



Doomed to Repeat History

The Right Re-embraces Lunatic Legal Arguments from the Past

Ian Millhiser July 2010

Spend a week listening to the right, and you'll think the founders were all modern-day Tea Partiers. Senator Tom Coburn (R-OK) thinks the Constitution forbids Congress to spend federal money on programs he personally disapproves of. Justice Clarence Thomas thinks that the minimum wage, child labor laws, and the federal ban on whites-only lunch counters all violate the Constitution. And of course, everyone on the right thinks that health reform is unconstitutional.

It's enough to make you think they're just making it up as they go along. It clearly can't be the case that every single law cherished by progressives just happens to be unconstitutional.

Yet the reality is even worse. When the right's view of the Constitution was ascendant 75 years ago, basic protections such as a restriction on child labor were declared unconstitutional; laws banning discrimination were unthinkable; and Social Security was widely viewed as next in line for the Supreme Court's chopping block.

America's right now wants nothing more than to revive this discredited theory of the Constitution. These conservatives are over-reading the Tenth Amendment, a provision of the Constitution that provides Congress's power is not unlimited. So-called "tenthers" conservatives are determined to use their twisted reinterpretation to shrink national leaders' power to the point where it can be drowned in a bathtub. They must not be allowed to succeed for three reasons:

- **Tentherism is dangerous.** Monopolists seized control of entire industries during tentherism's last period of ascendance. Workers were denied the most basic protections, while management happily invoked the long arm of the law when a labor

dispute arose. Worst of all, Congress was powerless against this effort. And the Court swiftly declared congressional action unconstitutional when elected officials took even the most modest steps to protect workers or limit corporate power.

- **Tentherism has no basis in constitutional text or history.** Nothing in the Constitution supports tenther arguments. And tenther claims are nothing new. Each of them was raised as early as the Washington administration, and each was rejected by George Washington himself.
- **Tentherism is authoritarian.** Health reform, Social Security, and the Civil Rights Act all exist because the people's representatives said they should exist. The tenthers express goal is to make the Supreme Court strip these elected representatives of power and impose a conservative agenda upon the nation.

The right's quizzical lawsuits challenging health reform are just the tip of the tenther iceberg. If these lawsuits succeed, much of America's most cherished laws could be next against the wall.

The tenther agenda

In its strongest form, tentherism would eliminate most of the progress of the last century. It asserts that the federal minimum wage is a crime against state sovereignty, child labor laws exceed Congress's limited powers, and the federal ban on workplace discrimination and whites-only lunch counters is an unlawful encroachment on local businesses. Many tenthers even oppose cherished programs such as Medicare, Medicaid, and Social Security.

Tenthers divine all this from the brief language of the 10th Amendment, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In layman's terms, this simply means that the Constitution contains an itemized list of federal powers—such as the power to regulate interstate commerce or establish post offices or make war on foreign nations—and anything not contained in that list is beyond Congress's authority.

The tenther constitution reads each of these powers very narrowly—too narrowly, it turns out, to permit much of the progress of the last century. As the nation emerges from the worst economic downturn in three generations, the

tenters would strip away the very reforms and economic regulations that beat back the Great Depression, and they would hamstring any attempt to enact new progressive legislation.

Killing health care

Congress's authority is limited to the itemized list of powers contained in the text of the Constitution, and the right falsely claims that health reform does not make the list. Although Congress's power is not limitless, it clearly permits national leaders to regulate the national health insurance market.

A provision of the Constitution known as the “commerce clause” gives Congress power to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” There is a long line of cases holding that this provision gives Congress broad power to enact laws that substantially affect prices, marketplaces, commercial transactions, and other economic activity.¹ And a law requiring all Americans to hold health insurance does all of these things.

Health reform opponents, faced with such a daunting case against their position, urge the courts to invent an entirely new limit on the commerce power. They believe the Constitution only permits Congress to regulate people who are already engaged in a particular kind of commerce. It does not permit Congress to require individuals to engage in economic activity they would not otherwise engage in, such as requiring uninsured Americans to carry insurance.

