

MODULE 3

The Commerce Clause

Gibbons to NFIB · the taxonomy era · the switch · aggregation · the three categories · the six considerations

Constitutional Law · Fall 2026 · Professor Jorge R. Roig

Where Module 2 left us

Module 2 gave you a three-part rule. Module 3 is the fight over the second part.

MARSHALL'S RULE, McCULLOCH

“Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited ... are constitutional.”

- 1 A legitimate end — is Congress after something it is allowed to be after?
- 2 **Within the scope of the Constitution — is there a power that covers this at all?**
- 3 Appropriate means — plainly adapted to that end, and not prohibited.

Elements one and three get heavy deference. Element two is where the fighting happens, and element two means the enumerated powers.

Watch element three at the end: in NFIB the Chief Justice calls the mandate necessary but not proper.

What kind of thing is it, or what does it do?

The question to carry through all fourteen readings — and it is a target, not background.

BY CATEGORY

What **KIND** of thing is this?

Manufacture or commerce. Direct or indirect. Economic or noneconomic. Activity or inactivity. Sort it into a box and the box decides the case.

Objection: decides constitutional questions by vocabulary. — Jackson, Wickard

BY CONSEQUENCE

What does it **DO**, and how much?

Measure the effect on interstate commerce, aggregate it if you must, and defer to Congress if the finding is rational.

Objection: has no stopping point at all. — Rehnquist, Lopez

Both objections are correct. Neither side can answer the other. So the Court keeps switching between them, and each new category eventually looks like the old one it replaced.

Marshall starts as wide as possible

Gibbons v. Ogden (1824) — three moves, and every later case argues about how much survives.

1

COMMERCE IS

**not merely traffic —
intercourse**

“Commerce, undoubtedly, is traffic, but it is something more: it is intercourse.” The word takes in navigation, and every form of commercial dealing with it.

2

AMONG MEANS

**intermingled with, not
between**

Commerce among the States does not stop at the external boundary line of each State. It may be introduced into the interior.

3

THE POWER IS

**plenary — restrained by the
ballot**

Exercised to its utmost extent, acknowledging no limitations other than are prescribed in the Constitution. The restraints relied on are elections.

Lopez quotes Gibbons. NFIB quotes Gibbons. They quote different sentences — and which sentence you need tells you which side you are on.

Four eras, one argument

The dates are worth memorising. The pattern underneath them is worth more.

1824–1890

DEFINITION

Gibbons defines the power as wide as it will ever be, and Congress barely uses it for sixty years.

1890–1937

THE TAXONOMY

Sorting replaces measuring. Manufacture v. commerce; direct v. indirect. Five statutes fall in 1935–36.

1937–1995

EFFECT

Nomenclature is abandoned by name. Fifty-eight years without a single statute struck down.

