

Federalism, the Rehnquist Court, and the Modern Republican Party

Introduction

Over the past two years, assessments of the Rehnquist Court's legacy have covered a broad range of topics, from civil rights to criminal procedure to the role of the Supreme Court itself.¹ A subject rarely missed, however, is federalism, which many commentators have called the centerpiece of the Rehnquist Court's constitutional agenda.² During William Rehnquist's tenure as chief justice, the Court reinvigorated a range of structural constraints on the national government, invalidating numerous federal statutes on the ground that they exceeded Congress's enumerated powers.³ The ultimate significance of these decisions remains unclear,⁴

¹ See, e.g., *A Symposium on the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 869–1190 (2006); *Symposium: Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O'Connor*, 58 STAN. L. REV. 1661–1996 (2006).

² See, e.g., Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023, 1047 (2005) (book review) (calling the Rehnquist Court's high-profile federalism decisions "the cases for which the Rehnquist Court will be remembered"); M. Elizabeth Magill, *The Revolution that Wasn't*, 99 NW. U. L. REV. 47, 47 (2004) ("A principal legacy of the Rehnquist Court is its revitalization of doctrines associated with federalism.").

³ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the civil remedy provision of the Violence Against Women Act as beyond Congress's powers under the Commerce Clause or Section 5 of the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act as beyond Congress's commerce power); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act as beyond Congress's Section 5 power); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *New York v. United States*, 505 U.S. 144 (1992).

but one point is undisputed: Under Rehnquist's stewardship, the Supreme Court revived the salience of federalism as a principle of constitutional law.

Though several scholars have offered insightful evaluations of the Rehnquist Court's federalism jurisprudence, most of them have overlooked an important part of the story. Specifically, by focusing almost exclusively on the Court's decisions addressing the structural limits on Congress's powers, they have largely ignored those disputes involving the federalism-based constraints on the states.⁵ The most significant of these constraints are the dormant Commerce Clause and the doctrine of preemption. The dormant Commerce Clause forbids state laws (absent

⁴ See, e.g., Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1321 (1999) ("Scrutiny of the recent decisions reveals them to be largely symbolic bows to a federalism myth rather than real limitations on federal power."); Ann Althouse, *Inside the Federalism Cases: Concern About the Federal Courts*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 142 (2001); Jim Chen, *Filburn's Forgotten Footnote—Of Farm Team Federalism and Its Fate*, 82 MINN. L. REV. 249, 254 (1997); Jesse H. Choper & John C. Yoo, *Who's So Afraid of the Eleventh Amendment: The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213 (2006); Douglas Laycock, *Protecting Liberty in a Federal System: The US Experience*, in PATTERNS OF REGIONALISM AND FEDERALISM: LESSONS FOR THE UK 119, 140 (Jorg Fedtke & B. S. Markesinis eds., 2005); Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551 (2003) (book review).

⁵ Of course, there are some notable exceptions. See, e.g., Cross, *supra* note 4, at 1310–11; Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1313–14 (2004); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 431–33 (2002); Michael S. Greve & Jonathan Klick, *Preemption in the Rehnquist Court: A Preliminary Empirical Assessment*, 14 SUP. CT. ECON. REV. 43, 44 (2006); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 U.C.L.A. L. REV. 1353 (2006); Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 68 (2001); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 436 (2002); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 362–78; Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 130–34 (2004).

congressional authorization) that discriminate against, or impose an undue burden on, interstate commerce. And the Supremacy Clause dictates that federal law shall preempt any state law with which it conflicts, either expressly or implicitly.

Together, these doctrines largely define the states' constitutional authority to regulate in those areas in which both the federal government and the states enjoy legislative jurisdiction. And because most human activity in the United States remains regulable by both the federal government and the states, these doctrines are critical to the states' policymaking autonomy.

Given the Rehnquist Court's rather aggressive efforts to enhance state autonomy in its decisions construing the Commerce Clause, the Tenth Amendment, the Eleventh Amendment, and Section 5 of the Fourteenth Amendment—decisions like *United States v. Lopez*,⁶ *United States v. Morrison*,⁷ and *Board of Trustees v. Garrett*⁸—one might reasonably have expected the justices to pursue a similar course with respect to preemption and the dormant Commerce Clause. But they did not. A careful examination of Rehnquist Court's record in the full range of federalism decisions shows that the five justices most responsible for the Rehnquist Court's "federalism offensive"—Rehnquist, O'Connor, Scalia, Kennedy, and Thomas—were largely indifferent to state policymaking autonomy in cases involving preemption and the dormant Commerce Clause. If anything, these justices actually pushed the law in the opposite direction, increasing the likelihood that state

⁶ 514 U.S. 549 (1995).

⁷ 529 U.S. 598 (2000).

⁸ 531 U.S. 356 (2001).

initiatives would be preempted or invalidated on dormant Commerce Clause grounds.

This article makes two empirical claims about the Rehnquist Court's federalism jurisprudence, one descriptive and one interpretive. The descriptive claim is that the Court's overall approach to federalism was more complicated than many have assumed, and it was not necessarily friendly to the states. To support this contention, I present an empirical study. Part of the study is qualitative, analyzing the justices' modest doctrinal moves with respect to preemption and the dormant Commerce Clause during Rehnquist's tenure as chief justice. The other part is quantitative, offering a statistical analysis of the justices' voting patterns in decisions handed between October 1991 and June 2005, the fifteen terms that Rehnquist, O'Connor, Scalia, Kennedy, and Thomas served together. Both aspects of the study underscore a basic point. In cases addressing the margins of Congress's power—where the choice was between congressional authority and state autonomy—these five justices consistently voted for the outcome that enhanced state autonomy. But in cases that were inframarginal, addressing matters plainly within Congress's regulatory authority—where the choice was between state autonomy and less regulation—they tended to vote for the outcome that reduced government regulation.

My interpretive claim is that these apparently inconsistent attitudes towards state autonomy are actually quite understandable once we consider the broader historical and political context. In fine, the Rehnquist Court's federalism decisions

reflected the values of the modern Republican Party, the political coalition that empowered and sustained a majority of the Court's justices. The modern GOP has generally endorsed the abstract principle of devolving greater power to state governments, and particularly the judicial enforcement of the limits on Congress's enumerated powers. But when the principle of state policymaking autonomy has clashed with the goal of reducing economic regulation, Republicans have repeatedly opted to reduce regulation at the expense of state authority. The Rehnquist Court largely mirrored these priorities. In the full run of federalism decisions, the justices tended to prefer results that curtailed regulation, even when those outcomes diminished the autonomy of state governments.

This article proceeds in three parts. Part I briefly summarizes the Rehnquist Court's federalism offensive. It suggests that those aspects of its federalism jurisprudence that have been largely overlooked—namely, those addressing the structural limits on state governments—may actually be more important to the states' real-world policymaking autonomy than the high-profile decisions on which the Rehnquist Court's reputation is based. Part II presents an empirical study of the Rehnquist Court's federalism decisions. It demonstrates that the justices' concern for state autonomy differed markedly depending on whether the constitutional provision at issue constrained Congress or the states. Finally, Part III suggests that this apparent tension in the Court's jurisprudence is eminently understandable given the broader political forces at work: It reflected the priorities

of the modern GOP, the political movement responsible for the Rehnquist Court's creation.

I. The Rehnquist Court's Federalism Offensive and the Limits of Its Domain

As many other commentators have discussed, the Rehnquist Court reshaped the doctrine of constitutional federalism.⁹ It articulated a new and arguably narrower standard for evaluating whether a federal statute falls within Congress's

⁹ The thoughtful and perceptive commentary on the Rehnquist Court's federalism jurisprudence is far too voluminous to cite in its entirety. Here is just a sampling: LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002); MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* (2005); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127 (2001); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Fallon, *supra* note 5; David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41 (2006); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 U.C.L.A. LAW REV. 1353 (2006); Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311 (2001); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343; Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS L.J. 569 (2003); J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSPECTIVES ON POLITICS 233 (2004); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and the Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005); Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477 (2001); Young, *supra* note 5.

commerce power.¹⁰ It developed a restrictive understanding of Congress's legislative authority under Section 5 of the Fourteenth Amendment, requiring that such legislation be "congruent and proportional" to the constitutional violations that Congress seeks to remedy or prevent.¹¹ It created the so-called "anticommandeering" principle, which prohibits Congress from directing the states to enact or implement regulation according to federal instructions.¹² It held that Congress cannot use its Article I powers to enact legislation subjecting the states to private, unconsenting suits for damages,¹³ overruling the relatively recent precedent of *Pennsylvania v. Union Gas*.¹⁴ And it extended this principle of sovereign immunity to suits brought in any court, whether state or federal,¹⁵ as well as to adjudicative proceedings before federal administrative agencies.¹⁶

¹⁰ See *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the civil remedy provision of the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act).

¹¹ See *Morrison*, 529 U.S. 598 (finding the civil remedy provision of the Violence Against Women Act invalid under section 5); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act).

¹² See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

¹³ See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

¹⁴ 491 U.S. 1 (1989).

¹⁵ See *Alden v. Maine*, 527 U.S. 506 (1999) (holding that Congress lacked the authority to subject the states to private, unconsenting suits for damages in state court under the National Labor Relations Act).

¹⁶ See *Federal Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. 743 (2002). Perhaps as notably, in fashioning these doctrinal innovations, the Court has asserted itself as the ultimate arbiter of questions concerning the breadth of Congress's power vis-à-vis the states, invalidating national legislation on federalism grounds at a rate unseen in several generations. See, e.g., David Franklin, *Marijuana and Judicial Modesty*, CHICAGO TRIB., June 9, 2005, at 27; Jeffrey Rosen, *The End of Deference*, NEW REPUBLIC, Nov. 6, 2000, at 38.

