".[10] Sugar manufacturing itself was considered a local activity that should be left to the states. Shortly after, a 1905 case, *Lochner v. New York* reaffirmed the Court's narrow interpretation of federal power.[11]

The *Lochner* case itself covered legislation regulating labor relations, and the Due Process Clause, but it had an indirect effect on the interpretation of the Commerce Clause. This case and the Lochner Era, a period lasting until 1937, were characterized by the use of substantive due process to strike down legislation that interfered with an individual's personal liberty - also known as freedom of contract. While the case did not directly deal with the

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[6] *United States v. E.C. Knight Company* 156 U.S. 1 (1895)
[7] National Archives and Records Administration. (n.d.). *Sherman Anti-Trust Act (1890)*. National Archives and Records Administration. https://www.archives.gov/milestone-documents/sherman-anti-trust-act
[8] *United States v. E.C. Knight Company* 156 U.S. 1 (1895)
[9] Id.
[10] National Archives and Records Administration. (n.d.). *Sherman Anti-Trust Act (1890)*. National Archives and Records Administration. https://www.archives.gov/milestone-documents/sherman-anti-trust-act
[11] Schwartz, David S. *The Spirit of the Constitution: John Marshall and the 200-Year Odyssey of McCulloch v. Maryland*. Oxford University Press, 2019.

Commerce Clause, it represented the beginning of the Lochner Era and a change in judicial interpretation.

Throughout the Lochner Era and the Court's use of substantive due process, we observe, according to one scholar, the Lochner Court "impos[ing] their own policy preferences on democratically elected legislatures".[12] Justice Oliver Wendall Holmes advocated against what he called judicial activism and believed that their own opinions should not conclude their judgment on whether regulations are in conflict with the Constitution.[13] This scenario coined the term "Lochnering" and was seen as committing a cardinal sin.[14] The Lochner Era in itself is an example of how politics and interpretations of individual Justices can get in the way of how Justices interpret the Constitution. During his confirmation hearing to become Chief Justice, Justice John Roberts stated, "You go to a case like the Lochner case. You can read that opinion today and it's quite clear that they're not interpreting the law, they're making the law".[15] This Court often based decisions around their pro-business ideology, instead of basing decisions on the law itself. They focused on the Due Process Clause of the Fourteenth Amendment and protecting citizens' right to liberty. The case law throughout the Lochner Era relied on the "majority's idea of government-as-it-should-be" and ultimately turned into judicial legislation.[16] As a result of the use of substantive due process, it is important to understand that the Justices' view, and interpretation of the Commerce clause changed.

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[12] Choudhry, Sujit. "The Lochner era and comparative constitutionalism." *International Journal of Constitutional Law* 2, no. 1 (2004): 1-55.
[13] Id, 7.
[14] Id, 7.
[15] "Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States, 109th Congress. ." GovInfo | U.S. Government Publishing Office. https://www.govinfo.gov/content/pkg/GPO-CHRG-ROBERTS/pdf/GPO-CHRG-ROBERTS.pdf.
[16] Choudhry, Sujit. "The Lochner era and comparative constitutionalism." *International Journal of Constitutional Law* 2, no. 1 (2004): 1-55.

The Lochner Court's focus on economic liberty led the Court to overturn many economic plans dealing directly with the Commerce Clause. In addition to the *E.C. Knight Company* case, *Carter v. Carter Coal Co.* is an example of a case where the Supreme Court overturned economic regulations based on the Commerce Clause. *Carter v. Carter Coal Co*., decided in 1936, held that mining, similar to manufacturing, cannot be regulated by Congress because of its intrastate activity.[17] The act in question was the 1935 Bituminous Coal Conservation Act that regulated coal prices, standards for safety and conditions, and an industry-wide minimum wage.[18] These local matters are to be decided by the states and the production of the coal cannot be regulated until the coal is introduced into interstate commerce.

