

“SOCIETY MUST BE [REGULATED]”: BIOPOLITICS AND THE
COMMERCE CLAUSE IN *GONZALES V. RAICH*

by
*John T. Parry**

*This Article makes three points about the Supreme Court’s recent decision in *Gonzales v. Raich*. First, it suggests that Raich complicates the effort to define Commerce Clause doctrine. Although Raich employed the doctrinal structure created by the *Lopez* and *Morrison* decisions, the emphasis was entirely different, and perhaps the only clear doctrinal result of the decision is that pieces of comprehensive regulatory programs will be upheld precisely because they are part of a larger program. Second, this Article contends that Raich exemplifies an idea of government power that assumes the rationality and desirability of regulation and that this assumption dovetails with Michel Foucault’s theory of biopower or biopolitics, in which the power of the modern state turns on its ability “to make live and let die.” Specifically, the Article explores what it means for constitutional law to accept the biopolitical nature of contemporary governmental power, particularly in the context of end of life decisions as well as pain-management. The third, concluding section considers the possibility that biopolitics, while usually described in negative terms, has more complex normative implications.*

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To defy our federal drug laws and to defy [them] on a whim that we can call anything and everything medicine without going through a proper process that protects people is what’s irresponsible. Clearly, you cannot just have people voting on what is and isn’t medicine. I mean, the average voter doesn’t have the time or the wherewithal to look at the research behind it. There has to be—if we’re going to call ourselves a civilized society and we’re going to have a process in our country to protect people, there has to be a process there. And I think . . . the FDA has done its job.¹

* Visiting Professor, Lewis & Clark Law School; Associate Professor, University of Pittsburgh School of Law. Thanks to Geoff Manne for including me in this symposium and to Brannon Denning for helpful comments.

¹ Calvina Fay, Executive Director of the Drug Free American Foundation, discussing *Gonzales v. Raich* on National Public Radio’s “Talk of the Nation,” June 7, 2005.

This Article on the Supreme Court's recent decision in *Gonzales v. Raich*² seeks to do three things. First, I will provide my assessment of what *Raich* might mean as a matter of doctrine—an assessment that will not be dramatically different from those provided by other participants in this symposium. Second, I will argue that *Raich* articulates an idea of government power that assumes the rationality and desirability of regulation and that this assumption dovetails with Michel Foucault's theory of biopower or biopolitics. I will also consider what it means for constitutional law to accept the biopolitical nature of contemporary governmental power, and here I will broaden my analysis to include end of life decisions as well as pain-management. Along the way, I will argue that federalism and rights-based responses to the biopolitical regulatory state fail to provide a meaningful alternative to its presumed flaws. Third, I will suggest in a brief concluding section that the biopolitical perspective may not be as bleak as it first appears to be.

I. RAICH AS DOCTRINE

Raich is the Supreme Court's third major effort in recent years to define a Commerce Clause power that is not logically limitless.³

The first case was *United States v. Lopez*, which struck down a federal statute regulating gun possession in a "school zone" on the ground that it exceeded Congress's powers under the Commerce Clause—the first such holding in nearly 60 years.⁴ Standing alone, *Lopez* could have been merely a shot across the bow: a warning to Congress that there must be some limits to the commerce power and that it should keep that idea in mind when legislating. Or, Chief Justice Rehnquist's majority opinion could be seen as an effort to give coherent content to Commerce Clause doctrine by organizing and explaining the disparate cases—as in his statement that "we have identified three broad categories of activity that Congress may regulate under its commerce power": (1) "use of the channels of interstate commerce," (2) "instrumentalities of interstate commerce, or persons or things in interstate commerce," and (3) "activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."⁵ And, of course, one might suspect that this organization and explanation also

² 125 S. Ct. 2195 (2005).

³ More generally, these cases are also part of the Court's recent effort to develop a law of federalism that is judicially-enforceable. Compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547, 554 (1985) (stating that, "[i]f there are to be limits on the Federal Government's power to interfere with state functions—as undoubtedly there are—we must look elsewhere to find them," and ultimately deciding that "the fundamental limitation . . . is one of process [*i.e.*, participation in the federal legislative process] rather than one of result").

⁴ 514 U.S. 549 (1995).

⁵ *Id.* at 558–59 (citations omitted). The Court identified these three categories in roughly similar terms in *Perez v. United States*, 402 U.S. 146, 150 (1971), although it used the broader phrase "activities affecting commerce" to describe the third category.

planted the seeds for redefining the commerce power—such as by requiring that the subject of regulation be an “economic activity” in some sense.⁶

Justice Kennedy’s concurrence raised the same ambiguities. On the one hand, his call for stability and restraint, and his insistence that decisions in this area would turn not on “content-based boundaries” but rather on matters of “degree,” blunted some of the potentially far-reaching aspects of the majority opinion.⁷ On the other hand, Justice Kennedy’s reliance on the concept of “an area of traditional state concern” (if that is not a “content-based boundary,” then what is?) to decide the case indicated a desire for a doctrine that would limit congressional activity across the board and not just in the case at hand.⁸

By contrast, Justice Thomas’s concurring opinion, which called for reconsidering “[i]n an appropriate case” and in light of original understandings the rule that the Commerce Clause permits Congress to regulate activities that have a substantial effect on interstate commerce, was far less ambiguous.⁹ So too were the dissents, which expressed alarm at the decision and made no serious effort to describe judicially enforceable limits on Congress’s commerce power, primarily because they insisted that the touchstone of Commerce Clause doctrine should be deference to Congress.¹⁰

In brief, the immediate impact of *Lopez* was uncertain. Large changes might be afoot, but their exact doctrinal form remained unclear. The phrase “economic activity” might become central, but the Chief Justice’s mention of “a distinction between what is truly national and what is truly local”¹¹—echoed in Justice Kennedy’s concurrence—could also be the key. Or the changes might be more modest: along the lines of requiring a jurisdictional element to ensure that the statute was properly applied in individual cases, or insisting on appropriate congressional findings of an impact on commerce (a kind of “due process of lawmaking” concern).¹² More than with most cases, it was clear that we would not know the holding of *Lopez* until the next case explained it to us.¹³

The next important case, *United States v. Morrison*, which struck down a provision of the Violence Against Women Act that created a civil cause of

⁶ *Lopez*, 541 U.S. at 559–61.

⁷ *Id.* at 574, 580 (Kennedy, J., concurring).

⁸ *Id.* at 583.

⁹ *Id.* at 585 (Thomas, J., concurring).

¹⁰ *See id.* at 603–04 (Souter, J., dissenting); *id.* at 616–17, 624–25 (Breyer, J., dissenting).

¹¹ *Id.* at 567–68.

¹² *See* Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 195 (1976); compare Philip Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002) (suggesting the Court’s commerce and Section Five cases misconceive and impose unrealistic expectations on the legislative process).

¹³ *See* Glenn H. Reynolds & Brannon P. Denning, *Lower Court Interpretations of Lopez, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369 (suggesting lower courts generally took the same wait-and-see attitude); cf. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 2–3 (Univ. of Chicago Press 1949) (discussing the ways in which the holding of a case emerges through subsequent interpretation).

action allowing victims to sue the perpetrators of “crime[s] of violence motivated by gender,” indicated that the doctrinal shift would be significant.¹⁴ Chief Justice Rehnquist’s majority opinion repeated the three “categories” of permissible Commerce Clause regulation established in *Lopez*. And as in *Lopez*, the third category—activities that substantially affect interstate commerce—was the only one into which the statute might fit.¹⁵ In response to the plaintiff’s claim that violence against women has a demonstrable effect on interstate commerce, as shown by numerous congressional findings, the Chief Justice applied *Lopez*: “a fair reading of *Lopez* shows that the noneconomic criminal nature of the conduct at issue was central to our decision in that case. . . . [I]n those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.”¹⁶

Under this approach, Congress’s findings were simply irrelevant because they did not show that any of the activity actually being regulated—gender-motivated crimes of violence—not only had an economic impact but was in itself economic.¹⁷ In addition, according to the Court, federal regulation of violent crime “that is not directed at the instrumentalities, channels, or goods involved in interstate commerce” would upset the “distinction between what is truly national and what is truly local.”¹⁸ Significantly, neither Justice O’Connor nor Justice Kennedy filed a separate concurrence, while Justice Thomas’s concurrence echoed his *Lopez* opinion and thus provided no comfort for anyone seeking to mitigate the impact of the majority opinion.¹⁹ On the other hand, the dissents were clear in their insistence that the court was veering badly off course.

