

WHAT HATH *RAICH* WROUGHT? FIVE TAKES

by  
Glenn H. Reynolds\* & Brannon P. Denning\*\*

*The Court's decision in Gonzales v. Raich provides an opportunity to reflect on the Rehnquist Court's apparent run at establishing a judicially-enforceable federalism. Two of the most visible symbols of this effort were the decisions in United States v. Lopez and United States v. Morrison, in which the Court twice struck down acts of Congress as beyond the scope of its commerce power. Now, nearly ten years after Lopez and five years after Morrison, Raich leaves many wondering whether the Court provided an answer to John Nagle's question whether Lopez was destined to be a watershed or a "but see" cite. In this Article, we offer our tentative, impressionistic answer(s) to the question we pose in this title. In doing so, we move from the practical impact of Raich (i.e., what does this mean for as-applied challenges to which lower courts were becoming receptive?) to more abstract ones (e.g., does Raich represent the third death of federalism, or was the Rehnquist Court's federalism project an illusion?).*

I.	INTRODUCTION .....	916
II.	TAKE ONE: THE END OF AS-APPLIED CHALLENGES .....	916
III.	TAKE TWO: THE EMILY LITELLA COURT .....	918
IV.	TAKE THREE: THE SUPREME COURT TO CONGRESS: "GET BIG OR GET OUT" .....	922
V.	TAKE FOUR: THE RETURN (?) OF THE NECESSARY AND PROPER CLAUSE .....	923
VI.	TAKE FIVE: IS <i>RAICH</i> THE "THIRD DEATH OF FEDERALISM?" OR WAS <i>LOPEZ</i> MERELY "ZOMBIE FEDERALISM"? .....	927
	A. <i>The Spending Power</i> .....	928
	B. <i>Preemption</i> .....	928
	C. <i>The Anti-Commandeering Principle</i> .....	929
	D. <i>The Commerce Power</i> .....	930
	E. <i>The Scope of Congressional Power under Section 5 of the Fourteenth Amendment</i> .....	931
VII.	CONCLUSION .....	932

---

\* Beauchamp Brogan Distinguished Professor of Law, The University of Tennessee.

\*\* Associate Professor of Law and Director of Faculty Development, Cumberland School of Law at Samford University.

## I. INTRODUCTION

*Gonzales v. Raich*, coming as it does at the end of both Justice O'Connor's and Chief Justice Rehnquist's tenure on the Court, provides an opportunity to reflect on the Rehnquist Court's apparent run at establishing a judicially enforceable federalism. We say "apparent," because we wonder whether there wasn't less to this than met the eye.

Two of the most visible symbols of this effort were the decisions in *United States v. Lopez* and *United States v. Morrison*, in which the Court twice struck down acts of Congress as beyond the scope of its commerce power. Now, nearly ten years after *Lopez* and five years after *Morrison*, *Raich* leaves many wondering whether the Court provided an answer to John Nagle's question: whether *Lopez* was destined to be a watershed or a "'but see' cite."<sup>1</sup>

Below, we offer our impressionistic answers to the question we pose in the title. In doing so, we move from the practical impact of *Raich* (i.e., what does this mean for as-applied challenges to which lower courts were becoming receptive?) to more abstract ones (e.g., does *Raich* represent the third death of federalism, or was the Rehnquist Court's federalism project an illusion?). Needless to say, it will take time to definitively assess the impact of *Raich*, so we offer the following takes fully aware of their tentative nature, notwithstanding the stirring imagery of headless zombies in which it is wrapped.<sup>2</sup>

## II. TAKE ONE: THE END OF AS-APPLIED CHALLENGES

There was irony in the timing of *Raich*. Examining lower court decisions after *Lopez* but before *Morrison*, then again in the years immediately after *Morrison*, we criticized the lower courts for not taking the Court seriously, even after *Morrison* appeared to confirm that *Lopez* was not a fluke.<sup>3</sup> Recently, however, lower courts seemed to be taking the hint, sustaining as-applied challenges to several federal criminal statutes.

For example, in 2003 the Ninth Circuit reversed the conviction of a woman for possession of child pornography.<sup>4</sup> The woman, who had a host of substance abuse and mental health problems, was in possession of photographs showing her and her ten-year old daughter posed together "with their genital areas exposed."<sup>5</sup> When photo shop employees developing the pictures notified

---

<sup>1</sup> John Copeland Nagle, *The Commerce Clause Meets the Delhi Sands Flower-Loving Fly*, 97 MICH. L. REV. 174, 176 (1998) (asking whether *Lopez* represented "a dramatic shift in Commerce Clause jurisprudence" or was "destined to be a 'but see' citation").

<sup>2</sup> See *infra* p. 118.

<sup>3</sup> Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003); Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?* 2000 WIS. L. REV. 369 (2000).

<sup>4</sup> *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003).

<sup>5</sup> *Id.* at 1115.

authorities, McCoy was charged with and pled guilty to possession of child pornography under the federal statute, based on the fact that the picture was produced “using materials which have been mailed or . . . shipped or transported” in interstate or foreign commerce.<sup>6</sup>

Applying the factors set out in *Lopez* and *Morrison*, Judge Stephen Reinhardt set aside McCoy’s guilty plea. He noted that the mere possession here was not “economic activity”; the relationship between the commercial child pornography industry and McCoy’s conduct was “highly attenuated at best”; there was little tying the activity to “a discrete set of cases that have a substantial effect on interstate commerce”; and the legislative history did not “support the conclusion that purely intrastate ‘home-grown’ possession has a substantial connection to interstate trafficking in commercial child pornography.”<sup>7</sup>

While paying homage to Judge Reinhardt’s “well-articulated opinion,” Judge Stephen Trott refused to accept its conclusions.<sup>8</sup> “Congress has declared that an entire class of activities substantially affects interstate commerce,” wrote Judge Trott.<sup>9</sup> “That activity is child pornography.”<sup>10</sup> Thus, “the factual non-commercial nature of a single item of the commodity is immaterial.”<sup>11</sup>

Similarly, in *United States v. Stewart*,<sup>12</sup> Judge Alex Kozinski, writing for another panel of the Ninth Circuit, reversed the conviction of a man charged with possession of machine guns, which he had manufactured himself.<sup>13</sup> As in *McCoy*, Kozinski followed *Lopez* and *Morrison* to the letter. He first concluded that mere possession of a machine gun was not “economic” activity.<sup>14</sup> Further, Kozinski found “the effect of Stewart’s possession of homemade machineguns [sic] on interstate commerce” to be attenuated.<sup>15</sup> The statute had “no jurisdictional element anchoring the prohibited activity to interstate commerce,”<sup>16</sup> and none of the findings accompanying the ban on machine gun possession “speaks to the relationship between mere possession of firearms and interstate commerce.”<sup>17</sup> The findings, Judge Kozinski continued, “focus

---

<sup>6</sup> *Id.* at 1116–17. Both the camera and the film used had either traveled in interstate or foreign commerce. *Id.* at 1116.

