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LOCHNER: ANOTHER TIME, ANOTHER PLACE

LARRY YACKLE*

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INTRODUCTION

Professor Lynn Baker's contribution to this symposium¹ extends her long-term project both to defend and to critique the Supreme Court's decisions on the scope of congressional power.² I find this work valuable and not a little provocative. If Baker's account of the decisions thus far is even partly right, the Court is poised to assume decision-making responsibility that has long been ceded to Congress. If her proposals for the future are adopted, we are in for a cataclysmic constitutional event that rivals the convulsive period when the nation confronted the judicial arrogation of authority associated (rightly or wrongly) with the decision we're here to remember: *Lochner v. New York*.³ Concomitantly, we are faced with the same methodological masks the *Lochner* Court wore to conceal what it was actually about. With a few notable exceptions, the modern Court has revealed no inclination routinely to superintend *state* regulatory policy.⁴ Yet Professor Baker contends that the

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¹ Lynn A. Baker, *Lochner's Legacy for Modern Federalism: Pierce County v. Guillen as a Case Study*, 85 B.U. L. REV. 727 (2005) [hereinafter Baker, *Lochner's Legacy*].

² E.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911 (1995) [hereinafter Baker, *Conditional Federal Spending*]; Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459 (2003); Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195 (2001) [hereinafter Baker, *The Spending Power*].

³ 198 U.S. 45 (1905).

⁴ The obvious examples are Takings Clause cases. Just recently, the Court granted review in *Kelo v. City of New London Connecticut*, ostensibly to consider whether to second-guess state officials' determination that a condemnation of property was for a "public use." 843 A.2d 500 (Conn. 2004), cert. granted, 73 U.S.L.W. 3204 (U.S. Sept. 28,

Court does (and should) presume to rein in Congress' ability to pursue similar goals. The theme on the surface is federalism. The implication is a fundamental shift in the locus of decision-making power from the legislative to the judicial branch.

I want first to situate Professor Baker's work within a larger scholarly literature. Next, I will examine Baker's analysis in this particular piece, in which she critiques Justice Thomas' opinion for a unanimous Court in *Pierce v. County of Guillen*,⁵ sustaining § 409 of the Highway Safety Act under the Commerce Clause.⁶ I will take quick looks at the spending power analysis Professor Baker would have preferred in *Guillen* and the explanation she supplies for the route the Court actually took. Finally, I will offer an alternative account that (I think) is more in keeping with the ambient case law.

I. THE LANDSCAPE

Professor Baker's work fits within two streams of literature tracking American political developments. In the main, she joins a choir of academic voices praising the limits the Rehnquist Court has placed on Congress' authority to regulate commerce, to dragoon state authorities into implementing federal policies, and to subject the states to private suits for damages.⁷ The methodology of choice under this banner is characteristically textualist, originalist, and formalist. Constitutional meaning is understood to be determinate, its pursuit an exercise in discovery rather than invention.⁸ The 1789 document and its amendments are said to fix a goodly range of ideas in constitutional stone. In this instance, the text itself, informed by history, marks off congressional power in formal categories from which Congress cannot stray. If it follows that Congress is unable to enact national social welfare, civil rights, and environmental legislation, we must grin and bear it. Like

2004) (No. 04-108). Cases in which the Court enforces structural constitutional limits on state authority to regulate commerce may also be illustrations. There, too, the Court presumes to re-examine the wisdom of state regulatory policy. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978). Recall, though, that the justices are far from united in these endeavors. Justice Scalia objects to current doctrine in so-called "dormant" Commerce Clause cases in part because it presses judges to weigh policies better suited for judgment by politically accountable officials. *See, e.g., CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring). Moreover, with an eye on matters considered below, I should note that the Chief Justice doubts the Court's capacity (in the dormant Commerce Clause context) to distinguish between traditional governmental functions and proprietary activities in the market. *See, e.g., South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 101-02 (1984) (Rehnquist, J., dissenting).

⁵ 537 U.S. 129 (2003).

⁶ 23 U.S.C. § 409 (2000).

⁷ *See, e.g., John O. McGinnis, Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 511-12, 521 (2002).

⁸ KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 6 (1999).

others in this camp, Baker faults the Court's decisions curbing congressional authority only insofar as they allow Congress more regulatory room than the Framers of our Constitution intended.⁹ The point of her work is to urge the Court to be more "consistent."¹⁰ Specifically, she contends that the "Federalist Revival" will come to naught if the Court leaves the states "at the mercy" of Congress' ability to achieve regulatory goals by placing conditions on federal spending.¹¹

Baker's work also fits (roughly) within a more pragmatic tradition, which has it that the Constitution should be interpreted to fortify the democratic process.¹² She insists that her approach to congressional authority does not rise or fall on originalism in general or on her understanding of "the Framers' intent" in particular.¹³ In her view, "both formalists and functionalists" should favor "the restoration of limits on Congress's spending power," because it would increase "aggregate social welfare."¹⁴ As Baker sees it, the structure of the Federal Government, particularly the apportionment of the Senate, favors less populous states. Those states, in turn, exploit Congress' spending power to channel federal resources their way. Moreover, Congress' ability to attach strings to federal funds generates conditions that effectively coerce states into adopting policies they would otherwise disclaim.¹⁵

I confess it. I don't understand the academic obsession with textualism, originalism, and the formalist reasoning they so often entail. There is a familiar literature refuting the notion that constitutional meaning can be derived from the text alone or in company with other surviving documents.¹⁶ Truth is, the arguments for textualism and originalism have been demolished. Were it not for the Supreme Court's stubborn refusal to give them up, there would be no fish left in those barrels worth the shooting.¹⁷ Nor do I understand how the Court's apologists conceive that textualism and

⁹ Baker, *Lochner's Legacy*, *supra* note 1, at 751-52.

¹⁰ *Id.* at 734-39.

