

PAUL CLEMENT AND  
THE STATE OF CONSERVATIVE LEGAL THOUGHT

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ABSTRACT

If 2011 is remembered as the year the states stood up to the Obama Administration and its bold vision of federal power, Paul Clement will be remembered as the lawyer they chose to make their case to the Supreme Court. In addition to the healthcare challenge, Clement appeared on behalf of Arizona in defense of the State’s sweeping new immigration law and helped Texas defend its new electoral map against interference from the federal courts. Along the way, he became the go-to lawyer for the “states’ rights” cause—a “shadow Solicitor General” leading the states in their push to reclaim power from the federal government.

This Essay reconciles the perception of Paul Clement as a champion of states’ rights with his less-visible work on behalf of the business community—work that, because of the pro-federal slant of the business agenda, often puts him at odds with the states’ rights movement. I will demonstrate that, despite the publicity he has gained for his high-profile federalism cases, Clement has done more than most private lawyers in recent memory to undercut the states’ rights agenda. More broadly, I will argue that the tension within his caseload—the push and pull between federalism and deregulation—reflects a broader rift within the conservative legal movement. Exploring this rift through the lens of Clement’s work, I will consider whether legal conservatism can still embrace the conflicting tenets of federalism and deregulation.

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I. LEGAL CONSERVATIVES FIND A PIN-UP

Last February, in a letter to the Speaker of the House, Attorney General Eric Holder announced the Justice Department would be aban-

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doing its defense of the Defense of Marriage Act (DOMA), the federal law that defines marriage as the legal union between a man and a woman and lets states ignore same-sex unions classified as marriage by other states.<sup>1</sup> Although the Obama Administration had defended DOMA in several prior challenges, it was only in recognition of the Justice Department's longstanding practice of defending duly enacted statutes against legal attack, and then only in jurisdictions where judicial precedent allowed it to mount a plausible defense without taking a position on how closely courts should scrutinize laws that burden the gay community. Now that challenges were pending in jurisdictions where the law is in flux, the Attorney General explained, the Justice Department would be required to take an affirmative position on the appropriate level of scrutiny, and the President was unwilling to take a stance contrary to his firm belief that DOMA is unconstitutional as applied to same-sex couples who are legally married under state law.<sup>2</sup> The Attorney General would go into further detail about the legality of DOMA and the Justice Department's authority to withdraw support from unconstitutional statutes, but the thrust of his message to Congress was clear: We don't like this law, and we've exhausted every professionally responsible argument that can be made in its defense; it's your problem now.<sup>3</sup>

The Holder letter was the first strike in a still-evolving conflict between the White House and House Republicans over the fate of DOMA in the courts. Republicans blasted the move as irresponsible and ill motivated, accusing the President of shirking the Justice Department's obligation to defend congressional enactments.<sup>4</sup> By forcing the Justice Department to abandon this role, critics asserted, the White House was not only attacking DOMA, it was attacking the constitutional prerogatives of Congress.<sup>5</sup> Worse yet, the White House was making an end run around the legislative process by using the Justice Department to effect an unauthorized veto.<sup>6</sup>

With the Justice Department out of the picture, it fell to Congress, and specifically to Republican leaders of the House of Representatives, to make provisions for DOMA's defense. House Speaker John Boehner agreed to intervene in the lawsuit and defend the law in his capacity as Speaker. He retained Paul Clement, a Solicitor General under President

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1. Letter from Eric Holder, U.S. Attorney General, to John Boehner, Speaker of the House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

2. *Id.*

3. *Id.*

4. David Baumann, *House Republicans Blast Holder on DOMA; Say DOJ Should Pay*, MAIN JUSTICE (May 3, 2011, 11:36 AM), <http://www.mainjustice.com/2011/05/03/house-judiciary-republicans-blast-holder-on-doma/>.

5. David Badash, *NOM's Maggie Gallagher Calls Obama's DOMA Position an "End-Run,"* NEW C.R. MOVEMENT (Feb. 23, 2011), [http://thenewcivilrights\\_movement.com/noms-maggie-gallagher-calls-obamas-doma-position-an-end-run/legal-issues/2011/02/23/17606](http://thenewcivilrights_movement.com/noms-maggie-gallagher-calls-obamas-doma-position-an-end-run/legal-issues/2011/02/23/17606).

6. *Id.*

George W. Bush and one of the more sought-after lawyers in the Washington legal community. Boehner had originally threatened to slash the Justice Department's budget to free up money for Clement's contract, which his firm, King & Spalding, had accepted at a considerable discount. When that road proved impassable (and most likely illegal), he scraped together funds, now said to total three quarters of \$1 million, from an internal network of House accounts.<sup>7</sup>

That Boehner would turn to Clement for such a momentous case came as a surprise to nobody. There may be two dozen lawyers in the United States who possess credentials commensurate with a case of this magnitude. The number gets smaller if you factor in lawyers with experience defending federal legislation, and approaches zero if you limit it to those with conservative bona fides. Having served at the helm of the Bush Justice Department for eight years, the final four as Solicitor General; having argued before the Supreme Court on more than fifty occasions, many of them for matters of rich historic significance like abortion and campaign finance and the President's conduct of the war on terrorism; and having earned a reputation as a gifted advocate with the ear of the Justices and an aptitude for winning big cases, Clement easily met all three criteria.

But what really sets Clement apart from other elite constitutional lawyers is his knack for avoiding controversy. Among the few lawyers to leave the Bush Administration with a better reputation than he entered with, Clement is in the enviable position of having worked at the helm of one of the more polarizing Justice Departments in the modern era yet having no reputational scars to speak of. This is due in part to the positions he took behind closed doors, where he is said to have clashed with more hawkish Justice Department officials over the scope of the President's counterterrorism powers.<sup>8</sup> But Clement is also emphatically likeable, a Midwesterner known inside Washington as a scrupulous lawyer for whom politics takes a backseat to the rule of law. As Walter Dellinger, who served as Solicitor General under President Bill Clinton, told the *New York Times*, "Paul is such a good advocate and such a cheerful friend that it's easy to forget how conservative he is."<sup>9</sup>

When Clement left the Justice Department, the legal community was alight with speculation over where among the power circle of Wash-

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7. Jennifer Bendery, *John Boehner Has Collected \$742,000 for DOMA Defense, Top House Official Says*, HUFFINGTON POST (Mar. 28, 2012, 9:02 AM), [http://www.huffingtonpost.com/2012/03/27/john-boehner-doma-defense\\_n\\_1382990.html](http://www.huffingtonpost.com/2012/03/27/john-boehner-doma-defense_n_1382990.html).

8. Jason Zengerle, *The Paul Clement Court*, N.Y. MAG., Mar. 26, 2012, at 28, 91.

9. Kevin Sack, *Lawyer Opposing Health Law Is Familiar Face to the Justices*, N.Y. TIMES, Oct. 27, 2011, at A1 (quoting Walter Dellinger, Solicitor General under President Bill Clinton) (internal quotation marks omitted).

ington law firms he would settle.<sup>10</sup> For those who follow the churn of lateral moves between the Justice Department and the private sector, Clement's employment was one of the biggest stories in years. One Washington lawyer described Clement as the "Holy Grail of law firm recruiting," observing that "the buzz in the legal world about Clement is like the buzz in basketball when LeBron James was coming out of high school and turning pro."<sup>11</sup> Clement settled on King & Spalding, the Atlanta-based powerhouse where he had headed the appellate practice before joining the Justice Department in 2001.<sup>12</sup> His decision was viewed as a significant victory for King & Spalding; the hire would unquestionably raise the firm's profile in Washington, and many believed it would vault King & Spalding into the upper echelon of the Washington appellate bar, a space occupied by an elite circle of firms specializing in high-stakes litigation before the Supreme Court.<sup>13</sup>

By all accounts, Clement exceeded the firm's expectations, bringing in prominent cases and influential clients and launching the firm into the spotlight at the Supreme Court. By the time Clement secured the DOMA contract, he had already assisted the National Football League and the National Basketball Association in disputes with their respective players' associations, represented the National Rifle Association before the Supreme Court in a landmark Second Amendment victory, and began work on behalf of a consortium of state attorneys general in an historic challenge to the Affordable Care Act.<sup>14</sup> The DOMA contract, a highly publicized affair and a rare opportunity for a private firm to defend federal legislation, was just the latest evidence that King & Spalding had struck gold when it hired Clement.

But no sooner had the terms of the DOMA contract been negotiated than King & Spalding withdrew its representation. In a statement explaining the decision, firm chairman Robert Hays apologized for the withdrawal, insisting the "process used for vetting this engagement was

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10. See Brett LoGuirato, *Why Paul Clement Is the 'Lebron James of Law,'* BUS. INSIDER (Apr. 5, 2012), [http://articles.businessinsider.com/2012-04-05/politics/31292022\\_1\\_oral-arguments-clement-comparison](http://articles.businessinsider.com/2012-04-05/politics/31292022_1_oral-arguments-clement-comparison) (there would be a massive bidding war).

11. Peter Page, *Legal Life After 'W' for Many Bush Attorneys*, NAT'L L. J., Oct. 27, 2008, at 6; see also Natalie Singer, *Defending Unpopular Positions Is What Lawyers Do: In an Era of Ideological Fencing, Paul Clement '92 Won't Be Fenced In*, HARV. L. BULL. (Winter 2012), [http://www.law.harvard.edu/news/bulletin/2012/winter/feature\\_2.php](http://www.law.harvard.edu/news/bulletin/2012/winter/feature_2.php).

