HERESTHETICAL MANEUVERS AND THE FEDERALISM DIMENSION IN RECENT US SUPREME COURT CASES

By
Marko Radenović

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Supervisor: Professor Anton Pelinka

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Abstract

Relying on Riker's concept of heresthetics and using the analytical narrative approach, the thesis offers a possible reconstruction of the reasons and actions behind the demise of the "federalism revolution" in the recent US Supreme Court Commerce Clause jurisprudence. By focusing on three interrelated cases – OCBC, Raich and Oregon – it argues that their outcomes and effects can be completely explained by assuming heresthetical maneuvers on the side of the Court's liberal-antifederalists. Frustrated by the string of 5:4 decisions that have curbed the powers of Federal Government, the liberals have applied heresthetical moves in order to divide the conservative-federalist majority. Their actions have been successful and they scored an anti-federal victory in Raich and liberal victory in Oregon. The hypothesis is substantiated by findings obtained through discourse and content analysis, and successfully tested on the repeated Court of Appeals trial in Raich.

Introduction

Starting with the early 1990s there has been a noticeable pro-federalist trend in the US Supreme Court jurisprudence. The "federalism revolution"[1] under the leadership of Chief Justice Rehnquist sought to limit the regulating powers of Congress and strengthen those of the States. This has seemed to indicate an end of a decades-long expansion of Congress' power, which was first set in motion to accommodate the ambitious agenda of the New Deal legislation.

Following the ascendance of Justice Rehnquist to the position of Chief Justice and a series of Republican appointees to the Court during Reagan/Bush era, tide has started to turn. Young identified Court's decision in *Gregory v. Ashcroft* (1991)[2] as the starting point of the federalist revolution. Since then Court has enacted pro-federalist jurisprudence in many different areas. Relying on the doctrine of the sovereign immunity, it has dramatically increased the legal immunity of the states and their employees in the string of cases like *Seminole Tribe v. Florida* (1996)[3], *Idaho v. Coeur d'Alene Tribe of Idaho* (1997)[4] and *Alden v. Maine* (1999)[5]. It has also decided against the commandeering of the state resources for the enforcement of federal legislation, most notably in *New York v. United States (*1992)[6] and *Printz v. United States* (1997)[7].

The most important cases (at least in the symbolic sense) were *United States v. Lopez* (1995)[8] and *United States v. Morrison* (2000)[9], which significantly limited the scope of

[1] See Vicki Lens, "The Supreme Court, Federalism, and Social Policy: The New Judicial Activism." *Social Service Review* 75 (2001): 318–336
[2] 501 U.S. 452 (1991)
[3] 517 U.S. 44 (1996)
[4] 521 U.S. 261 (1997)
[5] 527 U.S. 706 (1999)
[6] 505 U.S. 144 (1992)
[7] 521 U.S. 898 (1997)
[8] 514 U.S. 549 (1995)
[9] 529 U.S. 598 (2000)

Congressional regulatory power as derived from the Commerce Clause of the US Constitution. *Lopez* was actually the first case in nearly sixty years in which Court struck down a Commerce Clause-based federal regulation. A crucial fact here is that all of the federalist cases after *Lopez* were hotly debated minimal majority (5:4) rulings with the same five conservative-federalist justices on one side, and the liberal-antifederalist faction firmly opposed.[10]

The conservative-federalist revolution, however, has started to slow down in early 2000s and then came to an abrupt halt with the Supreme Court decision in the case *Gonzales v. Raich* (2005).[11] *Raich* was a highly controversial case that has received a lot of media attention at the time. California (followed by a dozen other states) has passed a law allowing the use of marijuana for medicinal purposes. In a remarkable reversal of the usual voting patterns, the majority of Court's conservatives voted to uphold a law that would virtually decriminalize marijuana, whereas all of the Court's liberals voted against it. This gave an opportunity to Senior Associate Justice Stevens, the leader of the Court's anti-federalist liberals, to author the majority opinion in the case. Stevens seized this chance and wrote an opinion that almost completely isolated *Lopez* and *Morrison*, dismantling any serious restrictions on the Congress' Commerce Clause power. Having achieved the desired antifederalist outcome, the Court's left-wing proceeded to apply the same techniques, but this time to further their liberal preferences, as exemplified in a liberal-federalist ruling of *Gonzales v. Oregon* (2006).[12]

In my thesis, I will argue that the liberal-antifederalist minority on the Supreme Court has actively deployed various heresthetical maneuvers - including manipulation with the federalism dimension - in the string of socially controversial cases (*OCBC*, *Raich*, *Oregon*). This was done

[10] The history and scope of the federalist revival is well documented in E.A.Young's extensive article. See Ernest A. Young "The Rehnquist Court's Two Federalisms." *Texas Law Review* 83, no. 1 (2004): 1-165.
[11] 545 U.S. 1 (2005)
[12] 546 U.S. 243 (2006)

in order to divide the conservative-federalist majority and thus create the opportunity for antifederalists to eviscerate the most important part (at least in symbolic value) of the Rehnquist's "federalist revolution", namely its attempt at curbing the Congress' powers derived from Commerce Clause.

I will attempt to reconstruct what has actually happened in those three cases, relying on the analytical narrative approach and using Riker's insight on the heresthetical maneuvers in the decision-making process. While such a narrative presents only one possible explanation of a specific historical development, it has the advantage of making rather modest assumptions about the actors. I will try to demonstrate that if assume that the Justices are rational and well-informed actors acting under the institutional restraints specific to the US Supreme Court, we can offer an almost complete explanation of the underlying logic behind the *OCBC*, *Raich* and *Oregon* outcomes.

This could shed light not only on the cases analyzed, but also on the important aspects of decision-making in the context of the Supreme Court. Some of the insights thus gained could then serve to elucidate the decision-making process in any type of committee.

The conceptual framework for the analysis of heresthetical maneuvers was provided in William H. Riker's seminal article "The Heresthetics of Constitution-making: The Presidency in 1787, with Comments on Determinism and Rational Choice" (1984), and his subsequent book *The Art of Political Manipulation* (1986). In my study of three specific Supreme Court cases I will rely on the concept of "analytic narrative" popularized by 1998 book "Analytic Narratives".[13] An analytic narrative can be defined as "the presentation of crucial historical events, using the intuitions of rational choice theory, to clarify the motivations and beliefs of the

[13] Robert H. Bates, and others, eds. *Analytic Narratives*. Princeton: Princeton University Press, 1998.

principal actors."[14] In the construction of the analytic narrative I will apply content and discourse analysis on the various Court document, from decisions (majority d., concurrences and dissents) of the Supreme and lower courts, to transcripts of oral arguments before the Court.

Riker's concept of heresthetics, while subjected to fierce criticism[15], has also been recently employed in a numbers of articles dealing with the US Supreme Court. However, almost none of them apply the holistic heresthetical perspective, focusing instead on a single type of maneuver.[16] Also, none of them are case studies, being either theoretical analyses within the framework of institutionalist approach, or more often, being mainly concerned with the trends that can be derived from the statistical analysis of a large sample of cases or with constructing general models of heresthetical behavior on the Supreme Court.[17]

In the first chapter of my thesis I will first offer a brief overview of definitions of federalism, federative systems and federations as well as their characteristics. I will also outline the theoretical principles that have informed the abstract concept of federal system of government, and that are often used as arguments for its introduction or subsequent preservation. Beside these philosophical arguments, I will list the usual practical reasons for the creation or adoption of a federal structure. Furthermore, I will review the principles that are reflected in the actual internal organization of a truly federal state.[18] Finally, I will examine the historical origin and related specifics of American federal structure in the rest of this chapter, as well as federalism's place in the modern American political thought.

[14] Schofield, N. Evolution of the Constitution, *British Journal of Political Science*, 32 (2002), 1-20, 1

[15] See generally Iain McLean, "William H. Riker and the Invention of Heresthetic(s)," *British Journal of Political Science* 32, (2002): 535–558.

[16] With the exception of Epstein and Shvetsova (2002), but their analysis is limited to the potential heresthetical maneuvers by the Chief Justice, as a part of his institutional power.

[17] Granting of certiorari: Brenner and Krol (1989), Boucher and Segal (1995), Hendrickson (2003); signaling: Baird (2004), Baird and Jacobi (2005); signaling and federalism dimension: Baird and Jacobi (2006), manipulation with dimensions: McGuire and Palmer (1995), sophisticated voting: Johnson, Spriggs and Wahlbeck (2005), Arrington and Brenner (2004)….

[18] Of course, these principles mostly apply to modern day liberal-democratic federal systems.

The following chapter will deal with the institutional position of the Supreme Court in the political system of the United States. I will offer a possible classification of the sources of the Court's institutional power into constitutional, precedential, and structural sources. I will also point to the features of the system that limit the Court's institutional strength, from the constitutional rules to the process of the appointment of the Supreme Court Justices.

In the third chapter I will briefly present the crucial cases and paths of Rehnquist's "federalist revival" in the 1990s. I will also give a short overview of the Court's Commerce Clause jurisprudence before the "revolution". Special attention will be given to important rulings of the Rehnquist Court related to the Commerce Clause (cases *Lopez* and *Morrison*), as these are the most relevant for my analysis.

In the fourth chapter I will outline the key elements of Riker's theory of heresthetics. I will also describe the internal and external factors shaping the Court's decisionmaking process and present a more detailed scheme regarding possible heresthetical maneuvers on the Court. Finally, I will briefly explain the concept of the analytical narrative and its crucial characteristics.

The last chapter will be devoted to analysis of the actual usage of the various heresthetical maneuvers by the Justices on the Supreme Court in the string of related cases – *United States v. Oakland Cannabis Buyers' Cooperative*, *Gonzales v. Raich*, and *Gonzales v. Oregon*. By employing the analytic narrative approach, I will offer a plausible explanation behind the demise of Rehnquist's "federalist revolution", at least when it comes to Commerce Clause jurisprudence. I will demonstrate that this was due to active heresthetical behavior of the Court's liberal-antifederalist minority (or at least its leader, Justice Stevens) in those three cases. This gave them the opportunity to undermine *Lopez* and *Morrison* legacy in *Raich*, and uphold physician-assisted suicide in *Oregon*.

1. Federalism and its role in the United States

1.1. Federalism and federal systems of government

"In the tension between federal and state power lies the promise of liberty."

Justice O'Connor in *Gregory v. Ashcroft* 501 U.S. 452, 459 (1991)

Federalism can be understood as an abstract normative principle related to the organization of a political entity in which certain powers are delegated to a central authority, while others are retained by the sub-units.[19] Federative systems as a category comprise not merely federations, but also any other types of non-unitary states such as confederations or quasi-federations, in which there exists some distribution of power among two or more orders of government.[20] The specific nature of federation as a sub-type of federative systems was highlighted in Wheare's definition: "[Federation is a] system in which the relationship between the national and constituent governments, in law and in practice, is not subordinate but coordinate." Wheare also emphasizes the importance of the Constitution, which governs both orders of government.[21] Building on the works of notable scholars in the field, Watts offered a more detailed description of the federation and its crucial characteristics:[22]

[19] For the claim that federalism is a normative (rather than a descriptive) term, see for example Douglas V. Verney, Douglas V. "Federalism, Federative Systems, and Federations: The United States, Canada, and India." *Publius: The Journal of Federalism* 25, no. 2 (1995):83-4, and Ronald L. Watts, *Comparing Federal Systems*, 2d ed. Ithaca: McGill-Queen's University Press, 1999.: 6.

[20] See Douglas V. Verney, Douglas V. "Federalism, Federative Systems, and Federations: The United States, Canada, and India." *Publius: The Journal of Federalism* 25, no. 2 (1995): 84 or Ronald L. Watts, *Comparing Federal Systems*, 2d ed. Ithaca: McGill-Queen's University Press, 1999: 8-9

[21] Douglas V. Verney, Douglas V. "Federalism, Federative Systems, and Federations: The United States, Canada, and India." *Publius: The Journal of Federalism* 25, no. 2 (1995): 83. quoting K.C. Wheare. *Federal Government*, 4d ed. Oxford: Oxford University Press, 1963.

[22] Ibid, 83-84.

1. two orders of government each dealing directly on their citizens;
2. a formal constitutional distribution of legislative and executive authority and allocation of revenue resources between the two orders of government ensuring some areas of genuine autonomy for each order;
3. provision for the designated representation of distinct regional views within the federal policy-making institutions, usually provided by the particular form of the federal second chamber;
4. a supreme written constitution not unilaterally amendable and requiring the consent of a significant proportion of the constituent units;
5. an umpire (in the form of courts or provision for referendum) to rule on disputes between governments;
6. processes and institutions to facilitate intergovernmental collaboration for those areas where governmental responsibilities are shared or inevitably overlap;

Inman and Rubenfeld contend that the doctrine of federalism is anchored in three sets of values: efficient allocation of resources; political participation of citizens; and protection of basic liberties.[23] In her opinion in *Gregory v. Ashcroft* (1991), Justice O'Connor offered a very similar perspective when she summarized most of the standard theoretical arguments in favor of the federal structure of government:

*"It assures a decentralized government that will be **more sensitive to the diverse needs** of a heterogeneous society; it increases opportunity for **citizen involvement** in democratic processes; it allows for more **innovation** and **experimentation** in government; and it makes government more **responsive** by putting the States in competition for a mobile citizenry. […]*

[23] Robert P. Inman and Daniel L. Rubinfeld, "Rethinking Federalism." *The Journal of Economic Perspectives* 11, no. 4. (1997): 44.

*Perhaps the principal benefit of the federalist system is a **check on abuses of government power**. "The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties"*.[24]

Apart from these theoretical arguments, typical practical reasons for the top-down adoption of the federal system are a comparatively large territory (that can be governed more efficiently and effectively from the regional centers) and ethnic/cultural/regional diversity (which calls for a certain amount of self-rule for disparate communities). On the other hand, federal systems can also sometimes be founded bottom-up, as a Union of previously independent or semi-independent states. According to Riker's "military interpretation" of the US Constitution, whether such "bargain of federalism" will actually take place depends primarily on how much are the potential member-states willing to sacrifice some of their powers in order to expand their territorial control or combine the resources in defense from a common external threat.[25]

Regardless of the nature of its conception, Auer argues that a truly federal structure reflects three essential principles: autonomy (self-rule), superposition (limited rule) and participation (shared rule). Autonomy indicates that constituent sub-units of the federation possess more than just a number of delegated competences. Superposition denotes that these competences, as well as the manner of their use, are nonetheless subordinated to the federal legal order. Finally, participation implies that the two legal orders (state and federal) have to cooperate with each other, and it could be argued that this interlocking federalism is the most important aspect of federal government.[26]

[24] 501 U.S. 452 (1991): 458. Emphasis mine.
[25] William H. Riker, *Federalism: Origin, Operation, Significance*. Boston: Little, Brown, 1964. : 12-17.
[26] Andreas Auer, "The constitutional scheme of federalism," *Journal of European Public Policy* 12, no. 3, (2005): 421-2.