New Deal Politics

Franklin D. Roosevelt, President of the United States of America from 1933 to 1941, ran into the obstacle of the Lochner Court through their continuous rendering of New Deal laws, such as the Bituminous Coal Conservation Act, the National Industrial Recovery Act, and the first Agricultural Adjustment Act of 1933, etc. as unconstitutional. After the Supreme Court continued to strike down New Deal legislation, President Roosevelt attempted to pack the Court in 1937. Despite the fact that Roosevelt was ultimately unsuccessful in his plan, Justice Owen Roberts decided to switch his vote in the 1937 *West Coast Hotel Company v. Parrish* case that ultimately ended the Lochner Era. Although there is a debate as to whether a "switch in time saved nine", many believe that Justice Roberts' switch in votes helped President Roosevelt's agenda to pass New Deal legislation which then led to the Supreme Court providing power back to Congress that they once lost during the Lochner Era. This Court ultimately turned back to a

[17] *Carter v. Carter Coal Co.* 298 U.S. 238 (1936)
[18] Id.

broad interpretation of the Commerce Clause and many theorists believe that "the Court's switch in time was politically rather than doctrinally motivated".[19] This change in jurisprudence sparked many cases to be overturned and many Commerce Clause cases to be interpreted broadly once again.

In 1937, *The National Labor Relations Board v. Jones and Laughlin Steel Corporation* Court opinion delivered by Chief Justice Hughes provided that Congress had the power to regulate labor relations, including manufacturing, under its Commerce Clause power because of the close and substantial relationship to interstate commerce, and thus the National Labor Relations Act was found to be constitutional.[20] Manufacturing activities did not previously count as commerce as decided in *United States v. E.C. Knight Company*.[21] Justice Hughes departed from the *E.C. Knight Company* opinion and decided that it was the activity's impact on interstate commerce that mattered and not the activity itself [22]. While Jones and Laughlin argued that the firing of ten employees was purely a local matter, the Court urged them to look at how that might have an effect on interstate commerce. Theorists have said they believed the National Labor Relations Act, also known as the Wagner act, was strategically based on the Commerce Clause instead of the Thirteenth Amendment, a decision made by lawyers and politicians to broaden Congress' power to regulate commerce.[23] There are also ideas that "the Supreme Court upheld the Wagner Act not because of the lawyers' Commerce Clause arguments, but because workers staged a series of sit-down strikes that confronted the swing Justices with a choice between

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[19] Eskridge Jr, William N., and John Ferejohn. "The elastic commerce clause: A political theory of American federalism." *Vand. L. Rev.* 47 (1994): 1355.
[20] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1 (1937)
[21] *United States v. E.C. Knight Company* 156 U.S. 1 (1895)
[22] Id.
[23] Pope, James Gray. "The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957." *Columbia Law Review* (2002): 1-122.

industrial peace or war".[24] This shows that public opinion could potentially affect Supreme Court Justices decisions in a close case like this regarding the Commerce Clause. With the public support of unions and workers' rights movements, Supreme Court Justices might have been swayed to the public's beliefs at the time. Similar to the Lochner Court, the New Deal Court could have been politically motivated based on what was happening at that time with the Great Depression and President Roosevelt's political agenda. Ultimately with the efforts of Franklin D. Roosevelt and his New Deal plan to make the Court interpret the Commerce Clause "broadly enough to embrace regulatory legislation with incidental (but demonstrable) effects on interstate commerce … [he was able to establish a] new Commerce Clause jurisprudence with unanimous majorities by 1942".[25]

The Court continued with its broad interpretation of the Commerce Clause and went a step further with its decision in the 1942 case, *Wickard v. Filburn*. In this case, Filburn challenged the Agricultural Adjustment Act of 1938 after he was penalized for producing excess wheat for his own private consumption.[26] The Court's decision allowed Congress to regulate this intrastate activity pursuant of the Commerce Clause because of how the local farmer, Filburn, might be negatively impacting interstate commerce by decreasing the amount of wheat that is put into the market.[27] The Court's determination of a substantial economic effect on interstate commerce shows just how broadly they interpreted federal commerce power. Although Filburn was just one farmer, the Supreme Court still believed that his personal consumption of wheat had a substantial effect on interstate commerce. Not only was this activity solely intrastate, it never

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[24] Id, 1.
[25] Eskridge Jr, William N., and John Ferejohn. "The elastic commerce clause: A political theory of American federalism." *Vand. L. Rev.* 47 (1994): 1355.
[26] *Wickard* v. *Filburn,* 317 U. S. 111 (1942)
[27] Id.

occurred outside of Filburn's farm. The New Deal politics and agendas helped Congress regain its limitless power under the Commerce Clause that Chief Justice Marshall outlined in *Gibbons*, stating that the power to regulate "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation, other than those prescribed in the Constitution".[28]

