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The Term the Constitution Died

By Michael S. Greve

Beneath the Supreme Court's many astounding decisions in its 2002–2003 term, and the shifting judicial coalitions that produced those results, runs a unifying basso continuo: Constitutional law, in the sense of judicial decisions that are guided—at least in aspiration—by the text, structure, and logic of the written Constitution, is dead. It has been replaced, often as a matter of explicit doctrine, with subjective judicial impressions of popular sentiment or political utility.

In the new age of postmodern constitutional law, one authority is as good as another. And so the Federalist Outlook *bids farewell to constitutional argument, and with the aid of Don McLean heralds the arrival of the oracular Constitution. The cryptic lyrics of "American Pie," Mr. McLean's 1971 classic, provide a strikingly accurate picture of our predicament.*[1]

A long long time ago . . .

. . . if you can still remember, the Supreme Court used to be guided by constitutional text and logic. Justices, of course, have always harbored personal prejudices and political preferences; some have pursued a discernible ideological agenda. Those tendencies, however, were constrained by the universally acknowledged need to connect a decision and opinion, in some reasonably direct and linear fashion, to the actual Constitution.

That constraint has now given way to a judicial style that Professor Lawrence Tribe has aptly characterized as "free-form method."[2] In addition to abortion on demand (which, whatever its merits, was not in the Constitution until the Supreme Court put it there), we now have racial quotas (ditto). We also have a constitutional right to sodomy or more precisely, against state restrictions thereon (*Lawrence v. Texas*). In support of those positions, the Supreme Court variously recurs upon perceived policy imperatives, an emerging national—or international—consensus, or the need to preserve and protect the Supreme Court's prestige and supremacy. None of these considerations even purport to amount to a constitutional argument.

As we shall see, the new judicial style is not confined to hot-button "individual rights," and it does not invariably benefit liberal constituencies. Though otherwise badly bloodied over the past year, for example, corporate America obtained protection against punitive damages in a "substantive due process" ruling that looks suspiciously like a trimester solution for corporate entities seeking to abort trial lawyer campaigns (*State Farm Mutual Automobile Ins. Co. v. Campbell*).

Shifting coalitions of justices produced disparate results. Not one majority opinion in the eighty-four cases decided over the past term, however, contains an argument that might help to restore a piece of the constitutional order. In any given case, on any given Monday, a few justices will support and enforce the Constitution. Five-plus justices will not.

I knew if I had my chance
That I could make those people dance
And maybe they'd be happy for a while

It's Sandra Day O'Connor's country; the rest of us just dance to her fiddle. *Grutter v. Bollinger* and

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Gratz v. Bollinger—concerning the use of racial preferences by the University of Michigan's law school and its undergraduate programs—confirm that central fact of American politics.

While Justice O'Connor has often been criticized for unduly fact-bound, confusing opinions, her majority opinion in *Grutter* is crystal clear: in pursuit of the "compelling" state interest in "diversity," anything goes. Educational institutions may use race-based preferences without exploring race-neutral alternatives. Nor does the Constitution limit the scale of racial preferences: a "critical mass" of minority students is whatever a university says it is.

As justices Scalia and Thomas pointed out in acerbic dissents to *Grutter,* the need to generate racial diversity by means of admissions preferences arises solely from the state's decision to operate an elite law school (and college): an open-admissions law school would invariably be multichromatic. A state, however, has no compelling interest—perhaps not even a plausible interest—in running a law school that competes with Duke or Columbia. How then can it have a compelling interest in using racially discriminatory means to compensate for its self-inflicted loss of "diversity"? Justice O'Connor provides no answer.

Her opinion flunks even a modest test of internal coherence. "We take the law school at its word" (that it would rather make do without racial preferences), reads the key sentence of the *Grutter* opinion. In *Gratz,* however, a six to three majority (including O'Connor) enjoined the overt use of automatic racial "extra points." As Justice Souter observed in a powerful dissent, a mechanical racial point system differs from more discretionary regimes not in its effect but only in its openness and transparency. It is a mistake, he continued, "to treat the candor of [Michigan's] admissions plan as an Achilles' heel." If anything, Michigan should get "an extra point of its own for its frankness." Just so. By insisting on an otherwise meaningless proviso ("no automatic preferences"), the Court has held that quotas are okay—so long as universities lie about them. And *then*, the Supreme Court will "take them at their word."[3]

