

WHOSE OX IS BEING GORED? WHEN ATTITUDINALISM MEETS FEDERALISM

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ABSTRACT

Empirical research indicates that factors such as an individual Justice's general political ideology play a substantial role in the decision of Supreme Court cases. Although this pattern holds in federalism cases, views about the proper allocation of authority between the state and federal governments—independent of whether the particular outcome in any given case is “liberal” or “conservative”—can sometimes be decisive, as demonstrated by the 2005 decision in Gonzales v. Raich, in which “conservative” Justices voted to invalidate a strict federal drug provision in light of California's legalization of medical marijuana and “liberal” Justices voted to uphold the federal law. Proponents of a strongly legal realist view of the Court might argue that views about federalism are themselves ideological, or that Justices who commit themselves to defending or opposing states' rights do so because of a calculation about the likely long-term consequences of such a position. But they do so only by draining the realist enterprise of its descriptive and normative power, because, as this Essay argues, genuine principles about federalism are distinctly legal, even if formed on the basis of long-term calculations about the likely effects of various views about federalism. Taking federalism as a point of departure, this Essay describes and

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justifies a method by which Justices choose the legal principles that bind them.

INTRODUCTION

Political scientists who study the Supreme Court do not take legal doctrine very seriously. According to the leading view of the political scientists—the “attitudinal model”—the attitudes of individual Justices are a better predictor of how the Court will resolve contested cases than is the sort of reasoning one finds in briefs and opinions.¹ By correlating each Justice’s votes with a variety of characteristics of the cases decided, the political scientists can infer the truly decisive factors in Supreme Court cases. Working within the tradition of legal realism, the attitudinalists thus “find the key to judicial behavior in what the justices do, [rather than] what they say.”²

Even conventional legal scholars such as myself must acknowledge that there is considerable truth to the political scientists’ claims. For example, we know that, should a case come before the Court posing the question whether a state may prohibit same-sex couples from adopting children, Justice Scalia will be much less likely to find the prohibition unconstitutional than Justice Kennedy would be. Why? Because we can extrapolate from their respective votes on gay rights issues in prior cases.³ The political scientist does the same thing, only more systematically. Because her computer model uses an

¹ For an excellent summary of the political science literature, see Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1155–60 & nn.20–36 (2004).

² Harold J. Spaeth, *Jurimetrics and Professor Mendelson: A Troubled Relationship*, 27 J. POL. 875, 879 (1965).

³ Compare *Lawrence v. Texas*, 539 U.S. 558, 562–79 (2003) (Kennedy, J. writing for the majority) (invalidating state criminal prohibition against same-sex sodomy as violative of Fourteenth Amendment’s Due Process Clause), and *Romer v. Evans*, 517 U.S. 620, 623–36 (1996) (Kennedy, J., writing for the majority) (invalidating as violative of Fourteenth Amendment’s Equal Protection Clause state constitutional provision prohibiting anti-discrimination measures based on “homosexual, lesbian or bisexual orientation, conduct, practices or relationships”), with *Lawrence*, 539 U.S. at 605 (Scalia, J., dissenting) (“Texas’s prohibition of sodomy neither infringes a ‘fundamental right’ . . . , nor is unsupported by a rational relation to what the Constitution considers a legitimate state interest, nor denies the equal protection of the laws.”), and *Romer*, 517 U.S. at 636 (Scalia, J., dissenting) (“This Court has no business imposing upon all Americans the resolution . . . pronouncing that animosity toward homosexuality is evil.” (internal quotation marks and citation omitted)).

algorithm based on many more prior case outcomes than the conventional legal scholar can hold in his head at any one time, the political scientist is able to do for most cases what the conventional legal scholar can only even begin to do in his areas of expertise and perhaps in those areas in which the Justices' views are well known among those generally knowledgeable about the law.

To be sure, the conventional legal scholar adds what he regards as an important qualifier: The *reason* Justices Scalia and Kennedy will likely disagree about the constitutionality of my hypothetical prohibition on adoption by same-sex couples is that they disagree about the law. Justice Scalia takes a narrow view of unenumerated rights and equal protection outside the context of race discrimination and its very closest analogues, while Justice Kennedy takes a broader view of both doctrines.⁴ Of course, the conventional legal scholar concedes, this disagreement about the law is related in some way to the respective values, ideology and preferences—all right, to the *attitudes*—of the Justices, but, he insists, the legal disagreement is not simply reducible to attitudes. Law plays a distinct mediating role.

By contrast, the political scientist employs Occam's razor to dispense with the metaphysical nonsense of law as a category independent of values, ideology and preferences, at least in the sorts of hard cases that reach the Supreme Court. Most spectacularly, she can point to the results of a recent experiment—the “Supreme Court Forecasting Project”⁵—in which a cousin of the attitudinal model was matched against a battery of legal experts, each of whom was asked to predict the outcomes of then-pending cases in their respective fields of

⁴ Justice Scalia has stated that he believes the only unenumerated “fundamental rights” protected by the Constitution's Due Process Clauses are those “interest[s] traditionally protected by our society,” *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion), defined by reference “to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.” *Id.* at 127 n.6. By contrast, Justice Kennedy would consider “asserted rights at levels of generality that might not be ‘the most specific level’ available,” and that “would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis.” *Id.* at 132 (O'Connor, J., joined by Kennedy, J., concurring in part). With respect to equal protection, for example, *Romer*, discussed *supra* note 3.

⁵ For a website maintained by The Supreme Court Forecasting Project, see The Washington University Supreme Court Forecasting Project, <http://wusct.wustl.edu/> (last visited Mar. 15, 2006).

expertise: The statistical model correctly predicted the outcome in seventy-five percent of the cases, while the human team was right in only fifty-nine percent.⁶ Thus, armed with her statistics and regression analyses, the political scientist can dismiss most talk of “law” as worse than useless.

The kind of analysis performed by the political scientists makes a very valuable contribution to our understanding of how the Supreme Court actually functions, and accordingly, I agree with those conventional legal scholars who argue that we ought to pay more (which is to say, at least, some) attention to their work than we currently do.⁷ But it would be a profound error to conclude, on the basis of the attitudinalists’ data, that law is bunk (and the researchers who designed and conducted the contest, to their credit, do not make any such sweeping jurisprudential claims based on its results).⁸ As I argue in this Essay, the treatment of issues of federalism—in the political branches as well as in the Court—shows why.

I. THE SUPREME COURT FORECASTING PROJECT

Before coming to questions of federalism, however, I want to say a few more words in general about the Supreme Court Forecasting Project. The first thing I want to say is that the contest was, in a certain sense, rigged.

We legal experts were not asked, after all, what was the legally correct outcome in the cases before the Court. We were asked to *predict* how the individual Justices of the Rehnquist Court would vote.⁹ It is not really surprising that a computer program designed to predict the voting pattern of those nine people would do a better job at that task than would scholars whose particular

⁶ See Ruger et al., *supra* note 1, at 1171 tbl.1. I take some small pride in the fact that I personally did slightly better than the statistical model in predicting the results of the cases about which I was asked.

⁷ See, e.g., Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 258–59 (2005) (observing that focus outside of legal academy “is not so much on how judges should behave, as on how they do and why;” arguing that “normative constitutional theory about judicial review will remain impoverished until it fully embraces [this] positive project”); Ruger et al., *supra* note 1.

⁸ See Ruger et al., *supra* note 1, at 1190 (“[A]nything our study has to say about the ‘nature of law itself’ is highly indirect.”).

⁹ Ruger et al., *supra* note 1, at 1161 (conceding that legal experts’ method of prediction was not pure “legalism” because “the individual legal experts considered both legal and nonlegal factors in reaching their predictions”).

expertise lies in the field of evaluating legal arguments rather than in guessing how other people will evaluate legal arguments.