One searches the Constitution in vain for any language supporting such a novel theory, but the right's anti-health care argument has another problem. It proves entirely too much.

Segregationists in the Jim Crow South explicitly demanded the right to not engage in commerce. Lunch counter operators wanted to not do business with black patrons. Employers wanted the right to not hire black workers. Realtors demanded the right to not sell certain homes to African Americans. If tenters' anti-health care arguments prevail, it's unclear how the federal ban on whites-only lunch counters survives the purge.

For some tenters, that may be the point. Indeed, some of the right's leading jurists have long felt that laws such as the landmark 1964 Civil Rights Act are unconstitutional.

Rolling back civil rights

Tentherism may be relatively dormant today, but tentherers dominated the Supreme Court from the late 1800s until 1937, when a majority of the Court finally recognized that national leaders must be empowered to solve a national economic crisis like the Great Depression.

Modern Supreme Court precedent dictates that the commerce clause gives Congress full authority to regulate the roads and railways used to transport goods in interstate commerce, as well as the goods themselves and the vehicles that transport them. The commerce clause also gives Congress the power to regulate activities that “substantially affect interstate commerce.”² This “substantial effects” power is the basis of Congress’s authority to ban discrimination throughout the country.

Yet Justice Thomas claimed in three separate cases—*U.S. v. Lopez*, *U.S. v. Morrison*, and *Gonzales v. Raich*—that this “substantial effects” test is “at odds with the constitutional design.”³ It’s difficult to count how many laws would simply cease to exist if Thomas’s view of the Constitution ever prevailed, but a short list includes the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, much of the Family and Medical Leave Act, and the most basic worker protections such as the minimum wage, overtime laws, and the regulation of child labor.

Many of the right’s most celebrated jurists share Thomas’s views. President Ronald Reagan nominated Judge Douglas Ginsburg to the Supreme Court in 1987—although Reagan was forced to withdraw the nomination after NPR reported that Ginsburg had a history of drug use. Ginsburg is most famous for describing tentherism as a “constitution in exile,” and for wanting to put that rightfully exiled monarch back on America’s throne.

But Judge Janice Rogers Brown may be the judiciary’s proudest tenther. She once compared liberalism to “slavery” and Social Security to a “socialist revolution.” And it was Sen. John McCain (R-AZ) who brokered the deal that elevated Brown to the federal bench—feeding the widespread belief that McCain would have nominated her to the Supreme Court if he had been elected president.

Making elections irrelevant

The Constitution gives Congress broad authority to “to pay the debts and provide for the common defense and general welfare of the United States.” This means that elected congressional representatives—not judges—are allowed to decide what is in the federal budget. Yet tentherers believe that the Supreme Court should seize control of the budget and eliminate spending programs that they happen to disapprove of.

The fullest articulation of this vision by an elected official occurred during Justice Sonia Sotomayor’s confirmation hearing. Senator Tom Coburn (R-OK) urged the Supreme Court during those hearings to begin “some reining in of Congress in terms of the general welfare clause,” a reference to Congress’s authority to spend money to promote the general welfare.

Coburn’s plan to wrest control of the federal budget away from Congress and give it to the Supreme Court, would not only be completely unprecedented—it is also a terrible idea. There is nothing in the Constitution to guide the Court in determining which portions of the federal budget to strike down, so the justices own personal political views would inevitably drive the budgeting process.

The Constitution already has a mechanism to allow the people to reverse spending decisions they disapprove of: elections. Conservatives are simply wrong to claim that we should shift control of America’s massive economy over to unelected judges.

Tentherism is undoubtedly a terrible idea, but it is hardly unprecedented. America has seen this movie before and it doesn’t end well.

America was not founded by tentherers

Contrary to the right’s claims, tentherism has no basis in the Constitution or its history. President George Washington himself rejected tentherism early in American history, and this radical view of the Constitution gained no traction at all until fairly late in American history.

