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THE ROBERTS COURT AND FEDERALISM

*MINUTES FROM A CONVENTION OF THE FEDERALIST
SOCIETY*

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3:15-4:45 p.m.

Grand Ball Room

JUDGE SENTELLE: Good afternoon. We're going to be talking this afternoon about the direction of federalism and the Roberts Court, which will necessitate talking about the direction of federalism before the Roberts Court. Well, some of us thought we had the direction figured out at the time of the *Lopez*¹ decision and the *Morrison*² case. In fact, I went around the countryside between the two to various Federalist chapters lecturing on *Lopez Speaks, Is Anyone Listening?*³ After *Morrison*, I thought maybe people would listen. And then after *Raich*,⁴ I didn't know what they would hear if they did listen.

(Laughter.)

JUDGE SENTELLE: So, hopefully we have panelists who will straighten out all of the questions that we all have about what that direction is.

We'll be starting with my old friend and fellow Tar Heel, Walter Dellinger. We were at UNC together many years ago. He thought it surprising that I could not remember him. I told him he must not have hung out at bars or I would've known him much better. But he was the big man on campus. Then he went off to some Ivy League school. I've forgotten which one; they all look alike.

(Laughter.)

JUDGE SENTELLE: He distinguished himself in many ways later, including teaching at Duke University Law School, which is near a great university, North Carolina and —

(Laughter.)

JUDGE SENTELLE: —also serving as solicitor general for a time during the Clinton administration.

¹ *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress does not have authority under the Commerce Clause to prohibit possession of handguns in school zones).

² *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress does not have authority under the Commerce Clause to provide a federal civil remedy to victims of gender-motivated violence).

³ David B. Sentelle, *Lopez Speaks, Is Anyone Listening?*, 45 LOY. L. REV. 541 (1999)

⁴ *Gonzales v. Raich*, 545 U.S. 1 (2005) (holding that Congress has authority under the Commerce Clause to ban the use of cannabis even where states approve its use for medicinal purposes).

I believe batting second will be Dr. John Eastman, the Dean and Donald Kennedy Chair in Law at Chapman University School of Law. Along the way, he clerked for the Honorable Clarence Thomas and is an old friend of the Federalist Society. He has actually practiced law as well as been an academic, which had the admiration of those of us who went to law school so we could practice law. Being a judge is a little like practicing law, except it doesn't pay as well.

Third, we'll hear Jeff Rosen, professor of law at George Washington University, Legal Affairs Editor of the *New Republic*, and the non-resident senior fellow at the Brookings Institution. His most recent book is *The Supreme Court: The Personalities and Rivalries That Defined America*.⁵

Batting cleanup is going to be Paul Clement, who was the forty-third Solicitor General of the United States and is currently a visiting professor at the Georgetown University Law Center and a senior fellow at the Center Supreme Court Institute.

Walter, you're first. They get about eight or ten minutes to directly present, and I'm going to let them talk to each other, and then we'll have questions from the audience.

HON. MR. DELLINGER: In his great book *Order and Law*, about his time as solicitor general, Charles Fried writes about an incident that, to me, really exemplifies a significant part of the debate over Federalism.⁶ A case came up to his office in which the Solicitor General had the option to enter as an *amicus* on behalf of the United States, involving what Charles saw as Lilliputian, provincial regulations hampering national commerce and the national free market. And his family, having come from eastern Europe to the States, the Brezhnevian-type regimes, he had eagerly left his post at Harvard to come to argue the Reagan Revolution, the central tenet of which he saw as free markets and liberating the entrepreneurial spirit of

⁵ JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* (2007).

⁶ See CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 186–88 (1991).

America from the hamstringing of multiplicity of governmental regulations.

So, he filed a strong brief arguing that the particular set of state regulations in this case were preempted by the national authority of the United States and circulated this draft brief around the Justice Department, when he reports that basically an explosion goes off at the Office of Legal Counsel—what Charles refers to as the states’ rights police headed by our friend Charles Cooper, who said this brief violates the central purpose of the Reagan Revolution, which is states’ rights. And a vigorous battle then ensued over which of these two principles, free market or state regulatory authority, represents the heart of what each of them thought they had come to Washington to advocate and to achieve.

That particular debate was resolved in Assistant Attorney General Cooper’s favor by General Meese, but the debate is one that goes and is, in a sense, a timeless debate. There is a genuine fissure in—it was sort of conservative legal thought between the twin poles of states’ rights on the one hand and freedom from excessive and multiplicitous and often inconsistent regulation on the other. One question is, as I slightly broaden this topic to “Federalism and the Era of Obama,” is whether there’s a similar fissure in thought on the other side.

There’s a traditional progressive position of people who grew up, as I did, in the South, where we thought of states’ rights as George Corley Wallace standing in the schoolhouse door. But more recently, plaintiffs’ tort lawyers, environmentalists, and others have sought out state regulation particularly in the past eight years, where they saw less regulatory zeal at the national level. All of a sudden for a variety of reasons, states became much more active in more segments of the economy. Attorney General Eliot Spitzer in a sense led the charge, but the tobacco settlement gave it an enormous impetus,⁷ where state attorneys generals’ offices began to see

⁷ Milo Geyelin, *States Agree to \$206 Billion Tobacco Deal*, WALL ST. J., Nov. 23, 1998, at B13. Forty-six states settled litigation with the tobacco industry over public health costs related to smoking, with \$206 billion to be paid to the states over twenty-five

themselves as a revenue source for the state, and attorneys general were often successful in running for governor, reversing a trend where lieutenant governors had beaten attorneys general in the era where they became revenue centers for their states and much more aggressive.

And when they discovered the technique of bringing in plaintiffs' tort firms on a contingency basis at no cost to the state, where you then had this amalgam of the authority of the state as a litigant with the profit incentive of contingency fee lawyers, you saw a very great transformation in the legal landscape and a major shift. It took a while, and all of a sudden, states' rights look more appealing to people who want to urge more liability on corporations, more recovery, more punitive attitudes, more regulatory protections.

One question as we look to the new era is whether that will look different. If you think of the party of regulation coming into national office, whether those people who—once they become regulators and once their agency has struck what they think is the right balance between cost and efficiency, consumer want and satisfaction, safety, environmental concerns, have struck whatever the right balance is—will be as eager to see fifty states be free to add to and have conflicting regulations so that that is one way in which the balancing of state and national authority I think will be up for additional debate.

Secondly, one question is whether it may at some level influence the courts. If there is more active regulation at the national level, will courts be as inclined to foster and to facilitate a multiplicity of state regulators when Congress has been ambiguous about the degree to which Congress is preempting a state law? For example, there was a revealing moment in the argument two terms ago

years. *Id.* New York State Attorney General Eliot Spitzer later sued several tobacco companies for violating provisions of the settlement. See Press Release, Office of the Attorney General, State of New York, Spitzer Sues Brown & Williamson for Violating National Tobacco Settlement (June 17, 2004); Press Release, Office of the Attorney General, State of New York, Spitzer Sues Tobacco Company for Violations of Tobacco Settlement Agreement (Mar. 19, 2001).

in *Watters v. Wachovia*,⁸ when my now-colleague Sri Srinivasan was arguing on behalf of the United States in favor of federal preemption of state regulation, not just of federal banks, but also of their operating subsidiaries that were doing mortgage loans. And when those mortgage subsidiaries became part of the national banks, did national preemption from state regulation follow?

Justice Stevens asked right off the bat, “How many additional regulators were added to the Office of the Comptroller of the Currency once you took on this new responsibility?”⁹ And the answer was, “That’s an empirical question they don’t know the answer to, but they felt that they had the authority, the resources to regulate both.”¹⁰ But the point that Justice Stevens was making is, “I’m skeptical that you’re really going to be regulating this at the national level. You’re ousting state regulation, but are you really going to be regulating?” So that, I think, is a factor that will be in the background.

A final factor will be the increasing role in the economic area that we’ve seen recently of multinational agreements. The Bush administration has accepted a number of regulations and standards recently from a group of twenty nations, that we’ve agreed to implement as part of the response to the fiscal crisis.¹¹ Whatever you think of the wisdom of having that kind of multinational agreement, it becomes possible only if the federal government is going to have the authority to speak for the United States. I think we’re increasingly facing a world in which, given that there’s a 400 million-person common market in Europe, the idea that the United States will now become like the Balkanization of Europe in the 1950s—with fifty different systems of regulations facing our businesses, whereas European-centered operations will have an extraordinarily

⁸ *Watters v. Wachovia Bank*, 550 U.S. 1 (2007).

⁹ See Transcript of Oral Argument at 45, *Watters*, 550 U.S. 1 (No. 05-1342).

¹⁰ See *id.* at 45–46.

¹¹ See Mark Landler, *World Leaders Vow Joint Push to Aid Economy*, N.Y. TIMES, Nov. 16, 2008, at A1.

common market—will make it very, very difficult for us to compete. My bias is in favor of preemption.

And I will just close with one comment on the summary of state sovereignty. I once did a two-minute summary of all—I think constitutional law can be summarized in two minutes, and any of you that ask, I'll give you the other minute and forty-five seconds. But the fifteen seconds on state sovereignty is this. The national power of Congress is limited to some extent by state sovereignty,¹² a doctrine traditionally invoked by those on the right to insulate conservative red-state practices from federal regulation. That doctrine is now being eyed fondly but warily by liberals seeking to protect blue-state positions on gay marriage, medical marijuana, punitive damages, and environmental regulations. The rule of thumb is this: Straight sovereignty claims are much more likely to be upheld by the current courtroom when they're advanced by Alabama than when they're put forward by Oregon.