Pre-*Gratz* and *Grutter,* public institutions had to justify racial discrimination by demonstrating (among other things) that their policies were destined and designed to terminate at some point. That test connects to the constitutional ideal of nondiscrimination. But the University of Michigan could not meet it and did not seriously attempt to do so: Its policies were explicitly designed to ensure a racial balance from here to eternity. And so, in sending the country off into the diversity mosh pit, Justice O'Connor replaced the constitutional test with a curfew: In the year 2028, her *Grutter* opinion ordains, now-permissible—nay, morally imperative—racial preferences will turn into a constitutional pumpkin.

It's right there in the Fourteenth Amendment.

February made me shiver
With every paper I'd deliver

This year's March *Outlook* urged the Supreme Court to heed, in a case argued in late February (*Franchise Tax Board v. Hyatt*), the full faith and credit clause of the Constitution as a means of curbing biased state liability verdicts.[4] No cigar, and not even close: the Court unanimously read the clause out of the Constitution. It made up for it, in a manner of speaking, by reading stuff *into* the Constitution.

Hyatt upheld a Nevada citizen's right to sue a California state agency for intentional torts committed, for the most part, in California—in a Nevada state court, under Nevada law, and in derogation of California law, which bars intentional tort claims against state agencies. State courts, the Supreme Court held, need not credit a sister state's enactments—not even those that protect a state's sovereign functions.

Contrast this holding with the contemporaneous decision in *State Farm v. Campbell,* which set aside a $145 million punitive damages ruling by the Utah Supreme Court. Writing for a six to three majority (Justices Scalia, Thomas, and Ginsburg dissenting), Justice Kennedy observed that the conduct for which State Farm was punished occurred mostly outside Utah and, moreover, was lawful in many of those jurisdictions. The due process clause, Kennedy averred, bars states from regulating and punishing conduct outside their own territory. Unless extraterritorial conduct has a nexus to the specific harm suffered by the plaintiff, juries and state courts may not consider it in assessing punitive damages.

State Farm lacks a constitutional basis. Due process, the case instructs, permits no more than a one-to-one ratio between punitive and compensatory damages when the latter are substantial; a ratio not to exceed single digits in some other cases; and perhaps a multiple-digit ratio in cases of personal injury or egregious conduct with small damages. This tripartite scheme is as contrived as—well, *Roe*.

The extraterritoriality problem, moreover, is hardly limited to punitive damages. Suppose a state jury awards substantial *compensatory* damages for an injury resulting from some product design: the manufacturer will either modify the "defective" design or, when that is impossible (as with pharmaceutical drugs), yank the product off the market. Either way, the award effectively punishes conduct that is legal in other states. Either way, it vitiates sister states' policy choice to keep the (unmodified) product legal and available.

Extraterritoriality problems arise not from punitive damages but from our unconstitutional choice-of-law regime. Under that regime, defendants may be sued in any state where they have minimum contacts. (Manufacturers, which cannot keep their products out of any state, can be sued anywhere.) Plaintiffs choose the most favorable forum court, which then chooses to apply its home state law—regardless of the defendant's home state law.

There would be no liability crisis if defendants' home state law—including liability limitations—offered them protection in the plaintiff's home court. As it happens, the Constitution commands states to give "full faith and credit" to a sister state's laws. The *Hyatt* Court, however, categorically "decline[d] to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause."[5] State courts may strike the balance on their own—and give "full" faith and credit to sister-state law by giving *zero* credit. In other words, the clause has no judicially recognizable content.

Having voted nine-zip to wipe out a vital constitutional check on state excess, the justices deal with the consequences—rampant state bias, exploding liability—in one of two ways. Justices Scalia, Thomas, and Ginsburg, dissenting in *State Farm,* deny that extraterritorial state court jurisdiction is a constitutional problem. The other justices deal with the problem when it seems to get out of hand (as with punitive damages)—not by going back to the constitutional text, but by making up due process ratios. Both camps "decline to embark on the constitutional course," to quote a phrase.

