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INTRODUCTION: A TALE OF (AT LEAST) TWO FEDERALISMS

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These are the best of times and the worst of times to be writing about federalism. Over the past fifteen years, the U.S. Supreme Court has breathed life into what appeared to be a moribund, abstract, technical area of law. Federalism has become relevant and everyone has something to say about the proper balance of power between the federal and state governments. Improbable as it may seem, suddenly it is cool to be a federal-courts junkie.¹

But the sexiness of the new federalism has come at the price of confusion and instability. Everything about the area of law now seems to be in flux. The most obvious example is that the composition of the Supreme Court is changing for the first time in eleven years — gone are both Chief Justice William Rehnquist, who played a strong leadership role in the Court’s federalism cases, and Justice Sandra Day O’Connor, another consistent member of the States’ Rights Five.² We can only speculate about the positions their replacements will take in future federalism cases and how the interplay of new personalities and judicial styles on the Court will affect the work of the Justices. Chief Justice John Roberts’s dissenting opinion in *Rancho Viejo, LLC v. Norton*, written when he was a circuit court judge, suggests that he is willing to read Supreme Court precedent narrowing Congress’s Commerce Clause powers and ex-

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1. See Jeffrey Toobin, *The Bench: Scotus Watch*, THE NEW YORKER, Nov. 21, 2005, at 44 (discussing the popular blog “Underneath Their Robes,” which was authored under the pen name Article III Groupie); Adam Liptak, *Mystery of Gossipy Blog on the Judiciary Is Solved*, N.Y. TIMES, Nov. 16, 2005, at A14 (same).

2. The States’ Rights Five are the late Chief Justice Rehnquist and Justices Anthony Kennedy, Sandra Day O’Connor, Antonin Scalia, and Clarence Thomas. See Lynn A. Baker, *The Future of Federalism?: Pierce County v. Guillen as a Case Study*, 50 N.Y.L. SCH. L. REV. 699, 700, n.4 (2005-2006); Editorial, *Fiddling with Federalism*, N.Y. TIMES, Oct. 15, 1999, at A34 (referring to the “states’ rights five”).

panding facial challenges to federal statutes broadly.³ Then-Judge Roberts, however, also allowed that he would be open to find “alternative grounds for sustaining application of [Commerce Clause statutes] that [would] be more consistent with Supreme Court precedent.”⁴ Harriet Miers, President George W. Bush’s next pick to fill a Supreme Court seat, had no record that would betray her leanings in federalism cases.⁵ Judge Samuel Alito, however, Bush’s next selection for the Court, had expressed hostility towards many of the assertions of Congressional power that we have grown accustomed to since the 1930s in his position on the U.S. Court of Appeals for the Third Circuit.⁶ Since Justice Alito is now a member of the Supreme Court, only time will tell if a new Court majority will coalesce to police strictly the boundaries of federalism.

In truth, the Court’s federalism jurisprudence was in flux even before the recent personnel changes. In the 1990s, the Supreme

3. 334 F.3d 1158 (D.C. Cir. 2003).

4. *Id.* at 1160. Chief Justice Roberts explained in his Senate confirmation hearings that “I thought, if there was another basis for sustaining the Endangered Species Act that was not inconsistent in the view of another Circuit court, that we ought to look at that and try to do it.” The Nomination of John Roberts to be Chief Justice of The Supreme Court Before the S. Judiciary Comm. 109th Cong. (2005) (statement of John G. Roberts, Chief Justice Nominee), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091301469.html>.

5. *But see* John C. Eastman, *The End of Federalism*, The Claremont Institute — Writings, ¶ 4 (Oct. 24, 2005), <http://www.claremont.org/writings/051024eastman.html> (speculating that Harriet Miers’s nomination was a signal that “[t]he era of ‘big government is over’ was over”).

6. *See, e.g.*, *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997) (Alito, J., dissenting) (voting to invalidate a federal law banning machine guns on the grounds that it exceeded Congress’s Commerce Clause powers); *Chittister v. Dep’t of Cmty. & Econ. Dev.*, 226 F.3d 223 (3d Cir. 2000) (holding that Congress did not validly abrogate state sovereign immunity in enacting the Family Medical Leave Act because the statute exceeded Congress’s power under Section 5 of the Fourteenth Amendment).

Indeed, Judge Alito was a champion of restricting Congress’s power in the name of federalism even before he was appointed to the bench. In 1986, he authored a memo urging President Reagan to veto a federal bill requiring used-car dealers to keep track of the mileage of cars on the grounds that the law would infringe upon states’ rights. Alito wrote that “the federal government should not intervene in matters that traditionally have been the responsibility of the states, and in which there is no overriding need for national policy uniformity. Appropriately, the licensing and transfer of automobiles have been a matter of state concern since the inception of motor travel.” Charles Hurt, *Alito papers evince a conservative*, WASH. TIMES, Nov. 15, 2005, at A14. President Reagan signed the legislation. *Id.*

Court engaged in a Federalism Revolution — taking upon itself the task of ensuring that the national legislature did not encroach upon the proper authority of the states.⁷ In more recent years, however, the strong rhetoric that the Court used in those cases has faded away and has been replaced by much more cautious, perhaps even counter-Revolutionary, language. For example, this past term in *Gonzales v. Raich*,⁸ the Court not only passed up an opportunity to further reduce the scope of Congress's powers, but Justice Scalia — usually a reliable vote to trim Congress's wings — concurred separately to emphasize the expansive reach of Congress's powers under the Commerce and the Necessary and Proper Clauses: “[w]here necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.”⁹ Moreover, the *Gonzales* decision is hardly an anomaly. Since 2003, in cases dealing with the Commerce Clause,¹⁰ Section 5 of the Fourteenth

7. See *New York v. United States*, 505 U.S. 144, 187 (1992) (“Much of the Constitution is concerned with setting forth the form of our government, and *the courts* have traditionally invalidated measures deviating from that form.”) (emphasis added). The cases of the Federalism Revolution also include: *United States v. Lopez*, 514 U.S. 549 (1995); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Printz v. United States*, 521 U.S. 898 (1997); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Alden v. Maine*, 527 U.S. 706 (1999); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *Jones v. United States*, 529 U.S. 848 (2000); *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001); *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002).