12. Dahlia Lithwick, *The Best Offense Is a Good Defense: Why Even Opponents of DOMA Should Want It to Get a Vigorous Defense*, SLATE (Apr. 26, 2011, 5:06 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/04/the\\_best\\_offense\\_is\\_a\\_good\\_defense.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/the_best_offense_is_a_good_defense.html).

13. Tony Mauro, *King & Spalding Lands a Big Fish: Paul Clement*, BLOG LEGAL TIMES (Nov. 20, 2008, 12:15 PM), <http://legaltimes.typepad.com/blt/2008/11/king-spalding-lands-a-big-fish-paul-clement.html>.

14. Robert Barnes, *NRA Avoids Getting Shut Out of Gun Case*, WASH. POST, Feb. 8, 2010, at A13; Sack, *supra* note 9; Tony Mauro, *Viet Dinh's Firm Aims for Appellate Big Leagues with Clement Hire*, NAT'L L. J. ONLINE (Apr. 25, 2011), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202491418249>.

inadequate.”<sup>15</sup> What prompted the change of course is still disputed. DOMA supporters tend to believe the firm caved to pressure—not only from gay equality advocates but also from firm clients and employees.<sup>16</sup> Firm insiders maintain that firm managers did not review the contract until after it was signed, at which point they concluded the terms were untenable and asked Clement to unwind it.<sup>17</sup>

Following the firm’s decision, Clement announced he would be leaving King & Spalding and taking the DOMA contract with him.<sup>18</sup> Explaining his decision in a widely circulated resignation letter, Clement said he was resigning “out of the firmly-held belief that a representation should not be abandoned because the client’s legal position is extremely unpopular in certain quarters.”<sup>19</sup> Having accepted the representation, Clement continued, “I believe there is no honorable course for me but to complete it.”<sup>20</sup>

Clement, naturally, would land on his feet. He joined Bancroft, an elite Washington, D.C. boutique founded by Viet Dinh, head of the Office of Legal Counsel under President Bush and a close friend of Clement from Harvard Law School. To the extent a law firm can have an ideological slant, Bancroft tilts decidedly rightward, its staff comprised of a star-studded collection of former Bush Administration lawyers and Supreme Court clerks.<sup>21</sup> Anyone following the Clement saga could sense Bancroft was a good fit, a place free from the institutional constraints of a major firm, where he could take on polarizing public interest cases without fear of upsetting the apple cart (or the business committee that stocks it). But few could have anticipated just how well Clement would take to his new environment, nor how swiftly his stock would rise inside the Washington legal community.<sup>22</sup>

When Clement joined Bancroft in April 2011, he brought the DOMA contract and the healthcare litigation, two of the biggest cases of the year. Those matters alone would have been a handful for a firm of

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15. Ashby Jones, *After King & Spalding Drops DOMA Case, Clement Drops Firm*, WALL ST. J. L. BLOG (Apr. 25, 2011, 12:09 PM), <http://blogs.wsj.com/law/2011/04/25/after-king-spalding-drops-doma-case-clement-drops-firm/>.

16. Greg Sargent, *Gay Rights Group: You’re Damn Right We Pressured Law Firm on DOMA*, PLUM LINE (Apr. 26, 2011, 12:13 PM), [http://www.washingtonpost.com/blogs/plum-line/post/gay-rights-group-youre-damn-right-we-pressured-law-firm-on-doma/2011/03/03/AFi9bqE\\_blog.html](http://www.washingtonpost.com/blogs/plum-line/post/gay-rights-group-youre-damn-right-we-pressured-law-firm-on-doma/2011/03/03/AFi9bqE_blog.html).

17. Jim Galloway & Bill Rankin, *King & Spalding to Withdraw from Defending DOMA; Clement Resigns*, ATLANTA J.-CONST. (Apr. 25, 2011, 10:30 PM), <http://www.ajc.com/news/news/local-govt-politics/king-spalding-to-withdraw-from-defending-doma-clem/nQst6/>.

18. Letter from Paul Clement to Robert D. Hays, Chairman, King & Spalding LLP (Apr. 25, 2011), available at <http://online.wsj.com/public/resources/documents/042511clementresign.pdf>.

19. *Id.*

20. *Id.*

21. Galloway & Rankin, *supra* note 17 (supporting the proposition that Bancroft is known for advancing conservative causes). The proposition that they hire conservative Supreme Court clerks and former government attorneys comes from author’s personal knowledge.

22. Mauro, *supra* note 14.

Bancroft's size, which still had to manage its normal, pre-Clement case-load. But within months Clement would pile on several additional matters destined for the Supreme Court, including two blockbuster federalism cases.

The first case, *Perry v. Perez*,<sup>23</sup> involved a controversial provision of the Voting Rights Act requiring states with histories of electoral discrimination to preclear new electoral maps with a federal court.<sup>24</sup> Texas had prepared a new map for the 2012 elections but, because of delays in the preclearance process, had been required to use an interim map drawn up by a federal judge.<sup>25</sup> On its face, the case presented a narrow issue—Could the court's interim map serve as a proper substitute for the map proposed by the State, or was the court required to honor the State's policy judgments regarding the size and location of new districts?

Stirring below the surface, however, were weightier questions—Must Southern states with histories of voter discrimination continue to operate under the watchful eye of the federal courts? Are the widespread civil rights violations that made federal legislation necessary in 1965 comfortably behind us? Who, between federal courts and state legislatures, should control redistricting under these circumstances? In a symbolic victory for the “states’ rights” movement, the Supreme Court sided with Texas, concluding federal courts must defer to the policy judgments of state lawmakers when drawing up interim maps.<sup>26</sup>

In the second case, Clement represented Arizona in a politically charged dispute with the Justice Department over the State's sweeping new immigration statute.<sup>27</sup> The Justice Department claimed the law interfered with federal immigration policy; Arizona claimed that it was simply trying to help Congress carry that policy out.<sup>28</sup> The question for the Court was how much latitude states should be allowed in using their own penalties and procedures to enforce federal immigration laws.<sup>29</sup> Next to healthcare, it was the most important federalism case to reach the Court in years, and when the Court gutted the law, striking down the majority of the challenged provisions, it dealt the states’ rights movement its most decisive loss of the term.

More recently, Clement agreed to represent yet another state government in a voting rights dispute with the Justice Department.<sup>30</sup> In this case, South Carolina challenged the Justice Department's decision to

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23. 132 S. Ct. 934 (2012) (per curiam).

24. *Id.* at 939.

25. *Id.* at 940.

26. *Id.* at 944.

27. *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012).

28. *Id.*

29. *Id.*

30. *South Carolina v. United States*, No. 12-203 (BMK) (CKK) (JDB), 2012 U.S. Dist. LEXIS 146187 (D.D.C. Oct. 10, 2012).

block implementation of the State's new voter identification law.<sup>31</sup> The Justice Department claims the law, which requires voters to show government-issued identification before casting a ballot, will have the effect of denying certain residents the right to vote on account of their race.<sup>32</sup> Last October, a three-judge district court handed Clement a partial victory. Although the court refused to preclear the photo identification requirement for the November 2012 election, citing concerns that immediate implementation would have an unlawful retrogressive effect on minority voters, it ruled that the provision would not disproportionately burden minority voters in elections beginning in 2013 and beyond.<sup>33</sup>

Clement had become the bespectacled face of the conservative legal agenda. He was making the case against the White House on health care, immigration reform, and gay marriage, but more broadly he was making the case against unbridled federal power and the Obama Administration's vision of government. "Clement's career is cresting just as the momentous legal crusades of a radicalized Republican Party are reaching the appellate level," wrote *New York Magazine*.<sup>34</sup> In a term about the scope of congressional authority, he had the entire lineup of federalism cases, two of which—healthcare and Arizona immigration—promised to leave lasting changes on the balance of power between the states and the federal government. If it's hard to imagine a private attorney wielding so much power, it's because there's no modern precedent for it.

Perhaps it was Clement's appeal as a symbol of unity in the midst of a divisive primary season, or perhaps it was the obvious parallel to the DOMA saga (just as the White House had walked out on Congress by refusing to defend DOMA, King & Spalding had walked out on Clement), but Clement's resignation elevated him to new heights of celebrity. "There's no doubt that Paul has become the leading advocate for the most deeply conservative causes in the law," said David Frederick, a prominent Supreme Court lawyer.<sup>35</sup> Clement is a profile in courage, a lawyer with the backbone to stand for principle in the face of politics. King & Spalding would become the perfect foil in the Clement narrative, the firm's perceived cowardice in the face of pressure only magnifying Clement's courage and resolve. As one conservative writer put, "Where King and company demonstrated cowardice, Clement showed charac-

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31. *Id.* at \*4.

32. James Rosen & Rebecca Cohen McClatchy, *Trial to Look at Voter ID Law, Discrimination History*, MCCLATCHY, Aug. 25, 2012, available at <http://www.mcclatchydc.com/2012/08/31/164598/sc-voter-id-law-takes-some-hits.html>.

33. See *South Carolina v. United States*, No. 12-203 (BMK)(CKK)(JDB), 2012 WL 4814094, at \*9–11 (D.C. Cir. Oct. 10, 2012).