<sup>7</sup> *Id.* at 1129–30. *See also* *United States v. Smith*, 402 F.3d 1303 (11th Cir. 2005); *United States v. Maxwell*, 386 F.3d 1042 (11th Cir. 2004); *United States v. Corp*, 236 F.3d 325 (6th Cir. 2001), all of which also reversed convictions of defendants whose child pornography convictions hinged on the fact that material used in the production had traveled in interstate commerce.

<sup>8</sup> *United States v. McCoy*, 323 F.3d at 1141 (Trott, C.J., dissenting).

<sup>9</sup> *Id.* at 1141.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> 348 F.3d 1132 (9th Cir. 2003).

<sup>13</sup> *Id.* at 1134 (noting that the machine guns Stewart was charged with possessing “had been machined and assembled by Stewart”).

<sup>14</sup> *Id.* at 1137.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1138.

<sup>17</sup> *Id.* at 1139.

primarily on the need for federal enforcement where firearms cross state and international borders, and are thus difficult for individual states to regulate on their own.”<sup>18</sup>

As in *McCoy*, not every member of the panel was convinced. Judge Jane Restani, sitting by designation, dissented, writing that “[p]ossession of machine guns, home manufactured or not, substantially interferes with Congress’s long standing attempts to control the interstate movement of machine guns by proscribing transfer and possession.”<sup>19</sup> Since Congress had chosen to regulate the demand for machine guns by eliminating the market for them, it could reach local, noncommercial possession, such as Stewart’s.<sup>20</sup>

In light of *Raich*, Judges Trott and Restani proved to be the better prophets.<sup>21</sup> But Judges Reinhardt and Kozinski—far from embarking on some wild frolic and detour—were merely taking the Court at its word and applying the factors as the Court had articulated them. One may forgive them if they feel somewhat ill-used by a Court that cannot make up its mind. Whatever the effects of *Raich* on lower courts (a point to which we return below), one thing is clear: the as-applied challenges to which lower courts had been warming are likely over. In both *Stewart* and *McCoy*, the correct outcome after *Raich* seems clear: if Congress can eliminate the interstate market in machine guns or child pornography, any manifestations of that activity, no matter how local, or how non-commercial, are within its reach (unless Congress chooses to exempt local activities).

### III. TAKE TWO: THE EMILY LITELLA COURT

“Liberty finds no refuge in a jurisprudence of doubt.”<sup>22</sup> That was the statement in *Planned Parenthood v. Casey* with which the Supreme Court responded to critics of its abortion jurisprudence. Even if the Court’s framework was flawed, its essential holding had to be preserved, lest people lose confidence in the Court and see its decisions as subject to shifting political winds.<sup>23</sup>

Yet in *Raich* the Supreme Court seems quite ready to abandon previous lines of jurisprudence without much concern for how it will affect its credibility. That’s unfortunate, because the Court’s backpedaling on the Commerce Clause is likely to have dramatic and damaging consequences for the Court’s authority with the audience that watches it most closely, the lower federal courts.

---

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1143 (Restani, J., dissenting).

<sup>20</sup> *Id.*

<sup>21</sup> The Supreme Court, in fact, granted certiorari in *Stewart* and in *Smith* and vacated the judgments in both. *See* *United States v. Stewart*, 125 S. Ct. 2899 (2005); *United States v. Smith*, 125 S. Ct. 2938 (2005).

<sup>22</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 844 (1992) (opinion of O’Connor, Kennedy & Souter, JJ.).

<sup>23</sup> *Id.* at 867–68.

On more than one high-profile subject this term, the Court has been reminiscent of the elderly and hard-of-hearing *Saturday Night Live* character Emily Litella, who would make attention-getting pronouncements and then, after some confusion, retreat with the trademark phrase: “Never mind!” With its step back from the property rights cases in *Kelo*,<sup>24</sup> and its retreat on the Commerce Clause in *Raich*, the Court invites people to take its future departures from settled law less seriously, since they can now be forgiven for wondering whether the Court might, at some future date, reverse itself and exclaim “Never mind!”<sup>25</sup>

Among those people are the judges of the federal district courts and courts of appeal.<sup>26</sup> As we have noted in previous works,<sup>27</sup> those courts seem less responsive to Supreme Court guidance—except when it steers them in directions that they, for institutional reasons, already want to go—than to their own institutional concerns. The classic model of judicial hierarchy, in which the Supreme Court announces general principles that are then faithfully applied by the lower courts, no longer holds, if it ever did.<sup>28</sup>

In arriving at that conclusion, we examined the way in which lower courts applied the decisions in *United States v. Lopez* and *United States v. Morrison*.

The initial installment of our project, published in the *Wisconsin Law Review* in 2000, was subtitled “What if the Supreme Court Held a Constitutional Revolution and Nobody Came?” There, we concluded that lower courts seemed strangely slow to respond to the *Lopez* decision, but suggested that Supreme Court clarification might improve matters.<sup>29</sup>

A couple of years later, we authored the next installment of our survey. Unfortunately, we found that lower courts were, in fact, doing little to put *Lopez*’s reasoning into effect. Examining the large number of lower-court cases addressing Commerce Clause issues, we found ample evidence of a desk-clearing mentality at work. We concluded:

But if ideology is not the source of lower court resistance—or, if any sustained inquiry is likely to result in the old Scots verdict, “not proven”—is there an explanation for lower courts’ behavior? Research by other scholars suggests that the problem here, to paraphrase former presidential candidate Michael Dukakis, is not ideology, but rather competence. What we are seeing in lower courts’ Commerce Clause decisions may be only symptomatic of a larger problem in the federal judiciary: that of courts responding to an

---

<sup>24</sup> *Kelo v. New London*, 125 S. Ct. 2655 (2005).

<sup>25</sup> As Mark Tushnet observed: “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.” Posting of Mark Tushnet to SCOTUSblog, “*Understanding*” *Gonzalez v. Raich*, [http://www.scotusblog.com/movabletype/archives/2005/06/understanding\\_g.html](http://www.scotusblog.com/movabletype/archives/2005/06/understanding_g.html) (Jun. 6, 2005, 14:05 EST).