The players tried for a forward pass

In a raft of decisions dating back to 1996, the Rehnquist Court had made it harder for the beneficiaries of federal antidiscrimination statutes—such as the elderly, religious groups, and the handicapped—to sue state governments for damages. In *Nevada v. Hibbs,* state governments sought to extend that protection to lawsuits under the 1993 Family and Medical Leave Act (FMLA), which compels private and public employers to grant employees leave time for various purposes. The states' effort to expand their immunity from private suits was rebuffed. Federalism protections, the Court ruled in a six to three decision, must give way when Congress claims to protect women.

Technically, the FMLA is about families, not women. (*Hibbs* was brought by a *male* plaintiff, against a state government that had never been shown to discriminate in its employment practices.) The FMLA does not and cannot redress sex discrimination in employment, because that is already unlawful under Title VII of the Civil Rights Act. Never mind, said Chief Justice Rehnquist's majority opinion: by compelling state governments to extend equal leave benefits (mostly to men), the FMLA is a permissible "prophylactic" safeguard against sex-based stereotypes.

En route to this constitutional condom, the Court surrendered hard-won federalism ground. Only three short years ago, in *United States v. Morrison,* the Supreme Court invalidated a key portion of the Violence Against Women Act (VAWA). A purported antidiscrimination remedy enacted under the Fourteenth Amendment, Chief Justice Rehnquist declared in that case, must actually remedy discrimination, not some other ill. Moreover, the remedy must be "congruent and proportionate" to the existing pattern of discrimination. If that is right, *Hibbs* is wrong. (The "stereotype" defense of the FMLA could also have been asserted, and in fact was asserted, in defense of VAWA—there, to no avail.) If *Hibbs* is the law, *Morrison* is half-dead.

Hibbs is read most charitably as the chief justice's effort to construct a line that reconciles the Court's solicitude of state governments with Brennan era precedents and perceived political realities. The line is this: In extending entitlements to the handicapped, the elderly, or the religious, Congress must respect states' rights. Traditional civil rights constituencies, in contrast, may crowd into the "antidiscrimination" lifeboat. Post-*Hibbs,* the line privileges three such constituencies: racial minorities, which were (or one of which was) the intended beneficiary of the Fourteenth Amendment; women, whose ascension into the pantheon of "discrete and insular minorities"—while bereft of a constitutional rationale—is politically irrevocable; and railroad companies, for some reason that the justices have declined to discuss.[6]

Connect the constitutional dots.

Bad news on the doorstep

As predicted a year ago in these pages, the federal preemption of state economic regulation (including liability lawsuits) emerged as a particularly fertile field of Supreme Court adjudication.[7] Over a dozen of the 2002–2003 cases deal with the preemption of state law under federal statutes or constitutional provisions, such as the due process clause and the commerce clause.

Those cases include two significant pro-preemption decisions: the *State Farm* ruling, and *American Insurance Association v. Garamendi*, where a five to four majority struck down California's Holocaust Victim Insurance Relief Act (HVIRA) as inconsistent with the national government's foreign policy.

The HVIRA compels all insurers doing business in California to disclose information about all policies issued between 1920 and 1945 in Europe, by European companies, to European citizens. The Nazis abrogated or confiscated many of the policies then issued to Jewish citizens. The purpose of the HVIRA is to reduce the discovery costs for trial lawyers who round up Holocaust survivors and their descendants to bring restitution claims. In *Garamendi*, the U.S. government argued that the HVIRA conflicts with a federal policy of encouraging Holocaust claims settlements from an international restitution fund, established by executive agreements that the Clinton administration arranged with Germany and other European governments. The *Garamendi* Court accepted that argument and declared the California law preempted.

More often, though, the Court ruled *against* preemption:

- In *Sprietsma v. Mercury Marine*, a unanimous Court sustained a state court liability lawsuit over an alleged "design defect" of an outboard propeller. The Court rejected the corporate defendants' claim that administrative actions under the Federal Boat Safety Act preempted such lawsuits.

- In *Norfolk & Western Railroad Company v. Ayers*, a closely divided Court (five to four) held that the Federal Employers Liability Act (FELA) authorizes asbestos-related lawsuits and damage awards based on a fear of future illness (as distinct from an actual or imminent injury). In construing the federal statute, Justice Ginsburg wrote in her majority opinion, courts should follow *state* common law, which typically permits such "phobic" damages.

