AMERICAN FEDERALISM AND THE TRAGEDY OF *GONZALES V RAICH*

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In this essay I contend that *Gonzales v Raich* (2005),[1] popularly known as the medical marijuana case, was the U.S. Supreme Court's worst modern decision. The indictment rests on four propositions. First, *Raich* is shockingly implausible even on its own merits. Second, *Raich* involves a matter – federalism and the constitutional division of power between the national and state governments – that is core to the U.S. constitutional system as reflected in the Constitution's text and history. Third, *Raich* came at a pivotal time in which the Court had just begun to reinvigorate, after long neglect, judicial protection of federalism, and it offered an opportunity to expand that protection by significantly shifting the American legal culture regarding federalism at little political cost. Fourth, *Raich* instead decisively undercut the Court's attempts to return American legal culture to founding principles in matters of federalism, resulting among other things in the Court's inability to defend federalism in the politically far more important and divisive challenge to the federal health care legislation in 2012. And, as a bonus, *Raich* denied two innocent women relief from painful physical suffering for no good reason.

It is hard to think of another modern decision in which the Court, given an easy opportunity to help restore a core principle of constitutional design, instead so decisively and unnecessarily turned the other way. Of course, for scholars, commentators and policymakers who favor wholly national solutions and distrust judicial enforcement of federalism, *Raich* was a triumph not a failure, for the same reasons. Critically, though, the outcome in *Raich* could not have happened without the votes of Justices most committed to judicial federalism – and that fact makes it all the greater a tragedy for those who seek to restore the constitutional balance between the states and the national government.

In *Bond v United States* (2011), Justice Anthony Kennedy – writing for a unanimous U.S. Supreme Court – gave a concise and powerful summary of the values of American federalism:

> The federal system rests on what might at first seem a counterintuitive insight, that freedom is enhanced by the creation of two governments, not one. ...
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> Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. …
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> … The federal structure allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry. Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. …

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1 545 U.S. 1 (2005).

> Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions. By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power. When government acts in excess of its lawful powers, that liberty is at stake.[2]

The decision in *Bond*, however, sustained no actual right nor invalidated any law; it simply concluded that the plaintiff's challenge to a federal law as beyond Congress' enumerated powers could be raised in court.[3] Fundamentally, though, if Justice Kennedy is correct that 'liberty is at stake' in federalism cases, protection of liberty should call forth some meaningful judicial action – not simply to allow such challenges, as in *Bond*, but in fact to establish material federalism limits upon the national government's action, as set forth in the Constitution.

A year later, in a much more consequential case, *National Federation of Independent Business v Sebelius*, a fractured Supreme Court refused to sustain a federalism challenge to the Patient Protection and Affordable Care Act (the wide-ranging health care reform act popularly known as Obamacare) as exceeding Congress' enumerated powers.[4] Justice Kennedy (along with Justices Scalia, Thomas and Alito) joined a strongly worded dissent that accused the Court of turning its back on federalism values. But in fact most academic and political commentators regarded the challenge to the Act as (at best) a stretch under existing law, and many went so far as say that prior precedent decisively settled the issue in the opposite direction.[5] Political pressures on the Court to sustain the federal legislation were immense, and ultimately it should be unsurprising, given the political and legal climate, that the challenge failed.

This essay argues that the critical misstep, for Justice Kennedy and other supporters of federalism, came in *Gonzales v Raich*. *Raich* involved an enumerated-powers challenge to federal drug laws, as applied to two women who wished to use home-grown marijuana for their own medical needs. Despite the obviously local and non-commercial nature of the activity, the Supreme Court upheld application of the federal law because suppressing the activity was (it said) 'necessary and proper' to the regulation of interstate commerce.

While focusing on *Raich*, this essay also suggests a larger point about precedent and legal culture. The federalism challenge in the health care case failed, at least in part, I will argue, because the Supreme Court failed to build a legal culture supportive of meaningful federalism challenges. Central to that failure was the decision in *Raich*. Prior to *Sebelius*, *Raich* was the only modern high-profile enumerated-powers challenge to a federal statute where (a) the challenge came close to succeeding and (b) the challenge, had it succeeded, would have had material consequences for public policy in the United States. Given the failure of the challenge in *Raich* (on a much less meaningful matter than the law challenged in *Sebelius*), it is no surprise that commentators and policymakers doubted the viability of the challenge in *Sebelius*, nor that the challenge fell short.

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2 *Bond v United States*, 131 S. Ct. 2355, 2364 (2011) (citations and quotations omitted).

3 Ibid. 2366-67. Bond had been convicted for a purely local assault under a federal law relating to the use of hazardous chemicals. The court of appeals held that she lacked standing to challenge the constitutionality of the federal law as exceeding enumerated powers, *United States v Bond*, 581 F.3d 128 (3rd Cir. 2009), and the Supreme Court reversed. On remand, the court of appeals upheld the law. *United States v Bond*, 681 F.3d 149 (3rd Cir. 2012).

4 132 S. Ct. 2566 (2012).

5 See below part V.

The irony is that the challenge in *Raich* failed for one reason: it failed to attract the votes of two of the Court's leading federalists, Justice Antonin Scalia and Justice Kennedy.

I *GONZALES V RAICH* – AN INITIAL ASSESSMENT

Even at first glance, *Raich* seems a preposterous holding. Under Article I, Section 8, of the U.S. Constitution, Congress has power to regulate 'Commerce … among the several States' and to 'make all Law which shall be necessary and proper for carrying into Execution the foregoing Powers…'[6] The government argued, and the Court agreed, that this language allowed Congress to regulate activity that concededly was not commercial and occurred entirely within California – indeed, activity that seemed to lack all but the most speculative connection with interstate commerce. Closer examination hardly casts the Court in better light.

Angel Raich and Diane Monson, California residents with painful medical conditions, either grew marijuana themselves or had it provided free of charge by local caregivers who grew it, and used it as a pain reliever. Neither woman purchased or sold marijuana nor did anything that approached a state boundary. California state law allowed this possession and use under the Compassionate Use Act of 1996,[7] which created an exception to the state's general ban of marijuana cultivation and possession in the case of medicinal use as directed by a physician.

U.S. federal law – the Controlled Substances Act, 21 U.S.C. §§801 et seq. (CSA) – has no such exception. In 2002, after federal drug agents raided Monson's home and destroyed her marijuana plants, Raich and Monson brought suit challenging the CSA, as applied to them, for exceeding the enumerated powers of the federal government. Specifically, they argued that the federal power over 'Commerce … among the several States' could not reach activities (such as theirs) that were neither commercial nor interstate.

The court of appeals agreed, finding that 'the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law' is a 'limited use that is clearly distinct from the broader illicit drug market — as well as any broader commercial market for medicinal marijuana — insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce'.[8] The Supreme Court reversed in a divided opinion.

Unsurprisingly, the Court's majority opinion made little effort to connect its result to the text or history of the relevant constitutional clauses. Instead, it relied heavily on the Court's 1942 decision in *Wickard v Filburn*,[9] which it found to be 'of particular relevance.'[10] 'In *Wickard*,' Justice John Stevens explained for the Court,

> [W]e upheld the application of regulations promulgated under the Agricultural Adjustment Act of 1938, 52 Stat. 31, which were designed to control the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and consequent abnormally low prices. The regulations established an allotment of 11.1 acres for Filburn's 1941 wheat crop, but he sowed 23 acres, intending to use the excess

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6 See *United States Constitution*, Art 1, s 8, cl. 3, 18.

7 Cal. Health & Safety Code § 11362.5. At least nine other states had some similar form of medical exception to their marijuana laws. See *Raich*, 545 U.S. 5 n.1.

8 *Raich v Ashcroft*, 352 F. 3d 1222, 1228 (9th Cir. 2003).

9 317 U.S. 111 (1942).

10 *Raich*, 545 U.S. 17.

> by consuming it on his own farm. Filburn argued that even though we had sustained Congress' power to regulate the production of goods for commerce, that power did not authorize 'federal regulation [of] production not intended in any part for commerce but wholly for consumption on the farm.' Justice Jackson's opinion for a unanimous Court rejected this submission. He wrote:
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> > 'The effect of the statute before us is to restrict the amount which may be produced for market and the extent as well to which one may forestall resort to the market by producing to meet his own needs. That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.'
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> *Wickard* thus establishes that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.[11]

Leaving aside for the moment the correctness of *Wickard*, quite obviously the conclusion in Stevens' last quoted paragraph simply does not follow from what Justice Jackson wrote in *Wickard*. Jackson said the federal regulation was valid as to Filburn because the effect of home-grown wheat, taken as a whole, on the interstate market 'is far from trivial' – that is, (a) as a factual matter, not as a matter of speculation, (b) there is a 'far from trivial' effect. In contrast, the Court's conclusion in *Raich* was that local non-economic activity could be regulated if *Congress concluded* that failure to regulate would 'undercut' interstate regulation.

The difference mattered because in *Wickard* there was proof of substantial home-growing activity *and* proof of non-trivial effects on interstate commerce, while in *Raich* there was not. As Justice Sandra Day O'Connor argued in dissent in *Raich*:

> There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market—or otherwise to threaten the CSA regime. Explicit evidence is helpful when substantial effect is not visible to the naked eye. And here, in part because common sense suggests that medical marijuana users may be limited in number and that California's Compassionate Use Act and similar state legislation may well isolate activities relating to medicinal marijuana from the illicit market, the effect of those activities on interstate drug traffic is not self-evidently substantial.
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> In this regard … this case is readily distinguishable from *Wickard*. To decide whether the Secretary could regulate local wheat farming, the Court looked to 'the actual effects of the activity in question upon interstate commerce.' Critically, the Court was able to consider 'actual effects' because the parties had 'stipulated a summary of the economics of the wheat industry.' After reviewing in detail the picture of the industry provided in that summary, the Court explained that consumption of homegrown wheat was the most variable factor in the size of the national wheat crop, and that on-site consumption could have the effect of varying the amount of wheat sent to market by as much as 20 percent. With real numbers at hand, the *Wickard* Court could easily conclude that 'a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions' nationwide. [It concluded:] 'This record leaves us in no doubt' about substantial effects[].[12]

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11 Ibid 17-18 (some citations omitted), quoting *Wickard v Filburn*, 317 U.S. 127-28.

12 *Raich*, 545 U.S. 53-54 (O'Connor J, dissenting) (citations omitted).

