

THE THIRD DEATH OF FEDERALISM

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ABSTRACT

Federal drug laws proved a stumbling block to the Rehnquist Court's attempted federalism revival. In its final year, the Court's fragile federalism coalition splintered in a pair of cases arising under the Controlled Substances Act (CSA). Missing from the emerging legal literature concerning those two decisions is any substantive discussion of the Supreme Court's much earlier, ill-fated efforts to preserve both judicial enforcement of the enumerated powers doctrine and federal narcotics laws. This article fills that gap.

Ninety-odd years ago the Court arrived at the same jurisprudential juncture it now confronts. In the early decades of the twentieth century, the White and Taft Courts similarly faltered when the Justices professed dedication to federalism was tested by congressional overreaching in the name of guarding the people from narcotics and other temptations to perceived moral vices. In sustaining what the Justices no doubt believed to be laudatory federal morals regulations, they sowed the seeds of federalism's first death twenty years later. For during the constitutional crisis of the 1930s, the Court's critics pointed to this earlier compromise of federalism principles in their efforts to expose as pre-textual the Court's invalidation of New Deal legislation on the ground that it exceeded Congress's enumerated powers.

*This article explores the parallels between the neglected history of federal narcotics laws and the Court's recent rulings in *Gonzales v. Raich* and *Gonzales v. Oregon*. The full significance of those decisions can be perceived only when they are viewed in the light cast by the turbulent history of federal narcotics regulation. Then and now, drug abuse provokes intense reactions, both physical and emotional. The history suggests that now, as then, the Court's decisions may prove more*

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portentous than they might at first appear. In addition, this parallel also begs more general questions about the feasibility of judicial efforts to enforce federalism. The final part of this article identifies and ventures some preliminary reflections on these issues.

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INTRODUCTION

For nearly a century, the Supreme Court has had a serious drug problem. In the Rehnquist Court's final year, its fragile federalism coalition splintered in two cases arising under the Controlled Substances Act (CSA). Ninety-odd years earlier, the Justices, then struggling to preserve federalism, had likewise succumbed to the lure of narcotics. The neglected history of early federal drug regulation reveals the Court's recent rulings to be far more significant than they might appear.

In the early decades of the twentieth century, the Court compromised its efforts to limit Congress to its enumerated powers in order to sustain what the Justices no doubt perceived to be salutary federal morals regulations. Throughout this period, the Court struggled to reconcile its continued commitment to federalism enforcement with the broad readings it had accorded Congress's enumerated powers in sustaining vice laws. In a striking parallel to recent controversies, the White and Taft Courts' most problematic rulings came in cases pitting federal narcotics laws against the states' reserved powers to govern public morality and

medical practice. Over time, it became increasingly clear to both the Court's critics and the Justices themselves that the Court's strict construction of Congress's enumerated powers in the context of federal statutes regulating working conditions and terms of employment could not be squared with its decisions upholding federal criminal statutes restricting lotteries, alcohol, sexual morality, and (most plainly) narcotics use. Ultimately, this inconsistency exposed the Court's federalism decisions as nothing more than the reflections of the Justices' own policy preferences, leading in the late 1930s and early 1940s to the tacit but nonetheless complete abdication of any judicial effort to limit the scope of congressional authority. This was the first death of federalism. Though the climatic clashes and consequent concessions came during the New Deal Era, a review of earlier federalism rulings discloses that this crisis was a long time in the making.

After nearly four decades interment, judicial federalism—albeit as a protection of the “States *Qua* States” rather than as a energetic enumerated powers doctrine—was briefly revived in then-Justice Rehnquist's 1976 opinion for a bare majority of the Court in *National League of Cities v. Usery*.¹ A mere nine years later, in *Garcia v. Metropolitan Transit Authority*,² the Court expressly overruled *National League of Cities*, concluding that “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”³

A decade later, Rehnquist, now Chief Justice, finally secured a bare majority willing to reassert some judicial role in limiting Congress to its enumerated powers. In *United States v. Lopez*, the “federalism five” shocked the legal community by invalidating a federal statute as beyond Congress's Commerce Clause authority—the first time the Court had so held since 1936.⁴ Only two years later, the Court invalidated the Religious Freedom Restoration Act on the ground that, insofar as it sought to affect the actions of state governments, it exceeded Congress's power to enforce the Fourteenth Amendment.⁵ At the end of the century, the same five Justices who formed the majority in *Lopez* joined again to hold that Congress lacked constitutional authority to pass the civil-remedy provision of the Violence Against Women Act.⁶ It seemed that the Court was on the cusp of a federalism counter-revolution.

¹ 426 U.S. 833, 847, 856 (1976).

² 469 U.S. 528 (1985).

³ *Id.* at 550. See generally William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985) (discussing the 1985 overruling of *Nat'l League of Cities*).

⁴ *United States v. Lopez*, 514 U.S. 549 (1995).

⁵ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁶ *United States v. Morrison*, 529 U.S. 598 (2000).

But as quickly as the movement mobilized, it came upon the same stumbling block that had proved fatal to similar efforts ninety years before—the federal anti-narcotics laws, now embodied in the CSA. By the twenty-first century, increasing public (and professional) recognition of marijuana’s occasional medicinal value, as well as decreasing public support for the seemingly futile war on drugs, resulted in nine states authorizing limited medical use of marijuana.⁷ At the same time, “throughout the Nation, Americans [were] engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide.”⁸ As part of that debate Oregon voters repeatedly endorsed a ballot initiative creating a legal mechanism for “Death with Dignity.” Attorney General John Ashcroft, who had previously been in the vanguard of federalism’s renaissance,⁹ proved no fan of either state innovation. His Justice Department aggressively enforced the CSA against those who sought to take advantage of this liberalization of state marijuana laws.¹⁰ Moreover, reversing the position taken by his predecessor, Ashcroft, in November 2001, issued an “Interpretative Rule” construing the CSA to forbid physicians from acting in accordance with the Oregon assisted suicide law.¹¹ In short, Ashcroft found, in this one federal statute, authority to halt all state experimentation on either controversial subject.

The medical marijuana issue came to the Supreme Court first in the case of *Gonzales v. Raich*.¹² Three of the federalism five proved immutable. But Justices Scalia and Kennedy, acting as spoilers, sided with the four *Lopez* and *Morrison* dissenters and sustained the application of the CSA to persons possessing marijuana for legal, medicinal purposes.¹³ The *Raich* holding swept aside the contrary laws of nine states, which reflected the collective judgment (often expressed directly via ballot initiative) of tens of millions of voters in those states.¹⁴ In *Lopez*, *Flores*, and *Morrison*, Justices Scalia and Kennedy supplied essential support to

⁷ *Gonzales v. Raich*, 545 U.S. 1, 5 (2005).

⁸ *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997). In rejecting the claim that the federal constitution *required* access to physician-assisted suicide, the Court stressed that “the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues,” *id.* at 719, and that “[o]ur holding permits this [earnest and profound] debate to continue, as it should in a democratic society.” *Id.* at 735. And so it did, until preempted by Attorney General Ashcroft’s reinterpretation of the CSA. *See infra* text accompanying note 313.

⁹ *See Gregory v. Ashcroft*, 501 U.S. 452 (1991) (upholding a mandatory retirement requirement for state court judges in Missouri’s state constitution).

¹⁰ *See Raich*, 545 U.S. at 7 (2005).

¹¹ *Oregon v. Ashcroft*, 368 F.3d 1118, 1123 (9th Cir. 2004), *aff’d*, *Gonzales v. Oregon*, 546 U.S. 243 (2006).

¹² 545 U.S. 1 (2005).

¹³ *See Raich*, 545 U.S. at 33 (Scalia, J., concurring).

¹⁴ *See id.* at 1.

the Court's efforts to revive some meaningful judicial enforcement of the enumerated powers doctrine.¹⁵ But *Gonzales v. Raich* revealed that, like Attorney General Ashcroft, they were selectively neglectful of this commitment when confronted with a conspicuous clash with their social conservatism.

Six months later, the Court, this time in an opinion by Justice Kennedy, sided with Oregon in the assisted suicide controversy.¹⁶ The most significant opinion was Justice Scalia's dissenting opinion for himself, Chief Justice Roberts, and Justice Thomas, in which Scalia made explicit what had been inchoate in *Raich*: Congress's enumerated powers could be stretched in the service of protecting public morality.¹⁷ His opinion echoed the voices of the White and Taft Court Justices who unknowingly laid the foundation for the New Deal Court's abandonment of federalism enforcement. *Raich* and *Gonzales v. Oregon*, therefore, constitute the third death of federalism.

In the commentary these two cases have already generated,¹⁸ their striking parallel with the early twentieth-century narcotics decisions has

¹⁵ See *United States v. Lopez*, 514 U.S. 549, 549 (1995); *City of Boerne v. Flores*, 521 U.S. 507, 507 (1997); *United States v. Morrison*, 529 U.S. 598, 598 (2000).

¹⁶ *Gonzales v. Oregon*, 546 U.S. 243 (2006).

¹⁷ *Id.* at 275 (Scalia, J., dissenting).

¹⁸ See, e.g., George D. Brown, *Counterrevolution?—Federal Criminal Law After Raich*, 66 OHIO ST. L.J. 947 (2005); Paul Chen, *The Informational Role of Amici Curiae Briefs in Gonzales v. Raich*, 31 S. ILL. U. L.J. 217 (2007); David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41 (2006); Jenny Miao Jiang, *Regulating Litigation under the Protection of Lawful Commerce in Arms Act: Economic Activity or Regulatory Nullity?*, 70 ALB. L. REV. 537 (2007); Douglas W. Kmiec, *Gonzales v. Raich: Wickard v. Filburn Displaced*, CATO SUP. CT. REV., 2004–2005, at 71; Alex Kreit, *Rights, Rules, and Raich*, 108 W. VA. L. REV. 705 (2006); Ronald A. Lindsay et al., *Hastened Death and the Regulation of the Practice of Medicine*, 22 WASH. U. J.L. & POL'Y 1 (2006); Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906 (2006); Ilya Somin, *A False Dawn For Federalism: Clear Statement Rules After Gonzales v. Raich*, CATO SUP. CT. REV., 2005–2006, at 113; George Steven Swan, *The Law and Economics of State-Sanctioned Medical Marijuana: Gonzales v. Raich*, 7 FLA. COASTAL L. REV. 473 (2006); Symposium, *Federalism After Gonzales v. Raich*, 9 LEWIS & CLARK L. REV. 743 (2005); Symposium, *Federalism Past, Federalism Future*, 21 ST. JOHN'S J. LEGAL COMMENT. 447 (2007); Symposium, *A Tale of (at Least) Two Federalisms*, 50 N.Y.L. SCH. L. REV. 615 (2005–2006); Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, SUP. CT. REV., 2005, at 1; Jordan Goldberg, Note, *The Commerce Clause and Federal Abortion Law: Why Progressives Might Be Tempted to Embrace Federalism*, 75 FORDHAM L. REV. 301 (2006); Emily P. Hughes, Note, *The Oregon Death with Dignity Act: Relief of Suffering at the End of Medicine's Ability to Heal*, 95 GEO. L.J. 207 (2006); Mollie Lee, Note, *Environmental Economics: A Market Failure Approach to the Commerce Clause*, 116 YALE L.J. 456 (2006); Tara M. Stuckey, Note, *Jurisdictional Hooks in the Wake of Raich: On Properly Interpreting Federal Regulations of Interstate Commerce*, 81 NOTRE DAME L. REV. 2101 (2006). See also *infra* notes 323–24 and accompanying text for discussion of the legal literature concerning the *Raich* and *Oregon* decisions.

been ignored.¹⁹ This article attempts to fill that gap. The first part of the article reviews the overlooked history of judicial federalism and federal morals regulation ninety years ago. Part II briefly summarizes the Rehnquist Court's federalism revival at the century's end. Part III treats the Court's recent decisions in the medical marijuana and assisted suicide cases, stressing the parallels between these rulings and the Court's early twentieth-century missteps. In Part IV, the article concludes with observations and hypotheses about the significance of this correlation.

I. THE FIRST DEATH OF FEDERALISM

The struggle in *Raich* between the Justices' commitments to federalism and socially conservative ideology, as well as the triumph of the latter over the former, echoed early twentieth-century Supreme Court rulings concerning the Harrison Anti-Narcotic Act of 1914.²⁰ As summarized by the *Raich* majority, that statute, albeit "in the guise of" a revenue law,²¹ in fact constituted Congress's first foray into regulation of narcotics use.

A. FEDERAL NARCOTICS REGULATION IN THE EARLY TWENTIETH CENTURY

Criminal prohibition of narcotics possession is a twentieth-century phenomenon. Indeed, less than ten years passed between the New York legislature's enactment of its first major narcotics law and the passage of the Harrison Act in 1914.²² A principal goal of the Harrison Act was to fulfill U.S. commitments made in the Hague International Opium Conventions of 1911 & 1913.²³ Accordingly, the subject of federal narcotics

¹⁹ My research disclosed no existing treatment of the similarity between *Raich* and *Oregon* and the early twentieth-century narcotics cases.

²⁰ Harrison Act, 38 Stat. 785, §§ 1–12 (1914), amended by 40 Stat. 1130, § 1006 (1919) (repealed 1939).

²¹ See *Gonzales v. Raich*, 545 U.S. 1, 10 (2005).

²² See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 355 (1993) (observing that in the nineteenth century drug laws "hardly mattered," and addiction and the sale and use of narcotics was not a crime, which changed radically in the twentieth century, and specifically identifying a 1905 New York statute declaring "cocaine, morphine, and opium to be 'poisons,' not to be sold at retail without a warning label" as exemplary of the earliest modern state narcotics laws). See generally Steven Wisotsky, *Exposing the War on Cocaine: The Futility and Destructiveness of Prohibition*, 1983 WIS. L. REV. 1305, 1312 (1983) (discussing earliest state and federal criminal prohibitions on the non-medical distribution of cocaine); STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS* (1993); H. WAYNE MORGAN, *DRUGS IN AMERICA: A SOCIAL HISTORY, 1800–1980* (1981); DAVID F. MUSTO, *THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL* (1973); STEVEN WISOTSKY, *BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY* 179 (1990).

²³ See Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 498–506 (1997); see also Aryeh Y. Brown, *Commentary, In Memoriam: Ralph Seeley; Obscured by Smoke: Medicinal Marijuana and The Need for Representation Reinforcement*

regulation fell within the jurisdiction of President Wilson's Secretary of State, William Jennings Bryan. A political dynamo as well as a self-proclaimed exemplar of traditional, Protestant morality,²⁴ Bryan proved to be one of the Harrison Act's most fervent and effective supporters. Even so, as enacted, the statute apparently was only meant to effect a regime of dealer registration rather than narcotics prohibition.²⁵

That was the reading the Supreme Court gave the Act in *United States v. Jin Fuey Moy*.²⁶ Writing for the Court, Justice Holmes dismissed an indictment that charged a conspiracy to possess morphine without a valid physician's prescription.²⁷ Holmes concluded that the statute did not apply to mere possession by persons not engaged in producing or dealing narcotics.²⁸ Invoking the canon that "[a] statute must be construed, if fairly possible, so as to avoid . . . grave doubts" as to the law's constitutional validity,²⁹ Holmes reasoned that "the gravest question of power would be raised by an attempt of Congress to make possession of opium," produced in any of the states, "a crime."³⁰ Holmes stressed that the Harrison Act authorized imposition of up to a five-year term of imprisonment:

Only words from which there is no escape could warrant the conclusion that Congress meant to strain its powers almost if not quite to the breaking point in order to make the probably very large proportion of citizens who have some preparation of opium in their possession criminal . . . and subject to the punishment made possible by [the Act].³¹

As construed by the Court, then, the Act sought merely to register, regulate, and tax persons engaged in the narcotics business.³² The Act left

Review, 22 SEATTLE U. L. REV. 175, 205–08 (1998) (discussing background to and enactment of the Harrison Act).

²⁴ See generally Edward McGlynn Gaffney, Jr., 16 J.L. & RELIGION 951, 952 (2001) (reviewing EDWARD J. LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION (1997)).

²⁵ See Luna, *supra* note 23, at 506.

²⁶ 241 U.S. 394 (1916).

²⁷ *Id.* at 402.

²⁸ *Id.*

²⁹ *Id.* at 401.

³⁰ *Id.* Holmes likewise dispensed with the government's claim that the Act, understood as a regulatory measure, could be sustained as a means to carry into execution the Opium Conventions. Holmes wrote, "The provision before us was not required by the opium convention, and whether this section is entitled to the supremacy claimed by the government for treaties is, to say the least, another grave question; and, if it is reasonably possible, the act should be read so as to avoid [it]." *Id.*

³¹ *Id.* at 402.

³² The Harrison Act, in pertinent part, provided "[t]hat it shall be unlawful for any person not registered under the provisions of this Act, and who has not paid the special tax provided

untouched individual possession even (as the indictment alleged) when held for non-medicinal purposes by "one addicted to the use of opium."³³ Foreshadowing trouble ahead, Justices Hughes and Pitney dissented, albeit without opinion.³⁴

Within three years the Court (Holmes included) reversed course.³⁵ On March 3, 1919, the Court decided *Webb v. United States*³⁶ and *United States v. Doremus*³⁷ in which the Justices both adopted a far broader interpretation of the Harrison Act and affirmed the constitutionality of the Act so construed. In both cases, Justice Day delivered the opinions for the same, five-Justice majority. *Webb* emphatically rejected the claim that the Act permitted physicians to prescribe narcotics to an addict for the purpose of "keeping him comfortable by maintaining his customary use."³⁸ As a substitute for reasoned explanation of this conclusion, Justice Day sputtered indignantly that "to call such an order . . . a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required."³⁹ Nor did Justice Day so much as acknowledge, let alone distinguish, *Jin Fuey Moy*. *Webb* theoretically left intact *Jin Fuey Moy*'s holding that mere possession of narcotics by a user was not itself a violation of the Harrison Act. As construed in *Webb*, however, the Act made it a federal crime to supply the user with the drug.⁴⁰ In practical effect, *Webb* rendered meaningless the limitation Holmes had, in service of federalism, grafted onto the Harrison Act in *Jin Fuey Moy*.

In *Doremus* the Court rebuffed the claim that the Harrison Act, as construed in *Webb*, exceeded Congress's power to tax. Justice Day's opinion reasoned that the Act was within the ambit of congressional authority so long as it had "some reasonable relation" to the raising of revenue, even if the law's "effect [was] to accomplish another purpose as

for by this Act, to have in his possession or under his control any of the [covered] drugs," excepting "the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician, dentist, or veterinary surgeon under this Act." Pub. L. No. 63-223, § 8, 38 Stat. 789 (1914). The Court "conclude[d] that 'any person not registered' in § 8 cannot be taken to mean any person in the United States, but must be taken to refer to the class with which the statute undertakes to deal, the persons who are required to register by § 1," *Jin Fuey Moy*, 241 U.S. at 402, i.e., "every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away" the covered drugs. § 8, 38 Stat. 789.

³³ *Jin Fuey Moy*, 241 U.S. at 399.

³⁴ *Id.* at 402.

³⁵ Some have thoughtfully speculated as to the causes of this abrupt switch. See, e.g., Brown, *supra* note 23, at 210-11 (suggesting that World War I, the Eighteenth Amendment, and the spirit of nationalism combined with the Red Scare to produce a "social upheaval" that "undoubtedly influenced" the Court's 1919 rulings).