Moreover, from a certain perspective, the very design of the contest between statisticians and legal scholars assumed the correctness of the legal realist claims that one might think it was designed to test. Oliver Wendell Holmes, Jr. famously wrote that the law is nothing more than “prophecies of what the courts will do in fact”¹⁰ Some legal realists practically made this aphorism their credo.¹¹ Of course, if you think that the law really consists of nothing but predictions of how courts will behave, then it is perfectly reasonable to design a contest that aims to discern the most accurate mode of prediction.

But what if you think that there are better and worse answers that can be given to any legal question, and that what makes one answer better than another is something internal to legal analysis?¹² Perhaps the question is one of constitutional interpretation and you are an originalist. Then you will be much more interested in the original understanding than in what the Supreme Court is going to say—even if the Supreme Court employs an originalist approach to the particular issue in question. Or perhaps you follow Ronald Dworkin in thinking that the best answer to any legal question is the one that best fits with and justifies the prior law, i.e., the answer that puts the law as a whole in its best light.¹³ Then you will sometimes be critical of the actual decisions of the Court, precisely because they depart from what you would have predicted the Justices would decide were they to apply your coherentist methodology correctly. Unless the Court’s opinion leads you to change your mind, the

¹⁰ OLIVER W. HOLMES, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897), reprinted in COLLECTED LEGAL PAPERS 173 (1920).

¹¹ See K. N. LLEWELLYN, *THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY* 12–14 (3d ed. 1960); Joseph W. Bingham, *What Is the Law?*, 11 MICH. L. REV. 1, 15 (1912); Jerome Frank, *Are Judges Human? Part Two: As Through a Class Darkly*, 80 U. PA. L. REV. 233, 236 (1931).

¹² H.L.A. Hart set out the most trenchant critique of the prediction approach. He argued that it is at best a means of understanding the law from the outside, providing little to no help to those who must make sense of the law from within. See H.L.A. HART, *THE CONCEPT OF LAW* 88–91 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994) (distinguishing between external and internal aspects of rules); see also *id.* at 141–47 (addressing directly and rejecting realists’ claims because even “open texture[d]” laws have “core of settled meaning” from which judges are not free to depart, enabling critics to state that judges’ “rulings are, though final, not infallible”).

¹³ See RONALD DWORKIN, *LAW’S EMPIRE* vii (1986) (“[O]ur law consists in the best justification of our legal practices as a whole”).

fact that you had incorrectly predicted what the Supreme Court would do simply points out a failing of the Supreme Court. It means that the Justices applied the wrong methodology, or applied the right methodology incorrectly. In either event, the failing is theirs, not yours. Accordingly, the Supreme Court Forecasting Project could not possibly have proved that law is bunk in any deep sense.

Moreover, the results of the Forecasting Project pose some puzzles of their own. The legal experts actually did a better job of predicting the votes of the more clearly “ideological” Justices of the right and left, while the computer did a much better job of predicting the “swing” votes of Justices O’Connor and Kennedy.¹⁴ Why? A determined attitudinalist might say that the attitudes of the Justices on the Court’s extremes are so widely known that the computer lost its competitive advantage as to them. In a particularly nuanced case, a legal scholar could take account of the ideologically liberal views of Justices Stevens and Ginsburg *as well as* their jurisprudential preference for purposivism over formalism. But, according to the attitudinalist, the attitudes of Justices O’Connor and Kennedy are subtler, and thus more readily discoverable by the data mining and curve fitting of the computer than by the legal scholar’s analysis.

Yet we can easily place the opposite spin on the performance differences with respect to the polar Justices and the swing Justices. Who is to say that the difference between the Court’s conservatives and liberals is not itself a difference over law? On this account, the reason Justice O’Connor and, to a lesser extent, Justice Kennedy, were so hard for the legal scholars to predict was that, as the swing votes, they controlled not only the outcome but also the agenda of the late Rehnquist Court. Cases came to the Supreme Court precisely when the outcome turned on the choice between methodologies—such as originalism versus purposivism¹⁵—or substantive issues—such as the permissibility

¹⁴ See Ruger et al., *supra* note 1, at 1172–75 & tbl.2 & fig.2.

¹⁵ Compare, e.g., *Ewing v. California*, 538 U.S. 11, 23–24 (2003) (plurality opinion) (citing *Harmelin v. Michigan*, 501 U.S. 957, 996–97 (1991) (Kennedy, J. concurring in part and concurring in the judgment) (eschewing “historical argument[s]” about Eighth Amendment’s prohibition on disproportionate sentences; holding that “*stare decisis* counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years”), *with id.* at 32 (Thomas, J., concurring) (citing *Harmelin*, 501 at 967–85 (1991) (Scalia, J., writing for the majority) (employing

of race-based affirmative action in higher education¹⁶—as to which the views of the extremes were clear but those of the centrists were more muddled. Viewed in this light, the computer model won only where one would expect it to win: in those cases and for those Justices for whom the law was, *ex ante*, unclear, and thus as to whom, extra-legal factors would play the leading role. Knowing this, however, does not tell us very much about the relative roles played by law and attitudes in general.

Even with these large caveats, though, the results of the contest are arresting. The computer model did, after all, get the bottom line right more consistently than the humans did. Most interestingly, it did so despite the fact that the model coded only for six factors: “(1) circuit of origin; (2) issue area of the case; (3) type of petitioner (e.g., the United States, an employer, etc.); (4) type of respondent; (5) ideological direction (liberal or conservative) of the lower court ruling; and (6) whether the petitioner argued that a law or practice is unconstitutional.”¹⁷ Yet by attending to this very small number of criteria, the computer outperformed the experts.

That aspect of the Project’s findings should not be especially surprising to anyone familiar with empirical evaluations of expertise in other fields. A formula that accounts only for strikeouts, walks, and home runs better predicts a pitcher’s subsequent performance than do the much more multi-faceted evaluations of professional baseball scouts;¹⁸ and doctors can do better at diagnosing a heart attack by focusing on just four factors—electrocardiograph, unstable angina, fluid in the lungs, and systolic blood pressure—than by also considering other risk factors.¹⁹ Perhaps really terrific experts could do better still by adding in more factors—such as average fastball speed or patient age, respectively—but for most experts, to the extent that such factors make a difference, it appears that the limited-factor models account for all the difference they make. Any independent consideration of these factors is essentially noise.

original-intent analysis to reject notion that Eighth Amendment prohibits disproportionate sentences in noncapital cases)).

¹⁶ See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

¹⁷ Ruger et al., *supra* note 1, at 1163.

¹⁸ See MICHAEL LEWIS, *MONEYBALL* 236–40 (2004).

¹⁹ See MALCOLM GLADWELL, *BLINK* 133–38 (2005).

The results of the Supreme Court Forecasting Project likewise suggest that nearly all of the considerations that we think should play a decisive role in adjudication are, from a causal perspective, also just noise. For example, in the recent Senate Judiciary Committee confirmation hearings for Chief Justice Roberts and Justice Alito, the Senators repeatedly asked the nominees for their views about precedent, and this was one of the few questions about which the nominees gave straightforward and detailed answers.²⁰ Was this a sensible focus for Senators concerned about how the new Justices would vote on specific issues the former deemed important? Apparently not. The computer model in the Supreme Court Forecasting Project did not code for the question of whether a party was asking the Court to overrule a prior precedent, whereas legal scholars could and did take this factor into account.²¹ But the computer won anyway. At least in the cases they actually decide, the Justices' professed views about precedent seem to be mere noise.