The majority's retort was that Congress had found that medicinal marijuana use as allowed by California would undermine the CSA regime. But as Justice O'Connor further explained, first that was not true (Congress had not considered the specific facts, since the CSA long predated state efforts to legalize medicinal use) and second it was (or ought to have been) irrelevant. If a mere congressional determination were enough, federalism limits on Congress would be enforced by Congress, not by the Court. And, to the extent the majority claimed to be applying *Wickard*, that was not what *Wickard* said.

And in fact, for all its supposed reliance on *Wickard*, the *Raich* Court's majority ultimately was candid in its application of an entirely different standard. As Justice Stevens explained, 'We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding'.[13] For this, the Court cited a string of later cases, but not *Wickard*, and not any that had upheld federal power over non-commercial non-interstate acts.[14] And although the Court did not directly acknowledge the point, the Justices knew that the invocation of a 'rational basis' test all but abandoned judicial review. That test, long applied to economic regulations challenged under the due process and equal protection clauses of the Fourteenth Amendment, was in law and practice almost impossible not to meet.[15]

Yet the *Raich* Court *still* did not have a convincing argument to uphold the statute. Congress' ultimate interest could not be the eradication of marijuana use[16] – it could only be the eradication of *interstate sale* of marijuana. Thus the question was (or should have been) whether allowing home use of marijuana for medical purposes could rationally be thought to interfere with the eradication of interstate sales. Instead of answering that question, though, the Court answered a different one: whether 'Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA'.[17] The case, though, was not a challenge to all national regulation of 'intrastate manufacture and possession of marijuana'; it was about a specific category of use.

The Court got around that problem by rejecting its premise. A challenge, the Court said, would not be evaluated on the basis of the particular circumstances of the challengers. 'That the regulation ensnares some purely intrastate activity is of no moment. As we have done many times before, we refuse to excise individual components of that larger scheme.'[18] But why not? If individual components of a statutory scheme (a) are purely intrastate and non-commerical, and (b) can be readily 'excise[d],' failure to do so lets Congress regulate something beyond its power without justification.[19] Congress gains extra powers simply by asserting its powers broadly.

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13 Ibid 22.

14 Ibid.

15 See, e.g., *Federal Communications Commission v Beach Communications, Inc.*, 508 U.S. 307 (1993); *Minnesota v Clover Leaf Creamery Co.*, 449 U.S. 456 (1981); *Williamson v Lee Optical*, 348 U.S. 483 (1955).

16 As Chief Justice Marshall explained in *McCulloch v Maryland*, 17 U.S. 316, 409-10 (1819), upholding a regulation under the necessary and proper clause requires that the regulation be the means to a 'legitimate end' – meaning an end within Congress' enumerated powers.

17 *Raich*, 545 U.S. 22.

18 Ibid.

19 Compare *Raich*, 545 U.S. 47-48 (O'Connor J, dissenting). O'Connor acknowledged that 'we must look beyond respondents' own activities. Otherwise, individual litigants could always exempt themselves from Commerce Clause regulation merely by pointing to the obvious – that their personal activities do not have a substantial effect on interstate commerce.' But she continued, quite plausibly: 'A number of objective markers are available to confine the scope of constitutional review here. Both federal and state legislation – including the CSA itself,

Here the majority's opinion gave no authority, but if the authority the Justices had in mind was *Wickard*, that again was faulty: *Wickard* had declined to 'excise individual components of [a] larger scheme' because the individual component (home grown wheat) was shown in itself to have substantial effect on interstate commerce. Rather the majority likely refused to view the activity in *Raich* narrowly because it knew that, if it did so, even finding a 'rational basis' for federal regulation would be a challenge.

In sum, it is hard to see *Raich* other than as judicial abdication: complete deference to Congress to establish the limits of its own power and complete reliance on political checks (to the extent they exist) to restrain all-encompassing centralization.[20] Thus even assessed on its own, *Raich* seems profoundly destructive of the federal structure and a profound departure from the Constitution's text. O'Connor's dissent concluded:

> We would do well to recall how James Madison, the father of the Constitution, described our system of joint sovereignty to the people of New York: 'The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite… . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.' The Federalist No. 45, pp. 292–293 (C. Rossiter ed. 1961).
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> Relying on Congress' abstract assertions, the Court has endorsed making it a federal crime to grow small amounts of marijuana in one's own home for one's own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently. … [W]hatever the wisdom of California's experiment with medical marijuana, the federalism principles that have driven our Commerce Clause cases require that room for experiment be protected in this case.[21]

My principal concern in this essay, however, is how *Raich* fits into the broader constitutional debate over American federalism. As subsequent sections describe, protections for the founders' system of federalism have waxed and waned throughout U.S. history. *Raich* came at a pivotal time, as interest in federalism was reviving after long neglect. Its rejection of a federalism challenge sent a strong message to the American legal culture that the federalism revival was overstated. And in that sense it had a malign effect that went far beyond the particular facts or even the general implications of the case.

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the California Compassionate Use Act, and other state medical marijuana legislation – recognize that medical and nonmedical (*i.e.,* recreational) uses of drugs are realistically distinct and can be segregated, and can regulate them differently. ... Respondents challenge only the application of the CSA to medicinal use of marijuana. ... To ascertain whether Congress' encroachment is constitutionally justified in this case, then, I would focus here on the personal cultivation, possession, and use of marijuana for medicinal purposes.' Ibid (citations omitted).

20 Indeed, Justice Stevens, the author of *Raich*, joined an earlier dissent by Justice Souter in *Morrison v United States*, 529 U.S. 598 (2000), making that argument expressly. See ibid 649-52 (Souter J, dissenting). On *Morrison*, see below part III.

21 *Raich*, 545 U.S. 57.

II A BRIEF HISTORY OF AMERICAN FEDERALISM

American federalism arose largely by historical accident. British colonization of what became the United States was organized through separate colonial governments under the direct authority of the crown but without any collective legal or governmental institutions. By the mid-eighteenth century, the thirteen colonies (for the most part) had separate governors and separate colonial legislatures that operated independently of each other; many had done so for over 100 years.

Brought together by the tightening of British rule in the 1760s and 1770s, the 'united' colonies first functioned more as an alliance. The First Continental Congress (1774-75) was a diplomatic assembly (the meaning of the word 'Congress' at the time) composed of representatives chosen and sent by the separate colonial legislatures. The Second Continental Congress (1775-1781), which declared independence in 1776 and managed war and diplomacy on behalf of the colonies collectively, began to act a little more like a central government, at least as to particular issues. The nation's first written governing document, the Articles of Confederation (principally drafted in 1777, ratified in 1781), gave the Congress some nation-like powers, particularly over war and treatymaking. But Congress remained a creature of the states, requiring a vote of 2/3 (9 of 13) of the state-selected delegations to approve major actions, and having little power over the states themselves.[22] And the drafting of the Articles revealed the jealousies of the states.[23] John Dickinson, the principal drafter and a nationalist by the standards of the time, in his initial draft gave Congress some key powers without much attention to limits. But North Carolina's Thomas Burke successfully moved a key amendment: the Articles would declare that Congress could exercise no power not expressly given to it in the Articles' text.[24]

Meanwhile, most of the states had adopted their own written constitutions and all had formal legislatures and elected governors (or 'presidents') without any unifying institutions apart from the Congress.[25] Many leaders at the national level regarded the ensuing system as defective, giving the states too much power and the Congress too little.[26] This, of course, was the central motivation of the 1787 Convention in Philadelphia. But while the Convention met with the goal of enhancing national power, it met against the backdrop of quasi-independent states. As the delegates recognized, the states were an entrenched feature of the political landscape that had to be accommodated, even by those who (if they had had the option) might have abolished the states and designed a single unified government.[27] Federalism was thus born of necessity.

At the Convention, eventually even the nationalist-inclined delegates began to see the advantages of federalism. Not least, they knew that ultimately their proposed Constitution would have to be ratified by people who trusted the state governments and distrusted national power, so constitutional protections for federalism would be a

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22 *Articles of Confederation and Perpetual Union*, Art. 9 (1781).

23 See Merrill Jensen, *The Articles of Confederation: An Interpretation of the Social-Constitutional History of the American Revolution 1774-1781* (University of Wisconsin Press, 1940).

24 *Articles of Confederation*, Art. 2 ('Each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.'); Ibid, Jensen, 174-75.

25 See Allan Nevins, *The American States During and After the Revolution 1775-1789* (A.M. Kelley, 1969).

26 Jack Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (Alfred A Knopf, 1979).

27 Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (Alfred A Knopf, 1997) 161-202.

selling point. But beyond that, federalism fit with important themes in the American political and social culture of the time.

To begin, an essential political postulate of the time was the separation of powers. From Montesquieu, Locke and the theory of English government, eighteenth-century Americans derived an almost religious devotion to the idea that separate governmental bodies should exercise the executive, legislative and judicial power.[28] The theory was twofold. First, and most importantly, divided government would check oppression. A government that could act only by coordinated acts of independent branches would be less prone to arbitrary or abusive power. While it was recognized that this might slow decision-making and introduce inefficiencies, the benefits were thought worth the cost.

But separation of powers was not just about checking government – it was also designed to channel the different powers of government to the branch most suited to exercise them.[29] Thus, while one argument for separating legislative and executive power was that separation would prevent either branch from behaving tyrannically, another argument was that multi-member representative legislatures best exercised law-making power but a single chief magistrate would best exercise law execution power.[30]

Though federalism had much less robust roots in the political theory of the time, it resonated with the principal themes of separation of powers. Federalism further divided government, recognizing the states as independent power centres to check the overreaching of the new national government.[31] And federalism fit with the idea of distributing powers to the bodies best able to exercise them.[32] Americans of the time well understood the differences in culture, attitudes, economies and geographies of the widely-dispersed former colonies. Local control of local issues had a natural attraction – while at the same time effective national control over national issues was an imperative after the series of failures of the Articles' Congress. Like separation of powers, federalism represented a division of government that promised both to check power and to make it more effective.

Beyond these core values, federalism had at least two attractions that may have been only imperfectly recognized at the time but have been given greater emphasis later. The first is the idea of experimentation. Justice Louis Brandeis later described the states as 'laborator[ies]' for public policy, testing which approaches worked and which did not.[33] But the framers had seen this in their own time – the newly independent states had adopted a range of policies on particular issues and some had proved more effective than others. In an example the delegates studied closely, the state

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28 See Michael D. Ramsey, *The Constitution's Text in Foreign Affairs* (Harvard University Press, 2007) 59-65; M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 2nd ed, 1998); W.B. Gwyn, *The Meaning of Separation of Powers* (Tulane University, 1965).

