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## CAN JUDGES BE UNCIVILLY OBEDIENT?

BRANNON P. DENNING\*

### ABSTRACT

*In a recent article, Jessica Bulman-Pozen and David Pozen identified “uncivil obedience” as a tactic for protesting laws or regulations, not by violating the law, as with civil disobedience, but rather by scrupulous attendance to it. They noted that it is a tactic available to private and public actors alike, but were doubtful that a judicial variety existed. They were skeptical because, in their opinion, even hyper-formalist legal opinions would be unlikely to be perceived as provocative as scrupulous adherence to the letter of the law might be when practiced by non-judicial actors. In this Article, I argue that judicial uncivil obedience is possible, discuss examples of lower court uncivil obedience to United States Supreme Court decisions, speculate why uncivil obedience might be a particularly attractive*

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*form of dissent by inferior courts in a hierarchical judicial system, and argue that my examples satisfy Bulman-Pozen and Pozen's criteria. In addition, I argue that the constraints on uncivil obedience identified by Bulman-Pozen and Pozen, which can limit the opportunity for its exercise, have analogues that likewise limit the ability of judges to engage in uncivil obedience.*

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## INTRODUCTION

Suppose that you are a lower court judge who thinks that a recent Supreme Court decision would produce a number of undesirable consequences if its reasoning were pushed to its logical limits. Your response might be to read the decision narrowly, perhaps nearly confining it to its facts until clear signals are sent from the Court that it is serious. That has tended to be lower courts'—especially courts of appeals'—response to salient, potentially broad and deep decisions like *United States v. Lopez*.<sup>1</sup>

In other words, you might react just as Fourth Circuit Judge J. Harvie Wilkinson III reacted to *District of Columbia v. Heller*.<sup>2</sup> Judge Wilkinson was an early critic of *Heller*, not only criticizing the Court's opinion,<sup>3</sup> but also predicting that lower courts would face a rash of suits that would force them to fill in the gaps in the Court's decision.<sup>4</sup> As a sitting judge, Wilkinson has warned his colleagues to say no more than necessary when applying *Heller*.<sup>5</sup>

Another tactic, however, would be to ignore any limiting signals furnished by the Court and apply its decision in a way that takes its logic, and the principles it seems to announce, at face value. You could, then, do what Judge Richard Posner—a vociferous critic of

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1. See generally 514 U.S. 549 (1995). For examples of early post-*Lopez* decisions narrowly reading the case, see Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369, 379, 397-98.

2. See generally 554 U.S. 570 (2008).

3. See generally J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009).

4. See *id.* at 280. He wrote:

The Court has invited future challenges by not defining the scope of the right to bear arms, by not providing a standard of review for firearms regulation, and by creating a list of exceptions to the newfound personal Second Amendment right. The cases filed since *Heller* and the multitude of federal, state, and municipal gun control regulations threaten to suck the courts into a quagmire.

*Id.*

5. See *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (“There simply is no need in this litigation to break ground that our superiors have not tread. To the degree that we push the right beyond what the Supreme Court in *Heller* declared to be its origin, we circumscribe the scope of popular governance, move the action into court, and encourage litigation in contexts we cannot foresee.”); see also *United States v. Mahin*, 668 F.3d 119, 124 (4th Cir. 2012) (refusing to speculate on the degree to which *Heller* applies outside the home).

*Heller* himself—did when he wrote a decision extending *Heller*'s holding by ruling that Illinois's total ban on the concealed carrying of weapons was unconstitutional.<sup>6</sup> The logic of *Heller*, Judge Posner argued, could not be confined to the possession of weapons in the home.<sup>7</sup> The reasoning employed by the Court, he argued, mandated that the right to armed self-defense be accorded to those who experienced confrontations in public, too.<sup>8</sup> It is difficult to imagine Judge Wilkinson joining such an opinion, much less writing it.

One might chalk up the differences in the treatment of *Heller* by Judges Posner and Wilkinson to the discretion that lower courts use when implementing Supreme Court decisions. Scholars continue to undermine the traditional hierarchical view of federal courts, wherein the Supreme Court issues decisions that lower courts dutifully and faithfully implement.<sup>9</sup> Recent scholarship has highlighted numerous ways in which lower courts possess and exercise discretion when it comes to interpreting and applying those decisions.<sup>10</sup> In particular areas, it appears that lower courts read potentially far-reaching decisions narrowly, with an eye to limiting their impact.<sup>11</sup> Given the almost negligible chance of the Court granting certiorari in and reversing any one case, lower courts—appeals courts in particular—have significant amounts of discretion to exercise with something approaching impunity.<sup>12</sup> A recent article by Richard Re, for example, argues that “lower courts have a substantial interpretative gray zone available to them” in which they may “legitimately narrow Supreme Court precedent by adopting a *reasonable* reading

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6. See *Moore v. Madigan*, 702 F.3d 933, 939 (7th Cir. 2012); see also *infra* notes 191-204 and accompanying text.

7. See *Moore*, 702 F.3d at 935-38.

8. See *id.*

9. For a succinct expression of this sentiment, see HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW 10 (1912). Black wrote that:

Inferior courts are absolutely bound to follow the decisions of the courts having appellate ... jurisdiction over them. In this aspect, precedents set by the higher courts are imperative in the strictest sense. They are conclusive on the lower courts, and leave to the latter no scope for independent judgment or discretion.

*Id.*

10. See, e.g., Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 417 (2007).

11. See, e.g., Reynolds & Denning, *supra* note 1, at 392, 397-98.

12. See Kim, *supra* note 10, at 397-98 (noting that the chance of district courts and courts of appeal being reversed by the Supreme Court is very small).

of it.”<sup>13</sup> Lower courts may even engage in “partial overruling,” which “occurs when a court accepts that a precedent already covers the relevant legal terrain but then trumps the precedent in whole or in part by establishing a new legal rule.”<sup>14</sup>

Neil Siegel recently highlighted how lower courts and the Supreme Court can work in tandem to expand constitutional principles that are tentatively, and perhaps narrowly, enunciated by the Court.<sup>15</sup> In what he terms “reciprocal legitimation,” the lower courts extend Supreme Court decisions, and the Court then ratifies those extensions in a later opinion.<sup>16</sup> In a recent example of the phenomenon, Siegel argues that *Obergefell v. Hodges*<sup>17</sup> was made possible after lower courts took up the Court’s invitation in *United States v. Windsor*<sup>18</sup> to use *Windsor*’s due process and equal protection analysis to strike down state same-sex marriage bans.<sup>19</sup> The Court then ratified the lower courts’ analyses in *Obergefell*.<sup>20</sup> He argued that the Court in *Obergefell* “seemed to be trying to legitimate its controversial conclusion in part by portraying federal court decisions concerning same-sex marriage as if they were entirely independent of its decision in *Windsor*, when in all likelihood they were not.”<sup>21</sup>

In this Article, I seek to add to this literature by exploring the possibility that lower courts can also press the logic of Supreme Court opinions to their limits, applying them in potentially far-reaching and disruptive ways with a view to critiquing them and perhaps affecting the future direction of Supreme Court doctrine.<sup>22</sup>

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13. Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 925, 927 (2016).

14. *Id.* at 926.

15. See Neil S. Siegel, *Reciprocal Legitimation in the Federal Courts System*, 70 VAND. L. REV. 1183, 1186 (2017).

16. *Id.* (“[D]istrict and circuit courts seek to legitimate their decisions by relying upon an initial Supreme Court decision ... as authority for expanding the scope of the decision, and the Supreme Court in a later decision ... seeks to blunt threats to its own legitimacy by invoking those district and circuit court decisions as authority for validating the expansion.”).

17. 135 S. Ct. 2584 (2015).

18. 133 S. Ct. 2675 (2013).

19. See Siegel, *supra* note 15, at 1185 (arguing that “*Windsor* seemed tailor-made to generating a lopsided circuit split in favor of same-sex marriage”).

20. See *Obergefell*, 135 S. Ct. at 2597, 2608-10.

21. Siegel, *supra* note 15, at 1185.

22. An early version of this paper labeled attempts to get the Court to trim early pronouncements as “bluff calling” opinions, while opinions that liked the direction in which the Court was headed and wanted to see those Court opinions reaffirmed and even expanded,

I further argue that when courts do so, they are engaging in a form of what Jessica Bulman-Pozen and David Pozen termed “uncivil obedience.”<sup>23</sup> As they define it, “uncivil obedience” is:

[A] deliberate, normatively motivated act or coordinated set of acts ... that communicates criticism of a law or policy ... with a significant purpose of changing or disrupting that law or policy ... in conformity with all applicable positive law ... in a manner that calls attention to its own formal legality, while departing from prevailing expectations about how the law will be followed or applied.<sup>24</sup>

While uncivil obedience takes many forms and can be undertaken by a variety of public and private actors, Bulman-Pozen and Pozen are skeptical that a judicial variety exists.<sup>25</sup> I argue here that it does and that Bulman-Pozen and Pozen were too quick to dismiss the possibility that uncivil obedience is a tactic available to lower court judges. Potential examples, I argue, are found in lower court applications of recent landmark Supreme Court decisions.<sup>26</sup>

Part I briefly describes Bulman-Pozen and Pozen’s theory of uncivil obedience, its criteria, limits on its exercise, and why they doubt that judges could be true uncivil obedient. Part II then offers several examples of lower court opinions that, I argue in Part III, satisfy Bulman-Pozen and Pozen’s criteria for uncivil obedience. While lower courts often engage in uncivil obedience in order to force the Supreme Court to limit prior, potentially far-reaching decisions, it is also possible that courts do so seeking to expand the

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“spine-stiffening” opinions. I gave those up because it seemed that proving an opinion was one or the other would be very difficult, requiring as it would insight into the mind of the judges in the majority.

23. See Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 820-21 (2015). A recently published student note takes a wide-angle approach and suggests that uncivil obedience is an example within a broader category of what the author calls “compliant subversion,” where actors comply with the letter of the law, but in a way that actually subverts its spirit. See Jacob Hutt, Note, *Compliant Subversion*, 92 N.Y.U. L. REV. 1609, 1614 (2017). Michael Kent and I have argued elsewhere that the Supreme Court often responds to attempts to subvert the spirit of its decisions by creating what we call “anti-evasion doctrines.” Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1779.

24. Bulman-Pozen & Pozen, *supra* note 23, at 820.

25. See *id.* at 833-34.

26. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

scope of an earlier decision whose reach or effect on prior cases is unclear but whose principle is one with which the majority is in sympathy. In either case, the lower courts are engaged in a critique of present or past Supreme Court doctrine. Part III also offers reasons why uncivil obedience might be particularly appealing to lower court judges, as well as why the technique is not more commonly employed by lower courts. A brief conclusion follows.<sup>27</sup>

## I. UNCIVIL OBEDIENCE IN A NUTSHELL

This Part summarizes Bulman-Pozen and Pozen's theory of uncivil obedience.<sup>28</sup> In addition to its definition and a summary of its criteria, I highlight why they are skeptical that judges can be uncivilly obedient.

### A. *Uncivil Obedience in Theory and Practice*

Intentionally violating a law to bring attention to the law's immorality or injustice and produce change, what is commonly referred to as "civil disobedience," is a familiar technique of activists.<sup>29</sup> And yet, there is some feeling that civil disobedience is becoming "increasingly irrelevant" because "guarantees of fundamental freedoms and equal treatment have been extended to more and more members of the world's democracies."<sup>30</sup> *Uncivil* obedience, however—civil disobedience's "legalistic doppelganger"—is, Bulman-Pozen and Pozen argue, an increasingly commonplace and popular

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27. One other caveat: the examples I use here are drawn from constitutional law because it is the body of law with which I am most familiar. I would guess that other examples can be found in areas of statutory interpretation or instances when federal courts must apply state law.

28. See generally Bulman-Pozen & Pozen, *supra* note 23.

29. Bulman-Pozen and Pozen define civil disobedience as follows:

A pared-down definition of civil disobedience, limited to elements that have attained near-universal agreement among theorists, might be the following: "a conscientious and communicative breach of law designed to demonstrate condemnation of a law or policy and to contribute to a change in that law or policy." Beyond these elements, one might further require that the breach be nonviolent and undertaken with a willingness to accept the legal consequences. These narrowing features are disputed.

*Id.* at 812 (footnote omitted).

30. *Id.* at 871.

factor in American politics.<sup>31</sup> From the generally accepted elements of civil disobedience—conscientiousness, communicativeness, reformist intent, illegality, and legal provocation<sup>32</sup>—they construct the definition of uncivil obedience quoted in the Introduction.<sup>33</sup> Instead of *defiance* of a law in order to draw attention to its injustice, at the heart of uncivil obedience is private or public actors' unstinting and to-the-letter *compliance* with the law.<sup>34</sup> Yet the motive is the same in both: critiquing the status quo with a view towards reform.

Examples abound. One Bulman-Pozen and Pozen offer is a 1993 incident in which a group of California motorists drove precisely fifty-five miles an hour on the freeway in an attempt to challenge the fifty-five miles-per-hour speed limit.<sup>35</sup> Another example is that of employees “[w]orking to rule”: “do[ing] exactly what they are told to do, adher[ing] exactly to safety protocols, or report[ing] to and depart[ing] from the premises exactly on time.”<sup>36</sup> Bulman-Pozen and Pozen also cite as examples public defenders who insist on jury trials for all of their clients,<sup>37</sup> Teddy Roosevelt strictly enforcing Sunday-closure laws for saloons while serving as New York police commissioner,<sup>38</sup> the Obama Administration’s use of the “big waiver” in the No Child Left Behind Act to counter Congress’s failure to amend the Act,<sup>39</sup> and Arizona’s immigration law that incorporated federal law.<sup>40</sup>

### *B. The Criteria for Uncivil Obedience*

Mirroring the elements of civil disobedience, Bulman-Pozen and Pozen specify five criteria for uncivil obedience: (1) conscientious-

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31. *Id.* at 871-72.

32. *Id.* at 820.

33. *See supra* text accompanying note 24; *see also* Bulman-Pozen & Pozen, *supra* note 23, at 820.

34. Bulman-Pozen & Pozen, *supra* note 23, at 811.

35. *See id.* at 810.

36. *Id.* at 818. The example they give is of American Airlines pilots filing “incessant—and technically mandatory—maintenance requests” after negotiations broke down between the airline and the pilots’ union. *Id.* at 818-19.

37. *See id.* at 830-31.

38. *See id.* at 831.

39. *See id.* at 833. *See generally* David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013).