Thank you.

(Laughter.)

(Applause.)

DEAN EASTMAN: Boy, following Walter Dellinger is quite a task.

We're trying to figure out exactly what the Roberts Court federalism is, and is it alive and well or is it deader than a doorknob. But before we can answer that question, I think it's important to understand what federalism is. Simplistically, it means any case in which a state wins, that's a good federalism decision, and when states lose, it's a bad federalism decision. But of course, those of us who recognize the importance of an intervening Constitution are a little more nuanced than that. If a power is within the federal government's power, then when the state loses to a legitimate exercise of federal power, that's advancing our federalism, this separation of powers between the two levels of government. And when the

¹² See Edward S. Corwin, *Congress's Power to Prohibit Commerce: A Crucial Constitutional Issue*, 18 CORNELL L.Q. 477, 482 (1933) (stating that James Madison's constitutional interpretation was that the "coexistence of the states and their powers [was] of itself a limitation upon national power").

federal government is exceeding its authority and nevertheless wins, that would be a violation of federalism. Or when states are acting in ways contrary to that federal charter, that would be a violation of federalism as well.

So, let's lead up to the Roberts Court by looking at, I think, two eras of the Rehnquist Court and trying to figure out how they did on this question of federalism and then see whether the Roberts Court is carrying forward the proper understanding of federalism or not. I divide this between the early Rehnquist Court and the late Rehnquist Court, and—for simplicity—I'm not going to go through all of their potential federalism decisions but a couple of the big ones. In the early Rehnquist Court, you get cases like *Lopez*¹³ and *Morrison*¹⁴ and *Solid Waste Agency of Northern Cook County*,¹⁵ clearly restricting the scope of the commerce power and much more in line with the original design of the Constitution, leaving the remainder for states to regulate, or not, as they saw fit—very good and very strong originalist federalism decisions.

But you also had from that early Rehnquist Court such cases as *Term Limits*,¹⁶ which did just the opposite, and, I would argue, Walter's already hinted at this—the Eleventh Amendment cases.¹⁷

¹³ *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress does not have authority under the Commerce Clause to prohibit possession of handguns in school zones).

¹⁴ *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress does not have authority under the Commerce Clause to provide a federal civil remedy to victims of gender-motivated violence).

¹⁵ *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (holding that the Corps' rule extending the definition of "navigable waters" under the Clean Water Act to include some intrastate waters exceeds the authority granted to the Corps under the Act).

¹⁶ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (holding that states cannot enact qualifications for offices of the U.S. Congress that are stricter than those specified in the Constitution).

¹⁷ The Eleventh Amendment doctrine developed in the Rehnquist Court strengthened the sovereign immunity of state governments against Congress. *See, e.g., Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that state sovereign immunity precludes individuals from bringing suits for money damages against states under Title I of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act of

It's something we don't often think about, but here was a set of actions where there was clear federal authority granted in Article I, Section 8,¹⁸ and yet we're creating this preserve of exemption for the states, and that seems to be somehow in tension with the notion of constitutional assignments of power in the federal system. So, you've got this little bit of a mixed message in the early Rehnquist Court. In the late Rehnquist Court, I don't think you have any mixed message at all. You've got cases like *Raich*,¹⁹ which seem to repudiate all the old Commerce Clause cases,²⁰ or, more appropriately, I think, defined in *Lopez*, we left open—illogically left open—whether *Lopez* overrules *Wickard v. Filburn*.²¹ *Raich* comes along, where that issue is directly confronted, and sides with *Wickard v. Filburn*, not with *Lopez*.²²

But you also have a very interesting implied presidential foreign powers preemption case in *American Insurance Association v. Garamendi*,²³ written by Justice Souter. The dissenters in the case are an interesting line of pro-federalist Justices, Ruth Ginsburg and John Paul Stevens as well as Justices Scalia and Thomas. And so you've got a very mixed bag of intrusion, now, on states' exercise of their police powers, and then one more I'll throw in there as well: *Lawrence v. Texas*, where, using an amorphous interpretation of a provision to the Fourteenth Amendment, Justice Kennedy writes a decision greatly intruding on the ability of states to exercise their police powers.²⁴ So, I think it's fair to say that the late era

1967 cannot be validly interpreted to abrogate state sovereign immunity); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress cannot subject states to suit in their own courts without their consent); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that Congress cannot abrogate state sovereign immunity under the Indian Commerce Clause).

¹⁸ U.S. CONST. art. I, § 8.

¹⁹ *Gonzales v. Raich*, 545 U.S. 1 (2005).

²⁰ *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905).

²¹ *Wickard v. Filburn*, 317 U.S. 111 (1942).

²² *See Raich*, 545 U.S. at 18–20 (2005).

²³ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

²⁴ *See Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding that a Texas statute prohibiting two persons of the same sex from engaging in certain sexual conduct violates the Due Process Clause).

of the Rehnquist Court, we've lost our way, this definition of federalism that I've given out.

So, let's see where we are with the Roberts Court. Chief Justice Roberts is starting his fourth term, Justice Alito also in his fourth term, although not quite as long on the first term as Justice Roberts was. There's a little adage that lingers in the halls: You really don't know why you've been there five years, and after that, you wonder why everybody else is there. But they are starting to make their mark. In the first term, the case that comes out—now, this is actually before Justice Alito takes the bench and Justice O'Connor is still voting—six to three, *Gonzales v. Oregon*, and, in fact, this upholds the right of states to regulate assisted suicide drugs, against the regulation of government that tried to prevent that.²⁵ I thought, "Wonderful. I don't like the underlying state issue, but I like the right of the states to make these experiments on their own. What a great federalism decision." I'm going to look at that six-three, and I just know I'm going to see Justice Roberts and Scalia and Thomas in the majority for this great federalism decision, and it's not. They're all in dissent.²⁶ What's going on here?

Well, of course, the case is decided on non-delegation grounds and deference grounds, and the lurking federalism issue and states' rights issue never really comes to the forefront, except in the important opinion by Justice Thomas in dissent.²⁷ Now, this not a rejection of the underlying federalism principles. This is perplexity that a court that, just the prior term, had written and issued the opinion in *Raich*, depriving the state of California of its ability to regulate medical marijuana, homegrown with no interstate commerce in this at all²⁸—and I'm not a big fan of medical marijuana, even though I'm from California. Sprouts is the better thing for us. So, but he writes, "I don't know how a court that just issued *Raich* can not recognize the

²⁵ See *Gonzales v. Oregon*, 546 U.S. 243, 274–75 (2006).

²⁶ See *id.* at 275.

²⁷ See *id.* at 299–303 (Thomas, J., dissenting).

²⁸ See *Gonzales v. Raich*, 545 U.S. 1, 19, 33 (2005).

same principles at stake in *Gonzales v. Oregon* either.”²⁹ Now he, of course, would have overruled the whole lot of it and gone back to *Lopez*, but he was trying to get some consistency there.

Now the Roberts Court, though, I think has then taken this and gotten a little more nuanced. We end up with a case, though, in *Rapanos*.³⁰ Instead of adopting the *Lopez* line, we end up with Justice Kennedy taking center seat in a swing decision creating a new balancing test.³¹ *Rapanos* is an interesting case, and I look forward to welcoming Solicitor General Clement back to the private sector and see if he adheres to the line he took in the brief there.

But here’s a case that involved a gentleman’s land that had some water on it.³² We called it wetlands. And some of the water flows under a hundred-year-old man-made drainpipe under a road into a creek across the road called Hoppler Creek.³³ And Hoppler Creek, it makes its way down the Kawkawlin River to Saginaw Bay some twenty miles away before we get to the navigable waters of Lake Huron.³⁴ This was allowed to be regulated by the Corps of Engineers under the theory that it was connected to navigable waters twenty-six miles away.³⁵ Now, the Court reverses that decision, but does so with Justice Kennedy writing an opinion concurring in the judgment, creating a great deal of ambiguity on what’s within the federal power or not; a multi-part balancing testing and standards and factors to consider on whether this is close enough to navigable water.³⁶ I mean, there wasn’t anything at issue about navigation. There’s no exercise of commerce here; no trade. It was really the exercise of a police power.

If we had been operating under the earlier Rehnquist Court, I think it’s fair to say that the *Lopez* majority would have said,

²⁹ See *Gonzales v. Oregon*, 546 U.S. at 299–301.

³⁰ *Rapanos v. United States*, 547 U.S. 715 (2006).

³¹ See *id.* at 759 (Kennedy, J., concurring).

³² See *id.* at 719 (majority opinion).

³³ See *United States v. Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003), *vacated*, 547 U.S. 715.

³⁴ See *id.*

³⁵ See *Rapanos*, 547 U.S. at 719.

³⁶ See *id.* at 759 (Kennedy, J., concurring).

“Where is the Commerce Clause connection here?” and given us a vastly different decision than we have here. So, the whole Commerce Clause revolution of the early Rehnquist Court seems to be gone.

