The Constitution at a Crossroads: The Ideological Battle Over the Meaning of the Constitution

Introduction

Lyle Denniston recently described "the tendency of the 'Roberts Court' to take on the broadest kind of controversy in cases brought to it."[1] From *Citizens United v. FEC,* in which the Court expanded the case on its own motion, scheduled a second argument, and then issued a sweeping ruling discarding prior case law, to the Affordable Care Act (ACA) cases about to be argued, in which the Court decided to hear just about every claim presented to it – including claims unanimously rejected by the lower courts – and scheduled six hours of argument time over three days, the Court under Chief Justice John Roberts has put itself at the center of some of the most important political controversies of our day.

Decisions like the Court's 5-4 ruling in *Citizens United* illustrate that the Roberts Court is not only taking big cases and issuing sweeping rulings, it is also splitting sharply along ideological lines on important questions about the meaning of our founding document. That is the focus of *The Constitution at a Crossroads: The Ideological Battle over the Meaning of the Constitution,* an attempt to map and describe the ideological battlegrounds on the Roberts Court. Constitutional Accountability Center (CAC) will be releasing *Crossroads* chapter-by-chapter over the next several months, beginning today with a set of three chapters on the powers of the federal government, which should help set the stage for the ACA argument later this month. Our plan is to release a dozen or so more chapters over the course of the spring, as the Court races toward the end of its October 2011 Term. After the Court completes its work, we will spend the summer editing, revising and compiling *Crossroads* into a single document for release in the early fall, timed to coincide with the celebration of the 225th Anniversary of the ratification of the Constitution and the opening of the Court's October 2012 Term.

[1] Lyle Denniston, *Argument Recap: Downhill, from the start,* Scotusblog, February 28th, 2012 (http://www.scotusblog.com/2012/02/argument-recap-downhill-from-the-start/#more-139919)

Crossroads is not the first attempt to map the ideological divisions on the Supreme Court. In 1988, in the wake of the decisive defeat of the nomination of Robert Bork to the Supreme Court and in the run-up to an election that seemed destined to determine the direction of the Court for a generation to come, the Reagan Justice Department released a series of reports that highlighted "substantial differences of opinion over the judicial role in contemporary society." The most famous of these reports, entitled *The Constitution in the Year 2000,* highlighted fifteen areas of constitutional law likely to be decided by the Supreme Court over the intervening years, and the "alternative roads down which the Court might travel over this time."

Twenty four years later, the Court remains precariously balanced between progressive and conservative wings with radically different visions of the road ahead in constitutional law, making 2012 just as important as 1988 in terms of the Supreme Court's future. But, looking back at these Reagan Era reports, it is also startling how much has changed in the debate over the Constitution. Part of this, of course, is simply a reflection of the fact that the Court has decided many of the issues identified in *The Constitution in the Year 2000,* sometimes traveling down the conservative road, other times taking a more progressive path.

But more important, the terms of the debate itself have changed dramatically. The *Constitution in the Year 2000* described the ideological division on the Court as mainly about judicial method – "interpretivism vs. non-interpretivism or strict interpretation vs. liberal interpretation or commitment to original meaning vs. commitment to an evolving constitution" -- and about "the judicial role in contemporary society." Whether or not those terms accurately described the ideological battleground on the Court in 1988, they certainly do not accurately describe the major battlegrounds today. In cases ranging from *Citizens United* to *Heller v. District of Columbia,* the Court's landmark Second Amendment ruling, the Court's ideological blocs are not fighting about whether the Constitution is living or dead: they are fighting about what it means.

For this reason, the stakes in this fight are higher in 2012 than they were in 1988. We're no longer fighting about judicial method. The Constitution itself is at a crossroads.

Several disclaimers and explanatory notes are appropriate at the outset of this endeavor. The first is that we will not even attempt in *Crossroads* to cover every important topic of constitutional law or even every area in which the Supreme Court is ideologically divided. We have tried to select the most important areas of the law in which the ideological divide on the Court is most significant and pronounced, but that selection process is inherently subjective and we will not cover some topics that justifiably could be included.

Second, a few words about balance. One of the most striking, and least successful, aspects of *The Constitution in the Year 2000* was the assertion by the Reagan Justice Department that it was setting forth the ideological debates on the Court "in the most objective possible manner." While that report did strain toward objectivity in certain places, no one who read the full report was fooled into thinking that the Department had abandoned the conservative positions it had taken on many of those topics over the past eight years and was suddenly agnostic about the outcomes. Similarly, CAC is an organization "dedicated to the progressive promise of the Constitution's text and history." We have strong and established positions on many (though not all) of the debates discussed in *Crosswords*, and we do not deny that fact or expect readers to be fooled into thinking otherwise.

That said, the very nature of this enterprise requires a degree of objectivity and neutrality in terms of presenting the two sides of the ideological divide on the Court. These ideological battles do not seem very interesting if one side is presented as a caricature, or not presented at all. So we try in these chapters to present both sides of the story. Whether we have struck this "balance" correctly is up to the readers to judge.

Finally, we note that because *Crossroads* will be released over time and then revised and edited after the Court ends its Term in June, it is very much a work in progress. As a result, we very much welcome comments and criticisms from our readers as we shape the final product. It is our hope that *Crossroads* will, in a small way at least, enhance what should be a grand celebration of the Constitution's 225th anniversary in September 2012. After all, we fight over the Constitution because it is the most important document in American life. We fight, because it matters to all of us.

Will the Supreme Court Impose Strict Additional Limits on Congress's Power to Tax and Spend for the General Welfare?

The Constitution at a Crossroads

Introduction

"It would, however, necessitate invalidation of the entire Affordable Care Act."

> Brief of State Petitioners in *Florida v. Department of Health and Human Services*, arguing that the Supreme Court should strike down the Affordable Care Act in its entirety because, according to the states, the Act's expansion of Medicaid is invalid under the Spending Clause

This nation's system of cooperative federalism –pursuant to which states and local governments work in partnership with the federal government in solving nationwide problems such as health care, environmental degradation and discrimination – is built upon the Constitution's Spending Clause and rulings by the Supreme Court that allow the federal government to condition generous grants of federal money upon state and local participation in these national efforts. For this reason, the Supreme Court's decision to review the claim by 26 states that the Patient Protection and Affordable Care Act (ACA) unconstitutionally coerced states into participating in the expansion of the federal/state Medicaid program was an unsettling surprise. In contrast to the claims against the ACA's mandatory coverage provision, there was no split in lower court rulings on the constitutionality of the Medicaid expansion: not a single lower court judge ruled for the states on this claim. Indeed, no court has *ever* ruled that *any* Spending Clause statute runs afoul of the Supreme Court dictum that forms the basis of the states' claim: "'in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[1]

So why did the Court decide to review this claim? Could this particular claim of coercion succeed where all others have failed and be the basis of a ruling by the Supreme Court striking down "the entire Affordable Care Act"? The Supreme Court will answer these momentous questions in the next few months. What is clear now is that the states, represented by former Solicitor General Paul Clement, have woven together an argument about coercion that is designed to appeal to the Court's

[1] *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 589-90 (1937)).

conservative majority and to capitalize on a sharp ideological split that has emerged on the Court over the past 15 years about the meaning of constitutional federalism and the scope of federal powers under the Spending Clause. As a result, in addition to being a critical test of the Supreme Court's jurisprudence under the Commerce Clause, the ACA litigation will likely produce the most important Spending Clause ruling in several decades. Even if the Supreme Court, like every lower court, ultimately rejects the states' coercion argument in this case, its ruling could make important new law on the ability of the federal government to use the Spending Clause to enlist states in federal-led efforts. With the state challenge to the ACA's Medicaid expansion pending before the Court, the Spending Clause is very much at a crossroads.

The Text and History of the Spending Clause

Providing Congress with the power to tax and spend was of central importance to the drafters of our Constitution: they had witnessed the disastrous consequences of the Articles of Confederation's failure to provide for such a power. Under the Articles, Congress had some powers, but was given no means to execute those powers. Congress could not directly tax individuals or legislate upon them; it could raise money only by making requests to the states. This created such an ineffectual central government that, according to George Washington, it nearly cost Americans victory in the Revolutionary War, and he lamented the dire situation in which his soldiers had been placed as a result of Congress's inability to levy taxes to support the Army.[2]

This historical foundation explains why the Spending Clause is the first and one of the most sweeping powers the Constitution confers upon Congress, providing the power "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."[3] As Alexander Hamilton made clear in the Federalist Papers, the power to tax and spend for the common defense and general welfare is "an indispensible ingredient in every Constitution,"[4] and it was essential for the Constitution to "embrace a provision for the support of the national civil list; for the payment of the national debts contracted, or that may be contracted; and, in general, for all those matters which will call for disbursements out of the national treasury."[5]

While the need for tax revenues was universally recognized by the signers of the Constitution, disputes broke out almost immediately about the precise meaning of the Spending Clause's text. The most sweeping reading, posed by anti-Federalist opponents of the Constitution, argued that the Spending Clause "amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare."[6] Madison made short work of this unduly

[2] *See* 18 THE WRITINGS OF GEORGE WASHINGTON 453 (John C. Fitzpatrick, ed. 1931) (Letter to Joseph Jones, May 31, 1780). *See also* WASHINGTON: WRITINGS 393 (John Rhodehamel, ed. 1997) (Circular to State Governments, Oct. 18, 1780); *id*. at 502-503 (Letter to Lund Washington, March 19, 1783).
[3] U.S. CONST., art. I, § 8.
[4] THE FEDERALIST PAPERS NO. 30 (Hamilton), at 134
[5] *Id.*
[6] THE FEDERALIST PAPERS NO. 41, at 259 (Madison).

expansive interpretation of the clause in Federalist 41, asserting that "[n]o stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction."[7]

A more serious disagreement broke out later between Madison and Hamilton about whether the power to tax and spend for the general national welfare was confined to the enumerated legislative fields delegated to Congress. While not endorsing the sweeping "every power" interpretation advanced by the anti-Federalists, when it came to taxation and spending, Hamilton interpreted the Spending Clause literally as a broad grant of authority to Congress to tax and spend for the general welfare. He declared in his important 1791 Report on Manufacturers that that the phrase "general welfare" was "as comprehensive as any that could have been used," and it was deliberately chosen because "the constitutional authority of the Union, to appropriate its revenues . . . necessarily embraces a vast variety of particulars, which are susceptible neither of specification nor of definition."[8]

Madison resisted this literal interpretation. Most definitively in a series of letters written towards the end of his career, Madison took the position that the Spending Clause was essentially a preamble to the other enumerated powers and not an independent grant of authority. In an 1830 letter to Andrew Stevenson,[9] he described the Spending Clause as "a mere introduction to the enumerated powers, and restricted to them." The next year, in a letter to James Stephenson,[10] Madison added that "with respect to the words 'general welfare,' I have always regarded them as qualified by the detail of powers connected with them. To take them in a literal and unlimited sense would be a metamorphosis of the Constitution into a character which there is a host of proofs was not contemplated by its creators."

