

SABRI, LANE, AND RAICH:
THE PROGRESSIVE LIMITS ON THE REHNQUIST COURT'S FEDERALISM REVIVAL⁺

Eric R. Claeys*
(DO NOT CITE WITHOUT AUTHOR'S PERMISSION.)

Federalism has been the Rehnquist Court's signature issue for more than a decade, but it is now suffering a rout. The Rehnquist Court will be remembered most for reinvigorating constitutional federalism in such cases as *New York v. United States*,¹ *Seminole Tribe v. Florida*,² and especially *United States v. Lopez*.³ In several decisions handed down over the last several Terms, however, the Court has significantly limited the reach of these precedents. In the 2003 case *Nevada v. Hibbs*⁴ and then again in the 2004 case *Tennessee v. Lane*,⁵ the Court gave a new lease on life to Warren and Burger Court precedents construing section 5 of the Fourteenth Amendment in sweeping terms. On the same day as *Lane*, in the 2004 decision *Sabri v. United States*, the Court declined a spending-power challenge to a law that made it illegal to bribe officials in state or local agencies that receive at least \$10,000 in federal funds.⁶ Before *Sabri*, the Rehnquist Court had not yet exported the federalism revolution to Congress's spending and spending-related powers; *Sabri*—an 8-0-1 decision—suggests that it never will.⁷ The last nail in the proverbial coffin came this Term, in *Gonzales v. Raich*,⁸ in which the Court distinguished *Lopez* and stalled the Commerce Clause revolution for the foreseeable future.

Now that the Rehnquist Court's federalism project has peaked, it is time for Court watchers to explain why it peaked. Surprisingly, however, if one surveys most of the leading explanatory accounts of the Rehnquist Court's federalism cases, they all point in the wrong

⁺ Copyright © 2005 Eric R. Claeys.

^{*} Assistant Professor of Law, St. Louis University. This project was supported by a research grant and other assistance from Saint Louis University Law School. This manuscript benefited from workshops at the DePaul School of Law and the 2005 Southeastern Association of Law Schools annual conference, and from constructive criticisms by Stephen Siegel, Stephanie Stern, Norman Williams, Fred Bloom, Bob Nagel, and Ellen Podgor. Thanks to Matt Jagger, Brett Caban, and Katie Patrick for their research assistance.

¹ 505 U.S. 144 (1992).

² 517 U.S. 44 (1996).

³ 514 U.S. 549 (1992).

⁴ 538 U.S. 721 (2003).

⁵ 541 U.S. 509 (2004).

⁶ 541 U.S. 600 (2004).

⁷ Every Justice except Justice Thomas joined the majority opinion; Thomas concurred in the judgment. For the prospects of the spending power, consider, e.g., Gary Lawson, *Making a Federal Case Out of It: Sabri v. United States and the Constitution of Leviathan*, 3 Cato Sup. Ct. Rev. 119, 133-39 (2003-04) ("advocates of limited government probably should not look forward to the next case" involving a spending-power challenge).

⁸ 125 S. Ct. 2195 (2005).

direction. They explore why there was a federalism revival at all, not why it peaked, why it peaked when it did, and how different Justices on the Court reconciled to themselves stalling a major doctrinal change less than a decade after starting it. These questions are important in their own right, but they have even greater urgency now that Chief Justice Rehnquist has passed away and Sandra Day O'Connor's replacement has been nominated. The Rehnquist Court has come to a close, and it froze further development on its signature issue in its last few Terms.

This Article provides a positive explanation of the Rehnquist Court's federalism docket. Relying on principles of interpretation from "institutionalist" political science, it describes the unifying principles of political theory and constitutional interpretation that shape how a broad bloc approached federalism cases while the federalism revival unfolded on the Rehnquist Court. This Article focuses on the Rehnquist Court's liberals—over most of the Court, Justices Stevens, Souter, Ginsburg, and Breyer—and its moderates—over the same period, Justices Kennedy and O'Connor. Kennedy and O'Connor share many views with the Rehnquist Court's liberals; those commonalities have been overlooked or under-emphasized in the scholarship to date on the Rehnquist Court's federalism revival. Importantly, this Article does *not* focus on the prime movers of the federalism revival, the Rehnquist Court's conservatives—Justices Scalia and Thomas, and the former Chief Justice. They were motivated by other concerns, which I explain in a separate article.⁹

The Article's thesis is that the constitutional-federalism revival has been substantially limited by a theory of government and constitutional interpretation called here the "Progressive theory of nationalism." This theory has three specific prescriptions. One is substantive: As a general working claim of political science, centralized national democratic government is more effective and legitimate than decision making and regulation at the state level. Another is interpretive: Other things being equal, it is appropriate to use the conventional tools and methodologies of constitutional interpretation to conform the Court's federalism precedent to the first, political-science claim. The last relates to the judicial role: Other things being equal, Congress is more capable than federal courts to mark off the reach of its regulatory powers.

These claims have heavily shaped the Supreme Court's case law since the late New Deal. More recently, they exerted a drag on the Rehnquist Court's federalism revival throughout the

⁹ See Eric R. Claeys, "Raich and Judicial Conservatism on the Rehnquist Court," 9 Lewis & Clark L. Rev., No. 4 (forthcoming winter 2005) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=825066).

1990s—even while the “federalist five” were reviving federalism. The Rehnquist Court’s liberal Justices have appealed to these ideas to oppose the federalism revival at every turn. Meanwhile, in early cases during the 1990s, Justice Kennedy and Justice O’Connor signaled that they would jump off the bandwagon long before the federalism revival threatened the areas of national regulation where the Progressive theory of nationalism had first taken root—especially the programs of economic regulation entrenched during the New Deal. *Sabri*, *Lane*, and most of all *Raich* mark the cases where Justices O’Connor and Kennedy converted those warnings into reality.

To be sure, the Progressive theory of nationalism is not the only factor that has influenced the Court’s federalism cases, and it does not explain every feature of every Justice’s voting or reasoning behavior. The federalism revival could not have taken place but for the fact that Justices Kennedy and O’Connor broke with the twentieth-century tradition and the Rehnquist Court’s liberals by deciding to revive constitutional federalism. Even with these qualifications, however, it is still fair to say that the Progressive theory of nationalism has substantially limited the scope of the Rehnquist Court’s federalism revival. In particular, if one appreciates the roots of the Progressive theory of nationalism, that theory helps explain when Kennedy and O’Connor side with state or national power, and why. To oversimplify simply, even though Justices O’Connor and Kennedy touted the virtues of federalism and cited *The Federalist Papers* as often as anyone else on the Court, in substance they seemed to follow more a vision of federalism that resembled the views of relatively conservative Progressives, like Woodrow Wilson. Both reconciled a weak attachment to states’ rights with a strong commitment to centralized national power over comprehensive economic regulation. In this understanding, federalism protects the prerogatives of the states as sovereigns, and it protects their functions as inculcators of local civic and moral virtues. But this understanding also protects state legislation in many situations in which the Founders’ federalism would have preferred vigorous and uniform national power. Moreover, in this view, when Congress asserts power to legislate on national economic problems, states and federal courts must take a backseat.

I. THE RISING AND STALLING OF THE REHNQUIST COURT’S FEDERALISM REVIVAL

A. The Doctrine

Constitutional federalism was the Rehnquist Court's signature issue. Federalism had lain largely dormant after the New Deal. The Burger Court used the Tenth Amendment to invalidate one federal law,¹⁰ but that decision was overruled within a decade¹¹ and the Burger Court undertook no other efforts to reinvigorate federalism at the constitutional level.¹² That trend changed in during the first decade of the Rehnquist Court. In the 1992 decision *New York v. United States*, the Court held that the Tenth Amendment bars Congress from "commandeering" unconsenting state legislatures to draft state responses to a federal nuclear-waste management program.¹³ In the 1995 decision *United States v. Lopez*, the Rehnquist Court revived the Commerce Clause and used it to invalidate a federal gun-free school-zone law.¹⁴ In the 1996 decision *Seminole Tribe v. Florida*, the Rehnquist Court stopped a trend questioning the Court's Eleventh Amendment (or, as called here, its "sovereign-immunity") doctrine and announced that Congress may not use its Article I powers to abrogates' states' immunity from damage suits.¹⁵

If *New York*, *Lopez*, and *Seminole Tribe* were the proverbial seeds for the Rehnquist Court's federalism revival, they blossomed in the late 1990s. The Rehnquist Court reaffirmed and extended *New York v. United States* in *Printz v. United States*, which held that Congress could not commandeer state sheriffs and other state executive-branch officials to execute mandates of federal law.¹⁶ In a torrent of cases, the Court reaffirmed *Seminole Tribe* and extended it to bar Congress from abrogating state sovereign immunity under other Article I legislative powers.¹⁷ The Court reaffirmed *Lopez* in *United States v. Morrison*, which considered the constitutionality of a federal gender-motivated violence cause of action.¹⁸ In *Morrison* and many subsequent cases, the Court went on to hold that Congress could not circumvent its Commerce Clause and sovereign-immunity doctrines by resorting to section 5 of the Fourteenth Amendment.¹⁹

¹⁰ See *National League of Cities v. Usery*, 426 U.S. 833 (1976).

¹¹ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

¹² The Burger Court did provoke spirited debates about the role of federalism in habeas corpus, [representative cites], and abstention, see *Younger v. Harris*, [cite], but not in constitutional doctrines.

¹³ 514 U.S. 549 (1995).

¹⁴ 505 U.S. 144 (1992).

¹⁵ 517 U.S. 44 (1996).

¹⁶ 521 U.S. 898 (1997).

¹⁷ need to insert cites.

¹⁸ 529 U.S. 598 (2000).

¹⁹ cites

To continue the metaphor, however, the federalism project stopped growing and even started to wither in the last several Terms, between 2002 and the present. In the 2003 case *Nevada v. Hibbs*²⁰ and then again in the 2004 case *Tennessee v. Lane*,²¹ the Court retreated from recent decisions construing narrowly Congress's powers under section 5 of the Fourteenth Amendment, and gave a new lease on life to Warren and Burger Court precedents construing section 5 in sweeping terms. On the same day as *Lane*, in the 2004 decision *Tennessee Student Assistance Corp. v. Hood*, the Chief Justice, Justice O'Connor, and Justice Kennedy retreated from recent sovereign-immunity decisions and held that federal bankruptcy courts could wind up a bankrupt student debtor's assets without the consent of a state creditor.²² Also on the same day, in the decision *Sabri v. United States*, the Court rejected a spending-power challenge to a law that made it illegal to bribe officials in state or local agencies that receive at least \$10,000 in federal funds.²³ Before *Sabri*, the Rehnquist Court had not yet exported the federalism revolution to Congress's spending and spending-related powers; *Sabri*—an 8-0-1 decision—suggests that it never will.²⁴ The most telling blow came in the 2004-05 Term, in *Gonzales v. Raich*. Justice Kennedy sided with the Court's liberal wing, agreed to distinguish and significantly limit *Lopez* and *Morrison*, and joined a Justice Stevens opinion for the Court upholding Congress's power under the Commerce Clause to prohibit the local growing and consumption of marijuana.²⁵

B. Deficiencies in Prevailing Explanations of the Doctrine

Clearly, constitutional federalism was the Rehnquist Court's signature issue; just as clearly, the Rehnquist Court suddenly lost interest in federalism in the last three years. This turnabout, however, has caught academic commentators by surprise.