II. ARE VIEWS ABOUT FEDERALISM VIEWS ABOUT THE LAW?

Indeed, looking at the six factors for which the Forecasting Project did code, it is hard to see how *any* of the issues that constitutional lawyers argue about figured into the analysis in any detail. Suppose one were trying to predict, in early 1999, whether or not the Court would say that Congress, when acting pursuant to the Commerce Clause,²² had the power to abrogate state sovereign immunity in private suits for money damages in state court. Less than three years earlier, in *Seminole Tribe of Florida v. Florida*,²³ the Court had ruled that under such circumstances Congress could not abrogate state sovereign immunity in suits in federal court, and much of the argument and the ultimate opinion in the later case, *Alden v. Maine*,²⁴

²⁰ See Adam Liptak, *Roberts Drops Hints in 'Precedent' Remarks*, N.Y. TIMES, Sept. 18, 2005, § 1, at 30; Richard W. Stevenson & Neil A. Lewis, *Alito, at Hearing, Pledges an Open Mind on Abortion*, N.Y. TIMES, Jan. 11, 2006, at A1.

²¹ See Ruger et al., *supra* note 1, at 1209, app. D (reporting that sixty-nine percent of legal experts stated that "Supreme Court precedent on point" was an "important factor").

²² U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power. . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

²³ 517 U.S. 44 (1996).

²⁴ 527 U.S. 706 (1999).

focused on what significance, if any, should be attributed to the fact that the text of the Eleventh Amendment²⁵ refers to courts of the United States, a term generally taken to mean federal rather than state courts.²⁶ But as a causal matter, that textual argument appears to have been largely a distraction. If you were interested in predicting the outcome, you would have done better to ignore the text of the Constitution and look to the Forecasting Project model's six factors, only one of which appears to have a strong positive correlation with what seems to be the central legal question: the "issue area of the case," here, federalism.²⁷ And sure enough, by the same 5-4 margin by which it decided most of its major federalism cases in the period from Justice Breyer's appointment until Chief Justice Rehnquist's death,²⁸ the Court in *Alden* ruled for the state.

Another way of putting that last point is to say that, whether they realize it or not, the Justices' *attitudes* towards federalism play a much larger role in their decision of cases involving

²⁵ U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

²⁶ *Alden*, 527 U.S. at 712 ("[T]he powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."); *id.* at 723–24, 727–30 (rejecting strict textual analysis; noting that "we have looked to history and experience, and the established order of things, rather than adhering to the mere letter of the Eleventh Amendment in determining the scope of the States' constitutional immunity from suit" (internal quotation marks and citations omitted)).

²⁷ It is possible, however, that other factors do correlate with law. For example, circuit of origin may matter because some circuits—most notoriously, the Ninth—include substantial numbers of judges who place less value on narrowly reading precedents than does the Supreme Court. For October Term 2004, the Supreme Court reversed eighty-four percent of the Ninth Circuit cases it reviewed, while reversing only seventy-three percent of the cases from the other circuits combined. Goldstein & Howe, P.C., *Circuit Court Scorecard: October Term 2004* (2005), <http://www.scotusblog.com/movabletype/archives/FinalOT04CircuitScorecard.pdf>; see also *Nine Justices, Ten Years: A Statistical Retrospective*, 118 HARV. L. REV. 510, 510–11 & fig.1 (2004) (noting that from 1994 to 2003, Ninth Circuit accounted for over thirty percent of all Supreme Court reversals of circuit court decisions). "Circuit of origin" could thus be implicitly coding for the legal value of precedent.

²⁸ Over the dissents of the other four Justices, Justices O'Connor, Scalia, Kennedy, and Thomas, and Chief Justice Rehnquist, voted to strike down federal laws as violative of the Commerce Clause or the Tenth or Eleventh Amendments in *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78–92 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995).

federalism than do any of the particular doctrinal issues those cases present.

Can we dispatch this result in the same way that I suggested that we can explain the difficulty of legal scholars in predicting the swing Justices? Is it a byproduct of the Court's docket? After all, even when considered from the perspective of a non-swing Justice, in most cases that reach the Supreme Court there is typically at least a colorable argument in favor of either side.²⁹ And conversely, we could surely generate a list of federalism issues that could *conceivably* come before the Court, in which the doctrinal details would be dispositive, regardless of what sort of scores obtained on the six factors used by the computer model: (1) Did Congress act within its authority under Article I, Section 8 by creating the Federal Reserve Board? (2) Could Congress expel Kansas from the Union? (3) Could the California Supreme Court refuse to be bound by a U.S. Supreme Court decision reversing the former on an issue of federal law? The key to predicting the outcomes of these cases is the actual content of constitutional law.³⁰

These examples confirm that the results of the Supreme Court Forecasting Project do not support the strongest version of the legal realist claim that law is indeterminate. Yet legal realists did not (and do not) typically endorse the radical indeterminacy thesis. Much of the realist enterprise focused precisely on contested appellate cases such as those studied in the Forecasting Project.³¹ Likewise, the Forecasting Project's data set appears directly relevant to the modern debate between

²⁹ See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 409 (1985) ("[T]here are no easy cases in the Supreme Court. If the case were that easy, certiorari would have been denied, the appeal would have been dismissed for want of a substantial federal question, or a clearly erroneous result below would have been overturned summarily." (footnote omitted)).

³⁰ The answers are: 1) Yes; 2) No; and 3) No. See, respectively, *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 424 (1819) (holding that Congress had authority to create Bank of the United States); U.S. CONST. art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate."); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 351 (1816) (holding that Supreme Court has appellate jurisdiction over issues of federal law decided in state courts).

³¹ See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 273 & n.31 (1997) ("[T]he Realists . . . did not generally view the law as . . . indeterminate in all cases. . . . Realists were mainly concerned to point out the indeterminacy that exists in those cases that are actually litigated, especially those that make it to the stage of appellate review . . ." (citing Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1239 (1931); Max Radin, *In Defense of an Unsystematic Science of Law*, 51 YALE L.J. 1269, 1271 (1942))).

those, like Dworkin, who say that there are correct answers in hard cases and those, like H.L.A. Hart, who characterize judicial decision making in such cases as the exercise of discretion.³² Unless we think that one or more of the six factors for which the computer coded is meaningfully dependent on law, it is difficult to resist the conclusion that the experiment is a triumph for Hartian positivism and all but the most radical versions of legal realism.

Nonetheless, it is on precisely the aforementioned ground that I want to resist this conclusion. In my view, even something as seemingly vague as “this is a case about federalism” should count as, or is correlated with, a *legal* reason to rule one way or the other. I can make my point most effectively by example.

In *Gonzales v. Raich*, the Supreme Court addressed the question of whether the federal law banning the possession, obtaining or manufacturing of marijuana could be constitutionally applied to someone who grew marijuana strictly within a single state—California—and for medical purposes as permitted under license from the state.³³ The Court upheld the federal law by a 6-3 margin.

I am not now especially interested in whether the *Raich* decision was correct, so much as I am interested in its political valence. To the general public, the *Raich* decision appeared conservative. A state had liberalized its drug laws, only to encounter resistance from a conservative federal government, and the Court had sided with the latter. Yet the majority that upheld the conservative federal law included all of the Court’s most liberal members, and the dissenters who sided with California’s liberalization included two of its three most conservative members.³⁴ Expressing the general public’s bewilderment, Hendrik Hertzberg suggested in the *New Yorker*

³² Hart concedes to Dworkin that “when particular statutes or precedents prove indeterminate, or when the explicit law is silent,” judges “[v]ery often . . . cite some general principle or some general aim or purpose . . . which points towards a determinate answer for the instant hard case.” However, Hart maintains that “though this procedure certainly defers, it does not eliminate the moment for judicial law-making, since in any hard case different principles supporting competing analogies may present themselves and a judge will often have to choose between them, relying, like a conscientious legislator, on his sense of what is best” See Hart, *supra* note 12, at 274–75.

³³ 545 U.S. 1 (2005).