<sup>26</sup> See, e.g., Benjamin Wittes, *Without Precedent*, THE ATLANTIC MONTHLY, Sept. 2005, available at <http://www.theatlantic.com/doc/200509/wittes> (last visited Sept. 4, 2005).

<sup>27</sup> Denning & Reynolds, *supra* note 3; Reynolds & Denning, *supra* note 3.

<sup>28</sup> Denning & Reynolds, *supra* note 3, at 1299–1310.

<sup>29</sup> Reynolds & Denning, *supra* note 3, at 399–402.

increasingly unmanageable caseload by resorting to corner-cutting, resulting in an overall reduction in the quality of courts' work product.<sup>30</sup>

New law from the Supreme Court, especially new law that might create more burdens for overworked judges, was getting short shrift. Nonetheless, there were signs that the lower courts were beginning to take the Court's Commerce Clause jurisprudence seriously.<sup>31</sup> It seems unlikely, however, that this will continue post-*Raich*,<sup>32</sup> and that raises some questions as to the Supreme Court's role in the future.

As a practical matter, of course, Supreme Court control over the lower courts has been notional for some time. Lower court caseloads have been exploding, while the Supreme Court is actually hearing fewer cases than it did decades ago. But the Supreme Court's power has always stemmed more from example than from its ability to directly overturn lower courts. Yet the more unclear and hesitant the Supreme Court seems, the less likely it is that lower courts will follow its lead.

That poses rather serious problems for the justice system. The legitimacy of lower courts' rulings, after all, stems largely from the notion that they are supervised by higher courts. In the absence of such supervision, decisions at the court of appeals level, if they are both effectively unreviewable (or at least unreviewed) and not really guided by principles from above, are simply ad hoc judgments by those who happen to have gotten hold of the case. These decisions are not much different from the decisions of faceless bureaucrats in the Executive Branch, with the exception, perhaps, that those faceless bureaucrats are under the authority of elected officials—the President and, to some extent, Congress—and hence subject to more public scrutiny and supervision than the courts.

A system of ad hoc decisions guided more by institutional expediency and personal preference than by overarching principle may or may not be a bad thing, but it is not a system of justice as we know it. Yet the Supreme Court's retreats this term, coupled with its self-imposed caseload reductions in recent years, suggest that the Court is less concerned than it should be with its role in overseeing the lower courts.

Though simple politics probably provide a great deal of explanation for the phenomenon of increased acrimony over court of appeals nominations, it is worth noting that the less supervision the Supreme Court affords lower courts, the more significant Congressional oversight, and particularly Senate scrutiny of lower court appointments, becomes. And although much of the increased scrutiny given to court of appeals candidates can be explained by the presence of well-heeled interest groups with money to spend, and a desire for attention in the media, there may be more going on than that. When federal appellate judges were seen as dutiful followers of Supreme Court precedent, it made

---

<sup>30</sup> Denning & Reynolds, *supra* note 3, at 1303.

<sup>31</sup> *Id.* at 1262–99 (examining recent cases); *see also supra* notes 3–18 and accompanying text.

<sup>32</sup> *See supra* note 21 and accompanying text.

sense to pay less attention to them and to focus on the Supreme Court. But with the Supreme Court deciding fewer cases, and with the courts of appeal seen (correctly) as far more independent, it is only natural for people to pay more attention to their staffing.

Such scrutiny, however, is a poor substitute for traditional appellate oversight. It is possible that turnover in the Supreme Court (the current Court, like Emily Litella herself, can be fairly characterized as both old and hard-of-hearing, even by Supreme Court standards) will reinvigorate its institutional role. The Court, especially if its membership becomes both younger and more vigorous, could easily return to its earlier caseloads, which would allow it to provide a greater degree of supervision, and perhaps encourage it to state its own positions more clearly and firmly. To the extent, of course, that the Court's lack of clarity stems from simple disunity, new appointments will only make a difference if they produce a court that is more closely aligned on important issues than today's court; it is impossible to say, at this point, whether that is likely, nor is it clear that even a Supreme Court composed largely of Bush appointees would necessarily treat federalism more seriously.

Still if, as Larry Solum has asserted, "a results-oriented, closely-divided court poses grave dangers for the rule of law,"<sup>33</sup> then any change in the Supreme Court's make-up that would make it less closely divided (or, ideally, less result-oriented) would be an improvement over a situation in which idiosyncratic vote-counting is the preferred method of predicting Supreme Court decisions, as it certainly has been in recent years. This suggests that a highly contested appointment process, in which nominees have strategic reasons to either conceal their ideology, or to have no consistent legal position in reality, is unfortunate for the rule of law, and likely to undermine the position of the judiciary over time.

On the other hand, some may feel that a weaker Supreme Court—and, for that matter, a weaker judiciary generally—is actually a good thing, giving primacy to the political branches and hence undermining concerns about the "countermajoritarian difficulty."<sup>34</sup> While judicial unpredictability and inconsistency may be unfortunate, the result—a sort of judicial anarchy—may be preferable to the judicial tyranny that some—such as Robert Bork—have been proclaiming for years.

We, however, are inclined to disagree. The judiciary is supposed to be about principle, not politics; at most, principle is supposed to be tempered by politics, not the other way around. The current situation has produced a

---

<sup>33</sup> Posting of Lawrence Solum to Legal Theory Blog, *O'Connor's Importance on the Court*, [http://lsolum.blogspot.com/archives/2005\\_07\\_01\\_lsolum\\_archive.html#112022961950969703](http://lsolum.blogspot.com/archives/2005_07_01_lsolum_archive.html#112022961950969703) (July 1, 2005).

<sup>34</sup> See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16–17 (1962) (outlining the "counter-majoritarian difficulty" with judicial review stemming from its character as lawmaking by unelected judges). See also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 139, 146 (1989) (using the term "Madisonian dilemma" to describe the same difficulty). For a lengthy discussion of this subject see Glenn H. Reynolds, *Sex, Lies and Jurisprudence: Robert Bork, Griswold, and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045 (1989).

politicized yet incoherent judiciary that is effective on neither level. Both of us have suggested reforms to the confirmation process,<sup>35</sup> and we suggest that the Emily Litella court is further evidence that something needs to be done.