In addition to these constitutional rulings, the Rehnquist Court several times invoked federalism principles in interpreting federal statutes so as to minimize the encroachment of the national government on state autonomy. For example, in *Gregory v. Ashcroft*¹⁷ the Court announced that when the application of a federal statute would “upset the usual constitutional balance of federal and state powers,” Congress “must make its intention to do so ‘unmistakably clear in the language of the statute.’”¹⁸ The Court thus concluded that the Age Discrimination in Employment Act (ADEA) did not apply to Missouri’s mandatory retirement age for state judges.¹⁹ Similarly, in *Solid Waste Agency v. U.S. Army Corps of Engineers*,²⁰ the Court invalidated as overly expansive the government’s “migratory bird rule,” which defined the scope of the Clean Water Act to reach all waters forming a habitat for migratory birds.²¹ The Court explained that, “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power,” Congress must make its intent to reach that result clear, especially when “the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.”²²

¹⁷ 501 U.S. 452 (1991).

¹⁸ *Id.* at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

¹⁹ *Id.* at 470.

²⁰ 531 U.S. 159 (2001).

²¹ *Id.* at 174.

²² *Id.* at 172–73. *See also* *Jones v. United States*, 529 U.S. 848, 858 (2000) (invoking the same canon of constitutional doubt to hold that the federal arson statute, 18 U.S.C. §844(i), does not apply to owner-occupied residences that have not been used for any commercial purpose); *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765 (2000) (holding that that a private individual could not bring a *qui tam* action against a state under the False Claims Act because the states are not

Some have argued—and with some force—that the practical effects of these decisions have actually been quite modest.²³ For instance, the Court’s Commerce Clause decisions affect only a small spectrum of activity that Congress might otherwise regulate—activity that is non-commercial, non-economic, and purely intrastate. Its sovereign immunity decisions leave open a number of other means for enforcing federal law against state governments, most notably suits for injunctions under *Ex Parte Young*.²⁴ And its anticommandeering decisions prohibit a form of legislation that Congress had employed only rarely, and for which there are typically a range of substitutes. Perhaps most significantly, the Rehnquist Court did nothing to curtail Congress’s authority under the Spending Clause, leaving Congress the ability to circumvent most of these constraints by enacting conditional spending legislation.²⁵

In any event, even if the Rehnquist Court’s decisions did not amount to a “federalism revolution,” they were still a noteworthy constitutional event.²⁶ As a result, they have deservedly received a great deal of attention, scholarly and otherwise. Importantly, though, this commentary has focused almost exclusively on

“persons” subject to suit under the Act); *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) (holding that neither a state nor its officials, when acting in their official capacities, were “persons” subject to suit under 42 U.S.C. §1983).

²³ See note 4 *supra*.

²⁴ 209 U.S. 123 (1908).

²⁵ See Mark Tushnet, *Alarmism vs. Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 52 (2003).

²⁶ Cf. Whittington, *supra* note 9, at 496 (explaining that, though the Rehnquist Court did not “storm[] the barricades of the centralized state while rallying the masses to its devolutionary banner,” its “federalism offensive [was] without question a political event”).

only one half of the federalism balance—namely, the Court’s decisions affecting the limits on Congress’s enumerated powers. But federalism has another side: the constitutionally grounded, structural limits on the states. These are the “union-preserving” rules of federalism, designed to protect national interests from the parochial tendencies of state or local governments.²⁷ If we see federalism only in terms of the breadth of the national government’s powers, we miss the less salient, but arguably no less significant, aspects of the federalism landscape. In particular, we ignore the degree to which state governments can (or cannot) exercise policymaking autonomy in areas of concurrent federal and state regulatory jurisdiction—which is to say, most areas of modern American life.²⁸

At its core, federalism requires a constitutionalized division of power between the national and state governments, with rules that delineate the respective roles of each.²⁹ While an unconstrained national government might swallow up the independent existence of the states—a point the Rehnquist Court repeatedly emphasized—so, too, might the states act in ways that would effectively destroy the Union.³⁰ Indeed, it was problems of this sort under the Articles of Confederation

²⁷ I borrow the term “union-preserving” from 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §6-1 (3d ed. 2000).

²⁸ See Fallon, *supra* note 5, at 431–33; Massey, *supra* note 5, at 502–12; Young, *supra* note 5, at 130–34.

²⁹ The remainder of this section draws heavily from a similar discussion in [redacted to preserve anonymity].

³⁰ This was, of course, the animating idea behind the Court’s holding in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), that Maryland’s tax on the Bank of the United States was unconstitutional. As Chief Justice Marshall wrote, to permit states such a power would be “in its nature incompatible with, and repugnant to, the constitutional laws of the Union.” *Id.* at 425.

that led to the Constitution's creation.³¹ A principal defect of the Articles was their failure to prevent the states from acting in self-interested ways that undermined the interests of the nation as a whole. States imposed various barriers to interstate commerce, such as protective tariffs on goods from other states; they often failed to comply with the Continental Congress's requisitions, the chief mechanism for funding the federal government; and they encroached on the federal government's authority, by entering into compacts with each other and signing their own treaties with Indian tribes.³² As Chief Justice John Marshall observed in *Gibbons v. Ogden*,³³ "[i]f there was any one object riding over every other in the adoption of the constitution, it was to keep commercial intercourse among the States free from all invidious and partial restraints."³⁴

Structural limits on state authority have thus been a central aspect of American federalism from the beginning. And those limits remain critical elements of our governmental structure.³⁵ As a matter of constitutional law, the two most

³¹ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 132–61, 354–63, 393–429, 463–67 (1969). See also KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 123 (15th ed. 2004) (“the poor condition of American commerce and the proliferating trade rivalries among the states were the immediate provocations for the calling of the Constitutional Convention”).

³² See SULLIVAN & GUNTHER, *supra* note 31, at 123; GEOFFREY R. STONE, ET AL. *CONSTITUTIONAL LAW* 9–10 (5th ed. 2005) (discussing Madison's memorandum to himself in April 1787 in preparation for the Constitutional Convention). See also 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 164 (Max Farrand ed., 1911) (“Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties; to infringe the rights & interests of each other.”).

³³ 22 U.S. (9 Wheat.) 1 (1824).

³⁴ *Id.* at 231.

³⁵ TRIBE, *supra* note 27, at §6–1, 1021.

important such limits are the doctrine of preemption and the dormant Commerce Clause. Grounded in the Supremacy Clause, the doctrine of preemption dictates that validly enacted federal laws shall negate any state laws with which they conflict. And the dormant Commerce Clause generally nullifies state laws that discriminate against, or place undue burdens on, interstate commerce. Cases involving these union-preserving aspects of federalism typically receive less attention than those addressing the breadth of Congress's legislative authority; they are often fact-specific and turn on the precise scope or purpose of the state or federal statutes at issue. Still, the overall trajectory of these decisions is quite important to the federal-state balance—perhaps even more important to the values of federalism than the high-profile cases addressing the limits on Congress's enumerated powers.

Consider preemption. So long as Congress acts within its enumerated powers, it can displace state law addressing the same subject, and it can do so in express or implied terms. The fields regulated by the federal government have grown dramatically over the last century, such that federal law now reaches into almost every corner of national life. From crime to occupational safety to environmental protection, federal law governs private conduct that generally was subject only to state control for the Nation's first 150 years. Granted, some of the Rehnquist Court's decisions have narrowed the breadth of Congress's legislative powers. But they have done so only at the margins; Congress can still regulate any

activity that is economic or commercial in nature, as well as a good deal of activity that is not.³⁶

Thus, the vast majority of human activity in the United States today is regulable by both the federal government and the states. Consequently, the frequency with which courts conclude that federal statutes have displaced state law within this expansive realm of concurrent jurisdiction is quite important to the breadth and significance of the states' residuary powers. To cite only a few recent examples, it determines the states' leeway to regulate in the field of immigration and naturalization;³⁷ to regulate automobile emissions in an effort to reduce greenhouse gases;³⁸ to use their investment and procurement practices to express

³⁶ As the Court clarified in *Gonzales v. Raich*, 545 U.S. 1 (2005), noneconomic, noncommercial, purely intrastate activities are still subject to federal regulation if Congress rationally “concludes that failure to regulate that class of activity would undercut” a larger, comprehensive scheme that, taken as a whole, plainly regulates interstate commerce. *Id.* at 18. Moreover, Congress can cure any constitutionally deficient statute by adding a “jurisdictional element”—language that ensures, on a case-by-case basis, that the regulated activity has a sufficient connection to interstate commerce. *See United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995). In fact, this is precisely what happened in the wake of the Court’s decision in *Lopez*. A year later, Congress amended the Gun-Free School Zones Act to add eleven words to 18 U.S.C. §922(q)(2)(A), defining the relevant offense as the knowing possession of “a firearm that *has moved in or that otherwise affects interstate or foreign commerce* at a place that the individual knows, or has reasonable cause to believe, is a school zone.” Pub. L. 104–208, 110 Stat. 3009, §657 (Sept. 30, 1996), codified at 18 U.S.C. §922(q)(2)(A) (emphasis added).

³⁷ *See, e.g., Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007) (holding that the federal Immigration Reform and Control Act preempted a city ordinance that prohibited employing, “harboring,” or renting housing to undocumented aliens); Pratheepan Gulasekaram, *Coming Soon—A City ID? Both Sides Might Consider Focusing on Their Shared Faith in Local Action*, S.F. CHRON., Sept. 30, 2007, at E1.