The Spending Clause from the New Deal to *South Dakota v. Dole*

The Supreme Court ultimately resolved this disagreement among these two preeminent Founders, and set the basic principles of its Spending Clause jurisprudence, during the New Deal era, when the Court was confronted with important new federal spending programs established to respond to the Great Depression.

In the first of these cases, *United States v. Butler,*[11] the Court determined that Hamilton's interpretation was the only one that matched the text of the Spending Clause. Noting that this dispute had previously been addressed by Justice Joseph Story, who "in his Commentaries, espouses the

[7] *Id.*
[8] Alexander Hamilton, Report on Manufactures, December 5, 1791, available at http://press-pubs.uchicago.edu/founders/documents/a1_8_1s21.html.
[9] James Madison, Supplement to November 27, 1830 Letter to Andrew Stevenson, available at http://press-pubs.uchicago.edu/founders/documents/a1_8_1s27.html.
[10] Letter from James Madison to James Robertson, April 20, 1831, available at http://en.wikisource.org/wiki/James_Madison_letter_to_James_ Robertson.
[11] 297 U.S. 1 (1936)

Hamiltonian Position,"[12] the Court in *Butler* agreed: "We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one."[13]

The problem with Madison's position, according to *Butler*, was that it could not be squared with the Constitution's enacted text: "[t]he necessary implication from the terms of the grant is that the public funds may be appropriated 'to provide for the general welfare of the United States.'"[14] Madison's position, on the other hand, would make the Spending Clause "mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers."[15] Accordingly, *Butler* held that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[16] There was no dissent on any of these important points.[17]

The Court built upon *Butler* in two important decisions the following year upholding different components of the Social Security Act of 1935. In *Helvering v. Davis*,[18] the Court upheld the Act's most famous component – the taxing of individuals and employers to provide for retirement security benefits for elderly Americans. The *Helvering* Court began by reaffirming the *Butler* Court's resolution of the dispute between Madison and Hamilton, declaring this dispute "settled by decision."[19] *Helvering* then established a broadly deferential standard for reviewing congressional decisions about the general welfare, holding that "whether wisdom or unwisdom resides in the scheme of benefits set forth in Title II it is not for us to say. The answer to such inquiries must come from Congress, not the courts."[20]

In *Steward Machine v. Davis*,[21] the Court upheld the Act's unemployment compensation program. Unlike the federally-run Social Security program at issue in *Helvering*, the Act's unemployment benefits program created a federal/state partnership. The federal government collected taxes from employers and then allocated up to 90% of those revenues back to states with unemployment compensation laws meeting minimum federal standards. The *Steward Machine* Court rejected the argument that the "tax and the credit in combination are weapons of coercion, destroying or impairing the autonomy of the states."[22] The Court held that the Social Security Act, rather than harming states, "is an attempt to find a method by which all these public agencies may work together to a common end."[23]

---

[12] *Id.* at 66.
[13] *Id.*
[14] *Id.* at 65.
[15] *Id*.
[16] *Id*.
[17] *See id.* at 80-81 (Stone, J., dissenting).
[18] 301 U.S. 619 (1937).
[19] *Id.* at 640.
[20] *Id.* at 644.
[21] 301 U.S. 548 (1937).
[22] *Id*. at 586.
[23] *Id*. at 588.

In embracing the federal/state partnership to provide unemployment compensation, the Court in *Steward* came very close to rejecting altogether the idea that a condition on federal spending could ever be coercive, noting that "every rebate from a tax when conditioned upon conduct is in some measure a temptation" and "to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties."[24] The Court wondered aloud whether the notion of coercion "can ever be applied with fitness to the relations between state and nation," and concluded that even if it could, "the point at which pressure turns into compulsion" had not been reached with the Social Security Act.[25]

The central holdings of these New Deal era cases -- *Butler's* resolution of the Hamilton/ Madison debate in Hamilton's favor, *Helvering's* deference to Congress, *Steward Machine's* skepticism about claims of coercion -- remain core principles of Spending Clause doctrine today. Indeed, the Court reaffirmed each of these principles in *South Dakota v. Dole,*[26] the leading Spending Clause case of the modern era, which was written by Chief Justice William Rehnquist and joined by Justices as ideologically diverse as John Paul Stevens and Antonin Scalia. Building upon *Steward Machine* and other prior cases, the *Dole* Court held that "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning the receipt of federal moneys upon compliance with federal statutory and administrative directives.'"[27]

The *Dole* Court also recognized four limits on the Spending Clause. First, the text of the Constitution expressly limits Congress's spending power to the pursuit of "the general Welfare."[28] Second, any conditions Congress places on grants to the States must be clear, thus enabling "the States to exercise their choice knowingly, cognizant of the consequences of their participation."[29] Third, "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[30] Finally, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds"[31] — Congress may "not 'induce' the recipient to 'engage in activities that would themselves be unconstitutional.'"[32]

The Rehnquist Court's Federalism Revolution and the Spending Clause

The Court's opinion in *South Dakota v. Dole* remains the touchstone of its Spending Clause jurisprudence, but the ideological consensus about the Spending Clause embodied in the *Dole* opinion has broken down considerably. In particular, over the past 15 years, as part of a significant jurisprudential movement by conservatives on the Court toward limiting the powers of the federal government in the name of protecting state sovereignty, the Court's conservative wing has expressed

[24] *Id.* at 589.
[25] *Id.* at 590.
[26] 483 U.S. 203 (1987).
[27] *Id.* at 206.
[28] U.S. CONST. art. I, § 8; *Dole*, 483 U.S. at 207.
[29] *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).
[30] *Dole*, 483 U.S. at 207 (citation omitted).
[31] *Id*. at 208.
[32] *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 203 (2003) (plurality) (quoting *Dole*, 483 U.S. at 210).

concerns about *Butler's* reading of the Spending Clause and used those concerns to ratchet up the limits recognized by *Dole*, particularly the requirement that states have "clear notice" about Spending Clause conditions.

This ideological divide is illustrated most clearly in *Davis v. Monroe County*,[33] a case about whether a school district that received federal funds could be held liable in a private suit for "deliberate indifference" to student-on-student sexual harassment. In an opinion by the Court joined by the Court's liberal wing, Justice Sandra Day O'Connor held that, in limited circumstances, such a suit was authorized. Applying *Dole's* clear notice requirement, the Court ruled that Title IX of the Education Amendments of 1972 "makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender."[34] Therefore, according to the majority, "funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment . . ."[35]

Justice Kennedy responded in a sharply worded dissent, writing also on behalf of Chief Justice Rehnquist and Justices Scalia and Thomas. Kennedy's dissent began by expressing concern about *Butler*'s account of the scope of the federal government's powers under the Commerce Clause:

> The Court has held that Congress' power "'to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.' " *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987) (quoting *United States* v. *Butler*, 297 U.S. 1, 66 (1936)). As a consequence, Congress can use its Spending Clause power to pursue objectives outside of "Article I's 'enumerated legislative fields'" by attaching conditions to the grant of federal funds. 483 U.S., at 207. *So understood, the Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the federal government to set policy in the most sensitive areas of traditional state concern, areas which otherwise would lie outside its reach*.[36]

To avoid "obliterate[ing] distinctions between national and local spheres of interest," Justice Kennedy emphasized the need to rigorously enforce the clear notice requirement recognized in *Dole*.[37] The clear notice requirement, he opined, "is not based upon some abstract notion of contractual fairness. Rather, it is a concrete safeguard in the federal system. Only if States receive clear notice of the conditions attached to federal funds can they guard against excessive federal intrusion into state affairs and be vigilant in policing the boundaries of federal power."[38]

---

[33] 526 U.S. 629 (1999).
[34] *Id.* at 650.
[35] *Id.*
[36] *Id.* at 654 (Kennedy, J., dissenting) (emphasis added).
[37] *Id.*
[38] *Id.* at 655.

Monroe County was decided during a decade-long period lasting roughly from 1992 to 2002, which has been called the "federalism revolution" of the Supreme Court under Chief Justice William Rehnquist. It is one of the few cases lost by state and local claimants during this time. . In many other cases, Justice O'Connor sided with the conservative wing in taking steps to police "the boundaries of federal power." These cases included *U.S. v. Lopez*[39] and *U.S. v. Morrison,*[40] in which the Court invalidated two federal laws as beyond Congress's Commerce Clause authority, *New York v. United States*[41] and *Printz v. United States,*[42] in which the Court established an "anti-commandeering principle" that prevented the federal government from directing state officials to administer a federal regulatory program, and a long string of cases including *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,[43] in which the Court significantly limited the ability of the federal government to trump the sovereign immunity of States under the 11th Amendment.