29 Ibid, Ramsey, 117-119.

30 Charles Thach, *The Creation of the Presidency, 1775-1789* (John Hopkins Press, 2nd ed, 1963) 25-27.

31 See Andrei Rapaczynski, 'From Sovereignty to Process: The Jurisprudence of Federalism after Garcia' (1985) *The Supreme Court Review* 388-389. ('It is precisely because the states are governmental bodies that break the national authorities' monopoly on coercion that they constitute the most fundamental bastion against a successful conversion of the federal government into a vehicle of the worst kind of oppression.').

32 See Michael McConnell, *Federalism: Evaluating the Founders' Design* (1987) 54 *University of Chicago Law Review* 1484, 1494.

33 *New State Ice Co. v Liebmann*, 285 U.S. 262, 386-87 (1932) (Brandeis J, dissenting) ('It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.').

constitutions adopted after independence varied significantly. Some, like Pennsylvania, had very weak executives; others, like Massachusetts and New York, had stronger ones – and the latter, being judged to work better, became models for the 1787 proposal.[34]

Second, modern federalism theory emphasizes free movement of people among states as an enhancement of liberty.[35] To some extent the benefit arises simply from the states' tendency to adopt different approaches in response to different local values; thus if people dislike the prevailing legal culture of one state they may move to another more congenial one. Further, mobility is a check on oppression and folly at the state level, because states can be thought of as competing for population and thus will adopt policies to attract new citizens and retain existing ones. While to some extent this latter dynamic works at the inter-nation level as well, it is obviously more effective if fostered within a country where barriers to migration will be less severe.

This last ground for federalism may seem less relevant to the eighteenth century, with its slow transportation and communication. But in fact eighteenth-century Americans knew all about mobility – not so much migration among existing states (though this did happen) but migration toward the frontier. Already by 1787 Daniel Boone and others had pioneered routes across the mountains to what became Kentucky and Tennessee. It was well understood that a wave of settlement was moving in that direction, and that the new settlements would become new states. Indeed, in 1787 Kentucky, though nominally part of Virginia, was on the verge of statehood (which it achieved in 1792). Plainly these new states, which the Constitution expressly contemplated,[36] would compete with the old states, and a state that became too oppressive would lose its population to the west.

Thus the core justifications for federalism, as expressed by Justice Kennedy in *Bond*,[37] can be seen from the outset. To be sure, the Constitution's drafters had little choice in the matter. The Constitution barely survived the ratification process as it was, in the face of charges that it took too much power from the states and erected too powerful a national government.[38] Looking to Thomas Burke's amendment to the draft Articles of Confederation, opponents and some supporters called for an amendment to say directly that Congress had no power not delegated to it in the Constitution and that other powers were reserved to the states or the people – what became the Tenth Amendment. A more nationalistic Constitution simply could not have been ratified. But it surely helped that federalism fit well with the ideas of the time, especially ideas about divided and responsible government.

At the same time, it is important to emphasize that the theory of federalism embedded in the Constitution was not merely a protection of the states. Like separation of powers, federalism promoted effective as well as divided government. A core counterpoint to insistence on local control over local matters was the insistence of deciding national matters at the national level. Like separation of powers, federalism was a balance as well as a check.

The Constitution's text implemented federalism in at least two central ways. The first was a division of subject matter, allocating national matters to the national government and leaving others to the states. Although the design permeates the document, it is most prominent in Article I, Sections 1 and 8. By Section 1, 'all legislative Powers herein granted' are given to Congress – meaning (as Alexander

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34 Ramsey, above n 28, 117-119.

35 See Ilya Somin, 'Foot Voting, Political Ignorance, and Constitutional Design' (2011) 28(1) *Social Philosophy and Policy* 202.

36 *United States Constitution*, Art. IV, sec. 3.

37 *See* above n 2.

38 Pauline Meier, *Ratification: The People Debate the Constitution, 1787-1788* (Simon & Schuster, 2010); Michael Gillespie and Michael Lienesch (eds), *Ratifying the Constitution* (University Press of Kansas, 1989).

Hamilton explained later)[39] that Congress could only exercise the 'granted' powers. Section 8 then gave Congress a specific list of powers – some of them very specific (e.g., the power to establish post offices and post roads) and some more open-ended, such as the power to regulate commerce among the states and the power to pass laws necessary and proper to effectuate other granted powers. (A few other powers of Congress are scattered through the document.)

The list may not seem entirely well-chosen. Some powers a national government probably should have are omitted – there is, for example, no express power to regulate immigration – while others are phrased in ways that became highly controversial later. But the basic structure is apparent: the national government would be limited to the listed powers (and related or ancillary powers), and those listed powers, while important, would not be all-encompassing. If they were limitlessly open-ended, the whole elaborate structure of Section 8 would be defeated – as Chief Justice John Marshall wrote later, 'the enumeration presupposes something not enumerated'.[40]

Moreover, the Constitution's drafters and their allies pointed to the enumerated powers structure as specifically designed to limit the national government and leave substantial residual subjects to the states. As Madison wrote (in the passage Justice O'Connor quoted in *Raich*):

> The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite…. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[41]

Three further provisions reinforced the basic idea of dividing national and local powers. First, Article I, Section 10 prohibited the states from exercising specifically listed powers. Some of these provisions were rights-protecting limits that also applied to the national government. But most – such as making treaties and engaging in war – were subjects reserved for the national government. Second, Article VI's supremacy clause assured that the national government's law-making acts would control the states, binding state judiciaries and displacing conflicting state laws.[42] Article VI thus enforced one pillar of federalism's division of powers: the national government was supreme within its sphere. Third, the converse was expressly stated in the Tenth Amendment, which made clear that the national government's sphere was limited to its

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[39] Alexander Hamilton, *Pacificus, No. 1* (June 29, 1793), 15 *Works of Alexander Hamilton* 33 (Harold Syrett ed, 1961-1987) 38-40.

[40] *Gibbons v Ogden*, 22 U.S. 1, 195 (1824). Relatedly, Marshall wrote in *McCulloch v Maryland*, 17 U.S. 316, 405 (1819): 'This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.'

[41] James Madison, *The Federalist, No. 45*, in, James Madison, Alexander Hamilton and John Jay, *The Federalist Papers* (Isaac Kramnick ed, 1987) 296.

[42] *United States Constitution* Art. VI ('This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.').

delegated powers[43] – thus setting forth federalism's second pillar, that the national government was not supreme (indeed, was impotent) beyond its sphere.

To many of the Constitution's defenders in the ratification debates, the Tenth Amendment's express statement was superfluous because its content was contained within the unamended Constitution's enumerated powers structure.[44] But some nationalist-minded leaders had occasionally spoken loosely of inherent national powers, and the asymmetry between the Articles (which had a Tenth Amendment-like provision in its Article 2) and the Constitution even bothered many of those who otherwise were inclined to support the Constitution. In the critical state of Massachusetts, which for a while seemed unlikely to ratify, Samuel Adams and John Hancock settled on a compromise to smooth approval: the state convention would ratify but recommend amendments.[45] Central to Massachusetts' proposal was Adams' demand for an express statement on delegated powers.[46] Both the idea of amendments and the specific idea of an express statement on delegation took hold in later states, leading ultimately to the adoption in 1791 of the first ten amendments. Thus the Tenth Amendment in effect codified the Massachusetts compromise that likely made ratification possible.

It is true, of course, that the Tenth Amendment is something of a truism – it says that maters not delegated are reserved, but it says nothing about which matters are delegated and which are reserved. That division – the core implementation of federalism – remains with the original text, most obviously Article I, Section 8. Nonetheless, the history and central place of the Tenth Amendment makes clear that the founding generation regarded the enumerated-powers structure as critical to the constitutional design. And it could hardly be so if in fact the original text's allocation did not leave many substantial matters to the states.

Thus the Constitution's federalism provisions, as a primary matter, envisioned a substantive division of power between the states and the national government. A secondary question of great importance was how this division would be enforced. To this, the Constitution gave two answers.

The first was judicial review. That is a controversial statement in some quarters, both because a strand of convention wisdom holds that judicial review in constitutional matters was not contemplated at all in the text or the founding (but only invented later by Chief Justice Marshall in *Marbury v Madison*), and because more sophisticated scholarship has argued in particular that the federalism provisions were not intended to be enforced judicially.[47] But neither objection holds up. The Constitution's text gives federal courts jurisdiction over cases arising under the Constitution,[48] a provision difficult to understand other than as empowering the courts to hear constitutional challenges. Relatedly, Article VI expressly subordinates federal legislation to the Constitution, because only statutes made 'in Pursuance' of the Constitution are supreme law. Combined, these provisions set out a clear path for at least a modest version of judicial review, as Hamilton explained:

> If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other

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43 Ibid, Amendment X ('The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.').

44 Ramsey, above n 28, 17-18 (quoting Wilson and Madison).

45 Ibid 18; Michael Gillespie, 'Massachusetts: Creating Consensus', in Gillespie and Lienesch, above n 38, 138, 147-58.

46 Ramsey, above n 28, 18. The Massachusetts proposal was to declare that 'all powers not expressly delegated by the aforesaid Constitution are reserved to the several states'.

47 E.g., Larry Kramer, 'Foreword: We the Court' (2001) 115(1) *Harvard Law Review* 4.

48 *United States Constitution*, Art. III, Sec. 2.

> departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter with in the limits assigned to their authority.[49]

Further, key drafters and others expressly contemplated the idea that the judiciary would check the national legislature, including with respect to federalism limitations. In the Massachusetts convention that proposed a version of what became the Tenth Amendment, Samuel Adams explained that the amendment was needed so that 'if any law made by the federal government shall extend beyond the power granted by the proposed Constitution,' it 'will be an error, and adjudged by the courts of law to be void'.[50]

It is, however, doubtful whether the framers thought judicial review would be the main bulwark of federalism. The text also contained an important structural limit. In the bicameral Congress, one branch, the Senate, was chosen by the state legislatures.[51] This design was introduced at the Convention by federalism-oriented delegates as a check on the national government. Madison's 'Virginia Plan,' which formed the initial baseline of the Convention's deliberations, gave the popularly-elected federal House of Representatives the power to appoint Senators. John Dickinson proposed the key change on June 7, 1787, explaining that the Senate would express 'the sense of the States' which 'would be better collected through their Governments; than immediately from the people at large.' Dickinson further elaborated that 'The preservation of the States in a certain degree of agency is indispensable. It will produce that collision between the different authorities which should be wished for in order to check each other.' Roger Sherman, seconding the motion, 'observed that the particular States would thus become interested in supporting the National Government and that a due harmony between the two Governments would be maintained'.[52] In support, George Mason put the point most directly:

> The State Legislatures also ought to have some means of defending themselves agst. Encroachments of the Natl. Govt. … And what better means can we provide than giving them some share in, or rather to make them a constituent part of, the Natl Establishment?[53]

Nationalist delegates such as Madison and James Wilson opposed Dickinson's motion, but it prevailed by a wide margin.[54] And in the ratification debates, this account of the Senate's role became an important theme countering anti-federalist fears of nationalist overreaching. Gordon Wood recounts the federalists' appeals to the

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49 Alexander Hamilton, *The Federalist, No. 78*, in *The Federalist Papers*, above n 41, 438-39.