Let me go to the Eleventh Amendment cases because I think one thing the Court has done is get this balance, this nuance on the Eleventh Amendment decisions a little bit more correct than the early Rehnquist Court had done. And so, we’ve got two cases decided in *Central Virginia College*, allowing that the exercise of bankruptcy power under Article I can abrogate state sovereign immunity,³⁷ and—if you accept my principle and articulation of federalism—the federalism is leaving the states the powers that were not delegated to the national government. A federal abrogation of state sovereign immunity seems to be the correct answer, and *Central Virginia College* goes that direction a little bit.³⁸

Let’s think about federalism in a little bit different way than we normally do, and these are criminal cases or death penalty cases. Now, these things are all decided under various provisions of the Bill of Rights as incorporated via the Fourteenth Amendment.³⁹ But we must confess that there’s no explicit language in the Fourteenth Amendment that actually governs a lot of these cases. The more amorphous the text, the more broad-reaching we read things into that text, the more we infringe on states’ authority to kind of balance their criminal law as they see fit. And we’ve had a series of these cases, where the Roberts Court has actually overruled federal appellate court decisions that really were intruding on state judgments about the appropriateness of criminal law.⁴⁰

Now, you might be tempted to write off all these as mostly overruling Judge Reinhardt out on the Ninth Circuit. But I think there’s a lot more going on with these cases than that, and I think if you look carefully at them, you find the Roberts Court, in an area that we have normally not considered as federalism cases, reviving

³⁷ See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 378 (2006).

³⁸ See *id.*

³⁹ See, e.g., *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 875 (2005).

⁴⁰ See, e.g., *United States v. Grubbs*, 547 U.S. 90, 99 (2006).

the notion that basic decisions about the criminal law fall under the exercise of the police powers. Sure, these decisions can be subjected to certain ultimate authority of the federal Constitution, but when we get into the details of regulating how significant the library for prisoners has to be or how much balance to give to aggravating versus mitigating factors or what kind of mix of a three-judge cocktail is appropriate, when the federal courts start making those determinations, you are intruding on some pretty basic federal decisions or state police power decisions.

So as I said, the Rehnquist Court has done a good job in reviving that aspect of states' ability to control their police powers. However, the last word on this, currently, comes last term in Justice Kennedy's opinion in *Kennedy v. Louisiana*, telling the state of Louisiana that they can't use the death penalty as the ultimate punishment for somebody that commits rape of an eight-year-old.⁴¹ There's no language in the text of the Constitution that actually decides that, but I think we should be looking at those kind cases as federalism cases as much as anything if we're ultimately going to get them right again.

Thank you.

(Applause.)

PROFESSOR ROSEN: I was delighted when Dean Reuter set for me an especially juicy topic for this afternoon, and that is the following: Is Justice Scalia's commitment to federal preemption in tension with his commitment to federalism and states' rights? I want to argue that the answer is yes and that the tension reflects a more basic tension within the conservative legal activism over the past couple of decades between originalist, pro-business conservatives and more libertarian conservatives, some of whom are sometimes described as part of a movement to resurrect the so-called "Constitution in exile."⁴²

⁴¹ See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2677 (2008).

⁴² See Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES, Apr. 17, 2005, § 6 (Magazine), at 42. For further discussion of the Constitution in Exile, see *infra* text accompanying note 98.

(Laughter.)

PROFESSOR ROSEN: I love coming to the Federalist Society and uttering those words, because I know many of you are skeptical of the existence of this libertarian movement. I'm going to argue that regardless of what you call it—the Constitution in exile movement or the cuddly Barney the Dinosaur movement—the movement undeniably exists, but it is in deep tension with the more pro-business, pro-national power, originalist conservatism that Justice Scalia has tended to favor. I once underestimated the significance of this tension among two strands of legal conservatism, but I'm now convinced that the tension has been growing in recent years. In the 1980s, conservatives were relatively united on a deregulatory project. There was a general suspicion of regulation, but there was a fundamental disagreement about whether it was best to pursue that through the courts with an allegiance to states' rights or to federal power more generally, and the tension that Walter identified between broad deregulatory commitments and federalism commitments.⁴³

And it seems to me that Justice Scalia has always tended to be more of a pro-business conservative than a libertarian, states' rights conservative, beginning with his days as the editor of *Regulation* magazine, which many called *Deregulation*, and tracing back to a particular date in 1984 when he debated Richard Epstein at the Cato Institute.⁴⁴ His commitments were clear. During the Cato debate, Scalia went first, and he challenged Libertarians to be consistent in repudiating economic judicial activism.⁴⁵ He said *Lochner*⁴⁶ had to remain dormant and conservatives should be careful as they gain control of the courts not to resurrect it.⁴⁷ Epstein took strong issue with this. He said that there were many legal doctrines that were

⁴³ See *supra* text accompanying notes 6–12.

⁴⁴ See Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, 4 CATO J. 711 (1985); Antonin Scalia, *Economic Affairs as Human Affairs*, 4 CATO J. 703 (1985).

⁴⁵ See Scalia, *supra* note 44, at 705–09.

⁴⁶ *Lochner v. New York*, 198 U.S. 45 (1905).

⁴⁷ See Scalia, *supra* note 44, at 705–09 (discussing substantive due process, though not mentioning *Lochner* by name).

ripe for resurrection, many regulations ripe for the “kill,” as he put it, and—by resurrecting property rights, limits on commerce power, and states’ rights, including judicious economic judicial activism—conservatives would be better off.⁴⁸

So, it wasn’t obvious, as John Eastman has said,⁴⁹ during the early Rehnquist years which of these two strains in the conservative deregulatory project would be ascendant. Would it be the states’ rights crowd or the federal deregulatory crowd? And many people were misled when, in wake of *Lopez*, the Rehnquist Court struck down, between 1995 and 2003, 33 federal laws after having struck down none in the previous years between 1937 and 1995.⁵⁰ But it soon became obvious that the states’ rights, libertarian conservatives lost and the nationalist, pro-business conservatives won. The states’ rights conservatives, whose intellectual hero is Richard Epstein, have only one relatively reliable champion on the current Supreme Court: Justice Thomas, who cited Epstein’s work in his confirmation hearings. And the death of the states’ rights phase of the deregulatory project was, of course, *Raich*.⁵¹ In *Raich*, the Court rejected the pre-New Deal vision of the Commerce Clause and unequivocally reaffirmed *Wickard*.⁵² It was obvious that that particular strain of states’ rights limits on Congressional power wasn’t going to go anywhere.

This also wasn’t surprising because aside principled intellectuals like Richard Epstein and his champions at the Cato Institute and Institute for Justice, there really was no national constituency for this states’-rights, libertarian vision. But at the very moment that the

⁴⁸ See Epstein, *supra* note 44, at 716.

⁴⁹ See *supra* text accompanying notes 13–18.

⁵⁰ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁵¹ *Gonzales v. Raich*, 545 U.S. 1 (2005).

⁵² *Wickard* upheld a federal act regulating agricultural products, finding that producing and consuming such products, because it had a substantial economic effect on interstate commerce, was a proper subject for federal regulation under the Commerce Clause. *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). *Raich* used the *Wickard* approach to find federal regulation of the production and use of marijuana permissible under the Commerce Clause. *Raich*, 545 U.S. at 17–19.

states' rights vision died, the federal preemption vision of the deregulatory project was resurrected with a vengeance. And there is indeed a long pedigree here. My friend Robin Conrad from the U.S. Chamber of Commerce is here. She and her colleagues did such good work for thirty years to try to focus the interests of the Court on business issues and to promote a bipartisan suspicion on the Court of "regulation by litigation." And Justice Scalia, both intellectually and jurisprudentially, he's been very sympathetic to that project.

Scalia has rarely met a preemption claim he doesn't like, unlike Justice Thomas, who has expressed skepticism about some of them.⁵³ And Scalia, broadly, I would say, has three principles that he is sometimes willing to sacrifice when they come into conflict with his deregulatory instincts. The first is that he is a moderate federalist. He believes in states' rights up to point, as *Lopez* and *Morrison* show.⁵⁴ But at the same time, he insists on national authority to trump that on issues that he cares about, and that, I think, explains his dissenting vote in *Gonzales v. Oregon*.⁵⁵

Second, he generally believes in *Chevron* deference,⁵⁶ but he's willing to abandon that in cases like *Brown & Williamson*, the tobacco case where he silently joined the majority opinion that there was no FDA jurisdiction over tobacco,⁵⁷ and surely more significantly the *Rapanos* case, where he was willing to defer neither to Congress nor to the executive, but instead to embrace what I would

⁵³ See, e.g., *Raich*, 545 U.S. at 57–74 (Thomas, J., dissenting) ("Our federalist system, properly understood, allows California and a growing number of states to decide for themselves how to safeguard the health and welfare of their citizens.").

⁵⁴ Scalia joined the majority in these cases—*Lopez* holding that the federal Gun-Free Schools Act of 1990 exceeded the power of congress to regulate commerce among the several states, *United States v. Lopez*, 514 U.S. 549 (1995), and *Morrison* striking down as unconstitutional the section of a federal statute providing civil remedies for gender-motivated violence, *Morrison*, 529 U.S. 598.

⁵⁵ *Gonzales v. Oregon*, 546 U.S. 243, 275–99 (2006) (Scalia, J., dissenting) (favoring an interpretation of a federal statute that put the regulation of assisted suicide under uniform, federal control).

⁵⁶ See, e.g., *id.* at 281. See generally *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

⁵⁷ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

call his fairly tortured statutory construction just to deny the ability of regulation over wetlands.⁵⁸

And Justice Scalia's third commitment is his general commitment to originalism and textualism. But there, too, he will relax or abandon that in cases like the sovereign immunity and Eleventh Amendment cases, when he's more interested in limiting access to the courts than in being a consistent originalist. Now, I'm not suggesting for a moment that Justice Scalia is nakedly unprincipled in any way. He's broadly committed to these three principles, but he also has strong deregulatory instincts. In general, though, Justice Scalia is more of a deregulatory guy than a states' rights guy.