Civil Rights Movement

The 1954 case, *Brown v. Board of Education,* sparked the beginning of the famous Civil Rights Movement. While that case dealt with violations of the Equal Protection Clause of the Fourteenth Amendment, the Civil Rights Movement inherently impacted the Supreme Court's interpretation of the Commerce Clause. The Civil Rights Act of 1964 prohibited discrimination on the basis of race, color, religion, sex, or national origin.[29] Soon after the passage of the Civil Rights Act in 1964, a motel which openly refused service to African Americans filed suit against the United States challenging Congress' power to compel private, intrastate behavior in the case *Heart of Atlanta Motel, Inc. v. United States*.[30] With the idea of separate but equal being overturned, the support from the National Association for the Advancement of Colored People (NAACP), the Civil Rights Act of 1957 and 1964, and the support of many Americans, one can infer that public opinion had something to do with the Supreme Court's decision to justify the Civil Rights Act under the Commerce Clause. This can also be seen as a continuation of the *NLRB* and *Wickard* trend of continuing broad interpretation of the clause in itself.

The Supreme Court ruled that Congress may enact regulations that prevent racially discriminatory policies in hotel accommodations because of the negative effect those policies

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[28] *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824).
[29] United States. Civil Rights Acts of 1957, 1960, 1964, 1968, and Voting Rights Act of 1965. Washington :U.S. Govt. Print. Off., 1969.
[30] *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241 (1964)

have on interstate commerce.[31] Decided on the same day as *Heart of Atlanta Motel*, the Supreme Court continued with the same ruling in the case *Katzenbach v. McClung* when the McClung's, restaurant owners refusing to serve African Americans, filed suit. The refusal to serve guests in restaurants and hotels solely based on their race has a substantial effect on interstate commerce.[32] Although one might not think the Commerce Clause directly connects to the Civil Rights Act, because of its purpose of ending racial discrimination, the Supreme Court's justification of Congress' power through use of the Commerce Clause shows the impact a political movement can have on Congress and ultimately the Court. With Congress' passage of the Civil Rights Act, the Supreme Court found itself redistributing wealth through social power and decisions. *McClung* seemed to be an easy decision for the Court "because this was a redistributional statute whose political values reflected those held by the Warren Court".[33] This case might have not been decided the way it was if it was not about overruling something as profound as the Civil Rights Act.

A Sudden Retreat

After the New Deal Era and the decisions rendered regarding the Civil Rights Act, the Court began to narrow its interpretation of the Commerce Clause and declare that federal commerce authority must have some limit. The case that provoked this limit on the Commerce Clause is the 1995 case, *United States v. Lopez*. After Congress passed the Gun-Free School Zones Act in 1990, Lopez, an individual who brought a gun into a school zone, challenged the Act's constitutionality based on the Commerce Clause.[34] Although this narrowing of the

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[31] Id.
[32] *Katzenbach* v. *McClung,* 379 U. S. 294 (1964)
[33] Eskridge Jr, William N., and John Ferejohn. "The elastic commerce clause: A political theory of American federalism." *Vand. L. Rev.* 47 (1994): 1355.
[34] *United States* v. *Lopez,* 514 U. S. 549 (1995)

Commerce Clause is not as severe as the Lochner Era's interpretation, the slight change in Commerce Clause jurisprudence was confusing to the lower courts and sparked debate about future cases.

The Supreme Court no longer relied on its broad interpretation of the Commerce Clause and Chief Justice Rehnquist, writing for the Court, held that while Congress does have broad power under the Commerce Clause, it does not extend to regulating the carrying of handguns when the activity is considered too indirectly related to commerce.[35] Rehnquist reaffirmed this rule that Congress only had the ability to regulate channels of commerce, the instrumentalities of commerce, and activities that substantially affect interstate commerce.[36] The government argued that guns in schools affect education, which affects job prospects and productivity, which then affects commerce.[37] The fact that the United States had to argue subsequent factors in Court to show that bringing a firearm in a school zone would eventually impact interstate commerce showed the Supreme Court that it was too far outside the scope of the Commerce Clause to be justified.

