RAICH AND JUDICIAL CONSERVATISM AT THE CLOSE OF THE REHNQUIST COURT

by
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This Article explains the separate opinions of Justices Scalia and Thomas in Gonzales v. Raich *and other New Federalism cases. Scalia and Thomas's opinions highlight a tension in how different judicial conservatives understand the objects of constitutional interpretation. Thomas represents the views of "originalists," who seek above all else to identify and follow the original meaning of the relevant constitutional text. Scalia represents the views of "judicial minimalists," who seek above all else to develop rules that minimize the interpretive and policy-making discretion of federal judges. Although originalism and minimalism complement one another in many cases, they do not always do so, and* Raich *marks the New Federalism case where these two approaches diverged.*

This divergence makes it impossible to understand "judicial conservatism" as a coherent project to change contemporary constitutional interpretation. Contrary to the views of many critics of the Rehnquist Court, "judicial conservatives" as such are not united enough to threaten seriously the New Deal transformation of the national government's power.

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I. INTRODUCTION

In *Gonzales v. Raich*,[1] the New Federalism passed from youthful exuberance to middle-aged sobriety. In the early and mid-1990s, the Rehnquist Court's five-vote federalist majority had revived federalism in Commerce Clause cases such as *United States v. Lopez*[2] and *United States v. Morrison*,[3] and in a torrent of sovereign-immunity cases after *Seminole Tribe v. Florida*.[4] These cases made it respectable to take federalism seriously again, and they struck down several easy targets in the U.S. Code. However, as often happens when a Court majority changes the law suddenly, the second round of cases turned out to be harder than the first. It is much easier to talk tough while striking down a symbolic gun-free school-zone law (as in *Lopez*) than it is when considering whether to rein in an ambitious national program like the War against Drugs (as in *Raich*). As in several cases from the two preceding terms, *Raich* also forced the Court to consider more substantial and difficult federalism challenges, and federalism lost pretty badly. In the meantime, William Hubbs Rehnquist, the earliest and perhaps the most enthusiastic federalist on the Court, has passed away. While the New Federalism has not been repudiated, in the future its growth is certain to be far slower and more erratic.

Because *Raich* stretched the New Federalism past its breaking point, it teaches important lessons about each of the federalists on the Rehnquist Court. One set of lessons relate to Justices Kennedy and O'Connor. Although they have provided the crucial fourth and fifth votes, they (especially Justice Kennedy) have also been decidedly more nationalist than many observers have realized. I hope to develop this theme elsewhere, but it requires elaboration more comprehensive than I can provide in this Symposium.[5] But *Raich* teaches equally surprising lessons about the Rehnquist Court's conservatives: now-deceased Chief Justice Rehnquist, and especially Justices Scalia and Thomas. Many observers of *Raich* were surprised that Justice Scalia concurred separately in *support* of Congress's power to regulate and ban home-grown

[1] 125 S. Ct. 2195 (2005).
[2] 514 U.S. 549 (1995).
[3] 529 U.S. 598 (2000).
[4] 517 U.S. 44 (1996).
[5] *See* Eric R. Claeys, Sabri, Lane, *and* Raich: *The Progressive Limits on the Rehnquist Court's Federalism Revival* (2005) (unpublished manuscript, on file with author).

marijuana, and that he sparred with Justice Thomas (in dissent) about how to apply the principles of constitutional interpretation they are supposed to share.

This Article interprets *Raich* as a turning point in the development of "judicial conservative" constitutional jurisprudence. The Article disregards the opinions by other Justices in New Federalism cases to focus on key opinions by Chief Justice Rehnquist and Justices Scalia and Thomas—for the Court, in dissent, or in separate concurrences. Within the Rehnquist Court's federalism docket, the Justices in question conducted a low-profile but still significant debate about how to understand "judicial conservatism" and apply it to the New Federalism. This Article assumes that "judicial conservatism" refers to an assortment of loosely-related approaches to constitutional interpretation, all originally unified in opposition to the "living Constitution" tendencies of the Warren Court. One commitment, "originalism," holds that constitutional interpretation is properly defined as a search for original intent or meaning. Another, "judicial minimalism," or simply "minimalism," accepts that judges have some policy-making discretion in the course of interpretation, but then seeks to minimize that discretion as much as possible. These two commitments complement one another as they apply to many constitutional problems, especially the most contentious constitutional cases of the Warren and Burger Courts. However, these commitments are not and need not be complementary in every possible case.

The thesis of this Article is that *Raich* marks the point in New Federalism cases where "judicial conservatism" ceased to be a coherent whole and fractured into its two separate parts. The tensions between originalism and minimalism have been noticeable since at least 2002, but they are now unmistakable. Justice Thomas and Justice Scalia both favor originalism and judicial minimalism, but Justice Thomas stresses the former over the latter, and Justice Scalia the latter over the former. *Raich* illustrated each Justice's choice for all to see. *Raich* also forced into the open hard questions about how judicial conservatives should handle questions of precedent and *stare decisis*. Justice Thomas is willing to follow original meaning, even when it requires him to reconsider decades of Court precedent. By contrast, Justice Scalia prefers to restrain judicial discretion by following controlling and well-established Court precedents, even when they go against the Constitution's original meaning.

This interpretation of *Raich* and other cases is instructive for two reasons. First, it explains the conservatives' motivations more clearly than many previous analyses of the Rehnquist Court's federalism docket. Previous explanations tend to suffer from one of two shortcomings. The more common one is to paint all five of the Rehnquist Court's federalists with the same broad brush. For instance, in one leading study, Richard Fallon concluded that the Rehnquist Court's "pro-federalism majority is at least as substantively conservative as it is pro-federalism. When federalism and substantive conservatism come into conflict, substantive conservatism frequently dominates."[6] Fallon's findings, while important, need to be qualified to

[6] Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 434 (2002).

distinguish between the intentions and behavior of the three more conservative Justices on one hand, and Justices O'Connor and Kennedy on the other. With one possible exception,[7] most of the judicial conservatives' decisions in federalism cases can be explained by their attachments to originalism and judicial minimalism. More interestingly, the studies that manage to avoid this problem still paint the conservatives with one broad brush. For instance, in a recent retrospective of the Rehnquist Court, Thomas Keck contrasts O'Connor and Kennedy with Rehnquist, Scalia, and Thomas by portraying the former as "pragmatic conservatives" and the latter as "conservatives" without qualification.[8] While Keck's portrait is savvier than most, it passes over important differences among the three conservatives—especially between Scalia and Thomas.

These differences are more important than ever now that Judges John Roberts and Sam Alito have been nominated to replace the Chief Justice and Justice O'Connor. During the 1950s, scholars learned to appreciate the differences among different species of liberals on the New Deal and Warren Courts. If conservative Republicans continue their ascendancy, scholars will need better to appreciate the differences among different species of conservatives on the Roberts Court.

Second, this study helps to put the Rehnquist Court's New Federalism project in a helpful if partial historical perspective. This perspective is helpful because *Raich* seems to have stalled the New Federalism for the time being, because Chief Justice Rehnquist has passed on, and because the Court is about to change membership substantially. This perspective is only partial because, of course, this Article is abstracting out of focus the intentions of Justices Kennedy and O'Connor, who made most of the difference in most of the close federalism cases. Even with that qualification, however, *Raich* teaches two important lessons about the legacy of the Rehnquist Court's New Federalism revival.

On one hand, in comparison with the Warren Court, the New Federalism marks an important break. Whatever their differences, judicial conservatives could agree on many specific prescriptions in federalism cases. They made those prescriptions stick in a surprising number of cases, and in the process, they put on the Court's agenda a constitutional issue that would have surprised most observers at the beginning of the Rehnquist Court.

On the other hand, in comparison with the New Deal, the New Federalism seems a minor correction at best. *Raich* marked the case where the New Federalism's most ardent supporters could no longer agree, and *Raich* was a long way off from threatening the core substantive claims associated with the New Deal expansion of the federal government. *Raich* brought into the open an ambiguity that has always troubled judicial conservatives. To exaggerate only slightly, originalists and judicial minimalists learned different lessons from the

[7] *See infra* section II.E (the anti-commandeering or Tenth Amendment cases).

[8] THOMAS D. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 235-43 (2004).

New Deal transformation. Originalists concluded primarily that the law needs to apply consistently a coherent form of original-meaning interpretation, and to replace the mix of nationalist policy arguments and "living Constitution" interpretive theory that ushered in the New Deal transformation. Judicial minimalists, by contrast, concluded mainly that the federal courts should never again construe the Constitution in a manner that requires them to launch a frontal assault against the political branches of the federal government. Justice Thomas fairly represents the intentions of the former group, Justice Scalia the intentions of the latter. In short, even if political conservatives manage, contrary to political reality, to stack the Court with judicial conservatives for the foreseeable future, judicial conservatives do not have a coherent or unified enough project to threaten seriously the New Deal transformation.

II. CONSERVATISM ON THE REHNQUIST COURT

Clearly, "judicial conservatism" is a slippery term to define; just as clearly, some attitudes about the Constitution, statutes, and adjudication are recognized by most to be "conservative." Although Robert Bork's *The Tempting of America*[9] and a recent case comment on *Lawrence v. Texas*[10] by Nelson Lund and John O. McGinnis[11] were written fourteen years apart, it is quite clear that both works appeal to the same audience: one which presumes that substantive due process is illegitimate, that this doctrine has tempted federal courts to overreach, and that this temptation has affected the U.S. Supreme Court's work from quite early in the country's history. Those themes and others have unified a more or less "conservative" critique of the federal courts and federal constitutional interpretation for at least forty years.