For stories describing the impact of the Federalism Revolution on the lives of Americans, see *AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE* (Denise C. Morgan et al. eds., 2005).

8. 125 S. Ct. 2195 (2005) (holding that Congress has the Commerce Clause power to criminalize the noncommercial use of medical marijuana under the federal Controlled Substances Act).

9. *Raich*, 125 S. Ct. at 2216 (Scalia, J., concurring). Indeed, Justice Scalia would also have loosened the economic activities tests even more than the majority did. His concurring opinion asserted that “Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce.” *Id.* at 2217.

10. See *Pierce County v. Guillen*, 537 U.S. 129 (2003) (holding that a federal law regulating highway safety — as well as a collateral evidentiary matter in state court proceedings — did not violate Congress's authority under the Commerce Clause). *Cf. Gonzales v. Oregon*, 126 S. Ct. 904, 916-23 (2006) (holding that the U.S. Attorney General's interpretative rule — that Oregon physicians who assisted suicides in accordance with Oregon's Death with Dignity Act (ODWDA) would do so in violation of the federal

Amendment,¹¹ the Spending Clause,¹² and the Eleventh Amendment,¹³ the Court has firmly held a confused (perhaps even inconsistent) line — refusing both to definitively strip Congress of substantial authority to regulate the states or to create individual rights that are enforceable against the states.

Even this apparent reversal of fortunes is uncertain. While commentators have both hailed and assailed the Court's counter-Revolution cases as the end of an era,¹⁴ those decisions have left ample room for lower federal and state court judges acting in good faith to expand or restrict the scope of Congressional power. For example, both *Nevada Department of Human Resources v. Hibbs*¹⁵ and

government's Controlled Substances Act (CSA) — was an invalid exercise of federal Commerce Clause regulatory power); *Granholt v. Heald*, 125 S. Ct. 1885 (2005) (holding that state laws regulating out-of-state wineries violated the Dormant Commerce Clause). The Court had earlier signaled its ambivalence about restricting the commerce power when it decided *Reno v. Condon*, 528 U.S. 141 (2000) (holding that a federal law barring a state's disclosure of personal information relating to their licensed drivers without the consent of affected drivers was a valid exercise of Congress's Commerce Clause authority). The Court may decide another important Commerce Clause issue this term, see *Rapanos v. United States*, 126 S. Ct. 414 (2005) (granting certiorari to decide whether the application of the Clean Water Act to the wetlands in this case is within Congress's authority under the Commerce Clause); *Carabell v. United States Army Corps of Eng'rs*, 126 S. Ct. 415 (2005) (granting certiorari to decide the same question at issue in *Rapanos*).

11. *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding that Eleventh Amendment did not bar suit against the state to recover damages for violation of Title II of the ADA in cases involving access to the courts); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that the Eleventh Amendment did not bar suit by state employee to recover damages for violation of the FMLA family-care leave provision).

12. *Sabri v. United States*, 541 U.S. 600 (2004) (holding that 18 U.S.C. § 666(a)(2) was a valid exercise of Congress's authority under the Spending Clause).

13. *Cent. Va. Cmty. Coll. v. Katz*, 126 S. Ct. 990 (2006) (holding that a bankruptcy trustee's proceeding to set aside the debtor's preferential transfers to state agencies was not barred by the Eleventh Amendment); *Tennessee v. Hood*, 541 U.S. 440 (2004) (holding that the Eleventh Amendment did not bar suit against a state governmental corporation for the discharge of student loans).

14. See Linda Greenhouse, *The Rehnquist Court and Its Imperiled States' Rights Legacy*, N.Y. TIMES, June 12, 2005, § 4 (Week in Review), at 3 (stating that "what had seemed until very recently to be a legacy in the making now appears evanescent, perhaps even illusory," and quoting Michael Greve of the American Enterprise Institute as saying that "[t]he federalism boomlet has fizzled"); *Editorial, Review and Outlook: High on the Commerce Clause*, WALL ST. J., June 8, 2005, at A14 ("Justices Scalia and Anthony Kennedy . . . appear to have retreated from putting any restraint on Commerce Clause-based regulation.").

15. 538 U.S. 721 (holding that the Eleventh Amendment does not bar suit by state employee to recover damages for violation of the FMLA family-care leave provision).

Tennessee v. Lane,¹⁶ two counter-Revolution cases, have been distinguished more than they have been extended in the lower federal and state courts — so that plaintiffs continue to be prevented from asserting claims against the states under the Family Medical Leave Act (FMLA) and Title II of the Americans With Disabilities Act (ADA).¹⁷ Moreover, both lawyers and judges are taking full advan-

16. 541 U.S. 509 (holding that the Eleventh Amendment does not bar suit against the state to recover damages for violation of Title II of the ADA in cases involving access to the courts).

