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RECENT DEVELOPMENTS IN FEDERAL – STATE RELATIONS: SELECTED CASES IN FEDERALISM

by

Michael James Stamcoff

Bachelor of Arts
Allegheny College
2004

A thesis submitted in partial fulfillment
of the requirements for the

Master of Arts Degree in Political Science
Department of Political Science
College of Liberal Arts

Graduate College
University of Nevada, Las Vegas
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Master of Arts

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1017-53

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ABSTRACT

Recent Developments in Federal-State Relations: Selected Cases in Federalism

by

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An interesting moment in Supreme Court history was the rise of William Rehnquist to Chief Justice in 1986. Under Rehnquist, the Court for the first time in nearly sixty years issued decisions that limited federal power. However, were the decisions indicative of the destruction of cooperative federalism and the Constitutional Revolution of 1937 or merely exercises limiting the excesses of federal power? This paper argues the latter. Recently, the Court further cemented their belief in cooperative federalism, while limiting its excesses where necessary in the cases of *Nevada Department of Human Resources* v. *Hibbs* (2003), *Granholm* v. *Heald* (2005), *Gonzales* v. *Raich* (2005), *Kelo* v. *City of New London* (2005), and *Gonzales* v. *Oregon* (2006). The *Granholm, Raich* and *Kelo* decisions were clear cooperative federalism victories; while *Hibbs* retreated from more stringent Eleventh and Fourteenth Amendment

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jurisprudence and *Oregon* recognized the limitations of the federal government in the realm of police powers.

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CHAPTER 1

INTRODUCTION

In April 1995, the Supreme Court issued its opinion in *Lopez* v. *United States*. For the first time in nearly sixty years, the Court placed a limitation to the exercise of federal power when utilizing the Commerce Clause. Critics lauded that it was a clear step towards "dismantling the Constitutional Revolution of 1937. Lopez emboldened federal courts to breathe new life into clauses such as 'privileges and immunities' and doctrines such as improper delegation that had been moribund since the age of Roosevelt" (Leuchtenburg 2002, 97). Other critics went so far to declare "it appears that Rehnquist and his conservative colleagues don't just want to turn the clock back to the days before Earl Warren; they're hankering, it seems, for the Articles of Confederation" (Toobin 1995, 82).

Were these predictions accurate? It is that question that will be explored herein. It is now eleven years later and the Court has had ample time to display whether or not *Lopez* truly marked the beginning of a federalism revolution or simply an indication that the Court would no longer allow the federal government free reign.

Through the analysis of key post-*Lopez* Supreme Court cases that many proponents of the federalism revolution theory believe are

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indicative of a radical shift, this paper will demonstrate that the Rehnquist Court's federalism jurisprudence is not indicative of a federalism revolution, but rather a judicial check on the excesses of federal power while still maintaining the core of cooperative federalism as most fully explained in *United States* v. *Darby Lumber* (1941) and *Wickard* v. *Filburn* (1942). This shall be accomplished looking solely through the lens of the Court.

The paper is organized as follows. Chapter 2 traces the history of federalism from the beginning of the republic to the ascension of William Rehnquist to the position of Chief Justice in 1986. Highlighted are the major cases that define the Court's federalism interpretations. The next chapter details the life of Rehnquist and several decisions made during his tenure on the Court beginning in 1971. Furthermore, it examines the numerous cases of the 1990s and early 2000s that limited the exercise of federal power and whether or not the decisions radically altered the Court's federalism jurisprudence. Chapters 4, 5, 6, 7 and 8 detail five recent cases (*Nevada Department of Human Resources* v. *Hibbs*, *Granholm* v. *Heald*, *Gonzales* v. *Raich*, *Kelo* v. *City of New London*, and *Gonzales* v. *Oregon*) that address this same issue of federalism jurisprudence. Lastly, Chapter 9 explains the current state of federalism as of the summer of 2006, exploring the jurisprudence of the justices, as well as whether or not the Court's collective opinions since *Lopez* truly mark a dismantling of the Constitutional Revolution of 1937 and

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cooperative federalism.

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CHAPTER 2

A HISTORY OF FEDERALISM

In September 1786, a Massachusetts farmer and Revolutionary War veteran named Daniel Shays led a small group of armed men to a Springfield courthouse with the intent of stopping land foreclosures. The end of the Revolutionary War resulted in an economic "depression [that] left many small farmers unable to pay their debts" (Edwards et al. 2005, 34) and thus the farmers were intent on maintaining what little they had left. The uprising shocked the elites who "were scared at the thought that people had taken the law into their own hands and violated the property rights of others. Neither Congress nor the state able to raise a militia to stop Shays and his followers and a privately paid force was assembled to do the job" (Edwards et al. 2005, 34). The government created under the Articles of Confederation was troublesome and this armed uprising served to solidify it. "Simply put, the Framers and the Founders recognized that the states were not the solution, and that state sovereignty was not the unalloyed blessing much of the current rhetoric ascribed to it. The states were, rather the primary source of the problems that plagued the Confederation" (Killenbeck 2002, 27). After an aborted attempt to deal with the problems inherent in the Article of

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Confederation in Annapolis, Maryland that same month (representatives from only five states bothered to show up), it was attempted again in May 1787. This time the convention would be held in Philadelphia, Pennsylvania and would change history.

The Constitutional Convention was attended by 12 states (Rhode Island did not find it significant enough) with a total of 55 representatives. The Convention decided rather than simply amending the Articles of Confederation, they would instead draft a new framework for government. Through constant debates, the Convention decided on such matters as a strong bicameral legislature, a weak executive, and an ambiguous judiciary. It is here, in the debates of what the government should look like, that the issue of federalism first arose. "Federalism is a way organizing a nation so that two levels of government have formal authority over the same land and people" (Edwards et al. 2005, 615). Indeed, many of the convention's delegates felt the majority of power should be vested in the states. These individuals were the Anti-Federalists and included such leaders as George Clinton, James Winthrop and Robert Yates. Another group favored a strong central government and as such was referred to as Federalists. The Federalist ranks included James Madison, John Jay and Alexander Hamilton.

Both the Federalists and Anti-Federalist published a series of articles defending their positions on various governmental issues. In *Federalist* No. 28, Alexander Hamilton wrote

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> Power being almost always the rival of power, the general government will at all times stand ready to check the 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 (Publius 2003, 176-177).

Furthermore, in *Federalist* No. 39, James Madison solidified the notion of federalism writing "the proposed Constitution, therefore, even when tested by the rules laid down by its antagonists, is in, strictness, neither a national nor a federal Constitution, but a composition of both" (Publius 2003, 242). Federalism was born.

The federalism debate of the 1780s demonstrated what was and still is so complicated about the subject. Its two central questions are "How was federalism possible in theory? and How would it work in practice" (Rakove 1996, 188)? The fear of Anti-Federalists rested on the notion of *imperium in imperio* that stated "two sovereign authorities could not coexist in one polity; one or the other had to be supreme; and because power itself was dynamic, the loser in the competition must expect its authority to continue to atrophy" (Rakove 1996, 182). Thus, the issue of federalism will always be problematic since there is a constant struggle between the nation and states. The issue becomes even more problematic since there is not a concrete way to determine how federalism would exist in practice. Only time would tell. Taken together, these factors indicated that federalism was an issue that would consistently trouble the nation.

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The Federalists were largely successful in achieving their aims. However, the Anti-Federalists insisted on a series of amendments protecting individual rights and liberties. These were tacked onto the Constitution as opposed to incorporated since the Constitution is simply a blueprint for how the government should be structured. Among the ten amendments, soon to be called the Bill of Rights, was the Tenth Amendment.

> 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.*

Indeed, "by dividing political authority and sovereignty between the national government and the states, federalism provides a structural check on national power, protecting not only states' rights but individual rights" (Devins and Fisher 2004, 53). Thus, the idea of federalism was firmly planted into American government. However, how would the newly established Supreme Court of the United States interpret this idea?

The Marshall Court (1801-1835)

McCulloch v. *Maryland* (1819)

No case captures the essence of the Marshall Court's interpretation of federalism than *McCulloch* v. *Maryland*. During the Constitutional Convention, the idea of a National Bank arose; however, it was not given much discussion. During George Washington's first-term as president,

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Secretary of the Treasury Alexander Hamilton was "asked to prepare a report on creating a national bank" (Devins and Fisher 2004, 55) by the House of Representatives. It narrowly passed Congressional approval and Washington signed the bank bill into law in 1791.

The Bank was rechartered in 1816. It was the so-called Era of Good Feelings in the United States, however, that would quickly change. "Late in 1818 the Second Bank of the United States ordered state banks to demand repayment of all loans. It also required state banks to exchange their notes for gold and silver. Few banks could do this. The result was the Panic of 1819...[and] the nation quickly sank into an economic depression that lasted several years" (Boyer 2003, 237). Furthermore, "because of inefficiency and corruption, the bank was very unpopular, and many blamed it for the nation's problems" (Epstein and Walker 2004, 327). Thus, in 1818, the state of Maryland passed a law "taxing the national bank's Baltimore branch $15,000 a year. The Baltimore branch refused to pay, whereupon the state of Maryland sued the cashier, James McCulloch, for payment" (Edwards et al. 2005, 74). After the Maryland state courts upheld their legislature's decision, it was appealed to Marshall's court.

In the landmark decision, Marshall "embraced an expansive view of Congress' powers" (Devins and Fisher 2004, 56). The three areas of constitutional law it addressed were the Tenth Amendment, the Necessary and Proper Clause and the Supremacy Clause.

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As it pertains to the Tenth Amendment, Marshall, writing the Court's opinion, stated

> Even the 10th Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the power "not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people," thus leaving the question, whether particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument (17 U.S. 316).

Thus, since the Constitution did not specifically mention the bank, it does not necessarily exclude Congress from creating it. This is because of the Necessary and Proper Clause.

The Necessary and Proper Clause is found in Article I, Section 8 of the Constitution and states Congress possesses the power "to make all Laws which shall be necessary and proper for carrying into Execution the forgoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Office thereof" (Berman and Murphy, 2000). According to Marshall's opinion (a 6-0 opinion)

> Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incident or implied powers; and which requires that everything granted shall be expressly and minutely described (17 U.S. 316).

Thus, Congress does have the constitutional right to establish a bank despite no direct mention. This proved to be an extremely wide interpretation of implied powers and in fact "this was indeed the broadest

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possible definition of national power...This ruling created the potential for the national government to expand its powers into many areas that had previously been thought to be reserved to the states (Berman and Murphy 2000, 106). However, regarding the issue of states taxing a federal bank, what was its legality?

The state of Maryland's tax on the Baltimore office of the Second Bank of the United States was also struck down in *McCulloch* on the basis that it violated the Supremacy Clause. The Supremacy Clause is found in Article VI, Paragraph 2 of the Constitution stating

> 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 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 (Berman and Murphy, 2000).

As such Marshall wrote "that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government" (17 U.S. 316). In fact, some quip that the opinion "contains language expansive enough that it would, if taken literally, prevent states from requiring U.S. mail trucks to stop at red lights" (Nagel 2001, 75). This wide interpretation of federal power would be indicative of the Marshall Court's federalism jurisprudence and expanded to the Commerce Clause in *Gibbons* v. *Ogden* (1824).

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Gibbons v. *Ogden* (1824)

The earliest commerce clause interpretation would occur in *Gibbons.* The Commerce Clause is found in Article I, Section 8, Clause 3 and states Congress has the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes" (Berman and Murphy, 2000). *Gibbons*

> Involved a license to operate steamboats in the waters between New York and New Jersey. One man, Aaron Ogden, had purchased a state-issued license to do so in New York waters, while his former partner, Thomas Gibbons, had gone to the national government for a federal coasting license. It was left to the Supreme Court to decide whether the central government's power of *interstate* commerce predominated over an individual state's power to regulate *intrastate* commerce (Berman and Murphy 2000, 107).

In a 6-0 decision, the Court again took an expansive view of federal power in different ways. Marshall wrote the opinion stating firstly defining commerce. "Commerce, undoubtedly is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse" (22 U.S. 1). He then addressed the issue of intrastate commerce, "it is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between the different parts of the same State, and which does not extend or affect other States. Such a power would be inconvenient

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and is certainly unnecessary" (22 U.S. 1). Thus, it is not Congress' place to regulate commerce when that commerce is completely within a single state's boundary. Thirdly, the Court ruled, "commerce among the States must, of necessity, be commerce with States" (22 U.S. 1). This means that "commerce among the states begins in one state and ends in another; it does not stop when the act of crossing a state border is completed. Consequently, commerce that occurs within a state may be part of a larger interstate process" (Epstein and Walker 2004, 412). Lastly, the court dealt with the issue of regulation. Marshall wrote, "this power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent and acknowledges no limitations, other than prescribed in the Constitution" (22 U.S. 1). Thus, once an activity was deemed to be commerce, Congress possesses the power to regulate it.

In all, the decision took a very expansive definition of commerce that would dominate the Court's jurisprudence, but it went one step further, reinforcing its strong view of national supremacy as evidenced in *McCulloch*. "In every such case, the act of Congress...is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it" (22 U.S. 1). Again, the Court applied the relevance of the Supremacy Clause as the Framers intended. The decision was called "the ultimate in nationalism" (Mendelson 1960, 22).

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This sweeping conviction of national supremacy as evidenced in the *McCulloch* and *Gibbons* decisions signified the Marshall Court's idea of federalism. In Marshall's interpretation, the state possesses power, however, national sovereignty reigns supreme. It is the earliest concept in the history of the United States of how federalism should exist, however, over time this concept would be altered.

