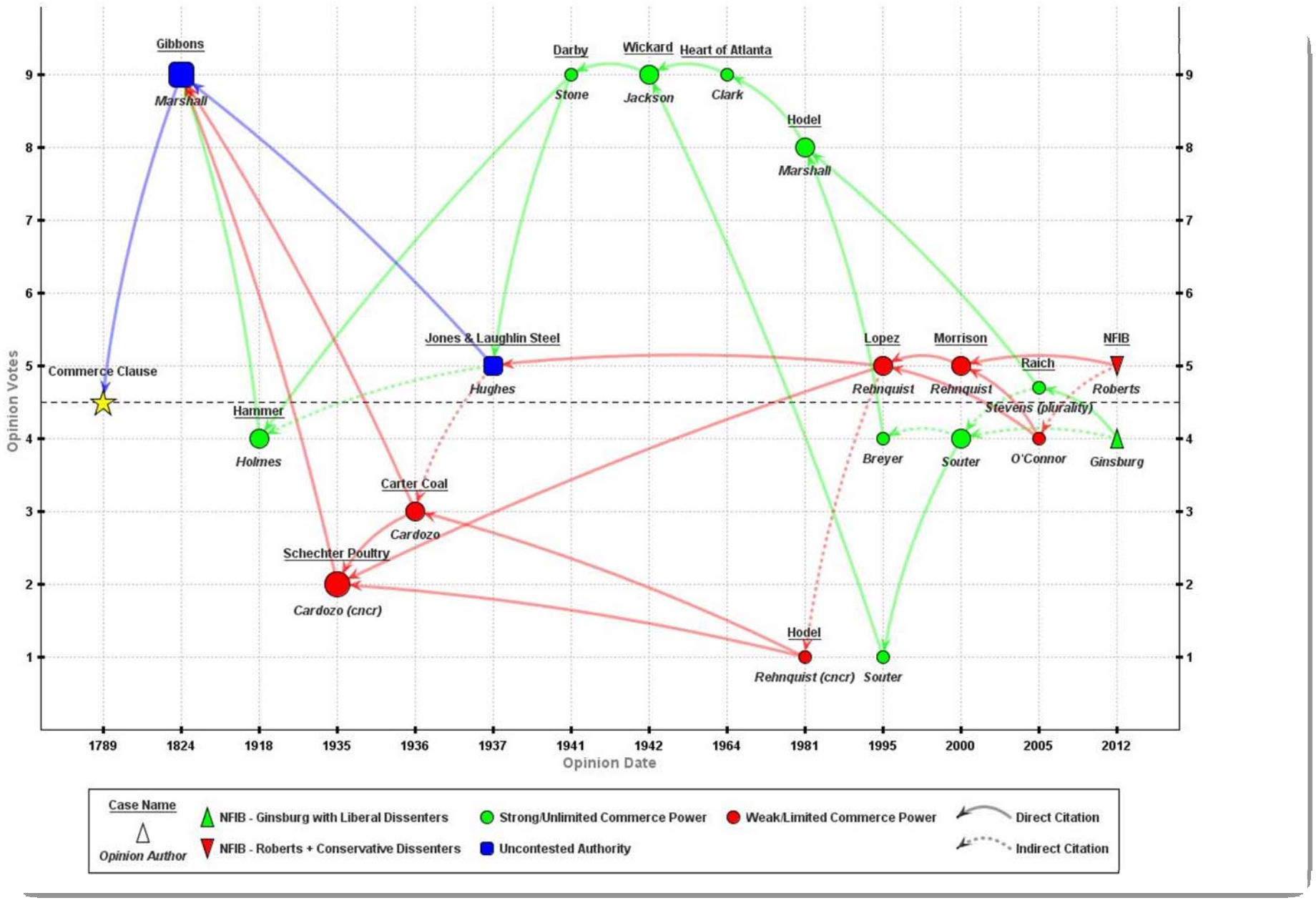
A VISUAL GUIDE TO *NFIB v. SEBELIUS*

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 "evaluat[e] 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 dissents 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' expansive view of the Commerce Clause expressed in his *Hammer* dissent and is consonant with the dissents 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.

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (9-0).
Usually recalled as a nondelegation case, *Schechter* also struck down provisions of the National Industrial Recovery Act for exceeding Commerce power. In his concurrence, Justice Cardozo articulated a pragmatic view of the limits on Commerce 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*.

Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (5-4).
Reversing the prior majority pattern of striking down New Deal legislation, Chief Justice Hughes' majority opinion upheld the National Labor Relations Act against a Commerce challenge. (Justice Roberts similarly "switched" his view in this case decided exactly two weeks after *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).). Both sides in the ACA debate implicitly claim fidelity to Hughes' opinion, which marks the beginning of modern Commerce jurisprudence.

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.

Wickard v. Filburn, 317 U.S. 111 (1942) (9-0).
The unanimous Court upheld the federal government's power to regulate wheat grown for purely personal use under the Commerce Clause. Justice Jackson's opinion represents the strongest view of federal Commerce power and is a bedrock case for ACA proponents.

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

Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (9-0).
The Court unanimously upheld the Surface Mining Act against a Commerce challenge. Justice Marshall's majority opinion articulated a typically strong understanding of federal power. Then Justice Rehnquist, however, only concurred in judgment and invoked Cardozo's opinions in *Schechter* and *Carter Coal* to suggest that pragmatic limits on Commerce power needed recognition. His opinion sets the stage for contemporary Commerce debate.

United States v. Lopez, 514 U.S. 549 (1995) (5-4).
Chief Justice Rehnquist's opinion for the majority struck down the federal Gun-Free School Zones Act as beyond Commerce Power. Rehnquist implicitly adopted his approach from his concurrence in *Hodel*. In dissent, Justices Breyer and Souter appealed to the older line of cases like *Wickard* and *Heart of Atlanta*.

United States v. Morrison, 529 U.S. 598 (2000) (5-4).
Chief Justice Rehnquist's majority opinion built on *Lopez* and struck down a portion of the Violence Against Women Act. Justice Souter invoked his prior dissent from *Lopez*. The dialectic was in full swing.

Gonzales v. Raich, 545 U.S. 1 (2005) (5-4).
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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