17. For examples of courts that have declined to extend *Hibbs* and holding that Congress did not validly abrogate state sovereign immunity in enacting FMLA provisions which allowed leave because of the employee's own health condition, see *Touvell v. Ohio Dep't of Mental Retardation & Dev. Disabilities*, 422 F.3d 392 (6th Cir. 2005); *Brockman v. Wyo. Dep't of Family Servs.*, 342 F.3d 1159 (10th Cir. 2003); *Bryant v. Miss. State Univ.*, 329 F. Supp.2d 818 (N.D. Miss. 2004); *Lizzi v. Wash. Metro. Area Transit Auth.*, 862 A.2d 1017 (Md. 2004). *But see* *Malone v. Shenandoah County Dep't of Soc. Servs.*, 2005 WL 1902857 (W.D. Va. Aug. 9, 2005) (holding that the FMLA retaliation provisions, when used in conjunction with the childbirth provision, validly abrogate state sovereign immunity); *Toeller v. Wis. Dep't of Corr.*, 390 F. Supp.2d 792 (E.D. Wis. 2005) (holding that Congress validly abrogated state sovereign immunity in enacting FMLA self-care provisions).

For examples of courts declining to extend *Lane*, see *Bill M. ex rel. William M. v. Neb. Dep't of Health & Human Servs. Fin. & Support*, 408 F.3d 1096, 1100 (8th Cir. 2005) (holding that Title II of the ADA does not validly abrogate state sovereign immunity as applied to state's refusal to fund home- and community-based Medicaid-funded services); *Miller v. King*, 384 F.3d 1248, 1275-76 (11th Cir. 2004) (holding that Title II of the ADA does not validly abrogate state sovereign immunity in the prison context); *Press v. State Univ. of N.Y.*, 388 F. Supp.2d 127 (E.D.N.Y. 2005) (holding that Title II of the ADA does not validly abrogate state sovereign immunity as applied to university's denial of access to post-secondary education because access to education is not a fundamental right); *Buchanan v. Maine*, 377 F. Supp.2d 276 (D. Me. 2005) (holding that Title II of the ADA does not validly abrogate state sovereign immunity as applied to access to public mental health services); *Johnson v. S. Conn. State Univ.*, 2004 WL 2377225 (D. Conn. Sept. 30, 2004) (holding that Title II of the ADA does not validly abrogate state sovereign immunity because access to higher education is not a fundamental right); *Haas v. Quest Recovery Serv., Inc.*, 338 F. Supp.2d 797 (N.D. Ohio 2004) (holding that Title II of the ADA does not validly abrogate state sovereign immunity as applied to claim that drug treatment facility did not accommodate paraplegic's disability); *Simmang v. Tex. Bd. of Law Exam'r*, 346 F. Supp.2d 874, 881-83 (W.D. Tex. 2004) (holding that Title II of the ADA does not validly abrogate state sovereign immunity as applied to cases involving refusal to provide double time for the bar exam); *Roe v. Johnson*, 334 F. Supp.2d 415 (S.D.N.Y. 2004) (holding that Title II of the ADA does not validly abrogate state sovereign immunity as applied to cases challenging a state's decisions concerning an applicant's admission to the bar); *McNulty v. Bd. of Educ.*, 2004 WL 1554401 (D. Md. July 8, 2004) (holding that Title II of the ADA does not validly abrogate state sovereign immunity as applied to education claims). *But see* *Constantine v. Rectors of George Mason Univ.*, 411 F.3d 474, 490 (4th Cir. 2005) (holding that Title

tage of the leeway created by the Federalism Revolution to think creatively about what Congressional authority should be.¹⁸

With federalism jurisprudence in such an unsettled state, and with the Supreme Court accepting certiorari on and deciding only about 80 of the more than 27,000 cases that were terminated on the merits by twelve circuit courts and the more than 26,000 cases decided by the highest courts of the states in recent years,¹⁹ it is the lower federal courts that most often have the last word on the scope of Congress's powers. Given that Republican Presidents committed to shrinking the federal government appointed the majority of the judges in ten of the thirteen circuits,²⁰ it is likely that as long as those judges continue to dominate the federal bench, the echoes of the Federalism Revolution (more than the echoes of the counter-Revolution) will continue to reverberate in the lower federal courts.

Finally, the unsettled state of the Court's preemption doctrine only adds more confusion to the already muddy picture of Revolution and counter-Revolution. One might expect a Court concerned about states' rights to be particularly attentive to minimizing the

II of the ADA abrogates state sovereign immunity as applied to cases involving the administration of higher education); *Ass'n for Disabled Ams. v. Fla. Int'l Univ.*, 405 F.3d 954 (11th Cir. 2005) (holding that Title II of the ADA abrogates state sovereign immunity as applied to access to public education claims); *Phiffer v. Colum. River Corr. Inst.*, 384 F.3d 791 (9th Cir. 2004) (holding that Title II of the ADA abrogates state sovereign immunity as applied to claim that state failed to accommodate plaintiff's osteoarthritis and osteoporosis); *Badillo-Santiago v. Naveira-Merly*, 378 F.3d 1 (1st Cir. 2004) (holding that Title II of the ADA abrogates state sovereign immunity as applied to claim that plaintiff was denied reasonable accommodation for his hearing impairment during trial).

18. See, e.g., *Westside Mothers v. Haveman*, 133 F. Supp.2d 549, 561 (E.D. Mich. 2001) (finding that Spending Clause legislation is a mere contract that is not the "supreme law of the land," and, therefore, could not be enforced pursuant to 28 U.S.C. §1983). The district court's rationale was subsequently rejected by the Sixth Circuit. *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir. 2002).