1.2. The importance and role of the concept of federalism in the creation of US

Facing a common enemy in the British Empire, thirteen original colonies have decided to join forces and create a Union "for their common defense, the security of their liberties, and their mutual and general welfare".[27] In November 1777, the Second Continental Congress had adopted the Articles of Confederation and Perpetual Union, as the first constitution of the newly formed United States. This covenant created a national government of very limited powers, whose authority was mostly confined to foreign relations, declarations of war and peace, fixing of the standards of weights and measures (including coins) and resolving disputes among the States. Even such weak grants of federal power were resisted in some States and the Articles were not ratified until March 1781.

However, after Revolutionary War ended, the Union has encountered various problems, from mutual trade wars to armed rebellions.[28] Such issues have prompted the delegates of the States to gather for the Constitutional Convention in Philadelphia and eventually adopt the Constitution of the United States on September 17, 1787. This new Constitution significantly expanded the authority of the federal government, yet it remained a government of the "enumerated powers".

The crucial difference between US, on one side, and most of other present-day federations on the other lies in the fact that the federal structure of the former was constructed bottom-up, while in the latter case the impulse was top-down. The US constitution superseded the loose confederate structure that was created through Articles of Confederation, where the former colonies had already enjoyed a significant degree of sovereignty. Thus it actually

[27] Article III, The Articles of Confederation and Perpetual Union.
[28] These include the Newburgh Conspiracy of 1783 and Shays' Rebellion of 1786-87.

represented a transfer of sovereign regulative powers from the "several states" to the new federal government. For this reason it had to be submitted for ratification to the legislatures and be approved by a qualified majority of the founding states.

It is important to emphasize, that in the case of US the principle of federalism was perceived not merely as a way to manage a large and diverse community, but also as one of the fundamental safeguards against the oppression by the Federal Government. Indeed, the concept of the division-of-powers was perceived from the very beginning as a crucial American contribution to modern political theory and practice, equally important for the preservation of freedoms as the liberal concept of the separation-of-powers.[29] For the Founding Fathers, Verney argues, federalism represented "an end in itself".[30] It inevitably implied a set of principles such as separation of powers, limited government, checks and balances, liberalism and judicial review. Moreover, Auer asserts that the idea of federalism was the most outstanding invention of the Founding Fathers, surpassing in relevance the concepts of written constitution, separation of powers or even democracy itself.[31]

However, due to historical circumstances related to unresolved race issue in the South, and following the subsequent constitutional battles for the preservation of racial discrimination at

[29] See William H. Riker, *Federalism: Origin, Operation, Significance*. Boston: Little, Brown, 1964. : 6-8, describing United States as the birthplace of modern, centralized type of federalism,

[30] Douglas V. Verney, Douglas V. "Federalism, Federative Systems, and Federations: The United States, Canada, and India." *Publius: The Journal of Federalism* 25, no. 2 (1995): 83.

[31] Andreas Auer, "The constitutional scheme of federalism," *Journal of European Public Policy* 12, no. 3, (2005): 420. It is interesting to note that although some of Madison's articles written for The Federalist (especially No. 45 and 51) are now quoted as crucial arguments by the proponents of judicial federalism, during the Constitutional Convention Madison himself was more inclined towards the concept of strong national government. In fact most of the features of American federalism were born out of opposition to Madison's so-called "Virginia plan" which envisioned a federal legislative elected directly by the people that would elect the President and would have a veto power over any state laws. However, even though most of his initial plan got rejected in the power struggle and political maneuvering during the Constitutional Convention, Madison nevertheless later wrote pamphlets arguing in favor of the ratification. For a detailed analytical narrative concerning the Constitutional Convention and the choice of method of selecting the President see generally Riker (1984). For a detailed account Madison's initial proposal and the struggle between Madison and Roger Sherman, who represented the small states interests, see generally David Brian Robertson, "Madison's Opponents and Constitutional Design." *American Political Science Review* 99, no. 2 (2005): 225-43.

least on the level of States, the idea of federalism became closely interlinked with overtly racist States' Rights movement. Coupled with Supreme Court's use of federalism arguments to strike down immensely popular New Deal legislation, by the middle of 20th century instead of being seen as one of the instruments for the preservation of freedom, federalism has become a synonym for anti-progressivism. This has prompted Riker to dryly dismiss federalism in United States as benefiting primarily "capitalists, landlords and racists". He concluded his admonition by stating: "Thus if in the United States one disapproves of racism, one should disapprove of federalism."[32] Things have changed since 1964, and federalism has once again risen in stature among political scientists. It has been rehabilitated by other societal actors, as well, which is evident in Court's recent federalism jurisprudence.

1.3. Federalism in the US Constitution

We have already mentioned the power-struggle of the smaller states and anti-federalists against the more populous states couple with advocates of strong of federal government. Partly because they were created by semi-independent former colonies, who wanted to preserve their interests and equal status in the future Union, partly because such a covenant was a completely novel and yet-to-be-proved concept, the United States at the time of its formation represented a federal structure with a rather weak central government.

Article I, section 8 of the Constitution of the United States specifically lists the Powers transferred from the States to Congress. The supremacy of Congress *vis-à-vis* the States, when regulating under these powers, is confirmed in paragraph 2 of Article VI. The authority of

[32] William H. Riker, *Federalism: Origin, Operation, Significance*. Boston: Little, Brown, 1964.: 155

federal government in relation to the States was subsequently subjected both to further limitation (Tenth and Eleventh Amendment), as well as expansion (primarily Fourteenth and Sixteenth Amendment). I will briefly focus only on the more ambiguous, and thus more controversial, sources of Congressional powers, which have been the battleground of the most federalism clashes in the past two centuries. It should be emphasized that the Ninth and Tenth amendment specifically reserve all other rights and powers to People and States, respectively.

1.3.1. Constitutional grants of regulatory powers to the Federal Government

1.3.1.1. Taxing and Spending Clause (Article I, Section 8, Clause 1)

This clause gives Congress the right to tax and spend in order to repay the various debts incurred by the federal government, including the resources spent for the "common defence" and "general welfare".[33] The taxing power was restricted by several clauses in Section 9 of Article I - limiting direct taxes (cl. 4) and prohibiting taxes and duties on "articles" exported from any State (cl. 5).[34] The limit on direct taxes was later abolished by the Sixteenth Amendment. The spending power, on the other side, is limited only by the Congress' obligation to occasionally publish the "account of the receipts and expenditures".[35] Due to unclear meaning of the phrase "general welfare", the limits of Taxing and Spending Clause sometimes had to be determined by a Supreme Court decision. The Court eventually adopted a broad interpretation in *United States v. Butler* (1936), claiming that Taxing and Spending represented an independent power of Congress.[36]

[33] Art. I, § 8, cl. 1 of the Constitution of the United States.
[34] Art. I, § 9, cl. 4 and cl. 5 of the Constitution of the United States.
[35] Art. I, § 9, cl. 7 of the Constitution of the United States.
[36] 297 U.S. 1 (1936). Such broad discretionary powers of Congress were later confirmed in *South Dakota v. Dole*, 483 U.S. 203 (1987) and *Sabri v. United States*, 541 U.S. 600 (2004).

1.3.1.2. Commerce Clause (Article I, Section 8, Clause 3)

"The Congress shall have Power […] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". One of the most heated debates in American constitutional law is over the meaning of the word "commerce". This stems from the fact that Commerce Clause represents the most ambiguous and thus the most powerful of all grants of power to Congress. As the number of areas for which a uniform nationwide regulations were necessary or preferable increased over time, Commerce Clause has been used as a foundation for numerous legislations, from New Deal to anti-segregation to environmental protection.

1.3.1.3. Necessary And Proper Clause (Article I, Section 8, Clause 18)

Unlike other Section 8 clauses vesting specific regulatory powers, the so-called Necessary And Proper Clause gives Congress a wide authority to legislate in order not only to successfully execute the enumerated powers, but also "all other Powers" given to the national government. It is thus sometimes referred to as "Elastic Clause"[37] and is often coupled with other grants of authority as a base for nationwide legislation. Higgins has argued that it served as a "safety valve in an otherwise dangerously rigid constitution" enabling the Congress to exercise powers that the Constitution "ought to have, but has not" transferred to Federal Government.[38]

[37] See for example Henry Bournes Higgins, "The Rigid Constitution." *Political Science Quarterly* 20, no. 2. (1905): 211 for an early reference and Pious, Richard M. "Inherent War and Executive Powers and Prerogative Politics." *Presidential Studies Quarterly* 37, no. 1 (2007): 68 for a very recent one.
[38] See Higgins, 211.

1.3.1.4. Supremacy Clause (Article VI, Paragraph 2)

The Supremacy Clause declares that the Constitution and all the federal laws and treaties (provided they are constitutional) are "the supreme Law of the Land".[39] It also adds that the judicial branch, including the judiciary of States, is bound to follow this rule in its opinions, regardless of possible contrary provisions in the constitutions or laws of any State. The concept of federal preemption of state laws is derived from this Clause. The Act of Congress can explicitly announce that a law or laws of several States are thereby preempted, provided it is within the Congress' authority to do so. This is known as express preemption. However, legal theory and judicial practice also recognize several types of implied preemption, in which the federal law trumps the state law in reality (subject to same limitations as "explicit preemption").

1.3.1.5. Due Process and Equal Protection Clause (Amendment XIV, Section 1, Clause 2)

Forbidding the States from depriving "any person of life, liberty, or property, without due process of law" and denying "any person within its jurisdiction the equal protection of the laws", this Clause is not primarily considered as empowering the Congress. However, given that the words "due process" and "equal protection" imply strict adherence to a certain standard, the federal government has often cited their violations on the side of the States as a rationale to pass the uniform national regulations. Several important federalism cases, like *Boerne*, *Kimel*, *Morrison*, *Garrett* and *Hibbs* involved "Equal Protection" issues. Due Process was successfully invoked against the States in *Tennessee v. Lane* (2004) and unsuccessfully against the Federal Government in *Raich* and related rulings.

[39] Art. VI, par. 2 of the Constitution of the United States.

1.3.1.6. Section 5 of Fourteenth Amendment

Sometimes referred to as the Necessary and Proper Clause of the Fourteenth Amendment, because it serves a similar purpose by granting Congress "the power to enforce" the Amendment's provisions regarding the States. Since the Fourteenth Amendment was enacted after the Civil War, it had the express intention of abrogating the rights of the States and assuring the uniform application of the progressive federal legislation against any State opposition. Thus it represented a dramatic shift in the constitutional arrangement of United States, empowering the federal government and subjecting the States to increased scrutiny when it came to individual rights.

2. Position of the Supreme Court in the political system of United States

In 1962 legal scholar Alexander Bickel described the Supreme Court as the "least dangerous branch"[40], following a similar reasoning offered by Alexander Hamilton during the ratification debates almost two hundred years earlier. In Federalist No. 78, Hamilton argued that while the executive "dispenses the honors" and "holds the sword" and legislative branch "prescribes the rules" and "commands the purse", the judiciary had no such powers and was actually dependent on the executive for the implementation of its rulings.[41] Moreover, the Court's role regarding the Congress and State legislatures remained a merely reactive one, limited by the case or controversy rule.[42] However, despite these limitations the Supreme Court has accrued a great amount of institutional power over the years.

2.1. Sources of the Court's institutional power

2.1.1. Constitutional sources

The Supreme Court of the United States was explicitly set up by Article III, Section 1 of the US Constitution declaring, "the judicial Power of the United States shall be vested in one supreme Court […]". Supreme Court is the highest court in the country and has both original and appellate jurisdiction. Its members are appointed for life, and hold their positions "during good

[40] See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. New Haven : Yale University Press, 1986.
[41] Alexandar Hamilton, John Jay, and James Madison. *The Federalist or the New Constitution*. London: J.M. Dent & Sons Ltd., 1926. No. 78.
[42] Although there were debates during the Constitutional Convention concerning the creation of the "council of revision" - a body that would scrutinize the new laws passed by the legislature and had the option of rejecting them - such ideas were eventually abandoned. See Stephen P. Powers and Stanley Rothman. *The Least Dangerous Branch? Consequences of Judicial Activism*. Westport: Praeger Publishers, 2002. p4.

behavior". This implies that the only way for a Justice to be removed from the Court (aside from resignation) is by Congressional impeachment and subsequent conviction. Since only one Supreme Court Justice has ever been impeached (Samuel Chase in 1804-5) and none have been convicted, this assures considerable autonomy of the Justices, and subsequently the Court itself. Another protective Clause expressly prohibits Congress from reducing the Justices' salaries while they are in office. However, as Toma points out, the Congress could still put a pressure on the Court by reducing its budget for all other expenses, including the wages of the Court's clerks and other personnel.[43]

2.1.2. Precedential sources

Throughout more than two centuries of its existence, the Court has managed to accumulate considerable powers through the interaction with the other institutional players, from Congress and President on one side, to States and state legislatures on the other. Due to often ambiguous and imprecise nature of the Constitution, the Court has been able to define the scope of its own authority within the system. This was done through a series of rulings (or precedents) establishing Court's supremacy as the arbiter in conflicts including other branches or different orders of government. The other institutional actors in the system, often pitted against each other, have in time acquiesced with such role of the Supreme Court, as charted by its precedents.

The most famous example is the power of independent judicial review that was not explicitly conferred to the Court, but has been inaugurated as a doctrine by Chief Justice Marshall in case *Marbury v. Madison* (1803). His novel invention soon became the cornerstone of the US liberal-democratic political system, and has later been copied by practically every

[43] See Eugenia Froedge Toma, "Congressional Influence and the Supreme Court: The Budget as a Signaling Device." *The Journal of Legal Studies* 20, no. 1. (1991): 131-146.

democratic Constitution in the world. With *Marbury*, the Supreme Court has gained the privilege to be the sole interpreter of the Constitution, which had significantly increased its relative power within the political system.

However, in the beginning, the Supreme Court even had to assure its supremacy over the federal and state judiciary, which was mostly accomplished through its rulings in *Chisholm v. Georgia* (1795)[44], *Ex parte Bollman* (1807)[45], *United States v. Hudson and Goodwin* (1812)[46], *Martin v. Hunter's Lesse* (1816)[47] and *Cohens v. Virginia* (1821)[48].