³⁶ 249 U.S. 96 (1919).

³⁷ 249 U.S. 86 (1919).

³⁸ 249 U.S. at 99.

³⁹ *Id.* at 99-100.

⁴⁰ *Id.* at 99.

well.”⁴¹ In other words, courts were not to inquire into congressional motives.⁴² Applying these precepts, Justice Day eagerly endorsed the fiction that the regulatory character of the Harrison Act was merely incidental to its revenue raising function manifested solely in the statute’s imposition of a nominal \$1 *per annum* tax.⁴³ The Act’s provisions confining lawful sales to those made upon a physician’s order in the course of “legitimate” medical practice (a concept itself circumscribed by *Webb* to exclude sustaining an addict) “tend[ed] to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue,” thereby “diminish[ing] the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law.”⁴⁴ After all, the very indictment before the Court charged Doremus with supplying 500 one-sixth grain tablets of heroin to “a person addicted to the use of the drug aforesaid as a habit, being a person popularly known as a ‘dope fiend.’”⁴⁵ Such a depraved individual, the Court speculated, might “not have used this great number of doses for himself” but rather have “sold some to others without paying the [\$ 1 *per annum*] tax.”⁴⁶ It was sufficient that “at least Congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue.”⁴⁷ Thus, no later than 1919, the Court discovered congressional authority to supplant any contrary state law and impose a nationwide blanket prohibition on the sale of narcotics to be enforced with severe criminal penalties, excepting only distribution that the Treasury Department (and the Court) deemed to be “in the regular course of the professional practice of medicine.”⁴⁸

In a laconic (one-sentence) dissenting opinion, Chief Justice White, joined by Justices McKenna, Van Devanter, and McReynolds, endorsed the opinion that:

[T]he court below correctly held the act of Congress, in so far as it embraced the matters complained of, to be beyond the constitutional power of Congress to enact because to such extent the statute was a mere attempt by

⁴¹ *Doremus*, 249 U.S. at 94.

⁴² *See id.* at 93 (“[F]rom an early day the Court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject.”).

⁴³ *Id.* at 94–95.

⁴⁴ *Id.* at 94.

⁴⁵ *United States v. Doremus*, 246 F. 958, 959 (W.D. Tex. 1918) (quoting indictment), *rev’d*, 249 U.S. 86 (1919).

⁴⁶ *Doremus*, 249 U.S. at 95.

⁴⁷ *Id.*

⁴⁸ *Doremus*, 246 F. at 959 (quoting indictment).

Congress to exert a power not delegated, that is, the reserved police power of the states.⁴⁹

It is unfortunate that the Chief Justice did not write into his opinion more of the lower court's reasoning, which was compelling and remains relevant. Judge West's opinion in the case methodically demonstrated that the provisions of the Act Doremus had been charged with violating "can only be a police measure looking primarily to the protection of the public against the abuse of this drug, not remotely serving as an aid or means to effect the object of the act in respect of its revenue."⁵⁰ In particular, Judge West explained that Doremus's indictment for sale "of the inhibited drug, 'not in the regular course of his professional practice as a physician and not for the treatment of any disease from which a patient was suffering,'" simply could not be believed ancillary to the collection of taxes.⁵¹ The Harrison Act imposed a merely "nominal" tax and then "so restrict[ed] and narrow[ed] the uses of the drug that no vital or important excess of revenue could reasonably be expected."⁵² The Act also dictated a "penalty for violating any provision of the [A]ct [] so disproportionate to the gravamen of the offense . . . as to be further convincing that Congress was more concerned with the moral ends to be subserved than with the revenue to be derived."⁵³ In essence, Judge West and the four Supreme Court dissenters were willing to acknowledge what all must have known—as a tax law, the Harrison Act was a sham. Although a bare majority of the Justices were willing to swallow the lie whole, in a mere three years the Court would reassert the judiciary's obligation to look behind such empty forms to a statute's actual effect.

Judicial deference to Congress's claimed purposes may be defensible, even laudable, in light of the relative institutional competence and legitimacy of the national government's judiciary and legislature. But selective deference is not deference at all; instead it is a disguise for inchoate judicial policy judgments—avowedly the province of the legislature. In the *Child Labor Tax Case*,⁵⁴ the Court selectively abandoned the posture of deference it had assumed in *Doremus* in favor of its perceived obligation to assess independently whether the challenged law "impose[d] a tax with only that incidental restraint and regulation which a tax must inevitably involve" or whether the statute "regulate[d] by the

⁴⁹ *Doremus*, 249 U.S. at 95 (White, C.J., dissenting).

⁵⁰ *Doremus*, 246 F. at 963.

⁵¹ *See id.*

⁵² *Id.* at 964.

⁵³ *Id.*

⁵⁴ *Bailey v. Drexel Furniture Co. (The Child Labor Tax Case)*, 259 U.S. 20 (1922).

use of the so-called tax as a penalty.”⁵⁵ Writing for eight Justices,⁵⁶ Chief Justice Taft sententiously intoned that:

It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty, even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature, because it leads citizens and legislators of good purpose to promote it, without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half.⁵⁷

Taft had little to say as to why this “high duty and function” did not require the Court to invalidate the Harrison Anti-Narcotics Act as well. His opinion identified only one difference between the two statutes—whereas the Child Labor Tax Law was “on the face of the act . . . a penalty,”⁵⁸ any ulterior motive that may have contributed to Congress’s passing of the narcotics law was “not shown on [its] face.”⁵⁹ Even that alleged difference ignored the unanswered conclusion of the *Doremus* trial court and four Supreme Court dissenters: The terms of the Harrison Act revealed that the law’s actual purpose was narcotics regulation, not revenue collection.⁶⁰

Justices McReynolds and Sutherland, perhaps among others, were both aware of and troubled by the Court’s inconsistency on federalism. Three years after the *Child Labor Tax Case*, McReynolds wrote for a unanimous Court in *Linder v. United States*, which reversed the criminal conviction⁶¹ of a physician whose sole offense was to provide a known addict with a relatively small quantity of narcotics for “the purpose of [temporarily] relieving conditions incident to addiction.”⁶² In language

⁵⁵ *Id.* at 36.

⁵⁶ Justice Clarke dissented without opinion. *See id.* at 44.

⁵⁷ *Id.* at 37.

⁵⁸ *Id.* at 39.

⁵⁹ *Id.* at 43.

⁶⁰ *See United States v. Doremus*, 246 F. 958 (W.D. Tex. 1918) *rev’d*, 249 U.S. 86 (1919); *United States v. Doremus*, 249 U.S. 86, 95–96 (1919) 95 (White, C.J., dissenting).

⁶¹ *See* 268 U.S. 5, 22–23 (1925).

⁶² *Id.* at 17.

that could as easily have come from opinions in the *Raich*⁶³ or *Oregon*⁶⁴ cases, McReynolds observed that “[o]bviously, direct control of medical practice . . . is beyond the power of the federal government.”⁶⁵ Like Holmes writing in *Jin Fuey Moy*, McReynolds next invoked “the familiar rule that ‘a statute must be construed, if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score.’”⁶⁶ Accordingly, McReynolds “strictly construed” the Harrison Act⁶⁷ and found it inapplicable to the circumstances before the Court, which were deemed within “the limits of that professional conduct with which Congress never intended to interfere.”⁶⁸

A year later in *United States v. Daugherty*, Justice McReynolds once again delivered the opinion for a unanimous Court.⁶⁹ In *Daugherty* the Court upheld a fifteen-year prison sentence, which, the Court noted, “seem[ed] extremely harsh.”⁷⁰ Nevertheless, McReynolds also outlined an argument in favor of overruling *Doremus*, a case from which he had dissented:

The constitutionality of the [Harrison] Anti-Narcotic Act, touching which this court so sharply divided in *United States v. Doremus*, was not raised below, and has not been again considered. The doctrine approved in *Hammer v. Dagenhart*, *Child Labor Tax Case*, . . . and *Linder v. United States* may necessitate a review of that question, if hereafter properly presented.⁷¹

Having gone out of his way to signal the Court’s willingness to reconsider the holding of *Doremus*, McReynolds proved unable to carry that project through to fruition. Just over a year after *Daugherty*, McReynolds wrote the Court’s opinion in *Alston v. United States*, which rebuffed a federalism challenge to the Harrison Act.⁷² But that was not necessarily the end of the matter. In rejecting Alston’s constitutional claim, McReynolds stressed that “[t]he present cause arises under those provisions

⁶³ *Gonzales v. Raich*, 545 U.S. 1 (2005).

⁶⁴ *Gonzales v. Oregon*, 546 U.S. 243 (2006).

⁶⁵ *Linder*, 268 U.S. at 18.

⁶⁶ *Id.* at 17–18.

⁶⁷ *Id.* at 19.

⁶⁸ *Id.* at 22–23; cf. *Lambert v. Yellowley*, 272 U.S. 581, 597–605 (1926) (Sutherland, J., dissenting) (arguing that the Eighteenth Amendment’s prohibition of intoxicating liquors “for beverage purposes” did not empower Congress to establish the maximum amount of liquor a physician could lawfully prescribe, and that such legislation constituted an impermissible intrusion into the reserved powers of the states to control the practice of medicine within their borders).

⁶⁹ 269 U.S. 360 (1926).

⁷⁰ *Id.* at 364.

⁷¹ *Id.* at 362–63 (citations omitted).

⁷² 274 U.S. 289, 294 (1927).

of [Harrison Act] section 1 which impose a stamp tax on certain drugs and declare it unlawful to purchase or sell them except in or from original stamped packages.”⁷³ These provisions were the most impervious to constitutional attack because they “d[id] not absolutely prohibit buying or selling . . . [and] ha[d] produced substantial revenue.”⁷⁴ Accordingly, McReynolds had no difficulty sustaining these provisions of the Act, which were “clearly within the power of Congress to lay taxes and ha[d] no necessary connection with *any requirement of the act which may be subject to reasonable disputation*.”⁷⁵ Thus, while he forcefully rejected one constitutional challenge, he also alluded to and kept alive another.

The only consequence of his doing so, however, was to defer for another year the Court’s conclusive reaffirmation of *Doremus*, which finally came in *Nigro v. United States*.⁷⁶ Frank Nigro had been indicted and convicted for selling an ounce of morphine without compelling the purchaser to submit an order for the drug on a government form as section 2 of the Harrison Act arguably required.⁷⁷ Chief Justice Taft’s opinion for the Court first embraced the government’s broad interpretation of section 2, requiring that all narcotics purchasers either have registered as dealers under section 1 of the Act or have in hand a qualifying physician’s prescription for the drug purchased.⁷⁸ As the three dissenters—Justices McReynolds, Sutherland, and Butler—argued, section 2 might have been read to require only that the *seller*, whom section 1 independently obliged to register, have previously obtained and used the government’s order forms.⁷⁹ But Taft stressed the literal language of section 2, which by its terms applied to “any person.”⁸⁰ As construed by the Court, the Act in effect criminalized receipt of the covered narcotics for non-medicinal purposes. So interpreted, it constituted a spurious use of the taxing power to prohibit private conduct deemed dangerous and immoral—a responsibility not entrusted by the Constitution’s enumerated powers to the federal government, but rather, one reserved to the states.

In form, at least, Chief Justice Taft agreed that the federal government lacked any such power. Early in his analysis, he rather righteously avowed that:

In interpreting the act, we must assume that it is a taxing measure, for otherwise it would be no law at all. If it is a

⁷³ *Id.* at 294.

⁷⁴ *Id.*

⁷⁵ *Id.* at 294 (emphasis added).

⁷⁶ 276 U.S. 332 (1928). That decision addressed and resolved a series of questions that the Eighth Circuit had, in a now-extinct procedure, certified for Supreme Court consideration.

⁷⁷ *See id.* at 337–38.

⁷⁸ *See id.* at 344.

⁷⁹ *See id.* at 355–58.

⁸⁰ *See id.* at 334.

mere act for the purpose of regulating and restraining the purchase of the opiate and other drugs, it is beyond the power of Congress, and must be regarded as invalid, just as the Child Labor Act of Congress was held to be, in *Bailey, Collector, v. Drexel Furniture Co.*⁸¹

Taft continued, "Everything in the construction of section 2 must be regarded as directed toward the collection of the taxes imposed in section 1 and the prevention of evasion by persons subject to the tax."⁸² Otherwise, section 2 of the Act could not be sustained.⁸³ Taft nevertheless upheld section 2 (as broadly construed by the government) on the transparent fiction that its strict constraints on both those who might sell and those who might buy narcotics were merely incidental to tax collection.⁸⁴ Taft reasoned that the section's requirement that purchasers also be registered (unless they held a valid physician's prescription) relieved the revenue service of a significant enforcement burden—namely, the need to examine the list of registered sellers to determine whether a particular seller's name appeared thereon.⁸⁵ But this imagined administrative convenience was eclipsed by the prohibitory effect of such a broad construction of the Act. Because would-be non-medicinal users were not even permitted to register, they could never obtain the forms necessary to make a purchase.⁸⁶ It would be as though Congress prohibited the sale of alcoholic beverages in order to ensure that distributors paid the excise tax on alcohol sales. Taft justified congressional elimination of the non-medicinal narcotics market as a means of ensuring that the distributors in that market paid their taxes.⁸⁷ The surgery succeeded but only by killing the patient.

To his credit, Justice McReynolds—himself no enthusiast for non-traditional behavior⁸⁸—emphasized these points in his dissenting opin-

⁸¹ *Id.* at 341 (citing *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922)).

⁸² *Id.* at 341–42.

⁸³ *See id.* at 342.

⁸⁴ *See id.* at 353–54.

⁸⁵ *Id.* at 345. Chief Justice Taft also noted that, in the years intervening between the events at issue in *Doremus* and those with which the instant case was concerned, Congress had amended the Act to increase the tax and the revenue produced thereby. *Id.* at 353. See Robert C. Brown, *When is a Tax not a Tax?*, 11 IND. L.J. 399, 421–22 (1936), for an argument that because this intervening amendment augmented the revenue raised under the Act, the amendment supplied the foundation for constitutionality woefully lacking in *Doremus*.

⁸⁶ *See* Harold Gill Reuschlein & Albert B. Spector, *Taxing and Spending: The Loaded Dice of a Federal Economy*, 23 CORNELL L.Q. 1, 20–21 (1937) (discussing the practical effect of the Harrison Act).

⁸⁷ *See Nigro*, 276 U.S. at 345–47.

⁸⁸ McReynolds was no enthusiast for non-traditional behavior. *Cf. Nigro*, 276 U.S. at 357 (McReynolds, J., dissenting) (acknowledging the "evils incident to the use of opium"). See JAMES E. BOND, I DISSENT: THE LEGACY OF CHIEF JUSTICE JAMES CLARK McREYNOLDS

ion, which Justice Sutherland joined.⁸⁹ He first exposed the necessary effect of the Court's interpretation of section 2, observing that "[a]s construed by the United States, the statute prohibits all sales except to those who are registered or hold physicians' prescriptions—no others can buy lawfully."⁹⁰ After noting that even the majority deemed the Act sustainable "only as a revenue measure," McReynolds rejected as an artifice the claim that "Congress could have supposed that collection of the prescribed tax would be materially aided by requiring" purchasers to use an order form that they could not lawfully obtain.⁹¹ "[I]nhibition of sales ha[d] no just relation to the collection of the tax laid on dealers[.]" and any "suggestion to the contrary [was] fanciful."⁹² Indeed, "the real and primary purpose [of section 2 as construed by the government was] not difficult to discover."⁹³ Congress's "plain intent [was] to control the traffic within the States by preventing sales except to registered persons and holders of prescriptions, and this amount[ed] to an attempted regulation of something reserved to the States."⁹⁴ The concluding passage of McReynolds dissent, which laid bare the fallacy essential to the majority's analysis, merits quotation at some length:

The habit of smoking tobacco is often deleterious. Many think it ought to be suppressed. The craving for diamonds leads to extravagance, and frequently to crime. Silks are luxuries, and their use abridges the demand for cotton and wool. Those who sell tobacco, or diamonds, or silks may be taxed by the United States. But, surely, a provision in an act laying such a tax which limited sales of cigars, cigarettes, jewels, or silks to some small class alone authorized to secure official blanks would not be proper or necessary in order to enforce collection. The acceptance of such a doctrine would bring many purely local matters within the potential control of the federal government. The admitted evils incident to the use of opium cannot justify disregard of the powers "reserved to the States respectively, or to the people."⁹⁵

124–26, 136 (1992), for a discussion of McReynolds's antipathy for unorthodox persons and conduct.

⁸⁹ See *Nigro*, 276 U.S. at 354–57. Justice Butler dissented on the ground that he would have rejected the government's broad construction of the Act's section 2 and, thereby, avoided the constitutional question. *Id.* at 358 (Butler, J., dissenting).

⁹⁰ *Id.* at 356 (McReynolds, J., dissenting).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 357 (quoting U.S. CONST., amend. X).

The clarity and force of McReynolds's analysis in this dissent demonstrates that the majority Justices were on notice as to the likely consequences of sustaining a broad interpretation of the Harrison Act but did so regardless. Even harder to justify, however, is the *Raich* Court's disregard of Justice Thomas's similar counsels decades after intervening events had proven McReynolds prophetic.⁹⁶

B. EARLY FEDERAL REGULATION OF OTHER "MORAL VICES"

After much ado about federalism, the Court affirmed the constitutionality of the Harrison Act, despite the transparency of Congress's illegitimate purpose: to exercise a core aspect of the police power—sheltering the weak-willed from the temptation of vice. The Harrison Act cases are a subset of a larger class of early twentieth-century rulings rejecting constitutional challenges to federal morals regulations. The majority of the Justices, perhaps inclined by their own moral sensibilities to sustain what they perceived to be beneficial safeguards against vice,⁹⁷ acceded to expanding constructions of Congress's enumerated powers, especially its authority over interstate commerce.

A seminal ruling came in *Champion v. Ames (The Lottery Case)*, in which a bare majority of the Justices sustained an 1895 federal statute enacted "for the Suppression of Lottery Traffic through National and Interstate Commerce."⁹⁸ Chief Justice Fuller, joined by three other justices, dissented from this holding in an opinion that was both forceful and foreboding. In prohibiting the interstate shipment of lottery tickets, Fuller objected, Congress had in effect asserted a power to regulate public morality by leveraging its control over the channels of interstate commerce.⁹⁹ Fuller warned that "the necessary consequence" of the majority's recognition of a virtually unlimited congressional power to regulate interstate transportation was "to take from the States all jurisdiction over [any] subject so far as interstate communication is concerned."¹⁰⁰ The majority's endorsement of this broad understanding of the commerce power constituted "a long step in the direction of wiping out all traces of state lines, and the creation of a centralized Govern-

⁹⁶ See *Gonzales v. Raich*, 545 U.S. 1 (2005).

⁹⁷ Cf. Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1, 78 (1999) ("The Justices' laissez-faire economic philosophy led them to strike down progressive regulations in areas like production and employment, yet their moral puritanism resulted in sustaining legislation that prohibited illicit sex, lotteries, and other vices.") (citation omitted).

⁹⁸ *Champion v. Ames (The Lottery Case)*, 188 U.S. 321, 364 (1903).

⁹⁹ *Id.* at 365 (Fuller, C.J., dissenting).