40. *See* Bulman-Pozen & Pozen, *supra* note 23, at 839.

ness; (2) communicativeness; (3) reformist intent; (4) legality; and (5) legal provocation.<sup>41</sup> Their article defines each element in turn.

### *1. Conscientiousness*

In order to be “conscientious,” they argue that “the act [must] be subjectively serious, calculated, and grounded in sincere conviction. It does not require that the act be morally attractive or guided by fundamental principles of justice.”<sup>42</sup> It need not be “devoid of self-interest” but it needs to be “rooted in genuine belief about right and wrong and ... [be] deployed to achieve lasting reform.”<sup>43</sup>

### *2. Communicativeness*

As they define it, communicativeness “requires that the act convey disapproval of a law or policy.”<sup>44</sup> The message “may be conveyed performatively, through the act itself, or it may be conveyed verbally, through commentary about the act.”<sup>45</sup> While “contemporaneous publicity” of the existence and intended significance of the uncivil obedience is necessary, Bulman-Pozen and Pozen are careful to point out that one engaging in uncivil obedience need not be candid about so doing.<sup>46</sup>

### *3. Reformist Intent*

Reformist intent, Bulman-Pozen and Pozen write, “requires that the actor not only convey disapproval of some law or policy but also aspire to reshape it in an enduring manner.”<sup>47</sup> Within this element, they further distinguish “direct” uncivil obedience—seeking “change [in] the law or policy with which [the protester] is conspicuously

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41. *See id.* at 820.

42. *Id.* at 821.

43. *Id.*

44. *Id.* at 822.

45. *Id.*

46. *Id.* (citing an example of employees who “may claim that they are ‘just’ looking out for workplace safety ... but their actions may disclose a distinct critical agenda concerning labor relations”).

47. *Id.*

complying”—from “indirect” uncivil obedience, where one law or policy is used to challenge another.<sup>48</sup>

Further, the reform can be explicit (the drivers who clogged the Los Angeles freeway with scrupulous observance of the speed limit sought congressional repeal of the fifty-five mile per hour limit) or, alternatively, “uncivil obedients may aim to reshape the ‘law in action,’ without necessarily revising the law on the books.”<sup>49</sup> Indirect uncivil obedience may occur by “enhanc[ing] the salience of a regulation or highlight[ing] its objectionable nature.”<sup>50</sup> Actors can also “exert pressure more directly by undermining the efficacy or efficiency of a particular law, policy, or institution” by, for example, highlighting the compliance costs of laws.<sup>51</sup>

#### 4. *Legality*

Where civil disobedience and uncivil obedience differ is in their legality.<sup>52</sup> Bulman-Pozen and Pozen explain that “[t]his criterion requires that authoritative directives be followed rather than flouted, obeyed rather than disobeyed.”<sup>53</sup> One who commits an act of uncivil obedience must “reasonably and genuinely believe it be clear that she is violating no positive law or regulation of an applicable jurisdiction.”<sup>54</sup> The action undertaken must not appear to be prohibited; it is not enough that the actor is unlikely to be caught or punished, “[t]he uncivil obedient must believe that her behavior truly conforms to relevant legal norms.”<sup>55</sup>

#### 5. *Legal Provocation*

The final element—legal provocation—“requires that the act, although believed to be lawful, strike others as jarring or subversive—and strike others as jarring or subversive at least in part

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48. *See id.* at 822-23.

49. *Id.* at 823 (footnote omitted).

50. *Id.*

51. *See id.* at 823-24.

52. *See id.* at 824.

53. *Id.*

54. *Id.*

55. *See id.* Therefore, “evasion” will not count, nor will bringing a test case insofar as the latter “reflects significant doubt about the conduct’s lawfulness.” *See id.*

*because of its very attentiveness to law.*<sup>56</sup> Put another way, the actor's use of an "authoritative directive" must be provocative because of the act's "uncommon disregard for principles of custom and moderation, even as it clings to formal legality."<sup>57</sup>

### *C. Skepticism About Judicial Uncivil Obedience*

Bulman-Pozen and Pozen observe that uncivil obedience is available to public actors<sup>58</sup> (recall Teddy Roosevelt's enforcement of Sunday closing laws against New York City saloons).<sup>59</sup> And yet they doubt that judges are capable of uncivil obedience. First, they argue, "judges ... are expected to attend carefully to the letter of the law," and so even formalist decisions are unlikely to "come across as an ironic or inflammatory intervention" because they would be seen as doing what judges should do—applying the law.<sup>60</sup> Second, the enduring image of judge-as-umpire or judge-as-law-discoverer means that a judge's ruling is seen as "elaborating the underlying law rather than changing or challenging it in some reformist fashion."<sup>61</sup>

They concede that "hypothetical examples of judges communicating a reformist intent through subversive attention to legal language" might exist; for example, imposing harsh sentences "at the very top of the guidelines range in order to protest draconian criminal penalties."<sup>62</sup> They further concede that their "categories might be extended to embrace more judicial behavior," but nevertheless, they doubt the "prevalence of judicial uncivil obedience as [they] have defined the concept."<sup>63</sup>

Bulman-Pozen and Pozen's example leads me to believe that they might have had judicial interpretation of statutes or regulations primarily in mind. In the next Part, though, I will describe lower court treatment of highly salient, potentially transformative Supreme Court decisions that are possible examples of judicial uncivil obedience. In Part III, moreover, I will make the case that uncivil

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56. *Id.* at 825.

57. *Id.* at 825-26.

58. *See id.* at 831.

59. *See supra* note 38 and accompanying text.

60. Bulman-Pozen & Pozen, *supra* note 23, at 833.

61. *Id.* at 833-34.

62. *Id.* at 834.

63. *Id.*

obedience, as Bulman-Pozen and Pozen define it, might be particularly attractive to lower court judges and that my examples satisfy their criteria.

## II. LOOKING FOR UNCIVIL OBEDIENCE IN THE LOWER COURTS

In this Part, I offer examples of lower court opinions that appear to be uncivilly obedient. Specifically, I argue that, in these examples, lower courts take the Supreme Court's opinions at face value and pursue the logic of the opinions to their ends. The results of doing so often highlight the potentially far-reaching effects of these opinions. The Court is then faced with the choice of adopting the lower court's reading, possibly confirming the transformative nature of its earlier decision,<sup>64</sup> or trimming its sails and charting a more modest doctrinal course. What follows are examples of judicial uncivil obedience in four areas of constitutional doctrine: (1) the Commerce Clause; (2) anti-commandeering; (3) affirmative action; and (4) the Second Amendment. While I do not claim that these examples are exhaustive, I do think there are enough that meet Bulman-Pozen and Pozen's definition<sup>65</sup> to suggest that the phenomenon of judicial uncivil obedience exists.

### *A. Possible Examples of Judicial Uncivil Obedience*

The examples in each of the four areas proceeded in similar fashion. First, the Supreme Court issued an opinion that had the potential to cut broad swaths through existing constitutional doctrine. Second, a court of appeals pressed the logic of the Court's opinion in ways that created splits with other courts, forcing the Court to intervene. Third, in the cases where the Court had the opportunity, it reversed the lower courts and indicated limits to how far its prior opinion should be extended.

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64. See, e.g., Siegel, *supra* note 15, at 1185.

65. See Bulman-Pozen & Pozen, *supra* note 23, at 820.

### 1. *The Commerce Clause*

*United States v. Lopez*'s,<sup>66</sup> invalidation of the Gun Free School Zones Act (GFSZA) on the ground that it exceeded Congress's power under the Commerce Clause was met with a mixture of outrage and incredulity.<sup>67</sup> *Lopez* triggered an avalanche of challenges to a wide range of federal statutes—mostly from federal defendants convicted of violating laws enacted under the aegis of the commerce power.<sup>68</sup> The overwhelming majority of lower courts reacted to *Lopez* by reading it very narrowly, using any available means to differentiate challenged statutes from the GFSZA.<sup>69</sup> This “narrowing from below”<sup>70</sup> continued even after the Court reaffirmed *Lopez* in *United States v. Morrison*,<sup>71</sup> although, following the latter case, a few courts did hand victories to defendants bringing as-applied challenges to their federal convictions.<sup>72</sup>

Three 2003 decisions from the Ninth Circuit—*United States v. McCoy*,<sup>73</sup> *United States v. Stewart*,<sup>74</sup> and *Raich v. Ashcroft*<sup>75</sup>—held that certain applications of the federal child pornography law, the federal ban on possession of machine guns, and the Controlled Substances Act (CSA), respectively, exceeded congressional power under the Commerce Clause. All did so in especially provocative ways that prompted dissenting opinions from members of the panels.

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66. 514 U.S. 549 (1995).

67. For contemporary commentary, see, for example, Tom Stacy, *What's Wrong with Lopez*, 44 U. KAN. L. REV. 243, 244 (1996); David O. Stewart, *Back to the Commerce Clause*, A.B.A. J., July 1995, at 46 (“For some, *Lopez* resembled a constitutional *Walpurgisnacht*, setting loose precedents that long ago had been consigned to the flames of the *auto-da-fé* for discredited cases.”).

68. See generally Reynolds & Denning, *supra* note 1 (collecting examples).

69. See *id.* at 371.

70. Re, *supra* note 13, at 923.

71. 529 U.S. 598 (2000).

72. See, e.g., Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1262 (2003).

73. 323 F.3d 1114, 1115 (9th Cir. 2003).

74. 348 F.3d 1132, 1136 (9th Cir. 2003), *cert. granted, vacated, and remanded* 545 U.S. 1112 (2005).

75. 352 F.3d 1222 (9th Cir. 2003), *rev'd sub. nom.* Gonzales v. Raich, 545 U.S. 1 (2005).

a. *United States v. McCoy*

In *McCoy*, the panel reversed the conviction of a defendant convicted of “simple intrastate possession of a visual depiction [of child pornography].”<sup>76</sup> The defendant was indicted for violating federal child pornography laws when employees at a photo shop discovered a picture of her and her ten year old daughter with their genitals exposed.<sup>77</sup> As the court noted, the picture had not been “mailed, shipped, or transported interstate and [was] not intended for interstate distribution, or for any economic or commercial use, including the exchange ... for other prohibited material.”<sup>78</sup>

In his opinion, the late Judge Stephen Reinhardt applied the *Lopez* and *Morrison* factors and found that several important elements were lacking.<sup>79</sup> First, noting that the possession of the material was neither commercial nor economic in nature, he refused to apply *Wickard v. Filburn*'s aggregation rule, arguing that *Lopez* and *Morrison* had limited *Wickard*'s reach.<sup>80</sup> He explained that, “[h]ere, we conclude that simple intrastate possession of home-grown child pornography not intended for distribution or exchange is ‘not, in any sense of the phrase, economic activity.’”<sup>81</sup>

Judge Reinhardt declined to follow decisions from other circuits that relied on the aggregation principle to uphold convictions even for intrastate, noncommercial possession of child pornography.<sup>82</sup> He observed that these decisions rested on “questionable premises”<sup>83</sup>: that Congress could have intended to address “demand side forces”;<sup>84</sup> that those decisions relied on subsequent legislative history to

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76. *McCoy*, 323 F.3d at 1115.

77. *See id.*

78. *Id.*

79. *See id.* at 1120-24.

80. *See id.* at 1120 (“In both *Lopez* and *Morrison*, the Supreme Court carefully limited the reach of *Wickard*, while affirming that decision’s continued vitality.”).

81. *Id.* at 1122-23 (quoting *United States v. Morrison*, 529 U.S. 598, 613 (2000)).

82. *See id.* at 1121-22; *see also* *United States v. Galo*, 239 F.3d 572 (3d Cir. 2001); *United States v. Kallestad*, 236 F.3d 225 (5th Cir. 2000); *United States v. Rodia*, 194 F.3d 465 (3d Cir. 1999); *United States v. Bausch*, 140 F.3d 739 (8th Cir. 1998); *United States v. Robinson*, 137 F.3d 652 (1st Cir. 1998); *United States v. Lacy*, 119 F.3d 742, 750 (9th Cir. 1997).

83. *McCoy*, 323 F.3d at 1121.

84. *See id.* (noting that premise “is based on speculation that Congress *could have* reasoned that purely intrastate possession will ultimately have a substantial effect on interstate commerce, even though it chose not to make any such findings or declarations”).

assess the intent of an earlier statute;<sup>85</sup> and that the possessor of a single intrastate piece of child pornography is an “addict[]-in-futuro” who must be punished lest she “ultimately enter the interstate pornography market.”<sup>86</sup>

The court also rejected the argument that Congress could have rationally believed regulating the intrastate market was necessary to regulate the interstate market effectively.<sup>87</sup> Finding such arguments too attenuated, the court pointed to the rejection of similar arguments in *Lopez* and *Morrison*, as well as the Supreme Court’s conclusion that to accept such arguments would be to convert the Commerce Clause into a “general police power.”<sup>88</sup> Judge Reinhardt added that “[i]t is particularly important that in the field of criminal law enforcement, where state power is preeminent, national authority be limited to those areas in which interstate commerce is truly affected.”<sup>89</sup>

The court further concluded that the statute’s jurisdictional hook, which covered depictions that had been produced with materials that themselves had moved in interstate commerce, “fail[ed] totally to [closely tie the regulated activity to interstate commerce].”<sup>90</sup> The court explained further that “[i]t not only fails to limit the reach of the statute to any category or categories of cases that have a particular effect on interstate commerce, but, to the contrary, it encompasses virtually *every* case imaginable, so long as any modern-day photographic equipment or material has been used.”<sup>91</sup>

Again declining to follow other lower courts that concluded the jurisdictional hook saved the statute or its application from invalidation, the court flatly held that “the hook at issue here provides no support for the government’s assertion of federal jurisdiction.”<sup>92</sup> To hold, as other courts had, that the presence of any hook suffices to

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85. *See id.*

86. *Id.* at 1122 (“We see no more justification for assuming that a possessor of a ‘home-grown’ photograph of one’s own child will ultimately enter the interstate pornography market as an addict than there is to assume that the possessor of a single marijuana cigarette will inevitably turn into a full-time heroin junkie.”).

87. *See id.* at 1123.

88. *See id.* at 1123-24.

89. *Id.* at 1124.