- In *Pharmaceutical Research and Manufacturers of America (PhRMA) v. Walsh*, the Court sustained a Maine statute under which the state threatens to exclude pharmaceutical products from the sizeable Medicaid market unless the manufacturers agree to make price concessions for drugs sold to *non*-Medicaid patients. The Court rejected both a dormant commerce clause challenge and a statutory preemption challenge to this extortionate scheme.[8]

- In *Kentucky v. Miller*, the Court unanimously narrowed the preemptive scope of the federal ERISA statute and re-empowered states to regulate vast segments of the health insurance market, especially managed care arrangements.

As these shorthand accounts suggest, preemption cases typically pit business interests, with an interest in uniform national regulation, against trial lawyers and state governments, who insist on local prerogatives to protect their clientele irrespective of the costs to the national economy. Along this crucial dimension, corporate America had a lousy 2002–2003 term. Worse yet, the preemption decisions raise the terrifying prospect of a stable judicial coalition against preemption.

The quartet practiced in the park

The table on the next page lists the justices' votes in the seven non-unanimous 2002 decisions involving state business regulation and federal preemption (constitutional as well as statutory).

The only two justices to dissent in each of the three contested rulings for federal preemption were Scalia and Thomas. Likewise, in the four contested cases that produced victories for states or trial lawyers, Justice Scalia and Justice Thomas voted with the anti-preemption majority in every case. The next most anti-preemption members of the Court are justices Ginsburg and Stevens.

Those four justices put in a crisp, nearly compelling, appearance in the *Garamendi* dissent.[9] In the *State Farm* punitive damages case, they suffered the defection of Justice Stevens, who will consistently vote against statutory preemption but *for* judicial preemption under the due process or dormant commerce clause. Conversely, in *Norfolk & Western Railroad* (the asbestos liability decision), the Fab Four found a fifth anti-preemption Beatle—and the case went south. In *PhRMA*, Justice Breyer added a sixth vote, to equal effect.

Anti-Preemption Votes, 2002–2003 Term[10]

Case	Ginsburg	Stevens	Souter	Breyer	O'Connor	Kennedy	Rehnquist	Scalia	Thomas
Pro-Preemption/Business Wins									
American Ins. Association v. Garamendi	X	X						X	X
State Farm Mut. Automobile Ins. Co. v. Campbell	X							X	X
Beneficial Nat. Bank v. Anderson								X	X
Anti-Preemption/Business Losses									
Nike, Inc. v. Kasky	X	X	X				X	X	X
Green Tree Financial Corp. v. Bazzle	X	X	X	X				X	X
Pharmaceutical Research and Mfrs. of America v. Walsh	X	X	X	X				X	X
Norfolk & Western R. Co. v. Ayers	X	X	X					X	X

2002 was a warm-up act. In years ahead, the fearsome anti-preemption foursome will prove increasingly cohesive and potent. Justices Ginsburg and Stevens will consistently vote against federal preemption (at least when Congress has the gall to preempt). Justice Thomas and Justice Scalia, for their part, have persuaded themselves that "federalism" implies a states' right to lay waste to the national economy.[11] The right, to be sure, may be limited, even abrogated—but only by Congress, not by the Court.

Against this left-right combo, the center cannot hold. It really has only one defense of its broad preemption position: We cannot hand the trial lawyers the keys to the national economy. That is true—but it is not a credible constitutional argument. The conservative justices' commitment to "federalism" will increasingly serve to expand the states' rights to exploit each others' citizens and businesses—through liability lawsuits that redistribute wealth from out-of-state defendants to in-state plaintiffs; through settlements among attorneys general that have the same logic and effect; and by taxing and regulating transactions in other states or, for that matter, foreign countries.

The courtroom was adjourned No verdict was returned

Apropos of state regulation, foreign countries, and unholy judicial coalitions: On the last day of its 2002–2003 term, the Supreme Court issued its nondecision in *Nike v. Kasky*. Nike was the target of an antiglobalization campaign accusing the company of sweatshop practices in Third, Fourth, and Fifth World countries. Nike responded with an aggressive public relations campaign and disputed the allegations in newspapers, letters to college directors of athletics, and other forums. An antiglobalizer sued Nike in a California court under California's Unfair Competition Law. Over Nike's objections that its campaign constituted protected First Amendment speech rather than commercial conduct, the California Supreme Court allowed the lawsuit to proceed to trial.

