ARTICLES

THE REHNQUIST COURT,
STRUCTURAL DUE PROCESS, AND
SEMISUBSTANTIVE CONSTITUTIONAL
REVIEW

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INTRODUCTION

In 1976, Professor Hans A. Linde published his pathbreaking paper, Due Process of Lawmaking.1 That article focused attention on a subject of subtlety and importance: To what extent should the processes by which laws are enacted affect their validity under seemingly substantive constitutional provisions like the First Amendment and the Equal Protection Clause?2 Anticipating a flurry of recent scholarship,3 Justice

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2. Id. at 199–201. As the title of the article suggests, it dealt largely with the due process clauses of the Fifth and Fourteen Amendments, including what restrictions—substantive or procedural—those provisions impose on lawmaking bodies. See id. at 199. The “due process of law making” slogan, however, has since come to be closely associated with process-centered restraints on legislative and other lawmaking authorities. See, e.g., infra note 630 (noting Justice Stevens’ use of the term in Fullilove v. Klutznick, 448 U.S. 448, 550 (1980)).
Linde took particular interest in whether the absence of legislative findings offered in support of an otherwise duly enacted law should bear upon that law’s constitutionality.4

Drawing in part on Justice Linde’s work, Professor Laurence Tribe began in the same time frame to advocate a style of judicial review that combines both process-centered and substance-centered components.5 In doing so, he documented the pre-Rehnquist Court’s use of this technique in high-profile cases—such as *New York Times Co. v. United States*,6 *Hampton v. Mow Sun Wong*,7 and *Mississippi University for Women v. Hogan*8—to invalidate statutes and rules.9 Professor Tribe also gave this approach to constitutional decisionmaking a name, calling it “structural due process.”10 For a variety of reasons, I prefer the more encompassing term “semisubstantive review.”11

Semisubstantive review, as I use that label, entails four key features. First, the subject matter of judicial inquiry is not the process applied in

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11. There are three main reasons that I prefer the label “semisubstantive review.” First, as we soon shall see, the Supreme Court has used the technique described by Professor Tribe not only to protect rights related to “due process” values, but also to protect the constitutional value of federalism. Second, even to the extent that the Court has used this technique to protect individual rights, it has derived its doctrines more from texts like the First and Eighth Amendments than the Due Process Clauses themselves. Third, the term “structural due process” might suggest that the Court in these cases is only, or at least mainly, interested in the fairness of the rulemaking processes as a general matter. In my view, however, the Court in these cases is keenly interested in how legislative processes interact with those particular constitutional values that drive the Free Speech Clause, the Equal Protection Clause, and other “substantive” constitutional constraints.
adjudicating a discrete dispute; rather, the matter at hand is the constitutionality of a statute or other generalized expression of legal policy. Second, some procedural omission by the lawmaker—rather than an incurably substantive flaw in the end product of its work—lays the groundwork for a judicial intervention that invalidates the challenged rule or negates how that rule otherwise would operate. It may be, for example, that a federal statute read as a whole, in context and in light of its legislative history, leaves no serious doubt that Congress meant to say “X.” The Court, however, might refuse to read the law to say “X” because of the procedural failure of Congress to “mak[e] its intention unmistakably clear in the language of the statute.”12 Third, this type of constitutional ruling is provisional, rather than conclusive, in nature. In the wake of our hypothetical statute “X” case, for example, Congress may go back to the drawing board and enact a new law that provides for “X” so long as it satisfies the Court’s process-centered requirement of facial clarity.13 For this reason, analysts sometimes describe semisubstantive rulings as “remanding the question to the political processes”14 or as embodiments of “second-look” review.15 These rulings contrast with judicial actions ordinarily associated with constitutional decisionmaking—namely, rulings that declare, once and for all, whether the substantive requirements of a challenged rule are compatible with the supreme law of the land. Fourth and finally, the Court confines its use of semisubstantive rulings to cases in which the substantive values at stake are (in the Court’s view) distinctively deserving of judicial protection. These process-centered invalidations, for example, seldom take hold in garden-variety cases that trigger only low-level, rational relation scrutiny.16 Instead, they surface most often in cases that involve judicially emphasized free expression, state autonomy or suspect classification values.17 It is the interaction of these substantive values with demands for heightened procedural regularity that justifies describing this judicial approach as involving semisubstantive review.18

13. See id. (noting clarity requirement).
17. Most of this article tends to support this proposition. See, e.g., infra notes 185–191, 192–209, and 228–263 and accompanying text (discussing rulings concerning affirmative action, the First Amendment, and the scope of the Fourteenth Amendment enforcement power).
18. This style of judicial review is also connected with many different slogans. See, e.g., Bryant & Simeone, supra note 3, at 335 (describing it as “on the record review”); Coenen, supra note 3, at 1583–84 (describing semisubstantive rules as “rights-driven rules of deliberation and dialogue,” “structural safeguards of substantive rights,” and “structural doctrines”); William N. Eskridge, Jr. &
In this Article, I examine how semisubstantive doctrines have fared in the hands of the Rehnquist Court. In Part I, I evaluate the modern Court’s use of four varieties of these rules—what I call semisubstantive “how,” “why,” “when,” and “who” rules. This discussion reveals that semisubstantive review pervades the Rehnquist Court’s work. Indeed, many of the Court’s most prominent rulings—in cases like Reno v. ACLU,20 City of Boerne v. Flores,21 and Lucas v. South Carolina Coastal Council,22 as well as its recent decisions on the rights of aliens23—involves important and varying features of semisubstantive analysis.

Part I also provides an initial outline of recurring themes that overarch the Rehnquist Court’s semisubstantive work. Three themes are of particular importance. First, this Court is broadly open to semisubstantive decisionmaking; indeed it has invoked semisubstantive doctrines in virtually every field of constitutional law.24 Second, notwithstanding the

19. All of these rules, of course, are to be contrasted with constitutional “what” rules, under which the Court makes a nonprovisional, once-and-for-all decision that focuses solely on a challenged law’s substantive content.
22. 505 U.S. 1003, 1031–32 (1992) (invalidating a state beachfront land use restriction as applied because it was based solely on legislative determination of need rather than a judicial determination of nuisance).
24. We shall see, before we are finished, that this attribute of the Rehnquist Court’s jurisprudence corresponds with a common tendency to prefer a “minimalist” style of constitutional review. See, e.g., Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court xi (1999); Debins, supra note 3, at 1211 n.182 (citing “ever-burgeoning literature on judicial minimalism”). In addition, many observers have reflected fruitfully on the potential values of various forms of semisubstantive decisionmaking. See, e.g., Eskridge & Frickey, supra note 18, at 646 (citing “powerful arguments for quasi-constitutional law”). Other scholarship recently has touched on the theoretical foundations for semisubstantive review. E.g., Michael C. Dorf & Barry Friedman, Shared Constitutional Interpretation, 2000 SUP. CT. REV. 61, 61–68; William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 DUKE L.J. 1215, 1266 (2001) (noting that “American lawyers and political scientists have dichotomized American law between the ‘higher lawmaking’ entitled in the Constitution and ‘ordinary lawmaking’ entailed in statutes” but urging that there is a need “to break down this dichotomy”); Elizabeth Garrett & Adrian Vermeule, Institutional Design of a Thayerian Congress, 50 DUKE L.J. 1277, 1294 (2001) (discussing values of congressional deliberation); Mark Tushnet, Subconstitutional Constitutional Law: Supplement, Sham, or Substitute?, 42 WM. & MARY L. REV. 1871, 1874–75 (2001) (discussing concept of “policy space,” within which policymakers are willing to pursue goals through use of varying means, some of which are less threatening to constitutional values). Of particular significance in this regard is the potential these doctrines hold to reduce the “counter-majoritarian difficulty” commonly associated with the more traditional “on-off” modes of judicial review. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16, 23–28 (1962). See also Coenen, supra note 3, at 1834–51 (providing a brief enumeration of arguments for and against semisubstantive decisionmaking).
Rehnquist Court’s evidenced receptivity to semisubstantive decisionmaking, it has often shown ambivalence toward the application of these doctrines (with the exception of the now-familiar, constitutionally driven, clear statement rules of statutory interpretation). Third, the Rehnquist Court has deployed semisubstantive review techniques in large part to advance much the same policy agenda that finds expression in its more traditional, once-and-for-all constitutional jurisprudence. More specifically, in a bevy of prominent “what” rule decisions, the Court’s so-called “Federalism Five” (made up of Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas) has given energetic protection to state autonomy values in a way unseen since the early days of the New Deal. In keeping with this theme, the current Court has used all forms of semisubstantive doctrines—“how” rules, “why” rules, “when” rules, and “who” rules—to deflect authority from federal policymakers to state and local officials.

In Part II of the Article, I review the Court’s semisubstantive work on a Justice-by-Justice basis. This study confirms the three themes developed in Part I. Yet Part II also does something more. It reveals that the more controversial forms of semisubstantive decisionmaking (most notably, findings-based “how” rules and purpose-centered “why” rules) have generated ambivalence not only within the Court as a whole, but within the minds of the individual Justices as well.

Finally, in Part III, I turn to an evaluation of the key themes that emerge from my analysis of the Court’s work in Parts I and II. I note, for example, that a gravitation toward semisubstantive decisionmaking fits comfortably with depictions of this Court as preferring a “minimalist” approach when it engages in constitutional review. In addition, I ask whether this Court’s ready use of semisubstantive doctrines to protect federalism values is justifiable in this day and age. In particular, I point out that strong federalism-based semisubstantive approaches took root as a sort of constitutional gap-filler in an era when the Court recognized no (or virtually no) hard and fast doctrines that shielded states from congressional overreaching. Now that the Rehnquist Court has forged many strong substantive protections of state autonomy values, it is an open question

26. See infra notes 568–573 and accompanying text (summarizing recent decisions).
27. See, e.g., infra notes 199, 639–649 and accompanying text (discussing various Justices’ ambivalent expressions about role of findings-based “how” rules).
whether semisubstantive safeguards of federalism interests continue to make sense.

I close Part III by building on my Justice-by-Justice analysis in Part II to explain why inevitable departures from and appointments to the Court may greatly affect the future prevalence of semisubstantive decisionmaking. To be sure, the replacement of one Justice with another—especially when, as now, so many of the Court’s rulings are closely divided—always portends some shifts in constitutional doctrine. With respect to semisubstantive decisionmaking, however, the opportunities for a marked change in direction are distinctively rich. This is the case, in part, because of the Justices’ ambivalent attitudes toward provisional rulings that this Article repeatedly highlights. It is also the case because the subjects of whether, why, and how to use these rules remain deeply under-theorized within the current Court’s work. In this environment, semisubstantive review—although pervasive—is jurisprudentially fragile, at least in the broad set of cases that do not involve constitutionally inspired clear statement rules of statutory interpretation. In short, within the present Court, the phenomenon of semisubstantive decisionmaking does not rest on a firm foundation of clearly articulated and widely accepted theory.

Against this backdrop, it is significant that Justice Stevens (the Court’s oldest member and most senior associate Justice) is also the most ardent proponent of a “due process of lawmaking” philosophy.28 On the other hand, Justice Scalia (whom many perceive as an intellectual leader of the Court29) has revealed a hardy skepticism toward most forms of semisubstantive doctrines.30 The potential implications of these real world conditions are not hard to see. Given President Bush’s expressed inclination to make future appointments in the mold of Justice Scalia,31 semisubstantive decisionmaking—despite its recent ascendancy in the work of the Rehnquist Court—may soon find itself on the decline.

28. See infra Part II.B.
29. See Laurence H. Tribe, Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?, 113 H ARV. L. R EV. 110, 159 (1999) (claiming “it is Justice Scalia’s orientation toward structural inference that seems to have galvanized a majority on the current Court”).
30. See infra notes 584—600 and accompanying text.
I. SEMISUBSTANTIVE CONSTITUTIONAL RULES AND THE VALUES THEY SERVE

A. CONSTITUTIONAL “HOW” RULES

What are constitutional “how” rules? They are not rules that direct attention to how—in terms of a law’s content—the lawmaker seeks to achieve a permissible purpose. For example, when the Court invalidates an antileafleting statute because a ban on littering provides a less restrictive alternative for keeping streets clean, it is not applying a constitutional “how” rule. Rather, it is applying a “what” rule. The latter label applies because the legislature must alter the substantive content of the law—that is, shift from a ban on leafleting (which is one thing) to a ban on littering (which is quite another)—to sidestep the constitutional trap. “How” rules, in contrast to “what” rules, focus on curable omissions in the lawmaking process that permit the lawgiver to reenact the very same substantive restriction the Court has rejected, or at least the restriction’s functional equivalent.

In Atascadero State Hospital v. Scanlon, for example, the Court refused to read highly suggestive statutory language (and even more suggestive legislative history) to abrogate the states’ Eleventh Amendment immunity from suit under the Rehabilitation Act. The Court based this ruling on what it saw as an important substantive constitutional value: the federalism-based value of protecting state authorities from congressional interference in allocating scarce state resources. The Court, however, did not block Congress from abrogating the states’ Eleventh Amendment immunity once and for all. Rather, it left open the possibility that Congress could effectuate an abrogation if it jumped through a judicially constructed “how” hoop by expressing its intention with crystal clarity.

The Eleventh Amendment rule applied in Atascadero is merely one of many constitutionally inspired clear statement rules the Court has developed over the years. Other “how” rules concern: (1) the role of studies conducted by the lawmaker in evaluating the constitutionality of statutes or the like (legislative-findings rules), (2) judicially constructed default rules that require affirmative legislative overrides of judicially

34. See id. at 241–47.
35. See id. at 238 & n.2.
36. See id. at 242–46.
37. See infra Part IA.1.
constructed protections of constitutional values (constitutional common law rules), and (3) constitutional doctrines that focus on the proper “packaging” of a law, either (a) with regard to the form the legal treatment of a subject takes (for example, as an affirmative monetary subsidy, rather than an economically equivalent tax break) or (b) with regard to the surrounding legal context into which a law is placed. The remainder of Part I.A. probes, on a doctrine-by-doctrine basis, the Rehnquist Court’s use of these various constitutional “how” rules. The ensuing Part I.B. shifts attention to the Court’s application of constitutional “when” rules, “why” rules, and “who” rules.

1. Clarity-Based Constitutional “How” Rules

No set of semisubstantive doctrines has done more heavy lifting than the many constitutionally inspired clear statement rules of statutory interpretation. In *Atascadero*, for example, the Court used a clear statement rule to vindicate the Eleventh Amendment-based value of state fiscal autonomy. In effect, the Court stripped a duly enacted statute of the consequences it otherwise would have had in order to give this value a healthy dose of judicial protection. The *Atascadero* rule, however, protected “state’s rights” in only a semisubstantive manner. It did not foreclose federal interference with state fiscal autonomy. Instead it insisted that Congress use a specialized process (in this case, by speaking with extreme clarity) if it wished to override this value. *Atascadero* thus raised the prospects for productive legislative deliberation on a constitutionally troublesome subject and, in so doing, reduced (but did not eliminate) the chances that a congressional coalition in favor of abrogation would take hold.

The use of clear statement rules to advance constitutional values is nothing new. These doctrines date back to the time of Chief Justice Marshall. In both the Warren and the Burger Courts, clear statement reasoning drove important—even landmark—rulings. Nor has the

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38. The doctrines described in 3(a) will be referred to as “form-based-deliberation rules” and the doctrines described in 3(b) as “surrounding-territory rules.”
39. See supra notes 33–36 and accompanying text.
41. See id. at 243.
43. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 596–602 (1983) (applying clarity-based rule to read federal legislation to bar claim of tax-exempt status to religious institution that prohibited interracial dating); *Greene v. McElroy*, 360 U.S. 474, 503–08 (1959) (construing federal statute to authorize revocation of security clearances with resulting likelihood of job losses only after adversary hearings, so as to protect against false charges of subversive activity); *Trop v. Dulles*, 356
Rehnquist Court abandoned this tradition, for it too has invoked many
different rules of clarity to safeguard all sorts of constitutional values.

The Court’s use of clear statement doctrines gives rise to two
questions of particular importance. First, which specific constitutional
values does—and should—the Court protect with this brand of
semisubstantive decisionmaking? Second, just how explicit must the text
of a federal statute be to cross the judicially constructed “clear statement”
threshold? This second question bears a close relation to the first.
Judicially required levels of statutory clarity, after all, can vary from
substantive context to substantive context. As a result, the Court can
protect one set of constitutional values more aggressively than another by
ratcheting up or down the rigor of any particular clear statement rule it
creates. The following Section will examine how these two key
questions—about which substantive values this Court protects and about
what levels of clarity it requires—have played out in the precedents of the
Rehnquist Court. It will show that the Rehnquist Court has used clear
statement rules to protect a variety of constitutionally grounded liberty,
equality, and property interests. Not surprisingly, however, it will also
become apparent that the present day Court’s most important innovations
with regard to rules of clarity have come in the federalism field.

(a) Clear Statement Rules and Non-Federalism Values.

The Rehnquist Court has used the tools of statutory interpretation in
the service of a rich mix of constitutional values. In INS v. St. Cyr, for
example, a five-Justice majority (made up of Justices Stevens, Kennedy,
Souter, Ginsburg and Breyer) reaffirmed what they saw as the
“longstanding rule requiring a clear statement of congressional intent to
repeal habeas jurisdiction.” In doing so, these Justices vindicated all of
the many constitutional rights that prisoners (including state prisoners)
might assert in federal habeas corpus litigation. The ruling thus illustrates

U.S. 86, 98–104 (1958) (narrowly construing congressional grant of authority to executive branch with
respect to denying passports to citizens; thus protecting associational and travel rights of Communist
Party members).

44. 533 U.S. 289, 298 (2001). The Court found that “[i]mplications from statutory text or
legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate
specific and unambiguous statutory directives to effect a repeal.” Id. at 299. It also noted the clear
statement doctrine’s purpose of ensuring “that the legislature has in fact faced” issues presented in
“traditionally sensitive areas”—here with regard to removing habeas corpus jurisdiction. Id. at 299 n.10
(quoting Gregory v. Ashcroft, 501 U.S. 452, 461 (1991)). But see id. at 333–34 (Scalia, J., dissenting)
(rejecting majority’s claim that past authorities established an anti-habeas-removal clear statement rule).

45. See Coenen, supra note 3, at 1610–11 (discussing Felker v. Turpin, 518 U.S. 651 (1996), and
anticipating Court’s explicit iteration of this interpretive canon). See also Stewart v. Martinez-Villareal,
523 U.S. 637, 645 (1998) (holding that habeas petition filed after dismissal of earlier petition as
premature is not “second or successive” petition under statute; otherwise “dismissal . . . for technical
a simple, but important, point: The Rehnquist Court does not act in monolithic fashion to protect only state autonomy interests when it wields the tools of semisubstantive review.46

Nor is St. Cyr an aberrational decision, for the Rehnquist Court has embraced many clear statement doctrines that protect constitutional values other than the promotion of “states’ rights.” This Court, for example, has held that: (1) “[w]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear;”47 (2) any legislative override of a decision applying the dormant Commerce Clause requires “an expression of the ‘unambiguous intent’ of Congress;”48 and (3) criminal statutes must be read in light of the “preference for traditional jury determination” envisioned by the Sixth Amendment, at least when the fact at issue will greatly increase a mandatory minimum sentence.49

In recognizing each of these constitutionally driven interpretive principles, the Rehnquist Court did not launch significant doctrinal innovations. The first two of these clear statement rules had rich precedential pedigrees; in embracing them the Court did nothing more than reaffirm well-settled principles.50 The third rule—though perhaps setting forth a new doctrine—also had strong roots in familiar precedents,51 particularly in the many decisions that require any “ambiguous criminal statute . . . to be construed in favor of the accused.”52

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46. It is not surprising, on the other hand, that the majority’s ruling drew a vigorous dissent from four members of the “Federalism Five,” who argued that the anti-habeas-removal clear statement rule invoked by the majority lacked support in precedent. See St. Cyr, 533 U.S. at 326–47 (Scalia, J., dissenting).
In a more interesting move, the Rehnquist Court has repeatedly and strongly endorsed the “presumption against retroactive legislation.” Indeed, the “[c]ases where this Court has found truly ‘retroactive effect’ adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation.” Although this canon has ancient origins, the Rehnquist Court can take full credit for its current vitality because Burger Court precedents had created doubts about its continuing efficacy. No less significantly, the Rehnquist Court grounded this doctrine in the very democracy-forcing, deliberation-heightening values that are said to justify semisubstantive review as a general matter. As the Court observed in Landgraf v. USI Film Products: “Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.”

What underlying substantive constitutional values does the presumption against retroactivity protect? In the criminal justice field, this principle safeguards constitutional concerns about proper notice and legislative fair dealing that are closely connected with both the Due Process and Ex Post Facto Clauses. It is important to recognize, however, that the Rehnquist Court has broadly employed this presumption to protect all manner of expectancy interests based on preexisting law. As a result (and not surprisingly), the modern Court’s emphasis of this doctrine dovetails with its energetic protection of private property rights in an ever-growing number of hard and fast constitutional rulings. In this way, the

57. Thus, the Court has emphasized that “the presumption against retroactivity applies far beyond the confines of the criminal law.” St. Cyr, 533 U.S. at 324. In particular, the presumption broadly safeguards “settled expectations,” thus fostering “creativity in both . . . commercial and artistic endeavors.” Landgraf, 511 U.S. at 265–66.
58. See, e.g., Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001) (holding that the right to assert a regulatory taking claim is not barred to a person who acquired property after the value-diminishing regulation was imposed); Phillips v. Wash. Legal Found., 524 U.S. 156, 160 (1998) (holding that lawyer-trust-account monies placed in state-created Interest on Lawyers Trust Accounts (“IOLTA”) constitute private property, so that state use of interest proceeds may constitute unlawful taking); Dolan v. City of Tigard, 512 U.S. 374, 394–95 (1994) (finding unconstitutional taking in government conditioning of grant of building permit on dedication of landstrip for flood-control and
antiretroactivity rule operates as one-half of a double-barreled approach—built on both substantive and semisubstantive doctrines—to protect expectancy-centered constitutional interests that are distinctively valued by the Rehnquist Court.

The current Court invoked another important rule of clarity in the final days of its 2000–01 term. The St. Cyr case did not present only an issue about the scope of federal habeas corpus jurisdiction. It also presented the substantive question of whether a new immigration statute—which blocked all discretionary suspensions of deportation for resident aliens convicted of aggravated felonies—applied to those persons whose convictions had become final prior to the statute’s enactment. In refusing to give this statute the sweeping reading advocated by government lawyers, the Court relied in part on the settled presumption against the retroactive application of newly enacted legislation. The Court, however, also relied on another, and less well-known, clear statement rule of statutory interpretation. Noting that this law concerned solely the treatment of noncitizens, the Court invoked the “the long-standing principle of construing lingering ambiguities in deportation statutes in favor of the alien.”

From one perspective, the Court’s deployment of this alien-favoring clarity rule was not of earthshaking importance; in fact, the Rehnquist Court itself had recognized and applied this same canon on at least one prior occasion. In previous cases, however, the Court had not suggested what it proposed in St. Cyr—namely, that this rule of clarity should and does draw support from the representation-reinforcement theory of constitutional interpretation long associated with Professor John Hart Ely. In particular, the majority in St. Cyr noted (in a lengthy footnote) that constitutional concerns become more acute when a retroactive law targets an “unpopular group,” and it cited secondary authority for the proposition

59. See supra notes 44–46 and accompanying text.
60. See supra notes 53–58 and accompanying text.
62. See Cardoza-Fonseca, 480 U.S. at 449.
63. See ELY, supra note 14, at 43–72.
64. St. Cyr, 533 U.S. at 315 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994)).
that “because noncitizens cannot vote, they are particularly vulnerable to adverse legislation.”

These passages tie the Court’s “pro-alien” clear statement rule of statutory interpretation to resilient strains of constitutional theory most famously expressed in “footnote four” of United States v. Carolene Products Co. This blending of constitutional and statutory reasoning bespeaks an openness to semisubstantive review as a general matter. Even more important, this theoretical move offers support for an approach to statutory interpretation that broadly protects ethnic minorities, women, and all other so-called “Carolene groups.” As the era of the Burger Court closed, distinguished commentators suggested that a pro-Carolene-groups canon of construction—though never identified by the Court itself as such—lay beneath many important precedents of the 1970s and early 1980s. With much justification, however, these commentators later

65. Id. at 315 n.39.
66. 304 U.S. 144, 152 n.4 (1938) (noting possibility that “prejudice against discrete and insular minorities” or “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation” may “call for a correspondingly more searching judicial inquiry”).
68. Eskridge & Frickey, supra note 18, at 602–03. See William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007, 1032 (1989) (claiming that various interpretations of statutes reflect a “special equal protection scrutiny applied by the Court to protect ‘Carolene groups’”); Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 473 (1989) (stating that “aggressive construction of ambiguous statutes designed to protect disadvantaged groups provides a way for courts to protect the constitutional norm of equal protection in a less intrusive manner”).
69. See supra note 68.
70. In particular, the Rehnquist Court has rejected plaintiff-favoring interpretations of federal antidiscrimination statutes in an ever-lengthening line of rulings. See, e.g., Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (rejecting a private right of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964).
asserted that the “Carolene groups” canon of interpretation had lost its sting during the years of the Rehnquist Court.71

Does the rhetoric of St. Cyr signal a change in judicial direction likely to bring greater judicial protection—through semisubstantive statutory construction—to those “discrete and insular minorities”72 historically favored in the Supreme Court’s hard and fast equal protection jurisprudence? Only a dreamer would suggest that an isolated footnote concerning the special difficulties faced by aliens is likely to trigger newly activist interpretations of Title VII and other anti-discrimination laws.73 Yet a seed has been planted. At the least, St. Cyr illustrates the rich possibilities that lie in linking doctrines of statutory interpretation to the theoretical underpinnings of settled constitutional law.

One final (and uncontroversial) clarity rule pervades the Rehnquist Court’s work. The Court has long recognized that “when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue.”74 Through the use of this so-called “doctrine of constitutional doubt,”75 the Court can and does protect fundamental values

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71. Eskridge & Frickey, supra note 18, at 614.
72. See supra note 66 and accompanying text.
73. See supra note 71 and accompanying text.
74. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545 (2001). Of course, the rule has its limits; thus, the Court has made it clear that “[t]he condition precedent for application of the doctrine is that the statute can reasonably be construed to avoid the constitutional difficulty . . . . We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.” INS v. St. Cyr, 533 U.S. 289, 336 (Scalia, J., dissenting) (relying on Miller v. French, 530 U.S. 327 (2000)); Salinas v. United States, 522 U.S. 52, 60 (1997); Seminole Tribe v. Florida, 517 U.S. 44, 57 n.9 (1996). Accord, e.g., Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 471 (2001) (“No matter how severe the constitutional doubt, courts may choose only between reasonably available interpretations of a text.”). The Court also has recently recognized—as I have suggested elsewhere—that the principle of constitutional doubt serves multiple purposes. See Coenen, supra note 3, at 1607. First, it serves a backward-looking goal of implementing congressional intent. Solid Waste Agency v. United States Army Corps of Eng’rs, 531 U.S. 159, 172 (2001). Second, it looks to the future in implementing the “prudential desire not to needlessly reach constitutional issues.” Id. See also St. Cyr, 533 U.S. at 305 (citing “desirability of avoiding [the] necessity” of “resolving . . . a serious and difficult constitutional issue” as lending support “to requiring a clear and unambiguous statement”). Thus, whenever the Court ducks a lurking constitutional issue by interpreting a federal law narrowly, it invites Congress to revisit that issue and then enact in a clear form a statute that has the effect the Court has provisionally averted. See Coenen, supra note 3, at 1608–10. See generally William N. Eskridge, Jr., Dynamic Statutory Interpretation 285–97 (1994); Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State 163–68 (1990); Matthew D. Adler, Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty, 145 U. PA. L. REV. 759, 835–39, 869–74 (1997); William K. Kelley, Avoiding Constitutional Questions As a Three-Branch Problem, 86 CORNELL L. REV. 831 (2001); Lisa A. Klopappenber, Avoiding Serious Constitutional Doubts: The Supreme Court’s Construction of Statutes Raising Free Speech Concerns, 30 U.C. DAVIS L. REV. 1, 3–9 (1996); Lisa A. Klopappenber, Avoiding Constitutional Questions, 35 B.C. L. REV. 1003, 1004–06 (1994); Frederick Schauer, Ashwander Revisited, 1995 SUP. CT. REV. 71, 71–74 (1996).
by eschewing interpretations otherwise ascribable to statutes that would push those statutes into constitutional danger zones. The Rehnquist Court has employed the doctrine of constitutional doubt in many cases. In one of its most publicized decisions from the 2001 Term, for example, the Court relied on this principle to outlaw the indefinite detention of aliens held back from deportation because they had no country to go to, despite powerful claims that Congress authorized this practice. This ruling illustrates the power of statutory interpretation rules to protect constitutional interests that reach beyond the federalism field.

Not surprisingly, however, a great deal of the Rehnquist Court’s work with the doctrine of constitutional doubt has come in federalism cases. The following section examines how the current Court has used this doctrine and other clarity-based “how” rules to protect not personal, but state autonomy, values.

(b) Clear Statement Rules and Federalism Values.

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76. In fact, few rules of law connected with our Constitution have found more frequent expression in the opinions of the Rehnquist Court. See, e.g., BE & K Constr. Co. v. N.L.R.B., 122 S. Ct. 2390, 2399, 2401–02 (2002) (relying on the Petition Clause and the doctrine of constitutional doubt to preclude the Labor Board’s enforcement of rules sanctioning the filing of nonmeritorious suits against union organizers); Raygor v. Regents of the Univ. of Minn., 122 S. Ct. 999, 1005 (2002) (refusing to apply federal tolling statutes to the state because doing so “raises serious doubts about the constitutionality of the provision given principles of sovereign immunity”); Calcano-Martinez v. INS, 533 U.S. 348, 351–52 (2001) (holding that “Congress has not spoken with sufficient clarity to strip the district courts of jurisdiction” over claims based on deportations for felonious behavior because of “serious constitutional questions” that would arise by “leaving [these] aliens without a forum for adjudicating claims”); St. Cyr, 533 U.S. at 299 (noting that “where an alternative interpretation of the statute is ‘fairly possible’ . . . we are obligated to construe the statute to avoid [serious constitutional] problems”); Solid Waste Agency, 531 U.S. at 172; Jones v. United States, 529 U.S. 848, 857 (2000) (applying the avoidance principle to eschew construction of a federal arson statute that makes it applicable to burning of homes that, among other things, receive power or gas by way of interstate transmission lines); Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 787 (2000) (finding conclusion that federal qui tam statute does not apply to actions against states is “buttressed” because there is a “serious doubt” about whether such an application would be constitutional (quoting Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring))); Jones v. United States, 526 U.S. 227, 239–40 (1999) (interpreting federal carjacking statute to require jury determination as to penalty-heightening matter of victim’s “serious bodily injury [or] death” because otherwise “the statute would be open to constitutional doubt in light of a series of cases over the past quarter century, dealing with due process and the guarantee of trial by jury”); United States v. X-Citement Video, Inc., 513 U.S. 64, 77–79 (1994) (citing avoidance canon in regulating indecent expression); New York v. United States, 505 U.S. 144, 170 (1992) (citing principle in federalism case); Rust v. Sullivan, 500 U.S. 173, 191 (1991) (citing, but not applying, principle in abortion-related speech context); Gomez v. United States, 490 U.S. 858, 864 (1989) (applying constitutional doubt rule in reading federal act not to permit magistrates to preside at jury selections at felony trials); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. Trades Council, 485 U.S. 568, 575 (1988) (applying principle to protect free expression and association values). See also Utah v. Evans, 122 S. Ct. 2191, 221 (2002) (O’Connor, J., concurring in part and dissenting in part) (relying on canon to preclude Census Bureau’s use of “hot-deck imputation” techniques).

The reach of the doctrine of constitutional doubt—as even a moment’s reflection will confirm—always moves with the currents of the Supreme Court’s substantive constitutional jurisprudence. For this reason, it is hardly shocking that the Rehnquist Court has increasingly applied the canon to interpret federal statutes narrowly in keeping with its expanding willingness to protect state autonomy interests against ambitious exercises of Congress’ enumerated powers. In Jones v. United States, for example, the Court was asked whether Congress had authority under Article I, section 8 of the Constitution to outlaw the burning of private homes because they receive power through electric interstate transmission systems. A unanimous Court noted that pushing the congressional commerce power this far would raise serious constitutional problems under the Rehnquist Court’s earlier decision in Lopez v. United States. As a result, it read the phrase “property used in interstate or foreign commerce” to exclude private homes, thereby in effect remanding the matter of the arson statute’s coverage to Congress for a studied reconsideration. Had the Rehnquist Court not previously constricted the commerce power with its full-bore constitutional ruling in Lopez, it might well have lacked the tools with which to whittle down the arson statute’s reach with its subconstitutional statutory-interpretation ruling in Jones. The case thus reveals the linkage between this Court’s substantive retrenchment in the states rights area and its resulting ability to vindicate federalism values with semisubstantive second-look rulings based on clear statement doctrines.

78. See, e.g., Solid Waste Agency, 531 U.S. at 172 (relying in part on doctrine of constitutional doubt to read the Clean Water Act not to authorize agency regulation of small, localized ponds in light of the Supreme Court’s Lopez and Morrison rulings). See also supra note 76 (noting other Rehnquist Court federalism-based uses of avoidance canon).


80. 529 U.S. 848, 848 (2000).

81. See id. at 850.

82. See id. at 852.

83. Id. at 853–55.

84. See id. at 851–52 (discussing Lopez).
The Court’s use of clarity rules to protect state autonomy reaches beyond the rule of constitutional doubt. As discussed earlier, for example, the Court has held fast to its holding in Atascadero that imposes a clear statement requirement for Eleventh Amendment abrogation, notwithstanding a potent argument that the logic of this rule has been undermined by later decisions. Pro-federalism values also help explain the Court’s repeated insistence that Congress must speak clearly when it conditions state entitlements to federal funds on the surrender of significant state regulatory authority.