³⁴ The majority opinion was written by Justice Stevens and joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Justice Scalia concurred in the judgment, and Chief Justice Rehnquist, Justice O’Connor, and Justice Thomas dissented.

magazine that one needed a “Supreme Court Decoder Ring” to understand how the *Raich* decision could count as liberal.³⁵

Of course, legal scholars understand that the decoder ring is simply federalism. Although Progressives like Louis Brandeis sang the praises of decentralization,³⁶ at least since the New Deal, liberals have generally favored an extremely limited judicial role in policing the boundaries of federal power. Conversely, at least for the last thirty years, conservatives have insisted on preserving some domain of state sovereignty as essential to the constitutional design.³⁷

What explains the division? As a doctrinal matter, the Justices appear to disagree about questions of institutional competence. Those who would uphold national power invoke the “political safeguards of federalism” that render judicial safeguards largely unnecessary.³⁸ Further, they worry about the Court’s ability to draw sensible and workable lines to confine Congressional power.³⁹ Meanwhile, the defenders of state sovereignty point to the central place of federalism-based limits on national power in

³⁵ Hendrik Hertzberg, *Watched Pot*, THE NEW YORKER, June 27, 2005, at 33.

³⁶ As a Justice, Brandeis most famously made the point in his dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), where he praised the experimental laboratories of the states, but he and other Progressives had been making the point more broadly in politics as well. See E. E. Steiner, *A Progressive Creed: The Experimental Federalism of Justice Brandeis*, 2 YALE L. & POL’Y REV. 1, 16–22 (1983) (ascribing Brandeis’s conception of federalism to his political relationship with Robert M. LaFollette).

³⁷ I am dating the relevant period to the Court’s decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), although that is just one marker. If one defines “conservative” as defensive of the status quo, one can identify states’ rights with conservatism as far back as the earliest years of the American republic, when they were invoked to resist federal efforts to abolish or limit slavery, although during the ante-Bellum period, abolitionists *also* sometimes invoked states’ rights, particularly in resisting federal power over fugitive slaves. See Steven Lubet, *Slavery on Trial: The Case of the Oberlin Rescue*, 54 ALA. L. REV. 785, 785–87 (2003) (“[I]n a political alignment that today seems oddly contradictory, the Union itself became the guarantor of slavery while abolitionists often rallied for the cause of ‘States’ Rights.’”).

³⁸ See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 & n.11 (1985) (citing JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175–84 (1980); 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) [hereinafter Wechsler, *Political Safeguards*]); see also Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

³⁹ See, e.g., *United States v. Lopez*, 514 U.S. 549, 608 (Souter, J., dissenting) (likening majority’s distinction between commercial and non-commercial activity to discarded distinction between direct and indirect effects on interstate commerce).

the constitutional design, asserting that states, no less than individuals, are entitled to judicial protection.⁴⁰

But it is difficult to take these doctrinal arguments very seriously, because some of the very Justices who make one set of arguments in the federalism context make the other set of arguments in the individual rights context. For example, in *Printz v. United States*,⁴¹ self-described textualist Justice Scalia⁴² begins his discussion of the question whether the Constitution forbids the federal government from “commandeering” state and local executive officials by acknowledging that the text does not speak to the question, but whereas in other contexts, such as abortion, that would just about end the matter for him,⁴³ he then goes on to find an anti-commandeering principle in the Constitution’s interstices.⁴⁴ Conversely, in their criticism of the Court’s decisions protecting state sovereignty, Justices Stevens, Souter, and Breyer have used the very constitutional insults—“judicial activism,” “penumbras,” and “*Lochner*”—that they have blithely ignored when hurled at individual rights decisions which they accept.⁴⁵

⁴⁰ See, e.g., *Lopez*, 514 U.S. at 575–81 (Kennedy, J., concurring) (“[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.”); *Garcia*, 469 U.S. at 564–67 (Powell, J., dissenting) (asserting necessity of judicial review for federalism issues because “[t]he States’ role in our system of government is a matter of constitutional law, not of legislative grace”); see also J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1690–91 (2004) (“If the courts are to function as interpreters of constitutional rights, they must necessarily function as arbiters of constitutional structure.”).

⁴¹ 521 U.S. 898 (1997).

⁴² See generally ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3 (Amy Gutmann ed., 1997) (offering views on textualism).

⁴³ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that Constitution does not protect abortion rights because “(1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed”).

⁴⁴ See *Printz v. United States*, 521 U.S. 898, 905 (1997) (“Because there is no constitutional text speaking to this precise question, the answer to the [petitioners’] challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court.”); *id.* at 933 (finding categorical prohibition on commandeering of executive officials).

⁴⁵ See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 98–99 (2000) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting in part and concurring in part) (“judicial activism”); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 665 (1999) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting) (“penumbras”); *Alden v. Maine*, 527 U.S. 706, 814 (1999) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (“*Lochner*”); *Coll. Sav. Bank v. Fla. Prepaid*

By my reckoning, in the recent period, only Justices O'Connor and Kennedy have been consistent in the arguments they use in the individual rights and states' rights contexts, and even for them, one suspects that the consistency is not so much a product of respect for what Herbert Wechsler famously called "neutral principles,"⁴⁶ as a reflection of the fact that they happen to support both relatively robust individual rights and relatively robust states' rights.⁴⁷

The opportunistic use of arguments in federalism (and other kinds of) cases may appear to reinforce the notion that general attitudes about federalism (and other broad issues), rather than law, account for the outcomes in the Supreme Court. But this is a false dichotomy, because—within the range of plausible outcomes in contested cases—general attitudes about federalism *are* distinctly legal in an important sense: For Supreme Court Justices, attitudes about federalism can and sometimes do trump attitudes about what would be wise policy in a way that is much less common for politicians.

Contrast, for example, the votes of most of the Justices in *Raich* with the action of Congress and the President less than three months earlier in passing a law that—in violation of principles of finality and respect for state legislative and judicial processes that political conservatives had been espousing for decades—authorized a federal district court to rehear, without any deference, issues that had been fully adjudicated by the state courts regarding the tragic fate of one individual named in the Act, Theresa Marie Schiavo.⁴⁸ The legislation was roundly and appropriately condemned as a betrayal of state sovereignty.⁴⁹

Postsecondary Educ. Expense Bd., 527 U.S. 666, 701–02 (1999) (Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting) ("*Lochner*").

⁴⁶ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19–20 (1959) [hereinafter Wechsler, *Neutral Principles*] (defining neutral principles).

⁴⁷ Cf. Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 575 (2003) (suggesting that for Justices with conservative agendas in the mid-1990s, "the prospect for doctrinal innovation in federalism cases was much brighter. Justices O'Connor and Kennedy had proven to be much more consistently supportive of states' rights than of rolling back individual rights in areas involving social issues").

⁴⁸ The legislation—Act of Mar. 21, 2005, Pub. L. No. 109-3, 119 Stat. 15—was applied in a series of court decisions. See *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378 (M.D. Fla. 2005); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223 (11th Cir. 2005) (per curiam), *reh'g en banc denied* 403 F.3d 1261 (11th Cir. 2005); *Schiavo ex rel. Schindler v. Schiavo*, 125 S. Ct. 1692 (2005); *Schiavo ex rel. Schindler v. Schiavo*, 358 F.

To be sure, one can find instances of the Justices voting in ways that appear to betray their federalism credentials, even on end-of-life questions of the sort that gave rise to the Schiavo legislation. This year, for example, three otherwise states'-rights-friendly Justices—Chief Justice Roberts⁵⁰ and Justices Scalia and Thomas—dissented from the Court's decision in *Gonzales v. Oregon*, which invalidated on statutory grounds the Attorney General's effort to use the federal Controlled Substances Act⁵¹ to displace a state law that authorizes physicians to dispense lethal doses of medication to terminally ill patients.⁵² Whether their votes were in fact inconsistent with their commitment to states' rights depends on what one thinks of the merits of the federal government's argument, of course, and Justice Thomas argued in dissent that it was the majority that was acting inconsistently in departing from what he took to be the core principles of *Raich*.⁵³ But whoever had the better of that argument, I concede that Justices do sometimes permit their views of the underlying substantive dispute to color their conclusions about the proper allocation of decisional authority. If *Gonzales v. Oregon* is not an example, then certainly *Bush v. Gore*⁵⁴ or some other case is.

