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FEDERALISM R.I.P.? DID THE ROBERTS HEARINGS JUNK THE REHNQUIST COURT’S FEDERALISM REVOLUTION?

Simon Lazarus*

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 a 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 congressional authority under the Commerce Clause.1 Chief Justice William Rehnquist’s majority opinion in United States v. Lopez announced its intention to rein in federal domestic legislative power with an apocalyptic pledge to “start with first principles”—including the “principle” that “[t]he Constitution creates a Federal Government of enumerated powers.”2 Asserting that there are activities “that the states may regulate but Congress may not,” Rehnquist stated that henceforth the federal commerce power would be bounded by a categorical—albeit unspecified—“distinction between what is truly national and what is truly local.”3 Lopez, and other decisions limiting congressional authority under the Fourteenth Amendment and the Commerce Clause,4 provoked fiery opposition from the four dissenting members of the Court. It also drove leading liberal academics to write books with fevered titles that advocated Taking the Constitution Away from the Courts5

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2. Id. at 552.
3. Id. at 564–65, 567–68.
and invoked a prerevolutionary tradition of “popular constitutionalism” that vested power in *The People Themselves.* One influential critique, by a widely admired Reagan circuit court appointee, charged that the recent Supreme Court decisions had “return[ed] the country to a pre-Civil War understanding of the Nation.”

But from Congress itself, the apparent victim of the “Federalism Five’s” 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 expanding array of federalism-based doctrines had been enacted after years of extensive legislative work by lopsided bipartisan majorities. The intrusive supervisory authority the Court asserted to disregard congressional factual findings, second-guess policy judgments, and micro-manage the selection of legislative ends and means, might have been expected to provoke an institutional backlash from members of Congress of all political stripes. For ten years, no such reaction emerged.

But in September 2005, during the Senate Judiciary Committee’s hearings on Judge John Roberts’ nomination for Chief Justice of the Supreme Court of the United States, the Committee broke Congress’ decade-long silence. The coverage of the inquiry has been predominantly negative. The Judiciary Committee members have been derided as timid and inept in their questioning, while Roberts was criticized as evasive, avoiding any clear picture of what his approach to major issues would be—making him “too much of a mystery” to confirm. 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—“federal-
ism.” On this important set of issues, the Committee asked sophisticated, well-informed, and even probing questions. Four Democrats and, more surprisingly, three Republicans, including Chairman Arlen Specter, registered if not a full-fledged backlash, then 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.

Specter and several of his colleagues branded the Rehnquist Court’s federalism decisions a mere cover for the “usurpation” of congressional authority—“the hallmark agenda 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 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. He asserted that the Court itself had recanted the confrontational approach proclaimed in *Lopez* a decade earlier, in its 2005 decision in *Gonzales v. Raich*, which held that federal drug laws preempted state laws legalizing medicinal marijuana. Roberts emphasized that, Chief Justice Rehnquist’s grandiose rhetoric notwithstanding, *Raich* meant that *Lopez* did not “junk” precedents extending back two hundred years, especially the late twentieth-century decisions validating massive expansions of federal domestic authority engineered by the New Deal of the 1930s, and 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; the Commerce Clause empowers Congress to legislate on any matter that it could rationally conclude might substantially affect the national economy. In effect, this interpretation relies almost totally on legislative politics to define the limits of the commerce power, and comes close to giving Congress a blank check and draining practical meaning from the concept of a

12. Id.
federal government with judicially enforced "enumerated powers." This is precisely why conservative commentators complained so bitterly that Raich meant "the end of the federalism revolution."\textsuperscript{14}

Roberts' responses regarding the 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—were distinctly mixed. He was forthcoming in some respects, yet in others less so. Neither he nor the Court's decisions have, to date, abandoned these latter Rehnquist Court initiatives as a matter of current black letter law. These initiatives continue to threaten major twentieth-century reform laws, such as 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 pillars out from any claim that these doctrinal initiatives were inspired, or can be justified, by devotion to principles of "federalism." 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 scrutiny of legislation implementing the Fourteenth Amendment or other constitutional provisions. Of course, this does not necessarily mean that the Roberts Court will prefer logical consistency to promoting conservative policy goals, but only that it may find the latter course more awkward to rationalize. Perhaps the Court's critics, and especially the press, will see through conservatives' "federalism" rhetoric, and stop repeating it, to avoid giving further credit to the notion that their goal is neutral-principled restoration of some imagined Jeffersonian devolution. In fact, the selectivity with which federalism doctrines are invoked shows that the real agenda is simply to undermine particular laws like the Family and Medical Leave Act (FMLA) or the Age Discrimination in Employment Act (ADEA), 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 2006, the Court decided five important federalism cases, three in January and

two in June during the last week of the term. In the most noted of
the three January decisions, Gonzales v. Oregon, observers empha-
sized the states' rights-oriented result (though liberal in policy terms),
where a 6-3 majority 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-im-
posed limits on congressional authority, the key fact was that all nine
justices acknowledged that the Commerce Clause empowered Con-
gress to give the Attorney General that authority if it chooses. No
one contended, as Chief Justice Rehnquist said of secondary educa-
tion in Lopez, that defining legitimate medical practice to include phy-
sician-assisted suicide was categorically reserved for exclusive state
control.

The two other, less-noticed, January federalism decisions both in-
volved the Rehnquist Court's expansion of state "sovereign immu-
nity" to block suits against state-affiliated entities. This thread of
federalism doctrine affects congressional legislative authority pursu-
ant 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 Rob-
erst and Alito hearings, the two decisions seemed to slow—but not
necessarily reverse—its advance. In United States v. Georgia, Justice
Scalia wrote, for a unanimous Court, an opinion that resoundingly af-
fmred congressional authority to empower citizens to sue states for
violation of the ADA, or other laws enforcing the Fourteenth Amend-
ment, insofar as such laws or lawsuits target conduct that "actually
violates the Fourteenth Amendment" independent of the statute. The
decision—surprising for the tone and breadth of the Court's sup-
port, if not necessarily for the result—could revitalize judicial enforce-
ment provisions of the ADA that had recently been considered on life
support. Just how much revitalization may transpire is open to ques-
tion, as Justice Scalia painstakingly distinguished other recent deci-
sions in which he and other conservative justices had voted to extend
state immunity.

15. The January decisions were Central Virginia Community College v. Katz, 126 S. Ct. 990
(2006); Gonzales v. Oregon, 126 S. Ct. 904 (2006); and United States v. Georgia, 126 S. Ct. 877
(2006). The June decisions were Rapanos v. United States, 126 S. Ct. 2208 (2006) and Arlington
19. Id. at 881.
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. As with *United States v. Georgia*, the future significance of the *Katz* holding is unclear. The new Chief Justice voted with the conservative minority to continue ratcheting up the scope of state sovereign immunity; that minority could well become a 5-4 majority, now that the apparently more assertive conservative Samuel Alito has replaced Justice O'Connor.

In the last week of the term, Alito joined Roberts, Scalia, and Thomas in hard-line opinions in two significant cases that shroud prospects for a quick or definitive abandonment of the Rehnquist Court's federalism doctrines. In *Rapanos v. United States*, two opinions on a splintered Court seem to assure that a 5-4 majority exists for interpretative standards that preserve a comparatively flexible and broad view of federal power under the Clean Water Act (CWA), to regulate wetlands to prevent contamination of navigable waters. But the conservative quartet signed onto an opinion by Justice Scalia, in which he adopted precisely the sort of rigid, categorical restriction on federal regulatory authority that six justices had rejected a year earlier in *Gonzales v. Raich*, when the regulation of marijuana was at stake. Particularly noteworthy was the fact that Chief Justice Roberts joined this opinion, which did not reflect the brand of deference to the legislative and executive branches he endorsed in his confirmation hearing regarding Commerce Clause legislation and, specifically, environmental legislation.

In *Arlington Central School District Board of Education v. Murphy*, also decided in the final week of the term, Justice Alito wrote the

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21. 126 S. Ct. 2208, 2214–35 (2006). Justice Kennedy, in a lone concurring opinion that may dictate the operative legal standard going forward, construed the CWA to reach wetlands with a "significant nexus" to navigable waters, even if they lacked a permanent surface water link; the four "liberal" justices voted to uphold traditional deference to federal regulators as long as their judgments are "reasonable." *Id.* at 2236–52 (Kennedy, J., concurring), 2252–65 (Stevens, J., dissenting); see *infra* Part V.A.

22. *Compare Rapanos*, 126 S. Ct. at 2214–35 with *Gonzales v. Raich*, 125 S. Ct. 2195 (2005); see *infra* Part V.A.