86. The argument goes something like this: Atascadero was handed down in an era when most abrogation issues concerned congressional attempts to negate the Eleventh Amendment immunity pursuant to its Commerce Clause power. In Seminole Tribe, however, the Court held that Congress cannot ever invoke the commerce power to abrogate Eleventh Amendment immunities, regardless of the clarity with which it speaks. See Seminole Tribe, 517 U.S. at 44. As a result of this ruling, the Atascadero doctrine came to apply only in cases where Congress was basing the abrogation on its enforcement powers under the Civil War amendments. In City of Boerne v. Flores, however, the Court gave these enforcement powers a limited reach, by holding that Congress could invoke them only to remedy or prevent genuine constitutional violations as established by the courts. 521 U.S. 507, 519–20 (1997). The practical effect of these post-Atascadero rulings is thus to limit that holding’s effect to the narrow set of cases in which Congress appears to be trying only to effectuate a remedy against states for a true infringement of constitutional rights. Because the Atascadero rule now serves to foreclose remedies against states only for actual constitutional violations, it arguably subverts, more so than it serves, those substantive constitutional values that should drive semisubstantive constitutional rulings. See Coenen, supra note 3, at 1627–28. Notably, this challenge to the continuing viability of Atascadero’s strong rule of clarity may have gained added force from the Court’s decision in INS v. St. Cyr, 533 U.S. 289 (2001). There the majority noted the observation of Professors Eskridge and Frickey to the effect that “[t]he Court . . . has tended to create the strongest clear statement rules to confine Congress’ power in areas in which Congress has the constitutional power to do virtually anything.” Id. at 299 n.10 (quoting Eskridge & Frickey, supra note 18, at 597). There is good reason to believe that this underenforcement-counterweight rationale helped underpin the Atascadero rule at the time it was first embraced. Indeed, Professors Eskridge and Frickey advanced precisely this view. See Eskridge & Frickey, supra note 18, at 597–98. Accord, Sunstein, supra note 68, at 468–69. Any such rationale, however, has long since faded from view. After all, Seminole Tribe, Alden v. Maine, and the post-City of Boerne Section 5 abrogation decisions have rendered the Eleventh Amendment abrogation field anything but one in which “Congress has the constitutional power to do virtually anything.” St. Cyr, 533 U.S. at 299 n.10 (quoting Eskridge & Frickey, supra note 18, at 597). See supra note 79.

The Rehnquist Court’s most significant moves with regard to federalism-driven rules of clarity, however, have not involved the specialized subjects of Eleventh Amendment abrogation or conditional spending. Instead they have involved its rethinking of canons of statutory interpretation, handed down decades ago in *Rice v. Santa Fe Elevator Corp.* and *United States v. Bass*, that deal with the reach of numerous federal regulatory measures. *Rice* held that courts, when evaluating claims of federal preemption, must “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” In *Bass*, the Court likewise emphasized that it would read federal criminal laws narrowly to protect traditional state interests in defining and prosecuting local crimes. The Court in *Bass* highlighted the democracy-forcing purposes of these rules: “In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the

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88. 331 U.S. 218 (1947).
89. 404 U.S. 336 (1971).

91. *Bass*, 404 U.S. at 339. Later Rehnquist Court opinions have applied *Bass* in this manner. See, e.g., Cleveland v. United States, 531 U.S. 12, 24 (2000) (relying on *Bass* in refusing to read a federal mail fraud law to cover misrepresentations aimed at getting a state video-poker license; fearing a “sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress” because “[i]quating issuance of licenses or permits with deprivation of property [as required by the statute] would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities”); Jones v. United States, 529 U.S. 848, 858 (2000) (applying the *Bass* principle to read federal arson statute as inapplicable to the burning of a private residence not used for commercial purposes); id. at 859–60 (Stevens, J., concurring) (agreeing that the *Bass* principle applies and noting the principle’s “kinship [to] our well-established presumption against federal pre-emption of state law”); Fischer v. United States, 529 U.S. 667, 681 (2000) (rejecting a broad construction of the term “benefits” under a federal antifraud statute in part because a contrary result “would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance”); McNally v. United States, 483 U.S. 350, 360 (1987) (reading a federal mail fraud statute not to reach assignment of state’s insurance business to agency required to make kickbacks where scheme results in no loss to state; noting aversion to any national “setting [of] standards of . . . good government for local and state officials”; adding that “[i]f Congress desires to go further, it must speak more clearly than it has”).
critical matters involved in the judicial decision.”92 Put another way, requiring clarity forces Congress to confront directly, and then squarely rule on, the constitutional federalism problems raised by legislative proposals that concern spheres of action traditionally governed by states.

In keeping with its general pro-state-rights stance, the Rehnquist Court has reaffirmed and applied the Rice and Bass presumptions on many occasions.93 Even more important, the Court has made two noteworthy moves that significantly expand the reach of these federalism-driven, clear statement rules. First, it has applied the Bass rule not only in interpreting federal criminal statutes, but in interpreting noncriminal statutes as well. Second, even in dealing with noncriminal regulations, the Court has signaled that it will expansively define the areas of traditional state regulatory behavior to which these rules apply.

The Court’s most prominent invocation of Bass in narrowly construing a noncriminal federal law came in Gregory v. Ashcroft.94 The


93 See supra notes 90–91. It is important to recognize, as explained elsewhere, that the Rice and Bass rules have a force that exists wholly apart from that of the avoidance canon. See Coenen, supra note 3, at 1616–17 & 1622 n.197. The Court recognized this same point when it noted recently that the presumption raised by the doctrine of constitutional doubt “is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.” Solid Waste Agency v. United States Army Corps of Eng’rs, 531 U.S. 159, 173 (2001) (emphasis added). It is also important to recognize that the Court does not always apply the Rice nonpreemption canon to protect state autonomy claims. In fact, the modern Court—attentive perhaps to countervailing “conservative” values—has often upheld preemption claims, especially when resulting rulings have protected business interests from invasive state regulatory controls. See Richard H. Fallon, The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions, 69 U. Chi. L. Rev. 429, 462–63 (2002). It is a complex question whether the Rehnquist Court’s most recent decisions in the preemption area comport on the whole with the profederalism tendencies it has revealed in other contexts. See id. at 462 & n.221 (noting that, in thirty-five preemption decisions handed down from the 1991 term onward, the Supreme Court has found preemption in sixteen cases, nonpreemption in thirteen cases, and both preemption and nonpreemption in six cases). At the very least, however, the Rehnquist Court has never retreated from the clear statement rhetoric of Rice, and (as shown immediately below) it has applied the kindred principle of Bass in an unmistakably aggressive way. In a similar vein, as Professor Fallon has recently noted, the Rehnquist Court has repeatedly used tools of statutory interpretation to protect local governments from damages liability under civil-rights and other federal statutes. See id. at 463. For another recent work that highlights the Rehnquist Court’s frequent willingness to override the antipreemption presumption established in Rice, see Calvin Massey, Federalism and the Rehnquist Court, 53 HAST. L.J. 431 (2002). Notably, in each of the cases from the 2001–02 Term that involved claims of federal preemption of state law, the Court invoked the Rice presumption in holding that the challenged state law continued to operate. See City of Columbus v. Ours Garage & Wrecker Serv., Inc., 122 S. Ct. 2226, 2232 (2002); Rush Prudential HMO, Inc. v. Moran, 122 S. Ct. 2151, 2159 (2002). Each case, however, also generated dissenting opinions written and joined by Justices typically associated with the Rehnquist Court’s pro-states-rights stance. Ours Garage & Wrecker Serv., Inc., 122 S.Ct at 2237 (Scalia, J., joined by O’Connor, J., dissenting); Rush Prudential HMO, Inc., 122 S. Ct. at 2171 (Thomas, J., joined by Rehnquist, C.J., Scalia, J., and Kennedy, J., dissenting).

issue in *Gregory* was whether the Age Discrimination in Employment Act ("ADEA")—a civil-remedies statute clearly meant to cover most state employee plaintiffs—gave protection to state judges who sought to challenge mandatory retirement rules. In holding that the ADEA did not authorize suit by this specialized category of potential plaintiffs, the Court drew directly on *Bass*’ deliberation-forcing logic, adding that the "plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers." *Gregory*’s newly hatched rule of clarity was subject to a closely circumscribed reading, however, because that case concerned not only an area of "traditional" state control, but an "authority that lies at 'the heart of representative government'"—namely, the ability of the state’s body politic to choose on its own those decisionmakers who will oversee its most critical affairs. Even so, in more recent decisions, the Court has not hesitated to invoke the *Bass* and *Gregory* principles in narrowly construing noncriminal federal statutes of other kinds. In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, for example, the Court relied on both *Bass* and *Gregory* to read the governing federal statute not to authorize *qui tam* civil actions against state, as opposed to private, defendants.

Is this extension of the *Bass* principle to the noncriminal context justifiable? In logic it is. After all, *Rice* established long ago that courts must interpret noncriminal federal statutes narrowly when invoked to preempt state laws that operate in a "field which the States traditionally have occupied." But states often engage in policymaking by choosing to

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U.S. 58, 65 (1989). *Will* was arguably distinguishable from *Gregory*, however, on the ground that it did not focus on duties created by Congress, but instead involved essentially whether state sovereign immunity from constitutional claims would be deemed congressionally removed. See generally supra notes 85–87 and accompanying text (discussing *Atascadero* rule).


100. 529 U.S. 765 (2000).

101. *Id.* at 787. *See also* BFP v. Resolution Trust Corp, 511 U.S. 531, 544–46 (1994) (illustrating the Court’s strong inclination to confine the operation of a federal civil statute). Professor Frickey’s excellent prior treatment of the *BFP* case demonstrates in detail why that case fits this pattern. See Frickey, supra note 90, at 208–13.

leave important fields of activity free of regulation. In these instances, federal rules that overarch the otherwise unregulated field are just as invasive of state policy choices as federal laws that preempt specific rules a state has enacted. It would seem to follow that there is little, if any, more reason to apply federalism-based clarity rules in preemption, than in nonpreemption, cases. It thus makes sense that the Rehnquist Court has moved to give equal rule-of-clarity treatment to all federal statutes that genuinely threaten to invade those areas traditionally regulated by the states.103

This observation brings into focus a question of enormous practical importance: Just when, and how freely, should we say that a congressional enactment concerns “the historic police powers of the States”104 A five-justice majority of the Rehnquist Court (made up, not surprisingly, of Chief Justice Rehnquist and Justices O’Connor, Scalia, Kennedy, and Thomas) displayed a willingness to give this rubric an expansive reach in Solid Waste Agency v. United States Army Corps of Engineers.105 The issue in that case was whether Congress had empowered the Corps of Engineers to block the filling of small ponds on the ground that migratory birds frequented them.106 In finding that the Clean Water Act’s grant of federal regulatory authority did not extend to these localized non-navigable sites, the Court first invoked the doctrine of constitutional doubt.107 The Court, however, augmented its reliance on that doctrine by forging another and more specialized clear statement rule. As Chief Justice Rehnquist explained:

Permitting [the Corps] to claim federal jurisdiction over ponds and mudflats falling within the “Migratory Bird Rule” would result in significant impingement of the States’ traditional and primary power over land and water use. . . . Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to “recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .” We thus read the statute as written to avoid the significant constitutional and federalism questions raised by [the Corps’s] interpretation, and therefore reject the request for administrative deference.108

104. Rice, 331 U.S. at 230.
106. Id. at 162.
107. Id. at 172.
108. Id. at 174 (internal citations omitted).
In responding to this reasoning, the dissenters did not question the majority’s newly minted local land use variation on the Bass clear statement theme. Instead, they challenged the majority’s invocation of this local land use principle on the facts presented. As explained by Justice Stevens:

Contrary to the Court’s suggestion, the Corps’ interpretation of the statute does not “encroach[h]” upon “traditional state power” over land use. . . . “Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits.” . . . The CWA is not a land-use code; it is a paradigm of environmental regulation. Such regulation is an accepted exercise of the federal power.

The battle of ideas waged in these passages concerns a matter of characterization. Chief Justice Rehnquist, writing for the majority, characterized the Corps’ proposed action as involving land use regulation, a field traditionally dominated by the states. Justice Stevens, writing for the minority, characterized the rule as involving environmental control, a field in which the federal government has long played a prominent role. This debate over characterization was of pivotal importance. Only by deeming the Migratory Bird Rule a land use regulation could the Court apply the historic-police-powers clear statement rule set forth in the Bass decision.

The broader message of Solid Waste Agency may well be that the Court’s “Federalism Five” stand ready to characterize at a high, state-favoring level of generality the fields of regulatory action that federal authorities have entered for purposes of applying the Rice and Bass clarity canons. Of course, reaching this conclusion would not mean that every exercise of federal authority falls within the canon of Rice and Bass. See, e.g., Buckman Co. v. Plaintiffs’ Legal Comm., 531 U.S. 341, 347 (2001) (reiterating Rice’s antipreemption rule, but finding the rule inapplicable because “[p]olicing fraud against federal agencies is hardly ‘a field which the States have traditionally occupied’” (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).
liberties.\textsuperscript{114} These divergent approaches to characterization, however, fit neatly together with a more general agenda of broadly safeguarding “states’ rights.”\textsuperscript{115} On this view, by narrowing the range of constitutional liberties subject to protection by federal courts and expanding those areas of regulation presumptively free of congressional tinkering, the Court maximizes state autonomy in the face of different forms of would-be federal interference.

There is another way of viewing the Court’s decision in \textit{Solid Waste Agency}. From this alternative perspective, the decision is not as closely connected with federalism values as with the Rehnquist Court’s eagerness to give private property rights energetic constitutional protection.\textsuperscript{116} The use of clear statement doctrines to block federal interference with “land and water use,”\textsuperscript{117} after all, not only protects state autonomy values but also safeguards the interests of private property owners otherwise subject to an overlapping set of regulatory controls. Put simply, because of the Court’s ruling in \textit{Solid Waste Agency}, landowners could pursue a real estate development project otherwise stopped dead in its tracks solely by a federal agency rule.

In the end, the Court’s decision in the Migratory Bird Rule case killed two birds with one stone. Built on a clarity-based principle of statutory interpretation, the decision simultaneously vindicated now-ascendant Tenth Amendment interests in state autonomy\textsuperscript{118} and Fifth Amendment interests in the free use of private property.\textsuperscript{119} In so doing, this provisional ruling safeguarded substantive constitutional values of recurring concern to the Rehnquist Court.

(c) How Clear is Clear?

As insightful commentators have noted, some rules of clarity carry more clout than others. In particular, Professors Eskridge and Frickey have drawn a distinction between ordinary clear statement rules (which do not require clarity on the face of the statute) and “super-strong” clear statement rules (which do).\textsuperscript{120} These commentators also have shown that the Rehnquist Court has tended to channel super-strong rules of clarity into the field of constitutional federalism, most notably in its Eleventh Amendment

\begin{itemize}
  \item \textsuperscript{114} See Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).
  \item \textsuperscript{115} See, e.g., supra note 79.
  \item \textsuperscript{116} See supra note 58 and accompanying text.
  \item \textsuperscript{117} Solid Waste Agency v. United States Army Corps of Eng’rs, 531 U.S. 159, 174 (2001).
  \item \textsuperscript{118} See supra note 79 and accompanying text.
  \item \textsuperscript{119} See supra note 58 and accompanying text.
  \item \textsuperscript{120} Eskridge & Frickey, supra note 18, at 611–12
\end{itemize}
abrogation decisions and in its adoption of the specialized internal political functions principle of the Gregory case.\textsuperscript{121} In a separate work, Professor Frickey has argued that the Court has recently gone a step further by transforming the traditionally “soft” rules of clarity of Rice and Bass into super-strong rules, at least when federal legislation threatens certain forms of local choice.\textsuperscript{122} The overall point is clear and predictable enough: In keeping with its formulation of full-scale substantive constitutional doctrines that cut down federal congressional power,\textsuperscript{123} the Rehnquist Court—subtly, but effectively—has shaped rules of statutory interpretation to advance the same constitutional end.

The foregoing discussion shows how the Court can fortify protections of particular constitutional values by explicitly adopting hard or soft clear statement rules. On other occasions, however, the Justices may reveal substantive policy preferences not in formulating rules, but in applying them. In Solid Waste Agency, for example, Justice Stevens disagreed with the majority’s conclusion that the vindication of federalism values justified application of a super-strong clear statement rule.\textsuperscript{124} His opinion also suggested, however, that federal authorities had spoken clearly enough even if a super-strong rule of clarity applied.\textsuperscript{125}

The difficult question of “how clear is clear” lurks in every case that involves application of a clear statement “how” rule.\textsuperscript{126} Even so, that question often draws little attention, at least on the face of the opinions in the case. The “how clear is clear” issue did take center stage, however, in the Court’s recent decision on the availability of federal habeas relief in INS v. St. Cyr.\textsuperscript{127} There, the Court’s dissenters not only challenged the

\textsuperscript{121} See id. at 597. For a discussion of the abrogation decisions, see supra notes 33–36, 85–86 and accompanying text. For a discussion of Gregory, see supra notes 94–103 and accompanying text.

\textsuperscript{122} Frickey, supra note 90, at 211 (discussing BFP case).

\textsuperscript{123} See supra note 79.

\textsuperscript{124} Solid Waste Agency v. United States Army Corps of Eng’rs, 531 U.S. 159, 191–92 (Stevens, J., dissenting).

\textsuperscript{125} See id.

\textsuperscript{126} See, e.g., Whitman v. Am. Trucking Ass’n, 531 U.S. 457, 471 (2001) (reasoning that the canon of constitutional doubt is inapplicable because of the unambiguousness of a section of the Clean Air Act (“CAA”) when “interpreted in its statutory and historical context and with appreciation for its importance to the CAA as a whole”).

\textsuperscript{127} 533 U.S. 289 (2001). St. Cyr also highlights another important and recurring question concerning rules of clarity driven by substantive constitutional concerns—namely, how those rules interact with other interpretive presumptions. In particular, the Court in St. Cyr held that the antiretroactivity clear statement doctrine completely trumped the principle, set forth in Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), of judicial deference to agency interpretations of ambiguous statutes. See id. at 320 n.45. Some of the many questions raised by this ruling are as follows: Is this trumping principle properly generalized to all clear statement rules built on concerns about substantive constitutional rights? If not, why not? And just when, in the end, will such trumping occur? See, e.g., C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411,
majority’s recognition of a super-strong presumption against removal of habeas corpus jurisdiction; they also argued that, even if such a rule exists, the Court misapplied it by, in effect, “fabricat[ing] a super clear statement ‘magic words’ requirement . . . unparalleled in any other area of our jurisprudence.”

This characterization of the majority’s action rested on a detailed argument about the facial clarity of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). In particular, the dissenters claimed that Congress’ express negation of "jurisdiction to review" deportation orders based on an alien’s past felonious conduct extended both to review proceedings brought under the Administrative Procedure Act ("APA") and to freestanding actions initiated under the federal habeas corpus statute. The majority rejected this position based on the proposition that courts historically have understood the terms "judicial review" and "habeas review" to have different meanings.

The dissenters responded by pointing to a companion statute that specifically indicated that "judicial review" could occur in a habeas corpus proceeding concerning noncrime-based deportation orders.

Whether the statute at issue in _St. Cyr_ was clear enough to negate the clear statement rule invoked by the majority is a fact-specific question beyond the scope of this Article. It is, however, worth reflecting on Justice Scalia’s specialized argument that the Court’s aggressive, clear statement approach in _St. Cyr_ markedly departed from the Court’s past use of clarity rules, particularly its use of clarity rules in the Court’s federalism-friendly, Eleventh-Amendment-abrogation cases.

In particular, did the majority in _St. Cyr_ wander far beyond the boundaries of past precedent by requiring not only a "clear statement," but also a clear statement framed in particular "magic words"?

The better view is that it did not.

To be sure, the majority in _St. Cyr_ held that an express statutory exclusion of "jurisdiction to review" conviction-based deportations was not explicit enough to negate habeas corpus jurisdiction, even when other
sections of the statute lent support to the contrary view. In its Eleventh Amendment cases, however, the Court also has held that certain forms of statutory language—for example, a “general authorization for suit in federal court”—do not suffice to abrogate state immunities even when “various provisions of the . . . Act are addressed to the States.” In castigating the majority opinion, Justice Scalia noted that the Court’s state sovereign immunity precedents had never required an “explicit reference to the Eleventh Amendment.” This argument, however, is beside the point because the majority’s opinion in St. Cyr did not require explicit reference to the Suspension Clause or any other constitutional provision. Rather, the majority held that, absent further clarification, a negation of “jurisdiction to review” deportation orders was not adequate to defeat a strong presumption (directly akin to the Court’s presumption in favor of retaining state immunities) that habeas corpus jurisdiction should be preserved. In the end, the Court no more required magic words in St. Cyr than it required magic words in its Eleventh Amendment cases. Rather, in both contexts, the Court now has specified only that certain verbal formulations are not enough to overcome countervailing constitutional concerns.

Whatever one ultimately concludes about the merits of Justice Scalia’s parsing of the IIRIRA, this discussion highlights an important dynamic in

135. See id. at 311–13.
137. Id. at 247. See also College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 676 (1999) (collecting authorities holding that “a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation” or by “stating its intention to ‘sue and be sued, or even by authorizing suits against it in any court of competent jurisdiction’”).
139. U.S. CONST. art. I, § 9, cl. 2.
140. Perhaps the most interesting feature of Justice Scalia’s excoriation of the majority for requiring “magic words” is that Justice Thomas joined it. St. Cyr, 533 U.S. at 326. Yet if any opinion of the Court in fact requires “magic words” to satisfy a clear statement rule, it is Justice Thomas’ concurring opinion in Kimel v. Board of Regents, 528 U.S. 62, 99 (2000). See generally infra notes 163–74 and accompanying text (discussing at length Justice Thomas’ approach in Kimel). Justice Thomas’ different views of statutory clarity requirements in Kimel and St. Cyr thus raise the perennial question: Do some substantive constitutional values have stronger claims to structural protections than others? If the federalism interests in Kimel in fact have a stronger clear-statement claim than the liberty interests in St. Cyr, the proponents of that position should pause to explain why. Moreover, in doing so, they should take account of the argument, made elsewhere, that the Eleventh Amendment clear statement rule that drove Justice Thomas’ opinion in Kimel stands on particularly shaky ground following the tectonic movements of Eleventh and Fourteenth Amendment doctrine caused by Seminole Tribe v. Florida, 517 U.S. 44 (1996), and City of Boerne v. Flores, 521 U.S. 507 (1997). See supra note 86 (explaining why these authorities place Atascadero’s clear statement rule in doubt).
the operation of semisubstantive constitutional rules. The point is that as individual Justices make contextual judgments about “how clear is clear” in particular cases, underlying allegiances to distinctive constitutional values may well creep into the decisional calculus. For this reason, it is not surprising that those Justices most closely associated with the protection of a vibrant federalism (led by Justice Scalia) found the statutes at issue in *St. Cyr* sufficiently clear to override an assertion of federal habeas jurisdiction. On the other hand, those Justices least eager to protect “states’ rights” (and probably most eager to protect the rights of “Carolene groups” as well) voted to preserve for aliens the protections afforded by federal court habeas corpus review.

(d) The Special Case of Extra-Super-Clear Statement Rules.

Thus far, it is evident that the Rehnquist Court frequently applies constitutionally driven “how” rules of statutory clarity when interests the court deems worthy of protection have been placed in jeopardy. Put differently, when confronted with two plausible constructions of a federal statute, the Court will read it narrowly to protect substantive constitutional values—often federalism-based values—while simultaneously inviting Congress to broaden the statute’s reach notwithstanding the constitutional price to be paid.

Federal courts, however, have no power to review state court interpretations of state statutes. As a result, the Supreme Court cannot invoke clear statement rules of statutory interpretation to counter constitutional problems posed by state court interpretations of state law. In addition, federal courts cannot invoke garden-variety clear statement rules to rein in constitutionally troublesome federal statutes if those statutes genuinely lack the level of facial ambiguity necessary to trigger an interpretive rule resolving the ambiguity. Even when the Court cannot apply a clear statement rule of statutory construction, however, it might invoke other semisubstantive doctrines that remand to the legislature a law that rubs up against constitutional concerns. The Court, for example, has often given specialized—albeit only provisional—protection to First Amendment values by applying the vagueness doctrine to invalidate state laws construed by state courts to cover speech- or association-related

141. *See supra* notes 66–68 and accompanying text.
142. *See supra* notes 39–119 and accompanying text.
144. *See, e.g.*, *supra* notes 74–75 and accompanying text (noting this limit on the operation of the rule of constitutional doubt).
conduct. In these cases, the Court says, in so many words, something like this: We recognize that lower courts have construed this law to cover the behavior at issue in this case. Notwithstanding the defendant’s claims that that behavior is constitutionally protected, we do not say that it lies beyond the state’s power of regulation. We do say, however, that state lawmaking authorities must produce a less vague—and thus more thoughtfully constructed—prohibition if they wish to prohibit the conduct the defendant has engaged in. In the meantime, this statute cannot stand.

The Rehnquist Court’s most noteworthy brush with the vagueness doctrine came in City of Chicago v. Morales. At issue in the case was a Chicago ordinance that created a loosely defined authority to disrupt private activity “[w]henever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place.” The Court’s invalidation of the ordinance confirmed the continuing vitality of the semisubstantive, process-centered principles inherent in the vagueness doctrine. No less important, as in St. Cyr, a sharp splintering of the Court—largely along federalist/nonfederalist lines—confirmed the potential importance of underlying substantive values (here, free movement, free association, and local autonomy values) in the application of semisubstantive, as well as fully-substantive, constitutional rules.

Does the vagueness doctrine constitute the only “how” rule approach available to courts forced to deal with linguistic fuzziness in statutes not amenable to clear-statement-based narrowing interpretations? Justice

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145. See Note, The Void-for-Vagueness Doctrine in the Supreme Court: A Means to an End, 109 U. PA. L. REV. 67, 87–88 (1960) (noting that “free speech vagueness cases have begun to proliferate” in “the post-New Deal period”). See also John Calvin Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 VA. L. REV. 189, 196 (1985) (“As Professor Amsterdam has taught us, a paramount concern is whether the law’s uncertain reach implicates protected freedoms.”).

146. See, e.g., BICKEL, supra note 24, at 201 (noting this dialogic feature of vagueness doctrine).


148. Id. at 47 n.2.


150. The three dissenters in the case were those Justices often most closely associated with values of local autonomy—namely, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas. See Morales, 527 U.S. at 73, 98. In addition, only Justices Souter and Ginsburg joined the lead opinion for the Court, which was authored by Justice Stevens. Id. at 45. Justices O’Connor, Kennedy, and Breyer each wrote separate concurring opinions that relied on an analysis more cautious and less far-reaching than that of Justice Stevens. Id. at 64, 69–70. For example, Justice O’Connor—in obvious keeping with secondlook theory—emphasized that “there remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation and violence.” Id. at 67 (O’Connor, J., concurring). See also id. at 73 (Breyer, J., concurring) (noting that the “city might have enacted a different ordinance” or that “the Illinois Supreme Court might have interpreted this ordinance differently” in a way that “permitted the city to apply that different ordinance (or this ordinance as interpreted differently) to circumstances like those present here”).
O’Connor’s extraordinarily semisubstantive concurring opinion in *Thompson v. Oklahoma*151 shows that the answer to this question is “no.”

*Thompson* presented the issue whether a state could, consistent with the Eighth Amendment, execute murderers who were younger than sixteen at the time of their offenses. Four members of the Court (led by Justice Scalia) said “yes” on the theory that the execution of juvenile offenders, including offenders who had committed their crimes when not yet sixteen, had long been authorized in many states.152 Four other members of the Court (led by Justice Stevens) said “no” because, in their view, the execution of this class of offenders abridged “evolving standards of decency” in light of the modern-day rarity of imposing the death penalty in this class of cases.153 Supplying the decisive fifth vote to block the inmate’s execution, Justice O’Connor constructed and applied an extra-super-clear statement rule founded squarely on a semisubstantive, structural due process rationale.154

According to Justice O’Connor, the problem was not that the dissenters in *Thompson* had failed to apply an applicable clear statement rule of statutory interpretation. Rather, Justice O’Connor conceded that the federal courts had no authority to find the relevant statutes ambiguous because the state courts had construed them to authorize capital punishment in precisely this set of cases.155 Nonetheless, Justice O’Connor found a clarity-based deficiency in the governing state statutes that precluded the defendant’s execution under federal constitutional law. The problem, Justice O’Connor reasoned, was that the Oklahoma legislature had never enacted a single law that specifically authorized the death penalty for this class of youthful offenders.156 Instead, the state had put in place two separate statutes—one that authorized imposition of the death penalty for adult offenders, and a second that authorized trying certain youthful offenders, including the defendant in *Thompson*, as adults.157 Justice O’Connor acknowledged—as she had to—that this combination of statutes exposed the defendant in *Thompson* to the death penalty as a matter of state law.158 In Justice O’Connor’s view, however, the Constitution required something more. As she explained:

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152. See *id.* at 859–78 (Scalia, J., dissenting).
153. *Id.* at 821 (plurality opinion).
154. See Coenen, supra note 3, at 1630–34.
157. *See id.*
158. *See id.*
Because it proceeded in this manner, there is a considerable risk that the Oklahoma Legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death eligibility.\textsuperscript{159}

Talking the talk and walking the walk of serious semisubstantive, constitutional decisionmaking, Justice O'Connor insisted that the legislature had to act with “special care and deliberation”\textsuperscript{160} in “this unique situation.”\textsuperscript{161} To evidence such care and deliberation, she continued, the legislature would have to enact a single, focused statute that “specifies [a] minimum age at which the commission of a capital crime can lead to the offender’s execution.”\textsuperscript{162}

Are there other examples of a structural insistence on such “extra-super” clarity in the work of the Rehnquist Court? In fact, a line of reasoning very similar to Justice O'Connor’s—although invoked on behalf of a very different set of constitutional values—recently surfaced in Justice Thomas’ concurring opinion in\textit{Kimel v. Florida Board of Regents}.\textsuperscript{163} At issue in\textit{Kimel} was whether Congress had satisfied\textit{Atascadero}’s “clear statement” requirement in attempting to abrogate the states’ Eleventh Amendment immunity under the ADEA.\textsuperscript{164} A seven-Justice majority had little difficulty finding a clear abrogation in the joint operation of two statutes. First, section 626(b) of the ADEA specifies that it “shall be enforced in accordance with” section 216(b) of the Fair Labor Standards Act (“FLSA”).\textsuperscript{165} Second, as stated by the Court’s majority, “[s]ection 216(b) . . . clearly provides for suits by individuals against States,” including “actions for backpay.”\textsuperscript{166} According to the majority, the language of these statutes “[r]ead as a whole . . . clearly demonstrates Congress’ intent to subject the States to suit for money damages” under the ADEA.\textsuperscript{167}

Justice Thomas (joined by Justice Kennedy) dissented from this ruling, invoking a rationale that bore no small measure of similarity to

\begin{itemize}
  \item \textsuperscript{159} Id.
  \item \textsuperscript{160} Id. at 856.
  \item \textsuperscript{161} Id.
  \item \textsuperscript{162} Id. at 857–58.
  \item \textsuperscript{164} See \textit{id.} at 66–67.
  \item \textsuperscript{165} 29 U.S.C. § 626(b) (1994).
  \item \textsuperscript{166} \textit{Kimel}, 528 U.S. at 73–76 (discussing 29 U.S.C. § 216(b) (1994)).
  \item \textsuperscript{167} Id. at 74.
\end{itemize}
Justice O’Connor’s opinion in *Thompson*. At the core of Justice Thomas’ critique was his assertion that “Congress likely did not contemplate the impact of . . . § 216(b) on the ADEA” when it amended FLSA to authorize money damages recoveries from states. According to Justice Thomas, the difficulty was that Congress revised section 216 only after it had separately enacted the ADEA, including its generally phrased, “incorporation by reference” remedies provision, section 626(b). In these circumstances, Justice Thomas was “unwilling to indulge the fiction that Congress, when it amended § 216(b), recognized the consequences for a separate Act (the ADEA) that incorporates the amended provision.” In sum, without focusing on the clarity of the statutory text itself, Justice Thomas declined to find an effective abrogation because he lacked “confidence that Congress had deliberated on the consequences of the amendment for the other Acts.”

The parallels between Justice O’Connor’s opinion in *Thompson* and Justice Thomas’ opinion in *Kimel* are striking. In each setting, a Justice who was moved by a commitment to underlying constitutional values refused to give effect to the joint operation of two statutes that, on their face, produced a presumably permissible—but constitutionally troublesome—result. In each case, the Justice refused to let an otherwise unremarkable incorporation-by-reference statutory scheme operate because of the “unusual” circumstances raised by substantive constitutional concerns. And in both cases, the Justices in effect demanded that the legislature speak pointedly, in one statute instead of two, so as to reveal a focused “attention” to the precise constitutional problem its dual statutory enactments had created.

Does the demonstration of these parallels mean that Justice Thomas—if given the chance—would have joined Justice O’Connor’s opinion in *Thompson*? One senses that this outcome is unlikely, and there are possible distinctions between the cases that might (at least at first blush) give Justice Thomas an “out” if called on to carry over his semisubstantive reasoning in *Kimel* to the question posed in the *Thompson* case. One possible distinction is that *Thompson*, in contrast to *Kimel*, involved state,

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168. *See id.* at 99 (Thomas, J., concurring in part and dissenting in part).
169. *See id.* at 103 n.2.
170. *See id.* at 102.
171. *Id.*
172. *Id.* (emphasis added).
175. Justice Thomas, of course, did not get this chance because the *Thompson* case was decided in 1988, four years before his appointment to the Supreme Court.
rather than federal, statutory law. It is doubtful, however, that this
distinction holds water; after all, it seems strained to say that the Court has
more authority to reject the “form” of legislation enacted by Congress 176
(which is, after all, a “co-ordinate department” of the national
government177) than the “form” used by state legislatures, over whose work
national law is supreme.178

Another possible distinction might rest on the notion that Justice
Thomas’ approach to Kimel concerned the construction of a statute,
whereas Justice O’Connor’s approach to Thompson involved an outright
constitutional invalidation. In particular, it might be said that the latter
judicial act is more difficult to overturn than the former when the
legislature revisits the policy question pursuant to the Court’s de facto call
for a “second look.” This argument, however, ignores legislative realities.
Under Justice O’Connor’s rationale in Thompson, the state legislature
retained the same measure of freedom that Congress would have possessed
if the Court had adopted Justice Thomas’ approach to Kimel. Because in
each instance the legislature was (or would have been) free to replace two
statutes with just one, the claimed distinction between a “constitutional”
ruling and a “statutory” ruling involves nothing more than word play.
From a functional perspective, the rules invoked by both Justice O’Connor
and Justice Thomas hinged on a provisional, semisubstantive intervention.

