International Municipal Lawyers Association

Trumping Home Rule and Sanctuary Jurisdictions

Constraints on Federal Inducements for State and Local Collaboration

Hugh D. Spitzer

UW School of Law

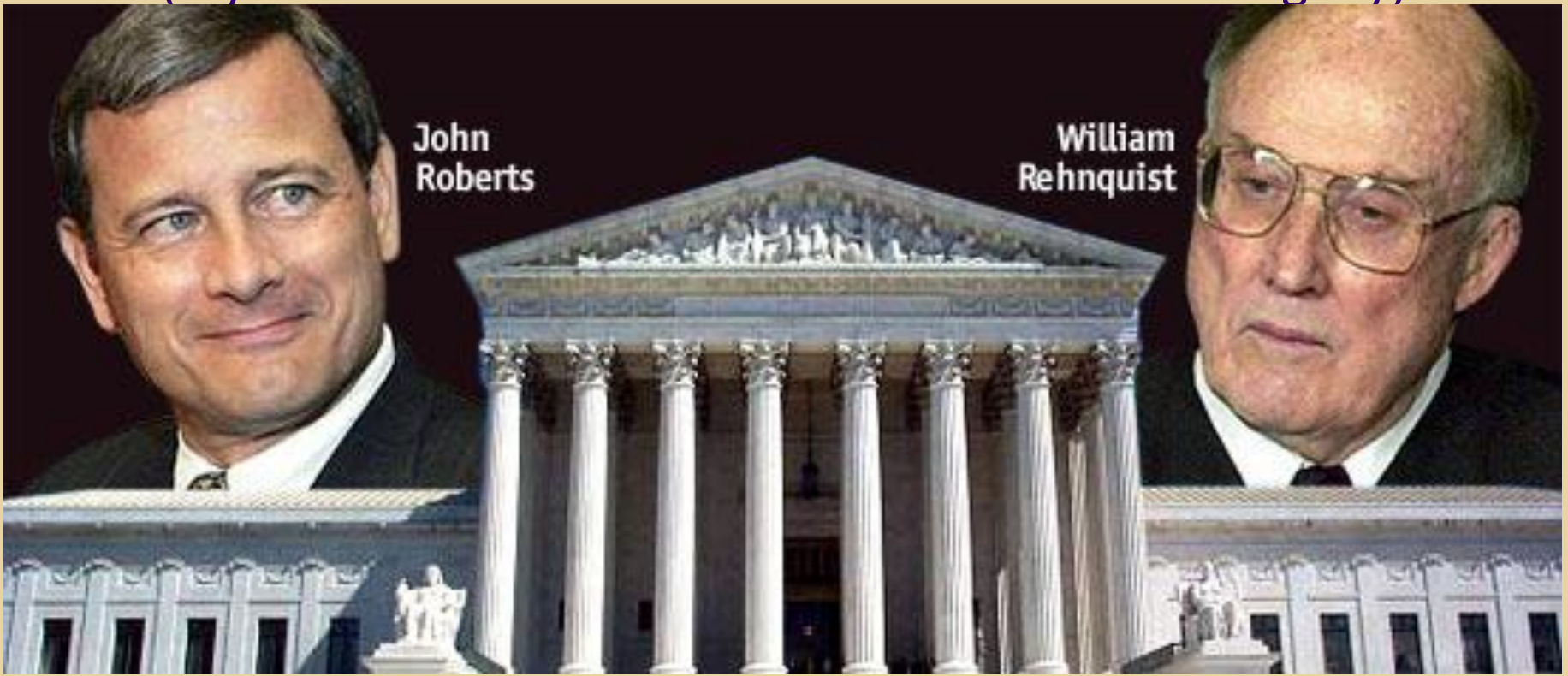
President Targets “Sanctuary Cities”