23. *See infra* Part V. Roberts, in his separate concurrence, seemed to signal that his vote had less to do with support for Justice Scalia on the merits than with his disappointment with the relevant federal agency, the U.S. Army Corps of Engineers, for not coming up with its own limitation of its CWA jurisdiction. *Id.* Nevertheless, his vote in this case indicates that Roberts cannot at this point be counted on to adhere to traditional "modest," deferential, post-1937 approaches to construing the reach of major twentieth-century federal regulatory schemes. *Id.*
opinion of the Court, which Roberts, Scalia, Thomas, and Kennedy joined. The case concerned the relatively narrow and specific question of whether plaintiffs prevailing in actions to enforce the Individuals with Disabilities in Education Act (IDEA) are entitled to reimbursement for consultant’s services as part of the attorney’s fees award mandated by the Act. However, in ruling that such services are not covered by the Act, Justice Alito went out of his way to tighten the Rehnquist Court’s doctrine that conditions incident to the receipt of federal grant funds must be spelled out in the text of the particular statute in question to be enforceable in court. Alito’s opinion could herald a broad new level of threat to the ability of beneficiaries of federal safety-net programs to vindicate federal guarantees.

In any event, the results of Chief Justice Roberts’ first term reinforce the impression left by his confirmation testimony that Rehnquist-style federalism will continue to be in play under the new regime. Exactly how it will play out and where it will lead is uncertain. The accession of Justice Alito deepens that uncertainty. It is not entirely clear whether he will go along with Chief Justice Roberts’ brusque refusal to read Lopez as the start of an anti-New Deal counterrevolution. 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. Further, in his January 2006 confirmation hearing, Alito declined numerous opportunities to acknowledge—as Roberts had—that his radical interpretation had been definitively sidelined by Raich. 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. It is, of course, possible that Scalia’s plurality opinion in Rapanos v. United States limiting the scope of the Clean Water Act, in which Roberts somewhat cryptically concurred, could presage just such a reversal of direction. But Rapanos was a statutory interpreta-

tion case which implicated constitutional limits on Commerce Clause authority in an attenuated manner—if at all. It now seems unlikely, though not inconceivable, that more than three members of the current Court will take up the invitation, extended by Chief Justice Rehnquist in *Lopez*, to frontally challenge Congress’ broad post-New Deal authority to implement the Commerce Clause.

Only time will tell whether this apparent rolling up of the Court’s Commerce Clause foray will take with it the other federalism dominoes. It is unclear whether Roberts’ exchanges with the Senate Judiciary Committee were the first chapter in a dialogue between the Roberts Court and a newly galvanized Congress over their respective constitutional turf, or whether they were simply posturing for the press and the C-SPAN audience. The underlying issue is neither esoteric nor technical, though the precise legal questions in many of the recent federalism cases are. 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 Supreme Court had brandished to strike down federal and state social legislation prior to the New Deal. This threat has now become more circumscribed. A strong majority of the current Court has acknowledged serious flaws in this approach and—at least within the context of the Commerce Clause—has effectively scuttled the “first principles” injudiciously proclaimed in 1995.

Unraveling the remaining strands of the Rehnquist “federalism” campaign is essential to ensure that major twentieth-century social reform laws stand as their congressional framers intended. Moreover, finishing off the Court’s retreat is fundamentally necessary to reinstate the 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. Both formulae cohere with the original intent of the founding generation, as well as twentieth-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 *The Federalist No. 46*, the “ultimate authority” over both federal and state governments “resides in the

27. 17 U.S. (4 Wheat.) 316, 421 (1819).
people alone,” whom the Courts should not “preclude” from assigning responsibility where “they may discover it to be most due.”28 Contrary to the Rehnquist Court’s half-aborted initiative, American federalism exists primarily to expand democratic options for the people—not to empower judges to arbitrarily trump the choices of their elected representatives.


A. Chairman Specter’s Prehearing Challenge

On July 19, 2005, when President Bush nominated Judge Roberts to fill 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 the application of the Endangered Species Act (ESA) to a species found in only one state.29 Roberts, however, quickly squelched this potential line of attack by mollifying critics such as Judiciary Committee Democrat Senator Charles Schumer of New York during courtesy calls made in 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 three-page single-spaced letter to the nominee giving “advance notice” of questions he planned to ask at the upcoming hearing.30 The letter did not mention any opinion or statement by Roberts, but rather focused on the Supreme Court’s Lopez and Morrison decisions invalidating provisions of, respectively, 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 on 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.”31 Focusing particularly on Morrison, Specter condemned the Court for “reject[ing]

30. See Letter of Aug. 8, supra note 11.
31. Id.
Congressional findings” and ignoring the operative rule of decision grounded in “decades of precedent” and elaborated in 1968 by Republican 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.” Specter’s only reference to “federalism,” the asserted philosophical basis for the Court’s new line of decisions, effectively dismissed it as a sham: “A reinvigoration of Federalism,” he said, “is, of course, the hallmark agenda of the judicial activism of the Rehnquist Court.”

Two weeks later, Specter sent a second letter, this time attacking the Court’s recent decisions constraining congressional authority to enforce the Fourteenth Amendment through laws such as the Americans with Disabilities Act. As in the August 8, 2005 Commerce Clause letter, Specter focused not on the substantive issues or on the philosophical “federalism” issue, but on “[t]he 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 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. Specter emphasized that 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 that Justice Scalia had criticized the “congruent and proportional” test as “flabby,” because it gives the Court too much discretion to reach apparently contradictory results based on the subjective policy prefer-

32. Id.
33. Id.
35. Id.
36. 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, in which the Court invalidated the Religious Freedom Restoration Act. 521 U.S. 507, 533 (1997).
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 new 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. 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 hearings commenced, it became apparent that Specter had succeeded in energizing his colleagues to defend Congress’ turf. During the hearings, seven of the Committee’s eighteen 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 general importance of respecting congressional prerogatives.38 But many questions were detailed and reflected a surprising knowledge of arcane doctrinal byways and a recognition that

37. Letter of Aug. 8, supra note 11.

38. In his first round of questioning, Senator Orin 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. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary, 109th Cong. 163–64 (2005) [hereinafter Roberts Transcript]. Hatch observed that Justice Stephen 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. Id. at 163.
the federalism debate was not just about the Commerce Clause but concerned other sources of Congress' constitutional and nonconstitutional authority.

1. Congress' Commerce Clause Authority

In addition to Specter, who pursued the issues elaborated in his letters in similar terms and at considerable length during Roberts' confirmation hearings, Senators Feinstein and Schumer criticized the Rehnquist Court's approach to limiting Congress' Commerce Clause authority, and they probed Judge Roberts' views on that issue to varying extents. Feinstein asked whether Roberts generally agreed with the post-Lozpez jurisprudence imposing new constraints on Congress and, specifically, what his Rancho Viejo dissent portended for the ESA and other environmental laws. Schumer, meanwhile, 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, could be aggregated to find a substantial effect on interstate commerce. Schumer also pressed the nominee on whether the Court should generally defer to Congress on factual and policy determinations that noncommercial, intrastate activities affect interstate commerce and are thus subject to federal legislative treatment.

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

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 through "appropriate legislation." In the hearing, Specter began where he left off, pressing Roberts to acknowledge that the congruent and proportional test, which the Court had "plucked . . . out of thin air," constituted "the very essence" of judicial "arbitrariness" and "activism." Specter was joined by fellow Republican Senator Michael DeWine, who noted the extensive docu-

39. Id. at 225–26, 349, 405–06.
40. Id. at 261–65 (discussing Wickard v. Filburn, 317 U.S. 111 (1942)). 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. Id. at 265.
41. Id. at 264.
42. Roberts Transcript, supra note 38, at 301–02.
mentation of disability-based discrimination culled from thirteen congressional hearings, and pressed Roberts to discuss whether the Court’s rejection of these findings was consistent with Roberts’ own emphasis on the “limited role” of judges.43


Committee members showed significant interest in the scope of congressional power under the Commerce Clause, the Spending Clause, and the Fourteenth Amendment, but also in the often overlooked issue of whether 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 would be available for violations of federal law—particularly against state and local governments—and it increased procedural barriers to plaintiffs in those situations where judicial relief remained, in principle, an option.44 Roberts himself championed this trend as an appellate lawyer in the Reagan and George H.W. Bush administrations and as a private practitioner.45 Senators Feingold, Leahy, and Feinstein tried to determine whether Roberts, as Chief Justice, would favor closing the courthouse 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

43. Id. at 217–19.
45. 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 § 1983 to support individual lawsuits against state officials for violating federal statutory rights, as well as federal constitutional rights. Roberts Transcript, supra note 38, at 415. As Deputy Solicitor General, Roberts sought to bar Medicaid providers from being able to sue state governments for underpayments, and individual beneficiaries from vindicating federal statutory rights in court, in view of an allegedly detailed statutory plan for administrative enforcement. See Suter v. Artist M, 503 U.S. 347 (1992) (arguing the cause for the United States as amicus curiae); Wilder v. Va. Hosp. Ass’n, 496 U.S. 498 (1990) (same). Roberts, unsuccessful in Wilder, was successful in Suter, but Congress reversed that result legislatively, preserving the private right of action in circumstances covered by that case. See Alaska Dep’t of Health & Soc. Servs. v. Ctrs. for Medicare & Medicaid Servs., 424 F.3d 931, 934–35 (9th Cir. 2005). In private practice, Roberts successfully argued for a narrowing of the standards permitting judicial relief, to the point where the law stands today. See Gonzaga Univ., 536 U.S. 273.
public assistance [programs] to enforce those rights in Federal court," and questioned Roberts' view of contentions by Justices Scalia, Thomas, and others that programs providing for federal funding and state administration, like Medicaid, are "kind of an exclusive bargain" between the two levels of government with no enforceable rights for beneficiaries.