90. *Id.*

91. *Id.*

92. *See id.* at 1126.

insulate the regulated activity from review “would ‘ignore[] the fact that the connection between the activity regulated and the jurisdictional hook may be so attenuated’ that there may be no substantial effect on interstate commerce.”<sup>93</sup>

Finally, the court looked at the legislative history and concluded that while Congress was concerned with the effects of commercial child pornography on interstate commerce, it did not address intrastate, noncommercial child pornography.<sup>94</sup> To the extent that it discussed the latter at all, the court noted that the Department of Justice expressed concerns over the constitutionality of covering possession of material whose sole connection with interstate commerce was that it had been produced with materials that had traveled in interstate or foreign commerce.<sup>95</sup>

The court held that “nothing in the circumstances of McCoy’s case establishes any substantial connection between her conduct and *any* interstate commercial activity.”<sup>96</sup> If she “and others similarly situated” were to be punished, Judge Reinhardt concluded, it would have to come at the hands of state, not federal, prosecutors.<sup>97</sup>

Dissenting, Judge Trott questioned whether an “as applied” challenge was even available.<sup>98</sup> He explained, “I come at this case from an analytical perspective different from my friends in the majority.”<sup>99</sup> *Lopez*, he argued, foreclosed as-applied challenges endorsed by the majority.<sup>100</sup> He continued: “The reason why I believe the majority’s approach is not viable is simple: the Supreme Court said in *Lopez* that ‘where a *general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence.’”<sup>101</sup> He argued that the “*de minimis* nexus of Rhonda McCoy” was legally irrelevant.<sup>102</sup> “[I]f the general regulatory statute at issue does bear a

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93. *Id.* (alteration in original) (quoting *United States v. Rodia*, 194 F.3d 465, 472 (3d Cir. 1999)).

94. *See id.* at 1127.

95. *See id.* at 1128.

96. *Id.* at 1132.

97. *Id.* at 1133.

98. *See id.* (Trott, J., dissenting).

99. *Id.* at 1134.

100. *Id.* at 1134-35.

101. *Id.* at 1134.

102. *Id.* at 1135.

substantial relation to commerce, an ‘as applied’ challenge is inappropriate.”<sup>103</sup>

Judge Trott thought that his colleagues “may have exceeded what the law permits,” though he did concede that “[t]his case is not free from doubt, as Judge Reinhardt’s well-articulated opinion concludes.”<sup>104</sup> Even so, while “not oblivious to the difference between wheat and child pornography ... as generic commodities determined by Congress to be part of a national market, they both are subject to Commerce Clause regulation. Therefore, the factual noncommercial nature of a single item of the commodity is immaterial.”<sup>105</sup>

*b. United States v. Stewart*

Building on *McCoy*, the Ninth Circuit then nixed the convictions of two additional defendants whose connections to interstate commerce the panels found insufficient to sustain federal jurisdiction. In *Stewart*, the defendant was convicted for possession of a machine gun in violation of federal law.<sup>106</sup> The twist was that the machine gun in question had been made entirely by the defendant.<sup>107</sup> He challenged his conviction, claiming that the application of the federal machine gun ban violated the Commerce Clause, as interpreted by *Lopez* and *Morrison*.<sup>108</sup>

After concluding that *Stewart* had not used the channels of interstate commerce because his machine gun was homemade, the court addressed whether his possession substantially affected interstate commerce.<sup>109</sup> Applying *Morrison*, the court concluded that it did not.<sup>110</sup>

Mere possession, it observed, was not economic activity, nor did the ban serve a commercial purpose.<sup>111</sup> The court explained, “that

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103. *Id.*

104. *Id.* at 1140-41.

105. *Id.* at 1141.

106. *See* *United States v. Stewart*, 348 F.3d 1132, 1134 (9th Cir. 2003).

107. *See id.*

108. *See id.*

109. *See id.* at 1136.

110. *See id.* at 1140.

111. *See id.* at 1137. Other circuits have upheld the machine gun ban. *See* *Navegar, Inc. v. United States*, 192 F.3d 1050, 1068 (D.C. Cir. 1999); *United States v. Franklyn*, 157 F.3d 90, 93 (2d Cir. 1998); *United States v. Wright*, 117 F.3d 1265, 1267 (11th Cir. 1997); *United States v. Knutson*, 113 F.3d 27, 31 (5th Cir. 1997) (per curiam); *United States v. Rybar*, 103

the effect of Stewart's possession of homemade machineguns on interstate commerce was attenuated under the fourth prong of the *Morrison* test."<sup>112</sup> In addition, as the court read them, *Lopez* and *Morrison* had already rejected the argument that because the cost of criminal activity is spread through insurance, regulations aimed at preventing violent crimes have an enormous impact on the national economy.<sup>113</sup> Furthermore, the court also read *Lopez* and *Morrison* to reject the argument that when people are less willing to travel to unsafe areas of the country, interstate commerce is significantly affected.<sup>114</sup>

Those arguments' causal chains were too attenuated to satisfy the Supreme Court's substantial effects test.<sup>115</sup> The court observed that the federal ban had no express element tying the machine gun to interstate commerce and lacked congressional findings.<sup>116</sup>

Judge Restani dissented.<sup>117</sup> Invoking *Wickard*, she argued that "[p]ossession of machine guns, home manufactured or not, substantially interferes with Congress's long standing attempts to control the interstate movement of machine guns by proscribing transfer and possession."<sup>118</sup> Because Congress sought "to totally eliminate the demand side of the economic activity by freezing legal possession at 1986 levels, 'an effect that is closely entwined with regulating interstate commerce' even as applied to purely intrastate possession of machine guns resulting from home manufacture," she concluded that "[a]llowing home manufacture [was] clearly not within the intent of § 922(o) and would upset Congress's entirely lawful plan to regulate trade in machine guns."<sup>119</sup>

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F.3d 273, 286 (3d Cir. 1996); *United States v. Beuckelaere*, 91 F.3d 781, 782, 784 (6th Cir. 1996); *United States v. Kenney*, 91 F.3d 884, 885, 891 (7th Cir. 1996); *United States v. Rambo*, 74 F.3d 948, 951 (9th Cir. 1996); *United States v. Kirk*, 70 F.3d 791, 797 (5th Cir. 1995); *United States v. Wilks*, 58 F.3d 1518, 1522 (10th Cir. 1995).

112. *Stewart*, 348 F.3d at 1137.

113. *See id.*

114. *See id.*

115. Glenn Reynolds and Dave Kopel dubbed this portion of *Lopez* and *Morrison* the "non-infinity principle." *See* David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 69 (1997).

116. *See Stewart*, 348 F.3d at 1138.

117. *See id.* at 1142 (Restani, J., concurring in part and dissenting in part).

118. *Id.* at 1143.

119. *Id.*

*c. Raich v. Ashcroft*

A month after *Stewart*, Judge Pregerson, writing for another divided panel, sustained an as-applied challenge to prosecutions under the Controlled Substances Act.<sup>120</sup> The case involved local, noncommercial production and possession of marijuana by defendants who were using it for medicinal purposes as permitted by California law.<sup>121</sup>

After first defining the relevant class of activities “as the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law,” the majority concluded that there was no economic activity being regulated.<sup>122</sup> Therefore, the court did not apply the “aggregation” principle because “the regulated activity in this case [was] not commercial.”<sup>123</sup> The court noted the absence of the “jurisdictional hook” in the CSA<sup>124</sup> and concluded that the congressional findings—while present—did not address the class of

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120. See generally *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003).

121. See *id.* at 1224. Compare *id.*, with *United States v. Sprofera*, 299 F.3d 725, 727-28 (8th Cir. 2002) (rejecting challenge to federal drug statutes), *United States v. Carter*, 294 F.3d 978, 981 (8th Cir. 2002) (per curiam) (“*Lopez* is inapposite because there the Court held that Congress did not make findings that the statute ... substantially affected interstate commerce.”), *United States v. Davis*, 288 F.3d 359, 362 (8th Cir. 2002) (rejecting Commerce Clause challenge to the Controlled Substances Act of 1970), and *United States v. Brown*, 276 F.3d 211, 214 (6th Cir. 2002) (rejecting Commerce Clause challenge to federal drug trafficking statutes because crimes occurred intrastate and noting that “[t]his view has been soundly rejected by this circuit as well as every other circuit to address the issue”). In fact, some courts felt the question of the federal drug laws’ constitutionality was so well-settled that failure to raise constitutional objections could not serve as a basis for an ineffective assistance of counsel claim. See *United States v. Rigmaiden*, No. 08-889, 2009 WL 2370668, at \*3-4 (W.D. La. July 29, 2009) (noting that it was “well-established” that the Commerce Clause authorized the federal government to criminalize drug offenses, and that an “attorney cannot be ineffective for failing to raise a meritless claim”); *Thomas v. United States*, No. 3:01cr179, 2008 WL 220743, at \*6 (D. Conn. Jan. 24, 2008) (rejecting ineffective assistance of counsel claim for failure to challenge constitutionality of conviction on drug charges under the Commerce Clause); *Caicedo v. United States*, No. 03 Civ. 7619 (LAK), 2003 WL 22681437, at \*1-2 (S.D.N.Y. Nov. 12, 2003) (finding that a failure to raise constitutional challenges to federal drug laws was not ineffective assistance of counsel).

122. *Raich*, 352 F.3d at 1229 (“As applied to the limited class of activities presented by this case, the CSA does not regulate commerce or any sort of economic enterprise.”).

123. *Id.* at 1230.

124. *Id.* at 1231.

activities subject to regulation and did not automatically immunize legislation from scrutiny.<sup>125</sup>

The court then addressed the degree of attenuation between the use of medical marijuana and the effect on interstate commerce:

The connections in this case are, indeed, attenuated. Presumably, the intrastate cultivation, possession and use of medical marijuana on the recommendation of a physician could, at the margins, have an effect on interstate commerce by reducing the demand for marijuana that is trafficked interstate. It is far from clear that such an effect would be substantial. The congressional findings provide no guidance in this respect, as they do not address the activities at issue in the present case.<sup>126</sup>

Judge Beam dissented from Judge Pregerson's opinion because "[t]hree out of the four *Morrison* factors favor regulation, and the conduct in this case is indistinguishable from the conduct at issue in *Wickard v. Filburn*."<sup>127</sup> Judge Beam explained that the plaintiffs' conduct was completely indistinguishable from that of Mr. Filburn except that the marijuana in *Raich* was consumed for medicinal, not nutritional, reasons.<sup>128</sup> Under *Wickard*, he continued, "the CSA clearly reaches plaintiffs' activities, even though they grow, or take delivery of marijuana grown by surrogates, for personal consumption as medicine in the home as permitted by California, but not federal, law."<sup>129</sup>

Even so, he also undertook a review of the challenge in light of *Lopez* and *Morrison*'s factors.<sup>130</sup> The application of the CSA to the conduct here, he concluded, was clearly aimed at economic conduct, as opposed to the conduct in *McCoy* and *Stewart*.<sup>131</sup> "Plaintiffs," he argued, "are growing and/or using a fungible crop which *could* be sold in the marketplace, and which is also being used for medicinal purposes in place of other drugs which would have to be purchased

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125. *See id.* at 1232 ("First, there is no indication that Congress was considering anything like the class of activities at issue here when it made its findings.... Second, *Morrison* counsels courts to take congressional findings with a grain of salt.").

126. *Id.* at 1233.

127. *Id.* at 1243 (Beam, J., dissenting).

128. *Id.* at 1238.

129. *Id.*

130. *See id.* at 1239.

131. *See id.* at 1242.

in the marketplace.”<sup>132</sup> Even if it could be characterized as noneconomic because the possession here was “noncommercial,” he concluded that it was activity that Congress needed to be able to regulate, lest the aims of the CSA—the elimination of the interstate market in marijuana and other Schedule I drugs—fail.<sup>133</sup>

Judge Beam conceded that there was no jurisdictional element present tying the conduct to interstate commerce and that there were no congressional findings addressing the use of medical marijuana, but was not worried about the latter.<sup>134</sup> He also argued that the arguments for applying the CSA even to local, non-commercial medical marijuana users was not unduly attenuated, and that “an evaluation of any attenuation factors favors the CSA’s constitutionality.”<sup>135</sup>

## 2. *The Anti-Commandeering Principle*

First in *New York v. United States*,<sup>136</sup> and then again in *Printz v. United States*,<sup>137</sup> the Supreme Court articulated a structural principle of federalism that limited Congress’s Article I powers. Congress could not, the Court in *New York* held, “commandeer” either state legislatures or state executive branch officials.<sup>138</sup> The Court held that the “choice” Congress gave states—either to pass legislation dealing with the disposal of low-level radioactive waste generated within its borders or be forced to take title to it—impermissibly infringed upon states’ residual sovereignty.<sup>139</sup> In *Printz*, the issue was whether state and local law enforcement personnel could be required to conduct background checks of prospective handgun

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132. *Id.* at 1239.

133. *Id.* at 1241 (“If Congress cannot reach individual narcotic growers, possessors, and users, its overall statutory scheme will be totally undermined.”).

134. *See id.* at 1241-42 (“[B]ecause medicinal use is not permitted by federal law, I fail to see how this is a particularly relevant concern.”).

135. *See id.* at 1242 (“Congress contemplated individual growers, possessors and users when it made its findings regarding the CSA. And, in light of the growing interstate community of medicinal marijuana users, the attenuation is not great, even, perhaps, nonexistent. Accordingly, an evaluation of any attenuation factor favors the CSA’s constitutionality.”).

136. 505 U.S. 144 (1992).

137. 521 U.S. 898 (1997).

138. *New York*, 505 U.S. at 175.

139. *See id.* at 175-76.

purchasers until a national instant background check system could be brought online.<sup>140</sup> The Court held that they could not.<sup>141</sup>

After *Printz* was decided, the Fourth Circuit heard *Condon v. Reno*,<sup>142</sup> in which the state of South Carolina argued that application of the Drivers Privacy Protection Act (DPPA), a federal law restricting the sale of personal data collected by departments of motor vehicles, constituted impermissible commandeering as applied to the State.<sup>143</sup> Specifically, the State argued that, after *New York* and *Printz*, state officials could not be made to comply with the federal law because doing so would conscript them in the enforcement of a federal regulatory program.<sup>144</sup>

Defending the law, the United States argued first that the claim should fail under *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>145</sup> which held that the enforcement of any structural federalism limits on congressional exercise of its commerce power should be effected through the political, not the judicial, process.<sup>146</sup> Its fall-back position was that the DPPA was distinguishable from the laws invalidated in *New York* and *Printz*.<sup>147</sup> The DPPA, the government argued, required only that the state regulate *its* behavior, not that of its citizens.<sup>148</sup> The Fourth Circuit rejected the federal government's attempts to distinguish the law.<sup>149</sup> It observed that "state officials must ... administer the DPPA" and that the anti-commandeering principle "made it perfectly clear that the Federal Government may not require State officials to administer a federal regulatory program."<sup>150</sup>

Returning to the government's contention that *Garcia* permitted Congress to regulate states by subjecting them to laws of general applicability, the court replied that:

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140. See *Printz*, 521 U.S. at 902-04.