We are not prepared to go as far as Richard Davis, who has proposed that Supreme Court justices be elected for a single 18-year term.<sup>36</sup> (Indeed, if we were to go to judicial elections, it might make more sense to elect court of appeals judges, given their current role. Such a move, though, seems like overkill.) Still, such proposals should serve as a warning that an Emily Litella Court is unlikely to sustain the kind of public regard that the Supreme Court has come to expect.

#### IV. TAKE THREE: THE SUPREME COURT TO CONGRESS: "GET BIG OR GET OUT"<sup>37</sup>

In an article written right after *Morrison*, Professor Adrian Vermeule challenged the assumption that judicially-enforced limits on the Commerce Clause would promote decentralized policymaking.<sup>38</sup> Vermeule suggested that, on the contrary, "Commerce Clause review . . . will promote the centralization of public policy at the national level by providing congressional coalitions with *ex ante* incentives to legislate more broadly, and to create national programs that are more comprehensive, than they would otherwise choose."<sup>39</sup> Vermeule noted that *Lopez* and *Morrison* left untouched the "aggregation" principle of *Wickard v. Filburn*, as well as the "national-regulatory scheme" exception borrowed from *Hodel v. Indiana*.<sup>40</sup> The latter, Vermeule argued, "may allow Congress to regulate intrastate activities that are *not* themselves commercial or economic, so long as the regulation is integral to the success of a larger valid scheme of (interstate or commercial) regulation."<sup>41</sup> Permitting the aggregation and regulation of certain activities essential to the furtherance of a national regulatory scheme, Vermeule wrote, "allow[s] and encourage[s] Congress to

<sup>35</sup> See Brannon P. Denning, *Empirical Measurement of Judicial Performance: Thoughts on Choi and Gulati's Tournament of Judges*, 32 FLA. ST. U. L. REV. \_\_\_\_ (forthcoming 2005); Brannon P. Denning, *The "Blue Slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM. & MARY BILL RTS. J. 75 (2001); Brannon P. Denning, *Reforming the New Confirmation Process: From "Despise and Resent" with "Advice and Consent,"* 53 ADMIN. L. REV. 1 (2001); Glenn H. Reynolds, *Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process*, 65 S. CAL. L. REV. 1577 (1992).

<sup>36</sup> RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* (2005).

<sup>37</sup> Comment to farmers attributed to Earl Butz, Secretary of Agriculture during the Nixon and Ford administrations. Barbara O'Brien, *Animal Welfare Reform and the Magic Bullet: The Use and Abuse of Subtherapeutic Doses of Antibiotics in Livestock*, 67 U. COLO. L. REV. 407, 440 (1992).

<sup>38</sup> Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?* 46 VILL. L. REV. 1325 (2001).

<sup>39</sup> *Id.* at 1325.

<sup>40</sup> *Hodel v. Indiana*, 452 U.S. 314 (1981).

<sup>41</sup> Vermeule, *supra* note 38, at 1332.



ensure the constitutionality of otherwise-suspect provisions by broadening their scope, or by bundling them into a comprehensive scheme of national economic regulation. The *ex ante* effect of the current rules, then, may just as easily promote broader federal regulation—policy centralization—as retard it.”<sup>42</sup>

Professor Vermeule’s understanding of both aggregation and the national-regulatory-scheme principles proved to mirror the Court’s in *Raich*. In her dissent, Justice O’Connor complained that the holding of *Raich*—that if Congress may eliminate the interstate traffic of X, it may reach all activities included within that general class, regardless how local or how noncommercial—essentially gutted *Lopez* and *Morrison*. “Today’s decision,” she wrote, “allows Congress to regulate intrastate activity without check, as long as there is some implication by legislative design that regulating intrastate activity is essential (and the Court appears to equate ‘essential’ with ‘necessary’) to the interstate regulatory scheme.”<sup>43</sup> If this is true, O’Connor continued, “then *Lopez* stands for nothing more than a drafting guide,” because Congress could merely have passed a larger regulatory scheme prohibiting the transfer or possession of firearms anywhere, and regulated the possession near a school zone as an incident to that larger scheme.<sup>44</sup>

It remains to be seen whether, in fact, *Raich* will influence Congress to legislate more broadly in order to avoid constitutional difficulties.<sup>45</sup> However, we feel confident predicting that *Raich*’s elaboration of the national-regulatory-scheme principle will invite lower courts to characterize existing statutes that had previously been thought vulnerable to Commerce Clause challenges as parts of national regulatory schemes, and hold that Congress may reach all local, noncommercial activity within the classes of activities covered by those statutes.<sup>46</sup>

But if *Lopez* and *Morrison* contained seeds of their own undoing that flowered so soon—little more than a decade later, in fact—that raises the question whether the restraints on the commerce power (and perhaps the federalism project generally) were more shadow than substance. We consider this below.

#### V. TAKE FOUR: THE RETURN (?) OF THE NECESSARY AND PROPER CLAUSE

*Raich* did make explicit what had largely gone unsaid in cases involving congressional power in general, and cases involving the commerce power in particular: the degree to which much of what we take for granted in articulating

<sup>42</sup> *Id.* at 1333.

<sup>43</sup> *Gonzales v. Raich*, 125 S. Ct. 2195, 2222–23 (O’Connor, J., dissenting).

<sup>44</sup> *Id.* at 2223.

<sup>45</sup> Early evidence showed that *Lopez* and *Morrison*’s effect on Congress was barely perceptible. See, e.g., Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court’s Anti-Congress Crusade*, 51 DUKE L.J. 435 (2001).

<sup>46</sup> For specific examples of “as applied” challenges sustained prior to *Raich* that would likely come out differently after it, see *supra* notes 3–18 and accompanying text.

the scope of Congress's power depends not so much on the scope of the power "to regulate commerce . . . among the several States," but rather on those implied powers that are "Necessary and Proper" to regulating commerce.<sup>47</sup> However, members of the *Raich* Court differed as to (1) what, precisely, the Necessary and Proper Clause required Congress to demonstrate when using it in combination with the Commerce Clause to expand power, and (2) how deferential the Court needed to be to those congressional demonstrations.<sup>48</sup>

In *McCulloch v. Maryland*, Chief Justice Marshall noted that the Necessary and Proper clause granted extensive, but not unlimited, powers to Congress:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.<sup>49</sup>

Marshall's famous statement might seem to be a test. In deciding whether a Congressional action under its necessary and proper powers is constitutional, we might ask: Is the end legitimate? Is it within the scope of the Constitution? Is it not prohibited? Is it consistent with (a) the letter, and (b) the spirit of the Constitution? And only if all of these questions are answered "yes" would the congressional action be upheld.