One might still have asked, as the dissenters did, whether the distinctions drawn by the majority were conceptually coherent or workable.²⁰ Arguably too, as Justice Thomas suggested, the Court had not gone far enough.²¹ Once Congress is allowed to regulate activities with a substantial impact on interstate commerce, drawing a precise line within that category will be extremely difficult. The resulting back and forth with a Congress determined to regulate would likely push the Court back to deference. More generally, whether one thinks the Court went too far or not far enough, determining whether an activity is economic or noneconomic, or whether a particular topic of government

¹⁴ 529 U.S. 598 (2000).

¹⁵ *Id.* at 610.

¹⁶ *Id.* at 610–11.

¹⁷ *Id.* at 613–18. As the dissenters pointed out, this analysis seems in tension with the idea that Commerce Clause legislation should be reviewed under a rational basis standard, so that the issue would be whether Congress reasonably could have concluded that the statute would regulate activity that was both economic and had a substantial impact on interstate commerce. *See id.* at 637–38 (Souter, J., dissenting).

¹⁸ *Id.* at 617–18.

¹⁹ *See id.* at 627 (Thomas, J., concurring).

²⁰ *See id.* at 640–46 (Souter, J., dissenting).

²¹ *See id.* at 627 (Thomas, J., concurring).

concern or regulation is truly national or truly local, is not a process that leads to cut and dried conclusions—not even when there is agreement on the baseline from which to reason.²²

Finally, the stability of the *Lopez/Morrison* interpretation of the Commerce Clause was suspect. Could a five justice majority that included Justices Kennedy and O'Connor maintain a strong line between economic and noneconomic in cases in which federal action was “really” needed or in which Congress did not seem to be unduly trespassing into an area of “traditional state concern?”²³ Once again, lower courts initially adopted a wait-and-see attitude.²⁴

²² For discussion of some of these problems, see generally Catherine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 YALE L.J. 619 (2001).

²³ The quotation marks simply indicate that *Morrison* can be seen as a case in which a majority of the Court decided that the general problem of violence against women or the specific availability of tort claims by victims was not a significant enough federal concern, or was actually not an area in which states had failed—which then leaves open the possibility of using the Commerce Clause to uphold statutes that meet these criteria. I do not mean to suggest that the issues in *Morrison*, or for that matter in *Lopez*, were necessarily or objectively less significant than in other Commerce Clause cases.

²⁴ See Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003). In their contribution to this symposium, Reynolds and Denning suggest that lower courts were beginning to take *Lopez* and *Morrison* seriously just as *Raich* was making its way to the Supreme Court. See Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915 (2005). Worth stressing is that consideration of the Court's Commerce Clause cases from *Lopez* to *Raich* reveals greater complexity than a mere focus on *Lopez* and *Morrison*, which renders the outcome in *Raich* less surprising and also helps explain the reactions of lower courts. For example, the same Term as *Morrison*, the Supreme Court also decided *Jones v. United States*, 529 U.S. 848 (2000), which overturned a criminal conviction by adopting a reading of the federal arson statute that was influenced by the principles of *Lopez* and *Morrison*, and *Reno v. Condon*, 528 U.S. 141 (2000), which suggested that restrictions on Congress's commerce power would still allow regulation of state economic activities—in this case the sale by states of personal information about licensed drivers. A year later, a 5-4 Court decided *Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), which rejected an EPA regulation that relied on an interpretation of the Clean Water Act that—according to the majority—would raise serious Commerce Clause issues, and where there was no clear statement from Congress that it meant to go so far. The dissenters contended that EPA's interpretation of the Act “falls well within the boundaries set by this Court's Commerce Clause jurisprudence”—including *Lopez* and *Morrison*. *Id.* at 192–93 (Stevens, J., dissenting). In the 2002 Term, the Court unanimously ruled in *Pierce County v. Guillen*, 537 U.S. 129 (2003), that a federal statutory ban on civil discovery of information collected by the states pursuant to federal highway safety programs was a valid exercise of the commerce power. The Court reasoned that discovery of highway safety information in civil suits made the states reluctant to gather that information, which in turn hampered efforts to improve highway safety, which in turn is a valid objective under the power to regulate the channels of interstate commerce and protect instrumentalities of interstate commerce. *Id.* at 147. Last Term, in *Sabri v. United States*, 541 U.S. 600 (2004), the Court upheld a federal statute that criminalizes bribes of state and local officials as a valid exercise of the spending power and the Necessary and Proper Clause, and it rejected an argument that *Lopez* and *Morrison* applied to and doomed the statute. In a concurring opinion, Justice Thomas addressed the

Raich complicates any effort to chart a clear doctrinal path. Writing for the majority, Justice Stevens provided at least two general descriptions of the Court's holding. First, Congress has the power under the Commerce Clause to "prohibit the local cultivation and use of marijuana [for medicinal purposes] in compliance with California law."²⁵ Second, "Congress's power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally."²⁶ Both statements are arguably in tension with the doctrinal direction that *Lopez* and *Morrison* suggested.

Reaching this holding (or perhaps holdings) involved two key issues: (1) whether Congress was really regulating an economic transaction when it prohibited cultivation or use of marijuana for medicinal purposes, and, more critically, (2) whether it would be better to uphold the statute even if that meant stretching the idea of economic activity or whether instead it would be better to strike down the statute and thereby limit the power of Congress to enact comprehensive regulatory programs. The justices—and particularly the majority—presented the issues in doctrinal terms as a problem of interpreting precedent, most critically the interaction of *Lopez* and *Morrison* with *Wickard v. Filburn*—which is arguably the most far-reaching Commerce Clause case.²⁷

To begin, Justice Stevens pointed out that the prohibition on cultivation or use of marijuana for medicinal purposes was part of a much larger program of regulation that encompassed, not just all uses of marijuana, but also a wide variety of "controlled substances."²⁸ Neither the parties nor any of the justices doubted that Congress could regulate controlled substances in the aggregate; they are articles that move in interstate commerce, albeit largely through illegal transactions. The issue, then, was whether marijuana grown, possessed, and consumed locally for medicinal purposes should be exempted.²⁹

As Chief Justice Rehnquist had in *Lopez* and *Morrison*, Justice Stevens sought to present a coherent picture of Commerce Clause doctrine, and in so doing he accepted the trappings of *Lopez* and *Morrison*. First, he endorsed the same three categories of acceptable Commerce Clause legislation articulated in *Lopez*, and he then described the power to regulate activities that substantially

Commerce Clause argument directly and said that the statute was valid Commerce Clause legislation as a matter of precedent. *See id.* at 610–11 (Thomas, J., concurring).

²⁵ *Raich*, 125 S. Ct. at 2199.

²⁶ *Id.* at 2201.

²⁷ 317 U.S. 111 (1942). Thus, Justice Stevens insisted that "[w]ell-settled law controls our answer," *Raich*, 125 S. Ct. at 2201, and concluded that, "[u]nder the present state of the law . . . the judgment of the Court of Appeals must be vacated." *Id.* at 2215. When a Supreme Court majority uses such phrases, one should probably assume that change is afoot. As an aside, the word "better" in my discussion of the issues before the Court should be read loosely, for example, in terms of the Constitution's "best" or most "precise" meaning, whether as a matter of text, intent, precedent, or policy, or with reference to the most desirable meaning from whatever perspective one brings to bear on the issue (*i.e.*, drug policy, federal power, individual rights, constitutional theory, and so on).

²⁸ *Id.* at 2201–04.

²⁹ *Id.* at 2196.

affect interstate commerce as extending to “purely local activities that are part of an economic ‘class of activities.’”³⁰

But the emphasis was different from the two previous cases. Justice Stevens sought to make *Wickard* the central doctrinal case. According to him, *Wickard* “establishes that Congress can regulate purely intrastate activity that is not itself ‘commercial,’ in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.”³¹ From there, upholding the medical marijuana ban flowed naturally.

By contrast, Justice Stevens chided the plaintiffs for reading *Lopez* and *Morrison* “far too broadly.”³² Neither case, he said, involved a challenge to a small aspect of an otherwise constitutional and comprehensive regulatory scheme; instead, the statutes in those cases were stand-alone regulations that either were, or were not constitutional. Nor did either case involve regulation of “economic activity,” whereas the regulation of locally grown and consumed marijuana is “quintessentially economic”—a term which he defined to include at least “the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market.”³³ Further, once an economic activity exists, “[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational [and commonly utilized] means of regulating commerce in that product.”³⁴

In short, I would read the majority as stating that *Wickard* is the heart of Commerce Clause doctrine, while *Lopez* and *Morrison* are, if not outliers, at least cases that merely police the outer boundaries of the doctrine to ensure that Congress is regulating economic activity in the broad sense defined by *Raich*, which includes production, distribution, possession, or consumption of a

³⁰ *Id.* at 2205.