19. See *The Supreme Court, 2004 Term: The Statistics*, 119 HARV. L. REV. 415, 426 (2005); Leonidas Mecham, Admin. Office of the U.S. Courts, Judicial Business of the United States Courts: 2004 Annual Report of the Director Table S-1 (2005), available at <http://www.uscourts.gov/judbus2004/tables/s1.pdf> (last visited Feb. 20, 2006); Shauna M. Strickland, Nat'l Ctr. for State Courts, State Court Caseload Statistics Table I (2004), available at http://www.ncsconline.org/D_Research/csp/2004_Files/SCCSTables%201-4.pdf (last visited Feb. 20, 2006).

20. See Alliance for Justice, Federal Judiciary by Court and Appointing President, http://www.allianceforjustice.org/judicial/judicial_selection_resources/selection_database/byCourtAndAppPres.asp (last visited Feb. 20, 2006).

preemptive effects of federal statutes. That was not the case, however, with the Rehnquist Court.²¹ Indeed, that Court strengthened preemption doctrine by encouraging strict textual (as opposed to contextual) determination of Congressional intent,²² narrowly reading savings clauses in preemption provisions,²³ showing increased concern that the response of businesses to the risk of liability under state common law actions would affect federal regulatory schemes,²⁴ and evincing little concern for states' ability to regulate their traditional areas of concern.²⁵ The combination of those

21. See, e.g., *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Geier v. Am. Honda Co.*, 529 U.S. 861 (2000); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000); *United States v. Locke*, 529 U.S. 89 (2000). But see *Bates v. Dow Agrosciences*, 125 S. Ct. 1788 (2005) (holding that FIFRA does not preempt claims for defective design, defective manufacture, negligent testing, breach of express warranty, and violation of Texas Deceptive Trade Practices Act); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002) (holding that ERISA does not preempt the Illinois HMO Act). See also *Granholm*, 125 S. Ct. 1885 (holding that state laws regulating out-of-state wineries violate the Dormant Commerce Clause).

22. See *Engine Mfrs. Ass'n* 541 U.S. at 255 ("In addition to having no basis in the text of the statute, treating sales restrictions and purchase restrictions differently for pre-emption purposes would make no sense."); *Lorillard Tobacco Co.*, 533 U.S. at 595 (Stevens, J., dissenting) ("Ripped from its context, this provision could theoretically be read as a breathtaking expansion of the limitations imposed by the 1965 Act. However, both our precedents and common sense require us to read statutory provisions — and in particular, pre-emption clauses — in the context of both their neighboring provisions and of the history and purpose of the statutory scheme."). But see *Geier* 529 U.S. at 912 (Stevens, J., dissenting) ("[N]either the text of the statute nor the text of the regulation contains any indication of an intent to pre-empt").

23. See *Geier*, 529 U.S. at 869 ("[T]he savings clause . . . does not bar the ordinary working of conflict pre-emption principles."); *Locke*, 529 U.S. at 106 ("We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.").

24. See *Buckman Co.*, 531 U.S. at 348 ("The balance sought by the [FDA] can be skewed by allowing fraud-on-the-FDA claims under state tort law."); *Geier*, 529 U.S. at 871 ("[T]he rules of law that judges and juries create or apply in [common law tort] suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts."); *Norfolk S. Ry. Co.*, 529 U.S. at 358 ("What States cannot do — once they have installed federally funded devices at a particular crossing — is hold the railroad responsible for the adequacy of those devices.").

25. See *Lorillard Tobacco Co.*, 533 U.S. at 591 (Stevens, J., dissenting) ("As the regulations at issue in this suit implicate two powers that lie at the heart of the States' traditional police power — the power to regulate land usage and the power to protect the

cases and the Federalism Revolution curtailed Congress's powers to protect individual rights in the name of federalism, while cutting back the states' powers to protect individual rights in the interest of respecting Congress's proper sphere of operation — creating an anti-regulatory void.²⁶ The result has been the inhibition of private litigation aimed at promoting the accountability of government and business.²⁷

Between the turnover of Supreme Court justices, the conflict between the Court's Federalism Revolution and counter-Revolution cases, and the doctrinal tension inherent in weakening affirmative Congressional powers while strengthening preemption jurisprudence, a Federal Courts scholar could be forgiven for asking in exasperation, "What on earth is going on?"

I do not pretend to have an answer to that question — and indeed, I strongly suspect that none of the individual Justices has an answer either. It is not a judge's job "to decide cases in a way that

health and safety of minors — our precedents require that the Court construe the preemption provision 'narrow[ly].'; *Egelhoff*, 532 U.S. at 151 ("[We] have not hesitated to find state family law pre-empted when it conflicts with ERISA or relates to ERISA plans.").

In contrast, the Court has been hostile toward state laws that touch on areas of traditional federal concern, such as maritime law and foreign affairs. See *Garamendi*, 539 U.S. at 421 (applying foreign affairs preemption: "The exercise of the federal executive authority means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two"); *Crosby*, 530 U.S. at 381 (creating Executive authority preemption: "This clear mandate and invocation of exclusively national power belies any suggestion that Congress intended the President's effective voice to be obscured by state or local action"); *Locke*, 529 U.S. at 99 (expanding the notion of field preemption: "The State of Washington has enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established").

26. See Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002) (describing both halves of the regulatory void); Denise C. Morgan & Rebecca E. Zietlow, *The New Parity Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347 (2005) (arguing that state law cannot replace federal civil rights legislation); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 3-4 (2004) (also describing both halves of the regulatory void).