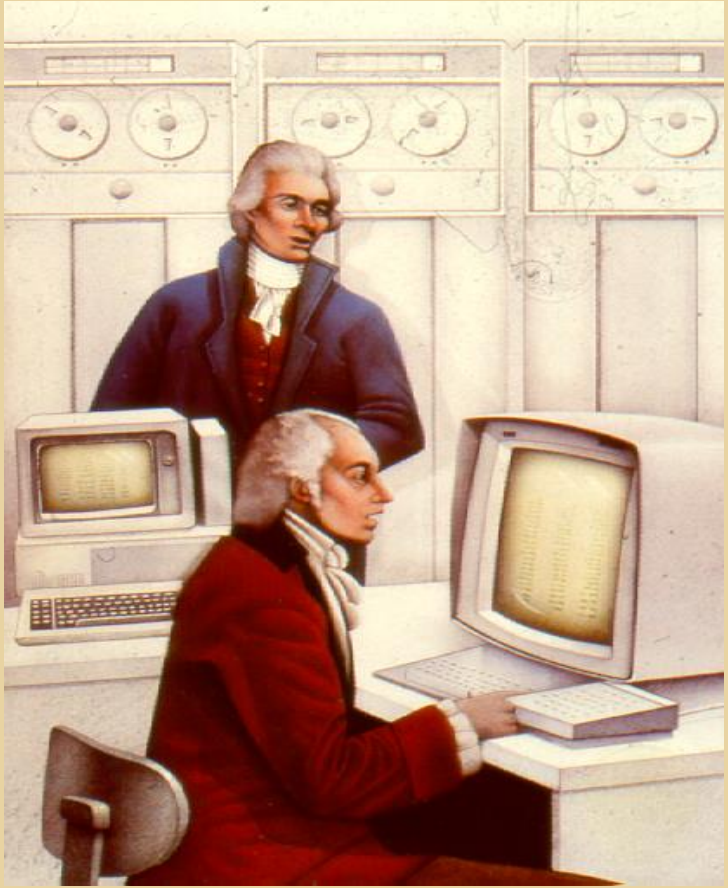
1/25/17 Executive Order No. 13,768



Unlikely Heros?

(If you don't like that Executive Order and its Progeny)





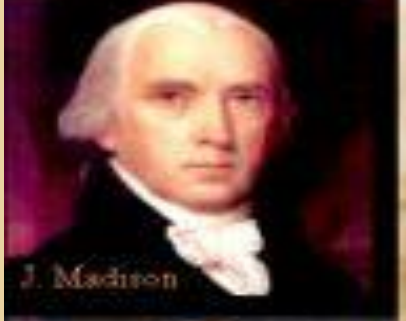
Nope…those Founders didn't have the modern equipment we have!



How’d they ever agree on this thing in 1787 ??



A. Hamilton



J. Madison



J. Jay

THE

FEDERALIST:

A COLLECTION OF

ESSAYS,

WRITTEN IN FAVOUR OF THE

NEW CONSTITUTION,

AS AGREED UPON BY THE

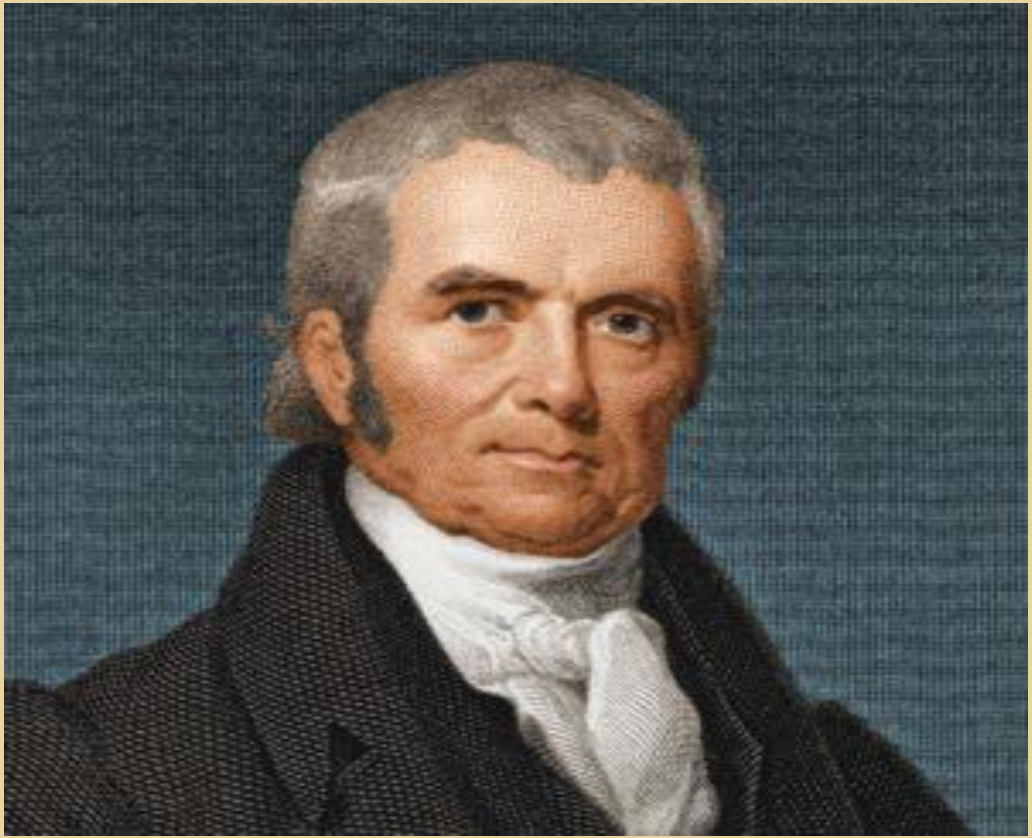
FEDERAL CONVENTION,

SEPTEMBER 17, 1787.