³⁸ *See* John M. Broder, *Judge Backs California Rules on Greenhouse Gases*, N.Y. TIMES, Dec. 12, 2007 (reporting that the U.S. District Court for the Eastern District

their moral objections to the human rights records of foreign regimes, such as Myanmar;³⁹ to police the practices of health maintenance organizations;⁴⁰ and to regulate the labeling and marketing of tobacco products, especially to minors.⁴¹ These questions might be narrow in a constitutional sense, but they are collectively quite important to the states' role in American government as centers of policymaking authority.

The same is largely true of dormant Commerce Clause cases, which present similar legal issues. As with preemption, dormant Commerce Clause cases generally ask whether various state laws shall be displaced by national interests in uniformity or efficiency. Instead of being trumped by a federal statute or regulation, however, state laws are invalid under the dormant Commerce Clause when they discriminate against or unduly burden interstate commerce. For instance, recent cases have addressed whether states can create an income tax preference for municipal bonds issued by the taxing state or its political subdivisions;⁴² whether local governments can create municipally-owned monopolies to process all solid

of California had upheld, against a preemption challenge from the automobile industry, a California law regulating the emission of greenhouse gases from motor vehicles).

³⁹ See *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Board of Trustees v. Mayor and City Council of Baltimore*, 562 A.2d 720 (Md. 1989).

⁴⁰ See *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004); *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002). See also Theodore W. Ruger, *The United States Supreme Court and Health Law: The Year in Review*, 32 J.L. MED. & ETHICS 528 (2004).

⁴¹ See *Rowe v. New Hampshire Motor Transport Ass'n*, 127 S. Ct. 3037 (2007) (order granting certiorari); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Cipollone v. Liggett Group*, 505 U.S. 504 (1992).

⁴² See *Department of Rev. of Ky. v. Davis*, 127 S. Ct. 2451 (2007) (order granting certiorari).

waste in a given community;⁴³ and whether states can impose income tax liabilities on out-of state businesses that derive profits from the taxing state but which have no physical presence there.⁴⁴

Preemption and dormant Commerce Clause cases therefore present a choice about the breadth of the states' policymaking autonomy. The more willing courts are to invalidate state and local laws on these grounds, the less breathing space state and local governments will enjoy to pursue their own initiatives. As Justice Breyer has suggested,

in today's world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional constitutional effort to trim Congress' commerce power at the edges, or to protect a State's treasury from a private damages action, but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.⁴⁵

A complete accounting of the Rehnquist Court's approach to federalism must therefore go beyond the high-profile decisions like *Lopez*, *Morrison*, and *Garrett*, which address the outermost margins of the national government's authority. It must also deal with the "ordinary diet" of inframarginal cases, where both the national government and the states possess the authority to legislate. That is, it

⁴³ See *United Haulers Assn., Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786 (2007).

⁴⁴ See *Tax Commissioner of W. Va. v. MBNA America Bank, N.A.*, 640 S.E.2d 226 (W. Va. 2006), *cert. denied*, 127 S. Ct. 2997 (2007).

⁴⁵ *Egelhoff v. Egelhoff*, 532 U.S. 141, 160–161 (2001) (Breyer, J., dissenting) (citations omitted).

must grapple with the Court's record in preemption and dormant Commerce Clause cases, the subject to which I now turn.

II. Empirical Analysis

Given its aggressive enforcement of the federalism-based limits on Congress's enumerated powers, one might reasonably have expected the Rehnquist Court to have approached the union-preserving side of federalism with a similar orientation. Indeed, because preemption and dormant Commerce Clause cases typically are not as salient as those involving the breadth of Congress's authority, they probably offered the Court even more political space for pursuing an agenda to expand state autonomy, as decisions in such a direction were unlikely to provoke much political resistance. But it did not happen. Whether we evaluate the Court's decisions qualitatively (in terms of their substantive legal content) or quantitatively (by counting the justices' respective votes for particular outcomes), we come to the same basic conclusion: There was no federalism offensive with respect to preemption or the dormant Commerce Clause.

A. Doctrine

Between October 1991, when Justice Thomas joined the Court, and September 2005, when Chief Justice Rehnquist passed away, the Supreme Court

handed down 76 full-dress opinions in cases involving the dormant Commerce Clause or the doctrine of preemption. In general terms, the Court left the doctrines surrounding these areas largely as it found them.⁴⁶ This is significant by itself, given the change the Court initiated with respect to the federalism-based constraints on Congress. More interesting still is that, to the extent the Rehnquist Court did alter the law governing preemption and the dormant Commerce Clause, it actually undermined state authority. Here, the Rehnquist Court sided with the forces for centralization.

Conditions certainly seemed ripe for the Court to press an agenda for change. Consider the dormant Commerce Clause. Two justices—Scalia and Thomas—openly called for the Court to abandon its enforcement of the Clause’s negative implications. Scalia stated that there is no “clear theoretical underpinning for judicial ‘enforcement’ of the Commerce Clause,” and that the Court’s “applications of the doctrine have, not to put too fine a point on the matter, made no sense.”⁴⁷ Likewise, Thomas wrote that “the underlying justifications for [the Court’s] involvement in the negative aspects of the Commerce Clause . . . are illusory,” and that the Court’s jurisprudence in the area “undermines the delicate balance in what we have termed ‘Our Federalism.’”⁴⁸ Thus, Scalia and Thomas offered not just two votes in favor of the states, but also fairly detailed historical and theoretical

⁴⁶ Section II.A borrows from a similar, somewhat dated discussion in [redacted to preserve anonymity].

⁴⁷ *Tyler Pipe Industries, Inc. v. Washington State Dep’t of Rev.*, 483 U.S. 232, 260 (Scalia, J., concurring in part and dissenting in part).

⁴⁸ *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 612 (1997) (Thomas, J., dissenting).

justifications for transforming the law surrounding the dormant Commerce Clause. This, in turn, would have given such changes a fair measure of intellectual and academic credibility.⁴⁹

Moreover, state governments brought cases to the Court that presented the justices clear opportunities to remake the law. On at least three occasions, states litigated cases expressly calling for the Court to discard broad swaths of its dormant Commerce Clause jurisprudence. For instance, in *Quill Corp. v. North Dakota*,⁵⁰ the State of North Dakota (joined by at least 29 other states as *amicus curiae*) asked the Court to overturn its 1967 decision, *National Bellas Hess, Inc. v. Department of Revenue*,⁵¹ which had held that states cannot require out-of-state sellers to collect use taxes on sales to the taxing state's residents if the seller has no physical presence in the taxing state.⁵² Changed circumstances arguably rendered the physical presence requirement obsolete, and the dramatic growth of the mail-order industry had increased the rule's financial burden on states in terms of lost tax revenue.⁵³ Still, in an 8–1 decision, the Court sustained *Bellas Hess*.⁵⁴ Conceding that the physical presence requirement was “artificial at its edges,” the Court reasoned that this “artificiality” was outweighed by the benefits of reduced litigation, settled expectations (which would “foster[] investment by businesses and

⁴⁹ *Cf. Whittington, supra* note 9, at 501 (discussing how “the intellectual context of the Rehnquist Court era help[ed] legitimate the Court's federalism offensive”).

⁵⁰ 504 U.S. 298 (1992).

⁵¹ 386 U.S. 753 (1967).

⁵² *Id.* at 758-60.

⁵³ *See Quill*, 504 U.S. at 303-04.

⁵⁴ *Id.* at 314-19.

individuals”), and respecting the “substantial reliance” on the rule, which “has become part of the basic framework of a sizeable industry.”⁵⁵ To the Court, these practical economic benefits counted for more than the states’ ability to close a large loophole in their sales tax structures.⁵⁶

In *Allied-Signal, Inc. v. Director, Division of Taxation*,⁵⁷ the State of New Jersey asked the Court to discard the centerpiece of its framework for analyzing state income taxes imposed on out-of-state businesses.⁵⁸ Under established precedent, a state could tax an apportioned share of an out-of-state taxpayer’s income so long as that income was earned as part of the taxpayer’s “unitary business” operating in the taxing state.⁵⁹ Conversely, a state could not tax income

⁵⁵ *Id.* at 315-17.

⁵⁶ Presently, the federal Internet Tax Nondiscrimination Act, Pub. L. No. 108-435, §§1101-04, 118 Stat. 2615 (2004), prohibits states from imposing any “multiple or discriminatory taxes on electronic commerce.” *Id.* §1101(a)(2). But requiring out-of-state sellers to collect use taxes on interstate sales would be neither a multiple nor a discriminatory tax, as it would merely extend the existing tax burden on in-state sales to all retailers, regardless of their physical location. See Walter Hellerstein, *Internet Tax Freedom Act Limits States’ Power to Tax Internet Access and Electronic Commerce*, 90 J. TAX’N 5 (1999). Thus, it is *Quill* that prevents states from being able to apply their sales and use taxes equally to purchases from in-state and out-of-state retailers. See Wade Anderson & Christine Mazingo, *Taxing Electronic Commerce*, 20 STATE TAX NOTES 521 (2000). A recent study estimated that the inability to tax Internet sales from out-of-state retailers with no physical presence in the taxing state will cost states roughly \$20 billion annually in foregone tax revenue by 2003. See David Brunori, *Mad on Main Street: Retailers and Internet taxation*, 19 STATE TAX NOTES 765 (2000).

⁵⁷ 504 U.S. 768 (1992).

