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CONTINUITY AND COHERENCE IN THE REHNQUIST COURT

JOHN O. MCGINNIS*

Tom Merrill's excellent Childress Lecture¹ will be seen as a heralding example of a new trend: the social science explanation of Supreme Court judicial decision making. Building on the insights of political scientists such as Lee Epstein,² Professor Merrill's study seeks to apply social science empiricism and strategic thinking to explain the inner workings of the Court and the shape of its doctrine. According to its proponents, such explanations are more realistic and more accurate than the more traditional treatments of the Court that Professor Merrill calls *Weltanschauungs* (a German term used by Anglo-Saxon academics almost always carries with it a faint hint of disparagement),³ which seek to locate a Court's doctrine in some overarching theory of jurisprudence or political science. As one who has recently offered such a global perspective on the Rehnquist Court,⁴ I suggest here that while Professor Merrill's social science approach has insights, it suffers from many of the same difficulties of imprecision as more traditional accounts. Moreover, it fails to represent fully and accurately the nature of Supreme Court jurisprudence because it slights methodological commitments and an era's social thought in shaping legal doctrine. Once those influences over a particular Supreme Court's jurisprudence are recognized, traditional accounts continue to offer a richer explanation than those offered by the new social science.

Professor Merrill's analysis divides the Court into the "first" and "second" Rehnquist Courts, which he argues are quite distinct.⁵ The first spanned the years 1987 to 1994, while the second began in 1994 and continues to the present. The essence of his thesis is that each Court had a different, but overlapping, five-member majority of conservative Justices. These

* Professor, Northwestern University Law School. Thanks to Neal Devins and Mark Movsesian for comments, and to Tom Merrill for recommending me as a commentator. I am also grateful to Saint Louis University for its great hospitality at the conference where these remarks were delivered.

1. Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003).

2. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

3. See Merrill, *supra* note 1, at 571.

4. See John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002).

5. Merrill, *supra* note 1, at 576-590.

conservatives, having failed to make progress for certain conservative policy preferences on social issues in the first Court, switched to conservative preferences on federalism issues in the second Court because they could reach a greater consensus on these issues. According to Professor Merrill, Justice Scalia was the strategic catalyst for this change.

My problems with the social science approach begin with the attitudinal model under which judges vote their preferences and the Court's jurisprudence results from these preferences. Professor Merrill, as the sophisticated legal scholar and former Deputy Solicitor General that he is, obviously does not accept the simplistic model that the Justices simply vote their policy preferences. He recognizes that preferences can include jurisprudential positions.⁶ For instance, judges may have methodological commitments such as originalism, textualism, or respect for precedent that substantially constrain their first-order policy preferences. Once the model is expanded, however, to include such preferences, the new model of social science begins to look like the old model in which legal methodology, particularly in choices of interpretative method, has a very substantial influence in generating the Court's jurisprudence.

Taking account of these methodological preferences also undermines Professor Merrill's basic thesis that a dichotomy exists between the behavior of the conservative Justices in what he calls the first and second Rehnquist Courts. All of these Justices—Rehnquist, O'Connor, Scalia, and Kennedy—have shared throughout both the first and second Rehnquist Courts at least a soft originalism committed to reviving the texts and structures of the Constitution of 1787 insofar as their other methodological attachments, such as an attachment to precedents, permit. Of course, no two of these Justices have precisely the same commitments. Justice Scalia, for instance, practices a far stricter originalism than either Justices O'Connor or Kennedy. All take more seriously, however, arguments from text, structure, and historical understanding than did most Justices in the Warren and Burger Courts.

The consequences of such a revival are striking—a rediscovery of the decentralizing structures of the Constitution that were obscured by the jurisprudence of the New Deal, Warren, and Burger Courts. As I have previously discussed, these Justices have moved to embrace federalism and the First Amendment protections for mediating associations, both civil and religious.⁷ Thus, these Justices have voted to breathe new life into constitutional mechanisms that promote competition in social norms, whether they relate to invigorating competition among states, or among private associations, or between secular and religious associations. More than the

6. *Id.* at 592.

7. *See* McGinnis, *supra* note 4.