Even with this concession, however, it nonetheless remains true that Justices *often* or at least *more than occasionally* seem to

Supp. 2d 1161 (M.D. Fla. 2005); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. 2005) (per curiam), *reh'g denied* 404 F.3d 1282 (11th Cir. 2005), *reh'g en banc denied*, 404 F.3d 1270 (11th Cir. 2005); *Schiavo ex rel. Schindler v. Schiavo*, 125 S. Ct. 1722 (2005).

⁴⁹ See, e.g., Charles Fried, Op-Ed., *Federalism Has a Right to Life, Too*, N.Y. TIMES, Mar. 23, 2005, at A17 (“[R]epublicans in Congress and President Bush have, in a few brief legislative clauses, embraced the kind of free-floating judicial activism, disregard for orderly procedure and contempt for the integrity of state processes that they quite rightly have denounced and sought to discipline for decades.”).

⁵⁰ The evidence that Chief Justice Roberts is otherwise friendly to states' rights can be found in his opinion as a Circuit Judge regarding denial of rehearing en banc in the “hapless toad” case, see *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003) (Roberts, J., dissenting from denial of rehearing en banc), and in his willingness to join in the dissent from the Court's conclusion that congressional power to adopt bankruptcy law authorizes abrogation of state sovereign immunity in *Central Virginia Community College v. Katz*, 126 S. Ct. 990, 1005 (2006) (Thomas, J., joined by Roberts, C.J., and Scalia and Kennedy, JJ., dissenting).

⁵¹ 21 U.S.C. §§ 801–904 (2000).

⁵² 126 S. Ct. 904 (2006).

⁵³ *Id.* at 939–40 (Thomas, J., dissenting) (“The majority's newfound understanding of the [Controlled Substances Act] as a statute of limited reach is all the more puzzling because it rests upon constitutional principles that the majority of the Court rejected in *Raich*.”)

⁵⁴ 531 U.S. 98 (2000).

care about federalism as such, rather than only invoking federalism opportunistically.

Consider the findings of Frank Cross and Emerson Tiller, who studied Supreme Court voting patterns in federalism cases from 1985–1997.⁵⁵ Individual Justices' political attitudes certainly made a big difference. Conservative Justices were roughly one and a half times more likely to use states' rights to defeat a liberal plaintiff's claims than a conservative plaintiff's claims, and roughly twice as likely to use states' rights to support a conservative plaintiff's claim than a liberal plaintiff's claim.⁵⁶ Conversely, liberal Justices were more than twice as likely to use states' rights to defeat a conservative plaintiff's claim than to defeat a liberal plaintiff's claim, and almost twice as likely to use states' rights to support a liberal plaintiff's position than to support a conservative plaintiff's position.⁵⁷

These results may overstate ideological impact, however, because Cross and Tiller apparently coded votes for federal preemption as votes against states' rights.⁵⁸ Yet, as a recent empirical study by Michael Greve and Jonathan Klick illustrates, Justices who otherwise generally favor states' rights also generally tend to favor preemption, and Justices who otherwise generally oppose states' rights generally tend to oppose preemption.⁵⁹ By respectively coding liberal Justices' votes against preemption, and conservative Justices' votes for preemption, as both running against federalism type, the Cross and Tiller data understate the importance of the Justices' dispositions towards federalism—unless, that is, their general attitudes towards preemption are themselves strongly correlated with the ideological valence of the outcomes in those cases.

In any event, even if we do not quibble with how Cross and Tiller coded preemption cases, the results point in at least two directions. As I have acknowledged, they pretty strongly indicate

⁵⁵ Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741 (2000).

⁵⁶ *Id.* at 760 & tbl.2.

⁵⁷ *Id.* at 761 & tbl.3.

⁵⁸ *See id.* at 753–54.

⁵⁹ *See* Michael Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment* 4, 54–57 (Fla. State. Univ. Coll. of Law Pub. Law & Legal Theory Working Paper No. 136, 2004), available at <http://ssrn.com/abstract=634263> (“We find substantial evidence to buttress the impression of preemption cases as a mirror image of pure federalism cases.”).

that the specific outcome—liberal or conservative—makes a big difference. But they also indicate that views about federalism qua federalism make a big difference too. For example, in nearly half (46.7%) of the salient cases in which a plaintiff sought a politically conservative result through national power, the conservative Justices stuck with their states' rights bona fides and rejected the claim.⁶⁰ And more generally, the correlation of outcome with individual Justices' overall liberal/conservative ideology is substantially less than one. Views about federalism as such are clearly making a difference for the Justices in substantial numbers of cases. Can the same be said about more than a handful of Senators or members of the House?

Ur-attitudinalists Jeffrey Segal and Harold Spaeth once wrote that "Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he is extremely liberal."⁶¹ There is more than a grain of truth in this observation, but it is also misleading insofar as it suggests that there is no difference between being a liberal or conservative judge versus being a liberal or conservative politician. At a minimum, most judges seem to care about federalism (one way or the other) in a way that most politicians do not.

Still, to say that Supreme Court Justices care more about federalism than politicians do is not necessarily to say that Supreme Court Justices care about *law*. The category of law, after all, cannot sensibly be defined to encompass "everything that isn't politics." And there is considerable evidence that Justices distort their methodological commitments in federalism cases to reach results that coincide with their federalism preferences.⁶² Perhaps attitudes about federalism are just

⁶⁰ Cross & Tiller, *supra* note 55, at 758, 760 tbl.2.

⁶¹ JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 65 (1993); *see also* LEE EPSTEIN AND JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 3 (2005) ("[W]ith scattered exceptions here and there, the decisions of Supreme Court justices, tend to reflect their own political values.").

⁶² *See* Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning*, 52 *UCLA L. REV.* 217, 257–58 (2004) (tables showing how the Justices selectively cite evidence from the Founding that supports their views about the allocation of authority between the state and national governments); *see also* Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 *MINN. L. REV.* 612 (2006) (arguing that the Justices favoring robust state sovereignty discount the nationalist opinions of the Marshall Court). The evidence is not entirely uni-directional, however. For example in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611 (2005), by a 5-4 margin, a broad reading of the scope of federal court jurisdiction in diversity cases under

another kind of attitude. A Justice might directly value federalism (or not) in the same way that a Justice might directly value the right of privacy or due process.

Yet describing attitudes towards federalism as first-order preferences of this sort does not ring true. It may be pointless to look behind other kinds of preferences: Why do I prefer chocolate to vanilla ice cream? I don't know. I just do. But attitudes about so complex a subject as federalism are unlikely to be first-order preferences. (Attitudes about privacy, due process, and other values treated by attitudinalists as simply political preferences are *also* unlikely to be simple first-order preferences, but let us put that issue aside.) In particular, two sorts of mechanisms probably generate judicial attitudes towards federalism, and both are tied up in legal questions.

First, one might form attitudes about federalism by a top-down methodology. Perhaps one thinks on textual or historical grounds that the Constitution is (or is not) a compact among sovereign states,⁶³ and that any construction of the document must begin by recognizing (or disavowing) the states' sovereign status. Or, deriving a core principle of democracy from the Constitution's text and history, one might think (or be skeptical about claims) that preserving a substantial domain of state and local rule maximizes voters' abilities to match their preferences to the policies under which they live, both by voting at the polls and by voting with their feet.⁶⁴ Or again, one might (or might

the supplemental jurisdiction statute, 28 U.S.C. § 1367. Interestingly, the majority included all but one of the Justices who typically vote to constrain federal power, and the dissent included all but one of the justices who usually vote to sustain federal power. This seeming reversal is probably best explained by the fact that each of the Justices was driven more by his or her attitude towards the proper relative role of text and purpose in statutory interpretation than by views about federalism.