1995–now

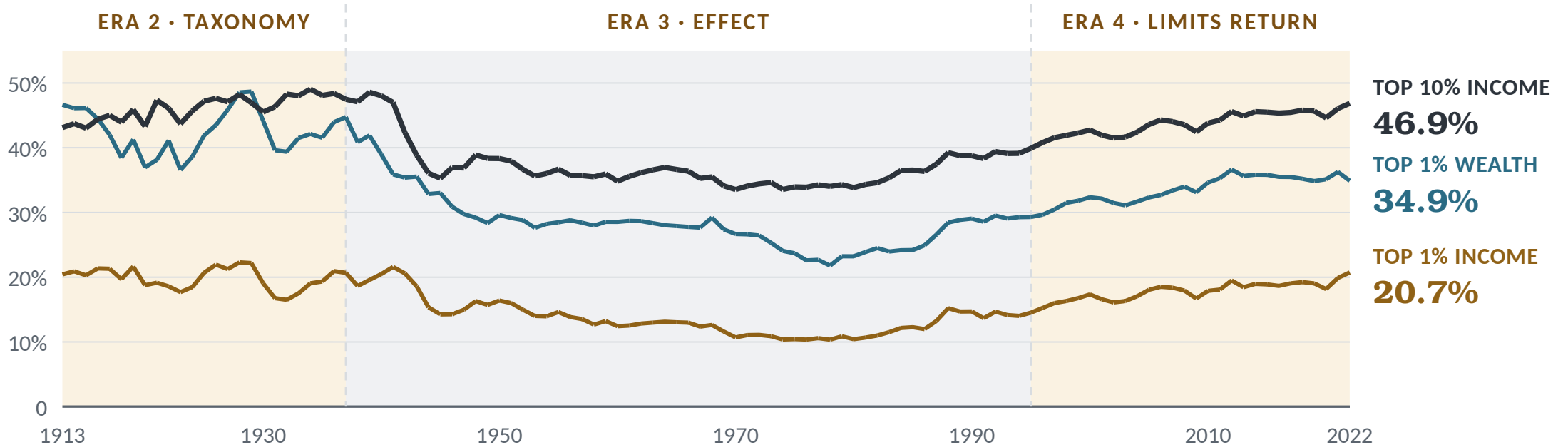
LIMITS RETURN

Lopez, Morrison, Raich, NFIB. Two fall, two stand. Not a straight line back.

Eras two and four sort by category. Eras one and three measure effect. Not progress — an oscillation. What drives the swing?

The same economy, twice

Concentration of income and wealth, 1913–2022 — the economy the Court was sorting, and ours.



A taxonomy in place of a test

United States v. E.C. Knight Co. (1895) — 98% of the nation's sugar refining, and the Government loses.

“Commerce succeeds to manufacture, and is not a part of it.”

WHAT THE COURT IS NOT DOING

Counting the effect. Ninety-eight per cent of national refining is not too small — the size of the effect is simply not what the test asks about.

WHAT IT IS DOING INSTEAD

Asking where in the sequence of production the activity sits, and answering a constitutional question with a taxonomy.

Harlan, alone: a rule that lets the country be monopolised, so long as the monopolist stops short of shipping, reads the power out of the Constitution exactly where it is needed.

Two statutes, and the method that killed them

1935 and 1936 — the New Deal's two biggest losses, decided by category rather than by effect.

SCHECHTER POULTRY • 1935

The Live Poultry Code

Birds shipped in from out of State, then slaughtered and sold to local butchers. The interstate journey had ended before the regulated transaction began — so the transaction was local, whatever its effect on the national market.

CARTER COAL • 1936

Wages and hours in the mines

Mining is production, and production is not commerce. Effects on commerce were called indirect however large they were — and the Court said the degree of the effect makes no difference to the question.

Both ask where the activity sits and never how much it matters. That is Knight's method run twice more — and within a year of Carter Coal it is gone.

The stream, and where it comes to rest

The one formalist doctrine that could reach local activity — and the off switch built into it.

THE IDEA

Goods moving between States are in a current of commerce. Congress may reach a local transaction that is a station on that journey — a stockyard, a broker — because it is a stop, not a destination.

WHY IT WAS USEFUL

It reached wholly intrastate activity without abandoning the category method. A stockyard sale is local in form and interstate in function.

AND ITS LIMIT

A current stops somewhere. In *Schechter* the birds had arrived, been sold and come to rest — and the formal category reasserts itself.

A doctrine with a stopping point built into it — which is exactly why it could never do what aggregation would do in 1942.

Jackson names this family of words in *Wickard* and refuses it.

The puzzle that will not close

Lottery tickets may be barred from interstate commerce. Goods made by children may not. Why?

CHAMPION v. AMES • 1903

Lottery tickets

Tickets carried for profit are subjects of commerce, and the power over their transportation includes the power to shut the channel entirely.

UPHELD 5-4

HAMMER v. DAGENHART • 1918

Goods made by children

The goods are harmless in themselves, so the statute regulates production — which is local — and aims to standardise the ages at which children may be employed.

STRUCK DOWN 5-4

The offered distinction: in Champion the evil precedes the transportation; in Hammer it does not. Is a lottery ticket harmful in itself, or only because of what people do with it?

State it in its strongest form, then say where it fails.

Two hubs, one market, and a rigged rate

The Shreveport Rate Case (1914) — drawn to scale, because the geography is the argument.

CARGO IN — FROM THE TEXAS INTERIOR



CARGO IN — FROM THE EAST AND NORTH



DALLAS → MARSHALL • 147.7 miles • 36.8¢ • 24.9¢ per 100 miles

DALLAS

LONGVIEW

MARSHALL

TEXAS

LOUISIANA

SHREVEPORT

SHREVEPORT → MARSHALL • 42 miles • 56¢ • 133.3¢ per 100 miles

And the pair that settles it: Houston → Lufkin, 118.2 miles, 50¢. Shreveport → Lufkin, 112.5 miles, 69¢. The Louisiana hub is nearer and pays a third more.