50 Merrill Jensen et al (eds), *Documentary History of the Ratification of the Constitution* (1976) 1385 (Adams to Mass. convention); for additional examples and discussion, see Ramsey, above n 28, 330-32; Saikrishna B. Prakash & John Yoo, 'The Origins of Judicial Review' (2003) 70 *University of Chicago Law Review* 887; William Treanor, 'Judicial Review before Marbury' (2005) 58 *Stanford Law Review* 455.

51 *United States Constitution*, Art. I, s 3.

52 Max Farrand (ed), *Records of the Federal Convention of 1787* (Yale University Press, 1911) 150 (Dickinson motion); ibid (Sherman second); ibid 152-53 (Dickinson further remarks).

53 Ibid 155-56.

54 Ibid 155, 156.

Senate as representing the 'sovereignty of the states'.[55] The states would be protected, Alexander Hamilton told the New York ratifying convention, because the Senators would have 'uniform attachment to the interests of their several states'.[56]

As a result, the framers likely thought the courts would not be called on often to exercise their power to enforce federalism. Serious legal threats to federalism would not become law – indeed, likely would not be proposed – because the states' representative in the Senate would not accept them. But if Congress did exceed its constitutional powers, the courts would be available to intervene.

The basic structure of constitutional federalism endured for over 140 years. Its contours were never uncontroversial.[57] The first of a series of clashes between former Federalist Papers co-authors Hamilton and Madison occurred in 1791 over Congress' creation of a national bank, which Hamilton thought appropriate under the 'necessary and proper' power; Madison strongly objected that the Convention had considered giving Congress an express power to incorporate banks and specifically rejected it.[58] Hamilton and Madison further debated whether Congress' power to tax to support the general welfare was limited to subjects covered in the rest of Article I, Section 8 (Madison's view) or conveyed a general power to spend money (Hamilton's view). The national bank issue ultimately reached to Supreme Court in 1819 in *McCulloch v Maryland* (which upheld it against a federalism challenge).[59] Later in the nineteenth century, the Democratic and Whig parties clashed over the constitutionality of Congress' spending on internal improvements.[60] And of course federalism played a core role in the Civil War, which among other things turned substantially on the question whether states had a right to secede from the union. The Union victory over the rebelling states, and the subsequent constitutional amendments that limited state power and enhanced Congress' powers to police the states, marked the end of the strongest versions of states' rights.

Yet at the nineteenth century's end, and indeed well into the next century, the core idea of dividing power between the states and the national government, based on a limited enumeration of national powers, remained firmly fixed in the constitutional culture. Indeed, the Supreme Court took a much more active role in defending federalism after the Civil War – motivated, one may speculate, by fears that the Union victory might usher in a complete centralization – and arguably went beyond what the Constitution required.[61] For example, In *United States v E.C. Knight Co.* (1895),[62] the Supreme Court refused to apply federal antitrust law against manufacturers located entirely in one state, even though the manufacturing was being done principally for shipment in interstate commerce – the first invalidation of a major federal economic regulation as beyond the commerce power, and one perhaps difficult to square with even a modestly aggressive reading of the necessary and proper clause. In *Hammer v*

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55 Gordon Wood, *The Creation of the American Republic, 1776-1787* (University of North Carolina Press, 2nd ed, 1998) 558-59.

56 Ibid. See also James Madison, *The Federalist, No. 45* in The Federalist Papers, above n 41, 294 (noting the importance of state governments in selecting Senators and otherwise influencing operations of the national government).

57 See Edward A. Purcell Jr., *Originalism, Federalism, and the American Constitutional Enterprise: A Historical Inquiry* (Yale University Press, 2007) *177-78.*

58 Stanley Elkins & Eric McKitrick, *The Age of Federalism: The Early American Republic, 1788-1800* (Oxford University Press, 1993) 229-32.

59 17 U.S. 316 (1819).

60 See David P. Currie, *The Constitution in Congress: Democrats and Whigs, 1829-1861* (University of Chicago Press, 2005).

61 See David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* (University of Chicago Press, 1985).

62 156 U.S. 1 (1895).

Dagenhart (1918)[63] the Court (again perhaps wrongly) found congressional regulation of child labour to be beyond the commerce power.[64]

To be sure, the Court in this period did not always invalidate aggressive federal regulation,[65] and its decisions tended to be divided and somewhat difficult to reconcile.[66] Despite some difficulties in specific application, however, the Justices retained a widely-shared core idea of a limitation on national power, even in economic cases. As late as 1935, in *A.L.A. Schechter Poultry Co. v United States*, the Court invalidated a key provision of the New Deal as beyond the commerce power.[67]

Schechter is worth recounting in some detail not only because it showed a consensus from the past, but because it proved to be the end of an era. The case concerned the Live Poultry Code, a regulation approved under the federal National Industrial Recovery Act and which governed wholesalers' purchases of chickens that had been shipped across state lines (into New York). Although the regulated chickens had once moved in interstate commerce, the transactions at the core of the *Schechter* case were themselves entirely intrastate, and the purchases were made entirely for use in New York. Thus the case plainly involved commerce; the question was whether it had a close enough relationship with interstate commerce. And the claim that it did was not an enormous stretch: the terms on which chickens could be sold within New York likely did indirectly affect the terms of the interstate sales.

Nonetheless, the Supreme Court unanimously invalidated the federal law. Chief Justice Charles Evans Hughes, writing for the Court, acknowledged some indirect interstate effect, but thought it too small. As he explained, allowing federal regulation in such circumstances would open the door to an essentially unlimited federal power over commerce, collapsing the traditional line between what was local and what was national:

> [W]here the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain with in the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the states over its domestic concerns would exist only by sufferance of the federal government.[68]

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63 247 U.S. 251 (1918).

64 Specifically, the Court found that Congress lacked power to ban the shipment in interstate commerce of goods made using child labour. It takes a narrow view of Congress' power to 'regulate commerce … among the several states' to reach such a result.

65 See *Coronado Coal Co. v United Mine Workers of America*, 268 U.S. 295 (1928) (upholding application of federal antitrust law to mine workers' union); *Stafford v Wallace*, 258 U.S. 495 (1922) (upholding federal law regulating conditions in stockyards that shipped goods in interstate commerce); *Houston, East & West Texas Railway Co. v United States*, 234 U.S. 342 (1914) (upholding federal regulation of shipping prices for intrastate shipments on an interstate railway); *Champion v Ames*, 188 U.S. 321 (1903) (upholding federal prohibition against shipping lottery tickets in interstate commerce).

66 E.g., compare *Champion*, 188 U.S. 321 (federal government may ban shipment of lottery tickets) and *Coronado Coal*, 268 U.S. 295 (federal government may ban local union activity that may restrain interstate commerce) with *Hammer*, 247 U.S. 251 (federal government may not ban shipment of products produced by child labour) and *E.C. Knight*, 156 U.S. 1 (federal government may not ban local combinations by manufacturers that may restrain interstate commerce). *But see* Barry Cushman, 'Formalism and Realism in Commerce Clause Jurisprudence' (2000) 67 *University of Chicago Law Review* 1089 (arguing that cases from this period can be reconciled).

67 295 U.S. 495 (1935).

68 Ibid at 546

Or as Justice Benjamin Cardozo put it in concurrence:

> There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. … The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. … There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of forces that oppose and counteract them, there will be an end to our federal system.[69]

Notably even Justice Louis Brandeis, who sympathized more with the New Deal than many Justices, joined the opinion, and allegedly told a presidential aide, 'This is the end of this business of centralization, and I want you to go back and tell the President that we're not going to let this government centralize everything.'[70]

By this time, though, the Supreme Court stood almost alone, and *Schechter* proved unsustainable. Twenty years earlier, the Seventeenth Amendment took away the states' Article I, Section 3 power to appoint Senators, replacing that system with direct election by the people of each state. Thus one of the core structural protections of federalism was removed – likely not intentionally, as the Amendment arose mostly from concerns over corruption in the appointment of Senators.[71] But the consequence was that the Senate had less institutional reason to be concerned over the growth of the national government: 'Once Senators ceased to owe their offices to state legislatures, they ceased to have personal interests in protecting the state legislatures' prerogatives. Indeed, the Seventeenth Amendment turned Senators from extensions of the state legislatures into potential competitors.'[72] (And a year earlier, the Sixteenth Amendment allowed taxation of personal income, opening up an important new source of federal revenue.)

These events had relatively little effect at first – the prosperity of the 1920s and the small-government tendencies of Presidents Harding and Coolidge curtailed pressures for national expansion. But that atmosphere shifted dramatically after the collapse of the national economy in 1929, the subsequent failure of economic recovery, and the perceived failure of government (state and national) to provide an effective response. Elected in 1932, the energetic President Franklin Roosevelt was determined to forge national solutions. More importantly, he was elected together with a nationalist Congress equally committed to national economic solutions, and by an electorate of similar sympathies. Roosevelt's New Deal consisted of a series of aggressive and comprehensive economic regulations, a great number of which reached into what had previously been regarded as local matters. The law in *Schechter* was one of many. Unsurprisingly, the Court could not prevail against this flood.

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69 Ibid at 554 (Cardozo J, concurring).

70 See <http://www.answers.com/topic/schechter-poultry-corp-v-united-states>, quoting Harry Hopkins, 'Statement to Me by Thomas Corcoran Giving His Recollections of the Genesis of the Supreme Court Fight,' April 3, 1939, typescript in Harry Hopkins Papers. Brandeis was a complicated case, as both an advocate of progressive government regulation of the economy and as an advocate of state experimentalism, especially in the area of economic regulation, as reflected in his famous dissent in *New State Ice Co. v Liebmann*, 285 U.S. 262 (1932). *See generally* Edward A. Purcell Jr., *Brandeis and the Progressive Constitution* (Yale University Press, 2000).