At least among academics, the dominant perception before *Sabri*, *Lane*, *Hood*, and *Raich* was that the Rehnquist Court's moderates and conservatives were stoking a major transformation toward constitutional federalism. Most academics were dismayed by this prospect. In a book-

²⁰ 538 U.S. 721 (2003).

²¹ 541 U.S. 509 (2004).

²² *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004).

²³ 541 U.S. 600 (2004).

²⁴ Every Justice except Justice Thomas joined the majority opinion; Thomas concurred in the judgment. For the prospects of the spending power, consider, e.g., Gary Lawson, *Making a Federal Case Out of It: Sabri v. United States and the Constitution of Leviathan*, 3 *Cato Sup. Ct. Rev.* 119, 133-39 (2003-04) ("advocates of limited government probably should not look forward to the next case" involving a spending-power challenge).

²⁵ Justice Scalia wrote a separate opinion concurring in the judgment. 125 *S. Ct.* at 2215.

length critique of the federalism revival, Judge John T. Noonan, Jr. concluded that “the highest court in the land has, by its own will, moved the middle ground and narrowed the nation’s power.”²⁶ In an essay decrying *Bush v. Gore*,²⁷ Jack Balkin and Sanford Levinson accused the federalist wing of the Rehnquist Court of launching a “constitutional revolution,” with “a systematic reappraisal of doctrines concerning federalism . . . that, if fully successful, will redraw the constitutional map as we have known it.”²⁸ On the other hand, there were at least a few sympathetic accounts. John McGinnis interpreted the federalism cases as part of a broader trend toward “a more skeptical view of centralized democracy in an era in which there is more elite skepticism about the prospects of nationally mandated social reform than existed in the eras of the New Deal and the Great Society.”²⁹ Keith Whittington suggested that the Rehnquist Court “moved carefully but steadily to reestablish some federalism-based constraints on the national government.”³⁰

These portraits suffer from several shortcomings. At a minimum, these portraits seem very much out of date after *Sabri*, *Lane*, *Hood*, and especially *Raich*. Furthermore, as will be explained in greater detail below, these portraits overlooked important warning signs in the seminal early cases. For one thing, Justices O’Connor and Kennedy left important clues that they were not as enthusiastic about the federalism transformation as, say, Justice Thomas.³¹ For another, it is striking that the liberals bristled with hostility toward the federalism transformation and opposed it in unified fashion. Perhaps, in the mid- and late 1990’s, it was reasonable to conclude that the Rehnquist Court was going to reinvigorate constitutional federalism in a

²⁶ John T. Noonan, Jr., *Narrowing the Nation’s Power: The Supreme Court Sides with the States* 156 (2002). See also Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* (2005); Fallon, 69 U. Chi. L. Rev. at 434 (suggesting that substantive conservatism explained the federalism revival better than other explanations); Herman Schwartz, *The States’ Rights Assault on Federal Authority*, in *The Rehnquist Court: Judicial Activism on the Right* 155, 155 (Herman Schwartz ed., 2002); Mark R. Killenbeck, *Pursuing the Great Experiment: Reserved Powers in a Post-Ratification, Compound Republic*, 1999 Sup. Ct. Rev. 81, 81-82 (“concluding that the federalist Justices “contemplate substantial revision, even wholesale reversal, of many of the assumptions that have guided American constitutional doctrine and public policy this century”); Charles E. Ares, *Lopez and the Future Constitutional Crisis*, 38 Ariz. L. Rev. 825, 825-26 (1996) (warning of a “constitutional crisis” and predicting that *Lopez* would “open[] the floodgates just by saying that there are limits on the commerce power”).

²⁷ 531 U.S. 98 (2000).

²⁸ Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1052 (2001). In the passage omitted in ellipses, Balkin and Levinson included racial equality and civil rights in their indictment, but they focused most of their examples and attention on federalism. See *id.* at 1052-55.

²⁹ McGinnis, *Rehnquist Court*, 90 Cal. L. Rev. at 490.

³⁰ Keith E. Whittington, *Taking What They Give Us: Explaining the Court’s Federalism Offensive*, 51 Duke L.J. 477, 479 (2001).

³¹ See, e.g., *Lopez*, 514 U.S. at – (Thomas, J., concurring) (criticizing all of the Court’s Commerce Clause case law going back to the New Deal).

serious manner. However, it was at least as reasonable to suspect that the Court would balk before applying federalist doctrines to threaten the New Deal. In any case, no matter which was the more reasonable interpretation five years ago, the latter alternative has prevailed and demands a satisfactory explanation.

At the other extreme, Robert Nagel doubted there was any federalism revolution worthy of notice. Nagel concluded early that the “Court is not inclined to enforce [a] robust version of federalism,” in large part because federalism is “in tension with important aspects of the judicial function and with natural inclinations of the judicial mind.”³² Interpreting recent cases and law-review articles representative of contemporary thought, Nagel teased out of them a “rationalistic” and “modern mindset that expects and desires an unlimited regulatory jurisdiction for the national government.”³³ That mindset is so pervasive and influential, Nagel argued, that modern lawyers have all but forgotten the habits of thought they would need to recreate a meaningful form of federalism.

Nagel’s critique deserves serious consideration, if for no other reason that it seems more accurate than most now after *Sabri*, *Lane*, and *Raich*. Even so, Nagel’s critique leaves important questions unanswered. For one thing, Nagel is so pessimistic about the federalism revival that he raises important questions about how a federalism revival managed to happen at all. Separately, Nagel’s critique is slightly overbroad. Many of the rationalistic and nationalizing tendencies he studies are reflected far more in the opinions of the Rehnquist Court’s liberals and moderates than in its conservatives.³⁴ Finally, to an important extent, Nagel assumes more than he demonstrates the “rationalistic” mindset he criticizes in the opinions of the Court’s moderates and liberals and in the writings of academics. He identifies important tendencies in the cases and the scholarship, but more needs to be done to trace the origins and especially the character of those tendencies.³⁵

³² Robert F. Nagel, *The Implosion of American Federalism* 47 (2001). Nagel said so even earlier, in *Real Revolution*, 13 Ga. St. U. L. Rev. 985 (1997).

³³ Nagel, *Implosion*, at 17.

³⁴ Nagel appreciates this fact, as he shows in his treatment of Justice Thomas’s defense of states’ rights in the Term Limits case, *Implosion*, at 69-73.

³⁵ To be sure, this Article cannot critique Nagel’s argument comprehensively. Nagel’s argument concentrates heavily on Fourteenth Amendment federalism, the federalism problems created when the Supreme Court encourages federal courts to enforce federal Bill of Rights and substantive due-process guarantees on resisting state governments; those problems go beyond the scope of this Article. See *infra* note 172 and accompanying text; see also Nagel, *Implosion*, at 85-98, 133-52. Even so, Progressive attitudes about nationalism and federalism provide

Other accounts have corrected the extreme tendencies in these two alternatives by focusing on the “O’Kennedy Court.” This approach stresses that the Rehnquist Court’s moderates, Justices O’Connor and Kennedy, have made most of the difference in federalism cases. For instance, in Thomas Keck’s account in *The Most Activist Supreme Court in American History*,³⁶ “the extent of judicial activism implied by the Court’s federalism revival has given pause to the Court’s more pragmatic conservatives, leading them to hedge on just how far they are willing to carry this revival.”³⁷

This “O’Kennedy Court” approach clearly captures important features missing from the “revolution” portrait and Nagel’s portrait. Justices O’Connor and Kennedy provided crucial fourth and fifth votes for all of the pro-federalism cases. Justice Kennedy provided the crucial fifth vote for Justice Stevens’s opinion for the Court in *Raich*,³⁸ and Justice O’Connor voted for more permissive readings of Congress’s section 5 powers in *Hibbs* and *Lane*.³⁹ At the same time, this general portrait begs important questions about Justices Kennedy and O’Connor: Do they position themselves in the middle simply so they can reap the benefits of being the swing votes? Or do they do so because their substantive and jurisprudential beliefs really do leave them between the conservatives and the liberals in federalism cases?

These questions become more urgent if one considers the labels often used for O’Connor and Kennedy. Keck describes them as “pragmatic,” Tinsley Yarbrough describes them as “centrists,”⁴⁰ and Kenneth Starr describes them as “common-law constitutionalists.”⁴¹ Such labels are accurate to an extent. Justices Kennedy and O’Connor do take cognizance of many factors in their interpretation, and their styles are hard to reduce to easily-understandable or – predictable methods of decision making.⁴² Nevertheless, labels such as “pragmatic,” “centrist,”

important context for some parts of Nagel’s trenchant critique; the limits of those attitudes help explain why and where the Rehnquist Court revived federalism in the face of the nationalizing tendencies he identified.

³⁶ Thomas M. Keck, *The Most Activist Supreme Court in History* 235-42 (2004).

³⁷ *Id.* at 239.

³⁸ Although one must hasten to add that Justice Scalia provided a sixth vote with an opinion concurring in the judgment. Nevertheless, Scalia’s separate concurrence would not have limited *Lopez* and *Morrison* as did Justice Stevens’s opinion for the Court, which was joined by Justice Kennedy.

³⁹ In *Lane*, O’Connor provided the fifth and crucial vote for a more permissive reading of section 5 and a narrower reading of *Morrison* and other Court precedents construing section 5 narrowly. In *Hibbs*, both O’Connor and the Chief Justice supported the more permissive reading of section 5.

⁴⁰ Tinsley E. Yarbrough, *The Rehnquist Court and the Constitution*, at xi (2000). See also James F. Simon, *The Center Holds: Power Struggle Inside the Rehnquist Court* (1995).

⁴¹ Kenneth W. Starr, *First Among Equals: The Supreme Court in American Life* 22, 34 (2002).