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

Unsurprisingly, since he had received Senator Specter's two pre-hearing letters, Roberts was well prepared to respond to the senators' federalism-related concerns. At several points, he seemed to volunteer elaborate observations not 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 dissent concerning the ESA's protection of a "hapless toad" species found in only one state. Roberts distinguished his dissent from that of Judge David Sentelle by noting that 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. He also attempted to assuage concerns raised by Senator

46. Roberts Transcript, supra note 38, at 247-49, 415-16.
47. Id. at 415, 430. 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. See, e.g., Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 674-75 (2003) (Scalia, J., concurring); Id. at 682-83 (Thomas, J., concurring); Blessing v. Freestone, 520 U.S. 329, 349-50 (1997) (Scalia, J., concurring). A notorious district court decision treating Justice Scalia's Blessing concurrence as if it were governing law, Westside Mothers v. Haveman, was reversed by the Sixth Circuit, and rejected by all other circuit courts considering the issue. 133 F. Supp. 2d 549 (E.D. Mich. 2001), rev'd, 289 F.3d 852 (6th Cir. 2002).
49. Roberts Transcript, supra note 38, at 226 (referring to GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003)). Roberts pointed to similar approaches advanced by the Fourth Circuit and Ninth Circuit to uphold federal laws protecting endangered species on the basis of multiple, if in some instances, attenuated impacts on interstate commerce. See Gibbs v. Babbitt, 214 F.3d 483 (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 noneconomic activities.
Feinstein about whether his *Rancho Viejo* dissent might be “a prelude for [overturning] the Clean Water Act and the Clean Air Act,” 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.50

However, the main thrust of his Commerce Clause testimony was to address concerns—or hopes—that he shared the inclination of some conservative advocates, academics, and judges to extend the reasoning of *Lopez* and *Morrison* and drastically roll back Congress’ post-New Deal regulatory authority and to 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*. *Raich*, he said, meant that those two decisions were not to be viewed as the start of a counter-revolution:

[*Lopez* and *Morrison* 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’s part, going 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.51

To drive the point home, he twice stated that *Raich* meant that *Lopez* and *Morrison* did not “junk all the cases that came before.”52

Roberts’ “did-not-junk” line may initially seem like a relatively innocuous truism. 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*.53 From the beginning, *Lopez* was significant, not for its limited holding—the federal statute at issue duplicated laws already on the books in fifty states and lacked any provision requiring even a nominal connection to interstate commerce54—but for Chief Justice

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50. *Roberts Transcript*, supra note 38, at 406. Senator Schumer voiced similar concerns, noting that if extended, Roberts’ logic in *Rancho Viejo* might threaten, in addition to the ESA, Title VII of the Civil Rights Act, OSHA, the Controlled Substances Act, and “prohibitions against personal possessions of biological weapons.” *Id.* at 265.

51. *Id.* at 225. 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. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

52. 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. *Roberts Transcript*, supra note 38, at 271–72, 356.


Rehnquist’s portentous rhetoric. Rehnquist’s majority opinion proclaimed its return to “first principles,” reviving the primacy of “enumerated” congressional powers, and categorically walling off “traditionally” or inherently “local” activities 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 in think tanks.

A decade later, Raich relied heavily on the aggregation “methodology” that Lopez scorned as the basis for upholding federal prohibition of possessing or growing marijuana for medicinal purposes as sanctioned by California state law. A 6-2 majority, including Justices Kennedy and Scalia of the former Federalism Five, held this prohibition consistent with the Commerce Clause, notwithstanding multiple factors that under Rehnquist’s Lopez opinion might have been expected to favor a contrary result. In common-sense terms, both the aim of the law and the conduct at issue in the case were “noneconomic”; under Lopez’s approach, aggregating the effects of the plaintiff’s personal use should have been barred. In addition, the regulation of the practice of medicine was traditionally a state matter—an important Lopez-denominated factor disfavoring federal regulatory authority. Other important factors were also present: the fact that the medicinal value of the marijuana for the patients involved in the case was painfully apparent; state legislation approved and regulated the practice; Congress had not contemplated this type of state-sanctioned medicinal use and procedure when it enacted pertinent provisions of the Controlled Substances Act; and there was little if any evidence that proscription of such state programs was necessary to achieve the aims of the Act. The Court ignored or discounted all these elements, despite their prominence in the framework outlined in Lopez.


57. Rehnquist’s exposition of Commerce Clause doctrine provided that federal laws covering “noneconomic” activities must, to be valid, show a “substantial effect” on interstate commerce without “having to pile inference upon inference”—i.e., without resorting to “aggregation” methodology. Lopez, 514 U.S. at 567.

58. See id. at 565.

59. Gonzales v. Raich, 125 S. Ct. 2195, 2220–23 (2005) (O’Connor, J., dissenting) (elaborating on the reasons why the factors stressed in Lopez were ignored by the majority).
As interpreted by Roberts, *Raich* put a revisionist gloss on *Lopez*, reading out Rehnquist’s radical devolutionist rhetoric and adopting something like Justice Kennedy’s *Lopez* concurrence. The gist of Kennedy’s opinion was that “enough was enough.” The Gun Free School Zones Act was just too big a stretch—at least if Congress didn’t bother to do its homework and spell out some sort of connection, however tenuous, to interstate commerce. But Kennedy emphasized that the Commerce Clause gave Congress whatever power it needed to assure the strength and health of the national economy.60 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.”61 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 interstate commerce.”62 He went on to describe this as a “fix” that “would be easy to meet in most cases [involving guns].”63

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 “noneconomic” activities or “traditionally” local subject-matter areas.64 In answering a question from Senator Schumer regarding 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 “aggregate[d]” only if they are “commercial in nature.”65 Nevertheless, he did not seem to feel that Rehnquist’s distinction between commercial and noncommercial activities had much bite, in terms of Congress’ discretion to identify “effects” on interstate commerce. He readily agreed with Schumer that Congress could regulate noncommercial cloning because of its potential commercial impact.66 When Senator Feinstein asked, in regard to

60. *Lopez*, 514 U.S. at 569, 572 (Kennedy, J., concurring).
62. Roberts Transcript, supra note 38, at 349.
63. Id. 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.”
64. See *Lopez*, 514 U.S. at 564-65.
65. Roberts Transcript, supra note 38, at 439-40.
66. Id. at 440.
the statute struck down in *Lopez*, "at what point does crime influence commerce?" Roberts responded, "I think it does."67

**B. Roberts on Congress' Fourteenth Amendment Enforcement Authority**

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

Senators DeWine and Specter pressed Roberts to acknowledge that his emphasis on judicial "modesty" and deference to Congress required that he repudiate the Court's current "activist" approach to scrutinizing laws passed to "enforce" the Fourteenth Amendment, as exemplified in *Garrett, Kimel,* and *Morrison*. What did the senators get for their effort?

Roberts' most significant statement about the Fourteenth Amendment concerned an issue never directly raised during the hearing, but which he was evidently eager 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. Instead, Roberts volunteered his opinion on the Equal Protection Clause of the Fourteenth Amendment:

> 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 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.68

Roberts' critique of Scalia's "originalist" construction of the Equal Protection Clause might have a bearing on his approach to Congress' power to enforce the Fourteenth Amendment. The most recent, and probably most conspicuous, occasion on which Scalia invoked this originalist construction was in his 2003 dissent in *Tennessee v. Lane*.69 Scalia asserted that henceforth he would vote to strike down all "prophylactic" legislation purporting to enforce the Fourteenth Amend-

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67. *Id.* at 349 (emphasis added).
68. *Id.* at 182 (emphasis added).
ment, except legislation targeted at the "original" spur for adopting the Amendment—systematic, state-sponsored race discrimination. Thus, for example, Title II of the ADA, which addresses discrimination against citizens with disabilities, and the VAWA, which prevents and remedies discrimination against women, would be flatly unconstitutional. No basis offered by Congress—whether rational, congruent, proportional, or otherwise—could prevent their invalidation.