The Supreme Court heard oral arguments in this widely watched case—and then, in a six to three ruling, dismissed it for unpersuasive technical reasons. (The majority included the familiar anti-preemption quartet.) The nondecision means that Nike must defend the lawsuit in California courts. In effect, the company lost: a settlement expressing regret and contrition is far cheaper than retaining a gaggle of lawyers for a trial and Lawrence Tribe for multiple appeals. The Supreme Court's punt invites anticapitalist cranks to flood the California courts with complaints against companies that dare defend their corporate practices in the public arena.[12]

Having so ruled (or rather not), the justices declared the bazaar closed. The question is whether one can make sense of the transactions.

A generation lost in space, with no time left to start again

The Supreme Court is a conservative Court, Linda Greenhouse declared in the June 22 *New York Times*. A week later—post-*Grutter*, post-*Lawrence*—the *Times* issued a partial retraction: the Rehnquist Court is a *moderate* Court.[13] Indeed. The Court handed rousing victories to

public-sector unions and feminists (*Hibbs*), civil rights constituencies (*Grutter*), and the homosexual lobby (*Lawrence*). Trial lawyers made substantial progress, despite *Garamendi* and *State Farm*, while business took a licking. What, pray tell, would a *liberal* Court look like?

Conservatives, for their part, have reverted to denouncing the Supreme Court as a mouthpiece and instrument of elite opinion. That explanation, too, misses important elements. For one thing, it ignores the Court's defiance of a highly mobilized elite opinion in *Bush v. Gore*. It also fails to explain the Court's decade-long (though perhaps now-abortive) campaign for states' rights, which the justices pursued in the teeth of fierce criticism in the law reviews and the nation's op-ed pages. Perhaps most important, the *Kulturkampf* complaint can only observe, but cannot explain, the Court's solicitude of cultural rather than business or political elites.

Perhaps the Court is simply dedicated to random imperialism. But its posture can also be described as a kind of principled anticonstitutionalism.

Federalism presupposes a meaningful distinction between what is national and what is local—between activities that spill over state borders and those that are "purely internal to each state," as Chief Justice John Marshall put it. The Supreme Court has to police the constitutional line both ways—against national overreach into local affairs, and against parochial state interferences with other states, or with the national economy. From Chief Justice Marshall to Chief Justice Taft, the Supreme Court performed this function—by and large, with remarkable courage and conceptual clarity.

Federalism *needs* a court with the power to police the national-state line, if only to guard against wholesale centralization. The power to police the line, however, is the power to wipe it out or even to invert the scheme—to render national what once was local, and vice versa.

So it has come to pass. Family law and criminal law, for example, used to be the province of the states, for the excellent reason that those laws rarely affect citizens outside a given state. In contrast to a uniform national "solution," moreover, diverse state laws permit citizens to sort themselves into a jurisdiction that suits their preferences. Justice Kennedy and Justice O'Connor still extol this "moral federalism"—until some state offends their sensibilities, whereupon they will crush the offenders under a uniform national right. Even while losing control over their internal affairs, however, the states have gained the authority to regulate parties and transactions *beyond* their own borders—to the point where California (motto: *Heute gehoert uns Deutschland/Und morgen die ganze Welt*) presumes the authority to regulate wholly German transactions, consummated over a half-century ago.[14] "Federalism" in its constitutional sense is dead. In its upside-down sense, it is not only alive but roaring.

Whence the inversion? Interest groups and coalitions are naturally drawn to central government (where the net returns on investments in lobbying are highest). Realizing that a boundary-policing Supreme Court is an obstacle to their ambitions, organized groups make a run at it, with the active assistance of central political institutions. Eventually, the Court proves incapable of resisting those pressures, cuts itself in on a New Deal, and plays out its political logic.[15]

Even if the Court were able to resist, it might not want to. A truly federalist court compartmentalizes democratic decision-making, consistent with the allocation of powers provided in the Constitution; it does not directly dictate policy outcomes. In contrast, a Court that restricts moral federalism in the name of made-up "rights" gets to run the country. Similarly, once the constitutional impediments to state aggression go by the boards, the states become wolves to one another—until a sovereign Court, Leviathan-like, steps in to police the state of nature.