A recent example of the Court asserting its position in relation to the other institutional actors in the political system was the case of *City of Boerne v. Flores* (1997)[49]. In *Boerne*, the Court was reviewing the constitutionality of Religious Freedom Restoration Act of 1993. RFRA was enacted by Congress in response to the previous decision in *Employment Division v. Smith* (1990)[50] where the Supreme Court ruled that the States reserved the right not to tolerate otherwise illegal acts done as a part of the religious practice (for example, the consumption of the peyote drug). Ruling in *Boerne* declared that only the Court itself had the right to define which civil rights were protected by the Fourteenth Amendment. The Court has thus affirmed its position as the sole interpreter of the Constitution, as well as sent signals to the Congress that such future legislative overrides of the Court rulings would be struck down.

[44] 2 U.S. 419 (1795)
[45] 8 U.S. 75 (1807)
[46] 11 U.S. 32 (1812)
[47] 14 U.S 304 (1816)
[48] 19 U.S. 264 (1821)
[49] 521 U.S. 507 (1997)
[50] 494 U.S. 872 (1990)

2.1.3. Structural sources

However, beside the specific grants of authority in the Constitution and those that the Court has later managed to secure for itself), there are at least two structural sources of Supreme Court's power vis-à-vis the Federal Government and the States.

First source of power is related to the two specific features of the US Constitution, namely its brevity and its rigidity. The US Constitution is very terse and condensed, which gives the Court both more opportunities for review and greater freedom in interpretation. The other important feature is the flexibility/rigidity of the Constitution itself, in the sense of special conditions attached to the ratification of the constitutional amendments. The more rigid a Constitution is, the harder it is for the legislature opposing the specific constitutional readings offered by the Court to counter those by simply passing amendments on the Constitution. From this perspective, the US Constitution is very rigid, requiring the approval of at least two-thirds of members of both the House and the Senate, as well as the support of at least three-fourths of state legislatures. The fact that in nearly 220 years of its existence, the US Constitution has been amended only 27 times, clearly illustrates its rigidity, and indirectly the importance and institutional strength of the Supreme Court.

Second source is derived from the federal structure of the American political system. Watts' list of the important features of federations explicitly cites the existence of a written constitution and the existence of an umpire.[51] A federal constitution thus has to offer the answers to the issues of defining the units, allocating powers, and setting up a scheme to resolve the

[51] Ronald L Watts, *Comparing Federal Systems*, 2d ed. Ithaca: McGill-Queen's University Press, 1999.: 7

inevitable conflicts between the orders of government.[52] The last problem often entails a great deal of constitutional adjudication. It is no surprise that all the early landmark Supreme Court cases involved federalism issues. The Court had to provide answers regarding the authority of federal government in relation to the States in cases like *McCulloch v. Maryland* (1819)[53], *Gibbons v. Ogden* (1824)[54], or Willson v. Black-Bird Creek Marsh Co. (1829)[55]. Sometimes the Court was asked to resolve disputes between the legislative and the executive, as in *Little v. Barreme* (1804)[56]. Through this practice of conflict resolution, the Court effectively became an essential part of the system upon which all the other institutional actors relied and whose decisions were, if grudgingly, obeyed.

2.2. Limits on the Court's institutional powers

Despite the considerable growth of Court's power in the last two centuries, Court's actions are still significantly limited by the so-called "case or controversy rule" (Article III, Section 2). This rule specifies that the Court can only strike down the legislative or executive decisions that were challenged in the court of law. In practice this means that the Court cannot nullify the laws enacted by the legislatures immediately following their passage, but has to wait until the case disputing them passes the whole judicial hierarchy and appears before the Supreme Court.

I have mentioned the rigidity of the Constitution as one of the sources of Court's power. Although the Court is the sole constitutional interpreter, it has to adhere to the letter of the

[52] Andreas Auer, "The constitutional scheme of federalism," *Journal of European Public Policy* 12, no. 3, (2005): 423-5
[53] 17 U.S. 316 (1819)
[54] 22 U.S. 1 (1824)
[55] 27 U.S. 245 (1829)
[56] 6 U.S. 170 (1804)

Constitution. Whenever it was in the opportunity to successfully do so, a Federal Government faced with an unfavorable Court interpretation sought to circumvent it by passing constitutional amendments. The first Amendment to be passed after the Bill of Rights was enacted in response to a Supreme Court decision, and it was aimed at curbing the Court's jurisdiction. Apart from the Eleventh, at least three other Amendments (Thirteenth, Sixteenth and Twenty-sixth) were passed in order to override Court's previous constitutional decisions.[57]

There are some important limitations that affect the Court's ability to act as a completely independent institutional actor. Both of them are related to the process of the appointment of Justices. First of all, the US Supreme Court is indirectly controlled by the other two branches through the process of the appointment of its members (unlike for example its Indian counterpart). The Supreme Court Justices are appointed by the President, and have to be approved by the Senate majority.[58]Another limit is more hypothetical and it regards the number of Justices on the Court. Since it has never been constitutionally specified, the number of the Court members has actually varied between six and ten during the first eighty years. Only since the mid-19th century has the Court been composed of a Chief Justice and eight Associate Justices.[59] However, since that number was defined by a mere Act of Congress, it did not require a constitutional amendment to be changed. Indeed, in 1937, President F.D. Roosevelt, frustrated by the Court's opposition to New Deal legislation, has seriously pushed for the Judiciary Reorganization Bill (also known as the Court-packing plan), that would allow him to appoint an extra Justice for each present Justice older than 70 years and six months. In order to save the

[57] See Roger Handberg and Harold F. Hill Jr. "Court Curbing, Court Reversals, and Judicial Review: The Supreme Court versus Congress", *Law & Society Review* 14, no. 2. (1980): 309-322.
[58] Art. II, Sec. 2, The Constitution of the United States.
[59] More specifically, the present number was defined in Circuit Judges Act of 1869.

institutional position of the Court, some of its members switched votes and the Court-packing plan eventually died in the Senate.[60]

[60] See for example Lucas J. Powe, *The Warren Court and American Politics*, (Cambridge, Massachusetts: Harvard University Press), 2001: 1-5.

3. The Supreme Court and the "Federalism Revolution"

> "*We start with first principles. The Constitution creates a Federal Government of enumerated powers*."
>
> Chief Justice Rehnquist in *United States v. Lopez* (1995), 514 U.S. 549, 552

Ever since he was appointed to the Court in 1972, Justice Rehnquist advocated and put in practice his own vision of "judicial federalism". However, it was only after the retirement of the liberal Justice Marshall in 1991, and his replacement with a conservative G.H.W. Bush appointee, Clarence Thomas, that the balance on the Court has finally tipped towards judicial federalism. However, it was not Rehnquist himself who authored the first two important federalist opinions. The Chief Justice assigned this important task to O'Connor, who in some cases proved to be the most adamant federalist on the Court, beside Rehnquist himself.[61]

Although it is hard to draw a clear line, Young[62] argues that the decision that marked the beginning of the "New Federalism" era was Court's ruling in *Gregory v. Ashcroft* (1991).[63] Writing for the majority, Justice O'Connor has concluded that Congress, when intruding in the areas of state authority, regardless whether it legislates based on Commerce or Section V power, must satisfy the "clear statement" rule in the language of the statute.[64] A year later, in *New York v. United States* (1992), O'Connor declared that Congress had no authority to effectively "commandeer" State resources into enforcing the federal legislation.[65] This was followed by

[61] O'Connor wrote forceful dissents in both *Dole* and *South Carolina v. Baker*, 485 U.S. 505 (1998) (where she was the lone dissenter), proving that in some cases she was willing to go even further than Rehnquist himself.
[62] Ernest A. Young "The Rehnquist Court's Two Federalisms." *Texas Law Review* 83, no. 1 (2004): 2, n.1.
[63] 501 U.S. 452. It should also be noted that a very similar argument can be found in Scalia's majority opinion in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), delivered only four days later, on June 24, 1991.
[64] Ibid, 456-70.
[65] 505 U.S. 144, p177-183

several years of relative ceasefire, during which the "Second Rehnquist Court" had its final shape (with the Clinton appointees Ginsburg replacing White in 1993 and Breyer replacing Blackmun in 1994).[66] That lineup would remain unchanged until Rehnquist's death in September 2005.

The 1990s also saw a series of cases in which the Court dramatically expanded the concept of Sovereign Immunity, a common law doctrine rooted in the idea that the lawgiver (once monarch, today the state) cannot break the law and/or be sued.. In *Seminole Tribe v. Florida* (1996)[67] the Court has concluded that the States enjoy immunity from federal laws before the federal courts. This was followed by the Court's decision in *Alden v. Maine* (1999)[68] that the States enjoy immunity from the federal laws even before their own, state courts. In addition, the Court has declared in *Idaho v. Coeur d'Alene Tribe of Idaho* (1997)[69] that not only the States, but also State employees acting in official capacity are immune from the suits based on federal laws. The Court repeated its newly acquired position that the Sovereign Immunity was a pre-Constitutional right that, since it was not explicitly relinquished upon entering the Union, should be considered as retained by the States.

3.1. The Commerce Clause jurisprudence before the "federalism revolution"

In a landmark case of *Gibbons v. Ogden* (1824), Chief Justice Marshall offered a broad interpretation of the Commerce power by arguing that it included interstate navigation i.e. not

[66] See Thomas W. Merrill, "The Making of the Second Rehnquist Court: A Preliminary Analysis," *St. Louis University Law Journal* 47, no. 3 (2003): 570
[67] 517 U.S. 44 (1996).
[68] 527 U.S. 706 (1999).
[69] 521 U.S. 261 (1997).

only the act of commerce itself, but also the means of transportation.[70] He also further expanded the reach of Commerce Clause regulation, contending that only the "completely internal commerce of a State", which does not affect any other State and "with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government ", should be regarded as reserved for the States.[71]

Despite Marshall's enormous authority, the Court has later taken a mixed view of this interpretation. Typical example is the ruling in *United States v. E.C. Knight Co.* (1895)[72] in which the Court made distinction between manufacture and commerce and concluded that the that a trust controlling 98% of the sugar refining capacity in the United States could not be reached by the anti-trust Sherman Act. However, with the further integration of national economy, such rationale was sometimes hard to defend, so the Court would occasionally expand Commerce Clause as in *Standard Oil Co. of N. J. v. United States* (1911)[73], only to restrict it again in cases like *Hammer v. Dagenhart* (1918)[74]. It was not until 1937 and the Court-packing plan, that the Court adopted a consistent position on the Commerce Clause. Its 5:4 decision upholding the federal regulation in *NLRB* v. *Jones & Laughlin Steel Corp*. (1937)[75] marked the turn of the tide.

However, the biggest expansion of the Commerce Clause came with the Court's decision in *Wickard v. Filburn* (1942)[76]. Filburn was a farmer who grew wheat on the acreage larger that the one allowed by the Agricultural Adjustment Act, a federal law intended to regulate the interstate market and the prices of the agricultural products. When the authorities learned of this,

[70] 22 U.S. 1, 192-3 (1824)
[71] 22 U.S. 1, 195 (1824)
[72] 156 U.S. 1 (1895)
[73] 221 U.S. 1 (1911)
[74] 247 U.S. 251 (1918)
[75] 301 U.S. 1 (1937)
[76] 317 U.S. 111 (1942)

he was forced to pay a federal penalty tax. Filburn appealed, arguing that he used excess wheat to feed his family and livestock. Since his case involved intrastate production and intrastate consumption, and not interstate commerce, the Federal Government should not have had the powers to regulate it. The Court, however, unanimously rejected such argument, concluding the following: wheat market was an interstate market; Congress has the right to regulate interstate market, including the price and the quantity of wheat on sale; by consuming the excess wheat, Filburn has excluded himself as a potential buyer from the interstate wheat market; his actions have thus lead to the decrease in demand on the interstate market, affecting the price of wheat. The Court in *Wickard* has for the first time applied the concept of "cumulative effect" – which meant that the Congress had the right to regulate even the individual action whose effects were insignificant, if the cumulative effect of all such actions on the interstate level significantly effects trade. As far as the scope of the regulation is concerned, the Court made the following conclusion:

> "But even if appellee's activity be local and though it may not be regarded as commerce, it may still, ***whatever its nature***, be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"[77]

3.2. Commerce Clause jurisprudence during Federalism Revolution of the 1990s

If there ever was a dispute which case to take as the starting point of the "federalist revival", there is no doubt that it was *United States v. Lopez* (1995)[78] that had launched Rehnquist's federalist agenda into the limelight. The purely practical consequences of *Lopez* decision, in which a 5:4 majority led by Rehnquist invalidated the 1990 federal Gun-Free School

[77] 317 U.S. 111, 125 (1942)
[78] 514 U.S. 549 (1995).

Zones Act[79] (making possession of firearms in school zones a federal offense), were mostly negligible.[80] However, the symbolic effect of the ruling was immense. *Lopez* was the first case since 1937 and the New Deal legislation in which Court struck down a Commerce Clause-based federal regulation arguing that the Congress had exceeded its constitutional powers. Relying on the analysis offered by majority in *Perez v. United States* (1971)[81], Rehnquist claimed that the Commerce Clause bestows the power on Congress to regulate the following categories[82]:

1. the use of the channels of interstate commerce.

2. the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.

3. [intrastate] activities that substantially affect interstate commerce.

The disputed legislation in *Lopez*, Rehnquist argued, could only be considered under the third category of *Lopez* test. However, he proceeded, when passing the Act the Congress has not offered enough evidence that the regulated activity (possession of gun in the school zone), even when accounting for aggregate effects, could substantially affect interstate commerce. To uphold such a law would require "[piling] inference upon inference" and would effectively give Congress a "general police power" that is constitutionally reserved for States.[83]

While they have joined Rehnquist's majority opinion, Court's moderate conservatives (Kennedy and O'Connor) also qualified their position in a Kennedy-penned concurrence describing the decision as a "*necessary* though *limited* holding".[84] On the other hand, in expressing their dissatisfaction with the ruling, the four liberals on the Court authored as much as

[79] 18 U.S.C. § 922(q).
[80] In his concurring opinion, Kennedy pointed out that "over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds." 514 U.S. 549, 581-2 (1995)
[81] 402 U. S. 146 (1971)
[82] 514 U.S. 549, 558-9 (1995)
[83] 514 U.S. 549, 567 (1995)
[84] 514 U.S. 549, 568 (1995) Italics mine.

three dissents. The voting pattern that has emerged in *Lopez*, with a sharp division between the five conservatives (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) and the four liberals (Stevens, Souter, Ginsburg, and Breyer)[85], will recur in almost all crucial cases of Rehnquist's New Federalism. Indeed, the outer limits of this revolution would eventually be defined through the defection of either Kennedy or O'Connor from the federalist agenda.

