FEDERALISM R.I.P.?
Did the Roberts Confirmation Hearings Junk the Rehnquist Court's "Federalism" Revolution?

By Simon Lazarus

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INTRODUCTION: HALFWAY BACK TO THE ORIGINAL – DEMOCRATIC – UNDERSTANDING

In the spring of 1995, five members of the Supreme Court launched what was widely seen as an historic turf war against Congress. For the first time since the New Deal, the Court held that a federal statute, the Gun Free School Zones Act of 1990, exceeded Congress' authority under the Commerce Clause. Chief Justice William D. Rehnquist's majority opinion in the case, *United States v. Lopez*,[1] proclaimed its intent to initiate a new era of reining in federal domestic legislative power with an apocalyptic-sounding pledge to "start with first principles," including the "principle" that "The Constitution creates a Federal Government of enumerated powers." Asserting that there are activities "which the states may regulate but Congress may not," Rehnquist announced that henceforth the federal commerce power would be bounded by a categorical (if unspecified) "distinction between what is truly national and what is truly local."[2] *Lopez* and, even more, subsequent 5-4 decisions announcing new limits on federal authority under the Fourteenth Amendment as well as the Commerce Clause,[3] provoked fiery opposition from the four dissenting members of the Court, and drove leading liberal academics to write books with fevered titles advocating "Taking the Constitution Away from the Courts,"[4] and invoking an alleged pre-revolutionary tradition of "popular constitutionalism" that vested constitutional interpretation in "The People Themselves."[5] One especially influential critique, by a widely admired Reagan circuit court appointee, charged that the new jurisprudence had "return[ed] the country to a pre-Civil War understanding of the Nation."[6]

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*Public Policy Counsel to the National Senior Citizens Law Center, and Senior Counsel, Sidley Austin LLP. I have benefitted from the work, wisdom, and specific criticisms of a number of people in preparing this paper, particularly my colleague at NSCLC, Lauren Saunders, the Directing Attorney of the NSCLC's Herbert Semmel Federal Rights Project. Responsibility for the finished product is, of course, solely my own.

[1] 514 U.S. 549 (1995).

[2] 514 U.S. at 565.

[3] See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (Federal Violence Against Women Act private civil remedy invalid under both Commerce Clause and Fourteenth Amendment); *Kimel v. Florida Board of Regents,* 529 U.S. 627 (1999) (Damages remedy for violation of Age Discrimination in Employment Act invalid as applied to state governments under either Commerce Clause or Fourteenth Amendment).

[4] Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, 1999)

[5] Larry D. Kramer, *The People Themselves* (Oxford, 2004).

[6] John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* (University of California, 2002)

But from Congress itself, the apparent victim of the "Federalism Five's"[7] attack, only a few sporadic individual protests were heard. To be sure, both houses of Congress were controlled, like the Supreme Court itself, by narrow Republican majorities. Nevertheless, most of the statutes struck down by the Court's constantly expanding array of federalism-based doctrines had been enacted after years of extensive legislative work by lop-sided bipartisan majorities.[8] Furthermore, quite apart from the particular laws affected, the intrusive supervisory authority the Court asserted, to disregard congressional factual findings, second-guess its policy judgments, and micro-manage its selection of legislative ends and means, might have been expected to provoke an institutional backlash from members of Congress of all political stripes. But for 10 years no such reaction emerged.

But in September 2005, the Senate Judiciary Committee broke Congress' decade-long silence. During and following the Committee's hearings on Judge John Roberts' nomination to be Chief Justice of the United States, coverage of the inquiry has been predominantly negative: The Judiciary Committee members have been derided as timid and inept in their questioning, while the nominee was criticized as evasive, avoiding any clear picture of what his approach to major issues would be – "Too much of a mystery," the *New York Times*, for example, editorialized, to confirm.[9] In fact, on the record of the hearing and relevant Supreme Court decisions, such dismissive slaps are quite unwarranted, at least in this particular area of congressional domestic authority aka "federalism." On this important set of issues, the Committee asked numerous, sophisticated, well-informed, and even probing questions. Four Democrats and, more surprisingly, three Republicans, prominently including Chairman Arlen Specter, registered if not a full-fledged backlash, at least an initial pushback, against the Rehnquist Court's federalism catechism, and its "denigration" of congressional power and status vis-à-vis the judiciary. Roberts' responses were sometimes evasive and even misleading. But more frequently, he offered surprisingly elaborate views of the Rehnquist Court's federalism campaign – views that were, frequently, pointedly critical.

In summary – as elaborated in the body of the paper:

Specter and his several colleagues branded the Rehnquist Court's federalism decisions a mere cover for "usurpation" of congressional authority – "the hallmark of the judicial activism of the Rehnquist Court." Moving beyond rhetoric to legal argument, Specter specifically targeted the Court's abandonment of its long-standing principle that

[7] In addition to Chief Justice Rehnquist, Associate Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas, who formed the majority in virtually every one of the Court's post-Lopez "federalism" decisions. Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen G. Breyer dissented in virtually every case, generally in passionate, even angry terms.

[8] The Gun Free School Zone Act, struck down in *Lopez*, the Violence Against Women Act of 1994, source of the provision invalidated in *United States v. Morrison*, the Age Discrimination in Employment Act of 1967, and the 1973 amendment thereto invalidated in *Kimel v. Florida Board of Regents*, and the Americans with Disabilities Act of 1989, partially invalidated in *Alabama Board of Trustees v. Garrett,* 531 U.S. 356 (2000), all had strong bipartisan co-sponsorship and voting support.

[9] "Too Much of a Mystery," was the title given by the *New York Times* to its editorial urging rejection of Roberts' nomination after his hearing. Section 4, page 11 (September 18, 2005)

courts must uphold the constitutionality of federal laws as long as Congress could have had a "rational basis" for enacting them.

In response, the nominee effectively embraced the Senators' critique, insofar as it concerned laws implementing the Commerce Clause of the Constitution. He asserted that the Court itself, in its 2005 decision, *Gonzales v. Raich*,[10] which held that federal drug laws preempted state laws legalizing medicinal marijuana, had recanted the provocatively confrontational approach proclaimed in *United States v. Lopez* a decade earlier. Roberts emphasized that, Chief Justice Rehnquist's grandiose rhetoric notwithstanding, *Raich* meant that *Lopez* did not "junk" precedents extending back 200 years, and especially the late 20th century decisions that validated massive expansions of federal domestic authority engineered by the New Deal of the 1930s, and the myriad civil rights, health care, environmental, and other reform legislation of the 1960s, 70s, 80s, and 90s.

In lawyers' code, Roberts' gloss on *Raich* reinstates the deferential approach endorsed by Senator Specter – that the Commerce Clause empowers Congress to legislate on any matter that it could rationally conclude might substantially affect the national economy. As a practical matter, this interpretation constitutes a blank check, draining substantially all practical meaning from the concept that the Constitution grants the federal government strictly limited "enumerated powers." This is precisely why conservative commentators complained bitterly that *Raich* meant "the end of the Federalism Revolution."[11]

On other planks in the Court's federalism platform – slashing Congress' authority to enforce equal protection and due process rights conferred by the Fourteenth Amendment, and disempowering private individuals and groups from enforcing federal statutory rights in court – Roberts' responses were distinctly mixed. In these areas he was forthcoming in some respects, in other respects less so. So neither he nor the Court's decisions to date have, as a matter of current black-letter law, abandoned these latter Rehnquist Court initiatives. These continue to threaten major 20th century reform laws, such as, for example, civil rights laws like the Americans with Disabilities Act (ADA), environmental laws, and Medicaid and other safety net laws. *However*, as a matter of underlying principle, the Roberts-*Raich* 180-degree reversal on the Commerce Clause has knocked the logical props out from any claim that these doctrinal initiatives were inspired, or can be justified, by devotion to principles of "federalism." This is because, by reaffirming that commerce power-based laws must stand if "rational," Roberts and the Court have highlighted the inconsistency of, and left no apparent defense for, retaining different and radically more intrusive judicial tests to cripple social legislation that implements the Fourteenth Amendment or other constitutional provisions. Which certainly does not mean that the Roberts Court will prefer logical consistency to promoting conservative policy goals, only that it may find the latter course more awkward to rationalize. Perhaps also, the Court's critics, and, especially, the press, will

[10] 125 S. Ct. 2195 (2005)

[11] Ramesh Ponnuru, *The End of the Federalism Revolution*, National Review (July 4, 2005). See also Michael Greve, *Down with Dope, Up with Hope?*, American Enterprise Institute Federalism Project post, http://www.aei.org, posted July 7, 2005

stop repeating conservatives' "federalism" rhetoric, to avoid reinforcing their claims to seek restoration of some imagined Jeffersonian devolution, as distinguished from selectively undermining particular laws, like the Family and Medical Leave Act or the Age Discrimination in Employment Act, that they disdain but lack the necessary Congressional or popular support to repeal.

Developments since Chief Justice Roberts' accession to the Court confirm the – contradictory – signals sent at his hearing. In January 2006 the Court decided three important federalism cases. In the most noted of these, *Gonzales v. Oregon*,[12] commentators emphasized the states' rights-oriented (though liberal in policy terms) result, that a 6-3 majority had denied the Attorney General the authority to preempt Oregon's assisted suicide law. But through the lens of the post-*Lopez* debate about federalism-based constitutional, court-imposed limits on Congressional authority, the key fact was that all nine justices acknowledged that the Commerce Clause empowered Congress to give the Attorney General that authority if it wants to do so. No one contended, as Chief Justice Rehnquist said of secondary education in *Lopez*, that defining legitimate medical practice to include assisting patient suicide was categorically reserved for exclusive state control.

The two, less noticed, January federalism decisions both involved the Rehnquist Court's expansion of state "sovereign immunity" to block suits against state-affiliated entities. This thread of federalism doctrine affects Congressional legislative authority pursuant to both the Commerce Clause and the Fourteenth Amendment, as well as other sources of Congressional power. Consistent with the fleeting and ambiguous treatment of sovereign immunity in the Roberts and Alito hearings, the two decisions seemed to brake – but not necessarily abort or reverse – its advance. In *United States v. Georgia,* Justice Scalia wrote, for a unanimous Court, an opinion that resoundingly affirms Congress' authority to empower citizens to sue states for violation of the ADA, or other laws enforcing the Fourteenth Amendment insofar as such laws or lawsuits target conduct that "*actually* violates the Fourteenth Amendment," independent of the statute. [13] The decision – surprising for its tone and breadth of Court support if not necessarily for the result –could revitalize judicial enforcement provisions of the ADA that had recently been considered on life support. Just how much revitalization is open to question, as Justice Scalia painstakingly distinguished other recent decisions in which he and other conservative justices had voted to extend state immunity.

In *Central Virginia Community College v. Katz*, a 5-4 majority held that the Rehnquist Court's state "sovereign immunity" doctrine did not bar Congress from authorizing federal bankruptcy trustees to recover monies inappropriately transferred by bankrupt entities to state agencies.[14] As with *U.S. v. Georgia*, the future significance of the *Katz* holding is also unclear. The new Chief Justice voted with the conservative minority to continue ratcheting up the scope of state sovereign immunity; that minority

[12] 126 S. Ct. 904 (2006)
[13] 126 S. Ct. 877 (2006) (Emphasis in original)
[14] 126 S. Ct. 990 (2006)

could well become a 5-4 majority, now that the apparently more assertively conservative Samuel Alito has replaced Justice O'Connor.

In all events, the January 2006 trio of decisions reinforce the impression left by Chief Justice Roberts' confirmation testimony that Rehnquist-style federalism will be in play under the new regime. Just where the play will be, and where it will lead, is uncertain. The accession of Justice Alito deepens that uncertainty. For starters, it is not entirely clear whether he will go along with Chief Justice Roberts' brusque refusal to read *United States v. Lopez* as the start of an anti-New Deal counter-revolution. Ten years ago, on the Third Circuit, Alito wrote a dissent reaching precisely the opposite conclusion, when he ruled that the federal ban on possession of machine guns exceeded *Lopez*-inspired strictures on Congress' Commerce Clause authority. And in his January 2006 hearing Alito declined numerous opportunities to acknowledge, as Roberts had proclaimed, that his radical interpretation had been definitively sidelined by *Gonzales v. Raich.*[15] However, at least with respect to Commerce Clause jurisprudence, Alito's impact will probably be limited. Only three members of the original Federalism Five (Rehnquist, O'Connor, and Thomas) kept the faith to dissent in *Raich*, two of whom, of course, are no longer on the Court. So, barring a brazen *volte-face* by Roberts, and Scalia as well, the *Raich volte-face* on Congress' Commerce Clause authority will stand for the foreseeable future.

Only time will tell, however, whether the apparent rolling up of the Court's Commerce Clause foray will take with it the other federalism dominoes – whether John Roberts' exchanges with the Senate Judiciary Committee were the first chapter in a dialogue between the Roberts Court and a newly galvanized Congress about their respective constitutional turf claims, or were simply posturing for the the press and the C-Span audience, with no long-term behavioral changes either from Congress or the Court. The underlying issue is not esoteric or technical, though the precise legal questions in many of the recent "federalism" cases are both. When the Rehnquist federalism revolution was first announced, both conservatives and liberals perceived, in its supercharged rhetoric and portentous reasoning, the seeds of a judicial movement to "restore" an imagined "Constitution-in-Exile" that the conservative pre-New Deal Supreme Court had brandished to strike down many forms of federal and state social legislation. That threat has now become more circumscribed; a strong majority of the current Court has acknowledged serious flaws in, and in one significant doctrinal area – Congressional authority to implement the Commerce Clause – effectively scuttled the "first principles" injudiciously proclaimed in 1995.