What about the future? Walter raised a question for liberals.⁵⁹ Will they be as dedicated to states' rights when the people who are brandishing them are not just Ralph Nader but conservative libertarians questioning the new regulations of the Obama administration? My question is from the opposite point of view. Will Justice Scalia be as committed to deference to federal authority and agency action when the agencies that he's asked to defer to are re-regulating rather than deregulating? I hope very much that he will and he will prove to be as consistent a nationalist under President Obama as he was under President Bush.

(Applause.)

HON. MR. CLEMENT: Well, I'm inclined to think that Jeff fell just short of his claim to provide us with photographic evidence that Bigfoot exists.

(Laughter.)

HON. MR. CLEMENT: But we can quibble about that later.

What I'd like to do here in my ten minutes is try to do three things—just very briefly sketch my own sort of view of the trajectory of a middle/late Rehnquist Courts and the Roberts Courts, talk a little bit about the early evidence from the Roberts Court, and then maybe talk a couple minutes about the preemption cases.

⁵⁸ See *Rapanos v. United States*, 547 U.S. 715, 719–46 (2006); see also *supra* text accompanying notes 30–36.

⁵⁹ See *supra* text accompanying notes 7–8.

Let me start with the trajectory of the Roberts Court. You've heard this in varying forms from all of the different speakers, and I'm tempted to omit my discussion of it in deference, to avoid repetition, but I think the interesting thing is that my own sort of version of it is a little bit different than everyone else's, and everyone else's is a little bit different from everyone else's, and I think it just shows that maybe it's a little hard to characterize cases as federalism cases or not. My classification goes a little like this. You had what I would sort of refer to as the mid-Rehnquist Court, which was kind of the high-water mark for federalism cases. And I'd identify the obvious *Lopez* and *Morrison* cases.⁶⁰ I guess unlike Dean Eastman, I would probably also identify cases like *Boerne* and *Garrett*,⁶¹ the Eleventh Amendment cases, as also being cases where the Court was in a pro-federalism mode and upholding limits on the federal government's ability to impose damage remedies on the states. So that's I think, where we would maybe classify those cases a little different. Because of the way I classify those cases, it seems to me that that really was the high water mark for federalism.

I think, then, if you look at the late Rehnquist Court, you see a very different story emerging, most obviously from the *Raich* case in its difference in treatment from the *Lopez* and *Morrison* cases,⁶² but I guess also, again in my way of looking at it, cases like *Hibbs* and *Tennessee v. Lane*, where the Supreme Court starts allowing damages actions against state governments in certain circumstances.⁶³

⁶⁰ *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress does not have authority under the Commerce Clause to prohibit possession of handguns in school zones); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress does not have authority under the Commerce Clause to provide a federal civil remedy to victims of gender-motivated violence).

⁶¹ *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that congress lacks constitutional authority to enact and apply against the states the Religious Freedom Restoration Act of 1993); *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that Congress cannot, consistent with the Eleventh Amendment, authorize individuals to recover money damages from the states for Fourteenth Amendment violations absent a pattern of discrimination).

⁶² See *Gonzales v. Raich*, 545 U.S. 1, 23–26 (2005).

⁶³ *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding Title II as valid remedial legislation); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that the Fam-

To me, I read that as further evidence that the high water mark of the Rehnquist Court federalism days had passed.

With that observation, though, let me make one sort of important qualification. I think there was a tendency, including at Federalist Society events, to really over-read *Lopez* and *Morrison* when they first came out and think, "Boy, this is the dawning of a new day." And I think there's equally been a tendency to over-read *Raich* and say, "Boy, you know, it's all over. This whole thing is ended." And I guess I could feel more confident about the first point because *Raich* comes along, and I think there are very many people that thought that that was a betrayal of *Lopez* and *Morrison*. And in some ways, I'm tempted to ask, "Did you read *Lopez*?" And in particular, "Did you read the concurrences in *Lopez*?" Because there were pretty clear signals, at least from Justice Kennedy and Justice O'Connor that *Lopez* was a fairly limited decision,⁶⁴ and just how limited a decision became clear when Justice Kennedy, among others, shows up in the majority in the *Raich* decision.⁶⁵

I think in some ways, in understanding the trajectory of *Lopez*, *Morrison*, to *Raich*, one thing to keep an eye on is the composition of the majority in that case. I mean, a five-justice majority that includes Justice O'Connor and Justice Kennedy is not always one that is going to be taken to every bit of its logical conclusion. And I actually think it's kind of interesting because I think roughly at the same time that *Lopez* comes out another important case comes out in the Supreme Court in a very different jurisprudential area: the *Apprendi* case.⁶⁶ And when *Lopez* comes out, a lot of people ask, "Boy, does this mean there's going to be a substantial rolling back of kind of

ily and Medical Leave Act allows state employees to recover money damages in federal court in the event of the state's failure to comply).

⁶⁴ See, e.g., *Lopez*, 514 U.S. at 572-75 (Kennedy, J., concurring, joined by O'Connor, J.) (tracing the history of Commerce Clause jurisprudence and emphasizing that the majority's holding does not call into question the line of cases recognizing the limited role courts now play with respect to Congress's Commerce Clause power).

⁶⁵ See *Raich*, 545 U.S. at 5-33 (holding that the Controlled Substances Act is a valid exercise of Congressional power).

⁶⁶ *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that penalty-enhancing findings must be submitted to jury and proved beyond reasonable doubt).

the role of the federal government?" Some people said yes; some people said no.

When *Apprendi* comes out, a couple of people read it and said, "Gee wiz, I wonder if this means that the federal sentencing guidelines are unconstitutional." And when you look at this, you can disagree, but I think the vast majority of people said, "Nah, couldn't be." Every court of appeals in the wake of *Apprendi* and pre-*Blakely*⁶⁷ upheld the federal sentencing guidelines.⁶⁸ So, there's some evidence for you.

But lo and behold, we get *Blakely* and then we get *Booker*.⁶⁹ I think if you look at the majority in *Apprendi*, though, you may get some of your answer there because the Justices, the unusual Justices that made up a five-justice majority—Scalia, Thomas, Stevens, Souter and Ginsburg⁷⁰—are Justices that I think, all things being equal, are likely to take a proposition all the way to the end even if there are substantial practical ramifications for that holding, so I think that is a difference in those two cases.

I think my headline on the trajectory of the Roberts Court is it's just too darn early to tell. We have a couple Section 5⁷¹ cases that sort of point in different directions. The *Katz*⁷² case looks like it's a

⁶⁷ *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that facts supporting augmented sentences must be determined by a jury).

⁶⁸ See *United States v. Stone*, 306 F.3d 241, 243 (5th Cir. 2002); *United States v. Sterling*, 283 F.3d 216, 219–20 (4th Cir. 2002); *United States v. Abernathy*, 277 F.3d 1048, 1049–50 (8th Cir. 2002); *United States v. Santiago*, 268 F.3d 151, 154–57 (2d Cir. 2001); *United States v. Summers*, 268 F.3d 683, 688–89, 689 n.3 (9th Cir. 2001), *cert. denied*, 534 U.S. 1166 (2002); *United States v. Skidmore*, 254 F.3d 635, 642 (7th Cir. 2001); *United States v. Thomas*, 242 F.3d 1028, 1034–35 (11th Cir.), *cert. denied*, 533 U.S. 960 (2001); *United States v. Dorris*, 236 F.3d 582, 586–88 (10th Cir. 2000), *cert. denied*, 532 U.S. 986 (2001).

⁶⁹ *United States v. Booker*, 543 U.S. 220 (2005) (holding that the Sixth Amendment requirements as articulated in *Blakely* and *Apprendi* apply to the federal sentencing guidelines).

⁷⁰ *Apprendi*, 530 U.S. at 468.

⁷¹ U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

⁷² *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006) (holding that Congress can treat states in the same way as other creditors or exempt them from the laws of bank-

backing away, even more substantial than in *Lane*⁷³ or *Hibbs*,⁷⁴ from the case law of *Boerne*⁷⁵ and *Garrett*.⁷⁶ But then you have the *United States v. Georgia*⁷⁷ case, another Section 5 case, which sort of muddies the water even further. You have cases like *Rapanos*⁷⁸ and *Medellín*.⁷⁹ But, as Dean Eastman put out,⁸⁰ it's kind of hard to know what *Rapanos* even means, as evidenced by the fact that the Court has the same basic question back in front of them because the circuit courts have split over how to interpret the *Rapanos* decision.⁸¹ And the *Medellín* case, which could have been, I think, a big federalism case, I think ends up being more of a separation of powers case than a federalism case the way that Chief Justice Roberts wrote the case. So, I think it is really too early to tell.

ruptcy, and that in rem jurisdiction of bankruptcy courts does not impinge state sovereignty like other kinds of jurisdiction).

⁷³ *Tennessee v. Lane*, 541 U.S. 509 (2004).

⁷⁴ *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

⁷⁵ *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act of 1993 exceeds Congress's powers to enforce the Fourteenth Amendment under section 5 of the Fourteenth Amendment because it is "out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior").