¹¹ *Id.* at 734.

¹² See, e.g., JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980); cf. Steven G. Calabresi, *Textualism and the Countermajoritarian Difficulty*, 66 *GEO. WASH. L. REV.* 1373, 1385-1389 (1998) (defending decisions promoting federalism on the ground that they prevent the Federal Government from imposing social policies that southern and western states find undesirable).

¹³ Baker, *The Spending Power*, *supra* note 2, at 198.

¹⁴ *Id.* at 218.

¹⁵ *Id.* at 214-16.

¹⁶ See, e.g., RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 13-25 (2001) (providing a good summary and citing some of the best authorities).

¹⁷ Still, the Court does insist on citing the text, together with its history, as justification for constitutional decisions. That style of opinion writing (and I do think references to the text and its history are largely a matter of style) encourages academics to try again (and again and again) to refurbish textualism and originalism into something serviceable. I find those efforts manifestly unsuccessful.

originalism can explain and justify decisions curtailing congressional authority. The Court's own attempts to justify those decisions on textualist and originalist grounds are feeble at best.¹⁸ Sadly, the justices are bereft of any convincing explanation for their judgments and apparently hope the public will be mollified if they turn palms up and stammer that James Madison made them do it. Academic textualists and originalists typically concede that they can't explain the lion's share of settled constitutional law in the United States.¹⁹

Certainly, it is unpersuasive to argue that the 1789 document in historical context establishes the idea of federalism in any form that lends itself to judicial enforcement.²⁰ Frankly, I'm not sure that anything important rides on the *existence* of the odd-shaped political units we call states, far less on a structural inference of no discernible shape at all.²¹ The "framers" were obliged to take the states as given; they had no other choice.²² American federalism is the product of a time when it was not yet clear that ours would be a single nation.²³ No one writing on a clean slate would create these states and give them any serious juridical consequence *as separate entities* in the overarching governmental structure. We might have done away with the states altogether were it not that political office-holders, national and local, draw their authority from them.²⁴ We have the states we do by historical accident; we perpetuate them by political impasse. In any case, there is no convincing

¹⁸ In *Printz v. United States*, 521 U.S. 898, 905 (1997), Justice Scalia admitted that he had no text at all with which to work. In *Alden v. Maine*, 527 U.S. 706, 713 (1999), Justice Kennedy disclaimed reliance on the text of the Eleventh Amendment and rested alternatively on hotly contested inferences from the Constitution and original understanding. Regarding the latter, he offered nothing to prove that the "framers" meant to immunize the states from suit in their own courts. He argued, instead, that state sovereign immunity was so solidly established that there was no occasion even to mention it. *Id.* at 724. That was not to summon historical evidence for a controversial modern decision, but rather to manufacture the decision from the absence of historical evidence.

¹⁹ E.g. Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 723-24 (1988).

²⁰ See Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 1-2 (2002); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 235 (2000) [hereinafter Kramer, *Political Safeguards*]; Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 231 (2000).

²¹ See Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1486 (1994) (explaining that modern federalism is the product of unpredicted developments in American politics and now enjoys no settled content).

²² Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 849 (1979).

²³ Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 908 (1994).

²⁴ Cf. Kramer, *Political Safeguards*, *supra* note 20, at 278 (explaining that the states now rely for their protection on state and federal officials who depend on local political support).

evidence that federalism ever had sufficient hard content to produce the modern decisions in which Professor Baker is interested.²⁵

Nor is there any obvious pragmatic reason for conjuring up federalism as a serious constitutional limit on the way we structure modern government. Some academicians (and a few justices) contend not that federalism is valuable in itself, but rather that the diffusion of governmental power by any means ultimately safeguards individual liberty.²⁶ That's a rough and dissatisfying view and not one Professor Baker shares.²⁷ We live in an age when powerful political, economic, and environmental forces are pulling the world's people closer together. The problems we face defy historically contingent political boundaries. Regional and transnational arrangements are increasingly the norm.²⁸ This is not to say that it is always preferable to govern outward from the center, nor to argue that decentralization should always be limited to administration.²⁹ Still, I do wonder whether it is wise to assume reflexively that federalism (as distinct from decentralization) is all that it is cracked up to be and thus to read a demonstrably inefficient version of it into our foundational law.³⁰

Professor Baker's points about political accountability are not inconsiderable. The imperfections in American government are obvious enough. Baker is correct that Congress may establish conditions for federal funds that McGovern liberals like me abhor.³¹ I must say, though, that limiting

²⁵ H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 852 (1999); Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1363-70 (1982).

²⁶ E.g., Clarence Thomas, *Why Federalism Matters*, 48 DRAKE L. REV. 231, 234 (2000).

²⁷ See Baker, *The Spending Power*, *supra* note 2, at 196 n.6 (explaining that she is not only concerned about "protecting individuals" but also is worried about "protecting the states against federal expenditures they find problematic").

²⁸ Of course, this is also an age in which ethnic and religious forces constantly drive us apart, invariably with painful results. I should have thought that recent experience with political disintegration would give us pause when we turn to the relationship between the Federal Government and the states.

²⁹ See generally Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997) (explaining that a more rigorous understanding of the values associated with federalism would help identify the occasions on which local decision-making is most sensible); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993) (countering any monolithic claim that centralization is ineluctable).

³⁰ The better case for federalism as a device for protecting liberty has it that autonomous states may compete among themselves for citizens by offering individuals ever better intrastate regulatory deals. Seth Kreimer, *Federalism and Freedom*, ANNALS AM. ACAD. POL. & SOC. SCI., March 2001, at 66; Ronald J. Krotoszynski, Jr., *Does the New Federalism Really Matter?*, 32 IND. L. REV. 11, 21 (1998); see also David J. Barron, *Commentary: A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 379-80 (2001) (explaining that the Court's decisions do not generally serve local autonomy at all).