This thread connects, by way of example, Justice Kennedy's seemingly disjointed—and politically incongruous—majority opinions in *State Farm* and in *Lawrence v. Texas*. Punitive damages and sodomy laws are quite alike: They are rarely enforced and, while technically aimed at particular conduct, principally serve to express public disapproval of certain constituencies. States, however, may not distinguish naughty from nice. Only the Court may do so.

Justice Scalia and Justice Thomas resist this constitutional inversion—up to a point. Their vociferous objections to the Court's imperious interventions under the umbrella of individual rights are right on the money, though probably futile. Their opposition to made-up judicial preemption doctrines (à la *State Farm* or *Garamendi*) is, in a manner of speaking, wrong on the money. Before the New Deal, we had firm, constitutionally grounded judicial doctrines against state aggression—for one example (among many others), the full faith and credit clause. California's Holocaust Act or the *Sprietsma* boat propeller suit would have been dead in the water six different ways, even in the absence of any federal action whatsoever. In that golden age, there was no need to vindicate far-fetched statutory preemption doctrines.[16] Those constitutional impediments to state aggression, however, have

been dismantled, and the justices are unwilling to reestablish them. (Witness *Hyatt*, for an instructive example.) That being so, Justice Scalia's and Justice Thomas's course of ditching the made-up judicial impediments is a leap halfway across a chasm—courageous, but an invitation to a costly chaos.

Don McLean's lament captures the conundrum: Our judicial generation *is* lost in space. The search for firm constitutional ground must start anew. Alas, we have run out of time.

And in the streets the children screamed
The lovers cried, and the poets dreamed
But not a word was spoken
The church bells all were broken

Written, it would appear, anno 2003 on the steps of the United States Supreme Court, where delirious college kids congregated to celebrate *Grutter* and lovers, *Lawrence*. The poets now sit on the bench, waxing about the right to define one's "own concept of existence, of meaning, of the universe, and of the mystery of human life" as an operative due process norm.[17] In that dewy-eyed atmosphere, one cannot get a constitutional word in edgewise. Our jurisprudence is as cracked as them church bells.

Now, what?

And the three men I admire most
The Father, Son, and the Holy Ghost
They caught the last train for the coast
The day the music died

After this term, we all need a break. We mortals, alas, have no exit. We need a plan of action for the here and now.

The standard conservative response focuses on judicial personnel: After *Grutter* and *Lawrence*, the Bush administration must replace any Supreme Court retiree (now or later) with a reliable conservative. Let's have a nomination brawl. Pass the ammunition.

Abortion on demand, quotas on demand, sodomy on demand: The right-wing insistence that enough is enough is surely understandable. With due respect to a decent and honorable justice, moreover, it would be useful to teach Justice O'Connor—and her fans and prospective successor—the lesson that postmodern "jurisprudence" eventually produces Nietzschean politics.

The true constitutional problem, though, lies deeper. Even a justice with rock-ribbed conservative instincts would confront the devilishly difficult task of having to reconstruct the constitutional spaceship in mid-flight—without causing more damage in the process. An orthodox conservative—even if one could be nominated, let alone confirmed—may be unsuited to that task. He (or she) might be unable to curb, let alone reverse, the Court's moral imperialism. At the same time, such a justice would almost certainly join the Court's let-the-states-loose quartet and, in the process, turn the Constitution into a trial lawyers' Bill of Rights.

Even that full-scale constitutional inversion and assault on the GDP would be survivable. But it is unnecessary and preventable. Perhaps we do not need another justice to defend traditional rules and reason in the fashion of Justice Scalia (who, after all, already has a vote and a voice). Perhaps the Supreme Court's renunciation of constitutional argument—qua constitutionalism, and qua argument—is best met by a justice of a more pragmatic orientation, one with a utilitarian disdain for legal forms, a healthy skepticism of regulating either railroads or sex, and above all a keen sense of business necessities and economies of scale.

Richard Posner, or somebody like him.

Notes

1. The full lyrics may be accessed from Mr. McLean's official website, www.don-mclean.com. An entertaining (if not entirely accurate) interpretation appears at www.straightdope.com/classics/a3_398b.html (accessed July 2003).

2. See Lawrence Tribe, "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation," 108 Harvard Law Review 1221 (1995).

3. By insisting on institutional camouflage, the Court has impeded an informed public debate and burdened elite schools with the pretend "review" of thousands of marginal white applicants who should and, in a world of open preferences, would apply to less selective institutions.