⁴² Dean Starr politely alludes to this problem when he describes Kennedy as full of “nuance” and O’Connor’s jurisprudence as “flexible.” Starr, *First Among Equals*, at 30, 32.

or “common-law” can also be misleading. They suggest that O’Connor and Kennedy focus on process or compromise to the exclusion of substantive issues. To the contrary, there is at least some “there” there. Justices O’Connor and Kennedy do have some substantive attachments. As a result, it is all the more important to identify the ideas and trends that shape their views on nationalism and federalism, even if those ideas and trends do not explain every decision they make on the facts of every particular case.

II. AN INSTITUTIONALIST STUDY OF THE FEDERALISM REVIVAL

To shed further light on the questions raised in the previous section, this Article conducts a modified “institutionalist” study of the Rehnquist Court’s federalism docket, focusing particularly on the opinions of the Court’s liberal and moderate Justices. “Institutionalism” refers to a branch of contemporary political science that aims to describe how government officers behave by describing the normative ideas that shape how they understand their offices and the policies they may with propriety promote. As Howard Gillman explains, institutionalists aim to describe the Supreme Court and other public institutions by reconstructing “those bundles of ideas and motivations that are associated with particular institutions,” and “in the hope that [they] can induce with some confidence the reasons that led a particular course of conduct.”⁴³ Institutional studies can require more patience in the study of courts than in other government actors. Law and precedent can and usually do prevent judges from writing their most concrete and immediate policy preferences into their decisions. Nevertheless, while judicial decision making is largely independent from policy preferences in the short term, it is strongly dependent on those beliefs in the long term. A judge may not defy a controlling law or precedent to promote her own political beliefs, but those political beliefs may subtly shape what she understands to be sound “law,” “precedent,” or “adjudication.” Ronald Kahn has aptly termed this sort of study as “constitutive”: Overarching theories of law and government “constitute” how the judge understands “law,” “adjudication,” and the proper judicial role for connecting legal interpretation to policy making.⁴⁴

In institutionalist terms, this Article has two theses: the Rehnquist Court’s liberals and moderates agree on many crucial “constitutive” commitments relevant to constitutional

⁴³ Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65, 78-79 (Cornell W. Clayton & Howard W. Gillman, eds. 1999).

⁴⁴ See RONALD KAHN, *THE SUPREME COURT AND CONSTITUTIONAL THEORY, 1953-1993*, at 4 (1994).

federalism; and these commitments can be traced out helpfully by studying their historical and theoretical roots in the political theory of the Progressive Era.⁴⁵ The moderates and liberals assume that constitutional federalism should be governed not by original-meaning interpretation but by policy considerations heavily influenced by political science. That view emerged as a crucial prescription of early Progressive political science. The moderates and liberals ground this political science in the language of efficiency, and presume that comprehensive national regulation is often more efficient and legitimate than corresponding state or local regulation. Here too, they presume the truth of Progressive political science, which held that the proper object of political science is rationally to implement the dictates of the will of the sovereign people. The moderates and liberals defend the New Deal transformation of the Commerce Clause in light of many important economic, social, and technological changes. “Change,” however, is a weakened and vulgar expression for a more comprehensive scientific theory of “Progress.”

To be sure, this Article’s survey is only a “modified” institutionalist survey. Among other things, this approach may paint with too broad a brush for many institutionalists, who often prefer to describe motivations and intentions, in Gillman’s words, “at a particular historical moment in a particular context.”⁴⁶ This Article illustrates the risk: Any interested observer must take care not to assume that any Justice or Justices on the Rehnquist Court understand federalism and constitutionalism precisely as Woodrow Wilson, Herbert Croly, or Frank Goodnow did. At the same time, there are also useful reasons to take a longer view than institutionalists typically prefer. Among other things, it may be necessary to depart from typical institutionalist time limits to fulfill the main intention of an institutionalist study of constitutional federalism. Constitutional-federalism doctrines have an overall unity to them, but it can be maddeningly difficult to see the forest for all of the trees. Wilson, Croly, and Goodnow, by contrast, were much clearer in their intentions. They presented their views as political scientists and public intellectuals. They did not need to reconcile their views to a contrary constitutional tradition.

⁴⁵ The Rehnquist Court’s conservatives deserve separate study because their corresponding “institutionalist” commitments are different. The conservatives represent a group of lawyers and judges who broke with the approach described in this Article for a combination of judicial restraint and original-meaning interpretation. See Claeys, 9 Lewis & Clark L. Rev. (forthcoming 2005).

⁴⁶ *Id.* at 79. See also Karen Orren & Stephen Skowronek, *Beyond the Iconograph of Order: Notes for a “New Institutionalism,”* in THE DYNAMICS OF AMERICAN POLITICS: APPROACHES & INTERPRETATIONS 311, 320 (Lawrence C. Dodd & Calvin Jillson eds., 1994) (“There is no escaping a description of ‘the times’ in the study of institutions.”).

Therefore, readers will need to discount the interpretation here in a few respects: Justice Kennedy and other contemporary Justices espouse views that in some respect are actually vulgar or popularized versions of Progressive scientific claims, but their views are also updated for the civil-rights movement and other updated modern national laws. To understand the normative commitments held by the New Deal Court—and particularly by the Rehnquist Court—it helps to articulate the different elements of the Progressive theory of nationalism, and then track the parts of that theory that successfully penetrated constitutional federalism. While there are risks in this interpretation, the reward is worth the trouble as long as the reader discounts sufficiently for the risks.

Accordingly, then, the next part provides a whistle-stop tour through twentieth-century American constitutional development, to identify where the Rehnquist Court’s liberals and moderates shared common ground and where they disagreed. Part IV then applies the lessons gleaned from Part III to survey the work of the Rehnquist Court.

III. THE PROGRESSIVE THEORY OF NATIONALISM AND FEDERALISM AT THE BEGINNING OF THE REHNQUIST COURT

A. *The Progressive Critique*

Many observers assume that the New Deal expansion of the national government was an accident, or a change made virtually inevitable by historical, industrial, and economic pressures that had been building since the late nineteenth century. I disagree. Keith Whittington hit closer to the mark when he identified “the key to centralization . . . not in economic modernization and nationalization per se, but in the philosophy behind the governmental activism that accompanied it. Centralization was not predetermined by structural economic changes, but arose from the sociopolitical understanding of those changes.”⁴⁷

That profound change in “sociopolitical understanding” was a new academic theory of political science known as the theory of “Progress.” One can see the connection in the writings of Frank Goodnow, a professor of administrative law and constitutional law at Columbia University and the first President of the American Political Science Association.⁴⁸ As he

⁴⁷ Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 *Hastings Const. L.Q.* 483, 487 (1998). Richard A. Epstein brought out the substantive assumptions behind the Commerce Clause expansion in a close case-by-case analysis in *The Proper Scope of the Commerce Power*, 73 *Va. L. Rev.* 1387 (1987).

⁴⁸ On the emergence of modern political science, see Dennis J. Mahoney, *Politics and Progress: The Emergences of American Political Science* (2004); David M. Ricci, *The Tragedy of Political Science: Politics, Scholarship, and Democracy* 29-96 (1984); Dorothy Ross, *The Origins of American Social Science* 146-300 (1991).

explained in his book *Social Reform and the Constitution*: “The tremendous changes in political and social conditions due to the adoption of improved means of transportation and to the establishment of the factory system have brought with them problems whose solution seems to be impossible under the principles of law which were regarded as both axiomatic and permanently enduring at the end of the eighteenth century.”⁴⁹ While this argument became quite familiar in later Commerce Clause case law, Goodnow differed from the later case law in that he traced the problems in law and doctrine to a deeper breakdown in political science. The pre-existing constitutional order “was permeated by the theories of social compact and natural right.”⁵⁰ That order suffered because it was developed on the “conception that society was static rather than dynamic or progressive in character,”⁵¹ when “[t]he basis of political society was later seen to be, as it probably always was, historical development rather than contract.”⁵² This insight had to wait until the late nineteenth century, with “the formulation of the evolutionary theory of development in the world of science.”⁵³

When Goodnow spoke of a “dynamic,” “progressive,” or “evolutionary” understanding of society, he presumed an understanding of politics known as “the living Constitution.” Woodrow Wilson frequently appealed to this idea when he referred to government a “living thing,”⁵⁴ the American Constitution “a vehicle of a nation’s life.”⁵⁵ He assumed as a fundamental political category the national “common political consciousness,” which he opposed to a people “not conscious of any unity, inorganic, unthoughtful.”⁵⁶

This claim about a “living Constitution” provided the backdrop for more specific normative critiques of political institutions. Leading theorists deduced from the living Constitution a normative goal of “efficiency.” In their understanding, each society has a popular will, and the popular will establishes the fundamental values that the society chooses for itself in its time. It then follows that political science ought to identify the methods of social control that

⁴⁹ Frank J. Goodnow, *Social Reform and the Constitution* 1 (1991); John A. Marini, *Theology, Metaphysics, and Positivism: The Origins of the Social Sciences and the Transformation of the American University*, in *The Progressive Revolution in Politics and Political Science: Regime Change in America* (Ken Masugi & John Marini eds., forthcoming 2005).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 3.

⁵³ *Id.* See also Dennis J. Mahoney, *Politics and Progress: The Emergence of American Political Science* (2004).

⁵⁴ Wilson, *Constitutional Government in the United States*, at 56.

⁵⁵ *Id.* at 157.

⁵⁶ Wilson, *Constitutional Government in the United States* 25-26.

will most effectively achieve those fundamental values. Chicago political-science and history professor Charles Merriam approvingly referred to this understanding as “sociocracy,” or “the scientific control of social forces by the collective mind of society for its advantage.”⁵⁷

Woodrow Wilson explained a similar view:

The object of constitutional government is to bring the active, planning will of each part of the government into accord with the prevailing popular thought and need, and thus make it an impartial instrument of symmetrical national development; and to give to the operation of the government thus shaped under the influence of opinion and adjusted to the general interest both stability and an incorruptible efficiency. Whatever institutions, whatever practices serve these ends, are necessary to such a system; those which do not, or which serve it imperfectly, should be dispensed with or bettered.⁵⁸

Leading Progressive political scientists and intellectuals used this general understanding of political science to critique the specific case of American federalism. This Article will refer to their critique as the “Progressive theory of nationalism.” This theory, like Progressive political science generally, justified specific prescriptions by appealing to two different sources of normative value. On one hand, Progressives criticized constitutional federalism on the ground that it stood in the way of a historical evolution from several local state societies to one encompassing national democratic will. Thus, Woodrow Wilson interpreted the Commerce Clause as a transmitter for a process of nationalization: “Our life has undergone radical changes since 1787, and almost every change has operated to draw the nation together, to give it the common consciousness, the common interests, the common standards of conduct, the habit of concerted action, which will eventually impart to it in many more respects the character of a single community.”⁵⁹

The same theorists, however, also advanced more or less the same critique in the language of efficiency. This argument is more familiar from modern constitutional law: Because the growth of the American economy made American life more interconnected and interdependent, Congress needed to make government more efficient by controlling matters with national concern more closely. As Woodrow Wilson explained, “The actual exchange of goods . . . is now so married to their production under our great modern industrial combinations,

⁵⁷ Charles E. Merriam, *American Political Theories* 330 (1924) (quoting Lester E. Ward, *Dynamic Sociology* (1883)).