The Taney Court (1836-1864)

John Marshall's death in 1835 marked a radical turning point of the Court and its interpretation of federalism. The successor to the position of Chief Justice would be Roger Taney, an appointee and political crony of Andrew Jackson. In 1831, Jackson nominated Taney to be the U.S. Attorney General. In this position, "Taney played a leading role in the controversy over the Second Bank of the United Sates, helping to write President Jackson's message in 1832 vetoing the bank's recharter" (Epstein and Walker 2004, 333). Obviously, this position was in direct opposition to the Marshall Court and the *McCulloch* decision. He later became Jackson's Secretary of the Treasury after the existing secretary, William Duane, "refused to withdraw federal deposits from the national bank (Epstein and Walker 2004, 333). However, Taney was never confirmed by the Senate, and after a long delay, when Jackson finally tendered the nomination, it was hastily rejected. Believing so strongly in the Spoils System he championed, Jackson nominated Taney for the

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Court in 1835, but again, the Senate postponed the nomination. Jackson re-nominated Taney later that year and was confirmed as Marshall's replacement as Chief Justice of the Supreme Court on March 15, 1836. It would end up an ironic choice since Jackson did everything in his power to quell the Nullification Crisis of 1832-1833 and insisted on union, yet would appoint a man whose constitutional interpretation would lead to the most cataclysmic war in United States history that shattered the Union.

The Taney Court's interpretation of federalism was dual federalism. Dual federalism is defined as "a system of government in which both the states and national government remain supreme within their own sphere, each responsible for some policies" (Edwards et al. 2005, 79). This interpretation very much rests on the idea that "federalism...means legalism—the predominance of the judiciary in the Constitution" (Dicey 1902, 170-171). However, such language is nowhere mentioned in the Constitution and other scholars argue that "the federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states; rather...[it] should be treated as nonjusticiable, final resolution being relegated to the political branches—i.e., Congress and the President" (Choper 1980, 175).

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Thurlow v. *Massachusetts; Fletcher* v. *Rhode Island;*

Pierce v. *New Hampshire*

A clear sign of the Taney's Court interpretation of federalism is evident in the so-called *License Cases* (1847). These cases dealt with the ability of local merchants to tax alcohol imports and whether or not such laws violated the Commerce Clause. As previously mentioned, the Marshall Court in its *Gibbons* decision again took an expansive and supreme view of federal power and the *License Cases* would directly contradict *Gibbons*. In a 9-0 decision, "the Court was unanimous in upholding the states' authority" (Hall 1992, 504). In his opinion, Taney stated "every power delegated to the federal government must be coincidence with a perfect right in the states to all that they have not been delegated; in coincidence, too, with the possessing of every power and right necessary for their existence and preservation" (46 U.S. 504).

Civil War/Reconstruction Courts (1865-1895)

After a Union victory in the U.S. Civil War, the Court returned to the Marshall interpretation of national supremacy.

Progressive Era Courts (1896-1936)

Dual federalism would be tweaked again at the turn of the 20th Century; however, this brand of dual federalism would be different from the Taney Court's. The Progressive Movement was in full force, however,

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the Court walked a fine line in its jurisprudence. Epstein and Walker (2004) argued that for "the Courts from the 1890s through the 1930s, dual federalism and the Tenth Amendment were masks to hide their laissez-faire philosophy." However, this belief was questioned most notably by Gillman (1993). Gillman suggested that the Courts and opinions of this era "represented a serious, principled effort to maintain one of the central distinctions in nineteenth century constitutional law—the distinction between valid economic regulation...and invalid 'class' legislation on the other—during a time of unprecedented class conflict" (Gillman 1993, 10).

Hammer v. *Dagenhart* (1918)

No case better displays the fine line the Progressive Era courts walked than *Hammer* v. *Dagenhart*. The Keating-Owen Child Labor Act was passed by Congress in 1916 and "prohibited shipment in interstate commerce of factory products made by children under the age of fourteen or by children aged fourteen to sixteen who worked more than eight hours a day" (Epstein and Walker 2004, 342). Roland Dagenhart had two sons, Reuben and John, who based on North Carolina law could work up to 11 hours a day, which directly flew in the face of the new child labor law. Backed by the mill where they were employed and numerous big business advocates, the Dagenharts contested.

The Court ruled 5-4 in favor of Dagenhart citing a difference between manufacturing and commerce found in *United States* v. *E. C. Knight*

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(1895) and in doing so, they successfully "argued that the production and manufacture of goods were not part of commerce and could not be regulated by Congress" (Devins and Fisher 2004, 59). In the Court's opinion, Chief Justice William Day stated

> The act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which Federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed (247 U.S. 251).

Thus, the act was struck down and the power was returned to the states. Although it did indeed champion dual federalism, it differed from the dual federalism of the Taney Court in that the decision wasn't necessarily advocating states' rights. Instead, "the justices were bent on prohibiting any state *or* federal interference with the growth of the nation's booming private-sector economy...at the same time, the Court limited the ability of states to pass similar legislation because that would restrict individual liberties" (Epstein and Walker 2004, 345). Thus, *Hammer* was more of a self-serving decision than one that truly embraced states' rights.

Oliver Wendell Holmes wrote in his dissent of *Hammer*, "I should have thought that if we were to introduce our own moral conceptions where, in my opinion, they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States" (Hall 1992,

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360). It was a victory for big business; however, the onset of the Great Depression in the 1930s would see the case overturned and the emergence of a new federalism interpretation called cooperative federalism.

Post-New Deal Courts (1937-1975)

The Great Depression affected all aspects of American life; however, one of the last places that would feel its effects was the Supreme Court. Indeed, the Court remained dominated by the same justices who presided over the Progressive Era courts. They were still steered by the dual federalism that was most evidently pronounced in *Hammer.* President Franklin Delano Roosevelt was so upset at the Court overturning key New Deal legislation, such as the National Industrial Recovery Act, that he proposed to expand the Supreme Court to include upto15 justices and as president would get to nominate some six new justices. The court-packing plan failed due to a combination of negative public opinion and an increasing willingness of the Court "to uphold Roosevelt's New Deal initiatives. Over the next few weeks, the Court signed off on both the Social Security Act and the National Labor Relations Act" (Devins and Fisher 2004, 62) without a change in Court personnel. The next few years saw several resignations and deaths and as such Roosevelt did get to appoint some five justices. This new Court would return to the ideas of John Marshall's national supremacy and

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imprint a new federalism interpretation known as cooperative federalism. Cooperative federalism is "a system of government in which powers and policy assignments are shared between states and the national government" (Edwards et al. 2005, 79).

United States v. *Darby Lumber* (1941)

The post-New Deal Court would not wait long to make its mark on its interpretation of federalism. 1938 saw the passing of the Fair Labor Standards Act (also known as the Wages and Hours Law) that "established a minimum wage of 40 cents per hour and a maximum workweek of 40 hours for businesses in interstate commerce" (Boyer 2003, 751). This piece of New Deal legislation blatantly contradicted the Court's 1918 *Hammer* decision. Fred W. Darby was the owner of a Georgia lumber company that violated the pay quota established in the Fair Labor Standards Act and cited *Hammer* as his defense.

The Court, in a 9-0 decision, completely reversed itself from just 23 years prior. Citing

> The powerful and now classic dissent of Mr. Justice Holmes, the conclusion is inescapable that *Hammer* v. *Dagenhart* was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled (312 U.S. 100).

The decision "also gutted the Tenth Amendment [by] denying that the amendment constituted a tool that litigants could wield to build up state authority that they could then use to challenge the exercise of

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enumerated and implied powers by the federal government" (Epstein and Walker 2004, 346). Yet, the decision was not a total victory for cooperative federalism. It "failed to invoke the total power of Congress over commerce. Rather, it was made applicable to employees engaged 'in commerce' or 'in the production of goods for commerce'" (Hall 1992, 217). This lack of clarity would see the issue emerge once again in *National League of Cities* v. *Usery* (1976) and *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985) with the Supreme Court having to decide whether or not the act applied to all workers and federalism would be redefined yet again.

Wickard v. *Filburn* (1942)

If *Darby* began the Court's movement from dual federalism to cooperative federalism, *Wickard* solidified it. In *Wickard*, the Court ruled "that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that the failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity" (317 U.S. 111). Under such an interpretation, commercial activity could be applied to nearly any endeavor and thus justiciable under the Commerce Clause. However, this was not an unbeknownst byproduct, but a clear and rational decision by the Court.

The author of the Court's opinion in *Wickard* was Justice Robert Jackson. In his personal correspondence, Jackson wrote of how the

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decision was symbolic of the Court crossing the Rubicon. "A frank holding that the interstate commerce power has no limits except those which Congress sees fit to observe might serve a wholesome purpose. In order to be unconstitutional by the judicial process if this Act is sustained, the relation between interstate commerce and the regulated activity would have to be so absurd that it would be laughed out of Congress" (Cushman 1998, 218). In sum, Jackson saw three key reasons for altering dual federalism jurisprudence. Firstly, "he thought that maintaining a pretense of review brought disrespect on the judiciary...Second, he thought the prospect of judicial review forced Congress to frame legislation that was unnecessarily complex and indirect...[and lastly Jackson thought the Court 'should not stand as a symbol of a protection of states right when in fact is powers has vanished'" (Cushman 1998, 218). Moreover, *Wickard* was a 9-0 decision so Jackson was clearly not alone in his thinking.

The Burger Court (1969-1986)

In terms of federalism interpretation, perhaps no Court is more fascinating than that presided over by Warren E. Burger. Burger was a Richard Nixon appointee and "was chosen because of his judicial experience, his opposition to Warren Court criminal procedure decisions, his criticism of judicial activism, and because his career was free of ethical blemishes" (Hall 1992, 104). What is so fascinating about the

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Burger Court and federalism is it begins adhering to cooperative federalism, briefly attempts to restore some limit to the exercise of federal power back to cooperative federalism in a period of only nine years. This is largely due to the changing make up of the Court and a key reversal of opinion.

National League of Cities v. *Usery* (1976)

The Fair Labor Standards Act of 1938 and its constitutionality, which was upheld in the aforementioned *Darby Lumber*, emerged once again the mid-1970s. In 1974, Congress passed a "federal statute that extended the maximum hours and minimum wage provisions of the Fair Labor Standards Act to most state and municipal employees" (Hall 1992, 573). A collective representing the cities called the National League of Cities argued that the statute violated the Tenth Amendment. "As one litigant claimed, the Tenth Amendment should protect the powers states already possessed, including authority over public workers" (Epstein and Walker 2004, 347). Surprisingly, the decision would be a radical departure from cooperative federalism and national supremacy supported by the Burger Court years earlier.

"The Court reached its decision by distinguishing between 'traditional' and 'nontraditional' governmental functions" (Devins and Fisher 2004, 66). The 5-4 opinion along ideological lines, written by Justice William Rehnquist stated,

> We have reaffirmed today that the States as States stand on a quite different footing from an individual or a corporation when

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> challenging the exercise of Congress' power to regulate commerce...Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. We agree that such assertions of power, if unchecked, would indeed, as Justice Douglas cautioned in his dissent in [*Maryland* v.] *Wirtz*, allow "the National Government [to] devour the essentials of state sovereignty," and would therefore transgress the bounds of the authority granted Congress under the Commerce Clause (426 U.S. 833).

However, the Court did not define what constituted "traditional" and "untraditional" and as such chaos and contradiction ensued in future applications. The decision "did not stand alone. When seen in context with decision such as *Younger* v. *Harris* (1971) and *Huffman* v. *Pursue, Ltd.* (1975) it seemed to signal judicial willingness to protect state political and judicial processes" (Kobylka 1986, 26). Nevertheless, just nine years later the same Burger Court with a couple new justices would reverse its attempt to limit the excesses of federal power and embrace cooperative federalism again.

Hunt v. *Washington State Apple Advertising Commission* (1977)

The North Carolina Board of Agriculture passed a regulation in 1972 "that required all closed containers of apples shipped into the state to display either the U.S. Department of Agriculture (USDA) grade or nothing at all. It barred information based on the grading systems of the states in which the apples were grown" (Epstein and Walker 2004, 476). The state of Washington developed its own grading system and as such, placed it on all of its containers and as such, asked the state of North

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Carolina to make an exception, but they refused so the Washington State Apple Advertising Commission (WSAAC) sued citing violation of the Tenth Amendment.

WSAAC argument stated "the law clearly discriminated against interstate commerce in favor of local growers...diminished the marketing advantage of [Washington] state's industry had earned...[and] increased the cost of interstate commerce" (Epstein and Walker 2004, 477). In the court's 8-0 decision (Justice Rehnquist did not participate) they ruled in favor of WSAAC stating

> When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake. North Carolina has failed to sustain that burden on both scores (432 U.S. 333).

Thus, the Burger Court began to embrace cooperative federalism again.

Garcia v. *San Antonio Metropolitan Transit Authority* (1985)

"One of the curious features of the 1976 [*National League of Cities*] decision is that when the Supreme Court remanded the case to a three-judge district court, instead of the district court's determining the difference between traditional and nontraditional functions, it said to the Department of Labor: You figure it out" (Devins and Fisher 2004, 67). Among the items listed as nontraditional, and thus having to abide by the Federal Labor Standards Act, was that of local systems of mass transit.

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After falling into debt in the 1970s, the San Antonio Transit System (SATS), renamed the San Antonio Metropolitan Transit Authority (SAMTA) in 1978, "turned to the federal government for assistance. The federal Urban Mass Transit Administration (UMTA) provided it with a $4 million grant...Between 1970 and 1980, the transit system received more than $51 million or 40 percent of its cost from the federal government" (Epstein and Walker 2004, 353-354). Several employees filed suit against SAMTA demanding overtime pay and the case was brought before the Supreme Court in 1984.

As previously mentioned, *National League of Cities*, and later *Hodel* v. *Virginia Surface Mining and Reclamation Association* (1981), attempted to develop tests for what constituted traditional functions. "Despite a number of attempts to clarify the meaning of these tests, no clear lines had been established by the time of *Garcia*" (Hall 1992, 325). Garcia argued

> There is nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. The States' continued role in the federal system is primarily guaranteed not by any externally imposed limits on the commerce power, but by the structure of the Federal Government itself. In these cases, the political process effectively protected that role. (469 U.S. 528).