141. See *id.* at 935.

142. 155 F.3d 453 (4th Cir. 1998), *rev'd*, 528 U.S. 141 (2000).

143. See *id.* at 455.

144. See *id.* at 459-60. Other scholars have similarly argued that there is tension between preemption and the anti-commandeering principle. See, e.g., Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11, 27-37 (2000).

145. 469 U.S. 528 (1985).

146. See *Condon*, 155 F.3d at 458.

147. See *id.*

148. See *id.* at 461.

149. See *id.* at 460.

150. *Id.*

[T]he DPPA does not attempt to regulate the disclosure of personal information contained in all public and private databases, which would incidentally apply to state motor vehicle records. Rather, the DPPA exclusively regulates the disclosure of information contained in state motor vehicle records. Of course, there is no private counterpart to a state Department of Motor Vehicles. Private parties simply do not issue drivers' licenses or prohibit the use of unregistered motor vehicles. Thus, rather than enacting a law of general applicability that incidentally applies to the States, Congress enacted a law that, for all intents and purposes, applies *only* to the States.<sup>151</sup>

*Condon v. Reno* produced a dissent from Judge Phillips, who argued that the panel majority had “[p]igeonhol[ed] the Act into one of two narrow legal constructs that it apparently believe[d] exclusively define[d] the Tenth Amendment’s constraints on federal power.”<sup>152</sup> He thought *New York* and *Printz* were easily distinguishable because, in the former case, Congress was trying to compel states to regulate private conduct in a particular way, but in the latter it was conscripting state executive officials into federal service.<sup>153</sup>

To the extent that the DPPA directly regulated states as states, he continued, neither *New York* nor *Printz* revived the former rule of *National League of Cities*.<sup>154</sup> He further explained that “[s]o long as it acts within the substantive constraints imposed by the

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151. *Id.* at 461-62. The Eleventh Circuit agreed with the Fourth Circuit. *See Pryor v. Reno*, 171 F.3d 1281, 1288 (11th Cir. 1999) (concluding that the DPPA violated the Tenth Amendment). Others circuits, however, disagreed. *See Oklahoma v. United States*, 161 F.3d 1266, 1272-73 (10th Cir. 1998) (reversing district court opinion enjoining DPPA); *see also Travis v. Reno*, 163 F.3d 1000, 1008 (7th Cir. 1998) (reversing district court decision holding that DPPA violated the Commerce Clause). In his opinion for a unanimous panel of the Seventh Circuit, Judge Easterbrook wrote:

Many thoughtful people believe that *National League of Cities* is more faithful to the original constitutional plan than is *Garcia*. But our part is to apply the Supreme Court’s jurisprudence as we find it. Indeed, for reasons we have discussed, Wisconsin’s position would be doubtful even if *National League of Cities* were resurrected.

*Id.*

152. *Condon*, 155 F.3d at 465 (Phillips, J., dissenting).

153. *See id.* at 466-68.

154. *See id.* at 469 (“[T]he majority’s suggestion that Congress lacks authority to regulate ‘States as States’ ... simply ha[d] no current force.”).

Constitution, [Congress] may direct or forbid the states to do any number of things by either fully or partially exercising its fundamental power of preemption.”<sup>155</sup>

### 3. *Affirmative Action*

In both *City of Richmond v. J. A. Croson Co.*<sup>156</sup> and *Adarand Constructors, Inc. v. Peña*,<sup>157</sup> the Court signaled a renewed skepticism about the constitutionality of race-based preferences. In *J. A. Croson*, the Court invalidated a quota for minority contractors because it found the City had presented insufficient evidence to justify, as a remedial measure, the preferences granted to a number of racial minorities.<sup>158</sup> The plan further failed to be narrowly tailored, the Court concluded, because (1) “there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting,” and (2) “the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing.”<sup>159</sup>

Six years later, in *Adarand*, the Court overruled *Metro Broadcasting, Inc. v. FCC*<sup>160</sup> and held that strict scrutiny was the proper standard of review even for *federal* race-based preferences.<sup>161</sup> Because equal protection was an individual, not a group, right, the Court concluded “that all governmental action based on race ... should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection ... has not been infringed.”<sup>162</sup>

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155. *Id.*

156. 488 U.S. 469 (1989).

157. 515 U.S. 200 (1995).

158. *See J. A. Croson Co.*, 488 U.S. at 499-500 (“The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone.... There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry.”).

159. *Id.* at 507.

160. 497 U.S. 547, 563-65 (1990) (ruling that “benign” racial preferences prescribed by Congress were entitled to deference and should be evaluated using intermediate, not strict, scrutiny in light of Congress’s power to enforce the Fourteenth Amendment), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

161. *See Adarand*, 515 U.S. at 227.

162. *Id.* (emphasis omitted).

*Metro Broadcasting's* holding was an outlier, the Court decided, and thus had to be discarded.<sup>163</sup>

*J. A. Croson* and *Adarand* called into question the continued viability of *Regents of the University of California v. Bakke*<sup>164</sup>—especially Justice Powell's opinion, which had been understood to permit the use of race as a factor among many in university admissions.<sup>165</sup> Cases soon made their way through the courts, including one brought by an unsuccessful applicant to the University of Texas's law school.<sup>166</sup>

Cheryl Hopwood applied to Texas's law school and was rejected.<sup>167</sup> Under the admissions procedures at the time, Black and Hispanic applicants were considered separately from other applicants and were admitted with lower test scores.<sup>168</sup> This enabled the law school "to meet an 'aspiration' of admitting a class consisting of 10% Mexican Americans and 5% blacks, proportions roughly comparable to the percentages of those races graduating from Texas colleges."<sup>169</sup> Hopwood claimed this use of race violated the Equal Protection Clause;<sup>170</sup> the Fifth Circuit agreed.<sup>171</sup>

The court stated that Texas would have to demonstrate that its use of race was narrowly tailored to a compelling governmental

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163. *See id.* at 226-27.

164. 438 U.S. 265 (1978).

165. *Id.* at 317 (Powell, J., plurality opinion). Contemporary commentary assumed that Powell's opinion was controlling, and thus binding on the Fifth Circuit. *See, e.g.,* Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996), 110 HARV. L. REV. 775, 778 (1997) ("The Fifth Circuit's claim that Justice Powell's position was 'implicitly rejected' by the four Justices who would have upheld the California quota system is clearly mistaken." (footnote omitted)); *see also* Philip T.K. Daniel & Kyle Edward Timken, *The Rumors of My Death Have Been Exaggerated: Hopwood's Error in "Discarding" Bakke*, 28 J.L. & EDUC. 391, 397, 400 (1999); Laura C. Scanlan, Note, Hopwood v. Texas: A Backward Look at Affirmative Action in Education, 71 N.Y.U. L. REV. 1580, 1583, 1587 (1996).

166. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert. denied sub nom. Thurgood Marshall Legal Soc'y v. Hopwood, 518 U.S. 1033 (1996). Other courts similarly concluded that Justice Powell's opinion was binding precedent. *See* Grutter v. Bollinger, 288 F.3d 732, 741-42 (6th Cir. 2002) (en banc), *aff'd*, 539 U.S. 306 (2003); Smith v. Univ. Wash. Law Sch., 233 F.3d 1188, 1200 n.9 (9th Cir. 2000) (criticizing the Hopwood court for failing to adhere to Bakke) ("We ... leave it to the Supreme Court to declare that the Bakke rationale regarding university admissions policies has become moribund, if it has. We will not.>").

167. *See Hopwood*, 78 F.3d at 938.

168. *See id.*

169. *See id.*

170. *See id.*

171. *See id.* at 944.

interest.<sup>172</sup> It first considered whether securing student body diversity was a compelling interest.<sup>173</sup> Though it acknowledged that Justice Powell's opinion in *Bakke* concluded that it was, the court agreed with the plaintiffs.<sup>174</sup> The court stated:

[A]ny consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications. Finally, the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection.<sup>175</sup>

The Fifth Circuit cited *J. A. Croson* for the proposition that “there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs.”<sup>176</sup> It also quoted a portion of the dissenting opinion in *Metro Broadcasting*, in which Justice O'Connor—for herself and three colleagues—said essentially the same thing.<sup>177</sup> Her dissent, the court claimed, was now vindicated by *Adarand*.<sup>178</sup> The Court concluded that “[i]n short, there has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination. Subsequent Supreme Court caselaw strongly suggests, in fact, that it is not.”<sup>179</sup>

Judge Weiner penned a specially concurring opinion in which he agreed that the admissions process used failed to satisfy strict scrutiny, but he thought the majority went too far in holding that diversity could never qualify as a compelling governmental interest.<sup>180</sup>

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172. *See id.* at 940-41.

173. *See id.* at 944.

174. *See id.*

175. *Id.*

176. *Id.* at 944-45.

177. *See id.* at 945.

178. *See id.*

179. *Id.*

180. *See id.* at 962 (Weiner, J., specially concurring).

His fellow panelists, he wrote, “declare categorically that ‘*any* consideration of race or ethnicity by the law school for the purposes of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.’”<sup>181</sup> While such a reading—which the panel treated as a straightforward application of binding precedent—“may well be a defensible *extension* of recent Supreme Court precedent,” and may even “prove to be the Court’s position,” it was for him “both overly broad and unnecessary to the disposition of this case.”<sup>182</sup>

Starting from the premise that “[w]e judge best when we judge least, particularly in controversial matters of high public interest,”<sup>183</sup> Judge Weiner would have regarded the status of the “definition and application of the compelling interest” test “to be suspended somewhere in the interstices of constitutional interpretation” because of the uncertain (to him) impact of *Adarand* on *Bakke*.<sup>184</sup> He saw no “compelling reason” to go where the Supreme Court declined, or maybe even feared, to go.<sup>185</sup>

#### 4. *The Second Amendment*

In its 2008 *Heller* decision, the Supreme Court held that the Second Amendment guaranteed an individual right to own firearms for self-defense.<sup>186</sup> Following *Heller*—and *McDonald*, which incorporated the right through the Fourteenth Amendment<sup>187</sup>—gun rights litigants sought to expand the right outside the home. Illinois prohibited all public carrying of firearms, open or concealed, loaded

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181. *Id.* at 963 (quoting majority opinion at 944).

182. *Id.*

183. *Id.* at 962 (quoting *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 931 (5th Cir. 1993) (Wiener, J., dissenting)).

184. *Id.* at 964-65.

185. *See id.* at 965.

186. *See* *District of Columbia v. Heller*, 554 U.S. 570, 602 (2008).

187. *See* *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

or unloaded.<sup>188</sup> Its restrictive law was unique among the fifty states.<sup>189</sup>

In a surprising opinion, the Seventh Circuit invalidated Illinois's broad ban on the public carrying of weapons, holding that the right to keep and bear arms could not be confined to the home if the self-defense right recognized in *Heller* was to be a meaningful one.<sup>190</sup> I say "surprising" not only because many other courts of appeals rejected calls to expand *Heller* beyond the confines of the home,<sup>191</sup> but also because the author of the opinion, Richard Posner, has been a persistent, scathing critic of the *Heller* decision.<sup>192</sup>

Starting from the premise that the right to self-defense is at the core of the Second Amendment, Judge Posner reasoned that while the Court may have held that the right was of particular importance in the home, it did not mean that it is not of great importance outside the home.<sup>193</sup> In fact, he argued that in the eighteenth century, "a right to keep and bear arms for personal self-defense ... could not rationally have been limited to the home" because of the necessity of travel in remote areas populated with "hostile Indians."<sup>194</sup> He also noted that the use of the word "bear" in the Amendment suggests a right to carry a weapon as well as to possess one.<sup>195</sup>

Judge Posner considered several arguments offered in support of the ban: (1) that more guns carried publicly decreased public safety

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188. See *Moore v. Madigan*, 702 F.3d 933, 934 (7th Cir. 2012). Most other states that did not have laws mandating the issuance of a concealed carry license upon satisfaction of character and training requirements did not ban concealed carry outright, but rather empowered officials to issue or withhold licenses in their discretion. See generally ANDREW JAY MCCLURG & BRANNON P. DENNING, GUNS AND THE LAW: CASES, PROBLEMS, AND EXPLANATION ch. 5 (2016).

189. See *Moore*, 702 F.3d at 940 ("Illinois is the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home, though many states used to ban carrying concealed guns outside the home.").

190. See *id.* at 942. The panel stayed the decision for 180 days "to allow the Illinois legislature to craft a new gun law that [would] impose reasonable limitations, consistent with the public safety and the Second Amendment ... on the carrying of guns in public." *Id.*

191. See, e.g., *Peruta v. San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 1995 (2017); *Kachalsky v. Westchester*, 701 F.3d 81, 100 (2d Cir. 2012), *cert. denied sub nom.* *Kachalsky v. Cacace*, 569 U.S. 918 (2013).

192. See, e.g., RICHARD A. POSNER, REFLECTIONS ON JUDGING 186-98 (2013).

193. *Moore*, 702 F.3d at 935-36 ("*Heller* repeatedly invokes a broader Second Amendment right than the right to a gun in one's home.").

194. *Id.* at 936; see also *id.* at 937 (discussing the modern-day need for protection outside the home).

195. See *id.* at 936.

more than if gun possession were restricted to the home; (2) that bans on public carrying allow the police to arrest anyone found carrying a gun; and (3) that public carrying increases crime generally.<sup>196</sup> He rejected each in turn.<sup>197</sup> While public carrying might endanger public safety, it might also “make criminals timid” if they knew “that many law-abiding citizens are walking the streets armed.”<sup>198</sup> The stop-and-frisk argument was weak, argued Posner, because “[o]ften the officer will have no suspicion (the gun is concealed, after all)... Many criminals would continue to conceal the guns they carried, in order to preserve the element of surprise and avoid the price of a gun permit.”<sup>199</sup> As for the relationship between public carriage of guns and crime generally, Judge Posner concluded that the empirical evidence failed to demonstrate a strong correlation between allowing the public carrying of weapons and an increase in crime, including assault.<sup>200</sup>

Judge Posner held that it was not enough to say that Illinois’s ban on carrying guns in public was not irrational; *Heller* and *McDonald* foreclosed the argument that the state should be given substantial deference in the regulation of firearms.<sup>201</sup> That the Illinois law was an outlier seemed to factor into the decision as well. “Illinois,” he wrote, “has lots of options for protecting its people from being shot without having to eliminate all possibility of armed self-defense in public.”<sup>202</sup> Towards the end of the opinion, he also responded to judges, like Judge Wilkinson, who urged the lower courts to avoid the “vast *terra incognita*” containing all the questions *Heller* and *McDonald* did not answer.<sup>203</sup> Posner wrote, “[T]hat ‘vast *terra incognita*’ has been opened to judicial exploration by *Heller* and *McDonald*. There is no turning back by the lower federal courts.”<sup>204</sup>

Judge Williams dissented: “The Supreme Court’s decisions in *Heller* and *McDonald* made clear that persons in the state of Illinois

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196. *See id.* at 937-40.