⁵⁸ Woodrow Wilson, *Democracy and Efficiency*, in 1 *College and State: Educational, Literary, and Political Papers* (1875-1913) (R.S. Baker & W.E. Dodd (1925)).

⁵⁹ Wilson, *Constitutional Government*, at 46.

organization and community of interest have so obscured the differences between the several parts of business which once it was easy to discriminate, that the power to regulate commerce subtly extends its borders every year into new fields of enterprise.”⁶⁰ As Herbert Croly concluded, “the increased efficiency of organization in business and politics, the enormous growth of an irresponsible individual money-power, the much more definite division of the American people into possibly antagonistic classes, and the pressing practical need for expert, responsible, and authoritative leadership,—these new conditions and demands have been by way of upsetting once more the traditional national balance.”⁶¹

Perhaps the transformation envisioned by Goodnow, Croly, and Wilson could be described as a shift from local liberty to vigorous national power and the national interest. However, it would be fairer to how such thinkers understood their own thought to say that they defined the substance of “liberty,” “effective government,” and “public happiness” differently from the constitutional tradition they were criticizing.⁶² In the natural-rights tradition that guided pre-New Deal constitutional law, “liberty” was understood largely as a negative freedom, to be left alone to apply one’s own energies and talents to one’s own ends.⁶³ By contrast, Woodrow Wilson construed liberty at a far higher level of generality: “[l]iberty fixed in unalterable law would be no liberty at all,” and that “political liberty consists in the best practicable adjustment between the power of the government and the privilege of the individual.”⁶⁴ That characterization allowed Wilson and other Progressives to construe “liberty” to mean not only freedom from restraint but also an entitlement to be a part of an active and organic community. In the pre-New Deal tradition, dual federalism was held to promote effective government more than encompassing national power would have, on the grounds that it protected the national government from getting distracted by local matters and kept local regulation in the hands of more knowledgeable local officials.⁶⁵ By contrast, as Frank Goodnow argued for the

⁶⁰ Wilson, *Constitutional Government*, at 185-86. See also Goodnow, *Social Reform and the Constitution*, at 7 (“classes of industrial workers have arisen which in numbers and in minute differentiation of occupation surpass anything which the world’s history has hitherto exhibited.”).

⁶¹ Croly, *Promise of the American Life*, at 269. Goodnow, *Social Reform and the Constitution*, at 11 (“has resulted in a constitutional tradition which is apt not to accord to the federal government powers it unquestionably ought to have the constitutional right to exercise”).

⁶² I am grateful to Fred Bloom for prompting me to clarify the contrasts in the following paragraph.

⁶³ See Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 *Corn. L. Rev.* 1549, 1566-74 (2003).

⁶⁴ Wilson, *Constitutional Government*, at 4-5.

⁶⁵ See Eric R. Claeys, *Justice Sutherland and the Commerce Clause before the New Deal*, 34 *Publius: The Journal of Federalism* 9, 22-27 (forthcoming 2004); McGinnis, *Rehnquist Court*, at 509-10.

Progressives, “political centralization is necessary if political systems are to be in accord with recognized facts” made apparent by the Industrial Revolution and broad social changes in America.⁶⁶ Finally, in the pre-New Deal tradition, dual federalism was held to promote happiness by promoting self-government, engagement, and responsibility, the virtues associated with Tocqueville’s conceptions of civil association.⁶⁷ By contrast, in terms similar to those in which Europeans praise the European Union now, Woodrow Wilson insisted that happiness lay in a transcendent national and popular community: “a nation which will some day know itself a single community is a-making in the warp and woof of the fabric.”⁶⁸

Let us consider two common objections to this interpretation of Progressive academic thought. Some object that Progressive thought was not uniformly nationalist in every respect. Fair enough. Woodrow Wilson hastened to add that “[i]t would be fatal to our political vitality really to strip the States of their powers and transfer them to the federal government.”⁶⁹ Thus, he warned that “[m]oral and social questions originally left to the several States for settlement can be drawn into the field of federal authority only at the expense of the self-dependence and efficiency of the several communities of which our complex body politic is made up.”⁷⁰ Such qualifications have caused some modern historians to challenge Wilson’s *bona fides* as “progressive” in any sense.⁷¹

Yet even here, the difference between Wilson and his fellow Progressives are not nearly as important as the differences between Wilson and the federalism that informed constitutional and political discussion from the Founding until his time. Before 1900, it was commonly assumed that federalism was designed to secure the freedom and happiness of individual

⁶⁶ Goodnow, *Social Reform and the Constitution*, at 7.

⁶⁷ See Claeys, *Justice Sutherland*, at 23, 25-26; McGinnis, *Rehnquist Court*, *supra* note --, at 509-10.

⁶⁸ Wilson, *Constitutional Government*, at 47. See also Croly, *Promise of the American Life*, 267 (“no reason why a democracy cannot trust its interest absolutely to the care of the national interest”; this trust “indicates the road whereby alone the American people can obtain political salvation.”).

⁶⁹ Wilson, *Constitutional Government*, at 191. See also *id.* at 179 (“If the power to regulate commerce between the States can be stretched to include the regulation of labor in mills and factories, it can be made to embrace every particular of the industrial organization of the country,” the prospects of which Wilson described as “obviously absurd extravagancies of interpretation.”).

⁷⁰ CG, at 195.

⁷¹ See, e.g., Eldon J. Eisenach, *The Lost Promise of Progressivism*. R.J. Pestritto, however, contends that Wilson did not differ materially from most other leading Progressives. Pestritto argues that Wilson’s earlier writings are much more consistent with other representative Progressives, and that Wilson trimmed in *Constitutional Government* in preparation for his 1912 presidential run. cite RJ’s book.

Americans—as *individuals*.⁷² For instance, when opponents complained that the Constitution (still unratified) trenched on the prerogatives that the states enjoyed under the Articles of Confederation, James Madison (writing as Publius) complained sarcastically: “We have heard of the impious doctrine in the old world, that the people were made for kings, not kings for the people. . . . It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object.”⁷³ By contrast, Wilson sought to preserve federalism to preserve the power of states as *communities*. He expected local organic communities to mold men’s personal habits and opinions to ready them for the stage of national action. He praised the states as “self-originated, self-constituted, self-confident, self-sustaining, veritable *communities*,” which have “sprung up of themselves, irrepressible, a sturdy, spontaneous product of the nature of men nurtured in a free air.”⁷⁴ He insisted that “only communities capable of taking care of themselves will, taken together, constitute a nation capable of vital action and control.”⁷⁵

Separately, others object that leading Progressives also argued for states’ rights in other contexts. For example, Progressive and then Supreme Court Justice Louis Brandeis is famous for arguing that federalism encourages each state to “serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁷⁶ However, to appreciate these changes, one must appreciate that leading Progressives transformed the conception of the state even more fundamentally than they transformed federalism. The trend is illustrated in the case in which Brandeis issued this *bon mot*, *New State Ice Co.*: Brandeis was attacking *Lochner* substantive due process doctrine because it stopped the states from experimenting with the power to require licenses to enter competitive, non-monopolistic businesses.⁷⁷ As Stephen Gardbaum⁷⁸ and Michael Greve⁷⁹ have both explained, Brandeis, other Progressives, and (later) New Dealers

⁷² See Eric R. Claeys, *Justice George Sutherland and Commerce Clause Federalism Before the New Deal*, 24 *Publius: The Journal of Federalism* 9 (2004).

⁷³ *The Federalist* No. 45, at 256, 257 (Charles R. Kesler intro., 1999) (Madison).

⁷⁴ *Constitutional Government*, at 182.

⁷⁵ *CG*, at 195.

⁷⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 311 (1932) (Brandeis, J., dissenting).

⁷⁷ *ff*—add a cite to *New State Ice*; Add a see also cite to *Lochner v. New York*.

⁷⁸ Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 67 *U. Chi. L. Rev.* 483 (1997).

⁷⁹ Michael S. Greve, “Laboratories of Democracy: Anatomy of a Metaphor” (April 1, 2001) (available at http://www.aei.org/publications/pubID.12743/pub_detail.asp); Michael S. Greve, “Madisonianism with a Minus

used federalism to discredit *Lochner*-style substantive due process and many other sources of federal-national law that prevented states from restructuring individual policy choices protected by individual property rights and private contract. In contrast to the natural-rights approach that informed American constitutionalism for much of the nineteenth-century, the Progressive theory of government and administration encouraged both levels of government to regulate economic life more actively; the Progressive theory of nationalism then encouraged Congress to take a more active role over states in areas about which national elites and the American people took a particularly active national interest. While a full account of Progressive thought would need to trace these relations thoroughly, the two theories are sufficiently distinct that this Article can focus on the Progressive theory of nationalism.

C. *The New Deal Transformation*

The Progressive theory of nationalism became influential during the New Deal. As Barry Cushman explains, this critique did not change the minds of the Progressives' political opponents. Rather, teachers of Goodnow and Wilson's stature trained students in government and law, and many of those students became judges, statesmen, and academics during the New Deal.⁸⁰

The New Dealers picked and chose from the critique sketched above in two important respects. In practice, New Dealers applied the Progressive theory of nationalism more broadly in practice than had leading Progressives. The Progressives' biggest practical successes came in railroad regulation, as noted in the *Shreveport Rate Cases*, in which the Interstate Commerce Commission successfully claimed the power to regulate intrastate railroad rates.⁸¹ However, that expansion of federal jurisdiction pales in comparison to the New Deal, in which Congress claimed the power to regulate production and labor in agriculture, manufacture, mining, and, in the National Industrial Recovery Act, the entirety of the American economy.⁸²

In constitutional theory, however, not every aspect of the Progressive theory of nationalism penetrated the New Deal Court's constitutional law. Most New Deal lawyers and judges balked at converting "living Constitution" political theory into an explicit source of legal

Sign: 'Our Federalism' and the Constitution," at 16-21 (available at <http://federalismproject.org/masterpages/publications/Madison%20lecture.pdf>).

⁸⁰ See Cushman, 223-24

⁸¹ 234 U.S. 342 (1914). For two useful critiques of these cases' significance, see Cushman, *Formalism and Realism*, 1126-31; Epstein, *Proper Scope*, at 1420-21.