34. Zengerle, *supra* note 8, at 30.

35. Martin Gould, *Obamacare Foes Pick Experienced Lawyer for Their Case*, NEWSMAX (Mar. 23, 2012, 4:09 PM), <http://www.newsmax.com/Newsfront/ClementBondihealthcaresupreme/2012/03/23/id/433731>.

ter.”<sup>36</sup> Glenn Beck called Clement a modern-day hero, equating his resignation with John Adams’s decision to represent a British soldier accused of murdering American patriots in Boston.<sup>37</sup> As for King & Spalding, Beck hopes the firm goes out of business.<sup>38</sup>

This tidy narrative obscures a more realistic picture of Clement’s place in the conservative legal landscape. Contrary to most accounts in the popular press, Clement is not a mouthpiece of the states’ rights movement. He’s done a spate of high-profile work for the states, but he makes his living as a business lawyer representing the interests of large corporations in cases before state and federal appellate courts. Those interests coalesce around the common cause of deregulation, or failing that, less burdensome regulation. We don’t read about his business cases because they concern the private sector and tend to be dryer, low profile, and devoid of the battleground political issues that animate his other work.

They also tend to be at odds with his federalism cases. Although there is nothing inherently inconsistent in fighting for federalism and deregulation at the same time, in practice the two positions are bound to clash. Over time the business community’s litigation agenda has taken on a pro-federal bent.<sup>39</sup> National businesses prefer the uniformity of federal law to the conflicts and redundancies of overlapping state regimes.<sup>40</sup> This is especially true during periods of deregulation, when federal law displaces state law without imposing new burdens of its own, creating the optimal regulatory environment. But even during periods of heightened regulation, litigation trends suggest that most businesses would still prefer a standardized set of federal rules to a patchwork of state regulations.<sup>41</sup>

Clement’s story, then, is more complicated than most observers appreciate. While Clement’s public image is bound up with his states’ rights work—Clement has been variously referred to as an “anti-solicitor general” (*New York Magazine*),<sup>42</sup> a right-wing “uber-attorney” (*The*

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36. Doug Carlson, *On DOMA: The Courage of Clement, Cowardice of King*, ETHICS & RELIGIOUS LIBERTY COMM’N (May 4, 2011), <http://erlc.com/article/on-doma-courage-clement-cowardice-king/>.

37. Carlos Maza, *Beck Lashes Out at King & Spalding, Compares Clement to Civil Rights Heroes*, EQUAL MATTERS BLOG (Apr. 28, 2011, 12:48 PM), <http://equalitymatters.org/blog/201104280005>.

38. *Beck Hopes Firm Goes out of Business for Failing to Refusing to Defend DOMA*, EQUAL MATTERS BLOG (Apr. 27, 2011, 8:20 PM), <http://equalitymatters.org/emtv/201104270014> (quoting *Glenn Beck Show* (Fox News television broadcast Apr. 27, 2011) (“[B]ut Clement’s law firm caved under pressure when things got just a little too uncomfortable, well, I hope they go out of business, quite frankly.”)).

39. Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 133 (2004).

40. SOLVEIG STEVENSON, COMPETITIVE ENTER. INST., RETHINKING FEDERALISM: THE CASE FOR PREEMPTION IN THE INFORMATION AGE 1 (2011).

41. See *infra* Part III.

42. Zengerle, *supra* note 8, at 30.



*Guardian*),<sup>43</sup> a conservative “ideological warrior” (*Daily Beast*),<sup>44</sup> and the “go-to guy for controversial conservative causes” (*Above the Law*)<sup>45</sup>—he continues to make his living as a commercial litigator, helping the business community pursue a pro-federal legal agenda. Both roles are “conservative” in the sense that they further objectives commonly associated with the political right, but one requires him to champion federalism while the other requires him to rein it in. From a legal standpoint, there is nothing wrong with challenging federal power on Wednesday then turning around and promoting it on Thursday; a lawyer’s pursuits are governed by the interests of the client, not ideological purity.

But what about from an ideological standpoint? Remove Clement from the picture and examine the two principles in the abstract—Is the push for federalism at odds with the push for deregulation? Can legal conservatism embrace both tenets and still claim to represent a coherent body of principles? If not, which tenet lies closer to the heart of modern-day conservative thought?

These questions need answers before there can be a serious discussion about the future of legal conservatism. As Professor Ernest Young has observed, “[C]onfusion about ideological labels has seriously distorted the debate about constitutional interpretation generally.”<sup>46</sup> The confusion begins with our language. We speak of legal conservatism as if it were a uniform and ordered whole when in fact it is messier, less organized, and more fragmented. Legal conservatism is not a monolith but rather a collection of principles and doctrines cobbled together under a shared label.

Our understanding of “conservatism” is pliable enough to bend with context. According to Professor Young, “virtually all participants in the debate have defined conservatism operationally, as whatever jurisprudence is advocated by judges, academics, and politicians generally considered to be on the rightward end of the political spectrum.”<sup>47</sup> We saw the term manipulated in the wake of the healthcare decision, when opponents of the Affordable Care Act criticized Chief Justice Roberts for failing to reach the “conservative” outcome<sup>48</sup> at the same time that support-

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43. Matt Seaton (MattSeaton) on Twitter, TWITTER (Mar. 12, 2012, 8:49 AM), <http://twitter.com/mattseaton/status/185393313719918593>.

44. Chris Geidner, *Paul Clement Argues Both Sides of the Federalism Debate*, DAILY BEAST (Apr. 26, 2012, 1:45 PM), <http://www.thedailybeast.com/articles/2012/04/26/paul-clement-argues-both-sides-of-the-federalism-debate.html>.

45. Staci Zaretsky, *Lawyer of the Month: March Reader Poll*, ABOVE THE LAW (Apr. 5, 2012, 2:37 PM), <http://abovethelaw.com/2012/04/lawyer-of-the-month-march-reader-poll/>.

46. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 623 (1994).

47. *Id.* at 621.

48. Luke Johnson, *John Roberts Outrages Conservatives in Health Care Ruling*, HUFFINGTON POST (June 28, 2012, 1:50 PM), [http://www.huffingtonpost.com/2012/06/28/john-roberts-conservatives-health-care-ruling\\_n\\_1634512.html](http://www.huffingtonpost.com/2012/06/28/john-roberts-conservatives-health-care-ruling_n_1634512.html).

ers applauded his restrained and “conservative” approach to judicial review.<sup>49</sup> One side was using “conservative” to refer to a substantive political outcome, the other to a legal philosophy, but both had laid legitimate claim to the term.

We fall into similar semantic traps when we talk about Paul Clement. Clement can advance a “conservative” cause by helping states push back against expansive interpretations of national power. But he can also advance a “conservative” cause by representing cost-weary businesses seeking to replace patchy state regulations with uniform federal laws. Determining which cause is closer to the heartland of conservative thought ought to be a priority for legal conservatives, if not for their benefit then for the common good, because nobody is well served when pundits and politicians speak of “conservative” laws or “conservative” rulings or “conservative” judges without having the cloudiest idea which principles the term embraces.

## II. THE TENSION BETWEEN FEDERALISM AND DEREGULATION

In his memoir about his years as Solicitor General under President Ronald Reagan, Charles Fried says the most frustrating aspect of his job was catering to ideologues inside the Administration who would cry foul anytime the Justice Department took a position in tension with the Administration’s stance on federalism.<sup>50</sup> The Reagan Administration was resolved to rein in the federal bureaucracy and redress the yawning disparity in power between the state and federal government. “The driving force behind [its] argument was the belief, widely held in the generation that had framed and ratified the Constitution, that strong local institutions were a bulwark of democracy and a protection against impositions by an arrogant, distant, and overreaching national government.”<sup>51</sup> For the “federalism police,” as Fried dubbed them, the Administration’s vision of state autonomy was an article of faith, a project to be elevated above most other domestic policy goals.<sup>52</sup> Pressing ideas inconsistent with this orthodoxy, even when they stemmed from equally settled conservative tenets like deregulation, “seemed like defiance of the Holy Office.”<sup>53</sup>

Fried thought the Administration’s dogmatic approach to federalism shortsighted. He left the Harvard Law School faculty to join the Reagan Administration because he believed in one of its central missions: relieving American business of the burden of excessive regulation. He ques-

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49. *Harvard Law Prof.: Roberts’ Ruling Was Conservative*, CBS NEWS (June 29, 2012, 8:25 AM), [http://www.cbsnews.com/8301-505263\\_162-57463529/harvard-law-prof.-roberts-ruling-was-conservative/](http://www.cbsnews.com/8301-505263_162-57463529/harvard-law-prof.-roberts-ruling-was-conservative/).

50. CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 182 (1991).

51. *Id.* at 186.

52. *Id.* at 188.

53. *Id.* at 52.

tioned whether deregulation could be achieved in conjunction with the Administration's promise to restore greater regulatory power to the states. He feared that devolving regulatory authority to states would lead to more regulation and less economic liberty, outcomes inimical to the Administration's pro-business agenda.<sup>54</sup> His distrust of local government stemmed in part from his years in Cambridge (he calls it the "The People's Republic of Cambridge"), a city notorious for its draconian approach to rent control.<sup>55</sup> In Cambridge, as in his birth country of Czechoslovakia, Fried witnessed local government at its most stifling. He came to Washington intent on defending capitalism wherever it might be threatened, convinced economic freedom was no more secure from provincial government bodies than national ones. "[T]he same social forces that had produced overregulation in federal programs were hard at work at the state level and could sometimes only be resisted by uniform federal standards," Fried wrote.<sup>56</sup>

Although Fried's skepticism was weakening his influence inside the Administration, he continued to voice it. When the Justice Department was told to advocate for a legal presumption favoring local regulations to the extent they conflict with federal law, Fried resisted. "This seemed to me a disastrous idea," he wrote.<sup>57</sup> "Better that firms operating on a national basis be subject to one uniform system of regulation than to scores of different ones. In a fractured and uncoordinated situation, businesses would as a practical matter be forced to comply with whatever regulations were most stringent."<sup>58</sup>

Fried was speaking from personal experience, but he might as well have been describing the last several decades of conservative legal thought. Conservatives had been wrestling with the competing tenets of federalism and deregulation well before Fried joined the Reagan Administration. According to Walter Dellinger, a Solicitor General under President Clinton, the tension between deregulation and federalism is a matter of "timeless debate."<sup>59</sup> "There is a genuine fissure," he says, "between the twin poles of states' rights on the one hand and freedom from excessive and multiplicitous and often inconsistent regulations on the other."<sup>60</sup>

When we speak of states' rights, it is often with the curious assumption that devolving regulatory authority to state governments will make for less regulation.<sup>61</sup> There is a perception that the states' right move-

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54. *See id.*

55. *Id.* at 186–87.