³¹ *Id.* at 2206. Justice Stevens continued by emphasizing the factual similarities between *Wickard* and *Raich* and minimizing the factual differences. The differences, he said, “do not diminish the precedential force of this Court’s reasoning.” *Id.* at 2207. Not surprisingly, for Justice O’Connor in dissent, these distinctions were critical, because she used them to define a more limited idea of *Wickard*’s “precedential scope.” *See id.* at 2225–27 (O’Connor, J., dissenting). Similarly, Justice Stevens deferred to Congress’s findings about “the causal connection between the production for local use and the national market,” *id.* at 2208, while Justice O’Connor contended that these findings were less extensive than the ones found inadequate in *Morrison* and that, in any event, they were neither specific to marijuana nor targeted at medical uses, *id.* at 2227–28 (O’Connor, J., concurring). I make no effort in this Article to reveal the real meaning or most important facts of *Wickard*. Nor do I try to determine whether the congressional findings at issue in *Morrison* and *Raich* are similar, different, or for that matter, sufficient to meet whatever Commerce Clause standard of review the Court chooses to employ.

³² *Id.* at 2197.

³³ *Id.* at 2198.

³⁴ *Id.* at 2209–11; *see also id.* at 2215 (describing the regulated activity as “the intrastate, noncommercial cultivation, possession and use of marijuana”). Justice Stevens also dismissed arguments that sought to narrow the scope of permissible regulation by focusing on medicinal use and compliance with state law. *See id.* at 2211–15.

commodity that moves in interstate commerce or that either effects interstate commerce or effects the regulation of interstate commerce.³⁵

Justice Scalia's interesting concurrence insisted that "Congress's regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause."³⁶ His basic point was that the Necessary and Proper Clause allows Congress to regulate "even those intrastate activities that do not themselves substantially affect interstate commerce" if such regulation is "necessary to make a regulation of interstate commerce effective" (and that it cannot regulate intrastate commerce in the absence of such a necessity, as in *Lopez* and *Morrison*).³⁷ As a prime example of this kind of situation, he observed that "[t]he regulation of an intrastate activity may be essential to a comprehensive regulation of interstate commerce even though the intrastate activity does not itself 'substantially affect' interstate commerce."³⁸ Application of this principle to the Controlled Substances Act's regulation of locally grown and consumed marijuana was "straightforward" and resulted in his vote to uphold the statute as applied.³⁹

In dissent, Justice O'Connor took particular issue with the majority's "breathtaking" definition of economic activity, which she claimed would "skirt the real problem of drawing a meaningful line between 'what is national and what is local.'"⁴⁰ Under her interpretation of *Lopez* and *Morrison*, local cultivation and use of marijuana for medicinal purposes is not an economic activity because it is not commercial, and nothing in *Wickard* would allow Congress to reach so far.⁴¹ She also stressed that the majority's emphasis on the scope of Congress's regulatory ambitions as a reason for upholding application of the Controlled Substances Act to medical marijuana "gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision."⁴²

³⁵ Fans—if any remain—of the direct/indirect effects test might want to argue that allowing regulation of noneconomic activities because they are important to a broader regulation of interstate commerce is another way of saying that those activities have an indirect effect on interstate commerce, while the actual purchase of marijuana in the marketplace would have a direct effect on interstate commerce. I'm not sure how useful such an analysis would be, but the lure of describing *Raich* in this way seems clear.

³⁶ *Raich*, 125 S. Ct. at 2216 (Scalia, J., concurring).

³⁷ *Id.* at 2216, 2218. By invoking the Necessary and Proper Clause to uphold the statute, Justice Scalia laid himself open to the charge that he had "resort[ed] to the last, best hope of those who defend ultra vires congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1997) (Scalia, J.); see *Raich*, 125 S. Ct. at 2226 (O'Connor, J., dissenting) (making such a suggestion).

³⁸ *Id.* at 2217 (Scalia, J., concurring).

³⁹ *Id.* at 2219.

⁴⁰ *Id.* at 2224 (O'Connor, J., dissenting).

⁴¹ *Id.* at 2224–27 (O'Connor, J., dissenting).

⁴² *Id.* at 2221; see also *id.* at 2222 ("In my view, allowing Congress to set the terms of the constitutional debate in this way, *i.e.*, by packaging regulation of local activity in broader

For his part, Justice Thomas reiterated his call for interpreting the Commerce Clause according to original understandings that would limit Congress's power to regulation of "the buying and selling of goods and services trafficked across state lines," except where the Necessary and Proper Clause allowed broader regulation.⁴³ While he admitted that on its face the general prohibition on intrastate growing, possessing, or distributing of marijuana might be necessary to regulating interstate commerce in marijuana, Justice Thomas insisted that federal regulation of the intrastate cultivation and use of marijuana for medical purposes was neither necessary nor proper.⁴⁴ As had Justice O'Connor, he also complained that the majority placed too much weight on the existence of a comprehensive scheme of regulation.⁴⁵

What does all this mean for Commerce Clause doctrine? A snapshot suggests that the momentum of *Lopez* and *Morrison* has been stalled. A majority of the Court has made Commerce Clause doctrine important again and to some extent has forced a change in the vocabulary by which that doctrine is articulated. But that majority has not yet managed to reformulate the substance of the doctrine very much, primarily because Justices Kennedy and O'Connor have not been willing to push for a significant amount of change.⁴⁶

Redefining doctrinal vocabulary can be a significant accomplishment if it influences legislative activity or promotes substantive doctrinal change. Yet *Lopez* and *Morrison* received at best mixed reviews in the lower courts,⁴⁷ and over the short term *Raich* will surely reinforce the inclination of lower courts not to do much with Commerce Clause doctrine, whatever the vocabulary of that doctrine might be. Similarly, I am not aware of evidence that Congress has shied away from regulation because of *Lopez* and *Morrison* (as opposed to because of turnover that may have produced more members with greater sympathy for state sovereignty).⁴⁸ Put differently, and as I already suggested,

schemes, is tantamount to removing meaningful limits on the Commerce Clause."). The realities of congressional politics, on the other hand, will often provide a counter-incentive against the enactment of broad, comprehensive regulatory schemes. What seems more likely is that, when Congress is attempting broad regulation, proponents of more targeted and constitutionally-dubious regulation will try to find a way to link it to the broader scheme (or they will try to link it to a pre-existing broad scheme of regulation).

⁴³ *Id.* at 2229–31 (Thomas, J., dissenting).

⁴⁴ *Id.* at 2231–34.

⁴⁵ *Id.* at 2237–38 (asserting that reliance on a comprehensive scheme that regulates an entire "class of activities" "begs the question . . . whether respondents' 'class of activities' is 'within the reach of federal power,' which depends in turn on whether the class is defined at a low or a high level of generality," and insisting that the constitutionality of a particular prohibition should not depend on whether it is enacted as a stand-alone statute or as one provision of a larger statute).

⁴⁶ One could draw the same conclusions about Section Five doctrine and the impact of *Tennessee v. Lane*, 541 U.S. 509 (2004), except that Justice Kennedy has been more firmly in favor of limiting the Section Five power.

⁴⁷ See *supra* notes 13, 24.

⁴⁸ See Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 451 (2001). The extent to which legislators take constitutional doctrine into account as a reason not to seek or vote for particular legislation is unclear and will likely depend in part on issues that have little to do with constitutional law.

the safe bet is to conclude that the heart of Commerce Clause doctrine remains largely unchanged to date, so that *Wickard* is still a core case while *Lopez* and *Morrison* represent subordinate efforts to define the periphery of permissible regulation.

Also worth highlighting, particularly for purposes of this Article, is the fact that six justices have signed on to the idea that the existence of a comprehensive regulatory scheme allows Congress greater latitude, through the Commerce Clause and/or the Necessary and Proper Clause, to regulate activities that have substantial effects on interstate commerce, even if those activities are not themselves commercial or economic within the meaning of *Lopez* and *Morrison* (whatever that meaning may be). That is, Congress may lack constitutional authority to regulate a given activity standing alone, but if Congress regulates an entire area that is related to that activity, it may gain the power to regulate that activity as well. Still another way of putting this nascent rule—if that is not too strong a word—is that the more Congress regulates, the more it can regulate.⁴⁹

I'll end this section with two caveats. First, remember the idea of distinguishing between what is truly national and what is truly local (or, alternatively, the need to respect areas of traditional state concern). *Raich* can be distinguished from *Lopez* and *Morrison*, not only because the regulation at issue is part of a comprehensive regulatory scheme, but also because regulation of drugs and controlled substances has been an area of national concern for roughly a century (depending on when one begins counting) and is a topic that has national and even international importance. Thus, perhaps *Raich* is the outlier because it addresses the exceptional case, and *Lopez* and *Morrison*, interpreted as Justice O'Connor suggested, are the core, normal cases—or so the Court reasonably might hold in the next case.

