JUST BLOWING SMOKE? POLITICS,
DOCTRINE, AND THE FEDERALIST
REVIVAL AFTER GONZALES v RAICH

Most assessments of Chief Justice Rehnquist's jurisprudential legacy have placed federalism firmly at its center.¹ And yet, a full decade after the Court's revival of limits on the commerce power in *United States v Lopez*,² grave doubts remain about the Chief's "Federalist Revival." Some of these doubts concern the advisability—both as a matter of judicial restraint and of substantive policy—of limiting national power. The doubts upon which I wish to focus here, however, go to the seriousness of the Court's enterprise. That seriousness might be doubted on two distinct grounds. First, many observers have argued that the Rehnquist Court's commitment to federalism is unprincipled, that is, that federalism merely provides an instrument for the achievement of politically conservative policy

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¹ See, e.g., Linda Greenhouse, *William H. Rehnquist, Architect of Conservative Court, Dies at 80*, NY Times (Sept 5, 2005), at 16; John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 Calif L Rev 485 (2002).

² 514 US 549 (1995) (striking down the federal Gun Free School Zones Act).

results. This criticism generally comes with a prediction that the Court will abandon federalism at the moment it ceases to promote such results. Second, others have argued that the Court's federalism jurisprudence is unsustainable, that is, either that the doctrinal formulations employed are incapable of rolling national power back any significant distance, or that the Court simply lacks the resolve to take its federalism very far.

Last Term's decision in *Gonzales v Raich*³ put the Court's seriousness to the test along both these dimensions. California legalized the use of marijuana for medicinal purposes—a position generally identified with politically liberal social policy. The national government, by contrast, has taken a more politically conservative line by barring marijuana use across the board. The question in *Raich* was whether the federal Controlled Substances Act could, within the limits of Congress's commerce power, prohibit the medicinal uses of marijuana that California wished to permit. Many observers predicted that the Court's "Federalist Five" would forget all about federalism in their rush to throw the book at pot smokers; some even wondered if the more liberal "Fab Four" might eschew their usually generous view of national power in order to help out the suffering patients.⁴

Raich also tested the sustainability of the doctrinal line taken in *Lopez* and *United States v Morrison*.⁵ Whatever the symbolic value of striking down federal laws in the latter two cases, the actual statutes involved had little practical importance. *Raich*, by contrast, challenged the federal Controlled Substances Act—a veritable paradigm of a big important federal statute. Doctrinally, the arguments in *Raich* applied maximum pressure to the weakest points in the Court's articulated tests under the Commerce Clause. In particular, it was hardly obvious how to characterize the regulated activity for purposes of telling whether it was "commercial" or "economic" in nature, and the government was able to advance strong claims that barring even noncommercial uses of marijuana was "necessary and

³ 125 S Ct 2195 (2005).

⁴ See, e.g., Dahlia Lithwick, *Dude, Where's My Integrity? Medical Marijuana Tests the Supreme Court's True Love of Federalism*, Slate (Nov 29, 2004), available at <http://www.slate.com/id/2110204/>; Ann Althouse, *The Marijuana Case: A Great Test of Law and Politics*, Althouse (Nov 28, 2004), available at <http://althouse.blogspot.com/2004/11/marijuana-case-great-test-of-law-and.html>.

⁵ 529 US 598 (2000) (striking down a portion of the federal Violence Against Women Act as outside the commerce power).

proper” to a broader scheme for regulating the interstate market in illicit drugs. To affirm the Ninth Circuit, which had held *Angel Raich’s* use of medicinal marijuana off-limits to federal regulation,⁶ the Court would have had to broaden and deepen its Commerce Clause doctrine considerably.

This the Rehnquist Court declined to do, and in so holding it invited—and received—vigorous questions about its seriousness in federalism cases. Those questions come, moreover, at a time of major transition for the Court. As the Roberts Court gets underway in the 2005 Term—and as the Court’s most consistently pro-federalism member, Sandra Day O’Connor, rides off into the sunset—those of us who write about federalism can plausibly wonder whether we will soon be in the unenviable position of freedom of contract experts after 1937.

This essay addresses the question of seriousness in three stages. Part I argues that *Raich* was mostly encouraging from the standpoint of principled decision making; virtually all the Justices, after all, held to their established positions on federalism doctrine irrespective of the political valence of the issue in the case. Part II is more pessimistic from a doctrinal perspective. I contend that doctrinal approaches were available to the Court that would have restricted national power in *Raich* without crippling national authority or mirroring the Court in unavoidably subjective analysis; the Court simply chose not to take them. The only silver lining is that the case was a legitimately difficult one, such that the United States’ victory should not necessarily be seen as a portent that the Federalist Revival has ground to a halt. I take up that predictive point in Part III, seeking to read the meager tea leaves available as to the future course of the Court’s federalism jurisprudence.

I. A (MOSTLY) GOOD DAY FOR PRINCIPLE

The conventional wisdom before the Court handed down its decision in *Raich* was that the government would win⁷—which it did. Many observers expected *Raich* to confirm their long-held suspicions that the Court’s federalism jurisprudence was merely a cover for the political preferences of the Justices. And, to some

⁶ *Raich v Ashcroft*, 352 F2d 1222 (9th Cir 2003).

⁷ See, e.g., Linda Greenhouse, *States’ Rights Defense Falters in Medical Marijuana Case*, NY Times (Nov 30, 2004), at A20 (reporting on the oral argument).

extent, the Court's decision to change course in *Raich* might be viewed as confirming that hypothesis: Confronted with a politically liberal state advancing a politically liberal social policy, the mostly conservative Court upheld Congress's right to impose a more politically conservative solution. Peter Smith, for example, has written that "it is difficult to resist the conclusion that the outcome of the Rehnquist Court's final federalism decision was influenced by policy-focused instrumentalism."⁸

I have never had much sympathy for these sorts of explanations for judicial decisions. Although such claims are often dressed in the analytical trappings of political science,⁹ it is frightfully difficult to prove that any given judicial decision was motivated by something other than the account offered in the opinion. Nor, in my view, is the political account a good guide to what happened in *Raich* itself. I begin with the Court's medical marijuana decision, then offer some more general observations about the political account of the Court's federalism cases.

A. A GLASS EIGHT-NINTHS FULL

The political or instrumentalist account of the Court's federalism cases is that the Justices favor federalism when it advances their political preferences, and they discard it when it does not.¹⁰ Hence the Court's conservative majority limited national power in order to preserve the right to own or possess firearms—supposedly a "conservative" right—in *Lopez* and *Printz* (and the liberals dissented).¹¹ Likewise, a conservative majority suspicious of the rights of plaintiffs in litigation protected state governmental defendants from liability in state sovereign immunity cases like *Alden* and *Garrett* (and the liberals dissented).¹² In a range of pre-

⁸ Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 Geo Wash L Rev (forthcoming 2006).

⁹ See, e.g., Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge, 2002).

¹⁰ See, e.g., Frank Cross, *Realism About Federalism*, 74 NYU L Rev 1304, 1307–12 (1999).

¹¹ See *United States v Lopez*, 514 US 549 (1995) (striking down the national Gun Free School Zones Act as outside the commerce power); *Printz v United States*, 521 US 898 (1997) (striking down portions of the Brady Act that "commandeered" state officials to enforce national gun control laws).

¹² See *Alden v Maine*, 527 US 706 (1999) (holding that Congress may not override state sovereign immunity when it acts pursuant to its commerce power, even for suits in state court); *Board of Trustees of the University of Alabama v Garrett*, 531 US 356 (2001) (holding

emption cases, by contrast, the liberals adopted a federalist pose in order to promote state governmental regulation while the more laissez-faire conservatives broadly construed less rigorous federal regulatory measures to supersede tougher state standards.¹³ The *Raich* result surely fits this pattern: A Court that had used the Commerce Clause to limit federal initiatives of a liberal stripe suddenly experienced a change of heart when asked to shelter some California pot smokers from federal prosecution.

But the Supreme Court is a “they,” not an “it,”¹⁴ and the votes of the individual Justices paint a considerably different picture. The most obvious version of the political hypothesis would have expected Chief Justice Rehnquist, Justice O’Connor, and Justice Thomas to vote in favor of cracking down on marijuana use; likewise, that hypothesis would forecast the four liberals (Justices Stevens, Souter, Ginsburg, and Breyer) casting their votes against the government. Instead, all seven of these Justices voted to affirm their previously expressed legal commitments on federalism and the Commerce Clause. That hardly seems to vindicate the political hypothesis. Unless we expect perfection, *Raich* seems like a *prima facie* vindication of principle over politics. By this count the glass is neither half full nor half empty—rather, it is *seven-ninths* full.

One can, of course, quibble. The Chief Justice, already battling the cancer that would take his life a year later, might have sacrificed his lifelong love of law enforcement not for federalist principle, but rather for a different, and more personal, political preference for broad access to pain-mitigating drugs.¹⁵ Justice O’Connor—likewise no stranger to cancer—has also noted the importance of

that Congress did not validly abrogate state sovereign immunity for suits under Title I of the Americans with Disabilities Act).

¹³ See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 US 525 (2001) (holding that federal warning labels on cigarettes preempted more extensive state restrictions on tobacco advertising); *Geier v. American Honda Motor Co.*, 529 US 861 (2000) (holding that federal regulations phasing in airbag requirements for cars preempted state common law products liability suits); see generally Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U Chi L Rev 429, 471–72 (2002) (observing that the Court’s conservatives generally favor federal preemption of state law, and the Court’s liberals generally oppose it); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 Tex L Rev 1, 30–32, 41–45 (2004) (noting the same phenomenon, and suggesting that this disparity reflects different views as to the point of federalism).

¹⁴ Apologies to Kenneth M. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 Intl Rev L & Econ 239 (1992).

¹⁵ Personally, I do not find it at all plausible that the Chief’s personal circumstances would have shaped his vote. I raise the possibility simply to highlight the indeterminacy of the political hypothesis.

access to pain relief.¹⁶ And Justice Thomas's conservatism has shown a libertarian streak,¹⁷ such that he might have voted as he did in order to further a political preference for rolling back regulation of private activity. These sorts of arguments, however, do more to undermine the political hypothesis than to save it. Many of us, as the Chief possibly did, harbor a variety of cross-cutting political preferences that may bear on a particular case, and the effect is to make the political hypothesis nonfalsifiable: Whichever way the Chief jumped, one could have constructed a political account of what pushed him. Likewise, my uncertainty about Justice Thomas highlights just how capacious our definitions of political ideologies like "conservatism" and "liberalism" really are. Given the availability of competing strands within each of these traditions, it is easy to formulate a political account either way in many (if not most) cases.¹⁸ That makes it difficult to identify those cases in which any given Justice may have been tugged in opposite directions by politics and legal principle.

Most legal principles, moreover, have a stopping point, although different lawyers may disagree about that point's location. Justice Scalia voted with the pro-states majorities in *Lopez* and *Morrison*, but he concurred in rejecting the Commerce Clause challenge in *Raich*. Does that mean he was inconsistent, and that he placed the politics of drug control over federalist principle? Federalism is inherently about the balance between national and state authority,¹⁹ and different people—as a matter of principle—will plausibly strike that balance in different places. Justice Scalia's commitment to a radical reordering of the current allocation of authority has always been a bit suspect: He is an "executive branch conservative" whose nonacademic legal career consisted largely of federal government service and whose academic career focused on federal

¹⁶ See *Washington v. Glucksberg*, 521 US 702, 736 (1997) (O'Connor, J., concurring).

¹⁷ See, e.g., *Lawrence v. Texas*, 539 US 558, 605 (2003) (Thomas, J., dissenting) ("If I were a member of the Texas Legislature, I would vote to repeal [the Texas anti-sodomy law]. Punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources.").

¹⁸ Moreover, if we treat Justice Thomas as a politically motivated libertarian vote, then we may have to move Justice Kennedy into the "principled" column for voting *against* his own libertarian tendencies in *Raich*.

¹⁹ See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 Wm & Mary L Rev 1733, 1750–53 (2005).

administrative law.²⁰ It seems plausible that he thought it important to affirm the limiting force of constitutional text in *Lopez* and *Morrison* without feeling any strong desire to roll back more significant federal statutes, like the Controlled Substances Act.²¹ That would hardly prove Scalia's vote was motivated by politics—rather, it simply suggests that he has been pursuing a more limited principle of federalism than, say, Justice O'Connor.

Justice Kennedy's vote, on the other hand, does seem plausibly explicable by the political hypothesis. He is well known for his hostility to drug use,²² and he may also be more sensitive than most to another form of political pressure in the form of a desire to appear statesmanlike by “moderating” the Court's federalism jurisprudence.²³ (Query whether the latter is really a “political” impulse at all, rather than a methodological commitment to incrementalism.²⁴) The important point, however, is that the force of the political hypothesis seems a bit attenuated when it can really only account for one or possibly two votes in a major case like

²⁰ See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 SLU L J 569, 609–12 (2003). But see Bradford R. Clark, *The Constitutional Structure and the Jurisprudence of Justice Scalia*, 47 SLU L J 753 (2003) (insisting that Justice Scalia really does care about federalism). As I discuss further in Part III, Chief Justice John Roberts and Justice Samuel Alito share a similar background.

²¹ See Part III.C for a discussion of the various commitments that might prompt a conservative jurist to care about federalism as a constitutional principle.

²² See, e.g., Lyle Denniston, *Commentary: Justice Kennedy and the “War on Drugs,”* SCOTUSblog (June 6, 2005), available at http://www.scotusblog.com/movabletype/archives/2005/06/commentary_just.html.

²³ Cf. David G. Savage, *The Rescue of Roe v. Wade*, LA Times (Dec 13, 1992), at A1 (discussing Justice Kennedy's decision to pursue a moderate course in *Planned Parenthood v. Casey*). A defender of Justice Kennedy might plausibly ask why I am unwilling to attribute to him precisely the same limited commitment to limiting national power that I attributed to Justice Scalia. It is, of course, hard to know—this sort of psychoanalysis does not come easy to lawyers, and my ultimate argument is that it is not worth doing. Justice Kennedy's opinions both inside and outside the federalism area, however, indicate greater comfort with the exercise of judicial power than Justice Scalia's do. Compare, e.g., *Roper v. Simmons*, 543 US 551, 574–75 (2005) (majority opinion by Kennedy, J, overruling prior precedent and striking down juvenile death penalty based “evolving norms of decency”), and *Lawrence v. Texas*, 539 US 558, 578–79 (2003) (majority opinion by Kennedy, J, striking down anti-sodomy law under broad and unenumerated right to personal autonomy), with *Roper*, 543 US at 607–08 (Scalia, J, dissenting), and *Lawrence*, 539 US at 586 (Scalia, J, dissenting); see also *United States v. Lopez*, 514 US 549, 579 (1995) (Kennedy, J, concurring) (“But as the branch whose distinctive duty it is to declare ‘what the law is, . . . we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines.’”). It is thus easier to imagine that Scalia—as opposed to Kennedy—would be uncomfortable with judicial implementation of a “necessity” requirement under the Necessary and Proper Clause, for example. See Part II.B (discussing the necessity issue in *Raich*).