Not long after that, Chief Justice Rehnquist relied on the holding in *Lopez* to continue a narrow interpretation of the Commerce Clause in the case *United States v. Morrison*.[38] The case calls a provision of the Violence Against Women Act of 1994 into question.[39] The specific provision gave victims of gender motivated violence the right to sue their attackers in federal

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[35] Id.
[36] "Commerce Clause." Legal Information Institute. Legal Information Institute. https://www.law.cornell.edu/wex/commerce_clause.
[37] *United States* v. *Lopez,* 514 U. S. 549 (1995)
[38] Maloney, Kerrie E. "Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence against Women Act after" Lopez"." *Columbia Law Review* 96, no. 7 (1996): 1876-1939.
[39] *Gonzales v. Raich*, 545 U.S 1 (2005)

court even if no criminal charges had been filed against the attacker.[40] The act was "the first civil rights remedy to victims of gender-motivated violence: 'All persons within the United States shall have the right to be free from crimes of violence motivated by gender…'".[41] The United States uses evidence that violence against women does inherently affect the economy and interstate travel, but the Supreme Court believed it went too far beyond economic activity and the scope of the Commerce Clause once again because it did not involve one of the three: channels of commerce, instrumentality of interstate commerce, and activities that substantially affect interstate commerce.[42] It seems that the substantial effects test is the most controversial and is the deciding factor in recent Commerce Clause cases. Although the Court upheld the substantial effects test in both *Lopez* and *Morrison* and only stated the need for economic activity, the current fear is that the Court may be open to getting rid of or greatly narrowing the substantial effects test altogether. If we go back and look at a case like *Katzenbach*, many would believe this is a big problem.[43] If we were to narrow the scope in a case like *Katzenbach* it could change the course for other cases such as *Heart of Atlanta Motel* and could potentially invalidate the Civil Rights Act altogether.

Five years later, the Court declined to further narrow its interpretation of commerce authority in the case *Gonzales v. Raich*.[44] In this case, the Supreme Court upheld the Controlled Substances Act that regulated the use and production of drugs after Raich sued the United States Attorney General when federal agents seized and destroyed Raich's medical marijuana plants in

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[40] Maloney, Kerrie E. "Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence against Women Act after" Lopez"." *Columbia Law Review* 96, no. 7 (1996): 1876-1939.
[41] Id.
[42] *United States* v. *Morrison,* 529 U. S. 598 (2000)
[43] Maloney, Kerrie E. "Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence against Women Act after" Lopez"." *Columbia Law Review* 96, no. 7 (1996): 1876-1939.
[44] *Gonzales v. Raich*, 545 U.S 1 (2005)

her own home.[45] The *Lopez* Court seems to go back in time to *Wickard v. Filburn* where they regulated intrastate activity because of the interstate market that exists beyond the local activity.[46] This change in decision after narrowly interpreting the Commerce Clause for the past ten years could be because of the politics behind marijuana and drugs in general. There is an illegal interstate market for marijuana and because Congress is seeking to eliminate this market, the Supreme Court accepts their justification under the Commerce Clause. The Court's broad definition of economic activity made it "easier to regulate even noneconomic activity as a part of a broader regulatory scheme".[47] We see Commerce Clause paradoxes in this case that raise questions on what the Court really believes is commerce and how they plan to interpret it in the future.[48]

Shortly after *Gonzales v. Raich,* the Court decided to return to a narrower interpretation of the Commerce Clause while still giving the Congress power over the states. In *National Federation of Independent Business v. Sebelius* the Supreme Court held that the Affordable Care Act's individual mandate could not be upheld by the Commerce Clause but that it could be upheld by Congress' Taxing Power.[49] The inactivity presented in this case gave good reason for the Court to reject the individual mandate under the Commerce Clause as Congress cannot compel individuals to engage in activity.[50] This inactivity standard shows a limitation placed on

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[45] Id.
[46] Nicholson, Emily K. "Congress' Regulation of Intrastate, Noncommercial Cultivation and Possession of Medicinal Marijuana under the Controlled Substances Act Is a Constitutional Exercise of Its Commerce Clause Authority: Gonzales v. Raich." *Duq. L. Rev.* 44 (2005): 335.
[47] Somin, Ilya. "Gonzales v. Raich; Federalism as a Casualty of the War on Drugs." *Cornell JL & Pub. Pol'y* 15 (2005): 507.
[48] Balman, Steven K. "Constitutional Irony: Gonzales v. Raich, Federalism and Congressional Regulation of Intrastate Activities under the Commerce Clause." *Tulsa L. Rev.* 41 (2005): 125.
[49] Sidhu, Jonathan S. "For the general welfare: finding a limit on the taxing power after NFIB v. Sebelius." *California Law Review* (2015): 103-139.
[50] *National Federation of Independent Business v. Sebeliu*s, 567 U.S. 519 (2012)

