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.
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> 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.

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[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.

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[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.