²⁴ See Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 Harv L Rev 6 (1996).

this. Under the circumstances, the hypothesis would be more a biographical point about Justice Kennedy than a useful hypothesis about the Supreme Court as an institution.

Attitudinalists might respond, of course, by noting that Justice Kennedy has long been a swing vote on the court, and his influence is likely to increase with Justice O'Connor's departure.²⁵ Predicting the behavior of the "median Justice" thus will often mean predicting the outcome of critical cases. But the political hypothesis purports not only to provide a predictive tool but also to state a more fundamental truth about law and courts—that is, that legal principle does not constrain judges, and the doctrinal explanations offered in judicial opinions are simply post hoc rationalizations meant to mask the pursuit of naked political preferences.²⁶ The positions taken by an overwhelming majority of the Justices in *Raich* do not support that hypothesis.

Despite how the case came out, then, the glass is seven- or (more likely) eight-ninths full. Almost all of the Justices adhered to established positions on federalism and the Commerce Clause, notwithstanding an apparent shift in the political valence of this case from previous ones raising similar issues. One decent case, of course, is hardly enough to disprove the political hypothesis. As I discuss in the next section, however, that hypothesis has broader problems.

B. THE POLITICS OF THE FEDERALIST REVIVAL

The political hypothesis—sometimes called the "attitudinal model" by political scientists—suggests that politics, not legal principle, drives judicial decision making.²⁷ Judge Richard Posner

²⁵ See Paul H. Edelman and Jim Chen, *The Most Dangerous Justice Rides Again: Revisiting the Power Pageant of the Justices*, 86 Minn L Rev 131 (2001) (identifying Justice Kennedy as the "most dangerous" Justice of the 1994–2000 terms); Charles Lane, *Kennedy Seen as the Next Justice in Court's Middle*, Washington Post (Jan 31, 2006), at A4 ("Alito's arrival . . . may turn the O'Connor Court into the Kennedy Court.").

²⁶ See Segal and Spaeth, *The Supreme Court* at 86 (cited in note 9).

²⁷ See, e.g., id; Smith, 74 Geo Wash L Rev (cited in note 8). The attitudinal model is increasingly under siege in political science circles from practitioners of positive political theory (PPT), which rejects the attitudinalist's image of individual Justices largely unconstrained from following their political preferences in favor of a model of strategic Justices who are constrained by the choices made by their fellows and the other institutional characteristics of their environment. See, e.g., Daniel B. Rodriguez and Matthew D. McCubbins, *The Judiciary and the Role of Law: A Positive Political Theory Perspective*, in B. Weingast and D. Wittman, eds, *Handbook on Political Economy* (Oxford, 2006) (available at <http://ssrn.com/abstract=875025>); Forrest Maltzman, James F. Spriggs II, and Paul J.

recently endorsed this view, at least as it applies to constitutional cases in the Supreme Court, in his *Harvard Law Review* “Foreword.”²⁸ Judge Posner aside, however, pursuit of political preference is certainly not how the judges say they decide the cases, and it is inconsistent with much anecdotal evidence from people who have worked with them. For example, when I went to clerk for a federal appeals court judge after wrestling with Critical Legal Studies for three years in law school, one of the very first questions that the judge asked me about a case was, “What’s the right answer?” (I wanted to hug him.) Not surprisingly, most proponents of the political hypothesis seem to concede that judges do not consciously vote their political preferences; the proponents insist, rather, that the influence of politics is subconscious—but nonetheless dispositive.²⁹

Because the political hypothesis takes this form, its plausibility depends heavily on its ability to predict results. Indeed, one of the attitudinalists’ primary criticisms of the “legal model”—which posits that judges are constrained to follow the preexisting legal materials—is that the latter model is not “falsifiable” empirically.³⁰ Attitudinalists have thus assembled a vast database of Supreme Court decisions, coded according to their political valence, which are then correlated to the supposed political predispositions of the Justices.³¹ While this approach is a valuable effort to introduce some analytical rigor into the usual speculation about why judges do what they do, it suffers from similar problems of indeterminacy to those that plague doctrinal analysis. This is not the place for a thoroughgoing critique of the attitudinal model. What I hope to do instead is to point up some conceptual difficulties with the

Wahlbeck, *Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making*, in C. Clayton and H. Gillman, eds, *Supreme Court Decision-Making: New Institutional Approaches* 43 (Chicago, 1999). The PPT perspective, however, shares the attitudinalist assumption that judges seek to maximize their preferences rather than seek some sort of legal “right answer.”

²⁸ Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 Harv L Rev 31 (2005).

²⁹ See *id.* at 52; Segal and Spaeth, *The Supreme Court* at 433 (cited in note 9) (remaining agnostic as to the judges’ conscious motives).

³⁰ See Segal and Spaeth, *The Supreme Court* at 46–47 (cited in note 9).

³¹ The various databases are available at <http://www.as.uky.edu/polisci/ulmerproject/setdata.htm>. For explanatory documentation, see Harold J. Spaeth, *The Original United States Supreme Court Judicial Database, 1953–2003 Terms: Documentation* (2005) (available at http://www.as.uky.edu/polisci/ulmerproject/allcourt_codebook.pdf).

political hypothesis and to illustrate the havoc wrought by those difficulties upon an effort to assess *Raich*.³²

An effort to demonstrate that the political or policy preferences of the Justices control their votes in particular cases faces two basic problems of characterization: One must coherently characterize the preexisting preferences of the Justices, and one must also characterize votes in particular cases in terms that map onto the Justices' defined preferences. Some version of these two problems would arise regardless of the method by which the assessment proceeds; for an empirical project like the attitudinal model, the problems become problems of coding. Attitudinalists have thus undertaken to rate individual Justices as "conservative" or "liberal" and to code case votes in the same binary terms. If either set of coding criteria is unreliable or indeterminate, then the results of the model fall into serious question.

Take the Justices first. The leading attitudinalists derive the Justices' individual predispositions from surveys of newspaper coverage at the time of each Justice's nomination.³³ It is common knowledge, however, that initial assessments—by well-informed professionals, much less newspaper editorial boards—often turn out to be wrong. So it is unsurprising that the attitudinalist method produces some real howlers: Professors Jeffrey Segal and Harold Spaeth list the younger Justice Harlan as a strong liberal, Justice Powell as equally conservative as Justice Thomas, Justice Blackmun as *more* conservative than Justice Thomas, and Justices Stevens, Souter, and Breyer as moderate conservatives.³⁴ Not surprisingly, the attitudinalists do not actually seem to stick with these initial ratings. Segal and Spaeth's discussion of the Rehnquist Court, for example, consistently treats Justice Souter as a liberal, notwithstanding his conservative score based on their initial cri-

³² The space devoted to the attitudinal model here is arguably disproportionate to its actual stature in political science. See, e.g., H. W. Perry, *Taking Political Science Seriously*, 47 SLU L J 889, 891 (2003) (observing that "many (I dare say most) public law political scientists, let alone political scientists generally, have never taken the attitudinal model that seriously"). The model's acceptance by influential legal scholars like Judge Posner, however, suggests that the model is worth taking on. Moreover, the Spaeth database of Supreme Court opinions has been employed more broadly by political scientists studying the Court from a variety of perspectives. To the extent that some of my objections go to the coding of that database, they implicate that broader body of work.

³³ See Segal and Spaeth, *The Supreme Court* at 321 (cited in note 9); Jeffrey Segal and Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 Am Pol Sci Rev 557 (1989).

³⁴ See Segal and Spaeth, *The Supreme Court* at 322 (cited in note 9).

teria.³⁵ That sort of modification, however, opens the attitudinalists to the charge of circularity. If one reclassifies Justices' personal ideology based on their subsequent votes,³⁶ then one cannot then use the correlation between the Justices' ideology and votes to prove anything about causation.

A more fundamental problem with coding both the preferences of Justices and the valence of votes is that we lack any coherent definition of "liberal" or "conservative." Political theorists notoriously disagree about the meanings of these terms.³⁷ *Lawrence v Texas*,³⁸ striking down a Texas anti-sodomy law, was widely condemned by social and religious conservatives, yet it was applauded by libertarian conservatives.³⁹ If the coder's definition of "conservative" is capacious enough to include both social conservatives and libertarians, it becomes possible to code virtually any outcome in a case about privacy rights and the like as either conservative or liberal. The Court's decisions on cross-burnings⁴⁰ show a similar divide on the liberal side. Free speech liberals have long opposed any restrictions on expressive activity, yet other liberals more focused on the question of equality for racial minorities have strongly argued for such restrictions.⁴¹ Again, the availability of a

³⁵ Professors Segal and Spaeth note, for example, that Justice Souter voted to strike down 42.3 percent of "liberal" laws and 74.2 percent of "conservative" laws without expressing any surprise that Souter voted against his predicted ideology, see *id.* at 415–16 and Table 10.1. Presumably this is based on a perfectly plausible—but unexplained—judgment that he is actually part of the Court's more liberal bloc.

³⁶ I have seen no indication that the attitudinalists perform a reevaluation of newspaper assessments years into a Justice's tenure. See Jeffrey A. Segal and Harold J. Spaeth, *The Authors Respond*, 4 *Law & Courts* 10, 10 (Spring 1994) (conceding that their model "does not even attempt" to account for changes in attitudes).

³⁷ For an introduction, see the two companion volumes edited by Peter Berkowitz, *Varieties of Conservatism in America* (2004) (surveying "classical conservatism," "libertarianism," and "neoconservatism"), and *Varieties of Progressivism in America* (2004) (surveying different positions on the American left). I have catalogued the very divergent strands of conservatism elsewhere. Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 *U Colo L Rev* 1139, 1181–1203 (2002).

³⁸ 539 US 558 (2003).

³⁹ See, e.g., Randy E. Barnett, *Restoring the Lost Constitution* 334 (Princeton, 2003) (applauding Justice Kennedy's opinion in *Lawrence* as protecting "liberty" rather than "privacy"). One might be tempted to write off libertarian outcomes as not conservative at all, yet the libertarian position is strongly identified with conservatism when it comes to economic regulation. Does anyone doubt that the attitudinalists should and would code *Lochner v New York*, 198 US 45 (1905), as a conservative decision?

⁴⁰ See *RAV v City of St. Paul*, 505 US 377 (1992); *Virginia v Black*, 538 US 343 (2003).

⁴¹ Compare, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 *Duke L J* 431 (arguing for restrictions on hate speech), with

liberal argument for either result in many such speech cases means that coding the results for attitudinal model purposes involves a difficult question of judgment.

Equally important, the different factors used to code a case as “conservative” or “liberal” may cut in different directions within the confines of a single case. The Spaeth database, for example, codes a case as “liberal” if it invalidates a criminal conviction, and “conservative” if it limits national power on federalism grounds.⁴² So what to do with a case like *Lopez*, which did both things at the same time? *Raich*, of course, would present precisely the same problem in reverse: The prevailing majority refused to enjoin enforcement of a criminal statute (conservative) but rejected a state-autonomy-based challenge to federal legislation (liberal).⁴³

What is a coder to do in such situations? When the prearranged criteria conflict, one of two things seems likely to happen: The coders may resolve the conflict based on some gestalt judgment that would be difficult to articulate and defend.⁴⁴ Alternatively, the coders might analyze the doctrinal issues in the case to determine which dimension of the decision (e.g., *Lopez*’s restriction of national power or its windfall to the individual defendant) is more salient. But this approach accords a critical role to doctrine that the attitudinalists generally seem at pains to deny. In any event, the indeterminacy of coding cases and Justices casts considerable doubt on the attitudinal model’s great strength—its strong predictive success. Without determinate coding criteria, we cannot be sure that the people com-

Nadine R. Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?* 1990 Duke L J 484 (opposing such restrictions).

⁴² See Spaeth, *Documentation* at 57–60 (cited in note 31).

⁴³ In fact, the current version of the Spaeth database classifies *Raich* as a “conservative” outcome—just as it classified *Lopez* and *Morrison*. See Harold J. Spaeth, *The Original U.S. Supreme Court Judicial Database*, available at <http://www.as.uky.edu/polisci/ulmerproject/sctdata.htm>.

⁴⁴ See Howard Gillman, *Separating the Wheat from the Chaff in the Supreme Court and the Attitudinal Model Revisited*, 13 Law & Courts 12, 17 n 12 (Summer 2003) (reporting a concession by Professor Spaeth that coding decisions are conducted “ad hoc”). It seems at least possible that, much as initial classifications of a Justice’s ideological position seem to be revised in light of his votes in subsequent cases, difficult calls about whether to code a given case as liberal or conservative may be resolved by looking at *who* voted for and against the result. This would, of course, pose a similar circularity problem. See Segal and Spaeth, *The Supreme Court* at 47 (cited in note 9) (“[A]n attitudinal model that measures the justices’ attitudes by their voting behavior and then explains their votes by their attitudes would . . . be unfalsifiable.”).

piling the relevant databases are not doing so in a way that simply confirms what they expected to find.⁴⁵

In the Commerce Clause cases, the Spaeth database seems to prioritize factors based on the specific result over structural views about federalism. The database classifies *Lopez*, *Morrison*, and *Raich* as all “conservative” decisions, presumably because the federal statutes struck down in the first two cases embodied “liberal” policies of gun control and gender equality, while the federal law upheld in *Raich* stifled a liberal California experiment in drug policy.⁴⁶ But thinking about the results in these terms simply is not very persuasive with regard to a number of key cases in the Federalist Revival. Does anyone really think that the Court struck down the federal Gun Free School Zones Act in *Lopez* because the Court was so pro-gun that it did not care about the safety of schoolchildren? Or that it struck down the civil remedy under the Violence Against Women Act in *Morrison* because the Court was pro-violence against women? Or that the result in *Seminole Tribe v Florida*⁴⁷ had anything to do with the Justices’ preconceived political preferences regarding the Indian Gaming Regulatory Act? The more plausible account is that the Justices in the majority in these cases were acting on a more general preference for state autonomy and sovereignty over national power, and in fact the Segal-Spaeth database allows for coding decisions about federalism issues as “conservative” simply on the ground that they are pro-states. But on that sort of criterion, one can hardly classify *Lopez* and *Raich* as the same, given their diametrically opposed conclusions on Commerce Clause doctrine.

We might, of course, simply take the Spaeth database’s classification of *Raich* as a conservative decision to be a mistake, given the decision’s nationalist orientation. Peter Smith’s account of the state sovereign immunity cases, for example, properly concedes that it is hard to assign any political valence to these cases in terms of their particular results.⁴⁸ While cases like *Kimel*⁴⁹ and

⁴⁵ See Gillman, 13 Law & Courts at 14–15 (cited in note 44) (suggesting that “maybe the books have been cooked a little bit to make the correlations a little better”).