⁶³ Compare, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803 (1995) (“[T]he Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States.”), and *id.* at 839 (Kennedy, J., concurring) (“A distinctive character of the National Government, the mark of its legitimacy, is that it owes its existence to the act of the whole people who created it.”), *with id.* at 846–50 (Thomas, J., dissenting) (“The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.”).

⁶⁴ See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (“The consumer-voter may be viewed as picking that community which best satisfies his preference pattern for public goods. . . . The greater the number of communities and the greater the variance among them, the closer the consumer will come to fully realizing his preference position.”). Then-Professor (now-Judge) McConnell provides a nice formulation of this point:

not) find the command of a domain of reserved powers for the states so unambiguous in the structure of Article I and the Tenth Amendment⁶⁵ that for the judiciary to fail to enforce that command would amount to dereliction of duty.⁶⁶ It should be plain that such arguments are *legal* insofar as they begin with the Constitution, its history, and its purposes.

Second, one might form attitudes about federalism from the bottom up—that is, by asking what sort of policy outcomes will be fostered by judicial solicitude to concerns about federalism. For example, a liberal Justice looking back over the nation’s history might reasonably conclude that principles of state sovereignty have, more often than not, been used to check national efforts to redress racial and other forms of inequality, or that they have too often stood in the way of federal laws that were, on balance, desirable. If so, the liberal Justice might thus also conclude that she ought not to afford protection to state sovereignty.

Or the liberal Justice might think that the past provides unreliable guidance for the medium-term future, in which federalism conflicts will most often pit a liberal state policy—such as California’s legalization of medical marijuana or Oregon’s legalization of physician-assisted suicide—against a more conservative federal policy. If so, our liberal Justice might conclude that she indeed ought to provide some protection for state sovereignty.

[A]ssume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each state, 130 will be pleased, and only 70 displeased. The level of satisfaction will be still greater if some smokers in State A decide to move to State B, and some anti-smokers in State B decide to move to State A. In the absence of economies of scale in government services, significant externalities, or compelling arguments from justice, this is a powerful reason to prefer decentralized government. States are preferable governing units to the federal government, and local government to states.

Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1494, 1494 (1987) (book review).

⁶⁵ U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

⁶⁶ See, e.g., *United States v. Lopez*, 514 U.S. 549, 567–68 (1995) (refusing to uphold federal legislation forbidding firearm possession in school zones because “[t]o do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated . . . and that there never will be a distinction between what is truly national and what is truly local. . . . This we are unwilling to do.” (citations omitted)).

Or perhaps the liberal Justice thinks something like the following: robust protection for state sovereignty will entitle states like California to liberalize their drug laws even in the face of a conservative congressional commitment to the war on drugs, which would be desirable, but it would also mean that laws like the Endangered Species Act⁶⁷ could be struck down, which would be *very* undesirable. Thus, I'll hold my nose and vote to sustain federal power in a case like *Raich* because that will preserve federal power in cases where its absence would cause even more serious problems.

In each of these examples, conversely, we can imagine a conservative Justice reaching different conclusions based on her contrary assessment of the desirability of the policies invalidated or validated under a view that is either committed or opposed to judicial protection of state sovereignty. The approach in these examples is “bottom-up” in the sense that—within the range of views that could plausibly be reconciled with the constitutional text and structure—one chooses a top-level approach to federalism cases based on the concrete bottom-level results to which it will likely lead.

Is such a bottom-up approach consistent with treating federalism as a *legal* question? It might not seem so. After all, my hypothetical bottom-up Justice begins with results and then moves to a view of law from there. And “result-oriented” judging is commonly contrasted to judgment according to law.⁶⁸

Yet bottom-up-ness of the sort I have just described is not result-oriented in the sense in which result-oriented judging is typically criticized. A true result-oriented judge asks on a case-by-case basis what outcome is best, and then constructs a legal argument to justify that outcome, perfectly content to reject that very argument in the next case because it leads to a result she dislikes. My bottom-up federalist (or anti-federalist) adopts an

⁶⁷ 16 U.S.C. §§ 1531–1544 (2000).

⁶⁸ See, e.g., Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CAL. L. REV. 535, 539 (1999) (anticipating criticism from suggestion that “theories should be judged by their likely fruits” because “[t]o some, the suggestion that a constitutional theory should be selected based on its likely results may seem to invite unprincipled, result-oriented decision making that is inconsistent with obligations of constitutional fidelity and the rule of law”); Erwin N. Griswold, *The Supreme Court, 1959 Term—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 91–94 (1960) (“When decisions are too much result-oriented, the law and the public are not well served.”).

approach to a category of cases based on an assessment of the pattern of results that will follow from that approach over time. Crucially, she then follows that approach even though it means casting some votes in favor of results she dislikes.

To be sure, the willingness to make decisions according to high-level principle is not unique to judges. Members of Congress, for example, might value high-level principles like checks and balances or, more realistically, the prerogatives of Congress vis-à-vis the President, in denying the President a power they think it would be beneficial for him to have. Likewise, an Administration committed to preserving the prerogatives of the Presidency might invoke executive privilege to resist turning over essentially harmless information to Congress, and thus pay at least a short-term political price.

But if elected officials *sometimes* support or oppose policies because of a high-level principle rather than the policies' immediate consequences, this mode of operation is, or at least is supposed to be, *characteristic* of courts. Although Wechsler's terminology has not worn well, he was undoubtedly tapping into the orthodox ideology of the American judiciary when he insisted that to be legitimate, a court's ruling must "rest[] on . . . reasons that in their generality and their neutrality transcend any immediate result that is involved."⁶⁹

A principle that says "courts ought not second-guess Congress as to the outer bounds of its power" surely qualifies as a neutral principle in Wechsler's sense. Indeed, it is a principle Wechsler himself more or less endorsed.⁷⁰ But it is equally a neutral principle to insist, as the Supreme Court did in *United States v. Lopez*⁷¹ and *United States v. Morrison*,⁷² that the strategy of enumerated powers of Article I, Section 8, requires that some regulatory domain be beyond the reach of Congress. That this is and was a matter of principle for the *Raich* dissenters—Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas—is

⁶⁹ Wechsler, *Neutral Principles*, *supra* note 46, at 19.

⁷⁰ *See id.* at 23–24 (questioning whether "there are any neutral principles that might have been employed to mark the limits of the commerce power of the Congress in terms more circumscribed than the virtual abandonment of limits in the principle that has prevailed" in the Court's decisions as of 1959); Herbert Wechsler, *Political Safeguards*, *supra* note 38 (arguing that structure of federal government provides principal constitutional protection for state sovereignty).

⁷¹ 514 U.S. 549 (1995).

⁷² 529 U.S. 598 (2000).

difficult to contest, unless one thinks that each of these conservatives thought it wise on policy grounds to exempt California-grown and consumed medical marijuana from federal regulation.⁷³

III. CHOOSING LEGAL PRINCIPLES BASED ON THE RESULTS THEY ENTAIL

It still might be objected that judges are not really acting in a principled manner unless they are principled in the identification of their principles, rather than only in the application of their principles. In this view, a liberal Justice who votes to uphold a draconian federal drug law because that is the price of ensuring that the Endangered Species Act survives, is still simply acting on an attitude; it's just a sophisticated attitude that accepts the institutional constraints of being on the Supreme Court. If the Justice could get away with upholding just those laws she liked and striking down just those laws she disliked, she would. She only accepts the limits imposed by her principles regarding federalism (or any other doctrine) as the closest she can come to achieving her full preferences in an institutional setting in which judges are supposed to provide reasons for their judgments that are not obviously inconsistent from one case to the next.