In fact, however, the test doesn't do much work. Marshall himself, of course, largely abandoned the question of "necessity," and it has gotten little

---

<sup>47</sup> See BORIS I. BITTKER, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 5.01[B] (1999) (noting that "the Supreme Court has long interpreted the Commerce Clause as a grant of power to Congress to regulate a state's 'internal commerce,' sometimes labeled 'intrastate commerce,' if it has a sufficiently substantial effect on 'commerce among the several states'" and that "[s]ometimes the Court has cited the Necessary and Proper Clause . . . but usually the authority is treated as self evident"); see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 583–86 (1985) (O'Connor, J., dissenting) (noting the connection between congressional authority of intrastate commerce and the Necessary and Proper Clause); *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1917) (upholding federal power to regulate local state freight rates; federal authority "necessarily embraces the right to control [railroad] operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted . . ."); *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838) (upholding power of Congress to punish theft of goods from ship-wrecked vessel on land completely within a single state; invoking combination of the Commerce Clause with the Necessary and Proper Clause).

<sup>48</sup> BITTKER, *supra* note 47, at 5–11 to 5–12 (speculating that using the Necessary and Proper Clause might "serve as a more effective barrier to a rampant Commerce Clause than does the requirement that local activities must 'affect' or 'substantially affect' interstate commerce if Congress wishes to regulate them" but doubting whether such a shift would "be perceptibly more restrictive than the current case law" because "the courts might well ordinarily defer to the judgment of Congress in determining whether a disputed legislative measure is 'necessary and proper for carrying into Execution'" congressional powers).

<sup>49</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

attention from courts since. By the time we reach *Raich*, however, the question seems to have been condensed to this:

In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a "rational basis" exists for so concluding.<sup>50</sup>

One wonders whether the ratifiers would have included the Necessary and Proper Clause had they foreseen such a shift.

At any rate, though the majority opinion does not apply Marshall's test to the case before the Court, Justice Scalia, in his concurrence, announces that it is easily satisfied, and Justice Thomas, in his dissent, concludes that it is not satisfied at all. Neither are we, nor should be serious watchers of the Court.

There are two ways of looking at the Necessary and Proper Clause: as an independent source of power for Congress, or as an adjunct—relating to means—in serving the ends spelled out in Congress's enumerated powers. Marshall, in *McCulloch*, suggested that it was the latter, but interpreted things so expansively that it has become, essentially, the former. As a practical matter, the Court's treatment of "necessary and proper" parallels its treatment of "public use" in the takings context: "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."<sup>51</sup>

Yet this judicial abdication calls the entire notion of enumerated powers—and, for that matter, the notion of judicial review—into question. If Congress is to be the judge of its own powers, then there seems little point to an enumeration. And if courts are, as a practical matter, going to defer to Congress's own interpretation of the scope of its powers, then their role is likely to be limited.

As James Madison himself said about the Necessary and Proper Clause: "Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress."<sup>52</sup> Madison's intention, however, has not carried the day, nor has the intention of the Framers generally. As Randy Barnett notes:

One thing we do know about its legislative history is the wording of a clause that was earlier proposed by Gunning Bedford and rejected by the Committee. The proposal was that Congress have the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." In other words, the Convention had before it an almost completely open-ended grant of power to Congress and

---

<sup>50</sup> *Gonzales v. Raich*, 125 S. Ct. 2195, 2208 (2005).

<sup>51</sup> *Berman v. Parker*, 348 U.S. 26, 32 (1954). Seen in this light, the connection between this term's *Raich* and *Kelo* decisions should be obvious.

<sup>52</sup> Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003), quoting 1 ANNALS OF CONG. 1947 (Joseph Gales ed., 1791).

rejected it, without discussion, in favor of the enumeration of particular powers and the ancillary Necessary and Proper Clause.<sup>53</sup>

This is clearly not the view of a majority of today's Supreme Court. For those of us who believed that the Supreme Court was showing an increased enthusiasm for enumerated powers doctrine, that is a disappointment, leavened only by the fact that at least some justices have acknowledged the issue. But it seems clear that, for the moment at least, judicial review of congressional actions under the Necessary and Proper Clause is effectively nonexistent. That is deeply unfortunate, and likely stems, at least in part, from the Court's unwillingness to be charged with "judicial activism."

The power of judicial review, through which the Supreme Court may invalidate laws that are beyond Congress's power to enact, is a fundamental part of our constitutional scheme; its proper exercise is not judicial "activism," but a judicial duty. When the Court strikes down laws that violate the Constitution, it is merely doing what it is charged to do. By contrast, when the Court invents new grounds for legislative power that are not within the Constitution, it is, by its deference, actually practicing judicial activism.

As James Madison himself said about the provisions of the Bill of Rights, "If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive."<sup>54</sup> This bulwark, whether impenetrable or not, is clearly narrow, as the Court seems unwilling to review "assumptions of power" that do not pose a conflict with explicit constitutional restrictions.

These are hardly new questions, but *Raich* again demonstrated that they can be fundamental ones. We hope that *Raich*, at least, will make litigants, judges, scholars, and members of Congress focus on the Necessary and Proper Clause and its relationship to Congress's enumerated powers. With the demise of the doctrine of enumerated powers as a restraint on federal power, the only protection remaining for the liberties of citizens not sheltered by powerful lobbying groups is that provided by the positive limitations on government embodied in the Bill of Rights. Those provisions were inserted by pessimists who did not believe—rightly, as it turns out—that the doctrine of enumerated powers would be enough to restrain the federal government over the long term. There is no reason to believe, however, that the Bill of Rights itself will survive over the long term if the rest of the plan is abandoned. As National Aeronautics and Space Administration engineers say, once you start relying on the backup systems, you are already in trouble. But that is where we are today.

---

<sup>53</sup> *Id.* at 185. See also Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 286–89 (1993).

<sup>54</sup> JAMES MADISON, Amendments to the Constitution, in 12 THE PAPERS OF JAMES MADISON 206–07 (Charles Hobson and Robert Rutland eds., 1979) (1789).