⁵⁸ New Jersey made this argument as an alternative defense of the judgment below in its favor. Because the state’s argument went well beyond the point on which the Court had originally granted certiorari, the justices ordered the case re-argued, and the parties filed supplemental briefs on the new, much broader question. See *Allied-Signal, Inc. v. Director, Div. of Taxation*, 503 U.S. 928 (1992).

⁵⁹ *Allied-Signal*, 504 U.S. at 772.

derived from discrete business activities that were unrelated to the taxpayer's activities in the state.⁶⁰ New Jersey argued that this "unitary business principle" was an unjustified restraint on the states' taxing powers and asked the Court to hold that all income earned by an out-of-state business could be taxed on an apportioned basis by a state in which the taxpayer did business.⁶¹ But, as in *Quill*, the Court adhered to its dormant Commerce Clause precedent, reasoning that New Jersey had failed to demonstrate that the unitary business principle was either unsound in principle or unworkable in practice.⁶²

Finally, the State of Alabama, in defending its discriminatory capital stock tax, argued in *South Central Bell Telephone, Inc. v. Alabama*⁶³ that the Court's dormant Commerce Clause precedent represented "an unconstitutional assumption of powers by the Courts of the United States"⁶⁴ and "should be abandoned."⁶⁵ With respect to the federal-state balance, the state contended that "the Court's negative Commerce Clause jurisprudence simply does not comport with the central axiom underlying our federal system" that "the States possess sovereignty concurrent with that of the Federal Government, subject only to the limitations imposed by the

⁶⁰ *Id.* at 773.

⁶¹ *See id.* at 777, 784.

⁶² *Id.* at 777–88.

⁶³ *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999).

⁶⁴ Brief of Respondent at 7, *South Central Bell Telephone Co. v. Alabama* (No. 97–2045) (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (in turn quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))).

⁶⁵ *Id.* at 28.

Supremacy Clause.”⁶⁶ Because the State had not raised this argument until it filed its brief on the merits, the Court treated it as waived and did not address it.⁶⁷ But Justice O’Connor wrote a separate, two-sentence concurring opinion specifically to note that “the State does nothing that would persuade me to reconsider or abandon our well-established body of negative Commerce Clause jurisprudence.”⁶⁸

Notably, the Rehnquist Court did not simply decline these invitations to broaden state regulatory autonomy. Instead, it effectively overruled precedent so as to strengthen the federalism-based restraints on state authority. Consider the Court’s 2005 decision in *Granholm v. Heald*.⁶⁹ At issue was whether states could permit in-state wineries to ship wine to consumers within their borders while prohibiting out-of-state wineries from doing the same, at least on equal terms.⁷⁰ Several Supreme Court decisions handed down nearly contemporaneous with the adoption of the Twenty-first Amendment seemed to hold that such state regulation was constitutional, protected by the Twenty-first Amendment from dormant Commerce Clause scrutiny. For instance, in *State Board of Equalization v. Young’s Market Co.*,⁷¹ the Court upheld a \$500 license fee imposed by California on the importation of beer into the state, holding that the Twenty-first Amendment “confer[s] upon the State the power to forbid all importations which do not comply

⁶⁶ *Id.* at 42 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

⁶⁷ *South Central Bell*, 526 U.S. at 171.

⁶⁸ *Id.* (O’Connor, J., concurring).

⁶⁹ 544 U.S. 460 (2005).

⁷⁰ *Id.* at 465.

⁷¹ 299 U.S. 59 (1936).

with the conditions it prescribes.”⁷² The idea that the states must permit “imported liquors to compete with domestic on equal terms,” said the *Young’s Market* Court, “would involve not a construction of the amendment, but a rewriting of it.”⁷³ In *Granholm*, however, the Court essentially discarded *Young’s Market* and several similar decisions, concluding that the dormant Commerce Clause prohibits any such discrimination in the interstate liquor market.⁷⁴

Or consider the broad conception of “facial discrimination” embraced by the Court in *C & A Carbone, Inc. v. Clarkstown*,⁷⁵ which Justice Souter characterized in dissent as “greatly extending the Clause’s dormant reach.”⁷⁶ At issue was a “flow control” ordinance enacted by the Town of Clarkstown, New York, which required all solid wastes generated or brought into the municipality to be processed at a designated transfer station in the city.⁷⁷ The purpose was to guarantee sufficient revenue to pay for the facility’s construction, a facility that would ultimately be owned by the city.⁷⁸ The ordinance did not favor local businesses as a class over out-of-state or nonlocal competitors; instead, it granted a monopoly in waste processing

⁷² *Id.* at 62.

⁷³ *Id.* See also *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938) (holding that a state law that “clearly discriminates in favor of liquor processed within the State as against liquor completely processed elsewhere” was constitutional under the holding of *Young’s Market*); *Indianapolis Brewing Co. v. Liquor Control Comm’n*, 305 U.S. 391, 394 (1939) (stating that “the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause,” including regulation that discriminates against imported liquors).

⁷⁴ *Granholm*, 544 U.S. at 493.

⁷⁵ 511 U.S. 383 (1994).

⁷⁶ *Id.* at 411 (Souter, J., dissenting).

⁷⁷ *Id.* at 386.

⁷⁸ *Id.* at 387, 393.

to a specific local transfer station.⁷⁹ The Court nevertheless held that the ordinance facially discriminated against interstate commerce because the favored facility was a local one.⁸⁰

Other Rehnquist Court dormant Commerce Clause decisions are to the same effect. In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,⁸¹ the Court extended the scope of the clause's scrutiny to include the state regulation of nonprofit organizations, striking down a Maine property tax provision that disadvantaged charitable institutions predominantly serving out-of-state residents.⁸² In *West Lynn Creamery, Inc. v. Healy*,⁸³ the Court held that a Massachusetts combined tax-and-subsidy program designed to aid the state's dairy industry was impermissible, even though both the tax and the subsidy, had they been enacted separately, would likely have been considered constitutional.⁸⁴ And in *American Trucking Associations, Inc. v. Scheiner*,⁸⁵ the Court overruled a long line of precedent to hold that a flat axle tax imposed on truckers for the privilege of using the state's highways was unconstitutional.⁸⁶

⁷⁹ See *id.* at 403 (Souter, J., dissenting).

⁸⁰ *Id.* at 391.

⁸¹ 520 U.S. 564 (1997).

⁸² *Id.* at 583-88, 595.

⁸³ 512 U.S. 186 (1994).

⁸⁴ *Id.* at 194-95, 199.

⁸⁵ 483 U.S. 266 (1987).

⁸⁶ *Id.* at 292-97 (overruling *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950), *Aero Mayflower Transit Corp. v. Board of Railroad Comm'rs*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 295 U.S. 285 (1935)).

The general theme of the Rehnquist Court's preemption decisions was similar. As with the dormant Commerce Clause, the Court did nothing doctrinally to provide greater protection for state autonomy. This may have been most surprising with respect to so-called "obstacle" preemption. Even where federal and state law might be construed as complementary, and where Congress has been silent with respect to its intent to displace state regulation, the doctrine of obstacle preemption empowers courts to infer from a federal statute's implicit objectives or overall structure an unstated congressional intent to displace state law. This gives the federal judiciary fairly broad discretion to nullify exercises of traditional state police powers.⁸⁷ As a result, it has been the subject of substantial criticism, both for its tenuous theoretical foundation⁸⁸ and for its failure to afford sufficient respect for state sovereignty interests.⁸⁹ Yet the Rehnquist Court evidenced few misgivings in using obstacle preemption to set aside a number of state laws.⁹⁰

⁸⁷ As Justice Kennedy observed in *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992), "[a] free wheeling judicial inquiry into whether a state statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law." *Id.* at 111 (Kennedy, J., concurring in part and concurring in judgment).

⁸⁸ See, e.g., Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 265-90 (2000) (arguing that there is no constitutional basis for "obstacle" preemption); Paul Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 71 (1988) ("obstacle" preemption doctrine "forces the courts either to search quixotically for the 'spirit' of a statute, or to choose between two doctrinally deficient theories of preemption").

⁸⁹ See, e.g., S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 687 (1991) ("Federal preemption decisions impede the ability of those governmental bodies that are structured to be most responsive to citizens' public values and ideas—state and local governments—and have concomitantly undermined citizens' rights to participate directly in governing themselves.");

As with the dormant Commerce Clause, the few alterations that the Rehnquist Court made in the law governing preemption tended, at least marginally, to compromise state autonomy. Consider its decisions concerning the impact of a federal statute's express preemption clause on implied preemption analysis. In the 1992 case of *Cipollone v. Liggett Group, Inc.*,⁹¹ which addressed whether the federal statutes governing cigarette labeling and advertising preempt state common-law tort claims, the Court indicated that the existence of an express preemption provision foreclosed implied preemption.⁹² But only three years later, in *Freightliner Corp. v. Myrick*,⁹³ the Court backtracked, stating that *Cipollone* established no "categorical rule precluding the existence of express and implied preemption."⁹⁴ Rather, *Cipollone* "[a]t best . . . supports an inference that an express pre-emption clause forecloses implied preemption."⁹⁵ In *Geier v. American Honda Motor Corp.*,⁹⁶ the Court discarded this remaining "inference" left by *Myrick*, holding that the existence of an "express pre-emption provision imposes no unusual, 'special

Wolfson, *supra* note 88, at 114 ("The current jurisprudence of preemption . . . fails to protect the political and judicial safeguards of federalism.").