That observation leads to the second caveat. Coming up with a correct doctrinal description of *Raich*—let alone a doctrinal assessment of *Lopez*, *Morrison*, and *Raich*, or of Commerce Clause doctrine in its entirety—may be a fool's errand. Consider Mark Tushnet's assessment of *Raich* soon after it was decided:

[F]or a while I thought we might regard the Supreme Court's federalism decisions as reflecting, not so much a coherent doctrine, but an attitude toward federalism—a general lack of sympathy for claims of expansive national power, which lack could be overcome by something enough justice found sufficiently important. . . . The alternative, which I suppose is getting increasingly plausible, is that the Court doesn't even have an attitude about federalism. What it has are, well, results. . . . I suppose that

For a qualified assertion that legislators do respond to court rulings when crafting new legislation, see Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 888–89 & n.221 (1991). For the suggestion that judicial review discourages legislators from giving full consideration to constitutional issues, see Devins, *supra*; Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1366–68 (1997).

⁴⁹ For a similar observation after *Morrison* was decided, see Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325, 1325 (2001).

someone truly dedicated to making doctrinal sense of the cases—or someone who had to do so as a matter of professional obligation—could come up with something that worked. But a more parsimonious account, I suspect, would be that there are some statutes five or more justices . . . think are more or less good ideas, and others that five or more justices think are more or less bad ideas; and that those justices will go to any (purportedly doctrinal) port in a storm to reach the results they think sensible.⁵⁰

Although I am sympathetic to Tushnet's analysis, I am not ready to go all the way with his application of Occam's razor. Doctrine is plainly a moving target, and it often seems to move much more according to attitudes than according to an apolitical internal logic. Yet I suspect that each of the justices tries most of the time to be reasonably consistent in his or her attitude toward federalism, as well as in his or her efforts to craft doctrine to reflect those attitudes. So, too, the justices almost always insert their doctrinal reasoning into an ongoing stream of precedent. Certainly they interpret earlier cases (readers should feel free to substitute "twist" or "misread" for "interpret"), but the felt need to take account of those cases tends to provide a real degree of constraint, particularly on the shape and tone of majority opinions. From there, one can usually chart out an aggregate doctrinal landscape, even if the details remain generally fuzzy. In short, I would argue that the justices make a good-faith effort to at least run their sense of what is or is not a good idea through the maze of doctrine, and that this process constrains—but does not itself determine—votes, results, and reasoning in individual cases and over time. The result, with Commerce Clause doctrine as in other areas, is something more than results, even if also something less than coherence or consistency.

II. *RAICH* AS BIOPOLITICS

What was at stake in *Raich*? The press tended to present the case as being about the right of seriously ill people to use marijuana for pain relief. And it is true that a substantive due process claim was part of the case—but the Court never reached that claim.⁵¹ Nor was the case simply about what the first section of this Article discusses: the power of Congress to regulate the medicinal use of intrastate marijuana. Critically, the Court assumed that medical marijuana would—and indeed should—be regulated by government entities at some level. The only issue was which government was allowed to do the necessary regulating.

Put doctrinally, *Raich* clearly is a federalism case. But underneath the veneer of federalism is a broad idea and endorsement of comprehensive regulatory power, be it federal (through the Commerce Clause) or state (through the so-called police power).

⁵⁰ Posting of Mark Tushnet to SCOTUSblog, "*Understanding*" *Gonzalez v. Raich*, http://www.scotusblog.com/movabletype/archives/2005/06/understanding_g.html (Jun. 6, 2005, 14:05 EST).

⁵¹ *Raich*, 125 S. Ct. 2195, 2215 (2005).

Another way of making the point is that federalism should not be seen merely as an issue of legal boundaries between state and federal governments. Nor does it function primarily to protect individual liberty.⁵² Instead, federalism is about allocating an increasing and overlapping government power to regulate people. Under this account, the struggle in recent federalism cases over state sovereignty and the appropriate level of dignity and respect to be accorded the states has resonance precisely because of the specific meaning and significance of “sovereignty” today.⁵³ With a broadening and deepening of the categories in which governments legitimately may regulate has come a kind of turf fight over which governments will have the greater share of regulatory authority—authority which they fully intend to use.

In general, that is, the federalism fight is not a dispute in which one government seeks merely to prevent regulation by the other, so that one possible outcome would be lack of regulation altogether. (Although because challenges to the constitutionality of particular exercises of government power are often brought by individuals, it is easy to forget that fact.) That is certainly the case with respect to *Raich*, for California plainly sought to regulate and control the use of marijuana; it just had different methods and goals than the federal government.⁵⁴ Or consider the current effort to combat the spread of methamphetamine by restricting access to over-the-counter cold and allergy medications that contain pseudoephedrine. In the absence of significant federal regulation, several states have limited public access to these over-the-counter medications. The federal government now appears poised to follow suit.⁵⁵ The only difference from regulation of medical marijuana—and one of the significant areas of controversy—is that the proposed federal statute might not restrict the ability of the states to regulate even more broadly than the federal government.⁵⁶

⁵² See, e.g., 514 U.S. 549, 576–77 (1995) (Kennedy, J., concurring) (developing the argument that federalism protects individual liberty).

⁵³ See, e.g., *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (“The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”).

⁵⁴ For an overview of the “strict[] controls” that California established for the regulation of medical marijuana, see *Raich*, 125 S. Ct. at 2232 (Thomas, J., dissenting).

⁵⁵ See Daniel Costello, *Remixed Cold Meds Pack Less Punch*, L.A. TIMES, Aug. 15, 2005, at F1:

As abuse of methamphetamines has grown in recent years, at least 44 states have enacted laws or are considering legislation to restrict products that contain pseudoephedrine. California now limits people from buying more than three packages of cold or allergy pills during each visit, and Oregon will require consumers to get a prescription from a doctor before they can buy over-the-counter cold medications next year. Congress is also considering legislation . . . requiring retailers to put all cold medications containing the decongestant behind the counter and have customers sign an inventory log and show a photo ID. Under the bill, pseudoephedrine would be listed as a Schedule 5 narcotic and could only be sold by a pharmacist.

⁵⁶ See *Senate Urges FDA to Speed Up Reviews of New Cold Formulas*, FDA WEEK, Aug. 12, 2005 (noting the controversy over whether federal legislation should preempt more far-reaching state regulation).

Respecting the dignity of the states, then, means respecting their sovereign capacity to manage their populations. Accepting federal power to regulate increases the size of the relevant population to be regulated, but I suspect it has little impact on whether regulation takes place. People disagree, of course, on whether it is better or more efficient to centralize regulation with the federal government or leave it to state or local entities that may have advantages in dealing with local conditions. Localized regulation could arguably even be more sensitive to the liberties or freedoms of those being regulated—although if that is the case, then we must consider whether those freedoms and liberties are themselves a subject of regulation and exist at its sufferance.

In a series of lectures given in the mid-1970s, recently collected under the title *Society Must Be Defended* (which I have adapted for the title of this Article), Michel Foucault used the term “biopolitics” to describe the expansion of sovereign power from “the right to take life or let live,” to include “the right. . . to ‘make’ live and ‘let’ die,” and he suggested that this sovereign right operates through general regulation of populations rather than through acts targeted at specific individuals.⁵⁷ As he explained,

[T]his technology of power, this biopolitics, will introduce mechanisms with a certain number of functions that are very different from the functions of disciplinary mechanisms. The mechanisms introduced by biopolitics include forecasts, statistical estimates, and overall measures. And their purpose is not to modify any given phenomenon as such, or to modify a given individual insofar as he is an individual, but, essentially, to intervene at a level at which these general phenomena are determined, to intervene at the level of their generality. The mortality rate has to be modified or lowered; life expectancy has to be increased; the birth rate has to be stimulated. And most important of all, regulatory mechanisms must be established to establish an equilibrium, maintain an average, establish a sort of homeostasis, and compensate for variations within this general population and its aleatory field. In a word, security mechanisms have to be installed around the random element inherent in a population of living beings so as to optimize a state of life.⁵⁸

⁵⁷ MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLÈGE DE FRANCE, 1975–1976, at 241, 245–47 (David Macey trans., Mauro Bertani et al. eds., Picador 2003).