Roberts' declaration that nonracial forms of discrimination have equal status as appropriate targets for congressional enforcement action does not, of course, mean that he accepted 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, disability, or age-based discrimination?

2. "Congruent and Proportional" Still in Play?

With respect to judicial deference to congressional fact-finding, Roberts did offer a boiler-plate acknowledgement of Congress' superior institutional competence, by noting that courts "can't sit and hear witness after witness," nor "make the policy judgments about what type of legislation is necessary in light of the findings that are made."

70. Id. at 564–65 (Scalia, J., dissenting). "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 unconstitutional 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 occurring 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.

71. Scalia's analysis, shared by 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. Id. at 564 (Scalia, J., dissenting). Senator DeWine objected to the Court's rejection in Garrett of the fact that Congress "found that [disability-based] discrimination flowed from stereotypic assumptions about the disabled, as well as, quote, 'purposeful unequal treatment.'" Roberts Transcript, supra note 38, at 218. During the oral argument in 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. Transcript of Oral Argument at 4–5, Lane, 541 U.S. 509 (No. 02-1667).

72. Roberts Transcript, supra note 38, at 218–19.
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.

He may, however, 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 *Lane* and *Hibbs*:

[W]here 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 significantly, Roberts went on to suggest that not only the nondeferential 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 broken ranks with the supporters of the congruent and proportional test, Roberts said, "[a]ny area of the law where Justice Scalia is changing his mind, has got to be one that is 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 *Kimel* 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 that they're interpreting the law and not making it.

By questioning the precedential force of the key cases establishing Rehnquist's Section Five jurisprudence, Roberts sought to placate Senator DeWine and other Judiciary Committee members who objected to that jurisprudence, without making any specific commitments. But DeWine and his colleagues have some basis for expecting

75. *Id*.
76. *Id*. 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 congruent and proportional may take on added potential significance.
Roberts to acknowledge conflict between his professed reverence for judicial restraint and his predecessor’s agenda for undermining Congress’ capacity for remedying discrimination based on age, gender, disability, and other immutable factors.\textsuperscript{77}

C. *Shrink the Strike Zone and Close the Courthouse Door: Roberts on Citizens’ Court Access to Enforce Federal Rights*

However flexible his views on Congress’ authority to enact broad social legislation, Roberts appeared considerably more rigid about the ability of individual citizens to enforce those laws in court, and about Congress’ capacity to empower them to do so. The Rehnquist Court has, over the past century, erratically but persistently created new obstacles to plaintiffs seeking to enforce federal statutory and constitutional rights. Roberts himself had seemingly applauded 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; 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 an individual to bring a cause of action for a given statute to be enforceable in court.\textsuperscript{78} He also rejected the radical view promoted by certain lower federal court judges, as well as conservative academics, that laws passed pursuant to the Spending Clause are not “laws” entitled to enforcement as “the supreme law of the land,” and so cannot create legal rights enforceable under 42 U.S.C. § 1983.\textsuperscript{79} Further, he indicated that current law does not accept a similar view promoted vigorously by Justices Scalia and Thomas that Spending Clause-based grants are merely “contracts” between the federal and state governments, which individual beneficiaries—“third-party beneficiaries” in the Scalia-Thomas contract-law analogy—cannot, without specific authorization

\textsuperscript{77} Similarly, Roberts gave a glint of hope to Specter when, in response to a prolonged harangue to jettison the congruent and proportional 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.” *Id.* at 302.

\textsuperscript{78} *Id.* at 430.

in the "contract," enforce in court, regardless of Congress' "intent."\footnote{Roberts Transcript, supra note 38, at 429–30.} Under the third-party beneficiary theory or the not-the-supreme-law-of-the-land theory, requirements in Spending Clause statutes like Medicaid would neither be enforceable as rights "secured by the Constitution and laws" of the United States under § 1983, nor in an action to enjoin ongoing state violation of federal law under the Supremacy Clause.

When confronted with his career-long record of opposing individual rights enforcement, Roberts had a simple response: the availability of private judicial relief turns on congressional intent. Though he acknowledged that the law does not require an express provision of a right to sue, he insisted that the problems of trying to divine intent would be eliminated if Congress would make itself clear. Roberts argued this point to Senator Leahy:

[The issue is not whether beneficiaries should be able to sue or not. The issue is 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 intended these individuals to have the right to sue in Federal court.\footnote{Roberts Transcript, supra note 38, at 416. Roberts repeated essentially the same argument in exchanges with Senators Feingold and Feinstein. Id. at 248, 430.}

Roberts' "Congress' intent" strategy glossed over almost all of the pertinent questions about the direction and ultimate destination of the Rehnquist Court's lengthy campaign to narrow privately initiated judicial enforcement of federal rights. In effect, he deflected back onto Congress the Committee's criticisms of the Rehnquist Court. While an effective debater's ploy, his argument was beside the point. It was—if not disingenuous—certainly less than candid.

First, 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" provisions for private enforcement actions, the courts must comply with that requirement as with any other legal requirement.\footnote{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, 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 claims against state governments expressly authorized by congressional enactments.} 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” literally means what it says, and provides a vehicle to enforce rights secured by federal “laws” and by the Constitution.\(^83\) 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 an 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 dead letter law. Although the Court has considerably narrowed § 1983, it has not yet gone that far. Roberts acknowledged as much in the hearing.\(^84\)

In fairness, Roberts did not so much misstate the law as provide a superficial and misleading account of how it is applied. 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, and whether it is couched in “mandatory” rather than “precatory” terms.\(^85\) In *Gonzaga University v. Doe*, the Court’s most recent attempt to narrow § 1983 right of action authority, the Court added a requirement that the statute in question must “unambiguously” use “rights-creating” language.\(^86\) In practice, this inquiry is an arbitrary extrapolation from the words Congress chose rather than an assessment of its unexpressed and often

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84. Roberts Transcript, supra note 38, at 248–49.
indiscernible "intent." 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. The court held, however, that specific requirements to provide institutional care for mentally retarded individuals can be judicially enforced because Congress specified that state Medicaid plans "must provide" such services "for all [eligible] individuals"—phrasing which the court found to satisfy Gonzaga’s "rights-creating" standard. It seems unlikely that Roberts, who argued for the prevailing party in Gonzaga and participated in several of its predecessor Supreme Court cases, is unaware of the extent to which the search for congressional "intent" professed by applicable doctrine is, in practice, a fiction.

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 federal statutory provisions that can trigger § 1983 actions descends from similar "clear statement," "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—as the "balance" between the state and federal governments. In fact, preserving "balance," however fictive, is beside the point. 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

87. 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 . . . ?" McCready v. White, 417 F.3d 700, 703 (7th Cir. 2005). He noted that the "rights-creating language" must be "clear and unambiguous," despite Congress' silence on the right of action issue. Id. 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.


89. Id. at 191 (quoting 42 U.S.C. §§ 1396a(a)(10), 1396d(a)(15) (2000)). In Sabree, then-Circuit Judge Samuel Alito’s concurrence gratuitously observed that “future Supreme Court cases” may go further and reject § 1983 suits to enforce Medicaid altogether. Id. at 194 (Alito, J., concurring).

that erect potential barriers to the straightforward effectuation of legislative intent.\textsuperscript{91}

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 count only if it appears "in the language of the statute" in question.\textsuperscript{92} 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 \textit{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.\textsuperscript{93} Throughout most of the twentieth century, the law clearly recognized a contrary presumption \textit{in favor of} "implying" a right of action to enforce federal laws generally.\textsuperscript{94} But in 1975, in \textit{Cort v. Ash}, the Court effectively reversed that presumption and introduced a multi-factor test, similar to those used to screen § 1983 claims,
to assess whether to "imply" a right of action from a given statutory scheme. After Cort v. Ash, the flood of such federal cases quickly shrank to a trickle, and has now 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" to authorize private rights of action are actually slanted not to divine Congress' actual purposes, but to shut the courthouse 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 that "they were doing case after case after case and they finally adopted an approach in the early 1980s 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."

In fact, the Court did not 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 which he evidently believes is applicable 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. It has steadily, if erratically and unpredictably, upped 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 (such as sheltering state and local officials and obstructing citizen access to courts), but they are independent of Congress' actual "intent." By unpredictably ratcheting up the applicable procedural barriers and—most egregiously—retroactively applying them to congressional actions taken decades before the Court's decisions, the Court has not only rendered Congress' true intent irrelevant, but has in practice made it difficult if not impossible to fulfill.

95. 422 U.S. 66, 78 (1975) (stating 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 underlying purposes of the statutory scheme;" and whether state law has traditionally provided such a remedy).

96. Roberts Transcript, supra note 38, at 294 (emphasis added).

97. 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. Id. at 255-56.
This was not always so. Initially, the Court sought to avoid retroactive imposition of its new *Cort v. Ash* criteria, which in themselves were broadly supported by liberal and conservative justices. In 1982, Justice Stevens made the common-sense observation that, if the goal is to effectuate Congress’ intent, “[w]hen 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.”