Printz deserves special note among these cases, because it forms a central pillar of the coercion claim against the Affordable Care Act. The states argue that "[i]f Congress were free to use its spending power to coerce States into enforcing the federal government's dictates, then the spending power would become the exception that swallows the anti-commandeering rule."[44] *Printz* is also notable for the effort by Justice Scalia to question anyone (or any opinion) that looks toward the views of Alexander Hamilton when it comes to "matters of federalism." Calling Hamilton the "most nationalistic of all nationalists," Scalia in *Printz* declared that "it was Madison's view – not Hamilton's – that prevailed . . ."[45] Although Justice Scalia did not cite *Butler,* his implicit critique of the *Butler* Court for favoring Hamilton's view of the Spending Clause over Madison's was apparent enough.

The state challengers to the ACA have also relied on *Florida Prepaid* because, in passing, the Court in that case took language from *Steward Machine* and *Dole* – cases that recognized that the point at which "pressure turns into compulsion" may never be "applied with fitness to the relationship between state and nation" – and subtly turned that language into a more definitive-sounding suggestion that there is such a line that the federal government cannot cross.[46]

Arlington Central and the Spending Clause in the Roberts Court

With Justice Samuel Alito having succeeded Justice O'Connor (the author of the majority opinion in *Monroe County*), there is some evidence that the concerns expressed by Justice Kennedy in

[39] 514 U.S. 549 (1995).
[40] 529 U.S. 598 (2000).
[41] 488 U.S. 1041 (1992).
[42] 521 U.S. 898 (1997).
[43] 527 U.S. 666 (1999).
[44] State Petr. Br. at 21.
[45] *Printz*, 521 U.S. n.9.
[46] *See Florida Prepaid*, 527 U.S. at 687 (1999)("in cases involving conditions attached to federal funding, we have acknowledged that "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *quoting South Dakota v. Dole,* 483 U.S. 203, 211 (1987), *quoting Steward Machine,* 301 U.S. at 590).

his *Monroe County* dissent may now be held by a five-justice majority on the Court. In the first and, to date, the only Spending Clause case decided by the Roberts Court, *Arlington Central School District v. Murphy,*[47] Justice Alito wrote the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas and Kennedy, holding that parents who successfully challenge a school board placement decision under the Individuals with Disabilities Education Act (IDEA) cannot recover the costs of retaining expert witnesses to support their claim. Justice Alito opined that the IDEA failed *Dole's* "clear notice" test, despite a congressional Conference Report on the IDEA stating, in part: "the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses. . ."[48] In Justice Alito's words: "the legislative history is simply not enough. In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds."[49]

This conclusion brought a blistering dissent from Justice Breyer, who asserted that none of the Court's prior rulings "suggest[] that *every spending detail* of a Spending Clause statute must be spelled out with unusual clarity."[50] Justice Breyer accused the majority of abusing the clear notice test to disregard the clear intent of Congress regarding the meaning of the IDEA and thereby reach "a result no Member of Congress expected or overtly desired."[51] More generally, Justice Breyer warned that the majority's application of the clear notice rule was thereby undermining the deference due to Congress established by cases going back to *Helvering v. Davis* and risked creating "a set of judicial interpretations that can prevent the program, overall, from achieving its basic objectives or that might well reduce a program in its details to incoherence."[52]

Coercion, Commandeering and the ACA Litigation

The foregoing account of the historical evolution of Spending Clause doctrine sets the stage for the constitutional challenge brought by a collection of states against the Affordable Care Act's expansion of the federal/state partnership under Medicaid.

Under Supreme Court case law from *Butler* to *Dole*, the claims against the ACA are clear losers, which is why even the most sympathetic lower court judges have rejected them. The states have not even attempted to assert that any of the four limitations on the Spending Clause recognized by the Court in *South Dakota v. Dole* have been violated. To the contrary, as the states have conceded, the ACA is completely clear in terms of notifying states about what is expected if they wish to continue to participate in the Medicaid program. Nor is there any question that the Act provides a generous financial incentive for the states to continue to

[47] 548 U.S. 291 (2006).
[48] H. R. Conf. Rep. 99–687, at 5.
[49] *Arlington*, 548 U.S. at 304.
[50] *Id.* at 317 (Breyer, J., dissenting).
[51] *Id.* at 324.
[52] *Id.* at 318.

participate in the federal program – under the Act's terms, the federal government will start by paying 100 percent of the costs of adding additional low income Americans. In essence, the states' principle claim is that the ACA offers *too* generous a deal to the States: one they cannot afford to refuse:

> There is no plausible argument that a State could afford to turn down such a massive federal inducement, particularly when doing so would mean assuming the full burden of covering its neediest residents' medical costs, even as billions of federal tax dollars extracted from the State's residents would continue to fill federal coffers to fund Medicaid in the other 49 States.[53]

To succeed in this challenge to the ACA, the states must convince the Court to do what the Court in *Steward Machine* essentially deemed impossible – draw and enforce a line between appropriate financial pressure and unconstitutional coercion. The states call "a judicially enforceable" coercion doctrine "a constitutional necessity," fusing together the concern Justice Kennedy expressed in *Monroe County* about the breadth of the Spending Clause with the "anti-commandeering" rule established in *Printz* to argue that the Court must police coercion so that the spending power does not "become the exception that swallows the anti-commandeering rule."

The United States has responded that "Petitioners challenge to the Act's Medicaid expansion lacks any support in this Court's precedents, invites standardless decisionmaking and intractable problems of administration, and is wrong as a matter of constitutional principle."[54] The U.S. makes powerful arguments in its briefs to support each of these propositions, which prevailed in the lower courts, even among judges who found the ACA's mandatory coverage provision unconstitutional. Most of these arguments were presented to the Supreme Court in an effort to convince the Court not to review these Spending Clause claims. So the question is whether the Court took these cases anyway simply to hear all the claims against the ACA in a single sitting or whether the conservative wing of the Court is poised and ready to strike out in a bold new direction and impose significant new limitations upon the federal government's exercise of its Spending Clause authority.

The Spending Clause at a Crossroads

With the Spending Clause challenges to the Affordable Care Act pending before the Supreme Court, the Spending Clause is very much at a crossroads.

Even if the Court rejects the states' argument and reaffirms the *Butler/Steward Machine/Dole* Spending Clause framework, the ideological fights that have played out in cases like *Monroe County* and *Arlington Central* will certainly continue. These statutory fights draw

[53] State Petr. Br. at 20.
[54] Brief for Respondents (Medicaid) at 15, *Florida v. DHHS* (11-400).

less attention, but, as commentators such as Simon Lazarus have explained,[55] the conservative wing of the Supreme Court has succeeded in significantly narrowing the reach and crippling the enforceability of many important federal laws through the use of sub-constitutional tests such as the "clear notice" rule.

The more important question is what happens if a majority of the Court accepts the states' invitation to impose new curbs on Congress' spending. If successful, these claims could bring down the Affordable Care Act, to date the most significant legislative accomplishment of the Obama presidency. This would be an enormously significant ruling even if the Court somehow limited its ruling only to that. But that seems unlikely; one of the most powerful points made by the United States is that the expansion of Medicaid under the ACA is essentially indistinguishable from prior expansions of Medicaid and other Spending Clause statutes. A ruling in favor of the States could thus call into question a myriad of conditions on federal spending and a large number of state-administered programs that are federally funded and supervised.[56]

In his dissent in *Barnes v. Gorman*[57] – a Spending Clause case decided between *Monroe County* and *Arlington Central* -- Justice John Paul Stevens described Justice Scalia, the author of the majority opinion in *Barnes,* and his conservative colleagues, as "fearless crusaders" because of their willingness to embrace changes to Spending Clause doctrine that could have "potentially far-reaching consequences that go well beyond the issues briefed and argued in this case."[58] The resolution of the ACA case will test the accuracy of Justice Stevens' description. If the Court's conservative majority accepts the states' invitation to revisit Spending Clause principles that have been in place since the New Deal, we will in fact be living in a brave new world, where settled understandings about the Spending Clause and the federal balance are settled no more.

[55] Simon Lazarus, *Stripping the Gears of National Government: Justice Stevens' Stand Against Judicial Subversion of Progressive Laws and Lawmaking* (September 29, 2011). Northwestern University Law Review, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1935952.

[56] *See* Brief of David Satcher *et al*. as *Amici Curiae* Supporting Respondents, *Florida v. DHHS* (No. 11-400) at 8-10 (discussing threats to federal spending programs involving education, jails and prisons, child welfare, vocational rehabilitation, and child support enforcement. *See also* Brief of Senate Majority Leader Harry Reid, House Democratic Leader Nancy Pelosi *et al*. as *Amici Curiae* Supporting Respondents, *Florida v. DHHS* (No. 11-400) at 34-35 (mentioning similar threats to federal spending programs including conservative statutes such as the Solomon Amendment, which effectively provides military recruiters with equal access to educational institutions, and the No Taxpayer Funding for Abortion Act, which would cut federal funding for health-benefit plans that cover abortion).

[57] 536 U.S. 181 (2002) (Stevens, J., dissenting).

[58] *Id*. at 192.

Regulating Commerce: Will the Supreme Court Strike Down the Affordable Care Act's Minimum Coverage Provision and other Economic Regulation?