⁹⁰ See *Egelhoff v. Egelhoff ex rel. Breiner*, 121 S. Ct. 1322 (2001); *Buckman Co. v. Plaintiffs' Legal Committee*, 121 S. Ct. 1012 (2001); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Geier v. American Honda Motor Corp.*, 529 U.S. 861 (2000); *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000); *United States v. Locke*, 529 U.S. 89 (2000).

⁹¹ 505 U.S. 504 (1992).

⁹² *Id.*, at 517 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978), and *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282 (1987) (opinion of Marshall, J.)).

⁹³ 514 U.S. 280 (1995).

⁹⁴ *Id.* at 288.

⁹⁵ *Id.* at 289.

⁹⁶ 529 U.S. 861 (2000).

burden' against pre-emption,"⁹⁷ and that "ordinary pre-emption principles" apply.⁹⁸

As the Court subsequently reiterated in *Buckman Co. v. Plaintiffs' Legal*

Committee,⁹⁹ "[t]o the extent respondent posits that anything other than our ordinary pre-emption principles apply" because Congress included an express preemption provision, "that contention must fail."¹⁰⁰

The Rehnquist Court also narrowed the traditional presumption against preemption, or at least clarified the presumption's contours in a way that makes preemption more likely. Since at least its 1947 decision in *Rice v. Santa Fe Elevator Corp.*,¹⁰¹ the Court has frequently reiterated that there is a "presumption against finding pre-emption of state law in areas traditionally regulated by the States," such that the Court will assume "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."¹⁰² The Rehnquist Court continued to endorse this starting point for

⁹⁷ *Id.* at 873.

⁹⁸ *Id.* at 874.

⁹⁹ 531 U.S. 341 (2001).

¹⁰⁰ *Id.* at 352. In *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), Justice O'Connor wrote for the Court that "an express definition of the pre-emptive reach of a statute . . . supports a reasonable inference . . . that Congress did not intend to pre-empt other matters." *Id.* at 541 (quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995)). (Justice O'Connor nonetheless went on to find that the state law was preempted.) This statement seems to contradict the quoted language from *Buckman*, rendered only four months earlier, which Justice O'Connor herself joined. The precise state of the law on this point may therefore be unclear. At a minimum, the Court has discarded the reasoning of *Cipollone*, and the more considered discussions of the point in *Geier* and *Buckman* seem of greater import than the dictum in *Lorillard*.

¹⁰¹ 331 U.S. 218 (1947).

¹⁰² *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) (quoting *Rice*, 331 U.S. at 230).

preemption analysis, invoking it on several occasions.¹⁰³ But it also emphasized the presumption's negative implication: Where the subject is one that the states have *not* traditionally regulated, the presumption does not apply. For instance, *United States v. Locke*¹⁰⁴ involved regulations imposed by the State of Washington on oil tankers traveling in Puget Sound.¹⁰⁵ Concluding that the state regulations were preempted by the federal Ports and Waterways Safety Act, the Court underscored that "an 'assumption' of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence."¹⁰⁶ The Court subsequently held in *Buckman* that state tort actions based on the defendant's fraudulent disclosures to the Food and Drug Administration were preempted by the Food Drug and Cosmetic Act.¹⁰⁷ Even though the Court in several previous preemption decisions had recognized that states have "great latitude" to "exercise[] their police powers to protect the health and safety of their citizens,"¹⁰⁸ the Court emphasized in *Buckman* that "[p]olicing fraud against federal agencies is hardly 'a field which the States have traditionally occupied.'"¹⁰⁹ Consequently, "no presumption against pre-emption obtain[ed]."¹¹⁰

¹⁰³ See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992).

¹⁰⁴ 529 U.S. 89 (2000).

¹⁰⁵ See *id.* at 97, 117–19.

¹⁰⁶ *Id.* at 90.

¹⁰⁷ *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001).

¹⁰⁸ *Medtronic v. Lohr*, 518 U.S. 470, 475 (1996) (internal quotation marks omitted).

¹⁰⁹ *Buckman*, 531 U.S. at 347 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¹¹⁰ *Id.*

To be sure, there were many cases in which the Rehnquist Court upheld state laws against preemption or dormant Commerce Clause challenges.¹¹¹ Still, it is clear that, taken as a whole, the Rehnquist Court's decisions in these areas did not alter constitutional doctrine so as to provide the states with greater autonomy to pursue their own policy initiatives. Rather, to the extent the Court disrupted prevailing understandings, it did so in a manner that valued national uniformity and economic efficiency over the states' interests in preserving their policymaking authority.

¹¹¹ *See, e.g.*, *Mid-Con Freight Systems, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 440 (2005); *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429 (2005); *Bates v. Dow Agrosiences L.L.C.*, 544 U.S. 431 (2005); *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004); *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003); *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *City of Columbus v. Ours Garage & Wrecking Serv., Inc.*, 536 U.S. 424 (2002); *Johnson v. Fankell*, 520 U.S. 911 (1997); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997); *Yamaha Motor Corp., N.A., U.S.A. v. Calhoun*, 516 U.S. 199 (1996); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995) (upholding Oklahoma's unapportioned sales tax imposed on the purchase of bus tickets for interstate travel); *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994) (rejecting dormant Commerce Clause challenge to California's worldwide combined income reporting system for affiliated corporations); *Nw. Airlines, Inc. v. County of Kent*, 510 U.S. 355 (1994); *Dep't of Revenue of Ore. v. ACF Indus.*, 510 U.S. 332 (1994); *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358 (1991) (sustaining Michigan's apportioned value added tax, even as applied to value added through manufacturing activities that occurred outside the state); *Amerada Hess Corp. v. Director, Div. of Taxation*, 490 U.S. 66 (1989) (upholding New Jersey's denial of deduction for federal windfall profits tax imposed on oil producers, even though taxpayers did not produce oil in New Jersey); *Goldberg v. Sweet*, 488 U.S. 252 (1989) (sustaining Illinois' unapportioned gross receipts tax on all telecommunications that were billed to a service address in Illinois and were initiated or terminated in the state).

B. Voting records

Another means of evaluating the Rehnquist Court's decisions is through a quantitative analysis of the justices' voting records. Though numerical tallies of the justices' votes in favor of certain outcomes can be a rather crude measure of the Court's work,¹¹² they nonetheless can tell us a great deal about patterns of judicial behavior. After all, the outcome a justice supports in a given case is often the single most revealing piece of information about his or her views. Moreover, studying votes allows us to record the justices' positions quite objectively, reducing the potential for bias in our data collection. While outcome-based analysis cannot answer all of the interesting questions we have about judicial decision-making,¹¹³ it is an important part of the mix of tools that can shed light on the Court's behavior.¹¹⁴

To conduct such an analysis here, I constructed a unique data set of federalism decisions handed down by the Rehnquist Court.¹¹⁵ It includes every federalism decision in which the Court issued a signed opinion where the question

¹¹² See Frank B. Cross, Thomas A. Smith & Antonio Tomarchio, *The Reagan Revolution in the Network of Law* 7 (Soc. Sci. Research Network, Working Paper Series, 2006), available at <http://ssrn.com/abstract=909217>.

¹¹³ See Barry Friedman, *Taking Law Seriously*, 4 PERSPECTIVES ON POLITICS 261, 265–266 (2006).

¹¹⁴ See Howard Gillman, *What's Law Got to Do with It? Judicial Behaviorists Test the "Legal Model" of Judicial Decisionmaking*, 26 L. & SOC. INQUIRY 465, 494–495 (2001) (describing the importance of such studies, even if they should be supplemented with historical and interpretivist inquiries).

¹¹⁵ The data set (in Microsoft Excel format) and accompanying codebook (a Microsoft Word file) are freely available for download at <http://claranet.scu.edu/coursepage.asp?cid=2086&page=01>.

presented fell into one of two categories.¹¹⁶ The first category consists of those decisions involving a structural constraint on the powers of the national government (*i.e.*, the Commerce Clause, the Tenth Amendment, the Eleventh Amendment, or Section 5 of the Fourteenth Amendment). The second category consists of decisions involving the dormant Commerce Clause or the doctrine of preemption.¹¹⁷ The purpose of this categorization was to gain traction on the question whether the justices' commitment to state autonomy differed depending on whether the federalism-based limit constrained Congress or the states. For each case, I coded

¹¹⁶ Every decision included in the study is listed in this article's appendix *infra*.

¹¹⁷ The cases included in the study were identified in the following manner:

* First, I conducted searches in Westlaw's Supreme Court database (SCT) searching for references to one of the relevant constitutional provisions or doctrines in the headnotes of opinions. Thus, I ran queries such as "he("eleventh amendment")," "he(preempt!)," and "he ("commerce clause")" for each of the relevant provisions or doctrines.

* Second, I read the text of each opinion generated by these queries to determine whether the Court's *holding*—its ultimate legal judgment in the case—addressed the provision or doctrine queried. In many cases it did not, as the opinion simply referred to the relevant doctrine for other reasons, such as to draw an analogy. Such cases were excluded from the universe.

* Third, my research assistant conducted searches in the Lexis-Nexis Supreme Court database (U.S. Supreme Court Cases, Lawyers' Edition) searching for references to one of the relevant constitutional provisions or doctrines in the full text of opinions. For instance, he ran the queries "(eleventh OR 11th) w/3 amendment" and "(tenth OR 10th) w/3 amendment."

* Fourth, my research assistant then read these opinions and excluded those whose holdings were clearly unrelated to the queried constitutional provisions or doctrines, erring on the side of inclusion.