Defense for Ratification



The Federalist No. 39
James Madison



John Marshall:
A *Real* Federalist!

Marshall's Key Nationalist Cases

- Fletcher v. Peck (1810)
- Martin v. Hunter's Lessee (1816)
- McCulloch v. Maryland (1819)
- Gibbons v. Ogden (1834)

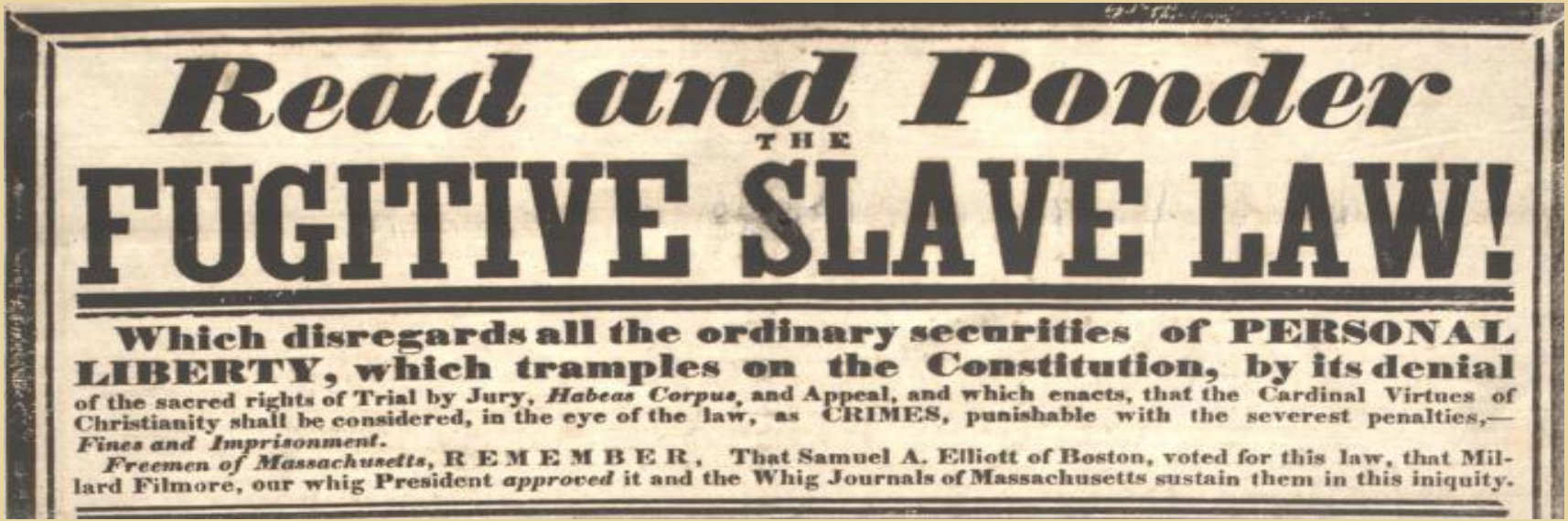
The Pendulum Swings Back (The Taney Court)

- Wilson v. Black Bird Creek Marsh Company (1829)
- Mayor of City of NY v. Miln (1837)
- Cooley v. Board of Wardens (1851)

A Notable Exception:



Prigg v. Pennsylvania (1842)

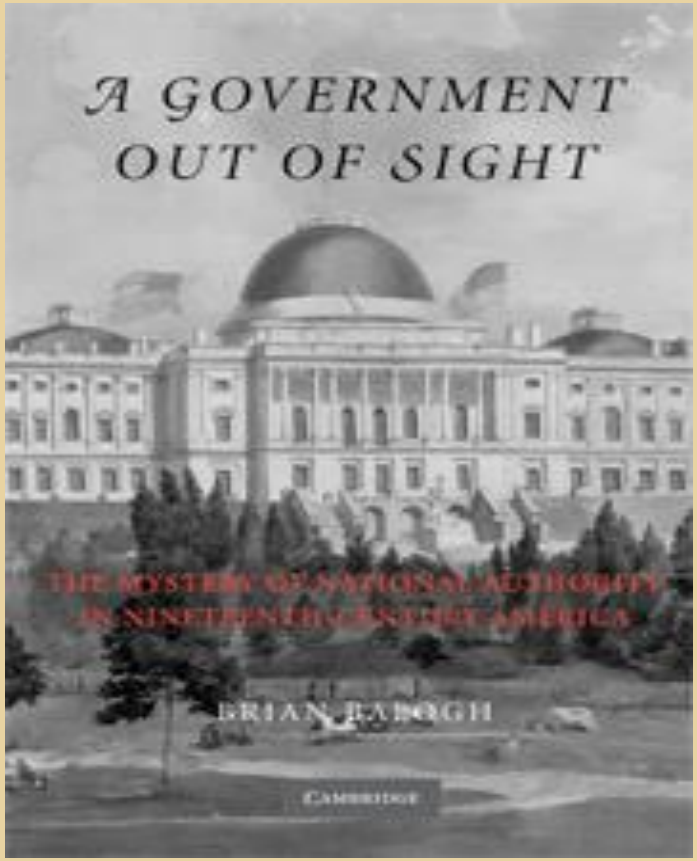


Read and Ponder THE FUGITIVE SLAVE LAW!