¹⁰⁰ *Id.* at 371. See generally JAMES W. ELY, JR., *THE FULLER COURT: JUSTICES, RULINGS, AND LEGACY* (ABC-CLIO 2003), for a recent overview of the Fuller Court.

ment.”¹⁰¹ Indeed, Fuller concluded his dissenting opinion by noting that “[o]ur form of government may remain notwithstanding legislation or decision, but, as long ago observed, it is with governments, as with religions, the form may survive the substance of the faith.”¹⁰²

As Chief Justice Fuller had feared, *The Lottery Case* supplied precedent for numerous federal statutes selectively forbidding interstate transport in an attempt to suppress goods and conduct deemed dangerous to public health or morals. For example, the Court thereafter upheld federal statutes imposing prohibitive taxation on the sale of artificially colored oleomargarine¹⁰³ and criminalizing interstate transport of “adulterated articles of food or drugs.”¹⁰⁴ Extending *The Lottery Case*’s recognition of Congress’s power to forbid interstate transport for the purpose of suppressing temptations to moral vice, the Court upheld a 1910 statute “commonly known as the white slave act.”¹⁰⁵ That federal statute made it a felony to transport any woman or girl—or to persuade, induce, or entice any woman or girl to go—from one state to another “for the purpose of prostitution or debauchery, or for any other immoral purpose.”¹⁰⁶ Justice McKenna, writing for a unanimous Court, reasoned that:

[S]urely if the facility of interstate transportation can be taken away from the demoralization of lotteries, . . . the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and enslavement in prostitution and debauchery of women, and, more insistently, of girls.¹⁰⁷

¹⁰¹ *The Lottery Case*, 188 U.S. at 365 (Fuller, C.J., dissenting).

¹⁰² *Id.* at 375. See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 306–12 (2004) (discussing whether the power “to regulate” within the meaning of the Commerce Clause should be construed to include the power “to prohibit”); Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 BUS. HIST. REV. 304 (1979) (providing a watershed reevaluation of the historical context and significance of the *E.C. Knight* case).

¹⁰³ *McCray v. United States*, 195 U.S. 27, 64 (1904). The tax was relatively transparent protectionism shielding the butter industry from competition, justified by undocumented claims that artificially colored oleomargarine somehow endangered public health, or at the least engendered consumer confusion. See generally Geoffrey Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989), for a deliciously ironic history of “the first battle in the margarine war,” which culminated in the passage of 1886 Act ultimately challenged in *McCray*.

¹⁰⁴ *Hipolite Egg Co. v. United States*, 220 U.S. 45, 60 (1911).

¹⁰⁵ *Hoke v. United States*, 227 U.S. 308, 317, 323 (1913).

¹⁰⁶ *Id.* at 317–18 (internal quotation marks and citation omitted).

¹⁰⁷ *Id.* at 322. Indeed, the Court seemed to embrace without reservation the broadest implications of *The Lottery Case*. Justice McKenna observed that:

Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are

The full import of *Hoke* quickly revealed itself in a series of cases that continued to expand Congress's power to regulate interstate commerce. First, the Court, over Justice McKenna's dissent on non-constitutional grounds, affirmed the felony convictions of two men under the same statute, for traveling from California to Nevada in the company of their voluntary mistresses.¹⁰⁸ *Caminetti* made fornication and adultery federal crimes so long as the prosecution established the minimal requirement of an interstate nexus.¹⁰⁹ Two years later, the Court upheld the War-Time Prohibition Act, a federal statute (enacted prior to the ratification of the Eighteenth Amendment) that prohibited the sale of distilled spirits for beverage purposes.¹¹⁰ The Court advanced still another

adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. [*Id.*]

Nor did the Court recoil from the apparent consequence that Congress could employ its authority over interstate commerce to exercise a general police power over the entire nation: "Congress has power over transportation 'among the several states;' that the power is complete in itself[;] and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise[;] and the means may have the quality of police regulations." *Id.* at 323 (emphasis added).

¹⁰⁸ *Caminetti v. United States*, 242 U.S. 470, 482–83, 496 (1917).

¹⁰⁹ A few days before, invoking *Hoke* and *The Lottery Case*, Chief Justice White's opinion for the Court had observed, albeit in dicta, that Congress had the power to prohibit all shipment or transport of intoxicating beverages "in the channels of interstate commerce." *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311, 325–26 (1917). The Court rejected a constitutional challenge to the Webb-Kenyon Act, which prohibited shipment of intoxicating liquors into a state only if the shipment violated state law. *Id.* at 332. A few weeks after the decision in *Clark Distilling Co.*, Congress enacted the Reed Amendment, which further extended the federal prohibition on interstate transport of alcohol. The Court later upheld the federal criminal prosecution of one who carried a single quart of liquor from Kentucky into West Virginia for personal use, even though West Virginia law permitted the conduct. *United States v. Hill*, 248 U.S. 420, 421–22, 427 (1919). Justice McReynolds dissented, claiming "the Reed Amendment in no proper sense regulates interstate commerce, but is a direct intermeddling with the state's internal affairs." *Id.* at 428.

¹¹⁰ *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 153, 168 (1919) (sustaining the Act as incidental to Congress's war powers). After acknowledging that "the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment," Justice Brandeis's opinion for a unanimous Court continued:

[I]t is nonetheless true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose. [*Id.* at 156.]

Less than a month later Justice McReynolds, writing for himself and Justices Day and Van Devanter, tried in vain to limit the damage *Hamilton* had done to the states' reserved powers. *Ruppert v. Caffey*, 251 U.S. 264, (1920) (McReynolds, J., dissenting). Dissenting from the Court's decision upholding as a war measure prohibition of near beer so weak as to be non-intoxicating, Justice McReynolds argued that the connection between watered-down beer and U.S. military necessities circa autumn 1919 was so attenuated as to expose Congress's assertion of its war powers as a mere pretext for an invasion of the police power of the states. *Id.* at 310. Having gone along with Court in *Hamilton*, though, Justice McReynolds and his fellow dissenters seemed to be unduly concerned about closing the barn door after the horse had escaped.

substantial step in 1925, when it affirmed a criminal conviction under a federal statute that prohibited the transport of stolen motor vehicles across state lines.¹¹¹ Chief Justice Taft's opinion for a unanimous Court in *Brooks* expressly condoned a *congressional police power* over interstate commerce:

Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this *it is merely exercising the police power*, for the benefit of the public, within the field of interstate commerce.¹¹²

The *Brooks* opinion was the first to concede this much so frankly, but this concession flowed ineluctably from *The Lottery Case* and its numerous progeny. In those decisions, the Court had invariably rejected the argument that Congress's selective prohibition of interstate transport had unconstitutionally invaded the powers reserved by the Tenth Amendment.¹¹³

Yet in *Hammer v. Dagenhart*, a bare five-Justice majority embraced this very argument, which they had previously rebuffed in the context of traditional morals regulation, as the ground for invalidating a federal statute prohibiting interstate transportation of goods produced by child labor.¹¹⁴ This statute made it unlawful for a "producer, manufacturer, or dealer [to] ship or deliver for shipment in interstate or foreign commerce any article or commodity the product of any . . . manufacturing establishment," which had in the previous thirty days employed children under the age of fourteen, or employed beyond set hours children between the ages of fourteen and sixteen.¹¹⁵ Justice Day's opinion for the Court argued that "[t]he act *in its effect* [did] not regulate transportation among the states, but aim[ed] to standardize the ages at which children may be employed in mining and manufacturing within the states."¹¹⁶ Were the Court to uphold the statute, "all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States," thereby destroying "the local power always

¹¹¹ *Brooks v. United States*, 267 U.S. 432, 441 (1925).

¹¹² *Id.* at 436–37 (emphasis added).

¹¹³ See *Champion v. Ames (The Lottery Case)*, 188 U.S. 321, 357–58 (1903).

¹¹⁴ *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918).

¹¹⁵ *Id.* at 268–69 (quoting the first section of the challenged federal statute, which also forbade employment of children 14–16 years old beyond certain hours).

¹¹⁶ *Id.* at 271–72 (emphasis added).

existing and carefully reserved to the States in the Tenth Amendment to the Constitution.”¹¹⁷

Justice Day sought to square the Court’s sudden solicitude for the states’ reserved powers with the long line of decisions commencing with *The Lottery Case*, which had repeatedly upheld federal legislation that “in effect” accomplished police power objectives.¹¹⁸ Rather feebly, Justice Day distinguished this contrary line of authority on the ground that “[i]n each of [these instances] the use of interstate commerce was necessary to the accomplishment of harmful results,” whereas by the time the products of child labor were ready for interstate shipment, “the labor of their production [was] over” and any harm to the laborers already complete.¹¹⁹ Holmes writing for himself and the other three dissenters countered, in his justly celebrated opinion, that “[i]t does not matter whether the supposed evil precedes or follows transportation. It is enough that in the opinion of Congress the transportation encourages the evil.”¹²⁰ Indeed, Chief Justice Taft had held exactly that for a unanimous court in *Brooks*, finding it sufficient that a federal prohibition on interstate transport of stolen cars suppressed theft of automobiles in the states from which they were taken.¹²¹ As Professor David Currie wrote of the *Hammer* decision: “It is hard to believe that the majority found its own distinctions persuasive.”¹²²

¹¹⁷ *Id.* at 272, 274. See DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995*, at 254–61 (1996), for a discussion of the constitutional amendment proposed in response to the Court’s decision in *Hammer*.

¹¹⁸ *Brooks v. United States*, 267 U.S. 432, 436–37 (1925).

¹¹⁹ *Hammer*, 247 U.S. at 271–72 (1918).

¹²⁰ *Id.* at 279–81.

¹²¹ *Brooks*, 267 U.S. at 438–39; see also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888–1986*, at 176 (1990) (observing that Chief Justice Taft’s opinion for the Court in *Brooks* “made no effort to show that stolen cars were harmful to anyone in the state to which they were transported . . . [and] thus left *Hammer* dangling without visible support and exposed the Court to a serious charge of inconsistency”). Professor Currie attempted to reconcile *Hammer* with *Brooks* on the ground that the federal statute affirmed in *Brooks* reinforced rather than supplanted state policy (apparently on the reasonable assumption that all states criminalized car theft whereas at least some permitted the child labor effectively proscribed by the statute struck down in *Hammer*). *Id.* Though this argument might square the two rulings considered in isolation, it ignores that by the time *Brooks* was decided the Court had, over Justice McReynolds’s passionate dissent, already upheld a federal criminal prosecution under a statute forbidding transport of even a small amount of liquor for personal consumption into a state that by law permitted the same. *Hill*, 248 U.S. 420, 421–22, 427 (1919). Thus, the Court did not in fact make conformity with state law a predicate to the exercise of the federal police power acknowledged in *Brooks* (and repudiated in *Hammer*).

¹²² CURRIE, *supra* note 121, at 98. The distinguished Professor Corwin was even more hostile to *Hammer*. See, e.g., EDWARD S. CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS: BACK TO THE CONSTITUTION* 254–55 (1936). But see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1427 (1987), for an assessment far more charitable to the *Hammer* majority.

It was as though, after years of thoughtless neglect, the Court in 1918 finally awoke too late to the realization of its duty to safeguard the states' reserved powers. Ultimately, it was Justice Holmes who, in his inimitable fashion, most eloquently summarized the clash between *Hammer* and the Court's prior decisions upholding federal morals regulations:

The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our 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.

But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court always had disavowed the right to intrude its judgment upon the questions of policy or morals. It is not for this Court to pronounce when the prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible to as against strong drink but not as against the product of ruined lives.¹²³

Of course, to say that *Hammer* could not be reconciled with the Court's prior rulings is not to say that *Hammer* was wrongly decided for the error may have been made in some, if not all, of the cases before. Regardless, the manifest tension between *Hammer* and its progeny, on the one hand, and the Court's numerous decisions affirming broad assertions of con-

¹²³ *Hammer*, 247 U.S. at 280 (Holmes, J., dissenting). Curiously, when the Court struck down the federal child labor tax as an impermissible end run around *Hammer*, Justices Holmes and Brandeis silently joined the majority opinion. *Bailey v. Drexel Furniture Co. (The Child Labor Tax Case)*, 259 U.S. 20 (1922). Whether their acquiescence reflected their perception that Congress's power to tax was more liable to abuse, and thus more appropriately subjected to probing judicial scrutiny, as some have wondered, see CURRIE, *supra* note 121, at 174, or whether they simply threw in the proverbial towel remains, for the present author at least, a mystery. For discussion of the Tenth Amendment aspects of these cases, see Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading The Constitution in Plato's Cave*, 23 HARV. J.L. & PUB. POL'Y 551, 555 (2000); David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAP. U. L. REV. 339 (1996); William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769 (1987). See generally THE TENTH AMENDMENT AND STATE SOVEREIGNTY: CONSTITUTIONAL HISTORY AND CONTEMPORARY ISSUES (Mark R. Killenbeck ed., 2002).

gressional authority, on the other, seriously undercut the Court's avowed dedication to the preservation of a robust federalism.¹²⁴

C. CONTEMPORANEOUS COMMENTARY

The Court's fidelity to principle, or lack thereof, was as vigorously debated off the Court as on it. Anticipating the Court's invalidation of the federal child labor act, Frederick Green, a law professor at the University of Illinois, published an article in 1917 arguing that the statute exceeded Congress's enumerated powers.¹²⁵ Like Justice Day's opinion for the Court in *Hammer*, Professor Green made out a creditable case in chief, stressing that little would be left of the states' reserved powers were Congress permitted to condition access to interstate markets on compliance with a congressional code of conduct.¹²⁶ His reasoning foundered, though, upon the shoals of precedent, because, as we have seen, the Court had sustained numerous federal morals regulations that operated in just such a fashion. Green's efforts to distinguish these cases exposed his own unconscious, but nevertheless decisive, prejudice on the merits of the underlying social and economic policy more clearly than any rebuttal ever could have. The prior cases were different, he argued, because interstate lottery tickets, liquor, prostitutes, or even willing adulterers were all things intrinsically dangerous or immoral, whereas exploitation of child labor was beyond reproach: "to employ children of 13 in factories or of 15 in quarries or mines . . . [was] not immoral."¹²⁷ To the contrary, "[a]n employer of child labor [was] . . . fully within his legal rights, and his moral rights as well."¹²⁸ Green presaged Holmes's poignant juxtaposition of "strong drink" with "the product of ruined lives," only without any sense of irony.¹²⁹ By all appearances, he also

¹²⁴ Compare, e.g., *The Child Labor Tax Case*, 259 U.S. 20 (1922), with, e.g., *Brooks v. United States*, 267 U.S. 432 (1925). For an exhaustive and illuminating account of the Taft Court's federalism jurisprudence, in all its manifestations, see Robert Post, *Federalism in the Taft Court Era: Can It Be "Revived"?*, 51 DUKE L.J. 1513, 1569 (2002) ("The question is why the Taft Court so forcefully sought to maintain this distinction [between commerce and manufacturing] in the context of child labor regulation, when it was unraveling analogous distinctions in the context of railroad rates, stockyards, and boards of trade.").

¹²⁵ See Frederick Green, *The Child Labor Law and the Constitution*, 2 ILL. L. BULL. 3 (1917).

¹²⁶ See *id.* at 20. Green also anticipated congressional resort to prohibitory taxation of child labor's outputs. Tellingly, he summarized his position in this context by asserting that "the power to lay and collect taxes does not include power to require payment from one who does a named act, if the price is pitched so high, that it is plain there will be nothing to collect, or not enough to make the law operate as a raising of revenue from a contributing class." *Id.* at 25. While it is hard to argue against such a common-sense approach, it must be observed that such a standard would have required invalidation of the Harrison Act as well.

¹²⁷ *Id.* at 5-6.

¹²⁸ *Id.* at 6.

¹²⁹ Compare *Hamer v. Dagenhart*, 247 US 251, 280 (1918) (Holmes, J., dissenting), with *Green*, *supra* note 125.

lacked any awareness that child labor might, to many, be a moral issue at least as compelling as lotteries and marital infidelity. Most importantly, he failed to discern that it was for Congress, and not for the Court, to determine what would be deemed good or evil for these purposes. In fulfilling the prophecy of Green's article in the ensuing Supreme Court term, the *Hammer* majority fell victim to a similar blindness.

Not surprisingly *Hammer* spurred numerous law journal articles. Many commentators savaged the majority on the ground that the ruling was glaringly inconsistent with the long line of decisions sustaining congressional regulations of perceived moral vices.¹³⁰ A few others struggled mightily, and at times outlandishly, to discover some unarticulated principle that would reconcile all the decisions.¹³¹ Commentators were nearly unanimous, however, in the conclusion that Justice Day's opinion for the Court failed in its effort to square *Hammer* with these prior rulings.

Robert Cushman, at the time a colleague of Green's at the University of Illinois, stressed the cases' apparent disarray, and the consequent confusion and impatience of the "man in the street" who had come to believe that "Congress has, or ought to have, authority to pass any salutary law in the interest of the national welfare."¹³² Nor would reciting that Congress "may pass laws to suppress the white slave traffic or the sale of adulterated food, [but] has no power to prohibit child labor . . . add much to his understanding of American constitutional law."¹³³ Rather "[t]oo often it merely decreases his respect for the constitution and the courts which construe it."¹³⁴ Cushman lamented that "Congress has come gradually to legislate in affairs over which it has been supposed to have no jurisdiction—to assume responsibility for the safety, health, morals, good order, and general welfare of the nation, and thus to exercise what may be called a national police power."¹³⁵ Nor, Cushman reasoned, had the Court in *Hammer* imposed any meaningful check on Congress, which "still retain[ed] full authority . . . to protect the national

¹³⁰ See, e.g., Thurlow M. Gordon, *The Child Labor Law Case*, 32 HARV. L. REV. 45 (1918); Thomas Reed Powell, *The Child Labor Law, the Tenth Amendment, and the Commerce Clause*, 3 S. L.Q. 175 (1918).

¹³¹ See, e.g., Note, *The Feasibility of State Control as a Test of the Scope of the Federal "Police Power"*, 29 COLUM. L. REV. 321 (1929) [hereinafter *Feasibility of State Control*]; F.D.G. Ribble, *The "Current of Commerce": A Note on the Commerce Clause and the National Industrial Recovery Act*, 18 MINN. L. REV. 296 (1934) [hereinafter *Feasibility of State Control*]; Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 HARV. L. REV. 1335 (1934).

¹³² Robert E. Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 289, 289 (1919).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 289–90.

health, morals safety, and general welfare from such evils as depend upon the physical agency of interstate commerce facilities."¹³⁶

Whereas Cushman's commentary affected a philosophical tone, other critics were more direct. Writing in the *Harvard Law Review*, prominent New York attorney and former Assistant Attorney General, Thurlow M. Gordon, excoriated the Court's inconstancy. He echoed Holmes, observing that "[t]ransportation of child-made goods encourages the ruin of the lives of future citizens in the state of production."¹³⁷ Alluding to the Mann Act cases, he continued: interstate transportation "directly aids this immorality quite as much as the transportation across state lines of girls for the purpose of prostitution."¹³⁸ Professor William C. Jones, of the University of California, Berkeley, declared that the Court could have the result in these and other similar, prior cases or it could have the result it reached in *Hammer*, but it could not, with any consistency, have both.¹³⁹ "Either the Lottery, Pure Food, and White Slave cases have been decided rightly on some large constitutional principle, or they have been decided wrongly, on no constitutional principle at all, but simply in response to a popular emotion."¹⁴⁰ The Court's efforts to distinguish these cases in *Hammer*, however, were "utterly indefensible."¹⁴¹

Thomas Reed Powell, then a Professor of Constitutional Law at Columbia University, would prove to be among "the Court's most acerbic and effective critics."¹⁴² By the time the Court decided *Hammer*, it was far too late, he insisted, to deny Congress the use of its power over interstate commerce as a means to affect primary conduct it might lack the power to govern directly.¹⁴³ Citing the Court's lottery, liquor, and Mann Act decisions, Powell declared that similar uses of Congress's Commerce Clause authority had been reaffirmed myriad times over several decades.¹⁴⁴ Once one "brush[ed] aside all the confused and erroneous thinking of the majority, . . . only their fiat" remained to account for the Court's failure to follow these precedents and sustain the Child Labor Act.¹⁴⁵ "[C]ertainly nothing in the Constitution [] require[d] the deci-

¹³⁶ Robert Cushman, *The National Police Power Under the Commerce Clause of the Constitution*, 3 MINN. L. REV. 452, 482-83 (1919).