To appreciate modern American judicial conservatism, it helps to start with what all conservatives agree it opposes, and then work backward to the different goods that different conservatives hope to conserve. The Warren Court is remembered for lending respectability to a "living Constitution" approach to constitutional interpretation, and for projecting federal judicial power to protect the individual-rights guarantees that emerged from that interpretation. In important respects, judicial conservatism is an umbrella covering a series of three separate reactions against those tendencies. The first reaction is to reject the notion of the living Constitution in favor of the Constitution's original understanding.[12] The second is to insist on judicial restraint, in protest against the counter-majoritarian tendencies of the Warren Court's rights revolution.[13] The last is a flight from the Warren Court's

[9] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 19-132 (1990).

[10] 539 U.S. 558 (2003).

[11] Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1556−73 (2004).

[12] *See, e.g.*, BORK, *supra* note 8, at 143−85; William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

[13] *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16−18 (1962); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. (1971).

tendency to use broad balancing tests, rather than bright-line rules.[14] In the 1970s and especially the 1980s, "judicial conservatism" came to stand for the political platform shared by lawyers and individuals who believed that originalism, judicial restraint, and bright-line rules provided a better conception of the judicial role than the conception that governed the Warren Court.[15]

By the same token, judicial conservatism is not monolithic—indeed, many people who might seem from the outside to count as judicial conservatives resist so being classified. For one thing, different originalists understand "originalism" very differently. Originalism can refer to original intent, the subjective intentions of the lawgiver, original meaning, the most reasonable objective public meaning of the text, or variations in between these two extremes.[16] Separately, the three reactions against the Warren Court described above conflict with one another in many important respects. As Gary Lawson has explained, judicial conservatives often fail to distinguish between originalism on one hand and judicial restraint and the rules-over-standards preference on the other. Originalism is a theory for interpreting the Constitution, while the other two tendencies—to which this Article shall refer jointly as "judicial minimalism"—are prescriptions about how judges ought to adjudicate.[17] These attachments may complement one another in some cases, but they do not and need not in all cases.

On the other hand, these attachments dovetail often enough that "judicial conservatism" is useful for our purposes here—even if some originalists, like Lawson or Randy Barnett, prefer not to be mistaken for "judicial conservatives."[18] Theoretically, Lawson and Barnett have a point. Their understandings of constitutional interpretation differ so profoundly from, say, Lino Graglia's, to make any generalizations about both camps bland at best and meaningless at worst.[19] At the same time, theoretically, originalism and judicial minimalism are more than mere contingent cousins. Many theories of politics promote originalist interpretation and minimalist adjudication for the same reasons, namely to prevent arbitrary rule and to promote the rule of law. In addition, historically, originalism and judicial minimalism both emerged in response to many of the same tendencies in contemporary constitutional

[14] *See, e.g.*, Antonin Scalia, *The Rule of Law as Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[15] This section follows in large part the argument of Ernest A. Young in *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 626−42 (1994).

[16] *See* Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1124−48 (2003); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569 (1998).

[17] Gary Lawson, *Conservative or Constitutionalist?*, 1 GEO. J. L. & PUB. POL'Y 81, 82 (2002).

[18] *See, e.g.*, Posting of Randy Barnett to The Volokh Conspiracy, http://www.volokh.com/archives/archive_2005_09_18-2005_09_24.shtml#1127102795 (Sep. 19, 2005).

[19] *See, e.g.*, Lino A. Graglia, United States v. Lopez: *Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719 (1996).

adjudication. Practically, many judicial nominees do not define their interpretive commitments as fastidiously as academics do. And politically, when Republican presidents and judge-pickers think of "strict constructionists,"[20] they think of judges who favor some mix of originalism and judicial minimalism. In short, different judicial conservatives are stuck with each other in practice, even if academics insist on more rigorous distinctions in theory.

These differences matter, however, when it comes to describing the different conservatives on the Rehnquist Court. Chief Justice Rehnquist was, especially while he was Chief Justice, hard to pin down. As Chief Justice, and especially in constitutional-federalism cases, he often submerged his own jurisprudential tendencies to write opinions on behalf of all the federalists as a group. That said, a few generalizations can be made safely. At least in federalism cases, he was sympathetic to the original federal-state design. However, he was not at all fastidious about using original-meaning principles of interpretation to steer the case law more closely to that design. Constitutional-federalism case law gradually lost its connection to any sort of original-meaning principles over the first half of the twentieth century. Chief Justice Rehnquist took the methodologies as they came from the precedent and worked with them to steer back to a more federalist order.

In contrast to Chief Justice Rehnquist, Justices Scalia and Thomas have striven to be far more consistent in how they decide constitutional cases. In important instances, the original meaning of the Constitution requires judges to develop discretionary standards that cut against judicial minimalism. In these cases, Justice Thomas errs on the side of original meaning; Justice Scalia errs on the side of minimalism. Those general tendencies also lead Justices Thomas and Scalia to view precedent differently. Justice Thomas favors original meaning over court precedent; Justice Scalia once acknowledged that originalism can be "medicine that seems too strong to swallow," and admitted he was ready to "adulterate it with the doctrine of *stare decisis*."[21]

III. FEDERALISM ON THE REHNQUIST COURT

These different attachments help explain how the Chief Justice, Justice Scalia, and Justice Thomas approached federalism cases. They agreed to advance the New Federalism (again, provided that Justices O'Connor and Kennedy agreed to go along) when cases satisfied their common judicial-conservative commitments. In general, if not always, the conservatives needed to be confident that a given federalism doctrine had grounding in the original meaning of the Constitution, that the relevant text had a clear meaning, and that its meaning lent itself to a bright-line interpretation. However, in the later and

[20] Debate between Albert Gore, Jr., Vice President of the United States and George W. Bush, Governor of Texas, in Boston, Mass. (Oct. 3, 2000), *available at* http://www.cnn.com/ELECTION/2000/debates/transcripts/u221003.html (remarks by then-Governor George W. Bush).

[21] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 861 (1989).

more extreme cases, especially *Raich*, the conservatives could not satisfy all of these commitments at once. Similarly, the conservatives gradually fractured about how to treat precedent. In most of the early cases, all of the conservatives agreed that the federalism questions presented differed substantially from previous cases; in the later cases, Justice Scalia argued for rules of decisions that followed Court precedent to a far greater degree than the Chief Justice or Justice Thomas felt obligated to do.

A. The Dormant Commerce Clause

The simplest evidence confirming this portrait comes from dormant Commerce Clause doctrine. In dormant Commerce Clause cases, Justices Scalia and Thomas and the Chief Justice were all marginalized. They followed their preferences for judicial minimalism and original meaning to their logical conclusions: narrow or abolish the dormant Commerce Clause. For judicial conservatives, the dormant Commerce Clause doctrine seems dubious. The Commerce Clause is in Article I. It specifically authorizes *Congress* to act, specifically by passing laws to regulate interstate commerce.[22] Nothing in its text or structure suggests that it authorizes federal courts to watchdog such protectionism in the absence of a law passed by Congress.[23] Justice Scalia, Justice Thomas, and (less frequently) Chief Justice Rehnquist did write or join opinions criticizing the doctrine for having (in Justice Scalia's words) "no conceivable basis in the text of the Commerce Clause."[24] They were even more suspicious of the doctrine because it required them (in Justice Thomas's words) to assess factors, like "whether a particular statute serves a 'legitimate' local public interest," which invite federal judges "to function more as legislators than as judges."[25]

These arguments were fairly straightforward, but they had one radical implication: Scalia and Thomas were willing to jettison more than a century's worth of Court precedent holding that the dormant Commerce Clause exists. Justice Scalia minimized the problem by professing himself willing to follow the doctrine in cases when states engage in "rank discrimination."[26] In doing so,

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[22] *See* U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power . . . To regulate Commerce . . . among the several States.").

[23] *See* Fallon, *supra* note 6, at 460−61; Richard A. Epstein, *Waste and the Dormant Commerce Clause*, 3 GREEN BAG 2D 29 (1999). *But see* Brannon P. Denning *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 KY. L.J. (forthcoming Nov. 2005); Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384 (2003).

[24] Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 262 (1987) (Scalia, J., dissenting); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 611−12 (1997) (Thomas, J., dissenting). *See also* Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting) ("[T]he jurisprudence of the 'negative side' of the Commerce Clause remains hopelessly confused.").

[25] *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 619 (Thomas, J., dissenting).

[26] *Tyler Pipe Indus., Inc.*, 483 U.S. at 265 (Scalia, J., dissenting).

he furthered several conservative attachments at once: he tried to harmonize dormant Commerce Clause law with the text of the Constitution (specifically the Comity Clause); [27] he professed himself willing to follow a large swath of the precedent; and he jettisoned the rest as necessary to make the doctrine follow a bright-line test for "rank discrimination." Justice Thomas (joined by Justice Scalia) followed a similar approach in another case when he suggested that the federal courts should strike down state laws only when they violate specific textual guarantees such as the Imports/Exports Clause.[28]

B. The Spending Power

This portrait also explains why the conservatives never tried to rein in Congress's spending powers. There is no *Lopez* decision on federal spending. Indeed, in the 1987 decision *South Dakota v. Dole*, Chief Justice Rehnquist wrote an opinion for a unanimous Court recognizing in Congress wide discretion to use its power of the purse to attach regulatory conditions to federal appropriations to states.[29] The conservatives' lack of interest is "curious," as Calvin Massey puts it, "if the Court is as hell-bent on limiting federal power as some of its critics claim."[30]

However, the lack of interest makes sense if one considers the conservatives' motivations. Given how spending-power issues seem under current law, it is virtually impossible for a conservative to reconsider Congress's spending powers consistent with the principles that inform judicial conservatism. Following the precedent, the conservatives assume that the spending power flows from the Taxing Clause, particularly its reference to taxing "to provide for the . . . general [w]elfare."[31] The phrase "general welfare" does not seem to have a narrow and specific meaning; it certainly does not seem easy to reduce to a clear and manageable judge-made rule. No surprise then, that in *South Dakota v. Dole*, Chief Justice Rehnquist wrote for the Court that "courts should defer substantially to the judgment of Congress"[32]

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[27] *See* U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

[28] *See Camps Newfound/Owatonna, Inc.*, 520 U.S. at 620−21 (Thomas, J., dissenting); *see also* U.S. CONST. art. I, § 10 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws."). For one critique of Justice Thomas's approach, consider Brannon P. Denning, *Justice Thomas, the Import-Export Clause, and* Camps Newfound/Owatonna v. Harrison, 70 U. COLO. L. REV. 155 (1999).