The lack of clarity since the 1976 decision saw Justice Harry Blackmun, change his mind and overrule the decision. In the Court's opinion, Blackmun wrote, "we perceive nothing in the overtime and minimum-wage requirements of the FLSA, as applied to SAMTA that is destructive

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of state sovereignty or violative of any constitutional provision" (469 U.S. 528). Blackmun added the Supreme Court has "no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause" (469 U.S. 528). Thus, "the Court should, except in rare and ill-defined circumstances, remain on the sidelines, trusting that state interests will be protected by the 'political safeguards of federalism'" (Pittenger 1992, 1).

Thus, unrestrained cooperative federalism and national supremacy emerged yet again; however, its victory would last only to 1995. Some argued, "*Garcia* interjects a wholly fictitious clause into Article I. It is a clause that commits to Congress the power to decide how far the power to regulate commerce should extend. It is a clause that is not there and doubtless would have ever been adopted" (Van Alstyne 1985, 1727). *Garcia* was only a 5-4 opinion and among the dissenters was William Rehnquist, author of *National League of Cities*. In his dissent, Rehnquist wrote "do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court" (469 U.S. 528). He would not have to wait very long.

Thus, the history of federalism in American history underwent significant changes. From the beginning of the republic to the post-New Deal Court era, dual federalism was the established federalism jurisprudence. However, *Darby* and *Wickard* shattered all existing

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understanding of federalism instituting a new interpretation known as cooperative federalism that allowed the federal government the power to regulate nearly any activity.

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CHAPTER 3

THE REHNQUIST COURT

The Rehnquist Court is notable for its interpretation of federalism. It would reexamine the post-New Deal Courts cooperative federalism jurisprudence and limit the excesses of federal power.

William Hubbs Rehnquist was born October 1, 1924 in Milwaukee, Wisconsin. After serving in World War II he entered Stanford University earning a master's degree in 1949 in Political Science, the best discipline, and another master's degree in Political Science from Harvard University in 1950. He followed those accomplishments with a Juris Doctorate, first in class, from Stanford Law School in 1951. A mere two months later he accepted a position from Supreme Court Justice Robert H. Jackson as a law clerk, a position he would hold until 1953. "The experience of working for Jackson confirmed Rehnquist's conservative instincts" (Tushnet 2005, 14).

As Justice Jackson's clerk, he authored "a memorandum to help the justice prepare for the Court's discussion of the constitutional challenge to officially segregated schools" (Hall 1992, 715). In the memo titled "A Random Thought on the Segregation Cases," Rehnquist wrote several interesting and revealing statements. He argued to uphold the separate

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but equal doctrine established in *Plessy* stating the NAACP's argument "that a majority may not deprive a minority of its constitution right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what he constitutional rights of the majority are" (Tushnet 2005, 19). He also wrote "it was no part of the judicial function to thwart public opinion except in extreme cases" (Tushnet 2005, 19). Thus, it is reasonable to assume that racial segregation was not extreme enough for his point of view. Such statements suggest a lack of moral fiber, but also directly refute necessary tenets of traditional democratic theory that the United States was founded upon, that being protection of minority rights that were clearly violated by segregation.

From 1953-1969 Rehnquist privately practiced law in Phoenix, Arizona where Arizona Senator and 1964 Republican Presidential candidate Barry Goldwater called him "the most conservative lawyer" (Tushnet 2005, 13) he ever met. "From 1969 until 1971 Rehnquist served as assistant attorney general for the Office of Legal Counsel. In that position, he supported executive authority to order wiretapping and surveillance without a court order, no-knock entry by the police (which was recently declared constitutional in *Hudson* v. *Michigan* in June 2006), preventative detention and abolishing the exclusionary rule" (Hall 1992, 715). These positions could be regarded as violating of the Fourth Amendment.

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1971 saw Justice John Marshall Harlan II announced his retirement from the bench, so President Richard M. Nixon nominated Rehnquist as his replacement after much cajoling from Attorney General John Mitchell and Counsel to the President John Dean, two key figures in the upcoming Watergate scandal. During the confirmation hearings the controversial memo written as a law clerk regarding was unearthed and Rehnquist claimed that the memo addressed Jackson's views on the issue, not his, but was written by Rehnquist.

> Most people who have studied the matter believe that it expresses what Rehnquist, not Jackson, thought...Rehnquist later acknowledged that he couldn't remember Jackson's saying that he had been "excoriated by 'liberal' colleagues" for upholding *Plessy*, and that Rehnquist himself had defended *Plessy*—at least for debating purposes—around the lunch table with other law clerks (Tushnet 2005, 20).

Nevertheless, it did not have an effect on the hearings. Following a 68-26 vote in the Senate, Rehnquist was confirmed as an Associate Justice on January 7, 1972.

It would not take long to see Rehnquist's views on federalism. In *Roe*, Rehnquist was one of two dissenters. In his dissent, Rehnquist included a history of anti-abortion statutes dating back to 1821 and concluded

> There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter (410 U.S. 113).

Similarly, this belief in placing some limitations on the excesses of federal power was evident in *National League of Cities* as Rehnquist

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authored the Court's opinion partially reversing *Darby Lumber*. He furthered indicated his position to limit the excesses of federal power in *Moose Lodge* v. *Irvis* (1972), *Columbus* v. *Penick* (1979), *Richmond Newspapers* v. *Virginia* (1980), and *Carter* v. *Kentucky* (1981) and notably dissented in *Garcia* (1985).

In 1986, Chief Justice Warren Burger announced his retirement from the United States Supreme Court. "The Reagan administration had no problem figuring out who to appoint in his place. Rehnquist was an 'intellectual giant' to the conservative lawyers in the Department of Justice and at the White House" (Tushnet 2005, 32). Following a 65-33 vote in the Senate, Rehnquist was confirmed as the sixteenth Chief Justice of the Supreme Court on September 26, 1986. Interestingly, "it was the largest number of negative votes on a successful nomination" (Tushnet 2005, 32) up to that point in American history and only the fourth time an Associate Justice was elevated to the Chief Justice position.

New York v. *United States* (1992)

The Low-Level Radioactive Waste Policy Act of 1980 declared that each state "responsible for providing for the availability of capacity either within or outside the State for the disposal of low-level radioactive waste generated within its borders" (505 U.S. 144). This was due to the states of Nevada, Washington, and South Carolina accepting a disproportionate

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amount of radioactive waste due to having the only facilities to house them. The law and its 1985 amendments placed certain conditions on states that did not comply including graduated surcharges and finally demanding "that states come up with a way to dispose of low-level radioactive waste by 1996 or be forced to become the owners of it" (Devins and Fisher 2004, 52). By 1990, the state of New York was far behind in creating its own facilities and creating a regional pact and thus sued claiming the law violated the Tenth Amendment. After being upheld at the state level, it was appealed to the Supreme Court.

In a 6-3 decision, the Court struck down the Low-Level Radioactive Waste Policy Act. Writing the Court's opinion, Justice Sandra Day O'Connor declared

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," reserved explicitly to the States by the Tenth Amendment (505 U.S. 144).

Thus, states cannot be commanded by Congress, only provide incentives. This anti-commandeering principle is the first key decision indicative of the Rehnquist Court's desire to create some limit to the excesses of federal power that dominated the post-New Deal era.

A significant element of the decision was a dramatic change in the Court's make-up. New to the Court were Anthony Kennedy, Antonin Scalia, David Souter and Clarence Thomas. All of these justices were

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nominees of conservative presidents and favored a judicial check on Congress. Interestingly, Thomas' confirmation "by a 52-48 margin [was] the closest Supreme Court vote in more than a century" (Milkis and Nelson 1999, 365). This make-up would continue issuing decisions that limited the excesses of federal power into the new millennium.

United States v. *Lopez* (1995)

In 1990, Congress passed the Gun-Free School Zone Act citing the Commerce Clause, but they did not provide evidence linking commerce to gun possession on school grounds arguing that if Congress could conclude there was a relationship, then that would be sufficient. Alfonso Lopez Jr., a senior at a San Antonio high school, was arrested for possessing a handgun on school property in March 1992 and sentenced to six months in prison plus parole and fines. "Lopez argued that the simple possession of a weapon on school grounds is not a commercial activity that reasonably falls under the Commerce Clause. Furthermore, the regulation of crime and education are traditional areas of state, not federal, jurisdiction" (Epstein and Walker 2004, 447). The federal court of appeals ruled in favor of Lopez and that decision was appealed to the Supreme Court in 1995.

In a 5-4 decision, Chief Justice Rehnquist wrote the opinion striking down the statute declaring, "The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in

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any way to interstate commerce. We hold that the Act exceeds the authority of Congress" (514 U.S. 549). Solicitor General of the United States, Drew Days, argued for the federal government stating "that possessing guns near schools had a substantial effect on interstate commerce because possessing guns near schools threatens the educational climate, impairing the education children get and thereby producing less well-educated and less productive graduates" (Tushnet 2005, 260).

Rehnquist responded stating "under the theories that the Government presents...it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where the States have historically have been sovereign" (514 U.S. 549). He concluded by declaring,

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do (514 U.S. 549).

It was "the first time since 1936 that the Court had struck a federal law on the basis of the Commerce Clause (Waltenberg and Swinford 1999, 102).

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The opinion did have four dissenters, three of whom filed opinions. Justice Stephen Breyer argued "Congress...had a rational basis for finding a significant (or substantial) connection between gun-related school violence and interstate commerce...As long as one views the commerce connection, not as a 'technical legal conception,' but as 'a practical one'" (514 U.S. 549) citing *Swift & Co.* v. *United States* (1905). Furthermore, he saw a clear connection between school and commerce as "education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy" (514 U.S. 549). He concluded by noting three serious legal problems the decision created that include running

> Contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence..., the Court believes the Constitution would distinguish between two local activities, each of which has an identical effect upon interstate commerce, if one, but no the other, is 'commercial' in nature..., [and] threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled" (514 U.S. 549).

Justice John Paul Stevens added in his dissenting opinion,

> Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession in particular markets (514 U.S. 549).

In the third dissenting opinion, Justice David Souter stated,

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> The Court observes that the Gun-Free School Zones Act operates in two areas traditionally subject to legislation by the States, education and enforcement of criminal law. The suggestion is either that a connection between commerce and these subjects is remote, or that the commerce power is simply weaker when it touches subjects on which the States have historically been the primary legislators. Neither suggestion is tenable (514 U.S. 549).

In his concurring opinion, Justice Clarence Thomas outright declared "we ought to temper our Commerce Clause jurisprudence" (514 U.S. 549). The decision marked the return of what Douglas Ginsburg called the Constitution in Exile. This is "meant to identify legal doctrines that established firm limitations on state and federal power before the New Deal...[and thus] encourage judges to strike down laws on behalf of rights that don't appear explicitly in the Constitution" (Rosen 2005). *Lopez* was by no means a simple case of poor arguments by the government, but followed the example of *New York* and later *Printz, Alden, Morrison,* etc. that there would be a restoration on the limitations to the exercise of federal power. It was a key departure from the New Deal, pre-Rehnquist Court interpretations that would continue with the Court further placing limitations on the excesses of federal power.

Seminole Tribe of Florida v. *Florida* (1996)

> Amendment XI: *The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.*

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Under the Indian Gaming Regulatory Act of 1988, "any Indian tribe having jurisdiction over Indian lands...shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact" (517 U.S. 44).

The Seminole Tribe cited *Pennsylvania* v. *Union Gas Co.* (1989) where "a divided Court ruled that the Commerce Clause permitted Congress to make an exception to the Eleventh Amendment's grant of immunity, holding that the power to regulate commerce 'among several States' would be 'incomplete without the authority to render States liable in damages'" (Epstein and Walker 2004, 372).

In a 5-4 decision, Chief Justice Rehnquist wrote the Court's opinion stating,

> In the five years since it was decided, *Union Gas* has proven to be a solitary departure from established law... In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. Petitioner's suit against the State of Florida must be dismissed for a lack of jurisdiction (517 U.S. 44).

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In his dissent, Justice John Paul Stevens noted "the importance of the majority's decision...cannot be overstated...It prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy" (517 U.S. 44).

In yet another dissent, Justice David Souter noted,

> There is no possible argument that the Eleventh Amendment, by its terms, deprives federal courts of jurisdiction over all citizen lawsuits against the States. Not even the Court advances that proposition, and there would be no textual basis for doing so. Because the plaintiffs in today's case are citizens of the State that they are suing, the Eleventh Amendment simply does not apply to them (517 U.S. 44).

As it pertained to the right for a federal court to hear the case, Souter in a lengthy discussion of history concluded "because neither text, precedent, nor history supports the majority's abdication of our responsibility to exercise the jurisdiction entrusted to us in Article III, I would reverse the judgment of the Court of Appeals" (517 U.S. 44).

However, some argued that the decision was not widely applicable since "Congress has provided a remedy against the state but not against state officials" (Monaghan 1996, 132). However, the application would be expanded in *Alden* v. *Maine* (1999). Detractors of the decision argued it violated Article III of the Constitution and "exemplified the Court's increasingly adamant refusal to countenance the headlong expansion of

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Congress' regulatory power under the Constitution's Commerce Clause" (Waltenberg and Swinford 1999, 121).

Printz v. *United States* (1997)

The 1993 Brady Handgun Prevention Act "required the Attorney General to establish a national instant background check system by November 30, 1998" (521 U.S. 898). It was an addendum to the Gun Control Act of 1968 that forbade the sale of guns to various criminals and mentally unstable individuals. In states that did not have background-checking systems, it mandated that the local chief law enforcement officer (CLEO) "conduct background checks on prospective handgun purchases" (Devins and Fisher 2004, 71). Sheriff Jay Printz of Ravalli County, Montana sued objecting "to being pressed into federal service, and contend[ed] that congressional action compelling state officers to execute federal laws is unconstitutional." (521 U.S. 898) as decreed in *New York*.