¹³⁷ Gordon, *supra* note 130, at 55.

¹³⁸ *Id.*

¹³⁹ William Carey Jones, *The Child Labor Decision*, 6 CAL. L. REV. 395 (1918).

¹⁴⁰ *Id.* at 410.

¹⁴¹ *Id.*

¹⁴² Alexander M. Bickel, *The Fate of Social Legislation, 1914-21: Federal*, in IX THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 414, 458 (Paul A. Freund & Stanley N. Katz eds., 1984).

¹⁴³ Powell, *supra* note 130, at 195.

¹⁴⁴ *Id.* at 195-98.

¹⁴⁵ *Id.* at 198.

sion of the majority,” which was “wretchedly supported by the argument of the opinion.”¹⁴⁶ These particulars, joined with “the narrow margin by which the decision was reached,” invited “the inference that the judges who composed the majority were influenced by their personal predilections on a question of policy.”¹⁴⁷ Powell ultimately concluded that “[t]he Child Labor decision illustrates anew the extent to which the judges of the Supreme Court are our governors. It shows that the predilections of a single judge may nullify the predilections of a majority of two houses of the national legislature and the chief executive of the nation.”¹⁴⁸

The decisions sustaining the constitutionality of the Harrison Act both confirmed and compounded these criticisms. Few, if any, commentators were as credulous as the Court concerning Congress’s nominal characterization of the statute as a tax, as opposed to a direct regulation. About *Doremus*, Professor Powell observed that “[t]his decision had been reached only by a five-to-four vote, and the judgment of reasonableness on which it was predicated [was] of course rationally indefensible.”¹⁴⁹ In reality, “[t]he court allowed Congress to abuse its taxing power for a worthy end.”¹⁵⁰ Joseph Long, a professor at Washington and Lee University, had no greater difficulty seeing through the forms of the Harrison Act. “By this act, under the guise of an excise law,” he remarked, “Congress undertook to regulate the sale of narcotic drugs throughout the United States.”¹⁵¹ But the Supreme Court capitulated to this fiction. In words that foreshadowed the *Raich* and *Oregon* contro-

¹⁴⁶ *Id.* at 199.

¹⁴⁷ *Id.* at 202.

¹⁴⁸ *Id.* at 200.

¹⁴⁹ Thomas Reed Powell, *Child Labor, Congress, and the Constitution*, 1 N.C. L. REV. 61, 80 (1922).

¹⁵⁰ *Id.*; see also THOMAS REED POWELL, VAGARIES AND VARITIES IN CONSTITUTIONAL INTERPRETATION 87 (1956) (describing the cases sustaining the Harrison Act as “[h]ardly candid”). Professor Powell nevertheless found the Harrison Act to be ‘distinguishable from the child labor [tax] law, in that its regulatory features were not the basis of taxability.’ Powell, *supra* note 149, at 80. This claim, however, appears to be predicated on a misreading of the Harrison Act. Powell explained that, as he read it:

The device of the Harrison Act is a clever one for securing the publicity of transactions so that the states may be aided in the execution of their police powers. It does not in and of itself enable the federal government to suppress unworthy conduct as would the artifice attempted in the child labor tax. [*Id.*]

However, as actually implemented, the Harrison Act did prohibit private sale, purchase, or use of narcotics absent a physician’s prescription, regardless of the treatment relevant state criminal law accorded that conduct. See Reuschlein & Spector, *supra* note 86, at 21 (concluding that the Harrison Act did “not merely [give] publicity to criminal transactions but rather afford[ed] an effective method for complete control of the drug traffic,” and noting that the “Federal Government has been the prosecutor, not the several states”).

¹⁵¹ Joseph R. Long, *Federal Police Regulation by Taxation*, 9 VA. L. REV. 81, 88 (1922). Cf. THOMAS JAMES NORTON, LOSING LIBERTY JUDICIALLY 212 (1928) (noting that the Harrison Act, though “in the guise of a revenue measure,” was “[i]n practice . . . a very detailed regulation of sales [of narcotics] in the States”).

versies, Professor Long explained that “[t]hus the regulation of the drug business and the practice of medicine [was] largely brought within the federal jurisdiction.”¹⁵²

What made this judicial abdication all the more troubling was its selectivity. Throughout, the Court persistently invoked federalism to annul those few congressional acts five or more of the Justices, for unknown reasons, found singularly contemptible. Contrasting the Court’s decisions sustaining the Harrison Act and other regulations cloaked in tax garb with the Court’s invalidation of the so-called Child Labor Tax, Professor Cushman pronounced the two lines of precedent “logically irreconcilable” and chastised the Court for preserving “two available judicial techniques for dealing with the validity of national police regulations under the taxing power.”¹⁵³ The Court’s choice of technique dictated the result in a particular case. The unbridled “discretion which the Court enjoy[ed] in determining which of the two doctrines [to] apply” in any given case secured it “a strategic position with respect to national policy.”¹⁵⁴ If the Court’s rulings took “on the aspect of . . . ‘judicial legislation,’” at least the usurpation had become “familiar” due to “its presence in so many other parts of our constitutional system.”¹⁵⁵

Writing in 1928, Arthur Machen dismissed as empty the Court’s claim in the *Child Labor Tax Case* that it would invalidate federal statutes attempting “under the guise of taxation to legislate upon matters [the Tenth Amendment] reserved exclusively to the states.”¹⁵⁶ That obligation had been honored far more in the breach than in the observance: “No critic can justly charge the Court with excess of zeal for states rights in the application of this principle, as witness . . . the decision sustaining, with a blindness worthy of Justitia herself, the obvious constitutional fraud of the Harrison Drug Act.”¹⁵⁷ A 1936 article in the *Georgetown Law Journal* proclaimed that “[t]he *Doremus* case represents, to this

¹⁵² Long, *supra* note 151, at 89.

¹⁵³ Robert E. Cushman, *Social and Economic Control Through Federal Taxation*, 18 MINN. L. REV. 759, 782–83 (1934).

¹⁵⁴ *Id.* at 783.

¹⁵⁵ *Id.*

¹⁵⁶ Arthur W. Machen, Jr., *The Strange Case of Florida v. Mellon*, 13 CORNELL L.Q. 351, 375 (1928).

¹⁵⁷ *Id.* (footnotes omitted, emphasis added); see also S. Chesterfield Oppenheim, *Unconstitutional Conditions and State Powers*, 26 MICH. L. REV. 176, 184 n.29 (1927) (“The federal government has no general police power but it is well known that police ends have been accomplished by the enactment of legislation under its enumerated powers.”) (citing *Doremus*, 249 U.S. 86 (1919)); Malcolm P. Sharp, *Movement in Supreme Court Adjudication—A Study of Modified and Overruled Decisions*, 46 HARV. L. REV. 593, 611 (1933) (“A second decision [*Nigro*] upholding our extensive system of federal narcotic taxations, prohibiting sales of narcotics except by registered persons” has “recently again raised questions in some minds whether the limits set for child labor legislation by Congress have been consistently observed in other decisions of the Court.”).

date, the extremity of regulation under the guise of the revenue power.”¹⁵⁸

A year later, Thomas Cowan, a law professor at Louisiana State University who had previously served as an attorney in the Department of Justice, ridiculed Chief Justice Taft’s opinions for the Court in the *Child Labor Tax* and *Nigro* cases.¹⁵⁹ In the former, “[t]he *Doremus* case was distinguished by a piece of judicial legerdemain.”¹⁶⁰ As to the latter, Cowan observed even more colorfully that “with judicial seriousness that would make a cat laugh the learned Chief Justice solemnly found that the elaborate restrictive measures of the Anti-Narcotic Act and the extremely severe penalties were” incidental and instrumental to the collection of the relatively tiny tax.¹⁶¹ Cowan continued:

The Chief Justice [] gravely found that Section 9 [of the Harrison Act], which subjects anyone failing to comply with the requirements of the act to a fine of not more than \$2,000 or imprisonment for not more than five years or both, was designed to prevent evasion of six dollars per annum on retail dealers in narcotics, and a stamp tax of one cent per ounce on packages of narcotics sold.¹⁶²

Plainly only willful blindness could reconcile the two cases according to any policy-neutral legal principle. For Cowan, there was no escaping the conclusion that the Supreme Court “is a policy-forming body,” that the “[i]nfluences brought to bear on it resemble those used on legislators,” and that “consideration of the desirability of legislation must be uppermost in the minds of the judges when they decide” cases avowedly dictated by principles of federalism.¹⁶³

¹⁵⁸ Charles V. Koons, *Growth of Federal Licensing*, 24 GEO. L.J. 293, 303 (1935–1936); see also Brown, *supra* note 85, at 420 (describing the Harrison Act as “a law designed to prohibit the sale of narcotics, except for proper medicinal purposes”); Thomas A. Cowan, *The Social Security Act and Free Judicial Choice*, 9 MISS. L.J. 407, 419 (1937) (noting that the “Harrison Anti-Narcotic Act [] was aimed at the complete control of trade in narcotics” and that *Doremus* constituted “the highwater mark of federal regulation by means of the taxing power”); George Ross Hull, *The Rights of the People of the States*, 59 AM. L. REV. 801, 810 (1925) (“In 1914, Congress reached out through the Harrison Narcotic Drug Act to regulate the sale of narcotics and justified its action by the taxing power.”); Thomas I. Parkinson, *Child Labor and the Constitution*, 12 AM. LAB. LEGIS. REV. 110, 112 (1922) (noting the transparently regulatory character of the Harrison Act and, accordingly, the tension between *Doremus* and the *Child Labor Tax Case*).

¹⁵⁹ See generally Cowan, *supra* note 158.

¹⁶⁰ Cowan, *supra* note 158, at 420.

¹⁶¹ *Id.* at 422.

¹⁶² *Id.*

¹⁶³ *Id.* at 425–26. Cowan was not adverse to inclusion of policy considerations in constitutional adjudication. To the contrary, it was his view that “[b]inding precedents in the application of constitutional standards would be intolerable.” *Id.* His ultimate point was, rather, that

Of course some scholars were unwilling to admit as much. Confronted with the constitutional confusion created by the clash between the child labor cases and the decisions sustaining federal morals regulations, several commentators sought to supply a reconciling principle not identified by the Court. For example, a student note in the *Columbia Law Review* acknowledged that the child labor "decisions [were] undoubtedly based far less on the reasons enunciated in the opinions than on a single underlying policy adverse to federal regulation under any power," and that "[t]he formulae announced are designed to meet an emergency without open violence to the precedents."¹⁶⁴ Citing the Court's reaffirmation of the Harrison Act in *Nigro*, the author observed that the rationale of the child labor cases was "already proving unequal to the strain of later decisions."¹⁶⁵ In other words, the theory of the Court's opinions (especially Chief Justice Taft's opinion for the Court in the *Child Labor Tax Case*) would have invalidated the Harrison Act as well. But the author recoiled from the conclusion that the Court's actual *holdings* were incompatible. Rather, "it [was] time to penetrate deeper and ascertain the inarticulate major premise that [was] guiding the Supreme Court to its conclusions."¹⁶⁶ The "principle tacitly recognized by the Court" and in fact dictating the seemingly inconsistent results was that "the federal government may use any of its powers for an ulterior purpose affecting the traditional sphere of state control when and only when this ulterior purpose is administratively incapable of attainment by state action."¹⁶⁷ While this explanation was sensible enough (as is any tautology), it reconciled the cases only by assuming the legitimacy and competence of the Supreme Court to make these kinds of predictive judgments.¹⁶⁸ Indeed, the Court's critics persuasively argued that the

"much would be gained if the court made its policy-forming function conscious and explicit." *Id.* One advantage to this frank course would be a "call for judicial restraint, since judicial policy makers, or rather policy reviewers, would have to accord to their legislative colleagues a measure of discretion in the application of the constitutional standard." *Id.* For this reason, among others, the federal courts might actually "gain in prestige if they would avowedly become policy reviewers of Congressional action where broad standards of constitutional power are in question." *Id.* at 426.

¹⁶⁴ See *Feasibility of State Control*, *supra* note 131, at 321; see also *id.* at 323 (observing that "the Court has actually sustained a large number of federal police measures and invalidated only a few"); cf. William A. Sutherland, *The Child Labor Cases and the Constitution*, 8 CORNELL L.Q. 338, 356 (1923) ("We doubt the soundness of the *Doremus* case, but it must be admitted that there is a very marked distinction between it and the [*Child Labor Tax Case*].").

¹⁶⁵ *Feasibility of State Control*, *supra* note 131, at 321.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 321-22.

¹⁶⁸ Cf. *Feasibility of State Control*, *supra* note 131, at 323 (asserting that "the Court has shown, almost without exception, a statesmanlike regard for the situation as to the feasibility of state action to attain the desired end").

states were, if anything, less able to address the child labor question than the problems posed by lotteries, alcohol, narcotics, or illicit sex.

But even more forceful was the unanswerable claim, advanced by the most cogent essayists both on and off the Court, that if American federalism had been reduced to these kinds of assessments, then they were more properly made by Congress than by the unelected, unaccountable, and uninformed Justices. Their acquiescence in federal morals regulations had undermined their role in enforcing the enumerated powers scheme. Their indulgence of the congressional overreaching that they thought laudable discredited their subsequent efforts to act as apolitical arbiters. The Justices forfeited the Court's ability to implement the constitutional rules dividing the realm of political engagement into state and national spheres. Thus impaired by the Supreme Court's decades-long acquiescence in constitutionally suspect federal morals regulations, federalism died (the first time) long before most Americans had even heard of Franklin Roosevelt.

D. THE NEW DEAL ERA

After briefly sketching an overview of the well-worn tale of federalism's demise during the 1930s, this part recounts the lesser-known role that the Court's decisions sustaining federal morals regulations in general, and the Harrison Act more specifically, played in those events. These decisions impeached the Court's claim to policy neutrality and, indeed, its professed commitment to federalism. For as we have seen numerous, prominent critics of the Court repeatedly observed throughout the 1920s and 30s that a selectively invoked and applied federalism was not really federalism at all, but rather merely a convenient stalking horse for judicial imposition of the Justices' unarticulated and unexplained policy preferences. This part concludes by arguing that this lesson, including its consequences for the New Deal Court, is one that the sitting Justices would be well advised always to remember.

1. *During Roosevelt's First Term*

If, as others have concluded, the ultimate clash between President Franklin Delano Roosevelt's New Deal and the Supreme Court constituted a "Great Constitutional War,"¹⁶⁹ then among the first shots was the Court's May 6, 1935 decision in *Railroad Retirement Board v. Alton Railroad Co.*, which struck down the 1934 Railroad Retirement Act as beyond Congress's enumerated powers.¹⁷⁰ Justice Owen Roberts wrote

¹⁶⁹ MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937* (2002); see also Max Lerner, *The Great Constitutional War*, 18 VA. Q. REV. 530 (1942).

¹⁷⁰ 295 U.S. 330 (1935).

the opinion for the Court, in which he was joined only by those aging Justices who would soon be infamously labeled the "four horsemen."¹⁷¹ This slim majority rejected the argument that the Act, which established a compulsory retirement and pension regime for all railroad workers, could be sustained as a measure to promote the safety and efficiency of interstate transport by rail. Justice Roberts reasoned that, even if Congress could compel the retirement of senior railway laborers, Congress could not, as a means to that end, impose a pension program on the industry. If the ends of safety and efficiency in interstate rail transportation "demand[ed] the elimination of aged employees, their retirement from the service would suffice to accomplish the object. For these purposes the prescription of a pension for those dropped from service is wholly irrelevant."¹⁷² To the government's assertion "that it would be unthinkable to retire a man without pension and [] that attempted separation of retirement and pensions [was] unreal in any practical sense," Justice Roberts answered that "[t]he supposed impossibility [arose] from a failure to distinguish constitutional power from social desirability."¹⁷³

A mere three weeks later in *A.L.A. Schechter Poultry Corp. v. United States*, the Court invalidated the National Industrial Recovery Act (NIRA).¹⁷⁴ In pertinent part, the NIRA authorized the president to approve, and thereby render legally binding, industry-specific codes of fair competition.¹⁷⁵ Delivering the opinion of a unanimous Court, Chief Justice Hughes found that the NIRA exceeded Congress's power to regulate interstate commerce.¹⁷⁶ The NIRA reached business transactions that were themselves wholly intrastate, even though they had effects on interstate commerce.¹⁷⁷ Hughes stressed that to serve as a predicate for constitutional exercise of the commerce power such effects had to be "direct" not "indirect."¹⁷⁸ While "[t]he precise line" between direct and indirect effects could "be drawn only as individual cases [arose], the distinction [was] clear in principle."¹⁷⁹ Moreover, this line was "a fundamental one, essential to the maintenance of our constitutional system."¹⁸⁰ Were the Court to disregard it, "there would be virtually no limit to the

¹⁷¹ See generally Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559 (1997).

¹⁷² *Alton R.R. Co.*, 295 U.S. at 367.

¹⁷³ *Id.* at 367. But see POWELL, *supra* note 150, at 42 (sardonically suggesting *Alton R.R.* established that "[i]t is a regulation of interstate commerce to help railroads but not to help railroad employees").

¹⁷⁴ 295 U.S. 495 (1935).

¹⁷⁵ *Id.* at 522-23.

¹⁷⁶ *Id.* at 542-50.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 546.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 548.

federal power and for all practical purposes we should have a completely centralized government.”¹⁸¹

The immediate consequence of *Schechter Poultry* was a scathing White House press conference. After comparing the *Schechter Poultry* decision to the Court’s ignominious ruling in *Dred Scott v. Sandford*,¹⁸² President Roosevelt framed the matter in the starkest of terms:

We are facing a very, very great national non-partisan issue We have got to decide . . . whether in some way we are going to . . . restore to the Federal Government the powers which exist in the national governments of every nation in the world.¹⁸³

Having attacked the Court for relegating the country to what he derisively characterized as a “‘horse and buggy’ definition of interstate commerce,” Roosevelt ominously announced that his Administration would continue to study the problem in search of an appropriate response.¹⁸⁴ Several rulings in the ensuing Supreme Court term exacerbated the rift between the Justices and the President.