³¹ See Candice Hoke, *Illusion, Reality, and a Federalism-Based Constitutional*

Congress' regulatory power is a blunt instrument for contending with small-state hegemony. Professor Baker's account demonstrates that the states as we know them are very much the problem, not the key to its solution.³² In any event, the question here is whether her ideas about using the Constitution to redress these grievances promises something better. I will pass on to where her views about constitutional meaning take her in this new piece.

II. THE COMMERCE POWER ANALYSIS

Justice Thomas' analysis in *Guillen* is easy enough to follow: Congress' power under the Commerce Clause includes the authority to regulate the channels and instrumentalities of commerce; highways and vehicles are, respectively, "channels" and "instrumentalities;" the point of the Highway Safety Act is to maintain roads for safe vehicular traffic; to that end, §152 of the Act requires state officials to collect information about dangerous conditions needing attention; to encourage states to meet their responsibilities, § 409 overrides any duty to disclose those records in response to discovery motions in traffic accident lawsuits.³³

I should have thought that Professor Baker would be pleased with this. To be sure, Justice Thomas sustained § 409. Yet he did so without invoking Congress' commodious power to regulate activities that substantially affect interstate markets. That is the authority that he and others have insisted amounts to an effective federal police power.³⁴ Instead, Thomas relied exclusively on Congress' power to regulate the channels and instrumentalities of commerce. Of course, this alternative theory equally lends itself to expansive federal regulation.³⁵ In any case, the headline story in *Guillen* is Thomas' success in persuading his colleagues to forgo the usual "affecting commerce" rationale for congressional action.

Professor Baker is not pleased at all. She does not explain why in this paper. But she did explain in the *amicus* brief that she and Mitchell Berman filed in *Guillen*.³⁶ In that brief, she dismissed any argument that § 409 might be defended as a regulation of channels and instrumentalities and insisted that

Challenge, 9 STAN. L. & POL'Y REV. 116-17 (1998) (describing the punitive conditions Congress has placed on state welfare programs in exchange for federal funding).

³² Professor Baker is willing to entertain the idea that constitutional amendments might resolve at least some of the difficulties she identifies. She has in mind existing proposals to shape congressional spending. Baker, *The Spending Power*, *supra* note 2, at 225. Wouldn't it be more sensible (if even less likely) to reapportion the Senate or even reconfigure the states?

³³ *Pierce County v. Guillen*, 537 U.S. 129, 146-47 (2003).

³⁴ *United States v. Lopez*, 514 U.S. 549, 584-85 (1995) (Thomas, J., concurring).

³⁵ See ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* 24 (2001).

³⁶ Brief of Amici Curiae Law Professors Lynn A. Baker and Mitchell N. Berman in Support of Respondents, *Pierce County v. Guillen*, 537 U.S. 129 (2003) (No. 01-1229), available at 2002 WL 1964091 [hereinafter Baker & Berman Brief].

the “affecting commerce” rationale is the only basis of congressional power that is “even potentially relevant.”³⁷ She then argued that § 409 *cannot* be sustained on the “affecting commerce” ground in part because it is not “clear” that “all” civil litigation in state court is “‘economic activity’ that ‘substantially affects interstate commerce.’”³⁸ Therein, she invoked the Court’s formal distinction in *United States v. Lopez* between regulatory targets that are commercial in nature and those that are not.³⁹ If the Court were to treat all civil suits in state court as commercial, according to Baker, the commercial/non-commercial distinction would surrender any capacity to differentiate between “‘what is truly national and what is truly local.’”⁴⁰

Trouble is, the commercial/non-commercial distinction can’t hope to do that in any case. Justice Breyer rightly made fun of it in *Lopez*,⁴¹ and academics have done the same ever since.⁴² You know the drill: possessing a gun near a school is *not* commercial behavior,⁴³ *declining* to purchase wheat at the market *is* commercial,⁴⁴ and it’s anybody’s guess where nicking a purse at Park Street Station falls.⁴⁵ It won’t do to insist that federal and state authority can sensibly be orchestrated simply by segregating regulated activities in two boxes, one for economic affairs and the other for everything else.⁴⁶ The Chicago faculty must be blushing *en masse*. This is the very formalism we associate with *Lochner* and rightly condemn – a refusal to acknowledge that the occasion calls for serious policy judgment and an attempt to hide the value choices that are actually being made behind the façade of labels.⁴⁷

Even if we take the commercial/non-commercial distinction seriously, its administration is more complicated than either the Court or Professor Baker lets on. First, the immediate target of the regulation must be identified; second, that target must be characterized. At both stages, the Court faces the omnipresent challenge to focus at the right level of generality. Professor Baker

³⁷ *Id.* at 22-23.

³⁸ *Id.* at 24 (quoting *Lopez*, 514 U.S. at 560).

³⁹ *Lopez*, 514 U.S. at 566.

⁴⁰ Baker & Berman Brief, *supra* note 36, at 24 (quoting *Lopez*, 514 U.S. at 567-68).

⁴¹ 514 U.S. at 627-30 (Breyer, J., dissenting).

⁴² E.g., Michael C. Dorf, *The Good Society, Commerce, and the Rehnquist Court*, 69 *FORDHAM L. REV.* 2161, 2173-76 (2001); NAGEL, *supra* note 35, at 19.

⁴³ *Lopez*, 514 U.S. at 560.

⁴⁴ *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).

⁴⁵ Even Professor McGinnis acknowledges that the commercial/non-commercial distinction, if rigidly applied, threatens regulation that needs to be imposed at the national level. McGinnis, *supra* note 7, at 518 (giving environmental controls as an obvious illustration).

⁴⁶ See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 *SUP. CT. REV.* 125, 176 (1995); Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 *CORNELL L. REV.* 1199, 1202 (2003).