56. *Id.* at 52.

57. *Id.* at 187.

58. *Id.*

59. *The Roberts Court and Federalism: Minutes from a Convention of the Federalist Society*, 4 N.Y.U. J. L. & LIBERTY 330, 333 (2009) [hereinafter *Roberts Court and Federalism*].

60. *Id.*

61. *Id.*

ment, being a project of the right wing, is synonymous with free markets and deregulation. For Dellinger, states' rights had always called to mind classic conservative imagery like "George Corley Wallace standing in the schoolhouse door."<sup>62</sup> But whereas proponents of states' rights would undoubtedly prefer their project work in harmony with conservative tenets like deregulation and economic liberty, the more sensible among them have come to understand it does not always work out that way. Today, Dellinger says, "states' rights look more appealing to people who want to urge more liabilities on corporations, more recovery, more punitive attitudes, more regulatory protections."<sup>63</sup>

Emboldened by years of deregulation under President Reagan, liberal interest groups redoubled lobbying efforts in state legislatures. Many had success—the environmentalists in California, New York, and Massachusetts; the labor unions in California and Michigan; the anti-tobacco groups in New England; and the bank reformers in New York.<sup>64</sup> But perhaps no group antagonized the business community with as much success as the trial lawyers.<sup>65</sup> In cooperation with consumer protection groups, the trial bar has gradually tilted the scale in civil litigation by pushing laws that make it easier to sue and collect damages from corporations.<sup>66</sup> Year after year, state by state, it has succeeded, securing longer limitations periods, restrictions on arbitration clauses, expanded tort liability for employers and manufacturers, as well as countless reforms designed to make civil litigation a vexing and costly enterprise for corporations.<sup>67</sup> Meanwhile, state courts fashioned creative remedies permitting plaintiffs to recover damages from multiple corporate defendants based on their respective shares of the market, and state attorneys general have ramped up litigation against corporate defendants in areas of national interest like firearms, lead paint, mortgage practices, and greenhouse gasses.<sup>68</sup>

The business climate is especially uninviting in states where the trial bar acts at the behest of the government. In these states, the attorney general plays the role of general contractor, auctioning off potential tort

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62. *Id.*

63. *Id.* at 334.

64. See Young, *supra* note 39, at 133–34.

65. Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1859 (2000).

66. See, e.g., Tim Murphy, *Rick Perry v. The Trial Lawyers*, MOTHER JONES (Aug. 22, 2011, 6:00 AM), <http://www.motherjones.com/mojo/2011/08/rick-perry-vs-trial-lawyers>; Lamar Smith, *Trial Bar v. Tort Reform*, POLITICO (Oct. 1, 2009, 8:25 AM), <http://www.politico.com/news/stories/0909/27761.html>; Marilyn Tennissen, *Business, Trial Bar at Odds over Pending Texas Asbestos Bills*, LEGAL NEWSLINE (Apr. 6, 2009, 2:29 PM), <http://legalnewsline.com/asbestos/220228-business-trial-bar-at-odds-over-pending-texas-asbestos-bills>.

67. See Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1511–12 (2009).

68. *Id.* at 1503.

judgments to plaintiff firms eager to assume regulatory power.<sup>69</sup> The practice, known in the scholarly community as “regulation through litigation,” gained national attention in the 1990s when plaintiff lawyers made a mint suing tobacco companies and gun manufacturers on behalf of state governments,<sup>70</sup> and was further popularized by Eliot Spitzer during his tenure as attorney general of New York.

Spitzer is not whom the Reagan revolutionaries envisioned when they set out to restore a balance of power between state and federal authority. Yet he was, in a peculiar way, precisely what they bargained for. Spitzer embodied a modern and muscular vision of state sovereignty. Before figures like Spitzer emerged, state attorneys general were viewed as watchdogs for consumers, their mandate limited to tracking down unscrupulous landlords and corrupt nursing homes.<sup>71</sup> But Spitzer envisioned an entirely different role for his office, combining his investigative authority with an ambitious interpretation of New York’s jurisdiction to insert the state into areas traditionally reserved for federal enforcement. His project culminated in the late 2000s with a string of enforcement actions against Wall Street financial institutions. Spitzer went after the banks, the mutual funds, the insurers, and reinsurers.<sup>72</sup> He even went after the record companies, accusing some of the world’s largest labels of withholding millions of dollars in royalties.<sup>73</sup> Most of his targets would pay extravagant fines and accede to severe restrictions on their business practices.<sup>74</sup>

But for all of his anti-business crusading, it may have been Spitzer’s coziness with the trial bar that permanently estranged him from the business community. To maximize the threat of liability, Spitzer deputized plaintiff lawyers and invited them to carry out his oversight role through contingency-fee suits.<sup>75</sup> These suits, which allowed private lawyers to wield the power and prestige of the State, had a way of bringing companies to the settlement table, and dozens of corporate defendants were forced to change their business practices or pay significant settlements as a result.<sup>76</sup> What sets regulation through litigation apart from the tradi-

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69. Joseph Forderer, *State Sponsored Global Warming Litigation: Federalism Properly Utilized or Abused?*, 18 MO. ENVTL. L. & POL’Y REV. 23, 25 n.7 (2010).

70. Edward T. Schroeder, *A Tort by Any Other Name? In Search of the Distinction Between Regulation Through Litigation and Conventional Tort Law*, 83 TEX. L. REV. 897, 900–01 (2005).

71. William B. Eimicke & Daniel Shacknai, *Eliot Spitzer: “The People’s Lawyer”—Disgraced*, 10 PUB. INTEGRITY 365, 367 (2008).

72. See, e.g., Carrie Johnson, *SEC, Spitzer Sue Mutual Fund Firm; Columbia Is Accused of Hurting Investors*, WASH. POST, Feb. 25, 2004, at E4 (describing suits against mutual fund firms); Floyd Norris, *When Spitzer Speaks, Insurers Take Note*, N.Y. TIMES, Oct. 16, 2004, at C1 (describing Spitzer’s investigation of insurance companies).

73. Lola Ogunnaike, *Record Labels Must Pay Shortchanged Performers*, N.Y. TIMES, May 5, 2004, at E1.

74. Andrew P. Morriss et al., *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 182 (2005).

75. See *id.* at 203 n.117.

76. *Id.* at 181–82.

tional tort suit is the plaintiff's motivation: regulatory lawsuits are motivated by a desire to change the behavior of the defendant, rather than by a desire to collect money damages.

Pro-business conservatives take particular offense to the practice because it combines two of their least favorite things—government regulation and the class action lawsuit. It is, critics say, an abuse of government power and a circumvention of the democratic process because unlike private litigants, government “super plaintiffs” can protect themselves from the injurious conduct through regulation or taxes.<sup>77</sup> “These discretionary decisions of state attorneys general regarding which manufacturing industries to target represent a critical aspect of product regulation in today’s economy and a major shift in the allocation of powers among the coordinate branches of government.”<sup>78</sup> Or, as Senator Mitch McConnell put it, “The more fundamental problem with ‘regulation through litigation’ is that private parties obtain through lawsuits what legislatures have not chosen, or have even chosen to reject.”<sup>79</sup>

It’s not only the cost of litigation that dogs the business community, it’s the uncertainty and second-guessing that poisons decision making.<sup>80</sup> Tort liability is most burdensome in states where the standards of care are set by state court judges and juries rather than by legislatures. In those states, manufacturers have less guidance in developing safety measures, and because juries don’t undertake the cost-benefit analysis that lawmakers do, liability standards tend to be skewed in favor of consumers.<sup>81</sup> Meanwhile, the interests of the countless consumers who actually benefit from the product, be it a prescription drug or a safety belt or a lawnmower, are not represented in court.

Your position on tort reform, then, is a strong indicator of where you fit inside the conservative legal movement. Tort reform is a fixture on the GOP platform, and Republican lawmakers who rely on corporate donors neglect it at their own peril. But if you are serious about states’ rights, you must be willing to accept the consequences of state regulation, and one of the most controversial consequences of state regulation is more litigation. That’s why tort reform tests the nerves of states’ rights conservatives: it requires sharing common ground with natural enemies like trial lawyers.

Early last year, House Republicans proposed capping the damages awardable by state court judges in medical malpractice and personal inju-

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77. Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 938 (2008).

78. *Id.* at 938–39.

79. Paul Weyrich, *Willpower: Losing Weight the Responsible Way*, NAT’L CTR. FOR PUB. POL’Y RES. LEGAL BRIEFS (Apr. 16, 2004), <http://www.nationalcenter.org/LB41.html>.