Congress and the federal government in regards to the Commerce Clause. Chief Justice Roberts points out that even though the Court's view on the Commerce Clause has been expansive, all the cases "have one thing in common: They uniformly describe the power as reaching activity".[51]

Questions and Impacts

The opinions of the Supreme Court in both *United States v. Lopez* and *United States v. Morrison* sparked questions about how the Supreme Court is interpreting the Commerce Clause case by case. The Court's interpretation in *Lopez* was narrowly defined by the substantial effects test, but "if the Court had intended to hold that all regulated activity must be economic in order for legislation regulating that activity to be constitutional after *Lopez*, it would have stated so explicitly … and *Lopez* would have overruled a number of longstanding precedents [like] *Katzenbach v. McClung* and *Heart of Atlanta Motel v. United States*".[52] Some argue that "activities that substantially affect interstate commerce" don't need to be economic in nature but only affect interstate commerce in the long run. The cases mentioned above were cases challenging the Civil Rights Act of 1964 and could have been decided based on racial discrimination and its substantial effect on interstate commerce. This brings up the important question of why gender is any different from race relating to the Civil Rights Act? Although the *Katzenbach* and *Heart of Atlanta* cases can be considered to be economic in nature they affected something else first. For example, in *Heart of Atlanta*, the policies affected African Americans from traveling which then affected interstate commerce. Women's activists believe that a similar argument could be made for a case like *Morrison*.[53] This can show how the Civil Rights

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[51] Drachsler, David. "Nfib V. Sebelius, the Commerce Clause and Activity/Inactivity." *Inactivity (February 12, 2022)* (2022).
[52] Maloney, Kerrie E. "Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence against Women Act after" Lopez"." *Columbia Law Review* 96, no. 7 (1996): 1876-1939.
[53] Id.

Movement and the NAACP could be considered a strong influence because of the following and support they received. Although there were a multitude of women's groups who lobbied for this act, it did not seem to make a difference in the Supreme Court's interpretation of the Commerce Clause because of its lack of economic activity.[54]

There is also the question of why the Court declined to further narrow their interpretation in order to uphold the Controlled Substances Act in *Gonzales v. Raich*. The Court heavily relied on the *Wickard* decision when they upheld the regulation of intrastate activity. Justice Stevens, delivering the opinion for the Court, "drew a close parallel … [and] observed that both the CSA and the AAA were passed to control the supply and demand of fungible commodities".[55] This close parallel could have been relied on because the Court feared that the "high demand for marijuana may similarly lure homegrown medicinal supplies of cannabis into illicit channels".[56] While Raich provided arguments to distinguish the difference between her situation and *Wickard*, the Court continued to strike down her argument in order to further Congress' goal of eliminating the interstate market for illegal drugs, increasing Congress' power under the Commerce Clause.

The slight changes back and forth from broad to narrow interpretations of the Commerce Clause calls the Court's Commerce Clause jurisprudence into question and "until the Court clarifies the sweep of the *Lopez* decision, legislation predicated on the Commerce Clause that regulates an activity whose connection to commerce is not immediately visible may be

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[54] "History of the VAWA." Legal Momentum. The Women's Legal Defense and Education Fund. https://www.legalmomentum.org/history-vawa.
[55] Nicholson, Emily K. "Congress' Regulation of Intrastate, Noncommercial Cultivation and Possession of Medicinal Marijuana under the Controlled Substances Act Is a Constitutional Exercise of Its Commerce Clause Authority: Gonzales v. Raich." *Duq. L. Rev.* 44 (2005): 335.
[56] Id, 338.

vulnerable to constitutional challenge".[57] The six opinions written in the *Lopez* case shows how this clause "has been a judicial whirligig that responds to shifting personal preferences of the Court's personnel changes".[58] If Commerce Clause jurisprudence changes even slightly every time different Justices leave and come in we will begin to see a change in how the federal government operates.