Which disregards all the ordinary securities of PERSONAL LIBERTY, which tramples on the Constitution, by its denial of the sacred rights of Trial by Jury, *Habeas Corpus*, and Appeal, and which enacts, that the Cardinal Virtues of Christianity shall be considered, in the eye of the law, as CRIMES, punishable with the severest penalties,—*Fines and Imprisonment.*

Freemen of Massachusetts, REMEMBER, That Samuel A. Elliott of Boston, voted for this law, that Millard Filmore, our whig President *approved* it and the Whig Journals of Massachusetts sustain them in this iniquity.

Fugitive Slave Act…allowed by U.S. Const. Art. IV, Sec. 2



A Vanishing Federal Government



The Gilded Age

THE SUPREME COURT AND THE ANTI-TRUST ACT

Victor Morawetz Discusses the Interpretation and Effect of the Sherman Law---The Sugar Trust Case.

At the request of THE NEW YORK TIMES Victor Morawetz, probably the most eminent of present-day authorities on the trust laws, has written the following illuminating article on the interpretation and effect of the Sherman law. It includes a criticism of the Knight case, otherwise called the Sugar Trust case.

In this article Mr. Morawetz contends the idea that the Supreme Court has construed the anti-trust law in such a way as to introduce into the law some novel doctrine inconsistent with the successful conduct of trade, like cases except the Sugar Trust case, and undertakes to show that it is both inconsistent with other decisions and wrong in principle. It will be regarded as the fullest exposition of what the Supreme Court really has done in dealing with the trust law that has yet been made.

By Victor Morawetz.

THE Act of Congress of July 2, 1890, commonly called the Sherman Anti-Trust Act, contains the following provisions:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations shall be deemed guilty of a misdemeanor."

On their face these prohibitions appear to enforce only established doctrines of the common law. Certainly they do not seem revolutionary or in conflict with sound political and economic policies. However, an idea has become prevalent that the Anti-Trust act has introduced into the law some novel doctrine inconsistent with the successful conduct of trade. It has been asserted that, if enforced consistently, the act would revolutionize modern business methods and, by making it impossible to carry on business effectively, would check our industrial progress and restrain the trade and commerce which it was designed to protect. In my opinion, this is a mistake. It is true that there are dicta in some of the opinions of the Judges which, taken alone, may furnish some basis for these views and these fears; but the mere dicta of Judges are not binding as precedents. Only actual decisions control in future cases, and it will be found that, with one exception, the actual decisions of the Supreme Court are consistent with a harmonious construction of the act which would effect its purpose without interfering with any business methods that have been regarded as lawful and proper.

The cases arising under the Anti-Trust act may be divided into four classes, viz.:

1. Cases involving contracts, combinations or conspiracies to restrain the trade or commerce of other persons, or of the public generally.

Contracts, combinations or conspiracies by means of physical force, or by means of threats, coercion, intimidation, to prevent other persons, or the public generally, from carrying on trade or commerce are illegal at common law, and it is evidently against that contracts, combinations, or conspiracies of that character, when in restraint of trade or commerce among the several States or with foreign nations, should be prohibited by an act of Congress furnishing effective remedies for its enforcement.

trade or commerce in tiles and, through the agreement of association, monopolized this trade or commerce for the benefit of the members of the association. The case, therefore, may properly be included in the class of cases involving attempts to monopolize interstate trade or commerce in violation of the second section of the Anti-Trust act. It should be observed that the decision in Montague vs. Lowry is not an authority for the doctrine that individual manufacturers or producers of an article of interstate commerce cannot lawfully enter into agreements to sell their products to certain dealers and no others, there being no attempt to monopolize or a branch of inter-State commerce. Such exclusive trade agreements never have been deemed unlawful as in restraint of trade or as constituting monopolizing, and the court in its opinion pointed out that the case before it was not a case of that character.

2. Cases involving contracts or combinations of public carriers to increase the rates or tolls payable by the public in respect of interstate commerce.