⁴⁷ See Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 511-12 (1997).

identifies § 409's target as the conduct of "all civil litigation in state court involving causes of action brought solely under state law."⁴⁸ I might have focused higher up the scale of generality and identified the target as the prevention of wrecks on interstate highways. Baker herself concedes that § 409 might be understood that way.⁴⁹ Or I might have focused lower down on the scale and identified the target as the discoverability of information in the hands of officials hoping to avoid drawing checks on the local treasury. Professor Baker characterizes the conduct of civil trials as non-economic (at least in some of the cases affected). Frankly, civil litigation sounds pretty commercial to me. If it's not, then my alternatives are: preventing highway disasters (with all their attendant costs) and insulating information from discovery in civil suits (potentially implicating expenditures of some order). In all fairness, though, Professor Baker's article does not simply rehearse the argument in her *amicus* brief, but rather addresses the analysis on which Justice Thomas actually relied. Let's look at what she says.

Initially, Baker insists that Justice Thomas committed a threshold category mistake. He treated § 409 as a regulation of the channels or instrumentalities of commerce when, in truth, it is a regulation of the way in which state civil trials are conducted.⁵⁰ This is not the commercial/non-commercial distinction itself, but it *is* a close cousin. Professor Baker presumes to know what counts as a channel or instrumentality and what doesn't. She engages in the same kind of formalist categorization we just went through and, concomitantly, invites the same kind of criticism. There is something else, too. For Baker, it is crucial to distinguish between the purpose of a federal regulatory scheme, on the one hand, and the nature of a target activity, on the other.⁵¹ She concedes that the overarching purpose of the Highway Safety Act is to improve highway safety. She contends, however, that § 409 is aimed at a categorically different activity (the conduct of civil actions in state court) and, accordingly, falls outside Congress' regulatory reach.⁵² This argument suffers from two shortcomings.

The first is not of Professor Baker's creation, but arises from the baseline approach to congressional power Justice Thomas deployed in *Guillen*.⁵³ The working idea is that the power to regulate commerce includes the power to determine the uses to which channels and instrumentalities are put. It doesn't matter what activities a statute addresses immediately. Nor does it matter *why* Congress chooses to regulate as it does. The Commerce Clause is satisfied so long as Congress is careful to package what it does as a condition on, or a

⁴⁸ Baker & Berman Brief, *supra* note 36, at 24.

⁴⁹ Baker, *Lochner's Legacy*, *supra* note 1, at 737-38.

⁵⁰ At least, Baker argues, it's not so easy as Thomas suggests to categorize § 409 in the way he does. *Id.* at 736-39.

⁵¹ *Id.*

⁵² *Id.* at 734-35.

⁵³ *Pierce County v. Guillen*, 537 U.S. 129, 146-47 (2003).

prohibition of, some use of interstate facilities. The result is an interpretation of the Commerce Clause that robs it of any discernible purpose.

The second short-coming *can* be laid at Professor Baker's door. She faults Justice Thomas for permitting Congress to choose an immediate regulatory target that is not itself a channel or instrumentality of commerce.⁵⁴ On first blush, this sounds extreme. Not even the Old Court restricted Congress to the regulation of activities conceived to *be* commerce in themselves, but rather insisted that Congress must limit regulatory statutes to activities having a "direct" connection to other activities that count as commerce.⁵⁵ Probably Professor Baker means only that the Court should take responsibility for deciding whether an immediate activity is linked, in turn, to channels or instrumentalities. She objects, then, to Thomas' explicit respect for Congress' judgment regarding the empirical connection between § 409 and the purpose of the Act of which that section is a part.⁵⁶

Justice Thomas' willingness to let Congress determine empirical matters seems unremarkable. Recall, though, that in *Lopez* and *United States v. Morrison* the Court suggested that it would no longer live with "reasonable" congressional judgments about the effects of regulation on commerce.⁵⁷ By some accounts, the Court means to exercise independent judgment about whether a sufficient link to interstate markets exists and set aside congressional determinations it thinks are wrong (though perhaps not unreasonably wrong). For my own part, I am encouraged that Justice Thomas did not take that approach in *Guillen*. Reports of the death of deference to congressional empirical judgments may have been exaggerated. If, however, Professor Baker would have the Court make first-order judgments here that mirror the first-order judgments the Court seemed to make in *Lopez* and *Morrison*, she is on less uncertain ground. Her position may not be popular in academic circles, but that's hardly the test.

Professor Baker concedes that Congress can reach activities that do *not* count as channels or instrumentalities "when the aim is to protect" activities that *do* fall under those headings.⁵⁸ She contends, however, that the Court's precedents are "not indifferent" to what target activities "are."⁵⁹ She insists that some justices have "strongly suggested" that there are "special constraints" on legislation that "intrudes upon integral areas of historical state sovereignty."⁶⁰ For this, she cites *National League of Cities v. Usery*,⁶¹ *Lopez*

⁵⁴ Baker, *Lochner's Legacy*, *supra* note 1, at 735-36.

⁵⁵ See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 302-03 (1936).

⁵⁶ *Guillen*, 537 U.S. at 147 (holding that "Congress could reasonably believe" that § 409 would lead to greater highway safety).

⁵⁷ See *United States v. Morrison*, 529 U.S. 598, 615 (2000); *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995).

⁵⁸ Baker, *Lochner's Legacy*, *supra* note 1, at 737.

