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Robert J. Delahunty

University of St. Thomas School of Law, rjdelahunty@stthomas.edu

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FEDERALISM AND POLARIZATION

ROBERT J. DELAHUNTY*

Perceptive observers of the American political scene have warned in recent years of the growing danger of political polarization.¹ Our political discourse has increasingly been dominated by questions that have proven to be resistant to accommodation and compromise: our political parties are increasingly captive to intransigent, “single issue” advocacy groups and only too willing to exploit divisive “wedge” issues; our elections almost equally divided between “Red” and “Blue” state voters. In the language of the Framers, “passions” rather than “interests” have come to play a leading role in our national political life.² This development is rightly perceived as menacing. It embitters our politics. It skews legislative and judicial outcomes towards unpopular extremes. It distracts attention from the great and pressing issues of poverty, inequality, and war. It undermines confidence in our institutions and leaders – as witness the impeachment of President Clinton or the Senate confirmation hearings on Justice Thomas. It can spill over into murderous violence. *Kulturkampf*³ or “Culture War” is a radical distemper in any society – all the more so in one as internally

* Associate Professor of Law, University of St. Thomas School of Law. I thank Teresa S. Collett and John O. McGinnis for their extremely helpful comments.

1. See, e.g., James Q. Wilson, *Divided We Stand: Can a polarized nation win a protracted war?*, WSJ.COM OPINION JOURNAL, Feb. 15, 2006, <http://www.opinionjournal.com/federation/feature/?id=110007966>, see also Geoffrey C. Layman, Thomas M. Carsey & Juliana Menasce Horowitz, *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 ANN. REV. POL. SCI. 83, 94 (2006) (finding that while “the extent of [political] polarization in American society is often greatly exaggerated and that popular polarization does not necessarily underlie political polarization,” there is also evidence of sharp polarization between subgroups (such a religious traditionalists and modernists), that residents of states that George W. Bush carried in 2004 by 6 percentage points or more differ strongly religiously, culturally and ideologically from residents of states that John Kerry carried by the same percentages in that year, and that rank-and file party members, not merely party élites, may be trending toward ideological poles). For doubts about the reality or fearsomeness of polarization, see, e.g., Morris Fiorina, *What Culture Wars?*, WALL STREET JOURNAL, July 14, 2004, also available at <http://www.hoover.org/publications/digest/3010006.html>; PIETRO S. NIVOLA, BROOKINGS INSTITUTION, THINKING ABOUT POLITICAL POLARIZATION, BROOKINGS INSTITUTION POLICY BRIEF # 139 (2005), <http://www.brookings.edu/printme.wbs?page=/comm/policybriefs/pb139.htm>.

2. See ALBERT O. HIRSCHMAN, *THE PASSIONS AND THE INTERESTS* (Princeton Univ. Press 1997).

3. See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

diversified, and therefore as fragile, as ours.

Might it be, however, that the makings of at least a partial solution to the problem of polarization lie already in our hands? Might that solution – as some have suggested – be federalism?⁴ Not to put too fine a point on it, might the ferocity of the national debate over abortion be significantly lessened if the Supreme Court overruled *Roe v. Wade*⁵ and returned the question of abortion to the states?⁶ This essay explores those questions and finds that without even *more* far-reaching judicial transformations than a decision to overrule *Roe*, the problem of polarization will remain with us. Indeed, if *Roe* were overruled but the Supreme Court's current constitutional jurisprudence otherwise left intact, the problem of polarization might well be *intensified*, as factional groups contended to capture Congress and work their will on the states through national legislation.

INTRODUCTION

Modern political thought has few truly original ideas. American federalism was one of them.⁷ Alexander Hamilton (quoting the Baron de

4. See David Gelernter, *Back to Federalism: The proper remedy for polarization*, THE WEEKLY STANDARD, April 10, 2006, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/062fkzaa.asp>; see also Jeffrey Rosen, *The Day After Roe*, THE ATLANTIC MONTHLY, June 2006, available at <http://www.theatlantic.com/doc/prem/200606/roe>; but see Richard Samuelson, *Can Federalism Solve America's Culture War?*, REALCLEAR POLITICS, April 26, 2006, http://www.realclearpolitics.com/articles/2006/04/states_rights_and_wrongs.html.

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

6. Beyond question, the Supreme Court's abortion decisions in *Roe* and later cases inflamed, and have continue to inflame, a considerable part of American public opinion. See Clarke D. Forsythe & Stephen B. Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States*, 10 TEX. REV. L. & POL. 85, 92–3, 162–67, 169 (2005). As the pro-abortion Center for Reproductive Rights has said, "There is perhaps no political issue more volatile in the United States than abortion. . . . Since it was decided in 1973, *Roe* has been under constant attack. Since 1995 alone, state legislatures have enacted 380 measures restricting abortion, and in November 2003, Congress passed the first-ever federal ban on abortion procedures." ERICA SMOCK, ET AL., CENTER FOR REPRODUCTIVE RIGHTS, WHAT IF ROE FELL? THE STATE-BY-STATE CONSEQUENCES OF OVERTURNING ROE V. WADE 5 (Sept. 2004).

7. Late in his life, James Madison remarked on the novelty of the American federal system. In an 1830 letter to Nicholas Trist, Madison wrote of the Constitution's "peculiar and unprecedented modifications of Power." It was an error, he said, to view the constitutional system as creating either "a simple Govt." or "a mere League of Govts." Rather, "[i]t is neither the one nor the other; but essentially different from both. It must consequently be its own interpreter. No other Government can furnish a key to its true character. Other Governments present an individual & indivisible sovereignty. The Constitution of the U. S. divides the sovereignty; the portions surrendered by the States, composing the Federal sovereignty over specified subjects; the portions retained forming the sovereignty of each over the residuary subjects within its sphere." JAMES MADISON TO NICHOLAS P. TRIST (Feb. 15, 1830), in 1 THE FOUNDERS' CONSTITUTION 239 (Philip B. Kurland & Ralph Lerner eds., 1987).

That said, constitutional historians have long noted that the idea of American federalism is indebted to the organization and practices of the decentralized British Empire before 1764. See

Montesquieu) argued in *The Federalist* No. 9 that the American form of federalism was designed to provide us with “the internal happiness” that was characteristic of “small republics,” while ensuring us, in our relations with the outside world, “all the advantages of large monarchies.”⁸ The “internal happiness” of “small republics” is largely owing to their (relative) homogeneity. As the size and population of a republic expand, however, so too will the likely diversity of its people’s religions, morals, cultures, and values. And with such diversity comes the possibility of intractable conflict.⁹ All of us are aware that the citizens of Alabama and Massachusetts, Oklahoma and Hawaii, are likely to have different opinions about same-sex marriage or the display of the Ten Commandments in public places. The Constitution, as Justice Holmes said in his defense of federalism in *Lochner v. New York*, “is made for people of fundamentally differing views.”¹⁰ Averting sharply polarizing conflicts between people of fundamentally different views – what Robert Cover called “Manichean politics” – was among the primary objectives of the Framers of our Constitution.¹¹ Rather than trying to annul or suppress such deeply felt differences, perhaps we should be striving to permit and accommodate – but also localize and contain – them. Federalism should enable us to do that.¹²

Andrew C. McLaughlin, *The Background of American Federalism*, 12 AM. POL. SCI. REV. 215, 217–19 (1918).

8. The Founders succeeded magnificently in this aim. “[T]he founders of the American Federal System for the first time in history ranged the power of a potentially great state on the side of institutions which had hitherto been confined to small states. Even the republicanism of Rome had stopped at the Eternal City’s walls.” Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 22 (1950). But Corwin, alas, appeared to think that he was writing an elegy for the Founders’ system.

9. This observation formed a central part of the Anti-Federalists’ objection to the consolidation of the states – which they regarded as small republics – into a single, federal nation of continental scale. Thus, “Brutus,” one of the most perceptive Anti-Federalist writers, argued that “[i]n a republic, the manners, sentiments, and interests of the people should be similar. If this be not the case, there will be a constant clashing of opinions; and the representatives of one part will be continually striving, against those of the other. This will retard the operations of government, and prevent such conclusions as will promote the public good. If we apply this remark to the condition of the United States, we shall be convinced that it forbids that we should be one government.” “Brutus,” No. 1 (Oct. 18, 1787), *reprinted in THE FOUNDERS’ CONSTITUTION supra* note 7, at 124.

10. *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

11. See ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT*, 38–39, 356 (Harvard Univ. Press, 1992).

12. I follow here the definition of federalism in WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 11 (Little, Brown & Co., 1964): “A constitution is federal if (1) two levels of government rule the same land and people, (2) each level has at least one area of action in which it is autonomous, and (3) there is some guarantee (even though merely a statement in the constitution) of the autonomy of each government in its own sphere.” Riker also usefully distinguishes between “centralized federalism” and “peripheralized federalism” as ideal types, defined by reference to the extent of federation rulers’ freedom to take decisions without obtaining the approval of the federation’s members. See *id.* at 5–6.

The presence or absence of federalism in other internally divided countries suggests that federalism can make an important contribution to national unity and cohesiveness. Over the centuries, Switzerland has successfully overcome the tendencies of its French, German and Italian elements to fall apart, probably because its decentralized, cantonal system of government accommodates local and linguistic differences so well.¹³ More recently, Canada met the threat of secession by Québec by devolving more autonomy on that disaffected province and its French-speaking inhabitants.¹⁴ By contrast, countries that are held together chiefly by the force and propaganda of strongly centralizing régimes or dominant ethnic or sectarian groups (even if they are nominally “federal” systems) tend to divide up along their internal fault lines once that centralizing power is removed. Thus, since the United States dislodged Saddam Hussein’s Ba’athist tyranny from power in Iraq, that country has threatened to disintegrate into its Sunni, Shi’ite and Kurdish components.¹⁵ Likewise, once Marshal Tito died, Yugoslavia began to split up into its Serb, Croatian, Bosnian Muslim, and other elements.¹⁶ Russian ethnic minorities under the Czars, for the most part, had little nationalist or separatist consciousness; Soviet promotion of Great Russian nationalism led to secession and dissolution along ethnic lines once Communist power fell.¹⁷ Even

13. See Thomas W. Merrill, *A New Age of Federalism?*, 1 GREEN BAG 2d 153, 158 (1998). For an account of the origins of Swiss federalism and the alterations made in it by the Swiss Constitution of 2000, see Thomas Fleiner, *Recent Developments in Swiss Federalism*, 32 PUBLIUS: THE JOURNAL OF FEDERALISM, Spring 2002, at 97, 98–104.

14. See Reference Re Secession of Québec, [1998] 2 S.C.R. 217. On Canadian federalism, see generally DANIEL J. ELAZAR, JERUSALEM CENTER FOR PUBLIC AFFAIRS, *HOW THE PRISMATIC FORM OF CANADIAN FEDERALISM BOTH UNITES AND DIVIDES CANADA* (1998), <http://jcpa.org/dje/articles2/canfed.htm> (last visited Mar. 23, 2007). For an account of the causes of the secessionist movement in Québec, see ERIC J. HOBBSAWM, *NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY* 171–73 (Cambridge Univ. Press 2d ed., 1992).

15. See F.S. Naiden, *Lines in the Sand*, 31 WILSON Q. 52 (2007).

16. Although Yugoslavia formally had a federalist “structure,” it lacked federalist “processes,” and its federalist structure was initially designed to suppress rather than accommodate ethnic differences. Hence, some analysts believe, Yugoslavia’s federalist structures contributed to ethnic mobilization and national dissolution once decentralization began. See Robert H. Dorff, *Federalism in Eastern Europe: Part of the Solution or Part of the Problem?*, 24 PUBLIUS: THE JOURNAL OF FEDERALISM, Spring 1994, at 99, 104–05. Furthermore, Josef Tito played a unique role in maintaining Yugoslav national identity until his death in 1980: during his lifetime, his personality and political power enabled him to enforce a national perspective on the individual republics in the Yugoslav federation. *Id.* at 107; see also Vesna Pestic, United States Institute of Peace, *Serbian National and the Origins of the Yugoslav Crisis* 10–13 (1996), available at <http://www.usip.org/pubs/peaceworks/pwks8.html>.