The railways are the principal highways of inter-State trade and commerce. If, as it was decided in the Debs case, combinations or conspiracy by physical force to stop the operation of inter-State railways would be in violation of the first section of the act because in restraint of the inter-State commerce of the public, it would seem to follow, for similar reasons, that a combination or conspiracy, without resort to physical obstruction, to render the transaction of inter-State commerce upon the railways more difficult or more costly would be in restraint of inter-State commerce within the meaning of the act. In the Trans-Missouri Freight Association case, 166 U. S. 290, and in the Joint Traffic Association case (171 U. S. 505, 565, 569) the Supreme Court held that contracts or combinations among railroad companies to maintain rates upon competitive inter-State traffic operated as a restraint of inter-State trade or commerce. It was contended that a combination to maintain rates upon competitive business could not fairly be considered in restraint of trade unless the rates themselves were unreasonable, but the court held that, in such a case, it would not inquire into the reasonableness of the rates, and that the combination must be deemed in restraint of commerce because its natural and direct effect would be to maintain all a higher level than otherwise would prevail the rates payable by the public as a condition of carrying on inter-State trade or commerce.

These traffic cases are not authority for the doctrine that a contract or combination among merchants or manufacturers which would constitute a restraint of inter-State commerce, prohibited by the first section of the Anti-Trust act, on the sole ground that the effect of the contract or combination was to restrict competition among the parties. Railway companies furnish the transportation necessary to enable the public to engage in inter-State trade or commerce. But they are not themselves engaged in inter-State trade or commerce. In the traffic cases the stoppage of competition was in restraint of inter-State commerce, and not because it restrained commerce of the railway companies which made the contracts or entered into the combinations. The object and effect was to restrain the inter-State commerce of the public by imposing additional burdens upon this commerce. As was stated by the Supreme Court, the natural and direct effect of



VICTOR MORAWETZ.

to competitive business, provided that the companies retain their freedom to modify these rates and do not agree to maintain them. In the traffic cases the restraint of inter-State commerce did not arise from the fact that the railway companies had consulted each other for the purpose of establishing uniform rates, but it arose from the fact that they had entered into agreements or combinations to maintain

act to protect trade and commerce against unlawful restraints and monopolies."

If Congress had intended to prohibit all contracts and combinations that in any degree diminish or restrict competition in trade or commerce, it is likely that Congress would have expressed this in the act. But the act does not purport to prohibit contracts or combinations that restrain competition in

The word "monopolize" has no well-defined legal or technical meaning. In the year 1623 a statute was passed by Parliament declaring that all grants of monopolies were against the fundamental laws of the kingdom. In commenting on this statute in his Institutes, Lord Coke said, "A monopoly is an institution or allowance by the King, by his grant, commission or otherwise, to his subject, or any politic or any person, or persons, body politic or corporate, of or for the sole buying, selling, making, working or using of anything whereby any person or persons, body politic or corporate were sought to be restrained and any freedom or liberty that they had before, or hindered in their lawful trade." However, although in those early days the word "monopoly" appears to have meant an exclusive right or privilege conferred by law, or by royal grant, and although, in those days, the word "monopolize" appears not to have been used by law makers or by the courts, many acts destructive of competition which, at the present day, would be described as "monopolizing" were unlawful at common law, or were prohibited by statute. (See 4 Blackstone's Com., 158, 159.) In modern times the words "monopoly" and "monopolize" often have been used in their ordinary or popular sense in judicial decisions and in statutes, as well as in general literature.

According to common usage in modern times the phrase "to monopolize commerce" means, by the elimination of competition to secure to some individual or group of individuals control of all or of a largely preponderating part of the commerce in some article. The phrase would not apply to a simple lessening of competition, leaving in existence reasonably competitive conditions; but it would apply to a concentration of control of a preponderating part of the commerce in any article, although competition be not wholly destroyed.

As a rule commerce can be monopolized only as to some particular article or articles, and only at certain places or markets. It never can be monopolized as to all articles at all places. The Anti-Trust act prohibits monopolizing "any part" of inter-State or international commerce. By these words Congress intended to prohibit the monopolization of inter-State or international commerce in any article as to any part of the United States. Thus, as decided in Montague vs. Lowry, above referred to, a combination monopolizing trade or commerce in unset tiles between a part of California and other States was in violation of the act. However, a combination among all the merchants or all the manufacturers dealing in, or producing, an article of commerce in a particular State or locality would not necessarily be in restraint of inter-State or international commerce or constitute monopolizing inter-State or international commerce. It would not be in restraint of inter-State or international commerce or constitute monopolizing, unless its effect should be to restrain other persons from obtaining a like article through inter-State or international commerce, or should be to concentrate control of such commerce in such a degree as to destroy reasonably competitive conditions.