⁵⁹ *Id.*

⁶⁰ *Id.*

and *Morrison*, and Justice Kennedy's concurring opinion in *Lopez*. In this vein, Baker faults Justice Thomas for saying that he needn't worry about the argument that § 409 "violates the principles of dual sovereignty embodied in the Tenth Amendment" because the Washington Supreme Court didn't address that claim.⁶²

There is something in what Baker says. Everyone recognizes that *National League of Cities* has a certain life after death. Both *Lopez* and *Morrison* contain explicit warnings about congressional meddling with affairs regarding which "States historically have been sovereign."⁶³ Justice Kennedy's separate (but controlling) opinion in *Lopez* may be the most important of the lot. In that instance, Kennedy distanced himself from much of Chief Justice Rehnquist's opinion for the Court and explained his own position on the ground that the statute touched a matter of "traditional state concern."⁶⁴ Still, it's been a long time since the Supreme Court invalidated an enactment of the Congress solely on the theory that it displaced state policy in a field in which the states had traditionally been dominant. The Court came close in the Sugar Trust Case, when it held that Congress could *not* regulate intrastate manufacturing *because* a state legislature *could*.⁶⁵ Even there, the Court purported only to be interpreting the term "commerce," not to be exercising judicial power in the name of "traditional" state concerns standing alone.⁶⁶ It wouldn't be fair, either, to say that *National League of Cities* simply enforced some constitutional protection for "integral areas of historical state sovereignty." The doctrine in that case was more nuanced. Or so the Court explained in subsequent decisions.⁶⁷ Finally, neither *Lopez* nor *Morrison* can be cited for the proposition that state sovereignty alone defeats a federal statute regulating either the channels and instrumentalities of commerce or activities that substantially affect national markets. Re-reading Kennedy's concurring opinion in *Lopez*, I'm inclined to think he was moved primarily by *Marbury*.⁶⁸ He went along so as not to shirk the Court's responsibility for holding Congress in check at least on occasion.⁶⁹

If Professor Baker reads Justice Thomas' reference to "dual sovereignty" correctly, she is quite right. The Court is forever intimating that a federal statute otherwise valid under the Commerce Clause can be struck down

⁶¹ 426 U.S. 833 (1976).

⁶² Baker, *Lochner's Legacy*, *supra* note 1, at 738 (quoting *Guillen*, 537 U.S. at 148 n.10).

⁶³ *Lopez*, 514 U.S. at 564, *cited in Morrison*, 529 U.S. at 613.

⁶⁴ *Id.* at 580 (Kennedy, J., concurring).

⁶⁵ *United States v. E.C. Knight Co.*, 156 U.S. 1, 11 (1895).

⁶⁶ *Id.* at 11-15.

⁶⁷ *E.g.*, *Hodel v. Va. Surface Mining & Recl. Ass'n*, 452 U.S. 264, 286-91 (1981).

⁶⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

⁶⁹ *See Lopez*, 514 U.S. at 583 (Kennedy, J., concurring); *see also City of Boerne v. Flores*, 521 U.S. 507, 511 (1997) (Kennedy, J., opinion of the Court).

because it independently “violates” the Tenth Amendment.⁷⁰ We have to live with that loose and confusing talk, though some of us wonder whether the Court isn’t deliberately sloppy in order to create the impression that it has text on which to rest when it really doesn’t. Nevertheless, when the Court is careful (as it was in *New York*⁷¹ and *Printz*⁷²) there is no denying the truth: the Tenth Amendment has no content of its own, and *Darby* is alive and well.⁷³ So if Justice Thomas meant in *Guillen* that he could, at once, hold that § 409 offends no internal restraint on the commerce power *and* disclaim any argument that § 409 falls outside a delegated power, then, yes, he was “less than wholly candid.”⁷⁴

It’s more likely, though, that Thomas was trying to say something else. The Solicitor General argued in *Guillen* that the Washington Supreme Court had not addressed the different question whether § 409 runs afoul of an *external* restraint on congressional power – like the state sovereign immunity the Court has inferred from the Constitution’s structure.⁷⁵ Recall that in *Printz* and other

⁷⁰ *E.g.*, *Printz v. United States*, 521 U.S. 898, 935-36 (1997) (O’Connor, J., concurring).

⁷¹ *New York v. United States*, 505 U.S. 144 (1992).

⁷² *Printz v. United States*, 521 U.S. 898 (1997).

⁷³ *United States v. Darby*, 312 U.S. 100, 124 (1941) (explaining that the Tenth Amendment “states but a truism that all is retained which has not been surrendered”); *accord Printz*, 521 U.S. at 919 (explaining that the Tenth Amendment only makes “express” what would otherwise be implicit in the enumeration of congressional powers); *New York*, 505 U.S. at 156 (reaffirming the *Darby* understanding).

⁷⁴ *Baker, Lochner’s Legacy*, *supra* note 1, at 738.

⁷⁵ Brief for the United States at 25, *Pierce County v. Guillen*, 537 U.S. 129 (2003) (No. 01-1229), available at 2002 WL 1560236. By tying the state court’s judgment exclusively to internal restraints, the Solicitor General was able to argue that the Court could also avoid the question whether the private respondents in *Guillen* had standing to advance a claim that § 409 violates an external restraint touching state sovereignty (e.g., the anti-commandeering principle). *Id.* at 22-23. Standing doctrine being what it is, I wouldn’t hazard a guess about the answer. *Cf.* *Dennis v. Higgins*, 498 U.S. 439, 451 (1991) (holding that private businesses have a “right” under the Commerce Clause for purposes of using the Ku Klux Klan Act to challenge state regulation). The posture is odd. The private parties in *Guillen* would be arguing that they are entitled under state law to discover information in the hands of defendant officers of local government. To that end, they would be contending that the federal statute on which the defendants rest their refusal to make the information available is unconstitutional because it intrudes on state sovereignty. The issue is *not* whether the private litigants would have standing for purposes of Article III. It *may* be whether they would have some variant on third-party standing to assert a constitutional claim belonging to their adversaries (as representatives of the state). Then again, it might be argued that claims partaking of state sovereignty (or even federalism generally) ultimately belong to individuals whose liberty is safeguarded by the diffusion of governmental power entailed. Justice Thomas dropped a hint that the Court might think it best not to allow self-interested private litigants to press structural claims of this nature when, by hypothesis, the “State’s legislative and executive branches expressly approve and accept the benefits and terms of the federal statute in question.” *Guillen*, 537 U.S. at 148 n.10.