⁸² **FF cites.**

argument, as it became later during the Warren Court.⁸³ Instead, the New Deal Court it used what I have called elsewhere a “soft” form of living Constitutionalism,⁸⁴ an early version of what is now commonly known as “multigenerational synthesis” thanks to Bruce Ackerman.⁸⁵ “Synthesis” refers to the process by which judges adapt precedents from an old and outdated historical context to provide precedential support for a new constitutional order ratified by Ackerman’s theory of “higher lawmaking.” Leading Progressives anticipated and endorsed this basic approach to constitutional adjudication. While Wilson encouraged courts to interpret the Constitution as a “vehicle of life,” he also stressed that they should interpret incrementally—only “as modest instruments of law,” and by a process he called “adaptation,” which he defined as “slowly progressive modification and transfer of functions as between the States and the federal government along the lines of actual constitutional development.”⁸⁶ Wilson presumed that courts would change doctrine gradually, not quickly, and within the confines of the case method and other conventional processes of legal reasoning.

The New Deal Court synthesized different federalism doctrines in more or less this spirit. While the “law review” version of this Article will trace the shifts at greater length, let us concentrate on three shifts most relevant to explaining *Lopez* and *Raich*. In part, the Court used the case method, informed by a heavy dose of the Progressive theory of nationalism. Frank Goodnow had proposed that constitutional law be informed by “presumption” that the constitutional “system should be made to harmonize with our actual economic and social situation”; the New Deal Court used that presumption to ratify expansions in Congress’s jurisdiction from one case to the next.⁸⁷ The best illustration of this approach occurred in Commerce Clause case law in the crucial period between 1935 and 1937. In these years, the Court ratified an expansion of the Commerce Clauses, by hearkening back to a policy argument made prominently in the 1914 *Shreveport Rate Cases*.⁸⁸ In these cases, then-Associate Justice Charles Evans Hughes had held that the ICC had jurisdiction to regulate in-state railroad traffic

⁸³ See, e.g., *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (opinion of Warren, C.J.) (reading the Eighth Amendment to proscribe cruel and unusual punishments as understood in light of “the evolving standards of decency that mark the progress of a maturing society”). For one of the few exceptions, consider Dean F. Alfange, *The Supreme Court and the National Will*, at viii (1937).

⁸⁴ Claeys, *National Regulatory State*, *supra* note --, manuscript in progress.

⁸⁵ Bruce Ackerman, *We the People: Founding* 88 (1991).

⁸⁶ Wilson, *Constitutional Government*, 162, 193-94.

⁸⁷ Goodnow, *Social Reform and the Constitution*, at 12.

⁸⁸ 234 U.S. 342 (1914).

and rates because they threatened to undermine, and therefore “affected,” traffic and rates across state lines.⁸⁹ In dissent in the 1936 case *Carter Coal*, Justice Cardozo proposed to use this “affects” principle to ratify the regulations under challenge, which regulated wage, hour, and production conditions in coal mines nationwide.⁹⁰ Justice Sutherland, who wrote the Court opinion, declined, because he judged the *Shreveport Rate Cases*’s precedent by the extent to which it comported with the original meaning of interstate commerce, which is to say “interstate trade.”⁹¹ In the 1937 decision *NLRB v. Jones & Laughlin Steel Corp.*, however, now-Chief Justice Charles Evans Hughes embraced Cardozo’s position in *Carter* as the law of the Court for regulation of local labor conditions.⁹² He did so because he preferred to give the meaning of the Commerce Clause a “practical conception in light of “actual experience.”⁹³ He was not about to keep Congress away from “industrial labor relations” “[w]hen industries organize themselves on a national scale” and when it was “necessary to protect interstate commerce from the paralyzing consequences of industrial war.”⁹⁴

Second, the New Deal Court often appealed to the plain meaning of power-vesting clauses.⁹⁵ The New Deal Court tended to construe vesting language broadly unless the evidence clearly suggested the language was meant to be read more narrowly. (This open-ended textualism is often associated with Harvard law professor James Thayer.⁹⁶ One excellent illustration comes from Chief Justice Stone, who gave the Necessary and Proper Clause a generous reading in two post-1937 Commerce Clause cases: “The commerce power is not confined in its exercise to the regulation of commerce among the several states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end.”⁹⁷ In another case, Justice Cardozo illustrated how such textualism connected to a

⁸⁹ cite

⁹⁰

⁹¹ See *Carter Coal Co.*, 298 U.S. at 298-99 (defining interstate commerce as interstate trade); *id.* at 308-09 (rejecting arguments based on the “effects” test).

⁹² 301 U.S. 1 (1937).

⁹³ *Id.* at 41-42.

⁹⁴ *Id.* at 41.

⁹⁵ Acknowledge Gillman on this point.

⁹⁶ White, *Constitution and the New Deal*, 33-61; James B. Thayer, “The Origin and Scope of the American Doctrine of Constitutional Law,” *Harvard Law Review* 7 (1893): 129.

⁹⁷ *United States v. Wrightwood Dairy*, 315 U.S. 110, 119 (1942) (upholding minimum-price orders for local milk); *United States v. Darby*, 312 U.S. 100, 118 (1941) (upholding minimum-wage requirements on goods shipped in interstate commerce) (both citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

nationalist and Progressive theory of government, in a case upholding Congress's spending powers. Previous precedent had established that the spending power flows from constitutional text Congress the power to raise taxes "to pay the Debts and provide for the common Defence and general Welfare of the United States."⁹⁸ In the 1937 decision *Helvering v. Davis*,⁹⁹ Justice Cardozo read the spending power to be generous: "Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times."¹⁰⁰

Last, and strongest, the New Deal Court appealed to originalism. This impression comes from the 1942 decision *Wickard v. Filburn*, in which the Court defended the expansion of the Commerce Clause that had taken place gradually since 1900 and at breakneck speed from 1937.¹⁰¹ Justice Jackson read the history and the precedent to conclude that the Constitution was originally meant to give Congress wide discretion, and that the Court had mistakenly politicized the Commerce Clause by reading it unduly narrowly before 1937.¹⁰² As Howard Gillman has explained, *Wickard's* narrative put the Court in the position of restoring an "ostensible timeless truth," namely "the framers' newly discovered belief in the need to allow government powers to expand so that it was able effectively to cope with novel social crises."¹⁰³ As Jackson explained, "[a]t the beginning [in the 1824 decision *Gibbons v. Ogden*,]" Jackson observed, "Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes." In the period between 1880 and 1937, he noted, some lines of precedent kept Congress's powers narrow, but other, "broader interpretations . . . destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons v. Ogden*." He concluded, however, by rejecting Filburn's challenges on the merits with the Progressive theory of nationalism. When Filburn complained that the law forced him to buy at an inflated price wheat that he could have grown for nearly free, Jackson demurred on the ground that the relevant policy concerns required courts to defer to Congress:

⁹⁸ U.S. CONST. art. I, sec. 8, cl. 1; see *United States v. Butler*, 297 U.S. 1 (1935).

⁹⁹ 301 U.S. 619 (1937).

¹⁰⁰ *Id.* at 641.

¹⁰¹ 317 U.S. 111 (1942).

¹⁰² Cass Sunstein continues to use this narrative in contemporary constitutional scholarship in --. Bruce Ackerman has criticized the narrative for being just a narrative in 1 ACKERMAN, *supra* note --, at

¹⁰³ Gillman, *supra* note --, at 238 (citing Horwitz, *supra* note --, at 56-57).

“The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness of the plan of regulation we have nothing to do.”¹⁰⁴

C. The Civil Rights Era and Great Society

New Deal constitutional argument and Progressive political-science argument informed the Supreme Court’s views on constitutional federalism until the Rehnquist Court. If anything, these arguments were reinforced by the civil-rights revolution of the 1950s and 1960s. In this period, southern politicians resisted national civil-rights legislation by appealing to federalism and states’ rights; these appeals discredited federalism even further among national elites.¹⁰⁵ For example, political scientist William Riker conducted one of the most influential studies of federalism in 1964, the normative conclusion of which stated simply: “if in the United States, one disapproves of racism, one should disapprove of federalism.”¹⁰⁶

After the Civil Rights Act and during the Great Society, Congress and influential legal elites began to pass new legislation on the assumption that constitutional federalism was a thing of the past. Cass Sunstein has aptly described this period as the “rights revolution.”¹⁰⁷ As Sunstein explains, after Congress passed the Civil Rights Act of 1964, it and the President “invoked the rhetorical power of the civil rights movement on behalf of causes involving not only discrimination on various grounds, but also the environment, workers, the poor, and even consumers.”¹⁰⁸ These proposals could not have been considered seriously if Congress and supporting elites had not assumed that constitutional federalism was most likely dormant.¹⁰⁹ As already explained in Part I, the Burger Court challenged these trends rhetorically from time to time, but not seriously.

D. The Reagan Revolution and the Revival of Federalism

However, a reaction started in the same period, two parts of which are especially relevant to appreciate the Rehnquist Court’s federalism project. Starting in the 1970s, important

¹⁰⁴ *Wickard*, 317 U.S. at 120, 122, 129 (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)).

¹⁰⁵ Whittington, 25 Const. L.Q. at 502; McGinnis, 90 Cal. L. Rev. at 500.

¹⁰⁶ William H. Riker, *Federalism* 155 (1964).

¹⁰⁷ Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (1990).

¹⁰⁸ Sunstein, *Rights Revolution*, at 25

¹⁰⁹

segments of American politics and culture became more receptive to federalism. This trend reflected itself in American presidential politics. Voters in both parties became more receptive to presidential candidates who ran “against Washington,” including Jimmy Carter, Ronald Reagan, Michael Dukakis, and Bill Clinton.¹¹⁰ By the late 1970s, there had developed a network of elite conservative thinkers and politicians considerably more skeptical about the national government and Great Society than their counterparts who had supported and staffed the New Deal and the Great Society.

Both sets of conservatives, voters and elites, were responding to many of the same developments. On one hand, by the late 1970s, state government did not seem as illegitimate as it had in the 1950s and 1960s. When the Civil Rights Act of 1964 and federal voting reforms discredited and broke up the most important features of southern racial segregation, states’ rights lost much of the opprobrium they had by association with Jim Crow.¹¹¹ On the other hand, by the late 1970s, the federal government had lost much of its luster, after the country withdrew from Vietnam and President Nixon’s misdeeds precipitated Watergate.¹¹² In the realm of ideas, economic conservatives became more sympathetic to decentralized and market-based approaches to public problems, and more concerned that public-choice pressures and regulatory complexity made centralized governance less effective than New Deal and Great Society elites had assumed.¹¹³ Meanwhile, social conservatives became interested in local, communitarian approaches to regulatory problems, and rekindled interest in the “mediating institutions” celebrated by Alexis de Tocqueville.¹¹⁴

IV. CONSTITUTIONAL FEDERALISM ON THE REHNQUIST COURT

A. *The Rivalries on the Rehnquist Court*

This constitutional theory and history sets the stage for the Rehnquist Court. Different blocs on the Rehnquist Court have reacted in different ways. The simplest approach is that of the the Rehnquist Court’s liberals: Justices White, Marshall, Brennan, Blackmun, and Stevens early on, but then Justices Stevens, Souter, Ginsburg, and Breyer. The liberals subscribe to the Progressive theory of nationalism, pretty much without qualification. They seek to apply it to

¹¹⁰

¹¹¹ Whittington, 25 Const. L.Q. at 516-17, 520-21.