First came *United States v. Butler*, which concerned a challenge to the constitutionality of the Agricultural Adjustment Act of 1933 (AAA), another statute enacted in the first one hundred days after FDR’s inauguration and centrally important to his administration’s legislative agenda.¹⁸⁵ The plaintiff in *Butler* attacked the AAA’s provisions authorizing the Secretary of Agriculture to tax processors of selected agricultural commodities in order to raise revenue.¹⁸⁶ The Act in turn permitted the Secretary to spend the proceeds of those taxes as rental or benefit payments to those producers who agreed to reduce production in any given market year.¹⁸⁷ Justice Roberts’s muddled and much maligned opinion for the Court rejected the claim that the challenged provisions were within Congress’s power “[t]o lay and collect Taxes, . . . to pay the Debts and provide for the common Defence and *general Welfare* of the

¹⁸¹ *Id.*

¹⁸² 60 U.S. (19 How.) 393 (1857).

¹⁸³ McKenna, *supra* note 169, at 112 (quoting 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: 1935 205, 215–16 (Samuel I. Rosenman ed., Random House 1938)).

¹⁸⁴ *Id.* at 113 (quoting 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: 1935, at 205, 215–16 (Samuel I. Rosenman ed., 1938)); *see also* WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 90 (1995). Professors McKenna and Leuchtenburg both emphasize that President Roosevelt’s commentary on the Court’s May 1935 decisions was not well received, even by many of his political allies.

¹⁸⁵ 297 U.S. 1, 73–75 (1936); *see* McKenna, *supra* note 169, at 119–22.

¹⁸⁶ *Butler*, 297 U.S. at 1.

¹⁸⁷ *Id.* at 55–56.

United States.”¹⁸⁸ Justices Stone, Brandies, and Cardozo dissented,¹⁸⁹ and most commentators, both at the time and throughout the intervening decades, dismissed the ruling in *Butler* as illogical and result-oriented.¹⁹⁰ Ultimately, such vulnerable opinions as the one Roberts wrote for the Court in *Butler* contributed in an immeasurable way to the subsequent demise of the enumerated powers doctrine.¹⁹¹ Publicly, President Roosevelt declined to comment on the ruling.¹⁹² Privately, however, he “hardened [his] resolve at some point to meet the constitutional impasse [between the New Deal and the Supreme Court] head-on.”¹⁹³ Several months after *Butler*, a bare five-Justice majority invalidated yet another New Deal effort in *Carter v. Carter Coal Co.*¹⁹⁴

The Court’s decision in *Carter* confirmed widely held expectations by according the Bituminous Coal Conservation Act of 1935 the same fate administered a year before to the NIRA in *Schechter Poultry*.¹⁹⁵ The Coal Act authorized the creation of coal industry codes that would both fix prices and govern labor relations.¹⁹⁶ Justice Sutherland, who delivered an opinion for himself and four other Justices, marshaled a significant amount of judicial authority for a previously unestablished

¹⁸⁸ U.S. CONST. art. I, § 8, cl. 1 (emphasis added).

¹⁸⁹ Justice Brandeis voted to sustain the AAA even though he had previously expressed his hostility to the Act in private communications with the Administration and its allies in the legal profession. Accordingly, historian Marian McKenna found “it . . . hard to accept the notion that [Brandeis] voted his conscience in the *Butler* case.” See MCKENNA, *supra* note 169, at 129–30, 133.

¹⁹⁰ For example, the second sentence of Justice Stone’s dissenting opinion implied that the majority’s conclusion was the product of some combination of unclear thinking and doubts about the likely efficacy of the AAA. See *Butler*, 297 U.S. at 78 (Stone, J., dissenting). Justice Stone observed that “[t]he present stress of widely held and strongly expressed differences of opinion of the wisdom of the Agricultural Adjustment Act makes it important, in the interest of clear thinking and sound result, to emphasize at the outset certain propositions which should have controlling influence in determining the validity of the act.” *Id.* Indeed, the quoted sentence may well have so seriously stung that it provoked Justice Roberts’s often ridiculed paean to policy-neutral or policy-blind judicial review. See *Butler*, 297 U.S. at 62–63 (“When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”). Many have attacked these perhaps ill-chosen words as naively reducing judicial review to an almost mechanistic function. For a more balanced and forgiving treatment of this passage of Roberts’s opinion, see CURRIE, *supra* note 121, at 227. See also MCKENNA, *supra* note 169, at 137–40 (discussing contemporaneous reaction to both the *Butler* majority and dissenting opinions and noting that Stone’s “was one of the strongest dissents registered since the Holmes era.”).

¹⁹¹ Cf. CURRIE, *supra* note 121, at 231 (“Justice Roberts . . . may well have reached the right result in striking down the Agricultural Adjustment Act, but by conceding too much he made it seem quite untenable; and that boded poorly for the future of the federal system.”).

¹⁹² MCKENNA, *supra* note 169, at 139.

¹⁹³ *Id.* at 142.

¹⁹⁴ 298 U.S. 238 (1936).

¹⁹⁵ *Id.*

¹⁹⁶ See *id.* at 278.

proposition, i.e., that coal mining, like agriculture and manufacturing, was not itself “commerce” within the meaning of the grant to Congress.¹⁹⁷ Eventually, Sutherland arrived at the crux of the dispute, whether relations between covered employers and their miners had a “direct” effect on interstate commerce. The distinction between direct and indirect effects on interstate commerce, Sutherland opined, was “not formal, but substantial in the highest degree,” a “fundamental” distinction, “essential to the maintenance of our constitutional system.”¹⁹⁸ To be sure, the line between the two types of effect was “not always easy to determine.”¹⁹⁹ But to Sutherland and his colleagues in the majority it seemed clear that whatever effect labor strife in the coal industry imposed on interstate commerce, however great its magnitude, the effect was merely “secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.”²⁰⁰

It bears emphasis that, with the conclusion that Congress lacked power over labor relations between coal miners and coal mine operators, Chief Justice Hughes wholeheartedly concurred.²⁰¹ Indeed, even Justice Cardozo’s dissenting opinion, in which Stone and Brandeis joined, was agnostic as to whether the Commerce Clause empowered Congress to regulate labor relations in coal mining.²⁰² Nevertheless, *Carter* proved to be the last case in which the Hughes Court invalidated New Deal legislation. Indeed, nearly sixty years would pass before the Supreme Court of the United States would next invalidate an Act of Congress on the

¹⁹⁷ See *id.* at 302–04.

¹⁹⁸ *Id.* at 307 (internal quotation marks and citations omitted).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 309. Some have suggested that Sutherland went further than prior precedent when he insisted that the magnitude of a regulated subject’s impact on interstate commerce was constitutionally irrelevant. See, e.g., CURRIE, *supra* note 121, at 224 (asserting that “there was no compelling reason for Sutherland’s conclusion that the magnitude of the effect had to be ignored”).

²⁰¹ After acknowledging that “Congress . . . has adequate authority to maintain the orderly conduct of interstate commerce and to provide for the peaceful settlement of disputes which threaten it,” Chief Justice Hughes continued: “But Congress may not use this protective authority as a pretext for the exertion of power to regulate activities and relations within the states which affect interstate commerce only indirectly.” *Carter*, 298 U.S. at 317 (Hughes, C.J., concurring in part and dissenting in part). Hughes supported the point by suggesting that were the Court to hold otherwise it would in effect amend the Constitution. *Id.* at 318 (“If the people desire to give Congress the power to regulate industries within the state, and the relations of employers and employees in those industries, they are at liberty to declare their will in the appropriate manner, but it is not for the Court to amend the Constitution by judicial decision.”). The Chief Justice wrote separately, however, solely because he rejected the majority’s additional conclusions that the price-fixing provisions could not be severed from the labor sections of the Act and, thus, that the former had to fall with the latter. *Id.* at 312–16.

²⁰² Cardozo dismissed as premature the complainants’ challenge to the labor sections of the Act, and would have avoided ruling on their constitutionality. *Id.* at 341 (Cardozo, J., concurring in part and dissenting in part).

ground that it exceeded congressional authority over interstate commerce.

2. *Roosevelt's Second Term*

Between the May 1935 press conference held in reaction to *Schechter Poultry* and his November 1936 reelection, President Roosevelt avoided public comment on the Supreme Court.²⁰³ Others were far less restrained. The decade-old chorus of criticism reached a crescendo as New Deal innovations failed Supreme Court review. Constitutional challenges to the New Deal made the previously academic controversy concerning the Court's federalism rulings a central aspect of national political discourse. Not surprisingly, the Court's critics grew in number and became sharper in tone.

One of the new voices was J. A. C. Grant, then a junior political science professor at the University of California at Los Angeles. In two lengthy and trenchant articles published in 1936 in the *Yale Law Journal*, Grant relied upon the Harrison Act cases to demonstrate that an unbiased solicitude for the states' reserved powers could not explain the Court's hostility to either federal child labor laws or the New Deal. For example, federal narcotics regulation invaded the states' police powers at least as materially as the statutes the Court voided on this ground. Grant characterized the Harrison Act as in reality "a series of regulations obviously intended to bring the sale of narcotics into the open and to forbid their sale for other than what Congress considered to be legitimate purposes, thereby vesting criminal jurisdiction in national hands to punish any anti-social sales."²⁰⁴ Grant dismissed Chief Justice Taft's efforts to distinguish *Doremus* in his opinion for the Court in the *Child Labor Tax Case*. All that Taft said of the congressional effort to impose a "'Tax on Employment of Child Labor'"²⁰⁵ could have been said of the Harrison Act. Grant answered Taft's claim by noting that in the case of the child labor tax, the congressional subterfuge had been obvious with the rejoinder: "Do we not commonly refer to the statute involved in *United States v. Doremus* as the Harrison anti-Narcotic Act? . . . [T]he purpose of the Narcotic Act was equally spread upon the face of the statute."²⁰⁶

By 1936, these fifteen-year-old cases might have been matters of merely historical interest, but Grant used them to lay the foundation for his attack on the Court's decisions in *Alton* and especially *Butler*. The

²⁰³ "Each adverse decision produced new outbursts of hostility [from various affected New Deal constituencies], but only stony silence came from the White House." McKenna, *supra* note 169, at 181.

²⁰⁴ J. A. C. Grant, *Commerce, Production, and the Fiscal Powers of Congress*, 45 *YALE L.J.* 751, 758 (1936).

²⁰⁵ *Id.* at 759.

²⁰⁶ *Id.*

selectivity of the Court's commitment to federalism belied the reasoning of Justice Roberts's majority opinions in both cases. Grant concluded that the decisions were primarily driven by the Court's hostility to the Roosevelt Administration and its policy agenda, notwithstanding Justice Roberts's repeated pleas to the contrary. Grant acknowledged that "[t]he majority has been extremely careful to avoid any intimation that it is the philosophy of those now in high places which it finds distasteful."²⁰⁷ Citing the Supreme Court bar's rhetoric against the New Deal, Grant stressed that "[c]ounsel, however, do not seem to have been impressed by [the Court's] linguistic quiescence."²⁰⁸ Grant was no less suspicious. In his view, the result in *Alton* had nothing to do with federalism:

There are reasons for suspecting that the real basis of the majority's opinion was a belief that any such act would violate the niceties of due process of law, and hence could not be justified under any power possessed by either [state or federal] government, the explanation that as a regulation of commerce it exceeds the powers of Congress being seized upon merely because it might meet with greater degree of popular approval.²⁰⁹

Grant was even harsher in his assessment of Roberts's *Butler* opinion, which he found to be plainly illogical²¹⁰ and a "sophistic phantasy."²¹¹ Federalism masked the majority Justices' true object—"to expand the arena of [their] discretion," and thus increase their own power.²¹² Grant acknowledged that these were certainly not the first Justices to succumb to this ambition, but he closed by warning that in *Butler* the Court had perhaps exceeded its institutional capacity. Limited to resolving justiciable cases or controversies, "it is entirely probable that" the Court had "undertaken a bigger task than it can handle."²¹³ The course of events over the next half decade proved Grant prophetic.

By 1936 the Court had numerous enemies, but none were more prominent and persistent than Princeton professor Edward S. Corwin, arguably the most distinguished scholar of American constitutional law then living.²¹⁴ In a brief preface, dated May 26, 1936, to his book *The*

²⁰⁷ *Id.* at 769 n.101.

²⁰⁸ *Id.*

²⁰⁹ J. A. C. Grant, *Commerce, Production, and the Fiscal Powers of Congress: II*, 45 YALE L.J. 991, 996 (1936).

²¹⁰ *Id.* at 1012.

²¹¹ *Id.* at 1017.

²¹² *Id.* at 1019.

²¹³ *Id.* at 1021.

²¹⁴ G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 17 (2000) (describing Corwin as "one of the ablest American scholars of the twentieth century"); Gerald Garvey, *Edward S. Corwin in the Campaign of History: The Struggle for National Power in the 1930s*,

Commerce Power Versus States Rights, Professor Corwin made plain his considered view that the Court had, in *Alton*, *Butler*, and *Carter*, far exceeded its proper role. He dismissed the Court's protestations to the effect that it was merely preserving federalism. That assertion was belied by the "inconsistency" of the Court's efforts, which the Court had confined "for the most part to national action touching productive industry, and particularly the employer-employee relationship in such industry."²¹⁵ When federal criminal or other morals regulations were at issue, however, the concern for the "Federal System and States Rights" receded into the background.²¹⁶ In the ensuing compact but forceful volume, Corwin repeatedly confronted the Court with its failures to enforce limits on congressional authority when examining the constitutionality of statutes that the Justices apparently deemed desirable as a policy matter. As much as, if not more than, Corwin challenged the historical and jurisprudential foundations of the conservative Justices' circumscribed view of federal power, he exposed their assertions that they were really concerned about federalism at all as counterfeit. Rather, their rulings sustaining federal morals regulations revealed that they too were nationalists when being so advanced their policy preferences. These policy-based assessments were, everyone conceded, the province of the legislature, not the judiciary. Accordingly, the Court's duty was clear: to cease its opposition to the New Deal agenda.²¹⁷

The focus of Professor Corwin's book was on the commerce power rather than on the taxing power. Nevertheless, he based his central argument on the Court's Harrison Act decisions. These rulings were crucial to Corwin's case that the Justices had only a selective solicitude for the Tenth Amendment that safeguarded their reserved powers only when dosing so comported with their personal policy predilections. On the question of whether the "reserved powers" limited the manner in which Congress might exercise one of its enumerated powers, early twentieth-century jurists have attempted to have it both ways. An affirmative answer was "only one of a pair of horses which the Court has ready saddled and bridled, depending on the direction it wishes to ride—the other being

34 GEO. WASH. L. REV. 219, 219 (1965) (asserting that Corwin "stands among the giants of American constitutional commentators—with Kent, Story, and Cooley").

²¹⁵ CORWIN, *supra* note 122, at ix.

²¹⁶ *Id.* at x; see also EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 25–26 (1941) (concluding that the Court's precedents provided "a body of materials out of which a relatively broad theory of Congress's power over interstate may be built, and likewise a body of materials out of which a relatively narrow theory may be built," hence allowing the Hughes Court "to decide the questions of constitutional interpretation which the New Deal legislation raised largely on grounds of public policy, on legislative grounds in short").

²¹⁷ See generally CORWIN, *supra* note 122, at 265, 266–69 (imploping the Court to reverse its course and "correct its own errors").

the supremacy clause of the Constitution itself.”²¹⁸ For illustration of this point, Corwin juxtaposed Justice Day’s inconsistent votes and statements in *Hammer*, on the one hand, and in *Doremus*, on the other. In *Hammer*, the Court, speaking through Justice Day, found it determinative that in closing the pathways of interstate commerce to users of child labor, Congress had sought to affect methods of production, this being a matter from time out of mind which belonged to the police power of the States. In *Doremus*, Justice Day discarded as irrelevant the Harrison Act’s very substantial usurpation of the States’ power to protect public morality.²¹⁹ The next decade added insult to injury. When the narcotic interests emboldened by Justice McReynolds’s suggestion that the Court might reconsider the Harrison Act’s constitutionality again brought the matter to the Justices in the *Nigro* case, “the Court—Justices McReynolds, Sutherland, and Butler dissenting—refused to deliver the goods.”²²⁰

Nor did Professor Corwin restrict his formidable talents to the realm of scholarly disputation. He confidentially proposed, and then publicly championed, the Roosevelt Administration’s notorious “Court-packing plan” of February, 1937.²²¹ Since then Supreme Court scholars have debated whether the Justices switched courses after the Spring in order to avoid a confrontation with the President, or whether the jurisprudential house of cards came tumbling down of its own accord—the end result of a process that had long been in progress.²²² Thankfully, for present purposes there is no need to choose sides in the debate between the “external” and “internal” accounts.²²³ The fickle quality of the Court’s federalism enforcement left its enumerated powers jurisprudence woe-

²¹⁸ *Id.* at 167.

²¹⁹ *Id.* at 168.

²²⁰ See *U.S. v. Doremus*, 249 U.S. 86, 93–94 (1919).

²²¹ Edward S. Corwin, *Standpoint in Constitutional Law*, 17 B.U. L. REV. 513, 531 (1937) (discussing Corwin’s wry verdict on the effectiveness of the Court-packing plan); see LEUCHTENBURG, *supra* note 184, at 115–19 (discussing Corwin’s role in the origins of the Court-packing plan).

²²² Compare LEUCHTENBURG, *supra* note 184, at 142–43, and Corwin, *supra* note 221, at 531, with BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 5 (1998), and WHITE, *supra* note 214, at 1–4. See generally Michael Ariens, *A Thrice-told Tale, or Felix the Cat*, 107 HARV. L. REV. 620, 652–66 (1994) (recounting historiography of the Court’s 1937 “switch”); Joseph Biancalana, *Originalism and the Commerce Clause*, 71 U. CIN. L. REV. 383, 399–403 (2002) (describing Commerce Clause jurisprudence of the Hughes Court); Barry Cushman, *Lost Fidelities*, 41 WM. & MARY L. REV. 95, 107 (1999) (charting position taken by Justice Owen Roberts throughout the New Deal Era); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891, 1897 (1994) (painting a picture “of a less sudden, discontinuous shift, and one less affected by immediate political factors, than may be connoted by the phrase ‘constitutional revolution of 1937’”); G. Edward White, *The “Constitutional Revolution” as a Crisis in Adaptivity*, 48 HASTINGS L.J. 867, 895 (1997) (challenging conventional treatment of the New Deal Court).

²²³ See, e.g., CUSHMAN, *supra* note 222, at 5 (distinguishing between “external” and “internal” accounts of jurisprudential transformation during the 1930s).

fully precarious. Whether that frailty fell to the force of political pressures outside the Court or to the force of intellectual disharmonies intrinsic to it, the Justices' inconsistency in their efforts to preserve federalism played a significant role in the Court's eventual abandonment of the whole endeavor. In fact, nearly sixty years passed before the Court would reassert any significant role in confining Congress to its enumerated powers.