⁵⁸ *Id.* at 246. See also MICHEL FOUCAULT, I THE HISTORY OF SEXUALITY: AN INTRODUCTION 135–45 (Robert Hurley trans., Random House 1978) (1976); Michel Foucault, *Governmentality* (1978), in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87, 99–102 (Graham Burchell et al. eds., 1991). Because I am painting with a broad brush and my basic point is straightforward, I have made little effort to address the differences in emphasis among Foucault’s various discussions of biopolitics and governmentality, let alone to consider whether or how these discussions fit with his other work. Compare Arpád Szakolczai, *Reappraising Foucault*, 103 AM. J. SOC. 1402, 1407–08 (1998) (arguing “nothing would be more mistaken than to take the 1976 course as representative concerning Foucault’s ‘theory’ of power”), with Jan Goldstein, *Framing Discipline With Law: Problems and Promises of the Liberal State*, 98 AM. HIST. REV. 364, 368 (1993) (arguing Foucault’s work is characterized by “plurivocality” within and between “certain key texts”). For a good overview of biopolitics, see Paul Rabinow, *Introduction*, in THE FOUCAULT READER 3, 14–23 (Paul Rabinow ed., 1984). For a useful and extended

It does not take much effort to see that this description matches the everyday, largely uncontroversial practices of what we sometimes call “the administrative state,” even allowing for differences in the ways the administrative state operates in different societies.

Most of the opinions in *Raich*, as well as the quotation that opens this Article, reflect the way in which this biopolitical perspective on state power—and thus the idea of federalism that I just developed—has become pervasive, so that the rational regulation and management of the population in the aggregate becomes normal, expected, and beneficial by definition. By contrast, the alternative of individual choice—or even choice through majority rule—becomes “irresponsible” and inconsistent with a “civilized [read, regulated] society.”⁵⁹

In the majority opinion, for example, Justice Stevens described California as “a pioneer in the regulation of marijuana,”⁶⁰ even as he characterized the federal Comprehensive Drug Abuse and Control Act of 1970 as an effort to develop “meaningful regulation” of “legitimate” and “illicit” drugs.⁶¹ As he describes it, the Act came at the same time that the executive branch and Congress sought a more rational organization of agencies and laws relating to drugs, and the resulting statute signaled a substantial increase in the scope and detail of controlled substance regulation.⁶² At the end of the opinion, Justice

analysis of some of the ambiguities in Foucault’s writings, see NANCY FRASER, *UNRULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY* 17–66 (1989). For the argument that a global form of biopolitics has emerged, see MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 22–41 (2000).

⁵⁹ See *supra* note 1. Only Justice Scalia’s opinion fails to articulate a biopolitical conception of regulation. At the same time, however, nothing in his *Raich* concurrence is hostile to it, and he joins the majority in emphasizing the significance of comprehensive regulation as enabling still more regulation. In an earlier case, *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483 (2001), the Court unanimously rejected necessity as a defense to federal prosecution for manufacturing and distributing medical marijuana. Although the substantive due process argument for medical marijuana is arguably stronger—at least for terminally ill people suffering great pain—the *Oakland* case underscores the Court’s deference to regulatory solutions over individual choice in this area.

⁶⁰ *Raich*, 125 S. Ct. 2195, 2199 (2005).

⁶¹ *Id.* at 2201.

⁶² *Id.* at 2202–04. Worth pointing out as well is that, again according to Justice Stevens, this “significant transformation” of federal drug policy took place “after declaration of the national ‘war on drugs.’” *Id.* at 2202. Increased regulation, then, was the direct consequence of an emergency or exceptional situation—notably, an emergency defined and created by the government itself—in which government authority to manage and thereby protect the population is at its zenith. In this way, biopolitics and the state of exception are linked. Put another way, the supposedly exceptional and temporary condition is a useful and maybe even necessary precondition for the expansion of normal regulation. The more common linkage among scholars is between the concern that “the state of exception tends increasingly to appear as the dominant paradigm of government” and the rise of discretionary power, where discretion becomes normal and formal rule of law constraints are weakened. GIORGIO AGAMBEN, *STATE OF EXCEPTION 2* (Kevin Attell trans., Univ. of Chi. Press 2005). As Schmitt put it, “the state remains, whereas law recedes.” CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 12 (George Schwab trans., MIT Press 1985). One way to connect these potentially disparate

Stevens noted in passing the plaintiff's substantive due process claim of an individual's right to use marijuana to alleviate pain. He spent more time, however, directing the plaintiffs to seek change by taking part in the same political and regulatory process that led to the comprehensive federal legislation that currently includes a ban on medical marijuana.⁶³

Similarly, at oral argument, Justice Breyer made the same point about the availability of the regulatory process. He also provided a qualified endorsement of regulation over other possible ways of making law (at least in the area of drug policy): "while the FDA can make mistakes, I guess medicine by regulation is better than medicine by referendum."⁶⁴ For both Justices Breyer and Stevens, in short, there is no real alternative to or way out of regulation and its processes—and perhaps there is no need for one.

In her dissent, Justice O'Connor also made little effort to characterize the regulation of marijuana by California, instead of the federal government, as a direct enhancement of individual liberty. Rather, she described liberty as a topic of state, not individual, concern. Thus, she highlighted the efforts of states to "regulate medical marijuana differently" from the federal government out of concern "for the lives and liberties of their people."⁶⁵ She also invoked Justice Brandeis for the idea that federalism, by making room for exercise of state police powers, "promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'"⁶⁶ Put more dramatically, Justice O'Connor highlighted the role of federalism in fostering fifty-one policy laboratories in which we become the subjects of experiments on how best to manage our liberty.⁶⁷

observations might be to say that private law and private and civil rights recede in a state of emergency, but that public, regulatory, and administratively-defined law—which is often characterized by the discretion usually deemed essential to confronting an emergency—remains and even expands. For excellent, if not always complementary discussions of the link between discretion and administrative law, see KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984).

⁶³ *Raich*, 125 S. Ct. at 2215.

⁶⁴ Transcript of Oral Argument at 50–51, *Ashcroft v. Raich*, 124 S. Ct. 2909 (2004) (No. 03-1454).

⁶⁵ *Raich*, 125 S. Ct. at 2229 (O'Connor, J., dissenting).

⁶⁶ *Id.* at 2220 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

⁶⁷ Although it goes beyond the scope of this Article, the fact that federalism has often shielded diverging approaches by the states to race and racism puts Justice O'Connor's use of Justice Brandeis's famous phrase into an interesting relationship with Ann Stoler's observation that colonies served as Europe's "laboratories of modernity." Noting that "the modern was played out in colonial settings," Stoler suggests that "those most treasured icons of modern western culture—liberalism, nationalism, state welfare, citizenship, culture, and 'Europeanness' itself—were 'clarified among Europe's colonial exiles in Asia, Africa, and Latin American and only then brought home.'" ANN LAURA STOLER, *CARNAL KNOWLEDGE AND IMPERIAL POWER: RACE AND THE INTIMATE IN COLONIAL RULE* 146–47 (2002). Following Stoler, perhaps we should think more centrally—as some scholars have urged—about how our commitments to democracy and the rule of law were shaped by and depended

For his part, although he expressed concern about the expansion of the federal commerce power, Justice Thomas also showed little concern for the plaintiffs' individual liberty claims. Instead, he argued that "Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens."⁶⁸ At the end of his opinion, he declared, "The majority prevents States like California from devising drug policies that they have concluded provide much-needed respite to the seriously ill. . . . Our federalist system, properly understood, allows California and a growing number of other States to decide for themselves how to safeguard the health and welfare of their citizens."⁶⁹ And, Justice Thomas was well aware that when the states "decide for themselves," the decision will likely be in favor of some kind of regulation.⁷⁰ Once again, the emphasis here is on the legitimacy of state efforts to regulate in ways that maximize aggregate public health.

My point is that at least eight of the justices agreed in *Raich* on the constitutional principle that one of the proper concerns of government is to regulate aggregate public health, which in turn means controlling the individual bodies of citizens as units of the larger public. The only issues that divided them were (1) which government will have the honors and (2) whether or when the act of regulating can itself constitutionally justify further regulation. Remember, too, that the issue in *Raich* was the provision of marijuana to seriously ill people for the purpose of alleviating their pain. The power "to make live and let die" is neither a metaphor nor a theoretical frolic. Biopolitical regulation of populations is concrete—individuals will live or die or will suffer more or less pain as a result of it. So, when the justices extol the inevitability or desirability of regulation or the ability of states to experiment among different forms of regulation, they are talking, among other things, about the power of governments to regulate and manage—whether to increase or decrease—the pain that their subjects feel in their daily lives. As we will see, the regulation of public health ultimately means managing our deaths as well.

Worth noting, too, is that the kind of regulation we see in such things as the Controlled Substances Act, or in state statutes that regulate in similar areas, is not simply a continuation of immemorial government practices. In other words, biopolitical regulation is different from and broader than the concerns of the traditional police power. I don't mean to suggest that the modern regulatory state departs from some historical norm of nonregulation. As William Novak has shown, local governments in the nineteenth century regulated a broad array of activities, which he characterizes as an "overwhelming presence of the state

upon such things as slavery—and the role played by the states in shaping these understandings—rather than simply arguing that those commitments were inconsistent with undesirable practices and celebrating the role of these commitments in the demise of these practices.