Although *Lopez* presented a watershed in Commerce Clause jurisprudence, it was still in its essence a very tentative holding, one that merely required of Congress to do some "homework" and provide congressional findings of the substantial aggregate effects when legislating under Commerce Clause. However, Court's subsequent ruling in *United States v. Morrison* (2000)[86], striking down federal Violence Against Women Act (VAWA), went one major step further in curbing the power of Congress. Writing for the majority, Rehnquist first conceded that, unlike in *Lopez* case, Congress had indeed made numerous findings of substantial aggregate effects of gender-based violence on interstate commerce prior to enactment of VAWA.[87] However, Rehnquist maintained that the strength of these findings was "substantially weakened" because they relied on the "method of reasoning" that the Court already rejected in *Lopez*.[88] If the Court accepted Congress' argument, there would be nothing to prevent Congress from regulating any crime "as long as the nationwide, aggregated impact of that crime has substantial effects" on interstate commerce.[89] In short, with *Morrison* the Court specifically barred Congress from regulating non-economic activities if the aggregate effects on interstate commerce were only "attenuated". This time O'Connor and Kennedy joined the majority without separate concurrence, and Court's liberals wrote two bitter dissents.

[85] Ernest A Young. "The Rehnquist Court's Two Federalisms." *Texas Law Review* 83, no. 1 (2004): 6.
[86] 529 U.S. 598 (2000)
[87] Ibid, 614
[88] Ibid, 615
[89] Ibid.

4. Heresthetics and analytical narrative

4.1. Heresthetical maneuvers

In my analysis I will rely primarily on William Riker's concept of *heresthetics* as "the art of political manipulation", offering the apparent losers in the political process an opportunity to reverse their fortune. While rhetoric relies on the strength of arguments (and debating skills) as means to persuade enough members of the majority to switch sides, heresthetics is about constructing the situation in such a way that others want to join your side or at least feel compelled by circumstances to do so. That is the crucial feature of heresthetics – it does not refer to pure psychological manipulation of other players, but to techniques used to redefine the whole structure of the game within which the interactions take place.[90] Riker has identified three general categories of heresthetical maneuvers utilized by the minority in order to split the majority in a decision-making process. [91]

It has to be noted that Riker's definition of the heresthetical maneuvers is somewhat limited and over-deterministic, and thus fails to take into account the probabilistic nature of the possible outcomes of the dispute. If we accept a more realistic assumption that the players are simply managing the probability of the preferred outcomes (which allows us to include the residual element of chance), we can extend our analysis to both sides in the conflict. By relying on heresthetical maneuvers, minority leaders try to turn the unfavorable situation around and create a majority coalition that will support at least some of their preferences. However, the members of the original majority can make similar moves, either as responses to the heresthetical

[90] Lee Epstein and Olga Shvetsova, "Heresthetical Maneuvering on the US Supreme Court", *Journal of Theoretical Politics* 14, no. 1 (2002): 96.
[91] See Riker, W. H., *The Art of Political Manipulation*, New Haven: Yale University Press, 1986, ix. See also Lee Epstein and Olga Shvetsova, "Heresthetical Maneuvering on the US Supreme Court", *Journal of Theoretical Politics* 14, no. 1 (2002): 93-122.

attacks by the minority or as precaution measures that might further increase the probability of the expected victory. Paine makes a passing reference to such a situation in his analysis of the issue dimension manipulation with the notion of "audience" i.e. the public perception of the votes cast in a specific case by the members of a legislative body.[92] I will analyze heresthetical moves by both sides, although the primary focus will be on the liberal minority faction. I will argue that the liberals have managed to win in two very important cases, mostly because of the heresthetical maneuvers by its informal leader, Justice John Paul Stevens.

As we have previously mentioned, there are three general methods of the heresthetical manipulation, according to Riker.[93] I will present them here in a somewhat expanded form:

1. **agenda control:**
    a.) can be used to predetermine the specific choices that the committee of decision-makers will have to opportunity to consider and choose from;
    b.) can be used to determine the winning option in the case of preference cycle;
2. **manipulation of issue dimensions:**
    a.) adding issue dimension(s), mostly in order to divide the present majority and create new winning coalitions;
    b.) eliminating issue dimension(s), mostly in order to preserve the present majority;[94]

[92] See S.C Paine, "Persuasion, Manipulation and Dimension," *Journal of Politics*, vol. 51, no. 1 (1989): 42-7. Paine recounts the actual attempt to introduce the "public opinion" dimension into a debate in the legislative assembly. He describes the heresthetical attack opening the dimension of the "audience", but also the heresthetical response that has closed it. However, his primary focus was on the importance of the existence of the "audience" that is at first influenced by rhetoric, and then used as part of the heresthetical maneuver in which the issue of respecting the "public opinion" is added as a dimension to the debate.

[93] See William H. Riker, *The Art of Political Manipulation*, New Haven: Yale University Press, 1986, ix. and William H. Riker, "The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice," *The American Political Science Review* 78, no. 1. (1984): 1-16.

[94] It is possible to add alternatives in order to strengthen the existing majority, by providing some of the members of the minority with an extra reason to join the majority. Similarly, it is possible to eliminate alternative to divide the

3. **strategic / sophisticated voting**:

   a.) strategic voting implies taking into consideration not only our own preferences, but also preferences of other players, when casting a vote;

   b.) sophisticated voting implies casting an insincere vote due to such strategic considerations;[95]

4.2. Heresthetics on the Supreme Court

The structure and scope of the decisionmaking process on the Supreme Court are heavily determined by at least three sets of factors:

1. Court's internal institutional rules (such as "the Rule of Four", seniority rule…);
2. constitutional principles (such as "case or controversy" rule, or even rigidity of Constitution);
3. and finally, Court's institutional position within the political system (especially in relation to Congress, President, States and state judiciary) and society in general;

This of course determines the possible types of heresthetical moves. Within the confines of the Supreme Court as a specific institution, these maneuvers can assume the following forms:

4.2.1. Agenda Control

Agenda control on the Supreme Court can be analyzed on two levels. Macro-level is related to the size and, more importantly, the content of the Court's docket for a certain term.

majority, especially if that majority was composed of heterogeneously motivated groups. However, given that the elimination of alternatives usually requires a majority power, it is unlikely that the minority could in reality use such an option.

[95] Sophisticated voting is a subset of strategic voting, for a person can take other players' choices into consideration and still conclude that their best option is to vote sincerely.

Baird and Jacobi use macro approach, but limited to the theory of judicial signaling and to dissents only.[96] Given the Court's limitation to "case or controversy", Court's agenda can be shaped on macro-level through two types of judicial behavior:

1. granting or denying of the *certiorari* (review);
2. signaling to the interested parties (potential litigants, "policy entrepreneurs", and even lower courts) how to frame the future issues/cases;

Another distinction should be made here. The certiorari decision represents an endogenous macro-level maneuvering, in which the Justices can choose from the already defined inputs (i.e. those appeals that reach the Court). The signaling maneuvers, on the other hand, belong to the exogenous macro-level agenda control, enabling the Justices to affect the inputs as well.

Agenda control on the micro-level refers primarily to the agenda-setting powers of the Chief Justice, especially on the conference vote, and related to a specific, individual case. These powers enable the Chief to employ other types of heresthetical maneuvers. For example, before the case is affirmed or reversed on the merits, Chief Justice can offer other, procedural alternatives: he could argue that the case should be declared moot or dismissed-as-improvidently-granted (DIG-ed). The case could also be GVR-ed, meaning that certiorari was granted, the ruling was vacated and the case was remanded to the lower court for revision. Beside the power of adding the alternatives (which in itself is akin to dimension manipulation), the seniority rule gives the Chief an opportunity to significantly affect the outcome through sophisticated voting on the preliminary conference.

[96] See Vanessa Baird and Tonya Jacobi, "The Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court", *USC Law Legal Studies Paper*, no. 05-21, (2005):1-44.

However, I will not concentrate in my analysis on the micro-level examination of the role and powers of the Chief Justice as done by Epstein and Shevtsova.[97] The reason for this is very simple. *OCBC* was a unanimous decision in which the potential heresthetic maneuvers of the Chief Justice were not necessary. In both *Raich* and *Oregon*, the Chief Justice - who has the formal authority over the Court's agenda during preliminary conference vote - was on the minority side on the conference and the final vote. Thus it is clear that neither Rehnquist (in *Raich*) nor Roberts (in *Oregon*) have used their privileged position to act heresthetically.[98] However, I will consider the specific position of the Senior Associate Justice, occupied throughout the Second Rehnquist Court by the Court's leading liberal, Justice Stevens.

It is a well-established fact that the Supreme Court Justices use their discretionary powers to select cases among the appeals for *certiorari* and thus shape the Court's docket. Due to purely physical limitations to the number of cases that the Court can review within a single term, it is logical that the Justices want to grant certiorari and focus on the cases they find most relevant. The Court receives more than 8000 certiorari requests each year. Each appeal is usually analyzed by one of the clerks (each Justice has four of them), who then make a brief memo discussing whether the case is "*certworthy*". Memo is then sent to other Justices and their clerks. This is called a "cert-pool" and is intended to alleviate the workload of Justices and clerks. *Certiorari* is usually granted in 80 to 100 cases per annum. Following the established tradition, decision to grant *certiorari* has to be supported by at least four Justices.[99] This "Rule of Four" is intended to

[97] See Lee Epstein and Olga Shvetsova. "Heresthetical Maneuvering on the US Supreme Court", *Journal of Theoretical Politics*, vol. 14 no. 1 (2002):93-122.
[98] It is of course possible that the Chief Justices have attempted to employ other micro-level maneuvers, especially DIG, but could simply not muster enough votes. However, if that were the case, it would be logical to assume that the rational Chief would then side with the majority on the conference to "control the damage". This was obviously not the case, thus suggesting the complete absence of heresthetical maneuvers by the Chief.
[99] See for example T.E. Baker, "A Primer on Supreme Court Procedures", *PREVIEW of United States Supreme Court Cases*, (2004): 483.

avoid the situation in which the minimal majority of Justices could completely dictate not only the outcome of the cases, but even the content of the issues debated before the Court.

Before we analyze Stevens' heresthetical maneuvers regarding agenda, we have to highlight several important facts. First, at least since 1994[100], given his seniority among the Court's liberals, Stevens has been an informal leader of the Court's liberal-antifederalists. Second, the liberal faction has been very disciplined in voting *en bloc*, at least when it came to the federalist issues. Out of thirty-odd federalist cases in 1994-2006 period, the coalition has fallen apart in merely four cases, none of which were related to Commerce Clause.[101] That implies that Stevens can usually count on four liberal votes, enough to grant *certiorari* for every case he wants to see reviewed before the Court. Third, unlike all other Justices, Stevens does not participate in the cert-pool. Him and his clerks examine every appeal for certiorari, and could thus have a better knowledge of the characteristics of certain cases than other Justices. All this gives Stevens a significant advantage in shaping of the Court's docket compared to his colleagues.

Although certiorari control enables the Justices to select the cases from the mass of appeals to the Supreme Court, it still presupposes choosing from the limited selection. In order to be able to review the cases that "ask the right question the right way", so to speak, Justices also rely on judicial signaling. This other type of macro-level agenda control gives them the opportunity to further influence the judicial outcomes through the manipulation of the inputs themselves.

[100] I.e. the formation of the Second Rehnquist Natural Court - composed of Chief Justice Rehnquist, and Justices Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer.
[101] The cases were *City of Boerne v. Flores* (1997), *Vermont Agency of Natural Resources v. United States ex. Rel. Stevens* (2000), *Egelhoff v. Egelhoff* (2001), and *Raygor v. Regents of the University of Minnesota* (2002).

Signals can be sent to three parties: lower courts, legislative bodies or potential future litigants (which includes various interest groups and policy entrepreneurs).[102] By signaling, the Justices are trying to actively create an opportunity to revisit the same issue under different circumstances. Indeed, Baird and Jacobi (2005) claim that a dissent highlighting an extra dimension in a certain case (that dimension typically being a federalism issue) often results in the appearance of cases dealing with the same issues, but reframed accordingly. There is on average a five to six-year time lag between the dissent and a reframed issue, but this can vary[103] depending on the pace of adjudication and appeal process.[104]

In another article, Baird and Jacobi (2006) have focused their analysis on the strategic interaction between the Supreme Court judges and litigants, i.e. the system of signalization judges use to shape the roster of cases that appear before the Court. This gives the judges the opportunity to partially circumvent the significant restriction on judicial power, namely the "case or controversy" rule, which clearly states that Court can only decide the issues arising from the cases argued before it. The authors highlight a very important point about signaling: it can sometimes be used by judges "to mislead the litigant as to the chances of success of the case."[105] The litigants and their cases then become mere chess-pieces utilized and sacrificed by the sophisticated agenda setters on the Supreme Court in order to win in the log run. In my analysis I will argue that *Raich* was used in precisely such fashion.

[102] Lori Beth Way and Charles C. Turner. "Disagreement on the Rehnquist Court: The Dynamics of the Supreme Court Concurrence." *American Politics Research* 34, no.3 (2006): 298

[103] For example, in the cases I will analyze later, the time lag between *OCBC*, in which liberals strongly suggested that the medical marijuana should be reframed as federalism issue, and *Raich*, which was framed as one, was only somewhat shorter, clocking at roughly 4 years. *OCBC* was decided in 2001, *Raich* case was first opened in 2002, and decided by the Supreme Court in 2005.

[104] Vanessa Baird and Tonya Jacobi, "The Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court", *USC Law Legal Studies Paper No. 05-21* (2005).

[105] Vanessa Baird and Tonya Jacobi "Judicial Agenda Setting through Signaling and Strategic Litigant Responses», unpublished.: p.6.

When analyzing the signaling maneuvers, we have to bear in mind that the signals are not aimed solely at the actors outside of the judicial system. In fact, they are often used to give hints to Justice's allies on lower courts. These are as important in framing of the cases as the potential litigants. In *Raich* it was the Court of Appeals that framed the case as a primarily Commerce Clause-challenge, relying in its reasoning specifically on *Lopez* and *Morrison*. In *Gonzales v. Oregon*, it was the same Court of Appeals that avoided constitutional issues and formulated the case as the mere problem of statutory interpretation. Active framing of the cases by the lower courts based on the signals received from one or more Justices helps the heresthetician on the Court in two respects: the cases are tailored precisely to divide the opposing majority and it is harder for the other side to reframe and neutralize the case.

The lower courts can have another important role in the signaling process. They can act as intermediaries between the Supreme Court's heresthetician on one side, and the litigants on the other, by clarifying ambiguous or misunderstood signals. This can be illustrated by the following example. When the Court of Appeals was reviewing the case on remand from the Supreme Court, Raich and her legal representatives have invoked Due Process and necessity defense. In the end, the Court of Appeals suggested that Raich should concentrate on the solely medical necessity defense.[106] However, due to limitations of this thesis, I will not explore this proposition any further.