Courts of the past half century, these Justices tend to favor the states over the federal government, and private mediating institutions over the states.

While the conservative Justices have some substantial agreement in much of their legal methodology, they differ on their willingness to adhere to established precedent—another key axis of legal craft—with Justices O'Connor and Kennedy more willing to accept as *stare decisis* decisions that they may believe were wrongly decided as an original matter. The Rehnquist Court decisions, therefore, are largely generated by the combination of these two commitments—a commitment to restoring the structures that had been obscured by the New Deal and Warren Courts, and a commitment to precedent, under which the two most precedent-respecting Justices are a restraint on how far the Court can go in its revival. This second commitment, of course, explains the failure to overrule *Roe v. Wade*.⁸

It is true that the attitudinal model of social science is useful in formalizing the obvious truth that the Court's jurisprudence is likely to change when one Justice is substituted for another. The Rehnquist Court did change when Clarence Thomas became the fifth Justice in the conservative majority rather than Byron White.⁹ Even this perspective, however, misses the broader view of what Justice Thomas's jurisprudence, a hard edged originalism that would revive much of the Constitution of 1787, reflects about the temper of our time—the dissatisfaction with more centralized forms of government decision making that were more popular in previous eras. The New Deal Constitution reflected the enthusiasm for centralized decision making in its reinterpretation of the Commerce Clause and Separation of Powers provisions that facilitated the national administrative state. The Warren and Burger Courts extended this enthusiasm for centralization to the social arena where the Court took it upon itself to determine the content of national rights under the rubric of its substantive due process jurisprudence. The appointment of someone like Justice Thomas and the rise of strong originalism as a thinkable methodology of judging was possible only after the perceived failures of centralized government stimulated a renewed consideration of the virtues of the Framers' Constitution. Hence, Justice Thomas's appointment is a confirmation of the changing political ideals that have propelled originalism's revival and that explain much of the Rehnquist Court's doctrine.

One way of bringing this point home is to contrast a paradigm conservative Justice on the Rehnquist Court, like Justice Thomas, and the paradigm

8. 410 U.S. 113 (1973).

9. Justice Thomas replaced Justice Thurgood Marshall, a noted liberal. Justice White was replaced by Justice Ruth Bader Ginsburg, whom Professor Merrill regards as part of the liberal bloc. Thus, the substitution of Justice Thomas for Justice White represents the net change in the composition of the conservative majority.

conservative Justice on the Warren Court, the second Justice John Marshall Harlan. Justice Harlan was not a systematic originalist nor a textualist. He was a common-law constitutionalist.¹⁰ He respected precedent, although his respect was consistent with slow evolution of legal norms. His methodological commitments stand in stark contrast to those of Justice Thomas, who hews to the original understanding of the Constitution and is willing to depart from precedent when that precedent is at war with that understanding. Evolution of constitutional norms plays no substantial part in Justice Thomas's thinking. From the perspective of a conservative of the Rehnquist era, like Justice Thomas, Justice Harlan's jurisprudence sometimes seems not much sounder from a methodological perspective than that of Warren Court liberals, and the results not strikingly different—the same direction, only slower. The political and legal ideals of the time must be invoked to explain this fundamental shift of conservative perspective. Justice Harlan reflected the consensus politics of the post-war era, in which both parties had more confidence in national power than Republicans do today. In contrast, Justice Scalia and, to an even greater extent, Justice Thomas reflect modern conservatism's fundamental challenge to that consensus. Hence, they are much more willing to embrace a methodology that leads to results radically at odds with the jurisprudence that was the product of that consensus.

Certainly, I think that the substantial change in the nature of conservative jurisprudence from the Warren Court to the Rehnquist Court is part of what historians will focus on a hundred years hence, and it is an important part of a fruitful explanation of this Court. Supreme Court jurisprudence of any era is, to some degree, a cultural artifact. An opinion of an era, like a popular song, rests on complex strands of sensibilities peculiar to the age. Our analysis of the Court must reflect this understanding to ring true. The somewhat myopic view of the new social science has trouble focusing on explanations that will integrate the Court's jurisprudence with the rest of an era's social thought.