⁶⁸ *Raich*, 125 S. Ct. at 2234 (Thomas, J., dissenting).

⁶⁹ *Id.* at 2239.

⁷⁰ *Id.* at 2232 (discussing California's "strict" regulation of medical marijuana).

and regulation in nineteenth-century American life.”⁷¹ But this kind of regulation was not centralized—certainly not federally and often not even at the state level—and it did not reach the same depth and breadth as contemporary regulations. The twentieth century, by contrast, witnessed centralization at the state and federal levels, and particularly the rise of the federal administrative state, a process which Novak notably connects with the “liberal state” and its “simultaneous pursuit of two seemingly antagonistic tendencies—the *centralization of power* and the *individualization of subjects*.”⁷² His description of the police power as “trad[ing] in a local, historical, and popular orientation for a new status as a category of constitutional law demarcating the ‘bidding and forbidding power of the State’” overlaps in important respects with Foucault’s description of the emergence of biopolitics in eighteenth and nineteenth century Europe.⁷³

Importantly, I am not arguing that *Raich* represents a new doctrine or attitude. To the contrary, this aspect of *Raich*—its easy approval of comprehensive and pervasive biopolitical regulation—is in some sense entirely uninteresting because it is not unique. For a long time now, the Supreme Court has been upholding regulatory legislation and programs in which experts are given the discretion to apply and enforce their knowledge broadly across sectors of the economy, the landscape, and the population in order to rationalize, normalize, and manage them for an overall aggregate benefit.⁷⁴ What makes the linkage between biopolitics and contemporary American administrative law and practice interesting, I think, is in the way that the biopolitical perspective illuminates the inefficacy or perhaps even irrelevance

⁷¹ WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 235 (1996); see also John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000) (describing the pervasiveness of land use regulation in the founding era). For another valuable perspective on the police power, see HOWARD GILLMAN, *THE CONSTITUTION BESEIGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993). Although Gillman focuses more on the Supreme Court’s response to late nineteenth and early twentieth century state regulation, he also recognizes the fact of frequent state and local regulation of economic activity in the nineteenth century.

⁷² NOVAK, *supra* note 71, at 241.

⁷³ *Id.* at 243; see also *id.* at 241–48.

⁷⁴ An important caveat is that the justices vary in their normative commitment to a biopolitical constitution. For some, biopolitics may be good in itself, while for others, principles of judicial restraint, federalism, or separation of powers may lead them to accept biopolitics even if they would prefer a different way of governing, and perhaps so long as no rights claim is available to help resist it. So, in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), the Court split sharply over the majority’s allowance of what is arguably a biopolitical approach to the Takings Clause of the Fifth Amendment, in which “public use” includes government management and transfer of property among various private uses, which are in turn understood to have public benefits. For the majority, this form of regulation is within the scope of the police power, at least in its current incarnation. See *id.* at 2675 (O’Connor, J., dissenting) (taking issue with the majority’s definition of the police power in this context). Justice Thomas’s dissent in *Kelo* drives the biopolitics point home by explaining how takings for “public use” over the past fifty years have often been used to manage poor and minority populations. See *id.* at 2687 (Thomas, J., dissenting); cf. FOUCAULT, *supra* note 57, at 254–57 (contending racism is central to biopolitics).

of law as a means of resisting—assuming for the moment that resistance is normatively desirable—the spread of comprehensive regulation of our bodies and surroundings in the service of managing the population.⁷⁵

As I already have suggested, the law of federalism provides little purchase for slowing or reversing regulation because it simply allocates the power to regulate between centralized states and a centralized federal government. Even more, absent a radical reengineering of Commerce Clause doctrine along the lines envisioned by Justice Thomas, the allocation of power achieved by the law of federalism is really about maintaining or safeguarding some small area of state sovereign authority to regulate, while recognizing the near-complete dominance of federal regulatory power, whether actual or potential. For that matter, as the debate over preemption in the regulation of pseudoephedrine makes clear, greater respect for state sovereignty will sometimes result in more, not less, regulation.

What, then, about individual rights-based resistance to biopolitics? For several reasons, I think rights-based objections fail almost completely.⁷⁶ First, one must formulate the right at issue, and there is no general right not to have a regulatory state. Not all of the work of biopolitics turns on direct management of people in ways that restrict their liberty. The collection and publication of data on the economy or education, and much of the work of the Army Corps of Engineers or the National Institutes of Health, for example, trespasses on no individual liberty interests in any sense that would have a hope of legal recognition. With respect to those activities that more often implicate liberty interests—the activities of, say, the Federal Bureau of Investigation, the Occupational Safety and Health Administration, or large parts of the Department of Health and Human Services—the most one could argue for, I think, is a “presum[ption] that any restriction on the rightful exercise of liberty is unconstitutional unless and until the government convinces a hierarchy of judges that such restrictions are both necessary and proper.”⁷⁷ One might even

⁷⁵ For an example of the debate about the role or efficacy of law as a counterweight to regulatory or disciplinary practices, compare Laura Engelstein, *Combined Underdevelopment: Discipline and the Law in Imperial and Soviet Russia*, 98 AM. HIST. REV. 338 (1993) (arguing law is superior to administrative discretion in the channeling of disciplinary practices), with Goldstein, *supra* note 58 (expressing doubts about law’s efficacy).

⁷⁶ Separation of powers-based objections to the rise of the administrative state have also largely failed. *See, e.g.*, *Whitman v. American Trucking Ass’ns*, 531 U.S. 457 (2001); *Morrison v. Olson*, 487 U.S. 654 (1988); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935).

⁷⁷ RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 5 (2004). I sympathize with Barnett’s proposal, although I think it has slight chance of becoming law, even in a more realistic and limited form. *See* John T. Parry, *Judicial Restraints on Illegal State Violence: Israel and the United States*, 35 VAND. J. TRANSNAT’L. L. 73, 125–26 (2002):

[O]ne way for U.S. courts to restrain state violence is simply to say that unauthorized government restraints on liberty are unconstitutional. Absent specific authorization through statutes or binding regulations, law enforcement authorities could not restrain a person’s liberty. . . . The due process clauses of the Fifth and Fourteenth Amendments would be the best sources for a constitutional no-restraint doctrine, because lack of

argue that this formulation is truest to the original understanding of the Constitution.⁷⁸ The problem, of course, is that the courts have never read the Constitution to include such a broad rule—and they are unlikely ever to do so. Although it is a signpost of modernity, the meaning of the Constitution nonetheless also reflects and changes in response to the forces of modernity that include the development of biopolitics.

Without broad-based liberty claims, procedural and substantive due process provide the most obvious avenues for relief. One of the touchstones of procedural due process, however, is the balancing of individual interests against government interests and the interests of the process itself.⁷⁹ Such claims do not prevent biopolitical regulation; rather they merely require it to work through channels in which individuals may be heard. The fact that, for example, a welfare recipient has the right to be heard at a meaningful time and in a meaningful manner does not make the provision and administration of welfare benefits less biopolitical in any “meaningful” way. The person being heard, whatever the outcome of the hearing, has still been inspected, recorded, and placed within a rationally-defined category that is managed, perhaps perfectly appropriately, for the greater good.⁸⁰

Substantive due process also provides little traction. Most rights claims will take the form of liberty interests that the government can override on a showing that it reasonably could have determined that regulation was necessary to achieve a legitimate purpose⁸¹—a test that is designed to make room for regulation. A small category of substantive due process claims will involve fundamental rights, as of course will claims grounded on more specific constitutional rights, but they do almost nothing to prevent biopolitical regulation. Victories, when they come, are usually about carving out a small space as protected within the regulatory program (much as the law of federalism carves out a small space for exclusive state regulatory authority) or about forcing more even-handed—and thus often simply more—regulation.

Take, for example, the right to choose whether to obtain an abortion. The exercise of this right—where that is financially and geographically possible—requires a medical procedure every aspect of which is heavily regulated (often

legislative or administrative authorization means that restraints on liberty are by definition without procedural due process. Importantly, locating the doctrine in the due process clauses highlights the limited nature of the no-restraint principle. Once the process happens—that is, once there is a law or regulation—the restraint on liberty is permitted unless it violates some other constitutional doctrine.

Compare *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2768 (2004) (rejecting the idea that an “officially sanctioned [detention] exceeding positive authorization to detain” is arbitrary).

⁷⁸ See BARNETT, *supra* note 77, *passim*.