4. Michael S. Greve, "Choice and the Constitution," *Federalist Outlook* No. 16 (March 2003) (available at federalismproject.org/masterpages/publications/index.html and at www.aei.org/publications/pubID.16024/pub_detail.asp).

5. *Franchise Tax Board v. Hyatt*, 123 S. Ct. 1683, 1690 (2003).

6. For racial minorities, see *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). For women, see *Hibbs*, 123 S.Ct. 1972 (2003).

For railroads, see *Burlington Northern & Santa Fe Railway Co. v. Burton*, 270 F.3d 942 (10th Cir. 2001) (*cert. denied sub nom. Atwood v. Burlington Northern*, 536 U.S. 959 [2002]).

7. Michael S. Greve, "The Supreme Court Term That Was and the One That Will Be," *Federalist Outlook* No. 13 (July/August 2002) (available at federalismproject.org/masterpages/publications/index.html and at http://www.aei.org/publications/pubID.15849/pub_detail.asp).

8. This thumbnail account slights numerous procedural and substantive complexities presented in the case. Foremost, the Medicaid statute at issue in the case does not "preempt" any state law at all. It is a spending clause statute, which has legal force only by virtue of the state's acceptance of federal funds (as opposed to a federal order or prohibition). With the arguable exception of Justice Scalia, however, all members of the Court analyzed *PhRMA* as a preemption case.

9. The correct preemption analysis of *Garamendi* emerges from its factual context. Caught between the sophisticated Germans (who desperately wanted preemption) and the generous trial lawyers (who emphatically did not), President Clinton told the German chancellor one thing ("Gerhard, this preempts everything") and instructed an adviser to confirm that position in writing (see *Garamendi*, Docket No. 02-722). On any fair reading, however, the executive agreements leave the door open to state regulation and lawsuits in state courts. The *Garamendi* majority's supposition that the Clinton administration would deliberately preempt a trial lawyer campaign, cynics might contend, is at odds with all evidence about that administration's general conduct. It is in all events contrary to the text of the agreements.

10. *PhRMA* is listed as a preemption case for reasons explained in note 8. *Nike* is listed as a business loss for reasons explained below. Another contested preemption (dormant commerce clause) case of the 2002 term, *Hillside Dairy v. Lyons*, 123 S. Ct. 2142, is not listed because business interests were split in that case.

11. Justice Scalia and Justice Thomas are driven by pro-state rather than anti-corporate sentiments. In the Terms' two decisions involving the *federal* regulation of business, they dissented from majority decisions sustaining the regulations. *Boeing v. United States*, 123 S. Ct. 1099; *Barnhart v. Peabody Coal*, 123 S. Ct. 748.

12. It is happening as we speak. Under the California consumer protection statute at issue in *Nike*, an animal rights group has since sued Kentucky Fried Chicken for allegedly misleading statements on the company's website regarding the treatment of its chickens. See www.kfccruelty.com.

13. Linda Greenhouse, "Will the Court Move Right? It Already Has," *New York Times*, June 22, 2003; "A Moderate Term on the Court" (editorial), *New York Times*, June 29, 2003.

14. Lest the ascribed motto ("Today, we own Germany/And tomorrow, the whole world") seem sheer hyperbole, note that California has in fact asserted its authority to tax the *worldwide* combined income of *foreign* corporations. *Barclays Bank PLC v. Franchise Tax Board of Calif.*, 512 U.S. 298 (1991). As for California's present ambitions to regulate extraterritorial problems from U.S. privacy policy to global warming, see the terrific article by Christopher Swope, "Made In Sacramento," *Governing*, July 2003, p. 34 (available at federalismproject.org). It would be nice if California first learned to govern itself.

15. A powerful interpretation along these lines is Martin Shapiro, "The Supreme Court from Early Burger to Early Rehnquist," in Anthony King, ed., *The New American Political System*, 2nd ed. (AEI, 1990), p. 47.

16. I have argued the point at greater length elsewhere. See Michael S. Greve, "Federalism's Frontier," 7 Texas Review of Law & Policy 93 (Fall 2002).

17. *Lawrence v. Texas*, at 29 (Citing *Planned Parenthood of Southeastern Pa. v. Casey*, 503 U.S. 833 (1992)).