Now perhaps Professor Merrill might suggest that the attitudinal model can encompass such gestalt switches—they simply represent a change in a lot of preferences. I think, however, this perspective misses the larger story: judges' views are not simply a collection of preferences, but instead are a jurisprudence that emerges dialectically from substantive and methodological commitments. In our era, a change in societal perspective caused legal

10. For a discussion of what a conservative common law constitutionalist is, see Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 717-18 (1994). I believe Justice Harlan fits the definition better than Justices O'Connor or Kennedy, who, despite a respect for precedent, have been willing to cut back sharply on emerging traditions such as the pre-*Lopez* view that the federal government was not substantially limited by the enumerated powers in its regulation.

theorists to take a renewed look at originalism, which, in turn, has systematically reoriented Supreme Court doctrine.

In contrast, Professor Merrill offers an explanation of the Rehnquist Court that self-consciously holds at arm's length any explanation of the Court's jurisprudence based on an inner legal or social theory logic. He suggests, instead, that it is a result of strategic decisions by individual Justices in pursuit of their preferences, given the constraints of external actors, like the Congress and the public. He uses the Rehnquist Court as an example of these new social science explanations. He claims that the Rehnquist Court conservatives have shifted strategically away from social issues to federalism and, further, that Justice Scalia is the strategic catalyst in that shift.

Professor Merrill, however, has a problem of characterization in saying that the second Rehnquist Court has largely abandoned social issues. This problem of characterization or coding, to use social science terminology, is another consideration that makes it unclear whether the new social science provides much of an advance in precision over older forms of legal explanation. The new social science categorizes, codes, and then aggregates cases in order to count them, so as to create a database for its explanations. Such categorization, however, requires judgments that are subjective and open to dispute.

What counts as a social issue in the Rehnquist Court is an example of subjective judgment. It is true that the second Rehnquist Court is no longer addressing social issues through a jurisprudence of fundamental rights, but that is because of the Court's methodological reorientation. In *Washington v. Glucksberg* (the right to die case),¹¹ the Rehnquist Court made clear that it will be loathe to create new fundamental rights, leaving *Roe* without much generative force outside the abortion area. The Court, however, has continued to focus on controversial social issues in other areas of public life, advancing an approach to social issues rooted in an interpretation of a particular text of the Constitution—the First Amendment, with both its religion and free speech clauses. Such a jurisprudence does not mean that the second Rehnquist Court is abandoning social issues. Instead, it is addressing them in a framework more consistent with its methodological commitments.

Most notable on the Court's agenda, of course, is religion, which may be our most salient and enduring social issue. Politically, regular attendance at religious services was a better predictor than high income of who voted for George W. Bush.¹² Socially, religion remains the social institution with the most influence over behavior. Thus, the Court decisions expanding the role of

11. 521 U.S. 702 (1997).

12. See Ronald Brownstein, *A Red-Blue State Stalemate?*, AM. PROSPECT, Nov. 18, 2002, at 37.

religion in social life may be the most important kind of decisions about social issues. Here, the Court in a series of cases has clarified, and to some degree relaxed, the strictures on government aid to religion, culminating in its epochal decision to uphold the constitutionality of school vouchers.¹³ Labeled by some as equal in importance to *Brown v. Board of Education*,¹⁴ this last decision is surely one of the most important social issue decisions for our generation because it permits religious denominations to operate schools with public funds. This funding, in turn, enables religious institutions to compete on a more equal footing with public schools in the most important arena of social norms—the transmission of values to the next generation.¹⁵ The vouchers case thus changes the balance of power between secular and religious educational institutions. It is difficult to understand why this decision should not be categorized as a social issues case since this new balance may ultimately affect future decisions on the entire range of matters that Professor Merrill categorizes as social issues, including abortion.