The foregoing objection, however, concedes the main issue to those of us who say that law makes a difference. The crucial question is *why* Justices feel that they can't get away with espousing contradictory principles from one case to the next. The policy reversals by long-serving Senators on the question whether it is appropriate to filibuster judicial nominees shows that they scarcely feel bound by their prior statements, once a different party captures the Presidency.⁷⁴ Judges and Justices,

⁷³ As the *Raich* majority noted, under the view proposed by Justice Thomas, even marijuana cultivated and consumed intra-state for *recreational* purposes would be exempt from federal legislation, see *Gonzales v. Raich*, 125 S. Ct. 2195, 2213 n.38 (2005), a result that it can hardly be assumed Justice Thomas favors on policy grounds.

⁷⁴ For example, Republican Senate Majority Leader Bill Frist, who led the charge against the Democrats' filibustering in 2005, voted against cloture during the filibuster of Richard Paez, a Clinton nominee to the Ninth Circuit Court of Appeals. See Dana Milbank, *The Killer Instinct*, WASH. POST, May 19, 2005, at A14. In 1995, some current Democratic Senators, including Barbara Boxer, Joseph Lieberman, Russ Feingold, Edward Kennedy, and John Kerry, supported a proposed rule change more extensive than the one suggested by Republicans in 2005. Not limited to judicial nominees, the 1995 rule change would have effectively ended the filibuster. See 141 Cong. Rec. S430 (1995); Craig

by contrast, usually feel at least some obligation to explain their apparent contradictions, and as a case like *Raich* demonstrates, they sometimes act in ways that strongly suggest that they really do consider themselves bound by the principles they have previously espoused.

The hard-core attitudinalist can explain Justices' willingness to be bound by principles they accept, even if they lead to results they dislike, only at the cost of reducing attitudinalism to a harmless truism: To define "attitudes" to include high-order principles like a commitment to a residuum of state sovereignty or deference to Congress, is to make clear that attitudes are not opposed to law. The move is not unlike certain skeptics' efforts to deny the existence of altruism by asserting that altruists are motivated by the pleasure they derive from helping others. That may be, but this leaves the question of *why* they derive pleasure from helping others, and if the skeptic can say only that preferences are exogenous, then he has offered no argument against the existence of altruism; he has simply clouded the issue. Likewise, if a commitment to act on legal principle is simply another attitude, then attitudinalism poses no threat to accounts of judging that take law seriously.

There remains, however, a related objection. Working within the ideology of law, one might still think that judges and Justices ought to derive their principles in a top-down rather than a bottom-up fashion. In this view, the liberal Justice who accepts the constitutionality of strict federal drug laws as the price of saving the Endangered Species Act has misunderstood his job. That job involves locating principles in text, structure, history, precedent, and other sources of constitutional meaning, and then applying those principles to concrete particulars. It may not be result-oriented in the conventional sense for a Justice to form high-order principles based on projected concrete results, so long as she then follows the high-order principles, but this method of selecting principles for decision nonetheless lacks legitimacy. Principles must come from the conventional sources of constitutional meaning, this objection asserts.⁷⁵

Gilbert, *GOP Says Democrats Have Flip-Flopped on Filibuster; Feingold Voted to Curb it 10 Years Ago; Now He Says it's Essential*, MILWAUKEE J. SENTINEL, Apr. 24, 2005, at A1.

⁷⁵ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 54–55 (1980) (finding neutral-principle approach insufficient, by itself, to serve as guiding theory for discovering and

Were Justices' attitudes towards particular projected results all that went into their formulation of principles, this last objection would have bite. Constitutional text, structure, history, and so forth constrain the legitimate scope of principles that a Justice can adopt. But within the fairly large zone of ambiguity, it is not only legitimate, but essential that Justices take account of the likely results to which competing principles would likely lead.⁷⁶

The point is clearest in debates over constitutional theory: Scholars espousing one interpretive approach or another go to great lengths to show that their preferred methodology yields the canonical answers and rejects the answers now deemed clear mistakes: A good theory must yield *Brown v. Board*,⁷⁷ *Griswold v. Connecticut*⁷⁸ (though not necessarily *Roe v. Wade*⁷⁹), and *Baker v. Carr*;⁸⁰ it must disapprove *Dred Scott v. Sandford*,⁸¹ *Plessy v. Ferguson*,⁸² and *Lochner v. New York*.⁸³

enforcing fundamental constitutional values) [hereinafter ELY, DEMOCRACY AND DISTRUST]; John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 949 (1973) ("A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it.").

⁷⁶ In describing judicial approaches toward federalism cases, Judge Newman has articulated this very concept. Judge Newman explained:

[A] judge functioning in a federal system is inevitably influenced by values associated with his or her view of federalism. . . . I do not mean that each judge is free to construct and apply a wholly personal view of federalism. The federalism slate is no more pristine than any other on which the judge writes. The origin of the states, the formation of the Union, the adoption of the Constitution, the Civil War, the Reconstruction Amendments, the realities of national power in post-New Deal America – in short, all of our history and all of our practice limit the range within which a judge is entitled to have views about federalism. But some range exists. . . . Federalism, in its many applications, presents choices Judges considering [diverse] issues will be influenced to some extent by the values they associate with federalism.

See Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CALIF. L. REV. 200, 210–11 (1984).

⁷⁷ 347 U.S. 483 (1954).

⁷⁸ 381 U.S. 479 (1965).

⁷⁹ 410 U.S. 113 (1973).

⁸⁰ 369 U.S. 186 (1962).

⁸¹ 60 U.S. (19 How.) 393 (1857).

⁸² 163 U.S. 537 (1896).

⁸³ 198 U.S. 45 (1905). For a similar conception of the "constitutional catechism" that "a Supreme Court nominee must recite . . . if he or she is to be confirmed," see Professor Balkin's blog at Balkinization, <http://balkin.blogspot.com/2006/01/constitutional-catechism.html> (Jan. 11, 2006, 18:11). Professor Balkin observes that

The nominee must state that he or she (1) believes that there is a right to privacy, (2) that *Griswold* correctly protected this right of privacy at least as to the right of married persons to purchase and use contraceptives; (3) that *Eisenstadt v. Baird*, 405 U.S. 438 (1972)—which extends *Griswold* to single persons—is correctly decided

Furthermore, we need not ascend to the level of grand constitutional theory to see that any relatively abstract constitutional principle must be constructed in substantial part to match the outcomes deemed essential by the legal community at large. Here is how Justice Kennedy, speaking for himself and Justice O'Connor, put that point in his *Lopez* concurrence: "[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point."⁸⁴

But does this sort of assurance really answer the objection in its most general form? Recall that the bottom-up approach to principle formation aims to generate principles that in turn yield concrete results that the particular Justice adopting the principles favors on grounds of policy, values, or attitudes. Those results may be consistent with the legal status quo at any given moment, but they need not be. Suppose the Justice thinks the Court's extant federalism jurisprudence (or some other body of law) yields highly undesirable results. Such a Justice could well favor principles that produce results inconsistent with the constitutional canon at any given time. If so, she would be acting according to legal principles, but we could not defend her method of principle selection on the ground that it is highly constrained by the consensus views of the legal community.

This form of the objection, I acknowledge, has bite in theory. A Justice committed to overturning whole domains of constitutional law simply because he disfavors the results that the prevailing legal principles tend to produce, could not be said to be picking legal principles in a manner that is constrained by law.

But this is a theoretical worry only. The confirmation process we now have is very poorly suited for discerning potential Justices' views about genuinely controversial issues that have been or are likely soon to come before the Court. What it is well suited to discover—indeed, perhaps the only thing it is well suited to discover—is whether a nominee accepts as settled the principles around which a strong consensus exists. We hear

as to its result; (4) that *Brown v. Board of Education* was correctly decided, (5) that *Plessy v. Ferguson* was incorrectly decided, and (6) that the one person one vote principle in *Reynolds v. Sims*, [377 U.S. 533 (1964)], is correct.

Id.