Texas set the rates inside Texas. Every one of them favoured a Texas hub over the one across the line.

Houston, East & West Texas Ry. Co. v. United States, 234 U.S. 342, 346 (1914) (Hughes, J.). Distances and rates as the Court states them; per-hundred-mile figures computed from them. East-west positions to scale.

What the Commission ordered

The Shreveport Rate Case (1914) — the order, and the sentence the holding rests on.

Texas sets the intrastate rates; the interstate rates are the carriers' own. The ICC orders them to stop charging more for the shorter interstate haul — which a carrier can obey only by raising its Texas rates or cutting its own.

Intrastate rates are the State's business — until used to injure interstate commerce. Congress reaches matters having “such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms ...”

A federal agency is setting rates inside Texas. That is the objection, and it is a good one.

Category two, eighty-one years early

Decided by economic effect in 1914, in the middle of the formalist era.

WHAT LOPEZ TAKES FROM IT

The second category in embryo — the power to protect the instrumentalities of interstate commerce even where the threat is purely intrastate. Lopez cites this case for exactly that, eighty-one years later.

WHAT IS ODD ABOUT IT

The Court decides by economic effect in 1914, mid-formalist era, over two dissents that gave no reasons. Wickard will later point at it as evidence the direct-indirect vocabulary was never doing the work.

The oscillation is not clean even within a single decade.

The year the Court changed its mind

1937 — and whether the pressure explains the change is still argued.

THE LANDSLIDE

Roosevelt wins re-election in 1936 by the largest margin in a century, having watched the Court strike down statute after statute.

THE BILL

February 1937: add one Justice for every sitting Justice over seventy, up to six new seats. It dies in the Senate.

THE SWITCH

Called “the switch in time that saved nine.” Justice Owen Roberts moves, and the Court begins upholding what it had been striking down.

The tidy story is pressure. The complication historians raise is chronology: Roberts’s decisive vote in *West Coast Hotel* was cast in conference before the bill was announced. I do not think anyone has settled it.

Either way, the doctrine that arrives in April is not a compromise — it is a replacement.

The Judicial Procedures Reform Bill was introduced 5 February 1937. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, was decided 12 April 1937. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, was decided 29 March 1937.

1937: effect, not source

NLRB v. Jones & Laughlin Steel Corp. — the switch, and the sentence built on for fifty years.

“It is the effect upon commerce, not the source of the injury, which is the criterion.”

WHAT IT REMOVES

The taxonomy. Manufacture against commerce, direct against indirect, the stream that had already ceased in *Schechter*. None of it survives as a test.

WHAT IT INSTALLS — IN THE SAME OPINION

A limit. Not effects “so indirect and remote” as to “obliterate the distinction between what is national and what is local.” *Lopez* will quote this sentence back in 1995.

The outer limit is announced in the very opinion that removes the old one. Decided 12 April 1937, while the Court-packing bill was pending.

Hammer overruled; a truism installed

United States v. Darby (1941) — unanimous, and it does two separate things.

THE SHIPPING BAN

Congress may exclude any article it chooses from interstate commerce, and its motive is not a judicial concern. Hammer is overruled outright — Holmes's dissent adopted almost whole.

THE WAGE AND HOUR RULES

A different footing. Production is not shipment. Congress may reach intrastate activity that “so affects” interstate commerce as to make regulation an appropriate means.

The Tenth Amendment “states but a truism that all is retained which has not been surrendered.”

What fears was the Amendment answering, if not precisely the fear that the federal government might do what it is doing here?

Hold the answer. In Module 3A the truism becomes an enforceable rule.

Aggregation, and a refusal to name

Wickard v. Filburn (1942) — 239 bushels too many, fed to his own chickens.

AGGREGATION

“That appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where ... his contribution, taken together with that of many others similarly situated, is far from trivial.”

AND THE REFUSAL OF NOMENCLATURE

Questions of the power of Congress “are not to be decided by reference to any formula which would give controlling force to nomenclature such as ‘production’ and ‘indirect’ and foreclose consideration of the actual effects.”