Paralleling the Court's treatment of funding for religious schools under the Establishment Clause is its treatment of access to school facilities for religious groups under the Free Speech Clause. These cases also address the important social issue of the extent to which religious influence is permitted in public life. In a series of cases, the Court has held that the First Amendment requires that schools who open their facilities to secular groups also open them to religious groups, rejecting the argument that the religious expression conducted under a neutral access principle presents an Establishment Clause violation.¹⁶ The most recent of these cases, *Good News Club v. Milford Central School*,¹⁷ is the most instructive because the contemplated after-school activity in that case was pervasively religious.¹⁸ There, the Rehnquist Court has established an equal facilities doctrine for religion, requiring infrastructure, in terms of physical facilities, to be available for expressive purposes to religious associations if they are made available for expressive purposes to secular associations. This line of important cases also advances a jurisprudence of Hayekian spontaneous order to address social issues because it allows religious ideals on character-building and other social norms to compete with secular ideas and norms.

13. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

14. 347 U.S. 483 (1954).

15. See John O. McGinnis, *The Enlightenment Case for Vouchers*, 57 N.Y.U. ANN. SURV. AM. L. 75 (2000) (describing the importance of educational competition for the formation of good social norms).

16. The leading case in this area is *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).

17. 533 U.S. 98 (2001).

18. *Id.* at 103 (describing the religious nature of the activities at issue in *Good News Club*).

To be sure, as Professor Merrill notes, in such cases as *Lee v. Weisman*¹⁹ and *Santa Fe Independent School District v. Roe*,²⁰ the Court has refused to permit government to sponsor religious observance. The school prayer cases, however, are completely consistent with cases approving generally available aid to religion if the Court is pursuing, as I have argued, a Hayekian jurisprudence that promotes spontaneous order through the religion clause of the First Amendment.²¹ Through both sets of decisions the Court is promoting a decentralized competition of social norms: the government is permitted to facilitate the competition of norms on an equal basis through the neutral provisions of funds, but it is restrained from imposing its own norms through sponsoring prayer in public schools. The embrace of this distinctive jurisprudence pushes a particular kind of social jurisprudence—one where the competition of private actors rather than government impositions should be the generative force for social norms.

Moreover, the Court's jurisprudence also comports with the respect for precedent that I noted earlier. The school prayer cases had clear rules: the government could not sponsor prayer in schools. They were, thus, powerful precedent for *Lee* and *Santa Fe* to follow. In contrast, the line the Court had drawn for permissible and impermissible aid to religion was notoriously difficult to apply.²² For reasons of legal craft, therefore, a neutrality rule became a powerful competitor to that vacillating line of previous jurisprudence on religious aid. Thus, these cases seem better grounded in a paradigm that combines both political theory and jurisprudential considerations like precedent than the kind of strategic behavior Professor Merrill adduces.

As Professor Merrill acknowledges, the second Rehnquist Court also has focused on the important social issue of homosexuality in *Boy Scouts of America v. Dale*²³ and in *Romer v. Evans*.²⁴ Homosexuality presents a more live social issue in our time than race or gender because there is much less of an uncontested core consensus on the issues of sexual orientation. Here, again the Court deployed a Hayekian jurisprudence. By permitting the Boy Scouts to exclude a leader who would interfere with their message, *Dale* maximizes the autonomy of private mediating institutions to set their own norms. By preventing the state from imposing special constitutional obstacles onto civil rights legislation for homosexuals, *Romer* requires the government not to

19. 505 U.S. 577 (1992).

20. 530 U.S. 290 (2000).

21. McGinnis, *supra* note 4, at 543.

22. As the Supreme Court itself admitted. *See* Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) (noting that the Supreme Court's aid to parochial school cases "sacrifice[] clarity and predictability for flexibility").

23. 530 U.S. 640 (2000).

24. 517 U.S. 620 (1996).

discriminate in the norms it applies. Moreover, once again in *Dale* the Court is building on precedent—the growing protection for expression, particularly joint expression by groups that the Court has been providing in the past few years.²⁵

Just as I think it is not accurate to say that the second Rehnquist Court has given up on social issues, I do not think it is correct to say that the first Rehnquist Court did not attempt to promote federalism. For instance, as Professor Merrill himself admits, *New York v. United States*²⁶ was decided by the first Rehnquist Court. *New York* was a crucial decision in the federalism revolution, because it impeded federal officials from using the federal system to avoid accountability by making state officials appear responsible for decisions over which they had no control. Moreover, *New York v. United States* is a characteristic decision of the Rehnquist Court in that it deployed the history of the Constitutional Convention to preclude the federal government from indirectly regulating citizens by issuing orders to state government, rather than regulating citizens directly by passing federal laws. Like the other federalism decisions of *United States v. Lopez*²⁷ and *United States v. Morrison*,²⁸ *New York* also is characteristic of the Rehnquist Court in that it overruled no precedent, although it did unsettle expectations that no congressional law would be invalidated ever again on federalism grounds.