VI. TAKE FIVE: IS *RAICH* THE “THIRD DEATH OF FEDERALISM?”<sup>55</sup> OR WAS *LOPEZ* MERELY “ZOMBIE FEDERALISM?”

Early on, *Lopez* appeared to signify that reinvigoration of a judicially-enforced federalism was the principal project of what Professor Merrill has coined the “second Rehnquist Court.”<sup>56</sup> Chief Justice Rehnquist appeared to make good on his prior expression of confidence that federalism “will . . . in time again command the support of a majority of this Court.”<sup>57</sup> The evidence was certainly there: requiring Congress to make a “clear statement” was designed to protect federalism interests,<sup>58</sup> as was articulation of the “anti-commandeering” principle. These were followed not only by *Lopez*, but also by the expansion of sovereign immunity beginning with *Seminole Tribe v. Florida*,<sup>59</sup> by the limitation of congressional power under Section 5 of the Fourteenth Amendment,<sup>60</sup> by extension of the anti-commandeering principle in *Printz v. United States*,<sup>61</sup> and, finally, by invoking the Commerce Clause for the second time in five years to invalidate an Act of Congress.<sup>62</sup> The combined effect of these cases led one federal judge to complain that the Court was “narrowing the nation’s power”; and that the Court had “side[d] with the states” against federal power.<sup>63</sup>

<sup>55</sup> Cf. William W. Van Alstyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709 (1985).

<sup>56</sup> Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003).

<sup>57</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 580 (1985) (Rehnquist, C.J., dissenting). Justice Rehnquist’s refusal to be reconciled to the (temporary) triumph of the process federalism of the majority and promise to fight on always reminded us of Malvolio’s promise to have his revenge at the end of Shakespeare’s *Twelfth Night*. See *Twelfth Night*, act V, scene 1 (Malvolio promising that “I’ll be revenged on the whole pack of you”).

<sup>58</sup> *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

<sup>59</sup> 517 U.S. 44 (1996); see also *Alden v. Maine*, 527 U.S. 706 (1999) (holding that nonconsenting states could not have sovereign immunity waived for suits brought in state court). For an argument that there is much less to sovereign immunity than meets the eye, see Jesse H. Choper & John C. Yoo, *Who’s So Afraid of the Eleventh Amendment? The Limited Impact of the Court’s Sovereign Immunity Rulings*, 105 COLUM. L. REV. — (forthcoming 2005).

<sup>60</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997); see also *Bd. of Tr. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62 (2000); *Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

<sup>61</sup> 521 U.S. 898 (1997).

<sup>62</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>63</sup> JOHN T. NOONAN, JR., *NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002). For critical reviews, see David P. Currie, *Inflating the Nation’s Power*, 71 U. CHI. L. REV. 1229 (2004) (book review); Brannon P. Denning, *Judge Noonan’s J’Accuse . . . !*, 34 CUMB. L. REV. 477 (2003–2004) (book review); Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551 (2003) (book review). For a more favorable review, see Carl Tobias, *Unmasking Federalism*, 88 CORNELL L. REV. 1833 (2003) (book review).

The near-hysteria expressed by some academics at the Court's tentative steps toward judicial enforcement of federalism principles obscured a good deal that should have given comfort to those who heard, in the opinions of the Federalism Five, the hoofbeats of the New Deal's famously obstructionist "Four Horsemen." First, there were a number of cases decided contemporaneously with those whose holdings were in tension with the federalism cases, and the Court never seemed (as *Raich* graphically demonstrates) to be able to follow earlier cases to their logical conclusions. Second, when examined closely, many of the "restraints" imposed on Congress by the Court's federalism decisions proved to be rather mild fetters that could easily be circumvented.

In this Part we attempt a retrospective (if panoramic) view of these dissonant notes in the Rehnquist Court's federalism project. Future historians might consider whether there was, at last, anything for the *Raich* Court to kill off—if, in fact, *Raich* represents any retreat at all.

#### A. *The Spending Power*

Many hoped that the Court would follow up *Lopez* by elaborating the limits on Congress's power to impose conditional restrictions on money appropriated to states, thus enabling it to regulate indirectly what it could not regulate directly.<sup>64</sup> In *Sabri v. United States*,<sup>65</sup> however, the Court declined the opportunity, upholding Congress's power to criminalize bribery of a state official concerning a state program that received some federal money, despite the lack of any connection between the federal money and the bribe itself.<sup>66</sup> While there were some procedural issues that made the issues in *Sabri* less clean than they might have been, nothing in the case indicated any appetite to strengthen *Dole*'s rather flaccid constraints on conditional spending requirements, much less revisit larger constitutional questions such as whether Congress can spend "for the general welfare" or only in connection with one of its Article I, Section 8 enumerated powers.

#### B. *Preemption*

Court critics made great sport of contrasting several of the Court's recent cases in which state power was deemed to have been preempted by federal law with cases like *Morrison* or *Seminole Tribe*. Indeed, the Court—including members of the Federalism Five—has shown a real appetite for applying implied preemption doctrines liberally, even to the point of limiting or

---

<sup>64</sup> See generally Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995).

<sup>65</sup> 541 U.S. 600 (2004).

<sup>66</sup> For a critical commentary on the decision, see Gary Lawson, *Making a Federal Case Out of It: Sabri v. United States and the Constitution of Leviathan*, 2003–2004 CATO SUP. CT. REV. 119; see also Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1 (2003) (urging the Court to reverse the lower court decision upholding Sabri's indictment).

extinguishing state common law tort claims,<sup>67</sup> despite the Court's previous admonition that preemption of statutes reflecting an exercise of a state's traditional police powers required a clear statement of congressional intent to do so.<sup>68</sup> The erosion of the "presumption against preemption" has been particularly noticeable in cases involving state regulations that have international implications. Recently, in fact, the Court held that a mere presidential policy statement that Holocaust survivors and their heirs should settle claims outside of the judicial system and through a system established by executive agreement was sufficient to preempt a state law requiring merely that insurance companies disclose their involvement in insurance sales prior to the Holocaust as a condition of doing business in the state.<sup>69</sup> This despite the fact that the executive agreement establishing the compensation fund disclaimed any preemptive intent and the fact that Congress had both acknowledged that states were legislating in this area and had, years before, left the regulation of the insurance industry to the states.

### C. *The Anti-Commandeering Principle*

In the wake of *New York v. United States* and *Printz*, there were questions about the extent to which the so-called "anti-commandeering principle" operated. After all, preemption itself, as Mark Tushnet has argued, constitutes a type of commandeering, since it "commands" the states and their officials *not* to engage in particular types of conduct, and may require the expenditure of resources to comply with the federal regime.<sup>70</sup> South Carolina might therefore have been forgiven for thinking that it had a winner when it challenged a federal statute prohibiting any person or state from selling driver's license data.<sup>71</sup> The Court thought otherwise. In a unanimous opinion, it drew a distinction between mandates from the federal government that required affirmative action on the part of states and their officials and preemption, which, it noted, not only required mere forbearance on the state's part but was

<sup>67</sup> See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

<sup>68</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (noting that if Congress legislates in an area traditionally regulated by states, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress").