Jackson is naming Knight. The taxonomy is not abandoned but repudiated, as a method. So: if nomenclature is forbidden in 1942, what is “economic activity” doing in 1995?

Same day, two different theories

Heart of Atlanta and Katzenbach v. McClung, same day — and the difference is the point.

HEART OF ATLANTA • OUTPUTS

216 rooms, two blocks from the interstate

75% of guests came from out of state. The customers moved in interstate commerce, so the discrimination burdened the traffic directly.

KATZENBACH v. McCLUNG • INPUTS

Ollie's Barbecue, eleven blocks off the highway

It served almost no travellers. What moved was the meat — 46% of purchases, from a local supplier who bought out of state.

Katzenbach's standard is rational basis: where legislators "have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end."

If Ollie's position turns on where the beef was bought, the rule has nothing to do with why it is wrong.

What a commerce rationale costs

The great civil rights statute of the century rests on the power to regulate trade.

The right to be free of state discrimination, Douglas wrote, “occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines.”

Congress had a Fourteenth Amendment available and did not use it — The Civil Rights Cases (1883) had held Section 5 powerless against private discrimination. Goldberg named the stake: “the vindication of human dignity and not mere economics.”

What is lost when a right is protected under a clause that is not about rights?

And the harder half: is anything lost, if the result is identical? A traveller in 1965 got the room either way.

The three categories

Perez v. United States (1971) — the case that gives the modern doctrine its shape.

1

CHANNELS

The use of the channels of interstate commerce. Darby's shipping ban; Heart of Atlanta.

2

INSTRUMENTALITIES

Instrumentalities, or persons or things in commerce — even where the threat is purely intrastate. Shreveport, 1914.

3

SUBSTANTIAL EFFECTS

Activities substantially affecting interstate commerce. Extortionate credit. This is where all the difficulty lives.

Stewart, alone in dissent: “it is not enough to say that loan sharking is a national problem, for all crime is a national problem.” The seed of *Lopez*.

Step 1 is bracketed to Perez and Lopez jointly — the categories are Perez's, the discipline is Lopez's.

Perez v. United States, 402 U.S. 146, 150 (1971) (Douglas, J.), 157 (Stewart, J., dissenting), 8–1.

The first limit in sixty years

United States v. Lopez (1995) — did it change the doctrine, or only the temperament?

WHAT LOPEZ DOES NOT DO

It does not overrule *Wickard* or *Perez*, or restore direct against indirect. It takes the three categories and adds nothing.

WHAT IT DOES

It takes a sentence always there — the power “though broad indeed, has limits” — and enforces it for the first time in sixty years.

THE GOVERNMENT’S CHAIN

guns near schools → violence → impaired learning → a less productive citizenry → a burden on the economy.
The objection is not that a link is false. It is that the chain is too long: “pile inference upon inference.”

*Count the links in *Wickard* and *Katzenbach*. Is either chain shorter?*

MY VIEW, NOT THE COURT’S

I honestly think *Lopez* is right. That gets me in trouble with liberals, but it is right.

Step two, and the footnote

Four of the six are in Lopez. One is not in the body of the opinion at all.

1

ECONOMIC ACTIVITY?

Gun possession in a school zone is not economic “by any definition.” The first and heaviest of the four.

2

CONGRESSIONAL FINDINGS?

§ 922(q) had none. Breyer: their absence “at most deprives a statute of ... some extra leeway.”

3

JURISDICTIONAL NEXUS?

No element tying possession to commerce. A literal provision — a proxy. A limit, or a ritual?

4

TRADITIONAL STATE POWER?

One passing reference in the body. The doctrinal work is in FOOTNOTE 3. Marked with a question mark, filed “in FN.”

A consideration relegated to a footnote is one the Court is not confident about. A test, or an intuition dressed as one?

Congress did the homework

United States v. Morrison (2000) — and the findings were held not to be enough.

“[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”

WHAT CHANGED FROM LOPEZ

Four years of hearings and a mountain of findings on the national economic cost — exactly the record whose absence Lopez had noticed.

WHAT DID NOT CHANGE

Not economic. No jurisdictional element. Traditional state concern. Three factors run identically, and the statute still falls.