Moreover, the first Rehnquist Court also rendered an important federalism decision in *Gregory v. Ashcroft*.²⁹ There, it held that federal laws would apply to operations of state governments only if Congress clearly expressed its intention that those laws be so applied.³⁰ This “clear statement” rule made it easier for states to mobilize their resources against such applications by forcing federal representatives to be explicit. This rule certainly promoted a more federalism-friendly jurisprudence.

More generally, it is quite clear that two other members of the Court—Chief Justice Rehnquist and Justice O’Connor—were interested in restricting the powers of the federal government vis-à-vis the states long before the “second Rehnquist Court.” After all, they both vigorously dissented in *Garcia v. San Antonio Metropolitan Transit Authority*.³¹ Given these Justices’ interest in federalism both before and after the first Rehnquist Court, the most

25. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995).

26. 505 U.S. 144 (1992).

27. 514 U.S. 549 (1995).

28. 529 U.S. 598 (2000).

29. 501 U.S. 452 (1991).

30. *Id.* at 470.

31. 469 U.S. 528 (1985) (holding that traditional state functions were not immune from federal regulation).

parsimonious explanation for the lack of federalism focus in the first Rehnquist Court is that the docket did not provide the relatively unusual opportunities to advance federalism without overruling precedent—the kind of pro-federalism decisions that *New York*, *Lopez*, *Morrison*, and *Gregory* all represented. Moreover, as I recognize above, Professor Merrill is certainly correct that Justice Thomas made a difference: without Justice Thomas, those in favor of federalism still lacked the votes to achieve their objectives.

I am also skeptical that Justice Scalia was the strategic catalyst of these changes. My first reaction is one of amusement. Scalia a strategist? Is it strategic to write barbed concurrences and dissents that alienate other Justices? Seriously, however, I think the claim that Justice Scalia is strategically shifting from social issues to federalism belies his deep methodological commitments. More than most Justices who have sat on the Court, Justice Scalia does not simply have a set of preferences, he has a jurisprudence—originalism. We know this both because he has said so in no uncertain terms and because he has made decisions rooted in his view of the original understanding that sit uneasily with the preferences of political conservatives. For instance, in *Maryland v. Craig*,³² Justice Scalia dissented from a decision that upheld a statute which permitted a child to testify out of sight of the defendant who had allegedly abused her. While this provision offered protections for victims of crime and so was supported by conservatives, Justice Scalia dissented because the language of the Confrontation Clause required face-to-face confrontation of the accused with an accuser even when the accuser was a child.³³ He has also frustrated efforts by conservatives to use the Constitution to reform state tort law. He refused to impose substantive due process limits on punitive damages because he believed that the substantive due process theory behind such limitations is not well-rooted in the Constitution.³⁴

If originalism, rather than a set of conservative policy preferences, is Justice Scalia's core commitment (tempered by some respect for very well-established precedent), it is not at all surprising that he supports federalism. After all, federalism was the keystone of the original understanding.³⁵ While it is true that some of his federalism jurisprudence, like that of sovereign

32. 497 U.S. 836 (1990).

33. *Id.* at 862 (Scalia, J., dissenting) (“Whatever else it may mean in addition, the defendant’s constitutional right ‘to be confronted with the witnesses against him’ means, always and everywhere, at least what it explicitly says: the ‘right to meet face to face all those who appear and give evidence at trial.’” (quoting *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (quoting *California v. Green*, 399 U.S. 149, 175 (1970)))).

34. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 607 (1996) (Scalia, J., dissenting).