197. *See id.*

198. *Id.* at 937.

199. *Id.* at 938.

200. *See id.* at 939 (“In sum, the empirical literature on the effects of allowing the carriage of guns in public fails to establish a pragmatic defense of the Illinois law.”).

201. *See id.*

202. *Id.* at 940.

203. *See id.* at 942.

204. *Id.*

(unless otherwise disqualified) must be allowed to have handguns in their homes for self-defense.”<sup>205</sup> However, he added, “those cases did not resolve the question in this case—whether the Second Amendment also requires a state to allow persons to carry ready-to-use firearms in public for potential self-defense.”<sup>206</sup> While conceding that the majority’s reading of *Heller* and *McDonald* is not unreasonable, for him the question was one that “requires a different analysis from that conducted by the Court in *Heller* and *McDonald*.”<sup>207</sup>

Not only did Judge Williams opine that “[t]he historical inquiry here is a very different one” than in *Heller*,<sup>208</sup> he was unconvinced that the right recognized in *Heller* extended beyond the home.<sup>209</sup> He also observed that an earlier Seventh Circuit decision was apprehensive of treating *Heller* as having potentially broader holdings. Quoting earlier precedent, he wrote “the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense.... Judicial opinions must not be confused with statutes, and general expressions must be read in light of the subject under consideration.”<sup>210</sup>

The language in *Heller* about the right to carry “in case of confrontation,” for example, he argued must be read in light of what he understood to be the Court’s core holding: that individuals have a right to possess “handguns in the home for self-defense.”<sup>211</sup>

Finally, he criticized Judge Posner’s reading of the empirical literature on public gun carrying and Judge Posner’s use of it to rebut the state’s reasons for banning public carrying. He first commented that the literature was mixed about the effects of concealed carrying on crime, and noted that “[t]o the extent the majority opinion’s studies draw different conclusions, the Supreme Court has made clear that ‘the possibility of drawing two inconsistent conclusions from the evidence’ does not prevent a finding from being

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205. *Id.* at 943 (Williams, J., dissenting).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 946 (“That the Second Amendment speaks of the ‘right of the people to keep *and* bear arms’ ... [did] not to [him] imply a right to carry a loaded gun outside the home.”).

210. *Id.* (quoting *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) (upholding federal ban on gun possession by domestic violence misdemeanants)).

211. *Id.*

supported by substantial evidence.”<sup>212</sup> Second, he thought Posner’s application of intermediate scrutiny was inconsistent with the court’s earlier application of it to the federal ban on gun possession by persons convicted of domestic violence.<sup>213</sup> The ban on public carrying, unlike the ban on *all* possession by such persons, should not require as much evidence to sustain it, since it did not apply to the core Second Amendment right—the ability to engage in self-defense in the home—recognized by *Heller* and *McDonald*.<sup>214</sup>

### B. Supreme Court Reaction

In each of the instances above, save one, the Supreme Court retreated somewhat or at least stymied attempts to extend the logic of its opinions to their limits. The Ninth Circuit’s entertainment of as-applied challenges to various federal statutes ended when the Court decided *Gonzales v. Raich*.<sup>215</sup> *Reno v. Condon*<sup>216</sup> reversed the Fourth Circuit and drew a bright line between preemption and unconstitutional commandeering.<sup>217</sup> And *Grutter v. Bollinger*<sup>218</sup> saw the Court reject the *Hopwood* court’s conclusion that *Bakke* had been superseded, instead embracing Justice Powell’s opinion and giving it the majority’s imprimatur.<sup>219</sup>

#### 1. The Commerce Clause

In his opinion for the six-member majority in *Raich* (which included Justices Kennedy and Scalia, who had joined the *Lopez* and *Morrison* majorities), Justice Stevens wrote:

[T]he activities regulated by the CSA are quintessentially economic.... The CSA ... regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate

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212. *Id.* at 952 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 211 (1997)).

213. *See id.*

214. *See id.* at 953.

215. 545 U.S. 1 (2005).

216. 528 U.S. 141 (2000).

217. *See id.* at 150-51.

218. 539 U.S. 306 (2003).

219. *See id.* at 325.

possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.<sup>220</sup>

The Court rejected the Ninth Circuit's attempt to "isolat[e] a 'separate and distinct' class of activities ... beyond the reach of federal power, defined as 'the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law.'"<sup>221</sup> That it was physician recommended and authorized under state law could not counteract the preemptive effect of a congressional judgment that criminalized the production, possession, and sale of marijuana and declared that marijuana had no recognized medical use.<sup>222</sup> Further, the Court noted that because it was fungible, exempting medical marijuana from federal regulation "will have a significant impact on both the supply and demand sides of the market for marijuana."<sup>223</sup> Justice Stevens found that "Congress could have rationally concluded that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial."<sup>224</sup>

The Supreme Court remanded *Stewart* for reconsideration in light of *Raich*.<sup>225</sup> On remand, the Ninth Circuit read *Raich* to "stand[] for the proposition that Congress can ban possession of an object where it has a rational basis for concluding that object might bleed into the interstate market and affect supply and demand, especially in an area where Congress regulates comprehensively."<sup>226</sup> *Stewart's* machine gun, homemade though it may have been, was still subject to congressional regulation.<sup>227</sup>

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220. *Raich*, 545 U.S. at 25-26 (footnote omitted).

221. *Id.* at 26.

222. *See id.* at 27-28.

223. *Id.* at 30.

224. *Id.* at 32.

225. *See* United States v. Stewart, 451 F.3d 1071, 1072-73 (9th Cir. 2006).

226. *Id.* at 1076-77.

227. *See id.* at 1077. No petition for certiorari was filed in *McCoy*; however, the Ninth Circuit acknowledged that *Raich* effectively overruled it. United States v. McCalla, 545 F.3d 750, 756 (9th Cir. 2008) ("[T]o the extent the reasoning employed in *McCoy* relied on the local nature of the activity, it has been overruled by the Supreme Court's decision in *Raich*").

## 2. *The Anti-Commandeering Principle*

*Reno v. Condon*<sup>228</sup> reversed the Fourth Circuit and made clear that there was a distinction between statutory preemption and commandeering.<sup>229</sup> In so doing, the Court made three moves. First, it accepted the argument that the statute did not apply only to states because it regulated resale and disclosure of personal information by “private persons who have obtained that information from a state DMV.”<sup>230</sup> Second, it held that the information protected was an article of commerce and comfortably within the regulatory ambit of the Commerce Clause.<sup>231</sup>

The Court then finessed the anti-commandeering issue by distinguishing between congressional regulation of “state activities” and regulation of the manner in which states regulated “private parties.”<sup>232</sup> Citing *South Carolina v. Baker*<sup>233</sup>—a case that predated the Court’s announcement of the anti-commandeering principle<sup>234</sup>—the Court concluded that while compliance with the DPPA “requires the State’s employees to learn and apply the Act’s substantive restrictions ... and notes that these activities will consume the employees’ time and thus the State’s resources,” the DPPA did “not require the States in their sovereign capacity to regulate their own citizens.... It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.”<sup>235</sup>

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228. 528 U.S. 141 (2000).

229. *See id.* The Court recently discussed this distinction at length in *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1479-81 (2018) (invalidating a federal statute prohibiting states from authorizing sports gambling).

230. *Reno*, 528 U.S. at 146.

231. *See id.* at 148 (“The United States bases its Commerce Clause argument on the fact that the personal, identifying information that the DPPA regulates is a ‘thin[g] in interstate commerce,’ and that the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation.... We agree with the United States’ contention.” (alteration in original) (citation omitted)).

232. *See id.* at 150.

233. 485 U.S. 505 (1988).

234. *See Reno*, 528 U.S. at 150.

235. *Id.* at 150-51.

### 3. *Affirmative Action*

Finally, the Fifth Circuit's *Hopwood* opinion was superseded by the Court's embrace of Justice Powell's *Bakke* opinion in *Grutter v. Bollinger*.<sup>236</sup> The lower courts had reached different conclusions under the *Marks v. United States*<sup>237</sup> rule used to identify the portions in a divided opinion that represent controlling precedent.<sup>238</sup> Rather than "decid[ing] whether Justice Powell's opinion [was] binding under *Marks*," the Court simply endorsed its conclusion "that student body diversity is a compelling state interest that can justify the use of race in university admissions."<sup>239</sup> By doing so, the Court seemed to treat race-based university admissions as categorically different than racial preferences in government contracting,<sup>240</sup> a conclusion that was bolstered by the deferential form of strict scrutiny that the majority applied.<sup>241</sup>

The majority stressed that *Adarand* and *J. A. Croson* did not limit the universe of "compelling interests" to remedies for past discrimination; others could qualify.<sup>242</sup> Then surprisingly, in light of its use of strict scrutiny, the majority deferred to "[t]he Law School's educational judgment that ... diversity is essential to its educational mission."<sup>243</sup> It further held:

Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper

236. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); see also *Gratz v. Bollinger*, 539 U.S. 244 (2003).

237. See 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'). The *Marks* rule is easy to articulate, but difficult to apply, as commentators have noted. See, e.g., Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 798-800 (2017).

238. See *Grutter*, 539 U.S. at 321-22.

239. *Id.* at 325.

240. See *id.* at 325-29.

241. See *id.* at 328-29. The deferential nature of the Court's application of strict scrutiny was notable at the time. See, e.g., Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 970-80 (2004).

242. See *Grutter*, 539 U.S. at 328 ("[W]e have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination.').

243. *Id.*

institutional mission, and that “good faith” on the part of a university is “presumed” absent “a showing to the contrary.”<sup>244</sup>

The Court’s solicitude toward the University of Michigan was in stark contrast to the skepticism expressed about the use of race by Congress and by the City of Richmond to combat alleged past discrimination.<sup>245</sup>

The *Grutter* majority then concluded that the use of race in the admissions process as part of a holistic review of applicants was appropriately narrowly tailored.<sup>246</sup> In contrast to *J. A. Croson*, which sharply criticized Richmond’s failure to explore race neutral means to boost the percentage of minority contractors bidding on government-funded projects,<sup>247</sup> *Grutter* held that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”<sup>248</sup> It also denied that the law school’s use of race in seeking a critical mass of racial minorities functioned as a quota.<sup>249</sup>

#### 4. *The Second Amendment*

No petition for certiorari was filed in *Moore v. Madigan*, and the Court has declined to review other similar cases.<sup>250</sup> Only one other appeals court panel agreed with Judge Posner that the logic of *Heller* dictated that the right to keep and bear arms receive some protection outside the home.<sup>251</sup> That decision, however, was reversed en banc, and the United States Supreme Court denied certiorari.<sup>252</sup>

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244. *Id.* at 329.

245. *See supra* notes 156-59 and accompanying text.

246. *See Grutter*, 539 U.S. at 334-38.

247. *See supra* notes 156-59 and accompanying text.

248. *See Grutter*, 539 U.S. at 339.

249. *See id.* at 335-36.

250. *See supra* notes 186-92 and accompanying text.

251. *See Peruta v. Cty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *rev’d en banc*, 824 F.3d 919 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1995 (2017).

252. *See Peruta*, 824 F.3d at 923-24.

In each of the four areas discussed above, the panel majority purported simply to apply binding precedent to reach a decision. Like those employees who “work-to-rule” or the L.A. freeway drivers who scrupulously observed the speed limit during rush hour, the judges gave the appearance of simply “following the rules.” However, I argue that embedded in the panel decisions is either a critique of a recent Supreme Court decision or an attempt to leverage recent decisions in a way that creates tensions with earlier Supreme Court decisions so as to force the Court to clarify its doctrinal direction.<sup>253</sup> In the next Part, I make the case that these instances meet Bulman-Pozen and Pozen’s criteria for uncivil obedience.

### III. THE CASE FOR THE EXISTENCE OF JUDICIAL UNCIVIL OBEDIENCE

In this Part, I reexamine Bulman-Pozen and Pozen’s criteria for uncivil obedience and explain why the cases discussed in Part II satisfy them. In addition, I speculate why uncivil obedience is not more widespread by reference to the authors’ own identification of systemic constraints on uncivil obedience. First, though, I offer some thoughts why uncivil obedience might be a particularly attractive means by which lower court judges can critique the Supreme Court.

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253. *See infra* Part III.

*A. Why Uncivil Obedience Might Be Particularly Attractive to Judges*

Why might judges—particularly appellate court judges<sup>254</sup>—find uncivil obedience an attractive technique for engaging with the Supreme Court? Uncivil obedience permits dissent from within the law’s four corners and allows parties who engage in it to overcome asymmetries in power.<sup>255</sup> Those features might make uncivil obedience especially tempting to lower court judges operating in a hierarchical judicial system.

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254. My examples have been drawn from the courts of appeals. However, there is also a district court opinion that might qualify as an uncivilly obedient one. In *Lawrence v. Texas*, the Court held that majoritarian moral disapproval of same-sex sodomy was not a legitimate governmental interest and struck down Texas’s law criminalizing that conduct as a due process violation. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Justice Kennedy wrote:

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.”

*Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) (plurality opinion)).

Following that decision, a federal district court upheld an as-applied challenge brought by persons charged with violating federal obscenity statutes. See *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578, 579-80 (W.D. Pa.), *rev’d*, 431 F.3d 150 (3d Cir. 2005). In his opinion, the judge wrote that “we find that after *Lawrence*, the government can no longer rely on the advancement of a moral code *i.e.*, preventing consenting adults from entertaining lewd or lascivious thoughts, as a legitimate, let alone a compelling, state interest.” *Id.* at 587.