Finally, one might try to distinguish the cases by saying that the
federal law in Kimel was at least arguably ambiguous, while the law in
Thompson was definitively not open to interpretation because of the
meaning previously ascribed to it by the state courts.179 There is, however,
a deep problem with this suggestion because Justice Thomas’ anti-
incorporation-by-reference reasoning in Kimel simply did not turn on the
presence of statutory ambiguity in any ordinary sense. As the majority
explained, Justice Thomas’ problem in Kimel was not with “what Congress
did enact” (and thus with the ambiguity of its words), but instead with
“when it did so”180 (and thus with the “legislative processes” that produced
the troublesome result).181

176. See Thompson, 487 U.S. at 876–77 (Scalia, J., dissenting) (critiquing Justice O’Connor’s
focus on “the precise form the state legislation must take”).
177. James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7
178. See U.S. CONST. art. VI, cl. 2. See also OLIVER WENDELL HOLMES, JR., Law and the Court,
in COLLECTED LEGAL PAPERS 291, 295–96 (1920) (suggesting greater legitimacy of judicial review
with regard to “the laws of the several States” than with regard to “an Act of Congress”).
179. See supra notes 143–44 and accompanying text.
181. Thompson, 487 U.S. at 876–77 (Scalia, J., dissenting).
In the end, Thompson and Kimel seem subject to distinction, if at all, solely because they involved different substantive constitutional values—Eighth Amendment just punishment values in Thompson and Tenth and Eleventh Amendment state rights values in Kimel. Making this point, however, merely raises the question whether courts might more legitimately construct semisubstantive constitutional rules to safeguard the latter values over the former. At least for many observers, it will be a matter of no little difficulty to say that substantive constitutional interests are more deserving of protection in a case that involves exposing a concededly lawbreaking state to damages liability\(^\text{182}\) than in a case that involves putting fifteen-year-olds to death. To be sure, there may be other reasons for finding Justice Thomas’ approach to Kimel reconcilable with a rejection of Justice O’Connor’s treatment of Thompson.\(^\text{183}\) Ultimately, however, one senses that if there is any real distinction between the cases it lies in Justice O’Connor’s greater attachment to what we might call “human rights” values and Justice Thomas’ greater attachment to what might be called “states’ rights” values. The more general point is clear enough: Different allegiances to different constitutional values may lead different Justices to fashion very similar semisubstantive approaches but then apply them in very different areas of constitutional law.

This last observation brings into view a matter of practical importance for advocates who operate in a legal world pervaded by semisubstantive constitutional doctrines. The point is that what the Court does in one substantive area of law with these doctrines may well influence how such doctrines later come to operate in seemingly unrelated fields. It is unlikely that the Justices perceived any connection whatsoever between Thompson and Kimel. But as modern commentary throws light on the pervasiveness of semisubstantive decisionmaking, such connections are less likely to escape notice. Rich opportunities for argument by analogy lurk in the Court’s evergrowing web of semisubstantive constitutional precedents.

\(^{182}\) See Alden v. Maine, 527 U.S. 706, 754-55 (1999) (explaining that states have obligations to comply with federal statutes even if Eleventh Amendment shields them from damages liability).

\(^{183}\) For example, one might distinguish the semisubstantive approaches taken by these two Justices on judicial manageability grounds. From this perspective, Justice Kennedy’s approach to Kimel involved only a modest “tweaking” of the already well-established super-clear statement rule of Atascadero. Justice O’Connor’s approach to Thompson, in contrast, involved a bold new adventure that held the potential of “infecting” all sorts of areas of constitutional law. Once again, however, this line of reasoning holds little persuasive power. Justice O’Connor, for example, was careful to limit the principle she relied on to the death penalty context, and there is no reason to say that Justice Thomas’ approach in Kimel logically extends only to Eleventh Amendment abrogation cases. See generally supra notes 39-119 and accompanying text (discussing Rehnquist Court’s use of various clear statement rules).
2. Findings-Based “How” Rules

Rules of clarity test the constitutional adequacy of a lawmaking process by focusing on its product or output. If a law is clear enough, the Court will, in effect, conclusively presume that constitutional concerns were appropriately considered as policymakers went about adopting the now-challenged rule. The Rehnquist Court, however, also has given impetus to a very different set of process-driven, semisubstantive “how” rules. These doctrines test the adequacy of a lawmaking process, when significant constitutional values are at stake, by focusing directly on how that process in fact unfolded. As a general proposition, “[t]here is no principle of constitutional law which nullifies action taken by a legislature, otherwise competent, in the absence of a special investigation.”184 In some fields of ostensibly “substantive” constitutional law, however, this general rule has given way to important qualifications. Most significantly, the Rehnquist Court has explored—and at least sometimes embraced—semisubstantive findings-based “how” rules in the important areas of (1) affirmative action, (2) free expression, and (3) state autonomy from congressional control.

(a) Affirmative Action

One area in which the Court seems concerned about lawmaker findings involves the government’s use of so-called “affirmative action.” Although it was Justice Powell who initially asserted that the constitutionality of remedy-based, race-conscious programs may hinge on the quality of legislative findings,185 the post-Powell Rehnquist Court has shown a receptiveness to this same semisubstantive, process-centered approach.186 Most significantly, in City of Richmond v. J.A. Croson Co.,187 the Court’s five-Justice majority (in an opinion written by Justice O’Connor and joined in relevant part by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy) focused squarely on the lack of

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185. See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307, 309–10 (1978). See also Fullilove v. Klutznick, 448 U.S. 448, 498 (1980) (Powell, J., concurring); Laurence H. Tribe, Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice, 92 HARV. L. REV. 864, 877 (1978) (describing Justice Powell’s Bakke opinion as “responsive to a sense that, if such quotas are to be imposed at all, they should be imposed in a more deliberate and cautious manner and by a more broadly accountable body than was the case in Bakke”).
“[p]roper findings”\textsuperscript{188} made “with the particularity required by the Fourteenth Amendment”\textsuperscript{189} in striking down a race-based contractor-set-aside program.\textsuperscript{190} As Justice O’Connor explained: “While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination with . . . some specificity before they may use race conscious relief.”\textsuperscript{191}

(b) The First Amendment

The Rehnquist Court has also directed attention to the quality of legislative investigations in applying the First Amendment. For example, in striking down an outright ban on commercial “dial a porn” messages in \textit{Sable Communications, Inc. v. FCC,}\textsuperscript{192} the early Rehnquist Court reasoned that “the congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means . . . to achieve the Government’s interest in protecting minors.”\textsuperscript{193} Eight years later, Justice Stevens—writing for the much-altered, present day version of the Rehnquist Court—again pointed to findings-based concerns in invalidating the Communications Decency Act’s sweeping restrictions on “indecent” Internet speech.\textsuperscript{194} The issue in \textit{Reno v. ACLU} was (once again) whether the congressional prohibition was “carefully tailored” in light of potential alternatives for safeguarding

\textsuperscript{188} Id. at 510.
\textsuperscript{189} Id. at 492.
\textsuperscript{190} Id. at 510–11. Justice O’Connor’s opinion contained a variety of sections, only some of which spoke for a majority of the Court. Five justices, however, did join Part IV of the opinion, which focused on legislative findings. \textit{Id.} at 476.
\textsuperscript{191} Id. at 504 (emphasis added). \textit{See also id.} at 520 (Kennedy, J., concurring in part) (noting that the “legislative record” suggested that the set aside program was not remedial). The ruling in \textit{Croson} tracked prior signals in \textit{Wygant v. Jackson Board of Education}, 476 U.S. 267 (1986). The plurality in that case noted that: “[A] public employer . . . must ensure that, before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted.” \textit{Id.} at 277. Notably, in its most recent affirmative action, set-aside decision, \textit{Adarand Constructors, Inc. v. Pena,} the Court quoted this passage directly. 515 U.S. 200, 220–21 (1995). \textit{See also Wygant,} 476 U.S. at 290, 277 (O’Connor, J., concurring) (emphasizing that this mode of analysis does not “require[ ] that public employers make findings that they have engaged in illegal discrimination” but does require that “convincing evidence” be present “before [the government] embarks on an affirmative action program”). The Court’s democracy-forcing approach to remedial affirmative action programs has garnered significant scholarly support. For example, Drew S. Days, III, suggests that:

When Congress has taken the extraordinary step of adopting an explicit racial classification . . . the Court has the responsibility to assure itself that the decision was reasoned and deliberate . . . not because Congress lacks the constitutional power to enact such legislation, but because it may have enacted legislation without proper attention to the degree that its actions may threaten “values of permanent significance” in our society.

\textsuperscript{192} 492 U.S. 115 (1989).
\textsuperscript{193} Id. at 129.
\textsuperscript{194} \textit{See Reno v. ACLU,} 521 U.S. 844, 879 (1997).
minors against harmful pornographic communications. In finding a First Amendment violation, the Court relied on process-centered considerations. As it explained: “Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.” The Court added that “[t]he lack of legislative attention to the statute at issue in Sable suggests [a] parallel with this case.”

Members of the Rehnquist Court have focused on legislative studies and findings in other First Amendment cases as well. These decisions,
as commentators have noted, leave open many questions about the significance of the lack of legislative inquiries in First Amendment litigation.\textsuperscript{199} The Court’s repeated references to legislative findings in these cases, however, leave no doubt that they have come to play a meaningful role in the application of free speech principles.

Any doubt in this regard was removed by the Court’s recent decision to invalidate a key provision of the Omnibus Crime Control Act of 1968 in \textit{Bartnicki v. Vopper}.\textsuperscript{200} The issue in \textit{Bartnicki} was whether Congress could prohibit a newspaper’s publication of true information, which addressed a matter of public concern and which the newspaper’s editors had lawfully obtained, when they should have known that that information had initially come to light by way of a third party’s illegal electronic surveillance.\textsuperscript{201} The Court found a First Amendment violation notwithstanding the government’s entreaties that the statute was needed to deter illegal invasions of privacy by drying up the market for unlawfully intercepted information.\textsuperscript{202} In rejecting this argument, the Court reasoned that there was “no empirical evidence to support” it,\textsuperscript{203} including no “evidence in the legislative record.”\textsuperscript{204} The Court also emphasized that “petitioners cite no evidence that Congress viewed the prohibition against disclosures as a response to the difficulty of identifying persons making improper use of scanners and other surveillance devices and accordingly of deterring such conduct.”\textsuperscript{205} It explained that: “The dissent argues that we have not given proper respect to ‘congressional findings’ or to ‘Congress’ factual predictions.’ But the relevant factual foundation is not to be found in the

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\item[199.] See, e.g., Bryant & Simeone, supra note 3, at 339 (citing “ambiguity in Justice Kennedy’s opinions regarding the significance of the formal legislative record” in the Court’s \textit{Turner Broadcasting} cases); \textit{id.} at 338, 334 (concluding that “\textit{Turner II} appeared to undercut the \textit{Turner I} plurality’s suggestion that the Court may oblige Congress, like an administrative agency, to substantiate its findings . . . with evidence on the formal record,” but noting that this purported holding may not carry over to “strict scrutiny” cases because \textit{Turner Broadcasting} involved intermediate scrutiny of a content-neutral law); Lee, supra note 198, at 1262, 1281 (noting findings-related questions that would be raised by television programming restrictions or reenacted ban on distribution of anonymous campaign literature).
\item[201.] \textit{See id.} at 517–18.
\item[202.] \textit{See id.} at 529, 535.
\item[203.] \textit{Id.} at 530–31.
\item[204.] \textit{Id.} at 531 n.17.
\item[205.] \textit{Id.} at 530.
\end{enumerate}
made after detailed consideration of the constitutional question is constitutional is generally entitled to some deference from a court, especially when that judgment is legislative record. Bartnicki, like its precedential predecessors, does not spell out the precise role that legislative studies will play in future strict scrutiny or intermediate scrutiny First Amendment cases. The case, however, follows the lead of others in which the Rehnquist Court has scrutinized the quality of legislative findings in assessing the constitutionality of legislation under the First Amendment.

206. Id. at 531 n.17. The dissenters endorsed “the ‘drying up the market’ theory [as] both logical and eminently reasonable” and wondered “how or from where Congress should obtain statistical evidence about the effectiveness of these laws.” Id. at 552 (Rehnquist, C.J., dissenting). See also id. at 551–52 (noting that in New York v. Ferber, 458 U.S. 747 (1982), the Court “did not demand, nor did Congress provide, any empirical evidence to buttress [the state’s] basic syllogism that ‘[t]he most expeditious if not the only practical method’ of protecting children from pornography producers ‘may be to dry up the market for this material’) (quoting Ferber, 458 U.S. at 760). But cf. Bartnicki, 532 U.S. at 530 n.13 (majority opinion) (distinguishing Ferber as involving “speech . . . of minimal value”). The dissenters also faulted the majority’s reasoning as incompatible with the judiciary’s adoption of the deterrence-based Fourth Amendment exclusionary rule without “first requir[ing] empirical evidence.” Id. at 551 n.7 (Rehnquist, C.J., dissenting). See id. (asserting, for this reason, that the Court’s rationale reflected a “do as we say, not as we do” presumptuousness). One might respond to this criticism by positing that the common sense inferability of deterrence is stronger with regard to the exclusionary rule than in Bartnicki’s no-publication context. Even if this distinction is rejected, however, another distinction exists that jibes well with a rights-centered semisubstantive approach. On this view, both the Fourth Amendment exclusionary rule and Bartnicki’s First Amendment pro-publication principle reflect a judicial willingness to make assumptions about “chain of causation” issues that favor the vindication (rather than the subordination) of important substantive constitutional rights.

207. In particular, it is not clear in this regard whether Bartnicki itself involved strict scrutiny, intermediate scrutiny or something in between. Compare id. at 526 (characterizing the challenged rule as content neutral), with id. at 526 (noting that the rule nonetheless constitutes “a regulation of pure speech”). It is also unclear if this matter is of analytical significance with respect to the role of findings. See supra notes 198–99 (citing treatments of the Turner Broadcasting cases and their impact on this issue).

208. It also raises the question whether findings-and-study rules lurk in cases outside the First Amendment area that concern threats to liberty, property, and equality. Professor Cass R. Sunstein, for example, has suggested that a sort of findings-and-study logic underlay the Rehnquist Court’s seminal ruling in United States v. Virginia, 518 U.S. 515 (1996). He suggests that Virginia is linked with Kent insofar as it requires a current legislative judgment—here, that same-sex education is necessary to promote educational diversity. . . . If the state reached its decision deliberatively and without infection from stereotypes about gender roles, and the decision promoted rather than undermined equal opportunity, the Court might uphold the program. Cass R. Sunstein, The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided, 110 Harv. L. Rev. 4, 75–76 (1996). See also Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 485 (1987) (distinguishing an earlier decision invalidating coal-mining subsidence law on the ground that the new law was supported with “detailed findings” by way of which the “[l]egislature specifically found that important public interests are served by enforcing [the challenged] policy”); Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (stating that “customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act’s constitutionality”); Frickey, supra note 3, at 724 (“In upholding the exclusion of women from the selective service in Rostker v. Goldberg, the Court stressed that the Congress had recently ‘carefully considered and debated’ the alternatives.”); David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190, 201 (1988) (stating “it is a commonplace that a legislative judgment that a statute is constitutional is generally entitled to some deference from a court, especially when that judgment is made after detailed consideration of the constitutional question”). A subtly related point was touched on in the Court’s recent ruling in INS v. St. Cyr, 533 U.S. 289 (2001), which involved applying the constitutionally inspired, antiretroactivity rule of clarity. See supra note 53. In choosing to apply this rule, the majority deemed the statute’s “legislative history . . . significant because, despite its comprehensive character, it contains no evidence that Congress specifically considered the question of
There is much to be said about the advisability of using findings-based “how” rules in the free speech field. One thing, however, can be said for sure: In taking this tack, which lacked any firm basis in prior authority, the Rehnquist Court has made a distinctive contribution to both the law of the First Amendment and the law of process-centered, semisubstantive review.

(c) Federalism-Driven Findings-Based Rules.

The Court’s most pointed treatments of legislative findings have come in assessing federalism-based challenges to attempted exercises of congressional power. These decisions have concerned two separate
sources of federal legislative authority: the Article I Commerce Clause and the Fourteenth Amendment Enforcement Clause.  

The Commerce Clause story begins with United States v. Lopez. Faced with a federal statute that prohibited possession of a gun within 1000 feet of a school, the Court—for the first time in fifty-nine years—concluded that Congress had reached beyond its enumerated Article I lawmaking authority. In ruling that Congress could not base this statute on the affecting-commerce prong of the commerce power, the Court relied primarily on the fact that the activity Congress had regulated was not “economic” in nature. The Court also observed, however, that “[n]either the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.” The Court added:

We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce. But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.

This aspect of the Court’s reasoning in Lopez raised large questions about the relevance of congressional findings in commerce power cases. Should such findings matter at all? If so, should they matter only in cases that involve the regulation of economic activity, only in cases that involve the regulation of noneconomic activity, or in cases of both kinds? Should findings be determinative in all cases or only in close cases, and just how close must a “close case” be? The case also raised questions about how explicitly and elaborately Congress must speak in making and setting forth its findings. Must Congress make findings on the face of the law? May the Court determine that Congress made findings implicitly if there is


212. See id. at 566–68.

213. Id. at 560, 567.

214. Id. at 562.

215. Id. at 562–63 (citations omitted).
extensive support for them in committee reports or other legislative materials? Is it enough that there is some measure of support for such findings, even if that support is not extensive?\(^{216}\)

The Court grappled with some of these questions in *United States v. Morrison*,\(^ {217}\) which concerned a provision of the Violence Against Women Act (“VAWA”) that created a federal private right of action for gender-based assaults.\(^ {218}\) A defendant sued under VAWA contested its constitutionality, relying on *Lopez* and the “noneconomic” character of the federally regulated conduct.\(^ {219}\) In seeking to distinguish *Lopez*, the government pointed to the plethora of findings that Congress had assembled to show that acts of gender-motivated violence do in fact profoundly affect interstate commerce.\(^ {220}\) A majority of the Court, however, was not impressed with the government’s “how” rule argument. Specifically eschewing a findings-based approach to the case, the Court found that Congress had once again exceeded its Article I powers.\(^ {221}\)

In invalidating the VAWA’s civil remedy provision, the majority emphasized that the Act targeted only “noneconomic, violent criminal conduct” and that Congress had relied on only a highly generalized “‘costs of crime’ and ‘national productivity’” rationale in invoking its commerce power.\(^ {222}\) At least in these circumstances, the Court concluded, even the most elaborate findings would not do.\(^ {223}\) It is noteworthy, however, that *Morrison* held only that “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”\(^ {224}\) It also is noteworthy that the Court declined to “adopt a categorical rule against aggregating the effects of any noneconomic activity” for purposes of applying the affecting-commerce aspect of the

\(^{216}\) Such questions recur in the sources cited supra note 210. *See*, e.g., Frickey, supra note 3, at 707; Friedman, supra note 210, at 762; Krent, supra note 210, at 732.

\(^{217}\) 529 U.S. 598 (2000).

\(^{218}\) See id. at 601–02.

\(^{219}\) See supra note 213 and accompanying text.

\(^{220}\) *See* *Morrison*, 529 U.S. at 628–31 (Souter, J., dissenting). Justice Souter noted that: Passage of the Act in 1994 was preceded by four years of hearings, which included testimony from physicians and law professors; from survivors of rape and domestic violence; and from representatives of state law enforcement and private business. The record includes reports on gender bias from task forces in 21 states and we have the benefit of specific factual findings in the eight separate Reports issued by Congress and its committees over the long course leading to enactment.

\(^{221}\) Id. at 629–31 (footnotes omitted). *See also* id. at 628–29 (citing “mountain of data assembled by Congress . . . showing the effects of violence against women on interstate commerce”).

\(^{222}\) See id. at 614–15, 626–27.

\(^{223}\) Id. at 617–18.

\(^{224}\) Id. at 614 (emphasis added).
commerce power.225 By penning these passages, the Court left itself room to give weight to the presence or absence of legislative findings in some future commerce power cases.226

Despite these subtly semisubstantive features of the *Morrison* opinion, there can be no doubt about the Court’s core message in that case. By deeming extensive congressional investigations and findings wholly inconsequential, the Court indicated that, as a rule, Congress cannot “study its way around” the constitutional limits previously laid down in *Lopez*.227 *Morrison*, in short, signals that, for this Court, even the most meticulous findings will seldom, if ever, matter in contests over the scope of the affecting-commerce prong of the Article I commerce power.

*Morrison*’s minimization of the role of findings in the Commerce Clause context contrasts starkly with the Rehnquist Court’s emphasis of the significance of findings in its most recent treatments of the Fourteenth Amendment Enforcement Clause. Within two years after resurrecting meaningful limits on the commerce power in *Lopez*, the Court struck another blow for state autonomy by reining in Congress’ “power to enforce, by appropriate legislation,” the substantive protections provided by the Civil War Amendments.228 The Court’s most critical move in this direction came in *City of Boerne v. Flores*.229 There the Court confronted a constitutional challenge to the Religious Freedom Restoration Act of 1993 (“RFRA”), which broadly proscribed generally applicable state laws that had the effect of burdening religious conduct, even if the lawmaker lacked the purpose of interfering with religious activities. Pointing to supportive pronouncements in landmark Warren Court voting rights precedents,230 proponents of the legislation argued that the protection it gave free exercise values reflected a permissible exercise of Congress’ power to expand the scope of Fourteenth Amendment due process rights.231 The Rehnquist Court, however, emphatically rejected this argument, holding instead that Section 5 goes no further than authorizing Congress to enact “measures that

225. See *Morrison*, 529 U.S. at 613.
226. Accord, e.g., Bryant & Simeone, supra note 3, at 344 (concluding, for this reason, that “Morrison . . . furthered *Lopez*’s ambiguity regarding the need for findings and record evidence”).
227. See, e.g., *Morrison*, 529 U.S. at 639 (Souter, J., dissenting) (noting that, under majority’s analysis, “some particular subjects arguably within the commerce power can be identified in advance as excluded, on the basis of characteristics other than their commercial effects”).
228. See U.S. CONST. amends. XIII, XIV, XV.
231. The Free Exercise Clause of the First Amendment, of course, has long been deemed incorporated into the due process guaranty. See *City of Boerne*, 521 U.S. at 519.
remedy or prevent unconstitutional actions” as determined by judicial constructions of the Fourteenth Amendment’s substantive protections.232 The Court also held that, for a law to constitute an “appropriate” enforcement measure, it must be marked by “congruence and proportionality” to the underlying constitutional wrong Congress had sought to rectify.233

Having stated this test, the Court in City of Boerne found that the RFRA did not meet it in light of the Court’s earlier interpretation of the Free Exercise Clause as ordinarily barring only those laws that intentionally target religious groups or practices.234 Most important, in finding that the RFRA lacked “congruence” to remedial goals permitted by Section 5, the Court focused squarely on the congressional investigation that had preceded the RFRA’s enactment.235 The Court acknowledged that Congress sometimes could invoke Section 5 to frame legislation that reached farther than the Constitution’s own proscriptions to remedy constitutional wrongs.236 The Court also explained, however:

In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. . . . Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion.237

Put another way, the essential question was whether the RFRA represented a genuine effort to remedy an identifiable pattern of unconstitutional conduct in the form of ostensibly neutral laws deviously deployed to disadvantage religious behavior or adherents. And on this key point, there was a fatal “lack of support in the legislative record.”238

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232. See id.
236. See id.
237. Id. at 530.
238. Id. at 531.
Having squarely focused on the lack of proper findings assembled by Congress in enacting the RFRA, the Court in *City of Boerne* went on to offer a caveat rich with lawyerly equivocation. It stated:

Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but “on due regard for the decision of the body constitutionally appointed to decide.” . . . As a general matter, it is for Congress to determine the method by which it will reach a decision.239

With this passage, as Professors Bryant and Simeone have aptly noted, the Court “assiduously preserved ambiguity as to the ultimate significance or necessity of legislative findings of fact and supportive legislative record evidence” in the enforcement-power context.240

A flurry of Section 5 cases descended on the Court in the wake of *City of Boerne*.241 Moreover, the Court continued in these cases to send mixed signals about the significance of congressional findings in assessing the constitutionality of exercises of the Section 5 power. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,242 for example, the Court invalidated Congress’ invocation of the power to abrogate state sovereign immunity in patent infringement actions.243 The Court did so, however, only after painstakingly detailing why the legislative record did not support subjecting states to such suits to remedy claimed procedural due process violations.244 Having gone to this trouble, the Court quickly added that a “lack of support in the legislative record is not determinative” of constitutionality.245 In *Florida Prepaid*, as in *City of Boerne*, the Court thus left lawyers guessing about what role legislative findings would play in future enforcement power cases.

The Court took a similar tack in *Kimel v. Florida Board of Regents*.246 There the Court was at pains to document the failure of the “legislative record” to establish “reasons” based on the Equal Protection Clause for abrogating the states’ Eleventh Amendment immunity from suit under the

239. *Id.* at 531–32 (citations omitted).
243. *See id.* at 630.
244. *See id.* at 637–48.
245. *Id.* at 646.
ADEA.247 Once again, however, the Court noted that, while “a review of the ADEA’s legislative record as a whole . . . reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age, . . . that lack of support is not determinative of the § 5 inquiry.”248

The drift of these passages was clear enough. They suggested that the Court—following a pattern discernible in other contexts too249—held ambivalent feelings about taking a strong findings-based, semisubstantive approach to this important area of law. More particularly, the Court’s qualifying language in City of Boerne, Florida Prepaid, and Kimel suggested that, even though legislative findings provided a proper starting point for judicial investigation, able lawyers might defend Section 5 legislation by bringing before the courts, rather than Congress itself, the sort of justificatory factual materials found missing from the legislative record in each of those cases.

Push came to shove on this question in the Court’s most recent Section 5 decision. In Board of Trustees of the University of Alabama v. Garrett,250 the Court considered whether a congressional abrogation of state immunity from suit under the Americans with Disabilities Act (“ADA”) was a permissible exercise of the Section 5 power.251 The Court, once again, found that Congress lacked the power it had asserted, but this time the Court also left little doubt that congressional factfinding (at least for now) lay at the heart of its Section 5 jurisprudence.252 To begin with, the Court in Garrett combed the legislative record with particular meticulousness, concluding in the end that the requisite “pattern of unconstitutional state action” needed to justify remedial legislation had not been “documented” by Congress.253 Next, the Court in Garrett tellingly omitted the sort of dicta about the potential irrelevance of findings that had marked its earlier Section 5 decisions. Finally and most important, the Court in Garrett was in fact forced to confront probative evidentiary material that lay outside (or at least at the periphery of) the legislative record. It was in dealing with these materials that the Court had to, and

247. See id. at 88.
248. Id. at 91 (citation omitted).
249. See, e.g., supra notes 198–99 (discussing Turner Broadcasting cases).
251. Id. at 360–64.
252. See id. at 374.
253. Id. at 372. Indeed the majority’s examination of the legislative materials was so energetic that four dissenters described it as akin to judicial review of “an administrative agency record.” Id. at 376 (Breyer, J., dissenting).
did, tip its hand with regard to the decisive effect of inadequate legislative factfinding.

The evidence in Garrett came from a detailed study, conducted by the Task Force on the Rights and Empowerment of Americans with Disabilities, that documented unconstitutional pre-enactment discrimination against the disabled by state governments. The four dissenters in the case had no difficulty finding that this evidence established the challenged law’s constitutionality; after all, they argued, it revealed just the sort of pre-enactment unconstitutional behavior that City of Boerne indicated Congress could remedy or prevent, including by abrogating the state’s Eleventh Amendment immunity. The Court’s federalism-friendly majority, however, found this same evidence inconsequential because it “consists not of legislative findings, but of unexamined, anecdotal accounts.” Speaking directly to the need for congressional responsibility, the majority added that this evidence was “submitted not directly to Congress but to [a] Task Force . . . which made no findings on the subject of state discrimination.” The critical concurring opinion of Justice Kennedy, which was joined by Justice O’Connor, was no less suggestive of the need for investigation by Congress itself. As Justice Kennedy explained: “The predicate for money damages against an unconsenting State in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity.”

How can one reconcile the Court’s outcome-determinative dismissiveness towards congressional findings in Morrison with its all but simultaneous sanctification of the role of congressional findings in Garrett? Perhaps the difference in approach comports with the different clauses at play in the cases. On this view, the specialized aim of Section 5 puts Congress, when it exercises this power, in much the same role as a court granting an injunction. For this reason, just as surely as courts are required to justify remedial decrees with underlying factual findings, when Congress wields its remedial section 5 authority, the issuance of its supportive findings may properly be insisted upon.

254. Id. at 370–72.
255. Id. at 379–82 (Breyer, J., dissenting).
256. Id. at 370.
257. Id. at 370–71.
258. Id. at 376 (Kennedy, J., concurring) (emphasis added).
259. It is noteworthy in this regard that the centerpiece of Justice Breyer’s dissent in Garrett was his objection to the majority’s purported willingness to treat “the Congress of the United States” like “a lower court.” Id. at 383 (Breyer, J., dissenting).
There is, however, a more plausible synthesis of Morrison and Garrett. That synthesis focuses on that same tendency of the Rehnquist Court encountered in the preceding descriptions of its work: the inclination to vindicate, whenever fairly possible, underlying substantive constitutional interests in federalism. But how can it be that this same substance-driven instinct generated entirely different approaches to legislative findings in two cases that both involved concerns about state freedom from congressional overreaching? The answer to this question is that the two cases arose against greatly differing precedential backgrounds.

In Morrison, the issue nubbed down to whether the Court should constrict the protection of state autonomy it had initiated in Lopez by constructing a “congressional findings” exception to its newly minted noneconomic-activity nonaggregation rule.260 In Garrett, in contrast, the issue was whether the Court should give defenders of legislation enacted under Section 5 not just one bite at the apple, but two: first, by letting them rely on congressional findings and second (should this effort fail), by letting them rely in the courts on evidence assembled outside the legislative record.261 As has been seen previously, rhetoric in both Lopez and the pre-Garrett cases left it open to the Court to resolve these issues in a way that maximized or minimized state freedom from congressional regulation.262 To give state prerogatives the broadest protection, however, the Court had to reject the decisiveness of findings in Morrison, while endorsing the decisiveness of findings in Garrett. And in keeping with the Rehnquist Court’s often evidenced commitment to federalism values,263 that is exactly what the Court did.

(d) Semi-Structural Themes and Proper-Findings “How” Rules

Our study of findings-based “how” rules confirms each of the three key themes we have previously detected in the Rehnquist Court’s semisubstantive work. The modern Court’s use of these rules in the affirmative action, free speech, and federalism fields evidences its willingness to engage in semisubstantive reasoning all across the landscape of constitutional law. The work of the current Court with these rules also illustrates dramatically its ambivalence about more adventurous forms of semisubstantive decisionmaking. To see this ambivalence, one need only recall the Court’s simultaneous emphasis and de-emphasis of congressional findings in the series of cases that run from Lopez to City of Boerne to

260. See supra notes 211–27 and accompanying text.
261. See supra notes 211–49 and accompanying text.
262. See supra notes 215–16, 248–49 and accompanying text.
263. See supra note 79 and accompanying text.
Florida Prepaid to Kimel. This same theme of ambivalence—as we have seen—marks the Court’s affirmative action and First Amendment decisions as well.

Finally, the Court’s divergent treatment of findings in Morrison and Garrett confirms the same lesson suggested by the Court’s recent work with clarity-based “how” rules—namely, that its process-based semisubstantive doctrines, no less than its traditional once-and-for-all rulings, reflect this Court’s priorities with regard to substantive constitutional values. Nearly a decade ago, Professors Eskridge and Frickey advanced the thesis that values of federalism were predominantly driving the Rehnquist Court’s development of “quasi-constitutional law.” Morrison and Garrett—and other intervening rulings as well—leave no doubt that a federalism-centered approach to semisubstantive decisionmaking has persisted and gained strength in the work of the Rehnquist Court.

3. Form-Based Semisubstantive “How” Rules

There exists an important set of constitutional “how” rules that do not depend on either legislative clarity or legislative findings. The operation of these doctrines hinges instead on how a particular law is packaged. One subset of these rules distinguishes between two different forms of regulation even though those forms of regulation, upon adoption, have the same real-world effects. Why do these rules glorify “form” over “substance” in this way? Because judges sense that the form proposed legislation takes, when it is under consideration, may well affect levels of resistance and scrutiny in the lawmaking process. A second subset of form-based “how” rules focuses on the context into which a law is placed. Under this approach, legislative authorities may reenact exactly the same law a court has previously struck down, but to do so they must—after giving the matter focused attention—reshape the surrounding legal landscape into which the invalidated law fits. We turn now to the Rehnquist Court’s work with each of these sets of semisubstantive doctrines—what I call “form over substance” rules and “surrounding territory” rules.

264. See supra notes 228–49 and accompanying text.
265. See supra notes 198–99 (concerning the First Amendment); Coenen, supra note 3, at 1673 n.407 (noting intricacies of Justice O’Connor’s view of findings in the affirmative action context).
266. See Eskridge & Frickey, supra note 18, at 597–98, 619–28, 642–44.
267. See, e.g., notes 78–119 and accompanying text (discussing federalism-centered clear statement rules).
(a) Form-over-Substance Rules.

The most bandied-about form-over-substance rule finds its home in the Court’s dormant Commerce Clause jurisprudence. Foundational to this body of law is the principle that states (no matter how clearly they have spoken or how many findings they have made) may not enact tax breaks that favor local firms over interstate competitors.

The courts, however, also have held that outright monetary subsidies that have the same economic effects as impermissible tax breaks are constitutionally acceptable. The question becomes: How can this be? The main reason for the distinction lies in the semisubstantive notion that differing forms of state aid to local businesses lend themselves to differing levels of lawmaker attentiveness and care. In particular, because an outright subsidy “involves the direct transfer of public monies,” it will be “subject to heightened political visibility” and thus greater obstacles to securing enactment.

The underlying thought behind doctrines of this kind goes something like this: Rule A and Rule B, if adopted, will have the same practical effects. Those practical effects are constitutionally problematic. Nonetheless, the form of Rule B generates a level and type of legislative transparency that makes it less likely to be adopted than Rule A unless very strong reasons of policy support it. As a result, Rule A, but not Rule B, is subject to constitutional attack.


270. Pelican Chapter, Associated Builders & Contractors, Inc. v. Edwards, 901 F. Supp. 1125, 1137 (M.D. La. 1995). The point has been noted in discussions of the dormant Commerce Clause by such distinguished commentators as Peter Enrich, Mark P. Gergen, Walter Hellerstein, and Donald H. Regan. See Coenen, supra note 269, at 983–1002 (providing a detailed collection of authorities as well as a much more refined development of the process-centered distinction between dormant Commerce Clause tax-break and subsidy cases). No less significantly, the point builds directly on the pioneering work of “tax expenditure” theorists, particularly Stanley Surrey. See, e.g., Stanley S. Surrey, Tax Incentives As a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures, 83 HARV. L. REV. 705 (1970).