80. Klass, *supra* note 67.

81. *See id.* at 1511 n.31.

ry cases.<sup>82</sup> The law received a warm reception from the business lobby, which has for years been calling on Congress to reform the civil justice system and reign in the trial lawyers; and a predictably fiery one from House Democrats, who criticized Republicans for weakening accountability in the provision of healthcare and giving negligent doctors a free pass.<sup>83</sup> The real story was opposition from certain corners of the Republican Party.<sup>84</sup> Virginia Attorney General Ken Cuccinelli, a leader in the push to overturn the Affordable Care Act, said the bill was “breathtakingly broad in its assumptions about federal power.”<sup>85</sup> He pointed to the proposed law as evidence of a “constitutional disconnect” among Republicans who oppose federal power when it’s used for ill (he gives the example of Obamacare) yet still feel comfortable telling state court judges how to conduct civil trials.<sup>86</sup> Congressman Louie Gohmert, a Texas Republican, said he was “reticent to support Congress imposing its will on the states by dictating new state law in their own state courts.”<sup>87</sup> Echoing these concerns, Senator Tom Coburn wondered where the line would be drawn once Congress put its “nose under the tent to start telling [states] what their tort law will be.”<sup>88</sup>

Randy Barnett, the prolific right-wing legal scholar and one of the most vocal opponents of the Affordable Care Act, was more direct. “What constitutional authority did the supporters of the bill rely upon to justify interfering with state authority in this way?”<sup>89</sup> Barnett asked, before accusing the bill’s proponents of practicing “fair-weather federalism,” which is to say, supporting federalism only to the extent that it is consistent with other policy objectives.<sup>90</sup> In Barnett’s circle, this is a polite way of calling someone spineless.

Barnett didn’t coin “fair-weather federalism.” The pejorative has been in use for decades, reserved for “hypocritical” conservatives who speak fondly of state rights’ one day and then turn around and undermine

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82. See Todd Ruger, *House GOP Pushing Tort Reform Bill that Democrats Say Will Fail in Senate*, BLOG LEGAL TIMES (Apr. 19, 2012, 1:02 PM), <http://legaltimes.typepad.com/blt/2012/04/house-gop-pushing-tort-reform-bill-that-democrats-say-will-fail-in-senate.html>.

83. See *id.*

84. Julian Pecquet, *State Lawmakers Blast House GOP’s Medical Malpractice Reform Bill*, THE HILL (Mar. 14, 2012, 4:04 PM), <http://thehill.com/blogs/healthwatch/state-issues/216099-state-lawmakers-blast-medical-malpractice-reform-bill->.

85. Ken Cuccinelli, Op-Ed., *Keeping the Feds at Bay*, WASH. POST (Oct. 28, 2011), [http://www.washingtonpost.com/opinions/keeping-the-feds-at-bay/2011/10/28/gIQAfJfUQM\\_story.html](http://www.washingtonpost.com/opinions/keeping-the-feds-at-bay/2011/10/28/gIQAfJfUQM_story.html).

86. *Id.*

87. David Nather, *Tort Reform Bill Hits Speed Bump*, POLITICO (Feb. 9, 2011, 6:45 PM), <http://dyn.politico.com/printstory.cfm?uuid=BBC00AF8-35CA-46D7-8DCD-AA3D0ED1EC05> (internal quotation mark omitted).

88. Eli Y. Adashi, *The Sustainable Growth Rate—What Happens Now?*, MEDSCAPE NEWS (June 30, 2011), <http://www.medscape.com/viewarticle/745412>.

89. Randy E. Barnett, *Tort Reform and the GOP’s Fair-Weather Federalism*, WASH. EXAMINER (May 21, 2011, 12:54 AM), <http://washingtonexaminer.com/article/39943>.

90. *Id.*

them the next. They called President Bush a fair-weather federalist when he supported a federal cloning ban,<sup>91</sup> and they said the same thing about Governor Rick Perry, who has suggested Texas might be better off a secessionist state, when he said he would back a federal constitutional amendment defining marriage as the union of one man and one woman.<sup>92</sup>

Barnett's criticism would have had more resonance in the 1980s, when legal conservatives were all camping under one tent. Back then everybody shared the same priority—undoing the damage wrought by the Warren Court and two decades of judicial overreaching. The movement was still in a reactive posture, united under the banner of judicial restraint, its common interest in reforming the courts masking long-buried ideological differences.

Although a shared distaste for the Warren Court can kindle a movement, it cannot sustain it—at least not from an organizational standpoint. A legal movement needs a support structure before it can produce consistent results in the courts. But notwithstanding a surge in membership and popular support, legal conservatism remained weak and disorganized, a movement without sway in the legal academy or a viable agenda in the courts.<sup>93</sup> So while the conditions had been ripe for a conservative revolution in the late 1970s and early 1980s (Nixon appointed four Justices to the Supreme Court between 1969 and 1974), the movement still had no legs to stand on, no way to turn anger and frustration into concerted action.

In his book about the rise of the conservative legal movement, Stephen Teles chronicles the movement's transformation from a fringe and widely discredited ideology to a mainstream school of thought.<sup>94</sup> Beginning in the 1970s, when conservatives began populating law school faculties, the outlines of the modern movement started to take shape.<sup>95</sup> Consistent with grooming processes long familiar to the left, right-leaning graduates from top law schools were encouraged to begin their careers in prestigious clerkships with conservative judges and justices.<sup>96</sup> The idea was to “replicate the function that major universities serve on the left of creating a community of people with similar views on similar issues.”<sup>97</sup> These clerkships, in turn, opened doors to faculty appointments and government placements previously dominated by left-leaning lawyers. Around the same time, a group of young academics founded the Federal-

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91. Glenn Harlan Reynolds, *Fair-Weather Federalism?*, FOX NEWS (Apr. 22, 2002), <http://www.foxnews.com/story/0,2933,50840,00.html>.

92. Mike Riggs, *Rick Perry's Fair-Weather Federalism*, REASON.COM (July 29, 2011), <http://reason.com/archives/2011/07/29/rick-perrys-tenuous-understand>.

93. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 2* (2008).

94. *Id.* at 4–5.

95. *Id.* at 91.

96. *Id.* at 140.

97. *Id.* at 164.



ist Society with the aim of building a conservative “counter-elite” to challenge the dominance of the liberal orthodoxy in the nation’s top law schools and legal institutions.<sup>98</sup> These were positive developments, and the Federalist Society would eventually prove instrumental to the movement’s development, but it was not until conservatives began channeling resources into long-term litigation campaigns that the movement started reaping dividends in the courts.

Following the lead of established public-interest groups like the National Association for the Advancement of Colored People and the American Civil Liberties Union, conservatives leveraged their newfound foothold in the legal academy by recruiting young lawyers into public-interest law firms (PILFs) where they could further the movement’s litigation agenda.<sup>99</sup> Their progress was slow going. According to Teles, the “first-generation PILFs” struggled to build strong reputations because they were too closely linked to local business interests, their main source of funding.<sup>100</sup> Intimate ties to the business lobby frustrated their efforts to develop a public-interest identity, and it took the emergence of a second generation of PILFs, this one funded not by local chambers of commerce but by individual donors and other public-interest groups, to set the states’ rights agenda on track.<sup>101</sup> As Mark Tushnet put it, “[T]he first generation of conservative public interest law firms was unable to pull off the public-relations move of identifying the interests of large businesses with the public interest.”<sup>102</sup>

The second wave of PILFs went some way toward addressing the organizational problem, lending the movement more authenticity and garnering a strong base of ideological support.<sup>103</sup> Public-interest groups prefer ideological donors because they do not demand instant gratification and won’t limit funding to projects promising quick payoffs.<sup>104</sup> Rather, they tend to appreciate the grinding pace at which movements are built and equipped to compete with the well-endowed institutions on the other side of the aisle.

But while the PILFs overcame their organizational problems, they made only modest headway in the courts. The movement appeared to gain traction in the 1990s when the Supreme Court issued a series of decisions scaling back the broad interpretation of federal power that had prevailed in the Court since the New Deal era. It was during this period

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98. *Id.* at 138.

99. *Id.* at 67.

100. *Id.* at 221.

101. *Id.* at 68–69 (“The firms’ business-heavy caseload lent credence to their adversaries’ argument that, far from being defenders of the public interest, they were nothing more than shill for conservative business interests.”).

102. Mark Tushnet, *What Consequences Do Ideas Have?*, 87 TEX L. REV. 447, 453–54 (2008) (reviewing TELES, *supra* note 93).

103. TELES, *supra* note 93, at 221.

104. *Id.* at 222.

that the Supreme Court, for the first time in six decades, invalidated a federal law on the ground that it exceeded congressional authority under the Commerce Clause.<sup>105</sup> Although the Supreme Court had not struck down a federal law since 1937, it would strike down thirty-three over the next eight years,<sup>106</sup> a trend that led experts to predict the Court would adopt a pre-New Deal approach to the commerce power.

But the trend would be short-lived. Although judicial conservatism remained ascendant throughout the period, over time it stopped paying dividends for the states' rights movement. In 2005, the Supreme Court ruled that Congress could, consistent with its authority under the Commerce Clause, proscribe the production and use of homegrown marijuana, even though the marijuana was permitted under state law and intended for personal consumption.<sup>107</sup> The Court based the decision, *Gonzales v. Raich*, on an expansive interpretation of the commerce power,<sup>108</sup> dashing hopes that it would restore the pre-New Deal vision of limited federal power.