⁸⁴ *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring).

nominees uniformly praising or accepting as settled those decisions widely regarded as canonical, while invoking anti-canonical cases as illustrations of the proposition that sometimes the Court must overrule its own precedents. Anyone who makes it through this process without perjuring himself or herself is extremely unlikely to start dismantling the constitutional canon.⁸⁵

Perhaps a different way to make that last point is to acknowledge that except in periods of unusually sudden legal change, the unseen areas of agreement among the Justices dwarf the highly visible areas of disagreement.⁸⁶ If so, it may not matter very much how a Justice chooses the legal meta-principles that will guide him or her in cases in which a variety of plausible answers can be given. The Hartian positivist would say that decisions in such cases are discretionary.⁸⁷ The strong attitudinalist would say they are ideological.⁸⁸ A weaker attitudinalist would say that individual Justices are substantially driven by what would generally be regarded as non-legal factors, including strategic factors that take account of the behavior of their colleagues.⁸⁹ I have argued here that these decisions are also (although not entirely) driven by legal principles, and that these principles can be called "legal" even if derived by a calculus that looks to their long-term impact.

⁸⁵ At least with respect to federalism, Justice Thomas is an arguable exception to this claim, for he has indicated a willingness to roll back federal power by distinguishing, as in the pre-New Deal period, between commerce and manufacture. *See id.* at 586–87. However, Justice Thomas is not an exception to the general proposition I am advancing in this Essay, for Justice Thomas has pretty clearly formed his views of the appropriate line between state and federal authority in a top-down manner. He begins with a view about the structure of Article I and the original understanding, and derives a relatively narrow understanding of the scope of the Commerce Clause from there.

⁸⁶ Consider the voting patterns of the Court from 1994 to 2003. Of the 823 decisions analyzed in one study, the Court split 5-4 only 175 times (21.3%). *See Nine Justices, Ten Years: A Statistical Retrospective*, *supra* note 27, at 520 tbl.4. By contrast, the Court decided 356 of those cases (43.3%) without any dissent. *Id.*

⁸⁷ *See supra* note 32 and accompanying text.

⁸⁸ *See supra* note 61 and accompanying text.

⁸⁹ *See, e.g.,* LEE EPSTEIN AND JACK KNIGHT, *THE CHOICES JUSTICES MAKE* xiii (1998) (“[J]ustices are strategic actors who realize that their ability to achieve their [policy] goals depends on a consideration of the preferences of others, of the choices they expect others to make, and of the institutional context in which they act.”).

CONCLUSION

I would conclude with a few words about what I mean by “long-term” impact. Consider the saga of Justice Felix Frankfurter. As a progressive lawyer and law professor in the first third of the twentieth century, Frankfurter came to see activist judicial review as tending towards politically conservative results. We don’t know for certain how Frankfurter came by his jurisprudential views, but it is not unreasonable to assume that the deference he tended to grant to Congress and state legislatures was rooted in substantial part in an extrapolation from his formative period. Having concluded that activist judicial review would do progressive causes more harm than good, he stuck by that view even during the 1950s and 1960s, when activist judicial review tended to further progressive causes.

From a certain perspective, Frankfurter is a tragic figure: having erected his Maginot Line of judicial restraint, he lacked the flexibility to adjust to the new social reality and ended up not merely fighting the last war, but enlisting in the army of the enemy.⁹⁰ But we may offer at least two defenses of Frankfurter’s rigidity. First, perhaps long-term policy calculations played an insubstantial role in his actual choice of principles. Perhaps he followed Thayer, Holmes and other champions of judicial restraint for top-down reasons having to do with the proper role of courts and elected bodies, apart from the likely outputs of those bodies.

Second, maybe Frankfurter was right. The relatively recent resurgence of criticism of *conservative* judicial activism—especially but not exclusively in cases involving federalism—calls to mind Zhou En-Lai’s answer to a question about the effect of the French Revolution: “Too soon to tell.”⁹¹ Whether judicial restraint or strong judicial protection for state sovereignty or any other jurisprudential principle serves conservative or progressive values in the long run can only be answered in, well, the long

⁹⁰ Perhaps most salient in this regard are Frankfurter’s dissents in *West Virginia Board State Board of Education v. Barnette*, 319 U.S. 624, 646–52 (1943) (Frankfurter, J., dissenting), and *Baker v. Carr*, 369 U.S. 186, 266–70, 280–97 (1962) (Frankfurter, J., dissenting).

⁹¹ See SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* xiii (1989).

run. Justice Frankfurter's critique of judicial review of politics in *Baker v. Carr* was derided by liberals for nearly forty years. Then the Supreme Court decided *Bush v. Gore*,⁹² and Frankfurter didn't look so bad.

The hard question for a Justice who is inclined to select abstract jurisprudential principles based in part on his or her assessment of the likely long-term consequences of those principles, is what counts as an appropriate temporal window. At the very least, principles must be binding from case to case. A judge or Justice who switches his or her principles from one case to the next—one day adopting robust protection for state sovereignty because it protects a state's power to take a measure he approves on policy grounds and another day denying any such protection because he disapproves of the relevant state policy—is not acting according to principle in any meaningful sense.

But it does not follow that the relevant time horizon must be effectively infinite or even the expected tenure of a Justice. It is perfectly appropriate, and in keeping with the common-law conception of judging, for a Justice to adjust his or her legal principles in response to new cases. A New Dealer might at first suppose that the lesson of 1937 was that Courts should defer to elected officials, full stop, only to encounter cases in which the arguments against deference in certain contexts—such as racial discrimination,⁹³ malapportionment,⁹⁴ and freedom of expression⁹⁵—seem compelling. If the Justice then adopts a principle (such as John Ely's principle of representation reinforcement⁹⁶) that explains why deference is inappropriate in these new settings, he does not act in an unprincipled fashion. But even at this level, too-frequent switching of principles belies the claim that the principles are really being followed. More than one or at most two fundamental shifts over the course of a judicial career should be *prima facie* evidence of unprincipled, and thus, non-legal decision making.

There still remains the embarrassment that as an aggregate body the Court can appear unprincipled even when its individual

⁹² 531 U.S. 98 (2000).

⁹³ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁹⁴ *Baker*, 369 U.S. at 186.

⁹⁵ *Barnette*, 319 U.S. at 624.

⁹⁶ See generally ELY, DEMOCRACY AND DISTRUST, *supra* note 75.

members act in individually principled ways. Federalism cases provide a particularly acute example. In 1995, *Lopez* reinvigorated a notion of areas of traditional state sovereignty that, in a somewhat different doctrinal context, had been squarely rejected in 1985 by *Garcia v. San Antonio Metro. Transit Auth.*,⁹⁷ which overruled the 1978 decision in *National League of Cities v. Usery*,⁹⁸ which in turn overruled the 1968 decision *Maryland v. Wirtz*.⁹⁹ By my count, only one of the Justices to have participated in these cases—Justice Blackmun—ever changed his mind about the basic issue;¹⁰⁰ yet because of changes in personnel, the Court as a whole blew in the wind.

And yet through it all, the basic judicial conception of the Constitution's allocation of authority between the state and national governments did not much vary. Even under *National League of Cities* or the view of Chief Justice Rehnquist and Justice O'Connor in *Raich*, the federal government has enormous power. The room for maneuver of the Justices' differing views about federalism (and most other subjects) is constrained by the giant mass of legal doctrine that does not get litigated. Looking forward, further empirical work on the Court (by attitudinalists or others) could profitably focus less on the tip of cases that divide the Justices, and more on what determines the shape of the iceberg of agreement beneath the surface.

⁹⁷ 469 U.S. 528, 531 (1985).

⁹⁸ 426 U.S. 833 (1976).

⁹⁹ 392 U.S. 183 (1968).

¹⁰⁰ Compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985) (Blackmun, J., writing for the majority) (overruling *National League of Cities*), with *National League of Cities v. Usery*, 426 U.S. 833 (1976) (Blackmun, J., joining in the majority opinion).