* Fifth, after my research assistant compiled lists of decisions involving the various provisions and doctrines, I compared these lists to those that I had generated using Westlaw. I read all of the cases on my research assistant's lists that did not appear on my lists.

* Finally, I added to the study universe those cases discovered by my research assistant (which I had not found in Westlaw) where the Court's holding directly addressed the queried provision or doctrine.

the justices' votes as either favoring or disfavoring the outcome that enhanced state autonomy.¹¹⁸

Because there is no neutral baseline against which to measure the justices' voting records, the study compares the justices' records to each other. That is, it captures the justices' *relative* commitment to state autonomy. Although imperfect in some respects, such comparative analysis can nonetheless be telling, as I believe the

¹¹⁸ In most cases, such coding decisions were straightforward. Nevertheless, three issues are worth mentioning. First, several cases presented two separate federalism issues that addressed distinct constitutional provisions or doctrines. For example, in *Morrison*, the Court addressed two questions: (a) whether the civil remedy provision of the Violence Against Women Act was within Congress's commerce power, and (b) whether it was valid legislation under Section Five of the Fourteenth Amendment. *United States v. Morrison*, 529 U.S. 598, 619 (2000). In cases like this, I treated the justices' positions on the two issues as two distinct votes and coded them accordingly.

Second, some cases presented multiple claims raised under the same constitutional provision or doctrine. In several preemption cases, for example, the Court addressed whether a variety of state law actions were preempted by federal law. In these cases, I coded a justice's split vote—typically, a vote that one claim was preempted while another one was not—as half of a vote for each outcome. This follows the protocol of another recent empirical study of the Rehnquist Court's voting patterns in preemption cases. *See Greve & Klick, supra* note 5, at 94. This is essentially an arbitrary judgment, but treating each claim within a preemption decision as a separate case risked distorting the results through an overpopulation of preemption votes.

Finally, some cases defied simple classification as to the constitutional provision at issue. For instance, in *Board of Trustees v. Garrett*, the Court held that Congress had not validly abrogated the states' sovereign immunity from private suits for damages because Title I of the ADA was not valid Section Five legislation. *Bd. of Trs. of Univ. of Ala. V. Garrett*, 531 U.S. 356, 374 (2001). One might deem this either an Eleventh Amendment decision or a Section Five decision, but including it in both would effectively count a single vote twice. Thus, I simply assigned these cases to one category or the other. In this instance, I classified *Garrett* and similar decisions as Section Five cases. Such judgments about categorization are only matters of form, as the study ultimately combines Eleventh Amendment and Section Five cases under the broader heading of federalism decisions involving the limits on the national government.

results below illustrate. Further, the study presents the data for two distinct (but overlapping) time frames. The first is from October 1991, when Justice Thomas joined the Court, to September 2005, when Chief Justice Rehnquist passed away. This period covers the fifteen terms in which the five justices widely recognized as responsible for the Rehnquist Court's federalism revival—Rehnquist, O'Connor, Scalia, Kennedy, and Thomas—served together. The second time frame is from October 1994, when Justice Breyer joined the Court, to September 2005. I present the data from this period separately because the same nine justices served together for these eleven terms, allowing us to compare the justices' records to one another in precisely the same, relatively large universe of decisions.

1. October 1991 to September 2005

Over these fifteen terms, the Court handed down 103 signed opinions on the merits in federalism cases (as defined above), five of which raised multiple federalism issues (and thus yielded multiple votes per justice). Of these, 27 cases involved the constitutional limits on Congress's powers (yielding 29 distinct votes). And the justices' voting records in these cases are much as one would have expected: Rehnquist, O'Connor, Scalia, Kennedy, and Thomas typically voted to invalidate the assertion of federal authority at issue, while the other four justices typically dissented. This pattern is especially clear in the Court's 20 non-unanimous votes, as Table 1 demonstrates. (These differences, in all decisions and in non-unanimous

decisions, are statistically significant at the $P=.01$ level.¹¹⁹) The justices who led the federalism offensive were remarkably unified in their drive to reinvigorate the structural constraints on Congress, and the Court almost always split five-to-four.

¹¹⁹ One can demonstrate that the differences are statistically significant—that is, likely the result of genuine differences in the justices' behavior rather than a product of the random mix of cases that happened to come before the Court—through a simple difference in proportions Z-test. See DAVID S. MOORE, *THE BASIC PRACTICE OF STATISTICS* 504–07, 521–24 (4th ed. 2007). The standard deviation (SD) of the differences equals the root of $((P_1 \times (1 - P_1)) \div N_1) + ((P_2 \times (1 - P_2)) \div N_2)$, where P_1 is the first proportion, P_2 is the second proportion, N_1 is the number of trials (or votes) out of which P_1 is a proportion, and N_2 is the number of trials (or votes) out of which P_2 is a proportion. The Z-score for the difference equals $(P_1 - P_2) \div \text{SD}$. At the $P=.05$ level of confidence (where there is a 95% chance that the difference in the proportions is not the result of random chance), $Z=1.96$. Thus, a Z-score of 1.96 or higher means statistical significance at the level of $P=.05$. At the $P=.01$ level of confidence (where there is a 99% chance that the difference in the proportions is not the result of random chance), $Z=2.58$. Thus, a Z-score of 2.58 or higher means statistical significance at the $P=.01$ level.

In Table 1, the Z-score for the difference in all decisions (69.7% versus 9.6%) is 12.763. The Z-score for the difference in non-unanimous decisions (91.0% versus 6.3%) is 21.466. Because both of these Z-scores exceed 2.58, the differences are statistically significant at the $P=.01$ level.

Table 1

Proportion of votes in favor of result augmenting state autonomy in cases involving the federalism-based limits on the national government, October 1991 to June 2005

	All decisions (N=29)	Non-unanimous decisions (N=20)
Rehnquist, O'Connor, Scalia, Kennedy, and Thomas combined	69.7% N=145	91.0% N=100
Remaining four justices combined	9.6% N=114	6.3% N=80

Over the same fifteen terms, the Court handed down 76 preemption and dormant Commerce Clause decisions (yielding 79 distinct votes), which reveal a very different picture, at least with respect to state autonomy. As Table 2 illustrates, Rehnquist, O'Connor, Scalia, Kennedy, and Thomas were much more ambivalent about state autonomy in this context. Indeed, as a group they were substantially *less* likely than their four remaining colleagues to vote for the result that favored state autonomy. In non-unanimous preemption and dormant Commerce Clause

cases, they were roughly 15 percent more apt to vote to invalidate the state law at issue, a difference that is statistically significant at the $P=.01$ level.¹²⁰

Table 2

Proportion of votes in favor of result augmenting state autonomy in cases involving preemption and the dormant Commerce Clause, October 1991 to June 2005

	All decisions (N=79)	Non-unanimous decisions (N=43)
Rehnquist, O'Connor, Scalia, Kennedy, and Thomas combined	45.2% N=385	41.4% N=214
Remaining four justices combined	52.5% N=314	56.1% N=171

Parsing the data further to examine the individual justices' voting records in preemption and dormant Commerce Clause cases gives us some additional details about how differently the Rehnquist Court approached the two sides of federalism. As Table 3 shows, the four justices who most frequently voted against the outcome

¹²⁰ The Z-score for the difference in voting records in non-unanimous preemption and dormant Commerce Clause decisions is 2.8974. The Z-score for the difference in voting records in all preemption and dormant Commerce Clause decisions is 1.9254, which is just shy of statistical significance at the $P=.05$ level.

favoring state autonomy in preemption and dormant Commerce Clause cases were all members of the “federalist five”: O’Connor, Kennedy, Scalia, and Thomas.

Table 3

Proportion of votes in favor of result augmenting state autonomy in cases involving preemption and the dormant Commerce Clause, October 1991 to June 2005 (minimum of participating in 30 decisions)

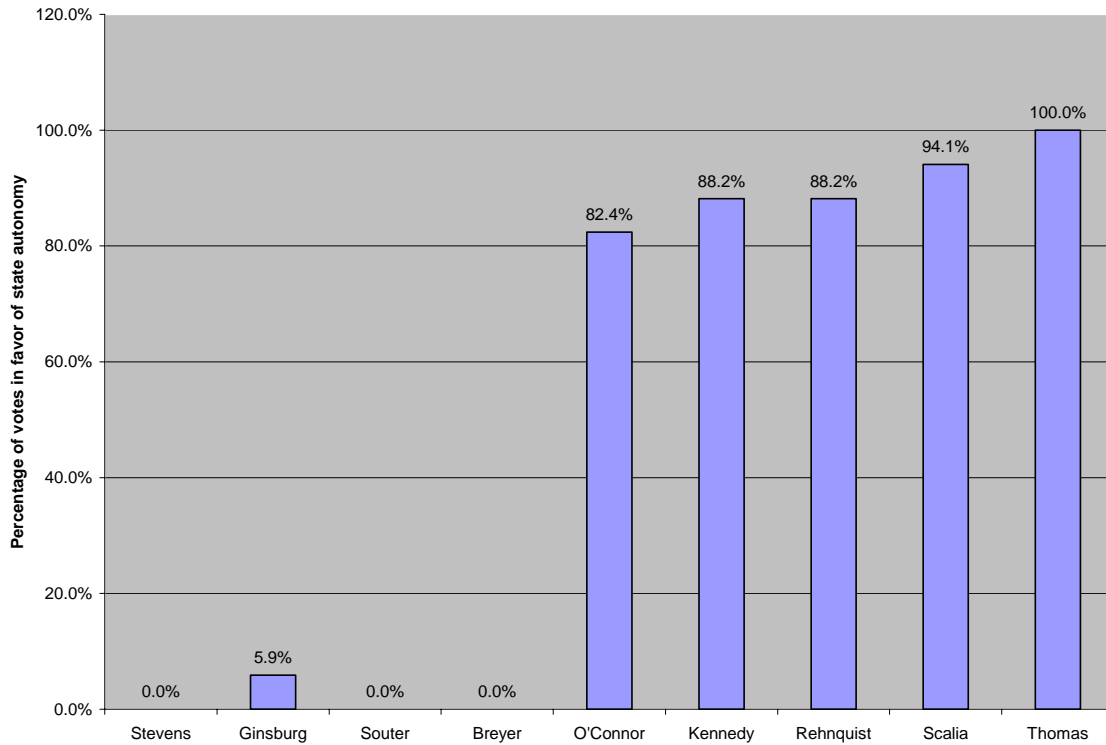
	All decisions	Non-unanimous decisions
O'Connor	39.2% N=79	31.4% N=43
Kennedy	39.9% N=79	32.6% N=43
Scalia	41.9% N=74	34.5% N=42
Thomas	49.3% N=76	47.7% N=43
Breyer	49.1% N=53	52.1% N=24
Souter	51.3% N=78	53.6% N=42
Stevens	51.9% N=79	54.7% N=43
Rehnquist	55.8% N=78	60.5% N=43
Ginsburg	55.5% N=64	63.3% N=30

