# MAKING STRIDES

## A Look at Historic Labor Acts During Labor History Month

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May is labor history month. As such, I think it would be instructive for us to revisit the legal wrangling that led to the birth of the National Labor Relations Act. On May 27, 1935 the US Supreme Court in its decision Schechter Poultry Corp. v. United States, 295 US 495 (1935), declared the National Industrial Recovery Act (NIRA) unconstitutional. The crown jewel of President Franklin Roosevelt's New Deal legislation, the NIRA was meant to provide greater regulation on the quality of goods sold in commerce. Under the act, the US government brought criminal charges against the Schechter Poultry Company because it allegedly sold infirm chickens to the public. This ultimately led to a constitutional challenge to the law.

The NIRA is particularly noteworthy because it also contained provisions providing for the right of employees to form unions, as well as limitations on the maximum amount of hours employees could work, and the minimum wages they would receive. The law was deemed unconstitutional because it was viewed by the court as a legislative abuse of Congressional power to regulate commerce. The court declared that the NIRA exceeded the permissible boundary of Congress's regulatory authority under the Commerce Clause because the law reached activity that only "indirectly" affected commerce.

As one could imagine, Roosevelt's reaction to the Supreme Court's invalidation of the NIRA was extremely harsh. He openly challenged the court's authority. Sound familiar? In response, Roosevelt proposed the Judicial Procedures Reform Bill of 1937. Through this legislation, often referred to as the court packing plan, the president would be allowed to appoint one new, younger judge for each federal judge with 10 years' service who did not retire or resign after reaching the age of 70. Most likely, in reaction to the Judicial Procedures Reform Bill, the court had a change of view concerning the scope of Congressional power under the Commerce Clause. In what is known as the stitch in time that saved nine, the Supreme Court started validating New Deal legislation.

In National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1(1937), the Supreme Court declared that the National Labor Relations Act of 1935 (commonly known as the Wagner Act) was constitutional. It effectively spelled the end to the court's striking down of New Deal economic legislation, and greatly increased Congress's power under the Commerce Clause. In National Labor Relations Board v. Jones & Laughlin Steel Corporation, Chief Justice Hughes held that "although activities may be intrastate in character, when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." This was directly contrary to Chief Justice Hughes' earlier opinion in Schechter Poultry Corp. v. United States.

With the recent constitutional challenge to the Affordable Care Act (ACA), it appears that history may be repeating itself 75 years later. In essence, it appears that the 26 states challenging the ACA are reanimating the failed arguments that lay at the heart of Schechter Poultry Corp. They argue that the federal requirement that every American purchase health insurance transgresses the boundaries of Congressional power under the Commerce Clause. And it appears that the Supreme Court has taken this challenge seriously. During oral argument, Justice Anthony Kennedy, often the swing vote between liberal and conservative justices on the court, queried whether it was constitutional for the government to "create" commerce in order to regulate it.

Kennedy's question misses the point and has created the impression that the Supreme Court might deem the ACA unconstitutional. The fact is that markets for individual health insurance already exist. All the law requires is that everyone participate in them.

What is the difference between this legislative mandate and the Congressional mandate under the Fair Labor Standards Act that no employee be paid below minimum wage or that all employees who work in excess of 40 hours a week receive time and a half? No one questions Congress's ability to regulate this aspect of commerce. Surely, there are employees in the labor market who might work for less than minimum wage or waive their right to overtime. If unfettered market forces were allowed to determine what minimum pay rates would be, it would come as no surprise how little individuals would charge for their labor. Why should employees be forced to these minimum standards?

The answer, of course, is that this country believes (for the time being at least) that there should be some minimum employment standards in this country so employees with little or no bargaining strength have some minimal level they will not fall below. One can certainly argue that affordable health care is even more essential than minimum employment standards. Everyone will get sick and will eventually require health care. This is as inevitable as death and taxes. Those who get sick and do not have insurance, or the ability to pay, ultimately impose those costs upon everyone else. These costs we can ill afford, especially after our recent economic crisis. How could the ACA not be an appropriate regulation on interstate commerce?

President Obama's recent admonition to the US Supreme Court to "not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress" has its historical antecedent in the court's invalidation of the NIRA. Of course, his comment would have withstood scrutiny better if he added the words "in furtherance of their clear authority under the Commerce Clause," but the sentiment remains the same.

Congress has passed progressive legislation, in response to our broken health care system, which is vitally necessary to every American. It is appropriate under the expansive scope that was read into the Commerce Clause 75 years ago when the NLRA was deemed constitutional in National Labor Relations Board v. Jones & Laughlin Steel Corporation. If the Supreme Court does not heed his admonishment, maybe it's time again to dust off the Judicial Procedures Reform Bill.