The Constitution at a Crossroads

Introduction

> Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use.
>
> Chief Justice John Marshall in *Gibbons v. Ogden*

As this quote from Chief Justice John Marshall in the Supreme Court's first major opinion interpreting the Constitution's Commerce Clause makes clear, the fundamental issue of the scope of the federal government's power has been debated since the founding of our Republic. It also shows that, throughout our nation's history, opponents of broad federal power have relied on a narrow construction of the Constitution in attempts to impose limits upon Congress's powers under the Commerce Clause and the Necessary and Proper Clause—threatening, perhaps, to "explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use." [1]

The latest skirmish in this debate is the constitutional challenge to the Patient Protection and Affordable Care Act (ACA), particularly its minimum coverage provision, which requires Americans who can afford it to either purchase a minimum level of health insurance or pay a penalty. To the "powerful and ingenious minds" of the law's challengers, the ACA is a novel expansion of federal power that goes beyond what was contemplated or permitted by the Founders. To others, [2] the healthcare mandate is a regulation of commerce that is clearly constitutional under the text of the Commerce and Necessary and Proper Clauses and Supreme

[1] *Gibbons*, 22 U.S. 1, 222 (1824).

[2] *See,* Testimony of Charles Fried, Before the Senate Committee on the Judiciary Hearing on "The Constitutionality of the Affordable Care Act," February 2, 2011.

Court interpretations of these texts in early decisions such as *Gibbons* and *McCulloch v. Maryland*.[3] Although one conservative commentator initially predicted that "there is a less than 1% chance that courts will invalidate the individual mandate as exceeding Congress's Article I power,"[4] the lower courts have split on this question, and now some are predicting that an ideologically divided Supreme Court will strike the mandate down.

The challengers to the mandate rely heavily upon a series of ideologically-divided rulings issued over the past 15 years in which the Court's conservative bloc articulated new limits on Congress's power under the Commerce Clause. Most significantly, in *United States v. Lopez*[5] and *United States v. Morrison,*[6] the Court invalidated the Gun Free School Zones Act and part of the Violence Against Women Act, holding that these federal laws did not regulate activities sufficiently tied to interstate commerce.

While these cases form the basis for the attacks on the Affordable Care Act, two more recent cases justify the prediction that the health care challenges will be easily disposed of by the Court. In *Gonzales v. Raich,*[7] Justices Antonin Scalia and Anthony Kennedy joined their liberal colleagues to uphold federal regulation of medicinal marijuana, even if grown in a backyard for personal consumption, in accordance with local law. In *United States v. Comstock,*[8] Chief Justice John Roberts and Justices Kennedy and Samuel Alito agreed with the Court's liberal wing in holding that the Necessary and Proper Clause permitted Congress to enact a federal law allowing the government to hold mentally ill, sexually dangerous federal prisoners beyond the date they would otherwise be released from prison.[9] The question left by *Raich* and *Comstock* is whether these cases are accurate reflections or refinements of the views of these conservative Justices about the scope of federal powers, or more a reflection of the conservative policy goals – regulating drugs and sexually dangerous criminals – at issue in these cases.

What *is* clear, however, is that with a challenge to the most important legislative achievement of the Obama presidency pending before the Supreme Court, the Constitution's Commerce Clause and its Necessary and Proper Clause are at a crossroads.

---

[3] 17 U.S. 316 (1819)

[4] Orin Kerr, What Are the Chances that the Courts Will Strike Down the Individual Mandate?, The Volokh Conspiracy, available at: http://volokh.com/2010/03/22/what-are-the-chances-that-the-courts-will-strike-down-the-individual-mandate/ Professor Kerr prognosticates that he expects "a 9-0 (or possibly 8-1) vote to uphold the individual mandate."

[5] 514 U.S. 549 (1995).

[6] 529 U.S. 598 (2000).

[7] 545 U.S. 1 (2005).

[8] 130 S.Ct. 1949 (2010).

[9] 130 S.Ct. at 1954; *id.* at 1965 (Kennedy, J., concurring); *id.* at 1968 (Alito, J., concurring).

The Text and History of the Commerce and Necessary and Proper Clauses

The debate over the scope of federal power was central to America's Founding and has continued throughout our nation's history. In 1783, soon after the Revolutionary War was won, George Washington wrote to Alexander Hamilton that "unless Congress have powers competent to all *general* purposes, that the distresses we have encountered, the expences we have incurred, and the blood we have spilt in the course of an Eight years war, will avail us nothing."[10] Referring to the failed Articles of Confederation -- which placed the nation's foundations upon a mere "league of friendship" among the thirteen independent states—Washington expressed to Hamilton that "[n]o man in the United States is, or can be more deeply impressed with the necessity of a reform in our present Confederation than myself."[11]

In the summer of 1787, delegates convened in Philadelphia to hold a Constitutional Convention, and the question of the scope of federal power was a central issue for debate. On one side was James Madison and the Virginia Plan, which proposed greatly expanding federal power. On the other was William Patterson and the New Jersey Plan, which advocated for a weaker national government. James Wilson, one of only six men to have signed both the Declaration of Independence and the Constitution, explained that under the Virginia Plan, "the Natl. Legislature is to make laws in all cases at which the separate States are incompetent," while under the New Jersey Plan the powers of Congress would not be expanded much beyond what they were under the Articles of Confederation.[12] With the experience of the failed Articles of Confederation fresh in their minds, the delegates overwhelmingly approved the Virginia Plan.[13]

With the principles of the Virginia Plan as a guide, the drafters of the Constitution created a list of enumerated powers provided to Congress in Article I, Section 8, including the Commerce Clause and the Necessary and Proper Clause. The Commerce Clause granted Congress the "Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[14] And the Necessary and Proper Clause provided Congress the "Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States."[15]

The debate over the appropriate scope of federal power intensified as Anti-Federalist opponents of ratification expressed concerns that the proposed Constitution tipped the balance too far in favor of federal power and closer to the imperial British rule they had fought against in the Revolutionary War. The proponents of ratification, led by John Jay, Alexander Hamilton

[10] 18 The Writings of George Washington 490 (John C. Fitzpatrick, ed. 1931) (Letter to Alexander Hamilton, March 4, 1783) (emphasis in original).
[11] *Id.* at 505.
[12] 1 The Records of the Federal Convention of 1787 252, 277 (Max Farrand ed., rev. ed. 1966).
[13] *Id.* at 322.
[14] U.S. Const. art. 1, §8, cl. 3.
[15] U.S. Const. art. I, §8, cl. 18.

and James Madison in *The Federalist Papers,* answered those arguments with two points. First, they laid out the case for the broad powers granted to the federal government, emphasizing "the importance of their continuing firmly united under one federal government, vested with sufficient powers for all general and national purposes."[16] Second, they stated that the powers granted to the federal government under the Constitution were "few and defined," while the powers "which are to remain in the State governments are numerous and indefinite."[17]

The precise scope of those "few and defined" powers quickly proved controversial, with two prominent members of President George Washington's cabinet – Treasury Secretary Alexander Hamilton and Secretary of State Thomas Jefferson – clashing sharply over whether the Constitution permitted Congress to establish a national bank. President Washington sided with Hamilton and created the bank, leading to the Supreme Court's unanimous ruling in *McCulloch v. Maryland,*[18] upholding the creation of the bank against a constitutional challenge.

As did the authors of *The Federalist Papers*, Chief Justice Marshall recognized in *McCulloch* that the federal government is "one of enumerated powers." Marshall made this point even more forcefully in *Marbury v. Madison*,[19] in which he opined that "[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."[20] But most of *McCulloch* is devoted to articulating the broad scope of those enumerated powers: "'in order to form a more perfect union,' it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers."[21] Evoking language from Hamilton's advisory opinion to Washington, Chief Justice Marshall upheld the establishment of a national bank under the Necessary and Proper Clause, stating "[l]et 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, but consistent with the letter and spirit of the constitution, are constitutional."[22]

Chief Justice Marshall similarly understood the Commerce Clause as providing a broad grant of authority to Congress, as he expressed in his decision for the Court in *Gibbons v. Ogden*.[23] Once again, as a starting point, Chief Justice Marshall acknowledged that Congress's power was not unlimited, explaining that the enumeration of powers in the Constitution "presupposes something not enumerated."[24] But again, he emphasized the broad scope of

[16] The Federalist Papers, No. 3, at 36 (Jay) (Clinton Rossiter, ed. 1999).
[17] The Federalist Papers No. 45, at 289 (Madison).
[18] 17 U.S. 316 (1819)
[19] 1 Cranch 137 (1803).
[20] *Id*. at 176.
[21] *Id.* at 403.
[22] *Id.* at 421. Hamilton wrote to Washington, "If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the constitution; it may safely be deemed to come within the compass of the national authority." The Papers of George Washington Digital Edition (Theodore J. Crackel, ed. 2008) (Letter from Alexander Hamilton to George Washington, Opinion on the Constitutionality of an Act to Establish a Bank, 1791).
[23] 22 U.S. 1 (1824).
[24] *Id.* at 195.

these enumerated powers. He rejected a "narrow construction, which would cripple the government, and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent."[25] In Marshall's view, "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse."[26] Marshall emphasized that "[t]he power over commerce . . . was one of the primary objects for which the people of America adopted their government," and made clear that "the attempt to restrict it comes too late."[27] Under Chief Justice Marshall's expansive view of the Commerce Clause, "[t]he wisdom and the discretion of Congress . . . and the influence which their constituents possess at elections, are . . .the sole restraints on which they have relied, to secure them from its abuse."[28]

From the *Lochner* Era to the Roberts Court

Judicial deference to congressional action under the Commerce Clause was the rule for America's first century. But as Congress began taking a more active role in regulating the growing American economy during and after the Industrial Revolution, the Court started to push back, taking a much narrower view of the Commerce Clause. While this period, known as the *Lochner* era, is most often associated with the Supreme Court's invocation of substantive Due Process to overturn state labor regulations based on a new found "liberty of contract," equally far-reaching were its decisions overturning federal laws based on a restrictive understanding of the Commerce Clause. Creating categorical exceptions in cases such as *United States v. E.C. Knight Co.*[29] and *Carter v. Carter Coal Co.*,[30] the Court ruled that production, manufacturing, and mining fell outside Congress's powers because the Court did not believe that these activities fell within the definition of commerce. The Court also invalidated federal child labor laws and federal wage and hour laws on the ground that Congress could not regulate activities that had only an indirect effect on interstate commerce.[31]

The *Lochner* era ended in 1937, with the Court jettisoning both its substantive Due Process assault on state labor regulations and its restrictive reading of the Commerce Clause.[32] With a shift toward a national economy driven by increasingly rapid technological change, the Court's doctrine began to allow for greater federal controls. The result was a return to the broad Commerce Clause powers affirmed by Chief Justice Marshall and judicial deference toward the elected branches.