[29] 483 U.S. 203 (1987). Justices Brennan and O'Connor dissented, but on the narrow ground that the Twenty-first Amendment required Congress to be more careful in regulating drinking than it would otherwise be.

[30] Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 436 (2002).

[31] U.S. CONST. art. I, § 8, cl. 1.

[32] 483 U.S. 203, 207 (1987).

about what lies in the "general welfare," and went on to doubt whether this judgment "is a judicially enforceable restriction at all."[33]

To challenge this understanding, the conservatives would need to reconsider whether the spending power really flows from the Taxing Clause. Rightly or wrongly, the Court agreed that the spending power flowed from the Taxing Clause in the 1936 decision *United States v. Butler*, which invalidated a New Deal agricultural-spending program on other grounds.[34] Subsequent decisions assumed that *Butler* was right to the extent that it lodged the spending power in the Taxing Clause, and wrong only to the extent that it claimed that the phrase "general welfare" was subject to other constitutional limits.[35] In the last decade, however, David Engdahl[36] and Gary Lawson (both in his own scholarship and in cooperation with Guy Seidman)[37] have argued that the original meaning of the Constitution gives Congress power to spend not whenever the "general welfare" so requires, but only when funding is necessary and proper to carry into execution the federal government's enumerated powers.[38] That interpretation would threaten Medicare and Social Security much as the pre-1937 reading of the Commerce Clause threatens much the post-1937 regulation.

Nevertheless, none of the conservatives took any interest during the Rehnquist Court in reconsidering the constitutional basis of the spending power. Although it is risky to divine from a Justice's silence, several explanations seem consistent with these Justices' general approaches. Too much precedent may have passed under the bridge for any of these Justices to reconsider. The prevailing view of the spending power has roots in policy debates and executive-branch legal opinions going back into the early nineteenth century.[39] Engdahl and Lawson's interpretations, by contrast, may seem novel and untested. The conservatives are willing to defy prevailing tendencies in law and scholarship to an extent, but perhaps this move was

[33] *Id.* at 207 n.2. Justice O'Connor dissented (with Justice Brennan) on other grounds, but not on this point. *See id.* at 212−13 (O'Connor, J., dissenting).

[34] 297 U.S. 1 (1936). In *Butler*, the conservative wing of the New Deal Court held that the Taxing Clause justifies federal spending, but then invalidated a particular agricultural spending program on a Tenth Amendment theory.

[35] *See* Helvering v. Davis, 301 U.S. 619 (1937); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888−1986, at 229 (1990) (describing *Butler* as "hopelessly inconsistent"); *id.* at 238 (describing "the breadth of *Butler*'s concession that Congress could spend for any nationwide purpose").

[36] *See* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994); David E. Endgahl, *The Basis of the Spending Power*, 18 SEATTLE U. L. REV. 215 (1995).

[37] *See* GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 26−32 (2004); Gary Lawson, *Making a Federal Case Out of It:* Sabri v. United States *and The Constitution of Leviathan*, 3 CATO SUP. CT. REV. 2003−2004, at 119, 133−39. *But cf.* John Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001).

[38] *See* U.S. CONST. art. I, § 8, cl. 18 ("Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers[.]").

[39] *See, e.g.*, *Butler*, 297 U.S. at 65−66.

asking too much of them. In any case, "general welfare" is not the sort of language that a judicial conservative will use to mount a federalism revival.

C. Lopez *and the Commerce Clause*

On the other hand, this portrait also allowed the judicial conservatives to innovate in *United States v. Lopez*, the case that made the New Federalism a movement.[40] *Lopez* was the first case since the early New Deal in which the Court declared an act of Congress beyond the scope of its interstate-commerce powers—a provision of the Gun Free School Zone Act that made it a federal crime to possess a firearm within 1,000 feet of a school anywhere in the United States. Doctrinally, *Lopez* limited *Wickard*'s broad and deferential "rational basis" test.

In *Lopez*, Justice Thomas's opinion highlights why many judicial conservatives would be confident reading the Commerce Clause more narrowly. Justice Thomas found a strong case, grounded in "text, structure, and history" explaining why commerce "among the several states" originally meant "sale and/or transport" across state lines.[41] In most cases, that definition lends itself to a bright-line rule. Justice Thomas distinguished himself from other judicial conservatives in that he was willing to reconsider a great deal of precedent inconsistent with the original meaning of interstate commerce. While he made a slight nod to *stare decisis*, he disturbed all Court precedent that conferred on Congress power to regulate interior trade or the productive activities that generate goods or service for trade.[42] (That disturbance may explain why Justice Scalia did not join Justice Thomas's concurrence.)

The Chief Justice, by contrast, demonstrated his methodological flexibility in *Lopez*. He probably needed this flexibility to write an opinion holding Justices Thomas and Scalia together with Justices O'Connor and Kennedy, neither of whom is nearly as sympathetic to originalism as any of the conservatives. Chief Justice Rehnquist assumed that, strictly as a matter of plain and original meaning, Justice Thomas was right about the original meaning of "commerce among the several states." Chief Justice Rehnquist's opinion for the Court assumed throughout that "interstate commerce" in its most precise form meant something like "interstate trade."[43]

At the same time, Chief Justice Rehnquist's Court opinion was shaped much less by original meaning than by the common law method. As Chief Justice Rehnquist readily recognized, New Deal and subsequent precedent had

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[40] 514 U.S. 549 (1995).

[41] *Id*. at 585, 587 (Thomas, J., concurring). For a debate over Thomas's interpretation, compare Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999) with Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

[42] *Lopez*, 514 U.S. at 601 n.8 (Thomas, J., concurring).

[43] *See, e.g.*, *id.* 558−59 (classifying the Court's cases into three groups, involving "the channels of interstate commerce," "the instrumentalities of interstate commerce," and "those activities that substantially affect interstate commerce").

also "ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress."[44] Chief Justice Rehnquist needed to confine that jurisprudence, and he proposed a wide range of arguments in the hope that some would stick. Most lawyers give *Wickard v. Filburn*[45] pride of place among the New Deal Commerce Clause cases; Rehnquist gave equal time to *NLRB v. Jones & Laughlin Steel Corp.*,[46] which (conveniently enough) "warned that the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to . . . effectually obliterate the distinction between what is national and what is local.'"[47] With that opening wedge, Rehnquist sought to mark off other limits on the precedents: they upheld national power only as to local "economic activity," laws that were "essential part[s] of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," laws that had a "jurisdictional element" tied to interstate trade, and laws that were supported by congressional findings.[48] Some of those grounds bloomed later: In *Morrison*, Chief Justice Rehnquist converted the "economic activity" rationale into a clear constitutional requirement. Other grounds turned out to backfire: In *Morrison*, Rehnquist downplayed the legislative-findings ground heavily.[49] Otherwise, in *Lopez* and then again in *Morrison*, Chief Justice Rehnquist avoided playing defense by playing offense. When the government and the Court's liberals argued against these decisions, Chief Justice Rehnquist consistently considered their arguments *ad absurdum* and warned that they "bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[50] Chief Justice Rehnquist's argument gave away too much ground to the precedent to be purely originalist, but it relied heavily on intuitions about the Commerce Clause's original meaning and the Constitution's federal structure to clear space for a Commerce Clause revival.

D. Sovereign Immunity (and the Eleventh Amendment)

The judicial conservatives' common tendencies also explain why and how they supported the sovereign-immunity project, also known as the Eleventh Amendment doctrine. Sovereign immunity bars federal courts from asserting jurisdiction over damage suits against unconsenting states. To begin with, sovereign immunity fits the profile of a constitutional doctrine that makes judicial conservatives comfortable. Sovereign immunity requires courts to apply a clear and simple rule: They must dismiss actions for money damages

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[44] *Id.* at 556.
[45] 317 U.S. 111 (1942).
[46] 301 U.S. 1 (1937).
[47] *Lopez*, 514 U.S. at 557 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37).
[48] *Id.* at 559, 561, 562−63.
[49] *See* United States v. Morrison, 529 U.S. 598, 610−11 (2000).
[50] *Lopez*, 514 U.S. at 567.

against states except when the states clearly consent. In addition, as Justice Scalia recounted in one case, sovereign immunity had a long pedigree in history and precedent, going back to *Chisholm v. Georgia* and the campaign to overrule it with the Eleventh Amendment,[51] through *Hans*, until the Warren and Burger Courts started to question the doctrine openly.[52] That history and precedent gave Justice Scalia and the other conservatives enough confidence to stand by their interpretation of Article III.

Of course, many observers believe that the conservatives reneged on another tenet, namely their attachment to original meaning. Most observers call the doctrine the "Eleventh Amendment" doctrine. The Eleventh Amendment, by its terms, bars federal courts from exercising jurisdiction of lawsuits between citizens of one state and another state. If the doctrine is framed in those terms, the Rehnquist Court's sovereign-immunity doctrine is too broad because it goes on to protect states from damage actions under many other fonts of Article III jurisdiction, especially federal-question cases. On that basis, the Rehnquist Court's liberals and commentators have decried the sovereign-immunity cases bitterly, complaining that "one cannot deduce [the doctrine] from either the text of Article III or the plain terms of the Eleventh Amendment."[53]

These criticisms, however, do not confront the conservatives on their own terms. Justice Scalia first considered sovereign immunity at length in his 1989 opinion in *Pennsylvania v. Union Gas Co.*, in which a Court plurality came close to repudiating sovereign immunity utterly for the Court.[54] In his dissent, Justice Scalia grounded the doctrine of sovereign immunity in Article III, not the Eleventh Amendment. He conceded that "if there were no state sovereign immunity beyond [the] precise terms" of the Eleventh Amendment, "then it would unquestionably be most reasonable to interpret it as providing immunity only when the *sole basis* of federal jurisdiction is" state/foreign-citizen diversity.[55] Justice Scalia, however, believed that the amendment reflected "a consensus that the doctrine of sovereign immunity . . . was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away."[56] In this understanding, sovereign immunity flows primarily not from the Eleventh Amendment but from Article III, and particularly the passages vesting the "judicial power" and enumerating various "cases" and "controversies." In David Currie's interpretation, "article III's provision extending the judicial power to 'Cases arising under this Constitution' was subject to an implied

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[51] 2 U.S. (2 Dall.) 419 (1793).