17. See Conor Cruise O’Brien, *The Repeal of Enlightenment: Religion, nationalism, and civil society*, 57 TRANSITION 1992, at 9, 15. “The essence of Stalin’s nationalities policy was an appearance of great decentralization and local autonomy, combined with the reality of tight control from the center. Theoretically, the constituent republics enjoyed from the beginning even the right of secession. In practice, the machine was so constructed as to render impossible the exercise of that right. [But] [t]hroughout the duration of Stalin’s empire, nationalism remained a latent force, in various disguises.” *Id.* See also HÉLÈNE CARRÈRE D’ENCAUSSE, *THE GREAT*

democratic countries that combine highly centralizing traditions with sharp internal differences in class, religion or ideology are gravely weakened by unending factional conflict for mastery of the State. The Third French Republic, with its insurmountable differences between Catholics and secularists, working class and bourgeoisie, stands as a classic example: its sudden and dramatic collapse before Hitler's invading armies in June 1940 arguably owed as much to exhaustion from the unremitting factional strife within French society as to the incompetence of the French High Command or the unexpectedness of the German *blitzkrieg*.¹⁸ Federalism often seems to *sustain* loyalty to the nation-state rather than to weaken it: by defusing potential internal conflicts along creedal, ethnic or linguistic lines, it lends the nation-state greater resilience, tenacity and strength.¹⁹

In order to explain the reconciling and integrative possibilities of American federalism, we must begin with an account of what, exactly, our federalism was originally intended to be, why it has proven to be resilient in the past, and how it could help us now to resolve the problem of polarization. Such an account is offered in Part I below. Part II discusses three deeply entrenched obstacles in governmental practice and Supreme Court jurisprudence to the recovery of a more robust form of federalism. Part III considers whether those obstacles can be surmounted.

I.

The United States has been a federal union for longer than any other nation state (Switzerland being the arguable exception), and it has practiced federalism successfully on a continent-wide scale for well over two

CHALLENGE: NATIONALITIES AND THE BOLSHEVIK STATE 1917–1930 4–5 (Nancy Festinger trans., Holmes & Meier 1991) (Russian centralizing policies in aftermath of assassination of Czar Alexander II in 1881 stimulated rise of non-Russian nationalisms in Empire).

18. See WILLIAM L. SHIRER, *THE COLLAPSE OF THE THIRD REPUBLIC: AN INQUIRY INTO THE FALL OF FRANCE IN 1940* (Simon & Schuster 1970) (1969); MARC BLOCH, *STRANGE DEFEAT: A STATEMENT OF EVIDENCE WRITTEN IN 1940* 126–76 (Gerard Hopkins trans., Norton 1999) (1949); Fritz Neumann, *About the Collapse of the Third French Republic*, 27 *MODERN LANGUAGE J.* 283 (1943). On France's rejection of decentralization and pluralism and the social and political conflicts that ensued, see PIERRE BIRNBAUM, *THE IDEA OF FRANCE* 100–43 (M.B. DeBevoise trans., Librairie Arthème Fayard 1998).

19. Federalism has also served to *reintegrate* nations torn apart by war – for example, as Daniel Elazar argued, even as American federalism “provided the framework for the disruption of the Union [in the Civil War], it also made possible the reunification of the nation as a stronger and ‘more perfect’ political order... [T]he existence of federalism prevented the victorious North from confronting the defeated South with an ‘either-or’ proposition, namely, demanding that the Southerners accept reunification on the North's terms alone or forever be denied their rights as Americans.” Daniel J. Elazar, *Civil War and the Preservation of American Federalism*, 1 *PUBLIUS: THE JOURNAL OF FEDERALISM* 39, 55 (1971).

None of this, of course, is to say that federalism is always a success story. In some recent instances, federalism has not served to quiet internal differences. See Samuel Krislov, *American Federalism as American Exceptionalism*, 31 *PUBLIUS: THE JOURNAL OF FEDERALISM*, Winter 2001, at 9, 16.

centuries. Yet, as Supreme Court cases from *M'Culloch v. Maryland*²⁰ to *Gonzales v. Raich*²¹ and *Gonzales v. Oregon*²² demonstrate, the precise allocation of constitutional authority between state and federal governments has never been definitively settled, and indeed may never be. Moreover, despite two centuries of experience, the potential of American federalism remains poorly understood.²³ We need, then, some account of how our federalism was intended to work and what deviations from that original plan have since arisen.

Borrowing the terms of the British political philosopher Michael Oakeshott,²⁴ we can say that the Framers conceived of the national or federal government as comprising a “civil association” and the states as comprising “enterprise associations.” As a civil association, the national government was primarily designed to maintain civil order and to provide public goods such as national defense. Other than providing certain public goods to the populace as a whole, it did not, as such, have any moral or ideological purposes at all. The Constitution creating it addressed, almost exclusively, either the powers that had to be vested in the national government in order to enable it to secure these limited ends, or else the procedures by which the leadership of the national government is to be chosen or in accordance with which that leadership is to act. It was primarily a Constitution of powers, structures and procedures, not of values. Accordingly, the original Constitution did not assign to the national government the responsibility for pursuing (in John Rawls’ term²⁵) any substantive conception of the good; indeed, by implication, it denied it any such responsibility.²⁶ In the eighteenth century context, the explicit

20. *M'Culloch v. Maryland*, 17 U.S. 316 (1819).

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

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

23. See Merrill, *supra* note 13, at 155.

24. MICHAEL OAKESHOTT, *MORALITY AND POLITICS IN MODERN EUROPE* (Shirley Robin Letwin, ed., Yale Univ. Press 1993).

25. JOHN RAWLS, *A THEORY OF JUSTICE* (Harvard Univ. Press 1971).

26. Consistent with this understanding of federalism, Daniel Elazar identified two traditions that converged in the making of our Constitution: an individualist tradition leading to the creation of a large commercial republic, and a communitarian tradition that fostered the creation of a commonwealth. Elazar observes that “[a]ll told, the federal Constitution is oriented toward creating and protecting a national marketplace, both political and economic, and is oriented toward protecting that marketplace and access to it on the part of all citizens as individuals . . . To participate in the marketplace, one only need subscribe to the rules of the game which, in the federal Constitution, are political rather than moral.” Daniel J. Elazar, “*To Secure the Blessings of Liberty*”: *Liberty and American Federal Democracy*, 20 *PUBLIUS: THE JOURNAL OF FEDERALISM*, Spring 1990, at 1, 7. But, Elazar went on to say, “the federal Constitution and the government it creates are both incomplete and need the states to be complete . . . Certainly in the revolutionary period most of the state constitutions were designed to foster commonwealths rather than marketplaces, that is to say, polities that were both republican and committed to a shared moral vision. It is not unfair to say that the federal Constitution could emphasize individualism and the marketplace precisely because the founders could count upon the state constitutions to

constitutional prohibition on a national establishment of religion – coupled with the implied, and intended, protection for state religious establishments²⁷ – would have conveyed exactly that message.²⁸

To be sure, the federal government has asserted over time the authority to enact substantive value-choices on the basis of an alleged “national police power.”²⁹ But as we shall see, this kind of federal legislation has often been found problematic, and its defense has usually rested on aggressive interpretations of the Commerce Clause. Even as late as the 1960s, it seemed questionable whether Congress had the power under article 5 of the Fourteenth Amendment – a provision that surely authorized deep federal intervention in what had previously been matters reserved to the states³⁰ – to enact legislation designed to enforce substantive conceptions of justice. Indeed, the debate in the 1960s Supreme Court over the constitutionality of civil rights legislation was framed chiefly in terms of the scope of Congress’ Commerce Clause power, not on its power to enforce equal protection norms.³¹

emphasize community and commonwealth.” *Id.* Elazar concludes, however, by pointing out that particularly since the end of the Second World War, the Supreme Court “has consistently interpreted the federal Constitution in such a way as to extend the marketplace into the commonwealths.” *Id.* at 12.

27. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring).

28. This is not to say, however, that the Framers sought a radical divorce between the intended workings of the federal government and the promotion of substantive good. Rather, they intended that the federal system promote the good *indirectly*. Thus, given the view of many of them as to the relation between “virtue” and “commerce,” one would expect them to have hoped that merely by creating a successful commercial republic, they would also be encouraging personal qualities such as toleration, good manners, honesty, thrift and enterprise. The disconnection between “commerce” – understood now as welfare-maximization – and “virtue” is a contemporary one. See ALBERT O. HIRSCHMAN, *RIVAL VIEWS OF MARKET SOCIETY* (Viking 1986).

Likewise, the various constitutional provisions that upheld republicanism, banned monarchism, and prevented or hindered the emergence of orders of nobility in either the temporal or spiritual realm, would have contributed to the inculcation of virtues of independence, self-reliance, and lack of ostentation. Benjamin Rush put the proposition boldly in his Letter of July 21, 1789 to John Adams: “Republican forms of government are more calculated to promote Christianity than monarchies. The precepts of the Gospel and the maxims of republics in many instances agree with each other.” BENJAMIN RUSH TO JOHN ADAMS (July 21, 1789), in 1 *THE FOUNDERS’ CONSTITUTION*, *supra* note 7, at 138.

29. See, e.g., *Champion v. Ames*, 188 U.S. 321 (1903); *Hoke v. United States*, 227 U.S. 308 (1913); *Greater New Orleans Broadcasting Ass’n, Inc. v. U.S.*, 527 U.S. 173 (1999).

30. The Court’s original understanding in the *Slaughter-House Cases*, which denied that the Fourteenth Amendment “radically changes the whole theory of the relations of the State and Federal governments to each other,” was badly mistaken. 83 U.S. 36, 78 (1872). Although even the current Supreme Court occasionally adopts the same dismissive attitude, see *United States v. Morrison*, 529 U.S. 598, 620 (2000), there can be little doubt that the Fourteenth Amendment radically restructured federal-state relations in this nation. See, e.g., Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 *LAW & CONTEMP. PROBS.* 175 (2004).

31. See, e.g., *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

By contrast, it has been natural and common throughout American history for the states to legislate with a view of upholding and enforcing substantive conceptions of the good (albeit ones that may vary widely across the nation). The areas that are generally acknowledged as “traditionally” subject to state police power regulation – criminal law, family law, divorce and marital relations, education³²—are also areas suffused with specifically moral content. Madison emphasized the scope of the states’ reserved powers in *The Federalist* No. 45 when he said that they “extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.”³³ Likewise, in *The Federalist* No. 14, Madison insisted that “the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity.” Indeed, Madison’s celebrated theory, in *The Federalist* No. 10, of the risks of “capture” of state legislatures by tyrannical “factions,” and of the consequent need (as he argued) for a nation-wide government to dissipate and localize those risks, depends on the assumption that the states may and will legislate particularistic – and therefore polarizing – conceptions of the good.³⁴ American federalism has traditionally been seen

32. See Merrill, *supra* note 13, at 157 (finding that federal systems typically vest basic control over public education in regional units, as well as “[f]amily law-questions of marriage, divorce, child custody and the like,” and the authorities to support religion (if that is constitutionally permitted) and to designate an official language).

33. See also ST. GEORGE TUCKER, 1 BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 185–87 (Birch & Small 1803) (The powers granted by the Constitution exclusively to the federal government “have no relation to the domestic economy of the state. The right of property, with all its train of incidents, except in the case of authors, and inventors, seems to have been left exclusively to the state regulations; and the rights of persons appear to be no further subject to the control of the federal government, than may be necessary to support the dignity and faith of the nation in its federal or foreign engagements, and obligations; or its existence and unity as the depositary and administrator of the political councils and measures of the united republics.”).

It is important to recall here that Blackstone’s 18th century understanding of “property” represented a far broader conception than the current understanding that is located in commercial value; rather, 18th century property rights encompassed the full range of how an individual reflected his or her identity – indeed, as Jefferson, and his acolyte Madison, described it – the pursuit of happiness. See James Madison, *Property*, National Gazette, March 29, 1792, reprinted in JAMES MADISON: WRITINGS 515 (Jack Rakove ed., Penguin 1999)(describing a person’s property to include “free use of his faculties and free choice of the objects to which to employ them”).