---

[25] *Id.* at 188.
[26] *Id.* at 189.
[27] 22 U.S. at 190.
[28] *Id.* at 197.
[29] 156 U.S. 1 (1895).
[30] 298 U.S. 238 (1936).
[31] *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (federal child labor laws); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (federal wage and hour laws).
[32] *See West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding state minimum wage laws); *NLRB v. Jones & Laughlin Steel Crop.*, 301 U.S. 1 (1937) (upholding National Labor Relations Act against Commerce Clause challenge).

The new post-*Lochner* doctrine of deference toward Congress's Commerce Clause powers reached what some consider its high water mark in Court's 1942 decision in *Wickard v. Filburn*.[33] Here, the question was whether Congress could address the national problem of volatility in the price of wheat by regulating wheat grown on a family farm for private consumption as part of a broader regulatory scheme. While the Court conceded that the impact of the individual family farmer was small, it upheld Congress's use of its Commerce Clause power because, in the aggregate, the economic impact of all such activities "is far from trivial."[34] The Court's logic was that whether the wheat was introduced to market or used for private consumption, it would have the effect of suppressing the price of wheat.[35] Evoking Chief Justice Marshall, the Court responded to the criticism that Congress was forcing farmers into the market in order to stabilize prices by recognizing that "[t]he conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process," since "[s]uch conflicts rarely lend themselves to judicial determination."[36]

For more than fifty years after the end of the *Lochner* era, the Court did not strike down a single federal law as exceeding Congress's authority under the Commerce Clause or the Necessary and Proper Clause. Then, in the mid-1990s, a deeply divided Court struck down the federal Gun Free School Zones Act and part of the Violence Against Women Act (VAWA) as exceeding Commerce Clause powers. In *United States v. Lopez*, a five-Justice conservative majority observed that the ban on guns in school zones was "a criminal statute," that, unlike the regulation of wheat in *Wickard*, "is not an essential part of a larger regulation of economic activity."[37] Declining to expand further the Court's deference toward Congress, the Court refused "to pile inference upon inference" in order sustain congressional action, arguing that to do so would fundamentally blur any "distinction between what is truly national and what is truly local."[38] Importantly, the *Lopez* Court did not overrule any prior precedent, citing approvingly to the entire post-*Lochner* line of cases.[39] Nonetheless, the *Lopez* Court clearly meant to draw a line in the sand, emphasizing that it was unwilling to "convert congressional authority under the Commerce Clause to a general police power."[40] The *Lopez* majority concluded that by enumerating federal power in the Constitution, our founding charter "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."[41]

In *United States v. Morrison*, the same five Justices from the *Lopez* majority struck down VAWA's civil remedy provision, noting that gender-motivated crimes "are not, in any sense of

[33] 317 U.S. 111 (1942).
[34] *Id.* at 128.
[35] *Id.*
[36] *Id.* at 129.
[37] 514 U.S. 549, 561 (1995).
[38] *Id.* at 567-68.
[39] *Id.* at 555-61.
[40] *Id.* at 567.
[41] *Id*. at 566.

the phrase, economic activity."[42] The *Morrison* majority, considering the federal law's civil remedy provision, concluded it could think of "no better example of the police power, which the Founders denied the National Government and reposed in the States."[43] Again, the majority balked at questioning prior precedent, but reinforced its statement in *Lopez* that "[t]he Constitution requires a distinction between what is truly national and what is truly local."[44]

The dissenting Justices in *Lopez* and *Morrison* believed the Court should give Congress greater deference in determining whether a regulated activity has a substantial effect on interstate commerce.[45] In the dissenters' view, the Court's distinction between economic activity and non-economic activity was contrary to prior decisions, which had only emphasized an activity's effect on interstate commerce.[46] Such "categorical exclusions have proven as unworkable in practice as they are unsupportable in theory," according to the dissenters, and harkened back to the discredited *Lochner* era.[47] To the dissenters, the appropriate safeguard for federalism in this area was not the courts, but, as Chief Justice Marshall had emphasized, the political structures established by the Constitution.[48] Citing the *amici curiae* brief from the 36-State coalition in support of VAWA, the dissent in *Morrison* observed that it is "not the least irony of these cases that the States will be forced to enjoy the new federalism whether they want it or not."[49]

Lopez and *Morrison* were decided during a decade-long period known as the "Federalism Revolution" of the Rehnquist Court. During this period, the Court imposed a number of other restrictions on the use of the Commerce Clause. In *Seminole Tribe v. Florida*,[50] the Court held that Congress does not have power under the Commerce Clause to abrogate state sovereign immunity afforded to the states under the Eleventh Amendment. In *New York v. United States* and *Printz v. United States*[51] the Court struck down federal laws that required state officials to participate in federal regulatory efforts, holding that the Commerce Clause could not be used to "commandeer" state and local officials. Finally, in *Solid Waste Agency of Northern Cook County v. United States*[52] and *Rapanos v. United States*,[53] the Court twice used

[42] *Id.* at 613.
[43] *Id.* at 618.
[44] *Id.* at 613, 617.
[45] *Lopez*, 514 U.S. at 616-17 (Breyer, J., dissenting) ("Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce -- both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy."); *Morrison*, 529 U.S. at 628 (Souter, J., dissenting) ("The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours.").
[46] *Lopez*, 514 U.S. at 628 (Breyer, J., dissenting).
[47] 529 U.S. at 639, 642-44 (Souter, J., dissenting).
[48] *Id.* at 648-49.
[49] *Id.* at 654.
[50] 517 U.S. 44 (1996).
[51] 521 U.S. 898 (1997).
[52] 531 U.S. 159 (2001).
[53] 547 U.S. 715 (2006).

the principle of constitutional avoidance to limit the scope of the Clean Water Act and thus avoid Commerce Clause concerns

Fears that *Lopez* and *Morrison* would cascade into an even broader judicial review of federal legislation were somewhat staunched by the Court's 2005 decision in *Gonzales v. Raich*, which upheld Congress's power to regulate medicinal marijuana grown for personal consumption, in accordance with local law.[54] Six Justices voted to uphold Congress's use of its Commerce Clause power, with Justice Anthony Kennedy signing on in full to the majority opinion and Justice Antonin Scalia concurring separately. As a starting point, the majority opinion observed that "[t]he Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation."[55] Addressing prior precedent, it explained that "[o]ur case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[56]

Justice Scalia concurred separately in *Raich* to emphasize that "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."[57] Distinguishing *Lopez* and *Morrison*, Scalia explained that "Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."[58] Citing to *McCulloch*, Scalia explained that "the Necessary and Proper Clause . . . empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation."[59] Applying these principles to the case at hand, Scalia agreed that "Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market 'could be undercut' if those activities were excepted from its general scheme of regulation."[60] Dissenting, Justice Sandra Day O'Connor, joined by Chief Justice William Rehnquist and Justice Clarence Thomas, found the case "materially indistinguishable from *Lopez* and *Morrison*."[61]

While Justice Scalia presented a broad understanding of the Necessary and Proper Clause in *Raich*, the limits of his view were highlighted by his dissent in *United States v. Comstock,*[62] in which the Court, by a 7-2 vote, upheld under the Necessary and Proper Clause a

[54] 545 U.S. 1 (2005).
[55] *Id.* at 16.
[56] *Id.* at 17.
[57] *Id.* at 34 (Scalia, J., concurring).
[58] *Id.* at 37. As Scalia explained, *Lopez* and *Morrison* "do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation." *Id.* at 38-9.
[59] *Id.* at 39. Although, "even when the end is constitutional and legitimate, the means . . . may not be otherwise 'prohibited' and must be 'consistent with the letter and spirit of the constitution.'" *Id.* (quoting *McCulloch*, 17 U.S. at 421).
[60] *Id.* at 42 (quoting *Lopez*, 514 U.S. at 561).
[61] *Id.* at 45 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Thomas, J.).
[62] 130 S.Ct. 1949 (2010).

federal law allowing the government to institute civil-commitment proceedings against mentally ill, sexually dangerous federal prisoners beyond the date they would otherwise be released from prison. In upholding the law, the majority opinion, which Chief Justice Roberts joined in full, recognized that "the Constitution 'addresse[s] the 'choice of means' 'primarily . . . to the judgment of Congress.'"[63] Referencing Chief Justice Marshall's decision in *McCulloch*, the majority emphasized how "[t]he Framers demonstrated considerable foresight in drafting a Constitution capable of such resilience through time."[64]

In dissent, Justice Thomas, joined by Justice Scalia, argued for a more narrow understanding of the Necessary and Proper Clause that would limit its scope to the execution of Congress's enumerated powers. Because in the views of Justices Thomas and Scalia the challenged federal statute "does not execute *any* enumerated power," they would have found it outside Congress's power.[65] Justice Kennedy, in a separate concurrence, pushed back against this understanding that "the Necesssary and Proper Clause can be no more than one step removed from an enumerated power."[66] Instead, "[w]hen the inquiry is whether a federal law has sufficient links to an enumerated power to be within the scope of federal authority, the analysis depends not on the number of links in the congressional-power chain but on the strength of the chain."[67] Kennedy broke with the majority, however, in his emphasis on the importance of "whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause," something he would weigh on the side of concluding that "the power is not one properly within the reach of federal power."[68]

The Commerce Clause and the Necessary and Proper Clause at a Crossroads

With the challenges to the Affordable Care Act pending before the Supreme Court, the Commerce Clause and the Necessary and Proper Clause are at a significant crossroads. While cases as old as *McCulloch* and *Gibbons* and as new as *Raich* and *Comstock* strongly support the constitutionality of the minimum coverage provision, cases from *Carter Coal* to *Morrison* also indicate that a conservative majority on the Court is more than capable of imposing new limits on the powers of the federal government when it chooses to do so.