Scholars disagree about the point at which the Court took a nationalist turn, with some contending it was the late 1990s, others suggesting it was the early years of the Roberts Court, and still others convinced it's been a pro-federal court all along. But everyone agrees the Court's decision in *Raich* was a death knell of sorts for the states' rights movement.<sup>109</sup> In retrospect, the Court's flirtation with states' rights in the 1990s has been attributed not to the movement but rather to the presence on the Supreme Court of ideological allies like Justices Rehnquist and O'Connor. "The two Justices who believed most strongly in federalism have both left the Court," wrote David Strauss, a professor at the University of Chicago, in a piece about the waning influence of judicial conservatism.<sup>110</sup>

The Supreme Court would continue to uphold expansive interpretations of federal power well into the 2000s, but the Court's nationalist, pro-business agenda would find its stride in the Roberts Court.<sup>111</sup> The Roberts Court is rightfully viewed as a business-friendly court, but its pro-business orientation owes much to its bold vision of federal power.<sup>112</sup>

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105. See, e.g., *United States v. Morrison*, 529 U.S. 598, 617 (2000); *United States v. Lopez*, 514 U.S. 549, 567–68 (1995).

106. Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 SUP. CT. ECON. REV. 233, 280–83 app.A (1999).

107. *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

108. See *id.* at 22.

109. See Mark C. Christie, *Economic Regulation in the United States: The Constitutional Framework*, 40 U. RICH. L. REV. 949, 977 (2006).

110. David A. Strauss, *The Death of Judicial Conservatism*, 4 DUKE J. CONST. L. & PUB. POL'Y 1, 10 (2009).

111. See Jeffrey Rosen, *Supreme Court, Inc.*, N.Y. TIMES MAG., Mar. 16, 2008, at 38, 38.

112. See Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943, 950 (2009).

Since Chief Justice Roberts took the helm in 2005, the Court has been preoccupied with preemption. The issue has been a fixture on the Roberts Court docket since the beginning, and the Court's decisions tend to favor federal law and the particular corporate stakeholder invoking it.<sup>113</sup>

[A]t the same time the Court was cutting back on Congress's authority under the Commerce Clause in the name of states' rights, it began to limit significantly the ability of states to provide tort rights and remedies for its citizens by preempting common law and statutory claims for damages associated with drugs, medical devices, and consumer products . . . .<sup>114</sup>

Each statutory scheme is different, of course, and the Court's approach toward preemption will vary from case to case. Still, the general trend favors uniformity over multiplicity, federal over state. More specifically, it reflects the Court's suspicion of tort litigation as a means of regulating commercial conduct.<sup>115</sup> The Roberts Court is happy to uphold federal power if it means not subjecting businesses to the whims of juries or state trial judges.

Conservatives devoted to promoting deregulation are finding it increasingly difficult to share common ground with the states' rights movement. Their differences sharpened during the financial crisis, when the business community supported some of the Obama Administration's more dramatic federal interventions into the economy. While the U.S. Chamber of Commerce (the Chamber) went on record in support of the stimulus package and the Troubled Asset Relief Program, states' rights groups accused the federal government of overreaching and challenged the program in court.<sup>116</sup> Since parting ways in the late 1970s, the two camps have found independent sources of funding, occupied separate spheres of power, and advanced diverging positions on some of the biggest cases of the day. Although still loosely linked together under the conservative banner, the camps have little left in common, and often find themselves on opposing sides of the same case. Remarking on this trend, Professor Young said, "It is no longer possible to equate a vote for state autonomy with a vote for a politically conservative result."<sup>117</sup>

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113. See, e.g., *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1265–66 (2012) (holding that state law tort claims of defective design and failure to warn were preempted by the Locomotive Inspection Act); *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1075–76 (2011) (holding that National Childhood Vaccine Injury Act preempts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects).

114. *Klass*, *supra* note 67, at 1504–05.

115. See *id.*

116. Seth Bailey, *TARP Challenged in Federal Court*, OPENMARKET.ORG (Feb. 9, 2009), <http://www.openmarket.org/2009/02/09/tarp-challenged-in-federal-court/>.

117. Ernest Young, *The Conservative Case for Federalism*, 74 GEO. WASH. L. REV. 874, 875 (2006).

Organizationally, the business community is the strongest camp in the conservative legal establishment, its advantage so considerable that at least one scholar describes it as being outside the establishment entirely. “[W]e may have seen a return of business-oriented conservative litigation, but it is now outside the conservative legal movement’s institutional framework,” Professor Mark Tushnet observed.<sup>118</sup> The business community owes part of its institutional strength to the Chamber, the world’s largest business federation, whose membership comprises more than 300,000 companies.<sup>119</sup> The Chamber spends a mind-blowing amount of money—more than the national committees of both major parties combined—to advance its agenda in Washington, and its litigation wing, the National Chamber Litigation Center, has had unparalleled success before the Supreme Court, both in its capacity as a party and as amicus writing in support of the business community.<sup>120</sup>

Viewed against this backdrop, the 2011–2012 Supreme Court docket offers a skewed picture of the state of modern conservatism. While the Supreme Court has shown a renewed interest in federalism cases, it’s seldom that their outcomes favor the states’ rights movement. “[O]ne thing you cannot say,” lamented Professor David Strauss, in addressing the Court’s pro-federal trend, “is that this is a Court that cares deeply about local prerogatives and protecting local governments from the intrusions of people in Washington, D.C.”<sup>121</sup>

### III. PREEMPTION AND THE FATE OF THE STATES’ RIGHTS MOVEMENT

In November 2008, the Federalist Society hosted a seminar on the Roberts Court and its commitment to federalism.<sup>122</sup> Paul Clement was there, flanked by an impressive panel of law professors and lawyers, including Walter Dellinger, former Solicitor General under President Clinton. Dellinger opened the discussion on a confrontational note, calling attention to a rift in conservative legal thought between deregulation and states’ rights.<sup>123</sup> Dellinger was a Democrat addressing a room full of Republicans, and he undoubtedly recognized that he was treading on precarious ground with this topic. But he forged on, insisting conserva-

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118. Tushnet, *supra* note 102, at 456.

119. *About the Chamber of Commerce*, USCHAMBER.COM, <http://www.uschamber.com/about> (last visited Feb. 22, 2013). *But see* Josh Harkinson, *US Chamber Shrinks Membership 90%*, MOTHER JONES (Oct. 14, 2009, 9:33 AM), <http://www.motherjones.com/mojo/2009/10/us-chamber-caves-membership-numbers>.

120. Adam Liptak, *The Roberts Court: Justices Offer Receptive Ear to Business Interests*, N.Y. TIMES, Dec. 19, 2010, at A1; Eric Lipton et al., *Large Donations Aid U.S. Chamber in Election Drive*, N.Y. TIMES, Oct. 10, 2010, at A1; *see also* David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce’s Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1019 (2009).

121. Strauss, *supra* note 110, at 11.

122. *See Roberts Court and Federalism*, *supra* note 59, at 330.

123. *See id.* at 333.

tives were due for a reckoning: they would eventually have to decide which tenet embodies core conservatism.<sup>124</sup>

Clement spoke later. He had prepared remarks about federalism and the Roberts Court, but he was not about to let Dellinger's comments slide. Clement rejected the idea that the two schools of thought are inherently contradictory.<sup>125</sup> The question, he said, was not how much regulation is acceptable but rather who should be doing the regulating.<sup>126</sup> Clement believes you can defend a limited role for the federal government and still accept uniform federal authority in areas where states cannot act collectively.<sup>127</sup> By the same token, he said, you can favor deregulation and still recognize room for state action in areas where state laws won't create tension.<sup>128</sup>

Clement's remarks echo a position he took a decade earlier in a short essay about preemption he co-authored with Viet Dinh, now his colleague at Bancroft.<sup>129</sup> The authors criticized commentators for mistaking the Court's preemption cases for cases about federalism.<sup>130</sup> In their view, federalism cases present big-picture scholarly questions—questions about the boundaries of federal and state authority, about which sovereign can act and when.<sup>131</sup> Preemption cases tend to be narrower, their outcomes turning on the scope of a statute or the intent of Congress, the cases often decided without regard for constitutional principles.<sup>132</sup> “There is no real tension between the Supreme Court's federalism decisions and its preemption cases because the latter, properly understood, are not ‘about federalism.’”<sup>133</sup>

Clement's explanation has logical appeal, but is there any evidence that it works that way in practice? In other words, does the states' rights agenda operate in tension with that of the business community? Is the business community considering where its agenda fits with legal conservatism generally and federalism specifically, and if so, will it pull back where its success threatens to undermine the ongoing campaign for states' rights?

Clement knows better than anyone that the two sides are pushing the courts in different directions, their most common point of contention being preemption, or the extent to which federal law displaces state law

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124. *See id.* at 336.

125. *Id.* at 352–53.

126. *Id.* at 360–61.

127. *See id.* at 353.

128. *See id.* at 360.

129. Paul D. Clement & Viet D. Dinh, *When Uncle Sam Steps In: There's No Real Disharmony Between High Court Decisions Backing Preemption and the Federalism Push of Recent Years*, LEGAL TIMES, June 19, 2000, at 66, 66.

130. *Id.*

131. *Id.*

132. *See id.* at 66, 67.

133. *Id.* at 66 (quoting *Coleman v. Thompson*, 501 U.S. 722, 726 (1991)).

in a particular policy area. Having argued both sides of the preemption debate, Clement knows the business community has come to value the doctrine with the same fervor that the states' rights movement has come to detest it. By the same token, he knows the success of one side often comes at the expense of the other. A Supreme Court decision upholding the supremacy of federal law not only threatens to displace state action in the affected policy area but also strengthens the preemption doctrine by making it more likely that federal law will displace state action in other areas.