⁷⁶ *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that Congress can only abrogate state sovereignty using its section 5 authority when it establishes a pattern of discrimination by the states which violates the Fourteenth Amendment and when the remedy imposed by Congress is congruent and proportional to the targeted violation).

⁷⁷ *United States v. Georgia*, 546 U.S. 151 (2006) (holding that Title II of the Americans with Disabilities Act validly abrogates state sovereign immunity insofar as it creates a private cause of action for damages against the states for conduct that violates the Fourteenth Amendment).

⁷⁸ *Rapanos v. United States*, 547 U.S. 715 (2006).

⁷⁹ *Medellín v. Texas*, 128 S. Ct. 1346 (2008) (holding that there is no binding federal law that preempts state limitations on the filing of successive habeas petitions).

⁸⁰ See *supra* text accompanying notes 30–35.

⁸¹ Compare *United States v. Robison*, 505 F.3d 1208, 1221–22 (11th Cir. 2007) (applying the "significant nexus" test of Justice Kennedy's concurrence in *Rapanos* to define "navigable waters"), and *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999–1000 (9th Cir. 2007) (applying the "significant nexus" test), and *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724–25 (7th Cir. 2006) (applying the "significant nexus" test), with *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (holding that either the "relatively permanent waters" test of Justice Scalia's plurality opinion

One way to try to answer the question of what the Roberts Court is going to look like on federalism issues is to look at it this way, which is the Roberts Court as we now have it has two members who weren't on the Rehnquist Court. If you look at the Justices that were replaced from the Rehnquist Court to the Roberts Court, it is hard to be too optimistic that the Roberts Court is going to be substantially more pro-federalist because, to Chief Justice Rehnquist and Justice O'Connor—certainly the earlier Justice O'Connor more, I think, particularly—were two pretty strong votes for states and pretty strong views about federalism. Now so far, the returns, I think, are too early to tell on Chief Justice Roberts and Justice Alito as to where they will be.

But I think at least in part of the strong kind of federal background before they took the bench, it's a little hard to be sort of bullish about the extent to which there are going to be more states' rights, more pro-federalism than the Justices that they ended up replacing. Certainly, time will tell. I think if you look at the Chief Justice though, Chief Justice Roberts, in his early votes in federalism cases, I think that it is, again, maybe hard to predict if he's going to end up substantially more pro-federalist than Chief Justice Rehnquist. There are certainly some cases where I think it would be hard to think that there would be any difference in the votes cast. If you look at the *Katz* decision on the Eleventh Amendment⁸² or the *Rapanos* decision about the geographical scope of the Clean Water Act, the jurisdictional reach of the Clean Water Act,⁸³ my guess is that Chief Justice Rehnquist would have voted the exact same way in those two cases.

But there are cases where I think it's less clear. We've talked a lot about *Gonzales v. Oregon*.⁸⁴ The fact that the Chief Justice was in dissent in that case⁸⁵—in a case that I think, properly understood,

in *Rapanos* or the "significant nexus" test can be applied to define "navigable waters").

⁸² Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356 (2006).

⁸³ *Rapanos*, 547 U.S. 715.

⁸⁴ See *supra* text accompanying notes 25–29, 55.

⁸⁵ See *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006).

probably is a federalism case, not just administrative regulation case—I think is of some interest, again in part because the returns are early and all we can do is look at the few precincts we have reporting at this point.

Another case, which no one else will probably mention the whole weekend, is the *Danforth v. Minnesota* case, kind of an obscure criminal procedure case.⁸⁶ But here, the question is basically whether state courts can have their own rules about retroactivity on collateral review.⁸⁷ It's basically whether *Teague*⁸⁸ applies in state courts, apply it to claims that are brought under state *habeas*, even though the underlying claim is a federal constitutional claim.⁸⁹ If I haven't lost you, the punch line here is that there were only two votes that thought that state courts had to follow federal rules when they were having their own state collateral review provisions, and one of those two votes was Chief Justice Roberts.⁹⁰ So, I think that is, again, perhaps a very early return, perhaps a tea leaf too obscure for most. But I think that it is some evidence.

And the last thing I would point to is the *Medellín*⁹¹ decision itself because there was a decision that could have very easily been a decision that was principally and foremost about federalism. I think if you read that decision, you will conclude that it is foremost about international law and self-executing treaties and second most about separation of powers and what the president can do. But the discussion of federalism is very much submerged in that case, and I don't think it needed to be so.

The last thing I will say, is to just talk about preemption for one second, and I guess maybe we can talk about more of this in the panel discussion. But I would like to just offer the contrary perspective that I don't think there's anything inherently contradictory

⁸⁶ *Danforth v. Minnesota*, 128 S. Ct. 1029 (2008).

⁸⁷ *Id.* at 1032–33.

⁸⁸ *Teague v. Lane*, 489 U.S. 288 (1989) (setting forth the circumstances under which new constitutional rules will be given retroactive effect on collateral review).

⁸⁹ See *Danforth*, 128 S. Ct. at 1032–33.

⁹⁰ *Id.* at 1047–48.

⁹¹ *Medellín v. Texas*, 128 S. Ct. 1346 (2008).

about a justice taking a view that is, in some of these areas like the Eleventh Amendment or Commerce Clause or the like, to take the view that the federal government's powers are limited but then also to take the view that is more likely at the margins to find federal law preempting.

And I guess I would summarize why there isn't an inherent contradiction this way. If you have a view that federal government power ought to be limited, then a starting place for understanding where the federal government ought to regulate are those areas where the federal government has to regulate uniformly because if the states regulate on their own, you'll have races to the bottom, races to the top, or other collective action problems. And if you had a view that the federal government really ought to get involved almost only where it plays a necessary role in providing uniform rules, then I think you're likely to conclude that those uniform federal rules ought to preempt state law.

So, with those thoughts, I'll sit down.

(Applause.)

JUDGE SENTELLE: Walter, you had to go first, so you get to comment first, or question, whatever you'd like to do to your fellow panelists.

HON. MR. DELLINGER: Alright. Small note to Jeff Rosen. I love defending Justice Scalia from attack at the Federalist Society. I think his votes in the punitive damages cases from the states, where he has taken the position that the Fourteenth Amendment's broad generalities do not license courts to set aside state policy choices,⁹² is perfectly consistent with his position in *Exxon* to reduce the amount, by ninety percent, of the punitive damages in the case,⁹³ where it was a matter of, as we emphasized from day one, federal maritime law where necessarily judges have to make their own

⁹² See, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 598–600 (1996) (Scalia, J., dissenting); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 24–25 (1991) (Scalia, J., concurring).

⁹³ Cf. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2634 (2008) (Scalia, J., concurring in the Court's opinion limiting punitive damages).

determinations and that that distinguished it. Indeed, the fact that he believes that punitive damages should be limited that way shows the consistency of his restraint in not invalidating state judgments on punitive damages. Liberated by being a common law maritime judge, as he was, uniquely, in the *Valdez*⁹⁴ case, he comes from a different position.

PROFESSOR ROSEN: It's a wonderful defense, and we now all owe Walter \$20,000.

(Laughter.)

HON. MR. DELLINGER: I think more generally, when we think about federalism from the time of the founding to now, there are reasons that people act instrumentally when it comes to federalism. We have lost, between 1790 and now, the purpose of states' rights in federalism to a significant degree. That is, in 1790, the anti-Federalists who opposed the Constitution on behalf of states' rights did so on behalf of a different conception of government, a different relationship of the people to the governed. In the states, you had under the state constitutions of 1776 the most populist governments we've ever seen. Those people believed that direct democracy was most desirable. So, you had annual elections; you had instructed delegates; you had recall; you had weak governors, often appointed by the legislature; you had courts that were elected, and quite consciously so, to be kept on the short leash of the people. You had large legislative assemblies so that each legislator was elected from a small constituency, an ordinary person.

Contrast that with the Madison-Hamilton vision of a national government that is Burkian in its approach, where you have two years between the election of members of the House; you have six-year senators, an indirectly elected president, judges with life tenure, all designed to provide some distance from the government and the vastly large legislative districts with relatively few legislators so, as Madison said, only the worthy and the great will be

⁹⁴ The "Valdez" was the supertanker in the *Exxon* case. See *id.* at 2611.

elected.⁹⁵ And as the anti-Federalists charged, only the worthy and the great will be elected.

Jury trial was about people serving a need, so government at the state level was of a different kind than government at the national level. And yet now, they are indistinguishable in the quality that you are as close to your Congressman as you are to your state representative. You have, in some ways, more ability to connect directly to the Obama or McCain campaign than you can to find out who your county commissioner is. The size of our states is such that they no longer have a different kind of necessary relationship, which is not to say that federalism doesn't serve purposes. But the purposes that made it so vital at the time of the founding are no longer there.

And then we have the Fourteenth Amendment,⁹⁶ which is an enormous incursion on state authority and granting to the courts and Congress great authority.

JUDGE SENTELLE: I move arbitrarily and capriciously to Dean Eastman.

(Laughter.)

DEAN EASTMAN: I want to take on the federal preemption cases. I was at a judges' conference one week ago, where my debate opponents accused the conservatives on the Court of being hypocrites for their preemption decisions, and that seems to be grossly simplistic. I mean, you have to look at what it is that's being preempted and what the source of the federal regulation or statute's power is on whether it's appropriate for preemption. And so, there's something like labeling of a drug that's moving in interstate commerce, that seems to be pretty clearly within the commerce power. And I'm about as stingy on the scope of commerce power as anybody. And so, if it's explicit, that should be easy.