The Third Circuit reversed, concluding that *Lawrence* did not explicitly overrule earlier cases upholding federal statutes criminalizing the distribution of obscenity and that arguments otherwise were speculative. See *Extreme*, 431 F.3d at 161. “For district and appellate courts in our judicial system, such a determination dictates the result in analogous cases unless and until the Supreme Court expressly overrules the substance of its decision. *Lawrence v. Texas* represents no such definitive step by the Court.” *Id.* Possible differences in how uncivil obedience looks like in district courts as opposed to courts of appeal, and whether the likelihood of reversal by the appellate courts would function as an additional constraint on its exercise by district court judges, are intriguing questions but are beyond the scope of this Article. They do, however, suggest fruitful avenues for future inquiry.

255. See Bulman-Pozen & Pozen, *supra* note 23, at 865-68.

“Whereas government service neither selects for nor rewards a taste for reform-minded law breaking,” Bulman-Pozen and Pozen write, “uncivil obedience allows office-holders to press dissenting positions from within the stance of legality that the public expects of them.”<sup>256</sup> This is true of federal judges as well.<sup>257</sup> Outright resistance of Supreme Court decisions thought to be wrong-headed is understood in our system as illegitimate and lawless.<sup>258</sup> Likewise, the Court itself has repeatedly warned lower courts that overruling precedents is its prerogative, no matter how superseded those decisions may seem in light of more recent cases.<sup>259</sup> But “work[ing] to rule” as it were, reading decisions for all they are worth, can demonstrate the unintended or untoward consequences of Supreme Court decisions and can “perform[] its own critique” while insulating the judge from criticism that she is abandoning the rule of law.<sup>260</sup>

Additionally, Bulman-Pozen and Pozen hypothesized that uncivil obedience might become a primary vehicle for dissent expressed by political conservatives.<sup>261</sup> Reasoning from evidence suggesting “that political conservatives value deference to established authority, as such, more than political liberals do,”<sup>262</sup> they argue that “[w]e may expect to witness a systematic skew in the distribution of conservative dissent in the direction of uncivil obedience.”<sup>263</sup> Uncivil obedience “cloaks dissent in behavior that is, at least superficially, respectful of established authority.... [T]he uncivil obedient emphasizes the formal legality of her action. Like the civil disobedi-

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256. *Id.* at 866.

257. *See supra* Part II.A.

258. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 957 (2005) (“Vertical stare decisis is generally considered absolute.”); Alice Marie Beard, *Resistance by Inferior Courts to Supreme Court’s Second Amendment Decisions*, 81 TENN. L. REV. 673, 698 (2014) (“Supreme Court decisions holding that a right is fundamental require obedience by lower courts if the rule of law is to continue to prevail.”). For a historical account of the obligation of lower courts to follow and implement decisions of superior courts, see JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES* 1-2, 38-44 (2009).

259. *See* *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) (“[I]t is this Court’s prerogative alone to overrule one of its precedents.” (alteration in original) (quoting *United States v. Hatter*, 532 U.S. 557, 567 (2001))); *see also* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

260. *See* Bulman-Pozen & Pozen, *supra* note 23, at 863.

261. *See id.* at 869-71.

262. *Id.* at 869.

263. *Id.* at 870.

ent, she is out to change the system, but she does so by mastering the system's rules. She does so from the inside."<sup>264</sup>

A similar attitude might characterize lower court judges' relationships to some Supreme Court decisions. While obviously not all lower court judges are ideologically conservative, they do tend to be conservative in one sense—by both training and position within the judicial hierarchy, they defer to authority.<sup>265</sup> If those traits tend to make uncivil obedience attractive to those who care about appearance and reputation,<sup>266</sup> then it stands to reason that uncivil obedience would show up among at least some federal judges.

### *B. Uncivil Obedience: A Second Look at the Criteria*

Taking a look at the criteria Bulman-Pozen and Pozen employ to identify genuine acts of uncivil obedience—conscientiousness, communicativeness, reformist intent, legality, and legal provocation<sup>267</sup>—I argue in this subsection that all are present in the circuit court opinions discussed above in one form or another.<sup>268</sup> The discussion here will take them slightly out of the order in which Bulman-Pozen and Pozen present them, proceeding from what I perceive as the easiest to satisfy (legality) to potentially the most difficult (legal provocation). In addition, because I think that they are closely related, I will discuss conscientiousness and reformist intent together.

#### *1. Legality*

Of the five elements, “legality” seems the easiest to satisfy. An uncivilly obedient judge or panel would purport to be doing nothing more than taking the Court at its word and applying the decision as written. Because faithfully applying Supreme Court opinions is what lower court judges are supposed to do,<sup>269</sup> an uncivilly obedient judge could “reasonably and genuinely believe ... that she is vio-

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264. *Id.*

265. See *supra* notes 257-59 and accompanying text.

266. See Bulman-Pozen & Pozen, *supra* note 23, at 870.

267. See *id.* at 820.

268. See *infra* Parts III.B.1-III.B.4.

269. See *supra* note 9 and accompanying text.

lating no positive law or regulation”<sup>270</sup> and that “her behavior truly conforms to relevant legal norms.”<sup>271</sup>

Unlike many courts of appeals, which seized on any plausible distinction between the statutes invalidated in *Lopez* and *Morrison* and those under review in order to sustain the latter,<sup>272</sup> the Ninth Circuit conducted a meticulous analysis using the factors employed by the Court.<sup>273</sup> Similarly, the Fourth Circuit did not simply assume that the anti-commandeering rule of *New York* and *Printz* left ordinary preemption doctrine untouched.<sup>274</sup> It instead took seriously the argument that while a line might exist between constitutionally unproblematic preemption and impermissible commandeering, the precise location of that line was not obvious, and the Court left no clear marker by which courts could distinguish between the two.<sup>275</sup> Especially when the law in question seemed aimed at states *qua* states, there was no reason to suppose that some forms of “preemption” could *not* shade over into forbidden “commandeering.”<sup>276</sup> At least such a conclusion was a plausible reading of the Court’s decisions.

Likewise, the *Hopwood* court inferred from *Adarand* and *J. A. Croson* that the Court was taking a much tougher line on race-based preferences, tightening both what counted as a compelling interest and what satisfied narrow tailoring’s required means-ends fit.<sup>277</sup> Finally, Judge Posner argued in *Moore* that the principles enunciated in *Heller* could not logically be restricted to the home, if the Court meant what it said about self-defense and the right to possess a weapon for use in confrontations to be taken seriously.<sup>278</sup> That the opinions contained at least plausible readings of the Court’s cases was often confirmed in dissenting or concurring opinions, which

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270. See Bulman-Pozen & Pozen, *supra* note 23, at 824.

271. See *id.*

272. See, e.g., Reynolds & Denning, *supra* note 1.

273. See, e.g., United States v. McCoy, 323 F.3d 1114, 1119-30 (9th Cir. 2003).

274. See Condon v. Reno, 155 F.3d 453, 462, 463 n.6 (4th Cir. 1998), *rev’d*, 528 U.S. 141 (2000).

275. See *id.* at 459-61, 463 n.6.

276. See *id.*

277. See *Hopwood v. Texas*, 78 F.3d 932, 945-48 (5th Cir. 1996).

278. See *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012).

usually conceded that the majority's conclusions did not defy a reasonable reading of the case law.<sup>279</sup>

## 2. *Conscientiousness and Reformist Intent*

“Conscientiousness” requires that uncivilly obedient actors “be subjectively serious, calculated, and grounded in sincere conviction.”<sup>280</sup> While their acts need not be “devoid of self interest,” an act does not qualify as uncivil obedience “[i]f driven by little more than a desire for private benefit.”<sup>281</sup> Bulman-Pozen and Pozen stress, though, that “[t]he bar to clear is low.”<sup>282</sup> The point of the criterion is simply to exclude “narrowly commercial or competitive behaviors” and “instinctive or whimsical behaviors.”<sup>283</sup>

The opinions above surely meet Bulman-Pozen and Pozen’s standard for conscientiousness. Judges—honest ones, at least—do not write their opinions for private benefit. Nor do they intend their opinions to be understood as mere satire, an exercise in the whimsical, or as an unreasoned emotional outburst. Judges write opinions to give persuasive reasons that support the judgment rendered—to demonstrate fidelity to the rule of law, not to indulge some personal whim.

In addition to evincing a certain sincerity, uncivilly obedient actors must harbor a “reformist intent”—that is, they must convey disapproval of the law and “aspire to reshape it in an enduring manner.”<sup>284</sup> Disapproval may take different forms. But, “[m]ost basically, uncivil obedience ... enhance[s] the salience of a regulation or highlight[s] its objectionable nature.”<sup>285</sup> Uncivil obedience, alternatively, may take a more direct form “by undermining the efficacy or efficiency of a particular law, policy, or institution.”<sup>286</sup> The circuit court opinions described in Part II, I submit, each adopt the former, more indirect form of uncivil obedience.

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279. See, e.g., *Condon*, 155 F.3d at 465-67 (Phillips, J., dissenting).

280. See Bulman-Pozen & Pozen, *supra* note 23, at 821.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* at 822.

285. *Id.* at 823.

286. *Id.*

The Ninth Circuit's post-*Lopez* decisions might be read as expressing opposition to restrictions on the power of Congress to regulate an integrated, global economy.<sup>287</sup> Given the options open to lower court judges for treading carefully when implementing a new Supreme Court decision, I cannot help but suspect that Judges Reinhardt and Pregerson's Commerce Clause decisions in *McCoy*<sup>288</sup> and *Raich*<sup>289</sup> were intended to signal disapproval of the direction in which the Court's Commerce Clause jurisprudence was headed. The decisions aimed to demonstrate that a commitment to that path entailed limiting the federal government's ability to prosecute child pornographers and illegal drug users. Judge Reinhardt, in fact, once criticized the Court in print for limiting the scope of federal power.<sup>290</sup>

The *Hopwood* panel's conclusion that the combined effect of *J. A. Croson* and *Adarand* was to diminish the precedential value of Justice Powell's *Bakke* opinion seems of a similar piece.<sup>291</sup> It could be read as pressing for the privileging of an antidiscrimination reading of the Equal Protection Clause over that of anti-subordina-

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287. See, e.g., *Raich v. Ashcroft*, 352 F.3d 1222, 1227 (9th Cir. 2003).

288. 323 F.3d 1114 (9th Cir. 2003).

289. 352 F.3d 1222 (9th Cir. 2003).

290. See Stephen Reinhardt, Millennium Speech (Mar. 4, 2000), in 9 J.L. & POL'Y 435, 436-37 (2001). Judge Reinhardt wrote:

In the last few years, ... five Justices have invalidated Congressional legislation in a manner unprecedented since the beginning of the New Deal. They have done so by severely curtailing the historic scope of the Commerce Clause, by resurrecting the Tenth Amendment from judicial oblivion, and by shedding their textualist clothing in order to arrive at a broad-sweeping goal-oriented misconstruction of the Eleventh Amendment. From the time that Franklin Roosevelt threatened to pack the Court in 1936, until 1992—a period of fifty-six years—on only one occasion did the Supreme Court strike down a statute on the basis that Congress had exceeded its constitutional authority. That one occasion was in 1976 when Justice Rehnquist briefly assembled a temporary five-member majority for a decision that was later overruled. Between 1992 and February 2000, however, the Court has held nine congressional statutes unconstitutional, either in whole or in part, with seven of those nine cases decided by the same 5-4 split. By the end of the summer, the Supreme Court has promised to tell us whether three other important statutes, including the Violence Against Women Act, can survive the acid bath of its federalism jurisprudence. My suggestion is: don't hold your breath—but do recognize that the crisis is real and that, if it continues unchecked, it will drastically alter the fundamental nature of the American government.

*Id.* (footnotes omitted).

291. See *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996).

tion.<sup>292</sup> A majority of the panel disapproved of Powell's decision that diversity in education constituted a compelling governmental interest and sought to "reshape" the law of affirmative action accordingly.<sup>293</sup> The panel was, in fact, quite explicit in its critique of *Bakke*, writing that racial classifications employed to increase diversity "frustrate[d], rather than facilitate[d], the goals of equal protection."<sup>294</sup> It was likewise supportive of the more recent cases that, to the court, seemed to underscore the panel's critique and justify its declaration that Justice Powell's *Bakke* opinion had been superseded.<sup>295</sup>

The Fourth Circuit's *Condon* decision was critical of the Court's *National League of Cities* and *Garcia* line of cases, observing that "the Court's jurisprudence ... has not been a model of consistency."<sup>296</sup> By contrast, it detected more firmness and less vacillation in the Court's anti-commandeering cases and concluded that line of cases, not *Garcia*, applied.<sup>297</sup> Implicit in that choice too was a rejection of the *Garcia* Court's call for judges to step back from federalism controversies and allow the political safeguards to do their work.<sup>298</sup> It also seemed motivated by a desire to further the Rehnquist Court's federalism project, which sought to reestablish a role for courts in refereeing vertical federalism disputes.<sup>299</sup>

Likewise, given Judge Posner's scathing criticism of *Heller* and *McDonald*, his riposte to other judges who urged courts to leave open as many questions about the scope of the right to keep and bear arms as possible—that now the Court opened the door, "[t]here is no turning back"<sup>300</sup>—strikes a false note. Surely the avatar of pragmatic judging could have plotted a more restrained course than the one taken in *Moore*, as other courts have.<sup>301</sup> His decision seems calculated to enhance the salience of *Heller* and *McDonald* by

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292. *See id.* at 944-46.

293. *See id.*

294. *Id.* at 944.

295. *See id.* at 944-45.

296. *Condon v. Reno*, 155 F.3d 453, 458 (4th Cir. 1998), *rev'd*, 528 U.S. 141 (2000).

297. *Id.* at 459, 465.

298. *See id.* at 464.

299. *See id.*

300. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

301. *Cf. id.* at 941 (comparing *Moore* with the Second Circuit's decision in *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012)).

demonstrating how far their logic could extend, leading to a much broader right than the Court was willing to acknowledge.<sup>302</sup> Not unlike H.L. Mencken, who quipped that “[d]emocracy is the theory that the common people know what they want, and deserve to get it good and hard,”<sup>303</sup> Judge Posner leaves the Court with a choice: accept his reading of the Second Amendment, with all of its expansive possibilities, or narrow *Heller* and *McDonald*, possibly even overruling them.<sup>304</sup> His criticism of those decisions leaves little doubt which course he would prefer the Court to take.