71 See Todd Zywicki, 'Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment' (1994) 73 *Oregon Law Review* 1007.

72 Ramsey, above n 28, 308.

The Court's last stand was *Carter v Carter Coal Co*. in 1936, which invalidated extensive regulation of coal mining, including labour conditions, on the ground that mining was not commerce: 'Mining brings the subject matter of commerce into existence. Commerce disposes of it.'[73] But four Justices, including Brandeis, Cardozo and Chief Justice Hughes, dissented. Later that year Roosevelt overwhelmingly won reelection. And the following year, the Court divided 5-4 the other direction *NLRB v Jones & Laughlin Steel* Co. (1937),[74] upholding the constitutionality of a federal regulation of labour/management relations at major steel plants in Pennsylvania. Chief Justice Hughes, author of *Schechter* and dissenter in *Carter*, wrote for the majority, finding labour conditions at the plants had an 'immediate' effect on interstate commerce because of the company's interstate activities. The opinion began with an acknowledgement of federalism values:

> The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.[75]

But it continued:

> When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war?[76]

That was not inconsistent with *Schechter*, either in reasoning or result, especially since *Schechter* involved goods that were no longer intended to enter interstate commerce. But it was substantially in conflict with *E.C. Knight*, the 1895 case that had said (perhaps wrongly) that Congress could not regulate intrastate manufacturing destined for the interstate market, and with *Carter Coal*.[77]

Four Justices dissented in *Jones*. But they were Justices on their way out. All four retired in the next few years. And President Roosevelt was determined to remake the Court. Indeed, he had already tried, in the infamous 'court-packing' plan of 1937, in which he proposed to expand the size of the Court to gain additional appointments.[78] That idea was defeated in Congress; how much it influenced the sitting Court to uphold the President's priorities is debated. In any event, of far greater significance was that Roosevelt's continuing reelections allowed him to appoint ultimately a majority of the Court. With no appointments in his first term, Roosevelt had five in his second, and two more shortly thereafter. By 1942, when the Court took up the next major federalism challenge, Roosevelt-appointed Justices held seven seats.[79] That case,

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73 298 U.S. 238, 304 (1936).
74 301 U.S. 1 (1937).
75 301 U.S. 30 (citing *Schechter*).
76 Ibid 41.
77 See above n 73.
78 See Noah Feldman, *Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices* (Twelve, 2010) 103-122.
79 Frankfurter, Jackson, Black, Reed, Douglas, Murphy, and Byrnes. The others were Stone, whom Roosevelt had elevated to Chief Justice, and Owen Roberts, who like Stone joined the majority in *Jones*.

Wickard v Filburn,[80] pointed the way toward a full revolution in federalism; the Court held that the federal government could, as part of nationwide regulation of wheat prices, regulate the amount of wheat grown by a farmer for personal consumption in his own backyard. Robert Jackson – formerly Roosevelt's Attorney General – wrote that although the actions of one such farmer might not materially affect interstate commerce, the actions of all similarly situated persons, when aggregated, no doubt would. That was enough for the unanimous Court.

As discussed above,[81] *Wickard* did not say that Congress' regulatory power extended to everything, or even to everything tied to commerce. But it was increasingly regarded that way in later years by the wider legal culture. If Congress could reach noneconomic activity that indirectly affected interstate commerce, and if indirect effects could be aggregated across all who did or might engage in the activity, it seemed doubtful whether anything lay beyond the commerce power. The Court did not take up any enumerated powers challenges for many years, and when it did it consistently rejected them.[82] Congress enacted more and more regulation intrusive on local matters, with less and less attention to whether federalism values were offended. Forty years after *Wickard* hardly anyone took enumerated powers seriously.

Moreover, federalism – already tarred by association with corporate interests in the New Deal period – became increasingly associated with racism and Southern resistance to racial integration in the post-World War II era. As the civil rights movement gained momentum at the national level, local opponents fought back on federalism grounds: states, they said, had the right to work out their own race relations, especially as to private behaviour. Federal civil rights laws regulating private discrimination became a brief federalism issue at the Court in the 1960s, and unsurprisingly the Court upheld them in broad language.[83] This dynamic furthered the complete eclipse of judicial federalism, as the balance of policy seemed to tip decisively to federal power and federalism values were ignored or minimized.

That is not to say, of course, that Congress during this period nationalized every issue. To the contrary, Congress left large areas mostly or entirely to the states, including basic tort, contract and criminal law, family law and property law. But that was principally by choice, and by institutional limitations: Congress did not have the capacity to regulate everything, and the fields it did not address remained by default with the states. American federalism was, at the end of this period, a political rather than a legal subject.[84]

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80 317 U.S. 111 (1942). A year earlier, the Court in *United States v Darby*, 312 U.S. 100 (1941), unanimously overruled *Hammer v Dagenhart* and found that Congress could regulate wages and hours of workers producing goods for shipment in interstate commerce.

81 See above part I.

82 E.g., *Heart of Atlanta Motel Inc. v United States*, 379 U.S. 241 (1964); *Katzenbach v McClung*, 379 U.S. 294 (1964); *Maryland v Wirtz*, 392 U.S. 183 (1968); *Perez v United States*, 402 U.S. 146 (1971); *Hodel v Virginia Surface Mining and Reclamaction Ass'n, Inc*., 452 U.S. 264 (1981). The only material exception during this period, which turned on state sovereignty rather than the scope of the commerce clause, was the short-lived decision in *National League of Cities v Usery*, 426 U.S. 833 (1976) (invalidating federal wages-and-hours law as applied to certain state employees), *overruled by Garcia v San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

83 *Heart of Atlanta Motel v United States*, 379 U.S. 241 (1964); *Katzenbach v McClung*, 379 U.S. 294 (1964).

84 See Herbert Wechsler, *Principles, Politics and Fundamental Law* (Harvard University Press, 1961) 49-82; ibid 82 ('Federal intervention as against the states is thus primarily a matter for congressional determination in our system as it now stands.').

III THE FEDERALISM REVIVAL

In the 1990s, the Supreme Court began tentatively to take judicial enforcement of federalism seriously again. The beginning of a sustained revival may be traced to the relatively obscure case *Gregory v Ashcroft*[85] at the beginning of the decade. Technically *Gregory* was not even a constitutional case – the question was whether the federal age discrimination act[86] prohibited mandatory retirement provisions for state judges. The Court found that it did not, construing an ambiguous exception for political offices[87] to include judges.[88] But Justice O'Connor,[89] writing for the Court, placed the constitutional structure of federalism at the centre of the analysis:[90]

> As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government. ... Over a hundred years ago, the Court described the constitutional scheme of dual sovereigns:
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> > '[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence, . . . [W]ithout the States in union, there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.'
>
> The Constitution created a Federal Government of limited powers [quoting the Tenth Amendment]. The States thus retain substantial sovereign authority under our constitutional system.[91]

O'Connor's opinion then outlined the individual-rights benefits of federalism, anticipating Justice Kennedy's discussion some 20 years later in *Bond*:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

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85 501 U.S. 452 (1991).

86 *Age Discrimination in Employment Act (ADEA) of 1967*, 81 Stat. 602, 29 U.S.C. § 621-34.

87 See 29 U.S.C. §630(f).

88 *Gregory*, 501 U.S. 467.

89 Justice O'Connor, who became a central figure in the federalism revival, was unusual among the Justices in coming from a career in state rather than national government; she had been a state legislator and state court judge (but had not held any national office) before her appointment to the Court. *See* Joan Biskupic, *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice* (Ecco, 2006). Early in her Supreme Court service O'Connor had pressed federalism arguments even where most of the Court was unsympathetic. *See, e.g., South Dakota v Dole*, 483 U.S. 203 (1987) (O'Connor J, dissenting) (arguing that a federal conditional spending program was unconstitutional as beyond federal power).

90 501 U.S. 457-58.

91 Ibid (quoting *Texas v White,* 74 U. S. 725 (1869), and the key passage of Madison's *The Federalist No. 45* she later quoted in *Raich*) (internal quotations and citations omitted).

> Perhaps the principal benefit of the federalist system is a check on abuses of government power. The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties. ... Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. Alexander Hamilton explained to the people of New York, perhaps optimistically, that the new federalist system would suppress completely "the attempts of the government to establish a tyranny":
>
> > '[I]n a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.'
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> James Madison made much the same point:
>
> > 'In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.' [92]

And O'Connor concluded:

> One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but there is no doubt about the design. If this 'double security' is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.[93]

This was little short of breathtaking, coming as it did in support of a doctrine thought not long previously to be little more than a shelter for racists and Southern irredentists. Or, at least, it would have been, had *Gregory* been a more prominent case. But the mundane nature of the challenge, and the fact that the Court ultimately grounded its ruling on statutory analysis rather than the Constitution, disguised its significance. Nonetheless, a beginning had been made.

The following year brought a constitutional decision, albeit in a somewhat obscure context. In *New York v United States* (1992),[94] the federal government had attempted to force states to manage hazardous waste disposal – not by passing federal regulations, but in effect by requiring states to regulate. Announcing what became known as the anti-commandeering principle, the Court (again per O'Connor) found this impermissibly blurred the line between the state and federal governments: 'While

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92 501 U.S. at 458-59 (*quoting* Hamilton, *The Federalist No. 28*, and Madison, *The Federalist No. 51*) (some quotations and citations omitted).

93 501 U.S. 459.

94 505 U.S. 144 (1992).

Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.'[95] The Court coupled this conclusion with statements of federalism policy that expressly echoed *Gregory*:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. 'Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in anyone branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.' *Gregory v Ashcroft*, 501 U.S., at 458.[96]

The force of *New York v United States* was blunted by the unusual facts and further by the embarrassing absence of clear textual support for the majority.[97] But it was the first meaningful invalidation of a federal regulation on constitutional federalism grounds for some time. The Court's strong endorsement of federalism values – especially their roots in protection of individual rights – in *Gregory* and *New York* signalled a change in approach. But still the Court had not confronted the central challenge of federalism, which was the problem of holding Congress to its enumerated powers.

The Court took up that challenge in 1995 in *United States v Lopez*.[98] *Lopez* was convicted under federal law[99] of possessing a gun near a school – a regulation the federal government almost laughably defended as a regulation of interstate commerce.[100] But the legal culture had so fully discounted federalism limits on the national government in the decades following *Wickard* that in fact it was Lopez's argument, not the government's, that seemed novel. The trial court rejected it out of hand, and in embracing it (albeit cautiously)[101] on appeal, the court of appeals recognized that it was doing something unusual. But the appeals court, prominently citing *Gregory* and *New York,*[102] had the right sense of the new mood at the Supreme Court. In the first case to overturn a federal statute squarely on enumerated powers grounds since the New Deal era, the Court affirmed the invalidation of Lopez' conviction, relying principally on the ground that his activity was non-economic and that allowing federal regulation on the grounds urged by the government would leave no subject beyond federal control. As Chief Justice William Rehnquist wrote for the majority:

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95 Ibid 162.