¹¹² See Whittington, 25 Const. L.Q. at 504.

¹¹³ Whittington, 25 Const. L.Q. at 505-06; McGinnis, 90 Cal. L. Rev. at 502.

¹¹⁴ See McGinnis, *Rehnquist Court*, at 504 (citing Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000)).

new legislative problems, to ratify further centralization by Congress. Of course, the liberals are not in total lockstep with one another. But few if any of their disagreements are about substantive ends; most focus on doctrinal means.

The next bloc consists of the Rehnquist Court’s conservatives—former Chief Justice Rehnquist and Justices Scalia and Thomas. The conservatives were not motivated by Progressive theories of interpretation and nationalism—if anything, their conservatism was motivated in large part as a reaction *against* the “living Constitution” tendencies of the Warren Court. Because the conservatives had different motivations, I am exploring their behavior in scholarship elsewhere¹¹⁵ and will say little about them here. Suffice it to say here that the conservatives supported fairly consistently efforts to revive federalism, for formalist and textualist reasons.

The last group consists of the Court’s moderates—Justice Powell for a year, but then Justices O’Connor and Kennedy. On many of the fundamental questions that have informed American constitutional development since the Progressive Era, the moderates resemble the liberals far more than they do the conservatives. Unlike the conservatives and like the liberals, they accept as fundamentally legitimate the notion of a living Constitution, as they made abundantly clear in their joint plurality opinion with Justice Souter in *Casey v. Planned Parenthood*.¹¹⁶ “Soft” living Constitution views strongly influence their views on federalism—in how they understand both the object of constitutional interpretation and the substantive goals that federalism ought to promote. The federalism revival came into being when the moderates agreed to marriages of convenience with the Court’s conservatives; it has stalled over the last few terms as the moderates filed for divorce because the logic of the federalism revival threatened Progressive commitments in core areas of Court federalism precedent.

B. The Commerce Clause

In this draft, I will only sketch out the connections for most doctrines (in part IV.C, *infra*), but I will highlight the connections in substantial detail for one doctrine, the Commerce Clause, which vests in Congress power to “regulate Commerce . . . among the several states.”¹¹⁷ The Rehnquist Court’s liberals have been quite straightforward in Commerce Clause cases: protect the expansionist tendencies in New Deal and Warren Court Commerce Clause case law,

¹¹⁵ Claeys, Raich *and Tensions in Conservatism*, 9 Lewis & Clark L. Rev.

¹¹⁶ 505 U.S. 803 (1992).

¹¹⁷ U.S. Const. art. I, § 8, cl. 3.

for the policy reasons and with the doctrinal arguments entrenched during the New Deal. By contrast, Justices O'Connor and especially Kennedy were willing to reconcile the New Deal expansion to some general commitment to federalism. To complete this reconciliation, O'Connor and especially Kennedy recast constitutional federalism so that it resembles strikingly Woodrow Wilson's vision of federalism. In their account, federalism values are relatively unimportant in local economic regulation, but matter a great deal with respect to the states' responsibility to inculcate sound morals and social habits and the states' prerogatives' of sovereignty.

These coalitions and tensions were apparent a decade ago, in the seminal case *United States v. Lopez*.¹¹⁸ *Lopez* invalidated a provision of the Gun Free School Zone Act that made it a federal crime to possess a firearm within 1,000 feet of a school anywhere in the United States. Doctrinally, *Lopez* limited *Wickard*'s broad and deferential "rational basis" test. Although the Court opinion in *Lopez* (written by Chief Justice Rehnquist) did not draw the lines of distinction with perfect clarity, they ran somewhat as follows. If an act of Congress regulates some sort of "economic enterprise," or some activity that is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," then *Wickard* continues to control and rational-basis deference applies.¹¹⁹ By contrast, if the activity is neither economic nor part of a larger regulation of economic activity, *Wickard* ceases to control, the Court reserves independent judgment, and the act is in all likelihood declared to exceed the scope of commerce.¹²⁰ In any case, *Lopez* was the first case since the early New Deal in which the Court declared an act of Congress beyond the scope of its interstate-commerce powers. At a minimum, it threatened national victims'-rights laws and other "non-economic" laws; in the hands of a determined majority, some parts of the Court's reasoning could have provided the wedge for reconsidering the New Deal expansion of the Commerce Clause.

Let us focus not on Chief Justice Rehnquist's Court opinion but on the *Lopez* dissents. For one thing, they bristle with animosity. Justice Stevens managed in a single page to accuse the majority of rendering a decision that was "radical," "discredited," and "extraordinary."¹²¹

¹¹⁸ 514 U.S. 549 (1995).

¹¹⁹ *Lopez*, 514 U.S. at 560.

¹²⁰ *Lopez*, 514 U.S. at 561.

¹²¹ *Lopez*, 514 U.S. at 602 (Stevens, J., dissenting).

Justice Souter accused the majority of *Lochnerism*, of taking a “backward glance at . . . the old pitfalls” of pre-New Deal Commerce Clause and substantive due process review.¹²² The account presented here explains why. Since the first third of the twentieth century, academics and a steadily-growing number of public lawyers have held that Congress ought to have broad powers to regulate complex and fast-changing economic conditions, and that the will of the American people is nobler and more legitimate than policies issued by the democratic processes in the states. In the middle of the New Deal, the federal judiciary recast the interpretive methods that governed constitutional federalism in large part to lock that view into law. The Warren Court more or less took the New Deal expansion for granted and shifted the focus of constitutional discussion to the Fourteenth Amendment and the New Deal. Now, judges who assume that the Warren Court’s agenda was right are inclined to see *Lopez* as defying five decades of sensible constitutional developments. Worse, *Lopez* insulted many of their core commitments about how the Constitution should be interpreted and how the national government ought to be structured. *Lopez* and *Morrison* provoked strong hostility because the majority had defied a central institutionalist tenet or “regime principle” of post-New Deal American liberalism.¹²³

In addition, to criticize the majority rule in *Lopez* and *Morrison*, the liberals assumed as true and relied heavily on the claim of Progressive political science that centralized government is more efficient in an economically-interdependent world. In his dissent in *Lopez*, Justice Souter spoke of the “hopeless porosity of ‘commercial’ character . . . in America’s highly connected economy.”¹²⁴ Justice Breyer argued that the gun-free school-zone law challenged in *Lopez* deserved deference because “[e]ducation, although far more than a matter of economics, has long been inextricably intertwined with the Nation’s economy,”¹²⁵ and because upholding the law “would interpret the commerce power as ‘an affirmative power commensurate with the national needs.’”¹²⁶

Although Justices Kennedy and O’Connor joined the federalist majority in *Lopez*, they also made clear they understood *Lopez* in terms far narrower than the Court’s conservatives. Justice Kennedy wrote a concurring opinion on behalf of himself and O’Connor, and that opinion makes clear that both Justices understand federalism more in Progressive terms than in

¹²² *Lopez*, 514 U.S. at 607 (Souter, J., dissenting) (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

¹²³ Ackerman, *We the People: Foundations*, at 37-44.

¹²⁴ *Lopez*, 514 U.S. at 608 (Souter, J., dissenting).

¹²⁵ *Lopez*, 514 U.S. at 620 (Breyer, J., dissenting).

¹²⁶ *Id.* at 625.

pre-1900 terms. To be sure, Kennedy talked tough about federalism, and he cited *The Federalist* and other founding authorities. But at the end of the day, his views on federalism and nationalism turned out to be closer to the conservative/Progressive views of Woodrow Wilson.

On one hand, Kennedy fundamentally agreed with the *Lopez* liberals that the Commerce Clause needed to be read broadly because the United States need a centralized national government for a complicated industrial national economy. Kennedy wrote the concurrence to warn that *Lopez*'s holding, while "necessary," was "limited."¹²⁷ He warned that Congress may "regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy."¹²⁸ (It is telling that Kennedy assumed that "we" are a single people, capable of forming a "unified purpose," for economic affairs.) Kennedy firmly rejected the pre-1937 interpretation of the Commerce Clause: "[N]either the course of technological advance nor the foundational principles for the jurisprudence itself were self-evident to the courts that sought to resolve contemporary [Commerce Clause] disputes by enduring principles."¹²⁹ Kennedy did so for basically the same reasons as Justices Souter and Breyer, the post-1937 tradition, and Progressive political science: this "interdependent world of ours" made local regulation impossible after "the rapid industrial development in the late 19th century."¹³⁰ Before joining Kennedy's opinion, Justice O'Connor had already expressed the same commitments in her own voice, in her Court opinion in *New York v. United States*: "As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress' commerce power."¹³¹

On the other hand, Kennedy broke with the liberals by limiting the reach of these Progressive principles. He balked at following the New Deal case law in lockstep because he was concerned "that the federal-state balance is not destroyed."¹³² He touted "federalism [as] the unique contribution of the Framers to political science and political theory."¹³³ Citing *The Federalist*, he touted federalism because "freedom [is] enhanced by the creation of two

¹²⁷ *Id.* at 568.

¹²⁸ *Lopez*, 514 U.S. at 573-74 (Kennedy, J., concurring).

¹²⁹ *Lopez*, 514 U.S. at 568 (Kennedy, J., concurring).

¹³⁰ *Lopez*, 514 U.S. at 574, 570 (Kennedy, J., concurring).

¹³¹ *New York v. United States*, 505 U.S. 144, 158 (1992).

¹³² *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring).