Unraveling the remaining strands of the Rehnquist "federalism" campaign is essential to ensure that major 20th century social reform laws stand, and work, as their congressional framers intended. More fundamental, finishing off the Court's retreat is

[15] The Third Circuit decision was *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996). The contrast with Roberts' hearing position is delineated in Simon Lazarus and Lauren Saunders, *Gunning for Congress: Samuel Alito's Federalist Bent Makes John Roberts Look Like a Moderate*, American Prospect Online, http:www.prospect.org, posted November 15, 2005. Nominee Alito's testimony on the issue is discussed in Section III below.

necessary to reinstate the design for a democratic federalism contemplated by the framers of the Constitution itself. Senator Specter's prescription for "rational basis" deference to Congress descends directly from Chief Justice John Marshall's 1819 bedrock instruction in *McCulloch v. Maryland*, that courts must uphold acts of Congress as long as their "end be legitimate," and their means "appropriate" to their end.[16] Both formulas jibe with the original intent of the founding generation, as well as 20th century Supreme Court precedent pre-dating the 1995 Rehnquist diversion, that the safeguards of federalism be primarily political and democratic, not judicial. As stated in Federalist No. 46, the "ultimate authority" over both federal and state governments "resides in the people alone," who the Courts should not "preclude" from assigning responsibility where "they may discover it to be most due." Contrary, therefore, to the Rehnquist Court's half-aborted initiative, American federalism exists primarily to expand democratic options for the people, not to empower judges to contract their options, or arbitrarily trump the choices of their elected representatives.

I. THE JUDICIARY COMMITTEE ON FEDERALISM: "THE HALLMARK AGENDA OF THE JUDICIAL ACTIVISM OF THE REHNQUIST COURT"

A. Chairman Specter's Prehearing Challenge

As soon as President Bush announced, on July 19, 2005, Judge Roberts' nomination to fill retiring Justice Sandra Day O'Connor's seat, Democrats immediately targeted a 2003 Roberts dissent, in which he appeared to question whether the Commerce Clause justified application of the Endangered Species Act to species found in only one state.[17] Roberts, however, quickly squelched this potential line of attack on his candidacy, mollifying Judiciary Committee Democrat Senator Charles Schumer of New York and other potential critics during courtesy calls the first week after President Bush announced his nomination.

Little more was heard about the Commerce Clause as a serious confirmation issue until the first week of August, when out of the blue, Republican Judiciary Committee Chair Specter released a 3-page single-spaced letter to the nominee giving "advance notice" of questions he planned to ask at the upcoming hearing.[18] The letter did not mention any opinion or action or statement by Roberts, but rather focused on the Supreme Court's *Lopez* and *Morrison* decisions (noted above) invalidating provisions, respectively, of the Gun Free School Zones Act and the Violence Against Women Act under the Commerce Clause. Nor did the letter directly raise substantive issues about the reach, in principle, of Congress' Commerce Clause power, as indicated by those two or any other Supreme Court decisions. Instead, Specter zeroed in the constitutional turf-grab registered in these cases. Accusing the Court of "usurping Congressional authority," he wrote that "members of Congress are irate about the Court's denigrating and, really, disrespectful statements about Congress' competence." Focusing particularly on *Morrison*, Specter condemned the Court for "reject[ing] Congressional findings" and

[16] 17 U.S. (4 Wheat.) 317 (1819)
[17] *Rancho Viejo v. Norton*, 334 F.3d 1158 (D.C. Cir.)
[18] Letter dated August 8, 2005, from Arlen Specter to Honorable John G. Roberts, Jr.

ignoring the operative rule of decision grounded in "decades of precedent" and elaborated in 1968 by Justice John Marshall Harlan – that the Court must defer to Congress if a "rational basis" can be adduced for "a chosen regulatory scheme necessary to the protection of commerce. . . ."[19]

Specter's only reference to "federalism," the asserted philosophical basis for the Court's new line of decisions, was in effect to dismiss it as a sham. "A reinvigoration of federalism," he said, "is, of course, a hallmark agenda of the judicial activism of the Rehnquist Court."

Two weeks later, Specter followed with a second letter, this one attacking the Court's recent decisions constraining congressional authority to enforce the Fourteenth Amendment through, in the particular cases at issue, the Americans with Disabilities Act.[20] As in the August 8 Commerce Clause letter, Specter focused, not on the substantive issues or on the philosophical "federalism" issue but "on the Court's judicial activism in functioning as a super-legislature." Once again, he assailed the Court's rejection of congressional factual findings supported by "overwhelming evidence," and, especially, for overturning a statutory remedy for which Congress plainly had a "rational basis."

In the second letter, Specter especially targeted the legal standard the Court had "manufactured" in 1997 for laws implementing authority conferred on Congress to "enforce" the Fourteenth Amendment by "appropriate legislation." Under this standard, Fourteenth Amendment enforcement legislation is valid only if "proportional and congruent" to specific, systematic, demonstrated violations of the substantive provisions of that Amendment.[21] As emphasized by Specter, this proportional and congruent formula expressly jettisons the rational basis approach traditionally used to evaluate all federal legislation, tacitly abandoned as to the Commerce Clause in *Lopez* and *Morrison*, and empowers the federal courts to calibrate the appropriateness of Congress' "ends" and its "means" for achieving them. Specter noted Justice Antonin Scalia's critique of the congruence and proportionality test as "flabby," because it gives the Court too much discretion to reach apparently contradictory results based on individual justices' subjective policy preferences. But his principal point was that any approach – the congruent and proportionality test or Scalia's bright-line "alternative" – that results in invalidating a factually and "rationally" defensible statute like the Americans with Disabilities Act, converts the Court into an illegitimate "super-legislature."[22]

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[19] *Maryland v. Wirtz*, 392 U.S. 183, 190.

[20] Letter from Arlen Specter to Honorable John G. Roberts, Jr., dated August 23, 2005.

[21] The rule that Section Five enforcement legislation must demonstrate "proportionality or [later characterized as "and"] congruence between the means adopted and the legitimate end to be achieved" originated in *City of Boerne v. Flores*," 521 U.S. 521, 533 (1997), in which the Court invalidated the Religious Freedom Restoration Act.

[22] Specter implicitly criticized Scalia's alternative to the congruent and proportionality test, which he derided as "a new rationale for disagreeing with the ADA's remedy . . . that the Fourteenth Amendment applies only to state racial discrimination" and not to gender, age, disability, or other forms of discrimination "far removed from the principal object of the Civil War Amendments."

In launching this attack, Specter's aim was plainly not to initiate a drive to cripple the Court (though he did refer darkly to President Franklin Roosevelt's court-packing proposal to counter "activist" Supreme Court rejections of New Deal legislation). Nor was he attempting to put Judge Roberts' eventual confirmation at risk (though he did claim to speak on behalf of "the Senate's determination to confirm justices who will respect Congress' constitutional role"). Rather, in previewing his questions in such florid, angry terms, Specter appears to have been bent on recruiting Roberts, as the prospective leader of a new Court, to reverse a misguided gambit undertaken by his predecessor. And he may also have been aiming to jolt his Senate colleagues into recognizing, as for a decade they had generally failed to do, the threat posed by the Rehnquist Court's "federalism" to their own power and status.

B. Judiciary Committee Members Join Specter's Attack

Soon after the actual hearing commenced, it became apparent that Specter had succeeded, insofar his aim in writing the August 8 and August 23 letters was to energize his colleagues to defend Congress' turf. During the four days of statements and questions, seven of the Committee's 18 members, four Democrats and three Republicans, propounded numerous statements and questions about the Court's federalism jurisprudence. Echoing Specter's August letters, the questions recognized that the issue at stake was far less states' rights versus federal power than congressional power vis-à-vis the judiciary. Some members emphasized the importance of respecting congressional prerogatives generally.[23] But most questions, however, went into detail, reflecting surprising knowledge of arcane doctrinal byways, and a recognition that the federalism debate was not just about Congress' powers under the Commerce Clause – indeed, that equally serious threats to Congress concerned other sources of Congress' constitutional and non-constitutional authority.

1. Congress' Commerce Clause Authority

In addition to Specter himself, who pursued the issues elaborated in his letters in similar terms and at considerable length, Senators Feinstein and Schumer criticized the Rehnquist Court's approach to limiting Congress' Commerce Clause authority and to varying extents they probed Judge Roberts for his views on that issue. Feinstein asked whether Roberts generally agreed with the post-*Lopez* jurisprudence imposing new constraints on Congress and, specifically, what his *Rancho Viejo* dissent portended for the ESA and other environmental laws.[24] Schumer pushed Roberts to explain where he stood on the validity of *Wickard v. Filburn*, the 1942 decision extending Commerce Clause authority to purely intrastate actions which, if repeated in multiple locations,

[23] In his first round of questioning, Hatch sought "reassurance" that Roberts' lack of Hill experience would not lead him to disrespect Congress in reviewing federal laws, specifically observing that "along with Senator Biden," he was the primary co-sponsor and author of the Violence Against Women Act, and that he felt that the Court "overreached" when it overturned the civil liability provisions of that act in *Morrison.* Hearing transcript (on file with author) (hereafter "Transcript"), page 35. Hatch observed that Justice Stephen G. Breyer exhibited deference to Congress in reviewing issues such as the constitutionality of the criminal sentencing guidelines, based on Breyer's experience in 1979-80 as Chief Counsel to the Senate Judiciary Committee.

[24] Transcript at 116-18, 279-80, 352-53.

could on an aggregated basis, substantially affect interstate commerce.[25] Schumer also pressed the nominee on whether he and the Court should generally defer to Congress on factual and policy determinations as to the likelihood that non-commercial and intrastate activities could or would affect interstate commerce and hence be fit subjects of federal legislative treatment.[26]

2. Congress' Authority to "Enforce" Equal Protection and Due Process of Law Under the Fourteenth Amendment

Senator Specter's prehearing attack focused its most scathing criticism on the Court's evisceration of Congress' authority, expressly conferred by Section Five of the Fourteenth Amendment, to "enforce" the equal protection, due process, and "privileges and immunities" provisions in Section One of the Amendment, by "appropriate legislation." In the hearing, Specter took up where he had left off, pressing Roberts to acknowledge that the congruence and proportionality test, "plucked out of thin air" by the Court, constituted "the very essence" of judicial "arbitrariness" and "activism."[27] Specter was joined by fellow Republican Michael DeWine, who stressed the extensive documentation of disability-based discrimination culled from Congress' 13 hearings, and pressed Roberts to discuss whether the Court's rejection of Congress' findings underlying the ADA was consistent with his emphasis on the "limited role" of judges in governing.[28]

3. Judicial Enforcement of Federal Constitutional and Statutory Rights

Committee members showed significant interest, not only in the extent of Congress' power to enact legislation under the Commerce Clause, spending clause, and the Fourteenth Amendment, but also in the often overlooked issue of whether and when and how readily private individuals can go to court to enforce rights created by laws passed by Congress. The Rehnquist Court had steadily narrowed the occasions on which private judicial relief is available for federal law violations, particularly against state and local government violators, and it increased procedural barriers to plaintiffs in those situations where judicial relief remained, in principle, an option. Roberts himself as an appellate lawyer in the Reagan and George H.W. Bush administrations, and as a private practitioner, frequently championed this trend.[29] Senators Feingold, Leahy, and Feinstein

[25] 317 U.S. 111 (1942). Transcript at 167-71, 397-98. Schumer noted that, without the *Wickard* doctrine, laws such as the ESA, Title VII of the Civil Rights Act, OSHA, and the Controlled Substances Act "would go," and he observed that Justice Clarence Thomas, whom President Bush had consistently held out as a model for his judicial nominees, would overrule *Wickard* and other post-New Deal Commerce Clause precedents.

[26] Transcript at 397-98

[27] Transcript at 216-19

[28] Transcript at 104-05.

[29] As an assistant to President Reagan's first attorney general, William French Smith, Roberts referred in a memo to the "damage" wrought by the Supreme Court's 1981 decision construing 42 U.S.C. §1983 to support individual lawsuits against state officials for violating federal statutory rights, as well as federal constitutional rights. As Deputy Solicitor General, Roberts argued for barring Medicaid providers to sue state governments for underpayments (*Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), and for barring individual beneficiaries from vindicating federal statutory rights in court in view of an allegedly detailed statutory plan for administrative enforcement. *Suter v. Artist M,* 503 U.S. 347 (1992). (Roberts, unsuccessful in the first case, was successful in the second, but Congress reversed that result legislatively, preserving the private right of action in circumstances

probed to determine whether Roberts as chief justice would favor closing court house doors still further. They stressed the importance of suits under 42 U.S.C. §1983 for beneficiaries of "Medicaid, public housing, child support enforcement, and public assistance"[30] programs to "enforce their rights in federal court," and questioned Roberts' view of contentions (by Justices Scalia, Thomas, and certain lower court federal judges) that programs providing for Federal funding and state administration, like Medicaid, are a "kind of exclusive bargain" between the two levels of government, with no enforceable rights for beneficiaries.[31]

II. ROBERTS' RESPONSE: ONE CHEER FOR THE FEDERALISM FIVE

Unsurprisingly, especially in the wake of Senator Specter's two prehearing letters, nominee Roberts was well prepared to respond to the senators' federalism-related concerns. On several points, he seemed to volunteer elaborate observations not necessarily called for by the questions. In general, he did not give a thumping endorsement to his predecessor's signature initiative.