[52] *See, e.g.*, Parden v. Terminal Ry. of Ala. State Docks Dep't, 377 U.S. 184 (1964); Employees of Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279 (1973); Edelman v. Jordan, 415 U.S. 651 (1974); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).

[53] Seminole Tribe v. Florida, 517 U.S. 44, 83−84 (1996) (Stevens, J., dissenting).

[54] 491 U.S. 1 (1989).

[55] *Id.* at 31 (Scalia, J., concurring and dissenting).

[56] *Id.* at 31−32.

exception for suits by individuals against nonconsenting states."[57] Indeed, the Eleventh Amendment reinforces this reading. After all, it specifies that the "judicial power . . . shall not be construed" to abrogate sovereign immunity in citizen-state diversity cases.[58] The phrasing suggests that the Article III "judicial power" is narrow to begin with; the judicial power is misread when judges "construe" it to reach a font of jurisdiction it was not originally meant to reach.[59]

Now, many academics strongly disagree with Justice Scalia's and Currie's interpretation,[60] and Justice Scalia himself recognized "that the question is at least close."[61] Whether or not Justice Scalia's reading ultimately captures the original meaning of Article III, it is not so willful that it is tantamount to "substitution of [one's] own views of federalism for those expressed in statutes enacted by the Congress and signed by the president."[62] His view is backed up by respectable scholarship,[63] and it is at least plausible enough to be consistent with the tenets of judicial conservatism that Justice Scalia and the other conservatives have followed.

Chief Justice Rehnquist followed the same approach as Justice Scalia, with a few qualifications particular to his general tendencies. Chief Justice Rehnquist left his main contribution in sovereign-immunity law in the Court's opinion in *Seminole Tribe v. Florida*, the case that stopped further erosion of sovereign immunity and encouraged states to use the doctrine against lawsuits authorized by Congress. Chief Justice Rehnquist's main contribution came not in sovereign-immunity doctrine *simpliciter* but in *stare decisis*. Using the traditional and open-ended factors associated with *stare decisis*, Chief Justice Rehnquist did the dirty work necessary to discredit and overrule the plurality

[57] CURRIE, *supra* note 34, at 8.

[58] U.S. CONST. amend. XI.

[59] *Accord* Alden v. Maine, 527 U.S. 706, 722−23 (1999) ("Although earlier drafts of the [Eleventh] Amendment had been phrased as express limits on the judicial power granted in Article III, the adopted text addressed the proper interpretation of that provision of the original Constitution." (citations omitted)).

[60] *See, e.g.*, Symposium, *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity*, 53 STAN. L. REV. 1115 (2001); Symposium, *State Sovereign Immunity and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 817 (2000); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983).

[61] Pennsylvania v. Union Gas Co., 491 U.S. 1, 34 (1989) (Scalia, J., concurring and dissenting).

[62] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 96 (2000) (Stevens, J., dissenting).

[63] *See* CURRIE, *supra* note 34, at 8. Caleb Nelson suggests that, in cases where the Eleventh Amendment does not precisely control, sovereign immunity inheres in the terms "case" and "controversy" as a limitation on courts' personal jurisdiction. *See* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559 (2002).

opinion in *Union Gas Co*.[64] In sovereign-immunity law proper, Chief Justice Rehnquist was slightly less committed to textualism than Justice Scalia. To be sure, Chief Justice Rehnquist followed Justice Scalia's opinion in *Union Gas Co.* by saying that sovereign immunity follows not from the Eleventh Amendment read in isolation, but rather from the "constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III."[65] At the same time, Chief Justice Rehnquist was more ecumenical in how he understood sovereign immunity. He referred to the doctrine (as Justice Scalia had not in *Union Gas Co.*) simply as the "Eleventh Amendment."[66] Chief Justice Rehnquist also reinforced his argument with a decidedly non-textual ground, the idea that the Eleventh Amendment reflected a deeper "'shock of surprise'" among the founding generation when the 1793 case *Chisholm v. Georgia* suggested that unconsenting states could be sued in federal court.[67]

E. The Anti-Commandeering Immunity (and the Tenth Amendment)

The conservatives behaved in "anti-commandeering" or "Tenth Amendment" cases as they did in sovereign-immunity cases. The anti-commandeering doctrine holds that state legislative and executive officials may not be "pressed into federal service" by acts of Congress requiring them to pass state laws or take state administrative actions to execute federal policies.[68] The conservatives supported this doctrine because it seemed to them contrary to the original meaning of Article I, although they strained originalist logic on this point here more than anywhere else.

To appreciate the conservatives' problem, consider the Court opinion in *New York v. United States*, the case which first made the anti-commandeering principle the basis for a Court holding.[69] Justice O'Connor wrote the Court opinion declaring invalid provisions of a federal waste law that required states

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[64] *See* Seminole Tribe v. Florida, 517 U.S. 44, 62−66 (1996).

[65] *Id*. at 64.

[66] *See, e.g.*, *id.* at 58, 67, 72. *See also* Tennessee v. Lane, 541 U.S. 509, 538 (2004) (Rehnquist, C.J., dissenting).

[67] *See Seminole Tribe*, 517 U.S. at 69 (quoting Monaco v. Mississippi, 292 U.S. 313, 325 (1934)).

The judicial conservatives could also be criticized for one more specific ruling in the *Seminole Tribe* line of cases—*Alden v. Maine*, 527 U.S. 706 (1999), which immunized states from federal-question lawsuits in their own state courts. This ruling was less defensible for the conservatives, though still minimally defensible. In short, if the term "State" in the Constitution refers to a political organization with most of the attributes of sovereignty of 18th-century nations, it may not be proper, under the terms of the Necessary and Proper Clause, *Alden*, 527 U.S. at 732−33; Printz v. United States, 521 U.S. 898, 923−24 (1997), for Congress to pass a law that undermines state sovereignty by making the state suable in its own court without its consent. This argument turns on the accuracy of Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999).

[68] *Printz*, 521 U.S. at 905.

[69] 505 U.S. 144, 153−54 (1992) (citing 42 U.S.C. § 2021e(d)(2)(C)).

to "take title" to nuclear waste if they failed to meet certain conditions. Justice O'Connor relied heavily on history, to say that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[70] She relied heavily on a policy value, namely political accountability.[71] But Justice O'Connor did not rely heavily on constitutional text. She relied primarily on the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[72] As she quickly recognized, however, the Tenth Amendment merely "'states but a truism that all is retained which has not been surrendered.'"[73] Nevertheless, she insisted anyway that the Amendment "directs [the Court] to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power."[74]

For Justice Scalia, however, the Tenth Amendment is simply not a sound enough textual hook to hang the anti-commandeering rule. Justice Scalia struggled mightily with this problem in *Printz v. United States*, in which he wrote the Court's opinion declaring invalid provisions of the Brady Act that required state and local law-enforcement officers to participate in a federal program for checking the backgrounds of gun buyers.[75] In a concurrence, Justice Thomas underscored Justice Scalia's problem: Justice Thomas proposed to decide the case for Printz on either of two separate grounds—lack of power under the Commerce Clause, and Justice O'Connor's Tenth Amendment theory from *New York*.[76] The Commerce Clause theory was not implausible for Justice Thomas after his concurring opinion in *Lopez*, but it was not available to Justice Scalia. Scalia probably could not have kept a Court majority for that proposition, and in any case he had not joined Justice Thomas's *Lopez* concurrence. The Tenth Amendment theory, however, was not a plausible ground for decision for a serious originalist. Justice Scalia probably needed to make favorable reference to that theory to keep Justice O'Connor in his Court

[70] *Id.* at 162.

[71] *See id.* at 168−69 (If the federal government preempts, "it is the Federal Government that makes the decision in full view of the public, and it will be federal officials that suffer the consequences if the decision turns out to be detrimental or unpopular. But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated.").

[72] U.S. CONST. amend. X.

[73] *New York*, 505 U.S. at 156 (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).

[74] *Id*. at 157.

[75] 521 U.S. 898, 903 (1997) (citing 18 U.S.C. § 922(s)(1)(A)). Under the Act, these provisions were set to expire when the U.S. Attorney General established an instant background-check system. *See id.* at 902.

[76] *See id.* at 936−37 (Thomas, J., concurring).

majority, but he gave the theory only a passing reference.[77] In that respect, Justice Thomas deserves criticism for failing to practice the interpretive theory he usually preaches, while Justice Scalia appreciated how hard a case *Printz* is for originalists.