96 Ibid 181-82.

97 See, e.g., ibid 177 (hedging as to whether the textual source of the limit was Article I, Section 8 or the Tenth Amendment).

98 514 U.S. 549 (1995).

99 *Gun-Free Schools Zones Act*, 18 U.S.C. §922(q).

100 514 U.S. 563 ('The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy…').

101 *United States v Lopez*, 2 F.3d 1342 (5th Cir. 1993) (holding only that the government had not proved the connection between Lopez' actions and interstate commerce because the government had offered effectively no proof at all).

102 Ibid 1344-45.

> The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.[103]

The *Lopez* decision was revolutionary. Of course, on its face it might seem unremarkable to hold that a non-economic intrastate activity lay beyond Congress' power over interstate commerce. But to reach that conclusion would be to ignore the then-dominant legal culture in which Congress routinely invoked its interstate commerce power (or rather, its power to regulate as 'necessary and proper' to effectuate its interstate commerce power) to reach activities having only remote and tangential relationships to interstate commerce. And the tenuous footing of the *Lopez* decision was underscored by the strong four-Justice dissent endorsing the government's view: Congress might reasonably suppose that guns near schools would foster crime and inhibit learning, and that those effects might in turn affect the national economy. That was all the dissent would have needed to uphold the statute – in effect, as the majority countered and the dissent did not bother to meaningfully deny, leaving Congress' power without judicial supervision.[104]

Few commentators cared about Lopez himself or federal regulation of guns in schools: the federal regulation was symbolic at best. But commentators, and the dissenters at the Court, recognized the implications. If taken seriously, the limits suggested in *Lopez* would endanger federal laws that people did care about. Accordingly, commentary condemned the decision as unprecedented and destabilizing, while predicting that the Court would not follow through with additional enumerated powers cases.

The Court proved the latter prediction wrong five years later in *United States v Morrison* (2000).[105] Morrison challenged the federal Violence against Women Act (VAWA)[106] as applied to a sexual assault in Virginia with no apparent connection to interstate commerce. Congress, stunned by the *Lopez* decision, had backed up its jurisdictional claims in VAWA with hearings and more specific conclusions about interstate effects.[107] VAWA touched more policy nerves than the law at issue in *Lopez*, because federal remedies for sexual violence – while generally duplicating state remedies – were preferred by many victims' groups. At the same time, though, the legal culture was not blindsided by *Morrison*, as it had been by *Lopez*. Not only was *Lopez* a clear precedent, but the Court's recent decisions had been (controversially) pursuing federalism values in other areas, most notably expanding state sovereign immunity under the Eleventh Amendment,[108] extending *New York*'s anti-commandeering principle,[109] and limiting Congress' enforcement power under the

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[103] 514 U.S. 564 (opinion of Rehnquist C.J, joined by O'Connor, Scalia, Kennedy and Thomas JJ.).

[104] See ibid 619-24 (Breyer J, dissenting, joined by Stevens, Souter, and Ginsburg JJ.).

[105] 529 U.S. 598 (2000).

[106] 42 U.S.C. §13981.

[107] See 529 U.S. at 599, 614.

[108] E.g., *Seminole Tribe of Florida v Florida*, 517 U.S. 44 (1996); *Alden v Maine*, 527 U.S. 706 (1999).

[109] *Printz v United States*, 521 U.S. 898 (1997).

Fourteenth Amendment.[110] This time both the trial court and the court of appeals ruled against the federal statute.

Unsurprisingly the Supreme Court, again closely divided, agreed. Relying heavily on *Lopez*, the Court's majority (per Rehnquist) again emphasized that the conduct was non-economic, that the relationship to interstate commerce was attenuated and speculative, and that a ruling for the government would leave federal power essentially without judicial check.[111]

Morrison was a critical step because it solidified the holding in *Lopez*; as a result, *Lopez* was not an outlier, but part of a trend. Further, *Morrison* went beyond *Lopez* in at least two critical respects. Doctrinally, the Court reestablished the proposition (stated in *Wickard*) that Congress had to prove (not merely speculate about) a connection with interstate commerce, and relatedly demonstrated the force of that requirement by rejecting Congress' not insubstantial proofs. And in terms of legal culture, the statute the Court invalidated was more politically sensitive. In both respects, the ground had begun to shift; federalism limits were being taken seriously, not just among the bare majority of Justices who defended them at the Court, but more broadly among the lawyers and commentators who make up the broader legal community.

But questions remained about the Court's commitment, and correspondingly about the legal culture's willingness to accept the federalism revival. The central cases had been decided mostly by 5-4 margins. In the enumerated powers cases, a core of dissenters lead by Justices Breyer and Souter mocked the new trend and remained committed to a version of the commerce clause that left almost total discretion to Congress. Academic commentary was sharply negative.[112] Neither *Lopez* nor *Morrison* struck at major policy initiatives. That set the stage for *Raich*, which would be the next test of the Court's commitment.

IV THE LOST OPPORTUNITY OF *RAICH*

The foregoing discussion supports several important conclusions about the context of *Raich*. First, in the aftermath of *Wickard v Filburn*, the American legal culture's view of federalism had drifted far from the Constitution's basic text and structure. Whether *Wickard* was itself defensible, the assumptions it fostered stood diametrically opposed to the core founding idea that the federal government would be legally (and judicially) limited in its subject matter.[113] To the extent one takes seriously the need for fidelity to founding values (whether strictly through a judicial philosophy of originalism or more loosely as a matter of respecting core constitutional principles), the legal status of federalism in the mid- to late-twentieth century represented a fundamental judicial and constitutional abdication: it had become precisely what the Constitution promised it would not.

Second, prior to *Raich* a majority of the Court had consciously begun a campaign to rectify the constitutional departures of the post-*Wickard* consensus.[114] That consensus had become so ingrained that it could hardly be overturned by a single case; instead, as the Court appeared to recognize, changes of that magnitude best came (and

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

111 *Morrison*, 529 U.S. 603-19 (opinion of Rehnquist C.J, joined by O'Connor, Scalia, Kennedy and Thomas JJ.). See also ibid 608 (noting 'the dissent's remarkable theory that the commerce power is without judicially enforceable boundaries…'). As in *Lopez*, Justices Stevens, Souter, Breyer and Ginsburg dissented.

112 E.g., Lawrence Lessig, 'Translating Federalism: *United States v Lopez*' (1995) *The Supreme Court Review* 125.

113 See above part II.

114 See above part III.

perhaps could only come) incrementally. Thus the cautious decade-long progression from *Gregory* to *Lopez* to *Morrison* reflected an appropriate and largely successful strategy. After *Morrison*, the Court appeared to have reinvigorated judicial federalism sufficiently that federalism was beginning to be taken seriously in the broader legal culture, without precipitating overwhelming pushback.

Third, prior to *Raich* the federalism revival remained vulnerable. Academic commentary remained generally hostile. Politically, substantial interests were aligned against it, because if pressed it might threaten significant federal legislation. In particular, it had a political valence: the laws most at risk appeared to be regulations of workplace conditions, environmental and land use restrictions,[115] and similar regimes supported by the political left. And judicial resistence remained prominent, as a strong minority of Justices loudly opposed it and refused to accept its legitimacy.

Fourth, *Raich* presented an opportunity for a further incremental entrenchment, in several important respects. Politically, a decision against the government would go beyond *Morrison*, because conduct the national government wanted to prohibit would become legal. Thus *Raich* was not merely symbolic (as *Morrison* and *Lopez* largely were) but would have real effects on public policy. Doctrinally *Raich* would also take the Court a bit beyond *Morrison*, because marijuana generally was an item of interstate commerce even though Raich's marijuana was not. That distinguished *Morrison*, which did not involve an interstate commodity. And judicially, an affirmance would further signal the Court's support for broader implementation of judicial federalism in the lower courts.

At the same time, ruling against the federal government would not have been a large step, either politically or doctrinally. As a political matter, it would not likely face great opposition. As noted, generally the political valence of federalism favored the political right. But the politics of *Raich* cut the opposite way – political conservatives tended to favor tougher drug policy while many liberals doubted its necessity or effectiveness and feared its threat to civil liberties. (Notably, the two lower court judges who ruled for Raich were Democatic appointees).[116] Further, Raich and her co-plaintiff were extremely sympathetic people burdened by great suffering (quite unlike the unattractive defendants in *Lopez* and *Morrison*). That would give the Court political cover: one could imagine that conservative criticism of the Court would be tempered by conservative support for the federalism agenda more generally, while liberal criticism would be tempered by sympathy for Raich and suspicion of federal drug laws.

Similarly, as O'Connor's opinion in *Raich* ultimately showed,[117] the Court could rule against the federal government without major doctrinal changes in its own holdings. *Wickard*, though superficially similar, was distinguishable on the grounds that the government's case in *Raich* rested on speculation rather than proven facts. To be sure, that was a distinction aimed at lawyers – almost a technicality. But in the model of incremental change, that was a positive, not a negative, attribute. The Court would be able to explain a ruling against the government in technical terms that did not portend a federalism revolution, while at the same time reinforcing and expanding the federalism revival. *Raich* was not really a challenge to *Wickard*; it was a challenge to what *Wickard* had come to stand for in the broader legal community – a judicial *carte blanch* for the federal government.

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[115] See John Nagle, 'The Commerce Clause Meets the Delhi Sands Flower-Loving Fly' (1998) 97 *Michigan Law Review* 174 (discussing impact of commerce clause cases on the federal *Endangered Species Act*).

[116] See *Raich v Ashcroft*, 352 F. 3d 1222 (9th Cir. 2003) (opinion by Pregerson, joined by Paez).

[117] See above part I.

Critically, though, progress in the federalism revival depended on the Court's judicial federalists standing together. Four Justices had shown, from *Lopez* onward, their firm opposition to any meaningful judicial protection of federalism.[118] And ultimately the judicial federalists did not stand together. Justice Kennedy, without comment, joined Justice Stevens' opinion for the Court – an opinion that conveyed an effective blank check to Congress with almost no acknowledgement of federalism values. Perhaps of greater significance, Justice Scalia concurred in the judgment, though without endorsing all of Stevens' opinion.[119]

As a result, Justice O'Connor's praise of judicial federalism and her careful explanation of *Wickard* came in dissent. Rather than continuing the incremental revival, *Raich* appeared to signal retreat.[120] In particular, it weakened the case for federalism on two core grounds. First, it made federalism look political. The five proponents of judicial federalism were identified as the conservative Justices. They had struck down federal laws relating to gun control and protection of women – causes to which conservatives were often thought unsupportive. Once federalism turned against a conservative cause, the 'war on drugs,' some of them seemed to waver. To be clear, the point is not that sympathy for firm enforcement of drug law swayed votes (although that position has been advanced); that is mere speculation. Rather, the point is that the speculation seemed plausible, and was widely made, in the commentary.