27. See David Barron, *Reclaiming Federalism*, DISSENT MAGAZINE, Spring 2005, available at <http://www.dissentmagazine.org/article/?article=249> ("[T]he Court consistently decides against 'overreaching' by states and localities and legitimates business-backed federal efforts to curb state and local regulations."); Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 706 (2000) (describing the Court as "opposed to civil litigation, both in general and as a tool of government accountability and law reform").

establishes broad rules for the future and that also gives deep theoretical justifications for outcomes,” but rather to decide one case at a time based on the specific facts before him or her.²⁸ Still, those of us who earn our living trying to draw straight lines through judicial meanderings like to believe that there is *some* order in the workings of our highest court.

The first four pieces in this volume, which were presented at the Federal Courts section panel at the 2005 AALS convention, ask some version of the Federal Courts scholar’s distressed query. My colleague, Professor Edward A. Purcell, Jr., opens the volume by putting that question into a broader historical and theoretical context. His article asks:

[W]hether, and to what extent, it is possible for “federalism” to serve as a meaningful and independent norm in the nation’s constitutional enterprise. In other words, are the provisions of the Constitution that establish the federal structure, sufficiently clear, specific, and complete to direct those who construe them to “correct” decisions or, at least, to eliminate wide ranges of discretion in such decision making?²⁹

Can an examination of history set us on the proper path prescribed by the Constitution, or, when it comes to American federalism, are we condemned to muddle through, always wondering, “What on earth is going on?”

Professor Purcell’s interrogation provides some lessons and yields some insights into the “true” nature of American federalism, but more fundamentally, it “reveal[s] disagreement, uncertainty, conflict, and change.”³⁰ Indeed, he contends that federalism has been, remains, and always will be a contested issue, in part because “[s]ome of our most basic conceptions and assumptions about the federal system have changed substantially over the years.”³¹ In sharp contrast to the work of Federal Courts scholars who pro-

28. Cass Sunstein, *Foreward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 15 (1996).

29. Edward A. Purcell, Jr., *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 N.Y.L. SCH. L. REV. 635, 637 (2005-2006).

30. *Id.* at 635.

31. *Id.* at 637.

pound clear cut prescriptive theories of federalism,³² Professor Purcell concludes that “the idea of ‘constitutional federalism’ — that is, federalism as a directive constitutional norm — [is] deeply problematic.”³³

Each of the sections of Professor Purcell’s article examines one of the moving parts of American federalism: our ideas about the proper role of the Supreme Court in the federal system; our ideas about the values of federalism; our understanding of the nature of federalism as a structure of government; and our ideas about the nature and meaning of the Constitution itself. He finds that even the founding generations had at least five conflicting ideas about the appropriate role of the Supreme Court and judicial review. Moreover, “[a]lthough the five views were distinct, they were also frequently intermixed in the minds of the founders.”³⁴ Professor Purcell traces those different understandings of the Court’s proper function from the ante-bellum period to the modern era — and attributes our failure to settle on one dominant conception to the fact that “[n]either the Constitution nor any other authoritative source unequivocally defined such a system or such a role.”³⁵

Professor Purcell contends that discussions of the values of federalism — “usually described as including protecting liberty, encouraging diversity and innovation, ensuring political accountability, promoting democratic participation, and protecting local values and interests” — are similarly unhelpful in identifying clear lines between state and federal authority.³⁶ Indeed, he asserts

32. See RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* 15 (1987) (“For a ‘proper understanding’ of federalism . . . we must look to the explanations of the Founders, what is characterized as the ‘original intention.’”); Antonin Scalia, *Common-Law Courts in a Civil-Law System, in A Matter of Interpretation: Federal Courts and the Law* 3, 45 (1997) (“Often — indeed, I dare say usually — [the original meaning of the constitution] is easy to discern and simple to apply.”); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177-79 (1989) (discussing the “advantage[s] of establishing as soon as possible a clear, general principle of decision” and urging judges to write decisions that establish broad discretion-constraining rules of law). See also *Morrison*, 529 U.S. at 616-18 (“The Constitution requires a distinction between what is truly national and what is truly local.”).

33. Purcell, *supra* note 29, at 697.

34. *Id.* at 643.

35. *Id.* at 663.

36. *Id.* at 663, n. 121.

that those conversations, which began to proliferate in the late twentieth century, were driven by

an anxious sense that many “traditional” lines ostensibly separating national and state power were no longer sound, easily detectable, or even operationally plausible. Some kind of functional analysis seemed necessary to justify the existence of the states as independent governing units, to assure Americans that those state governments actually produced public benefits, and to identify useful and intelligible lines that could be drawn between federal and state authority.³⁷

Professor Purcell offers as an example the fact that the notion that states should serve as laboratories of democracy does nothing to distinguish between those social experiments that the Constitution permits and those that it prohibits.

Professor Purcell next argues that the national conception of federalism as a structure of government has evolved over time. He points out that the founding generation did not have much of a choice about adopting a federalist structure — given the political reality of the states, federalism was “a working compromise necessary to allow [them] to forge a new and more ‘energetic’ central government.”³⁸ Professor Purcell contends that different theories of federalism, like dual federalism, cooperative federalism, and competitive federalism, have emerged over time “from the processes of social change and reflected the ideas, values, and challenges of new generations confronting new historical contexts and new political alignments.”³⁹ As such, no one theory can claim greater constitutional legitimacy than any other.

The piece ends with an examination of our changing ideas about the Constitution and constitutional interpretation. Professor Purcell contends that our search for a clear, stable understanding of that document has been frustrated.

The rise and spread of utilitarianism, naturalism, positivism, and relativism undermined many traditional legal and moral ideas. At the same time, philosophical skepti-

37. *Id.* at 664.

38. *Id.* at 683.