A. Roberts to Congress: The New Deal Commerce Clause is Safe in My Hands

As anticipated, Roberts moved quickly to deflect environmentalist criticism of his 2003 *Rancho Viejo v. Norton* opinion concerning Endangered Species Act protection of a "hapless toad" species found only in one state. He noted that, unlike a separate dissent in the case (by Judge David Sentelle), his dissent merely suggested that the D.C. Circuit should have reheard the case en banc "because there are other ways of sustaining this act that don't implicate the concern" voiced by a Fifth Circuit decision.[32] He also attempted to assuage concerns raised by Senator Dianne Feinstein about whether his *Rancho Viejo* dissent might be "a prelude for [overturning] the Clean Water and the Clean Air Act,"

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covered by that case.) In private practice, Roberts argued, successfully, to narrow the standards still further for permitting judicial relief, to the point where the law stands today. *Gonzaga University v. Doe*, 536 U.S. 273 (2002)

[30] Senator Feingold – Transcript at 148; Senator Leahy, at 366.

[31] Senator Leahy, page 366; Senator Feinstein, page 384. Justices Scalia and Thomas have proposed their contract/third party beneficiary concept for barring private enforcement of state-administered federal entitlement programs in various cases, particularly, *Blessing v. Freestone*, 520 U.S. 329, 349 (1997); *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644, 674, 682-83 (2003). A notorious district court decision treating Justice Scalia's *Blessing* concurrence as if it were governing law, *Westside Mothers v. Haveman*, 133 F.Supp.3d 549 (E.D. Mich. 2001), was overruled by the Sixth Circuit, *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir. 2002), and rejected by all other circuit courts considering the issue.

[32] *GDF Realty Investments, Ltd. V. Norton*, 326 F.3rd 622 (2003) As noted above, Roberts pointed to similar approaches advanced by the Fourth and Ninth Circuits to uphold federal laws protecting endangered species on the basis of multiple, if in some instances attenuated impacts on interstate commerce. *Gibbs v. Babbitt*, 326 F.3d 622 (4th Cir. 2000); *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996). Although Roberts' Senate testimony implied that such an alternative theory would provide justification for ESA coverage of the arroyo toad at issue in *Rancho Viejo*, that conclusion might not turn out to be true. Furthermore, limited though it was, Roberts' dissent does indicate he may have broader questions about using the Commerce Clause to justify federal laws regulating non-economic activities.

observing that, given "the commercial impact of pollution," these laws would not present "remotely" as difficult an issue as ESA application to a purely one-state species.[33]

However, the main thrust of his Commerce Clause-related testimony was to staunch concerns (or hopes) that he shared the inclination of some conservative advocates, academics, and judges to extend the reasoning of *Lopez* and *Morrison,* in order to drastically roll back Congress' post-New Deal regulatory authority, and lay waste to the vast network of laws derived from that authority. Roberts seemed intent on sending this message, without specifying his opinion of recent individual decisions, by focusing on the Court's 2005 decision in *Gonzales v. Raich.*[34] *Raich*, he said, meant that those two decisions were not to be viewed as the start of a counter-revolution. Instead, they were merely:

> two decisions in [the] more than 200-year sweep of decisions in which the Supreme Court has . . . recognized extremely broad authority, on Congress' part, going way all the way back to *Gibbons v. Ogden* and Chief Justice John Marshall when those Commerce Clause decisions were important in binding the nation together as a single commercial unit.[35]

To drive the point home, he twice stated that *Raich* means that *Lopez* and *Morrison* did not "junk all the cases that came before."[36]

Roberts' did-not-junk line may seem like a relatively innocuous truism. But in context his formulation was tantamount to confirming that conservative observers were correct when they lamented that *Raich* meant the "end of the Federalism Revolution" proclaimed in *Lopez.*[37] This is because, from the beginning, *Lopez* was significant, not for its limited holding – the federal statute at issue duplicated laws on the books in all 50 states and lacked any provision requiring even a nominal connection to interstate commerce – but for Chief Justice Rehnquist's portentous rhetoric. As noted above, Rehnquist's majority opinion proclaimed its return to "first principles," reviving the primacy of "enumerated" congressional powers, and categorically walling "traditionally" or inherently "local" activities off from Congress' reach. It was these rhetorical thunderbolts that provoked passionate and lengthy dissents from Justices Stevens, Breyer, Souter, and Ginsburg, as well as frantic opposition from liberal observers, and equally intense enthusiasm from conservative legal intelligentsia on the bench, in academia, and think tanks.

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[33] Transcript at 353. Senator Schumer voiced similar concerns, noting that if extended, Roberts' logic in *Rancho Viejo* might threaten, in addition to ESA, Title VII of the Civil Rights Act, OSHA, the Controlled Substances Act, and "prohibitions against personal possessions of biological weapons." Transcript at 171.

[34] 125 S. Ct. 2195 (2005)

[35] Transcript at 116. Referring to Chief Justice John Marshall's decision in *Gibbons v. Ogden* could have been intended to underscore an expansive view of the Commerce Clause, because *Gibbons* is often characterized as one of the broadest expressions of the commerce power.

[36] Interestingly, Roberts made his "junking" remark twice, both times in the course of failing to respond to invitations from conservative Republican senators to endorse *Lopez* as a "healthy" reminder that that there are limits to Congress' "enumerated" powers. Transcript at 180 (Cornyn), 288 (Sessions).

[37] Ramesh Ponnuru, *National Review (*July 4, 2005).

A decade later, *Raich*, although not directly on point with *Lopez*, relied heavily on the aggregation "methodology" *Lopez* scorned, as the basis for upholding federal prohibition of possession or growing for self-consumption of marijuana for medicinal purposes as specifically sanctioned by a California state law.[38] A 6-2 majority, including Justices Kennedy and Scalia from the former Federalism Five, held this prosecution consistent with the Commerce Clause, notwithstanding multiple factual elements of the case that under Rehnquist's *Lopez* opinion might have been expected to favor a contrary result. To begin with, in common-sense terms, both the aim of the law, and the conduct at issue in the case were "non-economic;" under *Lopez's* approach, hypothetically aggregating the effects of the plaintiff's personal use could have have been barred. In addition, the subject-matter area (regulation of the practice of medicine) was traditionally a state matter, an important *Lopez*-denominated factor disfavoring federal regulatory authority. Other such factors included: the fact that the medicinal value of the marijuana for the patients involved in the case was painfully apparent; that state legislation approved and regulated the practice; that the threat of abetting illicit recreational drug abuse, Congress' clear objective in passing the Controlled Substances Act, was more theoretical than real; and that Congress had not contemplated this type of state-sanctioned medicinal use and procedure when it enacted pertinent provisions of the Act. The Court ignored or discounted all these elements, despite their prominence in the framework outlined in *Lopez*.

As interpreted by Roberts, *Raich* put a revisionist gloss on *Lopez*, reading out Rehnquist's radical devolutionist rhetoric, in effect adopting something like the concurring opinion in *Lopez* of Justice Kennedy. The gist of Kennedy's opinion was that "enough was enough" – that the Gun Free School Zones Act was just too big a stretch to connect to interstate commerce, at least if Congress didn't bother to do its homework and spell out some sort of connection, however tenuous. However, Kennedy emphasized, the Commerce Clause gave Congress whatever power it needed to assure the strength and health of the national economy.[39] In effect, as Justice O'Connor's *Raich* dissent tartly observed, her colleagues in 2005 had retroactively trivialized *Lopez*, so that it now represented nothing more than a "drafting guide."[40] Roberts expressly confirmed O'Connor's spin. He told the Judiciary Committee that the only constitutional defect that *Lopez* identified in the Gun Free School Zones Act was the statute's lack of "a requirement that the firearm be transported in intestate commerce." He went on to describe this as a "fix" that "would be easy to meet in most cases [involving] guns . . ."[41]

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[38] Rehnquist's exposition of Commerce Clause doctrine provided that federal laws covering "non-economic" activities must, to be valid, show a "substantial effect" on interstate commerce *without* "piling inference upon inference" – i.e., without resorting to "aggregation" methodology. 514 U.S. at 567.

[39] 514 U.S. at 569, 572.

[40] 125 S.Ct. at 2223.

[41] Transcript at 279. One of the few facts pertinent to issues arising during his testimony of which Roberts appeared not to be aware is that Congress actually enacted a "fix" similar to his recommendation. The senators also appeared unaware that they had voted for this "fix."

Roberts also seemed to minimize the impact of Rehnquist's doctrinal invention in *Lopez* that Congress faces an especially high burden when it purports to link interstate commerce with "non-economic" and/or "traditionally" local subject-matter areas.[42] In answering a question from Senator Schumer whether Congress can regulate "purely local" activities if it finds that they "exert a substantial effect on interstate commerce," Roberts noted Rehnquist's rule that the effects of such activities can be "aggregated" only if they are "commercial in nature."[43] Nevertheless, he did not seem to feel that Rehnquist's distinction between commercial and non-commercial *activities* had much bite, in terms of Congress' discretion to identify "effects" on interstate commerce. He readily agreed with Schumer that Congress could regulate non-commercial cloning because of its potential commercial impact.[44] When Senator Feinstein asked, in regard to the statute struck down in *Lopez* itself, "At what point does crime influence commerce?" Roberts responded, "*Well, I think it does*."[45]

B. Roberts on Congress' Fourteenth Amendment Enforcement Authority

1. Scalia's "Originalism" Misstates the Framers' (Original) Intent

As noted above, Senator DeWine and especially Senator Specter pressed Roberts hard to acknowledge that his emphasis on judicial "modesty" and deference to Congress required repudiating the Court's current "activist" approach to scrutinizing laws passed to "enforce" the Fourteenth Amendment, as exemplified in *Board of Trustees of the University of Alabama v. Garrett*, *Kimel v. Florida Board of Regents*, and *United States v. Morrison*. What did the senators get for their effort?

Probably, Roberts' most significant statement about the Fourteenth Amendment concerned an issue never directly raised during the hearing, but which he evidently was poised to answer. He discussed, and succinctly dismissed, the brand of "originalist" constitutional theory promoted by Justice Scalia – namely that broad and vague constitutional terms should be "strictly" confined by reference to *societal practices* extant when the provision was drafted – Roberts focused on the equal protection clause of the Fourteenth Amendment. Roberts volunteered:

> There are some who may think they're being originalists who will tell you, "Well, the problem they were getting at were the rights of the newly freed slaves. And so that's all that the equal protection clause applies to."
>
> But, in fact, they didn't write the equal protection clause in such narrow terms. They wrote more generally.
>
> That may have been a particular problem motivating them, but they chose to use broader terms, and we should take them at their word, so that *it is*

[42] 514 U.S. at 564-65.
[43] Transcript at 398
[44] Ibid.
[45] Transcript at 279.

perfectly appropriate to apply the equal protection clause to issues of gender and other types of discrimination beyond the racial discrimination that was obviously the driving force behind it.[46]

Roberts' critique of Scalia's "originalist" construction of the equal protection clause has potential bearing on his approach to construing Congress' power to enforce that amendment. This is because the most recent, and probably the most conspicuous occasion on which Scalia invoked his version was in his 2003 dissent in *Tennessee v. Lane*. Here Scalia asserted that henceforth he will vote to strike down *all* "prophylactic" legislation purporting to enforce the Fourteenth Amendment, except legislation targeted at the "original" spur to adopting the Amendment, namely systematic state-sponsored race discrimination. [47] Hence, for example, Title II of the Americans with Disabilities Act, which is addressed to discrimination against citizens with disabilities, or the Violence Against Women's Act, insofar as it purports to prevent or remedy discrimination against women, would be flatly unconstitutional; no basis offered by Congress, rational, congruent, proportional, or otherwise could help.[48]

Roberts' declaration that non-racial types of discrimination have equal status as appropriate targets for congressional enforcement action does not, of course, mean that he committed himself to accept Specter's invitation to repudiate the doctrinal obstacles the Rehnquist Court imposed on Congress when it seeks to draft Section Five enforcement legislation. However, it does seem fair to observe that this was the impression he sought to convey. Why else would he have gone so visibly out of his way to distance himself from Scalia's contention that, in principle, the equal protection clause has little force when applied to gender or disability or age-based discrimination?

2. "Congruent and Proportional" in Play?

With respect to judicial deference to congressional findings, Roberts did offer boilerplate acknowledgements of Congress' superior institutional competence – noting that courts "can't sit and hear witness after witness," nor "make the policy judgments

[46] Transcript at 58

[47] "Prophylactic" legislation, as used by Justices Scalia and Kennedy here, means legislation proscribing practices that are not themselves violations of the substantive provisions of the amendment – e.g., that do not inherently constitute unconstitional discrimination in violation of the equal protection clause – or prescribing affirmative procedures or practices in order to generally remedy a pattern of such violations, or to prevent them from occuring in the future. If limited to redressing actual, specific, proven violations, as Justice Scalia advocates, section five of the Fourteenth Amendment would authorize little more than federal tort legislation for constitutional violations.

[48] *Tennessee v. Lane,* 541 U.S. at 561-65 Scalia's analysis (shared with Justices Kennedy and Thomas in their dissent in the same case purporting to apply the "congruent and proportional" test to invalidate Title II) would put discrimination driven by negative stereotyping, as distinguished from consciously intentional discrimination beyond the reach of Congress' Section Five authority. Senator DeWine objected to the Court's rejection in *Garrett* of the fact that Congress "found that [disability-based] discrimination flowed from stereotypic as well as 'purposeful unequal treatment.'" Transcript at 105. During the oral argument in *Tennessee v. Lane*, Justice Ginsburg flagged this problem, in objecting to assurances from other members that, even if Congress could not redress the alleged violation present in that case through the remedy provided by the ADA, other, more "congruent or proportional" means could be employed; Ginsburg noted that the proposed test for finding a violation was so stringent that it was problematic whether, in the real world, one could ever be found.

about type of legislation is necessary in light of findings that are made."[49] But while he observed that deference to Congress on such points "has a solid basis," he declined to criticize the Federalism Five for failing to show appropriate deference, or to state whether or how he would handle such situations differently.