Congress saying so does not make it so — and the sharper reading is less deference to Congress. Factor 2 is not a box a diligent Congress can tick; it is a judgment the Court now reserves to itself.

Souter, dissenting: the majority has revived Carter Coal’s formalism under a new name. He is making our argument for us.

The fifth consideration

Gonzales v. Raich (2005) — two women growing marijuana at home, and Wickard controls.

CONSIDERATION FIVE — THE COMPREHENSIVE SCHEME

Is it “an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated”?

GET THE METAPHOR THE RIGHT WAY ROUND

Failing to regulate leaves a gaping hole. The hole is what an exemption would OPEN — not something Congress closes.

TWO FORMULATIONS OF THE DISTINCTION

Brief single-subject statute against lengthy detailed framework; facial challenge against as-applied excision.

O'Connor, dissenting — the best counter-argument in the module: if a broad statute can do what a narrow one cannot, then *Lopez* is nothing more than a drafting guide.

An objection to *Raich* — or a description of how every limit on legislative form works?

Gonzales v. Raich, 545 U.S. 1, 24 (2005) (Stevens, J.) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)), 6–3; *O'Connor, J., dissenting*.

The mandate, argued from both sides

Build both columns with the class before anyone reads what Roberts does with them.

The whole case is in one word. Is the mandate regulating commerce, or compelling it?

FOR THE MANDATE

Free riders: the uninsured shift costs to the insured.

Everyone is in the market for health risk.

The problem is national. No State can solve it.

AGAINST THE MANDATE

The self-insurer has chosen to stay out.

There is a freedom not to buy.

Health and insurance are traditional state areas.

The problem is local.

No precedent has ever compelled a purchase.

Consideration six comes straight out of the right-hand column — out of the freedom not to buy. Draw the arrow before you turn the page.

The sixth, and the word proper

NFIB v. Sebelius (2012) — necessary, but not proper.

“The power to regulate commerce presupposes the existence of commercial activity to be regulated.”

THE STRUCTURAL ARGUMENT — THE PART STUDENTS DROP

If a power to regulate included a power to create, parts of the Constitution would be superfluous: Congress may coin money in addition to regulating its value. An argument from the document’s own drafting — harder to answer than the broccoli.

Necessary, but not proper. Element three of McCulloch’s rule, doing real work for the first time in this course — 193 years after Marshall wrote it.

Ginsburg answers with Lopez’s own weapon, the piling of inferences. And he treats Wickard as the outer boundary, not as an error.