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 *ancien régime* 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.”

In sum, during 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. 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 effectively acknowledged. The Committee might have demanded whether Roberts believed 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

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100. *Id.* at 287. 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*, include *Cannon v. University of Chicago*, 441 U.S. 677 (1979) and *Thompson v. Thompson*, 484 U.S. 174 (1988).

101. 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.
questions, the confirmation hearing did little to clarify Roberts’ prior record—a record that is inconclusive but on the whole unpromising.

IV. The Alito Hearings: One Step Back?

Four months after John Roberts was confirmed as Chief Justice, and 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 the 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 VAWA and the ADA, 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 the thin air.”

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 Fourteenth Amendment. Rather than simply ask Alito his opinion of Rehnquist Court decisions, they focused on certain opinions he himself had written. During his fifteen-year Third Circuit career, Alito 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 Lopez that, in 2005, a 6-3 Supreme Court majority rejected in Raich, and that Roberts rejected in his confirmation hearing. In Rybar, Alito read Lopez, which invalidated Congress’ effort to criminalize the possession of handguns within one thousand 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), in


substance "strictly limit[ing] [Lopez] to its own peculiar circumstances," thereby turning it into a "constitutional freak." 104

Roberts had taken pains to distance himself from suggestions by others that Lopez portended a radical contraction of the post-New Deal Commerce Clause. Alito did not follow Roberts’ script. He did not seize the opportunity presented by the hearing, and the Court’s recent backtracking in Hibbs, Lane, and Raich, to disavow the more aggressive implications of the Federalism Five’s early 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 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’s wrong” with the deferential “rational basis” test for evaluating the constitutionality of federal laws, and whether he would “subscribe to that test over the proportionate and congruence test,” he demurred. 105 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. 106 But unlike Roberts, he said nothing to criticize the soundness of the Federalism Five’s strict scrutiny of Fourteenth Amendment enforcement legislation, nor to suggest that the precedential force of its doctrinal approach might be in question. 107

V. WHAT NEXT: DOWN WITH FEDERALISM, UP WITH “MODESTY”... OR RENEWED ACTIVISM?

What does the testimony of nominees Roberts and Alito, set against the backdrop of the Supreme Court’s recent decisions, indicate about the status and historical significance of the Rehnquist Court’s federal-

104. Id. at 287 (Alito, J., dissenting).
105. Alito Transcript, supra note 102, at 478.
106. Id.
107. Alito did, however, indicate that he probably does not subscribe to Justice Scalia’s even more drastic circumscription of Fourteenth Amendment enforcement authority:

[O]ne 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 . . .

Id. at 477–78 (emphasis added).
ism crusade? And what are federalism’s prospects on the Roberts Court? The following is my reading of the tea leaves.

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

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 “[t]he post-New Deal administrative state is unconstitutional.”\(^{108}\) The two constitutional bulwarks of the expansion of federal power decried by Lawson and his allies were 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 Alito, show any appetite for reviving the pre-New Deal Commerce Clause.

With respect to the Spending Clause—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 has broadly construed Congress’ discretion to impose conditions in the form of binding legal rules on state and local government recipients of federal funds. The opinion in a key Spending Clause case, *South Dakota v. Dole*, was written by none other than Chief Justice Rehnquist.\(^{109}\) 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 *Dole* opinion made no mention of the categorical limits he attempted to draw around Congress’ Commerce Clause authority in *Lopez*. Since *Lopez*, the Court has declined opportunities to import *Lopez*-style federalism into Spending Clause jurisprudence.\(^{110}\)

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110. The leading recent case is *Sabri v. United States*, 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. 541 U.S. 600 (2004). 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.” Id. at 610–14 (Thomas, J., concurring).
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 twentieth-century Supreme Court's drive to invalidate social legislation on Commerce Clause, Due Process, and other grounds. A further clue may be his response to questions on the Court's 5-4 ruling in *Kelo v. City of New London*. In that case, the Court held that using eminent domain to force transfers of private property to new private owners for "economic development" constituted, in principle, a legitimate "public purpose" under the Fifth and Fourteenth Amendments. Libertarian conservatives have sought to demonize *Kelo* in an attempt to galvanize public support for stronger constitutional protection of 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 of eminent domain authority.

Justice Alito's record on the bench and 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 a common cause in tightening the scant current limits on Congress' authority to attach prescriptive conditions on funds transferred to state and local governments, or private groups or individuals. 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 defected in *Raich*, and

111. *Roberts Transcript*, supra note 38, at 162, 270. Asked to name an example of "immodesty," Roberts stated that "the clearest juxtaposition would be the cases from the *Lochner era.*" Id. at 408.


115. In his hearing, Alito did find occasion to describe the limitations on Spending Clause conditions drawn by Chief Justice Rehnquist in 1987 in *Dole*. 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 have signaled that he will lean toward state autonomy and look for opportunities to narrowly construe the *Dole* test—but any such suggestion is quite speculative. See *Alito Transcript*, supra note 102, at 390.
the other two have left the Court. Second, there is no support from
the political constituency which sent Roberts and Alito to their cur-
rent positions for cutting back the substantive scope of federal power.
On the contrary, both corporate interests and social conservatives
nurture major legislative proposals that, if anything, push the envel-
lope 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.116 In that case, a 6-3 majority upheld
an Oregon law authorizing physician-assisted suicide. However, the
three justices perceived as the most politically conservative—Scalia,
Thomas, and Roberts—voted for preemption of the Oregon statute.
Scalia’s dissent, filled with scorn for Oregon’s liberal policy goals,
marshalled arguments that ran roughshod over applicable “federal-
ism” doctrines.117 Furthermore, Justice Thomas, not previously
known for retreating from positions simply because they had been re-
peatedly rejected by Court majorities, did just that in this case.118 He
announced that his past insistence on “reconsidering” and “modify-
ing” the Court’s sixty-year old “Commerce Clause jurisprudence” was
“water over the dam.”119 Finally, the six justices who ruled for Ore-
gon did not base their decision on the constitutional scope of the
Commerce Clause. Justice Kennedy’s majority opinion made clear
that Congress could, if 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. The Court unanimously avoided applying to regulation of
medicine—certainly a traditional state responsibility—the type of cat-
egorical protection from federal control 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.”120 For all these reasons, the Or-

117. Id. at 926–39 (Scalia, J., dissenting).
118. Id. at 940 (Thomas, J., dissenting).
119. Id. at 939–41 (Thomas, J., dissenting). Justice Scalia cited sources such as the American
Medical Association for the proposition that “[p]hysician-assisted suicide is fundamentally in-
compatible with the physician’s role as healer” to defend the Attorney General’s decision to
override Oregon’s definition of “legitimate medical practice.” Id. at 932 (Scalia, J., dissenting)
(alteration in original) (internal quotation marks omitted) (quoting Washington v. Glucksberg,
521 U.S. 702, 731 (1997)). Most remarkably, he acknowledged that the issue of what is legiti-
mate medical practice, on which the case turned, rested “on a naked value judgment”—but
missed not a beat in approving the Attorney General’s decision to invalidate a state statute
reflecting a contrary judgment. Id. at 937 (Scalia, J., dissenting).
FEDERALISM R.I.P.?

The Gonzales v. Oregon case came close to definitively ending the Rehnquist Court's flirtation with paring back Congress' post-New Deal Commerce Clause power.

But it soon became apparent that the signals sent in Gonzales v. Oregon—however close—were not quite definitive. On a Court newly shifted one vote to the right with Justice O'Connor's replacement by Justice Alito, ideology may trump doctrinal consistency. This possibility is graphically illustrated by the Court's end-of-the-term decision on the scope of federal authority under the Clean Water Act to regulate wetlands.121 In Rapanos, five members of the Court (Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer), in separate opinions, voted for two standards that, while distinct, appear to mutually preserve broad authority for the U.S. Army Corps of Engineers to police wetlands that may potentially contaminate or otherwise affect navigable waters.122 However, four justices—Roberts, Scalia, Thomas, and Alito—signed a plurality opinion calling for a major rollback of CWA enforcement. Justice Scalia, the author of the opinion, announced a novel, quasi-constitutional theory confining federal authority in rigid, categorical terms. His approach would confine federal regulatory authority to cover only those wetlands that maintain a permanent "surface [water] connection" with navigable waters.123 He would deny the Corps—and Congress—the flexibility to take into account the impact that pollution in arroyos, swamps, or ditches, not permanently flowing into navigable waters, could have in degrading the national water supply. This abstract framework for truncating the CWA clashes starkly with the practical, deferential approach he embraced a year earlier in Raich to uphold the Justice Department's de-


122. Justice Kennedy authored a concurring opinion, technically for himself alone, but which controlled the outcome of and established the rule of the case. His new formulation extends CWA jurisdiction to wetlands having a "significant nexus" to navigable waterways. Id. at 2236–52 (Kennedy, J., concurring). While admonishing the District Court and the Army Corps to respect this new "significant nexus" test, Justice Kennedy made clear that he intended this formula to be broad enough to cover the particular regulatory activity challenged in the case, and otherwise to permit the Corps generally to maintain its aggressive approach to controlling water pollution under the CWA. Id. (Kennedy, J., dissenting). Justice Stevens, writing separately for the four "liberal" justices, contended that the Corps' regulation of the wetlands at issue in the case constituted a reasonable interpretation of the Act, thereby deserving judicial deference under Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Rapanos, 126 S. Ct. at 2252–65 (Stevens, J., dissenting).