However, he may have offered something of a concession by adding that the dismissive approach to congressional factual findings in *Kimel*, *Garrett,* and *Morrison* may be viewed as having been altered by *Tennesse v. Lane* and *Hibbs*:

> where the court did defer to the fact-finding . . . and particularly in the *Hibbs* case focused on the legislative recognition based on its examination of the factual record developed at hearings about the statute that was at issue there and the particular approach that they were taking to remedy discrimination under the Fourteenth Amendment – which is the authority that Congress has.

Perhaps more significant, Roberts went on to suggest that, not only the non-deferential treatment of congressional findings, but the "proportional and congruent" standard for scrutinizing Section Five legislation had been put in play by two more recent decisions. Observing that Justice Scalia had, as noted above, broken ranks with the supporters of the *Boerne* proportionate and congruent test, Roberts said, "Any area of the law where Justice Scalia is changing his mind has got to be one that's particularly difficult, and one that I think is appropriately regarded as still evolving and emerging." He continued in the same vein:

> I don't know if the more recent cases in Lane and Hibbs represent a swinging of the pendulum away from cases like Garrett and Kimmel on the other side, or if it's simply part of the process of the court trying to come to rest with an approach in this area.
>
> But it is an area that the court has found difficult. And just as a general matter, I think when you get to the point of reweighing congressional findings that starts to look more like a legislative function, and the courts need to be very careful as they get into that area to make sure they're interpreting the law and not making it.[50]

By thus questioning the precedential force of the key cases establishing Rehnquist section five jurisprudence, Roberts sought to placate his particular questioner at this point, Senator DeWine, and other Judiciary Committee members who object to that jurisprudence, without making any commitments. But DeWine and his colleagues have some basis for expecting Roberts to acknowledge conflict between his professed reverence for judicial restraint and his predecessor's agenda for undermining Congress'

[49] Transcript at 106.

[50] Transcript at 106-07. Given Roberts' elaborate exposition of factors that militate in favor of reducing a particular decision or rule's precedential weight, his casting of doubt on the force of "proportional and congruent" may take on added potential significance.

capacity for remedying discrimination based on age, gender, disabilities, and other invidious factors.[51]

C. Shrink the Strike Zone and Close the Courthouse Door? – Roberts on Citizens' Court Access to Enforce Federal Rights

But however flexible his views on Congress' authority to enact broad social legislation, Roberts appeared considerably less pliable about individual citizens' ability to enforce those laws in court – or about Congress' capacity to empower them to do so. In this area, as noted above, over the past quarter century, the Rehnquist Court, erratically and confusingly, but persistently conjured new obstacles to plaintiffs seeking to enforce federal statutory and constitutional rights. Roberts himself had seemed to applaud these courthouse door-closing efforts, and as an advocate participated in a number of them. Many such private enforcement actions are directed at state and local governments and officials; as noted below, Rehnquist Court decisions paring back such authority have frequently been justified by reference to imperatives of federalism.

In his Senate Judiciary testimony, Roberts did affirm that current law does not require that Congress expressly authorize individual rights of action in order for a given statute to be enforceable in court.[52] He also rejected a radical view promoted by certain lower federal court judges as well as conservative academics and advocates, that laws passed pursuant to the spending clause are not "laws" entitled to enforcement as "the supreme law of the land" in the constitutional sense, and on that ground cannot create legal rights enforceable under 42 U.S.C. §1983. Further, he also indicated that current law does not accept the related view promoted vigorously by Justices Scalia and Thomas that spending clause-based grants are merely "contracts" between the federal and grantee state governments, which individual beneficiaries – "third party beneficiaries" in the Scalia-Thomas contract law analogy – cannot, without specific authorization in the "contract," enforce in court – regardless of Congress' "intent." [53] As noted above, under the third party beneficiary theory or the not-the-supreme-law-of-the-land theory, requirements in spending clause statutes – like, for example, Medicaid – would neither be enforceable as rights "secured by the Constitution and laws" of the United States under Section 1983, nor in an action to enjoin ongoing state violation of federal law under the Supremacy Clause.

Confronted about his career-long record of repeatedly showing up in opposition to individual rights enforcement, Roberts chose a simple response. He contended that the

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[51] Similarly, Roberts gave a glint of hope to Specter when, in response to a prolonged harangue to jettison the "proportional and congruent" standard ("which has no grounding in the Constitution, no grounding in the Federalist Papers, no grounding in the history of the country"), Roberts noted that a case on the 2005 docket of the Court could present an opportunity to revisit that test, and if he is confirmed, he "would approach that with an open mind and consider the arguments." Transcript at 219.

[52] Transcript at 385.

[53] Transcript at 384. The Scalia-Thomas "third party beneficiary" theory originiated in Scalia's concurring opinion in *Blessing v. Freestone*, 520 U.S. 329, 349 (1997) (in which Justice Kennedy concurred); and was restated in opinions concurring in the judgment by Scalia and Thomas in *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644, 674, 683-84 (2003)

availability of private judicial relief turned on Congress' "intent." Though he acknowledged that the law does not require express provision of a right to sue, he insisted that the problems of trying to divine Congress' intent would be eliminated if only Congress would make itself clear. "The issue," he argued to Senator Leahy,

> is not whether [beneficiaries] should be able to sue or not. The issue whether Congress intended them to be able to sue or not. The issue doesn't even come up if Congress would simply spell out in the legislation, "We intend these individuals to have the right to sue in federal court." [54]

Roberts' "Congress' intent" strategy glossed over substantially all the pertinent questions about the direction and ultimate destination of the long campaign of the Rehnquist Court to narrow privately initiated judicial enforcement of federal rights. In effect, he deflected back onto Congress the Committee's criticisms of the Rehqnuist Court's drive to narrow the court access of individual citizens. While an effective debater's ploy, his argument was beside the point. If not outright disingenuous, his argument was certainly less than completely candid. This is so for several reasons:

In the first place, the pertinent question is when courts should entertain citizen suits *even though* Congress has *not* made its "intent" on this point clear. Obviously, when Congress does "spell out" provision for private enforcement actions, the courts must comply with that requirement as with any other legal requirement.[55] The doctrinal area in which the court access issue has been most frequently and fiercely litigated during the Rehnquist years – and the area on which the Senate Judiciary Committee focused in questioning Roberts – has been the scope of 42 U.S.C. §1983. This Reconstruction Era statute imposes civil liability on any person who "under color of any [state] statute, ordinance, regulation, custom, or usage, subjects . . . any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States]." In 1980, the Court made clear the obvious: that the phrase "and laws" means what it says as its terms literally provide, and provides a vehicle to enforce rights secured by federal "laws" and not just the Constitution. Section 1983 is the principal avenue for private actions to enforce federal statutory requirements against state and local governments – in safety net, civil rights, and other statutes that do not themselves contain express provision for a right of action.

If the availability of the courts for private enforcement of federal requirements in fact depended on whether Congress "spelled out" such authority, §1983 would be a dead

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[54] Transcript at 367. Roberts repeated essentially the same argument in exchanges with Senator Feingold (149) and Senator Feinstein (384).

[55] However, the Rehnquist Court's hostility to private enforcement has driven it to create significant roadblocks to such actions even where Congress does "spell out" its authorization. For example, as noted above, the Court has dramatically broadened a concept of state "sovereign immunity" "plucked out of thin air," in Senator Specter's terms, to bar suits to enforce Fourteenth Amendment-based suits against state governments expressly authorized by Congressional enactments.

letter. Although the Court has narrowed §1983, it has not, at least not yet, gone that far. Roberts, indeed, acknowledged as much in the hearing.[56]

In Roberts' defense, he did not so much misstate the law as mislead as to its meaning. The case-law often speaks of congressional intent, but the recent criteria the Court has developed to sort out whether Congress "intended" to authorize private court enforcement have little or nothing to do with Congress' actual state of mind when it passed the law in question. These criteria, which have constantly been subjected to changes of emphasis, ordering, and wording, encompass such objective inquiries as whether the requirement giving rise to a violation is targeted to benefit the plaintiff, whether it is not so "vague and amorphous" that courts cannot realistically administer it, whether it is couched in "mandatory" rather than "precatory" terms.[57] In the Court's most recent attempt to clarify – and narrow – §1983 right of action authority, *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Court added the requirement that the statute in question "unambiguously" create rights by using "rights-creating" language. In practice, this inquiry is an arbitrary extrapolation from the words Congress chose rather than an assessment of its unexpressed, and often indiscernible, "intent." [58] For example, the Third Circuit held that not all requirements of the Medicaid program are judicially enforceable because the Medicaid Act contains no "rights-creating language" applicable to the entire statutory scheme; but, the Court held, specific requirements to provide institutional care for mentally retarded individuals can be judicially enforced because they specify that state Medicaid plans "must provide" such services "for all eligible individuals."[59] Roberts, of course, who argued for the prevailing party in *Gonzaga*, as well as participating in several of its predecessor Supreme Court cases, is more than aware of the extent to which the search for congressional "intent" professed by applicable doctrine is in practice a fiction.[60]

Further, the criteria employed in these right of action inquiries include tests containing an *explicit bias* against authorizing private suits, *regardless of Congress' actual intent*. The Court's insistence on "unambiguous rights-creating" language, to limit

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[56] In response to questions from Senator Feinstein. Transcript at 385

[57] *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997); *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 522-23 (1990); *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 426-430 (1987)

[58] Recently, Seventh Circuit Judge Frank Easterbrook contended that there is a logical response to the apparent "oxymoron-how can an 'implied' right of action be phrased in 'clear and unambiguous terms,' when statutory *silence* is what poses the question?" Easterbrook noted that is that the "rights-creating language" must be "clear and unambiguous," despite Congress' silence on the right of action issue. Technically, Judge Easterbrook may be correct, but in practice, since the only significance of "rights-creating" status is authorization for right-of-action authority, the distinction he suggests is, unsurprisingly, nearly always one without a difference. *McCready v. White*, 417 F.3d 700, 703 (7th cir. 2005)

[59] *Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004). Supreme Court nominee Samuel Alito in a concurring opinon in *Sabree*, gratuitously observed that "future Supreme Court cases" may go further and reject §1983 suits to enforce Medicaid altogether.

[60] As Deputy Solicitor General, Roberts argued, unsuccessfully, against a private right of action in *Wilder*, supra note 63, and, successfully, in *Suter v. Artist M.*, 503 U.S. 347 (1992). The Court's denial of a right of action in the latter case was overruled by Congress when it reauthorized the Medicaid statute in 1994. 42 U.S.C. §1320a(2) (confirming Congress' contemporaneous perception of a gap between its actual intent and the tests employed by the Court ostensibly aimed at ferreting out its intent).

federal statutory provisions that can trigger §1983 actions, is descended from similar "clear statement" and "unmistakable intent" and "clear and manifest intention" screens, which are also applied to obstruct private actions against state and local governments in other procedural contexts. All these functionally equivalent formulae are designed, not to aid in ascertaining Congress' actual "intent," but to "preserve" what is routinely characterized (with no analysis) as the "balance" between the states and the federal government.[61] As several observers have noted, these rules "function not as 'tie-breakers' that might be justified on various institutional or even prudential grounds, but rather as initial presumptions that *erect potential barriers to the straightforward effectuation of legislative intent."*[62]

As an additional monkey-wrench tossed into Congress' machinery for conferring right of action authority, these rules require that the "clear statement" or "unambiguous" language will only count, if it appears in "in the language of the statute" in question. In other words, *it does not matter if Congress might reasonably have assumed*, given the contemporaneous legal context, that a particular law could be privately enforced against states or localities. For example, would not the Reconstruction Era Congress that passed the 1871 law containing §1983 have assumed that state or municipal defendants would be its most obvious targets, since the driving goal of that legislation and other legislation to enforce the Reconstruction amendments was to end discriminatory and other abusive state practices, especially in the South? More recently, as discussed below, prevailing law would have given Congress reason to anticipate the availability of private court access under (subsequently curtailed) implied right-of-action or other court-created doctrines. In these cases, Congress might well have failed to specify that particular provisions would be enforceable in court against state or local governments, because it would have seemed superfluous or unimportant to do so.

As acknowledged by Chief Justice Rehnquist in his 2002 *Gonzaga* opinion, his Court's persistent narrowing of §1983 has been a subset of this broader campaign to cut back on court access to enforce federal rights. Throughout most of the 20th century, the law clearly recognized a contrary presumption *in favor of "implying"* a right of action to enforce federal laws generally.[63] But in 1975 in *Cort v. Ash*, the Court in effect reversed that presumption, and introduced a multi-factor test, similar to those described above for screening §1983 claims, for assessing whether to "imply" a right of action from a given statutory scheme.[64] After *Cort v. Ash*, the flood of federal such cases shrank quickly to a trickle, and has been, for many years, all but completely dried up. In his confirmation hearing, Roberts invoked this history in a manner that underscores his awareness that the Court's formulae for divining congressional "intent" about authorizing private rights of action are actually slanted not to divine Congress' actual purposes but to shut the court

[61] *Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (citing and linking cases in different but related contexts involving private suits against state and local governments).
[62] Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 Harv. L.Rev. 1959 (1994).
[63] *Texas & Pacific R. Co. v. Rigsby*, 241 U.S. 33, 39-40 (1916); *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)
[64] *Cort v. Ash*, 426 U.S. 66, 78 (1975) stated the new approach as follows: whether the plaintiff is a member of a class of persons specially benefited by the statute; whether there is any indication of legislative intent to create a right of action remedy; whether a right of action remedy is "consistent with the statutory scheme;" whether state law has traditionally provided such a remedy.

house door as much as possible. Analogizing the current confusion over the applicability of §1983 to "the issue of implied rights of action in the past," he testified:

> [T]hey were getting case after case after case. And they finally adopted an approach in the early 1980's that said, look, *we're not going to imply rights of action anymore. Congress, if you want somebody to have a right of action, just say so.*[65]

In fact, the Court didn't say any such thing. But that is evidently what Chief Justice Roberts believes the Court meant; he knows that is the result of the implied right of action cases – an approach, and result, which, evidently, he believes is transferable to issues of court access under §1983.