271. In addition, form-based deliberation logic may help support constitutional distinctions between rules that do not have precisely parallel practical effects. In New York v. United States, 505 U.S. 144 (1992), for example, the Rehnquist Court held that Congress cannot forcibly enlist states to implement a federal regulatory program. See id. at 149. The Court simultaneously reaffirmed, however, that Congress can effectively entice states to implement a federal program by conditioning the award of federal money on their doing so. See id. at 166–69, 171–72. See also id. at 208 (White, J., concurring in part and dissenting in part) (highlighting this point). The Court in New York justified the distinction on the ground that it reflects the different degrees of interference with state autonomy that come from coercion on the one hand and inducement on the other. See id. at 166–77. In Printz v. United States, 521 U.S. 898 (1997), however, the Court also pointed out that direct commanding—unlike conditional spending—comes “at no cost” to the federal government. See id. at 922.
Form-based deliberation rules live in constant peril of judicial repudiation. Few starting points of argument are more familiar to lawyers, after all, than the oft-incanted platitude that “substance” should prevail over “form.” Sonorous slogans, however, often mask important functional realities. In particular, given the nature of the real-world legislative process (in which lawmakers might well prefer to hide special treatment of favored constituents in obscure and technical tax legislation), it is not so clear that the subsidy/tax-break distinction falls on the formal, rather than the substantive, side of the form-versus-substance line.

The reason for such concern is not that the form per se is bad, but that [direct-cash payments] create[] special risks that governmental aid will have the effect of advancing religion (or, even more, a purpose of doing so).” Id. at 819 n.8. See also id. at 890 (Souter, J., dissenting) (noting that the “risk of diversion [to religious education] is obviously high when aid in the form of government funds makes its way into the coffers of religious organizations”). To be sure, many will find the reasoning reflected in these passages difficult to follow and ultimately unpersuasive. Mitchell reveals at least, however, that form-based distinctions connected with legislative processes continue to play some role in the Rehnquist Court’s Establishment Clause decisionmaking. In particular, Justice Thomas’ focus on legislative purpose suggests that the anti-direct-cash-payment rule

thought behind this rationale seems not far removed from the form-based rationale for distinguishing subsidies and tax breaks. On this view, the conditional spending form of exacting autonomy-compromising state compliance with federal wishes will (at least sometimes) generate more care, caution and restraint by Congress precisely because it is more visibly costly. The result (as with subsidies) should be that Congress usually will not interfere with federalism values by involving states in operating federal programs unless there are extremely good reasons for doing so. See, e.g., Roderick M. Hills, Jr., The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t, 96 MICH. L. REV. 813, 865 (1998) (claiming that “the federal government, burdened by deficits and public impatience with additional federal taxes . . . cannot offer unlimited bribes to nonfederal governments in return for unlimited cooperation”). In similar fashion, one might view United States v. Lopez as embodying a quasi-form-based deliberation rule. 514 U.S. 549 (1995). The Court in Lopez, after all, did not foreclose Congress altogether from regulating guns near school zones when it invalidated the Gun Free School Zones Act. See supra notes 211–16 and accompanying text (discussing Lopez). It did require, however, that any such regulation embody a “jurisdictional element” that tied the gun possession in some way to movement by the gun or its possessor across a state border. Lopez, 514 U.S. at 561. Such a requirement carries with it the assurance that at least someone somewhere will give thought to the constitutionally mandated commerce-connectedness of a federal regulation. Moreover, because the practical effect of these two forms of congressional regulation is likely so similar, the ruling in Lopez had a rather pure remand-to-the-legislature quality. Indeed, following Lopez, Congress reenacted—and the courts have upheld—the Gun-Free School Zone Act prohibition augmented with a jurisdictional hook. See, e.g., United States v. Danks, 221 F.3d 1037, 1039 (8th Cir. 1999). See also LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 90 (3d ed. 2000).
form is often connected up with substance, and what is formal may not be formalistic. In the law of contracts, for example, there is widespread agreement that rules that channel promises into certain forms—whether they be sealed instruments, signed documents, or bargained-for exchanges—serve important instrumentalist purposes, including the goal of inspiring caution and reflection when important choices are made. A similar thought drives the foundational tax-break/subsidy distinction long drawn by the Court in its dormant Commerce Clause case law.

Even so, it is not surprising that (as with findings-based “how” rules) the form-over-substance subsidy-protecting “how” rule has stirred signs of ambivalence within the Rehnquist Court. For now, however, there is little in the Court’s decisions that suggests that the subsidy/tax break distinction stands in serious danger of judicial rejection. As a result, this feature of dormant Commerce Clause doctrine confirms the Rehnquist Court’s openness, in yet another context, to semisubstantive second-look oriented styles of judicial review.

Another semisubstantive, form over substance rule took hold in the Court’s recent decision in Apprendi v. New Jersey. In that case, the Court confronted a state statute that authorized increased punishment for any criminal offense the trial judge found, by a preponderance of the evidence, to have been committed with the purpose of intimidating an individual “‘because of race, color, gender, handicap, religion, sexual orientation or ethnicity.’” In an opinion written by Justice Stevens (joined by Justices Scalia, Souter, Thomas, and Ginsburg), the Court ruled

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274. See Lon L. Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 799 (1941) (providing “an inquiry into the rationale of legal formalities, and an examination of the common-law doctrine of consideration in terms of its underlying policies”).

275. To be sure, in Camps Newfound/Owatonna, Inc. v. Town of Harrison, the Court noted that “[w]e have ‘never squarely confronted the constitutionality of subsidies’ . . . and we need not address these questions today.” 520 U.S. 564, 589 (1997) (quoting W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 199 n.15 (1994)). Even so, the Court’s full corpus of precedents—including New Energy Co. v. Limbach, 486 U.S. 269 (1988), and C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994)—lend strong support to the tax-break/subsidy distinction. See Coenen, supra note 269, at 977–78 (detailing this argument). Indeed in Camps Newfound/Owatonna itself, the Court went on to acknowledge that “[t]his distinction is supported by . . . precedent” and added that “we see no reason to depart from it.” 520 U.S. at 591.


277. Id. at 468–69 (quoting N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999–00)).
that this sentence enhancement provision violated the defendant’s jury trial and burden of proof rights under the Sixth and Fourteenth Amendments.\footnote{See id. at 476.} The controlling principle, according to the Court, is that an adjudicative finding that supports a sentence greater than the maximum punishment specified for the underlying crime (in this case, second-degree firearm possession for an unlawful purpose, which carried a prison term of five to ten years) must be made by a jury (rather than a judge) subject to a “beyond a reasonable doubt” (rather than a “preponderance of the evidence”) standard of proof.\footnote{See id. at 469–70, 476.} Because the New Jersey hate crime enhancement law authorized an additional ten years of imprisonment—and actually resulted in the imposition of a twelve-year term in Apprendi’s own case—the statute as applied offended this newly formulated constitutional rule.\footnote{See id. at 470–71.}

Four dissenters, led by Justice O’Connor, excoriated the Court’s holding as based on “meaningless formalism.”\footnote{Id. at 539 (O’Connor, J., dissenting).} They argued that, under the majority’s reasoning, states could keep in place judge-made preponderance of the evidence enhancements by simply expanding the possible maximum punishment for each underlying offense.\footnote{See id. at 540.} Thus:

First, New Jersey could prescribe, in the weapons possession statute itself, a range of 5 to 20 years’ imprisonment for one who commits that criminal offense. Second, New Jersey could provide that only those defendants convicted under the statute who are found by a judge, by a preponderance of the evidence, to have acted with a purpose to intimidate an individual on the basis of race may receive a sentence greater than 10 years’ imprisonment.\footnote{Id.}

Moreover, even if this approach fell victim to the principle of \textit{Apprendi}: New Jersey could cure its sentencing scheme, and achieve virtually the same results, by drafting its weapons possession statute in the following manner: First, New Jersey could prescribe, in the weapons possession statute itself, a range of 5 to 20 years’ imprisonment for one who commits that criminal offense. Second, New Jersey could provide that only those defendants convicted under the statute who are found by a judge, by a preponderance of the evidence, to have acted with a purpose to intimidate an individual on the basis of race may receive a sentence greater than 10 years’ imprisonment.\footnote{Id. at 540.}
According to the dissenters, a constitutional regime that tolerated such a set of laws, while simultaneously invalidating the enhancement provision at issue in *Apprendi* itself, reflected an intolerable glorification of “approved phrasing” and endorsement of “a meaningless . . . difference in drafting . . . criminal statutes.”

Responding to the dissent’s substance over form argument, the majority launched a celebration of precisely the sort of “structural democratic constraints” that drive deliberation-enhancing semisubstantive constitutional analysis. In particular, according to Justice Stevens, the dissenters’ proposed alternatives would require a state legislature “to revise its entire criminal code” if it wished to render sentence enhancements as broadly applicable as the blunderbuss state hate crimes law at issue in *Apprendi* itself. Second, the dissenters’ supposedly indistinguishable statutory proposals would “expose every defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature’s judgment, generally proportional to the crime.” According to the majority:

This is as it should be. Our rule ensures that a State is obliged “to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices” of exposing all who are convicted to the maximum sentence it provides. So exposed, “[t]he political check on potentially harsh legislative action is then more likely to operate.”

The essence of this reasoning is that statutory form matters. In a setting where a legislative innovation threatened to extend the length of many sentences based on fact-findings made neither by a jury nor beyond a reasonable doubt, the Court insisted that lawmakers at least pay close attention to the business at hand. As Justice O’Connor emphasized, the underlying constitutional principle of the Court’s decision suggests that the New Jersey legislature remained able to expose defendants, like Mr. Apprendi, to significant sentence enhancements pursuant to preponderance of the evidence findings made by the sentencing judge. In the majority’s view, however, there was nothing wrong with that result. Instead, that

285. *Id.* at 543 (quoting Jones v. United States, 526 U.S. 227, 267 (1999) (Kennedy, J., dissenting)).
286. *Apprendi*, 530 U.S. at 541 (O’Connor, J., dissenting).
287. *Id.* at 490. n.16 (Stevens, J.).
288. *Id.*
289. *Id.*
290. *Id.* (internal citation omitted) (quoting Patterson v. New York, 432 U.S. 197, 228 n.13 (1977) (Powell, J., dissenting)).
291. *Id.* at 540.
outcome properly showed judicial modesty while giving constitutional values a needed boost. By design, the Court’s ruling gave legislators room to maneuver. Yet it simultaneously increased the odds that lawmakers would focus on the precise consequences of their actions, including with respect to the constitutional jury right and burden of proof values the Court deemed deserving of protection.292

In its practical effects, Apprendi is one of the most important decisions of the Rehnquist Court era. The decision thus illustrates this Court’s willingness to use semisubstantive approaches in high-profile and high-stakes cases, including (at least on occasion) to protect the rights of criminal defendants. Apprendi also confirms that semisubstantive styles of review, although pervasive, have generated mixed reactions within the Rehnquist Court. The core of the dissenters’ objections, after all, focused squarely on the form-centered and provisional nature of the Court’s holding. It bears repeating, in this regard, that “form over substance” rules are not necessarily formalistic. The majority in Apprendi zeroed in on this very point, emphasizing that the rule it had formulated should serve to discipline and enlighten legislative decisionmaking. According to the

292. The rule of Apprendi bears some relation to the extra-super-clear statement rule proposed in the concurrences in Thompson and Kimel. See supra notes 151–83 and accompanying text. In Apprendi, after all, the Court precluded one statute—the hate crimes law—from affecting the operation of other statutes—namely, the underlying substantive criminal provisions—and thus required treatment of the legislated-upon subject in one focused statute with respect to each crime. Put differently, in Apprendi, just as in Kimel, the Court rejected an incorporation-by-reference statutory approach. There are, however, important differences between the cases. Most important, in both Kimel and Thompson, there was a genuine question over whether the legislature (or at least large numbers of its members) really intended to affect the result the literal language of its statutes put in place. The cases thus bore a close kinship to cases involving clear statement rules, which (like other interpretive rules) concern (at least to some degree) effectuating legislative intent. On the other hand, Apprendi involved a case in which legislative intent was clear. The legislature, after all, unmistakably had provided that hate-based sentence enhancements for all crimes could and should be made by judges acting on a preponderance of the evidence. The point of the Court in Apprendi was not to question whether the legislature really intended this result; rather, it was to force more meticulous consideration about whether the legislatively intended result was a good idea. Put another way, the clarity-based rules proposed in Thompson and Kimel (like all clear statement rules of statutory interpretation) might be called “Is this what you really mean?” rules, while the form-based decision in Apprendi involves what might be described as an “Are you sure you really want to do this?” rule. Of course, the application of any “Is this what you really mean?” rule will trigger reconsideration of both what the legislature meant and what it wants. See, e.g., EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 262–63 (1991) (“Clear statement rules operate less to reveal actual congressional intent than to shield important values from an insufficiently strong legislative intent to displace them.”) (emphasis in original)); Frickey, supra note 3, at 720 n.130 (suggesting that Gregory’s clear statement rule does not so much pursue “some interpretive end in itself” as it creates a “procedural focus” on federalism values in the lawmaking process). It is not true, however, that “Are you sure you really want to do this?” rules will trigger inquiries into what the legislature meant. It is for this reason that the former sets of rules are clarity rules, and the latter set of rules are form-based deliberation rules.
majority, the important substantive values at stake in the case deserved at least this measure of judicial protection. 293

(b) Surrounding-Territory Rules

Some semisubstantive doctrines focus on whether legislative authorities have treated the area of law that surrounds a constitutionally troublesome subject in a way that reveals a willingness to grapple with the hard issues it presents. In BMW of North America v. Gore, 294 for example, Justice Breyer wrote a critical concurring opinion that took this sort of approach to the problems posed by jaw-dropping punitive damages awards. 295 The majority in the case concluded that a $2 million award for the undisclosed presale repainting of a new car was constitutionally “excessive.” 296 While not questioning this characterization, Justice Breyer chose to focus his sights not so much on the size of the award, but on the lack of a careful treatment of punitive damages policy in state law. He noted, for example, that “there are no . . . legislative enactments here that classify awards and impose quantitative limits;” 297 or that “contain a standard that readily distinguishes between conduct warranting very small,

293. This treatment of Apprendi was written prior to the issuance of last term’s decisions, applying Apprendi, in Ring v. Arizona, 122 S. Ct. 2428 (2002), and Harris v. United States, 122 S. Ct. 2406 (2002). In Ring, the Court dealt with a specialized problem raised by the intersection of Apprendi and the Court’s death penalty jurisprudence—namely, whether states could permit judges (rather than juries) to find the presence of aggravating factors needed to put a capital defendant to death. Ring, 122 S. Ct. at 2432. The Court said “no,” and (reflecting some of the Court’s internal tension about form-based rules) reasoned that “labels,” id. at 2439, and “form,” id. at 2440, should not control whether a particular judge-made finding concerns an impermissible “elevation of the maximum punishment” for purposes of Apprendi. Id. at 2441. In Harris, however, the Court seemed to reinforce the analysis set forth in the text concerning the form-based nature of Apprendi in noncapital cases. The issue in Harris was whether Apprendi permitted a judge, rather than a jury, to make a determination (concerning, for example, use of a weapon in committing a charged crime) that would result in imposition of a mandatory-minimum sentence where that minimum fell within the legislatively established statutory sentencing range. The dissenters in the case repeatedly emphasized that, unless the Constitution barred such a mandatory-minimum sentencing methodology, “Apprendi can easily be avoided by clever statutory drafting.” Harris, 122 S. Ct. at 2425 (Thomas, J., dissenting). The Court’s plurality in effect found this concern beside the point, emphasizing that the controlling principle was whether the mandatory sentence imposed as a result of the judge’s finding fell within the range previously stipulated by the legislature for the underlying crime. See, e.g., id. at 2417. But cf. id. at 2426 (dissenting opinion) (“Whether one raises the floor or raises the ceiling, it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed.”). The bottom line is that Harris appears to permit legislatures to engage in just the sort of form-based—but focused—redrafting on which the majority and dissenters exchanged views in Apprendi. Harris, however, strongly suggests the Court’s conflicting feelings about so-called “form over substance” rules as a general matter. In particular, the sentencing scheme challenged in Harris was upheld in a 5–4 decision, with the critical vote being cast by Justice Breyer solely because he continued to condemn Apprendi itself as misbegotten.

295. See id. at 586–98 (Breyer, J., concurring).
296. See id. at 574 (majority opinion).
297. Id. at 595 (Breyer, J., concurring).
and conduct warranting very large, punitive damages awards."\(^{298}\) As Professor Sunstein has observed, Justice Breyer’s treatment of the case “requires state officials to set out criteria on their own and in that way forces democracy. Like the void for vagueness doctrine, it is intended to catalyze and improve, rather than to preempt, democratic processes.”\(^{299}\) In other words, Justice Breyer applied a constitutional “how” rule, rather than a constitutional “what” rule, in finding a due process violation.

Surrounding territory rules can draw attention to aspects of subconstitutional law that, at first blush, have only a tenuous nexus to the rule under constitutional attack. The point is well-illustrated by the Rehnquist Court’s recent decision in *Illinois v. McArthur*,\(^{300}\) and particularly that decision’s treatment of the Court’s earlier decision in *Welsh v. Wisconsin*.\(^{301}\)

In *McArthur*, the Court confronted the question whether the Fourth Amendment barred police officers from impeding a man’s entrance into his home while they awaited a warrant to search it for marijuana.\(^{302}\) In arguing

\(^{298}\) Id. at 588.

\(^{299}\) Sunstein, * supra* note 208, at 82. Notably, the Court’s rulings may have in fact had just this effect. As the Court noted in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*: “A good many States have enacted statutes that place limits on the permissible size of punitive damages awards,” and “[s]ince our decision in *Gore*, four additional States have added punitive damages caps.” 532 U.S. 424, 433 & n.6. Of particular note, one of these four states is Alabama, whose punitive damages methodology was at issue in *Gore* itself. See id. at 433 n.6. For the suggestion in *Cooper Industries* that a Court majority might be willing to take an approach something like Justice Breyer’s *BMW* approach in a closely related context, see id. at 440 n.13, which suggests that the scope of appellate review for the unconstitutionality of punitive damages awards might significantly narrow “if the State’s scheme constrained a jury to award only the exact amount of punitive damages it determined were necessary to obtain economically optimal deterrence or if it defined punitive damages as a multiple of compensatory damages.” See also *City of Indianapolis v. Edmond*, 531 U.S. 32, 49 (2000) (Rehnquist, C.J., dissenting) (noting that “roadblock seizures are consistent with the Fourth Amendment if they are ‘carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers’”)(quoting Brown v. Texas, 443 U.S. 47, 51 (1979)).


\(^{301}\) Id. at 333–36 (construing *Welsh v. Wisconsin*, 466 U.S. 740 (1984)). Notably, *McArthur* bears no small measure of resemblance to *Apprendi* (* see supra* notes 276–92 and accompanying text) because the decision in each case pushed the legislature toward a crime-by-crime reassessment of the operation of a particular rule of criminal procedure. Even so, it seems that *McArthur* involved a surrounding territory, form-based approach, while *Apprendi* involved a form-over-substance, form-based rule. This was the case because *Apprendi* identified two different statutory forms that would generate the desired result of nonjury-generated sentence enhancements for unlawful possession of a gun. The Court held that the legislature had to use one of these forms (the all-in-one-statute form) rather than the other (the overarching-punishment-statute-supplements-the-underlying-crime-statute form) in light of jury right and burden of proof concerns. In contrast, *McArthur* involved whether a particular search was constitutional in light of the surrounding context created by subconstitutional rules; thus the Court’s approach in *McArthur* was like Justice Breyer’s approach in *BMW* (which, one may argue, focused on whether a particular punitive damage award was permissible against the backdrop of the surrounding set of subconstitutional punitive damages rules). To be sure, this distinction might seem to split hairs. But that fact merely evidences the often intimate connection among the semisubstantive doctrines considered in this article.

\(^{302}\) *McArthur*, 531 U.S. at 328.
against this claim of police authority, the defendant in McArthur relied on Welsh. In Welsh, the Court held that police officers could not invoke exigent circumstances to go into a person’s home without a warrant to prevent the loss of evidence in the form of that person’s blood alcohol level. Reasoning that both cases involved misdemeanors under state law, and that a warrantless exclusion from the home is “nearly as serious” as the warrantless entry deemed unlawful in Welsh, the defendant in McArthur argued for suppression of all evidence seized from the premises. The Court, however, distinguished Welsh on two grounds. First, the Court noted that “[t]emporarily keeping a person from entering his home . . . is considerably less intrusive than police entry into the home itself.” Second (and more important for our purposes), the Court emphasized that the driving-while-intoxicated misdemeanor involved in Welsh was “nonjailable” under state law, while the marijuana misdemeanor involved in McArthur was potentially “jailable.” This latter difference mattered, in the Court’s view, because “the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State’s interest in arresting individuals suspected of committing that offense.”

The Court’s reliance on this factor is troublesome for several reasons. For example, according to the Court’s jailable/nonjailable distinction, the level of constitutional protections one enjoys will diminish, rather than rise, with the seriousness of the crime one has allegedly

303. Id. at 335–36.
304. See McArthur, 531 U.S. at 335; Welsh, 466 U.S. at 753–56.
305. See McArthur, 531 U.S. at 335–36.
306. Id. at 336.
307. Id.
308. Id. (quoting Welsh, 466 U.S. at 754 n.14).
309. Some problems with the jailable/nonjailable distinction—at least in the Fourth Amendment area—concern the practical problems it may pose for law enforcement authorities. Indeed, just such concerns helped drive the Court’s ruling in Atwater v. City of Lago Vista, in which the Court rejected an argument founded on Welsh to forbid custodial arrests (absent compelling need) for nonjailable crimes. 532 U.S. 318, 346–47 (2001). The Court’s five-Justice majority (in an opinion written by Justice Souter joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas) deemed this approach inconsistent with the need for “readily administrable” Fourth Amendment rules because “an officer on the street” frequently cannot know whether the wrongdoing she is investigating is jailable or not. Id. at 348. In contrast, the four dissenters (in an opinion written by Justice O’Connor) drew directly on Welsh in reasoning that: “If the State has decided that a fine, and not imprisonment, is the appropriate punishment for an offense, the State’s interest in taking a person suspected of committing that offense into custody is limited at best.” Id. at 365 (O’Connor, J., dissenting). The dissenters added that, in their view, the unknowability concerns raised by the majority were overstated, likely to cause few practical problems in light of the qualified immunity defense, and outweighed by the “severe intrusion” on liberty and privacy effected by a full-scale custodial arrest. Id. at 365–66.
committed. Yet for many it will seem unjust to say that persons subject to the greatest punishments possess the smallest measure of constitutional rights. Another problem with the Court’s McArthur/Welsh analysis concerns the incentives it creates for state legislatures. In particular, the same defenders of liberty who challenged the legality of the state’s actions in Welsh are likely to worry that the case’s reasoning may lead state legislatures to reclassify any number of “nonjailable” misdemeanors as “jailable.” The incentive for making such reclassifications emerges from the simple reality that, on the reasoning of McArthur, increased punishments will broaden opportunities for government officials to engage in searches and seizures free of the burdens imposed by the Fourth Amendment exclusionary rule.310

It is this latter point that discloses the subtly dialogic, second-look character of the ruling in Welsh as it has been refined in McArthur.311 Why? Because, under these authorities, the scope of constitutional search and seizure rights seem to depend directly on the state legislature’s choices about how to formulate statutory rules.312 In particular, to negate the Fourth Amendment rights possessed by suspected drunk drivers under Welsh, the state legislature may need only to increase the permissible punishment for the drunk driving offense.

310. Justice Breyer made much the same point about the creation of perverse incentives recently in a very different constitutional context. In United States v. United Foods, Inc., the majority ruled that the First Amendment barred Congress from imposing assessments on mushroom growers to fund advertisements that promoted mushroom sales. 533 U.S. 405, 413 (2001). The Court distinguished its validation of a comparable program for tree-fruit growers in Blackman v. Wileman, Brothers & Elliot, Inc., 521 U.S. 457 (1997), on the ground that, unlike the mushroom program, the tree fruit “program [was] part of a far broader regulatory system that does not principally concern speech.” United Foods, 533 U.S. at 415 (internal citation omitted). As Justice Breyer observed in his dissent, “the holding here . . . creates an incentive to increase the Government’s involvement in any information-based regulatory program, thereby unnecessarily increasing the degree of the program’s restrictiveness.” Id. at 429 (Breyer, J., dissenting). See also Kyllo v. United States, 533 U.S. 27, 46–47 (2001) (Stevens, J., dissenting) (criticizing the majority’s limitation of Fourth Amendment prohibition to the warrantless use of home-searching technologies “not in general public use” and noting that “this criterion is somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available”).

311. Of course, this statement holds true only if the jailable/nonjailable distinction of Welsh and McArthur remains good law. See supra note 309 (discussing recent Atwater case and shadow it casts over jailable/nonjailable distinction). See also McArthur, 531 U.S. at 336 (noting that Court “need not decide” whether restriction placed on home occupant would have been permissible “were only a ‘nonjailable’ offense at issue”). The signals of concern about this surrounding-territory approach dovetail, once again, with other expressions of ambivalence about semisubstantive constitutional rules.

312. See also Ferguson v. City of Charleston, 532 U.S. 67, 101–02 (2001) (Scalia, J., dissenting) (suggesting that subconstitutional rules—including physician-patient privilege and duties to report law violations—shape Fourth Amendment expectations of privacy of patients with respect to drug urine tests). Nor is this phenomenon tied uniquely to the Fourth Amendment. See supra note 310 (discussing First Amendment ruling in United Foods case).
One might quibble over whether this aspect of the McArthur/Welsh approach embodies a pure semisubstantive constitutional “how” rule. Nonetheless, the democracy-forcing, remand-to-the-legislature character of the rule suggested by Welsh and McArthur rule is undeniable. In effect, under that rule, state legislatures may render inoperative a Fourth Amendment prohibition in exactly the same on-the-ground circumstances to which the Supreme Court had applied it. In addition, those legislatures are pushed toward thoughtfully considering, on a careful crime by crime basis, whether lengthening sentences is justified to displace court imposed restrictions on the state’s investigatory powers in particular contexts. In short, surrounding territory doctrines work just like semisubstantive rules are supposed to operate. They facilitate legislative second looks; they induce legislative focus; they reward legislative care and particularity; and they directly engage nonjudicial officials in a collaborative elaboration of constitutional rights.


In Erie Railroad Co. v. Tompkins, the Supreme Court held that there is no such thing as a “federal general common law.” In the days since Erie, however, the Court has crafted many specialized federal common law rules. The Rehnquist Court has persisted in this practice, even while emphasizing a reluctance to carry the tendency too far. Most

313. The McArthur/Welsh approach, after all, requires the legislature to alter the content of surrounding sentencing law if it wishes to put back in place the provisionally invalidated practice of conducting certain searches without warrants. See supra notes 18–23 and accompanying text.

314. Not surprisingly, the “nature of the penalty” approach to rights identification taken in Welsh and McArthur holds the potential for extension in other fields. For example, on the logic of these cases, it would be possible for the Court to limit the operation of the antibalancing, hands-off, free exercise rule of Employment Division, Department of Human Resources v. Smith solely to the application of “generally applicable criminal laws.” 494 U.S. 872, 884 (1990) (emphasis added). On this view, if the state elects to associate only civil disadvantages with a particular form of conduct, then courts should feel free (in light of the lesser expression of state concern) to engage in constitutional balancing when a person suffers those disadvantages because she has engaged in that conduct for religious reasons. Consistent with second-look theory, however, the state might escape resulting free exercise limitations by making the regulated form of conduct subject to criminal penalties. This line of analysis once again reveals the rich opportunities for analogistic arguments created by the Court’s array of structural doctrines. See supra text following note 183.

315. 304 U.S. 64 (1938).

316. Id. at 78.


319. See, e.g., Atherton v. FDIC, 519 U.S. 213, 218 (1997) (finding that proper applications of “substantive” federal common law are “few and restricted”) (quoting O’Melveny & Myers v. FDIC,
important, the Rehnquist Court has drawn upon constitutional values in recognizing rules with legislatively modifiable features. The Court, for example, has embraced a “federal common law” doctrine that requires courts to accord the same “claim preclusive effect of a dismissal by a federal court sitting in diversity” that would be accorded to such a dismissal under the law of the state in which the court rendering judgment sits. According to the Court, this rule was promulgated to avert the “inequitable administration of the laws” that Erie seeks to avoid by facilitating like treatment of similarly situated litigants in state and federal courts. The Court’s rule—although congressionally reversible—thus comports with constitutional assurances that citizens will receive “the equal protection of the laws.”

Because common law rules, by definition, are subject to legislative override, they have an obvious “remand to the legislature” quality. In addition, constitutional common law rules protect substantive constitutional values in a process-centered, democracy-forcing way. This is so for two reasons. First, the practical effect of adopting a principle of constitutional common law (at least in many instances) is to establish a default rule that


322. Id. at 508–09 (quoting Hanna v. Plumer, 380 U.S. 497, 508 (1965)).

323. U.S. CONST. amend. XIV, § 1. See also Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) (noting that generally “Fifth Amendment equal protection claims” applicable to the federal government are “precisely the same as . . . equal protection under the 14th Amendment” assertable against states). Another supervisory decision founded on equal protection concerns is Frazier v. Heebe. See 482 U.S. 641, 649 (1987) (invalidating a local rule of the Louisiana federal district court that excluded from practice before it a member of the Louisiana bar whose home and office were in Missouri because it “unnecessarily and arbitrarily discriminates against out-of-state attorneys”). Notably, Frazier was a decision of the very early Rehnquist Court; the only current Court member who voted with the majority was Justice Stevens. All other then-sitting Justices who remain on the Court (namely, Chief Justice Rehnquist and Justices O’Connor and Scalia) dissented from the Court’s ruling. See id. at 651–55 (Rehnquist, C.J., dissenting) (reasoning that supervisory power authorizes Supreme Court review of lower court judgments, but not lower court rules).

324. See, e.g., Neal Kumar Katyal, Legislative Constitutional Interpretation, 50 DUKE L.J. 1335, 1366–67 (2000) (noting that “as Professor Monaghan’s excellent description of ‘constitutional common law’ reveals, many of the Court’s constitutional pronouncements are already modifiable by Congress”; also noting Monaghan’s view “that the practice of constitutional common law is justified because it ‘opens a dialogue with Congress’”).
nonjudicial authorities can override only by legislating in clear terms.\textsuperscript{325} To the extent that constitutional common law rules work this way, they promote thoughtful and clear-headed lawmaking in exactly the same manner as do other clarity-mandating “how” rules.\textsuperscript{326} Second, whether or not constitutional common law rules incorporate a clear statement feature, they place the weight of legislative inertia on the side of constitutional rights. The key point is that constitutional common law rules stand until legislatures override them. And securing such an override is seldom an easy task. It requires building interest group pressures, generating supportive coalitions, securing enactment of a bill in both houses of the legislature, overriding any veto, and the like.\textsuperscript{327} No less important, many constitutional common law doctrines are not susceptible to outright repeal. Rather they may be jettisoned only if the legislature simultaneously adopts some other rule that implements in an alternative way the constitutional values the constitutional common law rule was meant to protect.\textsuperscript{328} In short, regardless of the precise features that mark any particular rule of constitutional common law, these rules always place deliberation-heightening obstacles in the way of legislators who would prefer that those rules not operate. Put another way, these rules inevitably focus the mind of legislators who are contemplating their negation on the important constitutional values they serve.

The following section deals with the operation of constitutional common law and common-law-like rules in the Rehnquist Court. It first examines the straightforward, though often controversial, set of doctrines the Court has put in place pursuant to the so-called “supervisory power.”\textsuperscript{329} Next, it examines those more ambitious, though still provisional, constitutional common law rules that govern not only the proceedings of federal tribunals, but also the actions of state legislative, executive, and judicial officials.

(a) Supervisory Rules

Some semisubstantive doctrines derived from the Constitution emanate out of the federal courts’ ability to develop default rules that apply

\begin{itemize}
  \item[325.] See infra note 347 and accompanying text.
  \item[326.] See supra notes 37–119 and accompanying text.
  \item[328.] See, e.g., infra notes 377–83 and accompanying text (discussing this feature of the \textit{Miranda} decision).
  \item[329.] For a general treatment and a useful collection of authorities, see TRIBE, supra note 149, § 3-23 at 466 n.2. See also Coenen, supra note 3, at 1737–42.
\end{itemize}
to the federal courts’ own operations and proceedings. Although the Supreme Court has long laid claim to this so-called “supervisory” authority, few supervisory power cases have made their way to the Rehnquist Court. In one important ruling, however, a razor-thin majority of the Court signaled its strong reluctance to wield this power in the important context of overseeing federal grand jury proceedings.

In United States v. Williams, the defendant asked the Court to uphold dismissal of a federal indictment on the ground that federal prosecutors had obtained it without disclosing to grand jurors “substantial exculpatory evidence.” Faced with these circumstances, the defendant advocated adoption of a supervisory rule that “can be justified as a sort of Fifth Amendment ‘common law,’ a necessary means of assuring the constitutional right to the judgment ‘of an independent and informed grand jury.’” The Court, however, eschewed this approach, citing authorities going back to Blackstone for the proposition that “it has always been thought sufficient to hear only the prosecutor’s side” in grand jury proceedings. Even more significantly, the Court’s majority hinted that federal judges lack any measure of supervisory power over grand jury activities and stated expressly that they lack such authority “as a general matter at least.”

The majority reached this conclusion—even while acknowledging that “the grand jury normally operates . . . under judicial auspices”—because it is “an institution separate from the courts, over whose functioning the courts do not preside.”

The majority’s endorsement of a broad abandonment of supervisory authority over grand jury activities triggered a vigorous dissent by an
uncommon alliance of Justices, with Justice Stevens writing for himself, Justice Blackmun, Justice O’Connor, and Justice Thomas. In the eyes of the four dissenters, the limited role of the federal judiciary in overseeing federal grand jury proceedings cut against, rather than for, the majority’s decision. As Justice Stevens observed, “the prosecutor’s duty to protect the fundamental fairness of judicial proceedings assumes special importance when he is presenting evidence to a grand jury” because “the prosecutor operates without the check of a judge.” It chilled the bones of these Justices to think that the majority would “hold that countless forms of prosecutorial misconduct must be tolerated—no matter how prejudicial they may be, or how seriously they may distort the legitimate function of the grand jury.” In the dissenters’ view, the governing rule should have been that whenever “the withheld evidence would plainly preclude a finding of probable cause,” the prosecutor must disclose it or face dismissal of the resulting indictment through the federal courts’ invocation of their supervisory authority.