123. Rapanos, 126 S. Ct. at 2219–20. Technically, Justice Scalia's opinion amounted simply to construction of the scope of the CWA. But the argument emphasized that his narrow interpretation was necessary to avoid an allegedly serious constitutional question and that a more generous view could broach Congress' Commerce Clause authority. Id. at 2220–35.
cision to prohibit home-grown marijuana for medicinal purposes.\textsuperscript{124} Indeed, Scalia’s constriction of federal Commerce Clause authority in \textit{Rapanos} sounds like Chief Justice Rehnquist’s assertion in \textit{Lopez}, seemingly repudiated by Scalia and five of his colleagues in \textit{Raich}, that certain major subject-matter areas are hermetically sealed off from federal control, no matter how substantial their effects on national problems.

Scalia’s florid opinion made little effort to mute his ideological disdain for the regulatory scheme and, especially, the agency responsible for enforcing it, or to claim that his decision was driven by deference to the agency, pertinent judicial precedent, Congress, or even the preferences of the states. He derided the Corps of Engineers as “an enlightened despot” exercising “discretion that would befit a local zoning board.”\textsuperscript{125} He asserted that an “immense expansion of federal regulation of land use . . . has occurred under the Clean Water Act . . . during the past five Presidential administrations.”\textsuperscript{126} Nor was he impressed that the agency’s interpretation of its CWA authority had stood for 30 years. On the contrary, Justice Scalia saw this long-term bipartisan endorsement, not as a reason for \textit{Chevron} deference, but as “entrenched Executive error.”\textsuperscript{127} Similarly, the fact that “the lower courts have continued to uphold the Corps’ sweeping assertions of jurisdiction” was no reason to defer to judicial precedent.\textsuperscript{128} As for Congress’ failure to overturn the Corps’ interpretation, Scalia shrugged this off as “perhaps” due “simply to their unwillingness to confront the environmental lobby.”\textsuperscript{129} Much like Chief Justice Rehnquist’s 2000 opinion striking down the Violence Against Women Act in \textit{Morrison}, Scalia’s \textit{Rapanos} opinion purported to protect state and local governments from congressional usurpation—in the teeth of vigorous endorsement of the federal regulator’s position by a strong majority of state governments, and even the county in which the developer plaintiff’s wetland parcel was located.

Scalia’s tirade would appear to mock the canons of “judicial modesty” repeatedly embraced by nominee Roberts as his jurisprudential

\textsuperscript{124} Gonzales v. Raich, 125 S. Ct. 2195 (2005). Justice Scalia’s concurring opinion in \textit{Raich} contended that the limits of congressional authority to regulate activity that affects interstate commerce without actually being “in” interstate commerce depends, not on the scope of the commerce power per se, but on the validity of Congress’ judgment that such regulation is a “necessary and proper”—i.e., practically defensible—means of controlling interstate commerce. \textit{Id.} at 2215–20 (Scalia, J., concurring).

\textsuperscript{125} \textit{Rapanos}, 126 S. Ct. at 2224.

\textsuperscript{126} \textit{Id.} at 2215.

\textsuperscript{127} \textit{Id.} at 2232.

\textsuperscript{128} \textit{Id.} at 2217.

\textsuperscript{129} \textit{Id.} at 2231.
lodestar. Nevertheless, now-Chief Justice Roberts joined Scalia’s Rapanos opinion. In his short concurrence, the Chief Justice implied that his aim may merely have been to teach the Army Corps and the U.S. Environmental Protection Agency a lesson in humility, not to significantly constrain federal water pollution control. He stressed that the agencies could “readily” have avoided this rebuke by following up on the Court’s invitation five years earlier130 to develop, through new regulations, “some notion of an outer bound to the reach of their authority” that would give them “plenty of room to operate,” while tactfully acknowledging and tempering the Corps’ prior “essentially boundless view of the scope of its power.”131 But Roberts might have made the same point by concurring in Justice Kennedy’s opinion. With his “significant nexus” formulation, Justice Kennedy offered a broad but workable standard—a standard that is conceptually similar to aspects of the Court’s Commerce Clause jurisprudence that were specifically endorsed by Roberts in his confirmation hearing.132 His choice to join Scalia’s rather than Kennedy’s opinion in Rapanos necessarily raises questions about the Chief Justice’s commitment to uphold broad, post-New Deal Commerce Clause authority for federal statutes and programs that offend conservative policy goals and constituencies.

B. Still at Risk—Congressional and Citizen Enforcement of Twentieth-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 to 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.

132. Limiting CWA jurisdiction to wetlands having a “significant nexus” to navigable waters is closely equivalent to limiting congressional jurisdiction to apply the Commerce Clause to noneconomic activities having a “substantial effect” upon interstate commerce. See Gonzales v. Raich, 125 S. Ct. 2195, 2205 (2005).
1. A Second Mugging of the Fourteenth Amendment?

Senator Specter appeared to draw Roberts into an acknowledgement that the Court might be entering questionable territory when it quarreled over the veracity of Congress' fact-finding. Roberts also seemed to suggest that the Federalism Five's late-1990s substitution of congruent and proportional scrutiny for traditional, necessary and proper, rational basis deference might be in play as a result of the Court's *Hibbs* and *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 *Lane* to continue retreating from *Kimel*, *Garrett*, and *Morrison*, or whether these more recent cases will prove merely a temporary respite from continued evisceration of Congress' Fourteenth Amendment enforcement authority.

How the Roberts Court will treat congressional efforts to reinvigorate the Fourteenth Amendment is particularly uncertain because a key issue was not discussed during his confirmation hearing. The issue involves 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 an essential remedy for violations of constitutional rights or of statutory provisions designed to protect constitutional rights. While "sovereign immunity" is not 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.133

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 decision appears understandable. For one thing, the Court's sovereign immunity jurisprudence is so muddled that it seems to make congruent and proportional the test both for evaluating the validity of the law and for determining whether Congress validly "abrogated" sovereign immunity.134

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134. The Court established the congruent and proportional test as the criterion for determining the reach of Congress' authority to enforce the Fourteenth Amendment by "appropriate" legislation, under Section Five of the Amendment, in *City of Boerne v. Flores*, 521 U.S. 507, 520,
importantly, 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. Like the other doctrines that Specter and his colleagues criticized in the Roberts hearings, 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 for 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.

If the Roberts Court continues to scrutinize Fourteenth Amendment enforcement legislation while backing off of Commerce Clause measures, that asymmetry would 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 by once again inventing an anomalous, willful misreading of the express enforcement authority conferred by Section Five on Congress to nullify the egalitarian sweep of the equal protection and due process protections present in Section One.

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 not only a "classic example of judicial activism," as Senator Specter observed, but activism of an egregiously political kind—smacking of Bush v. Gore as much as

533 (1997). Two years later, the Court applied the same formulation, congruent and proportional, albeit radically tightened into a much more stringent barrier for Congress to overcome, to determine whether legislation abrogating state sovereign immunity was valid. See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 646 (1999). In the cases especially targeted by Senator Specter in the hearing, the Court did not appear to perceive a difference between determining the scope of "appropriate" under Section Five, on the one hand, and determining whether Congress had authority under the Supremacy Clause to abrogate sovereign immunity. See, e.g., Garrett, 531 U.S. 356.

135. See Fla. Prepaid, 527 U.S. at 648-65 (Stevens, J., dissenting).

It would not merely pit the Court against Congress in an abstract, institutional sense; it would align a twenty-first century conservative Court majority against specific enactments of the twentieth-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 the reenactment of stricken or weakened legislation. Indeed, such actions would not only promote the ideological agenda of political conservatives, but would, like *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 (*Kimel*), the ADA (*Garrett*), the VAWA (*Morrison*), or the FMLA (*Hibbs*).