cases, the Court cited the Tenth Amendment not as itself an external limitation on federal authority, but rather as confirmation that external restraints exist even in the absence of some alternative textual home.⁷⁶ When Justice Thomas explained that he needn't address any argument that § 409 violates the "principles of dual sovereignty embodied in the Tenth Amendment,"⁷⁷ he probably only meant the claim that Congress had attempted to commandeer state officials to administer the Highway Safety Act.⁷⁸

Professor Baker thinks § 152,⁷⁹ the provision of the Act to which § 409 is an amendment, *would* violate the anti-commandeering principle.⁸⁰ That provision requires states to "conduct and systematically maintain" surveys of public roads in order to identify hazards.⁸¹ It is those reports, in turn, that § 409 shields from discovery in lawsuits claiming that dangerous conditions caused accidents. In Baker's view, § 152 directs state officials to implement federal policy in the manner of the Brady Law in *Printz* and thus can be sustained, if at all, only on the basis of the spending power.⁸² Accordingly, by her account, Justice Thomas could not blithely set any spending analysis aside simply because he held that § 409 offends no internal restraint on the Commerce Power. This is a fair point. Yet the explanation for Thomas' position is the same: He almost certainly meant to accept the Solicitor General's representation that the judgment below was grounded exclusively on the internal restraint ground.⁸³

⁷⁶ See Mathew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, ANNALS AM. ACAD. POL. & SOC. SCI., March 2001, at 158, 161.

⁷⁷ *Guillen*, 537 U.S. at 148 n.10.

⁷⁸ Justice Thomas was also being sloppy when he said that he needn't decide whether § 409 "could also be a proper exercise of Congress' authority under the Spending Clause or the Necessary and Proper Clause." *Id.* at 148 n.9 (emphasis added). The disjunctive "or" in that sentence suggests that the Necessary and Proper Clause might have supplied an alternative basis for congressional action, apart from the commerce and spending powers. But that has never been the law.

⁷⁹ 23 U.S.C. § 152 (2000).

⁸⁰ Baker, *Lochner's Legacy*, *supra* note 1, at 733-36.

⁸¹ 23 U.S.C. § 152 (a)(1).

⁸² Baker, *Lochner's Legacy*, *supra* note 1, at 736-39.

⁸³ If the Court were to decide whether § 152 offends the anti-commandeering rule, I don't like Baker's chances. Recall that Justice O'Connor wrote separately in *Printz* to say that the Court had not suggested that "ministerial reporting requirements" were unconstitutional. *Printz v. United States*, 521 U.S. 898, 936 (1997) (O'Connor, J., concurring). True, § 152 addresses the states alone (not in company with private industry). Still, the Court might conclude that the regulation it imposes is covered by *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1985). *Cf. Reno v. Condon*, 528 U.S. 141, 151 (2000) (upholding a federal statute prohibiting the states from disclosing information about motorists with driving permits).

III. THE SPENDING POWER ANALYSIS

Professor Baker also objects that Justice Thomas declined to use *Guillen* as a vehicle for curbing Congress' power to regulate pursuant to the spending power.⁸⁴ Alternatively, she argues that § 409 fails the tests established by *South Dakota v. Dole*⁸⁵ and *Davis v. Monroe County Board of Education*⁸⁶ or, if it doesn't, those tests should be cinched up.⁸⁷ In this, Baker rehearses her warning that Congress' power to achieve regulatory goals by purchasing state cooperation threatens to surrender the beachhead the Court has established in the Commerce Clause cases.⁸⁸ In prior work, Baker has argued that Congress should be allowed to offer the states only enough money to reimburse them for expenditures they make toward implementing federal programs.⁸⁹ Here, she lays that approach aside in favor of other arguments. Those arguments, in turn, would have the Court engage in the kind of behavior associated with *Lochner*.

First, a disclaimer: Professor Baker does *not* propose that § 409 is (or should be) invalid because it fails to "provide" for the "general Welfare of the United States."⁹⁰ That way certainly lies *Lochner*.⁹¹ It is obvious enough that the legislative branch must be entitled to decide what counts as the public interest in general. The Court could second-guess Congress at that level of generality only by sounding very much like Justice Peckham explaining why the Bake Shop Act didn't further the public health.⁹² Just as choosing among public-regarding purposes is for state legislatures in police power cases, selecting among public-regarding ends must equally be left to Congress in spending power cases.

Professor Baker *does* argue that § 409 is (or should be) invalid because it is insufficiently related to the purpose for which the Highway Safety Act makes federal funds available – namely, to reduce accidents.⁹³ Baker acknowledges that the Supreme Court has scarcely demanded a tight fit between a particular condition and the goals of Congress' larger program. All that is necessary is that the condition "bear *some relationship*" to Congress' purpose.⁹⁴ Yet here

⁸⁴ Baker, *Lochner's Legacy*, *supra* note 1, at 739-51.

⁸⁵ 483 U.S. 203 (1987).

⁸⁶ 526 U.S. 629 (1999).

⁸⁷ Baker, *Lochner's Legacy*, *supra* note 1, at 739-51.

⁸⁸ See Baker, *Conditional Federal Spending*, *supra* note 2, at 1916.

⁸⁹ *Id.* at 1954-55. That understanding would certainly produce the results Baker wants, though at the price of eliminating virtually any congressional capacity to regulate by means of conditional spending. See David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 57 (1994).

⁹⁰ U.S. CONST. art I, § 8, cl. 1.

⁹¹ *Lochner v. New York*, 198 U.S. 45 (1905).

⁹² *Id.* at 57.

⁹³ Baker, *Lochner's Legacy*, *supra* note 1, at 746-51.