The problems arise when it's not an explicit preemption and you've got all these implied preemption doctrines, and a conflict

⁹⁵ Cf. THE FEDERALIST NO. 57 (James Madison) (discussing characteristics of people who will be elected as federal representatives).

⁹⁶ U.S. CONST. amend. XIV.

preemption's easy, but the other ones—how big is the field that was intended if it's implicit? Now you're talking about preempting state policy decisions not because they are within federal power but within the potential exercise of federal power that hasn't actually been exercised yet, and now that's the transfer of power from Congress, who ought to be making those decisions, to the courts who ought not.

And the biggest context of that implied preemption exists in the whole dormant Commerce Clause arena if you think about it.⁹⁷ There are some good friends of mine in this room who are keen on the dormant Commerce Clause cases to get wine traveling across interstate lines, and that's a good thing. But we have to recognize what a turning upside-down in the federal system it is if we are now letting courts make basic police power-exercise decisions for the states without an explicit act of the elected officials in Congress to do so. This is an unbelievably broad implied preemption without even the statutory or regulatory vote that existed. So, I think we've got to be much more nuanced before we can call the conservatives "hypocrites" in their preemption cases. If this is an exercise of power clearly within the Commerce Clause, you've got to then cut in favor of preemption.

Now, the second category of things, and not the implied preemption, is when the exercise of the power is itself pretty tenuous. I would love to see, for example, the labeling of a drug that's moved in interstate commerce can easily be preempted. But the requirement of a sign that gets put in the doctor's office seems to be a much more tenuous connection to the exercise of commerce among the states' power, and I'd love to see a *Lopez* analysis on the front end of those cases involving the back-end preemption claims. I don't see that coming out of the Roberts Court, so when I say that the early Rehnquist Court's idea of federalism and the limits on federal power is not coming to the forefront here—it's in those kinds of cases that I'm talking about.

⁹⁷ See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

JUDGE SENTELLE: Thank you, Dean.

Moving right along with the order in which we have gone before, we're going to take Jeff up next. I'm going to cheat just a little bit and interfere a little bit myself at this point. I think moderators ought to be exacerbaters at times.

Jeff's references to the Constitution in exile⁹⁸ have given me an opportunity to say something in public that I've been thinking in private for quite some period of time. I'm not sure what the Constitution in exile movement is. I do know that the first time I ever heard of it was when a legal writer—it may have been Jeff; I'm not sure—described me as a leader of it.

(Laughter.)

JUDGE SENTELLE: It's a bit confusing to try to lead a movement that you never heard of before. It reminded me of the time that the first lady said there was a vast right-wing conspiracy, which she then identified as consisting of two senators and a judge from North Carolina who had lunch together. And I would say that I've gotten about as much benefit out of being the leader of a movement that I never heard of as I get out of being a member of a conspiracy that met in the Senate dining room.

(Laughter.)

JUDGE SENTELLE: That said, Jeff, what was it you convinced us all of? I lost track somewhere along the way.

PROFESSOR ROSEN: Well, what I've convinced you of, since no one has disputed it, is the same distinction Walter began with—

JUDGE SENTELLE: He didn't know what it was.

PROFESSOR ROSEN: Well, let me repeat it. There are two conservative legal movements that you guys in the Federalist Society have been at the forefront of. One has marched under the banner of states' rights and the other has marched under the banner of de-regulation. And I don't care what you call the libertarian wing—whether you say it's the Constitution in exile movement, the states' rights movement, or the Judge Sentelle movement—the truth is that

⁹⁸ See *supra* text accompanying note 42.

these movements exist. There have been books written about different aspects of them, many by conservative scholars.⁹⁹ There are litigation groups set up to forward these competing views—such as Cato for the Libertarians and the Chamber of Commerce for the pro-business conservatives. And they have representatives on the appellate courts and on the Supreme Court today. So I hope I’ve convinced you, because whether you acknowledge them or not, these two strains in legal conservatism exist. Again, the label seems more important to you than to me.

The question that we’re talking about today—and I won’t pretend to convince you of this because it’s a hard question—is one that John Eastman just raised.¹⁰⁰ Is it hypocritical to embrace strains of both these movements? Can you at times be a states’ rights conservative and at other times be a deregulation conservative? And I think—maybe “hypocrite” is too strong, but I have to say Justice Scalia told us that his entire jurisprudence was staked on the idea that he would reach results that he disagreed with when the methodology compelled it. And of course, his famous example in the culture war case is the flag burning. Justice Scalia is a conservative guy, he says, but he allows people to burn flags.¹⁰¹

I’m troubled, I have to tell you frankly, that in the cases we’ve been discussing, these federalism and regulation cases, it’s hard to come up with lots of examples—I hope you will—of cases where Justice Scalia reaches results that are inconsistent with his general deregulatory instincts. He seems to pick and choose among the states’ rights and deregulation methodologies, as the *Oregon* case shows,¹⁰² as *Rapanos* shows,¹⁰³ based on the result. In this regard, I would distinguish Justice Scalia from Justice Thomas, who is a principled states’ rights conservative. I mean, he has the courage of his

⁹⁹ See, e.g., STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

¹⁰⁰ See *supra* text accompanying note 97.

¹⁰¹ See *United States v. Eichman*, 496 U.S. 310 (1990).

¹⁰² *Gonzales v. Oregon*, 546 U.S. 243, 275–99 (2006) (Scalia, J., dissenting).

¹⁰³ *Rapanos v. United States*, 547 U.S. 715, 719–57 (2006).

convictions. He's willing to take his *Lopez* concurrence¹⁰⁴ wherever it goes. And his dissents in some of the preemption cases signal to me his consistency.

I would end this thought by saying the proof is in the pudding, and we'll find out under President Obama the following: Imagine the kinds of challenges that are likely to come to the re-regulatory efforts of the Obama administration. If there's a ninety-day moratorium on mortgage foreclosures, as the president-elect has suggested,¹⁰⁵ someone, whether you want to call him a Constitution in exile guy or a states' rights guy, might challenge that as a taking. Some district court judge—again, I don't care what the label is—might go for it. What would Justice Scalia do in a case like that? Now, I think I'm confident that he would reject the claim, although Justice Thomas might be more sympathetic to it. Or imagine the kind of cases that are to come from the financial crisis, with people suing the bond rating agencies for having inflated the value of those bonds. Are new doctrines going to be created to keep people out of court, expanding *Stoneridge*¹⁰⁶ and so forth?

I'm just saying that we'll soon know whether the results in these cases turn on the sympathy for the economic result, deregulation versus re-regulation, or with a really principled and consistent dedication to a methodology. But on the Constitution in exile point, I'm happy to abandon the label if you at the Federalist Society will stop denying one of your greatest achievements, which is the creation of these two very different movements that, despite tensions and inconsistencies, have really transformed the law over the past thirty years.

JUDGE SENTELLE: Paul.

HON. MR. CLEMENT: Let me try to add three quick thoughts. One—I think this echoes something that Dean Eastman said¹⁰⁷—is

¹⁰⁴ *United States v. Lopez*, 514 U.S. 549, 584–603 (1995) (Thomas, J., concurring).

¹⁰⁵ See, e.g., Jackie Calmes & Jeff Zeleny, *Obama Details Plan to Aid Victims of Fiscal Crisis*, N.Y. TIMES, Oct. 14, 2008, at A1.

¹⁰⁶ *Stoneridge Inv. Partners, L.L.C. v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008).

¹⁰⁷ See *supra* text accompanying note 71. Clement is actually referring to his own, not Eastman's, earlier comment.

that it's a little hard to make predictions about the Roberts Court in part because, as I said,¹⁰⁸ the early returns are limited. Probably the area where you have the greatest number of cases is in the preemption area. But the preemption cases are actually kind of difficult to draw too much from because, at bottom, most of them end up being statutory construction cases. It's pretty much common ground among everyone on the Court that, where Congress has the power—and the current Court has a more robust view of the Congress's power than, say, Dean Eastman—where Congress has the power if they're explicit enough about what they want to do in preempting state law—it's pretty much agreed that Congress gets to do it. And that's why a very important case like *Reigel* last term in the medical device context can be decided eight to one.¹⁰⁹

There's broad agreement on the Supreme Court that if Congress is clear about it, it can have preemptive effect. And so, when these cases are decided not eight-one but five-four, I'm not sure that it signals some seismic shift in where the Justices are on federalism, but it shows a difference in how clear they think the statute either is or needs to be. So, I think it's easy to over-read those.

Second, let me make one more try at making the point that these two legal movements that Jeff talks about¹¹⁰ are really not inherently in tension. They may be in certain cases, sure. But in some ways, the question in a lot of these preemption cases is as follows: What sense does it make to have fifty-one entities regulating something? And it is, I think, a fairly consistent way of looking at it that, you know, maybe the answer should be one or fifty but not fifty-one, and where do you draw the line between one and fifty? I mean people can disagree about that, and surely there are some areas where there are going to be concurrent regulation and should be concurrent regulation, and the Constitution's explicit in allowing it.¹¹¹ But I think one way of thinking about it is the preemption cases

¹⁰⁸ See *supra* text accompanying notes 71–79.

¹⁰⁹ *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008).

¹¹⁰ See *supra* text accompanying notes 49–52.

¹¹¹ See U.S. CONST. art. IV, § 2.

really are asking not whether there should be regulation or deregulation generally, but who should be the regulator and should there be all sorts of them or should there be every state to regulate its own or should it be the federal government alone that does the regulation?