Clarence Thomas versus George Washington

Justice Thomas is probably the leading proponent of tentherism on the federal bench, but the founding generation would actually be quite shocked by his nar-

row view of Congress's power to regulate commerce. Indeed, the framers viewed this power more expansively than a majority of the justices on today's Supreme Court in many ways.

The Supreme Court's decision in *U.S. v. Morrison*, for example, struck down part of the Violence Against Women Act. The Court acknowledged that Congress has broad authority over economic matters, but rejected Congress's authority over "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."⁴ In other words, *Morrison* eliminates much of Congress's power to regulate violent activity. But *Morrison* would probably render a law signed by George Washington unconstitutional.

President Washington signed "An Act to Regulate Trade and Intercourse with the Indian Tribes," which the First United States Congress had passed pursuant to its commerce power. The 1790 act reached far beyond economic matters, prohibiting "any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians," including wholly noneconomic crimes such as assault or murder. Washington's decision to sign this bill demonstrates his expansive view of the commerce power—a view that in no way resembles tentherism.

Many tenthers claim that local businesses that serve only in-state consumers are immune from laws enacted under the commerce power because the commerce clause permits economic regulation "among the several states." This view was also rejected early in American history.

A New York steamboat owner argued in the 1824 case called *Gibbons v. Ogden* that Congress lacked the power to regulate New York's internal waters. Writing for a unanimous Court, Chief Justice John Marshall rejected this claim.

In Marshall's view, "Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior"⁵ Congress can therefore regulate "commerce which concerns more States than one," and only those rare economic activities that have no impact on other states' economies are beyond Congress's reach.⁶

Washington and Marshall's expansive view of the Commerce power remained largely unquestioned for most of the Constitution's first century. Indeed, the Supreme Court did not strike down a single law as exceeding Congress's Commerce power until 1870.⁷ So tenthers like Justice Thomas will find little comfort in the early history of the United States.

Tom Coburn versus George Washington

Senator Coburn's claim that the Supreme Court can seize control of the federal budget would also shock the founding generation. There was vigorous debate among the founders regarding the proper scope of Congress's power to spend money, but this debate was resolved very early in the Constitution's history, and the courts have never since questioned that Congress has broad authority over the national purse.

Recall that the Constitution gives Congress broad authority to "provide for the common defense and general welfare of the United States." This language denotes few, if any, substantive limits on Congress's spending power, but James Madison argued during the Washington administration that they had a hidden meaning. Madison's early vision of the spending power dictates that federal spending is only permitted when it advances one of Congress's other enumerated powers, such as by building a post office or funding a war.

Madison's chief rival in the founders' debate over the spending power's scope was Alexander Hamilton, the nation's first treasury secretary and a co-author of Madison's *Federalist Papers*. Hamilton believed that Congress's spending authority extends over a "vast variety of particulars, which are susceptible neither of specification nor of definition."

The debate between Madison and Hamilton came to a tee in 1791, when Congress passed a bill that would spend money to create the First Bank of the United States. Madison protested that the bill was unconstitutional, but President Washington sided with Hamilton and signed the bill into law.

Significantly, Madison appeared to abandon his narrow view of the spending clause by the time he entered the White House in 1809. Madison signed legislation when he was president establishing the Second Bank of the United States. Madison also appointed Justice Joseph Story to the Supreme Court, one of the strongest defenders of the Hamiltonian view of the spending clause.

The debate over the spending clause's proper scope largely laid dormant until 1936 when the Court unanimously endorsed Hamilton's view of the spending clause in *U.S. v. Butler*, a case challenging a New Deal agricultural program.⁸ Even Justice James McReynolds joined his brethren in siding with Hamilton over Madison—a telling decision since McReynolds was an archconservative who voted twice to hold Social Security unconstitutional and who liked to call President Franklin Roosevelt a "crippled son-of-a-bitch."⁹

Tentherers like Coburn are apparently radical even by McReynolds' standards. Moreover, as Hamilton's early triumph over Madison indicates, the founding generation firmly rejected the tenther view of Congress's spending power very early in American history.