⁹⁴ Baker cites *New York v. United States*, 505 U.S. 144, 167 (1992) (Baker's emphasis added). Baker, *Lochner's Legacy*, *supra* note 1, at 747.

again Baker insists that the Court should up the *ante* in order to keep the spending power from becoming an easy alternative avenue to regulatory goals Congress cannot otherwise achieve.

Baker contends that § 409 doesn't help to avoid highway accidents because it isn't needed to prompt state officials to comply with § 152. She has located "no evidence" that the Federal Government has ever docked a state for failing to gather information about hazardous road conditions.⁹⁵ From that, she infers that the states collect the data required without the additional incentive that § 409 might create.⁹⁶ Now then, this is precisely the kind of armchair analysis of empirical circumstances for which *Lochner* is roundly criticized. Professor Baker offers no serious exploration of the experience with § 152 prior to the adoption of § 409, nor even a careful appraisal of any evidence there may be that adding § 409 to the mix might help keep the states in line. Her position (at this level) is simply an inference drawn from the mere fact that states were willing to accept federal funds at a time when this particular assurance did not exist. Small wonder the Supreme Court is not so quick to dismiss the possibility that Congress has some reason for doing what it does. Consider, for example, that a "belt-and-suspenders" policy might make sense, given that the remedy of withholding funds is drastic and thus rarely invoked.

Professor Baker contends that the real parties in interest are officials of local government, who typically have the duty to collect the information required by § 152 and, in turn, have an incentive to do so assiduously in hopes of slicing themselves a larger share of the federal pie.⁹⁷ Baker insists, however, that those local officers have an independent incentive to maintain highways: if they don't, they open themselves to private lawsuits. To the extent § 409 allows them to withhold data from tort plaintiffs, that independent incentive is undermined. If local authorities know their chances of avoiding tort liability are reduced by virtue of the ability to withhold probative evidence, they will be less willing to part with local treasure to keep roads in good repair. By Baker's account, it is at least possible that § 409 diminishes locally-funded expenditures on road projects more than it nourishes federally-funded expenditures. If that is the way the incentives play out, the "net result" of § 409 will be a "decrease in highway safety" – a result that is "antithetical" to the Highway Safety Act's purpose, far less "related" to that purpose within the meaning of spending power doctrine.⁹⁸

Of course, Professor Baker does not know how these incentives will play out. She offers no data to throw light on the empirical questions she raises. Nor does she report on any evidence that Congress might have developed. She thinks the Supreme Court should work through the economic calculus in order to decide, as a constitutional matter, whether § 409 serves the Act's objectives.

⁹⁵ *Id.* at 748.

⁹⁶ *Id.*

⁹⁷ *Id.* at 748-49.

⁹⁸ *Id.* at 749-51.

The question whether § 409 is constitutionally permissible becomes, by her account, the empirical question whether § 409 is good policy. This, too, is *Lochner* resurgent in another place. If there is one thing we (or most of us) agree upon, it's that the Court is not equipped to make policy judgments of this kind and, more to the point, that legislative bodies, state and federal, *are*. Congress may have misjudged whether § 409 does more good than harm. But in a democracy, we respond to poor political judgments (regarding highway safety) with better politics.⁹⁹

IV. THE PLACE OF TRADITION IN THE ANALYSIS

Professor Baker notes (fairly enough) that when the Court appraises the validity of a federal statute, it invariably considers whether the subject matter has traditionally been regulated by the states.¹⁰⁰ She makes something of this, more perhaps than have the justices themselves (at least consciously) to date. I'm not sure what precisely she has in mind. She toys with the idea that the Court should find a federal statute unconstitutional solely on the basis of the empirical fact that the activity regulated has historically been left to the states. Specifically, she says the idea that "the recent Commerce Clause jurisprudence . . . is driven by a (sometimes) unstated inquiry into . . . whether the congressional enactment seeks to regulate an area 'where States historically have been sovereign' or whether it instead involves an appropriate and traditional federal function."¹⁰¹ The disjunctive "or" distinguishes between matters that have historically been handled by the states, on the one hand, and matters that "involve" an "appropriate" federal "function" on the other. It's not clear whether the subjects Baker puts in those two boxes exhaust the universe of affairs that government might regulate. If they do, and if matters involving "appropriate" federal "functions" are the only subjects that Congress can reach, then it appears that in Baker's view the constitutionality of federal enactments turns entirely on whether, as a matter of experience, the subjects regulated have historically been governed by the states.

⁹⁹ Professor Baker also contends that § 409 fails the "clear notice" test. *Id.* at 742-46. Chief Justice Rehnquist explained in *Dole* that Congress must express conditions on spending "unambiguously." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). The idea is to respect the states' entitlement to choose. Only if the elements of the deal being offered are clear can the states decide intelligently whether to accept it. Yet Professor Baker would demand greater clarity from Congress than the Court itself requires in cases like *Dole* and *Davis*. By her account, § 409 lends itself to four different readings, thus demonstrating that it is not sufficiently exacting. Baker, *Lochner's Legacy*, *supra* note 1, at 742. Those four alternative constructions are not far-fetched. Lawyers might well spin them out in service of arguments about § 409's effect in particular circumstances. Still, it's hard to think that any state's decision whether to accept federal funds would be affected if § 409 were drafted differently. That, after all, is the point of the "clear statement" doctrine – not to preempt all fair disagreement about the meaning of a statute in context.

¹⁰⁰ Baker, *Lochner's Legacy*, *supra* note 1, at 757.

¹⁰¹ *Id.* at 762 (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)).