Williams illustrates the sort of debate likely to arise when courts are asked to wield the ill-defined supervisory power. It also corresponds with each of the themes we have encountered already in our examination of semisubstantive constitutional law. On the one hand, the Court in Williams did not block the recognition of supervisory rules, including in the grand jury area; in this regard, the decision jibes with the Rehnquist Court’s oft-evidenced willingness to deploy semisubstantive constitutional rules in a variety of contexts. On the other hand, Williams evidences a hesitance to apply supervisory rules in a willy nilly fashion. More particularly (and in noteworthy keeping with the discretion-countering tendencies of the opinion’s author, Justice Scalia), Williams reflects an effort to block claims of supervisory power over grand jury matters with a wooden per se rule or at least a powerful presumption. In these regards, the starkly contrasting opinions in Williams correspond with other expressions of

338. See Williams, 504 U.S. at 55–70 (Stevens, J., dissenting).
339. Id. at 62.
340. Id. (citations omitted).
341. Id. at 68.
342. Id. at 70. See id. at 70 n.13.
343. For a contrasting decision, in which the Court did issue a constitutionally connected supervisory ruling, see Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 808 & n.19 (1987) (overturning on supervisory power grounds criminal contempt conviction based on violation of injunction that was prosecuted by lawyer of defendant’s adversary in civil action; relying on “basic notions of fairness” and citing circuit court authority that viewed “appointment of interested prosecutor [as a] due process violation”). See also Mu’Min v. Virginia, 500 U.S. 415, 422 (1991) (indicating existence of supervisory power over jury voir dire in federal courts).
ambivalence about the advisability of embracing semisubstantive constitutional doctrines.

Whatever the scope of the Court’s supervisory power, rulings based on that power can stand “only in the absence of a relevant act of Congress.” For this reason, supervisory rulings always have a remand-to-the-legislature quality. Moreover, Congress may overturn a supervisory rule (at least if the rule has “long gone unquestioned”) only by way of a “clear[] expression” of intent. It is important to recognize that supervisory authority “how” rules differ from clear statement “how” rules because the latter, but not the former, focus solely on judicial interpretation of previously enacted federal statutes. At the same time, supervisory rules operate in a fashion that parallels clarity-based rules of statutory construction. In effect, each set of rules forces Congress to go back to the drawing board if it genuinely wishes to override constitutional values the Court has provisionally protected. In addition, because in each instance the renewed legislative drafting effort must clearly override the Court’s preferred position, there is strong reason to believe that such proposals will receive a particularly close and well-informed review. Through the use of both sets of rules, the Court holds Congress’ feet to the fire when it senses that, unless it acts, important constitutional values will receive too little attention from lawmaking authorities.

(b) Non-Supervisory Common-Law-Like Rules

In Dickerson v. United States, critics of Miranda v. Arizona sought to capitalize on the provisional and dialogic nature of supervisory rules by arguing that a federal statute, 18 U.S.C. § 3501, had overturned the Court’s holding that custodial interrogations must be preceded by Court-specified warnings about the privilege against self-incrimination. The Court, however, rebuffed this attempt. It reasoned (with persuasiveness)

347. Link v. Wabash R.R. Co., 370 U.S. 626, 631–32 (1962). Accord Carlisle, 517 U.S. at 426 (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 47 (1991)), for proposition that “we would not lightly assume that Congress has intended to depart from established principles such as the scope of a court’s inherent power” (internal quotation marks omitted)).
350. Dickerson, 530 U.S. at 431–32.
that supervisory rulings can target only federal proceedings. Thus *Miranda* could not have embodied a supervisory ruling because it set forth an evidentiary rule that from its inception operated in state, as well as federal, courts.

This “either it is a supervisory rule or it is not” line of reasoning raises an important question not pursued in the *Dickerson* opinion: Are there some forms of constitutional common law or common-law-like rules that do apply to the states? How this question is answered is a matter of no small importance. Indeed, in the wake of the criminal justice revolution worked by the Warren Court, theorists suggested that some of that Court’s most significant rulings rested on “constitutional common law.” On this view, key doctrines—perhaps even including the Fourth Amendment exclusionary rule—were not required, so much as inspired, by the Constitution and, as a result, were modifiable (at least to some degree) by legislative authorities. In fact, just such an approach was taken in *Miranda* itself when the Court observed that states might displace the requirement of judicially specified warnings if they formulated a “fully effective equivalent.” By thus recognizing the modifiable nature of the *Miranda* warnings, the Court openly invited state legislatures to participate in the definition of constitutional protections. This endorsement of interbranch dialogue did not help *Miranda*’s detractors in *Dickerson*, however, because they had sought to defend not a legislatively promulgated replacement for the *Miranda* warnings, but instead their outright repeal.

*Smith v. Robbins*, another case in which the Rehnquist Court was asked—this time successfully—to cut down a landmark decision of the

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351. See id. at 436–38.
352. See id. at 438–39.
353. Monaghan, supra note 320, at 3.
357. 528 U.S. 259 (2000).
Warren Court provides an interesting contrast to Dickerson. Robbins concerned the present-day robustness of Anders v. California, in which the Warren Court held that the Constitution requires states to take meaningful steps to protect the appeal rights of convicted defendants represented by appointed counsel. The Court in Anders ruled that it was not enough for the state to show only that “court-appointed counsel . . . filed a no-merit letter [declaring counsel’s withdrawal] whereupon the [appellate] court examined the record itself and affirmed the judgment.” Instead the Court required that counsel’s request to withdraw “be accompanied by a brief referring to anything in the record that might arguably support the appeal” in light of pertinent authorities. In addition, the appellate court had to determine “after a full examination of all the proceedings [that] the case is wholly frivolous.” The majority in Anders described compliance with these measures as a “requirement” that would appropriately “induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities cited to it by counsel.” The dissenters likewise described the Anders ruling as imposing a “procedure that the Court commands is constitutionally superior to the system . . . followed in California.” Indeed, according to the dissenters: “The fundamental error in the Court’s opinion . . . is its implicit assertion that there can be but a single inflexible answer to the difficult problem of how to accord equal protection to indigent appellants in each of the 50 states.”

In Robbins, the question was whether states could comply with Anders by adopting procedures different from the procedures spelled out in Anders, including when those substitute procedures were not founded on the view that Anders establishes “a mandatory minimum” of constitutional protections. Opting for the answer most protective of local autonomy, the Court upheld a state scheme that required of defense counsel only a “summary of the case’s procedural and factual history, with citations [to] the record.” Arguably, the full body of rules at issue in Robbins

358. 386 U.S. 738 (1967).
359. See id. at 743–45.
360. Id. at 743.
361. Id. at 744.
362. Id.
363. Id. at 745.
364. Id. at 747 (Harlan, J., dissenting). Accord id. at 746 & n.* (describing Anders procedure as a “requirement”).
365. Id. at 747.
367. Id. at 281. In Anders, as previously noted, the Court had required a “brief” focusing on legal points. Anders, 386 U.S. at 744.
demanded a more searching inquiry by the state appellate court than the Warren Court had mandated in *Anders*; thus it is subject to debate whether these procedural protections were (all things considered) more protective of defendants’ appeal rights than the methodology laid down in *Anders* itself. The important point, however, is that none of this mattered to the Court’s majority. Instead, the critical question, according to the Court in *Robbins*, was whether the State’s procedure “reasonably ensures that an indigent’s appeal will be resolved in a way that is related to the merit of that appeal.”

By embracing this government-friendly standard of review, *Robbins* in effect recast a longstanding criminal procedure precedent in the guise of a common-law-like rule that invited states to meet their constitutional responsibilities in a much broadened set of new ways.

*Robbins* confirms the Rehnquist Court’s willingness to invoke semisubstantive techniques in a wide array of constitutional settings. It also suggests that in the field of criminal procedure, this Court may look to recast past decisions in constitutional common law terms so as to vindicate the same value of state autonomy it has protected with other semisubstantive approaches. In fact, Justice Thomas closed his *Robbins* opinion with the telling observation that:

> [I]t is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States, from the top down. We should, and do, evaluate state procedures one at a time, as they come before us while leaving “the more challenging task of crafting appropriate procedures . . . to the laboratory of the States in the first instance . . . .

This way of thinking about past decisions of the Warren Court has potentially profound implications. For example, in justifying the result in *Robbins*, the Court emphasized that in *Pennsylvania v. Finley*, it had “explained that the *Anders* procedure is not ‘an independent constitutional command,’ but rather is just ‘a prophylactic framework’ that we established to vindicate the constitutional right to appellate counsel.” The Court continued: “We did not say that our *Anders* procedure was the only prophylactic framework that could adequately vindicate this right; instead,

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368. Id. at 276–77 (emphasis added). See id. at 296 (Souter, J., dissenting) (challenging this standard as substantially diluting protections provided in *Anders*); id. at 289 (Stevens, J., dissenting) (same).

369. See, e.g., supra notes 217–63 and accompanying text (discussing *Garrett* and *Morrison*, among other cases ).


by making clear that the Constitution itself does not compel the *Anders* procedure, we suggested otherwise.\(^{373}\) In light of this rhetoric, might the Rehnquist Court declare in the not so distant future that states may reshape Fourth Amendment rights by adopting programs that abandon or circumscribe the exclusionary rule of *Mapp v. Ohio*\(^{374}\) while centering legal restrictions on such matters as police officer education, police officer discipline, money damage awards, and the like? It is noteworthy in this regard that the same Rehnquist Court majority that reined in *Anders* in *Robbins* declared not long ago that the Fourth Amendment exclusionary rule “*is prudential rather than constitutionally mandated.*”\(^{375}\) In light of *Robbins*’ treatment of similar passages from *Finley*, perhaps the Court now stands ready to let “‘the laboratory of the States’” develop alternative methods of countering Fourth Amendment violations.\(^{376}\)

And what about *Miranda* itself? Although *Dickerson*, at first blush, suggests a strong recommitment by the current Court to the *Miranda* ruling, a close reading of the opinion suggests the possibility that this Court might permit states to reshape rules in this area in much the same way that *Robbins* allowed states to tinker with *Anders*. Along these lines, the most important thing about *Dickerson* may be not what it says, but what it fails to say. In particular, *Miranda* held that states could abandon the Court-specified warnings only if they came up with a “fully effective equivalent”\(^{377}\) and “safeguards for the privilege [that] are fully as effective as those described above.”\(^{378}\) Equally insistent pro-defendant flourishes, however, do not appear in the *Dickerson* opinion. Instead the Court in *Dickerson*—mouthing much the same rhetoric that marked *Robbins*\(^{379}\)—spoke of requiring “an adequate substitute for the warnings required by *Miranda*,”\(^{380}\) “a procedure that is effective in securing Fifth Amendment rights,”\(^{381}\) and protections that operate “sufficiently to meet the constitutional minimum.”\(^{382}\) These passages leave room for the Court to water down *Miranda*’s “fully effective equivalent” standard in the future,

\(^{373}\) Id.


\(^{378}\) Id. at 490.

\(^{379}\) *See supra* note 368 and accompanying text.


\(^{381}\) Id. at 441 n.6 (emphasis added).

\(^{382}\) Id. at 442 (emphasis added).
thus augmenting state power (à la Robbins) to develop police-warning substitutes.383

This is not to say that Dickerson now stands as a precedential Trojan Horse cleverly constructed by Chief Justice Rehnquist as a launching point for a future all-out assault on Miranda. In particular, the Court’s opinion in Dickerson was blunt in insisting that “Miranda requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored.”384 This passage indicates—contrary to the arguments made by Miranda’s opponents in Dickerson itself—that the delivery of some form of a warning about the self-incrimination privilege is a minimum constitutional requirement. But what if, for example, a state adopted a program that mandated delivery of only Miranda’s non-counsel-related warnings: “You have a right to remain silent, and anything you say may be used against you,” and further specified that courts could admit into evidence only those confessions that were made with knowledge of their being videotaped? Would the Court uphold this sort of Miranda substitute on the theory that taping is likely to instill caution on the part of the suspect and facilitate a meaningful, after the fact, judicial check for voluntariness?

It is doubtful that such an approach would have passed muster with the Warren Court, given its ardent celebration of the importance of a criminal suspect’s access to counsel.385 But the Warren Court was not—like the present-day Court—avowedly committed to a “federal system” that safeguards “the laboratory of the States” in the field of criminal

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383. In Dickerson, the closest pass the Court made to the “fully equivalent” rhetoric of Miranda came in the following sentence: “As an alternative argument for sustaining the Court of Appeals’ decision, the court-invited amicus curiae contends that [section 3501] complies with the requirement that a legislative alternative to Miranda be equally as effective in preventing coerced confessions.” Id. at 441 (emphasis added). Perhaps this language signals a full-scale reaffirmation of Miranda’s full-equivalency standard. Particularly in light of the more tepid language used elsewhere in the opinion, however (see supra notes 380–82 and accompanying text), there is reason to doubt this conclusion. Also, this “equally as effective” language comes not in a freestanding discussion of Miranda by the Court itself, but in a passage that simply summarizes an advocate’s argument. See id. Finally, the quoted sentence speaks not of protections equivalent to the Miranda warnings, but of safeguards “equally as effective in preventing coerced confessions.” Id. As Justice Scalia argued in his dissent, the Miranda rule may be seen as significantly overinclusive if the Court’s sole purpose is merely “the elimination of compulsion.” Id. at 448–50 (Scalia, J., dissenting). This “equally as effective” passage, especially when read in light of this observation, thus may invite states to come up with alternative protections that are not as expansive as the Miranda warnings, but that are (even though significantly more meaningful than the voluntariness requirement standing alone) more carefully and narrowly tailored to the exclusion of evidence based on genuinely coerced confessions.

384. Id. at 442 (emphasis added).

385. See, e.g., Miranda, 384 U.S. at 480–81 (noting that the “attorney plays a vital role” in “protect[ing] to the extent of his ability the rights of his client”).
procedure. In light of this transformation in outlook, no less an authority than Professor Yale Kamisar has indicated that the present-day Court would uphold a legislature’s adoption of this lesser-warning-plus-taping substitute for the procedures spelled out in *Miranda* itself.

It is the potential for just such joint legislative-judicial retrenchments that have caused thoughtful observers to note that the Supreme Court’s embrace of constitutional common law rules might on balance reduce, rather than expand, individual liberty. There is rich debate to be had on this subject. Whatever position one takes in that debate, however, *Robbins* signals that the Rehnquist Court stands ready to engage in an open give and take with nonjudicial authorities about the proper contours of important “constitutional” rules of criminal procedure. It also suggests—in keeping with what we have seen elsewhere—that this Court’s fashioning of constitutional common law approaches is likely to take forms that emphasize and protect state autonomy and experimentation.

### B. CONSTITUTIONAL “WHY” RULES

The preceding discussion shows that the Rehnquist Court often protects constitutional values by applying provisional, process-centered constitutional “how” rules. Another important set of semisubstantive constitutional doctrines focuses not on how nonjudicial authorities proceeded in adopting rules, but on why those authorities acted as they did. Applying these doctrines, courts often invalidate rules adopted with a wrongful lawmaker “intent,” “motive” or “purpose.”

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387. See *Miranda in Light of Dickerson*, 44 LAW QUAD. NOTES 3–4 (U. Mich. Law School, Spring 2001) (reporting Kamisar’s view that videotaping, subject to certain restrictions, “would justify a shortening of the *Miranda* warnings” and that “such legislation would be upheld by the Supreme Court”).


constitutional “why” rules are semisubstantive in nature for the simple reason that, under each of them, the Court does not reject the outcome of the lawmaking process because of its objectionable content. Instead, the invalidated law fails because a tainted process—in particular, a tainted mental process—led to its adoption. As a result, nonjudicial authorities can reinstate exactly the same rule that judicial authorities have repudiated. To do so, however, they must act free of the wrongful reasoning processes that attended the rule’s initial adoption.

Constitutional “why” rules are nothing new. Indeed, in large part because these rules have been around so long, there already exists an extensive literature on their merits and their operation. That literature, however, does not focus on two distinctive and important features of the Rehnquist Court’s work with “why” rules. First, the current Court’s decisions in this area present a particularly striking example of its ambivalence about semistructural decisionmaking. Second, recent rulings of this Court highlight the practical challenges that lawmakers face when they seek to respond to “why” rule invalidations with new laws purportedly purged of a preexisting wrongful purpose. We now turn to these two important matters.

1. The Rehnquist Court’s “Why” Rule Schizophrenia

As will soon become evident, the Rehnquist Court’s use of semisubstantive “why” rules has been and remains extensive. Yet the Justices of this Court have often sent out mixed signals about the legitimacy of motive-based review.

The tension begins with the work of Chief Justice Rehnquist himself. In Washington v. Davis, for example, then-Justice Rehnquist joined an opinion that firmly strapped the Court’s race-related equal protection jurisprudence to the mast of legislative motive. In that case, the Court based doctrines have long generated controversy, the philosophical and practical debate about them is beyond the scope of this article. See Coenen, supra note 3, at 1757–58 (providing a quick summary of the critiques of purpose-centered rules). See also, e.g., City of Indianapolis v. Edmond, 531 U.S. 32, 55 (2001) (Rehnquist, C.J., dissenting) (criticizing primary-purpose standard applied to drug checkpoint, car stop program because it is “bound to produce wide-ranging litigation over the ‘purpose’ of any given seizure”).


392. Illustrative of important pre-Rehnquist Court “why” rule precedents is the Burger Court’s important equal protection decision in Washington v. Davis, noted infra note 394.

393. See supra note 390 (collecting some, but far from all, authorities).

394. 426 U.S. 229, 229, 241–42 (1976) (holding that strict scrutiny of laws that disadvantage protected groups is triggered by discriminatory purpose and not merely discriminatory effect).
rebuffed earlier authority that “warned against grounding decision on legislative purpose or motivation,” relying in part on the Court’s earlier endorsement of a purpose-based test under the First Amendment Establishment Clause. In ensuing decisions, Chief Justice Rehnquist repeatedly has written or joined opinions built on motive-based doctrines. During the same period, however, Chief Justice Rehnquist also wrote or joined opinions that take constitutional “why” rules to task. In the dormant Commerce Clause context, for example, he has characterized “[s]triking down legislation on the basis of asserted legislative motives” as “dubious,” in part because that approach “assumes that individual legislators are motivated by one discernible ‘actual’ purpose, and ignores the fact that different legislators may vote for a single piece of legislation for widely different reasons.”

Chief Justice Rehnquist does not stand alone in displaying cross-cutting feelings about constitutional “why” rules. In City of Erie v. Pap’s A.M., for example, a four-Justice plurality (in an opinion authored by Justice O’Connor, and joined by Chief Justice Rehnquist and Justices Kennedy and Breyer) claimed that “this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit motive.” But neither the Court as a whole nor any one of these Justices has given this principle a reading that even remotely resembles what its language suggests. Rather, in a long and strong body of decisions, the Rehnquist Court has applied many constitutional doctrines that give determinative effect to the lawmaker’s purpose.

395. Id. at 243.
396. See id. at 244 n.11.
397. See, e.g., Hunter v. Underwood, 471 U.S. 222, 228–29 (1985) (opinion by Rehnquist, J.) (invoking Davis to invalidate facially neutral Alabama constitutional provision, adopted in 1901, that disenfranchised persons convicted of crimes of moral turpitude because evidence showed it was put in place as part of state’s effort “to establish white supremacy”).
399. Id. at 702–03. See also City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (advancing similar views in First Amendment context).
400. See infra note 583 and accompanying text.
402. Id. at 292.
403. See generally infra notes 404–69 and accompanying text. This disharmony is also pointedly reflected in Chief Justice Rehnquist’s dissenting opinion (joined by Justices Scalia and Kennedy) in City of Indianapolis v. Edmond. 531 U.S. 32, 49 (2000). In that opinion, he quoted Scott v. United States, for the proposition that “[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.” Edmond, 531 U.S. at 52 (quoting Scott v. United States, 436 U.S. 128, 136 (1978)). In a footnote within the very same paragraph, however, he went on to acknowledge that “we have looked [at the purpose of the program in analyzing the constitutionality of certain suspicionless searches.” Id. at 52 n.4.
In some of these cases, the Court has applied doctrines laid down in decisions that predate the Rehnquist Court. Like its predecessors, for example, this Court has invoked the “Lemon test” rule\textsuperscript{404} that laws offend the Establishment Clause unless they were adopted with “a secular legislative purpose.”\textsuperscript{405} Rehnquist Court decisions have reaffirmed the principle that the constitutionality of laws that discriminate on the basis of gender will depend on the legislature’s “genuine” purposes in acting, and not on “hypothesized” objectives “invented \textit{post hoc} in response to litigation.”\textsuperscript{406} Following earlier authority, the Rehnquist Court also has held that ostensibly neutral time, place and manner restrictions trigger strict scrutiny under the Free Speech Clause if (and only if) the “government’s purpose” is not “unrelated to the content of expression.”\textsuperscript{407}

More noteworthy than the Rehnquist Court’s adherence to previously promulgated “why” rules has been its recognition of purpose-based rules not recognized or emphasized by Courts that came before it. Departing from a prior effect-centered jurisprudence,\textsuperscript{408} for example, the Rehnquist Court has held that a facially neutral criminal law can violate the Free Exercise Clause only “if the object of [the] law is to infringe upon or


\textsuperscript{405} Id. at 612. \textit{Accord}, \textit{e.g.}, Edwards v. Aguillard, 482 U.S. 578, 590 (1987) (relying on “legislature’s preeminent religious purpose” in striking down creation-science law). \textit{See also infra} notes 434–445 and accompanying text (discussing Court’s recent \textit{Santa Fe} decision).


Even if the preservation of female chastity were one of the motives of the statute, and even if that motive be impermissible, petitioner’s argument must fail because ‘it is a familiar practice of constitutional law that this court will not strike down an otherwise constitutional statute on the bases of an alleged illicit legislative motive.


\textsuperscript{407} Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). \textit{See, e.g.}, Bartnicki v. Vopper, 532 U.S. 514, 526 (2001) (“In determining whether a regulation is content based or content neutral, we look to the purpose behind the regulation . . . .”), Hill v. Colorado, 530 U.S. 703, 719 (2000) (following \textit{Ward} in declining to invalidate state medical buffer-zone law that “was not adopted ‘because of disagreement with the message it conveys’”) (quoting \textit{Ward}, 491 U.S. at 791); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 645 (1994) (stating that “even a regulation neutral on its face may be content based if its manifest purpose is to regulate speech because of the message it conveys”). \textit{See also} Elena Kagan, \textit{Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine}, 63 U. CHI. L. REV. 413, 414 (1996) (arguing that “notwithstanding the Court’s protestations in [early authority,] First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives”).

restrict practices because of their religious motivation.\footnote{409} It is a decision of the Rehnquist Court that held that government restrictions violate so-called substantive due process if their “purpose . . . is to place a substantial obstacle in the path of a woman seeking an abortion.”\footnote{410} And it has said repeatedly that a critical inquiry under the Double Jeopardy and Ex Post Facto Clauses is “whether the legislature intended the statute to establish civil proceedings.”\footnote{411} Most important, in all these settings, the Justices have signaled the dialogic character of constitutional “why” rules by focusing attention not on objective indicators of purpose that lurk in the law’s substance, but on the particular legislative history and context of enactment of the challenged law.\footnote{412}


\footnote{410} Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992) (emphasis added). See also Stenberg v. Carhart, 530 U.S. 914, 952 (2000) (Ginsburg, J., concurring) (reiterating and applying Casey’s “purpose or effect” standard); id. at 1008 n.19 (Thomas, J., dissenting) (reading Justice Ginsburg’s concurrence “to suggest that even if the Nebraska statute does not impose an undue burden on women seeking abortions, the statute is unconstitutional because it has the purpose of imposing an undue burden”).


\footnote{412} See, e.g., Seling, 531 U.S. at 262 (for purposes of Double Jeopardy and Ex Post Facto Clauses, “determining the civil or punitive nature of an Act must begin with reference to its text and legislative history”); Hunt v. Cromartie, 526 U.S. 541, 546 (1999) (noting that a “facially neutral law” is subject to strict scrutiny “if it can be proved that the law was ‘motivated by a racial purpose or object’” and that such determination requires “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available”) (quoting Miller v. Johnson, 515 U.S. 900, 913 (1995) and Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)). See also Hunt v. Cromartie, 532 U.S. 234, 266–67 (2001) (Thomas, J., dissenting) (arguing that the district court “could have accorded great weight to [an] e-mail as direct evidence of a racial motive” and also deem relevant State Senator’s statement “that the legislature was going to be able to avoid Shaw’s majority-minority trigger by ending just short of the majority”); id. at 253–54 (majority opinion) (agreeing that such evidence supported finding of wrongful purpose, but deeming it insufficient in context). In Nguyen v. INS, 533 U.S. 53 (2001), the Court reiterated that, in a sex-discrimination equal protection case, “[s]tatements from the government’s brief are not conclusive as to the objects of the statute . . . as we are concerned with the objectives of Congress, not those of the INS.” Id. at 67. The Court then (and without citation to authority) cryptically added: “We ascertain the purpose of a statute by drawing logical conclusions from its text, structure, and operation.” Id. at 67–68. One might wonder whether this passing comment was meant to exclude derivations from other sources, particularly legislative history, lawmaker testimony, and the background against which the statute was enacted. See infra notes 434–45 and accompanying text (discussing Santa Fe case). More likely, the Court pointed to its ability to extrapolate legislative purposes from “structure” and “operation” as an appropriate additional route to discovering relevant purposes. This is so because in Nguyen, the dissenters’ close review of the actual legislative materials in isolation indicated that the legislative purposes relied on by the majority were in
The Rehnquist Court’s work with semisubstantive “why” rules reveals an abiding ambivalence about their legitimacy. For example, Justice O’Connor—who spoke of eschewing purpose-centered inquiries in City of Erie—has signed on to each of the purpose-centered doctrines endorsed by the Court in the free exercise, abortion, and double jeopardy/ex post facto law contexts. No less notably, it was Justice O’Connor who led the charge in promulgating two new constitutional “why” rules that may well constitute the most significant contributions to this field of law by the Rehnquist Court. First, in a line of cases initiated by Shaw v. Reno (in which Justice O’Connor wrote for the Court), a five-Justice majority built on Washington v. Davis to hold that voting districts created by the state are unconstitutional if race is “the predominant factor motivating the legislature’s [redistricting] decision.” The potency of this principle ebbed in the Court’s most recent voting district ruling—Hunt v. Cromartie—due to Justice O’Connor’s vote to uphold the district with Justices Stevens, Souter, Ginsburg, and Breyer, rather than (as in past cases) to invalidate the district with Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. Yet Hunt did not mark a departure from the underlying principle of the predominant-purpose test. Rather, the Court applied that principle, carefully sifting the legislative record before deciding that a wrongful race-based purpose did not infect the challenged districting plan.

A second purpose-centered doctrine endorsed by the present-day Court concerns the Fourth Amendment. In City of Indianapolis v. Edmond, the issue was whether a vehicle checkpoint program, adopted by local officials to impede trafficking in unlawful drugs, offended the general rule that government seizures generally must rest on some measure of individualized suspicion. Distinguishing earlier checkpoint programs designed to rid the roads of drunk drivers or illegal aliens recently transported across national borders, the Court (again in an opinion

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413. See supra notes 401–02 and accompanying text.
414. See supra notes 408–11 and accompanying text.
416. See supra note 394.
419. See id at 253–58.
421. Id. at 34, 38–40.
written by Justice O'Connor) deemed the challenged scheme unconstitutional because its “primary purpose was to detect evidence of ordinary criminal wrongdoing.”\textsuperscript{422} Moreover, in characterizing the program’s purpose as involving crime detection, rather than road safety enhancement, the Court focused not so much on the program’s objective characteristics\textsuperscript{423} as on the city’s manner of drafting the particular policy and its concession that that policy’s “primary purpose” was “interdicting illegal narcotics.”\textsuperscript{424} *Edmond* was followed less than four months later by *Ferguson v. City of Charleston*,\textsuperscript{425} another Fourth Amendment decision that applied a constitutional “why” rule to strike down warrantless drug tests administered by a state hospital to pregnant patients.

These cases reflect a pattern suggesting that—notwithstanding occasional hand-wringing about purpose-centered doctrines—the Rehnquist Court has not hesitated to use them to strike down state programs in a way that spurs dialogues with nonjudicial authorities. There is, however, a fly in the ointment: The extent to which motive-centered invalidations actually share power in the real world depends in the end on how courts respond to lawmaker reprises undertaken in the wake of the initial judicial intervention. Can state and local authorities, following a motive-based remand to the legislature, really succeed in reinstating exactly the same law a court has just declared unconstitutional under the banner of a constitutional “why” rule? We turn now to what the Rehnquist Court has said and done with respect to this important question.

2. “Why” Rules and Legislative Reprises

Several Rehnquist Court decisions cast light on the nature of legislative prerogatives in the wake of rulings based on semisubstantive “why” rules. For example, the Court in *Edmond* invalidated an Indianapolis car checkpoint program on the ground that its purpose was to nab drug pushers and drug users for prosecution. What if the Indianapolis City Council subsequently reinstated much (or even exactly) the same system of car stops, while making clear in the process that it “was designed primarily to serve purposes . . . of ensuring roadway safety”\textsuperscript{426} by getting

\textsuperscript{422} Id. at 41 (emphasis added). Notably, the Court cited a string of earlier Rehnquist Court decisions as supporting its view that “intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level.” Id. at 46. See also id. at 45 (citing *Whren v. United States*, 517 U.S. 806 (1996); *Florida v. Wells*, 495 U.S. 1 (1990); *Colorado v. Bertine*, 479 U.S. 367 (1987); *New York v. Burger*, 482 U.S. 691 (1987)).

\textsuperscript{423} See *id.* at 44 n.1.

\textsuperscript{424} Id. at 40.


\textsuperscript{426} *Edmond*, 531 U.S. at 41.
dangerous drug-intoxicated drivers off local streets? Libertarians would be sure to greet this Lazarus-like resurrection of the Indianapolis program with a “substance must trump” form argument for judicial invalidation. A court sensitive to the dialogic character of semisubstantive decisionmaking, however, might well find that argument unavailing. In particular, the court might note that the opinion in *Edmond* itself lends support to permitting just this sort of legislative reprise. As the Court took pains to explain in that case:

> While we recognize the challenges inherent in a purpose inquiry, courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful... As a result, a program driven by an impermissible purpose may be proscribed while a program impelled by licit purposes is permitted, even though the challenged conduct may be outwardly similar.

Our hypothetical resurrected-checkpoint-program case raises fundamental questions about purpose-centered rules and second-look theory. It is noteworthy, for example, that Professor Alexander Bickel, who was strongly drawn to second-look approaches as a general matter, denigrated purpose-centered doctrines. He argued that these doctrines

427. See supra notes 272–74 and accompanying text (noting role of substance over form arguments with regard to form-based rules).

428. *Edmond*, 531 U.S. at 46–47 (emphasis added) (citations omitted). The dissenters in *Edmond* were even more explicit. In their view, “if the Indianapolis police had assigned a different purpose to their activity here, but in no way changed what was done on the ground to individual motorists, it might well be valid.” *Id.* at 55–56 (Rehnquist, C.J., dissenting) (emphasis added). Notably, in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the same six-Justice majority that coalesced in *Edmond* relied on “improper purpose” reasoning once again to invalidate a hospital-based program of urine testing pregnant women for cocaine use. *See id.* at 85–88. The Court noted that “[i]n looking to the programmatic purpose, we consider all the available evidence.” *Id.* at 81. Here it mattered that the program was laid down in a document that reflected such law enforcement concerns as “the chain of custody... and the logistics of police notification”; that the same document did not “discuss different courses of medical treatment for either mother or infant”; and that “prosecutors and police were extensively involved” in “the development and application of the policy.” *Id.* at 82. Justice Kennedy, in a concurring opinion, highlighted the second-look nature of the Court’s ruling and rationale. As he stated:

> [W]e must accept the premise that the medical profession can adopt acceptable criteria for testing expectant mothers for cocaine use in order to provide prompt and effective counseling to the mother and to take proper medical steps to protect the child. If prosecuting authorities then adopt legitimate procedures to discover this information and prosecution follows, that ought not to invalidate the testing. One of the ironies of the case, then, may be that the program now under review, which gives the cocaine user a second and third chance, might be replaced by some more rigorous system. We must, however, take the case as it comes to us... *Id.* at 90 (Kennedy, J., concurring).
encourage “less candor in debate”\textsuperscript{429} and permit “no effective legislative reprise”\textsuperscript{430} because judges can manipulate analysis to find illicit purposes whenever they object to a challenged program’s substantive content. One response to these criticisms would be to abandon all purpose-centered doctrines. This result seems improbable, however, given their wide and growing recognition by the Rehnquist Court.\textsuperscript{431} Another possible response to Bickel’s critique would be to make purpose-based invalidations nonreversible by legislative authorities. Such a cure for the problems presented by motive-based invalidations, however, would be worse than the disease that Bickel diagnosed. In particular, this approach would visit the sins of the “parent” lawmaker on the innocent “children” of later generations. It also might well bar the enactment of a substantively beneficial law (perhaps a greatly beneficial law) solely because a purely procedural flaw marred an earlier incarnation of that law.\textsuperscript{432} Responsive to these concerns, the Supreme Court has signaled that improperly motivated laws may be reinstated if cleansed of an originally improper purpose.\textsuperscript{433} But just how can such a cleansing occur? The Rehnquist Court grappled with this question in \textit{Santa Fe Independent School District v. Doe}.\textsuperscript{434}

The \textit{Santa Fe} case arose out of a dispute that involved a school district’s promulgation of a series of policies with respect to pre-football-game prayers.\textsuperscript{435} Prior to 1995, the elected student council “chaplain” of Santa Fe High School delivered a prayer before each home game.\textsuperscript{436} After a suit was brought to challenge this practice and a court order against its continuation was issued, the school district adopted one, and then another, new policy.\textsuperscript{437} In August 1995, the school district adopted a policy that authorized two student elections—one to determine whether “invocations” would occur at games at all and a second one (if necessary) to elect the student who would deliver them.\textsuperscript{438} In October 1995, the school district revised its rules once again, this time carrying forward the two-vote

\begin{itemize}
\item \textsuperscript{429} BICKEL, \textit{supra} note 24, at 216. \textit{See also} Kagan, \textit{supra} note 407, at 4134 (noting “the ease of legislatures’ offering pretextual motives and the difficulty of courts’ discovering the real ones”).
\item \textsuperscript{430} BICKEL, \textit{supra} note 24, at 221.
\item \textsuperscript{431} \textit{See supra} notes 415–25 and accompanying text.
\item \textsuperscript{432} \textit{See Clark, supra} note 391, at 974–75 (noting that invalidation of “useful laws passed for putatively bad purposes . . . would be dysfunctional because it would serve only to chasten legislative immorality rather than to advance the public good”).
\item \textsuperscript{433} \textit{See Edmond, 531 U.S.} at 46–47; McGowan v. Maryland, 366 U.S. 420, 444–45 (1961) (explaining, in upholding Sunday closing laws, that their original purpose of advancing religion had been superseded by goal of securing a uniform day of rest).
\item \textsuperscript{434} 530 U.S. 290, 313–17 (2000).
\item \textsuperscript{435} \textit{Id.} at 294.
\item \textsuperscript{436} \textit{Id.}
\item \textsuperscript{437} \textit{Id.} at 295–98.
\item \textsuperscript{438} \textit{Id.} at 297–98
\end{itemize}
approach of the August policy, but specifying that the elected student’s pregame remarks could embody “a brief invocation and/or message.”