⁴⁶ See Spaeth, *Database* (cited in note 43).

⁴⁷ 517 US 44 (1996) (holding that the judicial enforcement provision of the Indian Gaming Regulatory Act was invalid under the Eleventh Amendment).

⁴⁸ See Smith, 74 Geo Wash L Rev (cited in note 8).

⁴⁹ *Kimel v Fla Bd of Regents*, 528 US 62 (2000) (striking down a provision of the Age Discrimination in Employment Act that sought to abrogate state sovereign immunity in damages suits brought under the Act).

*Garrett*⁵⁰ made it more difficult for federal rights plaintiffs to recover for discrimination, for example, cases like *Florida Prepaid*⁵¹ impinged on the interests of the business community in the intellectual property field, and cases like *Seminole Tribe* were so ambiguous as to whose ox had really been gored as to defy political classification.⁵² Leaving the sovereign immunity cases out, however, would seriously weaken any argument that the Federalist Revival bears a political stamp overall; as I have long argued, the sovereign immunity cases are at the heart of the Rehnquist Court's vision of federalism.⁵³ The obvious alternative would be to say that the immunity cases reflect a strong preference that state governments not be subject to suit—a preference that is part and parcel of a “conservative” commitment to limiting national power.

This move, however, reveals a more fundamental difficulty with many versions of the political hypothesis. The problem is that it is hard to distinguish between a “preference” for federalism of the sort just described and a good faith legal view about the meaning of the Constitution. In the immunity cases, for instance, how much conceptual daylight is there between a “preference” that states not be subject to suit and a legal conviction that the Constitution contains a strong principle of state immunity?⁵⁴ One cannot prove the

⁵⁰ *Bd of Trs of the Univ. of Ala v Garrett*, 531 US 356 (2001) (striking down a provision of Title I of the Americans with Disabilities Act that sought to abrogate state sovereign immunity in damages suits brought under the Act).

⁵¹ *Fla Prepaid Postsecondary Expense Bd v College Savings Bank*, 527 US 627 (1999) (striking down a provision of the Patent Remedy Clarification Act that sought to abrogate state sovereign immunity in damages suits for patent infringement); see also *Chavez v Arte Publico Press*, 157 F3d 282 (5th Cir 1998) (invalidating Congress's attempt to abrogate state sovereign immunity in copyright cases).

⁵² It was highly unclear in *Seminole Tribe* whether the State of Florida was really better off once it had been held immune from suit under the IGRA. The Act was designed to permit states some say in regulating gaming on Indian reservations, and the anti-state suit provisions were designed to allow the tribes to compel states to negotiate agreements under which gaming proceeds. After holding that these anti-state suit provisions were invalid, the Eleventh Circuit held them severable from the remainder of the Act. See *Seminole Tribe v Florida*, 11 F3d 1016, 1029 (11th Cir 1994), *aff'd*, 517 US 44 (1996). The result was that a nonconsenting state would be cut out of the process entirely, and regulations for gaming would be promulgated by the Secretary of the Interior. *Id.*

⁵³ See Young, 83 Tex L Rev at 2 (cited in note 13); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 Supreme Court Review 1, 1–2.

⁵⁴ One frequent answer is to say that the immunity cases reflect a politically conservative hostility to civil plaintiffs. See, e.g., Erwin Chemerinsky, *Understanding the Rehnquist Court: An Admiring Reply to Professor Merrill*, 47 SLU L J 659, 665–69 (2003). That answer is problematic on several levels. In cases like *Florida Prepaid*, the unfortunate plaintiffs are, in fact, the very same sort of corporate business entities that conservatives usually stiff plaintiffs in order to defend. Moreover, one would expect a Court that was simply out to

primacy of political preferences over legal principle if one's definition of political preferences is so broad as to include legal principles.

The attitudinal critique in political science tends to an across-the-board assault on law as a meaningful determinant of judicial outcomes. In the legal literature, however, accusations that the Court behaves politically are often localized to particular doctrinal areas. As Peter Smith's recent essay demonstrates,⁵⁵ the Rehnquist Court's federalism jurisprudence is a particularly common target. But this sort of selectivity opens the instrumentalist account itself to the charge of instrumentalism. Why is the Court's federalism jurisprudence constantly critiqued as instrumentalist, while the Court's equal protection jurisprudence, for example, is not?⁵⁶ Professor Smith, to his credit, recognizes the problem and attempts an answer: Federalism cases, he says, are more troubling because federalism has been associated in the past with unsavory causes like slavery and segregation.⁵⁷ We should be more worried about instrumentalist judging, in other words, when the policy ends to be served are bad ones.

make states hard to sue to limit damages suits by plaintiffs against state officers. Cf. John Jeffries, *In Praise of the Eleventh Amendment—and of Section 1983*, 84 Va L Rev 47 (1998) (arguing that the availability of damages suits against officers largely eliminates the practical impact of state sovereign immunity on plaintiffs' ability to recover). Yet the Court has done little to guard the flank of state immunity by shoring up the common law immunities of individual officers; indeed, in perhaps the most important line of cases, it has refused to extend official immunity to private entities exercising functions delegated to them by governmental bodies. See *Wyatt v Cole*, 504 US 158 (1992); *Richardson v McKnight*, 521 US 399 (1997).

⁵⁵ Smith, 74 Geo Wash L Rev (cited in note 8); see also Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 Brooklyn L Rev 1313, 1328 (2004).

⁵⁶ The most obvious example of instrumentalism is the widespread tendency to charge that the majority Justices in *Bush v Gore*, 531 US 98 (2000), voted to elect their favored presidential candidate, without leveling a similar accusation at the four dissenters, who are equally vulnerable to charges of partisanship. See, e.g., Jack A. Balkin and Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va L Rev 1045, 1049–50 (2001) (describing the majority as “[f]ive members of the United States Supreme Court, confident of their power, and brazen in their authority” and claiming the majority “engaged in flagrant judicial misconduct that undermined the foundations of constitutional government”—without any censure of the dissenters); Frank Michelman, *Bush v Gore: Suspicion, or the New Prince*, 68 U Chi L Rev 679, 689 (2001) (conceding that “the *Bush v. Gore* dissenters . . . no doubt, had reasons parallel to those of the majority for preferring an opposite electoral outcome and hence for preferring an opposite legal outcome in *Bush v Gore*,” but nonetheless concluding that “[t]he dissenters get an exemption because they all maintain that the Court should have denied or dismissed the writs of certiorari in the election cases”).

⁵⁷ Smith, 74 Geo Wash L Rev (cited in note 8).

That ground of distinction will not do, for at least two reasons. First, it grossly distorts the complicated relationship between federalism and race over the course of our history. Henry Adams, for example, wrote over a century ago that “[b]etween the slave power and states’ rights there was no necessary connection. The slave power, when in control, was a centralizing influence, and all the most considerable encroachments on states’ rights were its acts.”⁵⁸ In any event, most accept the modern nationalization of racial matters, so that current debates about state autonomy concern nonracial questions, such as gay marriage or air pollution control.⁵⁹ It is odd to criticize doctrine driven by policy preferences on these sorts of issues on the ground that federalism doctrine *used to be* driven (if it even was) by another set of preferences entirely.

The second problem is that more favored doctrinal adventures have also been associated with unsavory causes. How much of First Amendment doctrine has been developed in service of pornographers and the Ku Klux Klan?⁶⁰ How much Eighth Amendment doctrine has benefited brutal murderers?⁶¹ Why do we so readily accept that a judge who allows the Nazis to march in a Jewish community is holding his nose and acting on principle, while presuming that a judge who invokes principles of federalism to shelter a state policy is in fact embracing that policy on the merits? I submit that it is far more plausible to view the academy as politicized on these questions than the judges themselves. Academics criticize as instrumentalist the decisions they do not like, and much of the academy has little use for federalism.⁶² Under those circumstances, many if not most critiques of the Court’s decisions as “political” are no more trustworthy than the opinions that they purport to debunk.

⁵⁸ Henry Adams, *John Randolph* 178 (Peter Green, 1969) (1898). See also Lynn A. Baker and Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 Duke L J 75, 143–49 (2001); Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 Am J Legal Hist 466 (1992).

⁵⁹ See Baker and Young, 51 Duke L J at 147–57 (cited in note 58).

⁶⁰ See, e.g., *Brandenburg v Ohio*, 395 US 444 (1969); *Reno v ACLU*, 521 US 844 (1997).

⁶¹ See, e.g., *Roper v Simmons*, 543 US 551 (2005).

⁶² See, e.g., Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 Colum L Rev 215, 290–93 (2000) (intemperately criticizing the Court’s federalism cases). Although my observation pertains primarily to legal academics, the leading proponents of the attitudinal model in political science make little attempt to hide their own political contempt for the Rehnquist Court. See Segal and Spaeth, *The Supreme Court* at 430–31 (cited in note 9).

C. INDETERMINACY AND STRUCTURAL PRINCIPLE

In order to determine the realm of judicial outcomes that are governed by law, as opposed to politics, the political hypothesis must draw two difficult boundary lines. One is the line between determinacy and indeterminacy: The claim that law fails to constrain presupposes a definition of legal “constraint” or, conversely, when a judge should be said to be exercising “discretion.” The second line divides political from nonpolitical arguments, so that we can tell which arguments are driving the decisions in particular cases. The mainstream legal literature has long recognized that neither of these boundaries is easy to demarcate; surprisingly, proponents of the political hypothesis seem to take them almost for granted.⁶³

Take indeterminacy first. The attitudinalists seem to think that law loses any constraining or directive force whenever precedents can be cited on either side of a question. But the fact that one can write an argument that would avoid Rule 11 sanctions for either party in most Supreme Court cases hardly proves that one side’s argument is not *stronger*, as a matter of law, than the other side’s. It is no doubt difficult to factor the weight of precedent, or the multifarious factors that may make one textual reading or precedential authority more persuasive than another, into a political scientist’s model. And yet eliminating these comparative judgments from consideration will lead the attitudinalist to find indeterminacy even in cases where most professional lawyers would say that one answer is clearly better than the other.

The fact that reasonable professionals will disagree about the right answer in many cases—and particularly in the atypical subset of constitutional cases that reach the Supreme Court—hardly proves that the Justices are unconstrained by legal principle. Judge Posner, for example, asserts that when the Court was asked last Term “to decide whether execution of murderers under the age of eighteen is constitutional,” the Justices were “at large. Nothing compels a yes or no.”⁶⁴ I would contend, however, that both the

⁶³ A related criticism notes that the attitudinalists’ conception of “legal” decision making is a straw man, grounded in notions of “mechanical jurisprudence” that have been out of vogue for nearly a century. See Gillman, 13 *Law & Courts* at 12 (cited in note 44); Gerald Rosenberg, *Symposium on the Supreme Court and the Attitudinal Model*, 4 *Law & Courts* 3, 6–7 (Spring 1994).

⁶⁴ Posner, 119 *Harv L Rev* at 41 (cited in note 28).

majority and the dissents in *Roper v Simmons*⁶⁵ were meaningfully constrained by legal principle. Justice Scalia's dissent took the view that the Court should strike only those practices disapproved by a clear consensus of American jurisdiction, under which approach no one could plausibly say that thirty out of fifty states amounted to a "consensus."⁶⁶ Justice O'Connor's dissent and Justice Kennedy's majority opinion allowed a considerably greater role for "objective" moral reasoning, but disagreed as to how that moral calculus ought to play out.⁶⁷ Neither disagreement—over method, or over application—provides much comfort to attitudinalists. The fact that the Justices disagreed over which method of legal reasoning to adopt does not prove that either method fails to constrain on its own terms; the attitudinalist would need to show (somehow) that individual Justices shift back and forth between different methods in different cases depending on the political valence of the results. Nor does disagreement among Justices applying basically the same method demonstrate a lack of constraint. One could just as well say that one of the Justices (Justice Kennedy, in my own view) was mistaken. In any event, given the general similarity of political outlook between Justices Kennedy and O'Connor, it would be exceptionally difficult to show that the difference between them in *Roper* was a function of raw political preferences.

The most likely answer to these arguments would raise the other boundary question: Which arguments are "legal," and which are "political"? One might argue, for instance, that Justice Scalia's methodological aversion to moral argument is itself a political preference. Judge Posner makes a similar move in his "Foreword" when he counts as "personal or political" the methodological preference for rules over standards.⁶⁸ But now *everything* is a "political" preference. There is no way to distinguish, for instance, a methodological preference for rules from a preference for following precedent. At this point, of course, the attitudinal model is truly

⁶⁵ 543 US 551 (2005) (holding that the juvenile death penalty violates the Eighth Amendment).

⁶⁶ *Roper*, 543 US at 615–18 (Scalia, J, dissenting).

⁶⁷ *Id* at 561–64 (majority opinion); *id* at 590 (O'Connor, J, dissenting).

⁶⁸ See Posner, 119 Harv L Rev at 51 (cited in note 28) (suggesting that Justice Scalia's vote to strike down the Texas flag desecration statute is attributable to a "political" preference that "constitutional standards such as freedom of speech be recast as rules that have very few exceptions").

nonfalsifiable. Justices acting consistently with the legal model will simply be satisfying their own political preference for lawlike behavior.⁶⁹

It might seem more plausible to suggest that the overtly moral arguments that moved Justices O'Connor and Kennedy in *Roper* are simply political preferences. The situation is considerably more complicated, however. Ronald Dworkin has famously argued that the general moral commitments of a free society are part of the legal background that must be consulted when more particular sources of law—text, precedent, and so on—run out.⁷⁰ Whatever one thinks of that approach in general, there is some warrant for it in the Eighth Amendment context, where both the morally freighted text of the Constitution (“cruel and unusual”) and long-standing precedent (“evolving standards of decency”) seem authoritatively to incorporate moral reasoning into the relevant legal rule. One may protest that these sorts of tests are no way to run a legal railroad, but that—again—is a normative disagreement about the content of the law.

General views about federalism may perform a similar function in a case like *Raich*. I have argued elsewhere that a general concern for balance between national and state power is readily identifiable in the Constitution.⁷¹ This is a legal principle—a claim about the meaning of the Constitution—rather than a political preference exogenous to the case. Because the principle is general, however, it can offer legal direction even in cases where the immediate sources—constitutional text, direct precedent—run out.⁷² As I discuss in Part II, the text of the Commerce Clause and the existing precedent would have permitted—but did not dictate—a more restrictive approach to Congress’s commerce power. To the extent that the balance of power in twenty-first-century America has shifted in favor of the national power, the constitutional principle

⁶⁹ Judge Posner offers another avenue of nonfalsifiability when he hypothesizes that “voting against one’s seeming druthers may be a calculation that the appearance of being ‘principled’ is rhetorically and politically effective. It fools people.” *Id.* at 51–52. Now any judicial behavior contrary to the attitudinal model can be written off as subterfuge, undertaken to set up some future opportunity to behave politically. This may, of course, describe how judges in fact behave (at least sometimes). But the possibility makes it impossible to disprove the assertion that politics is at the root of every decision.