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 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 *Hibbs* and *Lane*, the Court in *United States v. Georgia* 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 politically compelling circumstances. In each of these cases, Court majorities that included members of the Federalism Five found ways to blink. Such results invite the type of speculation that Roberts voiced in his hearing, that the Court was perhaps having second thoughts about continuously ratcheting up doctrinal devices like congruent and proportional and "sovereign immunity" to throttle altogether major twentieth-century Fourteenth Amendment enforcement legislation. However, the picture remains decidedly mixed. *Hibbs* and *Lane* included vigorous dissents that could eventually be embraced by Roberts and especially Alito, as well as by any future Bush

137. *Letter of Aug. 8, supra* note 11; *Bush v. Gore*, 531 U.S. 98 (2000) (where a 5-4 majority overrode the Florida Supreme Court's construction of its state's election laws and precluded a recount that, at the time, was perceived as having the potential to transfer from George W. Bush to Al Gore, Florida's electoral votes and, thereby, the 2000 Presidential election).


Among [the prisoner-plaintiff's] more serious allegations, he claimed that he was confined for 23-to-24 hours per day in a 12-by-3-foot cell in which he could not turn his wheelchair around. He alleged that the lack of accessible facilities rendered him unable to use the toilet and shower without assistance, which was often denied. On . . .

several other occasions, he had been forced to sit in his own feces and urine while prison officials refused to assist him in cleaning up the waste.

*Id.* at 879.
appointees. Furthermore, 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.¹³⁹

2. “Denigrating” Congress by Closing the Courthouse Door to Citizen Enforcement?

Even more than in the Rehnquist Court’s Fourteenth Amendment Section Five decisions, selective, politically driven disdain for Congress seems apparent in its drive to limit privately initiated court enforcement of federal statutory rights. The new Chief Justice has given no indication of disowning or tempering this initiative. Over the past quarter century, the Rehnquist Court piled up impediments for plaintiffs seeking to enforce federal rights through § 1983, blindsiding Congress with new and unanticipated tests for upholding citizen suits, and using concerns over the “delicate federal-state balance” to justify the imposition of “clear statement” and kindred rules 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 vigilanty invalidated state laws and actions inconsistent with federal economic statutory schemes by invoking the judge-made doctrine of “preemption” under the Supremacy Clause.¹⁴⁰ In the most recent Supreme Court reaffirmation of hospitality toward private rights of action that allege a preemption of state law, 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 . . .”¹⁴¹ The

¹³⁹ Justice Scalia wrote, “[w]hile the Members of this Court have disagreed regarding the scope of Congress’s ‘prophylactic’ enforcement powers under § 5 of the Fourteenth Amend- ment, no one doubts that § 5 grants the power to ‘enforce’ . . . the Amendment by creating private remedies against the States for actual violations of those provisions.” *Id.* at 881 (citations omitted).


Court has yet to confront the dissonance between its readiness to au-
thorize preemption-based challenges to state laws—most of which are
brought by corporate plaintiffs—and its stinginess about § 1983-based
suits, which have traditionally been brought by plaintiffs alleging vi-
lations of civil rights or safety-net statutes. 142

To be sure, there are sensible considerations involved in the Court’s
ttempts to limit the reach of § 1983 jurisdiction—considerations em-
braced by all factions on the Court when applied in a balanced and
good-faith manner. But concerns about overwhelming the courts, par-
alyzing state and local agencies, provoking frivolous litigation, and le-
galizing what should be policy and administrative issues, are not federalism issues at all. These issues turn on principles of sound ad-
ministration—not “sovereignty.” Questions about allocating institu-
tional 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 France, and
what are now state and local schools, hospitals, police departments,
health and welfare departments, and other agencies were simply ad-
ministrative units of the central government. Claptrap about “immu-
nity,” “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 social and economic re-
form legislation have avoided the sort of frontal assault on congres-
sional authority that the Lochner Court mounted, and which many
conservative proponents of judicial restraint, including Chief Justice
Roberts and Justice Alito, condemn. By thus undermining enforce-
ment, whether by Congress under Section Five of the Fourteenth

142. However, just this past term the Court may have slipped “clear statement” reasoning into
preemption analysis. In Bates v. Dow Agrosciences L.L.C., it cautioned courts to construe am-
biguous 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-
Lohr, 518 U.S. 470, 485 (1996)).
Amendment, or by private citizens and the courts under § 1983, 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. Michael Greve of the American Enterprise Institute commented on this shrinking availability of enforcement:

_The Supreme Court's antientitlement 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 a rare exception.143

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 they were "quasi-constitutional" commands, and used them "to confine Congress's power in areas in which Congress has the constitutional power to do virtually anything."144 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."145

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 twentieth-century civil rights, safety-net, and regulatory legislation remains operable as long as the Rehnquist-era back-door barriers to en-

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145. _Id._ at 598.
forcement are in place. 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 and 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 or three justices took that position.\textsuperscript{146} Alito's promotion could create a new majority on this issue, and make his 2003 forecast a self-fulfilling prophecy. But after \textit{Raich} and Roberts' confirmation hearing, reinforced by the Court's rebuffs to New Federalism notions in cases like \textit{Hibbs}, \textit{Lane}, and \textit{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 a patina 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 \textit{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 interpretation that the Controlled Substances Act (CSA) overrode 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, and not only was such a design far from the statutory purpose of preventing illicit drug abuse, but Congress had actually rejected Ashcroft's assisted suicide amendment, offered when he was a Senator from Missouri, in the course of reauthorizing the CSA.\textsuperscript{147} Upholding the Justice Department's prohibition would not only have bypassed Congress, but would have preempted an active political debate in state legislatures. As Chief Justice Rehnquist had recently observed

\begin{itemize}
\item \textsuperscript{146} In \textit{Sabree v. Richman}, a Third Circuit panel undertook a meticulous analysis of Supreme Court precedent in reversing a district court decision that would have barred all Medicaid enforcement private actions. 367 F.3d 180 (3d Cir. 2004). Judge Alito concurred, but volunteered his view that "the analysis and decision of the District Court may reflect the direction that future Supreme Court cases in this area will take." \textit{id.} at 194 (Alito, J., concurring).
\item \textsuperscript{147} Gonzales v. Oregon, 126 S. Ct. 904, 913 (2006).
\end{itemize}
in ruling against federal judicial interference with that process, "[t]hroughout 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."\textsuperscript{148}

Justice Scalia's passionate dissent in \textit{Gonzales v. Oregon} acknowledged the apparent conflict of his position with the Court's "clear-statement cases." He 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 policy and political judgments to Congress and state legislatures.\textsuperscript{149} 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."\textsuperscript{150} What he did not seem pressed to explain was why an executive official with no direction from Congress should be permitted to impose that value judgment on states with a contrary view.

Thus, \textit{Gonzales v. Oregon} not only confirms that the Commerce Clause lynchpin of the Rehnquist federalism revolution is now, in Justice Thomas' terms, "water over the dam," but vividly demonstrates the extent to which 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 and finessed when it does not.

This brazen willingness to trump Congress' actual objectives with judge-made "clear statement" rules was confirmed with a vengeance in one of the final decisions of the 2005 term, \textit{Arlington Board of Education}.\textsuperscript{151} In this case, the increasingly familiar quartet of Roberts, Scalia, Thomas, and Alito, joined by Justice Kennedy, held that under the Individuals with Disabilities Education Act (IDEA), a parent prevailing in an action against a school board was not entitled to reimbursement for consultant's services as part of the attorney's fees award mandated by the Act.\textsuperscript{152} Writing for the Court, Justice Alito

\textsuperscript{149} Gonzales v. Oregon, 126 S. Ct. at 926-39 (Scalia, J., dissenting).
\textsuperscript{150} Id. at 937 (Scalia, J., dissenting). Certain of Justice Scalia's assertions seem not only sophistic, but just plain inaccurate. For example, his contention that "[t]he clear-statement rule based on the presumption against pre-emption does not apply because the Directive does not pre-empt any state law," is a claim that, presumably, would ring hollow for a doctor prosecuted by the USDOJ for conduct sanctioned by the Oregon statute. \textit{Id.} at 935 (Scalia, J., dissenting).
\textsuperscript{151} 126 S. Ct. 2455 (2006).
\textsuperscript{152} \textit{Id.} at 2463-64.
reached this judgment in the teeth of a statement in the Conference Report meshing the House and Senate bills into the final legislation: “The conferees intend that the term ‘attorneys’ fees as part of the costs’ include reasonable expenses and fees of expert witnesses . . . .”153 Implicitly, Justice Alito appeared to acknowledge that this language reflected the actual intent of the senators and representatives who wrote the law, and that the Court’s contrary result countermanded that intent. But this was no matter, he explained, because the IDEA is a “Spending Clause” statute providing funds to states in exchange for state compliance with specified conditions, and “[i]n a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told [in the statutory text] regarding the conditions that go along with the acceptance of those funds.”154

In other words, states and the courts may ignore Congress’ clear intent as to conditions incident to state acceptance of federal funds if such conditions, however minor, are not spelled out in specific detail in the statutory text. In this particular case, Justice Alito’s disregard of congressional intent appears especially stark. He belittled the instruction to award expert consultant’s fees as merely a snippet of “legislative history.” But this statement was not merely an individual member’s floor statement, nor even the report of a House or Senate committee accompanying a preliminary version of the bill. It was in the final report of the House-Senate conference, signed by all conferees representing both houses, and comprising both their final text and their explanatory statement.155 To anyone knowledgeable about the process by which Congress enacts legislation, such conference report explanatory statements can be more reliable, considered, and precise guides to Congress’ intention than imprecise statutory text—and the text at issue here was certainly not precise in any sense of the term.