2. October 1994 to September 2005

Over these eleven terms, during which the Court's personnel remained unchanged, the Court handed down 24 decisions involving the limits on Congress's enumerated powers. And again, Rehnquist, O'Connor, Scalia, Kennedy, and Thomas typically voted to invalidate the assertion of federal authority at issue, while Stevens, Souter, Ginsburg, and Breyer typically dissented. If we limit our review to the 17 non-unanimous votes (which are all that really matter in measuring the justices' voting records in relation to each other), the polarization of the Court is fairly dramatic. As Figure 1 shows, the justices who led the federalism offensive were remarkably unified, and the Court almost always split five-to-four.

Figure 1

Proportion of votes in favor of result augmenting state autonomy in federalism cases addressing the limits on Congress—non-unanimous decisions, October 1994 to June 2005 (N=17)

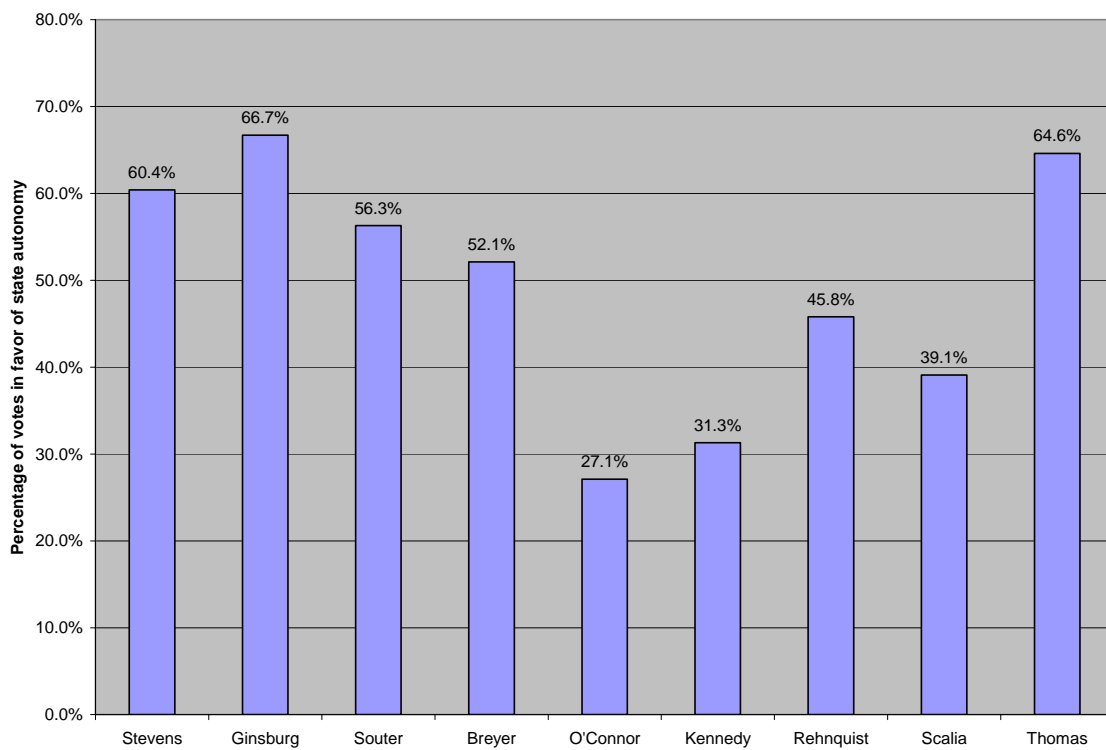


Over the same time period, the Court decided 51 cases involving preemption and the dormant Commerce Clause, yielding 53 distinct votes. In these decisions, Rehnquist, O'Connor, Scalia, Kennedy, and Thomas were much less unified. What is more, as a group they were less likely than their colleagues to vote for the outcome that enhanced state policymaking authority, a result that is fairly clear when we isolate the Court's non-unanimous decisions. Indeed, as Figure 2 illustrates, in the 24 votes between October 1994 and June 2005 in which the justices disagreed over a

preemption or dormant Commerce Clause dispute, O'Connor, Kennedy, Scalia, and Rehnquist were the four justices most likely to invalidate the state law in question.

Figure 2

Proportion of votes in favor of result augmenting state autonomy in federalism cases addressing the limits on state governments—non-unanimous decisions, October 1994 to June 2005 (N=24)



III. Discussion

As the study demonstrates, there were two very different sides to the Rehnquist Court's federalism project. Rehnquist, O'Connor, Scalia, Kennedy, and Thomas were remarkably united in reinvigorating the structural constraints on Congress's legislative authority, extending their push to limit the national government's enumerated powers across a number of doctrinal fronts. But these justices charted a very different course with respect to state autonomy in preemption and the dormant Commerce Clause cases, where they tended to support outcomes that restricted the states' capacity to pursue their own policy agendas. Why would a Court so dedicated to state autonomy in one context be apparently so indifferent to it in another? What might account for these sharp differences in the two categories of cases, at least along the dimension of state policymaking authority?

Of course, there are several possible explanations, and my goal here is not to offer a fully developed account of the Rehnquist Court's federalism jurisprudence. But the discussion that follows aims to make two points important to that inquiry. First, explanations of the Supreme Court's behavior cannot be purely legal, but must also take cognizance of the political and social environment in which the Court operates. As history well documents, "the Court's constitutional interpretations have always been influenced by the social and political contexts of the times in

which they were rendered.”¹²¹ Thus, accounts of the Court’s decision-making must be attentive to the Court’s institutional place, and particularly the various mechanisms by which the larger political system shapes the Court’s actions.

Second, given the institutional arrangements of American government, it should be unsurprising to find the political values of the ascendant political coalition reflected in the Court’s decisions. And if we examine the priorities of the political movement that gave rise to the Rehnquist Court—namely, the modern Republican Party—we tend to see the values expressed in the Court’s federalism decisions. The modern GOP has generally supported the devolution of power to state and local governments, at least in the abstract, and it has specifically advocated the judicial enforcement of the limits on Congress’s enumerated powers. But the GOP has never embraced a broader commitment to robust state autonomy as a matter of constitutional principle. Most important for present purposes, Republicans have repeatedly prioritized the substantive goal of reducing economic regulation over the more procedural goal of enhancing state autonomy. The Rehnquist Court’s federalism decisions reflected those values. They nicely translated this mix of political priorities—the promotion of state sovereignty, but not at the expense of increasing the stringency of regulation on private businesses—into constitutional doctrine.

¹²¹ MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 449 (2004).

A. The Supreme Court and American Politics

Trying to account for Supreme Court decision-making is a tricky business, and it is important to be clear about what we seek to explain. If we are interested in the justices' conscious intentions, the conventional sources of constitutional law—the text, structure, history, tradition, and precedent—almost certainly have a significant impact. It defies logic to think that the Court's elaborately reasoned opinions, and the carefully crafted arguments that the litigants present in similar terms, are purely a sham. By all available accounts, the justices earnestly believe that they are constrained by the law—at least to some degree, at least on most occasions.¹²² Of course, there remains a wide field of discretion, which the justices readily acknowledge; law, particularly at the Supreme Court, does not operate as a straitjacket. Still, it seems plain that the justices largely pursue their sincere understandings of what the Constitution requires.

¹²² For instance, justices have routinely stated, both in their opinions and outside the Court, that the law forced them to reach results that produced policy consequences that they disdained. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting); *Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (O'Connor, J., dissenting); Matt Labash, *Evicting David Souter*, WEEKLY STANDARD, Feb. 13, 2006 (reporting on a speech given by Justice Stevens in which Stevens stated that, in both *Raich* and *Kelo v. New London*, 545 U.S. 469 (2005)—two majority opinions that Stevens himself authored—"the law compelled a result I would have opposed if I were a legislator"). Of course, the justices' beliefs that their actions were purely a product of what the law dictated is probably naïve, as human beings generally have little sense of what influences their choices and behavior. *See* notes ___–___ *infra* and accompanying text. But my point here is simply that we have no reason to believe that these expressions are cynical or insincere.