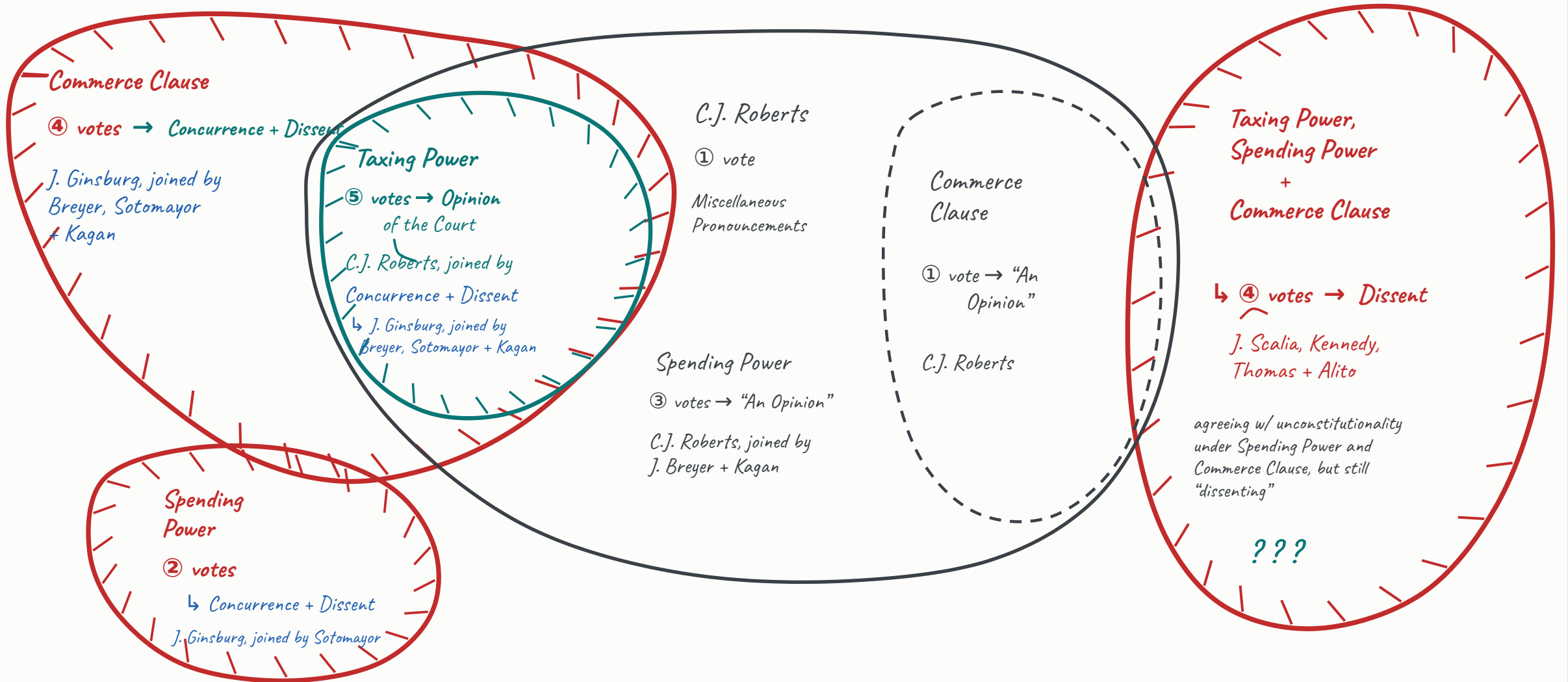
The opinions, in bubble form

Nine Justices, three powers — and only one line that five of them actually signed.

	C.J. ROBERTS	GINSBURG, BREYER, SOTOMAYOR, KAGAN	SCALIA, KENNEDY, THOMAS, ALITO
COMMERCE CLAUSE	① No power. “An Opinion.”	④ Power exists. Concurrence + dissent.	④ No power. Dissent.
TAXING POWER	⑤ It is a tax. OPINION OF THE COURT — the only one in the case.		④ Not a tax. Dissent.
SPENDING POWER	③ Coercive. “An Opinion.” (+ Breyer, Kagan)	② Not coercive. Ginsburg + Sotomayor.	④ Coercive. Dissent.