Finally, in constantly reformulating the applicable tests, stiffening old requirements and inventing new ones, the Court has in effect been "moving the goal posts" to *defeat congressional expectations*. To adapt a metaphor that Roberts himself introduced in his opening statement, the Court has repeatedly shrunk the strike zone to thwart the reasonable expectations of the Congress that enacted the provision being construed.[66] It has steadily, if erratically and unpredictably, raised the ante for Congress, changing priorities among or interpretations of the vague terms in its multi-factor tests. Hence, not only are the Court's screens to obstruct private judicial enforcement, while phrased and justified in terms of "congressional intent," actually aimed at promoting policies – sheltering state and local officials and obstructing citizen access to courts – that are independent of Congress' actual "intent." By unpredictably ratcheting up the applicable procedural barriers – and, most egregious, retroactively applying them to congressional actions taken decades before the Court's decisions – the Court has not only rendered Congress' true intent irrelevant, but in practice made it difficult if not impossible to fulfill.

It was not always so. Initially, the Court sought to avoid *retroactive* imposition of its new *Cort v. Ash* criteria – which, themselves, were broadly supported by liberal and conservative justices.[67] In 1982, Justice Stevens made the common-sense observation that, if the goal is to effectuate Congress' intent:

> When Congress acts in a statutory context in which an implied private remedy has already been recognized by the courts, . . . *the question is whether Congress intended to preserve the pre-existing remedy.*[68]

But that notion of respecting Congress' actual intent vis-à-vis private enforcement authority didn't survive succeeding rounds of Republican appointments to the Court. In 2001 Justice Scalia dismissed Stevens' 1982 solicitude as a relic of the discarded

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[65] Responding to questions from Senator Coburn. Transcript at 210

[66] Roberts' prescription for judicial "modesty" cast the judge in the role of the "umpire," who "calls balls and strikes" but does not actually play the game.

[67] *Cort v. Ash* was a unanimous decision and the Court's opinion was written by Justice Brennan.

[68] *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-79 (1982) (Emphasis added.)

"*ancien regime*" of presumptive hospitality to federal rights of action. Scalia shrugged off 1980s precedents honoring the "'expectations' that the enacting Congress had formed 'in light of the contemporary legal context.'" He brusquely denied that the Court had ever given such expectations, however reasonable, "dispositive weight." [69]

In sum, in Roberts' confirmation hearing, when the nominee asserted that the disposition of efforts by private citizens to enforce federal rights depends on what Congress intended, the Committee could productively have responded with a volley of follow-up questions.[70] They could have started by asking whether he really meant to honor what ordinary people and legislators understand by "congressional intent," or whether this was just a cover for defeating Congress' actual, reasonable "expectations," as Justice Scalia has effectively acknowledged. And the Committee might have demanded whether Roberts believes the current "gotcha" approach is consistent with his own professed commitment to judicial modesty and deference to Congress – as members did in regard to other facets of the Rehnquist "federalism" agenda involving flagrant snubs of Congress. Broadly stated, those are the real questions concerning the future for citizen-initiated federal rights enforcement on the Roberts Court. On those questions, the confirmation hearing did little to clarify Roberts' prior record – a record that is inconclusive but on the whole unpromising.

III. THE ALITO HEARINGS: ONE STEP BACK?

Four months after John Roberts was confirmed as Chief Justice (three months after Harriet Miers' nomination was withdrawn), the Judiciary Committee held five days of hearings on President Bush's nomination of Third Circuit Judge Samuel Alito to replace retiring Justice O'Connor. On federalism issues the committee members largely reprised their Roberts hearing performances. Republican senators Specter and DeWine used Alito's hearing, just as they had used the earlier proceeding, to attack the Rehnquist federalism jurisprudence for "denigrating" Congress. They defended laws impaired by that jurisprudence, like the Violence Against Women Act and the Americans With Disabilities Act, as "rationally" connected to Constitutional sources of Congressional authority. In particular, Senator Specter excoriated the Court's "congruent and proportional" formula for evaluating Fourteenth Amendment enforcement legislation as "pulled out of thin air." [71]

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[69] *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). In addition to *Merrill Lynch*, other Supreme Court decisions honoring Congressional "expectations" regarding an implied private right of action, and derided by Justice Scalia in *Sandoval*, were *Cannon v. University of Chicago*, 441 U.S. 677 (1979) and *Thompson v. Thompson*, 484 U.S. 175 (1988).

[70] On other "federalism"-related issues, Committee members pursued the nominee with pointed follow-up questions that penetrated beyond his initial, comparatively superficial answers. Understandably, the "right of action" area has been such a doctrinal swamp, overgrown with so many arcane rulings and issues, that senators found it unappealing to press Roberts, a manifest expert, too far.

[71] Transcript of Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court, http: www.washingtonpost.com/ wp-dyn/content/article2006/01/09/AR200601090755-pf.html, Monday, January 9, page 28 (DeWine); Tuesday, January 11, page 31-32 (Specter) (Alito hearings hereafter cited by day and page of transcript).

As with Roberts, Democratic senators Schumer, Feinstein, and Biden likewise probed the second nominee for his views on the Rehnquist Court's doctrines limiting Congressional authority under both the Commerce Clause and the enforcement provisions of the Fourteenth Amendment. However, rather than simply ask his opinion of Rehnquist Court decisions, they focused on certain opinions he himself had written. During his 15 year Third Circuit career, Alito had authored a number of opinions significantly more provocative than any written by John Roberts during his comparatively brief two year tenure on the D.C. Circuit. In a 1996 case, *United States v. Rybar*, an Alito dissent embraced the same, aggressive interpretation of the Rehnquist Court's 1995 *United States v. Lopez* decision that, in 2005, a 6-3 Supreme Court majority rejected in *Gonzales v. Raich*, and that Roberts rejected in his confirmation hearing.72 In *Rybar*, Alito read *Lopez*, which invalidated Congress' effort to criminalize the possession of handguns within 1000 yards of a school, to prohibit Congress from banning traffic in and possession of machine guns. In uncharacteristically caustic terms, he mocked his colleagues in the *Rybar* majority (and by implication, the six prior circuit court decisions that shared their interpretation, subsequently adopted by the Supreme Court in *Raich*) for in substance "strictly limit[ing]" *Lopez* to "its own peculiar circumstances," thereby turning it into a "constitutional freak."73

As noted above, Roberts had taken pains to distance himself from suggestions by others that *Lopez* portended a radical contraction of the post-New Deal Commerce Clause. But Alito did not follow Roberts' script. He did not seize the opportunity presented by the hearing, and the Court's recent back-tracking in *Hibbs*, *Tennessee v. Lane*, and *Raich*, to disavow the more aggressive implications of the earlier Federalism Five thunderbolts. He might have acknowledged that *Raich* had definitively resolved his dispute with his *Rybar* colleagues in their favor, making *Lopez* precisely the aberrant "freak" he described in his dissent. But he did not. Both before and after the hearing Senator Schumer expressly asked whether and how *Raich* affected his reading of *Lopez*; Judge Alito declined to provide an answer, even an equivocal one. When Senator Specter demanded that Alito explain "what is wrong" with the deferential "rational basis" test for evaluating the constitutionality of federal laws, and would the nominee "subscribe to that test over the proportionate and congruence test," he demurred. He did acknowledge that there was "ferment" in this area, and that some of the Court's decisions, in particular *Hibbs*, had not been "predictable." But unlike Roberts, he said nothing to criticize the soundness of the Federalism Five's comparatively strict scrutiny of Fourteenth Amendment enforcement legislation, nor to suggest that the precedential force of its doctrinal approach might be in question.[74]

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[72] *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996)

[73] 103 F.3d at 287.

[74] Alito did, however, indicate that he probably does not subscribe to Justice Scalia's even more drastic circumscription of Fourteenth Amendment enforcement authority: "one argument that has been made, which would represent a *very narrow* interpretation of congressional power – and this is basically the position that Justice Scalia took in the dissent that you mentioned, is that Congress' authority doesn't extend any further than remedying actual violations of the 14th Amendment; that Congress doesn't have additional authority to enact prophylactic measures outside of the area of race, which Justice Scalia would treat differently and recognize broader authority because of the historical origin . . . ." Wednesday, 1/11/06 Transcript at 32.

IV. WHAT NEXT: DOWN WITH FEDERALISM, UP WITH – "MODESTY"? OR RENEWED ACTIVISM?

What does the testimony of nominees Roberts and Alito, against the backdrop of the Supreme Court's recent decisions, indicate about the status and historical significance of the Rehnquist Court's federalism crusade? And what are its prospects on the Roberts Court? Here is a take on the tea leaves:

A. No Revival of the Pre-New Deal Commerce (Or Spending) Clause

As noted above, the Big Question underlying the early, frantic federalism debates was whether the *Lopez* majority would extend Rehnquist's argument far enough to reach Federalist Society co-founder Gary Lawson's conclusion that "the post-New Deal administrative state is unconstitutional."[75] The two constitutional bulwarks of the expansion of federal power decried by Lawson and his allies were, as noted above, the Commerce Clause, extensively discussed in Roberts' confirmation hearing, and the "Spending Clause," which was barely mentioned in the hearing. With respect to the former, as we have seen, neither the new Chief Justice, nor other members of the current Court, with the possible exceptions of Justices Thomas and Justice Alito, show any appetite for reviving the pre-New Deal Commerce Clause.

With respect to the Spending Clause – i.e., Congress' Article I authority to raise and spend revenue for "the general welfare of the United States" – which undergirds Social Security, Medicare, Medicaid, and many other programs – the Court in 1987 construed broadly Congress' discretion to impose conditions in the form of binding legal rules on state and local government recipients of federal funds (such as Medicaid and nondiscrimination rules). The opinion in that case, *South Dakota v. Dole*, was written by none other than Chief Justice Rehnquist. Post-New Deal interpretation of the Spending Clause gives Congress enormous leverage over state governments, and Congress exercises that leverage on a vast scale. Nevertheless, Rehnquist's *South Dakota v. Dole* opinion made no mention of the categorical limits he attempted to draw around Congress' Commerce Clause authority in *Lopez*.[76] Since *Lopez*, the Court has declined opportunities to import *Lopez*-style federalism into Spending Clause jurisprudence.[77]

Plainly, during his hearing, the new Chief Justice gave no comfort to advocates of restoring a pre-New Deal Constitution-in-Exile by gutting Congress' Commerce and Spending Clause powers. In addition to his responses to Commerce Clause questions, Roberts repeatedly condemned the "era" of *Lochner v. New York*, the 1905 decision that symbolized the early 20th century Supreme Court's drive to invalidate social legislation,

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[75] Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L.Rev. 1231 (1994).

[76] *South Dakota v. Dole,* 483 U.S. 207 (1987). The case upheld a statutory requirement that state governments accepting federal highway funds must enact federally prescribed age limits on alcohol purchase.

[77] The leading recent case is *Sabri v. United States*, 541 U.S. 600 (2004), in which the Court upheld the federal statute proscribing bribery of officials of any state or local government that receives federal funds – as a practical matter, all state and local governments. Justice Thomas concurred in the judgment, but argued at some length why "the Court's approach seems to greatly and improperly expand the reach of Congress' power . . . "

on Commerce Clause, due process, and other grounds.[78] A further clue may be his response to questions on the Court's 5-4 *Kelo v. New London* ruling; in that case, the Court held that eminent domain-forced transfers of private property to new private owners for "economic development" constitute, in principle, a legitimate "public purpose" under the Fifth and Fourteenth Amendments.[79] Libertarian conservatives have sought to demonize *Kelo* to galvanize public support for stronger constitutional protection for property rights. But rather than take Senator Brownback's invitation to join the critics of this much-maligned decision, Roberts implicitly defended it – as an example of judicial restraint, empowering legislatures to define the proper boundaries on eminent domain authority.[80]

As noted above, Justice Alito's record on the bench and in his confirmation hearing provide reason to believe that he could join Justice Thomas in arguing for a return to the pre-New Deal Commerce Clause. Were that scenario to materialize, it would seem likely that the two would also find common cause in tightening the current scant limits on Congress' authority to attach prescriptive conditions on funds transferred to state and local governments (or private groups or individuals).[81] But there are strong reasons to discount this possibility as a significant factor shaping the Roberts Court's jurisprudence. First, Thomas and Alito will be alone; on the scope of Congress' Commerce Clause authority, two members of the original Federalism Five have defected, and the other two have left the Court. Second, as noted below, there is no support from the political constituency which sent Roberts and Alito to their current positions for cutting back the substantive scope of federal power; on the contrary, both business conservatives and social conservatives nurture major legislative proposals that, if anything, push the envelope of Congressional Commerce Clause authority further in significant respects than it has previously been pushed.