39. *Id.* at 689.

cism, pragmatism, cognitive indeterminism, and later 'postmodernism' deepened doubts about the human capacity to know while highlighting the seemingly infinite malleability of words, sounds, symbols, and images.⁴⁰

This section critiques originalism as a method of constitutional interpretation on methodological and pragmatic grounds. Moreover, Professor Purcell contends that "[b]eyond those analytic problems . . . loom[s] the embarrassing fact that, as a practical political matter, originalist theories were used primarily as purposeful instruments of constitutional change and doctrinal innovation. Originalism was the natural tool of those who sought justifications for overthrowing existing doctrines, precedents, and practices."⁴¹ Seemingly resigned to the "incomplete, ambiguous, and ambivalent nature of American constitutional federalism" and the inevitability of historical change, Professor Purcell concludes that federalism will continue to be contested — and that we will have to look elsewhere for the clarity that we seek.

Professor Lynn Baker's piece, *The Future of Federalism?: Pierce County v. Guillen as a Case Study*, uses the Supreme Court's decision in *Pierce County v. Guillen*⁴² as a jumping-off point in her attempt to make sense of the Court's recent Spending Clause jurisprudence.⁴³ The Spending Clause gives Congress its most substantial powers to impinge upon state autonomy, and *South Dakota v. Dole* gives Congress considerable leeway in conditioning federal spending on state compliance with federal regulations.⁴⁴ But, despite the fact that the broad scope of Congress's Spending Clause authority "does not provide Congress an eternally available means of circumventing those limitations on Congress's other Article I powers that the Court has recognized," the Court has yet to attempt to more strictly police that power.⁴⁵ The *Guillen* case, in which the Supreme Court of Washington struck down a federal statute that conditioned the states' receipt of federal highway safety monies

40. *Id.* at 691.

41. *Id.* at 694.

42. 537 U.S. 129.

43. See Baker, *supra* note 2.

44. 483 U.S. 203 (1987) (holding that encouragement to state action is a valid use of the spending power).

45. Baker, *supra* note 2, at 703.

upon their agreement to shield certain accident reports and highway safety data from discovery and introduction into evidence in state court proceedings, offered the Court an opportunity to bring its Spending Clause jurisprudence more in line with its Commerce Clause and Section 5 case law.⁴⁶ Professor Baker's article asks the question: "Why did the States' Rights Five forego this rare opportunity to strengthen or re-affirm the significance of existing spending power doctrine which is so central to any meaningful 'federalist revival?'"⁴⁷

The *Guillen* case is indeed intriguing. As Professor Baker points out, "each member of the States' Rights Five was on record as having been willing to invalidate a federal statute under the doctrine set out in *Dole*."⁴⁸ Indeed, the amicus brief Professor Baker and her colleague Mitch Berman submitted in the case argued that the statute violated both the Spending and Commerce Clauses.⁴⁹ Given the Federalism Revolution, it seemed to her a slam dunk that the Court would use the opportunity presented by the *Guillen* case to further trim Congressional authority.⁵⁰ The Court, however, unanimously upheld the federal statute under the Commerce Clause and chose not to reach the Spending Clause issue.⁵¹

Professor Baker attributes the *Guillen* decision to the fact that the Justices employed categorical federalism,⁵² attempting to discern whether the core activity at issue was a traditional and appropriate area of federal or state regulation.⁵³ Indeed, she contends that "the recent Commerce Clause jurisprudence of the States' Rights Five, like their spending power jurisprudence, is driven by a (sometimes) unstated inquiry into whether the federal statute would regulate an area 'where States historically have been sovereign,' or whether it instead involves a traditional and appropriate federal function."⁵⁴ Since the Court viewed the *Guillen* statute as

46. *See id.* at 699-701.

47. *Id.* at 708.

48. *Id.* at 709.

49. *See id.* at 704-08.

50. *Id.* at 705.

51. *Guillen*, 537 U.S. at 146-48.

52. *See* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 *YALE L.J.* 619 (2001).

53. Baker, *supra* note 2, at 709.

54. *Id.* at 712.

regulating highway safety — an area traditionally regulated by the federal government — and not state court rules of evidence, it upheld the statute under the Commerce Clause.⁵⁵ In closing, Professor Baker notes the irony of the fact that the Court appears to have revived *sub rosa* the late Justice Rehnquist's traditional function test from *National League of Cities v. Usery*⁵⁶ that the Court subsequently declared unworkable in *Garcia v. San Antonio Metropolitan Transit Authority*.⁵⁷

Professors Jesse Choper and John Yoo, in *Effective Alternatives to Causes of Action Barred by the Eleventh Amendment*, also express puzzlement with the Court's Federalism Revolution. Focusing on the Court's recent sovereign immunity jurisprudence, which has inhibited Congress from holding states liable for violations of federal law through private damages actions, the authors ask "why the Rehnquist Court would devote substantial resources toward developing a line of cases that pose[s] no serious barriers to Congress, while at the same time depriving individuals of full vindication of their constitutional or statutory rights."⁵⁸

Choper and Yoo open their piece with the contention that scholarly criticism of the Court's line of sovereign immunity decisions that began with *Seminole Tribe of Florida v. Florida*⁵⁹ has been "vastly exaggerated."⁶⁰ Indeed, the authors argue that there are enough "internal" and "external" constraints on state sovereign immunity that the Court's decisions "establish no serious barrier to a Congress and President intent on achieving national policy objectives."⁶¹ Among the internal constraints — those created by Eleventh Amendment doctrine — Choper and Yoo list the availability of *Ex Parte Young* proceedings for prospective injunctive relief against state officers who violate federal law; retrospective damage suits against state officers in their private capacities; section 1983

55. *Id.* at 713.