The Supreme Court's failed experiment with tentherism

The Supreme Court briefly embraced some of the tentherers' views in the late 19th and early 20th centuries, despite the founding generation's decisive verdict against them. The Court drastically cut back on Congress's power to regulate commerce during this period, although it has never embraced a tenther view of the spending clause. Monopolies thrived as a result. Management was largely free to engage in the most abhorrent labor practices, and national leaders were powerless to stop them.

The Court's brief flirtation with tentherism began with its 1888 decision in *Kidd v. Pearson*.¹⁰ Because the commerce clause permits regulation of commerce "among the several states," *Kidd* determined that Congress cannot regulate activities that occur entirely within a single state's borders, even if those activities are part of an interstate industry or otherwise impact other states' economies.

Imagine, for example, that a Wisconsin baker imports flour from Iowa, bakes bread in Wisconsin, and then ships the bread to Minnesota. *Kidd* would allow Congress to regulate the act of importing the flour and shipping the bread since these activities cross state lines, but not the actual act of baking the bread. The Court explained this distinction saying that Congress could regulate transportation or even sales of products across state lines, but not "manufacturing."

It didn't take long after *Kidd* was decided for industry to figure out that it had been given a gift. A sugar monopoly claimed in 1895, for example, that it was immune from federal antitrust law, even though it had "acquired nearly complete control of the manufacture of refined sugar within the United States."¹¹ The justices happily agreed because, in their view, manufacturing sugar had nothing to do with selling sugar.

Congress quickly adapted to losing its power to directly regulate the production of goods and services by simply forbidding unwanted products from being transported, and the Supreme Court permitted Congress to do so—at least when such bans were enacted to achieve socially conservative ends.

The Court upheld a law in *Champion v. Ames* preventing the transportation of lottery tickets.¹² It permitted Congress to ban the transportation of prostitutes in *Hoke v. United States*.¹³ And Congress was allowed to ban alcohol from interstate transit in *Clark Distilling Co. v. Western Maryland Railway*.¹⁴

The Court's 1918 decision in *Hammer v. Dagenhart*,¹⁵ however, revealed the justices' distinction between regulating manufacturing and regulating transportation to be nothing more than an ideological charade. The case struck down Congress's decision to regulate the interstate transport of products produced by child labor. In dissent, Justice Oliver Wendell Holmes slammed the Court for imposing their own conservative values upon the Constitution: "It is not for this Court . . . to say that [regulation] is permissible as against strong drink but not as against the product of ruined lives."

Hammer was hardly the only example of tenther justices applying a double standard in order to achieve conservative results. These justices repeatedly upheld laws protecting management while striking down laws benefiting labor.

Tenther justices engaged in a decades-long war against labor unions beginning with the Court's 1908 decision in *Adair v. U.S.*¹⁶ *Adair* struck down a law forbidding employment discrimination against union members because, in the justices' view, union membership had nothing to do with commerce. When Congress attempted to improve working conditions for mining workers, the Court held in *Carter v. Carter Coal*¹⁷ that mining—like "manufacturing"—is beyond Congress's power to regulate.

Yet when mine owners sued a mining union to prevent the union from using cutthroat tactics to organize mine workers, the Court in *United Mine Workers v. Coronado Coal* decided that Congress should be allowed to regulate mining workers after all.¹⁸

The Court applied a similar double standard in two cases involving the meat and poultry industry. The Court upheld Congress's power to regulate stockyards where livestock was kept prior to sales in *Stafford v. Wallace*.¹⁹ But the minute Congress attempted to improve the working conditions in poultry slaughterhouses, the Court held such improvements unconstitutional in *A.L.A. Schechter Poultry v. U.S.*²⁰

The Supreme Court's much-repeated claim that Congress has the authority to regulate interstate transportation also broke down when Congress invoked this power

to protect workers. The Court struck down a federal pension system for railroad workers in *Railroad Retirement Board v. Alton Railroad* even though it is difficult to imagine a line of work more closely connected to interstate transportation.²¹

It's easy to mock tenther justices as purely driven by ideology, and such mockery is justified. There's no way to defend cases that allow Congress to protect management but not workers, or that shield monopolists but punish unions. But another, equally important lesson emerges from this age of discredited jurisprudence: judges are very bad at overseeing economic regulation.