Although the term "to monopolize" has been in common use for many years, and has been used for more than a century by English as well as American Judges, it must be conceded that the meaning of the term is not clearly defined, and it is not practicable in every case to determine easily and with certainty whether the term applies. In each case the question would be whether

It has been urged that the meaning of the term "to monopolize" is so vague and so uncertain that the statute in its present form cannot be enforced. There may be good ground for reaching this conclusion with respect to the enforcement of the criminal provisions of the act. However, the fact that in some cases it may not be clear whether a particular transaction constitutes monopolizing commerce within the meaning of the act seems not to be a sufficient reason for refusing to enforce the act in other cases which clearly are within its terms. (Compare Waters-Pierce Oil Co. vs. Texas, 212 U. S., 86, 109.) Few statutes and few rules of law are so well defined as to render their application in border-line cases free from uncertainty or doubt. Under a complex civilization the lawfulness of acts often must be made to depend upon complex conditions and cannot be determined by simple rules that can be applied without the exercise of discretion and in a more or less mechanical manner. As has been pointed out by the Supreme Court, even in relation to constitutional provisions, questions of degree often are the controlling ones (Wisconsin Railroad Co. vs. Jacobson, 179 U. S., 301). Similarly, in determining the lawfulness of acts of individuals it often is necessary to pass upon questions of degree, or to determine what, under all the circumstances of a given case, is reasonable. Thus the courts may be called upon to pass upon the reasonableness of railway rates, having regard to a multitude of conditions, including the relative adjustment of rates between different localities. Such an inquiry commonly would present practical difficulties at least as great as those presented by an inquiry whether a given transaction destroyed competition in inter-State trade or commerce to such an extent as to put an end to reasonably competitive conditions and to constitute what is called "monopolizing."

During the last Presidential campaign Mr. Bryan proposed in effect to define as an unlawful monopoly any combination controlling more than 50 per cent. of a branch of trade or commerce. Such an arbitrary rule, however, probably would not lead to greater certainty, inasmuch as the percentage of control would fluctuate, and it would be exceedingly difficult, if at all practicable, to determine the percentage of control of an entire industry or branch of trade at any one time concerning which conclusive evidence could be given under common control. Moreover, such a rule would not prove just or wise in all cases. No doubt it would be desirable to define the term "to monopolize" so clearly and definitely as to render it easy to determine its application in any case that may arise; but it is very doubtful whether such a definition can be framed. A statutory definition probably would give rise to as much uncertainty and litigation as the term "to monopolize," and judicial decisions would be necessary to define the definition itself. The safer and better course seems to be to leave the courts, in light of common understanding of the word "monopolize," and of the precise meaning of the statute in question, to determine its application to individual cases as they arise. The question in each case would be whether there was such destruction of competition as to put an end to reasonably competitive conditions.

The Anti-Trust act prohibits not only the monopolizing of any part of inter-State or international trade or commerce but also every attempt to monopolize and every combination or conspiracy to monopolize. An attempt to monopolize, or a combination or

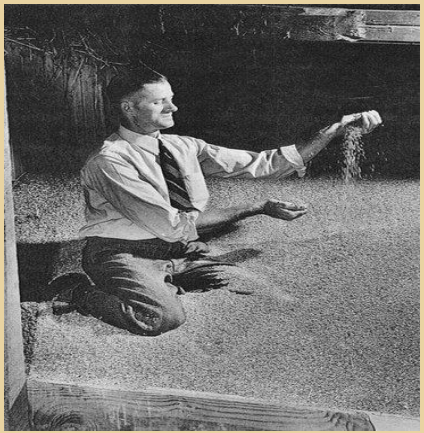
Forth and Back in Commerce Clause Jurisprudence

- Champion v. Ames (1903)
- Hammer v. Dagenhart (1918)
- Schecter Poultry Corp. (1935)



A Little more “Forth” in Commerce Clause Jurisprudence

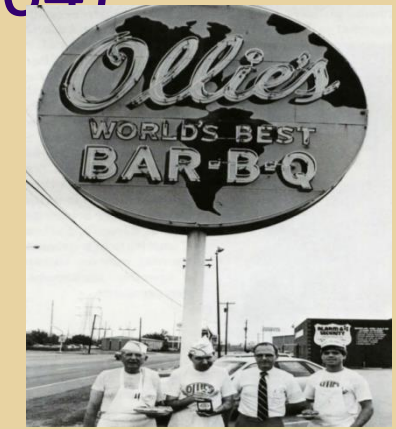
- NLRB v. Jones & Laughlin Steel (1937)
- United States v. Darby (1941)
- Wickard v. Filburn (1942)



The Federal Reach in the Warren Court Era

- Heart of Atlanta Motel v. U.S. (1964)
- Katzenbach v. McKlung (1964)





Reagan-Rehnquist Revolution

(They probably didn't have Sanctuary Cities in mind)

Commerce Clause:

- U.S. v. Lopez (1995)
- U.S. v. Morrison (2000)
- Gregory v. Ashcroft (1991)

Reagan-Rehnquist Revolution

10th Amendment:

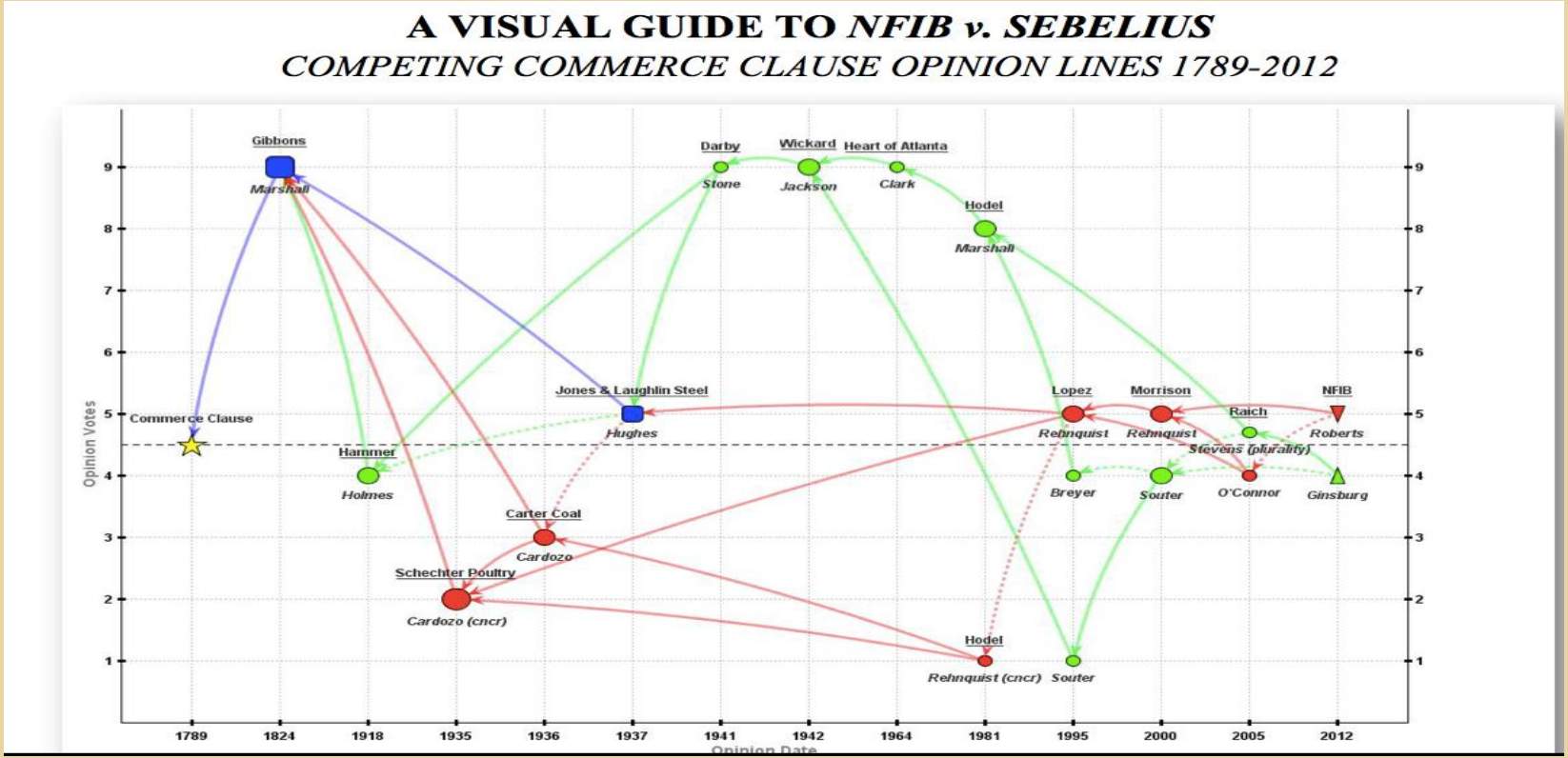
- New York v. United States (1992)
- Printz v. United States (1997)



Spending Clause Limits:

- *South Dakota v. Dole (1987)*

What Goes Around…



…Comes Around

(C.J. Roberts did have Sanctuary Cities in mind either)