These factors were evident in the Court's much-noted January 2006 decision in *Gonzales v. Oregon*.[82] In that case, as noted above, a 6-3 majority upheld the state law in question – Oregon's authorization for physician-assisted suicide. However, the three justices perceived as the most politically conservative (Scalia, Thomas, and Roberts) voted for preemption of the Oregon statute. Via a Scalia opinion redolent of scorn for Oregon's liberal/ libertarian policy goals, they marshalled arguments that, as noted below, ran roughshod over applicable "federalism" doctrines. Furthermore, Justice Thomas, not known previously for retreating from positions simply because they had been repeatedly rejected by Court majorities, did just that in this case. He announced that

[78] Transcript at 356. Asked to name an example of "immodesty," Roberts stated that "the clearest juxtaposition would be the cases from the Lochner era."
[79] *Kelo v. City of New London, Connecticut*, 126 S.Ct. 2655 (2005)
[80] Transcript at 198.
[81] In his hearing, Alito did find occasion to describe the limitations on Spending Clause conditions drawn by Chief Justice Rehnquist in 1987 in *South Dakota v. Dole*, noted above. By emphasizing that states are bound by such conditions only if they are "germane" to the overall purpose of the grant of funds, and only if Congress provides a "clear statement" of the nature of the conditions, Alito might be taken to have signaled that he will lean toward state autonomy and look for opportunities to narrowly construe the *South Dakota v. Dole* test – but any such suggestion is quite speculative. Transcript, Tuesday, January 10, at 21. (DeWine)
[82] 126 S. Ct. 904 (2006)

his past insistence on "reconsidering" and "modifying" the Court's 60-year old "Commerce Clause jurisprudence" was "water over the dam."[83] Finally, the six justices who ruled for Oregon did not base their decision on the constitutional scope of the Commerce Clause. Justice Kennedy's majority opinion made clear that Congress could, it wished, preempt Oregon's assisted suicide regime; the Court ruled simply – and with compelling evidence from the statutory text and legislative history – that it had chosen not to do so.[84] In this, significant regard, the Court unanimously avoided applying to regulation of medicine – certainly a traditional state responsibility – the type of categorical protection from federal dictation that Chief Justice Rehnquist seemed inclined to confer on local public school curricula, when he insisted, in *Lopez*, that there are subject-matter areas which the states may regulate but Congress may not."[85] For all these reasons, *Gonzales v. Raich* comes close to definitively ending the Rehnquist Court's flirtation with paring back Congress' post-New Deal Commerce Clause power.[86]

B. Still at Risk – Congressional and Citizen Enforcement of 20th Century Civil Rights and Safety Net Safeguards

While the Roberts Court appears likely to reinstate traditional "rational basis" deference to congressional definitions of the reach of its Commerce Clause powers (or rather, reconfirm the deference reinstated by *Raich*) and reconfirm similar deference regarding spending clause powers, similar levels of confidence are not warranted regarding the other two components of the Rehnquist Court's federalism agenda – cutting back Congress' Fourteenth Amendment enforcement authority, and curbing private suits to enforce federal statutory rights.

1. A Second Mugging of the Fourteenth Amendment?

As noted above, Senator Specter appeared to draw from the nominee acknowledgement that the Court might be entering questionable territory when majorities quarreled with minorities, and with Congress, over the veracity of Congress' factual

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[83] Justice Scalia cites sources such as the American Medical Association for the proposition that "physician-assisted suicide is fundamentally incompatible with the physician's role as healer" to defend the Attorney General's decision to override Oregon's definition of "legitimate medical practice." 126 S. Ct. at 931 Most remarkable, he acknowledges that the issue of what is legitimate medical practice, on which the case turns, rests "on a naked value judgment" – but misses not a beat in approving the Attorney General's decision to invalidate a state statute reflecting a contrary judgment. Id at 931 Justice Thomas' dissent is at 941.

[84] Attorney General Ashcroft, who promulgated the regulation at issue in the case, had actually, while a Senator, offered amendments to the CSA to ban physician-assisted suicide, but they were defeated. Id. at 913

[85] 514 U.S. at 565.

[86] Two pending cases will throw more light on the willingness of the reconstituted Court majority to keep faith with its reinstated rational basis, democratic deference to Commerce Clause statutes, against the interests of conservative political allies in particular subect-matter areas. The cases involve the reach of the Clean Water Act, and the Commerce Clause, up the chain of tributaries, and lakes and pools and wetlands adjacent, to navigabable waters. *United States v. Rapanos,* 376 F.3d 62 (6th Cir. 2004), *cert. granted,* 2005 WL 2493858; *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 370 (6th Cir. 2004), *cert. granted,* 2 2493859. A senior lawyer for the Corps has written that less than one percent of the current geographic coverage of the Act would remain under federal protection, if restrictive Commerce Clause theories, favored by hard-line conservatives and real estate development interests, were accepted by the Court.

findings. And Roberts also seemed to suggest that the Federalism Five's late-1990s substitution of "proportional and congruence" scrutiny for traditional necessary-and-proper rational basis deference might be in play, as a result of the Court's the *Hibbs* and *Tennessee v. Lane* decisions. But such straws in the wind do not definitively reveal which way the Roberts Court will veer – whether it will seize on *Hibbs* and *Tennessee v. Lane* to continue retreating from *Kimel, Garrett,* and *Morrison*, or whether these more recent cases will prove a merely temporary respite from continued evisceration of Congress' Fourteenth Amendment enforcement authority.

The prospect for Roberts Court treatment of congressional efforts to invigorate the Fourteenth Amendment is rendered particularly uncertain by the overhang of an issue not discussed during his confirmation hearing. This is the Rehnquist Court's expansion of the doctrine that state governments should enjoy "sovereign immunity" against lawsuits for damages, even when Congress has prescribed such lawsuits as essential to remedy violations of constitutional rights or of statutory provisions designed to protect constitutional rights. While this "sovereign immunity" concept is nowhere mentioned in the text of the Constitution, the Federalism Five aggressively invoked it, in conjunction with other federalism-related doctrines, to impede congressional efforts to "enforce" the Fourteenth Amendment (and to implement its Commerce Clause authority as well).[87]

In the Roberts hearing, Senator Specter did not expressly table the sovereign immunity issue, choosing instead to focus exclusively on its "congruent and proportional" recipe for micro-managing Fourteenth Amendment enforcement legislation. This omission would appear understandable. For one thing, the Court's sovereign immunity jurisprudence is so muddled that it seems to make congruent and proportionality the test both for evaluating the validity of the law and for determining whether Congress validly "abrogated" sovereign immunity. More important, Specter's overall point was, simply, that the Court's federalism jurisprudence, in its various guises, amounted to an unwarranted abandonment of the principle that federal legislation must stand if rationally related to a constitutionally legitimate objective. No less than the particular doctrines that Specter and his colleagues criticized in Roberts' hearing, the Federalism Five's expansion of state "sovereign immunity" is a purely judge-made excuse for invalidating "rational" legislative solutions. So, in Specter's analysis, reinstating "rational basis" deference in evaluating the scope of Congress' Commerce Clause authority should topple, not only the "congruent and proportional" domino, but the inflated sovereign immunity domino as well.[88]

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[87] See, e.g., *Kimel v. Florida*, 528 U.S. 62 (2000) (Congress lacks power to abrogate state sovereign immunity against suits to enforce Age Discrimination in Employment Act); *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Congress lacks power to abrogate sovereign immunity against suits to enforce Americans with Disabilities Act). *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Congress lacks power to abrogate power to abrogate immunity against suits to enforce statutes implementing its Commerce Clause authority).

[88] During the Alito hearing, Specter appeared to confirm that his "rational basis" approach targets the Court's sovereign immunity jurisprudence when, in the course of an extensive line of questions on the congruent and proportionate test, he referred dismissively to the Court's trumping Congressional legislative judgment by invoking "state immunity under the 11th Amendment." Transcript, Wednesday, January 11, at 31.

If a contrary scenario materializes – if the Roberts Court continues to micro-manage Fourteenth Amendment enforcement legislation while backing off from scrutinizing Commerce Clause measures, that asymmetry should moot any residual pretense that the Court's agenda in this realm owes anything to genuine concerns about "federalism." Instead, the Court would be pursuing a blatant reprise of the post-Reconstruction Court's notorious mugging of the Fourteenth Amendment – once again inventing an anomalous, willful misreading of the express enforcement authority conferred by Section Five on Congress, in order to nullify the egalitarian sweep of the equal protection and due process protections in Section One.[89]

On a more concrete level, continuing down the *Kimel-Morrison-Garrett* path would be transparently designed to undo specific major social reform laws enacted by Congress during and after the civil rights revolution of the 1960s. This would be, as Senator Specter observed, a "classic example of judicial activism," but an egregiously political kind, smacking of *Bush v. Gore* as much as *Lochner v. New York*. It would not merely pit the Court against Congress in an abstract, institutional sense. Rather it would align a 21st century conservative Court majority against specific enactments of the 20th century, reformist Congress. Were they to take this tack, these conservative Court majorities might be in a position to count on conservative congressional majorities, or at worst substantial minorities, to block retribution or reenactment of stricken or weakened legislation. Indeed, such actions would not only promote the ideological agenda of political conservatives, but also, analogous to *Bush v. Gore*, serve the political interests of Capitol Hill allies, by sparing conservative representatives the political risk of actually casting votes to repeal or dilute widely popular laws like the ADEA, ADA, VAWA, or the Family and Medical Leave Act.

As noted above, the Court's January 2006 decisions, especially its unanimous *United States v. Georgia* decision upholding certain ADA suits against states by state prisoners, reinforce the impression left by nominee Roberts' confirmation testimony -- that the velocity or even perhaps the direction of the Rehnquist Court's assault on Fourteenth Amendment enforcement could be in play. As in *Nevada v. Hibbs* and *Tennessee v. Lane*, the Court in *United States v. Georgia*[90] confronted circumstances in which linear application of the strict devolutionist logic of *City of Boerne, Kimel, and Garrett* could have barred Congress from granting a judicial remedy in morally and, probably, politically compelling circumstances. In each of these cases, Court majorities, including members of the Federalism Five, found ways to blink. Such results invite the type of speculation that Roberts voiced in his hearing, that perhaps the Court was having second thoughts about continuously ratcheting up doctrinal devices like "proportional and congruent" and "sovereign immunity," to throttle altogether major 20th century

[89] The Rehnquist Court reinforced this view of the motivation of the Federalism Five by revitalizing post-Reconstruction cases notorious for willfully misconstruing the Fourteenth and Fifteenth Amendments, such as *The Civil Rights Cases*, 109 U.S. 3 (1883), *United States v. Cruikshank*, 92 U.S. 542 (1875), and *United States v. Harris*, 106 U.S. 629 (1882), all fully on par with *Plessy v. Ferguson* (which upheld racial segregation as "separate but equal") as aimed at gutting the Reconstruction amendments. See, e.g., *United States v. Morrison*, 529 U.S. 598, 617-27 (2000). See Newman and Gass, *A New Birth of Freedom: The Forgotten History of the 13th, 14th, and 15th Amendments,* Breenan Center for Justice (2003).

[90] 126 S. Ct. 877 (2006)

Fourteenth Amendment enforcement legislation. However, as also noted above, the picture remains decidedly mixed. In *Hibbs* and *Tennessee*, vigorous dissents were issued that could eventually be embraced by Roberts and, especially, Alito, as well as by any future Bush appointments; and, while unanimous, *United States v. Georgia* was carefully hedged by Justice Scalia's opinion for the Court, so that future majorities, if so inclined, could readily limit the case to its facts.

2. *"Denigrating" Congress by Closing the Courthouse Door to Citizen Enforcement?*

Even more than in the Rehnquist Court's Fourteenth Amendment §5 decisions, selective, politically driven disdain for Congress seems apparent in its drive to limit privately initiated court enforcement of federal statutory rights. This is an initiative which the new Chief Justice has given no indication of disowning or tempering. Over the past quarter century, as noted above, the Rehnquist Court piled up impediments for plaintiffs seeking to enforce federal rights through §1983, blind-siding Congress with new and unanticipated tests for upholding citizen suits, and worrying over the "delicate federal-state balance" to justify the imposition of "clear statement" and kindred rules expressly designed to frustrate rather than fulfill congressional intent. But the justices have not been consistent in protecting states from federal court plaintiffs. On the contrary, over precisely the same period, the Court has been vigilant to invalidate state laws and actions inconsistent with federal *economic* statutory schemes, by invoking the (entirely judge-made) doctrine of "preemption" under the Supremacy Clause.[91] In the most recent Supreme Court reaffirmation of hospitality for this preemption private right of action, Justice Scalia registered "no doubt that federal courts have jurisdiction" to entertain a suit alleging that a state regulation "is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail . . . ."[92] The Court has yet to confront the dissonance between its readiness to authorize preemption-based challenges to state laws, most of which are brought by business plaintiffs, and its stinginess about §1983-based suits, most of which have traditionally been brought by plaintiffs alleging violations of civil rights or safety net statutes.[93]

To be sure, there are valid considerations behind the Court's seeking common-sense limits to the reach of §1983 jurisdiction – considerations embraced by all factions on the

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[91] More broadly, the Court has consistently has given short shrift to the "delicate" federal-state balance in striking down state actions under the federal treaty power, the dormant Commerce Clause, as well as the first and Fourteenth Amendments. See, e.g., *Crosby v. National Foreign Trade Council*, 536 U.S. 273 (2002) (interference with foreign affairs power); *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525 (2001) (labeling requirements preempt state tort law); and analysis and cases collected in Lauren Saunders, *Preemption as an Alternative to Section 1983*, Clearinghouse Review Journal of Poverty Law & Policy, March-April 2005, p. 705.

[92] *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 642 (2002) Public interest plaintiffs have begun bringing preemption-based suits, as the courts have obstructed §1983 suits, in part at the urging of my late colleague Herbert Semmel's October 2002 article following the *Verizon* case, *Enforcing Federal Rights Through 1331/Supremacy Clause Jurisdiction*, http://www.nsclc.org/federalrights/1331article102102.htm.

[93] However, just this past term the Court may have slipped "clear statement" reasoning into preemption analysis. In *Bates v. Dow Agrosciences LLC,* 125 S.Ct. 1788, 1801 (2005), it cautioned courts to construe ambiguous federal laws not to require preemption – "Because the states are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action."