The distinction between manufacturing and transportation may seem simple enough, but it proved completely unworkable in practice. The confusion that ensued from trying to draw a rigid line between two intimately connected activities made it very easy for tenther justices to resolve cases according to their own personal political beliefs. Fine constitutional decisions invite activist judging entirely because there are plausible arguments on both sides of the questions these distinctions raise.

This is why modern commerce clause doctrine abandoned such fine distinctions, granting Congress broad discretion over economic regulation. Indeed, our democratic Constitution demands such an approach because it is simply undemocratic to turn America's economic policy over to unelected judges who are guided by little more than their own discretion.

This is the vision Chief Justice Marshall embraced in *Gibbons* when he wrote that the "wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections" are the most robust limits on Congress's commerce power.²² If national leaders want to cast aside the minimum wage, allow poor children to toil in sweatshops, and eliminate Social Security and Medicare, then they have that right. But the American people must also have the power to swiftly cast such fools out of office.

Conclusion

Democracy is not easy, and American democracy has seen more than its share of hard fought battles. Today's progressives stared down defeat time and time again to ensure affordable health care for all Americans. Civil rights era progressives combated filibusters, racism, and lynchings to ensure that America's

promise would extend to all Americans. And New Deal progressives went up against a deeply activist Court in order to give us Social Security and the most basic workplace protections.

All of these are powerful, lasting victories—the kind of victories that elected officials do not overturn if they plan on keeping their jobs.

Tenther understands this. They understand that the American people will not stand for an agenda that would kill Social Security, civil rights, and health reform. Sadly, that is why they want to strip the American people of their power to make such decisions and give it to a Supreme Court dominated by conservatives.

Endnotes

- 1 See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005); *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).
- 2 *Raich*, 545 U.S., p. 23.
- 3 *Ibid.*, p.67 (Thomas, J., dissenting); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (Thomas, J. concurring: “I write separately only to express my view that the very notion of a ‘substantial effects’ test under the Commerce Clause is inconsistent with the original understanding of Congress’s powers and with this Court’s early commerce clause cases.”); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (“I believe that we must further reconsider our ‘substantial effects’ test” . . .”).
- 4 *United States v. Morrison*, 529 U.S., p. 617.
- 5 *Gibbons*, 22 U.S. (9 Wheat.), p.194.
- 6 *Ibid.*
- 7 See *United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1870).
- 8 *United States v. Butler*, 297 U.S. 1 (1936).
- 9 See *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).
- 10 *Kid vs. Pearson*, 128 U.S. 1 (1888).
- 11 *United States v. E.C. Knight Co.*, 156 U.S. 1, 9 (1895).
- 12 *Champion vs. Ames*, 188 U.S. 321 (1903).
- 13 *Hoke vs. United States*, 227 U.S. 308 (1913).
- 14 *Clark Distilling Co. vs. Western Maryland Ry. Co.*, 242 US 311 (1917).
- 15 *Hammer vs. Dagenheart*, 247 U.S. 251 (1918).
- 16 *Adair vs. United States*, 208 U.S. 161 (1908).
- 17 *Carter vs. Carter Coal Co.*, 298 U.S. 238 (1936).
- 18 *Coronado Coal Co. vs United Mine Workers*, 268 U.S. 295 (1925).
- 19 *Stafford v. Wallace*, 258 U.S. 495 (1922).
- 20 *A. L. A. Shechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
- 21 *Railroad Retirement Board, v. Alton Railroad Co.*, 295 U.S. 330 (1935).
- 22 *Gibbons*, 22 U.S. (9 Wheat.), p. 197.