Justice Scalia therefore tried to establish the relevant original meaning in Article I, in "historical understanding and practice, in the structure of the Constitution, and the jurisprudence of this Court."[78] He leaned heavily on "almost two centuries of apparent congressional avoidance of the practice,"[79] on structural considerations arising from the Constitution's general scheme of dual sovereignty,[80] and on structural considerations arising from the president's control over federal law enforcement.[81] The only direct textual support he cited to support the anti-commandeering doctrine was the Necessary and Proper Clause. If an otherwise-necessary law "violates the principle of state sovereignty" outlined in the rest of the opinion, he held, it is not a "'La[w] . . . *proper* for carrying into Execution the Commerce Clause,' and is thus . . . 'merely [an] ac[t] of usurpation.'"[82]

Justice Scalia invited serious criticism when he admitted that "there is no constitutional text speaking to this precise question."[83] Justice Stevens excoriated Justice Scalia in his *Printz* dissent: "There is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports the proposition" that Scalia put forth.[84] Thomas Merrill dismissed *Printz* on the ground that it "lack[s] any foundation in the text of the Constitution."[85] These criticisms are fair as directed to *Printz*'s reasoning, but they do not discredit *Printz*'s specific holding or the original-meaning enterprise generally. As it so happens, Scalia missed a more precise textual foundation for the anti-commandeering rule. As Michael Rappaport explained later, the term "State" as used in the Constitution probably "refer[s] to an entity that retained a significant portion, but not all of the sovereignty of an independent nation." As a matter of original meaning, that residual sovereignty must be "meaningful."[86] If so, it is not far-fetched to suggest that the states

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[77] *See id*. at 919 (citing U.S. CONST. amend X). Justice O'Connor subtly criticized Justice Scalia by repeating the Tenth Amendment theory in a concurrence. *See id.* at 936 (O'Connor, J., concurring).

[78] *Id*. at 905.

[79] *Id*. at 918.

[80] *See id*. at 918−22.

[81] *Id.* at 922−23.

[82] *Id*. at 924 (quoting U.S. CONST. art. I, § 8, cl. 18; THE FEDERALIST No. 33, 204 (Alexander Hamilton), and citing Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297−326, 330−33 (1993)).

[83] *Id.* at 905.

[84] *Id.* at 944 (Stevens, J., dissenting).

[85] Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 613 (2003); *see also* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle*, 111 HARV. L. REV. 2180, 2192 (1998) (describing Justice Scalia as being in an "odd position").

[86] Rappaport, *supra* note 60, at 835.

cannot be sovereign without integrity and independence from interference by Congress.[87] If Rappaport is correct, Scalia was right to conclude that the take-title law in *New York* and the background-check provisions in *Printz* were not "proper" under the Necessary and Proper Clause, because both schemes subverted the principles of state autonomy implicit in the term "State" as used throughout the Constitution.[88] In that light, Justice Scalia should have been absolved of the sins of which he has been accused, but chastised for the lesser sin of second-rate historical and textual analysis. That sin, however, does not trouble Justice Scalia very much; he confesses to it and maintains anyway that originalism is the worst method of interpretation except for all the others.[89] If one takes his opinions in *Printz* together with his opinions in other federalism cases, *Printz* does not prove that Justice Scalia is a hypocrite; it merely shows him applying his usual approach in a hard case.

In the same vein, *Printz* is also extremely consistent with Justice Scalia's preference for bright-line rules. To begin with, Justice Scalia specified that the rule applies only in the narrow cases when the "whole *object* of the law [is] to direct the functioning of the state executive,"[90] and when the federal government tries to "compel the States to enact or administer a federal regulatory program."[91] Justice Scalia underscored the same tendency when he construed the term "proper" in the Necessary and Proper Clause, which did the same work in his theory of the case that the Tenth Amendment had done for Justice O'Connor in *New York*. Normally, "proper" is the sort of term that Justice Scalia would prefer to leave for Congress to construe. Indeed, Scalia raised this concern when he rejected the government's attempt to distinguish *New York* as a case about commandeering state legislators, not state executive officials. Justice Scalia rejected this argument, observing that the "Court has not been notably successful in describing the . . . line that separates proper congressional conferral of Executive power from unconstitutional delegation of legislative authority" in federal separation of powers law.[92] If so, why not get the federal courts entirely out of harm and mischief's way? Nevertheless, because the anti-commandeering rule is a narrow and fairly clear rule of law,

[87] *Id*. at 839−41, 847−49.

[88] To consider how the Necessary and Proper Clause reinforces what "State" suggests, consider Lawson & Granger, *supra* note 77, and Nelson, *supra* note 58, at 1641−42. Even then, however, it might be that the original evidence suggests that "States" could keep autonomy over their legislation but not over law execution. *See* Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957 (1993).

[89] *See* Scalia, *supra* note 20, at 860−61 (originalism does not "employ the ideal personnel").

[90] Printz v. United States, 521 U.S. 898, 932 (1997).

[91] *Id.* at 933 (quoting New York v. United States, 505 U.S. 144, 188 (1992)). However, scholars have disagreed with this assessment. *See* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz, *and* Yeskey, 1998 SUP. CT. REV. 71, 82−101 (doubting whether the Court will be able to distinguish coherently between federal preemption and federal commandeering).

[92] *Printz*, 521 U.S. at 927.

Justice Scalia was comfortable using the term "proper" as the legal hook for enforcing that rule against an unwilling Congress.

F. Section 5 of the Fourteenth Amendment

At the same time, *Printz* confirms that Justice Scalia approaches federalism cases slightly differently from the Chief Justice and especially Justice Thomas. In his Court opinion, Justice Scalia sought a doctrine that would leave courts to enforce clear and manageable rules; Justice Thomas's concurrence suggested that he would at least consider federalism theories that might force the Court to butt heads with Congress. That tension would recur in later federalism cases.

One such case was the 2004 decision *Tennessee v. Lane*.[93] *Lane* presented the question whether Congress could use Section 5 of the Fourteenth Amendment to make legislation providing state courts to provide access to the disabled. (Congress had done so in sundry provisions of Title II of the Americans with Disabilities Act, which imposed these duties more generally on state governments.)[94] Under Section 5 of the Fourteenth Amendment, Congress has "power to enforce, by appropriate legislation, the provisions of" the rest of the Amendment.[95] The Warren and Burger Courts had construed Section 5 relatively permissively, to authorize Congress to pass laws that prevented states from engaging in conduct that would likely generate future Fourteenth Amendment violations, and the Rehnquist Court had done so a year before, in the 2003 decision *Nevada Department of Human Resources v. Hibbs*.[96] However, in the 1997 decision *City of Boerne v. Flores*,[97] the Rehnquist Court's federalist majority had read Section 5 to authorize legislation only when Congress could identify a "remedial or preventive power" being exercised,[98] and could then demonstrate "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[99] The congruence and proportionality test narrowed but did not eliminate Congress's power to enact prophylactic legislation. The Court had also applied *Boerne* to declare invalid a separate title of the Americans with Disabilities Act, in *Board of Trustees of the University of Alabama v. Garrett*.[100] In *Lane*, for himself, the rest of the Court's liberal wing, and Justice O'Connor, Justice Stevens read *Boerne* and *Garrett* narrowly, read the Warren and Burger Court

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[93] 541 U.S. 509 (2004). I am indebted for much of the discussion in this section to Michael Rappaport. *See* Posting of Mike Rappaport, *Scalia, Originalism, and Clear Rules* to The Volokh Conspiracy, http://volokh.com/archives/archive_2004_06_00.shtml (June 4, 2004).

[94] *See Lane*, 541 U.S. at 516−17 (citing 42 U.S.C. §§ 12131−34).

[95] U.S. CONST. amend. XIV, § 5.

[96] 538 U.S. 721, 727−28 (2003).

[97] 521 U.S. 507 (1997).

[98] *Id*. at 529.

[99] *Id*. at 520.

[100] 531 U.S. 356 (2001).

precedents, *Hibbs*, and Section 5 broadly, and upheld the provisions under challenge.[101]

The Chief Justice wrote the lead dissent, which used common law case reasoning to liken the case to *Boerne* and *Garrett* and to distinguish it from *Hibbs*.[102] It is striking, however, that, unlike Justices Kennedy and Thomas, Justice Scalia chose not to join the Chief Justice's dissent. Justice Scalia dissented separately to voice bright-line concerns about *City of Boerne*'s "congruence and proportionality" test. Although he had "joined the Court's opinion in *Boerne* with some misgiving," Justice Scalia explained, he "generally rejected tests based on such malleable standards as 'proportionality,' because they have a way of turning into vehicles for the implementation of individual judges' policy preferences."[103] To replace the congruence and proportionality test, Justice Scalia looked away from the term "appropriate" in Section 5, and put all the stress on the term "enforce."[104] In his construction, Congress may "enforce" only when it passes laws to "put in execution" the mandates of the Fourteenth Amendment.[105] That test would have made it virtually impossible for Congress to pass prophylactic laws. Again putting all the stress on the term "enforce," Justice Scalia concluded that "[n]othing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or 'remedy' conduct that does not *itself* violate any provision of the Fourteenth Amendment."[106]

Two features of Justice Scalia's argument deserve special notice here. First, Justice Scalia followed the same approach to precedent as he followed in the dormant Commerce Clause and elsewhere. He tried to harmonize his rule with the Court's previous precedent by setting a clear and high wall between the permissive Warren and Burger Court cases and the strict post-*Boerne* cases. He sought to limit the most permissive Section 5 cases to govern only when Congress legislates regarding racial discrimination.[107]

Second, to attack the rule he sought to replace and to tout its replacement, Justice Scalia appealed primarily to policy arguments favoring bright-line rules. Justice Scalia criticized the congruence and proportionality test once for having "no demonstrable basis in the text of the Constitution," but he never backed this claim up, and he did not consider whether the term "appropriate" might provide just that basis.[108] Instead, he spent more energy complaining that the congruence and proportionality test "cannot objectively be shown to have been

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[101] *See* 541 U.S. 509, 523 (2004) (citing, *inter alia*, Faretta v. California, 422 U.S. 806 (1975); Boddie v. Connecticut, 401 U.S. 371 (1971)); *see also* id. at 524−25.

[102] *See id*. at 538−54 (Rehnquist, C.J., dissenting).

[103] *Id*. at 556 (Scalia, J., dissenting).

[104] *Id.* at 558.

[105] *Id.* at 559 (quoting Noah Webster, American Dictionary of the English Language 396 (1860)).