II. FEDERALISM IN THE REHNQUIST COURT

Between 1936 and 1995, the Court upheld every federal statute regulating private conduct challenged as beyond Congress's power under the Commerce Clause. Countless post-World War II decisions affirmed the broadening assertions of this congressional authority. As one leading commentator observed, "by the 1980s the Commerce Clause game seemed about over. Case book editors were driven to dream up wild hypotheticals to try to find ways to encourage students to consider whether the commerce power had any practical limits at all."²²⁴

A. GUNS NEAR SCHOOLS

Then, for the first time in nearly sixty years, the Supreme Court shocked the legal community by striking down a federal statute on the ground that it was beyond the reach of Congress's power to regulate interstate commerce. In *United States v. Lopez*, the Court invalidated the Gun-Free School Zones Act of 1990 (hereinafter § 922(q)), that had made it a federal crime for any unauthorized person "knowingly to possess" a firearm "within a distance of 1000 feet from the grounds of a public, parochial, or private school."²²⁵ In March of 1992, Alfonso Lopez, then a senior at Edison High School in San Antonio, Texas, arrived to school carrying a .38-caliber handgun and five bullets.²²⁶ School authorities, alerted to the possibility that Lopez might be armed, confronted him, and he admitted possession of a gun.²²⁷ Lopez was initially charged

²²⁴ Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and United States v. Lopez*, 46 CASE W. RES. L. REV. 695, 701 & n.39 (1996). See generally DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 789, 813, 817 (1993) (questioning whether congressional power could reach a child's front-yard lemonade stand); GERALD GUNTHER, CONSTITUTIONAL LAW 140 (12th ed. 1991) (contemplating federal prohibition on possession of all pills because of the difficulty in distinguishing dangerous pills from others); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 197, 209 (2d ed. 1991) (suggesting federal prohibition of shoplifting and federal regulation of lawns, parking lots, and disposal of trash at carry-out restaurants).

²²⁵ *United States v. Lopez*, 514 U.S. 549, 551 (1995) (quoting 18 U.S.C. § 921(a)(25) & 922(q)(1)(A) 1988 ed., Supp. V).

²²⁶ *Id.*

²²⁷ *Id.*

with violating the Texas Penal Code; however, the state prosecution was subsequently dismissed when federal authorities indicted Lopez for violating § 922(q).²²⁸ After a federal district judge, via a bench trial convicted and sentenced Lopez, the U.S. Court of Appeals for the Fifth Circuit reversed his conviction, holding that § 922(q) exceeded the enumerated powers of Congress.²²⁹ The U.S. Supreme Court granted certiorari and by a narrow, five-Justice majority, affirmed the Fifth Circuit Court's ruling.²³⁰

Chief Justice Rehnquist's opinion for the Court attempted to demonstrate the invalidity of § 922(q) without overruling any of the Court's Commerce Clause precedents. The Chief Justice identified four ways in which the majority found § 922(q) to be more constitutionally problematic than other federal statutes that the Court had previously upheld. First, Chief Justice Rehnquist asserted that, whereas prior rulings had sustained the constitutionality of statutes regulating intrastate *economic* activity that had a substantial effect on interstate commerce, § 922(q) was "a criminal statute that by its terms ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define such terms."²³¹ Moreover, "Section 922(q) [was] not essential to the larger regulation of economic activity where the regulatory scheme could be undercut unless the intrastate activity was regulated."²³² Thus the Chief Justice contended that most of the Court's modern Commerce Clause rulings were simply inapposite.²³³

The Chief Justice also noted a second defect in § 922(q) because it lacked any "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce."²³⁴ A third flaw in § 922(q) was the absence of "legislative findings, and indeed even congressional committee findings, regarding [the] effect [of handgun possession near schools] on interstate commerce."²³⁵ Finally, in answering both government and Court dissent in

²²⁸ *Id.*

²²⁹ *Id.* at 552.

²³⁰ *Id.*

²³¹ *Id.* at 561.

²³² *Id.*

²³³ *Id.* at 561 (concluding that § 922(q) could not, "therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce"). The Chief Justice thus dispensed with the so-called aggregation principle established by the Court in *Wickard v. Filburn*, 317 U.S. 111 (1942). *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 562 (emphasis added) (Chief Justice acknowledging that "Congress *normally* is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce" and hinting that Congress might have saved § 922(q) had it made appropriate and substantiated factual findings); *see id.* at 563 (observing that "to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in

support of the Act, the Chief Justice highlighted a fourth way in which it was constitutionally problematic. As a *criminal* provision addressing a threat to *education*, §922(q) invaded regulatory spheres historically the exclusive province of the states. If the Court were to endorse either the government's or the dissent's theories, it would be "difficult to perceive any limitation on federal power, even in areas such as criminal law, enforcement, or education, where States historically have been sovereign."²³⁶

At the conclusion of his opinion for the Court, the Chief Justice admitted prior precedents accorded "great deference to congressional action," thereby taking "long steps down [the] road" in granting Congress "a general police power of the sort retained by the states."²³⁷ Though "[t]he broad language in these opinions has suggested the possibility of additional expansion," on this occasion the Court declined the invitation.²³⁸ Chief Justice Rehnquist explained "to proceed any further . . . would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated. This we are unwilling to do."²³⁹

To the dissenting Justices, the Chief Justice's canny parsing of the modern Commerce Clause cases missed the forest for the trees. In the dissenters' view, notwithstanding the modern Court's occasional paean to the virtues of federalism, the fundamental teaching of the precedents when examined together was that the Supreme Court had virtually no role in second-guessing a Congressional determination that a matter fell within the compass of its Commerce Clause authority.²⁴⁰ Justice Souter

question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here"); A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001) (criticizing judicial reliance in constitutional cases on perceived gaps in the formal legislative record); see also William Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002) (questioning wisdom and legitimacy of legislative record review). But see Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 453 (2001) (asserting that Congress virtually invited Supreme Court invalidation of numerous federal statutes and observing that "in several cases restricting Congress's Section 5 [of the Fourteenth Amendment] powers, Congress' factfinding was too limited or nonexistent").

²³⁶ *Lopez*, 514 U.S. at 564.

²³⁷ *Id.* at 567.

²³⁸ *Id.*

²³⁹ *Id.* at 567–68.

²⁴⁰ See, e.g., *id.* at 604 (Souter, J., dissenting) ("The practice of deferring to rationally based legislative judgments is a paradigm of judicial restraint" which is especially appropriate insofar as congressional regulation under the Commerce Clause is concerned because "[i]n judicial review under the Commerce Clause, [this judicial deference] reflects our respect for

even suggested that the majority's ruling might ultimately result in a replay of the ill-fated confrontation between Congress and the Court during the New Deal Era.²⁴¹ Most telling was Justice Breyer's failure to answer the majority's challenge to "identify any activity that the States may regulate but Congress may not."²⁴² And yet, the dissenters' unspoken rebuttal was that the Court had, decades before, interred the enumerated powers doctrine. On this view, the absence of any judicially enforceable limit on Congress's Commerce Clause authority was simply the pre-*Lopez* status quo. It was the majority's assertion that such a limit must be found that was revolutionary.

Even worse, the dissenters argued, the majority not only upset the preexisting legal order, but also failed to articulate any intelligible substitute to take its place. *Lopez* then "threaten[ed] legal uncertainty in an area of law that, until this case, seemed reasonably well settled."²⁴³ On this point, Justice Stevens's succinct, two-paragraph dissent delivered the crucial blow. His opinion was the only dissenting opinion to address the majority on its own terms. His one "additional comment" that he appended to his emphatic concurrence to the opinions of Justice Souter and Justice Breyer was that, even assuming that Congress's power under the Commerce Clause was limited to regulation of "commerce" or some "sort of economic enterprise,"²⁴⁴ § 922(q) was nevertheless within the scope of congressional power because "[g]uns are articles of commerce. Their possession is the consequence, either directly or indirectly, of commercial activity."²⁴⁵ Indeed, if a farmer's consumption of his own home-grown wheat could, as the *Lopez* majority contended, be characterized as

the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress's political accountability in dealing with matters open to a wide range of possible choices.") (internal quotation marks and citations omitted); *id.* at 616–17 (Breyer, J. dissenting) ("Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words 'rational basis' capture this leeway.").

²⁴¹ See *id.* at 608 (Souter, J., dissenting) ("[I]t seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago. The answer is not reassuring.").

²⁴² *Id.* at 564. Justice Breyer suggested some aspects of family life might be beyond congressional reach even under his analysis because "the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that *may* not hold true for other social institutions." *Id.* at 624 (Breyer, J., dissenting) (emphasis added). But on this score at least the Chief Justice seemed to have the last word when he observed that Justice Breyer's "suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance." *Id.* at 565.

²⁴³ *Id.* at 630 (Breyer, J., dissenting).

²⁴⁴ *Id.* at 561.

²⁴⁵ *Id.* at 602–03 (Stevens, J., dissenting).

“involv[ing] economic activity” so as to bring it within Congress’s Commerce Clause power, at the very least it required more elaboration than the Chief Justice provided to establish that Alfonso Lopez’s public possession of a .38-caliber handgun could not also be so characterized.²⁴⁶ Guns are mass-produced and sold in interstate and international markets. Whether, as Filburn’s ill-fated constitutional challenge to the Agricultural Adjustment Act claimed, the Filburn farm could fairly be characterized as a self-contained system isolated from interstate wheat markets, it is impossible to take seriously the prospect of Alfonso Lopez forging the steel for his home-made hand gun from raw ore extracted solely from his Texas estate. The point, of course, is not that the latter showing ought to be required before gun possession near schools should be excluded from the realm of congressional authority, but that in invalidating §922(q) while at the same time reaffirming the correctness of *Wickard v. Filburn*, the *Lopez* majority embraced fundamentally irreconcilable propositions. As the dissenters claimed, this mixed message introduced hopeless confusion into the law. Thus, in lieu of reviving the durable enumerated powers doctrine, the *Lopez* decision yielded only doctrinal incoherence.

B. VIOLENCE AGAINST WOMEN

Not surprisingly, *Lopez* provoked considerable political and academic criticism though, to be sure, it had its determined defenders in both quarters as well.²⁴⁷ In the lower federal courts, however, things continued much as they had before the 1995 ruling. Between 1995 and 1999, the U.S. Courts of Appeals rejected every Commerce Clause challenge to a major federal statute.²⁴⁸ It was as though they uniformly inter-

²⁴⁶ *Id.* at 560.

²⁴⁷ See, e.g., Symposium, *The New Federalism after United States v. Lopez*, 46 CASE W. RES. L. REV. 635 (1996) (reflecting diverse viewpoints); Symposium, *Reflections on United States v. Lopez*, 94 MICH. L. REV. 533 (1995) (reflecting diverse viewpoints). Compare, e.g., Raoul Berger, *Judicial Manipulation of the Commerce Clause*, 74 TEX. L. REV. 695 (1996) (supporting Justice Thomas’s concurring opinion), and Charles Fried, *Foreword: Revolutions?*, 109 HARV. L. REV. 13, 34–45 (1995) (defending Chief Justice Rehnquist’s opinion for the Court), with Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 720 (1996) (arguing that “instead of seeking to reactivate federalism review, the Court should make its withdrawal from the area explicit”). Nor was the debate confined to academic quarters. In the immediate wake of the decision President Clinton, “in an unusually pointed Presidential comment on a Court ruling,” criticized *Lopez* during his weekly radio address. Todd S. Purdum, *Clinton Seeks Way to Retain Gun Ban in School Zones*, N.Y. TIMES, April 30, 1995, at A1. During the address he also announced publicly that he had called upon Attorney General Janet Reno to find ways to circumvent the ruling. *Id.* In contrast, “Congressional Republicans generally applauded the Court’s solicitude toward the states.” Linda Greenhouse, *Justices Step in as Federalism’s Referee*, N.Y. TIMES, April 28, 1995, at A1.

²⁴⁸ See Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What If the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 385 n.85 & 396 (2000) (noting that the Fourth Circuit’s 1999 decision invalidat-

puted *Lopez* as an aberration, properly limited to its particular facts. The Supreme Court in turn side-stepped every call to clarify *Lopez*'s precedential significance, consistently denying petitions for certiorari in numerous post-*Lopez* Commerce Clause cases.²⁴⁹ But then, after the Court had managed to stay out of the fray for four years, the U.S. Court of Appeals for the Fourth Circuit in effect forced the Court's hand by invalidating the civil-suit provision of the Violence Against Women Act (VAWA).²⁵⁰ Enacted in 1994, the VAWA had been a relatively recent political accomplishment. Accordingly, the Solicitor General asked the Supreme Court to review the Fourth Circuit ruling, and the Court, following its tradition of honoring these requests, agreed to hear the case.²⁵¹ In *United States v. Morrison*, the Court affirmed the Fourth Circuit's ruling and invalidated the challenged VAWA section, but provided only modest clarification as to the meaning of *Lopez*.²⁵²

Unlike the Gun Free School Zones Act, the VAWA was supported by a "mountain of data assembled by Congress" as part of the formal legislative record "showing the effects of violence against women on interstate commerce."²⁵³ In *Morrison*, however, the Court dismissed this evidence as irrelevant.²⁵⁴ Writing again for the same five justices comprising the *Lopez* majority, Chief Justice Rehnquist reasoned that, even if the legislative record proved that intrastate gender-animated violence has, in the aggregate, a substantial impact on interstate commerce, the civil-remedy provision of the VAWA was nevertheless unconstitu-

ing the civil-remedy provision of the Violence Against Women Act was the first U.S. Court of Appeals ruling "to hold a federal statute unconstitutional based on a *Lopez* challenge" and that previously the Supreme Court had consistently "denied certiorari in cases that would have clarified the scope of *Lopez*").

²⁴⁹ See *id.*

²⁵⁰ Violence Against Women Act, 42 U.S.C. § 13981(c) (1994), *invalidated by* *United States v. Morrison*, 529 U.S. 598 (2000); see *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.3d 820 (4th Cir. 1999), *aff'd sub nom.*, *United States v. Morrison*, 529 U.S. 598 (2000).

²⁵¹ See Brief for the United States, *United States v. Morrison*, 529 U.S. 598 (2000) (99-5, 99-29). "Because the Court of Appeals invalidated a federal statute on constitutional grounds, we granted certiorari." *Morrison*, 529 U.S. at 605.

²⁵² *Morrison*, 529 U.S. at 602.

²⁵³ *Id.* at 628-29 (Souter, J., dissenting). Indeed, the Conference Committee Report on the VAWA included express, detailed findings, including the determination that:

[C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . , by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.

H.R. REP. NO. 103-711 at 385 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1853.

²⁵⁴ See *Morrison*, 529 U.S. at 619-22.

tional.²⁵⁵ The Chief Justice's majority opinion stressed the Court's reluctance to aggregate the effects of individual instances of intrastate, *non-economic* activity when deciding whether the activity had the requisite substantial effect on interstate commerce.²⁵⁶ Nonetheless, the Chief Justice, declined to commit the Court to never aggregating non-economic activity: "While we need not adopt a categorical rule against aggregating the effects of any non-economic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."²⁵⁷ The majority did not deem the case for the VAWA's civil remedy sufficiently compelling to depart from this tradition.²⁵⁸ Moreover, in the view of the majority, "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."²⁵⁹ Accordingly, the majority refused to aggregate the effects of these crimes on interstate commerce to provide a foundation for congressional authority.²⁶⁰

Like the Chief Justice's opinion for the Court, the dissenting opinions in *Morrison* closely paralleled their *Lopez* counterparts. The intervening half decade had, however, ripened the dissenters' initial incredulity into something approaching outrage. For example, Justice Souter charged that the majority's invalidation of the challenged the VAWA section could not be reconciled with three landmark commerce clause precedents the majority purported to reaffirm.²⁶¹ According to Justice Souter, the Court's two decisions confirming congressional power to enact the Civil Rights Act of 1964²⁶² established that Congress was free to employ its Commerce Clause authority to achieve moral or

²⁵⁵ See *Morrison*, 529 U.S. at 614. The Court also held that the VAWA's civil-remedy provision was beyond the scope of the authority granted Congress by section 5 of the Fourteenth Amendment; *id.* at 619–22.

²⁵⁶ See *id.* at 609–11.

²⁵⁷ See *id.* at 613.

²⁵⁸ See *id.* at 613–14.

²⁵⁹ *Id.* at 613.

²⁶⁰ *Id.* at 614–16. Scholars responded to *Lopez* and *Morrison* by revisiting a longstanding debate about the original meaning of the Commerce Clause; see also Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 879–83 (2002); Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1256–71 (2003). Compare Nelson & Pushaw, *supra* note 97, at 19–21 (late eighteenth-century understanding of "commerce" included both trade and manufacturing), with Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 129–30 (2001) (noting the distinction in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), between commerce and manufacturing in keeping with late eighteenth-century understanding of the terms and their usage by the founders in the Philadelphia and state ratifying conventions), and Grant S. Nelson & Robert J. Pushaw, Jr., *A Critique of the Narrow Interpretation of the Commerce Clause*, 96 NW. U. L. REV. 695, 707–11 (2002) (replying to Professor Barnett).

²⁶¹ See *id.* at 654–55 (Souter J., dissenting).

²⁶² See *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

social, rather than economic, ends.²⁶³ Hence, that Congress almost certainly enacted the VAWA out of a loathing for violence against women rather than for the purpose of clearing impediments to an integrated economy was immaterial to the Commerce Clause issue.²⁶⁴ Justice Souter likewise argued that the majority's effort to distinguish the VAWA from prior constitutionally valid federal laws on the ground that violence against women was "noneconomic" and therefore beyond the scope of *Wickard*'s aggregation principle faltered because *Wickard* concerned Congress's power over non-commercial activity (growth of wheat for home consumption).²⁶⁵ Justice Souter stressed that these were not inconsequential inconsistencies.²⁶⁶ To the contrary, they produced a legal indeterminacy that left the scope of congressional power very much to the eyes of a few supreme judicial beholders. Justice Souter prophesied that such an unstable legal regime could not long endure.²⁶⁷

Ultimately, *Morrison* provided precious little guidance to the lower courts about the scope of any federalism revival. Still, *Morrison* did clarify a few fundamental issues. First, the outcome indicated that *Lopez* was not merely a solitary signal of the Court's displeasure with Congress's inattention to the limits on its own authority. To the contrary, the result in *Morrison* seemingly portended a line of High Court rulings that would develop real, judicially enforceable boundaries on congressional authority. Second, though the Chief Justice assiduously and maddeningly avoided articulating any "categorical rule," his assertion in his majority opinion that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature," strongly implied that the Clause authorized Congress to reach into a state only if the object of congressional regula-

²⁶³ See *Morrison*, 529 U.S. at 637 (Souter, J., dissenting).

²⁶⁴ See *id.*

²⁶⁵ See *Morrison*, 529 U.S. at 643–45 (Souter, J., dissenting) ("It was obvious in *Wickard* that growing wheat for consumption right on the farm was not "commerce" in the common vocabulary, but that did not matter constitutionally so long as the aggregated activity of domestic wheat growing affected commerce substantially.") (citation omitted); accord Nelson & Pushaw, *supra* note 97, at 121 ("growing [wheat] for one's own use without the intent to sell is simply not commerce").

²⁶⁶ See *Morrison*, 529 U.S. at 643–45.

²⁶⁷ "Cases standing for the sufficiency of substantial effects are not overruled; cases overruled since 1937 are not quite revived. The Court's thinking betokens less clearly a return to the conceptual straitjackets of *Schechter* and *Carter Coal* and *Usery* than to something like the unsteady state of obscenity law between *Redrup v. New York*, 386 U.S. 767 (1967) (*per curiam*), and *Miller v. California*, 413 U.S. 15 (1973), a period in which the failure to provide a workable definition left this Court to review each case ad hoc. As our predecessors learned then, the practice of such ad hoc review cannot preserve the distinction between the judicial and the legislative, and this Court, in any event, lacks the institutional capacity to maintain such a regime for very long." *Morrison*, 529 U.S. at 654–55 (Souter, J., dissenting).

tion could be deemed economic.²⁶⁸ Precisely what was economic for these purposes, however, was left largely unresolved.