4.2.2. Manipulation of issue-dimensions

Sometimes macro-level agenda control cannot or will not wait for the "ideal case", and the chance to effectuate policy-change. The reasons can be numerous: from moral (the Justices

[106] *Raich v. Gonzales*, 2007 U.S. App. LEXIS 5834 (9th Cir. Cal. Mar. 14, 2007).

believe that the present situation is untenable because of the harm it causes to certain parties) over private (the Justices want to see the "wrong righted" before they retire from the bench) to practical-strategic (the Justices estimate that the situation is "ripe" or that a change in the Court's composition might decrease chances for a positive outcome in future). However, it is also possible that the Justices in the minimal winning coalition, having failed in "defensive denial"[107] or DIG-ing of an unwelcome case, resort to issue-dimension manipulation in order to neutralize it.

Many cases that appear before the Supreme Court contain several separate legal challenges. Some of these issues are in the forefront, while others might be just latently present in the case. Some of the challenges may also emerge in appeals or responses to appeals by the parties involved, while others may appear only in amicus briefs. Often the lower courts focus on a certain issue and make it central to the case. While this usually defines the case before the Supreme Court, it is also possible that the Justices "discover" an issue that was not mentioned by any of the parties involved on the lower levels. Of course, the more common practice is when the Justices do exactly the opposite, by deliberately "suppressing" the issue.[108]

The unwritten rule suggests that the ruling should respond to the questions posed in the case. While Justices mostly adhere to it, often enough they are willing to deviate from such norm. Analyzing the data for the 1988 term, McGuire and Palmer have concluded that "issue fluidity" appears in almost 50% of the cases.[109] "Issue suppression" which Ulmer has defined as "any case in which the Court grants full review and then proceeds to discover and decide an

[107] See Perry, 1991

[108] See Ulmer, S. Sidney – «Researching the Supreme Court in a Democratic Pluralist System: Some Thoughts on New Directions», *Law and Policy Quarterly*, No. 1 (1979): 70-73.

[109] McGuire and Palmer (1995), p692. It should be noted that the validity of the findings referred to here was doubted by Epstein, Segal and Johnson (1996), who claimed that McGuire and Palmer have incorrectly coded the cases, and that in the repeated analysis of the same cases, they could not find a single case of "issue creation". But see McGuire and Palmer (1996), for an effective rebuttal.

issue not raised by the [parties]"[110] is much more common form of issue fluidity and can be detected in 40% of the Court's rulings. The reason for this is very simple – it can be the only way to arrive at or preserve the majority coalition.

However, McGuire and Palmer claim that even the "issue discovery", a more complicated and controversial practice, can be detected in as much as 10% of all cases.[111] Ulmer defines it as "any case in which review is granted but in which the Court then suppresses and does not decide an issue posed by the [parties]".[112] "Issue discovery" is usually a result of the strong policy preferences of the Justices, who intentionally transform the case in line with the desired outcomes in a certain policy area. Epstein, Segal and Johnson (1996) argue that such behavior would represent a direct violation of the informal norm of judicial restraint, i.e. the (inverse) "variant of *sua sponte* doctrine".[113] The supporters of the judicial restraint/minimalism view such behavior by the Supreme Court as especially dangerous, claiming that it transforms judiciary from reactive into proactive power, thus making it similar and rival to legislative. Thus we can expect that the Justices will resort to "issue discovery" only when agenda setting mechanisms are not enough. However, often the Justices do not even need to "discover" the issue. They simply have to emphasize one of the latent issues at the expense of the focal ones, i.e. the ones pursued in the lower court decisions, appeals and amicus briefs.

[110] McGuire and Plamer (1995), 692, quoting Ulmer, S. Sidney. "Issue Fluidity in the U.S. Supreme Court: A Conceptual Analysis." In *Supreme Court Activism and Restraint,* ed. Stephen C. Halpern and Charles M. Lamb. Lexington, MA: Lexington Books, (1982):322.
[111] Ibid.
[112] It has to be noted that McGuire and Palmer deviate from Ulmer's definition by subsuming the cases of what Ulmer calls "issue contraction" under issue suppression and "issue expansion" under "issue discovery". Compare Ulmer, S. Sidney – «Researching the Supreme Court in a Democratic Pluralist System: Some Thoughts on New Directions», *Law and Policy Quarterly*, No. 1 (1979): 70-71. with McGuire and Palmer (1995), p700 and McGuire and Palmer (1996), p856
[113] Epstein, Segal and Johnson (1996), p845

4.2.3. Strategic (sophisticated) voting

As we have already mentioned, strategic voting assumes that the voter takes into account the preferences of other players. Sophisticated voting takes place when a person, due to strategic considerations, actually votes against her actual preferences.[114] Most of the articles on the strategic/sophisticated voting within the context of the Supreme Court are focused on the Chief Justice and his moves. This is because his institutional powers not only give him the widest range of maneuvers, but also allow him to reap the largest benefits from strategic voting. In this thesis, we will consider any voting against the primary policy preferences of the Justices on the liberalism-conservatism dimension (according to the attitudinal model) caused by the introduction of the other, federalism dimension.

Strategic (as well as sophisticated) voting often assumes players with perfect information. Supreme Court thus presents an excellent case for analysis. In the cases that will be examined in this thesis, the first two come from the same natural court. The same nine Justices have been on a bench together for seven years when the Court decided *OCBC*, and as much as eleven years in the *Raich* case. While *Oregon* featured a newcomer in Chief Justice Roberts, this change had only a limited effect on the calculations of other players, as I will examine later in this thesis. However, there is a very important institutional feature that is specific to the Supreme Court, which enables the Justices to approach the perfect information ideal even closer. After the conference vote, one of the members of the preliminary majority gets assigned to write a draft of the majority opinion. Other Justices may formulate their suggestions, as well as the drafts of the concurring and dissenting opinions. All these constantly revised drafts then circulate among the

[114] See Epstein and Shvetsova, . These two are often confused, especially since Riker himself used the word "strategic" to denote "insincere" voting. To add to the confusion, other scholars sometime use "sophisticated" when referring to actual "strategic" voting, and then differentiate between "sincere" and "insincere" voting. See for example Johnson, Spriggs and Wahlbeck (2005).

Justices and their clerks. That means that any of the Justices could at any moment be swayed by the arguments of the other side and could then decide to switch votes. Thus every Justice should be completely familiar with the preferences, arguments and votes of her colleagues.

On the private conference, the Justices review the case and cast a preliminary vote. According to the tradition, the first to cast a vote is Chief Justice, followed by the others in decreasing order of seniority. Each of the Justices has an option to pass at the conference. Having passed in the first round, the Justice can either vote again after all the other Justices have voted or decide to withhold the vote completely. Another important rule states that the most senior member (starting with the Chief Justice) of the conference majority has the right of assigning the writing of the draft opinion. Combined, these rules have very important consequences for the strategic behavior of the senior Justices. If the Chief believes that he will be in the minority on the conference vote, he has the incentive to pass in the first round, and then side with the majority, thus gaining right to assign the opinion. He would then assign it to himself and write an opinion that would try to control the damage and limit the decision to the facts of the case.

However, as we have mentioned, in case when the Chief Justice ends up in the minority, the right to assign the opinion goes to the most senior member of majority. If the Chief Justice and Senior Associate Justice (SAJ) are on the opposite sides of the ideological spectrum, the right to assign the opinion will almost always go to SAJ. This structural element makes SAJ the most important and powerful member of the Court after the Chief.[115] The situation on the Second Rehnquist Court (1994-2005) was precisely like that, with Rehnquist and Stevens being the leaders of the opposite factions. In practice this meant that whenever Rehnquist ended up in

[115] According to the Burger Court data (1971-86), Senior Associate Justice had the opportunity to assign the opinion in 11,2% of the cases. All other associate Justices taken together have assigned only 2,9%of the opinions. Johnson, Spriggs, and Wahlbeck (2005), 366

minority on the conference vote, the right to assign would come to Stevens, who could then significantly influence the content, scope and importance of the Court's decision.

Finally, Epstein and Shvetsova (2002) have offered a model of strategic/sophisticated voting that included interaction between Chief Justice and Senior Associate Justice given their institutional powers.[116] Johnson, Spriggs and Wahlbeck have analyzed the data from Burger and Rehnquist Courts, and have concluded that both Chief Justices and Senior Associate Justices have often used their prerogative to pass at the initial voting in order to be able to cast a sophisticated vote later.[117] Whereas Chief Justices in *Raich* and *Oregon* (Rehnquist and Roberts, respectively) have clearly not cast a sophisticated vote, given that they ended up in minority, it is clear that Senior Associate Justice Stevens and his liberal allies have strategically voted against marijuana. This gave Stevens an opportunity to assign the opinion writing in *Raich* to himself and use it to nullify a very large portion of federalist revolution.

An important caveat has to be made here. The analysis of sophisticated voting in cases with multiple dimensions presents us with a theoretical problem. The logic of sophisticated voting in single-issue cases is rather simple – it implies strategic voting against our actual preferences in order to avoid worse potential outcomes. In multiple-issue cases, on the other hand, the reason to cast a sophisticated vote in one dimension is a desire to achieve a more important goal in a different dimension. The question arises: Is such voting truly sophisticated or does it merely represent strategic voting in a dimension that is more important for the voter?

[116] Epstein, L. and Shvetsova, O., "Heresthetical Maneuvering on the US Supreme Court", *Journal of Theoretical Politics* 14, no. 1 (2002): 93-122.
[117] Johnson, T. R., Spriggs, J. F., and Wahlbeck, P. J., «Passing and Strategic Voting on the U.S. Supreme Court», *Law & Society Review* 39, no. 2 (2005): 349-72

4.3. Analytical narrative

Although Riker himself never referred to his work related to heresthetics as "analytic narrative" - especially given that the term itself was popularized only after his death, in 1998 book by Bates et al. - later authors have viewed his "The Art of Political Manipulation" precisely as a collection of such "analytical narratives".[118] However, while employing a heresthetical analysis implies an "analytic narrative" approach, such narratives do not necessarily have to focus on heresthetical maneuvers.

In her overview of "Analytic Narratives", Parikh points out that "analytic" refers to the use of rational choice, while "narrative" in that context means "specific qualitative historical presentation of the case data for the question to be analyzed."[119] Schofield offers a similar, but terser explanation, stating that the term refers to a technique of applying rational choice theory in order to interpret certain historical events.[120] In the introduction to their book, Bates et al. explain that the analytical narrative does not "provide explanation by subsuming cases under covering laws", but instead seeks to "account for outcomes by identifying and exploring mechanisms that generate them".[121]

Helmke offers a summation of the arguments put forward by Bates et al.: "The analytic narrative approach seeks to combine elements from both the ideographic and nomothetic traditions by moving back a forth between "thick," qualitative, descriptions of events and

[118] See for example McLean, Riker, p 10 calling Riker's work "analytic narrative". See also Schofield, p11,
[119] Parikh, 678
[120] Schofield, p19
[121] Robert H. Bates, and others, eds. *Analytic Narratives*. Princeton: Princeton University Press, 1998: 11-12. Internal quotations omitted.

processes to "thin" forms of reasoning that highlight the particular mechanisms that motivate the interactions between strategic actors."[122]

Carson and Kleinerman emphasize that "analytic narrative" relies on game-theoretical approach and assumes strategic actors, that are making moves under the political constraints in the attempt to obtain the best possible outcomes.[123] It is this emphasis on agency and choice that differentiates the "analytic narrative" from the structural and macro-level approaches.[124] Given such accent on the actors, it is important to follow Parikh's warning that the authors of "analytical narratives" should be explicit when the supposed preferences of the actors are "derived from the historical record" and when they are simply "assumed", relying for example on the attitudinal model (as it is case here).[125]

[122] Helmke, p4, n.2.
[123] Carson and Kleinerman, p302.
[124] Robert H. Bates, and others, eds. *Analytic Narratives*. Princeton: Princeton University Press, 1998: 13
[125] Parikh, 680

5. Case analysis

5.1 *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001)

United States v. OCBC was the first case involving the medical marijuana to reach the Supreme Court. However, when the verdict was delivered, it failed to stir much controversy either among legal scholars or the public in general. There were several reasons for this. On one side, Court's decision, authored by Justice Thomas, was a unanimous one, suggesting that even the Court liberals were not ready to accept the arguments put forward by OCBC and its legal representatives. On the other, the ruling itself was very limited, avoiding major constitutional issues and focusing instead on one application of a common law doctrine whose legal status was still under debate.[126] It has thus left open many other legal avenues that the proponents of medical marijuana could resort to. In my thesis, I will argue that, far from being relatively insignificant,[127] this case is in fact crucial for the understanding of the later demise of the federalist revolution, at least regarding the limits of the Congress' Commerce Clause power. In this chapter I will demonstrate that *OCBC* marked a starting point of the heresthetical attack on the federalism revival by the Court's liberal wing.

[126] See OCBC, p490, for a list of previous cases dealing with the issue of necessity defense.

[127] Search (conducted on May 23, 2007) for the case "United States v. Oakland Cannabis Buyers' Cooperative" on Google Scholar search engine has revealed only 52 (144 on LexisNexis) entries referencing the case in more than six years after the decision. We can compare this to 151 (314 on LexisNexis) for "Gonzales v. Raich", in less than 2 years, or 96 (120 on LexisNexis) for "Gonzales v. Oregon" in less than 17 months. As far as the impact within the judiciary is concerned, search on LexisNexis Shepard's Citation Service reveals that the OCBC has been cited 127 times in decisions by various state and federal courts since 2001. Compare to Raich - 139 times since June 2005 - and Oregon – 44 times since January 2006.

5.1.1. Background of the case

[128]OCBC was one of the not-for-profit organizations specialized in growing and subsequent distribution of medical marijuana that have opened in California following the enactment of CUA in 1996. The Cooperative was ran by qualified medical personnel and was only dealing with patients that were eligible for the treatment according to the conditions listed in the Act. In January 1998, the federal authorities have initiated a civil suit against OCBC and its executive director. Arguing that OCBC was in violation of the federal law, the Government asked for an injunction against the growing and distribution of marijuana. The District Court granted a preliminary injunction, to which OCBC did not appeal, but instead proceeded with the enjoined activities. The District Court then found OCBC in contempt, and at Government's behest, expanded the injunction to allow federal agents to seize the premises. At the same time it rejected OCBC's medical necessity defense – a common law institute that "traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils."[129] The District Court did recognize the possibility that the "human suffering" might occur as a result, but concluded that it could not ignore the federal law. Several days later, it rejected OCBC's appeal to reformulate the injunction in order to allow the "medically necessary" distributions.

OCBC appealed to both decisions, and the Court of Appeals for the Ninth Circuit eventually reversed and remanded the case ruling that:

1. medical necessity defense was a "legally cognizable defense";

[128] The following historical overview was written based on information in the majority opinion in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483
[129] OCBC, p490, quoting *United States* v. *Bailey*, 444 U. S. 394, 410 (1980).