This is an astonishing idea. Baker herself mulls the possibility that the Court may yet (and perhaps should) resuscitate *National League of Cities*.¹⁰² But she is actually suggesting something more dramatic than limits on federal regulation of the states *qua* states.¹⁰³ Here, she *does* seem to propose reviving the Sugar Trust Case, which relied on formal labels to divvy up regulatory targets between Congress and the states.¹⁰⁴ Baker, too, might use formal categories of some kind. But if I understand her correctly, she would chiefly let tradition draw the line between constitutionally permissible and impermissible congressional action. That would make experience (subject to empirical proof) the determinant of constitutional validity. The Court would be charged to keep Congress from deciding to regulate affairs that, for some reason or other, Congress has not regulated in the past. I'm not one to worry overmuch about identifying any particular warrant for judicial law-making. But even I have to wonder what possible justification could be offered for holding that the country is constitutionally obliged to do something the way it always has.

Nothing the Court has said in any of its recent cases supports this thesis. Most often, the Court takes account of the empirical fact of past state regulation as an aid to statutory construction. The Court does not hold that a federal enactment is invalid simply because it reaches a target not previously managed at the federal level. At most, the Court expresses doubts about the constitutionality of such a course and, relatedly, Congress' intention to operate close to the perimeter of its authority.¹⁰⁵ To ensure that constitutional issues are not raised unnecessarily, the Court construes statutes not to reach so far in the absence of exacting statutory language. Whatever one may think of the "doctrine of constitutional doubt" and the recent flurry of "clear statement" rules, the fact remains that the Court has not declared a federal statute unconstitutional simply because it departs from past regulatory practice. So far anyway, the Constitution has not become an undifferentiated drag on progress.

Professor Baker probably means to argue that the Court considers regulatory experience at the threshold of its analysis and beefs up the rigor of its review when Congress has moved into new territory. Specifically, she says that attention to a tradition of state regulation is "pivotal."¹⁰⁶ She may mean, then, that the Court begins (and perhaps should begin) its analysis by identifying and characterizing what Congress presumes to regulate. The Court's conclusions regarding those questions, in turn, determine (and perhaps should determine)

¹⁰² See *National League of Cities v. Usery*, 426 U.S. 833 (1976); Baker, *Lochner's Legacy*, *supra* note 1, at 763-64.

¹⁰³ Others propose that (more modest) course. *E.g.*, CHARLES FRIED, *SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT* 37-38 (2004).

¹⁰⁴ *United States v. E.C. Knight Co.*, 156 U.S. 1, 13-14 (1895).

¹⁰⁵ *E.g.*, *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

¹⁰⁶ Baker, *Lochner's Legacy*, *supra* note 1, at 763.

the direction in which the rest of the analysis proceeds. If Congress has regulated the same subject matter in the past, the Court applies a generous version of the doctrinal formulations for judging the validity of statutes. If Congress has previously left the subject matter to the states, the Court brings to bear a more muscular version of those formulations.

This position can be defended. But only at the price of grappling more generally with the difficulties of resting constitutional meaning on appeals to tradition. This is scarcely the only place where experience is said to influence decisions on the constitutionality of governmental action. We are more familiar with references to history in Fourteenth Amendment cases, where the operative question is whether some liberty has enjoyed a tradition of respect that entitles it to special constitutional solicitude.¹⁰⁷ Recall the vexing problems in that context: defining the liberty interest at stake at the right level of generality, discovering evidence regarding the way it was treated in the past, and assessing whether that tradition may have evolved over time.¹⁰⁸ Those same problems reappear here and demand attention.

If Professor Baker takes up this task, she will necessarily retrace the Court's efforts since *Lochner* to carve out a role for itself in orchestrating a political system that is developing underfoot. The core challenge is to foster policy-making by politically accountable institutions, but simultaneously to check those very institutions when they threaten values that *should* prevail even in the face of majoritarian sentiment.¹⁰⁹ None of the federal measures Baker finds troubling falls in the latter category. Here again, Congress certainly may make bad policy in the exercise of its powers to regulate commerce and to spend federal funds. But the Court has no warrant to strike policies down because the justices conclude they are unwise.

There is another explanation for the Court's recent decisions in this field, including *Guillen*. The Court appreciates that Congress may achieve its ends by offering the states financial inducements to cooperate.¹¹⁰ Yet the Court does not find that prospect troubling, because the states' "dignity" is preserved inasmuch as they are free to choose whether to accept conditions in exchange for cash.¹¹¹ There is even a way in which a sweeping congressional power to place conditions on spending celebrates the states' autonomy more than would

¹⁰⁷ See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989).

¹⁰⁸ See J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 *CARDOZO L. REV.* 1613, 1615 (1990); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 *N.C. L. REV.* 619, 698 (1994).

¹⁰⁹ Baker has begun this work. See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 *DUKE L.J.* 75, 80-84 (2001).

¹¹⁰ E.g., *Alden v. Maine*, 527 U.S. 706, 755 (1999); *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Bd.*, 527 U.S. 666, 678 n.2 (1999).

¹¹¹ See Evan H. Caminker, *Judicial Solicitude for State Dignity*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, March 2001, at 81, 82; cf. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (explaining that the "preeminent purpose" of state sovereign immunity is to spare the states the "indignity" of being sued by private litigants).

the diminished authority that Professor Baker would allow. Congress' expansive power under current law allows states the contractual freedom to bind themselves to behave in ways that Congress could not flatly require – the better to acknowledge the states' station as autonomous entities entitled to strike the bargains they will.

CONCLUSION

The Rehnquist Court has established important limits on congressional power and, into the bargain, raised questions about Congress' capacity to establish and implement a wide variety of social welfare, civil rights, and environmental programs. The very presence of the *Guillen* case on the Court's docket in 2004 is evidence enough that things constitutional are not what they used to be. Still, it seems unlikely that the Court has adopted the agenda that Professor Baker has in mind – with all the *Lochnerian* baggage her analysis entails.¹¹² At least, I should say, I hope not.

¹¹² See, e.g., Christopher H. Schroeder, *Environmental Law, Congress, and the Court's New Federalism Doctrine*, 78 IND. L.J. 413, 452 (2003); Mark V. Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 55-56 (2003).