In a 5-4 decision, Antonin Scalia wrote the Court's opinion ruling in favor of Printz and striking down the act stating, "it is incontestable that the Constitution established a system of 'dual sovereignty.' Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty,'" (521 U.S. 898) as discussed in *Federalist* No. 37. Citing *New York*, Scalia emphatically added "the mandatory obligation imposed on CLEOs to perform

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background checks on prospective handgun purchases plainly runs afoul" (521 U.S. 898) of the court's 1992 ruling. Furthermore, Scalia added,

> Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case by case weighing of the burdens or benefits is necessary, such commands are fundamentally incompatible with our constitutional system of dual sovereignty (521 U.S. 898).

Among the dissenters was Justice John Paul Stevens who cited the Necessary and Proper Clause and the Tenth Amendment as the basis for the legality of the Brady Handgun Prevention Act.

> The Tenth Amendment imposes no restriction on the exercise of delegated powers...The Amendment confirms the principle that the powers of the Federal Government are limited to those affirmatively granted by the Constitution, but it does not purport to limit the scope or the effectiveness of the exercise of powers that are delegated to Congress. Thus, the Amendment provides no support for a rule that immunizes local officials from obligations that might be imposed on ordinary citizens (521 U.S. 898).

Justice David Souter cited *The Federalist* as the basis of his dissent.

> Hamilton in No. 27 first notes that because the new Constitution would authorize the National Government to bind individuals directly through national law, it could "employ the ordinary magistracy of each [State] in the execution of its laws." Were he to stop here, he would not necessarily be speaking of anything beyond the possibility of cooperative arrangements by agreement. But he then addresses the combined effect of the proposed Supremacy Clause, and state officers' oath requirement, and he states that "the Legislatures, Courts and Magistrates of the respective members will be incorporated into the operations of the national government, as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws." The natural reading of this language is not merely that the

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> officers of the various branches of state governments may be employed in the performance of national functions; Hamilton says that the state governmental machinery "will be incorporated" into the Nation's operation, and because the "auxiliary" status of the state officials will occur because they are "bound by the sanctity of an oath," I take him to mean that their auxiliary functions will be the products of their obligations thus undertaken to support federal law, not of their own, or the States', unfettered choices (521 U.S. 898).

Furthermore, in No. 44 Madison wrote, "the members of the federal government will have no agency in carrying the State constitutions into effect. The members and officers of the State governments, on the contrary, will have an essential agency in giving effect to the Federal Constitution" (Publius 1961, 284). Souter concluded "in light of all these passages, I cannot persuade myself that the statements from No. 27 speak of anything less than the authority of the National Government, when exercising an otherwise legitimate power (the commerce power, say), to require 'auxiliaries' to take appropriate action" (521 U.S. 898).

Alden v. *Maine* (1999)

A group of probation officers brought suit against the state of Maine in 1992 for failure to pay overtime as dictated in the Federal Labor Standards Act. While the suit was pending the Supreme Court ruled in *Seminole Tribe* "even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against

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unconsenting States" (517 U.S. 44). The probation officers' suit was dismissed and appealed to the Supreme Court in 1999.

"*Alden* presented the first opportunity for the Court to determine whether Article I permits Congress to abrogate a states' immunity in its own courts" (Mezey 2000, 32). Writing for the Court's opinion, Justice Anthony Kennedy wrote

> It is unquestioned that the Federal Government retains its own immunity from suit not only in state tribunals but recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege...When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States (527 U. S. 706).

Thus, the suit was dismissed and extended the *Seminole* ruling.

In his dissent, Justice David Souter wrote on the issue of federalism,

> The State of Maine is not sovereign with respect to the national objective of the FLSA. It is not the authority that promulgated the FLSA, on which the right of action in this case depends. That authority is the United States acting through the Congress, whose legislative power under Article I of the Constitution to extend FLSA coverage to state employees has already been decided, see *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985), and is not contested here (527 U. S. 706).

As it pertains to the Framers' intent, he wrote that "the Court abandons a principle...much closer to the hearts of the Framers: that where there is a right, there must be a remedy" (527 U. S. 706). And thus, citizens have no remedy. Indeed, "Eleventh Amendment doctrine today creates vast areas in which the states can operate without much concern about

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federal judicial enforcement of the constitutional or federal statutory rights of individuals" (Doernberg 2002, 149). This is a potentially dangerous predicament. In fact, the decision "may signify that immunity federalism is the Court's new strategy of choice for preserving, or reestablishing, some balance between state and nation" (Young 1999, 51). Again, the Court was limiting the excesses of federal power

United States v. *Morrison* (2000)

In 1994 Congress passed the Violence Against Women Act (VAWA) that

> Provided money for shelters for abused women and for educational programs about violence against women. It made it easier to enforce orders restraining abusive men from approaching their victims by making it a federal crime to cross state lines to harm a person protected by a restraining order. VAWA also had a civil remedy provision, allowing people—mostly women, of course—attacked by others on the basis of their gender to sue the attackers in federal court for damages (Tushnet 2005, 261).

That same year, Virginia Tech student Christy Brzonkala claimed fellow students Antonio Morrison and James Crawford raped her. "So traumatizing was the episode, she related, that she dropped out of school and attempted suicide" (Leuchtenburg 2002, 91). After receiving what she deemed unsatisfactory remedies from the university, she decided to sue the two men and Virginia Tech citing the VAWA. The provision dealing with a federal remedy was the particular issue at hand and the inferior courts ruled against Brzonkala. She appealed to the Supreme Court.

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Unlike in *Lopez*, "Congress had made extensive findings that sexual assaults on women seriously affected their participation in the nation's economy. Women didn't take some jobs that would have been available to them because they were afraid of being assaulted, and they didn't travel from one state to another because of their fears" (Tushnet 2005, 264). Moreover, "Congress amassed findings and compiled a record to demonstrate that domestic violence and sexual assault cost the economy $5 to $10 billion a year" (Devins and Fisher 2004, 72).

Writing the Court's opinion, Chief Justice Rehnquist struck down the civil remedy provision stating,

> Gender motivated crimes of violence are not, in any sense of the phrase, economic activity... As we stated in *Lopez*, "[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." Rather, "[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court"... We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States (529 U. S. 598).

Despite noting Congress' economic findings, the majority dismissed them.

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In a dissenting opinion, Justice David Souter argued against Rehnquist's claim regarding who decides what falls under interstate commerce stating

> Congress has the power to legislate with regard to activity that, in the aggregate, has a substantial effect on interstate commerce. The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact... True, the methodology of particular studies may be challenged, and some of the figures arrived at may be disputed. But the sufficiency of the evidence before Congress to provide a rational basis for the finding cannot seriously be questioned (529 U. S. 598).

He further cited *Turner Broadcasting System, Inc.* v. *FCC* (1997) that stated "the Constitution gives to Congress the role of weighing conflicting evidence in the legislative process" (520 U.S. 180) and finally that "the Act would have passed muster at any time between *Wickard* in 1942 and *Lopez* in 1995, a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause extended to all activity that, when aggregated, has a substantial effect on interstate commerce" (529 U. S. 598).

Justice Stephen Breyer added in his separate dissenting opinion "the Constitution itself refers only to Congress' power to 'regulate Commerce...among the several States,' and to make laws 'necessary and proper' to implement that power. The language says nothing about

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either the local nature, or the economic nature, of an interstate-commerce-affecting cause" (529 U. S. 598). Additionally,

> His most pointed observation was that under the Court's theory, you could have two activities, one economic and other noneconomic, with precisely identical effects on the national economy, and Congress would have the power to regulate the first and not the second, a result Breyer thought entirely inconsistent with the idea underlying the commerce clause (Tushnet 2005, 264).

Nevertheless, was the opinion that drastic of a shift? Not really. It merely applied the rational-basis test established in *Lopez* and when applied here, it failed to pass muster for a majority of justices.

Conclusion

Some have questioned the dissenters of Rehnquist Court decisions stating "by refusing to accept the majority's attempt to breathe life into the federalism doctrine, the dissenters—who include some of the ablest minds on the Court—have missed the opportunity to collaborate in fashioning a meaningful, yet practical, demarcation between the national and the local" (Fried 2000, A29).

In sum,

> First, the Court has systematically shifted the federalism balance toward the states in its expansion of the doctrine of *Younger* v. *Harris* through the 1970s and 1980s. Second, it has greatly increased the scope of state immunity to federal law and federal suits, with both substantive (*Alden* v. *Maine* (1999)) and expanded procedural components (*Seminole Tribe* v. *Florida* (1996)). Third, the Court has narrowed congressional power under the Commerce Clause (*United States* v. *Morrison* (2000) and *United States* v. *Lopez* (1995)). Fourth, it has limited congressional power under Section

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> 5 of the Fourteenth Amendment (*Board of Trustees of the University of Alabama* v. *Garrett* (2001)). Fifth, it has circumscribed congressional power to require states to assist in implementing federal programs (*New York* v. *United States* (1992)) (Doernberg 2005, 129-130).

However, has the Rehnquist Court by placing limitations to the excesses of federal power drastically altered cooperative federalism as evidenced in *Darby Lumber* and *Wickard*? No. The core of those decisions still exists, but the Court has placed some limitations to areas that had previously gone unfettered. As the Rehnquist Court further proceeded into the 21st Century, it would further display that the Court did still rely on the core of cooperative federalism as evidenced in *Nevada Department of Human Resources* v. *Hibbs* (2003), *Granholm* v. *Heald* (2005), *Gonzales* v. *Raich* (2005), *Kelo* v. *City of New London* (2005), and *Gonzales* v. *Oregon* (2006).

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CHAPTER 4

NEVADA DEPARTMENT OF HUMAN RESOURCES v. *HIBBS* (2003)

> Amendment XIV, Section 1: *All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

> Amendment XIV, Section 5: *The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.*

In 1993, Congress passed the Family Medical Leave Act (hereafter FMLA), which sought to "alleviate sexually discriminatory hiring practices. The FMLA allowed for women and men to take three months off from work for family care without being fired" (Perla 2003). Moreover, the law dictates the leave is unpaid and "employees in high-ranking or sensitive positions are simple ineligible for FMLA leave: of particular importance to the States, the FMLA expressly excludes from coverage state elected officials, their staffs, and appointed policymakers" (538 U.S. 721). Furthermore, an employee wasn't eligible until after a year or 1,250 hours of service.

William Hibbs, an employee of the Nevada Department of Human Resources utilized the FMLA when his wife was involved in a serious

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automobile accident and required neck surgery. "In addition, Hibbs was worried that his wife's depression, which was caused by the pain medication she was taking, required round-the-clock attention" (Perla 2003). He requested and received the maximum of 12 weeks of unpaid leave. Hibbs did not return to work after his allotted leave and as such was fired.

Hibbs filed suit in federal district court and lost due to the Court's belief that the suit violated the Eleventh Amendment of the Constitution. He appealed and that decision was reversed with the Ninth Circuit Court ruling "the FMLA should be treated differently because the FMLA is aimed at remedying gender discrimination, which is subject to heightened scrutiny" (Perla 2003). The case was then granted certiorari by the Supreme Court. It was argued January 15, 2003 and decided May 27, 2003.

In a 6-3 decision, the Court ruled in favor of Hibbs. Chief Justice Rehnquist delivered the majority opinion (concurring were O'Connor, Souter, Ginsburg, Stevens and Breyer). In doing so, he took special care to note that the decision was not a departure from the Court's previous Eleventh Amendment jurisprudence as evidenced in *Seminole Tribe* and *Board of Trustees of Univ. of Alabama* v. *Garrett* (2001), but rather an example of how those decisions could be utilized to successfully challenge the statute. "We have made clear that the Constitution does not provide for federal jurisdiction over suits against non-consenting

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states. Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statue and acts pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment" (538 U.S. 721). The FMLA stated "an action to recover the damages or equitable relief prescribed in paragraph 1 may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction" (29 U.S.C. §2617(a)(2)). Obviously, the government would classify as a public agency and as such is applicable. As such, the FMLA relied on Sections 1 and 5 of the Fourteenth Amendment as its source of power as determined in *Fitzpatrick* v. *Bitzer* (1976). "In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct" (538 U.S. 721).

City of Boerne v. *Flores* (1997) established a test by which the Court can determine if a statute is a valid exercise of the Fourteenth Amendment. The test must show "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" (521 U.S. 507). Furthermore, the Court ruled in *Craig* v. *Boren* (1976) "statutory classifications that distinguish between males and females are subject to heightened scrutiny" (538 U.S. 721) and thus not the rational-basis test. Indeed, "what separates *Hibbs* from its

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predecessors is the Court's characterization of the constitutional right protected and the nature of the discrimination" (W. Williams 2004, 327).

Rehnquist openly admitted the Court's chauvinistic history as it pertained to gender discrimination. Some scholars claim "such honesty suggests that the Court may have been predisposed to accepting Congress's evidence of statewide gender discrimination" (Williams 2004, 328). The evidence in question involved Bureau of Labor Statistics surveys that showed a widening gap (33 percent to 16 percent in one year to 37 percent to 18 percent the next) of available leave between females and males following childbirth. Other data showed "many States offered women extended 'maternity' leave that far exceeded the typical 4- to 8-week period of physical disability due to pregnancy and childbirth, but very few States granted men a parallel benefit: Fifteen States provided women up to one year of extended maternity leave, while only four provided men with the same" (538 U.S. 721). The Court saw this as a clear example of gender discrimination. Furthermore, when debating the merits of the FMLA, "Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways" (538 U.S. 721) often via individual discrimination of those person in positions of power.

Rehnquist then detailed the states lackluster record in dealing with gender discrimination. Admittedly, states began to address the issue

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before the federal government; nonetheless, their actions possessed numerous shortcomings.

> First, seven States had childcare leave provisions that applied to women only. Indeed, Massachusetts required that notice of its leave provisions be posted only in "establishment[s] in which females are employed." These laws reinforced the very stereotypes that Congress sought to remedy through the FMLA. Second, 12 States provided their employees no family leave, beyond an initial childbirth or adoption, to care for a seriously ill child or family member. Third, many States provided no statutorily guaranteed right to family leave, offering instead only voluntary or discretionary leave programs. Three States left the amount of leave time primarily in employers' hands. Congress could reasonably conclude that such discretionary family-leave programs would do little to combat the stereotypes about the roles of male and female employees that Congress sought to eliminate. Finally, four States provided leave only through administrative regulations or personnel policies, which Congress could reasonably conclude offered significantly less firm protection than a federal law. Against the above backdrop of limited state leave policies, no matter how generous petitioner's own may have been, Congress was justified in enacting the FMLA as remedial legislation. In sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic Section 5 legislation (538 U.S. 721).