Court when applied in a balanced and good faith manner. But such concerns – about overwhelming the courts, about paralyzing state and local agencies, about provoking frivolous litigation, about legalizing what should be policy and administrative issues, and the like – are not *federalism* issues at all. These issues turn on principles of sound administration, not "sovereignty." These questions about allocating institutional roles and responsibilities would be no less salient, and the real issues at stake in particular cases would not differ materially, if the United States were a unitary governmental system like, say, France, and what are now state and local schools, hospitals, police departments, health and welfare departments, and other agencies were simply administrative units of the central government. Claptrap about "immunity," "dignity," and the "delicate federal balance," injected into the discussion by the Federalism Five and their antecedents, contributes nothing but confusion to the enterprise of generating workable and useful rules for judicial review of agency decisions.

In effect, the Rehnquist Court's multiple – and selective – techniques for narrowing and obstructing enforcement of civil rights, safety net, and other 20th century social and economic reform legislation have avoided the sort of frontal assault on congressional authority that the *Lochner* Court mounted, and which many conservative proponents of judicial restraint, including, prominently, Chief Justice Roberts and Justice Alito, condemn. By thus undermining enforcement, whether by Congress under §5 of the Fourteenth Amendment, or by private citizens and the courts under §1983 or other routes, the Court's conservative majority has mounted a form of legal guerilla warfare. That strategy has produced significant results, and has great potential to further magnify those results, if the logic of leading Rehnquist Court precedents is carried further. As stated by the AEI's Michael Greve:

> *The Supreme Court's anti-entitlement doctrines are connected, such that plaintiffs who manage to evade one obstacle are bound to stumble over another.* Plaintiffs who escape from restrictive statutory interpretation into Section 1983 will find that route, too, strewn with obstacles. They may find that their purported right was unrecognized in 1871 [a reference to Justice Scalia's doctrine, noted above]. Or, they may find that their claims for monetary damages *which are often the only effective means of forcing state and local governments into compliance* are blocked by a slew of Supreme Court decisions granting the states sovereign immunity. . . . Let plaintiffs argue that the state has waived its immunity by accepting federal funds, and they will lose. Let plaintiffs seek to obtain relief by naming a state's officers, rather than the state itself, as a defendant, and they will find that this so-called Ex Parte Young rule, once readily available, has become the exception.[94]

Greve's disarming candor confirms an observation by professors William Eskridge and Philip Frickey that deserves more notice than it has received. They note that the Rehnquist Court has in effect deployed these "super-strong clear statement rules" as if

[94] Michael Greve, *Federalism, Yes. Activism, No.* http://www.aei.org/publications/pubID.15851/pub_detail.asp (July 1, 2001) (Emphasis added)

they were "quasi-constitutional" commands – as techniques "to confine Congress' power in areas in which Congress has the constitutional power to do virtually anything." Eskridge and Frickey noted that the Court's clear statement rules for promoting "federalism and other structural values"

> are almost as countermajoritarian as now discredited *Lochner*-style judicial review. In this respect the Court's new canons amount to a 'backdoor' version of the constitutional activism that most Justices . . . have publicly denounced. [95]

While Greve and kindred enthusiasts bitterly lament the Court's recent retreat from its initial call for restructuring based on "first principles" and "enumerated powers," their agenda of neutralizing 20th century civil rights, safety net, and regulatory legislation remains operable, as long as the Rehnquist era back-door barriers to enforcement are in place. As noted above, the new Chief Justice participated as an advocate in putting in place key building blocks of this obstacle course, and was less than forthcoming in answering questions on the issue during his hearing. Justice Alito may prove at least equally inclined to build these barriers to court access higher and wider. In one cryptic but ominous 2003 concurring opinion, he gratuitously forecast that in the future the Supreme Court could cut off all litigation by Medicaid patients challenging state compliance with federal statutory and regulatory requirements, even though at the time only two, perhaps three justices took that position.[96] Alito's promotion, joining Roberts to replace O'Connor and Rehnquist, could create a new majority on this issue, and make his 2003 forecast a self-fulfilling prophecy. But after *Raich* and the Roberts confirmation hearing, reinforced by the Court's rebuffs to New Federalism notions in cases like *Hibbs*, *Tennessee v. Lane*, and *Sabri*, these doctrinal barriers to court access must be seen for what they are: legal strategies driven by "anti-entitlement" policy preferences, not principles grounded in "federalism." In particular, observers in the press and, especially, Congress should apprehend that this stealth assault on federal rights enforcement – and congressional intent and authority – is a brand of activism lacking even the pretense of constitutional legitimacy.

The manipulative and politically driven character of the conservative justices' application of clear statement and related devices was strikingly illuminated by Justice Scalia's recent dissent in *Gonzales v. Oregon*. If there was ever an appropriate situation in which to require from Congress a clear statement before displacing state legislative action, Attorney General Ashcroft's rule interpreting the Controlled Substances Act to override Oregon's assisted suicide regime was that case. Not only did the CSA lack any textual indication that Congress intended it as a device for outlawing physician-assisted suicide, not only was such a design far from the statutory purpose of preventing illicit

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[95] William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand.L.Rev. 593, 596-98 (1992)

[96] In *Sabree v. Richman*, 367 F.3d 180, a Third Circuit panel undertook a meticulous analysis of Supreme Court precedents in reversing a District Court decision that would have barred all Medicaid enforcement private actions. Judge Alito concurred, but volunteered his view that,"[T]he analysis and decision of the District Court may reflect the direction that future Supreme Court cases in this area will take. . . ." 367 F.3d at 194.

drug abuse; Congress had actually rejected Mr. Ashcroft's assisted suicide amendment, offered when he was a Senator from Missouri, in the course of reauthorizing the CSA.[97] Upholding the Justice Department's prohibition would not only have by-passed Congress but preempted an active political debate in state legislatures. As Chief Justice Rehnquist had quite recently observed, in ruling against federal judicial interference with that process:

> "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."[98]

Justice Scalia's passionate dissent in *Gonzales v. Oregon* acknowledged the apparent conflict of his position with the Court's "clear-statement cases." He then offered a series of highly technical assertions to distinguish each of what he described as separate "lines" of such cases – without addressing the underlying common policy of deferring major, unresolved policy and political judgments to Congress and state legislatures. In a disarming burst of candor, Scalia acknowledged that the issue driving him to override applicable canons of democratic deference – the "legitimacy of physician-assisted suicide" – "ultimately rests . . . on a naked value judgment." [99] What he did not seem pressed to explain was why an executive official with no direction from Congress was should be permitted to impose that value judgment on states with a contrary view.

Thus, *Gonzales v. Oregon* not only confirms that the Commerce Clause linch pin of the Rehnquist federalism revolution is now, in Justice Thomas' terms, "water over the dam." More broadly, the case vividly demonstrates the extent to which, at bottom, the sponsors of that "revolution" consider it little more than a rationale for political forum shopping, invoked when it serves the "value judgments" on their agenda, finessed when it does not.

IV. WRONG FROM THE START – FATAL FLAWS OF THE NEW FEDERALISM

What, then, to make of the Rehnquist Court's rollercoaster ride from *Lopez* to *Raich*? Was the "federalism revolution" an illusion? Could the conservative court-watchers who hailed the dawn of a new day, and the liberals who recoiled in horror, both have been so far off-base? In fact, they were not off-base. Had the Court followed through on the Chief Justice's call in *Lopez* to hermetically seal off activities which are inherently "local" from those which are "national," and confine congressional authority to the former, had a majority embraced Justice Thomas' *Term Limits* whopper that "We

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[97] 126 S. Ct. 904, 913

[98] *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)

[99] Certain of Justice Scalia's assertions seem not only sophistic, but just plain inaccurate. For example, his contention that "The clear-statement rule based on the presumption against pre-emption does not apply because the Directive does not pre-empt any state law." – a claim that, presumably, would ring hollow for a doctor prosecuted by USDOJ for conduct sanctioned by the Oregon statute. 126 S. Ct. at 935

The People" means "We the States," something like a genuine constitutional revolution, or counter-revolution, would have indeed been at hand.[100]

A. Repackaged, Unworkable, Incoherent

With their bold rhetoric and disciplined unity, the Federalism Five put forth for several years a credible threat to revive "States' Rights" as a major, judicially enforceable component of the 21st century Constitution. How to explain the precipitous fracturing that caused that threat to recede so abruptly?

To begin with, the task may simply have been undoable. The Rehnquist Court's *Lopez-Raich* 180° was not the first failed attempt to draw judicially manageable boundaries between federal and state spheres in the post-New Deal, post-World War II universe. In 1976, in *National League of Cities v. Usery*, the Burger Court, with then-Associate Justice Rehnquist writing the opinion, overruled a Warren Court decision only eight years old, and declared state and local government agencies that performed "traditional governmental functions" immune from federal minimum wage and maximum hour requirements.[101] Nine years later, almost precisely as fast as the *Lopez-Raich* turnabout, the Court junked this states' rights initiative and overruled *National League of Cities*.[102] Writing for the Court, Justice Blackmun, who had concurred in the 1976 *Garcia* decision, explained that the "attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function'" had spawned so much confusion as to be "unworkable."[103] From this perspective, the bold venture on which Rehnquist persuaded his four colleagues to embark in 1995 simply repackaged an idea that, like its predecessor, didn't work because some allies soon concluded that it couldn't work. Despite contemporaneous favorable reviews by prominent academic conservatives of the value of Rehnquist's *Lopez* enterprise of establishing judicially enforceable state/federal boundaries,[104] the undertaking was, simply, a fools' errand from the get-go.

These repeated failures to formulate durable doctrinal solutions reflect deeper incoherence and inconsistency in the theoretical underpinnings of the Court's federalism efforts. Indeed, this foundational weakness has led to multiple reversals and anomalies in "federalism" line-drawing exercises, of which the *National League of Cities-Garcia* and *Lopez-Raich* fiascos are only the most widely noted. One example is the Rehnquist

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[100] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845-926 (1995) (Thomas, J., dissenting). Former Reagan Solicitor General Charles Fried termed close to "revolutionary" the fact that three justices – Rehnquist, Scalia, and O'Connor – joined in Thomas' remarkable assertion that "[T]he notion of popular sovereignty that undergirds the Constitution does not erase state boundaries, but rather tracks them." Id. At 849. Charles Fried, *Forward: Revolutions?*, 109 Harv.L.Rev. 13, 16 (1995)

[101], 426 U.S. 833 (1976), overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)

[102] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)

[103] 469 U.S. at 531. In dissent, a furious soon-to-be Chief Justice Rehnquist vowed that anticipated new Republican appointments would in time reverse the Court's reversal; his forecast, vindicated a decade hence only to be undone once again in another decade, makes the *Raich* reversal all the more ironic – indeed, poignant, in view of the Chief Justice's imminent death and his passionate, career-long commitment to establishing a vision of federalism "first principles" he was never able to effectively articulate or sell to a majority of his colleagues. 469 U.S. at 589.

[104] John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S.Cal.L.Rev. 1311 (1997); Steven Calabresi, *A Government of Limited and Enumerated Powers*, 94 Mich.L.Rev. 752 (1995).

Court's 2000 retreat in *Reno v. Condon*[105] from Justice Scalia's thunderous 1997 ukase against federal "commandeering" of state agencies and officials in *Printz v. United States*.[106] Another, also discussed above, is the longstanding disconnect between the Court's hospitality to Supremacy Clause "preemption"-based suits against state and local governments – usually brought by or on behalf of businesses – and its hostility to Fourteenth Amendment-based private civil actions and §1983 suits generally – usually brought by or on behalf of traditional civil rights plaintiffs or entitlement beneficiaries. Still another was the similar disconnect between with Rehnquist' proclamation in *Lopez* of categorical limits on Congress' Commerce Clause authority, and his and the Court's persistent refusal to apply similar reasoning to constrain spending-clause authority – an area where, indeed, the font of effectively unconstrained congressional power is a decision by Chief Justice Rehnquist himself.[107]

B. No Political Juice

Off the Court, over the past quarter century, certain pockets of the conservative legal intelligentsia developed a variety of theories that provided, or could provide coherent, comprehensive justifications for Rehnquist's far-reaching *Lopez* rhetoric – justifications that acknowledged, and celebrated, its truly radical implications.[108] Moreover, echoes of some of this academic theorizing resonated among the youthful cadres in the upper reaches of the Reagan Justice Department, mocked as the "federalism police" by Reagan's Solicitor General, Charles Fried.[109] "Federalism" was a prominent plank in the extraordinary platform for constitutional change drafted by those cadres and issued as an official Department publication in 1988.[110] But, as noted earlier, with the singular exception of Justice Thomas, no member of the Federalism Five ever bought into these far-reaching theories, much less was willing to embrace their practical, real-world consequences. As to the two *Raich* defectors from Rehnquist's original Federalism Five majority: Justice Kennedy displayed his ambivalence from the start, in his concurring

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[105] 528 U.S. 141 (2000)

[106] 521 U.S. 898 (1997) The Court in *Reno v. Condon* did not overrule *Printz*, but instead distinguished it on the ground that the Drivers' Privacy Protection Act, upheld in Reno, which prescribed restrictions on the sale of drivers' license and registration records, "regulates the states as owners of databases," rather than affecting them "in their sovereign capacity to regulate their own citizens." In supposed contrast, which Chief Justice Rehnquist asserted rather than explained, the Brady Handgun Control Act struck down in *Printz* required state and local law enforcement officials to temporarily accept forms from prospective gun purchasers, provided to them by firearms dealers, and conduct background checks, pending the completion of a federal background check system. 528 U.S. at 151.

[107] *South Dakota v. Dole,* 483 U.S. 207 (1983)

[108] Perhaps the most prominent of these, largely libertarian, scholars and advocates, University of Chicago Professor Richard Epstein, cheerfully acknowledged that his interpretation of the Commerce Clause would require "dismantling large portions of modern government." Richard Epstein, *The Proper Scope of the Commerce Clause,* 73 U.Va.L.Rev. 1387, 1455 (1987).