34. As John O. McGinnis has pointed out, the original Constitution left the states as “repositories of enormous and potentially tyrannical powers,” checking them in part by “the free movement of goods and people guaranteed by the federal government.” John O. McGinnis, *The*

as incorporating and endorsing the possibility of such value-laden action at the state – but not the national – level.³⁵

Apart from Madison, other Framers acknowledged that the states retained their sovereignty with respect to local matters. For example, Roger Sherman wrote during the Connecticut campaign to ratify the Constitution that “[t]he powers vested in the federal government are clearly defined, so that each state will retain its sovereignty in what concerns its own internal government.”³⁶ Alexander Hamilton assured the New York ratifiers that the Union would not “new-model the internal police in any State.”³⁷ Similar representations were made to the Ratifying Conventions in Virginia and North Carolina.³⁸

The fact that the Bill of Rights was originally understood to apply only to the *federal* government, and not to the states,³⁹ underscores that many in the Founding generation feared that the national government might become a source of oppression, whereas the states were expected to prove to be reliable guardians of personal liberties.⁴⁰ At the same time, the Tenth Amendment confirmed the breadth of the police powers reserved to the states.⁴¹ From the early nineteenth century to the mid-twentieth century, the

Symbiosis of Constitutionalism and Technology, 25 HARV. J.L. & PUB. POL’Y 3, 5 (2001). See also John O. McGinnis, *Decentralizing Constitutional Provisions Versus Judicial Oligarchy: A Reply to Professor Koppelman*, 20 CONST. COMMENT. 39, 47 (2004) (if state enact policies that sustain a local oligarchy, the state’s non-oligarchic residents are free to leave). The importance of a mobile citizenry for maintaining “horizontal” federalism – *i.e.*, competition among the states – was brought out in Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

35. For a narrower conception of the states’ reserved “police powers,” see Randy Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 475–89 (2004). Professor Barnett’s theory chiefly addresses the scope of the states’ police power *after* the ratification of the Fourteenth Amendment, rather than at the time of the Framing.

36. RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* 70 (Univ. of Oklahoma Press 1987) (quoting Roger Sherman).

37. *Id.* at 68 (quoting Alexander Hamilton).

38. See *id.* at 68–69.

39. See *Barron v. Baltimore*, 32 U.S. 243 (1833).

40. Judge (then Professor) Michael McConnell has argued that James Madison’s celebrated thesis in *The Federalist* No. 10 that individual liberties are better protected at the national rather than state level was only partially successful on its own merits. See Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1500–06 (1987). See also Russell Hittinger, *Liberalism and the American Natural Law Tradition*, 25 WAKE FOREST L. REV. 429, 449 (1990). Alexander Hamilton, and indeed Madison himself, had doubts about the argument of *The Federalist* No. 10. See John Zvesper, *The Madisonian Systems*, 37 WESTERN POL. Q. 236, 242–45, 249, 252 (1984).

41. See William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L. J. 769, 772 (“Pluralism and localized choice, insubordinate to nationalism, in brief, are the residual constitutional rule. The prerogative of federalism from this perspective is at bottom a prerogative of diversity among state regimes of law and of culture, beyond the veto of others whom it may affront and beyond congressional command for uniformity of behavior or of law. . . . The constitutional assurance of federalism in the sense just described was not left to inference. Rather, an express, precautionary bookend was

Supreme Court's cases acknowledged that breadth.⁴² In *Gibbons v. Ogden*, Chief Justice John Marshall spoke of "that immense mass of legislation" that the States had "not surrendered to the general government."⁴³ Justice Joseph Story, a firm nationalist, stated in *Martin v. Hunter's Lessee* that it was "perfectly clear that the sovereign powers vested in State governments . . . remained unaltered and unimpaired, except so far as they were granted to the government of the United States."⁴⁴ The Taney Court was still more emphatic in recognizing the scope of the states' "police power."⁴⁵ Further, the Court continued to recognize the states' police power after the ratification of the Fourteenth Amendment. In *New Orleans Gas Co. v. Louisiana Light Co.*, the first Justice Harlan declared that "there is a power, sometimes called the police power, which has never been surrendered by the States, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety [.]"⁴⁶ And in a 1900 case upholding a local ordinance banning prostitutes from certain parts of the city, the Court said that "the police power was not by the Federal Constitution transferred to the nation, but was reserved to the states, and that upon them rests the duty of so exercising it as to protect the public health and morals."⁴⁷ By contrast, in the 1909 case of *Keller v. United States*, the Court said "there is in the Constitution no grant to Congress of the police power."⁴⁸ Were Congress to invade the states' reserved power (in that case, to regulate and criminalize prostitution), then, the Court said, "we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution."⁴⁹

Even in the mid-twentieth century, the Court could say "[p]ublic safety, public health, morality, peace and quiet, law and order - these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."⁵⁰ The Warren Court upheld a state law that

added to the Bill of Rights to make the matter textually explicit - [the Tenth Amendment].").

42. So too did state legislation. See William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061 (1994).

43. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

44. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 325 (1810).

45. See *New York v. Miln*, 36 U.S. (1 Pet.) 11, 102 (1837); *The License Cases*, 46 U.S. (5 How.) 504 (1847); see also Berger, *supra* note 36, at 67; *contra* Corwin, *supra* note 8, at 15-16.

46. *New Orleans Gas-Light Co. v. La. Light & Heat Producing & Mfg. Co.*, 115 U.S. 650, 661 (1885). See also *Mugler v. Kansas*, 123 U.S. 623, 658 (1887); *United States v. E.C. Knight Co.*, 156 U.S. 1, 31 (1895).

47. *L'Hote v. City of New Orleans*, 177 U.S. 587, 596 (1900).

48. *Keller v. United States*, 213 U.S. 138, 148 (1909).

49. *Id.* at 148-49.

50. *Berman v. Parker*, 348 U.S. 26, 32 (1954).

required many businesses to be closed on Sunday, the Christian Sabbath, despite noting the origin of Sunday closing laws in Christian beliefs, on the grounds that the state had the authority to prescribe a uniform day of rest for its citizens – “a day which all members of the family and community have the opportunity to spend and enjoy together[.]”⁵¹ Even in the school desegregation cases, the Warren Court, while intruding deeply into local autonomy, conceded that “education is perhaps the most important function of state and local governments.”⁵² The Warren Court’s later “substantive due process” cases, even while striking down some state “morals” legislation, also emphasized the scope of the state’s police powers in the area of morality as elsewhere. Thus, in a concurring opinion in *Griswold v. Connecticut*, Justice Arthur Goldberg, joined by Chief Justice Warren and Justice Brennan, wrote that the constitutionality of a state’s statutes prohibiting adultery and fornication was “beyond doubt.”⁵³ Even more recent Supreme Court decisions affirm the power of local government to regulate with a view to its citizens’ good habits and moral well-being.⁵⁴ Only in recent years has the Court questioned the legitimacy of state regulation to uphold the local community’s prevailing morality.⁵⁵ The distinction between a national civil association and state enterprise associations is thus inscribed deeply in the Constitution’s structure.

It is readily intelligible why the Framers should have designed American federalism to work in this manner. According to William Riker’s classic account of the formation of federal unions, the fundamental reason why independent entities unite to form a federation is to join military power

51. *McGowan v. Maryland*, 366 U.S. 420, 450 (1961).

52. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). *See also* *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools[.]”).

53. *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring).

54. *E.g.*, *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986) (upholding territorial law that sought to reduce casino gambling among residents); *but see* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (rejecting state’s claim to be able to ban truthful, non-misleading commercial messages in order to advance its interest in promoting temperance).

55. *See* *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, the lead opinion by Justice Anthony Kennedy quoted Justice Stevens’ dissent in *Bowers v. Hardwick*, 478 U.S. 186 (1986), saying: “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice;” . . . Justice Stevens’ analysis, in our view, should have been controlling in *Bowers* and should control here.” *Id.* at 577–78.

Perhaps the origin of this radically novel theme lies in Justice Blackmun’s opinion for the Court in *Roe v. Wade* which attempted to treat first trimester abortion as a purely medical – rather than moral – question: “Up to those [second and third trimester] points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.” *Roe v. Wade*, 410 U.S. 113, 166 (1973). For telling criticism of the Court’s tendency to transform moral into medical questions, *see* JAMES TUNSTEAD BURTCHELL, *RACHEL WEeping AND OTHER ESSAYS ON ABORTION* 61–68 (Andrews McMeel 1982).

in response to an external foreign threat.⁵⁶ More recently, political economists have argued that federal unions are typically formed in order to take advantage of economies of scale in providing defense against external enemies. Our federal system is but one example of that general rule: “The United States [in 1787] needed to build a better war machine, and the U.S. Constitution was it.”⁵⁷ But foreign threats are not the only reason why federations are formed: a more general explanation is that the union-wide level of a federal state will be expected to “provide public goods and policies for which economies of scale are large and heterogeneity of preferences low.”⁵⁸ Thus, for example, responsibility for defense and foreign policy matters will characteristically be assigned to the government of the union as a whole, because economies of scale are achievable in those areas and there is often little internal disagreement about the basic policy of maintaining military forces and protecting national security.⁵⁹ By contrast, in a federal union, local levels of government will likely be given responsibility for providing “those functions and goods for which economies of scale are less important and heterogeneity of preferences is higher.”⁶⁰ Thus, areas like education or criminal policy – in other words, issues involving such “heterogeneous preferences” as contested conceptions of the good – will tend to fall within the jurisdiction of governmental entities below the union-wide level.⁶¹ In enumerating the purposes of

56. See Riker, *supra* note 12, at 17–20; see also David C. Hendrickson, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING* (Univ. Press of Kansas 2003) (describing the constitutional founding as supra-national effort to solve the security dilemma faced by the newly independent states, much like the rise of the European community after the Second World War). There is of course abundant evidence in *The Federalist* and other Founding Era documents that this was indeed a major, indeed the chief, reason why the thirteen states formed a federal union under the Constitution. See, e.g., THE FEDERALIST NO. 14 (James Madison) (foremost among the purposes of the Union is that of serving as “our bulwark against foreign danger”); THE FEDERALIST NO. 23 (Alexander Hamilton) (“The principal purposes to be answered by union are these – the common defence of the members . . .”).

57. Keith E. Whittington, *Recovering “From the State of Imbecility”*, 84 TEX. L. REV. 1567, 1578 (2006) (reviewing CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* (CAMBRIDGE UNIV. PRESS 2005)).

58. ALBERTO ALESINA & ENRICO SPOLAORE, *THE SIZE OF NATIONS* 140 (MIT Press 2003). See also Merrill, *supra* note 13, at 158 (“Federal systems are adopted when two driving forces among contiguous groups of people are in rough equilibrium. One force is the desire to achieve certain economies of scale through the merger of separate governmental systems into a single larger system. The other force is the desire, on the part of at least some of these groups, to assure that their separate cultural identities will not be submerged into a new synthetic identity dictated by a majority of a larger system.”).

59. Note, however, that as early as the 1790s, foreign policy and levels of defense spending came to be vigorously contested. See DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* (Chapel Hill, Univ. of N. Carolina Press 1980).

60. Alesina & Spolaore, *supra* note 58, at 140.

61. The Anti-Federalists keenly perceived the advantages of maintaining local control over such questions. As “Agrippa” wrote, “[i]t is impossible for one code of laws to suit Georgia and Massachusetts. They must therefore legislate for themselves... The idea of an uncompounded

American federalism, Justice O'Connor was therefore right to emphasize that it "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society."⁶²

The view that American federalism was in large part designed to allocate governmental functions in this way finds support in our constitutional history. Consider two cases in which a major departure from this structure was undertaken – cases in which a national decision on a deeply contested question of substantive goods was forced. These are the cases of slavery and prohibition. In the first case, our federalism proved to be unable to contain sectional conflict. In the other case, our federalism proved its resilience and returned the debate over substantive goods to the states.

The Framers deliberately left the overriding moral question of human slavery for local law. Even apart from the abundant historical evidence for this claim,⁶³ the text of the Constitution – the Fugitive Slave Clause of Art. IV, sec. 3⁶⁴ – makes clear that slavery was to be a question of municipal law

republick, on an average, one thousand miles in length, and eight hundred in breadth, and containing six millions of white inhabitants all reduced to the same standard of morals, or habits, and of laws, is in itself an absurdity." 4 THE COMPLETE ANTI-FEDERALIST 6.15–17 (Herbert J. Storing ed., Univ. of Chicago Press 1981).

62. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). See also McConnell, *supra* note 40, at 1493–94 (1987); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1463 (1995) (praising Justice O'Connor's opinion in *Gregory* as "the Court's most sophisticated theorizing about why federalism is constitutionally desirable"); *id.* at 1467–69 (developing a constitutional rationale for leaving ordinary police powers to states and localities).