### 3. *Communicativeness*

Further, the act of writing a judicial opinion that applies or extends a Supreme Court decision in a potentially far-reaching, perhaps surprising, way seems to satisfy the element of communicativeness. Courts draft opinions giving reasons for their decisions; moreover, as Bulman-Pozen and Pozen conceive of this element, the judges writing the opinions are not required to be candid about their efforts to disrupt.<sup>305</sup> “If it is well understood,” they write, “that a certain act represents a conscientious effort to disrupt a law or policy, then the act may count as uncivil obedience even if the actor herself denies any disruptive ambition.”<sup>306</sup> “[S]ocial meaning,” not “semantic content,” is what matters.<sup>307</sup> Judges are not required to say—and are unlikely to write opinions that say—“we think this decision is a bad one that will produce all manner of untoward effects; to demonstrate how pernicious it is, we are going to apply the Supreme Court’s announced principle for all it is worth in this case.”

As I explained in the previous paragraphs discussing conscientiousness and reformist intent, when a judge holding strong views about the scope of Congress’s commerce power or of the wisdom of recognizing an individual right to keep and bear arms authors an opinion that invalidates a federal law as having exceeded congressional authority or extends the right to keep and bear arms, it does

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302. *See id.* at 942.

303. H.L. MENCKEN, *A LITTLE BOOK IN C MAJOR* 19 (1916).

304. *See Moore*, 702 F.3d at 942.

305. *See* Bulman-Pozen & Pozen, *supra* note 23, at 822.

306. *Id.*

307. *Id.*

not leave me with the feeling that the judge suddenly had a road-to-Damascus conversion moment. That is true especially when other, less dramatic options were open to that judge. The judges may say that they are simply applying the law, but there is more than one way to skin a cat. The judges' choices in the cases described in Part II seem calculated to communicate a particular message.<sup>308</sup>

#### 4. *Legal Provocation*

Bulman-Pozen and Pozen's final element is "legal provocation."<sup>309</sup> In their discussion of this "most distinctive element of uncivil obedience," they explain in more detail "[h]ow ... adherence to law ... manage[s] to provoke."<sup>310</sup> The key is to appreciate the gap between "the official rules and the unofficial customs that coexist in a given area, or between the letter of the law and its perceived purpose or spirit, and in the attention that is called to that gap."<sup>311</sup> Further, they note that provocation "may be especially legible when the act of uncivil obedience departs not only from social norms and regulatory goals, but also from the actor's immediate interests."<sup>312</sup> When it does so, "it may therefore be all the more apparent that their law-abidingness has a critical cast."<sup>313</sup> What is key, however, is that "provocation ... is always marked by the actor's unusually intensive, ostentatious, and self-conscious engagement with the technical legality of her protest."<sup>314</sup> But this element in particular they regard as likely lacking in court opinions because even hyper-formalist ones will not be seen as inflammatory or provocative.<sup>315</sup>

To qualify as legally provocative, then, the opinions described above should exhibit one or more of the following characteristics, according to the authors: (1) a demonstrable gap between the official rules and unofficial norms of courts of appeals decision-making; (2) a possible departure from the immediate interests of the opinions'

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308. *See supra* Part II.

309. *See* Bulman-Pozen & Pozen, *supra* note 23, at 827-41.

310. *Id.* at 827.

311. *Id.* (footnote omitted).

312. *Id.*

313. *Id.*

314. *Id.* at 827-28.

315. *See supra* notes 57-60 and accompanying text.

authors; and (3) a kind of hyper-technical legality that is unusual and self-conscious.<sup>316</sup> I think that one or more of these characteristics exist in each of the cases above and that each would indeed meet Bulman-Pozen and Pozen's criteria of legal provocation.

*a. Violation of Unofficial Norms*

We know from studies of courts of appeals that dissent rates are very low,<sup>317</sup> a phenomenon that has been attributed to a widespread norm of collegiality and consensus in the courts of appeals.<sup>318</sup> One of the first things to note about the cases discussed above is that the majority opinion in each was provocative in a literal sense—the opinions provoked a colleague to abandon the norm of consensus and file a dissenting opinion.<sup>319</sup>

There is also the norm among courts of appeals, as members of a hierarchical judicial system that are subordinate to the Supreme Court and bound by its precedents, that those inferior courts are not free to “underrule” the Court.<sup>320</sup> The Supreme Court itself has explicitly stated this on occasion, writing in one case that “only this Court may overrule one of its precedents.”<sup>321</sup> In the *Hopwood* case, the Fifth Circuit explicitly flouted that norm.<sup>322</sup>

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316. See Bulman-Pozen & Pozen, *supra* note 23, at 827-31.

317. See FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 159-60 (2007) (noting that dissent rates are “low,” and discussing theories why the rate is relatively low); see also FRANK M. COFFIN, *ON APPEAL: COURTS, LAWYERING, AND JUDGING* 227-28 (1994) (“[W]e judges are well advised to resist the temptation [to dissent] unless we find a compelling interest and no more effective alternative ... [such as] [w]hen the dissenter feels that a *serious mistake of law* has been made on a *significant issue* that is *likely to recur*.”).

318. See COFFIN, *supra* note 317, at 213-29 (discussing collegiality); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639 (2003).

319. See, e.g., *Moore v. Madigan*, 702 F.3d 933, 943-54 (7th Cir. 2012) (Williams, J., dissenting). Or, in *Hopwood*, Judge Weiner wrote a special concurrence that rejected much of the panel's reasoning while nevertheless joining its judgment. See *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996) (Wiener, J., concurring).

320. See *supra* note 9 and accompanying text.

321. *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam). For a thorough consideration of arguments for and against this norm, see generally Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1994). For arguments that courts are *not* obligated to follow superior court precedent, see generally Paul L. Colby, *Two Views on the Legitimacy of Nonacquiescence in Judicial Opinions*, 61 TUL. L. REV. 1041 (1987) and Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIGION 33 (1989).

322. See *Hopwood*, 78 F.3d at 944.

Finally, as Glenn Reynolds's and my readings of lower court interpretations of *Lopez* and *Heller* suggest,<sup>323</sup> there is a norm among courts of appeals to read narrowly highly salient, potentially disruptive Supreme Court decisions, at least absent signals from the Court that it is inviting robust application.<sup>324</sup> In each of the cases discussed above, other courts of appeals hearing similar challenges tended to uphold the child pornography statute,<sup>325</sup> the federal ban on machine guns,<sup>326</sup> the CSA,<sup>327</sup> the DPPA,<sup>328</sup> and limits on the public carrying of firearms.<sup>329</sup>

### *b. Departure from Self-Interest*

Scholars have posited that judges (like the rest of us) are self-interest maximizers.<sup>330</sup> Others have suggested that, within bounded limits, judges seek to advance their policy preferences.<sup>331</sup> We also know that lower court judges tend not to like to be reversed.<sup>332</sup>

323. See generally Denning & Reynolds, *supra* note 72; Reynolds & Denning, *supra* note 1.

324. See Siegel, *supra* note 15, at 1186 (discussing phenomenon of “reciprocal legitimation” between lower courts and the United States Supreme Court).

325. See *United States v. McCoy*, 323 F.3d 1114 (9th Cir. 2003).

326. See *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), *cert. granted, vacated, and remanded*, 125 S. Ct. 2899 (2005).

327. See *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), *rev'd sub. nom. Gonzales v. Raich*, 545 U.S. 1 (2005).

328. See *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998), *rev'd*, 528 U.S. 141 (2000).

329. See *Moore v. Madigan*, 702 F.3d 933, 934 (7th Cir. 2012).

330. See, e.g., Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993).

331. The strongest claims regarding judges' pursuit of policy goals are made by proponents of the attitudinal model of adjudication. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 64-73 (1993). *But see* CROSS, *supra* note 317, at 67 (“There is ample empirical evidence ... that legal rules matter in determining judicial outcomes.... [B]eyond ideological influences, legal rules of procedure matter greatly in determining outcomes.”).

332. See, e.g., Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 77-78 (1994). Caminker writes:

Much anecdotal evidence suggests that lower court judges dislike being reversed on appeal. Reasons include: (1) fear that their professional audience, including colleagues, practitioners, and scholars, will disrespect their legal judgments or abilities; (2) fear that a high reversal rate might reduce opportunities for professional recognition and advancement (including promotion to a higher court or appointment to judicial or other commissions); and (3) the perception that reversal undercuts their de facto judicial power, both in a tangible and

Again, each of the cases discussed above seems to represent a self-conscious departure from self-interest on the part of the majority.

For one thing, handing challengers a victory will produce similar challenges. Given the already heavy caseloads of courts of appeals<sup>333</sup> and the use of the Commerce Clause as the source of much federal law (especially federal criminal law), Glenn Reynolds and I speculated that the potential volume of challenges by criminal defendants alone was enough to cause judges to seek ways to narrow *Lopez*.<sup>334</sup> And yet, by seeming to take *Lopez* seriously, the Ninth Circuit all but invited additional facial and as-applied challenges, which in fact were forthcoming. Had *Hopwood* stood,<sup>335</sup> the Fifth Circuit would have found itself ground zero for anti-affirmative action litigation. Likewise, the Fourth Circuit's broad application of the anti-commandeering principle<sup>336</sup> would—had it stood—have likely rendered that court a magnet for similar cases. And the Seventh Circuit's invalidation of Illinois's absolute ban on the carrying of guns in public<sup>337</sup> ensured that whatever scheme for public carrying Illinois developed would itself be the subject of additional Second Amendment litigation.<sup>338</sup> That litigation has only recently ended.<sup>339</sup>

There is strong evidence, moreover, that the *McCoy* and *Raich* holdings directly contradicted the policy preferences of Judges Reinhardt and Pregerson. Judge Reinhardt, as noted, was a vocal critic of the Rehnquist Court's campaign to limit the reach of federal power by placing limits on the Commerce Clause.<sup>340</sup> Judges Pregerson

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intangible sense. The understandable desire to avoid such psychological and professional costs might well influence inferior court judges to decide cases in accord with their expectations about appellate court behavior. A judge may, for example, interpret ambiguous precedents or fill the gaps therein or apply precedents to new fact patterns in the manner she believes her reviewing court will do.

*Id.* (footnotes omitted).

333. In 2017, for example, there were 58,951 filings in the twelve circuit courts of appeal. FEDERAL JUDICIAL CASELOAD STATISTICS 2017, U.S. COURTS, [www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017](http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2017) [<https://perma.cc/8AD9-57FA>].

334. See Denning & Reynolds, *supra* note 72, at 1302-04.

335. See generally 78 F.3d 932 (5th Cir. 1996).

336. See generally Condon v. Reno, 155 F.3d 453 (4th Cir. 1998), *rev'd*, 528 U.S. 141 (2000).

337. See generally Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012).

338. See, e.g., Berron v. Ill. Concealed Carry Licensing Review Bd., 825 F.3d 843 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 843 (2017).

339. See *Berron*, 137 S. Ct. 843 (denying certiorari).

340. See *supra* note 290 and accompanying text.

and Reinhardt were also named in a recent survey as two of the most “liberal” judges currently serving at the time of the survey.<sup>341</sup> The ultimate utility of reductive labels like “liberal” and “conservative” aside, as a general proposition, more liberal judges tend not to favor judicially enforced limits on sources of federal power like the Commerce Clause. And whether one focuses on Judge Posner’s pleas for pragmatic judging<sup>342</sup> or his critiques of *Heller* and the right to keep and bear arms,<sup>343</sup> *expanding* that right seems to directly contradict his policy preferences either for a particular style of adjudication or with regard to the merits of *Moore*.<sup>344</sup>

But what of those opinions, like *Hopwood* and *Condon*, where it seems that the judges *approve* of the Court’s new direction and wish to see those principles reaffirmed and expanded? In both cases, I think, one could see the departure from self-interest in that those panels actively (aggressively in *Hopwood*) courted reversal, which judges, as a rule, seek to avoid.<sup>345</sup> In *Hopwood*, the panel practically begged for reversal by underruling *Bakke*,<sup>346</sup> even though most courts of appeals thought the Powell opinion was controlling.<sup>347</sup> *Condon*’s stretching of the anti-commandeering principle to encompass garden-variety preemption cases<sup>348</sup>—especially when plausible distinctions between the DPPA and the statutes invalidated in *New York* and *Printz* were available<sup>349</sup>—seemed to seek out the attention of the Supreme Court. Which it then got, along with a 9-0 reversal.<sup>350</sup>

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341. See Adam Bonica et al., *Measuring Judicial Ideology Using Law Clerk Hiring*, 19 AM. L. & ECON. REV. 129, 142 (2017) (listing Judge Reinhardt as the second-most liberal, and Judge Pregerson as the seventh-most liberal, judges on the court of appeals active at the time). Both have since died.

342. See, e.g., RICHARD A. POSNER, HOW JUDGES THINK 230-65 (2008).

343. See, e.g., POSNER, *supra* note 192, at 186-95.

344. See *supra* notes 190-91 and accompanying text.

345. See *supra* note 332 and accompanying text.

346. See *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (“Justice Powell’s view in *Bakke* is not binding precedent on this issue.”).

347. See, e.g., *Grutter v. Bollinger*, 288 F.3d 732, 741-42 (6th Cir. 2002) (en banc), *aff’d*, 539 U.S. 306 (2003).

348. See *Condon v. Reno*, 155 F.3d 453, 456, 461-62 (4th Cir. 1998), *rev’d*, 528 U.S. 141 (2000); see also *supra* notes 150-51 and accompanying text.

349. See, e.g., *Pryor v. Reno*, 998 F. Supp. 1317, 1326-31 (M.D. Ala. 1998), *rev’d*, 171 F.3d 1281 (11th Cir. 1999), *vacated*, 528 U.S. 1111 (2000) (concluding that the DPPA did not compel states to regulate and therefore did not run afoul of *New York* and *Printz*).

350. *Reno v. Condon*, 528 U.S. 141, 142-43 (2000); see also *supra* notes 228-35 and

*c. Self-Conscious Hypertechnical Legality*

Early lower court reactions to salient decisions like *Lopez* or *Heller* were cautious. Canvassing lower court opinions in the five years after *Lopez* was decided, Glenn Reynolds and I noted a style in a number of court opinions we termed “Simon Says *Lopez*,” in which the case was treated “as almost entirely, or entirely, symbolic: simply a requirement that Congress ritualistically find a connection with interstate commerce, however unpersuasive or attenuated that connection might be.”<sup>351</sup> Under such readings, “courts simply ensure that Congress has used certain magic words in legislation.”<sup>352</sup> Many of these early opinions seized upon any available factual difference between the Gun Free School Zones Act and whatever law was being challenged in order to uphold the latter and avoid engaging with *Lopez*’s larger implications.<sup>353</sup>

We noticed a similar tendency in the first slew of Second Amendment cases following the *Heller* decision.<sup>354</sup> Surveying roughly a year’s worth of litigation following the decision, we wrote:

As was true following *Lopez*, courts sometimes strain to distinguish the challenged law from the one invalidated in *Heller*, with courts frequently remarking that this or that challenged law sweeps much more narrowly than did the District of Columbia’s ordinance. Similarly, one often sees little analysis—a grudging acknowledgement of *Heller* as a new fact of life, quickly followed by the conclusion that the case did not really change anything. And while lower courts sometimes lament the lack of clarity in *Heller* regarding, say, what the standard of review actually was, few judges seem interested in figuring it out on their own.<sup>355</sup>

By contrast, in each of the opinions discussed above the majority carefully—even meticulously—analyzed the claim, applied what it took to be the relevant legal principles, distinguished contrary case

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accompanying text.