<sup>69</sup> *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (striking down California statute requiring disclosure of sale of insurance policies in Europe immediately before and during the Second World War); see also *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (striking down Massachusetts law prohibiting companies doing business with Burma to compete for state contracts); *United States v. Locke*, 529 U.S. 89 (2000) (striking down state regulations of international oil tankers entering state harbor; *held*, federal law preempted state measures). For criticism of *Garamendi*, see Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825 (2004).

<sup>70</sup> See, e.g., MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 83–90 (2003).

<sup>71</sup> *Driver's Privacy Protection Act (DPPA)*, 18 U.S.C. §§ 2721–25 (2000 & Supp. 2005).

also rooted in the text of the Supremacy Clause itself.<sup>72</sup> Since the Act in question was a valid exercise of Congress's commerce power, the Court held it was binding on the states.

#### D. *The Commerce Power*

Soon after *Lopez* was decided, the Court decided *United States v. Robertson*, which raised the question whether a local Alaska gold mine's operations "substantially affected" interstate commerce for purposes of the RICO statute.<sup>73</sup> In a per curiam opinion, the Court concluded that because the mine purchased out-of-state equipment and supplies, it was engaged in interstate commerce for purposes of that statute, and did not reach the substantial effects question.<sup>74</sup> For some commentators *Robertson* signaled that *Lopez* was likely a limited decision.<sup>75</sup> Had *Lopez* been a truly transformative opinion, one might have expected the Court to hear more Commerce Clause cases, much as it did when expanding the scope of sovereign immunity. The Court did not lack for attractive candidates, but it either refused to grant certiorari,<sup>76</sup> dodged the constitutional question,<sup>77</sup> or affirmed the power of

<sup>72</sup> *Reno v. Condon*, 528 U.S. 141, 151 (2000) (writing that "the DPPA does not require the States in their sovereign capacity to regulate their own citizens. The DPPA regulates the States as the owners of data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*").

<sup>73</sup> 514 U.S. 669 (1995) (per curiam).

<sup>74</sup> *Id.* at 671.

<sup>75</sup> See, e.g., Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life after Lopez*, 46 CASE W. RES. L. REV. 801, 833 (1996) (suggesting that when considered with *Lopez* concurring opinions, *Robertson* "portends more stability in Commerce Clause jurisprudence than some Court watchers initially predicted") (footnote omitted); Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167, 176 & n.48 (1996) (asking whether "we are about to enter an age in which there are extensive limits on the ability of the federal government to enact criminal law statutes" and answering "Perhaps not" in light of *Robertson*); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 206 n.227 (doubting whether *Lopez* "will have any significant effect" in light of *Robertson*); Stephen R. McAllister, *Is There a Judicially Enforceable Limit to Congressional Power Under the Commerce Clause?* 44 U. KAN. L. REV. 217, 219 n.20 (1996) (noting that, in light of *Robertson*, "pronouncements that *Lopez* signals a radical departure from precedent and a new era in Commerce Clause jurisprudence are at this time unwarranted and vastly overblown"); Deborah Jones Merritt, *Commerce!* 94 MICH. L. REV. 674, 733 (1995) (arguing that "*Robertson*, in sum, confirms that the Court does not intend an imminent, draconian reversal of its Commerce Clause jurisprudence with *Lopez*").

<sup>76</sup> See, e.g., *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000) (upholding authority of Fish and Wildlife Service to promulgate regulation prohibiting killing, on private land, of red wolves reintroduced into North Carolina), *cert. denied sub nom.* *Gibbs v. Norton*, 531 U.S. 1145 (2001); *United States v. Gregg*, 226 F.3d 253 (3d Cir. 2000) (upholding congressional power to pass the Federal Access to Clinic Entrances Act), *cert. denied* 532 U.S. 971 (2001).

<sup>77</sup> *Solid Waste Agency of N. Cook Co. v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (concluding that Congress had not given clear statement of intent to permit Corps to define "navigable waters" broadly to include all waters that are or might be



2005]

WHAT HATH *RAICH* WROUGHT?

931

Congress.<sup>78</sup> With the benefit of hindsight, it is *Lopez* and *Morrison*, not *Raich*, that look like the outliers.<sup>79</sup>

*E. The Scope of Congressional Power under Section 5 of the Fourteenth Amendment*

Another of Rehnquist Court critics' *bete noires*<sup>80</sup> was the limitation imposed by the Court on congressional power to enforce the Fourteenth Amendment. Announced unanimously in *Boerne v. Flores*, that Court's "proportionality and congruence" test combined with the Court's robust sovereign immunity jurisprudence to curb congressional efforts to subject states to liability for damages under federal civil rights statutes.<sup>81</sup> In 2003, however, the Court pulled back, voting 6-3 to uphold provisions of the Family and Medical Leave Act.<sup>82</sup> Professor Suzanna Sherry has persuasively argued that *Hibbs* is not consistent with what the Court's prior cases in this area hold, and that the Court "unmade" precedent in order to reach the result it desired.<sup>83</sup>

\* \* \*

---

used by certain types of birds); *see generally* Michael J. Gerhardt, *On Revolution and Wetland Regulation*, 90 GEO. L.J. 2143 (2002). *Cf.* *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004) (avoiding the question whether congressional power under the bankruptcy clause could abrogate state sovereign immunity). For an argument that it should not, *see* Adam Feibelman, *Federal Bankruptcy Law and State Sovereign Immunity*, 81 TEX. L. REV. 1381 (2003).

<sup>78</sup> *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (per curiam) (rejecting narrow state court interpretation of Federal Arbitration Act); *Pierce County v. Guillen*, 537 U.S. 129 (2003) (reversing state court invalidation of federal statute barring certain traffic safety data from being discovered in state or federal court trials); *United States v. Robertson*, 514 U.S. 669 (1995) (per curiam); *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265 (1995) (rejecting attempt to limit scope of Federal Arbitration Act). For arguments that the unanimity in some of these cases masked important (and difficult) questions, *see* Lynn A. Baker, *Federalism and Spending Power from Dole to Birmingham Board of Education*, in *THE REHNQUIST LEGACY* (Craig Bradley ed., forthcoming 2006) (abstract available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=734564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=734564)); Mitchell N. Berman, *Guillen and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487 (2003).