The last point I will offer is just an observation about another case in this area that may be coming down the pipe. We've seen some cases that fit this categorization. I think if the presidential election had come out differently, we'd be certain to see cases like this. Maybe now with the Congress and the presidency in democratic hands, we won't. But these are the cases where a state is regulating something and trying to regulate activity outside that state on the express understanding that the federal government's not doing enough. And the *Greenhouse Gases*¹¹² cases are a particularly good example of that.

*Garamendi*¹¹³ from a couple of terms ago I think actually fits this characterization. What was going on there, and I think the reason the Court decided it the way it did although it was close, is that California really wasn't trying to regulate California insurance companies. The state of California was basically trying to regulate German insurance companies, and that's something that I think at least a bare majority of the Court thought was not something that a state government ought to be doing.

JUDGE SENTELLE: Okay. The next item on the agenda would be to take questions from the audience. Right here, we have a line. You can go first, sir.

AUDIENCE PARTICIPANT: Well, the Constitution in exile is at least represented on Constitution.org¹¹⁴ and in Judge Napolitano's book,¹¹⁵ so it has gotten more than just a casual mention in the discussion

¹¹² See, e.g., *Massachusetts v. Env'tl. Prot. Agency*, 549 U.S. 497 (2007).

¹¹³ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

¹¹⁴ The Constitution in Exile, <http://www.constitution.org/cons/exile/exile.htm> (last visited Mar. 10, 2009).

¹¹⁵ ANDREW P. NAPOLITANO, *THE CONSTITUTION IN EXILE: HOW THE FEDERAL GOVERNMENT HAS SEIZED POWER BY REWRITING THE SUPREME LAW OF THE LAND* (2006).

here. But to characterize one of the two branches as deregulatory doesn't really do justice to it because it's not just the deregulation at the federal level. What some of us read into the Ninth Amendment¹¹⁶ and as something that should be incorporated toward the states is a general right to a presumption of non-authority, the expression of which would be a resurrection of the ancient prerogative writ of *quo warranto*, whereby any person could go to court and demand that any official prove his authority by an unbroken logical chain of derivation from the Constitution, and if he is unable to do so, either be enjoined from further action or removed from his position.¹¹⁷ And this would apply to federal, state, local or private officials.

Well, I'd like to get the panel's reaction to the idea of resurrecting the Ninth Amendment as an approach to addressing these issues.

JUDGE SENTELLE: Any particular one of you want to go ahead and jump first on the Ninth Amendment?

HON. MR. CLEMENT: I'll take that up. To read that into the Ninth Amendment, I think is to do a great disservice to what the founders accomplished. Those questions about the scope of state power were reserved to the states, and you could have state constitutions that were of limited authority. You could also have state constitutions that were general in authority in their delegation of power to the state government, and we specifically choose a system at the national level that leaves that open for people in their individual states to decide.

And, you know, if you're going to buy the notion of federalism, that you devolve power to the lowest level, you also devolve the decisions about how much power to give to the local governments as well.

JUDGE SENTELLE: Does anybody else want to bite on that? Jeff?

PROFESSOR ROSEN: I think it was such a great question because it reminds us that the scope and ambition of the movement, the X-movement, whatever you want to call it, in its most serious form,

¹¹⁶ U.S. CONST. amend. IX.

¹¹⁷ BLACK'S LAW DICTIONARY 1285 (8th ed. 2004).

that was a good libertarian defense—and Roger Pilon will provide an even better one in a moment—

(Laughter.)

PROFESSOR ROSEN: —of the idea that not only the Ninth Amendment and the Commerce Clause, but there are all these constitutional doctrines and statutory approaches that will resurrect lost liberties and deny regulation, as the gentleman said, at the state, federal, and local levels. Paul is doing an excellent job of giving a plausible theoretical justification for how you could, in theory, be a moderate states' rights guy and a moderate preemption guy and it would make some regulatory or economic sense.

But Justice Scalia is not in that position. He staked his claim not only on originalism but also on judicial restraint in economic matters, and that's what he balked at Cato of all places with Richard Epstein because Richard Epstein was confronting him with the implication of the theories, and he suddenly saw that it was *Lochner*.¹¹⁸ And the gentleman who asked the question and Roger both like *Lochner*, but Scalia is completely opposed to that, and that's why he can't just pick and choose and always end up conveniently at the deregulatory result.

JUDGE SENTELLE: Unless I see somebody dying to answer, I'll call on the next person in line.

AUDIENCE PARTICIPANT: How will the Roberts Court apply federalism principles to the proposed federal Freedom of Choice Act,¹¹⁹ which would not replace states with a regulatory scheme but would sweep away hundreds of state regulations on which the Court has repeatedly said the states have legitimate or compelling interest to protect?

PROFESSOR ROSEN: That will be a really good test. It's hard to be a *Raich*, pro national power conservative and strike down the Freedom of Choice Act. Justice Thomas could and be consistent with his previous opinions, but if any of the others, Roberts, Alito, Scalia, did that, I'd have to say, "My goodness, after all those

¹¹⁸ *Lochner v. New York*, 198 U.S. 45 (1905).

¹¹⁹ Freedom of Choice Act, H.R. 1964, 110th Cong. (1st Sess. 2007).

lectures about *Roe v. Wade*¹²⁰ and separating personal preferences from jurisprudential conclusions, you guys have really disappointed here.” Walter, what do you think of that?

HON. MR. DELLINGER: I thought sixteen, eighteen years ago that the Freedom of Choice Act would clearly be within Congress’s power under Section 5 of the Fourteenth Amendment,¹²¹ which I read at the time that the one institution of government mentioned is Congress. It was a radical amendment. It intended to empower Congress to give Congress more legislative authority and that Congress could enact that.

*City of Boerne v. Flores*¹²² and the succeeding opinions I think change that calculation considerably, so I no longer have anywhere near the confidence I had at the time that the act would be sustained because there’s a very different view of Congress’s power under the Fourteenth Amendment, a sort of I would call “jurocentric” view of the Fourteenth Amendment, where the Court sees itself as the principal actor under an amendment intended to empower Congress. But that’s the universe we live in.

JUDGE SENTELLE: Is anybody else dying to comment? If not, then Roger.

AUDIENCE PARTICIPANT: Okay. I want to pick up on Paul’s second point just a minute ago¹²³ to suggest to Jeff that his report on the Constitution in exile movement is premature. The phrase comes, Judge Sentelle, from your colleague Doug Ginsburg in a review in *Regulation* magazine in 1995,¹²⁴ which was then published by the Cato Institute—

JUDGE SENTELLE: I probably didn’t read it in ’95, and if I did, I’ve forgotten it by now, but in any event—

(Laughter.)

¹²⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

¹²¹ U.S. CONST. amend XIV, § 5.

¹²² *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹²³ Cf. *supra* text accompanying notes 110–111.

¹²⁴ Douglas H. Ginsberg, *Delegation Running Riot*, REG., Winter 1995, at 83, 84 (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993)).

AUDIENCE PARTICIPANT: Declining memories is not uncommon in this room.

(Laughter.)

AUDIENCE PARTICIPANT: In any event, I can understand how you might have thought of that, Jeff, from looking so much at the Scalia jurisprudence because Scalia was, of course, a sometime-member of the Constitution in exile movement. You pointed to the Scalia-Epstein debate. I know a little bit about that because I put that conference together, and Epstein is the true member, not Scalia.

But the larger issue, it seems to me, is that we really haven't come to grips with what we're talking about with federalism here, and I think that the reason we're not is because people like Scalia don't, in my judgment, have a correct understanding of it. It means federal power where it's authorized, state power when it's authorized, and, finally, no state power where the federal government is necessary under the Fourteenth Amendment to negate state power. And there's where Scalia has the difficulty because he is so antipathetic to substantive due process, which really should be done under the Privileges and Immunities Clause,¹²⁵ that he can't come to grips with that third element of federalism. So, perhaps you'd care to respond.

PROFESSOR ROSEN: Just to say, thank you so much, Roger. Finally, in front of the entire Federalist Society, a leader of the movement has embraced the title and said that it's not going far enough. Can we end these hisses and claims that it doesn't exist?

(Laughter.)

PROFESSOR ROSEN: No, it's too much fun to—we can do it year after year.

JUDGE SENTELLE: I'd like someone to point to me which way it's going so I can run in front of it.

(Laughter.)

PROFESSOR ROSEN: You're always in front of us, Judge. There's no question about that.

¹²⁵ U.S. CONST. art. IV, § 2.

Roger and Clint and all the good people at Cato in this movement have been disappointed from the beginning that Justice Scalia and others on the Court have fallen short of the true faith, as all Justices do. It's their job to be heroically principled and uncompromising and the judge's job to disappoint them. Of course, you just proved the point, Roger.

As to where it's going on, I guess my only thought was that the federalism side of it is that aside from you wonderful guys at Cato keeping the faith, for constitutional and theoretical reasons, about the importance of federalism for its own sake, the debate partly because of the appointments of Roberts and Alito, has shifted more to the deregulatory preemption side of things, and I think that that will get you some of the results you want but will disappoint you even more of the time. That's just where things seem to be going.

JUDGE SENTELLE: I see Walter straining to reply here.

HON. MR. DELLINGER: Well, I don't know if there's a movement of which Judge Sentelle is a leader. I do hear you referred to as El Hesse, which I think may be the exile leadership that you're denying here.