¹³³ *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring).

governments,” for it encourages two governments to protect the people’s liberty and to compete with one another for the American people’s affections.¹³⁴

Notwithstanding these citations to *The Federalist* and the framers, however, Kennedy’s federalism is watered down heavily to fit with the Progressive theory of nationalism. This connection is not easy to see on the surface. Kennedy recast Commerce Clause case law as a balancing test, and balancing tests are often created to conceal or avoid clear policy choices. All the same, if one pays close attention to the examples Kennedy cited in his balance, Kennedy’s federalism protects states’ rights (as Woodrow Wilson’s federalism had) more than individual rights (as *The Federalist*’s federalism had). To begin with, when Kennedy identified judicial federalism doctrines that he believed to be successful, he listed abstention, *habeas corpus*, the dormant Commerce Clause, *Erie* choice-of-law rules, preemption, and adequate and independent state grounds.¹³⁵ Abstention, *habeas corpus*, and the dormant Commerce Clause provide legal vehicles by which federal courts defer to the sovereignty reflected in the actions of state courts and executive officials. In the Founders’ federalism, sovereignty values play some role, but nowhere near as large a role as the role played by Commerce Clause federalism. Drain meaning out of the Commerce Clause, as happened in Progressive theory and in New Deal case law, and sovereignty values loom all the larger. Kennedy confirmed as much when he suggested that constitutional federalism existed to reinforce the “etiquette of federalism.”¹³⁶ Individuals do not benefit primarily when the federal government follows those rules of etiquette; the states do.

Separately, when Kennedy cited *Erie* choice-of-law and preemption, he confirmed that he did not appreciate the substantive differences between Publius’s federalism and the Progressives’. Because pre-1900 federalism was assumed to foster individual liberty, it kept federal power narrow—but by the same token, where there was federal power, it was clearly supreme and individuals had little risk of conflicting legal obligations. *Erie* choice of law rules and anti-preemption canons let state governments create more law, and more sources of legal obligation, both to facilitate the expansion of state power. Justice Kennedy did not understand the difference. He confirmed as much when he appealed to Justice Brandeis’s notion that “States

¹³⁴ *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) (citing *The Federalist Nos.* 46 & 51).

¹³⁵ See *Lopez*, 514 U.S. at --

¹³⁶ cite

may perform their role as laboratories for experimentation.”¹³⁷ He did not consider whether Brandeis’s federalism would have encouraged experiments with liberty and property to which the Framers would have been strongly opposed.

The same tendencies came out in the manner in which Kennedy used his balancing test to resolve *Lopez* on its facts. He noted that the gun-free school-zone act under challenge targeted education, “a traditional concern of the States,” and that the act “forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise.”¹³⁸ Given what he had already said about the Commerce Clause and economic regulation, Kennedy was carving out lines of federal and state responsibility substantially similar to Woodrow Wilson’s: Congress would take over control of national economic life, and state and local regulation would focus on the “[m]oral and social questions originally left to the several States,”¹³⁹ for a combination of reasons having to do with tradition and the values-reinforcing role of state and local criminal law.

Given how Kennedy recast federalism, it was already clear in *Lopez* that the Commerce Clause revival would last only as long as the cases involved challenges to the states’ traditional role legislating over social and moral issues. *Lopez* was reaffirmed and extended in *United States v. Morrison* primarily because the law under challenge fit that profile.¹⁴⁰ *Morrison* presented a challenge to a federal law creating federal civil and criminal causes of action to remedy acts of gender-motivated violence. As in *Lopez*, the law at issue did not regulate commercial activity, no matter how broadly “commercial” activity might be construed. Also as in *Lopez*, the law seemed to trench on a traditional state function, namely state tort and criminal laws, and on social-moral topics, the dignity and autonomy interests protected by local battery laws.

From this perspective, *Raich* proved to be the confounding case.¹⁴¹ *Raich* arose after the federal government prosecuted two Californians for violating the Controlled Substances Act by home-growing and consuming marijuana for medical purposes.¹⁴² The Ninth Circuit threw out the prosecutions on the ground that the Californians’ conduct was too local for the Commerce

¹³⁷ *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)).

¹³⁸

¹³⁹ CG, at 195.

¹⁴⁰ 529 U.S. 598 (2000).

¹⁴¹ Full cite to *Raich* when it becomes available.

¹⁴² *Raich* slip op. At 3-4.

Clause to reach it. To prevail, Raich and her co-defendant needed convince both Kennedy and O'Connor that the prosecution threatened proper local interests more than it promoted proper national interests—as Kennedy and O'Connor defined both in *Lopez*. From that perspective, *Raich* is an extremely close and hard case. Raich and her co-defendant batted one for two. But because the liberals continued to resist Commerce Clause federalism as much as they had in *Lopez*, .500 was not good enough to keep the inning going.

Justice Kennedy's reservations in *Lopez* explain why *Raich* case was clearly a harder case for federalism than *Lopez*. Although Kennedy did not write an opinion for himself, he joined Justice Stevens' opinion for the Court, and that opinion makes clear where Kennedy's attachments lay. Stevens framed the issues to focus on the ways in which Raich's prosecution was connected to national ends, as conceived of within the Progressive theory of nationalism. The Controlled Substances Act does regulate a considerable amount of interstate commerce, namely interstate traffic in controlled drugs. Of course, Raich's marijuana growing was not interstate trade, but as Kennedy had said in *Lopez* and as Stevens saw fit to remind him in *Raich*, "Congress may 'regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.'"¹⁴³ Moreover, because the marijuana in question was home-grown and not sold, *Raich*'s prosecution resembled Roscoe Filburn's prosecution for growing too much wheat for chicken feed. Any holding for Raich would have unsettled the claim that has grown around *Wickard* that Congress has power to regulate any individual, non-commercial activity that might arguably undermine an interstate regulatory scheme. Kennedy had said in *Lopez* that *Wickard* culminated a "definitive commitment to the practical conception of the commerce power."¹⁴⁴ In *Raich*, Stevens' Court opinion reaffirmed that *Wickard* and other pre-*Lopez* and *Morrison* precedents remain "[w]ell-settled law,"¹⁴⁵ and warned that Raich's argument threatened to undermine *Wickard* because it "logically extends to place *any* federal regulation . . . of *any* locally cultivated and possessed controlled substance for *any* purpose beyond the "outer limits" of Congress' Commerce Clause authority."¹⁴⁶ Since Kennedy had taken pains to insist that "we" are a single people with a "a unified purpose to build a stable national economy," this threat to *Wickard* was too much to bear.

¹⁴³ *Raich*, 125 S. Ct. at 2210 n.35 (*Lopez*, 514 U.S. at 573-74 (Kennedy, J., concurring)).

¹⁴⁴ *Lopez*, 514 U.S. at – (Kennedy, J., concurring).

¹⁴⁵ slip op. at 6.

¹⁴⁶ slip op. at 25-26.

All the same, *Raich* was still a hard case because it exposed some of the ambiguities in Justice Kennedy's balancing of state and federal interests in *Lopez*. It can be argued that the national interstate market for drugs is inextricably intertwined with their local growing and possession, but the local growing is also conceptually different. Moreover, the possession and consumption of illegal drugs are objects of criminal law, which, under Kennedy's taxonomy in *Lopez*, ought to be reserved to the states, because criminal law counts as social-moral regulation and has been traditionally regarded as such in our federalist system. On top of that fact, Raich and her co-defendant were at least arguably using marijuana consistent with a medicinal-marijuana exception ratified by California voters in a state referendum process. Thus, *Raich* presented a situation in which a routine law-enforcement proceeding by the federal government was short-circuiting a meaningful and intense political debate in the states. The prosecution could thus be seen, in Woodrow Wilson's framework, to "sap the states of the[ir] political vitality."

Justice O'Connor broke with Kennedy to write the lead dissent in *Raich*, on behalf of herself, the Chief Justice, and Justice Thomas.¹⁴⁷ In doing so, she stayed within the understanding that Justice Kennedy had marked off in *Lopez*. Citing Kennedy's *Lopez* concurrence, she insisted that the prosecution focused on "areas of criminal law and social policy, where 'States lay claim by right of history and expertise.'"¹⁴⁸ In the peroration of her opinion, she called the federal prosecution "overreaching," which "stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate marijuana differently."¹⁴⁹

To be sure, to make *Raich* follow *Lopez* and *Morrison* without threatening *Wickard* too much, O'Connor relied on several common-law-style legal arguments. She noted that that both state and federal laws distinguish between medical and non-medical uses of drugs.¹⁵⁰ She joined issue with Stevens's Court opinion about what *Lopez* meant by "economic" activity and whether home-growing marijuana counted.¹⁵¹ She assigned to the federal government the burden to "overcome empirical doubt" that marijuana possession, by itself, substantially affects interstate

¹⁴⁷ Justice Scalia wrote a separate opinion concurring in the judgment.

¹⁴⁸ *Raich*, 125 S.Ct. at 2224 (O'Connor, J., dissenting) (quoting *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring)).

¹⁴⁹ *Raich*, 125 S. Ct. at 2229 (O'Connor, J., dissenting).

¹⁵⁰ *Raich*, 125 S.Ct. at 2224 (O'Connor, J., dissenting).

¹⁵¹ See *Raich*, 125 S.Ct. at 2224-25 (O'Connor, J., dissenting).

commerce.¹⁵² Yet O'Connor made these legal arguments because she was struck by two larger policy arguments that fit within the conservative-Progressive rendition of federalism: Criminal law and the public health are "historic spheres of state sovereignty," and California's voters had "come to [their] own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering."¹⁵³

It could also be argued that Justice O'Connor's dissent, if it had become the opinion of the Court, could have gone considerably beyond the view of federalism that Kennedy sketched out in *Lopez*. After all, since she was willing to limit the Controlled Substances Act from reaching Raich and her co-defendant, she was willing to limit federal interstate regulatory schemes from some broader class of local conduct in which local concerns seemed especially strong.¹⁵⁴ Nevertheless, O'Connor reaffirmed her commitment to the New Deal expansion, following *Lopez* in saying that "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce . . . , *i.e.*, those activities that have substantially affect interstate commerce."¹⁵⁵ She also reaffirmed that she understood federalism in Progressive terms. When she touted federalism, she insisted that it exists "to protect historic spheres of state sovereignty"¹⁵⁶—note the commitments to "history" and "sovereignty"—and cited as her best normative argument Justice Brandeis's paean toward laboratories of experimentation.¹⁵⁷

C. Other Federalism Doctrines

In the full version of this Article, I plan to explain how this account explains many other features of the Rehnquist Court's docket, many of which have defied explanation to this point. Let me briefly recount the highlights here. To begin with, this account explains how the Court approached dormant Commerce Clause case law. This doctrine is nationalist, not federalist, for it encourages federal courts to declare dormant preempted state economic regulations. The Court's conservatives opposed most attempts to extend the dormant Commerce Clause for

¹⁵² *Raich*, 125 S.Ct. at 228 (O'Connor, J., dissenting).

¹⁵³ *Raich*, 125 S. Ct. at 2221 (O'Connor, J., dissenting).