The Court, in an opinion written by Justice Stevens, struck down this revised policy in light of the purpose that had propelled its adoption. The Court’s rationale was wide-ranging.\textsuperscript{441} It focused largely, however, on the school district’s claim that its late-in-the-game authorization of a nonprayer “message” negated the conclusion that its now-operative October policy was motivated by the same wrongful religious purpose that had infected the earlier rules.\textsuperscript{442} In rejecting this argument, Justice Stevens focused on the historical context in which the October policy had been adopted. As he explained:

This case comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause. One of those practices was the District’s long-established tradition of sanctioning student-led prayer at varsity football games. The narrow question before us is whether implementation of the October policy insulates the continuation of such prayers from constitutional scrutiny. It does not. Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment.\textsuperscript{443}

The majority concluded that it could not “turn a blind eye to the context in which this policy arose.” In light of the school district’s earlier constitutional wrongs, the Court reasoned, the October policy was “implemented with the purpose of endorsing school prayer.”\textsuperscript{445}

In a sharply worded dissent, Chief Justice Rehnquist (joined by Justices Scalia and Thomas) responded to this line of analysis with an unabashed appeal to semisubstantive, second-look logic. The Chief Justice initiated his attack by characterizing the October policy as calling for nothing more than a “vote . . . on whether to have a student speaker before football games” and “if the students vote to have such a speaker, on who that speaker will be.”\textsuperscript{446} He then asserted that this policy had permissible

\textsuperscript{439} Id. at 298.
\textsuperscript{440} Id. at 298 n.6 (emphasis added).
\textsuperscript{441} Id. at 309–09.
\textsuperscript{442} Id. at 314–17.
\textsuperscript{443} Id. at 315.
\textsuperscript{444} Id.
\textsuperscript{445} Id.
\textsuperscript{446} Id. at 320 (Rehnquist, C.J., dissenting).
nonpretexital purposes, including the purpose of “solemnizing public occasions.”  

He continued:

The Court bases its conclusion that the true purpose of the policy is to endorse student prayer on its view of the school district’s history of Establishment Clause violations and the context in which the policy was written, that is, as “the latest step in developing litigation [to] challenge practices that unquestionably violated the Establishment Clause.” But the context—attempted compliance with a District Court order—actually demonstrates that the school district was acting diligently to come within the governing constitutional law. [The] school district went further than required by the District Court order [when it] eventually settled on a policy that gave the student speaker a choice to deliver either an invocation or a message. In doing so, the school district exhibited a willingness to comply with, and exceed, Establishment Clause restrictions. Thus, the policy cannot be viewed as having a sectarian purpose.

This exchange between thoughtful jurists highlights the complexity of applying semisubstantive analysis when a new rule takes the place of another rule first adopted for constitutionally impermissible reasons. On one side of the ledger, there exists a deep “reluctance to attribute unconstitutional motives to the States”—a reluctance driven by the presumptive regularity of legislative proceedings and the presumptive constitutionality of legislative enactments. On the other side of the ledger lie no less weighty considerations. In particular, courts cannot minimize constitutional violations and are duty-bound to place all victims of unconstitutional conduct in “the position they would have occupied in the absence of such conduct.”  

There can be little doubt, in this regard, that the allegedly unlawful “message and/or invocation” policy adopted in October was in some degree causally connected to the unconstitutional “prayer-only” policies that had immediately preceded it. In these circumstances, it seems plausible to say that the challenged policy—even if it would have been constitutional had it stood on its own—was (as the majority concluded) the infected fruit of an unconstitutionally poisonous tree.

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448. Id. at 323–24 (citations omitted) (quoting id. at 315 (majority opinion)).
450. See, e.g., Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 131 (1810).
But just how far does this reasoning go? A fascinating contrast to the Santa Fe case is provided by the Court’s recent decision in Hunt v. Cromartie, which concerned the constitutionality of North Carolina’s “majority minority” twelfth congressional district. Invoking the Equal Protection Clause, the Supreme Court had twice struck down North Carolina’s earlier configurations of this district on the ground that they were predominantly motivated by race-based considerations. The North Carolina legislature then went back to the drawing board and once again configured the twelfth district to contain a preponderance of African-American voters. On these facts, it would have been easy for the Court to reason that “the context” of the legislature’s action revealed that it continued to be driven by impermissible race-centered motivations, rather than the permissible objective of favoring Democratic Party candidates. This outcome was all the more invited because (as even the majority conceded) some evidence at trial did support the inference that state leaders had acted with the predominant intent of simply reinstating a majority-black district. Nonetheless, five Justices who had pointed to the troublesome historical context in voting to invalidate the Santa Fe prayer policy (namely, Justices Stevens, O’Connor, Souter, Ginsburg, and Breyer) voted in Hunt to uphold this latest version of District 12 in the face of just such a continuing wrongful purpose argument. On the other hand, each of the three defenders of the legislature’s good faith in Santa Fe (namely, Chief Justice Rehnquist and Justices Scalia and Thomas) dissented in Hunt, now finding that past unlawful motives continued to lurk in the legislative redistricting process.

One is left with the suspicion that the contrasting approaches of eight Justices in these two cases resulted not so much from different levels of evidence about the persisting influence of unlawful lawgiver purposes, as from differing levels of loyalty to the underlying substantive constitutional values at play in the cases. Thus, it was Chief Justice Rehnquist and Justices Scalia and Thomas—the very same Justices who consistently have taken the narrowest view of the substantive reach of the Establishment

455. See Santa Fe, 530 U.S. at 315.
456. See Hunt, 532 U.S. at 265 n.7 (Thomas, J., dissenting) (noting potential relevance of fact “that District 12 has never been constitutionally drawn”).
457. See id. at 253–59 (acknowledging existence of some evidence to this effect).
458. Only Justice Kennedy supported the finding of continuing unconstitutionality in each context.
Clause—who also took the most forgiving view of the school district’s purpose in the Santa Fe case. Likewise, it was Justices Stevens, Souter, Ginsburg, and Breyer—the same four Justices who repeatedly have advocated a hands-off judicial approach to majority-minority districting— who joined with Justice O’Connor to take a forgiving view of the legislature’s purpose in Hunt.

For some, these curious parallels and disconnections will come as no surprise. Patrons of principle, however, might recoil at the thought that Justices could resolve in dissimilar ways quite similar “poisoned purpose” inquiries because of underlying substantive policy agendas. To identify this concern, however, merely pushes into view another, and a very difficult, question: If substantive policy allegiances should not drive decisions in “poisoned purpose” cases, what considerations should matter? The Santa Fe opinion, at least between the lines, suggested a number of factors that logically lent support to the majority’s still-tainted-purpose ruling. Thus: (1) the purportedly neutral school board policy was enacted close in time to the invalidation of its unconstitutional predecessor, thus giving local lawmaking authorities little opportunity for dispassionate reflection and deliberation; (2) the new school district policy was, from all appearances, enacted by exactly the same body of officials (unaltered, for example, by an intervening election) that had adopted the earlier, improperly motivated rule; (3) the purportedly curative rule was in fact a verbatim copy of the rule that went before, altered only by the addition of three words (namely, “and/or message”); and (4) the new policy, even on its face, skated at least right to the edge of constitutionality under settled Supreme Court precedent. Other potentially relevant matters also come to mind. It might be significant, for example, that lawmakers have a particularly long history of constitutional wrongdoing or have displayed a pattern of evading prior court orders; that the legislative record hints at a deep hostility to judicial concerns; or that the impact of the reenacted rule (although itself not justifying a determination of unconstitutionality)

462. See id. at 305–07.
463. See id.
464. See id. at 315. See also Wallace v. Jaffree, 472 U.S. 38, 59 (1985) (distinguishing facially neutral moment-of-silence law from law amended to specify that silence could involve “meditation or voluntary prayer”); id. at 70–79 (O’Connor, J., concurring) (developing this distinction at length).
2002] SEMISUBSTANTIVE CONSTITUTIONAL REVIEW 1363

plainly trenches on constitutional concerns as a practical matter.\footnote{465} Finally, even for those who generally would eschew a “result oriented” approach to purpose determinations, the nature of the substantive right in issue might properly matter in some cases.\footnote{466} Analysts inclined toward a representation-reinforcing approach to constitutional decisionmaking, for example, might well draw a distinction between Santa Fe and Hunt. According to these observers, it is one thing for a predominantly Christian school district to reinstate a policy with a practical effect that is likely to be unwelcome to only a small number of atheists and other religious “outsiders.” It is quite another thing, however, for an overwhelmingly white state legislature to attempt to construct—for the third time and in the face of repeated judicial resistance—a congressional district that has the practical effect of sending an African American to Congress.\footnote{467}

In the end, the Court’s treatments of semisubstantive “why” rules correspond with the themes that mark other features of its semisubstantive work. To begin with, the Court’s use of “why” rules reaches across many varying areas of constitutional law. Even standing alone (and they do not stand alone) the Court’s decisions in Edmond, Santa Fe, and Hunt illustrate this point well, for they show the Court wielding purpose-centered doctrines to protect reasonable-search-and-seizure, antiestablishment, and race-neutral-election values. Similarly, these decisions—and Santa Fe and Hunt in particular—confirm that the use of process-based doctrines are likely to reflect the substantive values the Justices hold. Moreover, at least sometimes the Rehnquist Court’s work with purpose-centered doctrine has supported the value of protecting state autonomy from federal interference. The Rehnquist Court’s seminal free exercise ruling in Employment Division, Department of Human Resources v. Smith,\footnote{468} for example, expanded local legislative prerogatives by replacing a more judicially intrusive effect-centered doctrine with a far narrower prohibition that focuses on the lawgiver’s intent.


\footnote{466} It might be, for example, that the Court in Rogers was particularly open to finding that a facially neutral law had a discriminatory purpose in light of the long history of discrimination against African Americans with regard to voting rights. See, e.g., Katzenbach v. Morgan, 384 U.S. 641, 656–58 (1966). Another factor might be the deeply held sense that “the political franchise of voting [is] fundamental . . . because [it is] preservative of all rights.” Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

\footnote{467} See Ely, supra note 14, at 170–71.

\footnote{468} 494 U.S. 872 (1990).
Finally, the Court’s precedents paint a telling picture of ambivalence about whether and when purpose-centered doctrines should take hold. The Court’s repeated suggestions that purpose should not matter—in the face of many holdings that it does—best reflect the Court’s conflicting feelings about these doctrines.469 There are more subtle signals of ambivalence as well. The sharp divisions over whether to accept a legislative second look in _Santa Fe_ and _Hunt_, for example, may reveal a lurking reluctance to use motive-based doctrines for genuinely dialogic purposes. At the very least, those cases reflect a half-heartedness among most of the Justices about pushing semisubstantive “why” rules as far as they might be taken by the strongest forms of their underlying remand-to-the-legislature logic.

C. CONSTITUTIONAL “WHEN” RULES

1. The Nature of “When” Rules

In a famous passage in a famous book, Professor John Hart Ely argued that the Court’s equal-protection sex-discrimination rulings should turn on considerations of timing.470 In particular, Professor Ely theorized that courts should strike down old laws that discriminate on the basis of sex because in former times women were systematically excluded from participation in the political process.471 If an invalidated old law were to be reenacted by a contemporary legislature, however, a court should sustain the new law because it “can’t responsibly be said” that women’s access to the lawmaking process remains “blocked” in the present day.472 As Professor Ely put the point: “The fact that due process of lawmaking was denied in 1908 or even in 1939 needn’t imply that it was in 1982 as well . . . .”473

There are some indications that Professor Ely’s “‘second-look’ approach”474 to sex-discrimination cases has found favor in the Rehnquist Court.475 This fact raises an intriguing question: Are there other areas of law in which the Court should and does gravitate toward the same sort of

469. See supra notes 401–25 and accompanying text.
470. _Ely_, supra note 14, at 169. Professor Ely’s work focused on what he perceived as the Warren Court’s guiding principle of representation-reinforcement, which in turn emanated from the Stone Court’s seminal footnote in _United States v. Carolene Products Co._, 304 U.S. 144, 153 n.4 (1938).
471. _Ely_, supra note 14, at 169.
472. Id.
473. Id.
474. Id.
475. See Coenen, supra note 3, at 1691–93.
time-driven “referral back” approach. Commentators have urged the Court to invalidate, on a provisional basis, enactments that smack of outdatedness due to intervening changes in social circumstances and values, and the Rehnquist Court has shown, albeit in a backhanded way, a possible openness to employing such a “when” rule methodology. The most suggestive signals along these lines came in the Court’s substantive due process ruling in Washington v. Glucksberg.

Glucksberg involved a challenge to the State of Washington’s criminal prohibition of assisted suicide. In another case, which involved a challenge to New York’s assisted-suicide law, a distinguished circuit court judge had written an ambitiously semisubstantive opinion that essentially advocated an outdatedness-based legislative reconsideration. The gist of that opinion was that a remand for a fresh look by state authorities made good sense because of the antiquity of the state’s laws and modern developments in medicine, technology, and moral outlooks. The Court in Glucksberg did not embrace this analysis. Instead, it unanimously upheld the Washington statute.

In doing so, however, the Court issued an opinion laced with suggestions that matters of timing might sometimes prove important. The Court began along this path by noting that: “Though deeply rooted, the States’ assisted-suicide bans have in recent years been reexamined and, generally, reaffirmed.” In Washington itself, the Court observed, the current assisted suicide ban had been enacted in 1975, and four years later the state had passed its Natural Death Act, which specifically declined “to condone, authorize or approve mercy killing.” No less important, in 1991 Washington voters rejected a ballot initiative which, had it passed, would have permitted a form of physician-assisted suicide, and in 1992 Washington . . . added a provision to the Natural Death Act expressly

476. See Jackson, supra note 210, at 2240.

477. See Calabresi, supra note 15 (advancing this view, with special focus on substantive due process limitations). See also BICKEL, supra note 24, at 143–56 (discussing possible applications of the concept of desuetude to generate legislative reconsideration of statutes that were enacted during another climate of opinion); Sunstein, supra note 208, at 95 (asserting, with regard to the right to die, that “[a] court might decide not to invalidate any and all legislative efforts to interfere with private choice, but to say more modestly that a state invoking old laws has not demonstrated an adequate reason to interfere with a private choice of this kind—unless and until a recent legislature is able to show that there is a sufficiently recent commitment to this effect to support fresh legislation”).

478. Id.


480. Glucksberg, 521 U.S. at 716 (emphasis added).

481. WASH. REV. CODE §§ 70.122.010–70.122.920 (2002).

482. Id.

483. Id.
excluding physician-assisted suicide.”484  In light of these developments and comparable developments elsewhere, the Court concluded that “the States are currently engaged in serious, thoughtful examinations of physician-assisted suicide.”485  Put differently, the Court confronted “a consistent and almost universal tradition that has long rejected the asserted right, and continues . . . to reject it today.”486  It was against this backdrop that the Court expressed its unwillingness to “strike down the considered policy choice of almost every State.”487

Running through Glucksberg are three separate strands of semisubstantive, time-tied analysis. First, the Court deemed it important that an “overwhelming majority of states explicitly prohibit[ ] assisted suicide.”488  This linking of rights-recognition to the actions of state legislative bodies entails an obvious form of interbranch Constitution-reading. After all, whenever the Court defines rights based on legislative choices, it obviously and openly involves nonjudicial authorities in the formulation of constitutional doctrine.489  It is also important to recognize that this technique reflects a time-tied approach to constitutional decisionmaking. Why? Because legislative prohibitions inevitably change in number and shape with the passage of years.490  Thus, under this style of analysis, a law that was constitutional in the past may well be found unconstitutionnal today and again held constitutional in the future—all depending on the ebb and flow of choices made by fifty elected state legislatures.491

This mode of constitutional reasoning, which tethers the judicial identification of fundamental rights to a “head count” of legislative decisions,492 is no recent innovation. It pervaded the work of the Warren493

484.  Id.
485.  Id. at 719 (emphasis added).
486.  Id. at 723 (emphasis added).
487.  Id. (emphasis added).
488.  Id. at 718.
490.  See, e.g., Calabresi, supra note 15, at 122 n.136 (1991) (noting shift in nation’s contraceptive laws over time, which purportedly helped justify Court’s decision in Griswold v. Connecticut, 381 U.S. 479 (1965)).
491.  See, e.g., infra notes 500–01 and accompanying text (noting constitutional history of death penalty laws).
492.  See Friedman, supra note 489, at 597 & 602 nn.119–120.
and Burger Courts. More importantly for present purposes, it marks the work of the Rehnquist Court as well. In particular, in one of the highest-profile cases of its most recent term, the Court found that capital punishment of the mentally retarded violates the Eighth Amendment—in light of eighteen states’ adoption of legislative restrictions on this practice during the past decade. Citing this surge of reform by nonjudicial authorities, the Court invalidated a practice it had refused to outlaw just thirteen years earlier, because of a “dramatic shift in the state legislative landscape.”

495. See, e.g., Atwater v. City of Lago Vista, 532 U.S. 318, 340 (2001) (relying on “two centuries of uninterrupted . . . state and federal practice permitting warrantless arrests for misdemeanors” in rejecting Fourth Amendment challenge to that practice; distinguishing Payton v. New York, 445 U.S. 573, 590 (1980), in which the court constitutionalized a search-and-seizure limitation in part because “a clear consensus among the States” has adhered to it); Atwater, 532 U.S. at 346 n.14 (approving view that “courts must be ‘reluctant . . . to conclude that the Fourth Amendment proscribes a practice that was accepted at the time of adoption of the Bill of Rights and has continued to receive the support of many state legislatures’”) (quoting Tennessee v. Garner, 471 U.S. 1, 26 (1985)) (emphasis added); Troxel v. Granville, 530 U.S. 57, 71 (2000) (plurality opinion) (finding substantive due process violation in part based on state’s departure from rule of “many other States . . . that courts may not award visitation unless a parent has denied (or unreasonably denied) visitation to the concerned third party”); Hunt-Wesson, Inc. v. Franchise Tax Bd., 528 U.S. 458, 467 (2000) (invalidating under Due Process and Commerce Clauses state law limitation on deductibility of interest expenses through unallocated attribution to nonunitary—and thus nontaxable—corporate income; noting that “[n]o other taxing jurisdiction, whether federal or state, has taken so absolute an approach . . .”); Lilly v. Virginia, 527 U.S. 116, 126 (1999) (plurality opinion) (tying firmly-rooted-hearsay-exception principle that is key for Confrontation Clause purposes to “[e]stablished practice”); Mitchell v. United States, 526 U.S. 314, 330 (1999) explaining that “[p]rinciples once unsettled can find general and wide acceptance in the legal culture, and there can be little doubt that the rule prohibiting an inference of guilt from a defendant’s rightful silence has become an essential feature of our legal tradition”; relying in part on adoption of no-inference principle by “some 44 states” prior to its incorporation into Fourteenth Amendment in 1965); McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting) (“A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality.”); Burson v. Freeman, 504 U.S. 191, 206 (1992) (relying in part on “widespread and time tested consensus” with regard to speech-restricted areas around polling places to uphold prohibition on campaigning within one hundred feet of voting locations); White v. Illinois, 502 U.S. 346, 355–56 n.8 (1992) (holding that spontaneous utterance rule constitutes a “firmly rooted” hearsay exception, thus avoiding Confrontation Clause problems, in part because it has been accepted “in nearly-four-fifths of the States”); Maryland v. Craig, 497 U.S. 836, 853 (1990) (noting that “a significant majority of States have enacted [similar] statutes” in rejecting absolute Sixth Amendment right to face-to-face confrontation); Rock v. Arkansas, 483 U.S. 44, 57–58 & 60 n.19 (1987) (relying in part on state practices regarding hypnotically refreshed testimony in finding violation of defendants’ right to testify on their own behalf).
497. Id. at 2246. See also id. at 2244 (noting that “the American public, legislators, scholars and judges have deliberated over this question” and that the “consensus reflected in those deliberations informs our answer to the question presented”); id. at 2247–50 (collecting past authority on relevance of legislative reforms; documenting such reforms with regard to execution of the mentally retarded; emphasizing the “consistency and direction of the change” that had made the practice “truly unusual”; and thus concluding that “it is fair to say that a national consensus has developed against it”). The earlier decision the Court overruled in Atkins was Penry v. Lynaugh, 492 U.S. 302 (1989).
A second element of time-tied reasoning pushed into view by Glucksberg emerges from its observation that “[t]he history of the law’s treatment of assisted suicide in this country has been and continues to be one of the rejection of nearly all efforts to permit it.”498 This rhetoric suggests that it is important not only that there are large numbers of assisted suicide laws, but also—in keeping with when-centered thinking—that these laws have been “currently” given “serious, thoughtful examinations.”499 In this dimension the opinion in Glucksberg harkens back to the Court’s landmark death penalty decision in Furman v. Georgia.500

In Furman, the Court said, in so many words: “We are now going to invalidate all death penalty laws in the United States and will hereafter uphold death penalty laws only if we perceive a widespread, modern-day reassessment of and resulting recommitment to capital punishment.” When, following Furman, just such a recommitment took place, the Court made good on its implicit assurance by upholding newly minted death-penalty statutes beginning in Gregg v. Georgia.501 In the view of the Court in Glucksberg, the same sort of contemporary nationwide re-endorsement that occurred with respect to capital punishment after Furman had already occurred with respect to the issue of physician-assisted suicide before the case in Washington State arose.502 For all practical purposes, state legislatures had remanded the assisted suicide issue to themselves. Thus, a judicial remand, like the one in Furman, was no longer a proper move.

The final element of “when” rule analysis brought to the fore in Glucksberg emanates from the Court’s treatment of recent actions taken by political authorities in the State of Washington itself. What if the facts had shown that, even though the assisted suicide issue had generated widespread political attention in other jurisdictions, it had stirred no similar interest in the legislative chambers of Olympia? It seems doubtful that these circumstances, standing alone, would have led the Court to issue a semisubstantive invalidation of Washington’s assisted suicide prohibition. The Court’s reasoning in Glucksberg, after all, focuses mainly on “[o]ur Nation’s history, legal traditions, and practices.”503 Even more

499. Id. at 719.
500. 408 U.S. 238 (1972).
502. See supra notes 486–87 and accompanying text.
503. Glucksberg, 521 U.S. at 709 (emphasis added). This statement is properly subject to one qualification: Perhaps the Court would have stepped in and commanded a legislative reconsideration if the statute had so long gone unenforced as to become marked by desuetude. See generally BICKEL,
importantly, any argument for a wrist-slapping of the Washington legislature with a fresh-look remand would be complicated by a nagging doctrinal reality: Neither the Rehnquist Court nor any of its predecessors has articulated a constitutional rule that authorizes the provisional invalidation of a statute simply because it has long escaped the enacting legislature’s active reconsideration. To be sure, Judge Calabresi has filled the pages of the *Harvard Law Review* with an argument for recognizing such a doctrine. So far, however, the Supreme Court has not taken the bait.

Having said all this, it is worth noting that the Court in *Glucksberg* did choose to emphasize that nonjudicial decisionmakers in Washington State itself grappled with the assisted suicide issue repeatedly in the not-distant past. Has this aspect of the Court’s opinion opened the door for judicial recognition of a new time-sensitive rule tied to the recent inaction of a single state legislature? Only time can tell.

2. Some Observations on Constitutional “When” Rules

The status of semisubstantive “when” rules remains, for the most part, fluid and ill-defined. For example, wholly apart from *Glucksberg*, Rehnquist Court precedents lend some support to “constitutional sunset rules” that link judicial determinations of validity (most notably, in the enforcement power and the affirmative action contexts) to a challenged statute’s limited duration. In keeping with second-look theory, such doctrines shift the burden of inertia in favor of constitutional values by periodically requiring a focused recommitment by political authorities to the constitutionally controversial rule of law. It is fair to say, however, that the notion of semisubstantive constitutional “sunset” rules—or at least the founding of such rules on a democracy-forcing, dialogic rationale—is entirely the product of extrapolation. Such a notion has never been endorsed in terms by the Rehnquist Court.

*supra* note 24, at 143–56 (discussing rule of desuetude); Coenen, *supra* note 3, at 1704–08 (summarizing and expanding on Bickel’s observations).

506. Cf. *supra* note 505 and accompanying text (noting Judge Calabresi’s failure in floating this approach for invalidating assisted suicide laws).
507. See *supra* notes 481–84 and accompanying text.
509. Id. at 1721–24.
510. Cf. *Fullilove v. Klutznick*, 448 U.S. 448, 489 (1980) (plurality opinion) (noting, in upholding minority business enterprise program, that it “may be viewed as a pilot project, appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or re-enactment”).
To say these things, however, is not to say that constitutional “when” rules are merely a figment of legal scholars’ imaginations. For example, constitutional head-count rules—perhaps more accurately denominated current-head-count rules—have pervaded the Supreme Court’s constitutional work, even in recent years. Beyond this, the Rehnquist Court’s rhetoric in *Glucksberg* reveals a telling willingness at least to speak about human rights in time-tied, democracy-promoting, hard-look-oriented ways. Whatever the fate of particular proposed “when” rules, this aspect of the Court’s substantive-due-process ruling in *Glucksberg* suggests the Rehnquist Court’s openness to linking assessments of fundamental values to process-centered doctrines across the full range of constitutional law.

D. CONSTITUTIONAL “WHO” RULES

There is a final type of semisubstantive doctrine that courts sometimes use to foster attentiveness to constitutional values when political authorities take action. Through the use of so-called constitutional “who” rules, courts can steer policy choices away from one decisionmaker to another, on account of institutional capacities with regard to particular constitutional choices.

The leading constitutional “who” rule case is *Hampton v. Mow Sun Wong*. There the pre-Rehnquist Court considered whether the equal protection component of the Fifth Amendment rendered invalid a prohibition on government employment of resident aliens promulgated by the Federal Civil Service Commission. In striking down the ban, the Court held neither that the Commission had exceeded its delegated authority nor that such a rule was *ipso facto* invalid under equal protection principles. Instead, the Court ruled that—as a matter of constitutional due process—the Commission was not a proper promulgator of the rule in light of the government interests invoked in its support. Those interests included: (1) giving the President a bargaining chip in treaty negotiations by enabling him selectively to waive the alien-employment prohibition, and (2) encouraging aliens to become citizens and thereby participate more fully in American life. According to the Court, these interests might have supported the rule if it had been adopted by Congress or promulgated by the President. In the Court’s eyes, however, the pursuit of these goals

514. *Id.* at 105.
was too “far removed from [the] normal responsibilities” of the Civil Service Commission, which has “no responsibility for foreign affairs . . . or for naturalization policies.” In short, given the important substantive equal protection values at stake, the Commission was not a proper “who,” and its hiring prohibition could not stand.

Commentators sometimes suggest that few cases apart from *Mow Sun Wong* involve constitutional “who” rules. In reality, however, “who” rule reasoning has surfaced with frequency, including in the work of the Rehnquist Court. In the Court’s two *Turner Broadcasting* decisions, for example, five-Justice majorities endorsed the proposition that judges should give “substantial deference to the predictive judgments of Congress” and added that “substantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency.” The implication of these passages is that some rules promulgated by agencies, pursuant to delegations of power that are not problematic under the nondelegation doctrine itself, will violate the First Amendment even though exactly the same rules would pass muster if enacted by Congress.

The parallels of this approach to that of *Mow Sun Wong* are apparent. In each setting, the Court has set the stage for a nonjudicial reconsideration of constitutionally troublesome decisions in light of the varying capabilities and interests different government decisionmakers bring to bear. According to *Mow Sun Wong*, a proper protection of equal protection

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515. Id.
516. Id. at 114.
517. Professor Lawrence Gene Sager, for example, has stated that:

*Mow Sun Wong* posits a right to procedural due process which requires that some legislative actions be undertaken only by a governmental entity which is so structured and so charged as to make possible a reflective determination that the action contemplated is fair, reasonable, and not at odds with specific prohibitions in the Constitution.


518. See *Tushnet, supra* note 517, at 202; *Adler, supra* note 74, at 867 (asserting that *Mow Sun Wong* was “an unusual case”).
519. See supra note 198.
522. *Accord City of Erie v. Pap’s A.M.*, 529 U.S. 277, 311 n.1 (2000) (Souter, J., concurring in part and dissenting in part) (noting that “[t]he nature of the legislating institution might . . . affect” judicial analysis of “means-end fit” and citing earlier *Turner* case for proposition that “[w]e do not require Congress to create a record in the manner of an administrative agency, . . . and we accord its findings greater respect than those of agencies”).
values required action by the President or Congress, rather than by the Civil Service Commission, because of (for example) the Commission’s excessive efficiency-mindedness, its lack of electoral accountability, and its unfamiliarity with important public policy matters of substantial relevance to the decision at hand. Likewise, according to the Turner Broadcasting opinions, free speech values favor congressional over agency speech restrictions because of (for example) differing levels of representativeness, factfinding capabilities, and susceptibility to interest group capture.

Members of the Rehnquist Court have shown an openness to applying constitutional “‘who” rules in other contexts as well. For example, various opinions suggest preferences for (1) decisions by Congress, over decisions by city councils, when free expression values are at stake;523 (2) decisions by federal authorities, over decisions by state authorities, in framing affirmative action policies;524 and (3) decisions by state courts, over decisions by state legislatures, when government action threatens uncompensated regulatory takings of private property.525 The Rehnquist Court has endorsed additional doctrines that have who-related features. It has, for example, often invalidated laws under the so-called “dormant Commerce Clause” principle; the essential effect of that principle is, however, to channel decisions that significantly threaten our “national ‘common market’”526 from locally minded state authorities to the nationally minded Congress, by way of the subrule that permits Congress to overturn judicial invalidations of state laws on this “constitutional” ground.527

523. See id. at 311 n.1.
524. As noted elsewhere, see infra notes 593–94 and accompanying text, the Court ruled in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), that courts must apply strict scrutiny to both state and federal race-based affirmative action programs. Id. at 235. The Court went on to suggest, however, the possibility that, in applying strict scrutiny, it might give more deference to federal than state authorities, at least when the case concerns “the authority § 5 of the Fourteenth Amendment confers upon Congress.” Id. at 230–31.
527. See, e.g., supra note 48 and accompanying text (noting congressional reversibility feature of the Court’s dormant Commerce Clause jurisprudence). The Court was particularly emphatic about the dialogic nature of its dormant Commerce Clause rulings in Quill Corp. v. North Dakota, 504 U.S. 298 (1992). In reaffirming its past ruling that effectively barred state taxation of many sale-by-mail transactions, the Court was careful to rely on only the dormant Commerce Clause, and not constitutionally nonreversible due process principles. “Accordingly,” the Court explained, “Congress is now free to decide whether, when and to what extent the States may burden interstate mail-order concerns with a duty to collect taxes.” Id. at 318. Put another way, the Court was not going to cut off
doctrine—long employed to protect substantive interests in free speech, free association, and free mobility\textsuperscript{528}—while noting that the doctrine shifts decisional authority away from potentially idiosyncratic individual police officers and prosecutors and into the hands of more accountable and deliberative legislative bodies.\textsuperscript{529} In a similar vein, the current Court has followed past authorities by deflecting some choices from legislatures to individual decision makers when those decisionmakers are better positioned to weigh the distinctive features of discrete cases marked by important constitutional concerns.\textsuperscript{530}

Members of the Rehnquist Court also have recognized the connectedness of the clear-statement-based rule of constitutional doubt and constitutional “who” rules in cases that concern the scope of congressionally delegated authority. This connectedness found expression many years ago in \textit{Kent v. Dulles}, when the Warren Court narrowly construed a grant of congressional authority invoked by the Secretary of State in promulgating a rule that prohibited the award of passports to Communist Party members.\textsuperscript{531} In rejecting the legality of this rule, the Court explained:

\begin{itemize}
  \item all democratic deliberation about these matters through application of a definitive on-off constitutional rule. However, given the important national interests at stake, it was for the national Congress, rather than the individual states, to balance the costs and benefits of permitting state taxation.

\textsuperscript{528} See, e.g., \textit{Reno v. ACLU}, 521 U.S. 844, 871–72 (1997) (noting that vagueness “is a matter of special concern” when dealing with content-based criminal statutes). \textit{See generally supra notes 145–50 and accompanying text (discussing vagueness doctrine).}

\textsuperscript{529} See \textit{Chicago v. Morales}, 527 U.S. 41, 60 (1999) (noting that vagueness rule imposes “the requirement that a legislature establish minimal guidelines to govern law enforcement”) (quoting \textit{Kolender v. Lawson}, 461 U.S. 352, 358). \textit{Accord id. at 64 (O’Connor, J., concurring) (noting that legislative guideline-drawing is “the more important aspect of the vagueness doctrine”)} (quoting \textit{Kolender}, 461 U.S. at 358).