Justice Alito’s contention stops short of embracing a radical devolutionist theory, repeatedly scorned by the Rehnquist Court and dismissed by nominee Roberts, that Spending Clause statutes are not the supreme law of the land under the Supremacy Clause and merely authorize one independent sovereign—the federal government—to enter into a contract with another and separate sovereign—individual state governments. But Alito’s argument, which was quite gratuitous

154. Id. (emphasis added).
155. See id. at 2466–75 (Breyer, J., dissenting).
and unnecessary to justify the majority's conclusion in the case, will surely be seized upon as a signal to downgrade the stature of "Spending Clause" safety-net programs like Medicaid and Social Security, and to read them less expansively than other federal laws.

In sum, omens from its first term indicate that the Roberts Court will ratchet up deployment of the arsenal of Rehnquist-era "anti-entitlement" procedural devices, such as its "clear statement" rules, to confound the New Deal and Great Society Congresses that enacted them, and the citizens who rely upon them.

VI. WRONG FROM THE START—FATAL FLAWS OF THE NEW FEDERALISM

What should one make of the Rehnquist Court's roller coaster 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. 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 had a majority embraced Justice Thomas' whopper that "We the People" means "We the States," a genuine constitutional revolution, or counterrevolution, would have indeed been at hand.

A. Repackaged, Unworkable, Incoherent

With their bold rhetoric and disciplined unity, the Federalism Five put forth a credible threat to revive "states' rights" as a major, judicially enforceable component of the twenty-first-century Constitution. So how can the precipitous fracturing that caused that threat to recede so abruptly be explained?

To begin with, the task may simply have been impossible. The Rehnquist Court's Lopez-Raich 180-degree change 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

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156. In a concurring opinion, Justice Ginsburg called Justice Alito's "clear statement" theory "unwarranted" and unnecessary to the Court's result. Id. at 2464 (Ginsburg, J., concurring).

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.158 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* in *Garcia v. San Antonio Metropolitan Transit Authority*.159 Writing for the Court, Justice Blackmun, who had concurred in the *National League of Cities* 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.”160 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, did not work because some allies soon concluded that it could not work. Despite contemporaneous favorable reviews by prominent academic conservatives of the value of Rehnquist’s *Lopez* enterprise of establishing judicially enforceable state/federal boundaries,161 the undertaking was simply a fool’s 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 *Usery-Garcia* and *Lopez-Raich* fiascos are only the most widely noted. One example is the Rehnquist Court’s 2000 retreat in *Reno v. Condon*162 from Justice Scalia’s thunderous 1997 ukase against federal “commandeering” of state agencies and officials in *Printz v. United States*.163 Another is the long-standing

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160. *Id.* 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 later 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. *See id.* at 579–80 (Rehnquist, J., dissenting).


163. 521 U.S. 898 (1997). The Court in *Reno v. Condon* upheld the Drivers’ Privacy Protection Act, which imposes restrictions on the sale by state and local governments of drivers’ license and registration records. 528 U.S. at 151. The Court did not overrule *Printz*, but instead distinguished it on the ground that the Drivers’ Privacy Protection Act “regulates the States as the
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 general hostility to Fourteenth Amendment-based private civil actions and § 1983 suits, which are usually brought by or on behalf of traditional civil rights plaintiffs or entitlement beneficiaries. Still another was the disconnect between Rehnquist's 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.164

B. No Political Juice

Over the past quarter century, certain pockets of the conservative legal intelligentsia developed a variety of theories that provided coherent, comprehensive justifications for Rehnquist's far-reaching *Lopez* rhetoric—justifications that acknowledged, and celebrated, its truly radical implications.165 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.166 "Federalism" was a prominent plank in the extraordinary platform for constitutional change drafted by those cadres and issued as an official Department publication in 1988.167 But, 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,

owners of data bases," rather than affecting them "in their sovereign capacity to regulate their own citizens." *Id.* 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. *Id.* at 149–50.


165. 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 of large portions of the modern federal government." Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1455 (1987).

166. In his memoir, Fried notes that he was "pulled over more than once and issued federalism speeding tickets." CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 187 (1991).

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 Lopez concurrence, and Scalia showed well before his elevation to the Court 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 to instead hatch ideas for exploiting federal power to advance conservative goals (such as legislatively preempting state regulation), while at his own Supreme Court confirmation hearing, then-Judge Scalia testified that the Tenth Amendment was a "constitutional redundancy," and, à la Garcia, that drawing lines between the federal and state spheres was an inherently unprincipled job, best suited for Congress, not the courts.

If there was, from the beginning, little appetite on the Supreme Court for an intellectually robust federalism jurisprudence, in society at large there was virtually no interest in rolling back federal power to even the limited extent involved in the Rehnquist Court's early decisions. 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 since the Nixon years had 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. 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, powerful

168. United States v. Lopez, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring) (binding precedent "forecloses us from reverting to an understanding of commerce that would serve only an 18th century economy"). In saying this, Kennedy was tacitly sparring with Justice Thomas' "originalist" concurring plea to scuttle precedents permitting congressional regulation of matters "affecting" interstate commerce.


170. Robert Kuttner, Revenue Sharing Anyone? BOSTON GLOBE, Nov. 19, 2001, at A15 ("Revenue sharing was a Richard Nixon innovation, part of his so-called New Federalism.").

171. The Violence Against Women Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act were all enacted with strong bipartisan support, a point stressed by Republican senators during the Roberts hearing. Roberts Transcript, supra note 38, at 164, 217–18, 300.
Republican constituencies 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, without 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, who is no moderate, readily acquiesced to 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." 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 belonged to Congress when, in 1996, he interpreted *Lopez* to preclude Congress from banning possession of machine guns.

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 can it be explained? One suggestion—impossible to document but plausible—would note the contemporaneous 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 until that time, despite frantic condem-
nation of the Rehnquist Court on the left, its persistently shaky conservative majorities had focused exclusively on moderating Warren and 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 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 and 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 soon after the *Raich* decision in June 2005, the Court's federalism had found "no takers." 177

VII. 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 1819, construing for the first time the standard for reviewing the constitutionality of laws implementing the powers assigned to Congress by Article I. Marshall famously wrote "[l]et Speaker Newt Gingrich of Georgia) in implementing the House Republicans' Contract with America in 1995, after Republicans seized control of both houses of Congress in the 1994 elections).

the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.” 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’ authority, 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.

Marshall’s formula, rarely questioned until the 1990s, is not merely a prudent acknowledgement of comparative institutional competence. 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, as well as “appropriate” means for achieving those ends. 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 an invitation 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 Specter’s attacks on that jurisprudence. Similarly, Justice O’Connor, in her passionate dissent in Garcia, argued “[i]t is not enough that the ‘end be legitimate’; the means to that end chosen by Congress must not contravene the spirit of the Constitution.” In other words, it is up to the courts to determine what component of the “spirit of the Constitu-

179. Id. at 420 (emphasis added).
tion" Congress might have contravened. This would seem to be quite a breathtaking proposition, especially for a conservative. 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. 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 of 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 its 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. Madison cogently explained this in *The Federalist No. 46*, in a passage mysteriously overlooked by Chief Justice Rehnquist and his comrades 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... whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other... [I]n every case should be supposed to depend on the sentiments and sanction of their common constituents... [T]he people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due...  

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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 seminal necessary and proper analysis, followed by modern courts and captured in 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. When, in 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."183

The Wechsler-Garcia vision of a federalism policed by congressional politics rather than judge-imposed formulas has been criticized for mistaking the sources of state political influence over national policy, and for leaving the door open to federal overreaching that might be important in principle though inconsequential in practice. 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 overreaching.


183. Garcia, 469 U.S. at 556 (emphasis added). Justice Blackmun's opinion for the Court extensively cited Professor Wechsler's article, with approval. See id. at 550–56. 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.


185. Justice Blackmun detailed numerous examples of the pervasive evidence of state and local governments' ability to secure influential roles in federal programs and substantial federal funding to support their own programs. See Garcia, 469 U.S. at 554–56.
More frequently than not, when the Court has offered help, it has soon found itself in 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 a nominee and witness before the Judiciary Committee, Chief Justice Roberts generally expressed his concurrence, often with emphasis and even eloquence. Much is riding on how steadfastly the Roberts Court restores that vision.