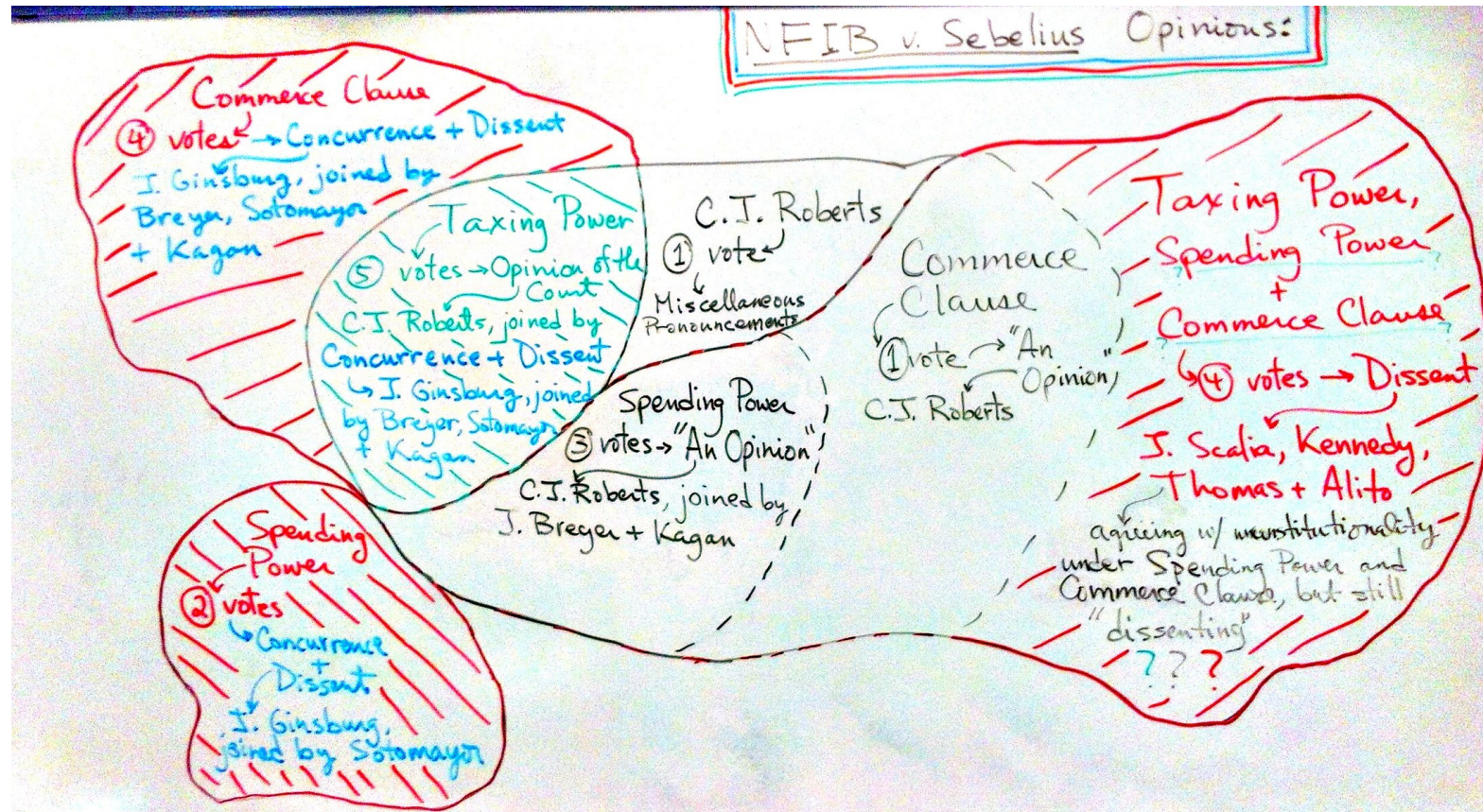
Five Justices said the Commerce Clause does not reach the mandate — and not one of them wrote an Opinion of the Court saying so. That is why consideration six sits on unsettled ground, and why I still tell you to use it.

NFIB v. Sebelius — the opinions



The board itself

Each region is an opinion. The overlaps are the Justices who signed more than one.



The shape to notice: no region on the Commerce Clause side holds five signatures.

NFIB v. Sebelius, 567 U.S. 519 (2012). My own board, photographed and cleaned up — lighting flattened, contrast lifted. Nothing drawn has been altered.

The test, assembled

Step 1 from Perez and Lopez. Step 2 built across three cases.

STEP 1 — WHICH CATEGORY? (PEREZ + LOPEZ)

Channels · Instrumentalities, or persons and things in commerce · Activities substantially affecting commerce

1 Economic activity?

LOPEZ

2 Congressional findings?

LOPEZ

3 Jurisdictional nexus?

LOPEZ

4 Traditional state power?

LOPEZ n.3

5 Comprehensive scheme?

RAICH · MINE

6 Regulate, not compel?

NFIB · MINE

Not a checklist and not weighted — Morrison satisfies 2 and loses; Raich fails 1 and wins on 5. And what it is made of: 1 and 6 are categories, 2 and 5 consequence, 3 is a drafting formality, 4 is an intuition in a footnote. The test itself is the oscillation.

The test, as a map

THE COMMERCE CLAUSE TEST

channels of interstate commerce

instrumentalities, persons & things

activities that substantially affect

PART ONE · which category?

Pérez · López

the first two are almost never
litigated – everything hard is
category three

PART TWO · the substantial-effects inquiry

Lopez · Morrison, and two of mine

gold = mine, not the Court's

IS THE EFFECT
SUBSTANTIAL?

1 economic
activity?

2 congressional
findings

3 jurisdictional
element

4 traditional
state power

5 comprehensive
scheme
· Raich

6 regulate,
not compel
· Sebelius

Wickard aggregates here

The test, and the four cases it sorts

The same six considerations, run across the four modern cases.