63. Pierce Butler, one of South Carolina's delegates to the Philadelphia Convention, made it perfectly clear that his state would demand protection for slavery as a condition for ratifying the Constitution: he bluntly told the assembled delegates that "[t]he security the Southn. States want is that their negroes may not be taken from them which some gentlemen within or without doors, have a very good mind to do." Quoted in PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 17 (M.E. Sharpe 1996); see also *Groves v. Slaughter*, 40 U.S. 449, 508 (1841) (Taney, C.J., concurring); Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2–4 (1987); Frederick Douglass, *The Constitution and Slavery*, THE NORTH STAR, March 16, 1849 (available at <http://teachingamericanhistory.org/library/index.asp?document=1106>); JOHN FERLING, *A LEAP IN THE DARK: THE STRUGGLE TO CREATE THE AMERICAN REPUBLIC 287–90* (Oxford Univ. Press 2003); see generally MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (Cambridge Univ. Press 2006).

64. As Justice Story explained in *Prigg v. Pennsylvania*, 41 U.S. 539, 540 (1842), this Clause was designed "to guard against the doctrines and principles prevailing in the non-slaveholding states, by preventing them from intermeddling with, or obstructing or abolishing, the rights of the owners of slaves," and was "a fundamental article, without the adoption of which the Union could not have been formed." In addition to the Fugitive Slave Clause, the original Constitution implicitly refers to slavery in three other places: Art. I, sec. 2 (counting slaves as three-fifths of persons for purposes of allocating representation in the House of Representatives among the states); Art. I, sec. 9 (prohibiting Congress from interfering with the slave trade before 1808); Art. V (entrenching Art. I, sec. 9 by forbidding its amendment for twenty years). Moreover, the protection of slavery was subtly woven into constitutional provisions that made no apparent reference to it, such as that for an Electoral College. See Paul Finkelman, *The Proslavery Origins*

for the states to decide. But slavery unavoidably became a national question with the acquisition of the Louisiana Territory and the ensuing demands to admit new states from that territory.⁶⁵ Beginning in 1820, Congress was forced with ever-greater frequency and urgency to decide whether to permit slavery in the territories, ban it, or delegate the question to territorial voters. As the slavery question became nationalized, it became no longer amenable to compromise through the toleration of local variation. As a state-by-state solution, which had made the original Union possible, became impossible, the Union began to fray under the strain.⁶⁶ The “irrepressible conflict” over slavery (as William Seward, in a celebrated speech of October 25, 1858, called it⁶⁷) led, of course, to our Civil War.

Likewise with Prohibition. After the horrifying waste and carnage of the First World War – the “War to End All Wars” – the world witnessed the appearance on all sides of radical, indeed utopian, experiments in

of the Electoral College, 23 CARDOZO L. REV. 1145, 1151–56 (2002); but see DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY* 40–7 (Oxford Univ. Press 2001).

65. See MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* 69–74 (Princeton Univ. Press 1998). Justice Story’s 1842 decision in *Prigg v. Pennsylvania* marked a significant step in the direction of nationalizing the question of slavery and served as a catalyst for abolitionist activity; and the annexation of Texas in 1845 triggered further sectional political conflict. *Prigg*, 41 U.S. 539; see Epps, *supra* note 30, at 194–95. By the 1850’s, southerners were producing “a torrent of literature defending slavery. Slavery had long had its vocal proponents, but in the early 1850’s they became increasingly intense, defensive, and prolific.” BRANDON, *supra*, at 29.

66. However, as Clark Forsythe and Stephen Presser have stressed, “[t]o be for federalism is not to be for the evils which federalism may leave untouched. The famous Lincoln-Douglas debates of 1858 illustrate the difference. Douglas was for states’ rights on slavery, holding that the federal power should not override each state’s own determination of whether it was free or slave. He also professed himself indifferent as to the choice each state made. . . . Lincoln had precisely the same view of states’ rights on the issue: The federal power should not in peacetime determine the question for the states. But he was convinced that slavery was a ‘political, social, and moral evil’ and that the right choice of each state would be to end slavery.” Clarke D. Forsythe & Stephen B. Presser, *Restoring Self-Government on Abortion: A Federalism Amendment*, 10 TEX. REV. L. & POL. 301, 326 (2006) [hereinafter *Restoring Self-Government*]. See generally HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES* (rev. ed., Univ. of Chicago Press 1999) (1959).

67. “Hitherto, the two systems have existed in different states, but side by side within the American Union. This has happened because the Union is a confederation of states. But in another aspect the United States constitute only one nation. Increase of population, which is filling the states out to their very borders, together with a new and extended net-work of railroads and other avenues, and an internal commerce which daily becomes more intimate, is rapidly bringing the states into a higher and more perfect social unity or consolidation. Thus, these antagonistic systems are continually coming into closer contact, and collision results. Shall I tell you what this collision means? They who think that it is accidental, unnecessary, the work of interested or fanatical agitators, and therefore ephemeral mistake the case altogether. It is an irrepressible conflict between opposing and enduring forces, and it means that the United States must and will, sooner or later, become either entirely a slaveholding nation, or entirely a free-labor nation.” 4 THE WORKS OF WILLIAM H. SEWARD (George E. Baker, ed., Houghton, Mifflin, & Co. 1889) (available at <http://condor.depaul.edu/~history/webresources/usprimary/WSeward.htm>).

government. Revolutionary régimes that advocated a striking variety of ideologies and programs – whether Communist, Fascist, nationalist or modernist – came to power in Russia, Turkey, Italy, Ireland, and (briefly) Hungary. It was as if, after years of apparently useless suffering and death, the world’s peoples hungered to find or create meaning. In the United States, that global yearning took a form that reflected the confluence of two deeply American streams of thought – Evangelicalism and Progressivism⁶⁸ – and issued in what Herbert Hoover called a “noble experiment”: the 1919 Eighteenth Amendment’s prohibition on the manufacture, sale or transportation of intoxicating liquors.⁶⁹ It is widely believed, of course, that this experiment in enforcing throughout the entire nation a highly contentious conception of the good resulted only in dismal failure.⁷⁰ In any case, the Eighteenth Amendment was repealed only fourteen years later by the Twenty-First (1933). The Prohibition Era’s attempt to impose a uniform, national solution to the problem of alcoholism in place of piecemeal local solutions lacked the durability that comes only from a stable, underlying moral consensus. And that is rarely achievable in a nation as diverse as ours.

To be sure, there have also been cases in which a stable, nation-wide consensus on contested questions of substantive goods has emerged to form the basis of lasting legal or constitutional change. The hard-won Civil Rights Act of 1964 appears to be such an example. But the Civil Rights Act is an exception. Far more typical is the case of abortion, which the Supreme Court federalized in *Roe v. Wade* and maintained in face of unremitting criticism in *Planned Parenthood v. Casey*.⁷¹ Those decisions

68. See Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 15 (2006). Post also notes the distortions that the Eighteenth Amendment worked in our federalism.

69. This is not meant to deny, however, that “the Eighteenth Amendment was long on its way. . . . [It was] the final expression of a fundamental change which had been more than a century in the making.” John Allen Krout, *THE ORIGINS OF PROHIBITION* 297 (Russell & Russell 1925).

70. For a survey of scholarship that has put the Temperance Movement in a better light, see Jed Dannenbaum, *The Crusade Against Drink*, 9 REVIEWS IN AMERICAN HIST. 497 (1981).

71. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). “The general consensus among legal scholars, whatever their view of abortion or of the ultimate result in the case, remains that the *Roe* opinion is intellectually and legally shoddy.” Gregory C. Sisk, *The Willful Judging of Harry Blackmun*, 70 MO. L. REV. 1049, 1054 (2005) (quoting Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 995–96 n.4 (2003)). Scholarly critics of *Roe* have included Alexander Bickel, Archibald Cox, John Hart Ely, Philip Kurland, Richard Epstein, Mary Ann Glendon, Gerald Gunther, Robert Nagel, Michael Perry and Harry Wellington. See *Restoring Self-Government*, *supra* note 66, at 316 & nn.62–71; see also Michael W. McConnell, *How Not to Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181, 1198–99 (1991) [hereinafter *Deliberation About Abortion*]; GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM* 92–97 (Syracuse Univ. Press 1985). Indeed, even Justice Ruth Bader Ginsburg, surely no foe of the right to abortion, has criticized *Roe* for “fashion[ing] a regime blanketing the subject, a set of

were, and of course remain, enormously polarizing and divisive, and the *Casey* plurality's Canute-like decision not to re-examine *Roe* precisely because it was divisive has, of course, done nothing to quiet the national debate.⁷² Even more polarizing was the Court's disastrous decision in the "partial birth" abortion case, *Stenberg v. Carhart*, which reached a conclusion satisfactory only to one extreme of American public opinion.⁷³ There is no reason to believe that the question of same-sex marriage, which the Court's decision in *Lawrence v. Texas* placed squarely on the national political agenda, will prove any more amenable to a consensus-based decision at the national level than the question of abortion has been.

With both these issues, as with Prohibition, the built-in constitutional tendency to decide contested moral questions at the state rather than national level continues to reassert itself. The Constitution is strongly skewed in favor of what Ronald Dworkin called "checkerboard" solutions,⁷⁴ at least in fundamental questions of morality. The conception of the states as "enterprise associations," is part of the Constitution's deep structure.

Rather than trying to cut against the grain of our constitutional federalism, we might consider trying to cut *with* it. In particular, our courts and elected policymakers could be exploiting the possibilities of our federalism to produce messy but viable compromises over divisive moral issues like abortion. Returning the question of abortion to the states would surely yield, in the end, a varied "checkerboard" of different state practices and policies. As with all compromises, no one could be perfectly satisfied with that result. Nonetheless, it seems to provide a better solution to the problem of polarization over the abortion issue than any other approach. Moreover, it is plausible to think, as Jeffrey Rosen does, that once the dust had settled, the states would have enacted fairly similar regimes: "in five or ten or thirty years, early-term abortions would be protected and late-term ones restricted."⁷⁵

Moreover, the chance that *Roe* might be overruled should encourage discussion of how a post-*Roe* legal landscape would look. To be sure, only two of the nine sitting Justices have previously expressed a desire to overrule *Roe*; the opinions of Chief Justice Roberts and Justice Alito on that question are still unknown. Furthermore, even if both of the new Justices

rules that displaced virtually every state law then in force." Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199 (1992). See also JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* 688–89 (Carolina Academic Press 2006) (quoting "devastating comments" on *Roe* from proponents of abortion right).

72. For devastating critiques of this aspect of *Casey*, see Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1029–32 (2003); see also Forsythe & Presser, *supra* note 6, at 105–08.

73. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

74. RONALD DWORKIN, *LAW'S EMPIRE* 178–9 (Belknap Press 1986).

75. Rosen, *supra* note 4, at 2.

proved willing to overrule *Roe*, there would still insufficient votes on the Court to do so, unless one of the five known pro-*Roe* Justices defected, which seems unlikely. Nonetheless, it is not unrealistic to envisage that the Court might abandon *Roe*. This is not simply because *Roe*'s doctrinal and historical foundations are so weak, or because *Casey* has not proven to be the definitive resolution of the controversy that the plurality in that case had hoped it would be. Rather, *Roe* may eventually be overruled for two reasons having more to do with social changes than with legal doctrines.

First, both popular and élite support for the current abortion régime may wither as medical and sociological evidence accumulates that abortion (especially if repeated) is harmful to the health and well-being of women.⁷⁶ Second, *Roe* was decided in a period in which the conventional wisdom had it that over-population was a grave risk.⁷⁷ Today, however, there is growing awareness of a coming "baby bust," caused by falling birthrates: "the average woman in the world bears half as many children as did her counterpart in 1972. No industrialized country still produces enough children to sustain its population over time, or to prevent rapid population aging."⁷⁸ In the United States, these trends seem likely to play out in ways that will depress governmental revenues, augment governmental pension and health care burdens, lower the level of physical fitness in the general population, make military actions increasingly difficult to sustain, and cause increasing friction over immigration. Sooner or later, the realization will sink in that our country's abortion régime is feeding into, and aggravating, those effects. And that realization, in turn, will bring *Roe* into greater disrepute.

II.