⁷⁹ See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁸⁰ The main webpage of the Department of Health and Human Services, for example, mentions “Specific Populations” of people for which it has special concern in the process of “leading America to better health, safety, and well-being.” The populations include “Women, Men, Children, Seniors,” “Disabilities,” “Racial & Ethnic Minorities,” and “Homeless”—in other words, everyone, and many of us more than once. See U.S. Dep’t of Health and Human Serv., <http://www.hhs.gov/>.

⁸¹ See *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

for reasons having nothing to do with the politics of abortion). It also requires the woman seeking the abortion to behave in certain ways—to perform the role of woman seeking abortion. Frequently, she will have to walk publicly through a line of protestors, read certain material about the fetus, read certain material about the risks she is taking, and navigate the various and diverging approved attitudes towards abortion that she will be urged to assume.⁸² She must act, in short, as one of a class of persons exercising a legal right against a state and a public that as a matter of law also has a protected interest in her health, sexuality, and pregnancy. Whatever one thinks about the right to choose, the exercise of this right certainly does not free a woman from the regulatory state. Rather, it further enmeshes her in it.

Going further, rights claims usually end up admitting the legitimacy of government action. Defining a right against government action also entails defining the proper scope of government action. Where the right ends, legitimate state power over us begins. When the right is determined through a balancing test, moreover, the limits of legitimate state power become quite murky. Claims of constitutional rights, then, nibble around the edges of the biopolitical state, and even when they prevail, they legitimate biopolitics far more often than they challenge it.

Finally, it is worth remembering that rights claims are not the same as liberty and freedom—that is, those words can be defined in ways that have little to do with, or at least go well beyond, the freedoms achieved by legal rights. The language of legally enforceable rights as we know it today, on the other hand, exists precisely because of the centralized nation state, so that even a successful rights claim is an exercise of state power. As Agamben puts it,

[T]he spaces, the liberties, and the rights won by individuals in their conflicts with central powers always simultaneously prepared a tacit but increasing inscription of individuals' lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves.⁸³

We have rights because we are citizens. Our rights distinguish us from those outside the political community and thus provide relative protection and status, but they also mark us as members of a regulated community. In this sense, rights are part of biopolitics—or, rather, rights discourse and biopolitics are both aspects of what it means to live in a modern society—again, for better or worse.⁸⁴

⁸² See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (upholding state requirements that a woman seeking an abortion wait 24 hours so that she could consider information about procedure and the fetus).

⁸³ GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 121 (Daniel Heller-Roazen trans., Stanford Univ. Press 1998). This analysis has similarities to—but is nonetheless distinct from—the critique of rights offered by some scholars associated with Critical Legal Studies. See, e.g., Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1998).

⁸⁴ For a usefully concise definition of “modern” society, see EYAL CHOWERS, *THE MODERN SELF IN THE LABYRINTH: POLITICS AND THE ENTRAPMENT IMAGINATION* 2–3 (2004). For another way at getting at the aims of the modern biopolitical state, see George F. Will,

A final way of getting at the heart of constitutional biopolitics and the inefficacy of resistance to it based on ideas of federalism and individual rights is to go one step beyond the regulation of pain medication to the regulation of end of life decisions. Death is no longer something that just happens. Rather it is a process, planned in advance and monitored and controlled by lawyers, doctors, family members, legislatures, government officials, and the person who is dying. It is the concern, in short, of biopolitics.

The Supreme Court has heard three cases, so far, dealing with the right to refuse medical treatment and assertions of a right to control one's own death. In *Cruzan v. Director, Missouri Department of Health*, the Court assumed there is a constitutional right to refuse medical treatment, even when refusal would lead to death—but it also allowed states to mandate a clear and convincing evidence standard to ensure that a purported desire to refuse treatment is “real.”⁸⁵ Then, in *Washington v. Glucksberg*, the Court rejected a claimed right to assisted suicide, but a majority also hinted that terminally ill people who are in great pain have a right to use pain-killing medication even if such medication would hasten the end of life.⁸⁶ In the companion case of *Vacco v. Quill*, the Court determined that rational legislators could distinguish between acts that directly cause death (such as assisted suicide) and acts that merely allow death to happen (such as withdrawing life support).⁸⁷ The message of all three cases is that state governments have significant latitude to regulate the end of life. Individuals can make their own choices through such things as living wills, but preparing, recognizing, and implementing a living will are not exceptions to state control. Rather, they are processes that are approved and regulated by the state for our benefit.

Yet my narrative here is not really about the law of suicide, assisted suicide, and refusal of treatment. Rather, the phenomenon that merits attention is the increasing medicalization, bureaucratization, and politicization of death, to which law responds in a way that only confirms these developments. Dying, that is, becomes articulated as a right and a litigation issue at the same time that the definition of life and death becomes medically complex and a topic of intense political concern.

Thus, Agamben describes how “the concept ‘death,’ far from having become more exact, now oscillates from one pole to the other with the greatest

Acts of Character Building, WASH. POST, Jan. 30, 2005, at B7 (describing individual character “as something that is, to a very limited but very important extent, constructed. Public policy participates in the building of it. This is a doctrine of architectonic government, concerned with shaping the structure of the citizenry’s soul.”). Note that although Will begins with a focus on individual character, he ends up speaking of the population as a whole, as the relevant entity possessed of a soul—a soul that exists to be managed.

⁸⁵ 497 U.S. 261 (1990).

⁸⁶ 521 U.S. 702 (1997); see also *id.* at 736–38 (O’Connor, J., concurring, joined in part by Ginsburg and Breyer, JJ.) (arguably suggesting there is a constitutional right to use medication to alleviate great pain even at the risk of death); *id.* at 745–50 (Stevens, J., concurring) (clearly making such a suggestion); *id.* at 790–92 (Breyer, J., concurring) (appearing to make such a suggestion).

⁸⁷ 521 U.S. 793 (1997).

indeterminacy.”⁸⁸ This description played out last spring in the controversy over the eventual death of Terri Schiavo. But for medical intervention, she would have died long before, and the issue was whether medical personnel could withdraw food and hydration and whether anyone else would be allowed to provide it. The questions of whether Schiavo was already “dead,” or as good as dead, or whether, if she was still “alive,” her life was worth living, were debated around the country. Her last days give weight to Agamben’s claim that “the sovereignty of the living man over his own life [through a legal right to take one’s own life] has its immediate counterpart in the determination of a threshold beyond which life ceases to have any juridical value and can, therefore, be killed without the commission of a homicide.”⁸⁹

However one chooses to characterize the Schiavo controversy, it is clear that there was nothing “natural” about it. After her injury, she could only exist—and could only die—within a matrix of pervasive and invasive legal and medical regulation. Indeed, to die, she would have to be killed, if only in the sense that medical professionals would take deliberate actions with the knowledge that those actions would lead to (and arguably “cause”) her death. The same was true for the way in which her various family members related to her and to each other; these bonds, too, were shaped, strained, and sustained by

⁸⁸ AGAMBEN, *supra* note 83, at 162. He goes on to explain:

On the one hand, brain death is taken to be the only rigorous criterion of death and is, accordingly, substituted for systematic or somatic death, which is now considered to be insufficient. But on the other hand, systematic or somatic death is still, with more or less self-consciousness, called in to furnish the decisive criterion. It is, in other words, surprising that the champions of brain death can candidly write that brain death ‘inevitably leads quite quickly to death’ According to a clear logical inconsistency, heart failure—which was just rejected as a valid criterion of death—reappears to prove the exactness of the criterion that is to substitute for it.