2. the District Court was mistaken in its conclusion that it had no discretionary power to issue a modified injunction based on CSA, allowing for medical necessity exceptions;
3. thus it should have taken the "public interest" and the possible suffering of patients into consideration when deciding on OCBC's petition to amend the injunction.

The District Court complied with the higher ruling, and modified the injunction accordingly. The Government then appealed to the Supreme Court against such interpretation of the medical necessity defense, and at the same time asked for the stay of the modified injunction until the matter is resolved. The Supreme Court approved the application for stay[130] and subsequently granted *certiorari*[131] in the case.

In essence, OCBC was arguing that, despite the CSA's absolute prohibition on the growth, distribution and consumption of marijuana (except in the government-approved research), the statute should be interpreted as also recognizing the implied exceptions, notably the medical necessity defense.[132]

The Supreme Court unanimously disagreed, concluding that such defense cannot be invoked by an organization. However, only five conservative justices have supported the majority opinion, authored by Justice Thomas, suggesting that that there could be no possibility of necessity defense within the matter regulated by CSA. The majority also expressed doubt that whether such defense could be available for any federal statute, if the statute itself does not explicitly acknowledge it. Still, it has refrained from reaching any general conclusion on that issue. The concurring opinion, written by Stevens and joined by Ginsburg and Souter, declined to such an extensive view and endorsed only a limited holding regarding the distributors of

[130] 530 U. S. 1298 (2000).
[131] 531 U. S. 1010 (2000).
[132] OCBC, p490

medical marijuana. It has to be noted that Justice Breyer has not participated in any of these decisions, due to the fact that his own brother had presided over the case in the District Court.[133]

5.1.2. Heresthetical maneuvers in OCBC

Before we can fully recognize the importance of Stevens' concurring opinion in this case, we have to first subject it to formal examination. There are three general types of concurring opinion (listed here in declining order of their support for the majority decision): regular concurrence, concurrence in part and in judgment, and concurrence only in judgment (often called the special concurrence).[134] Given Stevens' previous dissent from Court's decision to grant Government's application for the stay of the modified injunction, it is no surprise that his eventual concurrence was of the weakest type, i.e. in judgment only.

Way and Turner offer an alternative classification of concurring opinions based on the thematic analysis. They discern between four types of concurrences: ground laying, weakening, signaling, and preserving.[135] In ground-laying opinions the author suggests that the majority, while reaching the correct judgment, has done so using an incorrect or inferior reasoning. Such conclusion is often (though not always) followed by the presumably correct or at least more appropriate strategy for resolving similar cases.[136] Weakening concurrences are defined as the ones in which the author explicitly seeks to "narrow the scope and authority of the majority opinion". Weakening opinions argue that the majority either reached a decision that was broader than necessary to resolve the issue at hand or that the Court's decision does not (or should not)

[133] See for example NORML report, or any of the documents in the case created by the District Court.
[134] Lori Beth Way and Charles C. Turner. "Disagreement on the Rehnquist Court: The Dynamics of the Supreme Court Concurrence." *American Politics Research* 34, no.3 (2006): 296
[135] Ibid, 295-6. Of course, these ideal-types are not mutually exclusive, and most concurrences belong to more than one category.
[136] Ibid, 297

have the future implications that the majority claims it has. In the latter case, the justices will sometimes refer to the parts of the majority opinion as "dicta".[137] As we have already mentioned, the signaling opinion aims at potential litigants (but also other players in the political arena) and clearly suggests that the Justice is willing to revisit the issue or perhaps overrule the controlling precedent. Preserving opinions are not jurisprudentially or politically significant and mostly aim to preserve justices' own thoughts on the matter. [138]

Applying the methods of content, discourse and thematic analysis I will demonstrate that Stevens' concurrence in OCBC can be classified as a combination of weakening, signaling and ground-laying opinion, according to the Way-Turner taxonomy. This is important since I will argue that each of these types is related to a different heresthetical maneuver and aimed at achieving a different medium-term goal.

5.1.2.1. Sophisticated/strategic voting

Proving the existence of sophisticated voting in a certain historical situation is always a daunting task, unless we can rely on the personal accounts of those who have cast such a vote. However, careful analysis of the Court's documents related to the *OCBC* case can offer us some indications of sophisticated voting, at least when it comes to Justice Stevens, the chief architect of the heresthetical maneuvers against the Rehnquist's Commerce Clause jurisprudence.

When the Court was considering the Government's application for stay of the modified injunction (this time allowing OCBC to distribute marijuana to qualified patients), Stevens was the only Justice on the Court who opposed it. Indeed, he even made a somewhat unusual move and wrote a special dissent in response to such Court's decision.

[137] Ibid, 298
[138] Ibid, 298-299

"*Because the applicant [the Government of the United States] in this case has failed to demonstrate that the denial of necessary medicine to seriously ill and dying patients will advance the public interest or that the failure to enjoin the distribution of such medicine will impair the orderly enforcement of federal criminal statutes, whereas respondents have demonstrated that the entry of a stay will cause them irreparable harm, I am persuaded that a fair assessment of that balance favors a denial of the extraordinary relief that the Government seeks. I respectfully dissent.*" [139]

Such a dissent, clearly sympathetic towards OCBC and their patients, suggests that Stevens would have probably been willing to acknowledge medical necessity defense even when it came to distribution centers, let alone the individual patients. However, given that even his liberal colleagues did not share his sentiments, Stevens later decided to vote against OCBC. His switch can be easily explained from the perspective of heresthetics. The fact that it was precisely Stevens, who authored the concurrence, though it might seem unusual at first glance, actually provides us with a possible clue. Stevens switched his vote, because it was the only way for him to gather other Court's liberals behind his opinion. He could then use it as a vehicle to start a heresthetical campaign against the federalist revolution.

However, while he had to concede for strategic reasons that medical necessity defense was not applicable to distributors (like OCBC), he also wanted to preserve the possibility of such defense for the individual patients or their primary caregivers. Thus his opinion immediately took on a weakening form. Indeed, Stevens opened his concurrence with the following words:

> *"Lest the Court's narrow holding be lost in its broad dicta, let me restate it here: '[W]e hold that medical necessity is not a defense to* manufacturing *and* distributing *marijuana.' This confined holding is consistent with our grant of certiorari, which was limited to the question '[w]hether the Controlled Substances Act, 21 U. S. C. 801 et seq., forecloses a medical necessity defense to the Act's prohibition against* manufacturing *and* distributing *marijuana, a Schedule I controlled substance.'"*[140]

[139] 530 U.S. 1298.
[140] 532 U.S. 483, 499, quoting 494. Internal references omitted, emphases added by Justice Stevens.

We can see that in the very first two sentences, Stevens referred to Court's decision as both "narrow" and "confined holding", thus aiming to limit its impact to the facts of the case, i.e. the question that is "consistent with our grant of certiorari". Such a pattern would continue throughout his concurrence. At the same time, he called the rest of the majority opinion a "broad dicta", suggesting that it should not have the future ramifications that the majority hinted at. Indeed, in less then four full pages of his concurrence, Stevens refers to parts of majority opinion as "dicta" or "dictum" four times.[141] He then continued to forcefully counter both parts of the supposed Court's "dicta":

> *"Apart from its limited holding, the Court takes two unwarranted and unfortunate excursions that prevent me from joining its opinion. First, the Court reaches beyond its holding, and beyond the facts of the case, by suggesting that the defense of necessity is unavailable for anyone under the Controlled Substances Act. […] Second, the Court gratuitously casts doubt on 'whether necessity can ever be a defense' to any federal statute that does not explicitly provide for it, calling such a defense into question by a misleading reference to its existence as an 'open question.'"*[142]

Although Stevens would hint at another way of exempting the medical marijuana from the Government's strict drug-regulation scheme later in his opinion, it was obviously very important for him to preserve the medical necessity defense as an option. Stevens' motives for this became much more obvious four years later, when he authored and delivered the majority opinion in *Gonzales v. Raich*.

[141] See, 532 U.S. 483, 499, 501, 502, 503.
[142] 532 U.S. 483, 500-1, quoting 490-1. Internal references omitted.

5.1.2.2. Agenda Setting

As we have already mentioned, Justices have the ability to set the Supreme Court agenda by employing two separate methods. First, they can attempt to actively shape the set of cases that the Court can choose from through the use of judicial signaling. Second, they can then mold the Court's docket through the grant or denial of the *certiorari*.

While it is possible to argue that the decision whether to grant *certiorari* in *OCBC* involved long-term strategic thinking on the side of the Court's federalists and especially their liberal opponents, the answer to that question is not crucial to our analysis. Although *OCBC* did originally touch upon certain federalism matters, those were mostly set-aside during the District Court / Court of Appeals phase. By the time it reached the Supreme Court, *OCBC* was basically a case involving a controversial subject matter (medical marijuana), a controversial doctrine (necessity defense) and the Federal Government as the petitioner asking for a *certiorari* review. It is therefore hard to imagine that the Court would decline to hear such a case in any occasion.[143] So, even if the liberals had planned all along to use *OCBC* as a vehicle in their long-term heresthetic attack on the Court's Commerce Clause jurisprudence, they were certainly not the only Justices to vote for the granting of the review.[144] And indeed, Justice Thomas, writing for the conservative majority, offered a very straightforward explanation: "Because the decision

[143] Perry states that cases in which United States appears as the petitioner are granted certiorari in 75-90% of the cases. If we add to this a large number of amicus briefs submitted by relevant institutional actors (including most States) and various professional and interest groups, as well as the fact that the lower court was split (both positively correlated with chances to be granted certiorari), my conclusion seems quite reasonable. Hersel W. Jr. Perry, *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge: Harvard University Press, 1991: 136. n45.

[144] This can be easily proven, given the fact that the Court's "Rule of Four" requires that at least four Justices vote in favor of granting a *certiorari*. Since Justice Breyer did not partake in the case, the three remaining Court liberals could not had to be backed by at least one member of the "Federalist Five".

[of the Court of Appeals] raises significant questions as to the ability of the United States to enforce the Nation's drug laws, we granted certiorari."[145]

In my previous analysis I have demonstrated that Stevens' opinion had all the elements of a weakening concurrence. I have also offered a plausible explanation for this, contending that is very likely that Stevens initially dissented, but eventually strategically switched his vote in order to be able to write an opinion that would receive the support of other Court's liberals. However, such an explanation lacks a final answer. Why was it important for Stevens to gather his liberal allies behind his opinion? In order to fully understand why Stevens chose to author a concurrence rather than a lone dissent, we have to revisit his opinion, this time focusing on the typical elements of judicial signaling.

If we can demonstrate that Stevens' opinion also belonged to the category of signaling concurrences, the strategic considerations that could have lead him to change his vote become much clearer. We can argue that Stevens switched because the support of his colleagues was crucial in sending a truly powerful and thus effective signal to future litigants and interested parties. A lone dissenter represents a very weak ally on the Court. Of course, the situation is completely different if three Justices (actually four, if we include Breyer) suggest that they would be willing to revisit the same issue under somewhat altered circumstances.

I will argue that Stevens used his concurrence to send not one, but two separate signals. We have already shown that he employed the weakening strategy in his opinion precisely in order to leave open the question whether individual patients and their primary caregivers could

[145] 532 U.S. 483, 489. Of course, it is always possible that Thomas was merely trying to control the damage, and once again suppress the federalism issues brought forth by Stevens' concurrence.

still exercise medical necessity defense. He actually made it rather clear by pointing out that the present case did not "involve *any* such [individual] patients."[146]

However, it was the other signal sent by Stevens that was the crucial heresthetical maneuver in OCBC case. After spending most of his concurrence stating disagreement with the Court's "broad dicta" regarding medical necessity defense, Stevens suddenly invoked a completely different argument in defense of "medical marijuana".

> *"The overbroad language of the Court's opinion is especially unfortunate given the importance of showing respect for the sovereign States that comprise our Federal Union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to 'serve as a laboratory' in the trial of 'novel social and economic experiments without risk to the rest of the country.' In my view, this is such a case."*[147]

This seemingly innocent remark positioned near the end of his concurrence actually represents a powerful heresthetical attack on the Court's conservative-federalist coalition. With it Stevens has sent a signal to all the interested parties that the next medical marijuana case should reframe the issue in federalism terms, in order to divide the conservative majority and secure the victory for the liberals on the Court. This leads us to the third type of heresthetical maneuvers.

5.1.2.3. Manipulations with issue dimensions

The above-quoted passage represents not only Stevens' attempt to set the future Court's agenda through signaling, but also to manipulate the issue dimensions of the case, by emphasizing underlying federalism question. It is hardly by chance that Stevens resorted to one

[146] 532 U.S. 483, 502. Emphasis by Stevens.
[147] 532 U.S. 483, 502, quoting 285 U. S. 262, 311 (1932). Internal references omitted.

of the most famous profederalist quotes in the history of Supreme Court jurisprudence, Justice Brandeis' powerful dissent in *New State Ice Co.* v. *Liebmann* (1932).[148]

Stevens has also emphasized that the Court's ruling should be constructed as referring only to the *distribution* of marijuana[149] and not its cultivation and possession. While such an approach could be useful to make distinction between OCBC and the individual patients in the case of the medical necessity defense, it still leaves the issue of primary caregivers of the patients unresolved. However, it is possible that this distinction largely served a different purpose. By carefully separating *distribution* - which was clearly linked with commerce[150] - from *cultivation* and *possession* - two principally intrastate activities - Stevens was suggesting that the latter were outside the scope of Congress' Commerce Clause powers. And since CSA was a Commerce Clause-based legislation, this would imply that the disputed portions of the CSA were an unconstitutional exercise of federal power. With this suggestion, Stevens' opinion has taken the form of ground-laying concurrence.

This assumption seems to be confirmed by the lines immediately following Stevens' heresthetical manipulation with the federalism dimension. He goes on to argue that "California voters" (presumably exercising their reserved right to "serve as a laboratory") have made a decision to exempt patients and primary caregivers "from prosecution under state laws for *cultivating* and *possessing* marijuana".[151]

His heresthetical attack was aimed at dividing "federalists" from "conservatives" in a potential future case. Based on their previous records, Stevens knew that in such situations

[148] 285 U. S. 262 (1932)
[149] See for example, 532 U.S. 483, 499 (referring to the District Court opinion) or 500 (quoting majority's opinion at 494).
[150] Especially if we follow Chief Justice Marshall's reasoning in *Gibbons v. Ogden*, defining commerce as "intercourse". See 22 U.S. 1 (1824)
[151] 532 U.S. 483, 502. Emphasis mine.