Despite offering an opportunity for the adjustment and accommodation of contending moral visions within a fractured nation, the conception of federalism outlined in Part I has a weak hold in current American jurisprudence and law. To a considerable degree, this change is the outcome of the Civil War, the Reconstruction Era constitutional

76. For an extensive review of such evidence, see Forsythe & Presser, *supra* note 6, at 109–23. Like much else in the abortion debate, however, evaluation of the medical evidence is also polarized. For a different view from Forsythe's and Presser's, see Reva Beth Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions* 19–22, 36 (Jan. 19, 2007) (Yale Law School Research Paper No. 119), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=958254&high=%20reva.

77. See MARVIN OLASKY, *ABORTION RITES: A SOCIAL HISTORY OF ABORTION IN AMERICA* 301 (Crossway Books 1992). Indeed, Professor Thomas Grey read *Griswold*, *Roe* and related decisions as "simply family planning cases" that represented the "standard conservative view[]" that "social stability is threatened by excessive population growth." Thomas C. Grey, *Eros, Civilization and the Burger Court*, 43 *LAW & CONTEMP. PROBS.* 83, 88 (1980).

78. Phillip Longman, *The Global Baby Bust*, 83 *FOREIGN AFFAIRS*, May/June 2004, at 66.

amendments that followed that War, and the development of a new kind of American nationhood that the War and post-War amendments permitted. But those changes, however fundamental, do not account fully for the near-obliteration of the original conception of American federalism. Especially since the New Deal (but even before then), Congress, the Supreme Court, and the States themselves have joined together in a radical reworking of the original constitutional design.⁷⁹ At least when judged by “originalist” standards, the constitutionality of this revised scheme – though by now deeply entrenched both in governmental practices and in Supreme Court precedent – is very doubtful. As Justice O’Connor pointed out in *New York v. United States*, “[w]here Congress exceeds its authority relative to the States, . . . the departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials. . . . The Constitution. . . ‘leaves to the several States a residuary and inviolable sovereignty,’ The Federalist No. 39. . . reserved explicitly to the States by the Tenth Amendment.”⁸⁰ Yet these changes are on such a scale and have persisted for so many decades that a return to the original scheme of federalism now seems unlikely.

The chief sources of these deviations from the original understanding of federalism are three: first, a greatly broadened understanding of the scope of Congress’ powers under the Interstate Commerce Clause⁸¹ and an increased willingness on the part of Congress to deploy these expanded powers; second, a sweeping use of Congress’ spending power to provide funds, both conditionally and unconditionally, to the States; and third, expansive judicial review of State laws by the Supreme Court under section one of the Fourteenth Amendment. Let us consider each of these sources in turn, with greatest attention to the first.

1) *The Interstate Commerce Clause*. The story of the Supreme Court’s Commerce Clause jurisprudence, and in particular of the struggle between the Court and the New Deal (especially during Franklin Roosevelt’s first term) has often been told and re-told, and bears only the briefest repetition here.⁸² For the first several years of its existence, the New Deal found itself in conflict with the federal judiciary.⁸³ A key turning-point in the conflict

79. Moreover, there is considerable evidence to indicate that what have usually been taken to be the political safeguards of federalism are ineffective. See Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885 (2006).

80. *New York v. United States*, 505 U.S. 144, 182, 188 (1992).

81. U.S. Const. art. I, § 8, cl. 3.

82. See generally ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 168–95* (Oxford Univ. Press 1987); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS 290–350* (Belknap Press 1998).

83. “For several years the New Deal found the judiciary less than whole-heartedly enthusiastic about approving the emergency measures [that the Roosevelt Administration and Congress had enacted]. By the end of 1936 federal judges had issued about 1,600 injunctions to restrain federal officials from carrying out acts of Congress. . . . The executive and legislative branches of government, attempting to preserve and expand their powers by creating

(at least in some narrations of it) was the Court's decision in *NLRB v. Jones & Laughlin Steel Corp.*,⁸⁴ in which the Court, in an opinion by Chief Justice Hughes, upheld the constitutionality of the National Labor Relations Act of 1935. The basis of the challenge was the Tenth Amendment: "The act is challenged in its entirety as an attempt to regulate all industry, thus invading the reserved powers of the States over their local concerns. It is asserted. . . that the Act is not a true regulation of such commerce or of matters which directly affect it, but on the contrary has the fundamental object of placing under the compulsory supervision of the federal government all industrial labor relations within the nation."⁸⁵ The Court disagreed, finding that Congress could regulate unionizing activity at the defendant's Aliquippa, Pennsylvania plant pursuant to its authority over interstate commerce: "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."⁸⁶ Four Justices dissented, arguing that "whatever effect any cause of [labor] discontent may ultimately have upon commerce is far too indirect to justify congressional regulation. Almost anything – marriage, birth, death – may in some fashion affect commerce."⁸⁷

Jones & Laughlin was followed a few years later by the broader decision in *United States v. Darby*,⁸⁸ in which a Court, now dominated by New Deal appointees, upheld the wage and hour provisions of the Fair Labor Standards Act of 1938. In that opinion, Chief Justice Stone wrote that "[the] power of Congress [over] interstate commerce extends [to] activities intrastate which have a substantial effect on the commerce. . ."⁸⁹ The outer limits of the "substantial effects" test were subsequently explored in another New Deal Court decision, *Wickard v. Filburn*.⁹⁰ There the Court upheld an application of the Agricultural Adjustment Act of 1938 to a dairy farmer who had exceeded his prescribed quota for the production of wheat. The farmer grew a small crop of wheat to feed his livestock, to use for seed, for his household's own consumption, and (in part) for sale. The Court,

unprecedented emergency programs, found themselves up against a slow-moving judiciary, the branch of government most insulated from the political currents stirred by the economic crisis. Much more was at stake, however, than victory in a power struggle among the branches of government. Fundamentally, the fate of capitalism was being decided." Higgs, *supra* note 82, at 180.

84. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

85. *Id.* at 29.

86. *Id.* at 37.

87. *Id.* at 99 (McReynolds, J., dissenting).

88. *United States v. Darby*, 312 U.S. 100 (1941).

89. *Id.* at 120.

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

speaking through Justice Jackson, held that Congress' power to regulate interstate commerce could reach even that activity: "[Even] if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . ."⁹¹ To the argument that the farmer's wheat crop was far too small to have a "substantial effect" on interstate commerce, the Court responded by saying that the farmer's activity should be aggregated with those of other wheat farmers to determine whether the cumulative effect of all such activities on commerce was "substantial": "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."⁹²

There the Court's Commerce Clause jurisprudence stood, with no significant change, for decades,⁹³ until the Court's 1995 decision in *United States v. Lopez*,⁹⁴ followed in 2000 by *United States v. Morrison*.⁹⁵ Both cases were decided by narrow majorities that pitted five "federalist" Justices against four "nationalist" ones. Moreover, the outcome in *Lopez* was even closer than the bare numbers indicate, because Justice Kennedy, joined by Justice O'Connor, concurred with an opinion that signaled the unwillingness of those two Justices to stray far from what had become the Court's established jurisprudence: "the 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."⁹⁶ Nonetheless, *Lopez* was a significant case for at least three reasons. First, although the Court did not disturb (indeed, it affirmed) the *Jones & Laughlin*, *Darby* and *Wickard* decisions, it limited the application of *Wickard*'s "aggregation" technique to "economic" activities – a limitation later confirmed in *Morrison*.⁹⁷ Neither mere gun possession (the activity at issue in *Lopez*) nor gender-motivated violence (at issue in *Morrison*) were to be considered "economic" activities; hence, their effects could not be aggregated to produce the "substantial" impact on interstate commerce necessary to justify federal regulation. Second, Chief Justice Rehnquist's opinion for the

91. *Id.* at 125.

92. *Id.* at 127–28.

93. See Bednar & Eskridge, *supra* note 62, at 1451 ("For sixty years (1936 to 1995), the Court deferred to Congress in every Commerce Clause case it decided.").

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

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

96. 514 U.S. at 574 (Kennedy, J., concurring).

97. "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613.

Court in *Lopez* clearly identified the important stakes at issue: whether there was a “general federal police power” that would enable Congress to regulate “subjects such as family law and . . . education.”⁹⁸ In effect, the “federalist” Justices argued that the entire scheme of federalism would be undone if Congress were held to have a free hand to overrule the States and localities on matters of the most central concern to them. Third, Justice Thomas’ concurrence sounded a new and refreshing note: that the New Deal and later precedents had been wrongly decided, and that the Court should at least consider returning to the original understanding of the Interstate Commerce Clause. Although Justice Thomas wrote for himself alone, his opinion may conceivably prove more influential than the Court’s. He said:

[O]ur case law has drifted far from the original understanding of the Commerce Clause. . . We have said that Congress may regulate not only “Commerce [among] the several states,” but also anything that has a “substantial effect” on such commerce. This test, if taken to its logical extreme, would give Congress a “police power” over all aspects of American life. Unfortunately, we have never come to grips with this implication of our substantial effects formula. . . .

[I] am aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century. . .

[The pre-New Deal] cases all establish a simple point: from the time of the ratification of the Constitution to the mid-1930’s, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the Commerce Clause. Moreover, there was no question that activities wholly separated from business, such as gun possession, were beyond the reach of the commerce power. If anything, the “wrong turn” was the Court’s dramatic departure in the 1930’s from a century and a half of precedent.^[99]

Subsequent scholarly research has confirmed Justice Thomas’ view of the original understanding of the Commerce Clause. “‘Commerce’ means the trade or exchange of goods (including the means of transporting them); ‘among the several States’ means between persons of one state and another; and the term ‘To regulate’ means ‘to make regular’ – that is, to specify how an activity may be transacted – when applied to domestic commerce, but also includes the power to make ‘prohibitory regulations’ when applied to

98. *Lopez*, 514 U.S. at 565.

99. *Id.* at 584, 596, 599 (Thomas, J., concurring).

foreign trade.”¹⁰⁰

Among its many merits, Justice Thomas’ *Lopez* concurrence showed why the lead opinion was likely to be a toothless precedent. So long as the Court retains the “substantial effects” test and permits the effects of “economic” activities to be aggregated, Congress can reach and regulate nearly all the subject matters that, under *Lopez*, fell within the states’ traditional sphere. As Justice Breyer was to ask, tauntingly, in his *Morrison* dissent, “Congress will frequently find it possible to redraft a statute using language that ties the regulation to the interstate movement of some relevant object, thereby regulating local criminal activity or, for that matter, family affairs. . . . How much would be gained, for example, were Congress to reenact the present law in the form of ‘An Act Forbidding Violence Against Women Perpetrated at Public Accommodations or by Those Who Have Moved in, or through the Use of Items that Have Moved in, Interstate Commerce’?”¹⁰¹

The confused state of the Court’s Commerce Clause jurisprudence after *Lopez* was soon to be demonstrated by two cases involving the federal Controlled Substances Act (CSA).¹⁰² The first case, *Gonzales v. Raich*,¹⁰³ involved a challenge to the enforcement of the CSA by two residents of California who cultivated and consumed doctor-recommended marijuana for their medical conditions – a practice permitted under the State’s Compassionate Use Act, which authorized the limited use of marijuana for medical purposes. Following *Lopez* and *Morrison*, the court of appeals held that this purely local activity was beyond the reach of Congress’ regulatory power over interstate commerce. In an opinion written by Justice Stevens, one of the leading “nationalists” on the Court (joined by the erratic and undependable “federalist,” Justice Kennedy), the Court sustained the validity of the federal law even in this application. The Court emphatically reaffirmed the substantial effects test, saying that “[o]ur

100. Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 146 (2001); see also Randy Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003).

101. 529 U.S. at 659 (Breyer, J., dissenting).

102. In the interval between *Lopez* and *Morrison* and the two CSA cases, the Court addressed Congress’ Commerce Clause power in *Reno v. Condon*, 528 U.S. 141 (2000). There Chief Justice Rehnquist, a stalwart member of the Court’s “federalist” bloc, reversed the Fourth Circuit and upheld the federal Driver’s Privacy Protection Act (DPPA) against a state’s Commerce Clause challenge. The DPPA restricted the nonconsensual sale or release by a state of a licensed driver’s personal information. The State of South Carolina challenged the federal statute as a violation of the Tenth Amendment. The Court held, in part, that a driver’s personal, identifying information was in effect an article of commerce, and that a state’s release or sale of that information into the flow of interstate commerce sufficed to justify federal regulation. However, the Court declined to address the Government’s alternative defense of the DPPA – that the state’s intrastate activities in gathering, maintaining and distributing the information had a sufficiently substantial impact on interstate commerce to sustain federal legislation. *Id.* at 148–49.