[63] 130 S.Ct. 1949, 1957 (2010) (quoting *Burroughs v. United States*, 290 U.S. 534, 547-48 (1934)).
[64] *Id.* at 1955.
[65] *Id.* at 1974 (Thomas, J., dissenting, joined by Scalia, J.). Thomas underscored his belief that the Court's "opinion breathes new life into" the Necessary and Proper Clause, which he called "the last, best hope of those who defend ultra vires congressional action." *Id.* at 1983 (quoting *Printz v. United States*, 521 U.S. 898, 923 (1997)).
[66] *Id.* at 1965-66 (Kennedy, J., concurring); *see also id.* at 1969-70 (Alito, J., concurring) (acknowledging legitimacy of federal power more than one step removed from enumerated power).
[67] *Id.* at 1966.
[68] *Id.* at 1967-68.

The Court's ruling on the ACA case will be a landmark ruling no matter how it comes out. An opinion upholding the Act, joined by one or members of the Court's conservative bloc, could go a long way to ending, once and for all, the recurring question of whether the federal government has the powers required to solve problems, like access to health care, which are truly national in scope. A ruling striking down the Act would be a huge step back toward the *Lochner* era, with a progressive President at war with a conservative Supreme Court. Not since *Carter Coal* has the Supreme Court struck down any piece of legislation near the scope and scale of the Affordable Care Act as beyond Congress's powers under the Commerce Clause and the Necessary and Proper Clause.

Nearly 200 years ago, Chief Justice Marshall warned about those who would "explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use." Given that some of the rulings authored or joined by conservative members of the Roberts Court support a broad interpretation of federal power, it does not seem that the conservative bloc consistently holds as a "postulate" that the powers expressly granted to the federal government are to be given the narrowest possible construction. That said, it is unclear whether the conservative Justices who voted in support of federal power in *Raich* and *Comstock* will do so to uphold an exercise of congressional power that does not fit as well with their policy preferences. The Affordable Care Act, and many other federal laws, hang in that balance.

Enforcing Civil Rights: Will the Supreme Court Strike Down the Voting Rights Act and Other Landmark Civil Rights Legislation?

The Constitution at a Crossroads

Introduction

> Do decisions that return the country to a pre-Civil War understanding of the nation establish a more perfect Union? Are decisions just that shield not only the states but lesser appendages of the state from paying for the wrongs they commit? Do decisions that leave the elderly and the disabled with inadequate remedies for unequal treatment establish justice? . . . .Do decisions that deny Congress the power to protect the free exercise of religion secure the blessings of liberty? Do decisions that leave women less protected than men achieve any of the Constitution's ends?
>
> . . .
>
> The[se] results . . . were reached largely . . . by means of doctrinal devices – state sovereign immunity, congruence and proportionality of legislation, and record of evils to be eradicated – that have no footing in the Constitution. Remove these obfuscations, it will be clear that the court's decisions do not survive the test for serving constitutional purposes.
>
> JOHN T., NOONAN, JR.,NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 12 (2002).

Three years ago, an ideologically-divided Supreme Court appeared poised on the precipice of a ruling that would strike down a central provision of an iconic civil rights law – the preclearance provision of the Voting Rights Act of 1965 – as beyond Congress's constitutional authority. Then, the Court blinked, issuing instead an 8-1 ruling disposing of the challenge on narrow statutory grounds. Now with limits on state-imposed threats to voting rights front and center in the run-up to the fall 2012 elections, challenges to the Act are again racing through the court system, setting up a return engagement before the Court, possibly as soon as the October 2012 Term.

As the quote above from Judge John Noonan, a conservative appeals court judge appointed by President Ronald Reagan, makes clear, one of the most important and controversial developments in the Supreme Court's jurisprudence of the last 15 years is a new doctrine, minted by Justice Anthony Kennedy in the 1997 ruling in *Boerne v. City of Flores*, [1] limiting the power of Congress to protect the

[1] 521 U.S. 507 (1997).

constitutional guarantees of liberty and equality secured by the Fourteenth Amendment. Introduced with little notice or fanfare in *Boerne* – a case that divided the Court mainly over the meaning of the First Amendment's Free Exercise Clause – *Boerne's* "congruence and proportionality" test has subsequently become a lightening rod, as Justice Kennedy and other conservative Justices on the Court have applied this test with significant rigor in rulings that have narrowed the reach of landmark federal civil rights laws such as the American with Disabilities Act and the Age Discrimination in Employment Act. With a test to an important section of the Family and Medical Leave Act before the Court currently, and with a landmark challenge to the Voting Rights Act on its way to the Court, the constitutional authority of Congress to protect liberty, equality and civil rights is very much at a crossroads.

The Text and History of the Enforcement Power

The three Civil War Amendments – the Thirteenth, Fourteenth, and Fifteenth Amendments – establish the constitutional foundation for Congress to enact federal civil rights legislation, each giving to Congress the power to enforce the Constitution's new guarantees of liberty, equality, and the right to vote "by appropriate legislation."[2] In enlarging the constitutional powers of Congress, the Framers of the three Civil War Amendments gave Congress a critical role in ensuring that the new constitutional guarantees would be enjoyed by all Americans. For example, during the debates over the Fourteenth Amendment, the Framers of the Amendment explained that, to ensure that the Constitution's new guarantees "are to be effectuated and enforced, . . . additional power should be given to Congress . . . . This is to be done by the fifth section of the amendment . . . . Here is a direct affirmative delegation of power to carry out the principles of these guarantees, a power not found in the Constitution."[3] Thus, the Framers of the Fourteenth Amendment explained that the Enforcement Clause "casts upon Congress the responsibility of seeing to it, for the future, that all sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property."[4]

The language that the Framers used to define the scope of Congress' authority under the Civil War Amendments – "appropriate legislation" – reflects a decision to give Congress wide discretion to enact whatever measures it deemed "appropriate" for achieving the purpose of the Amendments. In giving Congress the power to enact "appropriate legislation" to secure the new constitutional guarantees of liberty, equality, and the right to vote, the Framers of the three Civil War Amendments granted Congress the sweeping authority of Article I's "necessary and proper" powers as interpreted by the Supreme Court in *McCulloch v. Maryland*,[5] a seminal case well known to the Framers of those Amendments.[6] In adopting a broad understanding of the scope of the enforcement power, the Framers

---

[2] U.S. Const., Amdt. XIII, §2; Amdt. XIV, § 5; Amdt. XV, §2.
[3] Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866).
[4] *Id.* at 2768.
[5] 17 U.S. (4 Wheat.) 316 (1819).
[6] *See, e.g.*, JOHN T. NOONAN, NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 28-31 (2002); Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev 1801, 1810-11 (2010); Evan Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1158-66 (2001); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 822-27 (1999); Michael W. McConnell, *Institutions and Interpretation*, 111 HARV. L. REV. 153, 178 n.153 (1997). For an extensive discussion of the text and history of the Enforcement Clauses

stressed the importance of a broad legislative power to protect constitutional rights – with corresponding deference from the courts to respect this new authority.

In the years after Reconstruction, the Supreme Court held that the Enforcement Clause of the Fourteenth Amendment gave Congress broad authority to secure the guarantees of the Fourteenth Amendment from state invasion, echoing the reasoning of *McCulloch*. "Whatever legislation is appropriate, that is adapted to carry out the objects the amendments have in view, whatever tends . . . to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial and invasion . . . is brought within the domain of congressional power."[7] Using the enforcement power, Congress has enacted a long list of iconic civil rights legislation vindicating the promises of the Civil War Amendments, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, and, more recently, the Americans with Disabilities Act and the Family and Medical Leave Act.

Boerne and the Congruence and Proportionality Test

In 1997, in its landmark opinion in *Boerne*, the Supreme Court changed course. *Boerne* held that the Religious Freedom Restoration Act ("RFRA") exceeded Congress' power to enforce the Fourteenth Amendment and, more important, demanded that federal enforcement legislation satisfy a new, searching standard of review, called congruence and proportionality. In fashioning the congruence and proportionality standard in *Boerne*, Justice Kennedy emphasized that the text of Section 5 limits Congress to the power to "enforce" the guarantees of the Fourteenth Amendment. "Legislation which alters the meaning of the [Fourteenth Amendment] cannot be said to be enforcing [it]. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[8] In choosing to give Congress a power to enforce, Justice Kennedy reasoned, the drafters of the Amendment gave Congress remedial authority to redress actual constitutional violations by state and local governments, not the substantive power to elucidate the Constitution's meaning.[9] Thus, in Justice Kennedy's view, Congress was required to hew to the Court's precedents in legislating under the Enforcement Clause. Any other result, the Court reasoned, would allow Congress to change the Constitution's meaning and overhaul the balance of powers between the states and the federal government. "If Congress could define its own powers by

---

of the Civil War Amendments, see DAVID H. GANS & DOUGLAS T. KENDALL, THE SHIELD OF NATIONAL PROTECTION: THE TEXT AND HISTORY OF SECTION 5 OF THE FOURTEENTH AMENDMENT (2009).