Rehnquist and O'Connor would likely defend federalism. On the other hand, Stevens was also aware of the very conservative position on drugs that Justice Kennedy has taken in a string of cases.[152]

[152] Before *OCBC* was decided Kennedy voted for conservative outcomes in a string of "search and seizure" cases involving drugs. See *United States v. Verdago-Urquidez*, 494 U.S. 259 (1990), *Florida v. Bostick*, 501 U.S. 429 (1991), *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). He also authored a concurrence in *Harmelin v. Michigan*, 501 U.S. 957 (1991), admonishing drug abuse and its effects on society (see pages 1002-1004). Before *Raich* was decided, Kennedy continued to vote conservative in cases involving drugs like *Kyllo v. United States*, 533 U.S. 27 (2001) and *Board of Education v. Earls* 536 U.S. 822 (2002). Similar comments, but limited to debating Kennedy's position on drugs, were made by Lyle Denniston and Pam Karlan at ScotusBlog. http://www.scotusblog.com/movabletype/archives/2005/06/commentary_just.html.

5.1.2.4. The heresthetical responses of the Court's federalists

Of course, such maneuvers have not gone unnoticed by the Court's federalists. After all, Stevens' claim that the OCBC was in fact a federalism case could not only have potential future, but also immediate effects on the conservative-federalist majority. For both these reasons, Justice Thomas had to resort to heresthetical response from the very beginning. Like Stevens, he also launched his opinion with a heresthetical device. Reacting to Stevens' attempt to manipulate the issue dimensions, Thomas starts by limiting the scope of debate:

> *"The Controlled Substances Act, 84 Stat. 1242, 21 U. S. C. § 801 et seq., prohibits the manufacture and distribution of various drugs, including marijuana. In this case, we must decide whether there is a medical necessity exception to these prohibitions. We hold that there is not."* [153]

We can notice the "issue suppression" at work here. Although Thomas only mentions manufacture and distribution, CSA also forbids possession of marijuana.[154] However, acknowledging that could unlock the federalism dimension of the case, i.e. precisely the one Stevens was alluding to and the one that Thomas was trying to close with his opening statement. Thomas thus chooses an indirect way to dispose of the issue, by relegating the controversy to a footnote.

> "*Lest there be any confusion, we clarify that nothing in our analysis, or the statute, suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the* ***other*** *prohibitions in the Controlled Substances Act.*" [155]

[153] 532 U.S. 483, 486. Emphasis mine.
[154] The Controlled Substances Act declares the following, "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U. S. C. § 841(a)(1). The practical issue of how to determine whether the purpose of possession was consumption or distribution is not addressed.
[155] 532 U.S. 483, 494, n. 7. Emphasis mine.

While he acknowledged that the respondents had raised various constitutional issues, including Commerce Clause dispute, Thomas explicitly refused to address them arguing that the lower court has failed to do so.[156] As far as Stevens' own Commerce Clause challenge aimed at splitting the Court's majority is concerned, Thomas again relegated the answer to that same footnote, noting that the Court was not deciding on a constitutional issue "such as whether the Controlled Substances Act exceeds Congress' power under the Commerce Clause".[157] It hardly comes as a surprise that Justice Stevens described that footnote 7 as "the most glaring example of the Court's dicta". [158]

However, although the majority had successfully evaded the potential immediate effects of Stevens' heresthetical assault, the battle was already lost in the long run. With his concurrence, Stevens had successfully sent signals to potential litigants and lower courts that a future case, involving individual patients and focusing on the federalism issues rather than medical necessity defense, could divide the Court's "Federalism Five" and create a new majority that would be prepared to uphold "medical marijuana".

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

Four years later, the Court faced *Gonzales v. Raich*; a case that completely followed the suggestions Stevens had laid out in his *OCBC* concurrence. Signaling to the potential litigants has obviously been successful. But even more impressive was the effect of the Stevens' concurrence on the lower court. I have already described how Stevens's "federalist" attack had provoked a heresthetical response by majority, in which Thomas stated that the Court in *OCBC*

[156] 532 U.S. 483, 494
[157] 532 U.S. 483, 494, n. 7.
[158] 532 U.S. 483, 501

will not address institutional questions such as Commerce Clause.[159] Ironically, it was precisely that sentence that the Court of Appeals eventually used as a key argument when concluding that Raich's lawsuit might be successful. Relying on such reasoning, it granted the preliminary injunction against the Government.[160] The fact that, after discussing *OCBC*, the lower court opinion cited the very same quote by Justice Brandeis that was at the core of Stevens's federalist maneuver, serves as yet another indicator that it was acting based on the Stevens' signals.[161]

5.2.1. Background of the case

[162]Angel Raich and Diane Monson were seriously ill California residents who, acting on the recommendation and under the supervision of their family doctors, have been using marijuana for medical purposes. While Monson cultivated her own marijuana, Raich had to rely on two caregivers who supplied her with the drug free of charge. In August of 2002, county deputy sheriffs and federal agents raided Monson's home. While the State officers concluded that her use of marijuana was lawful under the California regulations, the DEA agents confiscated and subsequently destroyed Monson's marijuana plants.

Respondents Monson and Raich have then sued the United States Attorney General for both injunctive and declaratory relief that would disallow further enforcement of CSA as applied in their case. Like their counterparts in *OCBC* case, respondents challenged CSA on the Commerce Clause, Due Process Clause, Ninth and Tenth Amendment and medical necessity grounds. The District Court denied their motion for preliminary injunction, arguing that they

[159] It was the already mentioned footnote 7. See 532 U.S. 483, 489, n.7
[160] *Raich v. Ashcroft*, 352 F.3d 1222, 2003 U.S. App. LEXIS 25317 (9th Cir. Cal. 2003), page 10 of majority opinion.
[161] Ibid, page 27-29 of majority opinion.
[162] The following historical overview of the case is based on similar overview in 545 U.S. 1, 1-6

could not demonstrate that they had a chance to win on the merits. The Court of Appeals then reversed arguing exactly the opposite. It suggested that CSA as applied to Monson and Raich might be "an unconstitutional exercise of Congress' Commerce Clause authority" and cited the Supreme Court decisions in *Lopez* and *Morrison*.[163] The Court of Appeals reached that conclusion by claiming that California's Compassionate Use Act created "a separate and distinct class of activities", namely an intrastate and noncommercial cultivation and possession of cannabis for medical purposes. Such purely local activities were then deemed to be outside the scope of the federal regulation.

Situation was therefore ripe for either liberal (the Supreme Court upholds the lower court verdict thus virtually decriminalizing marijuana) or anti-federalist victory (the Supreme Court strikes down the verdict and reaffirms the Commerce Clause).[164] This suggests that the case could have gone the other way had the Court liberals choose to put liberalism before anti-federalism. The Court's conservatives were badly divided. Some, like Rehnquist, were prepared to defend federalism at the price of decriminalizing a Schedule I drug (according to CSA), while others, like Kennedy, were less committed to federalism and hence not prepared for such a sacrifice.

[163] 545 U.S. 1, 5

[164] Randy Barnett, who represented respondents in Gonzales v. Raich, suggested that Raich case was deliberately framed as Commerce clause case by the liberal-antifederalist Court of Appeals for the Ninth Circuit seeking to exact "revenge" on the conservative Supreme Court. Barnett specifically named Judge Stephen Reinhardt as a possible mastermind behind this. See Barnett, Randy. The Ninth Circuit's Revenge (blog entry for June 09, 2005 at http://www.nationalreview.com/comment/barnett200506090741.asp)
While it is true that Reinhardt had the greatest number of Supreme Court reversals in the last decade, he did not participate in *Raich*. However, it is possible that Judge Harry Pregerson, his colleague on the Court of Appeals and the author of the Raich I and II opinions, might have had similar motives. He was the second most reversed Judge during the Second Rehnquist Court era. See Cox, Manson, and Batkins, Supreme Supervision Required. However, given my analysis, I contend that while lower court was sympathetic to Stevens' maneuvers , it mostly followed passively Stevens' signals in *OCBC*, and later in *Raich*.

When the Supreme Court finally delivered its verdict the general public was puzzled. In a seemingly remarkable reversal of the usual voting patterns (and the "attitudinal model"), all of the Court's liberals voted against and three of the Court's conservatives voted in favor of medical marijuana. Six Justices chose to vacate the ruling by the Court of Appeals and declared that the Congress had the right to regulate i.e. forbid local cultivation and possession of marijuana. However, only five of them (Stevens, Kennedy, Souter, Ginsburg, and Breyer) supported the majority opinion authored by Stevens that based this right of Congress on its Commerce Clause powers and, more specifically, on the *Wickard v. Filburn* precedent.

Justice Scalia wrote a separate concurrence, arguing that this right of Congress should be derived from Necessary And Proper Clause. On the other side, Justice O'Connor penned a bitter principal dissent, joined in all but the third part of her opinion by Rehnquist and Thomas. Ironically enough, its main line of reasoning was precisely Brandeis' "states as laboratories" argument that Stevens had previously invoked in *OCBC*. It is also interesting that, faced with the demise of his federalist project in the Commerce Clause jurisprudence, Rehnquist declined the opportunity to offer his own opinion. Thomas also wrote a separate dissent offering, among other things, the originalist interpretation of the meaning of the word "commerce".

5.2.2. Heresthetical maneuvers in *Raich*

We have already put forward a hypothesis that the very appearance of a case like *Raich* before the Court was at least partly a result of Stevens' use of heresthetical attacks (primarily judicial signaling and issue dimension manipulation) in *OCBC* four years earlier. In *Raich*, the Court's liberals once again employed every possible type of heresthetical maneuvers. Indeed, it is possible to argue that they were forced to do so in order to make full use of the opportunity

that they created with *OCBC*. The rest of the Court responded by bringing into play several maneuvers of their own.

5.2.2.1. Agenda Setting

As far as the control over the certiorari is concerned, we can safely assume that it was on the strength of the four liberal votes that the Court decided to grant review in *Raich*. While the appearance of the case like *Raich* before the Court represented a *win-win* situation for liberal antifederalists, the failure to grant review would amount to their defeat. If *Raich* were denied review, lower court's liberal and yet profederalist decision would be preserved, yet it would not have gained the power of the Supreme Court precedent. Thus, it would fail to offer final protection to the patients and their caregivers, while at the same time the *Morrison* legacy in Commerce Clause jurisprudence would remain untouched. Correspondingly, none of the Court's conservative federalists could have any interest in granting certiorari.[165]

In his *OCBC* concurrence, Stevens sent out clear signals that him and the rest of the Court's liberals would be willing to support medical marijuana on the Commerce Clause grounds. His majority opinion in *Raich* has now revealed that his signaling was a mere tactical ploy. Stevens did not want or, as I will demonstrate later, could not have used federalism to divide the conservative majority and preserve medical marijuana. However, he could and indeed had used marijuana to split the federalist majority and restore Commerce Clause powers of the Federal Government.

This of course did not mean that Stevens completely lost interest in protecting the patients' rights to medical marijuana. So, after he eviscerated Rehnquist's federalist legacy of

[165] It is possible to argue that Kennedy simply decided to curb further federalist revolution in Commerce Clause jurisprudence. However, this seems rather unlikely, given that Kennedy unreservedly supported *Morrison*, and has previously defected from the federalists only in *US Term Limits v. Thornton* (1995), a case completely unrelated to Commerce Clause.

Lopez and *Morrison*, Stevens returned to the other option he signaled in OCBC. In the final paragraphs of his opinion, he specifically claimed that the Court had not passed any judgment regarding the respondents' Due Process and necessity defense claims, thus leaving those questions open. He also suggested an alternative legal avenue - civil petition to Solicitor General to reclassify marijuana from Schedule I drug to a lower category. Finally, Stevens pointed out that patients and other citizens should also try to influence their Congressional representatives and thus effectuate a change in federal regulation.

Despite the fact that Stevens' had sent out (partly) false signals in *OCBC*, the respondents have not ignored the presence of these new signals in *Raich* and have immediately filed another suit, this time focusing on the Due Process and necessity defense arguments.[166] The decision by the Court of Appeals in *Raich II*,[167] following the remand from the Supreme Court, was delivered on March 14, 2007. It was decided by the same three-judge panel that has previously (in *Raich I*) framed *Raich* as a Commerce Clause challenge.[168]

This has provided an opportunity to test some of the assumptions I have made, and the predictions derived from them:

1. *Analysis of the Supreme Court decision in Raich, in the light of Stevens' dissent in OCBC, would suggest that Raich et al. (this time as appellants) have misinterpreted Stevens' silence on the Due Process issue. The analytical narrative offered in this thesis implies that the appellants should have focused solely on the medical necessity defense for the individual patients.*

[166] Obviously taking cues from Court's ruling in *Gonzales v. Oregon*, the respondents also added a plain language challenge, however the Court of Appeals declined to consider it, arguing that it did not appear in the original case. This could not be classified as signaling process because Raich et al. were relying on the official Court precedent.
[167] I will refer to the Court of Appeals rulings in first Raich case as *Raich I*, and second Raich case as *Raich II*. Also, I will continue to refer to the Supreme Court case *Gonzales v. Raich*, as simply *Raich*.
[168] The panel consisted of Judges Pregerson and Paez, from the Court of Appeals for the Ninth Circuit, and Judge Beam, from the Court of Appeals for the Eighth Circuit.

Such prediction was confirmed when the Court of Appeals in its ruling rejected the Due Process claims, while at the same time recommending that Raich could try the necessity defense argument.[169]

2. The lower court, in both Raich I and Raich II, has closely followed Stevens' signals (especially in OCBC) when framing the cases.

I have already demonstrated that the reasoning in *Raich I* has explicitly relied on the Stevens' heresthetical attack in OCBC. However, the effects of Stevens' signaling in OCBC case can also be detected in the *Raich II*. In the ruling the judges revisited the possibility of medical necessity defense, an option they ignored in *Raich I*.

> *"**Dicta** in a recent Supreme Court decision questioned the ongoing vitality of common law necessity defense.[…]But the majority ultimately conceded that the "Court ha[d] discussed the possibility of a necessity defense without altogether rejecting it." Id. (citing* Bailey*, 444 U.S. at 415).* ***Three Justices filed a separate concurrence*** *in* Oakland Cannabis*, noting that "the Court gratuitously casts doubt on 'whether necessity can ever be a defense' to* any *federal statute that does not explicitly provide for it, calling such a defense into question by a misleading reference to its existence as an 'open question.' […] We do not believe that the* Oakland Cannabis ***dicta*** *abolishes more than a century of common law necessity jurisprudence."*[170]

The new ruling demonstrated two important points. First, the lower court has not once, but on two separate occasions (*Raich I* in 2003 and *Raich II* in 2007) declined to follow the

[169] *Raich v. Gonzales*, 2007 U.S. App. LEXIS 5834 (9th Cir. Cal. Mar. 14, 2007).
[170] Raich v. Ashcroft, 352 F.3d 1222, 2003 U.S. App. LEXIS 25317 (9th Cir. Cal. 2003), 1227 n.4.

reasoning of the Court's majority in *OCBC*. It has instead relied each time on one of the signals from the concurring Justice in that case, thus adopting his *de facto* minority perspective. This is further evidenced by their repetition of his references to the parts of majority opinion as *dicta*. Second, Stevens' sophisticated voting in OCBC, with the purpose of endowing his signals with more authority, thus making them more effective, has obviously paid out, as demonstrated by the above quote.