35. See R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* 237 (1994) (“The two most important features of the government the framers created are federalism and the separation of powers.”).

immunity, depends on structural rather than textual support, Justice Scalia has made clear both in his theoretical writing and his separations of powers jurisprudence that he believes structural arguments are essential implements in the toolbox of constitutional interpretation. For instance, in *Morrison v. Olson*,³⁶ Justice Scalia argued in dissent that the independent counsel law was inconsistent with the President's constitutional authority to fire executive officers at will. This authority is not expressly granted in the Constitution, and Justice Scalia based his arguments in part on structural considerations such as the need for the President to control the executive branch to preserve the equilibrium among the branches.³⁷ Justice Scalia also expressly noted that structural arguments are a component of originalism in his essay, *Originalism: The Lesser Evil*.³⁸ Thus, Justice Scalia's federalism jurisprudence can be seen to flow from long-standing jurisprudential methodology.

Originalism: The Lesser Evil is also relevant to Professor Merrill's arguments that Justice Scalia's federalism opinions are insufficiently reasoned (and so suggest a lack of sincerity). In this essay, Justice Scalia suggests that originalist Supreme Court opinions, like *Myers v. United States*,³⁹ can never amass the totality of evidence for their positions because the opinions would simply be too long. Thus, the sovereign immunity decisions may enjoy more support in the original understanding than their opinions actually provide. In a lengthy article, Professor Michael Rappaport, for instance, has recently tried to show that the sovereign immunity decisions are rooted in the original understanding of the word "state," because the concept of state at the time of the framing was widely recognized to carry with it immunity from litigation by citizens.⁴⁰

Moreover, Justice Scalia's jurisprudence shows a sincere interest in federalism well before the strategic turn claimed by Professor Merrill. In *CTS Corp. v. Dynamics Corp. of America*,⁴¹ Justice Scalia radically sought to limit the dormant Commerce Clause. He wanted to jettison the balancing test that gives the Supreme Court authority to invalidate state laws on the basis of their burden on interstate commerce in favor of a test that invalidated them only when they actually discriminated against citizens of other states.⁴² It is hard to

36. 487 U.S. 654 (1988).

37. *Id.* at 703-15 (Scalia, J., dissenting).

38. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

39. 272 U.S. 52 (1926).

40. Michael B. Rappaport, *Reconciling Textualism with Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 821-22 (1999).

41. 481 U.S. 69 (1987).

42. *Id.* at 95-96 (Scalia, J., concurring).

think of any other Justice in history who struck such a blow for the states so early in his career.

Professor Merrill also cites an article of Justice Scalia's about federalism that was written in 1982 to suggest that Justice Scalia was not enthusiastic about federalism.⁴³ That article, however, does not seem inconsistent with a jurisprudence that seeks to keep Congress within its enumerated powers. It instead supports a claim that conservatives should respect the federal government's power over national commerce—a power the Constitution clearly gives the federal government.⁴⁴ Justice Scalia can logically both provide the federal government a wide berth within its enumerated powers and nevertheless enforce the enumerated powers against the federal government.

Thus, while Professor Merrill argues that Justice Scalia's doctrine of preemption undermines the sincerity of his support for federalism, it flows from this coherent position. If one believes that the Constitution provides the federal government appropriate authority for matters like national defense and spillovers among the states, it is plausible that within that government's authority the Court should be vigorous in preempting state laws. I myself have argued previously that some centralized authority, such as the authority to keep open the avenues of trade and investment among the states is necessary to make devolution and competition among the states work well.⁴⁵ It is true that the federal government's authorities after the New Deal exceed what is necessary to address and create the optimal conditions for competition, but in the economic realm these authorities rest on such substantial precedent that no precedent-respecting Court will overturn them. The problem with preemption in the modern jurisprudence on this view may not be the scope of preemption but the scope of the enumerated powers within which the federal government enacts its legislation.

Thus, I ultimately find Professor Merrill's strategic actor account unpersuasive both generally with respect to the Rehnquist Court and specifically with respect to Justice Scalia. The first and second Rehnquist Courts as well as Justice Scalia himself have a greater continuity and coherence both substantively and methodologically than Professor Merrill admits. Methodologically, they represent a move toward a jurisprudence more informed by the materials relevant to original understanding—text, structure, and history—although this movement respects precedent as well, largely because of the views of Justices O'Connor and Kennedy.