III. JUST ANOTHER CASUALTY IN THE WAR ON DRUGS?

A. "REEFER MADNESS"

Great enthusiasm and hope in at least some quarters attended the Court's decisions in *Lopez* and *Morrison*. Those rulings seemed to signal a renewed, albeit hesitant and fragile, judicial will to impose some meaningful constraints on congressional authority. Such aspirations, however, were dealt a lethal blow by the Court's decision in *Gonzales v. Raich*.²⁶⁹

Angel McClary Raich and Diane Monson filed suit in a U.S. district court seeking a declaration that the federal Controlled Substances Act (CSA) could not be applied to their cultivation and possession of marijuana for personal medical use, which was permitted by the law of their home state, California.²⁷⁰ In particular, they argued that, as applied, the CSA exceeded Congress's power to regulate interstate commerce.²⁷¹

For several years prior to filing suit, Raich and Monson—both of whom suffered from what the Court termed a "variety of serious medical conditions"—had regularly consumed marijuana to treat some of their numerous, severe symptoms.²⁷² Their consumption of the drug conformed with both the advice of their licensed, board-certified family physicians and with California's Compassionate Use Act.²⁷³ As the Court acknowledged, their physicians had exhausted all alternative treatments before concluding that marijuana alone provided effective relief.²⁷⁴ Moreover Raich's physician opined that if Raich stopped using marijuana she would certainly suffer excruciating pain and perhaps death due to precipitous weight loss and wasting syndrome.²⁷⁵ Perhaps most importantly, Raich and Monson did everything they could to distance the marijuana they consumed from any activity even arguably economic in nature.²⁷⁶ Moreover, they also assiduously avoided any connection be-

²⁶⁸ See *Morrison*, 529 U.S. at 613.

²⁶⁹ *Gonzales v. Raich*, 545 U.S. 1 (2005).

²⁷⁰ See *id.* at 5–8.

²⁷¹ *Id.* at 8, 15. Raich and Monson also argued that applying the CSA to their conduct violated "the Due Process Clause of the Fifth Amendment, the Ninth and Tenth Amendments, and the doctrine of medical necessity." *Id.* at 8. The Supreme Court expressly declined to reach the substantive due process and medical necessity arguments. *Id.* at 33.

²⁷² *Id.* at 6–7.

²⁷³ *Id.*

²⁷⁴ *Id.* at 7.

²⁷⁵ See *id.*; Brief for Respondents at 4–5, *Gonzales v. Raich*, 545 U.S. 1 (2005) (No. 03-1454).

²⁷⁶ See *Raich*, 545 U.S. at 7; Brief for Respondents, *supra* note 275, at 6–7.

tween their marijuana and the world outside California.²⁷⁷ For example, the cannabis Raich used was “grown using only soil, water, nutrients, equipment, supplies, and lumber originating from or manufactured within California.”²⁷⁸ And although Raich was unable, presumably due to her physical condition, to cultivate her own marijuana plants (as did Monson), two caregivers did this for her, entirely free of charge.²⁷⁹ Finally Raich and Monson had good reason to fear federal prosecution. In August 2002, federal Drug Enforcement Agents entered Monson’s home and “seized and destroyed all six of her cannabis plants.”²⁸⁰

Nevertheless, the Supreme Court squarely rejected Raich and Monson’s Commerce Clause claim in opinion by Justice Stevens, in which he was joined by the three other *Lopez* and *Morrison* dissenters as well as Justice Kennedy.²⁸¹ That majority reasoned that the plaintiffs’ legal claim was governed by “well-settled law,” that compelled the conclusion that “[t]he CSA [was] a valid exercise of federal power, even as applied to the troubling facts of this case.”²⁸² Justice Stevens’s opinion for the Court drew heavily on its exceedingly generous post-1937, pre-*Lopez* Commerce Clause rulings.²⁸³ Of course, under these precedents alone, the case for constitutionality was obvious and easy. Prior to *Lopez*, the Court’s Commerce Clause jurisprudence appeared to permit congressional regulation of virtually any private conduct. Therefore, it was easy for Justice Stevens to demonstrate that even the possession of home-grown marijuana used solely for medicinal purposes in conformity with state law—like anything else in twenty-first century America’s interconnected, commercial society—fell within the ambit of Congress’s power, as measured by pre-*Lopez* jurisprudence.²⁸⁴ More challenging was the task of explaining how this reasoning and conclusion could be squared with the Court’s intervening rulings in *Lopez* and *Morrison*.

Those two decisions appeared to re-impose some, albeit rather indefinite, constraints on congressional power. If, as *Lopez* and especially *Morrison* suggested, Congress’s authority under the Commerce Clause

²⁷⁷ See *Raich*, 545 U.S. at 7; Brief for Respondents, *supra* note 275, at 6.

²⁷⁸ Brief for Respondents, *supra* note 275, at 6. “Monson’s ‘cultivation of marijuana [was] similarly local in nature.’” *Id.*

²⁷⁹ *Raich*, 545 U.S. at 7; *id.* at 6–7.

²⁸⁰ *Id.* at 7. The Supreme Court elected to hear the case after the U.S. Court of Appeals held that Raich and Monson were entitled to a preliminary injunction against federal enforcement because they had “demonstrated a strong likelihood of success on their claim that, as applied to them, the CSA is an unconstitutional exercise of Congress’ Commerce Clause authority.” *Id.* at 8 (quoting *Raich v. Ashcroft*, 352 F.3d 1222, 1227 (2003)).

²⁸¹ *Id.* at 3–4, 9. Justices Souter, Ginsburg, and Breyer were the other *Lopez* and *Morrison* dissenters. *United States v. Morrison*, 529 U.S. 598, 600 (2000); *United States v. Lopez*, 514 U.S. 549, 550 (1995).

²⁸² *Raich*, 545 U.S. at 8.

²⁸³ See *id.* at 17–22.

²⁸⁴ See *id.* at 25–33.

was limited to “economic” activity, in what way was mere possession of locally grown marijuana for medicinal use, but not possession of a handgun, “economic”?²⁸⁵ Justice Stevens essentially dismissed this question by resort to that most versatile of weapons in the judicial armory—*ipse dixit*, i.e., it’s true because we say so. First, Justice Stevens broadly defined “economics” to include all “production, distribution, and consumption of commodities.”²⁸⁶ From this premise, it was a brief, unobjectionable step to the conclusion that, because “there is an established, and lucrative, interstate market” for illegal marijuana, “[p]rohibiting the intrastate possession . . . of [marijuana] . . . [was] a rational . . . means of regulating commerce in that product.”²⁸⁷ Why the Gun Free School Zones Act’s prohibition on possession of guns near schools could not likewise have been sustained as a rational means of regulating commerce in that product was not explained. Indeed, Stevens had, in his *Lopez* dissent, made this very argument for the constitutionality of that Act.²⁸⁸

To be sure, Justice Stevens also stressed that, whereas *Lopez* and *Morrison* had concerned claims that “a particular statute or provision fell outside Congress’s commerce power in its entirety,” Raich and Monson challenged “individual applications of a concededly valid statutory scheme.”²⁸⁹ Stevens explained that this distinction was “pivotal” because prior rulings established that “where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.”²⁹⁰ Unlike the CSA, the statutory provision the Court invalidated in *Lopez* was “not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated.”²⁹¹ But Justice Stevens irredeemably, though perhaps quite intentionally, intermingled this second basis for distinguishing

²⁸⁵ See *Morrison*, 529 U.S. at 610–11; *Lopez*, 514 U.S. at 560.

²⁸⁶ *Id.* at 25–26 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 720 (1966)). As Professor Massey has observed that, in an age of relentless commodification, this definition reaches virtually everything. See Calvin Massey, *The Constitution in a Postmodern Age*, 64 WASH. & LEE L. REV. 165, 209–10 (2007).

²⁸⁷ *Raich*, 545 U.S. at 26.

²⁸⁸ See *Lopez*, 514 U.S. at 602–03 (Stevens, J., dissenting) (observing that “[g]uns are . . . articles of commerce” and that “[t]heir possession is the consequence, either directly or indirectly, of commercial activity”); see also *Raich*, 545 U.S. at 50 (O’Connor, J., dissenting) (“*Lopez* makes clear that possession is not itself commercial activity.”); Jiang, *supra* note 18, at 559 (“While gun possession in a school zone certainly could not constitute a ‘production’ or ‘distribution’ of the relevant commodity (guns), it can certainly be deemed a ‘consumption’ of that commodity.”).

²⁸⁹ *Raich*, 545 U.S. at 3.

²⁹⁰ *Id.* at 23 (internal quotation marks and citations omitted).

²⁹¹ *Id.* at 24 (quoting *Lopez*, 514 U.S. at 561).

Lopez with the first, far weaker one: that marijuana possession was somehow “economic” but gun possession was not.

Thus it fell to Justice Scalia, who concurred in the result but not in the majority opinion, to differentiate between these two arguments and provide a perhaps more compelling and certainly more novel elaboration of the stronger one. Implicitly conceding that mere possession of marijuana could not be characterized as “economic” for the purposes of *Lopez* and *Morrison*, Scalia stressed that congressional authority over “intrastate activities that are not themselves part of interstate commerce” could not be derived from the Commerce Clause alone.²⁹² Rather, this authority also depended upon the Constitution’s explicit conferral upon Congress of the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution” the other powers expressly enumerated in Article I, section 8—including, of course, the power to regulate interstate commerce.²⁹³ Justice Scalia insisted that the authority conferred by the Necessary and Proper Clause encompassed intrastate activity even if that activity neither “substantially affected” interstate commerce nor was itself “economic,” so long as governance of that activity was somehow “necessary to make a regulation of interstate commerce effective.”²⁹⁴ Accordingly, that simple possession itself was “a noneconomic activity [was] immaterial to whether it [could] be prohibited as a necessary part of a larger regulation.”²⁹⁵ It sufficed that the CSA’s prohibition of marijuana possession was an “appropriate means” of, or that it was “reasonabl(y) adapted” to, “achieving the legitimate end of eradicating [proscribed narcotics] from interstate commerce.”²⁹⁶

Justice O’Connor’s dissent (which was in substance joined by Chief Justice Rehnquist and Justice Thomas) observed that Justice Scalia’s analysis, like the majority’s, failed to distinguish *Lopez*. Justice O’Connor argued that the federal prohibition on possession of a gun near a school could have, like the CSA’s prohibition of marijuana possession, been explained as “an appropriate means of effectuating” the related federal criminal prohibition on selling or delivering firearms to a minor.²⁹⁷

²⁹² *Raich*, 545 U.S. at 34 (Scalia, J., concurring).

²⁹³ U.S. CONST. art. I, § 8, cl. 18.

²⁹⁴ *Raich*, 545 U.S. at 18 (Scalia, J., concurring); cf. John T. Valauri, *The Clothes Have No Emperor, or, Cabining the Commerce Clause*, 41 SAN DIEGO L. REV. 405, 425–28 (2004) (discussing the relevance of the doctrine of incidental powers to Commerce Clause jurisprudence).

²⁹⁵ *Raich*, 545 U.S. at 40 (Scalia, J., concurring).

²⁹⁶ *Id.* at 19, 21 (Scalia, J., concurring) (internal quotation marks and citations omitted).

²⁹⁷ *Id.* at 52 (O’Connor, J., dissenting) (citing 18 U.S.C. § 922(b)(1) (1998 ed., Supp. II)); cf. Maxwell Stearns, *The New Commerce Clause Doctrine in Game Theoretical Perspective*, 60 VAND. L. REV. 1, 4 (2007) (“The *Raich* Court did not offer any satisfactory theory that reconciled the post-New Deal Commerce Clause expansion with the more recent doctrinal retrenchments represented by *Lopez* and *Morrison*.”).

Justice Scalia rarely leaves an argument unanswered, and this debate proved no exception. But the answer he gave was telling in its inadequacy. Scalia first reiterated the *Lopez* Court's bald assertion "that the statute at issue there was 'not an essential part of larger regulation of economic activity.'" ²⁹⁸ His sole effort to substantiate this claim, however, was to pronounce it "difficult to imagine what intelligible scheme of regulation of the interstate market in guns could have as an appropriate means of effectuation the prohibition of guns within 1000 feet of schools (and nowhere else)." ²⁹⁹ If so, this failure in imagination was unusual even for a lawyer. Central to the lives of most U.S. minors is school attendance; accordingly, it is hardly unimaginable that harsh and certain punishment of gun possession near schools would, in the aggregate, tend to diminish minors' demand for such weapons in the interstate marketplace. ³⁰⁰ The connection may be an attenuated one, but no more so than the link between *legally authorized* use of *non-commercial*, home-grown marijuana for *medical* purposes pursuant to a physician's order and the *illegal* (under both federal and state law) *interstate market* supplying the drug for *recreation*.

To his credit Justice Thomas, much like Justice McReynolds a century earlier, adhered to legal principle, even when doing so set aside a federal policy he likely favored as a personal matter. In his separate dissenting opinion, Thomas aptly characterized *Raich* as supplying yet another epitaph for judicial enforcement of the enumerated powers scheme: "Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers." ³⁰¹ In light of the majority's all-encompassing definition of economics:

"[The Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison's assurance to the people of New York that the 'powers delegated' to the Federal Government are 'few and defined,'

²⁹⁸ *Raich*, 545 U.S. at 41 n.3 (Scalia, J., concurring) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)) (emphasis added by Justice Scalia).

²⁹⁹ *Id.*

³⁰⁰ To be sure, Scalia also noted that, in *Lopez*, "the Government [had] not attempt[ed] to justify the statute on the basis of that relationship." *Id.* at 41 n.3 (Scalia, J., concurring). Still, it would diminish *Lopez* to an obscurity to read it as ultimately amounting to nothing more than the product of incomplete advocacy in support of the Act therein invalidated.

³⁰¹ *Id.* at 57 (Thomas, J., dissenting).

while those of the States are ‘numerous and indefinite.’

. . .

One searches the Court’s opinion in vain for any hint of what aspect of American life is reserved to the States.”³⁰²

The irony, of course, is that, when confronted with a case dividing the American political right-wing’s social conservative and libertarian constituencies, the nominally pro-federalism Rehnquist Court, in one of its very last constitutional decisions, endorsed a reading of congressional power so broad as to be virtually unlimited. Of the Justices still on the Court today, only Thomas remained steadfast in a principled commitment to federalism. Taking up the role McReynolds played in the 1920s and 30s, Thomas suffers a similar irony and intellectual isolation. Like McReynolds, Thomas endures demonization by the political left, who are opposed to any general limitation of congressional power.³⁰³ At the same time, Thomas’s usual defenders maintain a thunderous silence, unwilling to acknowledge the intellectual dishonesty of his fair-weather federalist colleagues. With the possible exception of the formal legal literature,³⁰⁴ the truth Thomas’s constancy exposes remains for the present obscured. But like the Taft and Hughes Courts, the Roberts Court will not long sustain a federalism doctrine erected on such a precarious foundation.

B. LETTING FEDERALISM DIE WITH DIGNITY

Like the early twentieth-century Supreme Court’s exoneration of Dr. Linder, who had been charged with violating the Harrison Act by what he believed to be sound, lawful medical practice,³⁰⁵ the Supreme Court’s vindication of Oregon’s Death With Dignity Act provided a temporary reprieve from the federal government’s use of the narcotics laws as a relentless engine of centralization. In both cases, however, the reprieve was more symbolic than real. In both cases, the Court’s opinions contained within them invitations to further expansion of federal author-

³⁰² *Id.* at 69, 70 (Thomas, J., dissenting) (quoting THE FEDERALIST No. 45, at 313 (James Madison) (J. Cooke ed. 1961)).

³⁰³ See BOND, *supra* note 88, at 135 (noting the New Dealers’ singular disdain for Justice McReynolds). See generally SCOTT DOUGLAS GERBER, *First Principles: The Jurisprudence of Clarence Thomas*, (1999) (discussing the unusually vitriolic nature of Justice Thomas’s left-leaning critics).

³⁰⁴ See, e.g., Kurt T. Lash, “Tucker’s Rule”: *St. George Tucker and the Limited Construction of Federal Power*, 47 WM. & MARY L. REV. 1343, 1390 (2006) (observing that “[a]lthough local autonomy may limit federal power to pass legislation like . . . the Violence Against Women Act, a vigorous application of the same rule would protect the right of California citizens to authorize medicinal use of marijuana and the right of Oregon residents to authorize physician assisted suicide”) (citation omitted).

³⁰⁵ See *Linder v. United States*, 268 U.S. 5, 22–23 (1925).

ity to suppress whatever Congress (and the Justices) deemed to be immoral.

Justice Kennedy, who just over six months earlier had silently joined the *Raich* majority, wrote the opinion for the Court in *Gonzales v. Oregon*,³⁰⁶ which rejected Attorney General John Ashcroft's conclusion that the CSA precluded physicians from acting under Oregon's Death With Dignity Act (ODWDA). (One wit observed that, after this ruling, federal law forbade marijuana prescriptions because, unlike the drugs at issue in the *Oregon* case, they *didn't* kill patients.) In pertinent part, and subject to extensive procedural protections, ODWDA authorized Oregon physicians to prescribe lethal doses of certain drugs when asked to do so by terminally ill patients.³⁰⁷ Those drugs were covered by the CSA, and on November 9, 2001, Ashcroft issued an interpretative rule reversing the position of the Clinton Justice Department and declaring that using controlled substances to assist a patient's suicide was not a legitimate medical practice.³⁰⁸ Accordingly, a physician's adherence with ODWDA was prohibited by the federal statute, so construed. Oregon challenged the rule in federal court,³⁰⁹ and the Supreme Court sided with the state, concluding that the Attorney General had misconstrued the CSA.

According to Justice Kennedy, the CSA "manifest[ed] no intent to regulate the practice of medicine generally."³¹⁰ This outcome accorded with "the structure and limitations of federalism, which allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."³¹¹ Echoing Justice McReynolds's opinion for the Court in *Linder*, Justice Kennedy emphasized that medical practice was an "area[] traditionally supervised by the States,"³¹² and that States were therefore free to choose among competing understandings of what constituted acceptable conduct by a physician in service of a patient's comfort and wishes.³¹³ Of course, the same claim had been made in support of California's conclusion that proper medical practice might in some cases include prescription of marijuana. Like McReynolds in *Linder*, Kennedy stressed the narrowness

³⁰⁶ 546 U.S. 243 (2006).

³⁰⁷ *Id.* at 251 (discussing Oregon statute).

³⁰⁸ *Id.*

³⁰⁹ *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1084 (2002).

³¹⁰ *Oregon*, 546 U.S. at 270 (internal quotation marks and citation omitted).

³¹¹ *Id.*

³¹² *Id.* at 274. Justice Kennedy deemed it "unnecessary even to consider the application of [federalism] clear statement requirements or presumptions against preemption to reach this commonsense conclusion." *Id.* (citations omitted).

³¹³ *Id.* at 286 ("The primary problem with the Government's argument, however, is its assumption that the CSA impliedly authorizes an Executive officer to bar a use simply because it may be inconsistent with one reasonable understanding of medical practice.").

of the Court's holding. Citing *Raich*, Kennedy explained that, "[e]ven though regulation of health and safety is primarily, and historically, a matter of local concern, . . . *there is no question that the Federal Government can set uniform standards in these areas.*"³¹⁴ Whereas McReynolds's opinion in *Linder* subtly foreshadowed the Court's subsequent reaffirmation of *Doremus* in *Nigro*, Kennedy's opinion expressly and authoritatively confirmed the implication of *Raich*: that meaningful judicial efforts to cabin the powers of Congress were at an end.