⁷⁰ See Ronald Dworkin, *Hard Cases*, 88 Harv L Rev 1057 (1975).

⁷¹ See Young, *Making Federalism Doctrine* at 1764–75 (cited in note 19).

⁷² See *id.* at 1775–99; Ernest A. Young, *Alden v Maine and the Jurisprudence of Structure*, 41 Wm & Mary L Rev 1601, 1638–51 (2000).

of balance would have supported this more restrictive tack. On the other hand, if one interprets the Constitution as a fundamentally nationalizing document,⁷³ then that interpretation would support the approach taken by the *Raich* majority. The important point for present purposes is simply that these are contending views about the law, not simply political preferences.

A final point about the preferences commonly imputed to the Justices by proponents of the political hypothesis: Why would one assume that the Justices place no value on the development of—and adherence to—a coherent set of legal rules? Political scientists in the interpretivist tradition have suggested that “justices acquire distinctive preferences, goals, or conceptions of duty by virtue of their understanding of the role of the Supreme Court in the political system,” and that “the justices’ concern about the maintenance of the institution’s power and legitimacy mitigates their temptation to indulge their personal points of view.”⁷⁴ Surely every constitutional lawyer has wrestled with the need to maintain some coherent distinction between law and politics, and one would think that this distinction might well be even more central to the professional identity of those lawyers serving as Supreme Court Justices. This “preference for law” may well be overridden in some cases, but why would one assume that it would *always* lose out to some marginal result-oriented preference having to do with, say, the implementation of the Indian Gaming Regulatory Act?⁷⁵

For the attitudinalists, analyzing a Supreme Court decision like *Raich* in terms of its articulated legal reasoning requires “the fatuousness characteristic of Pollyanna.”⁷⁶ Belief in the constraining force of law is an “unsophisticated view”; in truth, “the legal model and its components serve only to rationalize the Court’s decisions and to cloak the reality of the Court’s decision-making process.”⁷⁷

⁷³ See, e.g., Calvin H. Johnson, *Righteous Anger at the Wicked States* (Cambridge, 2005).

⁷⁴ Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in *Supreme Court Decision-Making* at 65, 77 (cited in note 27).

⁷⁵ See *Seminole Tribe v Florida*, 517 US 44 (1996) (holding that the Indian Gaming Regulatory Act could not overcome the states’ sovereign immunity).

⁷⁶ Segal and Spaeth, *The Supreme Court* at 1 (cited in note 9); but see Cross, 74 NYU L Rev at 1313 (cited in note 10) (advancing a more modest version of the political hypothesis and conceding that “[t]he law can and does constrain opinions to a degree”).

⁷⁷ Id at 6, 53. Although I have cited Judge Posner as the most prominent recent proponent of the political hypothesis among *legal* academics, he does not go nearly so far: His claim that law fails to constrain is limited to constitutional decisions by the Supreme

But like most categorical claims in a complex world, this claim is wrong: Politics surely enters into Supreme Court decisions, but it is hardly the whole story. Neither the federalism cases in general, nor the *Raich* decision in particular, bears out the claim that the Court's decisions are driven by result-oriented political preferences.

II. A BAD DAY FOR STATE AUTONOMY

The more interesting questions in *Raich* were doctrinal. The first two arose out of the fact that the federal Controlled Substances Act was a major federal statute governing a large class of activity. This gave rise to a problem of characterization: Is the "regulated activity"—which must be commercial under *Lopez*—the marijuana market generally? Or is it the medicinal use by people who grow it themselves in California? The second question arises if the latter characterization is accepted: To what extent can *non-commercial* activity be regulated as a "necessary and proper" means of facilitating a scheme of commercial regulation? Justice Stevens's majority opinion resolved the case by opting for a broad view of the relevant regulated activity. Justice Scalia's concurrence, by contrast, decided the case on "necessary and proper" grounds. These two doctrinal approaches seem likely to remain the primary battlegrounds in future Commerce Clause decisions.⁷⁸

The third and more general question arises from the presence of a state regulatory regime dealing with the same subject matter as the federal one. Should this matter? Most efforts to articulate the values served by federalism, after all, stress the importance of allowing state governments to make their own distinctive policy choices. From that perspective, *Raich* was a far more important case than *Lopez* and *Morrison*, in which the states had not undertaken to dissent from federal policy. Given the structure of the Supremacy Clause, however, it is difficult to give weight to state policy judgments when they come into conflict with federal mandates. The facts of *Raich* offered some possible avenues for re-

Court. See Posner, 119 Harv L. Rev. at 40–41 (cited in note 28). But within that sphere, it is not easy to see where he differs from the attitudinalists in political science.

⁷⁸ See, e.g., Randy E. Barnett, *Foreword: Limiting Raich*, 9 Lewis & Clark L. Rev. 743, 744–50 (2005) (offering an array of doctrinal strategies for limiting *Raich* along these two doctrinal lines).

specting state policy divergence, but the Court largely ignored them.

A. THE CHARACTERIZATION PROBLEM AND AS-APPLIED CHALLENGES

Lopez and *Morrison* suggested that the key question in Commerce Clause cases is whether the activity that Congress has sought to regulate is “commercial” or “economic” in nature. Generally speaking, Congress may regulate items or persons in interstate commerce, the channels and instrumentalities of interstate commerce, or activities with “substantial effects” on interstate commerce.⁷⁹ The third category has traditionally been the most capacious, especially in light of the Court’s holding in *Wickard v Filburn* that “substantial effects” must be assessed in the aggregate.⁸⁰ For example, the fact that the sale of a single stick of bubblegum has no appreciable effect on the national economy matters little, since the aggregate impact of all bubblegum sales is much more substantial.⁸¹ The Court limited this aggregation principle in *Lopez* and *Morrison*, however, by insisting that it applied only when the regulated activity is itself commercial or economic in nature.⁸² Most cases are thus likely to turn on the character of the regulated activity.

The Court had little trouble with this question in *Lopez* and *Morrison*: It found, without a great deal of disagreement on the point from the dissenters, that neither possessing a gun nor assaulting a woman is a commercial act.⁸³ The issue was considerably more difficult in *Raich*, however. The plaintiffs argued that their marijuana use was plainly noncommercial: They cultivated their marijuana themselves, so that it was neither bought nor sold—nor carried across state lines. They were thus not participants in any economic market for marijuana.⁸⁴ The U.S. government, on the other hand, insisted that the relevant activity was marijuana use in general, which generally does involve a purchase and sale and

⁷⁹ See, e.g., *Lopez*, 514 US at 558–59.

⁸⁰ 317 US 111, 127–28 (1942).

⁸¹ See Datamonitor, *Gum Confectionery in the United States* at 9 (Feb 2004) (reporting that the value of the U.S. gum confectionery market was \$2.296 billion).

⁸² See *United States v Morrison*, 529 US 598, 613 (2000); *Lopez*, 514 US at 560.

⁸³ See *Morrison*, 529 US at 613; *Lopez*, 514 US at 561.

⁸⁴ See Brief for Respondents in No 03-1454, *Gonzales v Raich*, at 23–27.

is thus clearly commercial in nature.⁸⁵ These divergent characterizations were reflected in the respective statutory schemes. The federal scheme regulated marijuana use generally, while the state regulatory regime sought to carve out a narrow class of purely medicinal, homegrown consumption.⁸⁶

The characterization problem in *Raich* was reminiscent of the classic “level of generality” problem arising in the definition of fundamental rights under the Due Process Clause.⁸⁷ Neither the Due Process Clause nor the Commerce Clause says anything about the appropriate level of generality at which to analyze any given activity, and the manipulability of this choice generates both unpredictability and the potential for result-oriented decisions. The *Raich* majority sought to avoid these pitfalls by deferring to Congress’s choice of the appropriate level of generality. Because the Controlled Substances Act regulated marijuana use generally, the Court rejected California’s attempt to carve out a particular subset of that activity for distinctive treatment.⁸⁸

This approach avoided the need for the Court to choose for itself the level of generality at which to characterize the regulated activity. There are several problems, however. One is that the Court may, in fact, have misconstrued Congress’s choice. The question is whether medicinal use of marijuana is sufficiently distinct from ordinary recreational use as to constitute a separate activity for regulatory purposes. The structure of the federal Controlled Substances Act suggests that medicinal uses are distinctive, and it regulates them separately under Schedules II through V of the Act.⁸⁹ Federal authorities have determined, of course, that marijuana is a drug without any legitimate medical use, but that determination is irrelevant to whether medical uses—where they

⁸⁵ See Brief for Petitioner in No 03-1454, *Gonzales v Raich*, at 40 (“For purposes of defining Congress’s power under the Commerce Clause in enacting the CSA, . . . there is no basis for distinguishing marijuana production, distribution, or use for purported medicinal purposes, as opposed to recreational (or any other) purpose.”).

⁸⁶ Compare Compassionate Use Act of 1996, Cal Health & Safety Code § 11362.5, with the Controlled Substances Act, 21 USC § 844(a). The CSA does expressly disclaim intent “to . . . exclu[de] any State law on the same subject matter . . . unless there is a positive conflict” such that the federal and state laws “cannot consistently stand together.” 21 USC § 903.

⁸⁷ See generally Laurence H. Tribe and Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U Chi L Rev 1057 (1990).

⁸⁸ See *Raich*, 125 S Ct at 2211–13.

⁸⁹ See 21 USC §§ 821–29; Scholars’ Brief at 17–18 (cited in “Author’s note”).

are thought to exist—are sufficiently distinct from recreational uses to require separate regulatory treatment. On that question, Congress and California were in agreement, and the Court arguably should have deferred to that judgment by analyzing medical use as a distinct class of regulated activity for Commerce Clause purposes.

More fundamentally, a policy of deferring to Congress's choice of the appropriate level of generality makes Congress the judge of its own power. As the *Raich* dissenters recognized,⁹⁰ Congress can choose how generally to regulate, and under the majority's approach Congress can leverage a dubious regulation of noncommercial activity simply by casting the regulatory net more broadly. A narrow regulation of the content of high school science textbooks, for example, might not hold up as "commercial" under *Lopez*, but Congress could overcome this barrier by enacting a more comprehensive scheme regulating the purchase and sale of textbooks generally. Adrian Vermeule has argued that this sort of perverse incentive is endemic to the Court's Commerce Clause doctrine.⁹¹ It is inevitable, however, only if the Court refuses to analyze whether particular subsets of activity are "commercial" notwithstanding the more general scope of Congress's regulatory scheme.

One escape from this dilemma would be through the Court's doctrine of facial and as-applied challenges. If the Court permitted as-applied challenges, then the constitutionality of federal regulation could be framed by the activity at issue in the particular case. Angel Raich used marijuana that she had grown herself for purely medicinal purposes; she did not buy, sell, or take the stuff across state lines. A traditional as-applied challenge would ask whether her activity was commercial. Hence, her brief began its discussion of the relevant class of conduct in the case by insisting that "Respondents are not challenging the constitutionality of the CSA on its face but only as it applies to the class of activities in

⁹⁰ See *Raich*, 125 S Ct at 2222 (O'Connor, J, dissenting) ("[A]llowing Congress to set the terms of the constitutional debate in this way, i.e., by packaging regulation of local activity in broader schemes, is tantamount to removing meaningful limits on the Commerce Clause.").

⁹¹ Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?* 46 Vill L Rev 1325, 1333–36 (2001) (noting that because the Court permits regulation of noncommercial activity where such regulation is part of a "comprehensive scheme," the *Lopez* doctrine may encourage Congress to draft broader regulatory schemes to the detriment of the States).

which they are engaged.”⁹² Under this approach, the Court would not “choose” a level of generality, but rather accept the case as defined by the litigants. This is how most constitutional litigation proceeds.⁹³

Assessing federal statutes as applied to particular plaintiffs would, of course, push in the direction of narrower frames, with the result that federal regulation would be more likely to be found unconstitutional in particular cases. That does not mean the courts would strike down federal law in many cases—the Court’s definition of commercial activity remains extremely capacious,⁹⁴ and the government would retain the option of arguing that sweeping in subclasses of noncommercial activity is “necessary and proper” to fulfill the legitimate commercial goals of the statutory scheme.⁹⁵ Moreover, the as-applied nature of the challenge inherently lowers the stakes by permitting the federal regulation in question to continue to be applied to those instances of the regulated activity that are commercial in nature. The *Raich* majority squarely rejected this sort of analysis, however, and refused to permit constitutional challenges to carve out noncommercial instances of an activity from a broader regulation covering commercial and noncommercial instances alike.⁹⁶

The Court’s rejection of as-applied challenges in *Raich* is odd, given its stated strong preference for as-applied challenges in other areas.⁹⁷ It is even odder in light of the Court’s recent decision in *Tennessee v. Lane*,⁹⁸ in which the Justices in the *Raich* majority es-

⁹² Respondents’ Brief at 19 (cited in note 84).

⁹³ The question how to define the activity at issue in a particular case is distinct from the generality issue involved in identifying protected individual rights. See generally *Michael H. v. Gerald D.*, 491 US 110, 127 n 6 (1989) (opinion of Scalia, J.). In *Bowers v. Hardwick*, 478 US 186 (1986), for example, one might have defined the regulated activity as “homosexual sodomy” because that is what the particular plaintiff had done, while still arguing that the interpretive question is whether the Constitution protects a more general right of sexual privacy.

⁹⁴ See Young, *Two Federalisms* at 135–37 (cited in note 13).

⁹⁵ I assess these sorts of arguments—which I believe provided the more persuasive ground for sustaining the statute in *Raich*—in the next section.

⁹⁶ See *Raich*, 125 S Ct at 2211–13.

⁹⁷ See, e.g., *United States v. Salerno*, 481 US 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”); *Younger v. Harris*, 401 US 37, 52–53 (1971). For a particularly lucid discussion of the Court’s use of facial and as-applied analysis in federalism cases, see Gillian E. Metzger, *Facial Challenges and Federalism*, 105 Colum L Rev 873 (2005).

⁹⁸ 124 S Ct 1978 (2004).

entially considered the ADA as applied to courthouse access cases, while refusing to evaluate whether the statute would be a valid exercise of the Section 5 power considered across the whole range of its applications.⁹⁹ *Lane*, however, was itself a departure from previous federalism cases that had tended to evaluate the full sweep of a statute rather than its application to individual instances. In *City of Boerne v Flores*,¹⁰⁰ for example, the Court's "congruence and proportionality" analysis focused on the entire sweep of the statute in question, not on its application to a particular plaintiff or even to a subclass of cases.