Clement knows this because he helped the business community secure some of the signature preemption victories of the last decade. He regularly appears on behalf of the business lobby in the Court's preemption cases, often with the aim of obtaining precedents at odds with the states' rights agenda. In *Williamson v. Mazda Motor of America, Inc.*,<sup>134</sup> a case about the preemptive scope of federal seatbelt regulations, he filed an amicus brief on behalf of a group of auto manufacturers.<sup>135</sup> He argued that a state court judgment imposing liability on Mazda for failing to incorporate lap-shoulder seatbelts in certain seating positions was preempted by federal regulations allowing manufacturers to install lap-only belts in the same positions.<sup>136</sup> His argument ultimately failed, and it's a good thing for the states' rights crowd, because implicit in the claim was the legally fraught proposition that states may not mandate what Congress left optional.

Clement would have better luck in *Bruesewitz v. Wyeth LLC*,<sup>137</sup> a highly anticipated preemption case about vaccine safety.<sup>138</sup> The issue there was whether federal law could shield vaccine manufacturers from tort suits arising from vaccine-related injuries. Clement, writing on behalf of the vaccine industry, argued that subjecting vaccine manufacturers to state law liability for design defects would upset the federal regulatory regime.<sup>139</sup> That regime had been carefully calibrated to hold manufacturers accountable to plaintiffs injured by defective vaccines, while still limiting manufacturers' exposure to frivolous lawsuits. Introducing state tort liability, manufacturers argued, would upset this delicate balance.<sup>140</sup> The Supreme Court ruled in favor of the vaccine manufacturers,

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134. 131 S. Ct. 1131 (2011).

135. See Brief of the Alliance of Automobile Manufacturers, et al. as Amici Curiae Supporting Respondents, *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011) (No. 08-1314), 2010 WL 3820816.

136. *Id.* at 21.

137. 131 S. Ct. 1068 (2011).

138. *Id.* at 1072.

139. See Brief of Glaxosmithkline L.L.C. et al. as Amici Curiae in Support of Respondents at 6, *Bruesewitz*, 131 S. Ct. 1068 (No. 09-152).

140. *Id.*

cementing another victory for the business community in its push for control of the Court's preemption doctrine.<sup>141</sup>

In *Kurns v. Railroad Friction Products Corp.*,<sup>142</sup> Clement filed an amicus brief on behalf of General Electric (GE), the world's leading manufacturer of diesel-electric locomotives. He argued that the Locomotive Inspection Act broadly preempts the field of locomotive safety, crowding out state laws aimed at regulating the design and construction of locomotives.<sup>143</sup> He asked the Court to hold that federal locomotive regulations preempted a state law tort claim against a distributor of locomotive parts that contained asbestos.<sup>144</sup> GE's position on preemption was aggressive—even more so than that of the Justice Department, which allowed for the possibility that states could permissibly regulate non-operational locomotives. The Supreme Court sided with GE and the parts distributor, concluding the Locomotive Act leaves no room for state action in the field of locomotive safety.<sup>145</sup>

Clement also had a hand in *AT&T Mobility LLC v. Concepcion*,<sup>146</sup> one of the more undervalued preemption victories of the decade.<sup>147</sup> The suit began as a class action brought by AT&T customers who had been charged sales tax for the retail price of phones they received for free.<sup>148</sup> When AT&T invoked a provision in the sales contract disallowing class action suits, the plaintiffs cried foul, claiming the class action is the only cost-effective way to pursue small-dollar claims against large corporations like AT&T. It would be unconscionable, they argued, to let consumers sign away their rights to their only realistic remedy.<sup>149</sup> The question before the Court was whether the Federal Arbitration Act (FAA) preempts state laws that prohibit contracts with class action waivers.<sup>150</sup> The Court said yes—at least to the extent such rules interfere with the objective of the federal statute that the Court identified as promoting the expeditious and informal resolution of consumer claims.<sup>151</sup> The Court takes a dim view of state laws that restrict the formation of arbitration agreements, especially when they have the effect of requiring the availability of remedies like the class action suit, which “interfere[] with fun-

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141. *Bruesewitz*, 131 S. Ct. at 1082.

142. 132 S. Ct. 1261 (2012).

143. Brief for General Electric Corp. as Amicus Curiae Supporting Respondents at 7–8, *Kurns v. R.R. Prods. Corp.*, 132 S. Ct. 1261 (2012) (No. 10-879), 2011 WL 4872044, at \*7–8.

144. *Id.* at 8.

145. *Kurns*, 132 S. Ct. at 1270.

146. 131 S. Ct. 1740 (2011).

147. Clement was retained by the wireless industry lobby to write an amicus brief in support of AT&T's position on preemption. See Brief of CTIA—The Wireless Association as Amicus Curiae in Support of Petitioner, *Concepcion*, 131 S. Ct. at 1740 (No. 09-893), 2010 WL 3183858.

148. *Concepcion*, 131 S. Ct. at 1744.

149. See *id.* at 1745.

150. *Id.* at 1744.

151. See *id.* at 1748.

damental attributes of arbitration and thus create[] a scheme inconsistent with [federal law].”<sup>152</sup>

After *Concepcion*, corporations can use collective action waivers to shield themselves from high-volume, small-dollar suits then rest comfortably knowing consumers will seldom pursue claims individually. As Justice Breyer observed in his dissent, “The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”<sup>153</sup> Critics fear the effects of the decision will spill into other areas like labor law where class action waivers promise to considerably limit exposure to civil liability.<sup>154</sup> Already, lawyers are advising employers to insert class action waivers in their employment contracts.<sup>155</sup>

All of the doctrinal developments of recent years circumscribing the reach of class actions pale in import next to the game-changing edict that companies with possible exceptions that warrant close scrutiny may simply opt out of potential liability by incorporating class action waiver language in their standard-form contracts with consumers (or employees or others).<sup>156</sup>

Taken together, Clement’s preemption cases tell the story of a lawyer who spends as much time challenging states’ rights as he does promoting them. Clement’s victories for the business community have not occurred in a vacuum: today’s preemption victories lay the groundwork for tomorrow’s, strengthening the business lobby’s litigation agenda by reinforcing the doctrinal case for uniform federal law. The Court’s decision in *Bruesewitz* will stand in the way of state legislatures seeking to regulate vaccine manufacturers and similar industries subject to close federal supervision, while its decision in *Kurns* makes state law a non-factor in the area of railroad safety. *Kurns* is especially notable because it would later be cited by the Justice Department as support for its preemption position in the Arizona immigration case,<sup>157</sup> forcing Clement, Arizona’s lawyer, to argue against a pro-preemption decision he helped secure.

But neither decision rivals *Concepcion* in its potential to alter the balance of power between the federal government and the states. Before

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152. *Id.*

153. *Id.* at 1761 (Breyer, J., dissenting) (quoting *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)) (internal quotation marks omitted).

154. Nantiya Ruan, *What’s Left to Remedy Wage Theft?: How Arbitration Mandates that Bar Class Actions Impact Low-Wage Workers*, 2013 MICH. ST. L. REV. *passim* (forthcoming).

155. See, e.g., Lisa M. Carvalho, *U.S. Supreme Court Reverses Ninth Circuit: Federal Arbitration Act Preempts California Law to Uphold Waiver of Class Action Option in Mandatory Arbitration*, EMP’T L. WATCH (Apr. 29, 2011), <http://www.employmentlawwatch.com/tags/att-mobility-v-concepcion/>.

156. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012).

157. See Brief for the United States at 27, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2011 WL 5548708, at \*27.



*Concepcion*, state courts could regulate the use of arbitration agreements by enforcing only those deemed fair to consumers and consistent with state policy. The FAA was the business community's response to this judicial hostility, Congress's way of telling the states to stop meddling in the affairs of the business community.

The *Concepcion* decision is already changing the relationship between state regulators and corporations in the area of consumer protection. According to David Arkush, a consumer advocate with Public Citizen, "[c]orporations can now prevent consumers and small business owners from exercising what is often their only real option for challenging companies that defraud them by millions or even billions of dollars: banding together to file class action lawsuits."<sup>158</sup> The decision has cast doubt on dozens of state laws designed to protect consumers from the harsh effects of arbitration. Among the laws now in question are class action-waiver bars in Georgia, California, South Carolina, and New Jersey, as well as a West Virginia law prohibiting nursing homes from using arbitration clauses in their admission agreements that strip residents of their right to bring personal-injury claims to court.<sup>159</sup>

This is just a sample, drawn exclusively from Clement's caseload, of pro-business outcomes that made life more difficult for the states and their allies in the conservative legal movement. If you expand the inquiry to the entire Supreme Court docket, more examples abound. In *CSX Transportation v. Alabama Department of Revenue*,<sup>160</sup> the Supreme Court made it easier for interstate railroad companies to challenge state tax laws under a federal statute prohibiting discriminatory taxes against railroads.<sup>161</sup> More recently, in *National Meat Ass'n v. Harris*,<sup>162</sup> the Court ruled that the Federal Meat Inspection Act preempted California's restrictions on using non-ambulatory farm animals for slaughter.<sup>163</sup> The Chamber submitted a brief in support of the slaughterhouses.<sup>164</sup>

More troubling for states' rights proponents is the fierceness with which the Chamber is pursuing its agenda. Recall that the Reagan Administration wanted the Justice Department to push for a legal presumption favoring state and local regulations to the extent they conflict with

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158. David Arkush, *U.S. Supreme Court to Major Corporations: You Write the Rules*, HUFFINGTON POST (Feb. 28, 2011, 6:06 PM), [http://www.huffingtonpost.com/david-arkush/us-supreme-court-to-major\\_b\\_854714.html](http://www.huffingtonpost.com/david-arkush/us-supreme-court-to-major_b_854714.html).