Id. at 162–63. See also *Keeler v. Superior Court*, 470 P.2d 617, 642–43 (Cal. 1970) (Burke, J., dissenting) (“it is readily apparent that our concepts of what constitutes a ‘corpse’ have been and are being continually modified by advances in the field of medicine, including new techniques for life revival, restoration and resuscitation”)

⁸⁹ AGAMBEN, *supra* note 83, at 139. From this perspective, the Court’s recognition in *Vacco v. Quill* of a permissible distinction between killing and letting die—between homicide and legitimate medical treatment—is critical. So, too, Congress’s passage of An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109–3, § 2, 119 Stat. 15 (2005), illustrates the value of rights claims to biopolitical regulation. The title of the Act is directed at “relieving” the parents by allowing the courts to assist them. Yet the text focuses on “any right of Theresa Marie Schiavo” and “the rights of Theresa Marie Schiavo.” Given that her parents desperately wanted to prevent the withdrawal of life support, the “right” that Congress was talking about was a right to life, or more specifically, a right to stay alive (as opposed, say, to the claimed right of a fetus to be born). Congress thus did something at once fundamental and revolutionary. Fundamental, because we believe both that the federal government was constituted in part to protect our life, liberty, and property, and that we have the right as private individuals to purchase medical treatment (subject, of course, to myriad regulations and constraints in which that right is embedded). Revolutionary, because the context in which Congress spoke of Schiavo’s “rights” suggested the possibility of a positive right to treatment, and even more, a positive right that would be free of the right-holder and would be used to keep her body alive according to the wishes of third parties and whether or not she once had the same wish.

her status as a subject of legal and medical concern. With the Schiavo case, and by implication with the thousands or more of managed deaths that take place every year, there was no baseline outside biopolitics, no way for “nature to take its course.”⁹⁰

The 2005 Term will present the Supreme Court with its fourth “right to die” case, *Gonzales v. Oregon*.⁹¹ The Oregon case is in a very general sense a repeat of *Raich*. The question is not about an individual right to die, but rather about the division of labor between the state and federal governments in regulating a decision to die that is, if not necessarily made possible, at least made easier or harder because of legal rules and medical developments.⁹² As in *Raich*, in other words, the recognition of rights to treatment—to manage pain or end life—takes place within, and calls forth, a web of regulation that makes our pain and our deaths topics of intense state and public concern as part of a larger management of the population in the service of such things as public health.⁹³

⁹⁰ Consider Foucault’s comments on the death of Franco:

[T]hanks to a power that is not simply scientific prowess, but the actual exercise of the political biopower established in the eighteenth century, we have become so good at keeping people alive that we’ve succeeded in keeping them alive when, in biological terms, they should have been dead long ago. [Franco] fell under the influence of a power that managed life so well, that took so little heed of death, and he didn’t even realize that he was dead and was being kept alive after his death.

FOUCAULT, *supra* note 57, at 248–49. I am not, however, trying to assert that Schiavo had already died in some obvious and objective sense. If death is subject to regulation, then so too is the definition of death itself. *See supra* note 88.

⁹¹ *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004), *cert. granted sub nom. Gonzales v. Oregon*, 125 S. Ct. 1299 (2005).

⁹² The specific issue in *Gonzales v. Oregon* is the Attorney General’s authority to promulgate a directive that doctors who prescribe life-ending doses of drugs in compliance with Oregon’s Death With Dignity Act have committed a criminal violation of and are subject to license revocation or prosecution under the federal Controlled Substance Act. That issue turns in part on whether the Attorney General is statutorily required to defer to state determinations of what constitutes a legitimate medical practice in the absence of a positive conflict between the Controlled Substances Act and state law. *See* 21 U.S.C. § 903.

⁹³ So, the Oregon Death With Dignity Act does not simply allow assisted suicide. Instead it creates a legal and regulatory process for managing physician-assisted suicide through prescription medications. *See Oregon*, 368 F.3d at 1122 n.3; *id.* at 1131 (Wallace, J., dissenting). Also worth noting in this context is that, if we take *Raich* seriously as a statement of Commerce Clause doctrine, a strong argument exists that Congress could regulate nearly all aspects of end of life decisions (in addition to the regulatory power it has—and has exercised—through strings attached to the receipt of federal funds for medical care). People receiving care in a hospital, hospice, or nursing home are engaging in the economic activity of paying for a service. Many of those receiving care in their homes obtain it from a home health aide or a visiting nurse—another economic activity. Arguably, *Raich* would also allow Congress to regulate care received from family members, whether because, as in *Wickard*, it substitutes for economic transactions and in the aggregate has a substantial effect on interstate commerce, or because it is necessary to a broader regulatory program. The objection would be that, unlike *Raich*, this is an area of traditional state concern and so is beyond the power of Congress. Yet that response, in turn, arguably would require an extension of *Lopez* and *Morrison* to prevent regulation of certain activities that are “economic”—and thus amenable to congressional regulation—within the definition provided by those cases.

III. WHAT'S SO BAD ABOUT BIOPOLITICS?

My goal so far has not been to convince readers that biopolitics is good or bad, although the tone of the preceding section leans toward the negative. Instead, I have tried to argue not only that the idea of biopolitics reflects our current social arrangements, but also that constitutional doctrine accepts it, makes room for it, and sometimes endorses it.

That said, I want to close by suggesting that biopolitics, while perhaps not necessarily good, is at least not wholly bad. Absent realistic alternatives, this claim is certainly worth considering. Foucault, for example, never charted a way out of biopolitics beyond developing an individual aesthetic of self-discipline and regulation—the “care of the self.”⁹⁴ Other writers speak of achieving something like a “new politics,” which usually means some combination of personal freedom that includes the substance—but often not the legal baggage—of individual human rights, combined with an ideal of community that fits uneasily with the ideal of personal freedom (thus the “politics,” which are likely to be anything but new), as well as a more egalitarian economic arrangement and the social safety net of the modern welfare state, but without the modern state itself. Even assuming this vision is desirable, no one has any practical idea how to make it happen.⁹⁵

My basic assertions are that the ills laid at the feet of biopolitics are not entirely its fault and that they are in any event the costs of “progress.” Consider, first, the charges. Critics point out that in the modern, centralized, biopolitical state, our individuality is suppressed to the larger goal of managing the population. As a result, we become detached and alienated, even as we are disciplined and regulated. At best we can resort to coping strategies, but larger transformation of our social environment is impossible.⁹⁶

⁹⁴ For brief discussions, see CHOWERS, *supra* note 84, at 173–79; JERROLD SEIGEL, *THE IDEA OF THE SELF: THOUGHT AND EXPERIENCE IN WESTERN EUROPE SINCE THE SEVENTEENTH CENTURY* 621–631 (2005).

⁹⁵ In the 1980s, Alan Freeman & Elizabeth Mensch suggested that rejection of the public-private distinction could lead to community-based decisions based on “something more like mutual trust, or love,” rather than “alienation and fear of one another.” Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 *BUFF. L. REV.* 237, 257 (1987). Nancy Fraser worried that Foucault may provide little help with “issues such as the prospects for democratic, nonbureaucratic, nonauthoritarian socialism.” FRASER, *supra* note 58, at 62. More recently, Agamben has argued for dissolving the relationship between violence and law, for “deactivat[ing]” law, so that “[o]ne day humanity will play with law just as children play with disused objects.” His goal is “to open a space between [law and life] for human action, which once claimed for itself the name of ‘politics.’” AGAMBEN, *supra* note 62, at 64, 88. So, too Patrick Hanafin has argued that “a right dislodged from the repressive state apparatus” or “a right beyond state power” is “impossible to conceive, by virtue of its very ungroundedness,” but he suggests that asserting this idea as a form of dissent could ground a new politics. Patrick Hanafin, *The Writer’s Refusal and Law’s Malady*, 31 *J. L. & SOC.* 3, 12 (2004), *reprinted in* *LAW AND LITERATURE* 3, 12 (Patrick Hanafin et al. eds., Blackwell 2004). Perhaps the work of Jürgen Habermas provides a better—or at least more sustained—example of efforts to re-imagine politics and escape the ills of modernity.

⁹⁶ See, e.g., CHOWERS, *supra* note 84, at 8, 193–97 (presenting such a diagnosis).

The flaw in this diagnosis is that it treats the alienated individual as problematic, as if there were an acontextual, dehistoricized thing known as “an individual” that is capable of being alienated or not, with the result that we should try to make it less, rather than more, alienated. Far more likely is that the idea of the individual developed in the modern period along with the modern state and that alienation is part of what defines an individual. To the extent the “problem” of the alienated individual has significance in the contemporary world, in other words, it is a direct consequence of the enlightenment and can only be solved through biopolitics. Indeed, biopolitics simply reflects the enlightenment project of promoting reason in place of “superstition” and arbitrary power. Social structures have become rationalized, so that governments are more likely to operate by articulated policy instead of fiat, the rule of law instead of whim, and democracy instead of hereditary rule or warlordism. The creation of the individual—a rational, rights-bearing but also alienated entity—is critical to all of these developments.

Importantly, under this account, these changes may not be liberating in any objective sense, because the freedoms they create come with real costs—the costs of being free in this way as well as the consequences of being part of a power structure in which these particular freedoms are defined, managed, and subject to suspension. Still, this process leads not only to centralization and state violence but also to rights that channel the exercise of state power, to pervasive regulation of our lives and environment but also to a significant amount of predictability and security for many people. Our modern anxiety can be imperfectly assuaged by the comforts that flow from management and technology, and there is no reason to believe we are any less happy than people were in the past—although neither is it clear that we are any happier.

How the costs and benefits of the enlightenment and biopolitics shake out, and whether that should even be the way we assess them (it appears to be a loaded standard, after all), are political and moral issues. Even more, however, they are questions of aesthetics. The comforts and controls of biopolitics will appeal to many people. Others will find fulfillment in acts of resistance along a variety of fronts. Beyond that, and what the future will bring, who can say?