As if there were any lingering doubt on this score, Justice Scalia, dissenting, went out of his way to signal that Congress enjoyed virtually unlimited authority to regulate public morality. Citing *Hoke* and *Champion*,³¹⁵ Scalia observed that "[f]rom 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."³¹⁶ Of course, Justice Scalia neglected to mention that the cited cases applied *only* to persons and articles which had crossed state lines, whereas the CSA applied without regard to any analogous limitation, as the facts of *Raich* so glaringly demonstrated.³¹⁷ Ignoring this difference, Scalia reasoned that "[u]nless 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."³¹⁸ Indeed, in broad, concluding language—to the effect that the CSA "surely excludes the prescription of drugs to produce death"³¹⁹—Scalia arguably welcomed congressional regulation, if not outright prohibition, of abortion.

To this extent, he espoused a position reminiscent of the White Court's contemporaneous defenders. They tolerated federal regulation of sex, booze, and drugs, but not child labor, which they were unwilling to regard as a *moral* problem.³²⁰ Justice Scalia likewise acknowledges the propriety of federal morals regulations, but refuses to recognize that, for many, guns in schools and violence against women present moral

³¹⁴ *Oregon*, 546 U.S. at 271 (emphasis added).

³¹⁵ See *supra* notes 98–107 and accompanying text.

³¹⁶ *Oregon*, 546 U.S. at 230.

³¹⁷ Indeed, the record in *Raich* established that her marijuana was "grown using only soil, water, nutrients, equipment, supplies, and lumber originating from or manufactured within California." Brief for the Respondents at 6–7, *Gonzales v. Raich*, 545 U.S. 1 (2005) (No. 03-1454).

³¹⁸ *Oregon*, 546 U.S. at 299.

³¹⁹ *Id.*

³²⁰ See, e.g., Green, *supra* note 125, at 6 (arguing that lotteries, adultery, liquor and narcotics were intrinsically "evil," whereas "to employ children of 13 in factories or of 15 in quarries or mines . . . [was] not immoral").

problems at least as acute as those traceable to medical use of marijuana or physician-assisted suicide by the terminally ill.³²¹

IV. DEJA VU ALL OVER AGAIN?

The preceding discussion sought to establish that the same kinds of inconsistencies that proved fatal to early twentieth-century judicial efforts to enforce a meaningful federalism also plague the Rehnquist Court's federalism revival. More specifically, history teaches that, in both contexts, the Supreme Court's first failures came in cases concerning federalism challenges to congressional statutes prohibiting narcotics use. Identification of this parallel is significant in its own right, as recent scholarly debate has accorded it scant attention.³²² But this parallel invites further questions, such as why do the past's mistakes seem to be repeating themselves? And what, if anything, does this evident cycling teach about the Rehnquist Court's likely legacy?

A central dispute in much of the legal literature concerning *Raich* is whether it marks the end of the *Lopez* revolution or merely a minor diversion from the course *Lopez* had launched (whatever course that may have been). Commentators have championed both views. Advocates of the former account have concluded that *Raich* signals the Justices' conclusion that *Lopez* and *Morrison* were extraordinary cases unlikely to sire progeny.³²³ On this reading, *Raich* marks the Court's return to the pre-

³²¹ Justice Thomas joined Justice Scalia's dissent. In his separate opinion, Justice Thomas made clear that he held fast to his position in *Raich*—that “the applications of the CSA” should be limited to accord with “the principles of federalism and our constitutional structure.” *Oregon*, 546 U.S. at 301 (Thomas, J., dissenting). But, in his view, “Respondents’ acceptance of *Raich* foreclose[d] their constitutional challenge.” *Id.* at 301 n.2.

³²² See *supra* note 19 and accompanying text.

³²³ See, e.g., Jonathan H. Adler, *Is Morrison Dead? Assessing a Supreme (Drug) Law Overdose*, 9 LEWIS & CLARK L. REV. 751, 777 (2005) (concluding that *Raich* repudiated *Lopez* and *Morrison*); Eric R. Claeys, *Raich and Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 818 (2005) (arguing that *Raich* reveals that even a dedicated “coalition of judicial conservatives would not be unified enough to undo the New Deal transformation of Congress’s powers”); Alex Kreit, *Rights, Rules, and Raich*, 108 W. VA. L. REV. 705, 719 (2005–2006) (asserting that “*Raich* turns *Lopez*’s substantive limitations on what activities Congress can constitutionally regulate into procedural limits that Congress will generally be able to easily overcome”); Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 844 (2005) (“*Lopez* and *Morrison* have been largely confined to their facts.”); John T. Parry, “*Society Must be [Regulated]*”: *Biopolitics and the Commerce Clause in Gonzales v. Raich*, 9 LEWIS & CLARK L. REV. 853, 859 (2005) (arguing that *Raich* teaches “that *Wickard* is the heart of Commerce Clause doctrine, while *Lopez* and *Morrison* are, if not outliers, at least cases that merely police the outer boundaries of the doctrine to ensure that Congress is regulating economic activity in the broad sense defined by *Raich*”); Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 932 (2005) (expressing doubt that “a robust judicially-enforceable federalism has much future left” after *Raich*); Smith, *supra* note 18, at 955 (“The most enduring legacy of the Rehnquist Court might simply be its failure to convince those of us with an understandable skepticism about invocations of federal-

Lopez status quo, which recognized virtually no limits on Congress's Commerce Clause authority. Others have argued that *Raich*, rather than *Lopez* or *Morrison*, constitutes the outlier, which will pose no obstacle to the continuation of the Rehnquist Court's modest judicial-enforcement-of-federalism revival.³²⁴

Only the passage of time under the Roberts Court will conclusively resolve this debate. But history strongly suggests that, even if *Lopez* and *Morrison* held promise of a return to meaningful judicial enforcement of the enumerated powers scheme, *Raich* will, sooner or later, prove fatal to that hope. The Court has already once attempted to stretch congressional powers to encompass plenary authority over all aspects of narcotics use, including related medical practice, while simultaneously preserving robust judicial enforcement of the enumerated powers scheme. That attempt failed when the exceptions for drugs and other morals regulations eventually swallowed the rule limiting Congress's authority to the discrete matters clearly embraced by Article I, Section 8. The Court's compromise of federalism could not be cabined to drug or even all morals laws, but rather vexed all ensuing judicial efforts to patrol the boundaries of congressional power.

This history, in turn, raises the question of *why* partial judicial federalism proved unstable. The Taft and Hughes Courts' critics offered an answer at the time: a partial federalism was in fact no federalism at all. It was instead a mask for policymaking outside the sphere of judicial competency and legitimacy. Inchoate judicial weighing of policy corrupted the Court's efforts to restrict congressional power. Constitutional law was subsumed by politics more properly the domain of the people's

ism that federalism can in fact be applied in a neutral and principled fashion."); Somin, *supra* note 18, at 118 (asserting that *Raich* "virtually eviscerated" *Lopez* and *Morrison*); Ilya Somin, *Gonzales v. Raich: Federalism as a Casualty of the War on Drugs*, 15 CORNELL J.L. & PUB. POL'Y 507 (2005) (contending that "*Raich* represents a major—possibly even terminal—set-back for efforts to impose meaningful judicial constraints on Congress' Commerce Clause powers"); Young, *supra* note 18, at 39–40 (speculating that "*Raich* most likely marks the outer bound of the Court's ambition in Commerce Clause cases" and "may indicate that even minor incursions on the federal edifice are unlikely . . . except in cases where to uphold the federal act would remove any limit whatsoever").

³²⁴ See, e.g., Ann Althouse, *Why Not Heighten the Scrutiny of Congressional Power When the States Undertake Policy Experiments?*, 9 LEWIS & CLARK L. REV. 779, 781 (2005) (concluding that *Raich* constituted a "conventional and predictable" decision, which should not be viewed as a "betrayal of the principle of limiting the commerce power articulated in" *Lopez* and *Morrison*); Brown, *supra* note 18, at 986 (viewing "the opinion and result in [*Raich*] as more of a stopping point, a refusal to extend, than any form of serious cutting back of the basic thrust of *Lopez* and *Morrison*"); Robert J. Pushaw, Jr., "*The Medical Marijuana Case: A Commerce Clause Counter-revolution?*", 9 LEWIS & CLARK L. REV. 879, 908 (2005) (arguing that "it is premature to pronounce *Raich* the death knell of the Rehnquist Court's Commerce Clause revolution"); cf. Randy Barnett, *Foreword: Limiting Raich*, 9 LEWIS & CLARK L. REV. 743, 744 (2005) (describing how a future Supreme Court majority, desirous of protecting federalism but unwilling to overrule *Raich*, might read it narrowly).

elected and accountable representatives. In short, to the extent that the calculus turned on questions of policy priorities, the Justices lost all claim to superiority relative to the political branches in the execution of American federalism.

This contemporaneous analysis is consonant with both the external and internal accounts of the New Deal era constitutional crisis reflected in modern scholarship. If, as the conventional historical narrative posits, the New Deal Court sharply altered course in response to political pressures emanating from the Roosevelt White House, then the Court's contemporary critics had facilitated this result by undermining the institution's capacity to resist these pressures.³²⁵ As we have seen, those critics relentlessly exposed the, at best, mercurial and, at worst, hypocritical nature of the Justices' invocation of federalism. By so doing, these commentators impeached the Justices' claims of fidelity to legal principle apart from and even in opposition to their personal policy preferences. Partisanship, public disinterest and ignorance, fatigue, and inertia permitted the Justices to avoid immediate individual accountability when they compromised their official integrity. But ultimately these compromises took their toll by subverting the Justices' only shelter in a sustained crisis—the public's confidence that they are effectuating policy judgments logically and morally prior to their own.³²⁶ In this way, the traditional account suggests that the Court's *Harrison Act* and other morals regulations cases were a significant source of the forces that ultimately compelled the Court to abandon federalism enforcement altogether.

More recent, revisionist scholarship, however, contends that the Court's post-1936 rulings sustaining New Deal legislation were more the product of the Court's internal efforts to achieve coherence, and thus equilibrium, in its own jurisprudence than the result of a sudden abdication to external, political pressure.³²⁷ If so, then *White* and *Taft* Court concessions to broad congressional assertions of power in the context of morals regulations play an even more direct causal role in the creation and resolution of the New Deal Court's transformation of federalism. For these concessions must be counted among the first cracks in the foundation of the turn-of-the-century legal order. Indeed, the revisionist interpretations of the Court's late-1930s abandonment of federalism indicate that the doctrinal analogs to Ptolemaic epicycles³²⁸ necessary to

³²⁵ See *supra* note 222 and accompanying text.

³²⁶ See CURRIE, *supra* note 121, at xii (1985) (observing that "when a judge swears to uphold the Constitution, he promises obedience to a set of rules laid down by someone else").

³²⁷ See, e.g., CUSHMAN, *supra* note 222, at 5; WHITE, *supra* note 214, at 1–4.

³²⁸ See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 168 (2d ed. 1970) (discussing the introduction of epicycles and epi-epicycles in an ultimately futile effort to reconcile Ptolemaic astronomical theory with observed reality).

abide apparently inconsistent application of legal principles created destabilizing forces within the Court. For example, Professor Cushman finds greater continuity than the external account acknowledges between the Hughes Court's interpretations of the Commerce Clause in *Schechter Poultry* and *Carter Coal*, on the one hand, and *Jones & Laughlin Steel Corp.*, on the other. Rather than a sharp break with the past, the *Jones & Laughlin* case constituted the logical fruition of the Court's longstanding recognition of congressional power to protect the "stream of commerce" from interruption.³²⁹ Similarly, Professor White roots the New Deal era's constitutional evolution in the broader context of the thirty years of constitutional doctrine expounded by the White, Taft, and Hughes Courts. Developments in the law governing executive discretion in foreign affairs, the structure and function of federal administrative agencies, and the freedoms of speech and the press laid the intellectual foundation for parallel progression in the Court's understanding of the constitutional limits on Congress's power to regulate the national economy.³³⁰ Common to Cushman and White is the revelation that legal doctrine and its intellectual presuppositions drove and shaped the Court's New Deal era constitutional decisions.

In both accounts, by the late 1930s tensions between accommodations already made and hard-line resistance to further change required resolution. These tensions were of the Court's own making and existed aside from any external pressure President Roosevelt brought to bear on the Court in the wake of his 1936 reelection. The Court resolved these tensions by bringing its economic substantive due process and commerce clause doctrine into accord with other recently "modernized" areas of its jurisprudence. Most significant in this revised history is the recognition of some substantial independent force to the Justices' obligation to achieve some manner of doctrinal coherence.

Of course this understanding of federalism's first death offers insight into the probable, long-term significance of the *Raich* and *Oregon* cases. Today's doctrinal inconsistencies will produce their own destabilizing pressures. Thus, without any need to conjure spectacular scenarios of future inter-branch collisions comparable to the court-packing crisis, one can foresee how the Court's recent compromise of its commitment to federalism will introduce into the legal doctrine tensions and uncertainties, which will in time likely work federalism's third death.

It might be tempting to deduce from the similarity between the past and more recent events a proof of a sort of historical inevitability to the

³²⁹ See CUSHMAN, *supra* note 222, at 175–76.

³³⁰ See generally WHITE, *supra* note 214, at 225–36 (situating evolution of the Hughes Court's Commerce Clause doctrine in broader jurisprudential context).

failure of judicial enforcement of the enumerated powers scheme.³³¹ Such a constitutional determinism would explain, if not excuse, the Rehnquist Court's disregard of history's examples and confirm the judgment espoused by many across numerous generations that the political safeguards of federalism must be sole mechanisms for securing this aspect of our constitutional structure.³³² The apparent prescription would be that the Court ought to announce, loudly and irrevocably, its withdrawal from the field, the only avoidable harm being the public reliance induced by the Court's pretense of federalism enforcement.³³³ This account, however, submerges the open divisions among the Justices and ignores the internal consistency of the *Doremus*, *Nigro*, and *Raich* dissenters. The persistence and clarity of these voices suggests that individual human judgment and character matter, and that the Justices need not be blind to the Court's inconsistencies and their effects.

These observations speak to a more general, jurisprudential debate. Supreme Court scholars struggle mightily to construct models that measure the extent to which doctrine drives the Justices' decision-making.³³⁴ Whereas most contemporary legal scholars implicitly assume "that court decisions are based centrally upon reasoned arguments of the type taught in law school,"³³⁵ other commentators, particularly political scientists, maintain that Justices' individual policy and ideological preferences influence their votes far more than any of the doctrinal syllogisms that dominate most legal scholarship, appellate briefs, and indeed judicial

³³¹ Cf. Edward A. Purcell, Jr., *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 N.Y.L. SCH. L. REV. 635, 637, 697 (2005–2006) (stressing "the incomplete, ambiguous, and ambivalent nature of American constitutional federalism itself" and questioning "whether, and to what extent, it is possible for 'federalism' to serve as a meaningful and independent norm in the nation's constitutional enterprise" by guiding judges "to 'correct' decisions or, at least," by eliminating "wide ranges of discretion in such decision making").

³³² See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); JESSIE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 175–84 (1980); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH.U. L.Q. 779 (1982); see also Garcia v. San Antonio Transit Auth., 469 U.S. 528, 551 n.11 (1985).

³³³ See, e.g., Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719, 720 (1996) (arguing that "instead of seeking to reactivate federalism review, the Court should make its withdrawal from the area explicit" and that "[t]he result would be that the Court would cease facilitating the growth of national power—the present effect of federalism review—and make an enormous and much needed contribution to the cause of honesty in constitutional law").

³³⁴ See generally Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 252–54 (1997) (contrasting legal model of judicial decision-making with then-emerging "attitudinal" model reflected in political science literature regarding the Supreme Court).

³³⁵ *Id.* at 252.

opinions.³³⁶ Moreover, the federalism decisions of both the Rehnquist and the Hughes Courts have been both scrutinized under and adduced as evidence for this “attitudinal” model.³³⁷

As interesting and important as these studies are, they neglect the opportunity this that history affords to recast the inquiry. Regardless of the subjective motivations of particular judges and justices, questions about the Court’s legitimate function and institutional capacity remain. Federalism’s forgotten first death in the White and Taft Courts teaches that doctrine matters, even as it illustrates the Justices’ short-term capacity to manipulate legal rules to effect their own policy objectives. Indeed, it is the very fragility of legal doctrine that ultimately supplies its power to constrain the Justices. The Supreme Court’s limited capacity to persist in opposition to the popular but constitutionally dubious actions of the overtly political branches depends (in the long if not the short run) on the credibility of the Justices’ claims of fidelity to legal principle apart from and even in opposition to their personal policy preferences. Partisanship, public disinterest and ignorance, fatigue, and inertia permit the Justices to avoid immediate, direct, and individual accountability when they compromise their official integrity. But ultimately these compromises take their toll by subverting the Justices’ only shelter in a sustained crisis: namely, the public’s belief that they effectuate policy judgments logically and morally prior to their own.³³⁸ This belief constitutes the sole foundation of the Court’s genuine and lasting authority; the Court “may truly be said to have neither FORCE nor WILL but merely judgment.”³³⁹

More specifically, reflection on the ways in which the White and Taft Courts’ compromise of federalism principles circumscribed the capacity of the Hughes Court to persevere in enforcement of the enumerated powers doctrine reveals a manner in which legal principle can constrain. To date, political scientists seek to test the constraining power of either an individual Justice’s professional conscience or the potential for adverse action by another branch of government.³⁴⁰ Judicial consideration of the latter sort of potential constraints is labeled “strategic” in the sense a Justice might alter behavior in anticipation of, and in hope of

³³⁶ See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); see also CROSS, *supra* note 334, at 252 n.4.

³³⁷ See, e.g., Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1309–10 (1999); Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt’s Court-Packing Plan*, 12 INT’L REV. L. & ECON. 45 (1992).

³³⁸ See CURRIE, *supra* note 121, at xii (1985) (observing that “when a judge swears to uphold the Constitution, he promises obedience to a set of rules laid down by someone else”).

³³⁹ THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³⁴⁰ See generally Cross, *supra* note 334, at 255.

influencing, actors elsewhere in the federal government. A different kind of strategy, illustrated by the first death of federalism, is unremarked. Our hypothetical strategic Justice would no doubt on occasion adjust her position not just to defuse confrontations with other branches of government but also to enhance the credibility of her claims to be bound by law, mindful as to how that credibility would likely be assessed by the bar and especially her judicial colleagues. These types of strategic considerations internal to the Court might in part explain why doctrinal incoherence proved fatal to the Hughes Court's efforts to enforce federalism as revisionist treatments suggest.

CONCLUSION

Drug abuse provokes intense reactions, both physical and emotional. This was just as true a century ago. The beginning of the end of the White and Taft Courts' efforts to constrain Congress to its enumerated powers can be traced to rulings rejecting valid federalism objections to early national narcotics laws. Ironically, the Rehnquist Court's efforts to revive meaningful judicial federalism faltered when confronted with the same social problem. It also seems likely that the Roberts Court will prove no more successful in executing a judicial policy of selective federalism than did the Hughes Court when tested by the New Deal. Thus, the Rehnquist Court's most lasting legacy may be as an exemplar of George Santayana's famous observation that "[t]hose who cannot remember the past are condemned to repeat it."³⁴¹

³⁴¹ George Santayana, *Reason in Common Sense*, 1905–1906, quoted in *Familiar Quotations*—John Bartlett 703 (15th ed. 1980).