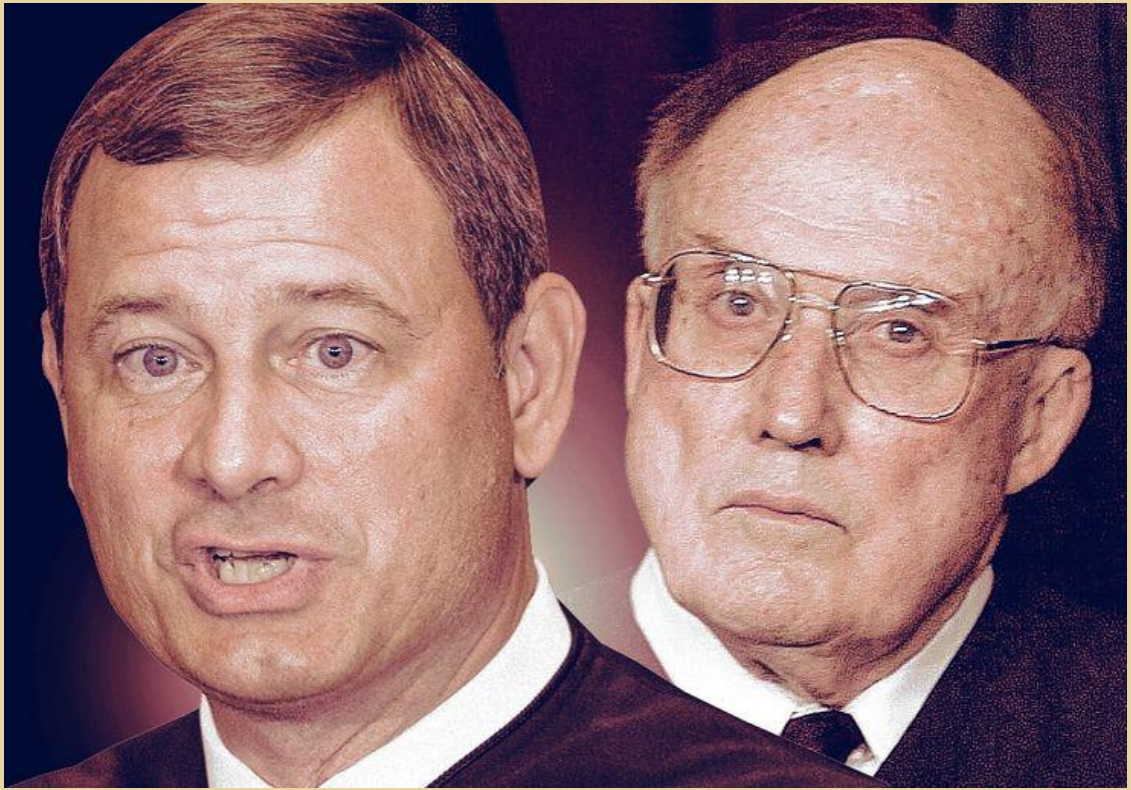
Three strands of federal-state jurisprudence converge bigtime in *NFIB v. Sebelius:*

- Commerce Clause
- Spending Power
- 10th Amendment

John Roberts v. Broccoli



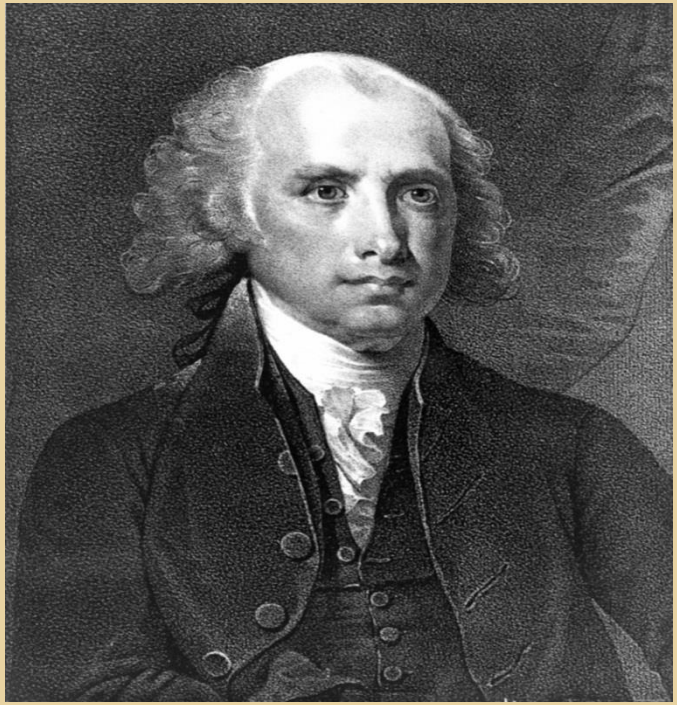
John Roberts v. Commandeering



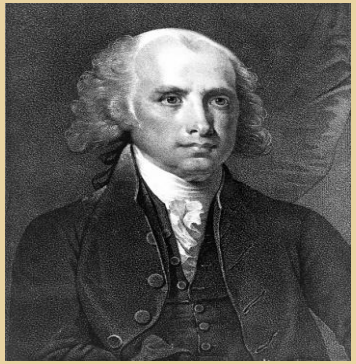
John Roberts & Spending Power



Coming Around Again







Coming Around Again





Preview of Coming Attractions

- Sanctuary cities
- Federal Education Grants
- ?????