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

case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."¹⁰⁴ Further, the Court found the case before it to be on all fours with *Wickard*: "Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a fungible commodity for which there is an established, albeit illegal, interstate market. . . . Here, too, Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions."¹⁰⁵

Justice Scalia, a core member of the "federalist" bloc in *Lopez* and *Morrison*, defected from it in *Raich*. Concurring only in the judgment, Justice Scalia focused on the relationship between the substantial effects test and the Necessary and Proper Clause.¹⁰⁶ Noting that "activities that substantially affect interstate commerce are not themselves part of interstate commerce," and thus that "the power to regulate them cannot come from the Commerce Clause alone[.]" Justice Scalia framed the question as whether the CSA's regulation of the intrastate activity at issue in the case was "necessary and proper" to the regulation of *interstate* commerce.¹⁰⁷ In his view, "[t]he regulation of an intrastate activity may be essential to a *comprehensive* regulation of interstate commerce even though the intrastate activity does not itself 'substantially affect' interstate commerce. . . . Congress may regulate even noneconomic local activity if that regulation is a necessary part of a more general regulation of interstate commerce."¹⁰⁸ He found the application of these guiding principles to the case in hand to be "straightforward": "In the CSA, Congress has undertaken to extinguish the interstate market in. . . marijuana. The Commerce Clause unquestionably permits this" because "these prohibitions of intrastate controlled-substance activities" was an "appropriate means of achieving the legitimate end of eradicating [marijuana] from interstate commerce."¹⁰⁹

Writing for three dismayed dissenters, Justice O'Connor found the

104. *Id.* at 17.

105. *Id.* at 18–19.

106. U.S. Const., Art. I, § 8, cl. 18.

107. 545 U.S. at 34 (Scalia, J., concurring in judgment).

108. *Id.* at 37 (emphasis added).

109. *Id.* at 39–40. For criticism from an "original meaning" standpoint of Justice Scalia's *Raich* concurrence, see Randy E. Barnett, *The Presumption of Liberty and the Public Interest: Medical Marijuana and Fundamental Rights*, 22 WASH. U. J.L. & POL'Y 29, 36–7 (2006) ("Justice Scalia essentially took the position that Congress can do pretty much whatever it wants when it comes to the Necessary and Proper Clause. That stance is, in my view, a great distortion of the classic landmark Necessary and Proper Clause case of *McCulloch v. Maryland*. . . . Justice Scalia's stance is even a distortion of the New Deal cases that . . . greatly expanded congressional power."); see also Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CINN. L. REV. 7, 14–15 (2006).

Court's reasoning and result "irreconcilable" with *Lopez* and *Raich*¹¹⁰. After *Raich*, she contended, *Lopez* "stands for nothing more than a drafting guide."¹¹¹ In large part, Justice O'Connor's opinion sought to link the "fundamental structural concerns about dual sovereignty" that arise in a federal system to "our Commerce Clause cases," thus leading her to emphasize that "this case involves the interplay of federal and state regulation in areas of criminal law and social policy, where 'States lay claim by right of history and expertise.'"¹¹² It was therefore a weighty consideration for her that "California . . . has drawn on its reserved powers to distinguish the regulation of medical marijuana."¹¹³ "[T]he Court has endorsed making it a federal crime to grow small amounts of marijuana in one's own home for one's own medicinal use. This overreaching stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently."¹¹⁴ For Justice O'Connor, then, the length of Congress' arm was shortened, not only because the production and use of medical marijuana were local and noneconomic activities, but also because they were protected and legalized by the policy choice of the state in an area traditionally reserved to it.

Justice O'Connor's opinion falters, however, because she was unwilling to assault the citadel of the Court's Commerce Clause jurisprudence; rather than calling for the re-examination of *Wickard*, she devoted considerable effort to the attempt to distinguish it. Not so for Justice Thomas, writing (again, for himself alone) in a separate dissent. As with his concurrence in *Lopez*, Justice Thomas' opinion in *Raich* was by far the most stimulating and incisive of all the opinions that the Court produced.

Justice Thomas restated the claim he had made in *Lopez*, that "the Commerce Clause empowers Congress to regulate the buying and selling of goods and services trafficked across state lines."¹¹⁵ But "commerce," in the original meaning of the Commerce Clause, could not have included "the mere possession of a good or some purely personal activity that did not involve trade or exchange for value."¹¹⁶ Consequently, the Commerce Clause alone did not empower Congress to ban both the interstate and intrastate, commercial or noncommercial, market in marijuana: "[i]n the early days of the Republic, it would have been unthinkable that Congress could prohibit the local cultivation, possession, and consumption of marijuana."¹¹⁷

110. *Raich*, 545 U.S. at 43 (O'Connor, J., dissenting).

111. *Id.* at 46.

112. *Id.* at 48; *see also id.* at 52.

113. *Id.* at 48.

114. *Id.* at 57.

115. *Id.* at 58 (Thomas, J., dissenting).

116. *Id.* at 59.

117. *Id.*

The analysis could not stop there, however, because there remained the question whether, given that Congress could regulate interstate traffic in marijuana, it could also reach the purely intrastate cultivation and use of marijuana by way of the Necessary and Proper Clause. The more interesting part of Justice Thomas' discussion concerned whether such Congressional regulation could be considered "proper": here federalism came to the fore. If Congress could regulate intrastate, noneconomic activity under the combined Commerce and Necessary and Proper Clauses, Justice Thomas reasoned, it would possess "a general 'police power' over the Nation."¹¹⁸ "Even if Congress may regulate purely intrastate activity when essential to exercising some enumerated power. . . Congress may not use its incidental authority to subvert basic principles of federalism and dual sovereignty. . . Here, Congress has encroached on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens. . . Further, the Government's rationale – that it may regulate the production or possession of any commodity for which there is an interstate market – threatens to remove the remaining vestiges of States' traditional police powers. . . This would convert the Necessary and Proper Clause into precisely what Chief Justice Marshall did not envision, a 'pretext. . . for the accomplishment of objects not intrusted to the government.'"¹¹⁹

More ably than the other dissenters, Justice Thomas exposed the deep weaknesses of the majority opinion. He rightly pointed out that "the Framers understood what the majority does not appear to fully appreciate: There is a danger to concentrating too much, as well as too little, power in the Federal Government."¹²⁰ Further, he observed that "today's decision

118. *Id.* at 65.

119. *Id.* at 65–66 (citations omitted). For a careful scholarly analysis of the original meaning of the Necessary and Proper Clause, see Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003). Still more recent scholarship has found persuasive evidence that the Ninth Amendment was originally intended, at least in part, to forestall a broad interpretation of express or implied federal powers, including the Necessary and Proper Clause. See Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1 (2006), and Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331 (2004).

120. 545 U.S. at 69 (Thomas, J., dissenting). Here Justice Thomas is calling attention to the important but neglected "vertical" dimension of federalism, which sees the states as potential competitors with the federal government for the people's favor. See Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 332–33, 338–53 (2003). Vertical federalism has in the past demonstrated both political and economic merits. On the political side, consider, e.g., the resistance of state officials, courts and juries in the Free States during the 1850s to the Supreme Court's increasing nationalization of the slavery question. See Brandon, *supra* note 65, at 101–09. On the economic side, see, e.g., Aaron Wildavsky, *A Double Security: Federalism As Competition*, 10 CATO J. 49, 43,45 (1980) ("Under a unitary regime, states and localities carry out national instructions; the problem is how to improve their obedience... The operational meaning of federalism is found in the degree to which the constituent units disagree about what should be done, who should do it, and how it should be

will add no measure of stability to our Commerce Clause jurisprudence: This Court is willing neither to enforce limits on federal power, nor to declare the Tenth Amendment a dead letter. If stability is possible, it is only by discarding the stand-alone substantial effects test and revisiting our definition of ‘Commerce among the several States.’ Congress may regulate interstate commerce – not things that affect it, even when summed together, unless truly ‘necessary and proper’ to regulating interstate commerce.”¹²¹

The other bookend in the pair of CSA cases is *Gonzales v. Oregon*.¹²² There the Court, in an opinion by Justice Kennedy, held that the CSA did not authorize the Justice Department to prohibit Oregon’s doctors from prescribing prescription drugs to assist their patients in committing suicide – a practice permitted by the Oregon Death With Dignity Act. Although the case turned on the construction of the CSA and thus did not directly involve Congress’ powers under the Commerce and Necessary and Proper Clauses, it was clearly freighted with implications for the constitutional principle of federalism. Pro-federalism commentators observed that constitutional federalism suggested that Oregon’s assisted suicide law should be immune from Congressional regulation, and regarded the Bush Administration’s attempt to trump that state law by reliance on the CSA as “a legally gratuitous departure from the principle that the states are free to manage their own internal affairs unless a valid federal law clearly constrains their discretion.”¹²³ Paradoxically, despite its decision in *Raich* only months before, the Court appeared to see matters much the same way. Indeed, the Court read the CSA in light of the very federalist values to which *Raich* had given short shrift.¹²⁴ A bemused Justice Thomas, again writing for himself in a separate dissent, put his finger exactly on the contradiction between the two decisions:

The majority’s newfound understanding of the CSA 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*. Notwithstanding the States’ traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens, the *Raich* majority concluded that the CSA applied

carried out. In a word, federalism is about competition and conflict. . .” “For the citizen, then, overlap, duplication, and redundancy (synonyms, in this context, for competition) are not wasteful but wonderful. They enhance reliability of supply; if one supplier will not, another will. Competition cuts down information costs; products may be distinguished by prices, exchanged, or given diversity; their mixes may be compared at the margins. Redundancy results in suppliers working hard to guess what citizen consumers want rather than the reverse. Competition is the better mouse trap that has a variety of units competing to beat a path to the citizen’s door.”)

121. 545 U.S. at 71 (Thomas, J., dissenting).

122. *Gonzales v. Oregon*, 546 U.S. 243, 126 S.Ct. 904 (2006).

123. Nelson Lund, *Putting Federalism to Sleep*, THE WEEKLY STANDARD, Oct. 31, 2005, available at http://findarticles.com/p/articles/mi_m0RMQ/is_7_11/ai_n15789676.

124. 546 U.S. at 923.

to the intrastate possession of marijuana for medicinal purposes authorized by California law because Congress could have rationally concluded that such an application was necessary to the regulation of the larger interstate marijuana market. Here, by contrast, the majority's restrictive interpretation of the CSA is based in no small part on the structure and limitations of federalism, which allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons. According to the majority, these background principles of our federal system . . . belie the notion that Congress would use . . . an obscure grant of authority to regulate areas traditionally supervised by the States' police power. . . I agree with limiting the applications of the CSA in a manner consistent with the principles of federalism and our constitutional structure. But that is now water over the dam. The relevance of such considerations was at its zenith in *Raich*. . . Such considerations have little, if any, relevance where, as here, we are merely presented with a question of statutory interpretation.^[125]

If *Raich* seemed to signal that the *Lopez/Morrison* line of Commerce Clause analysis was petering out, *Oregon* seemed to indicate that the Court was not prepared to pronounce the Tenth Amendment quite dead. Justice Thomas' comment in *Raich* that the Court's Commerce Clause/federalism jurisprudence would remain unstable has already proven to be prophetic. But precisely *because* the Court's thinking on those subjects is following such a wobbly trajectory, one may still hope that it will come eventually to a more principled and coherent theory.¹²⁶

But suppose, pessimistically, that the Court chooses to follow the "nationalist" path marked out in *Raich*. What consequences would follow for our hope that the current polarization in the abortion debate might be lessened by a return to federalism? Would the overruling of *Roe* and the referral of the question of abortion to the states diminish the national controversy?

The answer is plainly No. If *Raich* stood even while *Roe* was overruled, then Congress would have the power to close down the interstate market in abortion services and to criminalize the actions of those who engaged in transactions in that illegal market.¹²⁷ Moreover, Congress could

125. *Id.* at 940–41 (Thomas, J., dissenting) (citations and quotation marks deleted).