\textsuperscript{530} The Court’s decision in \textit{Employment Division, Department of Human Resources v. Smith}, 494 U.S. 872 (1990), has this consequence for certain free-exercise claims. In particular, by carrying forward the rule of \textit{Sherbert v. Verner}, 374 U.S. 398 (1963), the \textit{Smith} case requires state unemployment-compensation authorities to make individualized assessments about claims of conscientious religious objection, rather than indulging a legislatively constructed \textit{de facto} conclusive presumption that all such claims are trumped up. In a similar vein, the Court’s ruling in \textit{Alden v. Maine}, 527 U.S. 706 (1999), requires particularized and contextual assessments by federal executive-branch decision makers about whether to expose state defendants to private money-damage suits under the Fair Labor Standards Act. In effect, the Court concluded that a generalized congressional authorization of FLSA actions brought by private individuals did not adequately safeguard constitutional interests in federalism; rather a particularized (and costly) commitment to any such case by federal enforcement authorities was necessary. \textit{See Coenen, supra note 3, at 1803 n.924. Cf. Idaho v. United States, 533 U.S. 262, 272 n.4 (2001) (allowing suit by United States to establish tribal claim to submerged lands despite earlier dismissal on Eleventh Amendment grounds of tribe’s own suit brought to establish ownership). For a similar analysis with regard to congressional authorization of agency adjudications against states initiated by private parties, see \textit{Federal Maritime Commission v. South Carolina State Ports Auth.}, 122 S. Ct. 1864, 1877 (2002).}

\textsuperscript{531} 357 U.S. 116 (1958).
We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens’ right of free movement.532

Commentators have said that Kent reveals the Court’s de facto use of the otherwise moribund nondelegation doctrine “to ensure that certain decisions are made by Congress rather than the executive branch”533 when they involve “constitutionally sensitive domains.”534 Even more important, Justice Breyer recently lent his support to this characterization by describing Kent as a case in which the Court “assum[ed] Congress did not want to delegate the power to make rules interfering with [the] exercise of basic human liberties.”535 Building on this thought, Justice Breyer further observed that “one might claim that courts, when interpreting statutes, should assume in close cases that a decision with ‘enormous social consequences’ . . . should be made by democratically elected Members of Congress rather than by unelected agency administrators.”536 This “who” rule reading of Kent jibes with Professor Sunstein’s earlier suggestion that the “‘clear statement’ doctrine enjoys a special force as a basis for selective insistence on explicit legislative authorization of agency action” when important constitutional interests are at stake.537

The Rehnquist Court’s recent decision in Solid Waste Agency v. United States Army Corps of Engineers538 supports this same notion (not surprisingly) in the field of constitutional federalism. In particular, the

532. Id. at 130.
533. Sunstein, supra note 208, at 38 n.155.
534. Id. at 88. See also CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 79 (1969) (explaining that “delegation [does] not include[] the power to tamper with important constitutional rights”).
536. Id. (internal citations omitted). Largely because of competing structural reasons, Justice Breyer was ultimately unwilling to invoke such a principle to override the FDA’s assertion of regulatory jurisdiction over cigarettes. In particular, Justice Breyer endorsed the FDA’s assertion of jurisdiction because “the very importance of the decision taken here, as well as its attendant publicity, means that the public is likely to be aware of it and to hold [the elected President and politically elected officials who support his policy in this area] politically accountable.” Id. Thus, in this context, “public scrutiny . . . will take place whether it is the Congress or the Executive Branch that makes the relevant decision.” Id. at 190–91.
Court in *Solid Waste Agency* set forth a corollary to the clear statement avoidance canon in terms that speaks directly to dubious delegations of power under the Commerce Clause or other sources of congressional authority. Thus: “Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”\textsuperscript{539} This specialized clear statement doctrine vindicates how-rule and who-rule values when substantive constitutional interests in state autonomy are at risk.

Should the Court adopt other who-centered rules that protect constitutional interests in federalism? Invoking “the constitutional role of the States as sovereign entities,” four dissenters vigorously argued “yes” in *Geier v. American Honda Motor Co.*\textsuperscript{540} That case raised the question whether the Department of Transportation’s regulatory treatment of driver-protecting “passive restraints” in cars (pursuant to what the majority saw as a clear grant of rulemaking power) should operate to preempt state tort law to the extent it had authorized actions based on the theory that a failure to install airbags constitutes negligence. The majority (in an opinion written by Justice Breyer and joined by the ordinarily pro-federalist quartet of Chief Justice Rehnquist, Justice O’Connor, Justice Scalia, and Justice Kennedy) found the state law action preempted. In ruling for the automaker, these Justices relied largely on DOT’s “comments, which accompanied the promulgation” of its regulations and revealed (in the majority’s view) an intent to “deliberately provide[] the manufacturer with a range of choices among different passive restraint devices.”\textsuperscript{541} Given this purpose, the majority reasoned that permitting states to require use of one particular restraint (that is, the airbag) would stand “as an obstacle” to accomplishing the federal rules’ goals;\textsuperscript{542} thus the state law action ran afoul of “principles of conflict pre-emption.”\textsuperscript{543}

In a dissent authored by Justice Stevens, the four other members of the Court took issue with the majority’s characterization of the objectives of DOT’s “passive restraint” regulations.\textsuperscript{544} More importantly, for our purposes, the dissenters asserted that (regardless of what goals might lie behind the DOT rules) a who-centered preemption analysis—focusing on

\textsuperscript{539}  *Id.* at 172. *See also* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (rejecting the view that agency can mend unlawful delegation of legislative power by adopting a limiting construction of the statute).

\textsuperscript{540}  529 U.S. 861, 886 (2000) (Stevens, J., dissenting).

\textsuperscript{541}  *Id.* at 875 (majority opinion).

\textsuperscript{542}  *Id.* at 873.

\textsuperscript{543}  *Id.* at 874.

\textsuperscript{544}  *Id.* at 905.
the importance of federalism and the difference between congressional and agency action—mandated a rejection of the majority’s effort to “oust state courts of their traditional jurisdiction over common law tort actions.” 545 The dissenters relied on prior authority that had distinguished between congressional action and agency action with regard to so-called “field” preemption,546 arguing that the Congress-agency distinction should carry over to “conflict” preemption cases concerning claimed state law inconsistencies with federal regulatory goals.547 In particular, the dissenters urged that there is far more reason to entrust preemption decisions to Congress than to agencies because “structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement,”548 while no similar structural safeguards mark agency rulemaking. In light of these powerful “who”-centered concerns, the dissenters insisted that, at the very least, implied preemption cannot properly rest on “the final commentary accompanying an interim administrative regulation” that was “not to be found in the text of any Executive Order or regulation.”549

As this discussion reveals, four members of the Court were prepared in Geier to decide the case through application of a multifaceted, process-based, semisubstantive preemption rule. In particular, in the view of the dissenters, agency action can lay the basis for conflict preemption only when there exists “a specific expression of agency intent to preempt, made after notice and comment rulemaking.”550 Put another way, the dissenters advocated an approach that weaves together a clear statement rule (by mandating a “specific expression”), a proper-findings requirement (by mandating “notice-and-comment rulemaking”) and a semisubstantive “who” rule (by limiting this principle to cases involving a claimed “agency intent to preempt”). No less important, the dissenters rested their embrace of this principle on a desire to vindicate the substantive value of state autonomy. Given the dissent’s energetic effort to safeguard this value, a puzzling riddle arises out of Geier: How could four members of the

545. Id. at 887 (Stevens, J., dissenting). Not surprisingly, the dissenters relied squarely on institutional differences between agencies and Congress. See id. at 908 (supporting argument for heightened presumption of nonpreemption by noting that “[u]nlike Congress, administrative agencies are clearly not designed to represent the interests of States”).
547. Geier, 529 U.S. at 907–08 & n.22 (favoring rules that place “the power of pre-emption” squarely in the hands of Congress” and objecting in particular to judicial reliance on “unaccountable sources such as regulatory history in finding pre-emption based on frustration of purposes”).
548. Id. at 907 (emphasis added).
549. Id. at 887.
550. Id. at 885 (majority opinion, characterizing dissenters’ position).
Federalism Five decline to join an opinion that thus sought to protect basic federalism values?

One can speculate about this question until the cows come home. It might be, for example, that the majority concluded that indications of the rulemaker’s purpose to foreclose airbag suits simply overwhelmed countervailing concerns about “state’s rights.” Notably, the majority opinion did repeatedly express worry about “further complicat[ing] the law with complex new doctrine.” It might be that the Justices of the Geier majority (or various combinations of them) were generally hostile toward airbag lawsuits or were inclined to defer to, rather than to question, the views of agency experts. It might also be that the majority was willing to tolerate preemption of a cause of action that lay at the frontier of the common law of torts (in contrast, for example, to tolerating preemption of a rule of law embodied, after significant deliberation, in a duly enacted state statute). There is, however, a more interesting possibility. It might be that the Federalism Five’s fractionation in Geier reflects in large part the Rehnquist Court’s fundamental rethinking of how and why federal judges should safeguard state autonomy values in the first place.

551. Notably, the majority did find “clear evidence of a conflict” between the authorization of state airbag suits and federal-law objectives after painstakingly examining the DOT regulation and its history. See id. at 885.
552. Id. at 874.
553. To the extent that this outlook motivated the Court, it comports (rather than conflicts) with the underlying thought that drives constitutional “who” rules. The thought, which is reflected in a wide array of Rehnquist Court precedents, is that differing government actors bring different capacities and interests to the decisionmaking process. See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 440 (2001) (noting that constitutional rule of de novo appellate review of punitive damages awards comports with “the institutional competence of trial judges and appellate judges”); Madsen v. Women’s Health Ctr., Inc., 512 U.S. 753, 762–63 (1994) (applying different levels of scrutiny to bans on expressive activities imposed by legislatures and by judges); id. at 778 (Stevens, J., concurring in part and dissenting in part) (agreeing with application of different levels of review, but asserting that “injunctive relief should be judged by a more lenient standard than legislation”); id. at 791 (Scalia, J., concurring in part and dissenting in part) (agreeing with majority that stricter scrutiny should apply to judicial action; but going farther than majority by advocating full blown strict scrutiny, rather than elevated intermediate scrutiny); Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (distinguishing “legislative determin[ations]” with regard to land use from “adjudicative decision[s] about an individual parcel” in applying Fifth Amendment Taking Clause). See also Strauss, supra note 208, at 192 (noting that rules are often based on constitutional values and institutional capacities).
554. Of course, to the extent this line of thinking drove the decision in Geier, the majority (just like the dissent) embraced a semisubstantive “who” rule. So it is because any preemption approach that gives decisive weight to whether a rule has been promulgated by the state legislature, rather than a state court, constitutes a “who” rule in the purest sense.
The modern-day story of state protection from federal law controls begins with the Court’s 1976 decision in *National League of Cities v. Usery*.

In that case a five-Justice majority of the Burger Court laid down a once-and-for-all, federalism-based constitutional rule that immunized states from federal legislative regulation of their “integral operations in areas of traditional governmental functions.”

In *Garcia v. San Antonio Metropolitan Transit Authority*, however, the Court overruled *National League of Cities*. As the Court later explained in *South Carolina v. Baker*, *Garcia* held that “Tenth Amendment limits on Congress’ authority to regulate state activities . . . are structural, not substantive—i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.”

The guiding thought behind *Garcia* was that the state interests the Court sought to safeguard in *National League of Cities* were already, as a rule, adequately accommodated in the national political process due to the many influences state decision makers can and do exert on national representatives. For example, senators are elected on a state-by-state basis; the manner of selecting electoral college members is controlled by the state legislatures; and federal representatives are chosen from districts constructed by state authorities.

In keeping with this process-centered approach, the Court in *Baker* recognized that “extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment.”

In *Baker* itself, the Court found no reason to apply this defective-process principle to invalidate Congress’ decision to insist that states issue bonds in registered, rather than bearer, form. Citing the Carolene Products footnote, the Court reasoned that “South Carolina has not . . . alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it

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556. Id. at 852.
559. Id. at 512 (citation omitted).
562. See supra note 66 and accompanying text.
politically isolated and powerless.”

In short, because the “national political process did not operate in a defective manner, the Tenth Amendment is not implicated.”

In essence, the dissenters in Geier were prepared to apply the flip side of the nondefective-process analysis the Court had spun out in Baker. Indeed, in Geier Justice Stevens cited Garcia in arguing that the “structural safeguards” that work well to protect state interests when Congress enacts legislation do not operate when agencies promulgate rules. As he explained:

While the presumption [against preemption] is important in assessing the pre-emptive reach of federal statutes, it becomes crucial when the preemptive effect of an administrative regulation is at issue. Unlike Congress, administrative agencies are clearly not designed to represent the interests of States, yet with relative ease they can promulgate comprehensive and detailed regulations that have broad pre-emptive ramifications for state law.

So why did four of the Court’s most pro-federalism Justices not sign on to this analysis? Maybe because they disagreed with its fundamental premise that the structure of the national legislative process in fact fairly safeguards the interests of the states.

It is important to recall, in this regard, that Baker was a decision of the very early Rehnquist Court. At the time of that decision, Chief Justice Rehnquist had held his post for only a year, and Justices Brennan, White, Marshall, and Blackmun still roamed the Supreme Court Building. In a very real sense, the central story of the later—we might say, the real—Rehnquist Court concerns the route it has taken with regard to the process-centered vision of constitutional federalism handed down to it in Garcia and Baker. That route has been driven by the idea—vigorously advanced in the Garcia dissents of Justices Rehnquist, Powell, and O’Connor—that structural features of the national legislative process have not worked well to protect legitimate state interests from congressional overreaching.

564. Id. at 513.
565. Geier, 529 U.S. at 907 (Stevens, J., dissenting).
566. Id. at 908. This line of reasoning dovetails with the thinking of (among others) Calvin Massey and Stephen Gardbaum. For a discussion of their work, see Coenen, supra note 3, at 1788 n.887.
567. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 564–77 (1985) (Powell, J., dissenting); id. at 587–88 (O’Connor, J., dissenting) (noting that “[t]he last two decades have seen an unprecedented growth of federal regulatory activity”; that “[t]he political process has not protected against these encroachments on state activities, even though they directly impinge on a State’s ability to make and enforce its laws”; and that “all that stands between the remaining essentials of state sovereignty and Congress is the latter’s underdeveloped capacity for self-restraint”). Notably, by the
Indeed, during the past decade, the Court repeatedly has rejected Garcia-based defenses of congressional enactments in finding that those enactments exceeded newly minted once-and-for-all limits deemed latent in the Tenth Amendment and other features of our Constitution. It was this later Rehnquist Court that declared that Congress could not, as a general matter, forcibly enlist state legislatures or state executive officials568 to implement federal regulatory programs. It was this later Rehnquist Court that extrapolated significant limits on Congress’s ability to regulate noneconomic activities under the affecting-commerce prong of its interstate-commerce power.570 It was this later Rehnquist Court (squarely overruling a decision of the earlier Rehnquist Court571) that held that Congress could not wield its Article I powers to override state immunities from suit in either federal or state court.572 And it was this later Rehnquist Court that constricted Congress’s ability to rely on its Fourteenth Amendment enforcement power, including in efforts to override state Eleventh Amendment jurisdictional defenses.573 In all these contexts, a substantial bloc of dissenting Justices appealed to the process-centered logic of Garcia and Baker.574 Their mightiest efforts, however, failed to impede a five-Justice majority intent on “substantifying” major parts of the law of constitutional federalism in keeping with the nonprocess-centered logic that underlay the Garcia dissents.575

This history suggests one reason why a federalism-friendly five-Justice majority might have rejected the ostensibly state-protective “who”
rule proposed by Justice Stevens in Geier. Even the most ardent “federalist,” after all, might well hesitate to protect state autonomy with a rule built on a vision of how well congressional decision makers (but not agencies) take those interests into account. This hesitance will grow to the extent that any particular Justice harbors concerns about semisubstantive rules—particularly complex and nontraditional ones—as a general matter. With this thought in mind, we now turn to an examination of how each of the current individual Justices has approached semisubstantive constitutional review.

II. NINE JUSTICES’ APPROACHES TO SEMISUBSTANTIVE DECISIONMAKING

A. CHIEF JUSTICE REHNQUIST, JUSTICE SCALIA AND JUSTICE THOMAS

The Chief Justice, Justice Scalia, and Justice Thomas are often depicted as the “conservative wing” of the Rehnquist Court. This shorthand description disguises complex realities, but one reality is undeniable: These three Justices do band together in a large number of cases. This tendency toward solidarity has carried over to key areas of semisubstantive decisionmaking. In particular, these Justices share a strong willingness to supplement substantive protections of state autonomy with super-strong clear statement rules driven by this same constitutional value. Outside the field of federalism, however, these three Justices have been more hesitant to embrace provisional, semisubstantive approaches. Chief Justice Rehnquist, for example, vigorously dissented from the Court’s “who” rule analysis in Mow Sun Wong on the ground that it “inexplicably melds together the concepts of equal protection, and procedural and substantive due process.” Contrary to prevailing doctrine, he has expressed qualms about considering only the actual

577. For example, Justices Scalia and Thomas voted together in every one of the 24 key cases highlighted by the New York Times in its July 2001 end of the term review. Linda Greenhouse, In the Year of the Florida Vote, Supreme Court Also Did Much Other Work, N.Y. TIMES, July 2, 2001, at A12. Chief Justice Rehnquist was with them in all but two of those decisions. See id.
578. For example, these Justices have joined in all the post-Atascadero clear statement decisions (except Kimmel which is discussed infra note 607 and accompanying text), have uniformly endorsed the strict findings-centered approach to Section 5 in Garrett and its precursors (see supra notes 228–67 and accompanying text), and have coalesced in the Court’s pro-states ruling in the Solid Waste Agency case. See supra notes 105–19 and accompanying text.
580. Id. at 119.
purposes of the lawmaking body, even when engaging in heightened means-ends scrutiny under the Equal Protection Clause. 581 Similarly (and notwithstanding his commitment to the Court’s purpose-centered ruling in Washington v. Davis), 582 Chief Justice Rehnquist has expressed reservations about motive-based inquiries in a variety of other personal rights settings as well. 583

If any member of the Court has emerged as the resident detractor of semisubstantive rules, however, it is Justice Scalia. Indeed, Justice Scalia planted the seed for a general theory of skepticism in his dissenting opinion in Thompson v. Oklahoma. 584 At the core of that dissent lay the claim that Justice O’Connor had betrayed basic principles by insisting that a state legislature specify in a single statute that the death penalty applied to persons who were younger than sixteen when they committed their crimes. 585 According to Justice Scalia, a constitutional analysis that hinged on “the process” and “precise form” of state legislation—rather than “its constitutionally required content”—penetrates the very “heart of [state] sovereignty.” 586 Launching a parade of horribles attack, he asked why Justice O’Connor’s approach would not justify judicial imposition of “a requirement that the death penalty for felons under sixteen be adopted by a two-thirds vote of each house of the state legislature, or by referendum, or by bills printed in 10-point type.” 587 In short, Justice Scalia found in Justice O’Connor’s opinion the “loose cannon of a brand new principle” that was unjustifiably “disdainful” of state legislative prerogatives. 588

To be sure, Justice Scalia has occasionally made use of structural logic. In City of Richmond v. J.A. Croson Co., 589 for example, he offered a defense for providing different levels of scrutiny to state and national affirmative action programs, thus opening the door for the adoption of a


582. 426 U.S. 229 (1976).


585. See supra notes 151–62 and accompanying text (detailing Justice O’Connor’s approach to the case).


587. Id. at 877.

588. Id. at 875–76.

589. Id. at 877.

590. Id.

“who” rule approach in this difficult field of law.\textsuperscript{592} In \textit{Adarand Constructors, Inc. v. Pena},\textsuperscript{593} however, it was Justice Scalia who supplied the fifth vote needed to slam this door shut in a ruling that mandated strict judicial scrutiny of both state and federal affirmative action policies.\textsuperscript{594} There are other strong hints that Justice Scalia is decidedly unenthusiastic about process-sensitive protections of substantive values as a general matter. For example, although Justice Scalia has defended the dormant Commerce Clause distinction between subsidies and tax breaks, he has taken pains to invoke only a text-based (and not a process-based) rationale.\textsuperscript{595} In addition, Justice Scalia (joined by Chief Justice Rehnquist) has questioned a free exercise jurisprudence that focuses not on the facially demonstrable “object of the laws at issue,” but instead on “the subjective motivation of the lawmakers” who enacted them.\textsuperscript{596} And in \textit{Sable Communications, Inc. v. FCC},\textsuperscript{597} it was Justice Scalia who went out of his way to disassociate himself from the majority’s endorsement of a First Amendment proper-findings “how” rule.\textsuperscript{598} Writing only for himself, Justice Scalia insisted that “[n]either due process nor the First Amendment requires legislation to be supported by committee reports, floor debates, or even consideration, but only by a vote.”\textsuperscript{599} These many examples suggest a strong drift in Justice Scalia’s constitutional worldview. For him, as a general (though perhaps not an absolute)\textsuperscript{600} matter, it is the content of laws that should determine their constitutionality, regardless of the processes that led to their adoption.

\textsuperscript{592} In particular, Justice Scalia drew directly from the Federalist Papers in pointing to “the heightened danger of oppression from political factions in small, rather than large, political units.” \textit{Id.}

\textsuperscript{593} 515 U.S. 200 (1995).

\textsuperscript{594} \textit{Id.} at 227–28. \textit{But cf. supra} note 524 (noting potential different deference refinement of \textit{Adarand’s} congruity rule).


\textsuperscript{596} \textit{Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 558 (1993) (Scalia, J., concurring).}

\textsuperscript{597} 492 U.S. 115 (1989).

\textsuperscript{598} \textit{See supra} note 197.

\textsuperscript{599} Sable Communications v. FCC, 492 U.S. 115, 133 (1989) (Scalia, J., concurring). Similarly in \textit{Pennell v. San Jose}, 485 U.S. 1 (1988), Justice Scalia invoked form-based logic to question rent control laws by arguing that the subsidies they effectively provide can “be achieved ‘off budget,’ with relative invisibility and thus relative immunity from normal democratic processes.” \textit{Id.} at 22 (Scalia, J., concurring and dissenting). He was quick to add, however, that the “fostering of an intelligent democratic process,” driven by what he saw as a Takings Clause-based invalidation of such laws, was “perhaps accident, perhaps not.” \textit{Id.} at 23.

\textsuperscript{600} \textit{See, e.g., supra} notes 250–58 and accompanying text (discussing Garrett).
What about Justice Thomas? As discussed earlier, Justice Thomas has joined his federalism-minded colleagues in endorsing and applying strong semisubstantive clear statement how rules. In a similar vein, it was Justice Thomas who wrote for the Court in ascribing to the Warren Court ruling in *Anders v. California* a deeply dialogic, quasi-replaceable, common law quality. What is most noteworthy (and perhaps most surprising) about Justice Thomas’ work in the semisubstantive realm, however, is that that work may well reflect an emerging philosophical independence from Chief Justice Rehnquist and Justice Scalia. Justice Thomas, for example, elected not to join Justice Scalia’s critique of purpose-centered doctrines in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*. Similarly, in *United States v. Williams*, Justice Thomas voted to support a constitutionally inspired supervisory rule that Justice Scalia was unwilling to tolerate. In *Kimel v. Florida Board of Regents*, Justice Thomas wrote only for himself and Justice Kennedy in endorsing an intensely aggressive clear statement approach in the Eleventh Amendment abrogation context. And in *Geier v. American Honda Motor Co.*, Justice Thomas once again parted company with Justice Scalia by joining Justice Stevens’s potently semisubstantive “who” rule dissent.

Is there a unifying theme that ties together this significant body of semisubstantive work? The leading candidate for such a theme is an intense commitment to the value of federalism. To begin with, while Justice Thomas’ vote in *Church of Lukumi Babalu Aye* might seem “anti-federalist” as a technical matter, only rarely will free exercise cases turn on the difference between “subjective” and “objective” demonstrations of illicit purpose. For this reason, Justice Thomas’ decision not to join Justice Scalia in that case hardly reveals a departure from a distinctively strong commitment to protecting the prerogatives of states. In similar fashion, Justice Thomas’ position in the *Williams* case (endorsing federal supervisory authority over grand jury proceedings) might at first blush seem “anti-federalist” because it was supportive of criminal defendants’

602. *See supra* notes 357–70 and accompanying text (discussing *Anders* and *Robbins* cases).
605. *See supra* notes 331–44 and accompanying text.
607. *See supra* notes 163–74 and accompanying text.
609. *See supra* notes 540–50 and accompanying text.
610. Even Justice Scalia concurred in the result in *Church of Lukumi Babalu Aye*. Moreover, no post-*Smith* free exercise cases suggest that motives hostile to religion commonly underlie generally applicable criminal statutes.
rights. In reality, however, Justice Thomas’ vote in Williams did not threaten state autonomy values in even a small way because that case concerned only federal judges’ supervisory powers over proceedings in federal courts.611

All of Justice Thomas’ other semisubstantive positions fall in line with an overarching aim to protect state autonomy. His cutting down of the Anders rule in Smith v. Robbins612 fits this theme like a glove.613 Likewise, Justice Thomas’ no-preemption vote in Geier and his no-abrogation vote in Kimel corresponded directly with a powerful gravitation toward protecting state prerogatives against federal regulatory incursions.614 What is most important about those cases, however, is that in all of them Justice Thomas clearly eschewed the view, vigorously espoused by his frequent ideological companion, Justice Scalia, that the results of constitutional cases should depend on the “content” of rules, rather than the “process” that results in their adoption.615 In short, Justice Thomas’ semisubstantive work reveals something more than a hearty embrace of federalism values; it also reveals a willingness to protect those values with innovative and energetic process-centered rules.

B. JUSTICE STEVENS

If a “Semisubstantive Rules Hall of Fame” were ever to be established, Justice John Paul Stevens would be its first inductee. From his earliest years on the Court, Justice Stevens has evidenced openness to every form of semisubstantive doctrine in the Court’s expansive repertoire.616 Justice Stevens long has applied clear statement rules of statutory interpretation in both the federalism and nonfederalism areas.617 He has signaled receptivity to form-based deliberation rules, most notably in his opinion in Apprendi618 but also in the dormant Commerce Clause

613. See supra notes 357–70 and accompanying text.
614. See supra notes 606–09 and accompanying text.
617. Examples from the federalism area that are provided by his dissents in Lorillard Tobacco Co. and Geier. See supra notes 109, 540–50 and accompanying text. For examples from the individual rights area that are provided by his opinions in St. Cyr and Calcano-Martinez, see supra notes 44–46, 59–73, 76 and accompanying text).
618. See supra notes 276–92 and accompanying text.
context. Justice Stevens is the great champion of findings-based “how” rules, having vigorously embraced them in the First Amendment federalism, and affirmative action fields. Justice Stevens probably authored the single opinion most associated with a “when” rule approach to sex-discrimination law and certainly authored the opinion most associated with constitutional “who” rules. He is a proponent of semisubstantive “current head count” rules, which he has supported unstintingly in both Eighth Amendment cases and elsewhere. Justice Stevens has not shied away from the formulation of constitutional common law doctrines; indeed he took the lead in advocating constitutionally inspired supervisory rulings in both the Williams case and in Carlisle v. United States. Finally, despite occasional expressions of concern,


620. See, e.g., supra notes 195–97 and accompanying text (discussing Reno v. ACLU).

621. See, e.g., supra notes 540–50 and accompanying text (discussing Geter dissent).

622. Justice Stevens’ structural tendencies have been especially evident—and steady-handed—in his affirmative action opinions. For example, in Wygant v. Jackson Board of Education, 476 U.S. 267 (1986), Justice Stevens dissented from the Court’s invalidation of a race-based promotion plan put in place by a school board and its teachers. In doing so, he emphasized that “a shred of evidence ... suggests any procedural unfairness in the adoption of the agreement.” Id. at 318 (Stevens, J., dissenting). In Fullilove v. Klutznick, 448 U.S. 448 (1980), however, he vigorously dissented from the Court’s validation of a congressional race-based set-aside program. The problem, according to Justice Stevens, was that Congress had given this “decision of profound constitutional importance” only “perfunctory consideration,” id. at 550 (Stevens, J., dissenting), accompanied by no “testimony or inquiry in any legislative hearing.” Id. at 549–50. See also Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 97–98 (1977) (Stevens, J., dissenting) (arguing that omission of one group of Native Americans from reparations program violated equal protection because it was “the consequence of a legislative accident”).


624. See supra notes 511–17 and accompanying text (discussing Mow Sun Wong). Notably, the opinion in Mow Sun Wong also had a significant findings-and-study-rule component. See Coenen, supra note 3, at 1680 n.435.


626. See supra notes 331–42 and accompanying text.


Justice Stevens has not balked at applying purpose-centered doctrines in virtually every realm of constitutional law.629

Most important, Justice Stevens has openly defended his frequent invocations of structural doctrines on textual and theoretical grounds.630 He has acted with substance-subordinating intellectual honesty in applying semisubstantive doctrines all across the constitutional map—for example, in cases involving both affirmative action and federalism.631 And, aptly, it was Justice Stevens who first invoked the “due process of lawmaking” rubric in an opinion filed by a Supreme Court Justice.632 Based on all the evidence, one thing is clear: As long as Justice Stevens sits on the bench, semisubstantive approaches will push for attention in the decisionmaking of the Supreme Court.

C. JUSTICES SOUTER, Ginsburg and Breyer

Justices Souter, Breyer, and Ginsburg share with Justice Stevens a strongly “structuralist,” rather than “substantivist,” approach to policing congressional interferences with states rights.633 Disciples of Garcia, these Justices have consistently insisted that structural safeguards in the national legislative process—rather than all-or-nothing substantive judicial interventions—provide the most appropriate check against excesses by Congress as it exercises its Article I powers.634 This outlook has brought with it predictable tendencies. Clear statement rules of statutory interpretation constitute the bread and butter of these Justices in dealing with federalism-based claims that Congress has overreached the bounds of its authority.635

Justice Breyer—in what might someday become a semisubstantive-doctrine landmark—has gone beyond Justices Souter and Ginsburg by floating the idea that a proper-findings-and-study rule might someday find a place in the Court’s federalism jurisprudence. As he explained in his

629. See, e.g., supra notes 434–48 and accompanying text (discussing Santa Fe case).
630. See e.g., Fullilove v. Klutznick, 448 U.S. 448, 550 (1980) (Stevens, J., dissenting) (asserting that there is “no reason why the character of [congressional] procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law”); supra notes 92–95 and accompanying text (detailing theory of process-centered function of federalism-based, clear statement rules).
631. See supra notes 621–22 and accompanying text.
634. See infra note 712 and accompanying text.
635. See, e.g., supra note 109; infra note 712 (discussing cigarette advertising decision in Lorillard Tobacco).
dissenting opinion in *Morrison*, “[c]ommentators . . . have suggested that the thoroughness of legislative procedures—e.g., whether Congress took a ‘hard look’—might sometimes make a determinative difference in a Commerce Clause case.”\footnote{636} Following up on this thought, Justice Breyer emphasized that:

> [T]he law in this area is unstable and . . . time and experience may demonstrate . . . the superiority of [a] procedural approach—in which case the law may evolve towards a rule that, in certain difficult Commerce Clause cases, takes account of the thoroughness with which Congress has considered the federalism issue.\footnote{637}

Arguably these ruminations stand in tension with Justice Breyer’s earlier comments about legislative findings in his dissenting opinion in *Lopez*.\footnote{638} Whether that is true or not, however, few more “semisubstantively” minded pronouncements appear anywhere in the work of the Rehnquist Court.

It is noteworthy that neither Justice Souter nor Justice Ginsburg (unlike the great proponent of second-look rules, Justice Stevens) were willing to join this segment of Justice Breyer’s *Morrison* dissent. Justice Souter, in particular, has expressed very strong reservations about laying weight on legislative findings in evaluating whether Congress has exceeded its Commerce Clause powers. Indeed, sounding much like Justice Scalia in the *Thompson* case,\footnote{639} Justice Souter argued in *Lopez* that “requir[ing] Congress to act with some high degree of deliberateness . . . would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court.”\footnote{640} At the same time, Justice Souter acknowledged that “as a general matter findings are important”\footnote{641} in deciding whether “a particular activity substantially affects interstate commerce.”\footnote{642} Even more important, in his dissenting opinion in *Morrison* (joined by Justices Stevens, Ginsburg and Breyer), Justice Souter wasted no time in asserting that “[o]ne obvious difference from *United States v. Lopez* is the mountain of data assembled by Congress, here showing the effects of violence against women on interstate commerce.”\footnote{643} Perhaps Justices Souter and Ginsburg are, in the end, only slightly less interested in congressional studies than Justices Stevens and Breyer. At least so far, however, they

\footnote{637. Id. at 663–64.}
\footnote{638. See infra note 718 (noting Justice Breyer’s form over substance worries).}
\footnote{639. See supra notes 584–90 and accompanying text.}
\footnote{641. Id. at 612.}
\footnote{642. Id. at 613.}
have been unwilling to dress up this interest with the same ambitiously semisubstantive rhetoric advanced by Justice Breyer in his separate *Morrison* dissent.

Justice Souter also has dipped and swayed in evaluating the relevance of legislative findings in the Court’s nude dancing cases. In particular, he painstakingly declared in a separate concurring opinion in *Barnes v. Glen Theatre, Inc.*\(^{644}\) that legislative studies were unnecessary to justify a nude dancing prohibition defended on the ground that it countered problems such as neighborhood deterioration and increased crime.\(^{645}\) Rather, he professed a readiness to uphold the law based on an earlier Supreme Court opinion that had found that these “secondary effects” justified a different form of adult entertainment regulation (there a zoning regulation) adopted in a different state by a different lawmaking body.\(^{646}\) In *City of Erie v. Pap’s A.M.*\(^{647}\) however, Justice Souter donned sackcloth and disavowed his *Barnes* concurrence, proclaiming that he had “come to believe that a government must toe the mark more carefully than I first insisted.”\(^{648}\)

Despite this retreat, it remains unclear what legislative findings, if any, Justice Souter now will require to support nude dancing regulations. The confusion arises in part from his willingness to remand for further judicial proceedings in *City of Erie*—a move that suggests that, at trial, the city’s lawyers might lay an adequate “evidentiary foundation,” even if the city’s lawmakers themselves conduct no investigation whatsoever. Yet Justice Souter also explained that:

> That evidentiary basis [for the ordinance] may be borrowed from the records made by other governments if the experience elsewhere is germane to the measure under consideration and actually relied upon. I will assume, further, that the reliance may be shown by legislative invocation of a judicial opinion that accepted an evidentiary foundation as sufficient for a similar regulation.\(^{649}\)

Where all this leads is not clear, but these latter passages suggest that Justice Souter—in keeping with semisubstantive theory—stands ready to put at least some premium on legislative study (and some penalty on legislative sloth) when evaluating laws challenged on free expression grounds.

\(^{645}\)  *Id.* at 583–86 (Souter, J., concurring).
\(^{646}\)  See Calabresi, *supra* note 15, at 112 n.94 (noting and criticizing this reasoning).
\(^{647}\)  529 U.S. 277, 311 (2000).
\(^{648}\)  *Id.* at 317 (Souter, J., dissenting).
\(^{649}\)  *Id.* at 313 (emphasis added).
Justice Ginsburg—like Justices Souter and Breyer—has shown an openness to embracing semisubstantive techniques. Her work, for example, stands in contrast to that of most of her colleagues because it is unmarked by expressions of reservation about recognizing and applying proper-purpose rules. More specifically, a semisubstantive “why”-rule approach drove her invalidation of a males-only admissions policy in United States v. Virginia. Noting this point, Professor Sunstein has ascribed a strongly semisubstantive reading to Justice Ginsburg’s opinion in that case. As he has written:

*Virginia* is linked with *Kent* insofar as it requires a current legislative judgment—here, that same-sex education is necessary to promote educational diversity . . . . If the state reached its decision deliberatively and without infection from stereotypes about gender roles, and the decision promoted rather than undermined equal opportunity, the Court might uphold the program.