<sup>79</sup> *See also* *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (rejecting arguments that Court should restrict congressional power to retroactively extend copyright terms); *see generally* Richard A. Posner, *The Constitutionality of the Copyright Term Extension Act: Economics, Politics, Law, and Judicial Technique* in *Eldred v. Ashcroft*, 2003 SUP. CT. REV. 143, 143 n.3 (speculating that the liberal justices on the Court voted to grant cert in the case "hoping that a decision to uphold the constitutionality of the Sonny Bono Act would undermine the conservative Justices' jurisprudence of judicially enforced limits on Congress's enumerated powers, such as the power to regulate commerce"); *id.* at 152-56 (describing the tension between *Eldred* and cases like *Lopez*).

<sup>80</sup> *See, e.g.,* NOONAN, *supra* note 63.

<sup>81</sup> For a wonderful succinct summary of the doctrine, *see* Suzanna Sherry, *The Unmaking of a Precedent*, 2003 SUP. CT. REV. 231, 233-36.

<sup>82</sup> *Nevada Dep't Human Res. v. Hibbs*, 538 U.S. 721 (2003).

<sup>83</sup> Sherry, *supra* note 81.

When one focuses on the sweep of the Court's cases (especially within the last five years), as opposed to focusing on particular decisions, Judge Noonan's claim that the Court had "sided with the states" seems melodramatic. In fact, it seems as if the Court's moves towards federalism were merely dissonant notes in an overwhelmingly nationalist melody.<sup>84</sup> That was the thesis of Robert Nagel's *The Implosion of American Federalism*, a book that, when it was written, was decidedly heterodox.<sup>85</sup>

Nagel argued that whatever moves the Court was making in the name of "federalism" or "state's rights" were overshadowed—particularly in its decisions under the Bill of Rights and the Fourteenth Amendment—by a consistent and relentless nationalization that began sixty years ago and continued largely unabated, even during the high tide of the Rehnquist Court's federalism project. He concluded that even ostensibly "state's rights" or "federalist" justices actually offered a relatively tepid federalism, that "radical federalism" was unlikely, and that the Court's program of "radical nationalism," particularly in civil liberties areas was likely to continue unabated. What seemed to be a somewhat peevish dissent from the conventional wisdom at the time, after *Raich*, looks prescient.

Looking at the case law as a whole, we wonder whether there was enough life left in judicially-enforceable federalism for *Raich* to kill. In retrospect, it seems the Rehnquist Court conjured a *zombie federalism* that wandered aimlessly for a while, killing off the occasional federal statute drafted with no thought as to constitutionality (akin to the usual horror movie zombie victims who wander away from the group), but which, in the end, was pretty easy to kill without even the aid of a shotgun-wielding action hero.

## VII. CONCLUSION

The jury was out on whether *Lopez* and *Morrison* marked the repudiation of the near-toothless "process federalism" of *Garcia*. But now the jury has returned, and its verdict appears unfavorable. Barring a major, and unlikely, shift of the Court's composition, we now doubt that a robust judicially-enforceable federalism has much future left. We are unlikely to see a lower federal court, after *Raich*, strike down an act of Congress on Commerce Clause grounds, or even take the more modest step of upholding an as-applied challenge to a federal law. More troubling is that lower court judges may be even slower, after *Raich*, to implement Supreme Court decisions that the Court *is* firmly behind. Federal judges, like Judge Kozinski, faithfully and conscientiously applied the Court's *Lopez* and *Morrison* instructions only to have the Court pull the rug out from under them, vacating their decisions following *Raich*.<sup>86</sup> Chief Justice John Roberts criticized his colleagues on the D.C. Circuit for not squarely facing the questions raised about the Endangered

---

<sup>84</sup> See also *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (striking down Arkansas' attempts to limit terms of congressional delegation).

<sup>85</sup> ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* (2001).

<sup>86</sup> See *supra* note 21.

Species Act by *Lopez* and *Morrison*,<sup>87</sup> and found himself portrayed as an “extremist” during his confirmation hearings.<sup>88</sup> This unpredictability cannot be good for the Court as an institution, and will not do much to inspire confidence in it among lower courts.

Finally, and most distressing, is the possibility that *Raich* announces a return to the days in which the Bill of Rights is the only judicially-enforced limit on the power of the federal government. The Court’s nascent attempt, pre-*Raich*, to find *some* limit to the legislative power of Congress might have been confusing, it might have been messy, reasonable people could differ on where to draw the line, but it was at least an attempt to give substance to Chief Justice Marshall’s truism that enumerated powers presume something *not* enumerated. It is also worth remembering that lines of doctrine in the area of civil liberties (think state action or the Establishment Clause) are not without their problems either, yet no one has seriously suggested that the Court simply leave it to Congress or to the states to ascertain the scope of their own power *vis-a-vis* these provisions.

Perhaps we are too pessimistic. *Raich* did not overrule *Lopez* and *Morrison*. The anti-commandeering principle remains. And *Raich* could renew an important conversation over the scope and meaning of the Necessary and Proper Clause and its relationship with the other powers of Congress. It is also possible that in a case presenting a less politically charged topic than medical marijuana, the Court will return to its project of policing at least an outer limit to the powers of Congress.

Nonetheless, the Supreme Court’s action in *Raich* (and in the other instances of backpedaling we mention) will make it much harder for a future Court to exercise influence over the lower courts, except to the extent that it is steering them in directions that they already desire to go. And that may offer a lesson as well. Chief Justice Rehnquist was as strong, and as ideologically settled, as any Chief Justice in recent memory. Nonetheless, his ability to move the Supreme Court—or the courts as a whole—in the direction of his agenda was extremely limited. Administrative agencies have been famously

---

<sup>87</sup> *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc).

<sup>88</sup> See, e.g., Julie Hilden, *Supreme Court Nominee John Roberts’s Controversial Environmental Law Dissent: It Reveals Him as an Extreme Proponent of “States’ Rights” Federalism, to the Detriment of Endangered Species*, FINDLAW’S WRIT, Aug. 1, 2005, <http://writ.news.findlaw.com/hilden/20050801.html>.

condemned as a “headless ‘fourth branch’” of government.<sup>89</sup> It is beginning to seem as if the third branch is more or less headless as well.

---

<sup>89</sup> THE PRESIDENT’S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT (1937).