[7] *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1880); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966) ("The basic test to be applied . . . is the same in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fourteenth Amendment was ratified. . . . The Court has subsequently echoed his language in describing each of the Civil War Amendments."); *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) ("[T]he McCulloch v. Maryland standard is the measure of what constitutes ' appropriate legislation' under § 5 of the Fourteenth Amendment.").

[8] *Boerne*, 521 U.S. at 519.

[9] *Id.* at 520 (arguing that "the Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause").

altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'"[10]

Boerne drew a distinction "between measures that remedy and prevent unconstitutional actions and measures that make a substantive change in the governing law,"[11] reaffirming that when Congress enforces recognized fundamental constitutional rights rather than inventing new ones, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[12] While the line between remedial and substantive measures "is not easy to discern, and Congress must have wide latitude in determining where it lies," Justice Kennedy explained that "the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[13]

Applying this new test, the Court concluded that RFRA, which provided that government action that substantially burdened the free exercise of religion must meet the test of strict scrutiny, could not be justified as legislation enforcing the Fourteenth Amendment. The Act's sweeping coverage, Justice Kennedy wrote, "is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[14] Rather, as the legislative record clearly reflected, RFRA was an attempt to overturn legislatively the Supreme Court's prior decision in *Employment Division, Dep't of Human Resources v. Smith,*[15] which had narrowed the meaning of the First Amendment, and "attempt a substantive change in constitutional protections."[16]

Boerne's new interpretation of the scope of Congress' power to enforce the guarantees of the Fourteenth Amendment went unchallenged on the Court. Instead, the dissenters – Justices Sandra Day O'Connor, Stephen Breyer, and David Souter – took on the Court's prior interpretation of the Free Exercise Clause in *Smith*, arguing that, as a matter of First Amendment history, *Smith* was wrong (or there were serious doubts about its correctness) and should be re-considered or overruled.[17] As Justice O'Connor explained, "[i]f the Court were to correct the misinterpretation of the Free Exercise Clause in *Smith*, it would simultaneously put our First Amendment jurisprudence back on course and allay the legitimate concerns of a majority in Congress who believed that *Smith* improperly restricted religious liberty."[18]

---

[10] *Id.* at 529 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).
[11] *Id.* at 519.
[12] *Id.* at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).
[13] *Id.* at 519, 520.
[14] *Id.* at 532.
[15] 494 U.S. 872 (1990).
[16] *Boerne*, 521 U.S. at 532.
[17] *Id.* at 544-45 (O'Connor, J., dissenting); *see also id.* at 565-66 (Souter, J., dissenting) (calling for re-argument on the question whether *Smith* was correctly decided); *id.* at 566 (Breyer, J., dissenting) (same).
[18] *Id.* at 545 (O'Connor, J., dissenting).

The Rehnquist Court's Federalism Revolution: An Ideological Divide Emerges on Congruence and Proportionality

Boerne might have been viewed as an outlier case involving a unique set of circumstances – after all, in enacting RFRA, Congress had by statute attempted to displace the Supreme Court's interpretation of the Free Exercise Clause and mandate a constitutional standard of review for all future cases – but a majority of the Court did not treat it in this fashion. Rather, in a series of cases deciding between 1999 and 2001, at the height of the Rehnquist Court's Federalism Revolution, the Court applied *Boerne*'s newly-minted congruence and proportionality standard with rigor to hold unconstitutional in part a number of federal statutes, including two of the most important modern federal anti-discrimination laws. In these cases, the Court's liberal Justices recognized the dangers posed by the congruence and proportionality test and issued strongly-worded dissents.

In *Kimel v. Florida Bd. of Regents*,[19] decided in 2000, and *Board of Trustees of Univ. of Alabama v. Garrett*,[20] decided in 2001, 5-4 conservative majorities held that the Age Discrimination in Employment Act and the employment discrimination provisions of the Americans With Disabilities Act were not valid exercises of congressional power to enforce the Fourteenth Amendment, and were unconstitutional to the extent they allowed individuals to sue state governments for monetary damages.[21] In these cases, the Court, in opinions authored, respectively, by Justice O'Connor and Chief Justice William Rehnquist, reasoned that, because the Court had interpreted the Fourteenth Amendment to permit age discrimination and disability discrimination, so long as it is rationally related to a legitimate government interest, the ADEA's and ADA's prohibitions on such discrimination "attempt[ed] to redefine the States' legal obligations"[22] and "rewrite Fourteenth Amendment law laid down by this Court . . . . Section 5 does not so broadly enlarge congressional authority."[23] Conducting an extensive, searching review of the congressional record, the majority in both cases concluded that Congress had no basis for concluding that legislation was needed to correct a pattern of unconstitutional discrimination by the states.

Four Justices issued strongly worded dissents in each case. Most significantly, in *Garrett*, the Court's liberal wing took on the Court's sweeping use of *Boerne* to limit landmark antidiscrimination laws. Recognizing the broad sweep of the Fourteenth Amendment's guarantee of the equal protection of the laws and the broad discretion entrusted to Congress under the Enforcement Clause, Justice Breyer's dissent argued that "Congress could have reasonably concluded that the [ADA's] remedy . . .

---

[19] 528 U.S. 62 (2000).
[20] 531 U.S. 356 (2001).
[21] In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court held that Congress could not subject states to suit for money damages for violating federal statutes enacted pursuant to Congress' Article I powers. To overcome this principle of state sovereign immunity, Congress needed to point to a grant of authority to Congress at the expense of the states, such as the power granted to Congress in each of the Civil War Amendments. Thus, *Seminole Tribe* made the scope of Section 5 critical to providing federal damage remedies against state governments.
[22] *Kimel*, 528 U.S. at 88.
[23] *Garrett*, 531 U.S. at 374.

constitutes an 'appropriate' way to enforce th[e Constitution's] basic equal protection requirement." [24] The rational basis test, he explained, was designed to restrain judges, and should not be invoked to prevent Congress from ensuring that the Fourteenth Amendment's guarantee of the equal protection of the laws is actually enjoyed by all persons, regardless of disabilities. The four liberal dissenters took the majority to task for ignoring that Section 5 of the Fourteenth Amendment gave Congress "'the same broad powers expressed in the Necessary and Proper Clause'" to do "whatever 'tends to enforce submission to [the Amendment's] prohibitions' and 'to secure to all persons . . . the equal protection of the laws.'"[25] There was no basis in law, Justice Breyer argued, for refusing to "follow the longstanding principle of deference to Congress," and setting aside Congress' considered, well-supported judgment that the ADA was necessary to prevent "substantial unjustified discrimination against persons with disabilities," often motivated by "'stereotypic assumptions' or purposeful unequal treatment'" in violation of the Fourteenth Amendment's guarantee of equality.[26]

Toward the end of Chief Justice Rehnquist's tenure, the conservative ideological bloc that produced the federalism revolution began to break down, producing narrow majorities on the Court that have limited *Boerne*'s reach and have held that Congress has significantly more leeway to enact statutes that prevent or deter constitutionally-suspect discrimination or safeguard substantive fundamental rights secured by the Fourteenth Amendment. In 2003, in *Nevada Dep't of Human Resources v. Hibbs*,[27] in a 6-3 ruling authored by Chief Justice Rehnquist himself, the Court held that the Family and Medical Leave Act's family care provision, granting employees 12 weeks of unpaid leave to care for a family member, was appropriate legislation to prevent and deter gender discrimination by the states in the administration of leave benefits. By granting all persons the right to take leave, the Chief Justice explained, "the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family care giving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes."[28] While *Boerne*'s congruence and proportionality standard still applied, Chief Justice Rehnquist explained that "it was easier for Congress to show a pattern of state constitutional violations" because of the Fourteenth Amendment's heightened protection against gender discrimination.[29]

In 2004, in *Tennessee v. Lane*,[30] the Court held, by a 5-4 vote, that the ADA's prohibition on disability discrimination in the administration of public services was valid legislation enforcing the Fourteenth Amendment, as applied to barriers on access to state courthouses. In an opinion by Justice Stevens, the Court held that because the ADA prohibited discrimination in the exercise of fundamental rights, such as the right of access to the courts, that are "subject to more searching judicial review,"[31] Congress was justified in using prophylactic legislation to respond to a widespread pattern of

[24] *Garrett*, 531 U.S. at 377 (Breyer, J., dissenting).
[25] *Id.* at 386 (Breyer, J., dissenting) (citations omitted).
[26] *Id.* at 386, 380, 381 (Breyer, J., dissenting) (citations omitted).
[27] 538 U.S. 721 (2003).
[28] *Id.* at 737.
[29] *Id.* at 736.
[30] 541 U.S. 509 (2004).
[31] *Id.* at 522-23.

discrimination. "When Congress seeks to remedy or prevent unconstitutional discrimination, § 5 authorizes it to enact prophylactic legislation prohibiting practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause."[32]