Since gender discrimination falls within the realm of higher scrutiny and not rational-basis review it differs from decisions in *Kimel* and *Garrett*. "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test—it must 'serv[e] important governmental objectives' and be 'substantially related to the achievement of those objectives'" (538 U.S. 721). Furthermore, those cases dealt with extremely broad laws, while "two characteristics of the FMLA distinguish it from the previous antidiscrimination legislation. Firstly, Congress did not redefine the

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constitutional right which the FMLA sought to protect. Second, the FMLA had a narrower scope, aimed solely at remedying the pattern of gender discrimination in employers' family-leave policies, than the previous legislation" (W. Williams 2004, 330). For example, the Court found in *Boerne* that the Religious Freedom Restoration Act's "sweeping coverage ensured its intrusion at every level of government, displacing law and prohibiting official actions of almost every description and regardless of subject matter" (521 U.S. 507). However, in *Hibbs* the Court found that the FMLA was "congruent and proportional to its remedial object" (538 U.S. 721).

Among those penning brief concurring opinions were Justices Souter and Stevens. Souter stated the decision was in line with his Section 5 jurisprudence dating back to his dissents in *Seminole Tribe* and *Kimel*. Justice Stevens noted in his concurrence that there is no doubt that the Eleventh Amendment could not dismiss the case and cites the Commerce Clause as the basis. "Accordingly, Nevada's sovereign immunity defense is without merit" (538 U.S. 721).

Justice Kennedy wrote the primary dissent. The dissent targeted the majority's claim that the FMLA was a remedial program and instead insisted it was an entitlement program, as well as, an overall lack of evidence. "The evidence to substantiate this charge must be far more specific, however, than a simple recitation of a general history of employment discrimination against women" (538 U.S. 721). Kennedy

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also pointed out numerous irregularities in the majority's evidence such as the statistics used are those which polled the private sector and thus not the state which would obviously fall in the public sector. Moreover, certain laws discussed involved parenting leave, while the case at hand dealt with caring for any family member. Regarding individual discrimination Kennedy wrote, "even if there were evidence that individual state employers, in the absence of clear statutory guidelines, discriminated in the administration of leave benefits, this circumstance alone would not support a finding of a state-sponsored pattern of discrimination" (538 U.S. 721).

The dissent also picked apart the argument of the states not offering equal family leave to their employees. It

> Boils down to the fact that three States, Massachusetts, Kansas, and Tennessee, provided parenting leave only to their female employees, and had no program for granting their employees (male or female) family leave. As already explained, the evidence related to the parenting leave is simply too attenuated to support a charge of unconstitutional discrimination in the provision of family leave. Nor, as the Court seems to acknowledge, does the Constitution require States to provide their employees with any family leave at all. A State's failure to devise a family leave program is not, then, evidence of unconstitutional behavior (538 U.S. 721).

Interestingly, Kennedy stated that those who felt discriminated against by the state could still sue utilizing the Commerce Clause. In summation, Kennedy stated

> What is at issue is only whether the States can be subjected, without consent, to suits brought by private persons seeking to collect moneys from the state treasury. Their immunity cannot be abrogated without documentation of a pattern of unconstitutional acts by the States, and only then by a congruent and proportional

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> remedy. There has been a complete failure by respondents to carry their burden to establish each of these necessary propositions (538 U.S. 721).

The majority's use of evidence is particularly interesting because "n *Kimel*, the Court limited its search for evidence before Congress to the legislative history of the ADEA. Similarly, when searching for evidence before Congress in the *Garrett* case, the Court looked only to the legislative history of the ADA, and not to the general history of state discrimination against the disabled" (MacConaill 2005, 853).

In a separate dissenting opinion, Justice Scalia brandished the majority for lumping the states together "as some sort of collective entity which is guilty or innocent as a body" (538 U.S. 721) and instead must examine "whether the State has itself engaged in discrimination sufficient to support the exercise of Congress's prophylactic power" (538 U.S. 721).

Hibbs was a monumental decision because "although the Court's early decisions clarified what legislation would *not* satisfy the congruence and proportionality test, it was not until *Hibbs* that we learned what legislation would pass the test" (W. Williams 2004, 318). This precedent would be critical in future cases that attempt to invoke Section 5 of the Fourteenth Amendment, such as *Tennessee* v. *Lane* (2004) that successfully argued that disabled persons can sue the state if not provided handicap-accessible government facilities. Some even suggested "given the growing criticism of the congruence and

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proportionality test, it would not be unreasonable to speculate that the Court sought a case that would validate its test by offering a modern example of congruent and proportional legislation" (W. Williams 2004, 336). Nevertheless, the majority of scholars viewed the act as a retreat from its previous Eleventh and Fourteenth Amendment jurisprudence laid out since *Seminole Tribe*.

Furthermore, the victory "was important more for doctrinal and symbolic reasons than for practical ones: if Mr. Hibbs had lost, the practical result would have been limited to the 3.4 percent of the workforce comprised of state employees. Yet *Hibbs* was of vital importance, both for work/family advocates and for constitutional law" (J. Williams 2004, 368).

The votes of Rehnquist and O'Connor surprised many scholars (Rehnquist more than O'Connor). Rehnquist ensures to mention that the decision was not a departure from *Seminole Tribe*, et al. and thus, not a radical change. Some scholars argue his vote could be based on personal history as he cared for "a terminally ill wife...and sometimes left work early to help out his daughter (a single mother and a lawyer) had child care problems" (J. Williams 2004, 374-375). Some have speculated that his traditional conservatism is partially to credit. As Assistant Attorney General, Rehnquist felt the Equal Rights Amendment was dangerous and could lead to "nothing less than the sharp reduction in importance of the family unit, with the eventual elimination of that unit

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by no means improbable" (Mayeri 2004, 814). Similarly, O'Connor's personal history could be somewhat accountable for her vote. O'Connor "has an established track record on family caregiving issues...She cut back to part-time work for seven years in order to raise her children" (J. Williams 2004, 374).

The decision was a big victory for women's groups who "hailed the ruling not only for its explicit statement that Congress has more leeway to pass laws combating gender discrimination than other forms of bias, such as age and disability" (Mauro 2003). The decision was a clear victory for civil rights advocates as well, but they nonetheless found error in the judgment. Some find the Court's "premise that there are some types of discrimination that really matter, while others types of discrimination do not matter even enough to allow congressional action" (Chemerinsky 2004, 99) unjust since it is not applicable to age and disability.

Others found that the decision merely represented another example of the Supreme Court unjustly overruling Congress like a patriarch would a son or daughter. The Court "substituted its own judgment for that of Congress in reviewing the weight of the congressional findings abut he need for prophylactic legislation and the appropriate statutory remedy for the asserted injury" (Bucholtz 2003-2004, 84). Such action is very much indicative of the post-New Deal Courts. The "decision suggests...the existence of a line in the sand the Court is not willing to cross. This

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Court is ready to require more from a state challenging a congressional attempt to remedy discrimination that implicates the core of the Fourteenth Amendment" (MacConaill 2005, 855).

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CHAPTER 5

GRANHOLM v. *HEALD* (2005)

> Amendment XXI, Section 2: *The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.*

The issue of liquor is one that is omnipresent in American constitutional law. In fact, there are two of only twenty-seven amendments devoted it. The Eighteenth Amendment prohibited it, while the Twenty-first Amendment repealed that prohibition and added the section above.

The growth of the Internet in the 1990s and 2000s saw an explosion of wineries many of which are small and family-operated. In order to reduce costs and be profitable, many of these wineries utilize direct shipping of their liquors to consumers. "Direct sales to consumers account for $350 million in annual sales from the more than 3, 200 wineries in this country" (Greenhouse 2005). Each state possesses "a three-tiered system: liquor producer to licensed wholesaler to licensed retailer" (Stout 2005) for the distribution of liquor, thus direct shipping eliminates the wholesaler and retailer from the equation. Some 24 states ban direct shipping from out-of-state wineries. Among those states are Michigan and New York.

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Granholm is combination of cases brought by plaintiffs arguing against both the Michigan and New York statutes. "Under Michigan law, wine producers, as a general matter, must distribute their wine through wholeslaers. There is, however, an exception for Michigan's approximately 40 in-state wineries, which are eligible for 'wine maker' licenses that allow direct shipping to in-state consumers" (544 U.S. 460). Meanwhile, New York's law is less obvious.

> It channels most wine sales through the three-tier system, but it too makes exceptions for in-state wineries. As in Michigan, the result is to allow local wineries to make direct sales to consumers in New York on terms not available to out-of-state wineries. Wineries that produce wine only from New York grapes can apply for a license that allows direct shipment to in-state consumers. These licensees are authorized to deliver the wines of other wineries as well, but only if the wine is made from grapes "at least seventy-five percent the volume of which were grown in New York state." An out-of-state winery may ship directly to New York consumers only if it becomes a licensed New York winery, which requires the establishment of "a branch factory, office or storeroom within the state of New York" (544 U.S. 460).

The plaintiffs in both cases "claimed that the Michigan liquor Laws were in violation of the Commerce Clause of the U.S. Constitution because they discriminated against interstate sales and delivery of wine, thereby providing a direct economic advantage to in-state businesses and interfering with the free flow of commerce (Gerwin and Saylor 2005). However, these cases address the dormant Commerce Clause. That is the "implicit limitation it places on state legislative power. In other words, the negative implication of the Commerce Clause is that states may not exercise similar power in an explicit area of federal

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congressional authrotiy. The dormant Commerce Clause thus limits the ability of states to regulate their own commerce in a way that could impact interstate commerce" (Ballard 2006, 307).

In a 5-4 decision, the Court ruled for the plaintiffs stating "the laws in both States discriminate against interstate commerce in violation of the Commerce Clause and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment" (544 U.S. 460). Writing for the majority (which included Scalia, Souter, Ginsburg and Breyer), Anthony Kennedy began citing *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore* in which the Court determined that "differential treamtment of in-state and out-of-state economic interests that benefits the former and burdens the latter" (511 U.S. 93) is violative of the Commerce Clause. He further stated,

> The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests. Rivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented (544 U.S. 460).

This principle is very similar to the anti-commandeering principle established in *New York* v. *United States* (1992).

In an exhaustive discussion of liquor law since the 1880s, Kennedy notes two principles established by the Court prior to the 18th Amendment. "First, the Court held that the Commerce Clause prevented States from discriminating against imported liquor...Second, the Court

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held that the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce" (544 U.S. 460). In 1917, Congress passed and overrode President William Howard Taft's veto of the Webb-Kenyon Act which stated,

> That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise (544 U.S. 460).

However, Webb-Kenyon did not give states the right to discriminate. Instead, Kennedy states "the Wilson Act reaffirmed, and the Webb-Kenyon Act did not displace, the Court's line of Commerce Clause cases striking down state laws that discriminated against liquor produced out of state. The rule of *Tiernan*, *Walling*, and *Scott* remained in effect: States were required to regulate domestic and imported liquor on equal terms" (544 U.S. 460).

The Court then turned to the Twenty-first Amendment. The Court found "the aim...was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time" (544 U.S.

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460). Following the Twenty-first Amendment's ratification in December 1933 through 1940, the Court ruled in numerous cases that the Amendment permitted discrimination such as *State Bd. Of Equalization of Cal.* v. *Young's Market Co.* (1936). The majority found these decisions to be "inconsistent with history." Also note that such decisions were before the post-New Deal Era and the introduction of *Wickard.*

The Court instead relied on recent cases dealing with the Section 2 of the Twenty-first Amendment. "First, the Court has held that state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment...Second, the Court has held that Section 2 does not abrogate Congress' Commerce Clause powers with regard to liquor" (544 U.S. 460). In fact, in *Hostetter* v. *Idlewild Liquor Corp.* (1964) the Court ruled

> To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* "repealed," then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect (377 U.S. 324).

The Court then definitively ruled "the Court has held that state regulation of alcohol is limited by the nondiscrimination principle of Commerce Clause" (544 U.S. 460). This was most pronounced in *Bacchus Imports Ltd.* v. *Dias* (1984) when the Court ruled "the central purpose of the Amendment was not to empower States to favor local

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liquor industry by erecting barriers to competition" (468 U.S. 263). Thus, the three-tier system utilized in states is constitutional as long as it is applicable to everyone, including in-state wineries.

Lastly, Michigan and New York argue there are "two primary justifications for restricting direct shipments from out-of-state wineries: keeping alcohol out of the hands of minors and facilitating tax collection" (544 U.S. 460). Both the Court found to be weak stating that minors are less likely to drink wine than other forms of alcohol and that a simple adult signature requirement upon delivery would suffice. However, that does pose an interesting question if the item of commerce were beer or liquor that are more likely to be consumed by minors. As for taxation, "if licensing and self-reporting provide adequate safeguards for wine distributed through the three-tier system, there is no reason to believe they will not suffice for direct shipments" (544 U.S. 460). The majority of the Court thus concluded "if a State chooses to allow direct shipment of wine, it must do so on evenhanded terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand" (544 U.S. 460). Thus, the Court's interpretation of the Commerce Clause was very much an expansive one as evident since *Wickard*.

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The dissenters in the case were Stevens, Thomas, O'Connor and Rehnquist. Stevens penned a dissenting opinion emphasizing the original intent and contemporary rulings of the period. He argued

> Today many Americans, particularly those members of the younger generations who make policy decisions, regard alcohol as an ordinary article of commerce, subject to substantially the same market and legal controls as other consumer products. That was definitely not the view of the generations that made policy in 1919 when the Eighteenth Amendment was ratified or in 1933 when it was repealed by the Twenty-first Amendment...The views of judges who lived through the debates that led to the ratification of those Amendments are entitled to special deference. Foremost among them was Justice Brandeis, whose understanding of a State's right to discriminate in its regulation of out-of-state alcohol could not have been clearer (544 U.S. 460).