Further, the best argument against the post-*Wickard* consensus had always been that consensus' violence to common sense. One did not need to be a committed federalist to think it bizarre that Congress could invoke its power over interstate commerce to regulate matters that were neither interstate nor commercial. And one did not need to be a committed textualist to think it bizarre that the Constitution's Article I, Section 8 listed 18 specific powers of Congress, one of which, it turned out, apparently encompassed everything. These common intuitions failed to gain traction not principally because of reverence for *Wickard* (an obscure and often-mocked decision), but because the Court seemed unwilling to acknowledge them. Once the Court began its federalism revival, it had these aspects of common sense on its side. *Raich*, though, threw away that advantage by directly affirming Congress' broad interstate commerce power over non-interstate non-commerce. Of course, *Raich* did not foreclose all enumerated powers challenges nor repudiate (expressly) *Lopez* or *Morrison*; but *Raich* did undermine the simple yet effective formulation that power "to regulate Commerce" meant power over things commercial and power to regulate commerce 'among the several States' meant power over matters involving more than one state.

V AFTERMATH: *NFIB V SEBELIUS*

Raich might have been less important had it been followed by further entrenchments of federalism. It was not, whether by intention or coincidence. Shortly after the *Raich* decision was announced, Justice O'Connor retired. Her closest ally in federalism, Chief Justice Rehnquist, died two months later. Their replacements, Justice Samuel Alito and Chief Justice John Roberts, lacked the state-government orientation of their predecessors: Alito was a former federal prosecutor and judge; Roberts had

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[118] See above part III.

[119] See *Raich*, 545 U.S. 33-42 (Scalia J, dissenting). Although not endorsing all of Justice Stevens' arguments, Scalia did endorse Stevens' core holding that 'Congress could reasonably conclude that its objective of prohibiting marijuana from the interstate market 'could be undercut' if those activities were excepted from its general scheme of regulation.' Ibid 42 (Scalia J, dissenting).

[120] See generally 'Symposium, Federalism after *Gonzales v Raich*' (2005) 9 *Lewis & Clark Law Review* 743-934.

worked in Washington for his entire career. After 2005, the Court's high profile cases turned to the war on terrorism[121] and the Court's new attention to the Second Amendment.[122] No important enumerated powers cases were decided from 2006 until 2011; the most significant, *United States v Comstock* (2010),[123] was a win for the federal government with only Justices Scalia and Thomas dissenting. As discussed at the outset, *Bond v United States* (2011) served as a platform for Justice Kennedy's powerful rhetorical defense of federalism, but did not actually invalidate any federal laws.[124]

Thus when the next pivotal debate over federalism emerged in 2011 and 2012, in the context of the Patient Protection and Affordable Care Act (PPACA), *Raich* remained the most important recent precedent. That, I will argue, was of crucial significance in how the debate was framed, and perhaps in how the case was decided.

Among a great many other things, the PPACA directed (subject to various exceptions) that all persons in the United States obtain health insurance, and it required those that did not to pay a sum of money to the federal government. This 'individual mandate' was attacked as (among other objections) beyond Congress' enumerated power. Even on its face that seemed a bit of a stretch, as health insurance was obviously a national market and the individual mandate was a core part of the comprehensive regulation of insurance in the PPACA. The challengers relied centrally on the proposition that the mandate regulated *inactivity* rather than activity; inactivity, they said, was inherently non-commercial and local, and moreover federal regulation of inactivity was wholly unprecedented.

It is also important to note the political context of the debate. The PPACA was the central legislative accomplishment of President Barack Obama's first term. It fundamentally redesigned the health insurance market in the United States, a field that encompassed some 15% of the nation's gross national product, and it accomplished a goal that had been a Democratic party priority since the defeat of a previous health case reform under President Bill Clinton in 1994. The PPACA was, moreover, extremely controversial politically. The Act was passed in 2010 without any Republican votes and in the face of substantial partisan opposition. It became a centerpiece of the Republican party's campaign in the mid-term elections in 2010 (in which the party was very successful) and in the opening stages of the presidential election campaign in 2011 and early 2012. In sum, the importance of the issue, as a matter of policy and politics, can hardly be overstated, and attitudes toward the Act reflected a deep partisan divide.

In this setting the challengers of the Act would have had a difficult task in any event, but the malign precedent of *Gonzales v Raich* worsened the prospects in at least two material respects. Doctrinally, *Raich* stood for the proposition that a comprehensive national regulation of economic activity could incidentally reach noncommercial intrastate activity that might (in some vague and speculative way) 'undercut' the national regulation. That formula seemed to describe the PPACA at least as accurately as it described the situation in *Raich* itself. Moreover, *Raich* had insisted that the connection between the local activity and the national scheme was to be evaluated by Congress and overturned by the Court only if Congress' assessment lacked a rational basis. Both points negated what should have been a strong federalism argument based on *Lopez* and *Morrison*: that noncommercial regulation based on the

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[121] E.g., *Hamdan v Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v Bush*, 553 U.S. 723 (2008).

[122] E.g., *District of Columbia v Heller*, 554 U.S. 570 (2008); *McDonald v Chicago*, 130 S. Ct. 3020 (2010).

[123] 130 S. Ct. 1949 (2010) (holding that a federal law providing for civil commitment of federal prisoners was within Congress' enumerated powers).

[124] See above, n 2.

commerce clause was highly suspect and that the Court, not Congress, would ultimately judge the connection between local noncommercial conduct and interstate commerce. True, the challengers still had the argument that *Raich* concerned activity whereas the PPACA addressed inactivity – but that was a novel distinction lacking foundation in case law. Disappointingly for the challengers, but perhaps not unsurprisingly, the courts of appeal initially rejected the federalism challenge as contrary to precedent, including in opinions by conservative judges Jeffrey Sutton and Laurence Silberman.[125]

Even more significant, though, were the political implications of *Raich*. Kennedy and Scalia – two necessary votes if the PPACA were to be invalidated – had voted for the federal government in *Raich*. If they opposed the PPACA (as both ultimately did) judicial federalism was subject to a devastating political critique: Justices seemed to favor it only when it was consistent with their policy preferences. Academic and political commentary quickly picked up this theme. Core precedents, the PPACA's defenders claimed, made it an easy case – particularly *Wickard* and *Raich*.[126] To overturn the PPACA would be inconsistent, and would reveal a nakedly political Court, dominated by Republican-appointed Justices looking to undo the key legislative achievement of the opposing party.[127] This argument was linked specifically to the conservative Justices' votes to uphold a 'conservative' law in *Raich*.[128]

Nonetheless, surprisingly to many observers, when the Court heard oral arguments in the case in early 2012, the discussion seemed to go poorly for the

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[125] *Thomas More Law Center v Obama*, 651 F.3d 529 (6th Cir. 2011) (per Sutton); *Seven-Sky v Holder*, 661 F.3d 1 (D.C. Cir. 2011) (per Silberman). Subsequently a divided court of appeal for the Eleventh Circuit invalidated the individual mandate, *Florida v U.S. Dep't of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011), setting up a Supreme Court hearing in early 2012.

[126] See Ezra Klein, 'Unpopular Mandate', *The New Yorker* (online), 25th June 2012 <http://www.newyorker.com/reporting/2012/06/25/120625fa_fact_klein> (noting that when the challenge was initially filed, 'It was hard to find a law professor in the country who took them [arguments against the mandate] seriously.').

[127] See Ezra Klein, 'Of Course the Supreme Court is Political', *Washington Post* (online), 21st June 2012 <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/06/21/of-course-the-supreme-court-is-political/. Klein reported that 'Akhil Reid [sic.; actually Reed] Amar, a leading constitutional law scholar at Yale ... thinks that a 5-4 party-line vote against the mandate would be shattering to the court's reputation for being above politics' and quoted Amar as saying: 'If they decide [to invalidate the mandate] by 5-4, then yes, it's disheartening to me, because my life was a fraud. Here I was, in my silly little office, thinking law mattered, and it really didn't. What mattered was politics, money, party, and party loyalty.'

[128] See, e.g., Lawrence Lessig, 'Why Scalia Could Uphold Obamacare', *The Atlantic* (online), 13th April 2012 <http://www.theatlantic.com/national/archive/2012/04/why-scalia-could-uphold-obamacare/255791/> (arguing that Scalia's concurrence in *Raich* 'should yield an obvious and clear answer' in support of the health care law). Professor Lessig wrote in conclusion, referring specifically to *Raich* and other recent commerce clause cases: 'So with these liberal cases [such as *Raich*], limits [on the federal government] were not enforced. But when the cause is conservative, the willingness to limit Congress' power comes alive. The Court has struck laws regulating guns – twice. It has struck a law that regulated violence against women. And if Obamacare falls, it will have struck down the most important social legislation advanced by the Democratic Party in a generation. … With that score sheet, I fear the cynics win. When [law professors] want to insist that 'it's not all just politics,' the cynics (including most forcefully, our students) will insist the facts just don't support the theory. Even I would have to concede the appearance that it's just politics, even if I don't believe I could ever believe it.'

government.[129] Four of the five conservative Justices voiced scepticism of Congress' power (the fifth, Justice Thomas, had long been a reliable federalism supporter, including in dissent in *Raich*). That appearance redoubled the political pressure on the Court, however. Unlike all of the prior recent federalism cases (*Raich* included), which had gained only limited popular interest, the PPACA challenge was on the front page of every newspaper and dominated the opinion pages and online commentary for months. As speculation mounted that the mandate (and perhaps the entire law) would be invalidated, the inescapable parallel was with the early New Deal cases (*Schechter*, *Carter Coal*, and others), in which the Court invalidated high-profile legislation only to provoke a profound and ultimately unsuccessful political struggle with the President and his party.

What happened within the Court thereafter, and why, remains a matter of speculation.[130] The end result was the odd split decision in *NFIB v Sebelius* in June 2012[131] that found the individual mandate beyond Congress' commerce powers but upheld it anyway – as a tax, under Congress' power to 'lay and collect Taxes, Duties, Imposts and Excises.'[132] Only Chief Justice Roberts agreed with both propositions; the four Democratic-appointed Justices would have upheld the PPACA on both taxing and commerce grounds, while Justices Scalia, Kennedy, Alito and Thomas dissented from the tax holding.