43. Merrill, *supra* note 1, at 610 nn.149-52 and accompanying text.

44. See Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL'Y 19, 20 (1982).

45. McGinnis, *supra* note 4, at 508.

Substantively, the Rehnquist Court has been pursuing a coherent jurisprudence that invigorates decentralization and the spontaneous ordering of social norms that Alexis de Tocqueville celebrated in *Democracy in America*⁴⁶ as being the essence of the social order generated by our original Constitution. In a range of doctrinal areas—federalism, freedom of association, the religion clauses, and the balance of power between juries and judges—the Court is helping sustain a civil order that bubbles up from state governments or from citizens voluntarily gathered together or randomly selected.⁴⁷ This jurisprudence responds to the political understandings of our era where social theories, such as public choice, have shown that the disproportionate influence of special interest groups and the inattention of the general citizenry can prevent centralized democracy from measuring majority will and producing good social norms. In contrast, the kind of decentralized civic order described by Tocqueville engages the citizen and restrains special interests through competition, whether the competition is among different states or among different associations. The Rehnquist Court jurisprudence is designed to sustain this more decentralized system of order by protecting from centralized power the autonomy of mediating institutions and state governments that serve as “discovery machines” for decentralized social norms.

Professor Merrill kindly acknowledges my alternative view of the Rehnquist Court, but suggests it has flaws:

McGinnis’s devolutionary theory . . . cannot account for the continued willingness of the Court to find state laws preempted by federal regulation, to strike down discriminatory state laws under the dormant Commerce Clause doctrine, and to eliminate state experimentation with different sorts of electoral regimes under an ever-expanding First Amendment.⁴⁸

I do not believe that the doctrines are as problematic for my theory as Professor Merrill asserts.

First, as I explained above, preemption is at least compatible with a devolutionary theory. Second, the Court’s failure to excise the dormant Commerce Clause is consistent with the respect for precedent that marks the Rehnquist Court. The dormant Commerce Clause has been around for more than a century—far longer than the centralizing jurisprudence of the New Deal. It is hardly surprising that the current Court has not summarily disposed of it. What is surprising is that some Justices are willing to overrule it. Given the venerable nature of the contrary precedent, their votes actually show the strength of the devolutionary ideals of our time. Given differing legal

46. See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Phillips Bradley ed., Henry Reeve trans., Francis Bowen rev., Vintage Books 1990) (1835).

47. See McGinnis, *supra* note 4, at 489-495

48. Merrill, *supra* note 1, at 571.

methodological commitments of Justices (for instance, to precedent), no new jurisprudential pattern will ever work itself pure. The primary jurisprudential currents (like spontaneous order) can be discerned only by recognizing that these methodological commitments will create backwaters and eddies of their own.

Finally, the Court's willingness to wield the First Amendment against the states is consistent with my devolutionary theory, because the First Amendment protects the ability of private actors, including mediating institutions, to create a market for social norms.⁴⁹ This market can be even more effective than competition among the states.⁵⁰ Within the scope of the First Amendment, therefore, the Court is right to protect the autonomy of the private mediating institutions against the states just as it protects the autonomy of states against the federal government. Both actions devolve power to more effective fora for competition in social norms. Thus, when the Court struck down a blanket primary regulation, as it did in *California Democratic Party v. Jones*,⁵¹ it did so in favor of the autonomy of mediating institutions—in this case, political parties that are themselves important vehicles for competitive norm creation.

In my view, traditional legal scholarship—the close analysis of legal doctrine and legal methodology in the context of an era's social thought—still has the power to provide a more compelling description of the Supreme Court's jurisprudence. Here, I reveal myself doubly as a stick in the mud—methodologically as well as substantively. Traditional scholarship, rather than the new social science of positive jurisprudence, is needed to tell the most salient story of the Rehnquist Court—how it is moving toward a restoration of the devolution and spontaneous order more in keeping with both the Framers' ideas and our own.

49. See McGinnis, *supra* note 4, at 526-29.

50. *Id.*

51. 530 U.S. 567 (2000).