The use of facial analysis in Section 5 cases, however, has properly been influenced—at least implicitly—by the peculiar office of Section 5 as a vehicle for the legislative enforcement of constitutional rights. The worry in *Boerne* and its progeny is that Congress will use Section 5 to change the content of rights rather than simply to enforce them. This concern must be balanced, however, with deference to the institutional advantages that Congress enjoys with respect to enforcing rights in particular situations.¹⁰¹ Because of its different fact-finding mechanisms, for example, Congress may be better at identifying practices that derive from unconstitutional discriminatory intent, even though they are facially neutral in form.¹⁰² The doctrine has thus allowed Congress to act "prophylactically" by barring practices—such as a literacy test for voting—that it views as unconstitutional notwithstanding that a court would be unwilling to find the same practice unconstitutional.¹⁰³ The trick, of course, is to distinguish between cases

⁹⁹ *Lane* did not pursue a "pure" as-applied analysis because it did not ask whether the states' failure to provide access to the particular disabled plaintiffs in the case was unconstitutional; rather, it took a broad statute (requiring disabled access to public accommodations generally) and identified a much narrower subset of cases (those involving access to courthouses). It then assessed the constitutionality of the ADA as applied to this subset of cases. That, however, is a far cry from the ordinary facial challenge, which would have assessed the statute's entire range of applications.

¹⁰⁰ 521 US 507, 532–33 (1997); see also Metzger, 105 Colum L Rev at 894–97 (cited in note 97) (discussing the use of facial analysis in Section 5 cases).

¹⁰¹ Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv L Rev 1212 (1978); Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court's "Strict Scrutiny" of Congressional Efforts to Enforce the Fourteenth Amendment*, 46 Vill L Rev 1091 (2001).

¹⁰² See *Katzenbach v Morgan*, 384 US 641, 654–56 (1966) (noting Congress's "specially informed legislative competence" in identifying invidious discrimination).

¹⁰³ Compare *Lassiter v Northampton Cty Bd of Elections*, 360 US 45 (1959) (rejecting a constitutional challenge to literacy tests for voting), with *Morgan*, 384 US at 649 (framing the relevant question as, "Without regard to whether the judiciary would find that the

in which Congress is prophylactically enforcing the same constitutional principle as the Court has recognized, and cases in which Congress is trying to overrule the Court's interpretations and change the Constitution without going through the amendment process (as the Court thought it was in *Boerne*).¹⁰⁴ This is where facial analysis comes in: The Court looks to the entire sweep of the statute—not just its application in a particular case—to determine whether Congress has generally tried to conform the shape of its legislation to the constitutional principle recognized by the Court. If that is the case, then the fact that the statute may reach conduct that would not be unconstitutional in a particular case is not fatal.

The fact that Congress is enforcing rights grounded in the Constitution also explains, in my view, the departure from ordinary facial analysis in *Lane*. The Americans with Disability Act is generally considered an equality statute, enforcing the Equal Protection Clause. The problem then is that disability is not a suspect class, so that broad statutory prohibitions of discrimination based on disability are likely to prohibit far more conduct than would the Constitution itself.¹⁰⁵ But in *Lane*, an additional constitutional right was at stake: the right, grounded in the Due Process Clause, of access to courts.¹⁰⁶ The subset of ADA cases that the Court analyzed in *Lane* was thus carved out by the Constitution itself, rather than arbitrarily chosen by the majority Justices. Surely it makes sense to analyze the propriety of congressional enforcement of a right with particular regard to cases implicating that right.¹⁰⁷

Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment?"

¹⁰⁴ I take no position here on whether Congress *ought* to be able to enforce a different interpretation of the Constitution than that which the Court would accept. Current case law says Congress may not, and my subject here is how the Court enforces that principle by use of facial analysis of Congress's statutes.

¹⁰⁵ See *City of Cleburne v. Cleburne Living Ctr.*, 473 US 432, 442–47 (1985) (refusing to recognize the disabled as a suspect class); *Bd. of Trs. of the Univ. of Alabama v. Garrett*, 531 US 356, 374 (2001) (emphasizing the absence of heightened scrutiny in holding that Title I of the Americans with Disabilities Act was not a valid use of the Section 5 power).

¹⁰⁶ See, e.g., *Faretta v. California*, 422 US 806, 819 n. 15 (1975) (recognizing a criminal defendant's "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings"); see also *Press-Enterprise Co. v. Superior Court*, 478 US 1, 8 (1986) (recognizing the public's "First Amendment right of access to criminal proceedings").

¹⁰⁷ Cf. Metzger, 105 Colum. L. Rev. at 931–32 (cited in note 97) (concluding that *Lane* properly applied ordinary rules of severability in holding that Title II of the ADA could

The point of this side trip through the Section 5 cases is to show that the considerations governing the use of facial or as-applied analysis in these cases are unique to Section 5. The commerce power, by contrast, is not delimited by principles found elsewhere in the Constitution; the question is simply what counts as “commerce among the several states.” As-applied analysis would help to manage the otherwise intractable problem of defining the appropriate level of generality in Commerce Clause cases; the fact that such analysis is used differently in Section 5 cases is interesting but hardly dispositive.¹⁰⁸ Problems would remain, of course. As Gillian Metzger has suggested, an as-applied challenge may define the relevant class of activity “so narrowly as to not fairly constitute a discrete class.”¹⁰⁹ But that risk evaporates in cases like *Raich* where both state and federal authorities have chosen to treat medical uses of a substance differently from other uses. In any event, the alternative—allowing Congress’s choice to legislate generally to sweep in all sorts of noncommercial subclasses of activity—simply does too little to maintain balance between federal and state authority.

B. FALSE NECESSITY

The second important set of doctrinal issues has to do with Congress’s authority to regulate noncommercial activities under the Necessary and Proper Clause. Justice Scalia’s concurring opinion in *Raich* avoided the need to resolve the level of generality problem discussed in the last section by assuming, at least for the sake of argument, that the more narrow frame was appropriate. He thus conceded that, as in *Lopez* and *Morrison*, the regulated activity was noncommercial in nature.¹¹⁰ But this did not auto-

at least be upheld as applied to court access cases). The Court very recently adhered to this approach in *United States v. Georgia*, 2006 US LEXIS 759 (Jan 10, 2006), which upheld, as applied to persons alleging actual constitutional violations, the abrogation of state sovereign immunity in Title II of the Americans with Disabilities Act. See Sam Bagenstos, *Court Decides US/Goodman v. Georgia*, Disability Law (Jan 10, 2006) (available at <http://disabilitylaw.blogspot.com/2006/01/court-decides-usgoodman-v-georgia.html>) (observing that “[t]he Court’s decision . . . made clear that the as-applied analysis in *Tennessee v. Lane* was not a sport”).

¹⁰⁸ See Metzger, 105 Colum L Rev at 930 (cited in note 97) (concluding that “as-applied challenges generally remain available in the commerce power context”); Barnett, 9 Lewis & Clark L Rev at 745 (cited in note 78) (concluding that as-applied challenges remain available even after *Raich*).

¹⁰⁹ Metzger, 105 Colum L Rev at 929–30 (cited in note 97).

¹¹⁰ *Raich*, 125 S Ct at 2219 (Scalia, J, concurring in the judgment).

matically make the regulation unconstitutional. Rather, he argued that Congress may regulate noncommercial activity where such regulation is “necessary and proper” to the regulation of a commercial market. This argument relied heavily on dictum in *Lopez* suggesting that noncommercial regulation may be appropriate if it is “an essential part of a larger regulation of economic activity.”¹¹¹

Justice Scalia began by noting the broad purpose of the CSA to “extinguish the interstate market in Schedule I controlled substances, including marijuana.”¹¹² He went on to observe that “[d]rugs like marijuana are fungible commodities,” and therefore “marijuana that is grown at home and possessed for personal use is never more than an instant from the interstate market.”¹¹³ The government had offered several more specific arguments along these lines in its brief. It claimed, for instance, that medical cannabis may substitute for other painkillers, thereby affecting the market for those drugs.¹¹⁴ It also warned that any person arrested for marijuana possession would claim to have a medicinal purpose—a contention that would have to be negated beyond a reasonable doubt at trial.¹¹⁵

Some of these assertions were patently implausible as justifications for enforcing the CSA against medical patients. For example, the government’s concern that medical patients allowed to grow their own marijuana would no longer have to buy painkillers in the ordinary commercial market—thereby affecting prices in that market, à la *Wickard*¹¹⁶—is of course relevant only if the government is trying to support the *price* of pain-relieving drugs. But some of the other arguments could not be so readily dismissed, such as the concern about problems of proof in distinguishing between medicinal and nonmedicinal users. Much thus turns upon

¹¹¹ *Lopez*, 514 US at 561. The majority likewise relied on this language, see 125 S Ct at 2209–10, but for the different argument that one cannot carve a subset of noncommercial activities out of a more generally defined regulatory statute.

¹¹² *Raich*, 125 S Ct at 2219. In noting that “[t]he Commerce Clause unquestionably permits this,” *id.*, Justice Scalia rejected any suggestion that a purpose to eliminate commerce would fall outside the Clause. I do not mean to challenge that view for purposes of the present argument.

¹¹³ *Id.*

¹¹⁴ Petitioner’s Brief at 26–27 (cited in note 85).

¹¹⁵ *Id.* at 29–30.

¹¹⁶ See *Wickard v Filburn*, 317 US 111, 128 (1942).

the standard of review for claims that noncommercial regulation is “necessary” to facilitate commercial ends.

The leading case on the meaning of “necessary and proper” is, of course, *McCulloch v Maryland*, which framed the scope of judicial review in exceedingly deferential terms:

Let 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 consist with the letter and spirit of the constitution, are constitutional.¹¹⁷

This standard, unfortunately, amounts to a blank check: At least as interpreted in later cases,¹¹⁸ the *McCulloch* test requires courts to defer to any “rational basis” for legislation—it means, in virtually all cases, that Congress will be limited only by its own sense of self-restraint. The effect of the *McCulloch* test in federalism cases is thus to make the doctrine of enumerated powers dovetail with limits imposed on all government action by substantive due process. That hardly makes sense, given that a primary reason for discountenancing substantive due process challenges is their tenuous grounding in the constitutional text and structure—a problem from which enumerated powers challenges do not suffer.¹¹⁹

Rational arguments of “necessity” could easily have been made

¹¹⁷ *McCulloch v Maryland*, 4 Wheat 316, 421 (1819).

¹¹⁸ See, e.g., *Oregon v Mitchell*, 400 US 112, 286 (1970) (Stewart, J. concurring in part and dissenting in part) (citing *McCulloch* for the proposition that when Congress acts under its Section 5 power, “as against the reserved power of the States, it is enough that the end to which Congress has acted be one legitimately within its power and that there be a rational basis for the measures chosen to achieve that end”); *Scofield v NLRB*, 393 F2d 49, 53 (7th Cir 1968) (citing *McCulloch* for the basic rational basis test); *NLRB v Edward G. Budd Mfg Co.*, 169 F2d 571, 577 (6th Cir 1948) (same); *United States v Chen De Yian*, 905 F Supp 160, 163 (SDNY 1995) (same).

¹¹⁹ Nor can equating the two sorts of challenges be grounded in long-standing practice. The Court has manifestly not applied a rational basis test to cases testing the limits of Congress’s commerce power for much of our history. See, e.g., *A.L.A. Shechter Poultry Corp. v United States*, 295 US 495 (1935) (unanimously applying a more rigorous test). The more recent cases apply a rational basis test to Congress’s judgment that a particular activity, taken in the aggregate, will have a substantial effect on interstate commerce, see *Hodel v Virginia Surface Mining & Reclamation Assn., Inc.*, 452 US 264, 276–80 (1981), but deference applies only to that single link in the doctrinal chain; it does not apply, for instance, to the analytically prior question whether the regulated activity is commercial in nature, see *Lopez*, 514 US at 567–68 (refusing to defer on this question). Moreover, during the century in which the *McCulloch* test was formulated, its “reasonableness” review of the relation between governmental means and ends had yet to take on the “rubber stamp” quality that it would assume after 1937.

in *Lopez* and *Morrison*, as the *Raich* dissents pointed out.¹²⁰ The government should have argued, for instance, that the Gun Free School Zones Act was a necessary part of an effort to stop sales of guns to minors. Since schools are where minors congregate, and since it is always difficult to catch buyers and sellers in mid-transaction, surely it would be rational to prohibit the very possession of a gun at school in order to stamp out playground arms deals. If *Lopez* and *Morrison* are to stand, in future, for anything more than a guide to writing government briefs, then the Court is going to have to limit its deference to such arguments.

Justice Scalia's concurrence in *Raich* was ambiguous on the extent to which the Court should be prepared to look behind the government's assertions and determine for itself whether any given noncommercial regulation is "necessary" to a broader scheme of commercial regulation. I have argued elsewhere that a *McCulloch* standard for implied powers, developed at a time when the express powers of Congress were interpreted quite narrowly, may make little sense under modern conditions.¹²¹ Any attempt to tighten the standard of review, however, is likely to raise all the old concerns about second-guessing the policy judgments behind legislation that led to the repudiation of the *Lochner*-era jurisprudence.¹²² And the inevitable inconsistencies that would arise in the application of an open-ended standard in this area will only worsen the criticisms, discussed in Part I of this essay, that the Court's federalism jurisprudence is political or instrumental.¹²³

There are, however, at least two ways out of this dilemma. One is by way of clear statement: If Congress is to invoke the Necessary and Proper Clause in this potentially unlimited fashion, then at least Congress should make the judgment of necessity. This would substitute a process-based limit, derived from both the represen-

¹²⁰ See *Raich*, 125 S Ct at 2223 (O'Connor, J, dissenting).

¹²¹ See Young, *Making Federalism Doctrine* at 1754 (cited in note 19). *McCulloch* also presupposed that some review would be available to foreclose Congress's use of the commerce power as a pretext for noncommercial ends. See 4 Wheat at 422 ("[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."). But that motive-based limit has been dead ever since the Court overruled *Hammer v Dagenhart*. See *United States v Darby*, 312 US 100, 116–17 (1941).

¹²² See, e.g., *Lopez*, 514 US at 604–09, 614–15 (Souter, J, dissenting) (raising this worry).

¹²³ See Lawrence Lessig, *Translating Federalism: United States v Lopez*, 1995 Supreme Court Review 125, 170–75; Young, 46 Wm & Mary L Rev at 1836–40 (cited in note 19).

tation of the states in Congress and the procedural difficulties of federal lawmaking, for a substantive one.¹²⁴ In *Raich*, the only governmental necessity judgment consisted of an argument in a brief submitted by the Justice Department.¹²⁵ Insisting on a clear statement of Congress's intent, then, would have preserved the states' autonomy on the matter unless and until Congress could overcome the ordinary inertial barriers attendant on legislation and revisit the issue.