Justice Ginsburg’s work with semisubstantive doctrines has reached well beyond the sex discrimination context. In *Geier*, for example, she joined (as did Justices Souter and Thomas) Justice Stevens’s “who”-rule/“how”-rule effort to protect state autonomy interests against claims of federal agency preemption. In a similar vein, Justice Ginsburg drew on semisubstantive considerations in *Adarand Constructors, Inc. v. Pena* to urge judicial caution in the affirmative action field. There, in a brief concurring opinion joined by Justice Breyer, she declared that “in view of the attention the political branches are currently giving the matter of affirmative action, I see no compelling cause for [judicial] intervention” and added that she “would leave [these programs’] improvement to the political branches.”

These expressions comport with an overarching theory of the judicial role that resonates strongly with semisubstantive decisionmaking. As Justice Ginsburg stated not long before her appointment to the Court, “judges . . . do not alone shape legal doctrine.”
but they participate in a dialogue with other organs of government, and with the people as well."\textsuperscript{657}

\textbf{D. JUSTICES O’CONNOR AND KENNEDY}

At the center of the Rehnquist Court sit Justices O’Connor and Kennedy, whose votes have proved decisive in many constitutional rulings of the modern era. Perhaps most significantly, the votes of these Justices have propelled the “federalism revolution” undertaken by the Rehnquist Court.\textsuperscript{658} In particular, both of these Justices (together with the Chief Justice and Justices Scalia and Thomas) have been pulled toward a double-barreled set of substantive and semisubstantive protections against congressional incursions on state fiscal and regulatory autonomy.\textsuperscript{659} Justices O’Connor and Kennedy, for example, provided decisive support for the Court’s federalism supporting, findings-based approach in the \textit{Garrett} case. Likewise, it was the support of Justices O’Connor and Kennedy in \textit{Robbins} that permitted the Court to render substantially modifiable the Warren Court’s protections of the right to appellate counsel in \textit{Anders v. California}.\textsuperscript{660}

Justices O’Connor and Kennedy, however, have shown an openness to using semisubstantive reasoning to do more than advance the cause of “states’ rights.” Both Justices, for example, seem to believe that lawmaker findings may play a determinative role in evaluating remedial affirmative action programs.\textsuperscript{661} In addition, it was Justice O’Connor’s decisive (and deeply dialogic) approach in \textit{Thompson v. Oklahoma} that led the Court to invalidate a death sentence placed on a defendant who was fifteen years old when he committed his crime.\textsuperscript{662} Finally, even while expressing some misgivings about proper-purpose rules,\textsuperscript{663} Justice O’Connor has forged new motive-based doctrines and applied them vigorously to invalidate state and local laws.\textsuperscript{664}

In similar fashion, Justice Kennedy has embraced semisubstantive approaches both inside and outside the federalism field. His strong

\begin{itemize}
  \item \textsuperscript{658} See infra note 715.
  \item \textsuperscript{659} See infra notes 706–16 and accompanying text.
  \item \textsuperscript{660} See supra notes 357–70 and accompanying text.
  \item \textsuperscript{661} See supra notes 185–91 and accompanying text.
  \item \textsuperscript{662} See supra notes 151–62 and accompanying text.
  \item \textsuperscript{663} See supra notes 401–02 and accompanying text.
  \item \textsuperscript{664} See supra notes 413–25 and accompanying text. See also, e.g., \textit{Wallace v. Jaffree}, 472 U.S. 38, 77–78 (1985) (O’Connor, J., concurring) (relying squarely on legislative history in finding that impermissible religious motive lay behind moment-of-silence law).
\end{itemize}
commitment to proper-purpose doctrines—combined with an apparent
willingness to look at particular legislative proceedings in applying them—
distinguishes his work from that of the Chief Justice and Justice Scalia.665
Justice Kennedy also showed an openness to moving further than his
colleagues with super-strong clear statement reasoning when he joined
Justice Thomas’ concurrence in Kimel.666 Justice Kennedy’s twin opinions
in the Turner Broadcasting litigation667 suggest an inclination to bring
semisubstantive analysis to First Amendment free speech cases. More
particularly, his “who rule” willingness to distinguish between
Congressional and agency actions668 suggests a gravitation toward serious
forms of semisubstantive thinking. Likewise, his references in Turner
Broadcasting to “Congress’ findings”669 and “the record before
Congress”670 suggest a receptivity to the use of findings-based “how”
rules.571 There are also signs, however, that Justice Kennedy’s attitude
toward semisubstantive analysis is marked by some ambivalence. In
particular, as others have noted, the Turner Broadcasting opinions sent out
conflicting signals about the significance of congressional findings. In the
end, these opinions—like so much of the Court’s work—are “strangely
ambiguous” about whether semisubstantive considerations should or do
matter in the decision of concrete cases.672

E. THE COURT’S NEXT CHAMPION OF SEMISUBSTANTIVE REVIEW

What does this Justice-by-Justice review reveal about the future of
semisubstantive decisionmaking? To begin with, it confirms what we have
seen before. Semisubstantive approaches crop up often in the current
Court’s work. Most, maybe all, of the now-sitting Justices are particularly
open to using these doctrines to protect state autonomy values. And the
work of most of the individual Justices—like the work of the Court as a
whole—reveals much ambivalence about using semisubstantive rules, at
least outside the clear statement field. This Justice-by-Justice examination

665. Justice Kennedy, for example, wrote for the Court in Church of Lukumi Babalu Aye. See
supra note 409 and accompanying text. See also Ashcroft v. ACLU, 122 S. Ct. 1700, 1717 (2002)
(Kennedy, J., concurring) (“Congress and the President were aware of our [earlier First Amendment
internet-indecency-law] decision, and we should assume that in seeking to comply with it they have
given careful consideration to the constitutionality of the new enactment”).
666. See supra notes 163–83 and accompanying text.
668. See supra notes 519–22 and accompanying text.
670. Id. at 211.
671. See supra note 198 (discussing this aspect of the Turner Broadcasting cases).
672. Bryant & Simeone, supra note 3, at 335.
also demonstrates that the current Court’s clear leader in the use of second-
look approaches to judicial review is Justice Stevens. It shows as well that
the writings of the Court’s other members (with the likely exceptions of
Chief Justice Rehnquist and Justice Scalia) do not disclose clearly
crystallized philosophies toward this nuanced, and often understated, form
of constitutional decisionmaking. This point raises a question that is both
interesting to ponder and of vital practical importance to the future of
constitutional law: Who, among the sitting Justices, is most likely to
emerge as a fellow traveler of Justice Stevens in the field of
semisubstantive review? The previous Justice-by-Justice appraisal
suggests some answers to this question.

The members of the Court least likely to emerge as ardent
“semisubstantivists” are Chief Justice Rehnquist and Justice Scalia.673 In
particular, Justice Scalia has staked out a position that seems actively
hostile toward semisubstantive doctrines outside the clear statement
statutory-interpretation context.674 It also seems clear that Justice Souter is
unlikely to step forward as a leading proponent of broad and strong
semisubstantive review. To be sure, Justice Souter has joined some
important semisubstantive opinions.675 His own opinions on findings-
based “how” rules, however, suggest a tendency to focus on the content of,
rather than the process that produced, the challenged law.676

Justice Ginsburg, in contrast, might well move in a strong
semisubstantive direction. Particularly suggestive in this regard is her
scholarly writing, which reveals a pull toward process-centered judicial
review and a recognition that the Court has no choice but to engage in
dialogues with nonjudicial actors.677 At this point, however, Justice
Ginsburg’s work on the Court is too limited to permit much beyond
speculation about the future course of her treatment of semisubstantive
rules.678

There are signals that Justice Kennedy’s work might move toward
more active use of semisubstantive techniques. Viewed as a whole,
however, his writings suggest a significant measure of ambivalence about
this decisionmaking style. To be sure, Justice Kennedy took a strongly
semisubstantive position by joining the concurring opinion in *Kimel*,679 and

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673. See supra notes 576–09 and accompanying text.
674. See supra notes 584–09 and accompanying text.
675. See supra notes 540–50 and accompanying text (discussing dissenting opinion in *Geier*).
676. See supra notes 639–49 and accompanying text.
677. See supra note 657 and accompanying text.
678. See supra notes 650–57 and accompanying text.
679. See supra note 666 and accompanying text.
his own Turner Broadcasting opinions lend support to both constitutional “how” and constitutional “who” rules. They do so, however, in a restrained and backhanded way since nothing in those opinions suggests that the source of the challenged law, or the presence of legislative findings, made a real difference in the ultimate decision in the case. Viewed as a whole, Justice Kennedy’s work with semisubstantive doctrines does not reveal a firm, overarching commitment to this dialogic style of judicial review.

Justice O’Connor’s opinion in Thompson does reflect the sort of bold stroke not present in Justice Kennedy’s portfolio, thus suggesting that she might find a place in Justice Stevens’ hard-core, semisubstantive decision-making camp. Justice O’Connor, however, was pointedly careful to limit her opinion in Thompson to the “unique” setting of death penalty cases. Moreover, it was Justice O’Connor’s opinion in the Adarand case that jerked the Court away from its previous who-based approach to affirmative action cases. It has been suggested that the full spectrum of Justice O’Connor’s jurisprudence reflects a deep-seated, Court-centered vision of how constitutional interpretation should occur. For all these reasons, it seems likely that Justice O’Connor will continue to deploy semisubstantive doctrines in only a selective and limited way.

Perhaps Justice Thomas’ opinion in Kimel and his vote in Geier mark him as the Court’s next torchbearer for semisubstantive review. There is little indication, however, that Justice Thomas stands ready to use high-powered semisubstantive doctrines to protect constitutional values other than “states’ rights.” It remains to be seen whether this depiction of Justice Thomas will prove accurate over time. If it does, however, his work will not reinforce the past efforts of Justice Stevens. Instead it will reflect a striking departure from Justice Stevens’ approach, which has emphasized semisubstantive decision-making across all fields of constitutional law.

That leaves Justice Breyer. Particularly because he is the Court’s newest member, Justice Breyer has had little chance to reveal a highly

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680. See supra notes 667–71 and accompanying text.
681. See Bryant & Simeone, supra note 3, at 339 (finding “ambiguity” in Justice Kennedy’s Turner Broadcasting opinions). See also supra note 412 (discussing lukewarm view of purpose-based analysis suggested in Tuan Anh Nguyen, opinion authored by Justice Kennedy).
682. See supra note 662 and accompanying text.
685. See supra notes 606–09 and accompanying text.
686. See supra notes 601–15 and accompanying text (discussing states’ rights focus of Justice Thomas’ semisubstantive jurisprudence).
theorized enthusiasm about semisubstantive constitutional review. There are signals, however, that such an enthusiasm is building. To begin with, Justice Breyer has led the charge toward judicial minimalism, crafting much work that reflects a strong pull toward modest and narrow constitutional rulings. In addition, there is evidence that Justice Breyer may prove open to formulating constitutional “who” rules that respond to differing institutional capacities. Most important, Justice Breyer already has placed his own strong semisubstantive imprint on the pages of the United States Reports. In his concurring opinion in BMW v. Gore, for example, he outflanked even Justice Stevens, whose majority opinion took a more once-and-for-all substantive approach. No less significantly, his dissenting opinion in United States v. Morrison—in a section joined only by Justice Stevens—openly invited the Court to take a highly innovative findings-centered view of how to assess debatable claims of congressional Commerce Clause authority.

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687. See infra note 692 (quoting from Justice Breyer’s concurrence in Bartnicki v. Volper, 532 U.S. 514 (2001)).
690. See supra notes 294–99 and accompanying text.
692. See supra notes 636–38 and accompanying text. Justice Breyer’s openness to dialogue was also imminent in his concurring opinion in Bartnicki v. Vopper, 532 U.S. 514 (2001), discussed supra note 687. As he explained: “Legislatures . . . may decide to revisit statutes such as those before us, creating better tailored provisions designed to encourage, for example, more effective privacy-protecting technologies.” Id. at 1541 (Breyer, J., concurring). Notably, two very recent opinions by Justice Breyer—authored after the preceding discussion was written—confirm this overall impression. First, in Board of Education of Independent School District v. Earls, 122 S. Ct. 2559 (2002), the Court upheld a program of random drug urinalysis tests for public school students engaged in extracurricular activities. Justice Breyer filed a distinctively semi-substantive concurring opinion in which he wrote: Some find the procedure no more intrusive than a medical examination, but others are seriously embarrassed by the need to provide a urine sample with someone listening “outside the closed restroom stall,” ante, at 2256. When trying to resolve this kind of close question involving the interpretation of constitutional values, I believe it is important that the school board provided an opportunity for the airing of these differences at public meetings to give the entire community “the opportunity to be able to participate” in developing the drug policy. App. 87. The board used this democratic, participatory process to uncover and to resolve differences, giving weight to the fact that the process, in this instance, revealed little, if any, objection to the proposed testing program.
Id. at 2571. Likewise in Watchtower Bible and Tract Society, Inc. v. Village of Stratton, 122 S.Ct. 2080 (2002), Justice Breyer emphasized structural concerns in concurring in the Court’s decision to invalidate a registration requirement for person engaged in door-to-door expressive activities. Id. at 2091–92 (Breyer, J., concurring). In particular, he faulted the dissent’s invocation of a crime-
It is true that the work of Justice Breyer reflects some (though perhaps not much) ambivalence about strong forms of semisubstantive review. Given the pervasiveness of mixed feelings throughout the Court about these doctrines, that fact is hardly surprising. In any event, there is reason to believe that Justice Breyer—more so than any of his colleagues—might one day join Justice Stevens in leaving these feelings of ambivalence behind.

III. THE THEMES OF THE REHNQUIST COURT’S SEMISUBSTANTIVE WORK

What can we say about the Rehnquist Court’s vision of semisubstantive rules? Our survey suggests three central points. First, the use of semisubstantive doctrines constitutes a vital part of the Rehnquist Court’s constitutional work. Second, the Court has been particularly activist in applying these doctrines to safeguard substantive constitutional interests in state autonomy. Third, despite the Court’s widespread use of these doctrines, there is a persistent ambivalence among the Justices about whether these rules should be widely applied. Identifying these themes is important in and of itself. In particular, advocates who argue real world constitutional cases must be mindful of these forces at work in the collective mind of the Court.

In considering these themes, it is also important to recognize that each of them is part of larger story about the Court and its constitutional work. Looking at these themes in a broader context thus is an additional necessity. In particular, this sort of “big picture” appraisal may provide telling clues about the future direction of semisubstantive decisionmaking and perhaps about other forms of constitutional decisionmaking as well. We turn now to a broader-context appraisal of each of the three key themes that reach across the Court’s semisubstantive work. We consider in turn the themes of (1) pervasiveness; (2) federalism; and (3) underlying ambivalence.

prevention justification for the ordinance on the “why rule” basis that “in the intermediate scrutiny context, the Court ordinarily does not supply reasons the legislative body has not given.” Id. at 2091. He added that: “[W]e expect a government to give its real reasons for passing an ordinance” and that “if the village of Stratton thought preventing burglaries and violent crimes was an important justification for this ordinance it would have said so.” Id. at 2091–92.

693. See infra note 718 and accompanying text.
A. PERVASIVENESS

As we have seen, the Rehnquist Court has applied many different types of semistructural doctrines—"how" rules, "why" rules, "when" rules, and "who" rules—in many different constitutional settings. This reality suggests that these doctrines will persevere. So does an assessment of the jurisprudential backdrop against which the Rehnquist Court’s many semisubstantive rulings have come down.

As explained by Professor Sunstein, “the analytical heart of the current Court”—made up of Justices O’Connor, Souter, Kennedy, Ginsburg, and Breyer—prefers a “minimalist” judicial role in expounding constitutional law.694 Indeed, Professor Sunstein has devoted a book to documenting why “judicial minimalism has been the most striking feature of American law in the 1990s.”695 In keeping with its minimalist philosophy, when the current Court invalidates laws it often issues “narrow” and “shallow” opinions.696 (In Romer v. Evans,697 by way of example, the Court did not consider such matters as excluding gays from the military and was careful to avoid broad theoretical pronouncements, including as to whether rational relation or heightened scrutiny applies to laws that discriminate on the basis of sexual orientation.698) Even more important, this self-abnegating style of judicial decisionmaking reflects important policy goals: It facilitates “deliberative democracy”699; it reduces the “countermajoritarian difficulty” associated with judicial review;700 and (at least across the run of cases) it should generate sounder, better considered and more constitutionally sensitive legislative outcomes.701

The Rehnquist Court’s general gravitation toward minimalist decisionmaking helps explain its frequent use of semisubstantive doctrines. The essential purpose of these process-centered doctrines, after all, is to avoid judicial monopolization of constitutional decisionmaking, while “promot[ing] more democracy and deliberation” with regard to constitutionally troublesome issues.702 Indeed, it is hard to conjure up a

694. SUNSTEIN, supra note 24, at 9.
695. Id. at xi.
696. See id. at 4–5.
698. SUNSTEIN, supra note 24, at 10.
699. Id. at 25.
700. See BICKEL, supra note 24, at 16.
701. See SUNSTEIN, supra note 24, at 28.
702. Id. at 4. Sometimes the Court itself is quite explicit about its minimalist ambitions. For example, in Bartnicki v. Vopper, 532 U.S. 514 (2001), the Court considered the criminalization of a newspaper’s knowing publication of information which had lawfully come into its hands, but had been initially secured by a third party’s unlawful interception of a cell-phone conversation. In finding a
The judicial approach that will better “increase the space for further reflection and debate at the local, state, and national levels” than one which invites political decision makers—if they act carefully—to reinstate exactly the same law the Court has only provisionally invalidated.

The key point is that there is an intimate linkage between a general philosophy of judicial minimalism and the more specific (though multifaceted) practice of semisubstantive review. To be sure, it is theoretically possible to argue that a minimalist tribunal can and should steer clear of these remand-to-the-legislature doctrines. But, especially in light of the Court’s now-common use of these doctrines, such an argument seems unlikely to carry water in the real world. In short, the Rehnquist Court’s overarching commitment to a “democracy promoting” constitutional minimalism bodes well for the future use of semisubstantive review.

B. FEDERALISM

It should come as no surprise that the present-day Court has been particularly activist in using semisubstantive doctrines to safeguard state constitutional violation, the Court pointedly refused “to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.” Id. at 528. Quoting from Florida Star v. B.J.F., 491 U.S. 524, 532–33 (1989), it added:

Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily . . . . We continue to believe that the sensitivity and significance of the interests presented in clashes between [the] First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.

Id. at 529. See also id. at 541 (Breyer, J., concurring) (expressing preference to “emphasize the particular circumstances before us because, in my view, the Constitution permits legislatures to respond flexibly to the challenges future technology may pose to the individual’s interest in basic personal privacy” and adding that “we should avoid adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility”). On other occasions, some Court members criticize others because they eschew a minimalist approach. For example, in Kyllo v. United States, 533 U.S. 27 (2001), the opinion of Justice Scalia (perhaps the most “maximalist” member of the current Court, see, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377 (1992)), laid out a four-part test for determining when use of modern technologies to obtain incriminating evidence violates the Fourth Amendment. Justice Stevens, writing for himself and three other Justices, responded: “[T]he Court . . . has unfortunately failed to heed the tried and true counsel of judicial restraint. Instead of concentrating on the rather mundane issue that is actually presented by the case before it, the Court has endeavored to craft an all-encompassing rule for the future. It would be far wiser to give legislators an unimpeded opportunity to grapple with these emerging issues rather than to shackle them with prematurely devised constitutional constraints.” Id. at 2052. See also Ferguson v. City of Charleston, 532 U.S. 67, 85 n.24 (2001) (“We decline to accept the dissent’s invitation to make a foray into dicta and address other situations not before us.”).

703. SUNSTEIN, supra note 24, at 4.  
704. Key arguments against true semisubstantive doctrines are collected in Coenen, supra note 3, at 1845–51. These arguments (or at least most of them) are not arguments against a minimalist philosophy. They are, however, arguments against semisubstantive review.  
705. See SUNSTEIN, supra note 24, at 26.
autonomy. Viewed from a broad angle, however, the evolution of the law in this direction is problematic. The root of the difficulty is that the early emergence of energetic semisubstantive doctrines in the federalism field was justifiable on the theory that, absent the recognition of such doctrines, federalism values would suffer from underenforcement. This risk of underenforcement, in turn, emanated from the Court’s insistence in the Garcia case (consistent with a half-century of hands-off, post-New Deal decisionmaking) that safeguards of state interests built into the national government’s political structure mitigated the need to afford those interests protections in the form of judicially constructed on-or-off rules. Indeed, in Gregory v. Ashcroft, the Court (in an opinion written by Justice O’Connor) relied squarely on this underenforcement rationale in significantly expanding its state-favoring clear statement rule jurisprudence.

In the years following Gregory, however, a five-Justice coterie of the Rehnquist Court has largely abandoned Garcia’s philosophy by recognizing and applying significant substantive constitutional doctrines that protect “states’ rights.” At the same time, the Court as a whole has not retreated from the now-deep-seated semisubstantive protections of federalism (particularly in the form of strong clear statement rules) that were devised and nurtured in the pre-Rehnquist Court era. Indeed, the four Justices who remain deeply committed to the Garcia philosophy—that is, Justices Stevens, Souter, Ginsburg, and Breyer—continue to hold fast to the view that semisubstantive protections should operate in this area. The

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706. See supra notes 78–119, 210–63, 348–89 and accompanying text (discussing clear statement cases, Section 5 findings-and-study rules, and constitutional common law).


708. See, e.g., Wickard v. Filburn, 317 U.S. 111, 120 (1942) (asserting that “effective restraints on [the commerce power] must proceed from political rather than from judicial processes”).


710. As Justice O’Connor explained in her opinion for the Court: “We are constrained in our ability to consider the limits that the state-federal balance places on Congress’ powers under the Commerce Clause.” Id. at 464 (citing Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)). She continued: “Indeed, inasmuch as this Court in Garcia has left primarily to the political process the protection of the States against intrusive exercises of Congress’ Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. ‘[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which Garcia relied to protect states’ interests.’” Id. (quoting TRIBE, supra note 5, § 6-25, at 480).


712. An all-out reliance on Garcia–based reasoning appeared in Justice Stevens’ dissenting opinion in Kimel v. Florida Board of Regents, 528 U.S. 62 (2000), which was joined in full by Justices Souter, Ginsburg, and Breyer. See id. at 92–96 (Stevens, J., dissenting). Notably, while Justice Stevens used this rationale to reject states’ rights arguments in Kimel, he has invoked the clear statement concomitant of Garcia to protect state interests (against private ordering alternatives) in other contexts.
result is that the Rehnquist Court has effectively said to states rights advocates: “You can have your cake and eat it too.”

In an article published only months after Justice Thomas came on the Court, Professors Frickey and Eskridge challenged the Court’s preoccupation with applying clear statement rules in the federalism field, reasoning that other constitutional values were no less deserving of “quasi-constitutional” protection. A decade later, the Frickey and Eskridge critique may be supplemented by another objection that is directly tied to the appointment and work of Justice Thomas. Put simply, the fifth vote of Justice Thomas has caused the reinvigoration of constitutional states’-rights claims to become the Rehnquist Court’s most successful project. It logically follows that the once-sound underenforcement rationale for state protective semisubstantive rules rests today on an unsteady foundation, if not feet of clay.

The question remains: Does any of this matter? At least in the short term, the answer seems to be “no.” The Rehnquist Court has not yet even hinted that it might retreat from the activist, federalism-driven, clear statement rules that (as in Gregory) it has enthusiastically embraced. Nor has there been even quiet grumbling among dissatisfied Justices about the reality that these rules have persevered. The Federalism Five seems well-satisfied, at least for now, to have two lines of defense—one substantive and one semisubstantive—for protecting state autonomy from congressional control. It matters not that the second set of safeguards was developed precisely because, at the time of their emergence, the first set of


Focusing attention on only the Court’s institutional (and not individual rights) cases, Justice Thomas has supplied the fifth vote in support of states rights arguments in (among other cases) Lopez, Morrison, Printz, Seminole Tribe, Florida Prepaid, Kimel, and Garrett. See supra notes 568–74 and accompanying text. See also Linda Greenhouse, In the Year of the Florida Vote, Supreme Court Also Did Much Other Work, N.Y. TIMES, July 2, 2001, at A12 (describing “federalism revolution” as “arguably the most consequential development in constitutional law of the last decade”).

Of course, other particular structural rules may be subject to additional and less generalized critiques. See supra note 86 (discussing Atascadero’s Eleventh Amendment immunity-abrogation clear statement rule).
safeguards did not exist. The mood of this Court—consistent with its strong general state autonomy orientation—leans in the direction of leaving well enough alone.

C. UNDERLYING AMBIVALENCE

We have seen that both the Court and its individual Justices often have signaled an ambivalence about the legitimacy of semisubstantive rules. The reasons for this ambivalence, I suspect, are so complex that they are not fully understood by the Justices themselves. But some possible reasons for this mixed reaction seem not too hard to spot. To begin with, fundamental attitudes widely shared in the legal community tug in different directions when judges contemplate the use of process-centered semisubstantive doctrines. On the one hand, judges are likely to see the “substance” of a rule as far more important than its “form” and to sense that a rule’s “content,” rather than its purpose or packaging, should be decisive in evaluating its constitutionality. On the other hand, persons trained in law know that process is always critical. They also know the value of preserving the Court’s institutional capital, and they recognize that semisubstantive doctrines fit neatly into strong traditions of judicial restraint.

A checkered willingness to embrace semisubstantive doctrines may also reflect the rich matrix of loyalties that different Justices bring to different substantive constitutional values. According to one highly oversimplified depiction, for example, the Court’s most intensely federalism-minded Justices are eager to push forward the cause of state

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717. See, e.g., supra notes 198–99 (discussing Turner Broadcasting cases); notes 211–16 (discussing Lopez); notes 228–60 (discussing Section 5 congressional-findings rulings).

718. See, e.g., United States v. Lopez, 514 U.S. 549, 617–18 (1995) (Breyer, J., dissenting) (worrying that relying on findings could prove “unfortunate” because it “would appear to elevate form over substance”). See also supra note 272 (noting substance-over-form argument that recurs in dormant Commerce Clause cases). This way of thinking supports, for example, the critique that purpose-centered rules are troublesome because “emphasis on actual motivation may result in identically worded statutes being held valid in one state and invalid in a neighboring state.” United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 180 (1980) (Stevens, J., concurring). From a “substantivist” perspective such a result seems incoherent. From a “semisubstantive” perspective, however, it is not troubling at all.

719. See LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 6 (1988) (stating that “[b]ecause of the shaky foundation of judicial review, the Court consciously circumscribes its activities and invites other branches to participate”); Harry H. Wellington, The Nature of Judicial Review, 91 YALE L.J. 486, 502 (1982) (asserting that “perhaps we can accept more readily the legitimacy of judicial review” if “there is less finality in a constitutional decision than meets the eye”). See also BICKEL, supra note 24, at 19 (noting that traditional “[j]udicial review works counter” to “the central function that is assigned in democratic theory and practice to the electoral process”; thus advocating alternative means for judicial protection of constitutional values); Furman v. Georgia, 408 U.S. 238, 470 (1972) (Rehnquist, J., dissenting) (“[J]udicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review.”).
autonomy as far as they can on all fronts. On this view, those Justices stand ready, whenever able, to put aside semisubstantive doctrines in favor of fully-substantive doctrines that more aggressively protect “states’ rights.” At the same time, those Justices remain poised to protect state interests with semisubstantive doctrines if nothing more is achievable. Of course, Justices committed to substantive constitutional values other than state autonomy—such as free speech or free exercise—also may seek to combine the use of both semisubstantive and fully-substantive doctrines in a similar effort to maximize constitutional protections. The important point is that semisubstantive doctrines always will interact in complex ways with the substantive values they are forged to protect. This complexity, in turn, inevitably will produce a decisional pattern in which semisubstantive doctrines sometimes find favor and sometimes give way.

Finally, the Court’s ambivalence about strong forms of semisubstantive doctrines reflects the unsurprising reality that there are strong arguments of law and policy to be made both for and against their use. Some of these arguments already have been identified in this Article, and others have been detailed elsewhere. In addition, wholly apart from the overarching arguments for and against semisubstantive decisionmaking, specialized arguments may bolster or diminish the case for particular forms of these rules. Findings-based “how” doctrines, for example, have generated opposition on the ground they are a prescription for make-work, while some purpose-centered “why” rules may be distinctively defensible in light of constitutional history and text.

720. See, e.g., supra notes 244–63 (discussing findings-based approach in Garrett case).
721. For example, many viewed the Court’s original flag burning decision as inviting a legislative reprise. See Texas v. Johnson, 491 U.S. 397 (1989). See generally Geoffrey R. Stone, Flag Burning and the Constitution, 75 IOWA L. REV. 111 (1989) (discussing the Johnson case and arguing that it was correctly decided). After Congress passed a new post-Johnson flag burning law, however, the Supreme Court struck it down as, in effect, per se invalid. See United States v. Eichman, 496 U.S. 310 (1990).
722. See, e.g., Tushnet, supra note 24, at 1876–79 (asking “what role is left for substantive subconstitutional review” in light of Court’s “catalogue” of structural doctrines).
723. See, e.g., supra note 272–74 and accompanying text (identifying and critiquing substance over form argument with regard to form-centered “how” rules).
724. See Coenen, supra note 3, at 1834–51.
726. For example, in Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990), Justice Scalia suggested that, as “a textual matter,” it was reasonable to read the Free Exercise Clause as focusing on “the object,” rather than “the incidental effect of a generally applicable and otherwise valid provision.” Id. at 878. See also AKHIL REED AMAR, THE BILL OF RIGHTS 42–43
Perhaps most important of all, an ambivalence about semisubstantive decisionmaking comports with the historical fact that the Court has never offered an overarching theoretical justification for this style of judicial decisionmaking. Indeed, the Court’s members have never paused to consider (at least in the opinions they write) the latent kinship of the various forms of semisubstantive doctrines we have explored. It is not surprising that Justices are ambivalent about doctrines whose use tends to be episodic, under-theorized, and woven into opinions that do not trumpet their operation, their essential features or their underlying justifications.

This last point is of great significance as one considers the future prospects of semisubstantive decisionmaking. Consider, by way of contrast, the Court’s tiered levels of judicial means-ends review based on strict, intermediate, or rational-relation scrutiny. As a theoretical matter, this multilevel rhetoric of review carries the seeds for controversy. (At least to my knowledge, for example, the Framers never catalogued these tests; rather these formulations seem to be—in a very pure sense—nonoriginalist judicial extrapolations.) Yet even the most wild-eyed reformer would hesitate to argue that these tiers of review should now be scrapped. Their place in constitutional law is simply too well-settled because they have been transparently used and theoretically justified in key Supreme Court decisions over a long period of time. In contrast, semisubstantive doctrines (or at least many of them) have not generated the same measure of open and persisting acceptance. As a result, they are marked by an inherent instability. And for this reason they have an exposure to large-scale retrenchment by the Court.

It is unlikely that the Rehnquist Court or a near-term successor will undertake a massive rollback of existing semisubstantive rules. It is important to acknowledge, however, that the thinness of these rules’ openly stated theoretical underpinnings renders this result at least a possibility. Whether this possibility becomes a reality will depend, more than anything else, on who comes to sit on the Supreme Court bench. And, again, it is important to acknowledge in this regard that Justice Stevens, the Court’s great champion of semisubstantive decisionmaking, is also its oldest member. No less important (and regardless of who next leaves the

727. See, e.g., supra notes 151–83 and accompanying text (discussing subtle similarity of concurring opinions in Thompson and Kimel).
728. See supra notes 616–32 and accompanying text (discussing views of Justice Stevens). Justice Stevens was born in 1920. The Court’s next oldest member, Chief Justice Rehnquist, was born
Court), President Bush seems eager to appoint new Justices who share the philosophies of Justice Scalia, the Court’s harshest critic of semisubstantive styles of review. One never knows how these things will turn out. But the often-evidenced judicial ambivalence about stronger forms of semisubstantive decisionmaking (as well as the under-theorization of those rules that that ambivalence in part reflects) creates an opening for rethinking and reform. At the very least, a departure from the Court by Justice Stevens during the Bush presidency would surely decrease a strong existing pull toward endorsement and use of broad-based semisubstantive review.

CONCLUSION

In the final days of its October 2000 term, the Supreme Court handed down two high-profile decisions in which it vindicated constitutionally grounded claims of resident aliens by deploying “how”-based clarity doctrines. Reflecting on these rulings, New York Times columnist Anthony Lewis observed that “[t]he court’s approach, reading a law narrowly to avoid a serious question of individual rights, used to be fairly common in the Supreme Court [but] it had not been seen lately.” This comment is off the mark. While the Rehnquist Court has expanded the use of aggressive clear statement doctrines to protect interests in state autonomy, it has not backed away from simultaneously invoking those same doctrines to protect individual interests in liberty and equality. Indeed, as this Article reveals, the Court has deployed a rich variety of clarity rules to safeguard all sorts of constitutional values. It has done so as part of a much larger, though little recognized, program of applying “how” rules, “why” rules, “when” rules, and “who” rules to protect in provisional ways almost every constitutional value there is.

in 1924. All other sitting Justices were born in the 1930s, with the exception of Justice Thomas, who was born in 1948.

729. See supra note 31 and accompanying text.
731. Anthony Lewis, Abroad at Home; At the Heart of Liberty, N.Y. TIMES, June 30, 2001, at A15.
732. See supra notes 79–119 and accompanying text.
733. See, e.g., supra note 76 (citing Jones case concerning jury trials; X-Citement case concerning free speech; Gomez case regarding felony defendants’ rights to Article III judges; and Edward J. DeBartolo case concerning free association); supra note 49 (citing Castillo case about the jury right); supra notes 44–47 (discussing St. Cyr case regarding habeas corpus jurisdiction and Webster case regarding court authority to review constitutional questions). See also supra note 56 (citing Johnson ex post facto law case).
734. See generally supra notes 39–183 and accompanying text.
The bottom line is that the Rehnquist Court is broadly open to using semisubstantive doctrines to protect constitutional values, particularly (though not exclusively) when federalism values make a claim for judicial protection. At the same time, the Justices have often expressed ambivalence about the most aggressive uses of semisubstantive analysis.735 Because of this ambivalence, there is reason to suspect that near-term changes in the Court’s membership might weaken—and perhaps weaken greatly—its existing commitment to semisubstantive review.736

Predicting the course of constitutional law is a business fraught with difficulty. Here, as elsewhere, the best guide to the future may lie in the recent past. And if the recent past is our guide, it clearly suggests one thing. Semisubstantive analysis—rooted in practical notions of decisional minimalism and judicial restraint—will continue to play a prominent part in the Court’s protection of substantive constitutional values.

735. See supra notes 717–27 and accompanying text.
736. See supra notes 728–29 and accompanying text. This possibility is enhanced by the current Court’s marked tendency to decide important cases by five-to-four votes. See Greenhouse, supra note 715, at A12 (noting that thirty-three percent of Court’s decisions during it 2002–01 term came in five-four rulings).