He then regurgitated the 1933-1940 decisions that held this view. Nevertheless, he concluded by noting, "today's decision may represent sound economic policy and may be consistent with the policy choices of the contemporaries of Adam Smith who drafted our original Constitution" (544 U.S. 460). Alcohol is obviously an item of commerce and any reasonable reading of the Commerce Clause suggests that it is not exceptional. Indeed, to make it exceptional would severely undermine the Commerce Clause's legitimacy.

Justice Thomas wrote a far lengthier dissent questioning the majority's interpretation of history. He particularly emphasizes the Webb-Kenyon Act "because that Act's language displaces any negative Commerce Clause barrier to state regulation of liquor sales to in-state consumers" (544 U.S. 460). He further argues that Michigan and New York laws

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> are within the Webb-Kenyon Act's terms and therefore do not run afoul of the negative Commerce Clause. Those laws restrict out-of-state wineries from shipping and selling wine directly to Michigan and New York consumers. Any winery that ships wine directly to a Michigan or New York consumer in violation of those state-law restrictions is a "person interested therein" "intend[ing]" to "s[ell]" wine "in violation of" Michigan and New York law, and thus comes within the terms of the Webb-Kenyon Act (544 U.S. 460).

Furthermore, he argued *Clark Distilling Co.* v. *Western Maryland R. Co.*, (1917) established that Webb-Kenyon's "purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws" (242 U.S. 311). Based on this history of the Webb-Kenyon Act alone, Thomas concludes that Michigan and New York are allowed to discriminate. Nevertheless, he entertains the Twenty-first Amendment, Section 2 argument.

Again, Thomas argued that when viewed through that lens, the discrimination laws are constitutional.

> Though the Twenty-first Amendment mirrors the basic terminology of the Webb-Kenyon Act, its language is broader, authorizing States to regulate all "transportation or importation" that runs afoul of state law. The broader language even more naturally encompasses discriminatory state laws. Its terms suggest, for example, that a State may ban imports entirely while leaving in-state liquor unregulated, for they do not condition the State's ability to prohibit imports on the manner in which state law treats domestic products (544 U.S. 460).

He also reinforced Justice Stevens' assertion of contemporary interpretations that upheld discriminatory laws should be given deference. Interestingly,

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> though the dissents reached an outcome somewhat similar to those in early cases, their conceptual approach is as different from the Court's approach in those cases as is the majority's in *Granholm.* The Court in the 1930s refused to consider the history of Section Two, and without considering that history, it is impossible to arrive at either the *Granholm* majority's or dissents' positions, which all require Section Two to mean something other than what the text suggests (Nielson 2006, 753).

It should also be mentioned that Thomas' strict constructionist ideology would assumedly cause his dissent since the majority relies on the implicit.

Perhaps his most damaging argument is in regard to the Court's usage of *Bacchus.* "This is odd, because the Court does not even mention, let alone apply, the 'core concerns' test that *Bacchus* established. The Court instead *sub silentio* casts aside that test, employing otherwise-applicable negative Commerce Clause scrutiny and giving no weight to the Twenty-first Amendment and the Webb-Kenyon Act" (544 U.S. 460). The Court should have "considered the legitimacy of the local interest asserted by the states [by] weighing them against the federal interest" (Williams 2006, 634). Thus, the Court utilized its expansive *Wickard* interpretation of the Commerce Clause. He concluded "the Court does this Nation no service by ignoring the textual commands of the Constitution and Acts of Congress. The Twenty-first Amendment and the Webb-Kenyon Act displaced the negative Commerce Clause as applied to regulation of liquor imports into a State. They require sustaining the constitutionality of Michigan's and New York's direct-

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shipment laws" (544 U.S. 460). In sum, "his dissent reflected the belief that the majority insisted on making policy decisions that were ultimately better left to the states" (Ballard 2006, 317).

The Court's decision is very much an extension of its Commerce Clause jurisprudence since *Wickard.* Indeed, the Court placed emphasis on the post-New Deal Court's interpretation of the Twenty-first Amendment and the Webb-Kenyon Act and outright stated that the 1933-1940 decisions were false. Furthermore, the Court relied on implicit language that is not found in the Constitution furthering its ability to regulate anything and everything that falls within the realm of commerce. Critics of the dormant Commerce Clause cited "the inconsistent application and use of imprecise criteria when [the Court] does apply the doctrine...Some commentators have based their criticisms...on the source of the Court opinions, calling for the Privileges and Immunities Clause to serve the function that the dormant Commerce Clause now performs" (Ballard 2006, 319).

"It is plain that those who favor free markets have reason to celebrate the Court's holding, which obliterated laws that appear to be motivated be rent seeking" (Nielson 2006, 750). There is no doubt the laws were discriminatory and furthermore "no member of the Court...fails to recognize the legitimacy of the antidiscrimination principle, although Justice Thomas ahs written it is not found in the dormant Commerce Clause but instead in the Import-Export Clause" (Nielson 2006, 752).

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The potential damage of course involves the three-tier system utilized in the states. The ruling has the potential to damage wholesalers and retailers by simply bypassing them. Indeed, "while the three-tier system is constitutionally permissible, it is not constitutionally mandated" (Rutledge and Daniels 2006, 55). However, it is unlikely that many wine consumers will make their purchases online in the immediate future. However, as the Internet continues to grow it could become more hazardous. "Hours after the ruling the head of Michigan's Liquor Control Commission, Nida Samona, said at a telephone news conference that she would urge the state's Legislature to prohibit all direct sales" (Greenhouse 2005).

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CHAPTER 6

GONZALES v. *RAICH* (2005)

The year 2005 saw a clear indication that the Rehnquist Court was not undergoing a federalism revolution. Tackling the issue of medical marijuana, the opinion was a clear reinforcement of the Court's belief in cooperative federalism.

In 1970, "Congress set out to enact legislation that would consolidate various drug laws on the books into a comprehensive statute, provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs" (000 U.S. 03-1454). The result was the Comprehensive Drug Abuse Prevention and Control Act of 1970. In the act, Congress divided various narcotics into different levels called schedules. Marijuana was, and is still today, categorized as a Schedule I drug "because of [a] high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment" (000 U.S. 03-1454). Interestingly, "as a young lawyer in the Nixon White House, Rehnquist helped to write the Controlled Substances Act" (Gardner 2004).

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Angel Raich is a California resident who suffered from an inoperable cancerous brain tumor. "She has tried 35 approved medications for relief of seizures and constant pain. None of them has worked, but marijuana has been a godsend" (Kilpatrick 2004, 11B). She was able to use marijuana for treatment since California passed the Compassionate Use Act of 1996.

> The proposition was designed to ensure that "seriously ill" residents of the State have access to marijuana for medical purposes, and to encourage Federal and State governments to take steps toward ensuring the safe and affordable distribution of the drug to patients in need. The Act creates an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician (000 U.S. 03-1454).

Raich was unable to cultivate the marijuana herself, so she had two friends, also named in the suit as John Does, do so. Another plaintiff in the case is Diane Monson who suffers from "chronic back pain and spasms" (Leef 2005). She cultivated the marijuana herself. In sum, "11 states [have] legalized the use of marijuana for patients under a doctor's care" (Mears 2005).

"On August 15, 2002, county deputy sheriffs and agents from the federal Drug Enforcement Administration (DEA) came to Monson's home...[and] after a 3-hour standoff, the federal agents seized and destroyed all six of her cannabis plants" (000 U.S. 03-1454). This caused the plaintiffs to file suit in October 2002 "charg[ing] that Attorney General John Ashcroft and the DEA administrator, Karen Tandy, had

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violated the[ir] constitutional rights" (Leef 2005). The plaintiffs cited the Tenth Amendment, Commerce Clause, Due Process Clause of the Fourteenth Amendment, and doctrine of medical necessity in particular. When the case reached the Ninth Circuit Court of Appeals, they ruled in favor of Raich. They "concluded use of medical marijuana was non-commercial, and therefore not subject to congressional oversight of 'economic enterprise'" (Mears 2005). Indeed, the Court's decision would be an interesting one. "It gave the conservatives a choice: uphold the Ninth Circuit's ruling favoring individuals engaged in the *wholly intrastate non-economic activity* of growing and consuming cannabis for medical purposes as recommended by a doctor and permitted by state law *or* retreat from the landmark Commerce Clause decisions" (Barnett 2005) in *Lopez* and *Morrison.*

In a 6-3 decision, the Court held against Raich "ruling that the federal government can still ban possession of [marijuana] in states that have eliminated sanctions for its use in treating symptoms of illness" (Lane 2005, A01). However, it did not strike down the state laws. Writing for the majority (which included Justices Souter, Ginsburg, Breyer, and interestingly Kennedy and Scalia), Justice John Paul Stevens noted that the "respondents' challenge is actually quite limited; they argue that the CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds

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Congress' authority under the Commerce Clause" (000 U.S. 03-1454). Some critics decried that "from a practical standpoint, any possibility of using the Commerce Clause to regulate non-commercial activity appears doomed" (Kramer 2001, 143) after *Morrison*, however, *Raich* shows that to be false. The opinion rested largely on three previous court cases, *Wickard* v. *Filburn* (1942), *Lopez*, and *Morrison*.

As previously mentioned, in *Wickard*, the Court ruled "that Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that the failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity" (317 U.S. 111). The plaintiffs detailed three areas that their case differed from *Wickard*, however, Stevens wrote "those differences, though factually accurate, do not diminish the precedential force of this Court's reasoning" (000 U.S. 03-1454). Furthermore,

> In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. 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. Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, we have no difficulty concluding that 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. Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress was acting well within its authority to "make all Laws which shall be necessary and proper" to "regulate Commerce ... among the several

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> States." 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. (000 U.S. 03-1454).

It is the larger scheme issue that would again invoke *Lopez* and *Morrison*.

"Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal," Justice Stevens added. The key distinction is not only that the CSA was part of a comprehensive action, thus the act itself would have to be accused, but also that it dealt with issues that are "quintessentially economic...Because the CSA is a statute that directly regulates economic, commercial activity, our opinion in *Morrison* casts no doubt on its constitutionality" (000 U.S. 03-1454). Furthermore, the plaintiffs did not question Congress' power to pass the act.

Among the concurring justices were Anthony Kennedy and Antonin Scalia—two conservative federal power limitation supporters. Some question Kennedy's vote since he did not file a concurring opinion. However, some have suggested "Kennedy, it has been clear for some time, has little tolerance, judicial or otherwise, for those who are users of drugs, or who resist drug control measures" (Dennison 2005). He silently voted in favor of anti-drug positions in *U.S.* v. *Oakland Cannabis*

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Buyers' Cooperative (2001) and *Board of Education of Independent School District No. 92 of Pottawatomie County* v. *Earls* (2002).

As for Scalia, he filed a concurring opinion outlining his stance. The key for him was the Necessary and Proper Clause. He noted,

> Activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone...[And] the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce (000 U.S. 03-1454).

Thus, since cultivation of marijuana by Californians possessed an effect on interstate commerce, the Necessary and Proper Clause allows Congress to regulate the activity. Now, on the surface it appeared to be a retreat from his previous jurisprudence, however, it is actually merely a tempering. He continued,

> *Lopez* and *Morrison* affirm that Congress may not regulate certain "purely local" activity within the States based solely on the attenuated effect that such activity may have in the interstate market. But those decisions do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation; *Lopez* expressly disclaimed that it was such a case and *Morrison* did not even discuss the possibility that it was. To dismiss this distinction as "superficial and formalistic," is to misunderstand the nature of the Necessary and Proper Clause, which empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation" (000 U.S. 03-1454).

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The key then is the presence of "a more comprehensive scheme of regulation" (000 U.S. 03-1454). This particular case possessed it, while the others did not. He was not reversing himself, but merely noting that in a particular instance, when a comprehensive scheme is present, the Necessary and Proper Clause can be extended to intrastate activity. This is a cooperative federalism notion.

Furthermore, he noted, "neither respondents nor the dissenters suggest any violation of state sovereignty of the sort that would render this regulation 'inappropriate,'—except to argue that the CSA regulates an area typically left to state regulation. That is not enough to render federal regulation an inappropriate means" (000 U.S. 03-1454). However, he left wide open the potential of arguing the case with the Tenth Amendment as the focus.

Justice O'Connor based her opinion on the Tenth Amendment, particularly noting the state's police power. "This case exemplifies the role of States as laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens" (000 U.S. 03-1454). Thus, Congress does not have the authority to regulate such matters. She further argued that the lack of findings and statistics harm the case.

> Even assuming that economic activity is at issue in this case, the Government has made no showing in fact that the possession and use of homegrown marijuana for medical purposes, in California or elsewhere, has a substantial effect on interstate commerce...There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a

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> 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" (000 U.S. 03-1454).

That is an interesting argument; however, to O'Connor the case did not pass her rational-basis review test. Finally, she rested her argument on *Lopez*, which stated "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question" (514 U.S. 549). However, "if one really believes in the laboratories concept, one should want to free the states to conduct their policy experiments, not to empower judges to decide which experiments are the good ones and which are the bad" (Althouse 2005, 788).

In the case, the Court reaffirmed its cooperative federalist beliefs noting that there are areas that fall well within the bounds of federal power. They employed the rational-basis test established in *Lopez* and in this instance it passed. The Court ruled in favor of Congress regulating an intrastate noneconomic activity by citing its exhaustive precedents, most notably that of the post-New Deal era's *Wickard* decision. However, it is not a watershed case marking the death of *Lopez* and *Morrison*. "All a future Court need to do to reconcile *Raich* with *Lopez* is to stress that [the] congressional findings satisfy the heightened rationality review implicit in *Lopez*" (Barnett 2005, 747). Moreover, "*Raich* did not overrule *Lopez* and *Morrison*. The anti-commandeering principle remains...It is

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also possible that in a case presenting a less politically charged topic than medical marijuana, the Court will return to its project of policing at least an outer limit to the powers of Congress" (Reynolds and Denning 2005, 933).