126. Encouragingly, the appellate courts did not give up on the vision of federalism in *Lopez* and *Morrison* once *Raich* came down. *See, e.g.*, *United States v. Patton*, 451 F.3d 615 (10th Cir. 2006) (McConnell, J.); *United States v. Reynard*, 473 F.3d 1008, 1024 (9th Cir. 2007) (Pregerson, J., dissenting).

127. This is assuming, of course, that if the Court overturned *Roe*, it would not hold that the Due Process Clause of the Fifth Amendment barred Congress from legislating to restrict abortion, any more than the due Process Clause of the Fourteenth Amendment would bar the states from enacting such legislation.

also reach, and criminalize, abortions that involved only *intrastate* activity – e.g. abortions that were performed on or by persons who had crossed state lines for the purpose of an abortion, or who had used drugs or instruments that had entered the flow of interstate commerce. Further, at least on Justice Scalia’s analysis in *Raich*, if Congress sought to regulate abortion services *comprehensively*, then it could likely criminalize the purely intrastate provision of abortion services, even in cases where such activity had only trivial effects on interstate commerce. Indeed, it would seem that even *self-administered* abortions could be made a federal crime. We can glimpse the possible shape of things to come in the federal Partial-Birth Abortion Ban Act of 2003, in which Congress criminalized a physician’s performance “in or affecting interstate or foreign commerce” of a partial-birth abortion that killed a human fetus.¹²⁸ So long as the Court’s current Commerce Clause/federalism jurisprudence remains intact, Congress will seek to enact legislation that, like this statute, seeks to codify a *national* abortion policy. And the passing of *Roe* would only embolden Congress to act more drastically.

These scenarios should give pause both to those who would welcome *Roe*’s overruling and to those who would dread it: they show that the question of abortion would remain a polarizing item on the national legislature’s agenda for as far out as the eye could see. The Court’s current jurisprudence of federalism and the Commerce Clause would postpone indefinitely, or perhaps prevent altogether, the resolution of the problem of polarization that *Roe* created. Rather, it would be an open-ended invitation to unremitting factional struggle to control and use the levers of national legislative power.

2) *Congressional Spending Power*. Currently, the Federal Government provides about 30% of all state revenue.¹²⁹ For many states, Congress is the largest single source of funding. Federal financial assistance to the states may take either a conditional or an unconditional form. Regardless, the sheer size of the federal contribution and the states’ dependence upon it give Congress an extraordinarily powerful lever with which to shape state policies in ways that state voters would otherwise not desire.¹³⁰ Federal

128. The Supreme Court is currently reviewing the constitutionality of this federal law in *Gonzales v. Carhart*, 550 U.S. --, 126 S. Ct. 1314 (2006), rev’d, 127 S. Ct. 1610 (2007). Oral argument was heard on November 8, 2006 and, at the time of writing, the case was still pending.

129. Federal Funds Information for States, *FFIS: Your State’s Eyes and Ears in Washington*, <http://www.ffis.org/> (last visited March 30, 2007).

130. “Vertical” federalism was undoubtedly an important element in the Founders’ original vision. See THE FEDERALIST NO. 46 (Alexander Hamilton), NO. 51 (Alexander Hamilton or James Madison); VINCENT OSTROM, THE POLITICAL THEORY OF A COMPOUND REPUBLIC: DESIGNING THE AMERICAN EXPERIMENT 136–38 (rev. ed. 1987) (1969); Ilya Somin, *Closing the Pandora’s Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L. J. 461, 470 (2002).

subsidization of the states obviously tends to undermine the principle of federalism, limit state-to-state diversity, and make state governments less responsive to local preferences that differ from those of the prevailing national majority. Yet such programs are extremely popular, not least with elected state government officials, who can present them to their voters as “free money.” That consequence inhibits competition between state and federal governments to satisfy voters’ preferences (“vertical federalism”) – competition that was an important element of the Founders’ argument for the Union.¹³¹ It also makes the political process significantly less likely to restore the original design of federalism.

Yet the Supreme Court has adopted what effectively amounts to a “hands off” approach to the constitutionality of federal subsidization of the states, even in cases in which the express object of the federal subsidy is to steer states away from policies that state governments and voters would otherwise prefer, and even when those policies concern matters of core state powers and prerogatives. *South Dakota v. Dole*,¹³² the Court’s leading precedent on conditional federal grants to the states, upheld a federal statute designed to encourage uniformity in state laws setting the legal age for drinking alcoholic beverages. The Court ruled that pursuant to its spending power, Congress could attach conditions to the receipt of federal funds to achieve that purpose indirectly, even if it could not directly mandate a nation-wide minimum drinking age.¹³³ *Dole*’s conclusion was affirmed in *New York v. United States*,¹³⁴ where, even as it held that Congress could not “commandeer” the state legislatures, the Court allowed that Congress *could* “encourage a State to regulate in a particular way, or . . . hold out incentives to the States as a method of influencing a State’s policy choices. . . .” “If a State’s citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant.”¹³⁵

If Congress may subsidize state governments, that power presumably comes from the General Welfare Clause, under which Congress may “provide. . . for the general welfare of the United States.”¹³⁶ (The full clause in which this language occurs reads: “The Congress shall have power to lay

131. Somin, *supra* note 130, at 471–73.

132. *South Dakota v. Dole*, 483 U.S. 203 (1987).

133. *Dole*’s conclusion that Congress could validly appropriate funds for purposes outside the scope of its enumerated powers tracked the New Deal Court’s ruling in *United States v. Butler*, 297 U.S. 1 (1936), which in turn followed the lead of Justice Joseph Story. But *Dole* went further in holding that Congress could use its spending power, not only to exercise powers not delegated to it, but even to exercise some powers explicitly denied to it. See Jeffrey T. Renz, *What Spending Clause? (Or the President’s Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 83–87 (1999).

134. *New York v. United States*, 505 U.S. 144 (1992).

135. *Id.* at 166, 168.

136. U.S. Const. art. I, § 8, cl. 1.

and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.”). The Supreme Court has essentially accepted Joseph Story’s reading of the General Welfare Clause, which has three main prongs: 1) since the General Welfare Clause limits Congress’ power to *tax* (taxes may be imposed *only* “to pay the Debts and provide for the common Defence and general Welfare of the United States”), the Clause must also be a limitation on Congress’ power to *spend*; 2) at the same time, the Clause *expands* Congress’ power, since if it may tax in order to “provide for the general Welfare,” it must also be able to apply tax revenues for that purpose; and 3) Congress has the exclusive power to determine what the “general Welfare” consists in.¹³⁷ But recent scholarship has cast doubt on the truth of Story’s interpretation.¹³⁸ Thus, it can be argued that if the power to tax is also the power to spend, then many of the limitations on the powers of Congress enumerated in Article I, section 8 disappear. For instance, Congress has the power to “promote the progress of science and useful arts” through systems of copyrights and patents¹³⁹; but if it could spend for whatever it considered to be in the “general welfare,” it could also promote the arts and sciences by subsidies to artists and scientists – in which case, the explicit restriction of its power to enacting copyright and patent laws would fall away.¹⁴⁰ Likewise, if Congress could spend for what it determined to be the “general Welfare,” it would seem to have been unnecessary and redundant to say that it could also tax (and spend) “to pay the Debts and provide for the common Defence” of the United States.¹⁴¹

Further, even on Story’s interpretation, the General Welfare Clause is a *limitation* on Congress’ power (as well as a grant of power). Following Alexander Hamilton, Story agreed that, to be valid under the Clause, an appropriation must be “general”: “the object, to which an appropriation of money is to be made, must be general, and not local; its operation extending in fact, or by possibility, throughout the Union, and not being confined to a particular spot.”¹⁴² Several scholars have read that concession strongly; Ilya Somin, for instance, has written that “[f]ederal subsidies to a particular state or group of states seem to be the quintessential example of an expenditure whose ‘operation’ is ‘confined to a particular spot.’”¹⁴³

137. See Renz, *supra* note 133, at 125.

138. See *id.* at 126–29.

139. U.S. Const., art. I, § 8, cl. 8.

140. Renz, *supra* note 133, at 127.

141. Somin, *supra* note 130, at 491.

142. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 975, at 444 (reprint, 1991) (1833).

143. Somin, *supra* note 130, at 492. See also McConnell, *supra* note 40 at 1497–98 (finding a similar limitation in Alexander Hamilton’s account of the General Welfare Clause, and noting that

Were the Court's post-New Deal understanding of the General Welfare Clause to remain intact, the overruling of *Roe* would almost certainly do little to defuse the abortion debate by referring it to the states. Congress already deploys its (assumed) spending power very broadly to bring the states into line with the policies that national majorities prefer: through spending controls, "Congress has compelled states to dismantle their walls of separation of church and state, to violate the privacy provisions of their state constitutions, and to waive sovereign immunity."¹⁴⁴ There is no reason to doubt that Congress might attempt to leverage its power over state revenues to constrain them to follow the abortion policies it prefers, if the Court enabled the states to resume regulation over that question. Thus, again, the problem of polarization would return to afflict national politics.

3) *Supreme Court Case Law under the Fourteenth Amendment.* The third main source of deviation from the original design of federalism is, of course, the Supreme Court's own case law, especially in the area of substantive due process. To be sure, the Fourteenth Amendment was very largely *intended* to alter that design, especially (but not only) in the matter of state racial policies, and it cannot be doubted that the Amendment made a fundamental (and salutary) change in that respect.¹⁴⁵ But the Court's recent substantive due process cases manifest an unwarranted, indeed cavalier, disregard for the principle of federalism.

Roe itself is a perfect example of such disregard. As (then) Justice Rehnquist pointed out in his dissent in *Roe*, "[t]he majority of the States. . . have had restrictions on abortions for at least a century" – a fact that he rightly took to be "a strong indication. . . that the asserted right to an abortion is not 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"¹⁴⁶ Rehnquist later elaborated that point in his *Casey* dissent, noting that by the beginning of the twentieth century, "virtually every State had a law prohibiting or restricting abortion on its books." By the middle of the present century, a liberalization trend had set in. But twenty-one of the restrictive abortion laws in effect in 1868 were still in effect in 1973 when *Roe* was decided, and an overwhelming majority of the States prohibited abortion unless necessary to preserve the life or health of the mother.¹⁴⁷ Furthermore, the trend towards abortion "liberalization" or "reform" in the states had begun to stall in the years

"general" may mean "national" as opposed to "local").

144. Renz, *supra* note 133, at 85–86. Yet another example of such federal legislation is the Federal Assisted Suicide Funding Restriction Act of 1997, which "prohibits the use of federal funds in support of physician-assisted suicide." *Washington v. Glucksberg*, 521 U.S. 702, 702 (1997).

145. See generally AKHIL REED AMAR, *THE BILL OF RIGHTS* 137–283 (Yale Univ. Press 1998).

146. *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).

147. *Casey*, 505 U.S. at 952 (Rehnquist, C.J., dissenting).

immediately before *Roe*. No “reform” or “repeal” laws were enacted in 1971; after repealing all restrictions on early abortions in 1970, the New York legislature in 1971 lowered the time period for “abortion on demand” from twenty-four weeks to twenty weeks; arrests and prosecutions for abortion took place in Illinois and in Massachusetts shortly before *Roe*.¹⁴⁸ State voters were continually revisiting, and indeed reaffirming, abortion controls up until the eve of *Roe*: “The history of such regulation by state and local authorities stretches back to the colonial era and extended to the November 1972 elections, when the people of Michigan and North Dakota rejected legalization of abortion by casting their ballots, just two months before the Court’s decision in *Roe* in January 1973.”¹⁴⁹

Roe was a bolt out of the blue: “immediately before *Roe*, there was no indication that the Court was even concerned about abortion, much less that it was ready to invalidate all statutory restrictions.”¹⁵⁰ Indeed, only two years before *Roe*, the Court, in one of its (then rare) abortion decisions, had upheld the District of Columbia’s abortion law against a facial vagueness challenge.¹⁵¹ The Court’s limited precedents before *Vuitch* had evinced an understanding that abortion regulation, like other matters of morality and health, was properly a matter for the states. In *Missouri ex rel. Hurwitz v. North*,¹⁵² the Court affirmed a state court decision that itself had upheld, against both procedural due process and equal protection challenges, the revocation of a physician’s license for having unlawfully performed an abortion. The Court obviously found the state’s regulation of abortion to be well within its competence, saying: “A statute which places all physicians in a single class, and prescribes a uniform standard of professional attainment and conduct, as a condition of the practice of their profession, and a reasonable procedure applicable to them as a class to insure conformity to that standard, does not deny the equal protection of the laws.”¹⁵³ Earlier, in *Hawker v. People*,¹⁵⁴ the Court upheld the misdemeanor conviction of a physician for violating a state law barring the practice of medicine by one who had previously been convicted of a felony – which, in the defendant’s case, was a prior felony conviction for having performed an abortion. Even more firmly than in *North*, the Court’s language implied that abortion regulation was a matter for the states: “No precise limits have

148. Dellapenna, *supra* note 71 at 634, 673.

149. Forsythe & Presser, *supra* note 6, at 318.

150. Burt, *supra* note 11, at 344.

151. See *United States v. Vuitch*, 402 U.S. 62 (1971). In a note to himself before the argument in *Vuitch*, Justice Harry Blackmun blithely wrote: “Here we go in the abortion field.” LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY* 72 (2005).