Hibbs and *Lane* provoked strongly worded dissents objecting that the Court had watered down *Boerne*'s congruence and proportionality test beyond recognition. In *Hibbs*, Justice Kennedy's dissent, joined by Justices Antonin Scalia and Clarence Thomas, argued that the Court had failed to adhere to *Boerne*'s strictures. "Simply noting the problem is not a substitute for evidence which identifies some real discrimination that the family leave rules are designed to prevent."[33] In Justice Kennedy's view, "[t]he paucity of evidence to support the case . . . demonstrates that Congress was not trying to responds with a congruent and proportional remedy to a perceived course of unconstitutional conduct. Instead, it enacted a substantive entitlement program of its own."[34] In *Lane*, Chief Justice Rehnquist's dissent, joined by Justice Kennedy and Justice Thomas, argued that the majority should have followed the Court's three-year-old ruling in *Garrett.* "The near-total lack of actual constitutional violations in the congressional record is reminiscent of *Garrett* . . . . Title II can only be understood as a congressional attempt to 'rewrite the Fourteenth Amendment law laid down by this Court,' rather than a legitimate effort to remedy or prevent state violations of that Amendment."[35] The *Lane* dissenters rejected the majority's as-applied analysis, viewing it as an attempt "to rig the congruence-and-proportionality test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right."[36]

In a separate dissent in *Lane*, Justice Scalia argued that *Boerne's* congruence and proportionality standard should not be applied at all, calling the test "a standing invitation to judicial arbitrariness . . . that has no demonstrable basis in the text of the Constitution . . . ."[37] In Justice Scalia's view, all that Section 5 permits is legislation providing for access to courts to enforce the Amendment; it does not permit Congress "to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or 'remedy' conduct that does not *itself* violate any provision of the Fourteenth Amendment. So-called 'prophylactic legislation' is reinforcement rather than enforcement."[38] Out of deference to the Court's long line of precedents interpreting Section 5 broadly to uphold federal laws aimed at racial discrimination, Justice Scalia announced that he would not apply his new rule in that context, observing that "[g]iving § 5 more expansive scope with regard to measures directed against racial discrimination by the States accords to practices that are distinctively violative of the principal purpose of the Fourteenth Amendment . . . ."[39]

---

[32] *Id.* at 520.
[33] *Hibbs*, 538 U.S. at 746 (Kennedy, J., dissenting).
[34] *Id.* at 754 (Kennedy, J., dissenting).
[35] *Lane*, 541 U.S. at 547, 548 (Rehnquist, C.J., dissenting).
[36] *Id.* at 551 (Rehnquist, C.J., dissenting).
[37] *Id.* at 558 (Scalia, J., dissenting).
[38] *Id.* at 559 (Scalia, J., dissenting).
[39] *Id.* at 561 (Scalia, J., dissenting).

The Enforcement Power and the Roberts Court

As described above, the pendulum on the *Boerne's* congruence and proportionality test swung widely from the Court's demanding application in *Kimel* and *Garrett,* to the much more forgiving application in *Hibbs* and *Lane*, which reaffirmed that Congress has broad authority to create prophylactic rules to vindicate constitutional protections the Court has already recognized. But there is reason to believe that the Court's pendulum in this area may be poised to swing back. Chief Justice Rehnquist, who wrote the opinion in *Hibbs*, and Justice O'Connor, who joined the majority in *Hibbs* and cast the deciding vote in *Lane*, have been replaced by Chief Justice John Roberts and Justice Samuel Alito. If these Justices side with Justice Kennedy, who appears to be deeply committed to enforcing a strict version of the congruence and proportionality test he coined in *Boerne*, and Justices Scalia and Thomas, these cases are likely to be narrowed or overruled.

Indeed, in 2009, at oral argument in *NAMUDNO v. Holder*,[40] the Court's five conservative Justices seemed poised to strike down one of the most important provisions of the Voting Rights Act of 1965, the Act's preclearance requirement, which requires certain jurisdictions with a history of racial discrimination in voting to obtain federal permission before altering their voting laws or regulations. Such a ruling would be a dramatic development because the Court has upheld the constitutionality of the Act's preclearance provision four times[41] and *Boerne* and the cases that followed it have repeatedly cited the preclearance requirement of the Voting Rights Act as the archetype of valid enforcement legislation.[42] While the Court ultimately decided *NAMUDNO* on statutory grounds and avoided the constitutional question, the Court's opinion, written by Chief Justice Roberts, offers something of a road map for how the Court's conservatives might strike down the Act in the future. While the Chief Justice celebrated the Act's achievements, much of his opinion suggested that the Act's "current burdens" could no longer by justified by "current needs."[43] Viewing the preclearance requirement as an affront to federalism, the Chief Justice's opinion suggested that the Act may have run its course, citing "considerable evidence that it fails to account for current political conditions."[44] New challenges are now waiting in the wings.[45]

Possible Developments in the Future

The Court's present doctrine on the scope of congressional power to enforce the guarantees of the Civil War Amendments continues to be very controversial, and may change substantially in the Roberts Court. For the last fifteen years, the Supreme Court has been sharply divided between Justices

---

[40] 129 S. Ct. 2504 (2009).

[41] *See South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Georgia v. United States*, 411 U.S. 526 (1973); *City of Rome v. United States*, 446 U.S. 156 (1980); *Lopez v. Monterey County*, 525 U.S. 266 (1999).

[42] *See Boerne*, 521 U.S. at 530-34; *Garrett*, 531 U.S. at 373-74; *Hibbs*, 538 U.S. at 756-57 (Kennedy, J., dissenting).

[43] *NAMUDNO*, 129 S. Ct. at 2513.

[44] *Id.* at 2512.

[45] *See Shelby County v. Holder*, No. 10-CV-651, 2011 WL 4375001 (D.D.C. Sept. 21, 2011), *appeal pending*, No. 11-5256 (D.C. Cir., argued Jan. 19, 2012); *LaRoque v. Holder*, No 10-CV-651, 2011 WL 6413850 (D.D.C. Dec. 22, 2011), *appeal pending*, No. 11-5349 (D.C. Cir.).

on the left, who have argued that the power of Congress under the Civil War Amendments is wide in scope, giving Congress broad authority to "advance equal-citizenship stature"[46] for all persons, and Justices on the right, who would sharply restrict the power of Congress, permitting Congress to legislate only after creating an exhaustive record showing that the legislation is a tailored response to a pattern of proven constitutional violations by the states. Justice O'Connor, and to a lesser extent Chief Justice Rehnquist, split the difference, giving Congress fairly broad power to add to the constitutional protections recognized by the Supreme Court, while sharply limiting the power of Congress in areas in which the Court had not established robust constitutional protections. With the changes in the Court's personnel, the Court's conservatives may choose to apply *Boerne*'s congruence and proportionality test expansively across the board, establishing new limits on the power to enforce the Civil War Amendments. If so, it would put at risk a broad swath of civil rights legislation, especially the three landmark statutes that have been the focus of so many of the Court's recent cases, the Voting Rights Act, the Family and Medical Leave Act, and the Americans With Disabilities Act.

First, as discussed above, the Roberts Court could strike down the preclearance provision of the Voting Rights Act on the ground that it has outlived its time.

Second, the Roberts Court could revisit *Hibbs* and *Lane*, either limiting those decisions or overruling them outright. This Term, the Justices are considering a successor to *Hibbs*, *Coleman v. Maryland Court of Appeals*,[47] which raises the question whether the self-care provision of the Family and Medical Leave Act is within Congress' power to enforce the guarantees of the Fourteenth Amendment. In *Coleman*, the Fourth Circuit distinguished *Hibbs*, holding that the self-care provision was not appropriate legislation enforcing the Fourteenth Amendment because its connection to preventing sex discrimination by the states was too tenuous to satisfy *Boerne*'s congruence and proportionality standard.[48] With the lower federal courts reading *Lane* broadly,[49] there are plenty of vehicles for the conservatives on the Roberts Court to either limit or overrule *Lane* as an aberration, inconsistent with *Garrett*.

Third, with the addition of another conservative Justice or two, the Roberts Court might even limit the power of Congress to enact laws that prohibit employment, voting and other practices that have a disparate impact on racial minorities or women on the theory that the Constitution only forbids purposeful discrimination, and nothing more.[50] While these measures have generally been upheld as a prophylactic to guard against purposeful discrimination,[51] the Roberts Court might view them as (1)

---

[46] *See Lane*, 541 U.S. at 536 (Ginsburg, J., concurring).

[47] *See Coleman v. Maryland Court of Appeals,* No. 10-1016 (argued Jan. 11, 2012).

[48] *See Coleman v. Maryland Court of Appeals*, 626 F.3d 187, 193-94 (4th Cir. 2010).

[49] For example, the federal courts of appeals have extended *Lane*'s holding to discrimination in access to education, even though education is not a fundamental right. *See Bowers v. NCAA*, 475 F.3d 524, 554-56 (3rd Cir. 2007); *Toledo v. Sanchez*, 454 F.3d 24, 34-40 (1st Cir. 2006); *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 486-90 (4th Cir. 2005); *Association of Disabled Americans v. Florida Int'l Univ.*, 405 F.3d 954, 957-59 (11th Cir. 2005).

[50] *See, e.g. Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

[51] *See, e.g. United States v. Blaine County, Mont.*, 363 F.3d 897, 903-09 (9th Cir. 2004) (upholding results test in Section 2 of the Voting Rights as valid enforcement legislation); *In re Employment Discrimination Litigation Against*

once useful to prevent discrimination, but now out of date with advances in the nation; and (2) counterproductive to the goal of securing enforcement of the Fourteenth Amendment for all persons by encouraging the use of employment quotas and racial gerrymandering.[52] Having limited the scope of the disparate impact provision of Title VII and the result test of the Voting Rights Act,[53] the Roberts Court might deliver the knockout punch and declare important provisions these iconic statutes beyond the power of Congress.

---

the State of Alabama, 198 F.3d 1305, 1318-24 (11th Cir. 1999) (upholding disparate impact provision of Title VII of the Civil Rights Act of 1964 as valid enforcement legislation).

[52] See *Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009) (Scalia, J., concurring) ("Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is . . . discriminatory."); *LULAC v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part) ("It is a sordid business, this divvying us up by race.").

[53] See, e.g. *Ricci*, supra; *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).