[106] *Id.*

[107] *See id*. at 561.

[108] *Id.* at 558.

met or failed."[109] Justice Scalia criticized the test for the policy reasons that generate bright-line rules: the congruence and proportionality test was a "standing invitation to judicial arbitrariness and policy-driven decisionmaking," it "cast[] th[e] Court in the role of Congress's taskmaster," and it was not "'judicially defensible in the heat of interbranch conflict.'"[110]

Perhaps the most telling sign came when Justice Scalia contrasted his construction of Section 5 with his preferred construction of the Necessary and Proper Clause. When Congress passed a *bona fide* "enforcement" action, Justice Scalia suggested, he was ready "to leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States."[111] That contrast created an incongruity. If his rule had been adopted, Justice Scalia would have construed the term "enforce" to limit Section 5 far more deeply than he reads "necessary" or "proper" to limit the Necessary and Proper Clause. In Section 5, Justice Scalia seemed willing to err on the side of construing Congress's jurisdiction more narrowly than original meaning permits; in the Necessary and Proper Clause, he suggested, he preferred to err on the side of construing that jurisdiction more broadly. Scalia inclined toward these opposite errors because he placed a higher priority on avoiding judicial abuse and congressional blowback than he did on following the original meaning of the relevant text, or on avoiding the substantive consequences that would have come from departing from original meaning.

G. The Necessary and Proper Clause

Lane was equally telling in that Justice Thomas declined to join Justice Scalia's opinion. He wrote a short opinion and joined the Chief Justice's lead dissent, but he made no reference to Justice Scalia's separate dissent.[112] One suspects that Justice Thomas was more comfortable than Justice Scalia was with the congruence and proportionality standard. Although the congruence and proportionality may be (Justice Scalia's words) "flabby,"[113] in substance it captures the substance of a term like "appropriate" about as well as can be expected of language. Perhaps Justice Thomas preferred to follow the original meaning of "appropriate" where it led, even if it required an open-ended inquiry about whether a law responded "congruently" and "proportionally" to a Fourteenth Amendment violation.

Justice Thomas leaned even closer to this possibility in a case decided the same day as *Lane*, *Sabri v. United States*.[114] *Sabri* upheld against federalism challenges a federal law making it a crime to bribe any officer of a state or local

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[109] *Id.*

[110] *Id*. (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995)).

[111] *Id.* at 564.

[112] *See id.* at 565−66 (Thomas, J., dissenting).

[113] *Id.* at 557−58 (Scalia, J., dissenting).

[114] 541 U.S. 600 (2004).

government office receiving more than $10,000 in federal funds.[115] The case centered on whether the anti-bribery law was a means necessary and proper for Congress to protect the integrity of federal appropriations. The Court voted 8-0-1 to uphold the law, citing *McCulloch v. Maryland* for the principle that the Necessary and Proper Clause requires courts to examine only a law's "means-ends rationality."[116] The Chief Justice and Justice Scalia both joined the Court's opinion without comment. Their agreement and silence are understandable. The Court's reading of *McCulloch* has been conventional legal wisdom for a long time,[117] and any other reading would force them to make what they consider controversial and unmanageable value judgments about what "necessary" and "proper" mean. Nevertheless, Justice Thomas doubted both claims. Re-reading *McCulloch*, Justice Thomas read the term "necessary" and Chief Justice Marshall's interpretation of it to require Congress "to show some obvious, simple, and direct relation between the statute and the enumerated power."[118] In doing so, Thomas called into question a long-established and permissive reading of *McCulloch*, and he did not worry whether terms like "obvious," "simple," and "direct" are open-ended. Since Justice Thomas was trying to undermine in *Sabri* the bright-line clarity that Justice Scalia was trying to prop up in *Lane*, small wonder that Justice Scalia declined to join Justice Thomas's opinion.

H. Raich *and the New Federalism*

Gonzales v. Raich brought this rivalry between Justices Scalia and Thomas out into the open. The case presented a Commerce Clause challenge to a federal Controlled Substances Act prosecution against two Californians who were home-growing and consuming marijuana for medical purposes.[119] Justices Souter, Ginsburg, Breyer, and Kennedy agreed to an opinion by Justice Stevens that limited *Lopez* and reaffirmed that *Wickard v. Filburn* remains the dominant Commerce Clause case of the last century.[120] Justice O'Connor wrote a dissent, joined by the Chief Justice and Justice Thomas, that worked with the doctrines and the distinctions available to read *Lopez* broadly and *Wickard* narrowly; Justice O'Connor's arguments could easily have been made by the Chief Justice as well. In any case, Justices Scalia and Thomas were both sidelined. Even so, Justice Thomas wrote a separate dissent criticizing the Court's Commerce Clause cases even more sharply than he had in *Lopez*, while Justice Scalia surprised many observers by writing a separate concurrence upholding the application of the act under the Necessary and Proper Clause. Justice

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[115] *See id.* at 602−03 (citing 18 U.S.C. § 666(a)(2)).

[116] *Id.* at 605 (citing McCulloch v. Maryland, 31 U.S. (4 Wheat.) 316 (1819)).

[117] *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 146 & n.711 (2004).

[118] *Sabri*, 541 U.S. at 613 (Thomas, J., concurring). *Cf.* Lawson, *supra* note 36, at 133−39.

[119] 125 S. Ct. 2195, 2199−200 (2005).

[120] *See id*. at 2206 (citing Wickard v. Filburn, 317 U.S. 111 (1942)).

Thomas and Justice Scalia spent almost as much time sparring with one another as they did criticizing Justice Stevens's opinion for the Court. Although their differences pale into comparison with the differences they have with the other members of the Court, *Raich* still marks a major break.

Justice Thomas's dissent is fairly easy to understand: It hewed to what Justice Thomas understood to be the original meanings of the term "interstate commerce" and "proper," no matter where those terms led. Justice Thomas assumed the truth of what he had demonstrated in *Lopez*, that "commerce among the several states" originally meant commercial sales across state lines. As applied to the Commerce Clause, Justice Thomas believed, the term "proper" limits Congress to executing its regulatory commerce powers only by means that do not undermine the general federal-state balance created by Article I, Section 8.[121] He thus cited *McCulloch v. Maryland* for the principle that "proper" requires laws to consist with the "'letter and spirit' of, the Constitution," here the federal-state balance as marked off by Article I's enumerations of federal power.[122] Justice Thomas's interpretation is not deferential. It bars Congress from regulating the making of goods such as coal, wheat, and cars on the claim that such regulations are necessary and proper means toward the end of regulating interstate markets in the same goods. Nor can Justice Thomas's interpretation be reduced to a bright-line test. Justice Thomas's interpretation requires courts to engage in some sort of substance-over-form balancing, to determine whether a challenged federal law "improperly" uses too much state regulation to effectuate a constitutional federal object. Justice Thomas's interpretation also defies the conventional and more permissive interpretation of the Necessary and Proper Clause, which has predominated in the Court's precedent and in the academic commentary.[123] At the same time, Justice Thomas's reading has some support in the plain meaning of the term "proper," in the Constitution's structure, in *McCulloch*, and in academic commentary by original-meaning scholars.[124] Even if *McCulloch* has been read more permissively than Justice Thomas reads it, he was comfortable criticizing the precedent for "convert[ing] the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a 'pretext . . . for the accomplishment of objects not intrusted [sic] to the government.'"[125] Above all, for Justice Thomas, original meaning and Article I's structure are trumps: "If the Federal Government can regulate growing a half-dozen cannabis plants for personal consumption (not because it is interstate commerce, but because it is inextricably bound up with interstate commerce), then Congress' Article I

[121] See *id.* at 2233−34 (Thomas, J., dissenting) ("may not use its incidental authority to subvert basic principles of federalism and dual sovereignty").

[122] *Id.* at 2233 (quoting McCulloch v. Maryland, 31 U.S. (4 Wheat.) 316 (1819)).

[123] *See, e.g.*, Young, *supra* note 110, at 146 & n.711.

[124] *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789−1888, at 163−64 (1985) (interpreting *McCulloch*), *cited in Raich*, 125 S. Ct. at 2231 (Thomas, J., dissenting); Lawson & Granger, *supra* note 77.

[125] *Raich*, 125 S. Ct. at 2234 (Thomas, J., dissenting) (quoting *McCulloch*, 31 U.S. (4 Wheat.) at 423).

powers—as expanded by the Necessary and Proper Clause—have no meaningful limits."[126]

By contrast, Justice Scalia's concurrence seems harder to understand. Thomas Merrill has speculated before that Justice Scalia may never have taken federalism very seriously.[127] Since *Raich* was announced, more than one academic has asked me whether Justice Scalia trimmed because he cares more about the War on Drugs than he does about federalism.

As should be clear by now, however, there is an explanation that is more charitable and consistent with Justice Scalia's track record in other federalism cases. To begin with, Scalia follows the conventional originalist wisdom about "interstate commerce." He agrees that "commerce among the several states" refers to interstate trade and the interstate intercourse that encourages such trade. He called it "misleading" to equate "the channels, instrumentalities, and agents of interstate commerce" with "activities that substantially affect interstate commerce."[128] The latter "are not themselves part of interstate commerce," he explained, "and thus the power to regulate them cannot come from the Commerce Clause alone."[129]

Yet while Justice Scalia agreed with Justice Thomas about the Commerce Clause, he broke from Thomas on the Necessary and Proper Clause. Scalia made clear what he had hinted in *Lane*: He construes the Necessary and Proper Clause to "empower[] Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation."[130] Scalia's reasoning follows in straightforward fashion from his minimalism. For one thing, he followed his theory of precedent. He followed the conventional reading of *McCulloch*, in which Chief Justice Marshall is supposed to have construed "proper" broadly to mean "appropriate" and "plainly adapted."[131] He also resuscitated *United States v. Coombs*, an 1838 decision in which the Court cited the Necessary and Proper Clause to uphold a law making it a felony to steal goods belonging to a ship or vessel.[132] For another thing, Scalia's interpretation of the precedents created a clear rule for courts to follow when they read the Necessary and Proper Clause. Under Justice Scalia's interpretation, courts do not interfere when Congress determines whether a law is "proper" except in two fairly clear situations: when the law has no

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[126] *Id.* at 2233.