It is confusing for the lower courts to know what they should be using as precedent regarding the Commerce Clause when it continues to be interpreted more narrowly. After the *Lopez* decision, lower courts were reluctant to use it as an analysis and often treated it as an isolated case.[59] Some reasons as to why it is difficult to use *Lopez* are that it is "unclear how far the Supreme Court itself intended the decision to go… the Court declined certiorari in a number of cases in the intervening year that could have expanded its initial holding… and *Lopez* made a point of not overruling any of the Court's prior Commerce Clause decisions".[60]

Judicial Opinion and the Modern Court

Throughout these cases Justice Thomas expressed his opinion and interpretation of Commerce Clause jurisprudence through his concurrences and dissents. While he agreed with the Court's decision to strike down the Gun-Free School Zones Act, he believed that the substantial effects test is problematic. He stated that the Court "has drifted far from the original understanding of the Commerce Clause" and that commerce should be limited to trade and exchange of goods.[61] This sparks the idea that if the *Lopez* Court were to rule on a case like

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[57] Maloney, Kerrie E. "Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence against Women Act after" Lopez"." *Columbia Law Review* 96, no. 7 (1996): 1876-1939.
[58] Berger, Raoul. "Judicial Manipulation of the Commerce Clause." *Tex. L. Rev.* 74 (1995): 695.
[59] Denning, Brannon P., and Glenn H. Reynolds. "Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts." *Ark. L. Rev.* 55 (2002): 1253.
[60] Id, 1254.
[61] Berger, Raoul. "Judicial Manipulation of the Commerce Clause." *Tex. L. Rev.* 74 (1995): 695.

Katzenbach they would have decided differently, but one could argue that the popularity of the Civil Rights Act would have swayed the Justices to make the same decision that the Court did in 1964. So, there are currently Justices out there like Thomas who do not agree with the current Commerce Clause jurisprudence, and after the Sebelius decision, Roberts and Scalia seemed to agree that the Commerce Clause interpretation had been taken too far.[62] Justice Thomas restated a quote from Morrison in a dissent in *NFIB v. Sebelius*, saying 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".[63]

The modern Court in itself could lead to a change in Commerce Clause jurisprudence. If the modern Court departs from the substantial effects test, future Commerce Clause cases will have different outcomes and influence the way the federal government chooses to enact legislation. The Court today has a conservative majority with the recent appointments of Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barret in the last five years. While it is not clear which way these Justices will decide future cases, they may be influenced by the Justices that came before them.[64] One scholar stated that "Justice Gorsuch is considered by many to be true heir of the late Justice Scalia in his jurisprudential philosophy", implying that Gorsuch could potentially have the same skepticisms of the Commerce Clause and how far it has gone.[65] The question for the modern Court is not how they are going to apply cases like *Lopez* to future Commerce Clause cases but how they will use their power and interpretation to change the course of federal regulatory power. Could they potentially find a way to narrow the clause while

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[62] *National Federation of Independent Business v. Sebeliu*s, 567 U.S. 519 (2012)
[63] Id.
[64] McGoldrick Jr, James M. "Why Does Justice Thomas Hate the Commerce Clause." *Loy. L. Rev.* 65 (2019): 329.
[65] McCauley, Sean. "Revising the Marks Rule in Light of a Plurality Prone Supreme Court: A Case Study of National Federation of Independent Businesses v. Sebelius." *BU Pub. Int. LJ* 26 (2017): 257.

still upholding cases like *Heart of Atlanta*, *Katzenbach*, etc.? Will they decline the substantial effects test altogether? Or will they provide limitless power to Congress? Each of these questions will greatly impact federal power and Commerce Clause cases to come.

Conclusion

Commerce Clause jurisprudence has greatly changed since *Gibbons v. Ogden*. Throughout the past two centuries we see shifts from narrow to broad interpretations of the clause that can be directly linked to politics and public opinion. From the Lochner Era and judicial legislation, to the Civil Rights Movement, we see a plethora of interpretations. The changes in Commerce Clause jurisprudence can have a negative effect on lower court decisions and future decisions in regard to the clause as precedent. Some people continue to worry about the powers given to Congress through this clause and are afraid the recent decisions surrounding the Commerce Clause were just to cover up the limitless power the Court has granted to Congress. Others are afraid of the Court greatly narrowing the substantial effects test. Justices such as Thomas believe the Commerce Clause scope has gone too far and want to see a change with respect to Commerce Clause jurisprudence. The future is unknown for what powers the Commerce Clause holds. We can infer that a change in Justices, politics, movements, and events that are happening at a given time will have an effect on the Supreme Court's interpretation of the Commerce Clause. This can ultimately affect how the federal government operates and how Congress decides to proceed with the powers they are granted.

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