5.2.2.2. Manipulation of issue dimensions

If we compare Supreme Court's final ruling and the original suit brought by Monson and Raich it becomes obvious that once again several dimensions of the issue were deliberately suppressed. Of course, this time the liberals did not have to manipulate the issue-dimensions, since the case was already framed according to their preferences. The lower court has already suppressed other dimensions and focused on the Commerce Clause challenge. Stevens was now opinion writer for the Court's majority and he acted in a manner very similar to Thomas in *OCBC*. He Stevens acknowledged that the respondents challenged CSA on four other grounds.[171] He eventually made one cursory reference to two of those challenges (Due Process and medical necessity) near the end of his opinion. Finally, he declines to address the issues arguing that the lower court has not done so.

5.2.2.3. Sophisticated/Strategic Voting

Whether the liberal vote in *Raich* was truly sophisticated is hard to prove. However, it is easy to demonstrate that the liberals have acted strategically on both the conference and the final

[171] 545 U.S. 1, 4

vote. Indeed, we can apply the logic similar to the one we already used when we analyzed the Court's decision whether to grant certiorari for *Raich*. It suggests that the liberals were not presented with the actual choice. If they wanted to reap any benefits from their previous heresthetical moves, liberal faction had to vote against medical marijuana and in favor of federal regulation. They knew that Rehnquist would vote to preserve his federalist legacy on the preliminary voting. Thus, if they supported the liberal State law, the right to assign the writing of the majority opinion draft would go to Rehnquist as the highest-ranking member of the preliminary majority. He would then assign the opinion to himself and narrowly interpret the issue at stake, protecting the recent Commerce Clause jurisprudence as well as limiting the reach of the State law. The liberals knew it because this was precisely what Rehnquist had already done in a similar situation two years earlier, namely in the *Nevada Department v. Hibbs* case.

There is at least one other indicator that the liberals (or at least Stevens) have cast a strategic vote and voted against their preferences concerning marijuana. The proof of this can be found in Stevens' own candid public admission in his address to the members of the Bar Association of Clark County, Nevada, several months later. After stating that he completely supported the medical use of marijuana, and apologizing for his vote in *Raich*:

"*Nevertheless, those policy preferences obviously could not play any part in the analysis of the constitutional issue that the case raised. Unless we were* ***to revert to a narrow interpretation of Congress' power to regulate commerce among States*** *that has been consistently rejected since the Great Depression of the 1930s, in my judgment our duty to uphold the application of the federal statute was pellucidly clear*." [172]

Regardless of this, liberal's strategy has clearly worked and opinion assignment went to Stevens (as the most senior Associate Justice) who, not surprisingly, assigned the task to himself. He then used the opportunity and authored an opinion that almost completely rescinded any

[172] «An Unusual Apology», *O'Shaughnessy's - Journal of the California Cannabis Research Medical Group*, Fall 2005., http://www.ccrmg.org/journal/05aut/apology.html. Emphasis mine.

limitations on Congress' Commerce Clause power as established in *Lopez* and *Morrison*, narrowly limiting those two cases to their specific facts and thus making them practically irrelevant as precedents.

5.2.2.4. Heresthetical responses by the Court's federalists

The use of heresthetical maneuvers can be detected on the side of the Court's federalist wing, as well. However, given that *Raich* was largely predetermined as a Commerce Clause case by Stevens' concurrence in *OCBC*, there was not much room for such maneuvers.

Justice Scalia authored a concurrence in judgment only, in which he argued that the majority was wrong when it relied on Commerce Clause reach a verdict. According to Scalia, the Court should have instead relied solely on Necessary And Proper Clause. Although his ground-laying concurrence might have tried to preserve *Lopez* and *Morrison* Commerce Clause legacy, it is possible that his approach could have opened an even worse (from the federalist perspective) Pandora's box of unrestrained use of Necessary And Proper Clause. This was probably the reason why no other Justice supported his opinion.

The dissents suggest that at least one of them, Justice O'Connor, had actually cast a strategic vote in *Raich*. She in fact openly admitted doing so in the last part of her dissent, where she expresses her personal opposition to medical marijuana.

> *"If I were a California citizen, I would not have voted for the medical marijuana ballot initiative; if I were a California legislator I would not have supported the Compassionate Use Act."* [173]

[173] 545 U.S. 1, 61

It is interesting that the other two dissenters explicitly declined to join that part of her opinion. Thus we can assume that either their expressed preferences were sincere or that they were reluctant to reveal the calculations behind their vote.

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

The third case involving federalism issues and Controlled Substance Act was not related to medical marijuana, but to another controversial issue: physician-assisted suicide. Similarly to *Raich,* the case involved a liberal state law and a restrictive federal measure, and as such was almost certainly granted *certiorari* based on the votes of the four Court's liberals. After the unanimous Court had allowed for the States to prohibit euthanasia in *Washington v. Glucksberg* (1997)[174], this was the opportunity to revisit the issue in a somewhat reversed situation. At also has to be noted that, in the meantime, the Court's staunchest federalist, Chief Justice Rehnquist had died after a protracted battle with cancer.[175] Chief Justice John Roberts was appointed in his place. Another Court's federalist, Justice O'Connor had also announced that she would retire as soon as possible, which she did few months after *Gonzales v. Oregon* was decided.

5.3.1. Background of the case

In 1994, following the referendum, the state of Oregon has passed the so-called Death With Dignity Act (ODWDA), which exempted from civil or criminal liability state-licensed physicians that prescribed lethal doses of medical substances to terminally ill patients. Naturally, the Act contained many strict safeguards regulating such procedure, aimed at eliminating any

[174] *Washington v. Glucksberg*, 521 U.S. 702 (1997).
[175] The details of Rehnquist's fate might have had effects on the reasoning of the other members of the Court in this case.

potential abuses. Unlike marijuana in *OCBC* and *Raich* cases, the substances at issue here were classified under Schedule II of the CSA, which meant that they had high potential for abuse, but also accepted medical use, and could only be obtained with doctor's prescription.

However, when the Republican federal government took office in 2001, the new Attorney General issued a so-called Interpretive Rule declaring that the usage of controlled substances in physician-assisted suicide does not constitute a "legitimate medical purpose". Such practice was declared unlawful under CSA. State of Oregon, joined by several physicians and patients, has then sued for permanent enjoinment of the Rule, and the District Court agreed. The Court of Appeals later invalidated the Rule, arguing that by making a procedure that was permitted by the State a federal crime, it altered the balance of power between the States and national government. For such an authority, the Court reasoned, the Attorney General needed to have an explicit delegation by Congress, in line with the clear-statement doctrine, which was lacking in CSA. As an alternative reasoning, the Court of Appeals concluded that the Rule was outside the scope and meaning of CSA, which targeted only conventional drug abuse and also authorized Secretary of Health and Human Services, and not Attorney General, to make medical judgments.

The decision was 6:3 in favor of Oregon. Both of the Court's moderates voted with the liberals, while Thomas and Roberts joined Scalia's dissenting opinion. Thomas also authored a separate dissent. The liberals have now returned to their predictable attitudinal voting patterns, upholding the liberal Oregon law. Since the new Chief Justice voted with the minority, Stevens had once again the opportunity to assign the writing of the majority opinion draft. This time he gave it to Kennedy, Court's moderate who voted with federalist majority in *Lopez* and *Morrison*, but also lend crucial support to a new anti-federalist majority in *Raich*. Under Kennedy, the

Supreme Court took a very limited statutory interpretation approach, refusing to touch upon any of the constitutional issues.

5.3.2. Heresthetical maneuvers

5.3.2.1. Agenda setting

It is very plausible that the liberals have voted to grant a certiorari in *Gonzales v. Oregon*. The case involved a lower Court decision in favor of a liberal State law, which would not have gained the strength of a precedent if the Court just dismissed Government's appeal for certiorari. They could also reasonably assume that such a case would once again divide the conservative-federalist majority enabling the liberals to dictate the outcome, just like in *Raich*. The case had another advantage for the liberals because it was already framed as either the application of the clear statement rule or the simple plain meaning interpretation of the statute. While they have indeed opposed the use of the clear statement rules in curbing the Government's authority in the past, even such a relatively weak potential concession to the federalism cause was neutralized in the final opinion, which opted for the "plain meaning" solution. What was important for the liberals was that the case did not involve a serious constitutional challenge, such as Commerce Clause, that could jeopardize the recent *Raich* victory. Indeed, the respondents have mostly stayed away from any such claims during the oral arguments, and were even openly scolded by Thomas for doing so:

"[R]espondents have not seriously pressed a constitutional claim here, conceding at oral argument that their "point is not necessarily that [the CSA] would be unconstitutional. […] In

any event, to the extent respondents do present a constitutional claim, they do so solely within the framework of Raich. Framed in this manner, the claim must fail. […] Respondents' acceptance of Raich forecloses their constitutional challenge."[176]

5.3.2.2. Manipulation with issue dimensions

As we have already mentioned, Kennedy penned an opinion that carefully avoided any underlying federalism issues, and focused solely on the statutory interpretation and the supposed intentions of Congress at the time the act was passed. Not only did the majority completely ignore Thomas's rhetorical Commerce Clause-related attack, but it even declined to apply the already established doctrine of clear statement that was suggested in the lower Court rationale, declaring that it was "unnecessary even to consider the application of clear statement requirements".[177] Instead, it relied on the alternative argument offered by the lower court concluding that the plain meaning of "drug abuse" does not include "prescriptions for assisted suicide".[178]

5.3.2.3. Strategic/sophisticated voting

Since Oregon was another case involving multiple issue-dimensions that would split the conservative vote, the Court's liberals were aware that they, as a bloc, would decide which side would gain majority. This meant, that they would have a lot of influence on the content of the final decision. However, if they wanted to control the outcome even further, it was in their interest to vote contrary to Chief Justice and have Stevens assign the opinion. Of course, it is possible that the liberals would have voted in favor of Oregon, even if it meant siding with Chief

[176] 546 U.S. 243 (2006), 304. Of course, had the respondents seriously contested *Raich*, the liberals would either vote for the Government or, more likely, simply ignored such challenge in the final decision.
[177] 546 U.S. 243 (2006), 274
[178] 546 U.S. 243 (2006), 273

Justice. At any rate, the final tally reveals that Roberts did not pass first and then voted strategically with majority. It is logical to assume that, after Chief Justice cast his sincere vote in favor of the Government, Stevens voted against it, and other liberals followed suit.

5.3.2.4. Heresthetical responses

The minority had tried to employ the heresthetical tactics themselves, and Justice Thomas insisted that *Raich* should be the controlling precedent in this case. If Kennedy and the Court's liberals claim that federal government had the right to preempt state law with CSA, then they should be consistent and defer in this case to Attorney General's decision, argued Thomas in his dissent. Given his completely opposite position in *Raich*, the heresthetics would suggest that Thomas' support for the Government was a sophisticated vote. Indeed, just like O'Connor in *Raich*, Thomas openly admits this in his dissent:

> *"**I agree with limiting the applications of the CSA** in a manner consistent with the **principles of federalism** and our constitutional structure. Raich, supra, at ___ (THOMAS, J., dissenting); cf. Whitman, supra, at 486–487 (THOMAS, J., concurring) (noting constitutional concerns with broad delegations of authority to administrative agencies)."* [179]

The closing words of the dissent suggest that it was just a tactical ploy in order to point out the inconsistency of the majority, and perhaps an attempt to divide it. It seems specifically aimed at Kennedy, who defected from the federalists in *Raich* and has now authored the majority opinion in favor of the States.

> *"The relevance of such considerations was at its zenith in Raich, when we considered whether the CSA could be applied to the intrastate possession of a controlled substance consistent with the limited federal powers enumerated by the Constitution. […] The Court's reliance upon the constitutional principles that it rejected in Raich—albeit **under the guise of statutory interpretation**—is perplexing to say the least."*

[179] 546 U.S. 243 (2006), 303. Emphasis mine.

Conclusion

While political scientist and legal scholars become increasingly focused on the heresthetical maneuvers within the context of the Supreme Court, almost all of the research is oriented on statistical large-N analysis. In the thesis I have employed a completely opposite approach, focusing instead on three specific cases.

These cases share many important similarities. They were all related to same federal law, Controlled Substances Act. They all came to the Supreme Court from a liberal Court of Appeals for the Ninth Circuit. They were dealing with very controversial issues such as medical marijuana and euthanasia. They were all instances of liberal state regulations opposed to conservative federal regulations. And thus they all contained the underlying federalism dimension. It was reasonable to expect that the similarly composed majorities would reach analogous decisions based on the application of consistent rationale, with logically progressing effects.

In spite of these similarities, the outcomes, the rationales, the final alignments of Justices, and the ultimate effects of these cases were markedly different. *OCBC* was a unanimous decision against medical marijuana, without significant practical effects, that avoided federalism issues and focused on the medical necessity defense. *Raich* was a 6:3 decision in favor of the Federal Government, with massive legal consequences on the national level, and that mostly ignored the issue of medical marijuana and focused on the federalism (Commerce Clause) issues. *Oregon* was a 6:3 decision in favor of the State of Oregon, with significant legal consequences on the

state level, and that once again avoided federalism issues and focused on the statutory interpretation.

The only thing these results seemingly have in common is the fact that in all of them the Court's liberals voted *en bloc*. That detail combined with such disparate and somewhat surprising (if we assume attitudinal voting) final alignments of the Justice, implies that there might be a logical connection between all these cases. In his book *Art of Political Manipulation* Riker suggests that we should be able to identify heresthetical maneuvers by looking precisely into to events with seemingly inexplicable and surprising outcomes.

In the thesis I have offered a possible reconstruction of the events that have lead to the demise of the main tenet of the Supreme Court's "federalist revival" of the 1990s. I have done so using the "analytical narrative" approach, and relying on Riker's concept of heresthetical maneuvers. Through an in-depth analysis of the Court's documents I have identified heresthetical stratagems employed primarily by Court's liberals. I have demonstrated that, under a modest assumption that the Justices are acting as rational and well-informed agents within the institutional boundaries, the predicted effects of these maneuvers correspond completely with the actual results.

The insights thus gained can be used in construction of the better predictive models of the Justices behavior, but also on a more general scale, to improve our knowledge on the decisionmaking in the committees.

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