351. Reynolds & Denning, *supra* note 1, at 379.

352. *Id.*

353. *See id.* at 395.

354. *See generally* Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245 (2009).

355. *Id.* at 1259 (footnotes omitted).

law, and attempted to rebut counterarguments (including those offered by the dissenting judges in each case). The Ninth Circuit's Commerce Clause cases—especially *McCoy* and *Raich*—carefully analyzed the statutes in light of each of the factors the Supreme Court used to determine whether an intrastate activity “substantially affected” interstate commerce.<sup>356</sup> The *McCoy* ruling considered contrary holdings from other courts and why those opinions were unpersuasive.<sup>357</sup> So it was with the Fourth Circuit's explanation why *New York* and *Printz* applied (as opposed to the *Garcia* line of cases),<sup>358</sup> the Fifth Circuit's discussion of how subsequent Supreme Court affirmative action cases abjured *Bakke*,<sup>359</sup> and the Seventh Circuit's expansion of *Heller* beyond the four walls of one's home.<sup>360</sup>

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Much like the preacher who, when asked by a member of his congregation whether he believed in infant baptism, replied, “Believe in it? I seen it done!” I believe that not only is judicial uncivil obedience possible, but also that recent examples are readily apparent, if we look for them. Moreover, as argued above, uncivil obedience might be a particularly attractive method by which lower court judges can register dissent.<sup>361</sup> If that is so, then why don't we see more of it? That is the question I take up in the next Section.

### C. *Why Isn't Judicial Uncivil Obedience More Common?*

In their article, Bulman-Pozen and Pozen discuss several factors that operate to frustrate attempts at uncivil obedience.<sup>362</sup> I suggest that similar factors tend to constrain judges' opportunities to be uncivilly obedient.

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356. See *Raich v. Ashcroft*, 352 F.3d 1222, 1229-34 (9th Cir. 2003), *rev'd sub nom.* *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. McCoy*, 323 F.3d 1114, 1119-30 (9th Cir. 2003); see also *supra* notes 80-95, 121-25 and accompanying text.

357. See *McCoy*, 323 F.3d at 1121-22, 1130-31; see also *supra* notes 82-86 and accompanying text.

358. See *Condon v. Reno*, 155 F.3d 453, 460-62 (4th Cir. 1998), *rev'd*, 528 U.S. 141 (2000).

359. See *Hopwood v. Texas*, 78 F.3d 932, 944-45 (5th Cir. 1996).

360. See *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

361. See *supra* Part III.A.

362. See Bulman-Pozen & Pozen, *supra* note 23, at 842-59.

### 1. *Systemic Constraints on Uncivil Obedience*

Bulman-Pozen and Pozen identify the following as operating to constrain attempts at uncivil obedience: (1) the employment of standards (as opposed to rules);<sup>363</sup> (2) transsubstantive doctrines like “abuse of right,” equity, and preemption;<sup>364</sup> and (3) decentralized dynamics.<sup>365</sup>

Because standards are “imprecise” and “leave much of their content to be worked out by enforcers and interpreters on a case-by-case basis,”<sup>366</sup> they are less suited to uncivil obedience than rules, on which uncivil obedience “thrives.”<sup>367</sup> This is because rules’ “rigidity” offers the opportunity to implement them “in ways that are consistent with their terms,” thus lawful, “yet insensitive to their underlying purposes and presuppositions or to the customs of compliance and enforcement that have developed in a given context.”<sup>368</sup> An antidote to this—and to the opportunities for uncivil obedience—is to adopt standards that “allow enforcers and adjudicators to consider a wider range of facts and factors.”<sup>369</sup> Alternatively, one could adopt standards to complement rules.<sup>370</sup>

The authors also point to a number of “[t]ranssubstantive [d]octrines” that frustrate uncivil obedience.<sup>371</sup> In civil law jurisdictions and in international law, for example, there is an “abuse of right” doctrine whereby “conduct that adheres to the plain terms of the law may nonetheless be treated as unlawful when sufficiently unreasonable or antisocial—abusive—in some respect.”<sup>372</sup> Such a doctrine has the potential to check uncivil obedience by, say, sanctioning

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363. *Id.* at 842-47.

364. *Id.* at 847.

365. *Id.* at 856-59.

366. *Id.* at 842.

367. *Id.* at 843.

368. *Id.*

369. *Id.*

370. *Id.* at 844. Michael Kent and I have argued elsewhere that this is often a feature of constitutional law, whereby courts develop anti-evasion doctrines that frustrate actors’ ability to comply formally with a constitutional decision rule in ways that undermine or evade the constitutional principle the rule was designed to implement. See Denning & Kent, *supra* note 23, at 1778-79. Evasion, it seems, could be characterized in some instances as a “form[] of rule-conforming incivility.” See Bulman-Pozen & Pozen, *supra* note 23, at 845.

371. Bulman-Pozen & Pozen, *supra* note 23, at 847.

372. *Id.* at 847-48.

“[t]axpayers who pay in pennies.”<sup>373</sup> The closest analogy in common-law jurisdictions might be equity, which “supplies common lawyers with a highly adaptable ‘anti-opportunism device.’”<sup>374</sup>

Another such doctrine is preemption, particularly forms of implied preemption such as obstacle preemption.<sup>375</sup> The latter is often invoked “when states enact measures that flaunt their superficial attentiveness to federal law or policy while at the same time attempting to subvert it.”<sup>376</sup> Obstacle preemption “parallels the broader strands of abuse-of-right doctrine in its privileging of functional and purposive considerations, and in the discretion that is consequently afforded to judges.”<sup>377</sup> Bulman-Pozen and Pozen offer as a recent example of this phenomenon the Supreme Court’s invalidation of Arizona’s S.B. 1070, which, though “‘mirroring’ the terms of federal immigration law,” nevertheless was held to undermine the federal regime and pose obstacles to the achievement of congressional aims.<sup>378</sup>

Finally, Bulman-Pozen and Pozen cite “[d]ecentralized [d]ynamics” as a limit on opportunities to engage in uncivil obedience.<sup>379</sup> They observe that “uncivil obedience may be subject to more intensive nonlegal regulation in close-knit environments with high degrees of interaction, information flow, and trust among the participants.”<sup>380</sup> They cite as an example the correlation between the rise in uncivil obedience regarding Senate procedural rules with the erosion of norms and folkways that characterized the Senate of the mid-twentieth century.<sup>381</sup> A related consideration is whether the “cooperation-promoting norms” in a particular setting are “backed

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373. *Id.* at 849.

374. *Id.* at 851 (quoting Henry E. Smith, *An Economic Analysis of Law Versus Equality* 33 (Oct. 22, 2010) (unpublished manuscript), available at [http://www.law.yale.edu/documents/pdf/LEO/HSmith\\_LawVersusEquity7.pdf](http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf) (on file with the *Columbia Law Review*)).

375. *See id.* at 853-54.

376. *Id.* at 854.

377. *Id.*

378. *See id.* at 854-55.

379. *See id.* at 856.

380. *Id.*

381. *See id.* at 857-58. For a description of those community norms, and their gradual displacement with a “new Senate style,” see Brannon P. Denning, *Reforming the New Confirmation Process: Replacing “Despise and Resent” with “Advice and Consent,”* 53 ADMIN. L. REV. 1, 14-25 (2001).

by effective informal sanctions.”<sup>382</sup> Uncivil obedience may be lawful, but it also might subject those who engage in it to “[i]nformal sanctions such as retaliation, ridicule, and ostracism.”<sup>383</sup> Third, the “prospects for uncivil obedience,” they write, “will invariably be shaped by the surrounding legal culture and the criteria for legal validity that it recognizes.”<sup>384</sup>

## 2. Systemic Constraints on Judicial Uncivil Obedience

Similar constraints, I think, operate to frustrate judicial uncivil obedience. First, because it is “final,” the Court is “infallible”<sup>385</sup> when it comes to the construction of its own opinions. It is under no obligation to press its prior opinions to the limits of their logic.<sup>386</sup> Second, the Court can apply its decision rules in ways that produce particular outcomes.<sup>387</sup> Finally, the dynamics of the lower federal courts and the judges that staff them might mean that judges themselves are temperamentally unlikely to engage in uncivil obedience, save for a few provocateurs.<sup>388</sup>

Because the Court sits atop the judicial hierarchy and can, if it chooses to, have the last word<sup>389</sup> on questions of constitutional law, the Court can recharacterize its prior cases, create exceptions and carve-outs, or simply (if not always ingenuously) say “we didn’t mean that; you misunderstood our opinion.” In other words, nothing obligates the Court to accept lower courts’ readings of its cases; nothing obligates it to press the logic of those opinions to their

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382. See Bulman-Pozen & Pozen, *supra* note 23, at 858.

383. *Id.*

384. *Id.*

385. See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in the result) (“We are not final because we are infallible, but we are infallible only because we are final.”).

386. See *supra* Part II.B (discussing the Supreme Court’s steps to retreat from the extension of its logic).

387. See, e.g., Denning & Kent, *supra* note 23, at 1808 (citing *Lawrence v. Texas* and *Grutter v. Bollinger* as examples of cases where the Court applied its decision rules in ways to produce a different outcome than would otherwise be expected).

388. See *supra* Part III.A.

389. This assumes that Article V amendments to overturn Supreme Court decisions will remain all but nonexistent. Nevertheless, the Article V amendment process remains a potential check on the power of the Supreme Court. For a discussion of the value of the process as such a check, see generally Brannon P. Denning & John R. Vile, *The Relevance of Constitutional Amendments: A Response to David Strauss*, 77 TUL. L. REV. 247 (2002).

limits. Had it wished, it could have said, “Judge Posner misread our opinions in *Heller* and *McDonald*. The core of the Second Amendment’s right to keep and bear arms is the right to have arms for self-defense *in the home* and does not extend to the keeping and bearing of arms *in public*.”<sup>390</sup>

A related power possessed by the Court is the power to put a thumb on the scales when it applies decision rules created in other cases to produce results that differ from that which an honest application of the rules would seem to dictate. For example, commentators have observed that application of strict scrutiny in *Grutter* was noticeably more deferential than in *J. A. Croson*.<sup>391</sup> Likewise, in *Raich*, the Court spent little time conducting a careful analysis of the application of the Controlled Substances Act to criminalize local, noncommercial marijuana possession using the factors *Lopez* and *Morrison* specified for determining whether regulated activity “substantially affect[ed]” interstate commerce.<sup>392</sup> The Court cited instead to older cases that deferred to congressional judgment that interstate commerce was affected, at least where a rational basis existed for Congress’s conclusion.<sup>393</sup>

Finally, lower federal courts—especially federal courts of appeals—may be just the type of close-knit environment whose decentralized dynamics tend to discourage uncivil obedience. As noted above, lower court judges tend to look for ways to apply Supreme Court decisions faithfully, but narrowly, in the face of doctrinal uncertainty.<sup>394</sup> By nature, then, they may not see critique of the Court’s doctrine as part of their remit. And judges do face informal sanctions for violating the norms of judging.<sup>395</sup> Dissents, for exam-

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390. For Judge Posner’s analysis of *Heller* and *McDonald*, see *supra* notes 191-202 and accompanying text.

391. See, e.g., Massey, *supra* note 241, at 977-78, 977 n.165.

392. See *Gonzales v. Raich*, 545 U.S. 1, 25-33 (2005).

393. In his opinion, Justice Stevens criticized the respondents’ reliance on *Lopez* and *Morrison* as “myopic,” arguing that they “overlook[ed] the larger context of modern-era Commerce Clause jurisprudence preserved by those cases.” *Id.* at 23. Eschewing the hard look at congressional power embodied in *Lopez* and reiterated in *Morrison*, Justice Stevens framed the question thus: “In assessing the scope of Congress’ authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.” *Id.* at 22.

394. See *supra* notes 323-29 and accompanying text.

395. See *supra* notes 382-84 and accompanying text.

ple, can be a form of sanction for either unprincipled deviation from doctrine to achieve a desired policy result<sup>396</sup> or, as here, for pressing aggressive (but plausible) readings of Supreme Court decisions where a more limited reading is possible. Being overruled by the Court could be similarly viewed as an informal sanction that judges tend to seek to avoid.

It may be no coincidence that the judges who write what I have characterized as uncivilly obedient opinions have reputations of being particularly outspoken or provocative, like Judge Posner and the late Judge Reinhardt. Though I cannot prove it, except indirectly, I suspect that the main run of federal circuit court judges are cautious and small-c-conservative in their approach to doctrine in the manner of Judge Wilkinson.

### CONCLUSION

The claims I make here are fairly modest ones. I do not argue that lower court judges are frequently or even regularly uncivilly obedient. I merely argue that judges, too, *can* be uncivilly obedient, and that examples exist where judges have manifested uncivil obedience as defined by Bulman-Pozen and Pozen. If I am correct, then the existence of judicial uncivil obedience further calls into question the standard top-down account of judicial hierarchy in which lower courts dutifully implement the diktats of the United States Supreme Court. Instead, judicial uncivil obedience—along with phenomena such as “[n]arrowing ... [p]recedent from [b]elow”<sup>397</sup> and “reciprocal legitimation”<sup>398</sup> discussed in the Introduction—suggests that a more subtle dialectic exists between the Supreme Court on the one hand, and the lower federal courts that must implement its decisions on the other.

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396. See generally Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *YALE L.J.* 2155 (1998). Cross and Tiller hypothesized that the obedience to legal doctrine was enforced by “the prospect of a ‘whistleblower’ on the court—that is, the presence of a judge whose policy preferences differ from the majority’s and who will expose the majority’s manipulation or disregard of the applicable legal doctrine.” *Id.* at 2156.

397. See *supra* note 13 and accompanying text.

398. Siegel, *supra* note 15, at 1186.