The other option would involve giving weight to the judgment of the state legislature—like Congress, a democratically accountable institution—that measures incorporated in the state scheme could minimize any detrimental impact on federal regulation of nonmedicinal uses. The rational basis test derived from *McCulloch* has its impetus in the institutional advantages that legislative bodies enjoy over courts—primarily in terms of democratic legitimacy, but also sometimes based on fact-finding capacity and policy-making expertise.¹²⁶ A case like *Raich*, however, involves not one legislature but two. If the Court is looking for a legislature to defer to, it could choose to defer to California's judgment that a limited class of medicinal users may be carved out from the general prohibition on marijuana without unduly undermining the overall regulatory scheme. The Supremacy Clause does not make Congress's judgments any wiser or more legitimate than a state legislature's, and those are the criteria of deference when a court is asked to assess the limits of lawmaking authority. In assessing whether Congressional legislation is enacted "pursuant to this Constitution" so as to trigger the Supremacy Clause, there is no *a priori* reason that a modest Court should not defer to the state legislature's judgments rather than to Congress's.

This last argument raises a broader question: To what extent should it matter, when assessing the limits of Congress's power, that a state legislature has chosen to approach a particular policy issue in a way that deviates from the federal program? Although I have suggested that *Raich* raised complex variations on the tests adopted in *Lopez* and *Morrison*, it was this added element of state policy divergence that made the case truly distinct from what had

¹²⁴ See Young, 83 Tex L Rev at 17 (cited in note 13) (discussing the effects of clear statement rules).

¹²⁵ See Petitioner's Brief at 22–35 (cited in note 85).

¹²⁶ See Hart, 46 Vill L Rev at 1104–05 (cited in note 101).

come before.¹²⁷ The Court's approach to this element, however, offered little ground for optimism that its federalism jurisprudence will evolve in a direction that would truly respect the valuable aspects of state autonomy.

C. DOES STATE REGULATION MATTER?

Defenders of federalism from a policy standpoint tend to stress the value of having state governments adopt and implement policies that diverge from one another and from the national government. Such divergence is a precondition of state experimentation and accommodation of diverse preferences.¹²⁸ It underlies values of political participation at the state level: What good is political participation, after all, if participants are not free to pursue their own policy agendas?¹²⁹ And policy autonomy powers what is, in my view, the most plausible account of how state governments foster liberty. On that account, state governments prevent the entrenchment of elites at the national level by providing a place where parties that are out of power at the center can nonetheless pursue their own policy agendas. Successes at the state level then allow these "out" parties to present themselves as plausible and competent alternatives in national elections.¹³⁰ None of this works, however, unless state governments have the freedom to go their own way on at least some issues of significance.¹³¹

Given the centrality of state policy autonomy to theoretical accounts of federalism, it is somewhat surprising that *Raich* was the first of the Rehnquist Court's Commerce Clause trilogy to involve a serious difference of opinion over policy between the national government and a state government. The federal regulation in *Lopez* was completely redundant with state laws barring

¹²⁷ The same element figured prominently in *Gonzales v Oregon*, 126 S Ct 904 (2006) (deciding whether the Attorney General had statutory authority to preempt Oregon's physician-assisted suicide law).

¹²⁸ See Young, 83 Tex L Rev at 53–58 (cited in note 13).

¹²⁹ See *id* at 58–63.

¹³⁰ See Ernest A. Young, *Welcome to the Dark Side: Liberals Embrace Federalism in the Wake of the War on Terror*, 69 Brooklyn L Rev 1277, 1286–87 (2004). For a similar view, see Heather K. Gerken, *Dissenting by Deciding*, 57 Stan L Rev 1745, 1759–69 (2005).

¹³¹ See Young, 83 Tex L Rev at 63–65 (cited in note 13); see also Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 Vand L Rev 329 (2003).

guns in schools.¹³² And no one seriously thinks that the states were “pro-violence” or “anti-woman” in *Morrison*; indeed, thirty-six states filed an amicus brief supporting the VAWA’s constitutionality.¹³³ If the point of federalism is to facilitate diverse regulatory regimes or state-by-state experimentation, then neither *Lopez* nor *Morrison* did much in furtherance of those goals. *Raich*, however, involved a state regulatory experiment reflecting a substantial divergence between the views of the state population and that of the nation as a whole.

The Court’s majority, however, did not care. For them, the only question in the case was whether the law fell within Congress’s enumerated power under Article I. The existence or nonexistence of a state regulatory scheme was completely irrelevant to this question: “Just as state acquiescence to federal regulation cannot expand the bounds of the Commerce Clause, . . . so too state action cannot circumscribe Congress’ plenary commerce power.”¹³⁴ This position is plausible in light of the structure of Article I and the Supremacy Clause. Federal law is supreme so long as it is grounded in the enumerated powers, and the supremacy effect of such law extends from the most weighty to the most trivial enactments. The text makes no allowance, for example, for weighing the importance of a state policy against a federal law provision that purports to trump it.¹³⁵ It was thus surely intelligible, under the current doctrine, to view the contours of California’s regulatory program as irrelevant to the issue in *Raich*.

¹³² *Lopez*, 514 US at 581 (“Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds.”).

¹³³ Brief of the States of Arizona et al in Support of Petitioner in Nos 99-5, 99-29, *United States v Morrison* and *Brzonkala v Morrison* (filed Nov 12, 1999) (available at 1999 US S Ct Briefs, LEXIS 219); see also *Morrison*, 529 US at 653 (“The National Association of Attorneys General supported the Act unanimously. . . and Attorneys General from 38 States urged Congress to enact the Civil Rights Remedy, representing that ‘the current system for dealing with violence against women is inadequate . . .’”).

¹³⁴ 125 S Ct at 2213. The Court cited a variety of prior statements to the same effect. *United States v Darby*, for example, insisted that the commerce power “can neither be enlarged nor diminished by the exercise or non-exercise of state power.” 312 US 100, 114 (1941). And *Wickard* said that “no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress.” 317 US at 124.

¹³⁵ See *Raich*, 125 S Ct at 2212 (“It is beyond peradventure that federal power over commerce is ‘superior to that of the States to provide for the welfare or necessities of their inhabitants,’ however legitimate or dire those necessities may be.”) (quoting *Maryland v Wirtz*, 392 US 183, 196 (1968)); Ann Althouse, *Why Not Heighten the Scrutiny of Congressional Power When the States Undertake Policy Experiments?* 9 Lewis & Clark L Rev 779, 781 (2005) (“A federal law, however crude, trumps conflicting state law, no matter how carefully conceived and magnificently beneficial the state’s policy experiment may be.”).

I want to argue, however, that this view was mistaken. For one thing, it is surely ironic to hear those who have argued for the dramatic expansion of national power in the twentieth century as a necessary response to the practical necessities of modern governance suddenly become formalists when it comes to the Supremacy Clause.¹³⁶ If American federalism is to take account of modern institutional realities, then the development of state governments into large, sophisticated, and competent regulatory entities in their own right ought surely to be one of those realities. The critics of the Court's more formal doctrines are right when they say that federalism is a practical conception. To ignore the existence and activity of one of the world's largest regulatory jurisdictions—the great State of California¹³⁷—is to blink functional reality in the worst possible way. One would have thought we were past the day when Justices could assert that state governmental authority “does not exist.”¹³⁸

Ann Althouse has worried that taking state regulation into account “would invite fifty states and innumerable cities to carve out exceptions of all sorts from important federal statutes that are unquestionably supported by the Commerce Clause.”¹³⁹ But one need not propose some amorphous and open-ended balancing of state and federal interests to take state regulation into account. Doctrinally, recognition of the existence and capacity of state governments can and should occur through the “necessary and proper” analysis that considers when Congress may regulate matter outside the Commerce Clause in order to further a scheme of commercial regulation. It is one thing to say that any outright

¹³⁶ See, e.g., *Printz v United States*, 521 US 898, 941 (1997) (Stevens, J, dissenting) (arguing that federal commandeering of state officials is a necessary and practical response to modern crises). Critics of the Federalist Revival love to lambaste the Court for its excessive formalism. See, e.g., Matthew D. Adler and Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 Supreme Court Review 71 (“The jurisprudence of federalism has been bedecked with formalistic distinctions . . .”). For a convincing rebuttal, see Allison Eid, *Federalism and Formalism*, 11 Wm & Mary B of Rts J 1191 (2003).

¹³⁷ If California were an independent nation, its economy (with a gross state product of \$1.5 trillion in 2004) would rank somewhere between fourth and tenth largest in the world. See “Economy of California” in Wikipedia, available at http://en.wikipedia.org/wiki/Economy_of_California.

¹³⁸ *United States v Belmont*, 301 US 324, 331 (1937) (asserting that state authority is irrelevant “[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally”).

¹³⁹ Althouse, 9 Lewis & Clark L Rev at 789 (cited in note 135).

regulation of commercial activity is permissible, regardless of the presence or absence of state regulation. But it is quite another to say that state regulatory schemes are irrelevant to what federal measures are necessary under the "Sweeping Clause." "Necessity," after all, is a practical rather than a formal conception. Federal action may well be necessary when failure to act would leave a regulatory void; it may well be less necessary when state regulation is taken into account.

Consider, for example, the government's argument in *Raich* that the existence of any legal category of marijuana consumption would create daunting problems of proof in prosecutions of non-medicinal users.¹⁴⁰ Anyone arrested for recreational consumption would, of course, plead that they reserved their marijuana for "medicinal purposes," and federal prosecutors would have to negate this contention beyond a reasonable doubt. That seems like a pretty compelling argument, but it changes considerably when the state regulatory regime is added to the picture. Under that scheme, California provided authorized medicinal users with an optional ID card clearly stating that they were entitled to use marijuana under the state law scheme.¹⁴¹ Persons arrested for recreational use would either have such a card or they would not. While more marginal proof issues might remain, the California scheme cuts substantially into the federal government's case for extending their scheme of regulation to noncommercial activity.¹⁴² On these sorts of practical questions, the contours of state regulation ought to make a difference.

The majority opinion's insistence on the irrelevance of state regulation is particular depressing in light of its author. I have argued elsewhere that the Court's four putative "nationalists"—Justices Stevens, Souter, Ginsburg, and Breyer—actually harbor a meaningful conception of federalism that stresses the value of state regulatory autonomy.¹⁴³ Justice Stevens, in particular, has been willing to defend the authority of state governments to enact and implement their own policies in cases involving the preemption

¹⁴⁰ Petitioner's Brief at 30 (cited in note 85).

¹⁴¹ Cal Health & Safety Code §§ 11362.7–11362.83 (2003).

¹⁴² See Respondents' Brief at 38–39 (cited in note 84); Scholars' Brief at 28–29 (cited in "Author's note").

¹⁴³ See Young, 83 Tex L Rev at 41–45 (cited in note 13).

of state regulation by federal law.¹⁴⁴ As *Raich* demonstrates, these same values are at stake in cases about the constitutional scope of Congress's regulatory authority; Congress cannot preempt state law, after all, unless it has the authority to act in the first place. The Court's four liberals remain allergic to any suggestion that federalism is enforceable as a matter of constitutional principle, and yet it is hard to see how state regulatory autonomy can remain secure without some hard limit on Congress's power.

III. WORSE DAYS AHEAD?

Many observers will view *Raich* as the end of the Rehnquist Court's "Federalist Revival," especially when one sees it in conjunction with the Court's recent retreat in several important Eleventh Amendment cases.¹⁴⁵ Others will note the importance of the Controlled Substances Act and its clear range of constitutional applications, as well as the relative care with which the *Raich* majority analyzed its commercial impact, as evidence that the Court's jurisprudence is now "normalizing" or moderating; in a mature and meaningful Commerce Clause jurisprudence, after all, we would expect to see cases coming down on both sides of the line. This last section will try to read some tea leaves.

A. JUSTICE O'CONNOR'S QUESTION

At the oral argument in *Lopez*, Justice O'Connor asked Solicitor General Drew Days to tell her, if the Gun Free Zones Act was within the Commerce Power, what conceivable federal law would *not* be constitutional.¹⁴⁶ The transcript indicates that General Days

¹⁴⁴ See, e.g., *Geier v American Honda Motor Co.*, 529 US 861, 887 (2000) (Stevens, J., dissenting); *Lorillard Tobacco Co. v Reilly*, 533 US 525, 590 (2001) (Stevens, J., dissenting).

¹⁴⁵ See *Nevada Dept of Human Resources v Hibbs*, 538 US 721 (2003) (upholding abrogation of state sovereign immunity in the Family Medical Leave Act); *Tennessee v Lane*, 541 US 509 (2004) (upholding abrogation of state sovereign immunity in Title II of the Americans with Disabilities Act for plaintiffs denied access to the courts); *United States v Georgia*, 2006 US LEXIS 759 (Jan 10, 2006) (upholding abrogation of state sovereign immunity in Title II of the ADA for plaintiffs alleging constitutional violations); *Central Virginia Community College v Katz*, 2006 US LEXIS 917 (Jan 23, 2006) (upholding abrogation of state sovereign immunity under the Bankruptcy Code).

¹⁴⁶ Oral Argument in *United States v Lopez*, No 93-1260, 1994 US Trans LEXIS 107, at *4 ("If this is covered, what's left of enumerated powers? What is there that Congress could not do, under this rubric, if you are correct?").

had no answer to that question.¹⁴⁷ Not surprisingly, the majority opinions in both *Lopez* and *Morrison* stressed that, if the respective statutes in those cases were upheld, the Court would be left with no limiting principle for federal power at all.¹⁴⁸

One can make the case that *Raich* presented the same situation. The dissenters argued with considerable force that the doctrinal moves made to uphold the Controlled Substances Act could also have been applied to uphold the Gun Free School Zones Act and the private right of action provision of the Violence Against Women Act.¹⁴⁹ Randy Barnett, who argued the case for Angel Raich, predicted afterwards that “[t]here will never be another successful Commerce Clause challenge to a federal statute in the Courts of Appeals if the Supreme Court accepts EITHER of the government’s two theories.”¹⁵⁰ My own view, however, is that the Court’s back was not to the wall in the sense that it was in *Lopez* and *Morrison*. One can identify plausible federal statutes—for instance, a federal statute banning gay marriage—that would be exceptionally hard to justify on any of the theories offered in *Raich*.

My choice of gay marriage as an example is not simply an effort to tweak liberal assumptions (as fun as that is). Two aspects of gay marriage are important in this context: First, it is not a subset of

¹⁴⁷ See *id.* at *4–5:

General Days: Well, Your Honor, I’m not prepared to speculate generally, but this Court has found that Congress, for example, in *New York v. United States* could not regulate—could not require New York State to carry out certain responsibilities, because it was commandeering the instrumentalities of the State.

Justice O’Connor was unsatisfied by this reference to the anti-commandeering doctrine:

Question: Well, the objection there was that it was objecting the State governmental machinery to operate in a certain way. The question here, it seems to me, is quite different. The question here is the universe of transactions that the Congress may reach.