Lastly, the true legacy of the *Raich* decision may be the revelation of a clear distinction between members of the conservative faction. Firstly, "one of the lessons relate to Justices Kennedy and O'Connor. Although they have provided the crucial fourth and fifth votes, they (especially Justice Kennedy) have also been decidedly more nationalist than many observers have realized" (Claeys 2005, 792). Indeed, Kennedy voted with the liberal bloc in both *Kelo* and *Oregon*, and O'Connor would in *Oregon* as well. Nevertheless, as will be demonstrated, those cases do not challenge *Lopez* and *Morrison* and actually exacerbate them. Furthermore, the staunch conservatives Thomas and Scalia differed.

> Thomas represents the views of "originalists," who seek above all else to identify and follow the original meaning of the relevant constitutional text. Scalia represents the views of "judicial minimalists," who seek above all else to develop rules that minimize the interpretive and policymaking discretion of federal judges. Although originalism and minimalism complement one another in many cases, they do not always do so and Raich marks the New Federalism case where these two approaches diverged (Claeys 2005, 791).

This is quite interesting. However, the true key is how conservative are new appointees John Roberts and Samuel Alito? "Further, *Raich* continued the Supreme Court's uninterrupted practice of rejecting as-

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applied challenges to federal statutes, and is likely to preclude any such suits in the future" (Adler 2005, 751).

Despite losing the decision, Angel Raich has begun litigation again on the issue. This time she has "narrow[ed] the matter to the right to life theory: that marijuana should be allowed if it is the only viable option to keep a patient alive or free of excruciating pain" (Kravets 2006, 9A). Her case was argued in March 2006 in front of the Ninth Circuit Court of Appeals that ruled in her favor in 2003. As of publication time, the case had not been decided. Nevertheless, "even if it is successful, the case would be unlikely to stop the federal raids on pot clubs or protect most users and suppliers" (Kravets 2006, 9A). Moreover, it is not a case dealing with federalism. However, this author believes if the case reaches the Supreme Court, Raich will again be ruled against since there is no unequivocal test to determine that marijuana is the *only* drug that alleviates suffering.

Those who argue that the Rehnquist Court dismantled the 1937 Constitutional Revolution need to look no further than the *Raich* decision. It was firm in supporting its precedent in *Wickard* and applied its rational-basis review to determine the outcome, which of course is conservative.

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CHAPTER 7

KELO v. *CITY OF NEW LONDON* (2005)

> Amendment V: *No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;* ***nor shall private property be taken for public use, without just compensation.***

The Takings Clause of the Fifth Amendment was applied to state action via the Fourteenth Amendment Due Process Clause (property) in Chicago, Burlington & Quincy Railroad Co. v. Chicago (1897). In the opinion, Justice John Marshall Harlan wrote "the conclusion of the court on this question is that, since the adoption of the fourteenth amendment, compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal constitution" (166 U.S. 226). In January 2000, the City of New London, Connecticut approved of a plan to "seize 15 properties from private owners and transfer the real estate to private developers for later hotel, office and conference center projects" (Harney

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2005, F01) citing the power of the Takings Clause of the Fifth Amendment that states "nor shall private property be taken for public use, without just compensation." This Takings Clause, also known as power of eminent domain, was the key issue in the case. Moreover, the entity that was to develop the property was a private one.

The City of New London (hereafter 'City') argued that

> Decades of economic decline led a state agency in 1990 to designate the City a "distressed municipality." In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people. In 1998, the City's unemployment rate was nearly double that of the State, and its population of just under 24,000 residents was at its lowest since 1920 (000 U.S. 04-108).

Collectively, this showed the City to be in a clear state of decline. Nevertheless, Pfizer, the pharmaceutical giant, was building a new $270 million facility in City and as such, the City wanted to implement a comprehensive economic revitalization program to the surrounding area. The City asked the New London Development Corporation (NLDC), a private entity, to create such a plan. The NLDC's plan targeted 90 acres of land that included "115 privately owned properties, as well as 32 acres of land formerly occupied by the naval facility," (000 U.S. 04-108) 18 of which constituted Trumbull State Park. In sum, the plan was "projected to create in excess of 1,000 jobs, to increase tax and other revenues...and to make the City more attractive and to create leisure and recreational opportunities on the waterfront and in the park" (000 U.S. 04-108).

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After purchasing most of the property, there was a select group who refused to sell under any circumstances. "Susette Kelo and six other families...filed suit arguing their property rights were being violated by well-connected developers" (Mears 2005). They cited the aforementioned Takings Clause, particularly the "public use" portion. Indeed, in the past "government's authority to condemn land for public use traditionally has been used to eliminate slums, or build highways, schools, and other public works" (Mears 2005), however, the homes of Kelo, et al. were by no means blighted nor was there a clear public use in the proposed revitalization. The Connecticut State Supreme Court ruled in favor of City and in February 2005 the case was argued before the Supreme Court and decided that June.

In a 5-4 decision, the Supreme Court upheld the City's right of eminent domain. Justice John Paul Stevens, who was joined by Kennedy, Souter, Ginsburg, and Breyer, wrote the majority opinion. The basis of the ruling rested on two previous Court decisions, *Berman* v. *Parker* (1954) and *Hawaii Housing Authority* v. *Midkiff* (1984).

The key phrase under consideration was "public use." Stevens argued,

> While many state courts in the mid-19th century endorsed "use by the public" as the proper definition of public use, that narrow view steadily eroded over time. Not only was the "use by the public" test difficult to administer (*e.g.*, what proportion of the public need have access to the property? at what price?), but it proved to be impractical given the diverse and always evolving needs of society. Accordingly, when this Court began applying the Fifth Amendment to the States at the close of the 19th century, it embraced the

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> broader and more natural interpretation of public use as "public purpose." See, *e.g.*, *Fallbrook Irrigation Dist.* v. *Bradley*, (1896)...[and] *Strickley* v. *Highland Boy Gold Mining Co.,* (1906) (000 U.S. 04-108).

Thus, it is this interpretation of "public purpose" not "public use," based on over one hundred years of precedent that must be taken into consideration. The issue then becomes what is "public purpose" and Stevens added, "without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field" (000 U.S. 04-108).

In *Berman,* the Court ruled in favor of the city of Washington, D.C. and its development plan of a blighted neighborhood. Berman claimed that his store was not blighted, but the Court stated, "The area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were unsanitary or unsightly...The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers" (348 U.S. 26). Moreover, deference to the legislature is again reinforced, "It is within the power of the legislature to determine that the community should be beautiful as well as healthy...If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way" (348 U.S. 26).

Indeed, in the case of *Kelo,* the legislative body of the City of New London deemed it appropriate to reinvigorate the area and indicative of

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the *Berman* decision, clearly possesses that right. Secondly, it is the duty of legislative bodies to define public purpose, which City did. Thirdly, the plaintiffs' domiciles cannot be excluded as exceptions as it could undermine the entire project and create festering problems for the future good.

Nevertheless, a key aspect of Kelo's argument was that economic development does not constitute "public use." Stevens added "putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal. Promoting economic development is a traditional and long accepted function of government...Quite simply, the government's pursuit of a public purpose will often benefit individual private parties" (000 U.S. 04-108). That conclusion was reached in *Berman* as well when that opinion stated, "the public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects" (348 U.S. 26). Lastly, the Court struck down the notion of giving Person B, Person A's land for simple economic gain because this case dealt with a comprehensive plan and not a simple exchange.

Kelo further argued that there should be a "'reasonable certainty' that the expected public benefits will actually accrue" (000 U.S. 04-108).

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However, in *Midkiff* the Court stated, "when the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts" (467 U.S. 229). Again, it's a legislative power.

The key swing vote in the decision was that of Anthony Kennedy, a conservative justice who broke from the ranks in this particular case. He filed a concurring opinion. The key to him was the rational-basis review under the Public Use Clause that indicates whether takings "intended to favor a particular private party, with only incidental or pretextual public benefits" (000 U.S. 04-108) and if so, must be struck down.

> The trial court concluded, based on these findings, that benefiting Pfizer was not "the primary motivation or effect of this development plan"; instead, "the primary motivation for [respondents] was to take advantage of Pfizer's presence." Likewise, the trial court concluded that "[t]here is nothing in the record to indicate that ... [respondents] were motivated by a desire to aid [other] particular private entities." Even the dissenting justices on the Connecticut Supreme Court agreed that respondents' development plan was intended to revitalize the local economy, not to serve the interests of Pfizer, Corcoran Jennison [developer], or any other private party. This case, then, survives the meaningful rational basis review that in my view is required under the Public Use Clause (000 U.S. 04-108)

Thus, even though his opinion sided with City, it was a cautious concurrence "signal[ing] that governments seeking to use eminent domain powers to try to revitalize cities must show in the public benefits of such projects" (Biskupic and Koch 2005). That test being the rational

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basis review. Moreover, "a more stringent standard of review might be appropriate according to Justice Kennedy" (Nicholson and Mota 2005, 98).

Among the dissenters, Justice Sandra Day O'Connor wrote an opinion. She cited the social contract and *Calder* v. *Bull* (1798) in which the Court ruled

> An *act* of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority...A few instances will suffice to explain what I mean...[A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with *such* powers; and, therefore, it cannot be presumed that they have done it (000 U.S. 04-108).

She further argued "were the political branches the sole arbiters of the public-private distinction, the Public Use Clause would amount to little more than hortatory fluff. An external, judicial check on how the public use requirement is interpreted, however limited, is necessary if this constraint on government power is to have any meaning" (000 U.S. 04-108). However, the key to her dissent is the decision "severely undermines the concept of checks and balances in this important area of constitutional law" (Kanner 2006, 338). Thus, again her primary qualm was that the Court should be the final say on such issues.

So, how does this case represent a reaffirmation of cooperative federalism or indicate a limitation on the excesses of federal power?

On one hand the decision clearly possessed an expansive view of governmental powers and rested its laurels on precedents (*Berman* and

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Midkiff) established during the post-New Deal Court era. Moreover, it utilized a wide interpretation of the Constitution beyond its mere construction as indicative of "public use" becoming "public purpose." Furthermore, the decision stated that it is the domain of the legislature, not the judiciary to determine the various intents, thus deferring to them, which is clearly differentiated in the Constitution and a hallmark of federalism.

Interestingly, "two months after the ruling, addressing a bar association meeting, Justice Stevens called [the decision] 'unwise' and said he would have opposed it had he been a legislator and not a federal judge bound by precedent" (Broder 2006, A1). Thus, it is precedent that guided the decision.

However, the victory very much belongs to the states. In the final paragraph of the majority opinion Stevens added "we emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power" (000 U.S. 04-108). Indeed,

> The reaction from the states was swift and heated. Within weeks of the court's decision, Texas, Alabama and Delaware passed bills by overwhelming bipartisan margins limiting the right of local governments to seize property and turn it over to private developers. Since then, lawmakers in three dozen other states have proposed similar restrictions and more are on the way, according to experts who track the issue (Broder 2006, A1).

Kelo empowers states to act on the issue and not defer to the federal government for its decisions.

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O'Connor argued "states play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision to curtail state action, no less) is not among them" (000 U.S. 04-108).

Some have argued "the real way to stop the abuse of eminent domain is not to forbid its use for economic development, but to make sure that the funds so designated could have been used by the locality for other purposes that likely would have had broader public support and benefits" (Fischer 2006, 32). For example, if local citizens could have better roads, more schools, etc. would they prefer the money be spent there? If not, it should not be done. "The process of a city and its citizens arguing about alternative uses of the money and ending up using it to buy a site to promote economic development would make it more convincingly a 'public use'" (Fischel 2006, 35). However, the Court struck down such test proposals in *Fallbrook Irrigation Dist.* v. *Bradley*, (1896) and *Strickley* v. *Highland Boy Gold Mining Co.* (1906) for their impracticality.

"Lawmakers in 47 states have introduced more than 325 measures to protect private property" (Mehren 2006, 1A). Indeed, many have "expressed concern that state officials, in their zeal to protect homeowners and small businesses, would handcuff local governments that are trying to revitalize dying cities and fill in blighted areas with projects that produce tax revenue and jobs" (Broder 2006, A1). Some

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jurists have even proposed a constitutional amendment (Cohen 2006, 566-577) to ban economic development takings. Ironically, such an action would be the most extreme instance of federal empowerment. Only time will tell.

As for the revitalized New London waterfront, as of November 2005, nothing had been accomplished. "Wary of public disapproval...the state and the city have halted plans to evict the remaining residents. Investors are concerned about building on land that some people consider a symbol of property rights. At the same time, contract disputes and financial uncertainty have delayed construction even in areas that have been cleared" (Yardley 2005, A1). Moreover,

> In September [2005], Gov. M. Jodi Rell of Connecticut demanded that the New London Development Corporation...rescind eviction orders delivered to tenants in rental units that belong to homeowners who have refused to give up their property. The Connecticut General Assembly has asked cities to delay using eminent domain while it considers revising state law (Yardley 2005, A22).

The states are autonomous in their own sphere and able to decide whether or not they should allow takings in the name of economic revitalization and the Court came to its opinion by merely reiterating previous cooperative federalism decisions.

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CHAPTER 8

GONZALES v. *OREGON* (2006)

On November 9, 2001, Attorney General of the United States John Ashcroft issued the following Interpretive Rule:

> Assisting suicide is not a "legitimate medical purpose" within the meaning of 21 CFR 1306.04 (2001), and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the Controlled Substances Act. Such conduct by a physician registered to dispense controlled substances may "render his registration . . . inconsistent with the public interest" and therefore subject to possible suspension or revocation under 21 U. S. C. 824(a)(4). The Attorney General's conclusion applies regardless of whether state law authorizes or permits such conduct by practitioners or others and regardless of the condition of the person whose suicide is assisted (000 U.S. 04-623).