159. See CAL. CIV. CODE § 1668 (West 2012); S.C. CODE ANN. § 56-15-110 (2012); S.C. CODE ANN. § 56-15-130 (2012); W. VA. CODE R. § 16-5C-15(c) (2012); Muhammad v. Cnty. Bank, 912 A.2d 88, 99-101 (N.J. 2006); see also Dale v. Comcast Corp., 498 F.3d 1216, 1224 (11th Cir.) (holding that, under Georgia law, such clauses are considered on a case-by-case basis).

160. 131 S. Ct. 1101 (2011).

161. See *id.* at 1114.

162. 132 S. Ct. 965 (2012).

163. *Id.* at 968.

164. See Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioner, *Nat'l Meat*, 132 S. Ct. at 965 (No. 10-224), 2011 WL 3821399.

federal law. Charles Fried had opposed the idea, worried it would tip the scale too far toward the states. Now the Chamber and its allies in the business community are pushing in the opposite direction, inviting the Court to abandon the “presumption against preemption,” which requires courts to assume a state law is valid in the absence of an affirmative showing that it conflicts with federal law.<sup>165</sup> The presumption is an outgrowth of the principle that state power is meant to protect state law from the displacing effect of federal regulation. Doing away with it would tip the scale even further in the business lobby’s favor, eliminating one of the states’ most powerful defenses in preemption litigation.

These developments belie Clement’s assurance that the two schools of thought can work in harmony. If the Chamber were sensitive to the interests of the states—if it were motivated even in part by conservative unity—it would seek narrow holdings in preemption cases. But more often than not, when the Chamber appears before the Supreme Court, it is pushing not only for a business-friendly outcome but also for pro-federal doctrinal change that will endure beyond the particular dispute. The Chamber will not be satisfied to advance its cause in a piecemeal, case-by-case fashion. It wants to create a legal environment conducive to broad federal power and uniform federal regulation.

It appears to be doing just that. The federal courts are gradually changing the division of labor between Congress and the states, enlarging Congress’s license to legislate in policy areas once reserved for state legislatures. This shift is consistent with one commentator’s belief that the Chamber is not simply trying to secure favorable outcomes for its members; it’s trying to set the “intellectual foundation for a newly muscular preemption jurisprudence.”<sup>166</sup>

Consider how the two sides positioned themselves on the defining issues of the term—healthcare and immigration. While the states’ rights movement rallied behind the opponents of the Affordable Care Act, staking its position in a series of fiery briefs from organizations like the Cato Institute, Project Liberty, and the American Legislative Exchange Council, the Chamber kept a safe distance from the case. Although the Chamber filed two amicus briefs in the Supreme Court, neither took a position on the law’s constitutionality.<sup>167</sup> The Chamber wrote only to stress the importance of a prompt resolution, and to suggest that if the individual mandate is struck down, the rest of the Affordable Care should fall with it, because when push comes to shove, the Chamber’s members would

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165. See Tom Goldstein, *Argument Preview: Will ‘Presumption Against Preemption’ Survive?*, SCOTUSBLOG (Nov. 7, 2011, 6:00 PM), <http://www.scotusblog.com/2011/11/argument-preview-will-%E2%80%9Cpresumption-against-preemption%E2%80%9D-survive/>.

166. Franklin, *supra* note 120, at 1033.

167. See Brief of Chamber of Commerce of the United States as Amicus Curiae in Support of Reversal as to the Severability Issue, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (Nos. 11-393, 11-398, 11-400), 2012 WL 454626 (combining and briefing the cases).

prefer the status quo to the hollowed-out mess of a health care policy that would remain in the absence of the mandate.<sup>168</sup>

The Chamber was altogether absent from the Arizona immigration case, but if the position it took in a similar case last term is any indication, it probably would have aligned itself with the Obama Administration. In *Chamber of Commerce v. Whiting*,<sup>169</sup> the Chamber asserted that the Legal Arizona Workers Act interferes with federal immigration policy by imposing more onerous penalties than federal law on businesses that employ illegal aliens.<sup>170</sup> There is such a thing, the Chamber maintained, as a state that's *too* cooperative in enforcing federal law. The Supreme Court ultimately sided with Arizona, concluding the State had "taken the route least likely to cause tension with federal law."<sup>171</sup> But the Chamber's objection was clear: allowing states to determine for themselves whether someone is employing an unlawful alien frustrates federal law and leaves businesses at the mercy of fifty independent and potentially conflicting enforcement regimes.<sup>172</sup>

This, I think, is what Professor Tushnet meant when he said the business community is operating "outside the conservative legal movement's institutional framework."<sup>173</sup> Healthcare and immigration were indispensable opportunities for states' rights proponents. Winning either case would have lifted the besieged movement from a decade-long slump and dealt a devastating blow to the Obama Administration and its vision of federal power. The conservative "institutional framework," with its elaborate network of think tanks, advocacy groups, and public-interest law firms, mobilized accordingly. The campaign was unyielding: signs were hoisted, editorials submitted, briefs filed. Meanwhile, the Chamber kept quiet. The Chamber had no position on the constitutionality of the Affordable Care Act, at least none it felt comfortable detailing in an amicus brief. And it had already telegraphed its position on Arizona immigration, in the *Whiting* case, when it sued Arizona on the same pro-federal theory the Justice Department was using this time around.

#### IV. THE BIG TENT

Professor Young, who has written extensively on federalism and conservative political theory, argues that legal conservatism would be adrift were it not for its devotion to federalism.<sup>174</sup> Young believes fidelity to the framers' vision of a balance between state and federal power is

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168. *Id.* at 2, 15–16.

169. 131 S. Ct. 1968 (2011).

170. Brief for the Petitioners at 13–15, *Whiting*, 131 S. Ct. at 1968 (No. 09-115), 2008 WL 2131124, at \*13–15.

171. *Whiting*, 131 S. Ct. at 1987.

172. *See id.* at 1979.

173. Tushnet, *supra* note 102, at 456.

174. *See* Young, *supra* note 117, at 886–87.

reason enough for conservatives to keep federalism near to their hearts.<sup>175</sup> He maintains that limitations on centralized power can safeguard individual liberty, and that using the states as laboratories for political reform “fits the conservative view that change is both essential and dangerous.”<sup>176</sup> In making the conservative case for federalism, Young hopes to “provide principled reasons for a conservative court to favor federalism and to remind conservatives why they ought to be more consistent in that cause.”<sup>177</sup>

Young’s argument provides a useful starting point, but so far it has not found an audience outside academia, where it is needed most. Writing last year in *Slate*, Dahlia Lithwick and Barry Friedman observed that “federalism cases have always made . . . fickle friends.”<sup>178</sup> “They put people in an awkward spot,” the authors wrote.<sup>179</sup> “Either choose some rule regarding state (versus federal) power and apply it no matter what issue is at stake, or pick an outcome you like on any given issue, then assign governmental power.”<sup>180</sup> Lithwick and Friedman were addressing the tension between federalism and the conservative social agenda, a conflict that has left Republicans in the uncomfortable position of paying lip service to states’ rights while defending invasive federal programs like the war on drugs and DOMA. But their criticism is also true of the tension between federalism and deregulation.

The conflict, simply stated, is this: giving states more regulatory authority requires accepting the consequences of more regulation, whereas pushing for regulatory uniformity at the federal level requires accepting a circumscribed role for the states. The two schools of thought cannot exist without tension in a national market economy, but there has always been a flickering hope that their proponents might stay out of each other’s way in the greater interest of the movement. This hope has faded over the last decade with the prospect of a united conservative legal movement giving way to the reality that two of its main components, the business community and the states’ rights movement, no longer share an agenda.

The Federalist Society took off in the 1980s because it found a way to attract lawyers from a range of political and intellectual backgrounds. It billed itself as a “big tent” institution, a place where conservatives could come together to share fruit plates and listen to people like Paul Clement talk about how much they have in common. This worked well

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175. *See id.*

176. *Id.* at 886.

177. *Id.* at 887.

178. Barry Friedman & Dahlia Lithwick, *The Supreme Court Rediscovered Federalism Just in Time for the 2012 Election*, SLATE (Dec. 14, 2011, 4:53 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/12/the\\_supreme\\_court\\_rediscovered\\_federalism\\_just\\_in\\_time\\_for\\_2012\\_election\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/the_supreme_court_rediscovered_federalism_just_in_time_for_2012_election_.html).

179. *Id.*

180. *Id.*

three decades ago when conservatives were living in the shadow of the Warren Court, with the legal academy still overrun by liberals. But as the movement gained strength, infiltrating the very institutions it once opposed, the impulse that once united its factions grew fainter. Today legal conservatism is said to encompass the same assorted membership as it did thirty years ago, even though the forces that once united it have dissipated and the movement's various components have sought out their own identities and agendas.

We see this trend at work in the media's portrayal of Paul Clement. Both sides of the conflict would claim him as their own, even though history shows him to be beholden to neither. The best one can say for the standard trope about Clement is that it is right for the wrong reason. Clement *is* the go-to lawyer for the conservative legal agenda, but it does not follow that his success will advance the goals of legal conservatism, writ large. Call him a states' rights crusader and you're forced to reconcile his preemption work on behalf of the business lobby. Call him a shill of the business community and you're forced to account for his states' rights work, much of it in tension with the business community's vision of federal power. You can look to the common denominator and call him a "conservative," but then you're right back where you started, left with a label whose meaning has been stretched beyond usefulness.