Id. at *5. No example of a transaction that Congress may not reach was offered by the government.

¹⁴⁸ See *Lopez*, 514 US at 564 (“[I]f we were to accept the Government’s arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.”); *Morrison*, 529 US at 615–17.

¹⁴⁹ See *Raich*, 125 S Ct at 2226 (O’Connor dissenting); see also Scholars’ Brief at 23–25 (cited in “Author’s note”).

¹⁵⁰ Randy Barnett, *Adler on Importance to Federalism of Raich v. Ashcroft*, The Volokh Conspiracy (Dec 1, 2004), available at <http://volokh.com/posts/1101916887.shtml>. Professor Barnett’s more recent assessment seems somewhat less dire. See Barnett, 9 Lewis & Clark L Rev at 750 (cited in note 78) (predicting that, in the future, “the ‘doctrine’ established by the Court in *Raich* will seem remarkably narrow, fragile, and easy to distinguish or subtly modify”).

a larger class of activity that seems plausibly commercial, as medical marijuana use is a subset of a larger market in illicit drugs. Second, a federal statute banning gay marriage would stand largely alone, unattached to any comprehensive federal marriage scheme. Perhaps Congress could assert sufficient links to the interstate economy to support such a scheme under the Commerce Power. (Anyone who has ever paid for a wedding has experienced the multiplier effect of a marriage vow on the market for goods and services.) But the political checks on comprehensive national regulation of marriage and family structure seem very strong.

The message of *Raich* may be that when Congress enters a regulatory field in a comprehensive way—for example, federal drug regulation—its incursion will be upheld, but that isolated regulations of noncommercial acts will not be. That would leave us with little hard limit on Congress's power, but the same rule would effectively multiply political checks on national action. The most formidable "political safeguard of federalism," after all, is opposition on the merits to any particular federal proposal; by foreclosing Congress from legislating narrowly, the likelihood and ferocity of political opposition to any given proposal should increase.¹⁵¹ These dynamics will only increase in importance as the culture wars heat up. By impeding Congress's ability to single out particular practices for federal disapproval in areas otherwise left to state regulation, even the narrow limit described here would promote state-by-state experimentation and accommodation of divergent preferences. It is surely important that Congress lacks power to impose a national solution to current debates about marriage and similar issues.

Notwithstanding this silver lining, *Raich* most likely marks the outer bound of the Court's ambition in Commerce Clause cases. Apocalyptic predictions notwithstanding,¹⁵² many of us have long argued that the Court's Commerce Clause jurisprudence was primarily symbolic in its importance and unlikely to go far.¹⁵³ A roll-

¹⁵¹ See, e.g., Althouse, 9 Lewis & Clark L Rev at 789 (cited in note 135) (suggesting that it would have been politically difficult for Congress to legislate more broadly in *Lopez*).

¹⁵² See, e.g., Charles E. Ares, *Lopez and the Future Constitutional Crisis*, 38 Ariz L Rev 825, 825–26 (1996) (asserting that *Lopez* had "opened the floodgates" for judicial limits on national power).

¹⁵³ See, e.g., Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 Supreme Court Review 1, 63; Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 Geo Wash L Rev 139, 157–61 (2001).

back of the national regulatory state was never in the cards; there are simply too many precedential, institutional, and political constraints pressing the Court to uphold relatively broad federal power.¹⁵⁴ *Raich* may indicate that even minor incursions on the federal edifice are unlikely, and that except in cases where to uphold the federal act would remove any limit whatsoever, the Court will condone national action. As long as the next Solicitor General has any plausible answer to Justice O'Connor's question, he seems likely to prevail.

B. BATES AND THE COURT'S PREEMPTION JURISPRUDENCE

It may help to view *Raich* in conjunction with another important federalism case from last Term that has received significantly less attention: *Bates v Dow Agrosciences*,¹⁵⁵ in which the Court held that federal regulatory approvals under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)¹⁵⁶ did not preempt state common law claims against a pesticide company for failure to warn of the harms caused by its chemicals in certain types of soil. *Bates* is a significant case in at least two respects. First, its rejection of a preemption challenge to state law comes after a string of decisions holding state common law actions preempted by federal regulatory provisions.¹⁵⁷ Second, and without delving into the arguments on the merits, it struck many observers as a genuinely close case and thus an impressive win for opponents of federal preemption.

Despite the fact that *Raich* and *Bates* both involved agricultural production, somehow the FIFRA case did not have the same cachet among court watchers. I have argued elsewhere, however, that preemption cases are the most important of all for federalism

¹⁵⁴ See Cross, 74 NYU L Rev at 1313–26 (cited in note 10); Young, 83 Tex L Rev at 92–103 (cited in note 13).

¹⁵⁵ 125 S Ct 1788 (2005). See generally *The Supreme Court, 2004 Term—Leading Cases*, 119 Harv L Rev 376 (2005).

¹⁵⁶ 7 USC §§ 136–136y.

¹⁵⁷ See, e.g., *Buckman Co. v Plaintiff's Legal Committee*, 531 US 341 (2001) (holding that federal law preempted state law tort claims involving medical devices); *Geier v American Honda Motor Co.*, 529 US 861 (2000) (holding that federal safety regulations preempted state tort claims involving the failure to install airbags in cars); *Norfolk S. Ry. Co. v Shanklin*, 529 US 344 (2000) (holding that the Federal Railroad Safety Act preempted state tort remedies).

doctrine.¹⁵⁸ These cases have the most direct impact on the states' ability to make their own regulatory choices, and they often involve matters that, in their practical importance, far outstrip the policies at stake in Commerce Clause litigation.¹⁵⁹ *Bates's* resolution of a close statutory question against preemption, and by a lopsided vote, is thus quite encouraging for those concerned about state autonomy.

It is hard to tell whether *Bates* and other encouraging cases decided in the last couple of years represent a retreat from the Rehnquist Court's "jurispathological" (apologies to Robert Cover¹⁶⁰) approach to preemption of state law. In his partial dissent in *Bates*, Justice Thomas noted with approval that "[t]oday's decision . . . comports with this Court's increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption."¹⁶¹ On the other hand, I remain skeptical that the Court thinks of its statutory preemption cases—which are generally dominated by the details of the particular federal regulatory scheme at issue—as presenting a unified set of issues to be approached in a coherent fashion.¹⁶²

The important point, however, is that if the Court would approach preemption cases in this way, then *Raich-for-Bates* might be the sort of trade-off that any advocate of state autonomy ought happily to accept. The Commerce Clause line was always unlikely to be drawn very tightly, and therefore Congress will continue to enjoy, for the foreseeable future, an exceptionally broad range of potential action. The most important questions will go to what happens within this broad area.¹⁶³ Those will not be constitutional questions, but statutory ones, but the background norms with

¹⁵⁸ See Young, 83 Tex L Rev at 130–34 (cited in note 13). See also Calvin Massey, *Federalism and the Rehnquist Court*, 53 Hastings L J 431, 508 (2002) (making a similar point).

¹⁵⁹ See Young, 1999 Supreme Court Review at 39–42 (cited in note 53); Ernest A. Young, *Two Cheers for Process Federalism*, 46 Vill L Rev 1349, 1384–86 (2001).

¹⁶⁰ See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 Harv L Rev 4, 40–41 (1983) (identifying the "jurispathic" function of courts in killing off rival sources of law).

¹⁶¹ *Bates*, 125 S Ct at 1807 (Thomas, J, dissenting).

¹⁶² See Young, 83 Tex L Rev at 133 (cited in note 13).

¹⁶³ See *Egelhoff v Egelhoff*, 532 US 141, 160 (2001) (Breyer, J, dissenting) (stressing "the practical importance of preserving local independence, at retail, i.e., by applying pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute's language and purpose with federalism's need to preserve state autonomy").

which the Court approaches these interpretive questions are likely to have extremely important implications for state regulatory autonomy.

C. OF TOADS, MACHINE GUNS, AND SUICIDE: PROSPECTS FOR THE ROBERTS COURT

The current Supreme Court Term will afford our first look at a post-Rehnquist federalism jurisprudence. As this article goes to press in February 2006, the Roberts Court has already decided a variety of important federalism cases. In *Gonzales v Oregon*,¹⁶⁴ the Court held that former Attorney General John Ashcroft's interpretive rule stifling Oregon's experiment with legalized physician-assisted suicide was an invalid extension of the Controlled Substances Act. On the more nationalist side of the ledger, *Central Virginia Community College v Katz*¹⁶⁵ and *United States v Georgia*¹⁶⁶ upheld Congress's power to abrogate state sovereign immunity under the Bankruptcy Code and the Americans with Disabilities Act, respectively. An array of important federalism cases remain to be decided as Justice Samuel Alito takes his seat. First up are two consolidated cases under the Clean Water Act that ask whether Congress's commerce power extends to certain sorts of wetlands.¹⁶⁷ Two cases under the Vienna Convention on Consular Relations will test the power of supranational courts to preempt state procedural law.¹⁶⁸ Still other cases raise important questions

¹⁶⁴ 126 S Ct 904 (2006).

¹⁶⁵ 2006 US LEXIS 917 (Jan 23, 2006). For an early analysis, see Kevin Russell, *News and Analysis on Today's Decision in Katz*, SCOTUSblog (Jan 23, 2006) (available at http://www.scotusblog.com/movabletype/archives/2006/01/news_and_analys.html).

¹⁶⁶ 2006 US LEXIS 759 (Jan 10, 2006). The Court's unanimous holding was limited to suits by disabled state prisoners complaining of ADA violations that also amounted to "actual violations" of the Fourteenth Amendment. See *id.* at **9–13. For early accounts, see Bagenstos, *Court Decides* (cited in note 107); Lyle Denniston, *Court Rules on State Immunity, 2 Other Issues*, SCOTUSblog (Jan 10, 2006) (available at http://www.scotusblog.com/movabletype/archives/2006/01/court_adds_some.html).

¹⁶⁷ *Rapanos v United States*, No 04-1034, and *Carabell v U.S. Army Corps of Engineers*, No 04-1384. See generally Tony Mauro, *Justice Alito's Green Day*, Legal Times (Feb 8, 2006) (available at <http://www.law.com/jsp/article.jsp?id=1139306710859>).

¹⁶⁸ *Llamas v Oregon*, No 04-10566, and *Bustillo v Johnson*, No 05-51. On the interaction between international, federal, and state courts in the Vienna Convention context, see Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 Duke L.J. 1143, 1164–70, 1178–88 (2005).

of abstention¹⁶⁹ and the limits of state legislative control over redistricting.¹⁷⁰

Many observers have predicted that appointments by President George W. Bush are likely to accelerate the Court's efforts to limit national authority.¹⁷¹ My own view is that this is highly unlikely; if anything, the losses of Chief Justice Rehnquist and Justice O'Connor will yield a more nationalist court on federalism issues. Despite her moderate instincts and reputation as a swing Justice on many issues, Justice O'Connor was perhaps the Court's most committed Justice on questions of state autonomy. And the Chief Justice, while perhaps more accepting of national power in some circumstances,¹⁷² deserves to be described as the programmatic architect of the Federalist Revival. From the states' perspective, these Justices are virtually irreplaceable.

Nor are there strong grounds to believe that Chief Justice Roberts and Justice Alito will share their predecessors' commitment to limiting national power, even if these jurists turn out to be as "conservative" as many of their supporters no doubt hope. To see why, it may help to posit three different grounds upon which a Justice might support federalism as a constitutional constraint. One would be a deeply felt attachment to a particular state political community that generates a sense of state institutions as competent and important, most likely coupled with a more fundamental identification with a home removed from the nation's capital. Justice O'Connor, for instance, famously served in all three branches of state government and retained a strong attachment to her ranch in Arizona. She seems to have felt the importance of federalism

¹⁶⁹ *Marshall v Marshall*, 04-1544.

¹⁷⁰ See *LULAC v Perry*, 05-204; *Travis County v Perry*, 05-254; *Jackson v Perry*, 05-276; *G.I. Forum of Texas v Perry*, 05-439. I have suggested elsewhere that the Texas redistricting saga at issue in these cases may demonstrate how, contrary to conventional wisdom, political parties may subvert state autonomy at the behest of national political actors. See Young, 83 *Tex L Rev* at 75 & n 351 (cited in note 13).

¹⁷¹ See, e.g., Adam Cohen, *What's New in the Legal World? A Growing Campaign to Undo the New Deal*, *NY Times* (Dec 14, 2004), at A32 ("If the Supreme Court drifts rightward in the next four years, as seems likely, it could not only roll back Congress's Commerce Clause powers, but also revive other dangerous doctrines."). Indeed, Jack Balkin and Sandy Levinson have claimed that the nefarious purpose of *Bush v Gore*, 531 US 98 (2000), was to ensure a string of Republican judicial appointments that would perpetuate the Court's federalism "revolution." Balkin and Levinson, 87 *Va L Rev* at 1052-53 (cited in note 56).

¹⁷² See, e.g., *South Dakota v Dole*, 483 US 203 (1987) (Rehnquist, CJ, writing for majority upholding broad federal conditional spending power, over O'Connor's dissent).

in her bones, undergirding any intellectual attachment to constitutional principle.¹⁷³

A second impulse derives from a commitment to constitutional fidelity. Whether or not one has any intrinsic brief for federalism, one might be uncomfortable with the notion that the Supreme Court can simply stop enforcing certain constitutional principles, as the Court arguably did with federalism between 1937 and 1995.¹⁷⁴ One need not believe in any radical restoration of a "Constitution in Exile" to think that courts should make compensating adjustments, in marginal cases, to move back in the direction of a constitutional balance that has been lost.¹⁷⁵ Chief Justice Rehnquist seems most likely to have fallen into this camp. Although the Chief spent sixteen years in private practice in Arizona, he also spent possibly formative stints in the national military and the federal executive branch. It seems likely that much of the Chief's dedication to federalism came not from personal experience or attachment but rather from a sense that judges should not be allowed to render large structural principles of the Constitution a dead letter.

The third impulse is a belief in incrementalism or minimalism as the preferred form of legal change. I have argued elsewhere that incrementalism is one of federalism's primary virtues: Whereas national action generally commits the entire nation to a particular policy course, limits on such action leave the states free to experiment, as well as to simply reflect the divergent preferences of their citizens.¹⁷⁶ Proponents of change must work one state at a time, and individual states can rely on the experience of their fellows in evaluating proposed reforms. Justice O'Connor and Justice Kennedy—another key voice for state autonomy in many cases, *Raich* notwithstanding—have both been described as "ju-

¹⁷³ To take another (purely hypothetical) example, one might feel similarly if one were a professor at a large state university in Texas and descended from Texas ranchers on one side and Texas football coaches on the other.

¹⁷⁴ See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv L Rev 1231, 1233–37 (1994); Young, 46 Wm & Mary L Rev at 1764–75 (cited in note 19).