CASE	1 ECONOMIC	2 FINDINGS	3 NEXUS	4 STATE POWER	5 SCHEME	6 REGULATE	OUTCOME
Lopez 1995	No	None	None	Yes (n.3)	—	—	STRUCK 5-4
Morrison 2000	No †	Yes — not enough	None	Yes	—	—	STRUCK 5-4
Raich 2005	Not applied †	—	—	—	Yes †	—	UPHELD 6-3
Sebelius 2012 — all mine †	Yes	Yes	“Nasty”	No	Yes	No	NO COMMERCE POWER

Read the columns, not the rows: no factor decides a case. Morrison has the findings Lopez lacked and still falls; Raich fails factor one and wins on five. The Sebelius row is my run through the factors — the Court never ran them.

Lopez, 514 U.S. 549 (1995) • Morrison, 529 U.S. 598 (2000) • Raich, 545 U.S. 1 (2005) • NFIB v. Sebelius, 567 U.S. 519 (2012). † my reading, not the Court's. — the factor post-dates the case, or the Court did not run it.

The current case

Canna Provisions, Inc. v. Bondi — does Raich survive the ground shifting underneath it?

THE ARGUMENT

An as-applied challenge. Raich rested on consideration five — a comprehensive scheme undercut by an exemption. The claim is that the scheme is no longer comprehensive.

THE POSTURE — SAY IT PRECISELY

A First Circuit decision. Certiorari DENIED, 15 December 2025. A denial is not a decision on the merits and decides nothing. The assigned text is the circuit opinion.

Can a consideration expire? Consideration five is not a fact about the Constitution. It is a fact about a statute and how completely it is enforced.

The counter: constitutionality is judged by what Congress enacted, not by how vigorously the executive enforces it — or non-enforcement becomes a way of amending the Constitution.

Canna Provisions — questions for discussion

The Controlled Substances Act, applied to wholly intrastate, state-lawful cannabis businesses.

1

What has changed since 2005?

- Raich: grown at home, for personal medical use, no sales.
- Identical facts here — but lawful under state law.

2

Is the federal scheme still comprehensive?

- Consideration five asks whether an exemption would undercut it.
- Most States have legalised; enforcement is partial.

3

If it is not — what expired?

- The statute? The holding? Or a fact the holding assumed?

The argument on both sides

Neither column is about whether prohibition is wise.

FOR THE GROWERS

- As-applied, not facial
- Most States have legalised
- Riders bar federal enforcement
- Factor five rested on a premise that has eroded

FOR THE GOVERNMENT

- What Congress enacted governs
- Non-enforcement is not amendment
- Proves too much — every under-enforced statute would fall
- Only this Court may overrule Raich

THOMAS, J. — 2021

“a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana” — “A prohibition on intrastate use or cultivation of marijuana may no longer be necessary or proper.”

Where it lands

Cert was denied — which is not the same as the question being settled.

THE POSTURE

- First Circuit rejected it
- Cert denied, 15 Dec 2025
- A denial decides nothing

WHAT IT TEACHES

- Consideration five is a fact about a statute
- Not a fact about the Constitution
- Which of the six could expire too?

THE TRAP

- Factor five expands federal power
- Kill it and Congress loses reach everywhere else

A holding that rests on a fact can be outlived by that fact. Whether a lower court may say so first is a different question — and the First Circuit said no.

Is Raich still good law? Yes. Is its reasoning still true?

A denial of certiorari is not a ruling on the merits and creates no precedent. The First Circuit opinion is the assigned text.

Back to the question we started with

Where we started, and what two hundred years of it has produced.

Knight sorts by stage of production and calls it law. Wickard names that method and refuses it. Lopez brings a category back under a new name — economic against noneconomic. NFIB adds one more: activity against inactivity.

Four iterations of one move — and the test we assembled holds both methods at once, unreconciled.

THE FEDERALIST NO. 42

Madison gives the commerce power a few paragraphs and treats it as uncontroversial. Why has the clause that argued least in 1788 argued most since?

NEXT — MODULE 3A

Darby left the Tenth Amendment a truism. Next session it strikes down statutes. What changed between 1941 and 1992?

I will not resolve it for you. Both objections are correct — which is why the Court keeps switching.

The Federalist No. 42 (Madison) is assigned with this Module. Next: Module 3A — The Tenth Amendment.