This Interpretive Rule, sometimes referred to as the 'Ashcroft Directive,' was in direct response to the state of Oregon's Death With Dignity Act. "The 1994 law gives Oregon doctors the authority to prescribe controlled substances to mentally competent, terminally ill patients who are within six months of dying" (Lucas 2005). Furthermore, a second doctor must then examine the patient and agree with the decision and "once the law's safeguards have been met, attending doctors may prescribe, but not themselves administer, a fatal drug" (Kilpatrick 2006). In fact, "Oregon voters have twice approved the law, in 1994 and also in 1997" (Lucas

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2005). It is unknown how many total patients have utilized the act, but 37 patients did so in 2004.

Ashcroft interpreted "the Controlled Substances Act and announc[ed] that assisted suicide is not a 'legitimate medical purpose' that would allow doctors to prescribe Schedule II drugs under the act. Oregon, joined by physicians and terminally ill patients challenged the rule" (Mauro 2006). Since the Attorney General is the nation's leading law enforcement officer, Ashcroft surmised this gave him the power to threaten physicians who prescribe Schedule II drugs that if they do so for the purpose of assisted suicide "their registration to distribute controlled substances...[could be] revoked or be criminally prosecuted for violating federal law" (Bloustein and Sachs 2006).

The case reached the 9th Circuit Court of Appeals in May 2004, where it ruled in favor of Oregon. "The majority found the directive unlawful and unenforceable because it violated the plain language of the CSA, undermined Congress' intent and overstepped the bounds of the Attorney General's authority" (Bloustein and Sachs 2006). The Government appealed the decision and the case was argued before the U.S. Supreme Court on October 5, 2005.

On January 17, 2006, the Court ruled 6-3 in favor of Oregon. The majority opinion, authored by Justice Anthony Kennedy (joined by Stevens, Ginsburg, Breyer, Souter and O'Connor), dealt with the primary issue of "the Interpretive Rule's validity under the CSA...The parties

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before us are in sharp disagreement both as to the degree of deference we must accord the Interpretive Rule's substantive conclusion and whether the Rule is authorized by the statutory text at all" (000 U.S. 04-623).

As it pertains to deference, there are two precedential cases the Court considered, *Auer* v. *Robbins* (1997) and *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council* (1984). *Oregon* differed from *Auer* in the respect that the "underlying regulation does little more than restate the terms of the statute itself. The language the Interpretive Rule addresses comes from Congress, not the Attorney General, and the near-equivalence of the statute and regulation belies the Government's argument for *Auer* deference" (000 U.S. 04-623).

Now,

> If a statute is ambiguous, judicial review of administrative rulemaking often demands *Chevron* deference; and the rule is judged accordingly. All would agree, we should think, that the statutory phrase "legitimate medical purpose" is a generality, susceptible to more precise definition and open to varying constructions, and thus ambiguous in the relevant sense. *Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official. The Attorney General has rulemaking power to fulfill his duties under the CSA. The specific respects in which he is authorized to make rules, however, instruct us that he is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law. (000 U.S. 04-623).

Make no mistake about it; the CSA very much limits the power of the Attorney General. "Congress did not delegate to the Attorney General authority to carry out or effect all provisions of the CSA. Rather, he can

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promulgate rules relating only to 'registration' and 'control,' and 'for the efficient execution of his functions' under the statute" (000 U.S. 04-623). It is within the realm of "registration" provision and its role in promoting "public interest" that the Attorney General stated it could revoke physicians' licenses. "In determining consistency with the public interest, the Attorney General must...consider five factors, including: the State's recommendation; compliance with state, federal, and local laws regarding controlled substances; and public health and safety." However, Ashcroft failed to consider these factors and goes a step further declaring, "that using controlled substances for physician-assisted suicide is a crime, an authority that goes well beyond the Attorney General's statutory power to register or deregister."

Furthermore, under the CSA, "the statute permits the Attorney General to add, remove, or reschedule substances. He may do so, however, only after making particular findings, and on scientific and medical matters he is required to accept the findings of the Secretary of Health and Human Services (Secretary). These proceedings must be on the record after an opportunity for comment" (000 U.S. 04-623). Before issuing the Interpretive Rule, Ashcroft made no contact with Secretary and instead only relied on "the recommendation of the Office of Legal Counsel in the Department of Justice" (Bloustein and Sachs 2006). Indeed, it is very possible that Ashcroft hastily issued the directive as "he opposed physician-assisted suicide as a senator" (Mauro 2006) for years.

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Indeed, "CSA allocates decision-making powers among statutory actors so that medical judgments, if they are to be decided at the federal level and for the limited objects of the statute, are placed in the hands of the Secretary...The structure of the CSA, then, conveys unwillingness to cede medical judgments to an Executive official who lacks medical expertise" (000 U.S. 04-623). Ashcroft possessed little medical expertise. Moreover, when the CSA extended its regulatory power to anabolic steroids in 1990 "it relied not on Executive ingenuity, but rather on specific legislation" (000 U.S. 04-623). From a legal perspective, the Interpretive Rule specifically notes that physician-assisted suicide has no "legitimate medical purpose" and such implies "medical judgments" on which Ashcroft did not base his Rule on. "This confirms that the authority claimed by the Attorney General is both beyond his expertise and incongruous with the statutory purposes and design" (000 U.S. 04-623).

The CSA's "statutory purposes [are] to combat drug abuse and prevent illicit drug trafficking" (000 U.S. 04-623). Again, physician-assisted suicide does not involve either criterion. Solicitor General Paul Clement argued, "doctor-assisted suicide has a tendency to 'debilitate lives' just as much as drug abuse, which is what The CSA primarily targeted" (Bloustein and Sachs 2006). However, Justices O'Connor and Souter noted that such reasoning would include "lethal injection death penalties" (Bloustein and Sachs 2006) into the CSA. Justice Breyer

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commented on the intent of the CSA asserting, "Congress didn't think about the death penalty, and it didn't think of assisted suicide" (Alderson Reporting Company, 2006, 8). Thus, "the statute and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood. Beyond this, however, the statute manifests no intent to regulate the practice of medicine generally" (000 U.S. 04-623). In *Raich*, the Court was dealing with marijuana, which "has been determined by Congress to have no legitimate uses, while the controlled substances used in assisted suicide do have proper medical uses" (Smith 2005). There was a clear connection between marijuana and potential abuse and trafficking that was not present here.

Moreover, "regulation of health and safety is 'primarily, and historically, a matter of local concern'" (000 U.S. 04-623). It is an area of federalism that historically was delegated to the states. During the oral arguments, Justice Souter specifically stated "that Congress intended to retain and respect the historic powers of the States to define legitimate medical practices" (Alderson Reporting Company 2006, 56). The people of the state of Oregon chose to enact the law and thus, it is totally within their power. Although Justice O'Connor did not file a concurring opinion, it is possible to assume her stance is very much an extension of her dissent in *Raich*. "[*Raich*] exemplifies the role of States as

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laboratories. The States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens" (000 U.S. 03-1454). Oregon is thus a laboratory for the issue of assisted suicide.

Kennedy also noted that the CSA explicitly includes a role for states. Not only does the Attorney General have to pay heed to the state's recommendation and compliance with state and local laws regarding controlled substances, but the CSA includes a pre-emption provision which states,

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision . . . and that State law so that the two cannot consistently stand together (000 U.S. 04-623).

Thus, including states is very much evident in the process and was disregarded by Ashcroft. In sum, "the text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it" (000 U.S. 04-623).

Justices Scalia and Thomas filed dissenting opinions. Scalia argued, "the most reasonable interpretation of the regulation and of the statute would produce the same result. Virtually every relevant source of authoritative meaning confirms that the phrase 'legitimate medical purpose' does not include intentionally assisting suicide" (000 U.S. 04-

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623). He rested his argument on the fact that medicine is to produce health, while death obviously does not. He further stated,

> Prohibition or deterrence of assisted suicide is certainly not among the enumerated powers conferred on the United States by the Constitution, and it is within the realm of public morality *(bonos mores)* traditionally addressed by the so-called police power of the States. But then, neither is prohibiting the recreational use of drugs or discouraging drug addiction among the enumerated powers. From an early time in our national history, the Federal Government has used its enumerated powers, such as its power to regulate interstate commerce, for the purpose of protecting public morality...Unless we are to repudiate a long and well-established principle of our jurisprudence, using the federal commerce power to prevent assisted suicide is unquestionably permissible (000 U.S. 04-623).

Such reasoning is in direct correlation with his concurring opinion in *Raich* where a comprehensive scheme was present, as it was here, since it is the same act, the CSA, and as such, the federal government can interfere in intrastate activity.

Justice Thomas made no argument supporting his dissent, but rather he scolded the majority for "rest[ing] upon constitutional principles that [they] rejected in *Raich*" (000 U.S. 04-623). Nevertheless, by saying the principle in *Raich* should be extended, he is doing the same thing and reversing his own opinion. In fact, "Thomas justified his vote based on a technicality: during oral argument, the lawyer for Oregon said he wasn't asking the Court to overturn its Commerce Clause precedents and, Thomas says, he took the lawyer at his word" (Moller 2006). Thomas concluded, "the scope of the CSA and the Attorney General's power thereunder are sweeping, and perhaps troubling, such expansive federal

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legislation and broad grants of authority to administrative agencies are merely the inevitable and inexorable consequence of this Court's Commerce Clause and separation-of-powers jurisprudence" (000 U.S. 04-623). Thus, Thomas is advocating cooperative federalism.

Gonzales v. *Oregon* represents another instance of the Rehnquist Court limiting the excesses of federal power. However, what was most interesting is that the victory was courtesy of the liberal bloc of justices. The Court upheld a state's right to operate outside the realm of federal legislation, thus making it autonomous in its own sphere. Moreover, it restricted an expansive view of federal powers and instead cited the state's traditional power to regulate medical practice. Perhaps most amazing is, "neither side even mentioned the Constitution's 10th Amendment" (Kilpatrick 2006, 11B). Certainly, the issue of assisted suicide is nowhere enumerated in the Constitution and as such by the power of the Tenth Amendment must be a power reserved to the states. Based on that criterion alone, Oregon should have won. Nevertheless, no one bothered to mention this obvious oversight. Again, in *Oregon*, the liberal justices were guided by precedent in examining the Interpretive Rule, but also by *Washington* v. *Glucksberg* (1997) where they "ultimately upheld a state ban on assisted suicide, [but] it left the issue to the states" (Lucas 2005).

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Thus, the Rehnquist Court again applied its rational-basis review and established that this area of federal expansion was too far-reaching and thus curbed its excess.

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CHAPTER 7

THE STATE OF FEDERALISM

The issue of federalism is one of paramount importance in American history. The federalism debate is as old the nation itself. From the end of the Revolutionary War to 1787, the country was mired in depression and inefficiency due to the government established under the Articles of Confederation. That government relied upon states' rights and was foundering. Then we reevaluated the federalist system. At what became known as the Constitutional Convention, the Framers created a centralized government. Yes, the states would retain some power, however, through such clear enumerations as the Necessary and Proper Clause and the Supremacy Clause, the federal government's preeminence reigns supreme.

The Supreme Court has constantly varied on its interpretation on such issues as the Commerce Clause, Tenth Amendment, Eleventh Amendment, Supremacy Clause, and the Necessary and Proper Clause. Thus, they are key players in the federalism debate. The Marshall Court (1801-1835) operated under national supremacy, which does recognize states possess power, however, when conflict arises, the national government reigns supreme. The Taney Court (1835-1864) would alter

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this understanding and instead follow the dual federalism interpretation holding that the states and federal government remain autonomous in their own spheres. This lack of recognizing federal supremacy was the central issue that led to the American Civil War that divided the nation in two and cost 620,000 lives.

From 1865-1895 the Reconstruction Courts returned to national supremacy, but then the Court balanced itself representing "the judiciary's attachment to traditional limits of legislative power" (Gillman 1993, 15). These limits would last until 1937 when the post-New Deal Court would institute cooperative federalism as its interpretation of federalism and give the federal government exhaustive power. Although it would hit a few speed bumps in the 1970s and 1980s, it remained largely intact throughout the century and into the new millennium.

On the surface, *Lopez* appeared to transform the interpretation of federalism, however, it merely represents the point in which the Court stopped allowing the federal government free reign. These limitations as explored in the rational-basis review would further limit the excesses of federal power as it pertained to the Commerce Clause in *Morrison* and *Oregon;* and extended to the Fifth Amendment in *Kelo*; Tenth Amendment in *New York* and *Printz*; the Eleventh Amendment in *Seminole Tribe* and *Alden*; and Fourteenth Amendment in *Garrett*. The *Raich* and *Granholm* decisions showed that the Court has no difficulty

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adhering to cooperative federalist principles that were established in the post-New Deal era.

Indeed, "the classic dilemma about federalism [is] we might like to empower vanguard states to experiment with bold, creative new policies, but we also fear the bad things states might do if they have autonomy" (Althouse 2005, 788). As for the justices themselves, we are left with a pretty clear picture. Justices Souter, Stevens, Ginsburg and Breyer are clear and constant proponents of cooperative federalism, but recognize there are certain issues that are state issues as evidenced in *Oregon*. The conservative bloc of Roberts, Thomas, Scalia and Kennedy likewise believe in cooperative federalism, but are more apt to limit its excesses. Indeed, none of the recent cases explored repudiate the core of *Wickard*. As of January 31, 2006, Sandra Day O'Connor was replaced with Samuel Alito. His swing vote could determine the future of federalism for years to come.

In May 2006, the Court had the potential to further define its federalism interpretation in *DaimlerChrysler* v. *Cuno*. However, the Court sidestepped the question of interpreting the Commerce Clause and instead dismissed the case on the grounds that the plaintiffs did not have standing to sue. Nevertheless, its Commerce Clause interpretation will emerge again in the combined cases of *Rapanos* v. *United States* and *Carabell* v. *U.S. Army Corps of Engineers* that were argued before the

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Court on February 21, 2006. However, one thing remains likely is that the debate will continue to rage on until the end of this union.

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