¹⁷⁵ On the "Constitution in Exile," see Douglas H. Ginsburg, *Delegation Running Riot*, Regulation, No 1, 1995, at 83. For an approach based on compensating adjustments, see Young, 46 Wm & Mary L Rev at 1748–62 (cited in note 19).

¹⁷⁶ See generally Ernest A. Young, *The Conservative Case for Federalism*, 74 Geo Wash L Rev (forthcoming 2006).

dicial minimalists,” committed to deciding “one case at a time.”¹⁷⁷ It is not surprising that they also tend to emphasize the advantages of state-by-state policy diversity in their opinions upholding state autonomy.¹⁷⁸

I do not mean to exclude entirely the influence of other preferences—even political preferences, like a hostility to government regulation or to private plaintiffs, of the sort discussed in Part I. Nor do I mean to suggest that the impulses surveyed here are not themselves “political,” at least in a sense. But that sense is far more nuanced than the political hypothesis can accommodate. Constitutional fidelity is surely grounded, to some extent, in conservative suspicion of radical change¹⁷⁹—but it is also a legal interpretation of the obligation of the judge in constitutional cases. Affinities for state institutions and commitments to incrementalism are likewise views that may exist apart from strictly legal interpretations of the Constitutional text, history, and precedents, but to say that is hardly to accept the attitudinalist view. Almost every constitutional case involves, for example, practical judgments made with highly imperfect information. Cases about the scope of federal common lawmaking authority, for instance, involve judgments about the importance of policy uniformity on a given question;¹⁸⁰ the “necessary and proper” argument in *Raich* likewise involved a practical judgment about necessity. General views about the competence of state institutions and the desirability of policy diversity will inform these judgments. But this form of “political” influence informs the application of a legal standard—it does not serve as an alternative mode of decision that the legal arguments simply mask.

It must also be conceded that the impulses I have identified are far from absolute indicators. Justice Souter is often a minimalist,¹⁸¹ and surely no Justice bears a stronger attachment to an outside-the-Beltway hearth and home, but no one has been a more determined opponent of constitutional restraints on national au-

¹⁷⁷ Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999); see also Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 Harv L Rev 22 (1992).

¹⁷⁸ See *Gregory v Ashcroft*, 501 US 452, 458 (1991) (O'Connor); *United States v Lopez*, 514 US 549, 581–83 (1995) (Kennedy, J, concurring).

¹⁷⁹ See *Young*, 46 Wm & Mary L Rev at 1772 (cited in note 19).

¹⁸⁰ See *United States v Kimbell Foods*, 440 US 715, 727–33 (1979).

¹⁸¹ See Ernest A. Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 NC L Rev 619, 718–19 (1994).

thority. Chief Justice Rehnquist seemingly had little reason to care about federalism other than constitutional fidelity, and yet ended up leading the Federalist Revival. That said, one can plausibly infer that the strongest proponents of limits on national power will be Justices like O'Connor that combine two or more of these impulses, and that a bare impulse toward constitutional fidelity will often—but not always—be insufficient to make one an enthusiastic federalist. I have already discussed how Justice Scalia's vote in *Raich* may reflect a set of structural interests focused primarily on separation of powers, not federalism.¹⁸² This should be relatively unsurprising: Nothing in Justice Scalia's background or professed methodology reflects any affinity for state governmental institutions or for incrementalism.¹⁸³

Chief Justice Roberts's confirmation process was marked by concerns that he would roll back federal power to prehistoric levels. These concerns were engendered primarily by a dissenting opinion concerning a case that involved a Commerce Clause challenge to the Endangered Species Act.¹⁸⁴ There, Judge Roberts doubted Congress's ability to protect "a hapless toad that, for reasons of its own, lives its entire life in California."¹⁸⁵ But there is every reason to think, "hapless toads" notwithstanding, that Roberts is an executive-branch conservative in the mold of Justice

¹⁸² See text accompanying note 20. Even in *Printz v United States*, 521 US 898 (1997)—surely Justice Scalia's most important federalism opinion—he grounds the doctrine that Congress may not "commandeer" state executive officials to enforce federal law not only in federalism but also in fears that Congress's appropriation of state executive personnel would undermine the federal unitary executive. See *id.* at 922–23. Brad Clark has argued vigorously that Justice Scalia's commitments to federalism and separation of powers are complementary, see Clark, 47 SLU L J at 770 (cited in note 20), and I have little doubt that this is often true. My point is simply that his primary interest is in separation of powers, and that if push comes to shove he will prefer his established separation of powers commitments to any concern about federalism. In two important preemption cases, for example, Justice Scalia has emphasized his strong view of judicial deference to executive agency interpretations of law over important federalism concerns. See *Gonzales v Oregon*, 126 S Ct 904, 926 (2006) (Scalia, J, dissenting); *AT&T Corp. v Iowa Utils Bd*, 525 US 366, 378 n 6 (1999).

¹⁸³ See also Young, 72 NC L Rev at 681–86 (cited in note 181) (critiquing Justice Scalia's commitment to bright-line rules from a Burkean incrementalist perspective).

¹⁸⁴ See, e.g., *Scrutinizing John Roberts*, NY Times (July 20, 2005), at A22 (reporting that Judge Roberts "dissented in an Endangered Species Act case in a way that suggested he might hold an array of environmental laws, and other important federal protections, to be unconstitutional"). The case in question was *Rancho Viejo LLC v Norton*, 334 F3d 1158 (DC Cir 2003), in which Judge Roberts dissented from a denial of rehearing en banc. He stopped short of arguing that the ESA was, in fact, unconstitutional, and even offered an alternative rationale for upholding the statute. *Id.* at 1160.

¹⁸⁵ *Id.*

Scalia.¹⁸⁶ Roberts's professional life, after all, has been spent either in the federal government or as a Washington lawyer preoccupied with questions of federal law; he has no record of participation in or commitment to the institutions of state government comparable to Justice O'Connor's. It seems quite plausible, for example, that Chief Justice Roberts would have voted with Scalia in *Raich*. This expectation seemed to be borne out by the oral argument in the first major federalism case of the Roberts Court, at which the new Chief reportedly "stepped forward . . . as an aggressive defender of federal authority to block doctor-assisted suicide."¹⁸⁷ And, in fact, when *Gonzales v Oregon* came down in January, the new Chief Justice joined Justice Scalia's dissent arguing that the Controlled Substances Act should be read to confer broad authority on the Attorney General to preempt state regulation of doctors.¹⁸⁸

Judge Alito's considerably longer record of decided cases yields a few more hints of concern for state autonomy.¹⁸⁹ His dissent in *United States v Rybar*¹⁹⁰ argued that 18 USC § 922(o), which regulates the possession and transfer of machine guns, was an invalid exercise of the Commerce power. The *Rybar* dissent is a comparatively aggressive application of *Lopez*, and it suggests that Alito might have been with the dissenters in *Raich*.¹⁹¹ Nonetheless, like Roberts's, Judge Alito's resumé has a strongly national tilt: Indeed, Alito has spent his entire professional life as an employee of the

¹⁸⁶ See Merrill, 47 SLU L J at 609–12 (cited in note 20).

¹⁸⁷ *Roberts' Debut: Right-to-Die Case*, St. Petersburg Times (Oct 6, 2005), at 1A.

¹⁸⁸ See 126 S Ct at 779–94 (Scalia, J, dissenting).

¹⁸⁹ For the breathless tone of concerns about Judge Alito's pro-states leanings, see *Another Lost Opportunity*, NY Times (Nov 1, 2005), at A26 (worrying about "Judge Alito's frequent rulings to undermine the federal government's authority to address momentous national problems").

¹⁹⁰ 103 F3d 273 (3d Cir 1996).

¹⁹¹ The considerable attention devoted to Judge Alito's majority opinion in *Chittister v Dept of Community & Econ. Development*, 226 F3d 223 (3d Cir 2000), by contrast, seems misplaced. In that case, the Third Circuit held that the sick-leave provision of the Family Medical Leave Act was not a valid exercise of the Section 5 power, so that Congress could not abrogate state sovereign immunity for individual damages claims under the statute. Judge Alito has been criticized for not anticipating the Supreme Court's decision in *Nevada Dept of Human Resources v Hibbs*, 538 US 721 (2003), which upheld such abrogation for the family-care provisions of the FMLA. It will suffice to say that very few Eleventh Amendment aficionados expected *any* part of the FMLA to pass muster in *Hibbs*, and the provision that *Chittister* struck down is sufficiently more difficult to defend under Section 5 that two circuits have struck it down even after *Hibbs*. See *Tourell v Ohio Dept of Mental Retardation & Developmental Disabilities*, 422 F3d 392 (6th Cir 2005); *Brockman v Wyoming Dept of Family Servs*, 342 F3d 1159 (10th Cir 2003).

national government, much of that time as a Justice Department lawyer charged with implementing and defending national policy.¹⁹² Despite concerns in the press that he may “envision a dramatic curtailing of national power,”¹⁹³ it is hard to see Alito developing into an ardent partisan of states’ rights.

All this gives some reason to worry that the Federalist Revival, such as it was, may be drawing to a close. There is, however, a more optimistic scenario from the perspective of state autonomy. Five years ago, in the pages of this journal, I pleaded for the Federalist Five to adopt a more moderate approach to state sovereign immunity that might encourage the more Nationalist Four to support a judicially enforceable notion of enumerated powers.¹⁹⁴ The Court’s recent decisions in *Hibbs* and *Lane* do, indeed, show at least some members of the Five moderating their positions on sovereign immunity and the Section 5 power.¹⁹⁵ But *Raich* reflects the Four’s continued intransigence on enumerated-powers questions. The question is whether two new Justices can do any better at forging a consensus position that can attract support from across the Court’s ideological spectrum.

To the extent that Roberts and Alito *do* care about federalism, they may turn out to be more effective advocates for it than the other pro-states Justices on the current Court. Justice O’Connor’s affinity for open-ended balancing could hardly reassure Justices worried, as Souter and Breyer have been, about the ability of courts to identify principled limitations on federal power once they reopen the Pandora’s Box of judicial review in this area.¹⁹⁶ Likewise,

¹⁹² See the official White House biography at <http://www.whitehouse.gov/infocus/judicialnominees/alito.html>.

¹⁹³ Editorial, *Judge Alito on the States*, Wash Post (Nov 21, 2005), at A14.

¹⁹⁴ See Young, 1999 Supreme Court Review at 68–73 (cited in note 53).

¹⁹⁵ The two state sovereign immunity cases decided in January 2006 continued this trend. See *United States v Georgia*, 2006 US LEXIS 759 (Jan 10, 2006) (upholding abrogation of state immunity under Title II of the Americans with Disabilities Act, where the alleged statutory violation is also a constitutional violation); *Central Virginia Community College v Katz*, 2006 US LEXIS 917 (Jan 23, 2006) (upholding Congress’s authority to abrogate state sovereign immunity under the Bankruptcy Code). *Katz* is particularly significant, as it cut back on the Court’s earlier suggestion that none of Congress’s Article I powers would suffice to abrogate state sovereign immunity. See *Florida Prepaid Postsecondary Educ. Expense Bd v College Savings Bank*, 527 US 627, 636 (1999). Justice O’Connor provided the fifth vote in *Katz*; Chief Justice Roberts joined Justice Thomas’s dissent, which maintained the *Seminole/Alden* line on state immunities. Much will thus turn on the position that Justice Alito adopts in the next state sovereign immunity case.

¹⁹⁶ See *Lopez*, 514 US at 604 (Souter, J, dissenting); id at 627–28 (Breyer, J, dissenting).

Thomas's radicalism, Scalia's combativeness, Rehnquist's impatience with extended reason-giving, and Kennedy's sheer unpredictability created serious handicaps in this regard. As a seasoned doctrinal advocate known for his collegiality, Chief Justice Roberts may well be positioned to play a Brennan-like role—perhaps even reaching out to members of the Nationalist Four to forge the principled middle ground on federalism that has eluded the Court for so long.

The other half of a viable way forward, in my view, is for a solid majority of the Court to recognize that the values of constitutional federalism are implicated not only in cases that test the limits of Congress's power, but also in statutory construction cases that assess how far a given enactment has actually gone. I have already discussed the importance of preemption cases like *Bates* for preserving state autonomy.¹⁹⁷ On this score, the decision in *Gonzales v Oregon* upholding Oregon's physician-assisted suicide regime is encouraging. Especially after *Raich*, the primary restraints on the Commerce Clause will be political. Under those circumstances, it is important that the Court demand a relatively clear statement from Congress when it wishes to intrude into areas of traditional state authority (like medical practice). It is equally critical that federal preemptive authority actually be exercised by Congress, which is at least subject to political and inertial checks, rather than by executive actors that can act more easily and without input from the states' elected representatives.¹⁹⁸ Although it seemed relatively clear at the macro-level that Congress did not intend to grant a general regulatory power over medical practice to the Attorney General under the CSA, the structure of the Act was complex and included relatively open-ended delegations of power. The willingness of six Justices in the Oregon case to resolve these questions against the Attorney General bodes well for the survival of some elements of process federalism, notwithstanding the *Raich* majority's aversion to hard substantive limits on national authority.

CONCLUSION

There is some consolation in Justice O'Connor's descrip-

¹⁹⁷ See Section III.B.

¹⁹⁸ See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex L Rev 1321, 1433 (2001); Young, 83 Tex L Rev at 88–91 (cited in note 13).

tion of federalism as “our oldest question of constitutional law.”¹⁹⁹ While the balance of power between the nation and the states has steadily shifted in favor of the former over the 230 years of our history, one need look no further than current debates over air pollution, gay marriage, and the death penalty to see that federalism remains a vital force in our polity. This is true notwithstanding considerable ebbs and flows in the willingness of the federal courts to enforce constitutional limits on national power. Even in the case of medical marijuana, state legislation remains a considerable practical impediment to the imposition of a uniform national drug policy.²⁰⁰ On the constitutional side, much life remains in the anti-commandeering doctrine, state sovereign immunity, pro-federalism clear statement rules—and, I have argued, even aspects of Commerce Clause doctrine. It is, of course, far too early to tell whether the accomplishments of the Rehnquist Court will endure. But it is unlikely that *Raich* spells the end of the conversation.

¹⁹⁹ *New York v United States*, 505 US 144, 149 (1992).

²⁰⁰ See, e.g., M. L. Johnson, *House Overrides Carcieri's Medical Marijuana Veto*, Boston Globe (Jan 3, 2006) (available at http://www.boston.com/news/local/rhode_island/articles/2006/01/03/house_members_override_carcieris_medical_marijuana_veto/) (noting that even after the Court's decision in *Raich*, “[f]ederal authorities conceded they were unlikely to prosecute many medicinal users, and Rhode Island lawmakers pressed on, passing their medical marijuana bill on June 7”).