56. 426 U.S. 833, 852 (1976) (Congress may not "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions"), *overruled*, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

57. *Id.* at 714.

58. Jesse H. Choper & John C. Yoo, *Effective Alternatives to Causes of Action Barred by the Eleventh Amendment*, 50 N.Y.L. SCH. L. REV. 715, 727 (2005-2006).

59. 517 U.S. 44.

60. Choper & Yoo, *supra* note 58, at 715.

61. *Id.* at 715-16.

damages suits against state officials for violations of federal statutory or constitutional rights; suits brought against the states by the United States; and suits brought to enforce legislation enacted pursuant to Section 5 of the Fourteenth Amendment.⁶² Among the external constraints on state sovereign immunity — those that are independent of the Court’s sovereign immunity jurisprudence — the authors cite Congress’s ability to evade state sovereign immunity doctrine by regulating the states through Spending Clause legislation; Congress’s authority to use its treaty-making power to override state sovereign immunity; and the availability of non-federal alternatives like state regulatory schemes or state common law that provide remedies for violations of federal law by state officers.⁶³

Their conclusion that the Court’s sovereign immunity jurisprudence does not substantially inhibit Congress or protect states’ rights only piques Choper and Yoo’s curiosity about the Court’s intentions. They are not terribly concerned that the *Seminole Tribe* line of cases will “depriv[e] individuals of full vindication of their constitutional or statutory rights” because they think that the federal government’s ability to achieve national policy objectives should be the primary focus of the Eleventh Amendment cases.⁶⁴ Choper and Yoo do, however, appear troubled that the Court’s sovereign immunity decisions have the “[potential to] concentrate greater law enforcement discretion in the hands of the Executive branch.”⁶⁵ They explain that “[i]f the United States can successfully override sovereign immunity by itself suing the states, as the Court has concluded, then the applicability of the Eleventh Amendment hinges first on action by Congress, and then on the decisions of the President and the relevant agencies, rather than the choices of private parties.”⁶⁶

Professor Erwin Chemerinsky’s contribution, *Reconceptualizing Federalism*, contains both a critical component — questioning the coherence of the Supreme Court’s past fifteen years of federalism

62. *See id.* at 720-27.

63. *Id.* at 723-26.

64. *Id.* at 727.

65. *Id.*

66. *Id.* at 727-28.

jurisprudence — and a constructive component — proposing an alternative vision of federalism that would

be based on open and express attention to, and where necessary a balancing of, to how to best advance liberty and enhance effective governance. Generally, this will require the Court to abandon its use of federalism as a judicial limit on federal or state authority and to instead to use it to uphold the power of each level of government to deal with social problems.⁶⁷

His alternative vision should, perhaps, be called “empowerment federalism.”

Chemerinsky begins by providing a political and historical context for the Court’s Federalism Revolution.⁶⁸ He argues that while there is nothing inherent in federalism that makes it conservative, “throughout American history, and especially in the 1990s, federalism has been used by conservatives as a way of trying to limit government power. In other words, conservatives have used federalism as a procedural way of blocking substantive reforms with which they disagree.”⁶⁹ The Court’s invocation of states’ rights in its Federalism Revolution cases is highly formalistic, Chemerinsky notes, because those cases have “consistently invalidated highly desirable social legislation without serving the underlying goals of federalism.”⁷⁰ For example, Chemerinsky asserts that the Gun Free Zone Act that the Court struck down in *United States v. Lopez*,⁷¹ the civil rights remedy in the Violence Against Women Act that the Court struck down in *United States v. Morrison*,⁷² and the Religious Freedom Restoration Act that the Court struck down in *City of Boerne v. Flores*⁷³ were all beneficial pieces of legislation.⁷⁴ In addition, he argues that “[t]he values traditionally invoked to justify federalism — states are closer to the people, states serve as a barrier to tyranny

67. Erwin Chemerinsky, *Reconceptualizing Federalism*, 50 N.Y.L. SCH. L. REV. 729, 731 (2005-2006).

68. *See id.* at 732-36.

69. *Id.* at 735.

70. *Id.* at 736.

71. 514 U.S. 549.

72. 529 U.S. 598.

73. 521 U.S. 507.

74. Chemerinsky, *supra* note 67, at 736-38.

by the federal government, states are laboratories for experimentation — have virtually nothing to do with the Court’s decisions and, on reflection, are of little use in constitutional decisionmaking.”⁷⁵ Indeed, Chemerinsky argues that the Court spends a disproportionate amount of energy and attention on one half of the federalism equation: protecting state governments; and entirely too little energy and attention on the other half of the equation: “safeguarding the federal government and the supremacy of federal law.”⁷⁶ The Court did not even consider that concern in its recent sovereign immunity jurisprudence.

Chemerinsky argues, moreover, that the Court’s asserted concern with federalism and states’ rights is inconsistent with its case law involving federal preemption of state laws.⁷⁷ He notes that “over the last several years, the Supreme Court repeatedly has found preemption of important state laws, even when federal law was silent about preemption or explicitly preserved state laws.”⁷⁸ He cites *Geier v. American Honda Motor Co.*,⁷⁹ *Lorillard Tobacco Co. v. Reilly*,⁸⁰ *Crosby v. National Foreign Trade Council*,⁸¹ and *American Insurance Association v. Garamendi*⁸² as examples of the Court’s invocation of a presumption *in favor of* preemption that is at odds with the Court’s stated desire to exercise deference to the states.⁸³

It is a brave task to propose a constructive project in a field that is so deeply in flux, but Chemerinsky rises to the challenge. He ends with a sketch of an alternative view of federalism that focuses on creating effective government, not on limiting government authority.⁸⁴ Specifically, he contends that “[c]onstitutional doctrines about federalism should focus on how to empower each level of government with the necessary authority to deal with the complex problems of the 21st century.”⁸⁵ Chemerinsky asserts that at least

75. *Id.* at 745.