¹⁵⁴ *See, e.g., Raich*, 125 S. Ct. at 2223 (O'Connor, J., dissenting) ("I did not understand our discussion of the role of courts in enforcing outer limits of the Commerce Clause for the sake of maintaining the federalist balance our Constitution requires as a signal to Congress to enact legislation that is more extensive and more intrusive into the domain of state power.").

¹⁵⁵ *Raich*, 125 S. Ct. at 2221 (O'Connor, J., dissenting).

¹⁵⁶ *Raich*, 125 S. Ct. at 2220 (O'Connor, J., dissenting).

¹⁵⁷ *Raich*, 125 S. Ct. at 2220 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

formalist reasons: They believe the Constitution does not authorize the doctrine and believe it impossible to apply.¹⁵⁸ However, the conservatives were sidelined by a coalition of enthusiastic liberals and moderates. For them, the doctrine has strong overtones of the Progressive theory of nationalism. In the 1935 case *Baldwin v. G.A.F. Seelig*,¹⁵⁹ Justice Cardozo echoed Woodrow Wilson by explaining “that a chief occasion of the commerce clause was ‘the mutual jealousies and aggressions of the States,’”¹⁶⁰ and insisting that the “the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.”¹⁶¹ The liberals and moderates cited those same policies to apply the doctrine ever more aggressively. For one example, in *C&A Carbone*, Justice Kennedy’s Court opinion justified the dormant Commerce Clause doctrine as an ends-justified rule “to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.”¹⁶²

The same account explains in part why the Rehnquist Court never seriously considered exporting the federalism revolution to Congress’s spending powers. Again, since the New Deal, the Supreme Court has used pro-government textualism to construe Congress’s spending powers permissively. On the Rehnquist Court, the conservatives balked at reconsidering this case law, for the term “general welfare” is too indeterminate to lend itself to a clear and manageable judge-made rule.¹⁶³ The moderates and liberals, however, embraced a broad substantive vision of Congress’s spending powers comparable to Justice Cardozo’s during the New Deal. Thus, in *New York v. United States*, when Justice O’Connor spoke of the spending powers, she observed, “As conventional notions of the proper objects of government spending have changed over the years, so has the ability of Congress to ‘fix the terms on which it shall disburse federal money to the States.’”¹⁶⁴ Likewise, in *Sabri*, the anti-bribery case two Terms ago, Justice Souter quickly established that “Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare . . . and it has corresponding authority under the

¹⁵⁸ See Claeys, Lewis & Clark.

¹⁵⁹ 294 U.S. 511 (1935).

¹⁶⁰ *G.A.F. Seelig*, 294 U.S. at 522; see *supra* notes – and accompanying text.

¹⁶¹ *G.A.F. Seelig*, 294 U.S. at 523; accord *H.P. Hood & Sons*, 336 U.S. at 532 (quoting this passage from *G.A.F. Seelig*).

¹⁶² *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (citing *The Federalist* No. 22 (Madison)). See also *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 205-07 (1994).

¹⁶³ See Claeys, Lewis & Clark.

¹⁶⁴ *New York*, 505 U.S. at 158 (1992) (quoting *Pennhurst St. Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

Necessary and Proper Clause . . . to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare.”¹⁶⁵ In case there was any doubt, he cited *McCulloch v. Maryland* to establish that the controlling legal standard was “means ends *rationality* under the Necessary and Proper Clause.”¹⁶⁶

This account also helps explain why the moderates were so enthusiastic about the federalism revival as it applied to constitutional-immunity doctrines—“the Tenth Amendment,” which bars Congress from “commandeering” state policy makers to execute federal mandates, and “the Eleventh Amendment,” which uses traditional principles of sovereign immunity to protect unconsenting states from being sued for damages in federal court. The conservatives supported both doctrines for textual and structural reasons (valid for sovereign immunity, though strained if not implausible for the anti-commandeering rule).¹⁶⁷ The liberals abandoned the *stare decisis* and functionalism they embraced in Commerce Clause cases and became ardent textualists, believing that “[t]here is not a clause, sentence, or paragraph in the entire text of the Constitution of the United States that supports” either doctrine.¹⁶⁸ The moderates, however, had their own reasons. As their *Lopez* concurrence suggested, the moderates, and especially Kennedy, echo Progressives like Wilson in assuming that constitutionalism is not for the people as much as it is *for the states*. No surprise, then, that Justice Kennedy defended sovereignty immunity to preserve to states the “dignity, though not the full authority, of sovereignty,”¹⁶⁹ and the anti-commandeering rule to preserve “the etiquette of federalism.”¹⁷⁰ “Etiquette” puts the states on a par with the federal government; “dignity” gives them status over their citizens.

The account presented here does not effectively explain how the Court fractured in cases involving section 5 of the Fourteenth Amendment. The Rehnquist Court’s liberals consistently supported permissive readings of section 5, and at least some of their arguments implicate the Progressive theory of nationalism, but their arguments raise other issues not considered here. On

¹⁶⁵ 541 U.S. at 605 (citing U.S. Const. Art. I, sec. 8, cls. 1, 18).

¹⁶⁶ *Id.* at 605 (citing *McCulloch v. Maryland*, 4 Wheat. 316 (1819)) (emphasis added).

¹⁶⁷ See Claey's, Lewis & Clark.

¹⁶⁸ *United States v. Printz*, 521 U.S. at 944 (Stevens, J., dissenting).

¹⁶⁹ *Alden*, 517 U.S. at 715. *Accord Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287-88 (1997) (“dignity and status”). Chief Justice Rehnquist addressed this concern in *Seminole Tribe*, although not as emphatically as Justice Kennedy did in *Alden* or *Coeur d'Alene*. See 517 U.S. at 58.

¹⁷⁰ *United States v. Lopez*, 514 U.S. 549, 583 (1994) (Kennedy, J., concurring) (“etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy”). For a critique of this policy value, see Matthew D. Adler & Seth Kreimer, *The New Etiquette of Federalism: New York, Printz and Yeskey*, 1998 Sup. Ct. Rev. 71.

the other hand, Justice Kennedy was a consistent and enthusiastic federalist in these cases; he authored the Court opinion in *Boerne v. Flores* that established the strict and state-friendly “congruence and proportionality” test.¹⁷¹ This test and his votes in subsequent section 5 cases accord with his concurrence in *Lopez*. He embraces the Progressive theory of nationalism as it applies to American economic regulation, entrenched in New Deal and Great Society regulatory programs ratified under the Commerce Clause and spending power; but section 5 cases seem to him to present instead issues regarding education, criminal law, tort law, and other traditional functions of the states. Meanwhile, Justice O’Connor has, with little explanation, voted inconsistently in section 5 cases. She provided one of the two swing votes in *Hibbs* (Rehnquist was the other) and the swing vote in *Lane* to support a generous reading of Congress’s section 5 powers. These votes are hard to explain. To generate a complete and fully-persuasive explanation, I suspect some future scholar will need to follow Robert Nagel’s suggestion and consider how the Warren Court’s conceptions of national Fourteenth Amendment rights changed attitudes toward federal-state relations.¹⁷² That project lies beyond the scope of this Article.

Finally, the account presented here also helps highlight more general trends in the types of normative arguments that the Rehnquist Court’s liberals made to criticize the federalism revival. For instance, in the sovereign-immunity/section 5 case *College Savings Bank v. Florida Prepaid Postsecondary*, Justice Breyer insisted that “the content of specific federalist doctrines [has] had to change to reflect the Nation’s changing needs,” postulated that the Constitution’s overriding goal the “protection of liberty,” but then concluded that but he insisted that the Constitution and especially its structural provisions needed to be read to “promot[e] the sharing among citizens of governmental decisionmaking authority.”¹⁷³ He has developed this theme more systematically in a prominent 2002 law lecture and then a book, in both of which he warned against applying federalism doctrines in a manner that frustrates Congress from cultivating “participatory, active liberty” characteristic of the ancients.¹⁷⁴ In these authorities, Breyer recycled the Progressives’ conception of freedom: He postulated that the Constitution secures liberty, but then defined “liberty” at such a high level of generality that it could mean

¹⁷¹ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁷² See Nagel, *Implosion*, at 69-111.

¹⁷³ *College Savings Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 527 U.S. 666, 702-03 (1999) (Breyer, J., dissenting).

¹⁷⁴ Breyer, *Our Democratic Constitution*, at 246; see also *id.* at 257 (“federalism . . . suggests a need to examine consequences valued in terms of active liberty”).

either the individual freedom from restraint generally supposed by the Founders, or the close sense of community needed to make work a participatory, civic-republican democracy.

Similarly, in *Tennessee v. Lane*, in a concurrence joined by Justice Souter and Justice Breyer, Justice Ginsburg recycled Progressive themes about “the living Constitution.” *Lane* made binding on states access-to-courts provisions of the Americans with Disabilities Act. As Ginsburg saw the matter, “[i]ncluding individuals with disabilities among people who count in composing ‘We the People,’ Congress understood in shaping the ADA, would sometimes require not blindfolded equality, but responsiveness to difference.”¹⁷⁵ When Ginsburg mentioned “We the People,” she appealed to Bruce Ackerman’s conception of an evolving American historical consciousness.¹⁷⁶ Ginsburg then reiterated that “[l]egislation calling upon all government actors to respect the dignity of individuals with disabilities is entirely compatible with our Constitution’s commitment to federalism, *properly conceived*.”¹⁷⁷ Ginsburg subordinates the “Constitution’s commitment to federalism” to make sure it is conceived “properly” in light of an Ackermanian understanding of “We the People” in a field like disability rights.

Both Breyer’s and Ginsburg’s arguments are telling. As this Article has suggested, “living Constitution” themes have influenced the Rehnquist Court’s federalism case law deeply but indirectly. A century ago, a living-Constitution view of politics and a political science deduced from living-Constitution theory set normative objects for constitutional interpretation and government structure. Mid-century, Supreme Court Justices locked those normative opinions in the cases, but with fairly conventional legal arguments. Five Justices on the Rehnquist Court tried to change course, although two of them bought into Progressive ideas more than they may have realized. Breyer’s dissent in *Florida Prepaid* and Ginsburg’s concurrence in *Lane* show liberal Justices appealing back to the wellspring of Progressive political theory. Even if their arguments do not become binding constitutional doctrine, they reveal the normative commitments that inform how an important bloc on the Rehnquist Court views substance and doctrine in constitutional federalism. This interplay between Progressive theory and doctrine nicely captures the way in which judicial liberals have used constitutional interpretation to advance Progressive normative commitments, during the Rehnquist Court and for a century.

¹⁷⁵ *Lane*, 541 U.S. at 536 (Ginsburg, J., concurring).

¹⁷⁶ See Bruce Ackerman, *We the People: Foundations* (1991).

¹⁷⁷ *Lane*, 541 U.S. at 537 (Ginsburg, J., concurring).