A complete evaluation of *NFIB v Sebelius* requires more historical perspective than we now have. Opinions remain divided.[133] For some, it was the Chief Justice's '*Marbury*' moment – referring to Chief Justice Marshall's artful defusing of a potential constitutional crisis while in the long term building the Court's prestige and power.[134] For others it was a capitulation to political pressure that injured the Court more than a bold stance would have. And for federalism, it was seen as a victory by some – reaffirming fundamental principles, while avoiding a politically explosive ruling – and as a defeat by others (confirming that the Court would shy away from meaningful federalism-based checks on the national government).[135]

For present purposes we do not need to make any final assessment of *Sebelius*, other than to emphasize how it illustrates the lost opportunity of *Raich*. For those who wanted a stronger federalism holding in *Sebelius*, the conclusion seems evident. If *Raich* had come out the other way, the federalism challenge in *Sebelius* would have been much stronger. It would not have confronted the doctrinal difficulties posed by *Raich* – rather, a federalism holding in *Raich*, along the lines of Justice O'Connor's dissent, would have reinforced the central federalism arguments in *Sebelius*. Further, and more importantly, the political arguments in *Sebelius* would have had much less

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[129] See Dahlia Lithwick, 'Place Your Bets on Obamacare', *Slate* (online), 27th March 2012 <http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2012/03/a_close_vote_the_supreme_court_appears_to_be_headed_to_a_split_decision_on_the_affordable_care_act_.html>.

[130] E.g., Jeffrey Toobin, *The Oath: The Obama White House and the Supreme Court* (Doubleday, 2012) (speculating that Chief Justice Roberts initially voted to invalidate the law and changed his mind).

[131] 132 S. Ct. 2566 (2012).

[132] *United States Constitution*, Art. I, s. 8, cl 1.

[133] See Drew Singer & Terry Baynes, 'Analysis: Legal Eagles Redefine Healthcare Winners and Losers', *Reuters* (online), 3rd July 2012 <http://www.reuters.com/article/2012/07/03/us-usa-healthcare-court-idUSBRE8621A520120703>.

[134] See Vikram David Amar and Akhil Reed Amar, 'Chief Justice Roberts Reaches for Greatness', *LA Times* (online) 1st July 2012 <http://www.latimes.com/news/opinion/commentary/la-oe-amar-roberts-supreme-court-20120701,0,5926960.story>.

[135] See Singer & Baynes, above n 133.

force. First, the argument that the Court was going against precedent, and thus acting unlawfully and rashly, would have been much reduced. Second, the legal culture would have been more prepared for Court intervention, had the Court intervened in *Raich*. And third, the arguments from political inconsistency would have had little traction. Had the Justices struck down a 'conservative' law in *Raich*, they would have been less exposed to political scorn for striking down a 'liberal' law in *Sebelius*.[136]

To be sure, one can never know what tips the balance in a closely divided Supreme Court case. To suggest that a different outcome in *Raich* would have led to a different outcome in *Sebelius* is speculation. But given the closeness of the case, and the prominence of the precedential and political pressures on the Court, it does not seem unfounded speculation. A fundamental problem for the federalism challenge in *Sebelius* was that the American legal culture was not prepared for a judicial intervention of such magnitude. True, federalism was a more potent intellectual force in 2012 than it had been in (say) 1982, and judicial enforcement of enumerated powers limitations was more common and entrenched. That was so, in no small part, because of the Supreme Court's incremental revival of judicial federalism, from *Gregory* forward. But that incremental momentum had been substantially checked in *Raich* (and thus had received no material reinforcement for twelve years, since *Morrison* in 2000). It should not be surprising that large swaths of American legal culture viewed the *Sebelius* challenge as unprecedented, unreasonable, and politically motivated. A different result in *Raich* would have greatly mitigated that perception.

Of course, even among those sympathetic to federalism, support for the PPACA challengers was not universal. But for them the lost opportunity of *Raich* may loom as large, because the *Raich-Sebelius* combination suggests hesitancy in striking down meaningful national laws on federalism grounds – whereas a defeat for the national government in *Raich* would have more strongly offset the national government's win in *Sebelius*.

Illustrative of this point is a paper by Lawrence Solum arguing that the significance of *Sebelius* is its potential for changing the legal culture, or what Professor Solum calls the 'constitutional gestalt'.[137] Solum argues that, notwithstanding the result in *Sebelius*, the embrace of commerce clause limitations by a majority of Justices in such a high-profile case changes the calculus of federalism challenges. It is, he says, now a mainstream argument to contend that meaningful national laws can and should be invalidated as beyond Congress' enumerated powers. That does not mean, of course, that all or most challenges will succeed, or that the Court can or should return to an eighteenth-century (or nineteenth-century) conception of federal power; it does mean (he says) that *some* meaningful limits on national power can now safely be contested, and that this change in the 'gestalt' is a victory for federalism and for the basic structure of American constitutional law. As Solum argues:

> *Sebelius* marks a shift in what we can call the 'constitutional gestalt' regarding the meaning and implication of the so-called 'New Deal Settlement.' Before *Sebelius*, the consensus understanding was the New Deal and Warren Court cases had established a constitutional regime of plenary and virtually unlimited legislative power under the Commerce Clause … After *Sebelius*, the constitutional gestalt is unsettled … The most important indirect effect of *Sebelius* is that it enables constitutional contestation over

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[136] Cf. Lawrence Lessig, 'Why Scalia Could Uphold Obamacare', *The Atlantic* (online) 13th April 2012 <http://www.theatlantic.com/national/archive/2012/04/why-scalia-could-uphold-obamacare/255791/> (expressly charging the Court with striking down liberal laws and upholding conservative laws).

[137] Lawrence B. Solum, *The Effects of NFIB v Sebelius and the Constitutional Gestalt* (unpublished manuscript) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2152653>.

> the content of the constitutional gestalt and the meaning of the New Deal Settlement.[138]

Perhaps this is true. In particular, Professor Solum's idea of the 'constitutional gestalt' seems apt and consistent with the idea expressed in this essay of a 'legal culture' that extends beyond any particular Supreme Court opinion and takes in the basic assumptions, conventions and attitudes regarding a particular field of constitutional law. But one might say, more cautiously, that the legal culture is moved more by outcomes than by words in opinions. The modern federalism revival, I have argued, began in *Gregory v Ashcroft*.[139] But it was not widely remarked – because, although the government lost the case, it did not lose on constitutional grounds. *Gregory* laid the groundwork for the future with a very modest and incremental change. The wider legal culture did not take note until *Lopez*, which actually invalidated a federal law. But doubts persisted because the law seemed unimportant; a bigger step was *Morrison* – and even there, the Court's invalidation of a popular federal law lacked practical force because the conduct at issue was illegal under state law. It may be that *Sebelius* achieves the revolution in the 'gestalt' that these cases did not fully accomplish, but the fact that its commerce clause discussion also lacks practical force seems to count against it.[140] It is as easy to predict that Chief Justice Roberts' commerce clause discussion will become obscured within the legal culture by the perception that the federal government 'won' in *Sebelius*.[141]

Here is where *Raich* looms most prominently as the lost opportunity. A different result in *Raich* would have changed the 'gestalt' more profoundly than the split decision in *Sebelius*. For those who care about outcomes, it would have meant a material policy change in the nation's treatment of marijuana. As has become increasingly clear, including in the 2012 election, there is substantial movement at the state level for marijuana legalization (indeed, going beyond what was at stake in *Raich*).[142] But the continuing presence of federal drug laws – even if they are not consistently enforced – limits the practical effect of state-level legalization. Without the overhang of the federal laws, state experiments in legalization would be much more widespread and meaningful. This may or may not be a good thing as a policy matter, but it would be a continuing reminder of the importance and the reality of federalism. It would provide a practical illustration of the force and operation of federalism, not merely in the elite world of Supreme Court advocacy, and not even in the mostly-elite world of legal commentary, but in the wider American culture. That, I think, would change the 'gestalt' more effectively than Chief Justice Roberts' words on paper. And

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[138] Ibid 1-2. Notably, Professor Solum says only that *Sebelius* 'destabilizes the constitutional gestalt, potentially (but not necessarily) enabling a constitutional gestalt shift'. Ibid 2.

[139] See above part III.

[140] See Singer & Baynes, above n 133 (quoting constitutional law expert Geoffrey Stone as saying 'The practical impact is, it won't have much impact. … [The conservatives] won an argument, but it's not an argument that's likely to occur very often. And when it can, it'll be circumvented like it was here.').

[141] See ibid. (discussing argument by various legal scholars that Roberts' commerce clause discussion was non-binding dicta); *see also* Noah Feldman, 'Gay Marriage and Marijuana Are Coming to the Court', *Bloomberg* (online) 11th November 2012 < http://www.bloomberg.com/news/2012-11-11/gay-marriage-and-marijuana-are-coming-to-the-court.html> (implying that Roberts voted to uphold the PPACA on the authority of *Wickard*).

[142] In November 2012, voters in Washington state and Colorado approved ballot measures legalizing marijuana generally under state law. See Aaron Smith, 'Marijuana Legalization Passes in Colorado, Washington', *CNNMoney* (online) 8th November 2012 <http://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/index.html>.

that effect would continue even if one thinks (as I am inclined to think) that *Sebelius* will count more against federalism than for it.

CONCLUSION

The tragedy of *Gonzales v Raich* was not just that the Court's holding (that local noncommercial activity could be regulated under the federal government's commerce power) was textually implausible, or that its result failed to enforce a structural protection of liberty essential to the Constitution's basic design. The tragedy was that the opposite result should have been easily reached. The Court's majority had previously, in a series of well-considered incremental steps, revived American federalism from long judicial neglect and reintroduced federalism values in the broader legal culture. *Raich* was the logical and practical next step. It featured sympathetic plaintiffs and an issue (legalization of marijuana use in very narrow circumstances) whose appeal crossed political lines. It would have required only an incremental doctrinal advance that likely would not have excited much sustained objection, and in practical terms it would not have threatened material national concerns. But it would have been notable in further shifting the legal culture in federalism's favor by choosing the states over the national government in a direct policy conflict, and thus would have reinforced at little cost the values the Court's majority had extolled in prior cases. And it would have underscored the idea that federalism, though in modern American politics often associated with political and legal conservatives (including the Court's majority), could support causes favored by non-conservatives as well. Yet for whatever reason the Court's nominally pro-federalism majority could not hold together, thus passing up their best opportunity to entrench the federalism revival and making the Court look political, or faint-hearted, or both.