76. *Id.*

77. *See id.* at 746.

78. *Id.*

79. 529 U.S. 861.

80. 533 U.S. 525.

81. 530 U.S. 363.

82. 539 U.S. 396.

83. *See* Chemerinsky, *supra* note 67, at 746-53.

84. *See id.* at 753-55.

85. *Id.* at 754.

three benefits would flow from his reconceptualization of federalism.⁸⁶ First, the limits of Congressional power would be policed primarily by the political process and judicial protection of other parts of the constitution, as had been the case under *Garcia v. San Antonio Metropolitan Transit Authority*;⁸⁷ second, both federal and state courts would be more easily accessible to individuals asserting federal claims; and, third, a more limited preemption doctrine would enhance the power of state and local government.⁸⁸

Although not presented at the AALS convention, the first two student contributions to this volume show that the search for coherence that is one of the central projects of federal courts scholarship has appeal across the generations. Helena Lynch asks whether the Alien Tort Statute (ATS),⁸⁹ which confers federal jurisdiction to hear suits brought by aliens for torts committed in violation of the law of nations, also allows suits to be brought against those who are complicit in or provide support to those who violate the law of nations.⁹⁰ Lynch concludes that in light of the Supreme Court's decision in *Sosa v. Alvarez-Machain*,⁹¹ such complicity claims should be barred.⁹² She argues that

The aiding and abetting standard [that existed prior to *Sosa*] ultimately fails, however, to satisfy the criteria to constitute a cause of action under the ATS as set forth in *Sosa*⁹³ As a result . . . complicit actors are essentially untouchable under the ATS unless they are in direct control of the primary actors.⁹⁴

Sarah Kroll-Rosenbaum offers a critical examination of the proposed Marriage Protection Act (MPA), which would strip the lower federal courts and the Supreme Court of jurisdiction over any

86. See *id.* at 754-55.

87. 469 U.S. at 552 ("State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.")

88. See Chemerinsky, *supra* note 67, at 754-55.

89. 28 U.S.C. § 1350 (2000).

90. Helena Lynch, *Liability for Torts in Violation of International Law: No Hook Under Sosa for Secondary, Complicit Actors*, 50 N.Y.L. SCH. L. REV. 757, 758 (2005-2006).

91. 542 U.S. 692 (2004).

92. Lynch, *supra* note 90, at 758.

93. *Id.*

94. *Id.* at 758.

case challenging or interpreting the 1996 Defense of Marriage Act (DOMA).⁹⁵ Kroll-Rosenbaum first examines the two pieces of legislation in question.⁹⁶ She finds that DOMA, which provides that no state shall be required to recognize same-sex marriages performed out-of-state, does little to change existing law.⁹⁷ Historically, states have been free to decline to recognize out-of-state marriages that are inconsistent with their own policies.⁹⁸ Given the limited legal impact of DOMA, Congress could easily have concluded that the MPA was unnecessary.⁹⁹ Kroll-Rosenbaum contends that members of Congress were driven to consider the MPA by their fear that federal courts will require all states to accept same-sex marriages.¹⁰⁰ As it is currently drafted, the legislation would not, however, bar all same-sex marriage-related claims from the federal courts.¹⁰¹ Kroll-Rosenbaum then argues that the MPA is unconstitutional.¹⁰² She contends that even if Article III gives Congress the power to strip the Supreme Court of jurisdiction over a category of constitutional claims, and even if it also gives Congress the power to strip the lower federal courts of jurisdiction over those claims, “Congress does not have the constitutional authority to simultaneously strip both the original jurisdiction of the lower federal courts *and* the appellate jurisdiction of the Supreme Court over DOMA-related cases or controversies because constitutional rights are at stake.”¹⁰³

Taken together, these essays aptly mark the character of federalism jurisprudence at the end of the Rehnquist Court and the beginning of the Roberts Court. That jurisprudence is unclear, unsettled, and unstable. In spite of the acute analyses and revealing insights that the symposium’s participants provide, none purports to either identify a coherent doctrinal pattern in the Rehnquist Court’s federalism decisions or explain the goals and values that animated the States’s Rights Five. Indeed, if Professor Baker is cor-

95. Sarah Kroll-Rosenbaum, *The Marriage Protection Act: A Lesson in Congressional Over-Reaching*, 50 N.Y.L. SCH. L. REV. 809, 811-12 (2005-2006).

96. *See id.* at 812-21.

97. *Id.* at 812.

98. *See id.* at 814-15.

99. *See id.* at 815.

100. *See id.* at 816.

101. *See id.* at 817-18.

102. *See id.* at 826-30.

103. *Id.* at 812.

rect that some idea of “categorical federalism” undergirds *Guillen* and perhaps some of the Court’s other decisions,¹⁰⁴ then it seems clear that the judicial choice between “categories” is largely, if not wholly, arbitrary. The “categories,” in other words, are essentially conclusory, and they cannot be taken to explain why the Court has chosen to apply one instead of another. The authors suggest rather convincingly, then, that the scope, nature, direction, and consequences of the Rehnquist Court’s Federalism Revolution lies entirely in the hands of the Roberts Court.

104. See Baker, *supra* note 2, at 709-14.