152. *Missouri ex rel. Hurwitz v. North*, 271 U.S. 40 (1926).

153. *Id.* at 43.

154. *Hawker v. People*, 170 U.S. 189 (1898).

been placed upon the police power of a state, and yet it is clear that legislation which simply defines the qualifications of one who attempts to practice medicine is a proper exercise of that power. Care for the public health is something confessedly belonging to the domain of that power.”¹⁵⁵ And even in *Griswold v. Connecticut*, which can be seen as a precursor of *Roe*, Justice Harlan’s concurrence emphasized the need for judicial restraint in reviewing claims to constitutional protections for sexual conduct – restraint that would entail “wise appreciation of the great role[] that the doctrine[] of federalism. . . ha[s] played in establishing and preserving American freedoms.”¹⁵⁶

Washington v. Glucksberg also shows how little weight several members of the current Court seem willing to give to federalism values, even in a case in which the Court unanimously *upheld* a state’s prohibition on physician-assisted suicide against a substantive due process challenge. Voters in the State of Washington had rejected a ballot initiative that would have permitted a form of physician-assisted suicide in 1991, only six years before the Court decided the case. In 1994, Washington’s neighbor Oregon had enacted its Death With Dignity Act, which (as we have seen) *permitted* physician-assisted suicide. The Court noted that thereafter, “many proposals to legalize assisted-suicide have been and continue to be introduced in the States’ legislatures.”¹⁵⁷ Plainly, then, the people of the states were actively seized of the matter of physician-assisted suicide – not surprisingly, given that new life-extending medical technologies and increasing institutionalization near the end of life have sharply focused Americans’ attention on the circumstances in which they will die. Indeed, the Court recognized that “[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide.”¹⁵⁸ But only a bare majority of the Justices voted squarely to uphold the challenged law, and four Justices (O’Connor, Stevens, Souter and Breyer) felt impelled to write separate concurrences. Most revealing, perhaps, was the separate opinion of Justice Souter – the professed disciple of the second Justice Harlan – who signally failed to follow his mentor’s lead in giving serious weight to federalism. In a characteristic display of judicial arrogance, Justice Souter remarked that while “I do not decide for all time that respondents’ claim should not be recognized, I acknowledge the legislative institutional competence as the

155. *Id.* at 192–93.

156. *Griswold*, 381 U.S. at 501 (Harlan, J., concurring in judgment). On the other side of the ledger, then-retired Supreme Court Justice Tom Clark, in an influential 1969 law review article, had expressed support for a constitutional right to abortion. See Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOY. L.A. L. REV. 1 (1969).

157. *Glucksberg*, 521 U.S. at 717.

158. *Id.* at 735.

better one to deal with that claim *at this time*.”¹⁵⁹

Rather than nationalizing and legalizing questions of abortion, physician-assisted suicide, and the like, the Court should instead be attempting to return them to the political process and, ultimately, to the states. Unfortunately, the Court has failed to heed to Justice Holmes’ salutary reminder in *Lochner* that the Constitution “is made for people of fundamentally differing views.” Indeed, the Court has perversely stood Holmes’ insight on its head, taking the irreconcilable differences among the American people over such topics as a justification *for* its decision to constitutionalize the issues. Thus, Justice Breyer could write for the Court in *Stenberg v. Carhart* that

[w]e understand the controversial nature of the problem. Millions of Americans believe that life begins at conception and consequently that an abortion is akin to [*sic*] causing the death of an innocent child. . . . Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering. Taking account of these virtually irreconcilable points of view, *aware that constitutional law must govern a society whose different members sincerely hold directly opposing views* . . . this Court . . . has determined . . . that the Constitution offers basic protection to the woman’s right to choose.^[160]

III.

The prognosis for a return to anything like the robust, original conception of federalism is poor. And without such a return, the prospects for using our federalism to resolve the problem of polarization over abortion are also poor, even if *Roe* is overturned. Merely overruling *Roe* will not leave the question of abortion policy to the states alone, or ensure that a “checkerboard” solution to the issue of abortion gradually emerges; *deconstitutionalizing* the abortion question does not mean *denationalizing* it. On the contrary if *Roe* is overruled, we can readily expect pro-life and pro-choice forces to engage in an *intensified* factional struggle for mastery over Congress and the levers of national power.

Consider only the unlikelihood of a significant change in the Court’s Commerce Clause jurisprudence. Only Justice Thomas has raised the possibility of returning to a pre-New Deal understanding of that Clause, and his repeated invitations to his colleagues to reconsider the substantial

159. *Id.* at 789 (Souter, J., concurring in judgment) (emphasis added).

160. 530 U.S. at 920–21 (emphasis added); *see also id.* at 947 (O’Connor, J., concurring) (noting “virtually irreconcilable points of view” on abortion in American public opinion).

effects test and the accompanying aggregation technique have fallen on deaf ears. Even Justice Scalia adopted a distinctly *non-originalist* interpretation of the Commerce Clause in *Raich*.

Moreover, in order to prevent the abortion question from becoming a *national* political question in the wake of a reversal of *Roe*, the Court would have to do more than simply abandon the substantial effects test and the aggregation technique. The Court would also have to limit or overturn its more than century-old precedent, *Champion v. Ames (The Lottery Case)*,¹⁶¹ in which it first upheld the existence of a “national police power.” In *The Lottery Case*, Congress was held to have the power, pursuant to the Interstate Commerce Clause, to prohibit the transportation of lottery tickets across state lines. The majority of the Court, speaking through the first Justice Harlan, acknowledged that the federal legislation was primarily designed to enforce a moral condemnation of a particular form of gambling, rather than to regulate the manner in which a particular kind of interstate commerce was transacted. Yet the Court thought that the federal power to regulate interstate commerce, exactly like the state police power, could properly be directed to a substantive moral end: “If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another?”¹⁶² Four Justices, led by Chief Justice Fuller, dissented, arguing that while “the suppression of lotteries as a harmful business falls within th[e] [states’] power, commonly called, of police,” “[t]o hold that ‘Congress has general police power would be to hold that it may accomplish objects not intrusted to the general government, and to defeat the operation of the 10th Amendment.’”¹⁶³

The *Lottery Case* dissenters may well have been right as a matter of the original constitutional understanding: the power to regulate interstate commerce may well have been the power simply to subject interstate commerce in particular goods or services to a regular rule or method, not to ban them from interstate commerce altogether. Even when augmented by the Necessary and Proper Clause, that regulatory power may not have enabled Congress to legislate for a purpose so plainly within the sphere of the states’ reserved powers.¹⁶⁴ No matter: the Court is not about to revisit the *Lottery Case*. Even Justice Thomas joined Justice Scalia and Chief Justice Roberts in saying in *Gonzales v. Oregon* that the federal commerce

161. *Champion v. Ames*, 188 U.S. 321 (1903).

162. *Id.* at 356.

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

164. *See* Barnett, *supra* note 35, at 138–45.

power could be used for the moral objective of preventing physician-assisted suicide. “From an early time in our national history, the Federal Government has used its enumerated powers, such as its power to regulate interstate commerce, for the purpose of protecting public morality – for example, by banning the interstate shipment of lottery tickets. . . Unless we are to repudiate a long and well-established principle of our jurisprudence, using the federal commerce power to prevent assisted suicide is unquestionably permissible.”¹⁶⁵

Overruling *Roe* without changing the Court’s jurisprudence regarding Congress’ regulatory and spending powers *might* still result in returning the question of abortion policy to the states. The bare fact that, after *Roe*’s reversal, Congress would be assumed to have the constitutional *power* to regulate the abortion business would not, of itself, mean that Congress would choose to do so. Any legislation – let alone one as controversial as a national abortion policy bill – is beset by collective action problems. Critical “veto points” bestrew such legislation’s path.¹⁶⁶ The large number of “veto players” involved in any congressional decision-making (including subcommittee chairs and individual Senators as well as larger groups), combined with those players’ “lack of congruence” (or the dissimilarity of policy views) and “lack of cohesion” (or internal disagreements with the constituent units of each player) tends to prevent significant policy shifts from *any* given status quo.¹⁶⁷ And individual members of Congress may well prefer *not* to cast a vote that, even if it sits well with many of their partisans, is also likely to energize opposition in their constituencies. In default of any affirmative congressional action, the abortion issue would revert to the states.

Alternatively, Congress might expressly decide to “punt” the issue back to the states by affirmative legislation. A statutory model for such action could be found in the McCarran-Ferguson Act,¹⁶⁸ in which Congress restored the traditional understanding, upset in 1944 by the Supreme Court’s decision in *United States v. South-Eastern Underwriters Ass’n*,¹⁶⁹

165. *Gonzales*, 546 U.S. 243, 126 S. Ct. 904, 939 (Scalia, J., joined by Roberts, C.J., and Thomas, J., dissenting).

166. “[A] maze of obstacles stands in the way of each congressional decision. A bill must pass through subcommittees, full committees, and floor votes in the House and Senate; it must be endorsed in identical form by both houses; and it is threatened along the way by party leaders, rules committees, filibusters, holds, and other roadblocks. Every single veto point must be overcome if Congress is to act.” Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J. L. ECON. & ORG. 132, 146 (1999).

167. See George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289 (1995).

168. 15 U.S.C. §§ 1011–15.

169. *United States v. Se. Underwriters Ass’n*, 322 U.S. 533 (1944).

that the regulation of insurance transactions rested entirely with the states.¹⁷⁰ *South-Eastern Underwriters* held instead that insurance transactions were subject to Congressional regulation under the Interstate Commerce Clause, so that federal anti-trust laws were applicable to them. Congress reacted swiftly by enacting the McCarran-Ferguson Act, the first section of which declares that “the continued regulation and taxation by the several States of the business of insurance is in the public interest.”¹⁷¹ Further, the McCarran-Ferguson Act provides that “[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business,” and that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .”¹⁷² Assuming that the McCarran-Ferguson Act is a constitutionally valid regulation of the insurance industry,¹⁷³ it might conceivably serve as a template for a similar federal law relating to the business of abortion.

Whether Congress would hand over abortion regulation to the states in either of these two ways – by failing to act itself, or by an express delegation – is, obviously, open to doubt. Congress would surely be under severe pressure from highly mobilized constituencies on both sides of the abortion issue to legislate a comprehensive, nation-wide policy. Both sides would be sorely tempted to follow a “winner take all” strategy, particularly if the results of a particular election seemed to promise legislative majorities willing to codify one or the other side’s view. Even if Congress proved indecisive, dissatisfaction with the substantive outcomes in the states might still force the issue onto the national legislative agenda. The abortion issue seems likely to linger on the national stage.

Overruling *Roe* will be the right thing to do. But in itself, overruling *Roe* will do nothing to prevent a Congress that can use its enumerated powers “for the purpose of protecting public morality” from entering the abortion wars. Our emaciated federalism is unlikely to enable our polity to overcome the problem of polarization.

170. That understanding derived from *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1869), which had stated that “[i]ssuing a policy of insurance is not a transaction of commerce.”

171. 15 U.S.C. § 1011. The legislative history of the McCarran-Ferguson Act is surveyed in *Securities & Exchange Comm’n v. National Securities, Inc.*, 393 U.S. 453, 458–59 (1969); see also *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946).

172. 15 U.S.C. § 1012(a), (b).

173. *But see* Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249 (2005).