(Laughter.)

HON. MR. DELLINGER: My question, back to Roger, to the larger panel, is why is it that states' rights ever became thought of as a conservative notion? For the first 150 years of the country, the reverse was true. It's profoundly ahistorical in the following sense. There was in the 1780s and '90s a party—loosely using that phrase—that was for commerce, it was for industry, it was for strong money, it was against redistribution, it was for property rights. And that party saw the national government or a strong nationalist approach as absolutely essential to what it was doing.

There was a party that favored debtors. There were more redistributionists. It was more populist. It wanted to elect judges who didn't believe in secured rights but more populous democracy at their whim, and that was the Party of States' Rights, and it feared that the national government would appoint judges with life tenure who would invalidate ameliorative social programs adopted by the states in defense of property. And so it was for 150 years. If the

Framers had come alive in 1929 or 1935, they would have thought, “This is great—federal judges appointed for life are striking down incursions on property rights and striking redistributive projects,” so that states’ rights was never seen as the conservative doctrine nearly as much until the Civil Rights era, but it was used then—

JUDGE SENTELLE: There’s another guy lined up behind you, and it’s his turn. I noticed when you stood at that mic, I thought you were going to try that.

AUDIENCE PARTICIPANT: Well, he asked me a question.

(Laughter.)

JUDGE SENTELLE: He has his chance now.

AUDIENCE PARTICIPANT: Roger, I hope I do you justice because I was afraid you were going to steal my fire when I responded. And I find myself, oddly, having to attack some analysis that Dean Eastman made, as well as Jeff Rosen, regarding the nature of federalism. And I think the federalists, at least in the founders, and potentially even under Fourteenth Amendment analysis as well, which I believe it was 51—Madison said it was a double security.¹²⁶ It wasn’t a one-way street. Federalism is not at all analogous with states’ rights. It is not saying that the devolutionary power is the correct power. I think in general, we might agree that power that is closer to people is more accessible, it’s more democratic. But as a practical matter, they were to be set against each other just as the separation of powers envisioned.

And then you might say, “But wait a second; state courts can’t go around invalidating the Supreme Court. It’s not a two-way street in the judiciary.” But look at *Kelo*.¹²⁷ I mean, look at how the state courts have got it right, in my humble opinion, when you know, even, both before and I think, even in light of the downhill run from *Kelo*, so I do think it’s potentially a two-way street—and Jeff, the distinction I was going to capitalize that you made was between a kind of deregulatory and states’ rights agenda. I think there’s some

¹²⁶ THE FEDERALIST NO. 51 (James Madison).

¹²⁷ *Kelo v. City of New London*, 545 U.S. 469 (2005).

conflict for Scalia, even in interpretation but I just, I view federalism quite differently.

JUDGE SENTELLE: Okay. Who wants to shoot first?

DEAN EASTMAN: No. I don't think we're disagreeing. You're going to have some federal and state tensions, and the purpose of both of those tensions is to secure individual liberty. But the scope of the states' power in order to weigh into that game is a function of what the state citizens have given them, and that's where the devolution piece comes in, and I don't think there's any dispute about it. How broad a state police—I think one of the fallacies is that the presumption has to be a libertarian one. That's the question that's left up to the individual states on how they sort out that balance, and I think that may be the point of our disagreement.

But if you accept the premise that where that balance gets designed or decided is at the state level, not a federal judge interpreting the Ninth Amendment—

JUDGE SENTELLE: Jeff, you're nodding.

PROFESSOR ROSEN: That's right. Now, I'm thinking about it, which is better than nodding perhaps. If the presumption is individual liberty, then you don't dissent on the medical marijuana case obviously. That's what makes me think that some Justices are picking and choosing among the competing strands of conservatism. It's not like these tensions can't be reconciled at all—you did it very elegantly and Paul did too—but it's also not like they're seamless.

So, Justice Thomas in *Lopez*¹²⁸ is more like John Calhoun and James Madison, and the tradition that he's part of is much more of the pre-bellum South than of the founders. I guess that's what I'd say. I wouldn't deny the tensions among these strands.

JUDGE SENTELLE: Anybody else? All right. There's time left and nobody at the mic. Roger, you get to come back up.

(Laughter.)

AUDIENCE PARTICIPANT: I guess this is the exercise of equity, right? To answer your question, Walter, of how it became conservative

¹²⁸ *United States v. Lopez*, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring).

baggage if you will: it's because of the Nixon southern strategy in response to the Civil Rights movement,¹²⁹ and it's plagued the larger conservative libertarian movement ever since.

JUDGE SENTELLE: Wasn't it really before Nixon became a conservative?

AUDIENCE PARTICIPANT: Oh, yes. I mean, there were certain Democrats—

JUDGE SENTELLE: Nixon may have gone across party lines with the Southern Democrats.

AUDIENCE PARTICIPANT: The billboards in the South in the '50s condemning Chief Justice Earl Warren—and it's because states' rights has a terrible baggage, and that's not what federalism is really all about. It's about power belonging where it belongs. Either the federal government or the state government or neither.

JUDGE SENTELLE: I thank you and the prior speaker and everybody else that's convinced us that states' rights and federalism are not synonymous.

Okay. Anyone else want to take the microphone? Anyone else on the panel want to take a crack at each other?

AUDIENCE PARTICIPANT: I had a question given the number of cases the Court actually takes up these days. Are there circuit splits on any particular issues of federalism that you see creating federalism cases over the next couple of years potentially for this Court?

DEAN EASTMAN: I think Paul referred to the rebound cases from *Rapanos*.¹³⁰ The courts are trying to grapple with what Justice Kennedy actually means there. You're inevitably going to get splits. You already are starting to get some splits on that. If you take that principle or unmoored statement of purported principle and try and apply it across a lot of other provisions in the U.S. Code, you could end up with lots of splits. But I don't see this Court being

¹²⁹ See generally DAN T. CARTER, *FROM GEORGE WALLACE TO NEWT GINGRICH: RACE IN THE CONSERVATIVE COUNTERREVOLUTION, 1963–1994* (1999) (arguing that Republican opposition to the Civil Rights Movement and promotion of states' rights helped Republicans win voting majorities in the South).

¹³⁰ *Rapanos v. United States*, 547 U.S. 715, 759 (2006) (Kennedy, J. concurring); see *supra* note 81 and accompanying text.

quick to jump at taking that and resolving it with a clear-line rule because I think Justice Kennedy is going to remain the center chair, and he's not going to give any greater definition to what he said in the next go-around than he said on the last go-around in my view.

HON. MR. CLEMENT: The only things that I would add to that if you're sort of thinking about what's coming down the pike maybe in the longer term, five years, I can think the issue I alluded to,¹³¹ even with the Obama administration and Democrats with both houses of Congress, I think there's going to be efforts by states, principally California because it's in the best position to do it because California—especially if it can get some states to go along—can really have pretenses of leading on national policy, and I think to the extent that it tries to do that, whether it's in greenhouse gas, auto emissions, whatever it is, you know, and maybe the state of the economy will put some natural curve on that too, but one way or another, I think that issue is going to get back to the Supreme Court.

Another issue that's kind of lurking out there, and this—I may be overestimating people's interest level, but I do think there's a really interesting issue lurking out there in the Section 5/Eleventh Amendment jurisprudence because what happened in *Boerne* and the first set of cases is that the Supreme Court looked at whether or not legislation was appropriate under Section 5 of the Fourteenth Amendment basically on facial level.¹³² And so, it looked at the whole statute and asked in a somewhat amorphous test, "Is it proportional and congruent to the underlying constitutional provision that Congress says it's remedying?"¹³³ Then, in *Tennessee v. Lane*, the Court starts an inch towards more of an as-applied approach, and it doesn't ask, "Is Title II of the ADA congruent and proportional to the underlying constitutional prohibitions on disability discrimination?"¹³⁴ It looks at specific context, access to the courts, and says, "In that context, yes; maybe in another context, no."

¹³¹ See *supra* text accompanying notes 112–113.

¹³² *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

¹³³ *Id.*

¹³⁴ *Tennessee v. Lane*, 541 U.S. 509, 511 (2004).

Then in *United States v. Georgia*,¹³⁵ they go all the way to total as-applied analysis, and they basically look at one individual prisoner's claim and the Court says, "Look, you would have a plausible basis for bringing an Eighth Amendment claim; therefore, we're going to allow you to bring a Title II of the ADA¹³⁶ claim and sue the states for damages."¹³⁷ What that means is that the next case that gets up to the Supreme Court is almost guaranteed to be a case testing Congress's Section 5 power in a case where the application of it is purely prophylactic. It basically guarantees that the next time if it's a Title II ADA case in the prison context, it will be a claim by a prisoner who has no Eighth Amendment claim and only has a Title II ADA claim. And I think that the Court's jurisprudence here has moved us to a world where the next case—and I think it will be in the next couple of terms—is purely prophylactic. I think that, in turn, will have some impact on how the Court decides the case and how the Court looks at Section 5 going forward.

JUDGE SENTELLE: Okay. I think we're losing the use of the hall, so I want to thank all the panelists for their contributions to learning today. And thank you very much.

(Applause.)

(Panel concluded.)

¹³⁵ *United States v. Georgia*, 546 U.S. 151 (2006).

¹³⁶ 42 U.S.C. § 12132 (2006).

¹³⁷ *Georgia*, 546 U.S. at 162.