[127] *See* Merrill, *supra* note 80, at 604−20 (arguing that Justice Scalia acted strategically for the better part of the Rehnquist Court to side with a federalism revolution with which he does not agree to advance his agendas in other fields of the Court's case law).

[128] *Raich*, 125 S. Ct. at 2215 (Scalia, J., concurring).

[129] *Id.* at 2215-16.

[130] *Id.* at 2218.

[131] *Id.* at 2219 (citing McCulloch v. Maryland, 31 U.S. (4 Wheat.) 316, 421 (1819)).

[132] 37 U.S. (12 Pet.) 72 (1838), *cited in Raich*, 125 S. Ct. at 2216 (Scalia, J., concurring). In *Coombs*, the Court went out of its way to warn that Congress lacked jurisdiction to bar such thefts under its admiralty jurisdiction. *See Coombs,* 37 U.S. (12 Pet). at 77−78.

connection to a scheme for regulating interstate markets,[133] or when the law violates a specific and clearly-defined state immunity.[134] The former explains why he voted to strike down a stand-alone gun-free school zone law in *Lopez* and a more-or-less stand-alone gender-violence law in *Morrison*. The latter explains why he spearheaded the sovereign-immunity comeback in *Union Gas Co.* and wrote the Court's anti-commandeering opinion in *Printz*.

Of course, if Justice Scalia follows these rules of decisions in future New Federalism cases, he will vote with the Court's nationalists at least as often as he votes with its remaining federalists. Substantively, as long as the Roberts Court chooses not to reconsider Congress's spending powers, the most important federalism doctrine remaining is *Lopez*'s rendition of the Commerce Clause. Justice Scalia may side with the federalists if and when the Court considers challenges to other laws lacking an obvious interstate hook. Nevertheless, *Raich* makes clear that Scalia will side with the nationalists in the unlikely event that the Court entertains Commerce Clause challenges to other federal schemes that regulate local activities on the pretense of guaranteeing certain consequences for interstate trade. One presumes that Justice Scalia can live with these consequences for the reasons he expressed in *Lane*: Going by his reading of the precedent and the Necessary and Proper Clause, he avoids creating a "standing invitation to judicial arbitrariness and policy-driven decisionmaking," he avoids "cast[ing] th[e] Court in the role of Congress's taskmaster," and he lays down a rule of decision "'judicially defensible in the heat of interbranch conflict.'"[135]

IV. FEDERALISM AND CONSERVATISM AT THE CLOSE OF THE REHNQUIST COURT

A. The Full Half of the Glass

Clearly, then, the Rehnquist Court's conservatives agreed with one another in federalism cases to a striking degree; just as clearly, *Lane*, *Sabri* and especially *Raich* brought to light previously-latent disagreements about how the conservatives understand sound constitutional interpretation and adjudication. These differences are becoming more and more important. The Senate has just confirmed one conservative, John Roberts, to replace Chief Justice Rehnquist and, as of the publication of this Article, the Senate seems ready to confirm another, Sam Alito, to replace Justice O'Connor. If President Bush nominates one more conservative, the Court will have a majority of so-called "judicial conservatives." It is then all the more striking that the legal academy does not appreciate the tensions between different species of judicial conservatives.

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[133] *See Raich*, 125 S. Ct. at 2217−18 (Scalia, J., concurring).

[134] *See id.* at 2219 (citing Printz v. United States, 521 U.S. 898, 923−24 (1997)).

[135] 541 U.S. 509, 558 (2004) (Scalia, J., dissenting) (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995)).

While I cannot give an exhaustive account here of any of the important issues raised by these tensions, let me at least identify the highlights by comparing the New Federalism to the Warren Court and the New Deal Court. Let us first look back on the Rehnquist Court along the 40-year view. This lens sets up the Rehnquist Court for comparison with the Warren Court. That comparison makes a certain amount of sense, for many contemporary debates in constitutional law still play out within horizons first drawn during the Warren Court.

Viewed in this light, the New Federalism of the Rehnquist Court surely stands as a significant achievement. In the 1960s and early 1970s, living-Constitution interpretation seemed novel and exciting, and its momentum was not slowed appreciably by criticisms from the likes of Black, Bickel, and Bork. To keep momentum for its innovations with the Fourteenth Amendment and the Bill of Rights, the progressive wing of the Warren Court needed to assume to an important extent that structural constitutional law no longer deserved serious attention. Once it was taken for granted that a vigorous and centralized national government could and would protect the rights of workers, racial minorities, and other relatively unprotected groups, that wing could then ask whether federal courts should use the Constitution's individual-rights provisions to protect those same groups when national and state legislation failed. Of course, in this period it was safe to assume that federalism was off the constitutional table; in 1964 federalism stood in worse repute among national elites than it ever had.

In comparison with that period, the Rehnquist Court's New Federalism project stands as an impressive accomplishment. Even if the New Federalism does not gain any more traction than it has now, at least it has changed the shape of constitutional discussion from the parameters set during the Warren Court. In 1965, it would have been unthinkable for a Supreme Court Justice to reconsider every Commerce Clause case going back to 1937; Justice Thomas did just that in *Lopez*. In 1965, "strict construction" stood in ill repute among national legal elites because the term was a euphemism used by Southern white elites to criticize the federal courts without talking specifically about desegregation. In *Lopez*, by contrast, Justice Thomas's concurrence appealed confidently to "original understanding" interpretation, and Chief Justice Rehnquist's Court opinion used the structural principle that "congressional authority under the Commerce Clause [is not] a general police power . . . retained by the States" to swat down all arguments to the contrary.[136] Different members of the Rehnquist Court's federalist majority also rendered vigorous, if perhaps rhetorical, defenses of federalism on its merits, in such cases as *New York v. United States*,[137] and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.[138]

[136] 514 U.S. 549, 567 (1995); *id.* at 584 (Thomas, J., concurring).

[137] 505 U.S. 144, 168 (1992) (defending federalism in terms of accountability by Congress and state governments to individual voters). For a more sustained defense of *New*

In other words, the New Federalism provides some small proof that the Rehnquist Court's conservatives succeeded in changing the subject to some extent from the subjects favored by the Warren Court. If the conservatives had voted in lockstep in most of the leading constitutional cases decided during the Rehnquist Court, the lockstep voting would have meant that they were still cornered in the terms of debate set by the Warren Court. They would have agreed to keep structural constitutional law up on the shelf, and they would have conceded that privacy issues were the only issues proper to play with on the table. Their failures would look more or less the same as their failures in reality—cases like *Lawrence v. Texas*, where they dissented noisily while the rest of the Court passed them by and extended the Warren Court's conceptions of personal privacy and moral autonomy into new areas. But their successes would have been far more limited—no better than rearguard actions like *Washington v. Glucksberg*,[139] in which they found common cause with Justices Kennedy and O'Connor not to extend those same conceptions of privacy and moral autonomy any further. The New Federalism provided some small proof that judicial conservatives shifted from defense to offense. It provided opportunities for the conservatives to forge coalitions to develop new doctrines (or to resuscitate old ones) more consistent with the Constitution's original design than Warren and Burger Court case law had recognized.

From that perspective, then, the split that emerged in *Raich* should be striking because it confirms how far the New Federalism has come. It was surprising enough that the Supreme Court chose to start striking down acts of Congress again under the Commerce Clause in *Lopez*. Even then, in 1995, it would have been extremely implausible to predict that the New Federalism would develop so far or so fast that a decade later it might founder because of the differences that separate the intentions of Chief Justice Rehnquist, Justice Scalia, and Justice Thomas.

B. The Empty Half of the Glass

On the other hand, from a longer perspective, *Raich* also suggests that the New Federalism did not go very far at all. This perspective, of course, is the 100-year perspective, which brings the New Federalism into comparison with the Progressive critique of pre-1937 dual federalism and the New Deal expansion of the federal government.[140] This comparison is far more severe and far less flattering, both for the New Federalism specifically and for "judicial conservatism" generally. Stated simply, "judicial conservatism" is not a

York's argument, consider John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System,* 99 NW. U. L. REV. 89 (2004).

[138] 527 U.S. 666, 690 (1999) (arguing that the framers' "north star was that governmental power, even—indeed, especially—governmental power wielded by the people, *had to be dispersed and countered*") (emphasis in original).

[139] 521 U.S. 702 (1997).

[140] *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); Claeys, *supra* note 5, at 11−21.

coherent single project of constitutional interpretation. Different species of the genus "judicial conservative" do not agree on enough particulars to launch a program of doctrinal change as far-reaching as Roosevelt's New Deal appointees did.

If one judges both solely by the sheer scale of the transformations they wrought, the New Federalism pales in comparison to the New Deal. Some reasons relate to Justices O'Connor and Kennedy. Although they are politically conservative, they are still far less originalist and far more nationalist than any of the judicial conservatives.[141] Other reasons relate to the politics of judicial confirmations. Judicial conservatives are just one of several constituencies in the coalition of political interests that comprise today's Republican party. Moreover, as the Souter nomination showed 15 years ago and the failed nomination of Harriet Miers just confirmed, presidents and their political advisors feel important pressures to nominate "stealth" appointments and/or political allies instead of known judicial conservatives. But let us assume here that Republican presidents keep the presidency for the near future; that they actively want to stop nominating O'Connors, Kennedys, Souters, and Miers; that they figure out how to stop doing so; and that they succeed in confirming one or two more clear judicial conservatives. Even in this extremely unlikely hypothetical, *Raich* still highlights why a coalition of judicial conservatives would not be unified enough to undo the New Deal transformation of Congress's powers.