[109] In his memoir, Fried notes that he was "pulled over more than once and issued a federalism speeding ticket." Fried, *Order and Law: Arguing the Reagan Revolution – a Firsthand Account* 187 (1991)

[110] U.S. Dept. of Justice, Office of Legal Policy, *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation*, (1988). See Dawn Johnsen, *Tipping the Scale*, Washington Monthly, July/ August 2002, http://www.washigntonmonthly.com/features/2001/0207johnsen.html; Dawn Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change,* 78 Ind. L.J. 363 (2003).

opinion in *Lopez*.[111] Well before his elevation to the Court, Scalia showed that his heart was never in the federalism enterprise to begin with. He urged an early Federalist Society audience to abandon conservatives' traditional fondness for states' rights and instead hatch ideas for exploiting federal power to advance conservative goals (such as legislatively preempting state regulation); at his own Supreme Court confirmation hearing, then-Judge Scalia testified that the Tenth Amendment was a "constitutional redundancy," and, *a la Garcia*, that drawing lines between the federal and state spheres was an inherently unprincipled job, suited for Congress not the courts.[112]

If there was, from the first, little appetite on the Supreme Court for an intellectually robust federalism jurisprudence, in the society at large there was virtually no interest in rolling back federal power to even the limited extent involved in the Rehnquist Court's late 1990s first steps. Indeed, a particularly curious aspect of the Federalism Five's campaign was that it appeared to spring from nowhere, driven by no discernible political constituency. To be sure, Republicans had since the Reagan years consistently championed loosening the strings on states accepting federal funds for Medicaid and other social welfare programs. But no bloc with electoral clout nor any elected politicians sought declarations that Congress lacked the *power*, if it so chose, to attach those strings, or to legislate to address any problem of national significance, whether commercial in nature or otherwise. As noted above, most of the laws struck down by the Federalism Five were co-sponsored by key Republican members of Congress and enacted by overwhelming bipartisan congressional majorities. Indeed, two powerful Republican constituencies, business conservatives and social conservatives, strongly favor expanding federal domestic power at the expense of the states. For decades, business groups have promoted a variety of federal judicial and legislative approaches for "preempting" or barring state regulation of various sorts, especially but by no means exclusively, tort law. More recently, with not the least show of regret about displacing traditional state authority, social conservatives have pushed the envelope of federal power to bar same sex marriage, partial birth abortions, state-sanctioned medicinal marijuana use and life-termination procedures, and even provoked an hysterical congressional attempt to wrest control of a particular intra-family end-of-life dispute from the Florida state judicial system. In this regard, it seems significant that, in the Roberts hearing, Alabama's Republican Senator Jeff Sessions, no moderate, readily acquiesced in Roberts' view that all Congress needed to do to comply with *Lopez* was to amend the Gun-Free School Zones Act with a jurisdictional "hook;"[113] in the same vein, Oklahoma's Senator Tom Coburn, a particularly vocal social conservative, acknowledged on *Meet the Press* that Roberts' successor nominee, Judge Samuel Alito, trespassed on turf that rightfully

[111] 514 U.S. at 569 (Binding precedent "forecloses us from reverting to an understanding of commerce that would serve only an 18th century economy," [tacitly sparring with Justice Thomas' "originalist" concurring plea to scuttle precedents permitting Congressional regulation of matters "affecting" interstate commerce])

[112] Antonin Scalia, *The Two Faces of Federalism,* 6 Harv.J.L. & Pub. Pol'y 19, 20-22 (1982); Nomination of Judge Antonin Scalia: Hearings before the Committee on the Judiciary, 99th Cong., 2d Sess. 81-82 (1986); James B. Staab, *The Tenth Amendment and Justice Scalia's "Split Personality,"* 16 J.L. & Pol. 231, 235, 271-76 (2000).

[113] Transcript at 286.

belongs to Congress when, in 1996, he interpreted *Lopez* to preclude Congress from banning possession of machine guns.[114]

C. Newt Envy?

If there was neither external pressure, nor a deep or widely shared internal commitment behind the 1995 launch of the Rehnquist Court's brief federalism adventure, how to explain it? One suggestion – impossible to document but plausible – would note the contemporaraneous context, in particular the Republican "revolution" then in its initial, heady stages on Capitol Hill, dominating the headlines and, no doubt, animating the social and political circles in which at least some of the conservative justices traveled. For the first time since the 1930s, political conservatives had not only captured control of Congress, but were using that control to promote a policy agenda of their own – not just seeking to slow the advance of agendas developed by liberals and moderates. Up till that time, despite frantic condemnation of the Rehnquist Court on the left, its persistently shaky conservative majorities had focused exclusively on moderating Warren-Burger Court doctrinal initiatives. To justices intrigued by the legislative pyrotechnics flaring one block away in the Capitol building, the question might well have arisen as to how they too could design and execute an affirmative conservative agenda of their own. Given the disparity of their respective viewpoints, this would have been no easy undertaking. "Federalism" could have appeared a convenient unifier – as well, to boot, as a high-sounding, respectable label for packaging an array of new and old doctrinal weapons, equipping Court conservatives to complement congressional Republicans' forays against the vast statutory edifice built by decades of Democratic Congresses.

But if the federalism banner was hoisted primarily to pull together this shaky coalition to express the political mood of that moment, it is hardly surprising that the banner could not stay aloft, nor the coalition hold together, for long. This denouement seems especially predictable, at least in hindsight, given the resilient indifference from society at large and from the politically significant constituents of the Republican coalition in particular – even after liberal and centrist observers began sounding increasingly loud and frequent alarm bells following the *Kimel, Morrison,* and *Garrett* decisions in 2000 and 2001. As AEI Federalism Project Director Michael Greve observed, the day after the *Raich* decision in June 2005, the Court's federalism had found "no takers."

CONCLUSION: SAFEGUARD THE POLITICAL SAFEGUARDS OF FEDERALISM

When Senator Specter attacked the Rehnquist Court for scorning federal laws which Congress had a "rational basis" to enact, he might well have noted that the Court flouted not just the distinguished mid-century conservative Justice John Marshall Harlan who endorsed that test, but his iconic namesake, Chief Justice John Marshall. Chief Justice Marshall formulated the foundational prescription for judicial deference to Congress. in In 1819, construing for the first time, the standard for reviewing the constitutionality of

[114] See Simon Lazarus and Lauren Saunders, *Gunning for Congress: Samuel Alito's Federalist Bent Makes John Roberts Look Like a Moderate,* American Prospect Online, http://www.prospect.org, posted November 15, 2005.

laws implementing the powers assigned to Congress by Article I, Marshall famously wrote:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.[115]

Lest anyone mistake his drift, Marshall underscored that his construction of the necessary and proper clause should under no circumstances be taken to weaken Congress, but rather to strengthen and protect its discretion:

> The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, *it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government*. [116]

Marshall's formula, rarely questioned ever since, certainly not between 1937 and the 1990s, is not merely a prudent acknowledgement of comparative institutional competence. First and foremost, it is a safeguard for democracy. It ensures that the people's elected representatives, not life-tenured appointed judges, figure out what the "ends" of legislation should be – within broad constitutional limits – and what the "appropriate" means for achieving those ends should be. This, of course, is precisely what President Bush's talking points about "judicial restraint," and judges who won't "legislate from the bench," signify in ordinary parlance. And it is precisely what Senator Specter had in mind when he excoriated the Rehnquist Court's Commerce Clause and Fourteenth Amendment jurisprudence for departing from "rational basis" deference to Congress.

As noted above, academic Constitution-in-Exile proponents have sought to reinterpret Marshall's *McCulloch* formula by construing "necessary and proper" as invitations to the courts to limit Congressional power and intrusively review Congress' ends and means judgments. This attempt to turn the traditional understanding of *McCulloch* on its head is precisely the logic that underlies the post-*Lopez* Commerce Clause jurisprudence, as spotlighted in Senator Specter's attacks on that jurisprudence. [117] Similarly, Justice O'Connor in her passionate dissent in *Garcia v. San Antonio Metropolitan Transit Authority*,[118] argued "It is not enough that the 'end be legitimate, the means to that end chosen by Congress must not contravene the Constitution." In other words, it is up to the courts to determine what component of the "spirit of the Constitution" Congress might have contravened. Especially for a conservative, this

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[115] *McCulloch v. The State of Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)
[116] 17 U.S. at 420 (emphasis added)
[117] See Simon Lazarus, *The Constitution in Play,* The American Prospect (May 2004), page 60 (review of Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, 2004); Gary Lawson and Patricia Granger, *The "Proper" Scope of the Sweeping Clause,* 43 Duke L.J. 267 (1993).
[118] *supra*, 469 U.S. at 1035-36.

would seem to be quite a breathtaking proposition. Plainly, leaving life-tenured judges free to trump democratic results on so patently flimsy a basis mocks all formulations of judicial restraint, contemporary or otherwise.[119] In particular, it would seem difficult to hypothesize an approach more flagrantly in conflict with Chief Justice Marshall's injunction not to construe "necessary and proper" to "impair the right of the legislature to exercise its best judgment" in implementing the responsibilities of government.

Moreover, Marshall and the framers plainly viewed his deferential approach as itself essential to the constitutional design for their federal system. He and his compatriots would have been puzzled, and not pleased, by the Federalism Five's claim to find in "federalism" a source of sharp judge-made limitations on Congress' broad "necessary and proper" discretionary authority. Implicit in letting Congress choose the ends and calibrate the means of federal legislation is assuring their constituents, the people, freedom to choose between federal and state instrumentalities to do whatever work needs to be done. This was how federalism was originally supposed to work. As Madison cogently explained in Federalist No. 46 – in a passage mysteriously overlooked by Chief Justice Rehnquist and his comrades and enthusiasts in their crusade to turn "federalism" into a basis for judicial activism:

> Notwithstanding the different modes in which [federal and state governments] are appointed, we must consider both of them as substantially dependent on the great body of the citizens of the United States. . . . [T]he ultimate authority . . . resides in the people alone . . . [W]hether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other . . . in every case should be supposed to depend on the sentiments and sanction of their common constituents. . . . *the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due* . . . .[120]

Otherwise stated, federalism in the American system, as contemporaneously explicated by Chief Justice Marshall, is primarily an instrument for *expanding democratic options* for the electorate, not a weapon for courts to deploy in order to "preclude" the people or their representatives from choosing the options they "discover" to be appropriate.

Thus, the logic of Marshall's primordial necessary and proper analysis, captured by modern courts and most recently by Senator Specter's critique of the Rehnquist Court's federalism campaign, fits hand-in-glove with the view that the "safeguards of federalism" designed into the Constitution are overwhelmingly "political," not judicial – as articulated a half-century ago by Columbia Professor Herbert Wechsler.[121] When in

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[119] It should, however, be noted that Justice Scalia's concurring opinion in *Raich* left the door open for him to use this type of "necessary and proper" reasoning to strike down commerce-power based laws in the future.

[120] *The Federalist Papers*, Clinton Rossiter, ed. (Penguin 1961), pages 294-95 (No. 46, Madison) (emphasis added) Significantly, as evidence of his ambivalence from the start, this passage was cited by Justice Kennedy in his concurring opinion in *Lopez.* 514 U.S. at 569.

[121] Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L.Rev. 543 (1954); Wechsler's thesis was refined and updated

1985 the Court in *Garcia v. San Antonio Metropolitan Transit Authority* rejected Rehnquist's recipe for aggressive judicial defense of judicially defined spheres for state immunity and exclusive state authority, it expressly embraced Wechsler's "political safeguards" vision:

> [T]he principal and basic limit on the federal commerce power is that inherent in all congressional action – the built-in restraints that our system provides through state participation in federal governmental action. *The political process ensures that laws that unduly burden the States will not be promulgated.*[122]

The Wechsler-*Garcia* vision of a federalism policed by Congressional politics rather than judge-imposed formulas has been less criticized for mistaking the sources of state political influence over national policy, and for leaving the door open to federal over-reaching that might be important in principle though inconsequential in practice.[123] But the plain truth, obvious to anyone familiar with the ways of Congress or with the truly "cooperative" (often Byzantine) structure of most major domestic federal programs fashioned in Congress is that whatever its precise sources and nature, state participation in federal policy making is alive and well. The states do not as a general matter need the Court to protect them from Congressional ovrreaching. And more frequently than not, when the Court has offered help, it has soon found itself over its head.

The *Garcia* Court got it right, as the *Raich* Court discovered, and Judiciary Committee Chair Senator Specter insisted, by way of acknowledging limitations on the judiciary's competence, respecting democracy, and, indeed, capturing the vision of Chief Justice Marshall and the framers for federalism itself. As nominee and witness before the Judiciary Committee, Chief Justice Roberts generally expresssed his concurrence, often with emphasis and even eloquence. Much is riding on how steadfastly the Roberts Court restores that vision.

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more recently by Stanford Law Dean Larry D. Kramer, *Putting the Politics Back in the Political Safeguards of Federalism*, 100 Colum. L. Rev. 215 (2000)

[122] 469 U.S. 528, 556. (emphasis added) Justice Blackmun's opinion for the Court extensively cited Professor Wechsler's article, with approval. The Commerce Clause was the particular source of Congressional authority at issue in *Garcia*, as in *Lopez* (and *Raich)*, but the logic put forward by Justice Blackmun would of course apply equally to legislation implementing the Fourteenth or Fifteenth Amendments – if anything, with greater force, given the express direction to Congress in Section Five and Section Two of those amendments to "enforce" their respective substantive provisions and the recognition on the part of the framers of those amendments of the need for aggressive Congressional follow-up on their ratification.

[123] See, e.g., Dean Kramer's *Harvard Law Review* article cited in note 121; and see Note: The Lesson of *Lopez*: The Political Dynamics of Federalism's Political Safeguards, 119 Harv. L.Rev. 609 (2005).