Raich exposes a basic tension in how different kinds of judicial conservatives view the transformations wrote by American liberalism over the last century. Justice Thomas stands for the conservative lawyers and judges who understand judicial conservatism in terms of originalism. For them, the Court created a problem over the last century when it severed the connection between constitutional interpretation and original constitutional meaning. Originalists prefer to take on the New Deal expansion—indeed, they argue, the Court has no choice. The Court gets the power of judicial review, they argue, thanks to the original meaning and the very written-ness of the U.S. Constitution; it cannot then turn a blind eye when another branch of the government disregards the Constitution's provisions in a case properly before the courts. However, Justice Scalia stands for the conservative lawyers and judges who understand judicial conservatism in terms of judicial minimalism. For them, the greatest judicial sin of the last century occurred not when the Court strayed from original meaning but when the Warren Court overreached. Far from seeking to confront the New Deal, in many respects Justice Scalia and other minimalists seek to carry forward the restrained approach applied by the Court during and immediately after the New Deal, when the President's Court-packing plan was not yet a distant memory. The judicial-conservative movement has plenty of Scalias and Thomases, and conservative presidents and judge-pickers do not really distinguish between them when making appointments. The New Federalism revival could last only as long as both

[141] *See* Claeys, *supra* note 5, at 23, 25−34.

Scalias and Thomases were on board; in comparison with the New Deal expansion of the Commerce Clause, Justice Scalia and Justice Thomas's range of agreement is fairly narrow.

Judicial conservatism may change later, but not anytime soon. Consider President Bush's appointees to the Supreme Court. Both Chief Justice John Roberts and Justice-designate Sam Alito are federalists. As circuit judges, each encouraged his circuit to construe *Lopez* more broadly than his brethren preferred.[142] At the same time, we probably lack the information we need to determine where Judge Alito falls on the originalist-minimalist continuum. He has respected original meaning and precedent, but it takes a lot of cases at the Supreme Court to reveal the subtle differences between a Scalia and a Thomas. On the other hand, John Roberts may eventually resemble Chief Justice Rehnquist, Justice Scalia, or the second Justice Harlan, but he will probably not resemble Justice Thomas. Such would not be surprising from someone who is reputed to have taken Legal Process theory seriously as a student, who clerked for Judge Friendly and then-Associate Justice Rehnquist, and who was a Reagan administration lawyer.

To be sure, in the academy, the debate has shifted. Judicial minimalism gets less emphasis, as scholars like Justice Scalia, Judge Bork, and Lino Graglia have gotten older. Meanwhile, the next generation of originalists have spent far more energy clarifying what "originalism" is and working out the methods of inquiry and implications that follow.[143] At the same time, such a shift need not occur on the bench. Originalists are not monolithic, especially on broad terms such as "necessary" or "proper." Their disagreements probably seem trivial in the U.S. Justice Department and the other offices where many judicial conservatives get their second education, and even more so to the politicians and judge-pickers who appoint conservative nominees. Many of the best originalist scholars are not teaching at the schools that produce most of the likely Supreme Court nominees. Furthermore, even if any such shift does occur, it certainly will not occur any sooner than in two decades—the absolute minimum time it takes for professors' best students to become eligible for high office.

Separately, to roll back the New Deal expansion, judicial conservatives would also need to agree how to treat precedent. To be more pointed, they would need to agree to treat precedent in a certain way: not to attack it head on, but also not to treat it so deferentially as to put the seminal New Deal Commerce Clause, spending power, and Necessary and Proper Clause cases out of reach. *Raich* also suggests that this agreement is unlikely anytime soon in practice, and most originalists and other judicial-conservative academics have

[142] *See* Rancho Viejo, LLC v. Norton, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing *en banc*) (encouraging a Commerce Clause challenge against an application of the Endangered Species Act); United States v. Rybar, 103 F.3d 273, 286 (3rd Cir. 1996) (Alito, J., dissenting) (arguing for extending *Lopez* to bar a law banning the possession or transfer of machine guns).

[143] *See* Kesavan & Paulsen, *supra* note 15.

not given the problem of precedent serious attention until fairly recently.[144] Judicial conservatives on the bench should not be expected to solve over the next two decades thorny theoretical and practical problems that are still being worked out by their counterparts in the academy.

In fact, other problems would confound judicial conservatives even if they managed to surmount the problems that divided Justice Scalia from Chief Justice Rehnquist and Justice Thomas in *Raich*. Anyone who has read the surveys of Robert Post,[145] Barry Cushman,[146] and Richard Epstein[147] will recognize that the Commerce Clause case law between 1890 and 1937 raised many hard questions. Does the federal government regulate interstate commerce or local manufacturing conditions when the Department of Justice prosecutes a local company for monopolizing the national market for production of a certain good?[148] What of the case when an act of Congress bars interstate shipment of a good manufactured the wrong way?[149] My sense is that these cases could be resolved well enough to make the distinctions worth enforcing, but the issues raised are not easy. They also drive wedges between judicial conservatives especially effectively, forcing bright-line rule fans like Justice Scalia to quarrel with substance-over-form textualists like Epstein. Then, assuming those issues could be resolved, there would still remain massive reclamation projects elsewhere in federalism—federal field preemption, the Comity Clause (assuming conservatives were to succeed in burying the dormant Commerce Clause), and the choice-of-law and substantive-law rules governing diversity cases before *Erie*. Stephen Gardbaum[150] and Michael Greve[151] are the only recent scholars to appreciate

[144] *See* Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke* (2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=700175 (last visited Nov. 11, 2005); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not As Radical As It Sounds*, http://www.bu.edu/law/faculty/papers/pdf_files/BarnettR050205.pdf (last visited Oct. 9, 2005); Akhil R. Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 78−89 (2000); Young, *supra* note 14.

[145] *See* Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived?"*, 51 DUKE L.J. 1513 (2002).

[146] *See* Barry Cushman, *Continuity and Change in Commerce Clause Jurisprudence*, 55 ARK. L. REV. 1009 (2003); Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000).

[147] *See* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

[148] *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); United States v. E.C. Knight Co., 156 U.S. 1 (1895).

[149] *See* United States v. Darby, 312 U.S. 100 (1941); Hammer v. Dagenhart, 247 U.S. 251 (1918).

[150] Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 67 U. CHI. L. REV. 483 (1997).

[151] Michael S. Greve, *Laboratories of Democracy: Anatomy of a Metaphor*, FEDERALIST OUTLOOK AEI ONLINE, Apr. 1, 2001, http://www.aei.org/publications/pubID. 12743/pub_detail.asp; Michael S. Greve, Princeton Univ. Madison Lecture: Madisonianism with a Minus Sign: "Our Federalism" and the Constitution (Feb. 2004) at 16−21, http://federalismproject.org/masterpages/publications/Madison%20lecture.pdf.

how important these issues were to dual federalism; with so little serious academic interest, it is extremely unlikely that even the most dedicated lawyers could reconstruct the interstitial law that made dual federalism work. Here, too, many of the issues run against judicial conservatives' main attachments. *Swift v. Tyson*[152] diversity common law was an important part of pre-1937 dual federalism, but Justices Scalia and Thomas are probably the most skeptical critics of federal common law on the Court today.[153]

The New Federalism also pales in comparison to the New Deal because of the roles of the academy and the public-law bar. The Court was steering the case law toward the preferences of the academy and a substantial portion of the bar during the New Deal; not now with the New Federalism. After 1900, American law schools and other elite institutions were churning out many more admirers of Louis Brandeis than of George Sutherland,[154] while the Great Depression and the election of 1936 thoroughly demoralized the defenders of pre-1937 dual federalism. Long-term academic and political trends and the election of 1936 thus gave the Court considerable space to change course sharply and ratify the New Deal transformation. With the New Federalism, by contrast, the Rehnquist Court was trying to reverse course yet again—even though academic and political currents have been running even more strongly in a nationalist direction for 60 years.[155]

To be sure, this comparison is lopsided in many respects. The constitutional/political questions associated with the New Deal were an order more fundamental than the questions about constitutionalism that inform judicial nominations and federal politics today. But it is useful to remember that fact from time to time, because it is often forgotten in contemporary confirmation battles and academic scholarship. Shortly after President Bush's first election, legal academics who viewed that election as an act of usurpation accused the Rehnquist Court's moderates and conservatives of launching a "constitutional revolution" and of threatening to "redraw the constitutional map as we have known it."[156] In connection with the confirmations of Chief Justice Roberts and Justice-designate Alito, Cass Sunstein has published a book, titled *Radicals in Robes*, which takes on the "extreme view" that interpreters must try

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[152] 41 U.S. (16 Pet.) 1 (1842).

[153] *See, e.g.*, O'Melveny & Myers v. FDIC, 512 U.S. 79, 83 (1994) ("There is no federal general common law" (quoting Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938))); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 616−17 (1997) (Thomas, J., dissenting) (discussing dormant preemption).

[154] *See, e.g.*, STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877−1920 (1982).

[155] *See* Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477 (2001); Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483 (1998).

[156] Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1053 (2001).

"to illuminate the meaning of the text as the Framers understood it."[157] Yet in reality, as of now, the only Justice who consistently follows that view is Justice Thomas. Other judicial conservatives, while sympathetic to original meaning, are far more inclined to accept the New Deal than to confront it.

V. CONCLUSION

With these limitations, it is impressive that the New Federalism made any headway at all. All the same, the tension between originalism and judicial minimalism is a serious tension. It explains why the Rehnquist Court's judicial conservatives stopped voting together in *Raich*. More broadly, that tension is one contributing factor explaining why the New Federalism foundered on a case like *Raich*, and not a case much more threatening to the New Deal transformation of the American constitutional order.

[157] CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 4 (2005) (quotations omitted). Note that Sunstein refers to "the Scalia/Thomas brand of conservatism" without qualification. *Id.* at 11.