But the justices' subjective motivations can only take us so far in explaining the Court's decisions. Human beings are often, and perhaps mostly, unaware of why they hold particular beliefs or choose certain courses of action.¹²³ We feel ourselves thinking, preferring, and choosing, but our subjective experiences are largely misleading.¹²⁴ Much of our behavior is determined by unfelt features of our minds—motives, biases, knowledge structures, and the like—that work automatically, outside our fields of cognition.¹²⁵ And these aspects of our interiors often render us quite susceptible to the external influence of social situations, forces much more powerful than we generally appreciate.¹²⁶ More than we realize, our experience of conscious will is often an illusion.¹²⁷ As Jon Hanson and David Yosifon have explained, “[t]hough we perceive will and behave and experience ourselves ‘as if’ our will were controlling our behavior, and though we project will onto the behavior of

¹²³ See Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 22 n.69 (2004) (human beings tend “to ‘see,’ and to attribute a powerful causal role to certain salient features of our interior lives that actually wield little or no causal influence over our behavior, while simultaneously failing to see those features of our interiors that are in fact highly influential”).

¹²⁴ See *id.* at 25–34.

¹²⁵ See generally *id.* at 34–133.

¹²⁶ See, e.g., SUSAN T. FISKE, SOCIAL BEINGS: A CORE MOTIVES APPROACH TO SOCIAL PSYCHOLOGY 7 (2004) (“Social behavior is, to a larger extent than people commonly realize, a response to people’s social situation, not a function of individual personality.”); PHILIP ZIMBARDO, THE LUCIFER EFFECT 8 (2007) (“Most of us have a tendency both to overestimate the importance of dispositional qualities and to underestimate the importance of situational qualities when trying to understand the causes of other people’s behavior.”); Hanson & Yosifon, *supra* note 123, at 22 n.69 (“We are moved far more by forces that we do not appreciate than we realize and far less by forces to which we attribute behavior than we realize.”).

¹²⁷ See generally DANIEL M. WEGNER, THE ILLUSION OF THE CONSCIOUS WILL (1992). See also Hanson & Yosifon, *supra* note 123, at 124–33.

others, these intuitive conceptions of the will are fundamentally unreliable indicators of both the reality of our will and the source of our behavior.”¹²⁸

Thus, even if the justices subjectively experience their decision-making as an attempt to reach the best reading of the Constitution, their own perceptions generally misapprehend what actually determines their behavior. The justices themselves can see only a part of what moves them. Hence, no matter what they write in their opinions, or how much they might protest to the contrary,¹²⁹ there is much more to their choices than the objective interpretation of law. Forces external to the law and outside the justices’ cognition influence their attraction to particular constitutional theories, frame their readings of history and tradition, and shade their interpretations of precedent.

Furthermore, even if we assumed that the justices did no more than interpret and apply the law—acting as umpires calling balls and strikes, in Chief Justice Roberts’ famous analogy¹³⁰—the Court’s decisions will inevitably depend on the

¹²⁸ Hanson & Yosifon, *supra* note 123, at 131.

¹²⁹ See, e.g., *United States v. Butler*, 297 U.S. 1, 62 (1936) (“the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former”); Linda Greenhouse, *Another Kind of Bitter Split*, N.Y. TIMES, Dec. 14, 2000, at A1 (reporting that, the day after the Court handed down *Bush v. Gore*, Justice Thomas stated: “I plead with you that, whatever you do, don’t try to apply the rules of the political world to this institution; they do not apply,” and that “[t]he last political act we engage in is confirmation.”).

¹³⁰ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, nominee to be Chief Justice of the United States) (“Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody

composition of the Court's personnel. To state the obvious, different justices, of equal intelligence and skill, interpreting the same legal texts, often reach quite different results. This is because the conventional sources of constitutional law are generally indeterminate; they rarely compel a particular result, especially in cases that reach the Supreme Court.¹³¹ Consequently, a justice's constitutional ideology, worldview, and personal experiences affect the way she approaches the project of constitutional interpretation.¹³² Thus, an account of the Court's decisions also needs to address the forces leading to the composition of its membership. That is, we need to explain why it was staffed with these justices, possessing these particular constitutional visions, at this particular moment in history.

For all of these reasons, explanations of the Court's decision-making must account for the historical, political, and social context in which the justices act. Though the Court is certainly "independent" in important respects, its independence is constrained and shaped by the larger political system in which the Court is embedded.¹³³ This means that, as Robert Dahl famously recognized more than 50

plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.").

¹³¹ See Richard Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 39–54 (2005).

¹³² KLARMAN, *supra* note 121, at 447 ("Whether the traditional sources of constitutional law are thought to plainly forbid a particular practice depends on the personal values of the interpreter and on the social and political context.").

¹³³ See *generally* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT (Ronald Kahn & Ken I. Kersch eds., 2006); THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Gillman & Cornell W. Clayton eds., 1999); SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Howard Gillman & Cornell W. Clayton eds., 1999).

years ago, “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.”¹³⁴

The mechanisms supporting this relationship are fairly straightforward. First, the appointments process ensures that the justices tend to reflect the constitutional ideologies of their appointing presidents and, to a lesser degree, those of their confirming senators.¹³⁵ Presidents select nominees based largely on their perceived constitutional views, and Senators cast their confirmation votes for much the same reason.¹³⁶ Second, the Court’s institutional dependence requires the justices to be sensitive to the political priorities of Congress, the President, the lower courts, and the general public, all of which have the power to frustrate the Court’s objectives.¹³⁷ Without at least the tacit cooperation of these other power holders, the Court’s decisions are largely irrelevant.¹³⁸ Finally, like all human beings, the

¹³⁴ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

¹³⁵ See, e.g., LEE EPSTEIN AND JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 132 (2005); TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* 100 (1999).

¹³⁶ See PERETTI, *supra* note 135, at 84–101.

¹³⁷ See *id.* at 133–51; Barry Friedman, *The Politics of Judicial Review*, 84 Tex. L. Rev. 257, 295–329 (2005).

¹³⁸ To cite just one example, the Court in 1954 held in *Brown v. Board of Education*, 347 U.S. 483 (1954), that racial segregation in public education was unconstitutional. But eleven years later, 99 percent of African-American children in the deep South were still attending schools that were completely segregated. GERALD ROSENBERG, *THE HOLLOW HOPE* 50 (1991). It was not until Congress enacted major civil rights legislation, and the Justice Department began suing school districts for noncompliance, that meaningful desegregation started to occur. *Id.* at 42–57. Or consider the Court’s more recent decision in *Santa Fe Independent School Dist. v. Doe*, 530 U. S. 290 (2000), in which the justices held that a public high school’s policy of permitting student-led prayers before football games violated the Establishment Clause. Two months later, thousands of people were openly

justices want to be admired and respected—by friends, family, fellow judges, law professors, practicing lawyers, the media, the general public, and any number of other salient audiences.¹³⁹ This basic human need for approval tends to push the justices towards results that are consistent with prevailing political sentiments.¹⁴⁰

Together, these mechanisms generally ensure that the Court operates within, rather than outside, the Nation's political currents. That is, "the justices typically act in a way that is broadly consistent with the preferences of a dominant political coalition and, conversely, that they rarely adopt a course of action that is opposed by that coalition."¹⁴¹

Of course, the point should not be overstated.¹⁴² The Court does not march in lockstep with any political coalition or partisan agenda. One reason is that, once on the bench, justices may embrace constitutional views that differ from those that the appointing president and his political coalition had expected at the time of appointment.¹⁴³ Another is that the governing regime is often fractured, either

praying at high school football games throughout the South, some in a manner that was probably permissible under the letter (but not the spirit) of the Court's ruling, some in open defiance. See David Firestone, *South's Football Fans Still Stand Up and Pray*, N.Y. TIMES, Aug. 27, 2000.

¹³⁹ See LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* (2006).

¹⁴⁰ See Bradley W. Joondeph, *Judging and Self-Presentation: Towards a More Realistic Conception of the Human (Judicial) Animal*, 48 SANTA CLARA L. REV. (forthcoming 2008).

¹⁴¹ Howard Gillman, *De-Lochnerizing Lochner*, 85 B. U. L. REV. 859, 864 (2005).

¹⁴² See Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law School*, 32 LAW & SOC. INQUIRY 511 (2007).

¹⁴³ See Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, What, and How Important?*, 101 NW. U. L. REV. 1483 (2007).

because Congress and the presidency are held by different political parties or because the majority party, though controlling both elected branches, is split internally. Such situations typically afford the Court a fair degree of political support for any resolution of a given constitutional dispute (and ensure that it will not confront a dangerously united opposition). Moreover, most of the cases that the Court decides are not politically salient, such that elected officials generally do not care much how they are resolved. As a result, the Court typically enjoys a fairly broad expanse in which to act autonomously, at least in cases of low political salience, and it often reaches results that, in an immediate sense, contravene public opinion and the views of the ascendant political coalition.

But we should not miss the forest for the trees. As a wealth of empirical research has demonstrated, the Court's jurisprudence, at least in its broad contours, tends to reflect the constitutional values of the political movement that has empowered and sustained it, as well as the social and cultural values that surround it.¹⁴⁴ To oversimplify a bit, the Taney Court's jurisprudence, and particularly its decision in *Dred Scott*,¹⁴⁵ was a direct extension of the values animating the Jacksonian political regime that had dominated American politics since the 1830s.¹⁴⁶

¹⁴⁴ See J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSPECTIVES ON POLITICS 233, 236 (2004) ("A large body of empirical research in political science and history now exists to support the claim made more than a century ago by Finley Peter Dunne's fictional bartender-philosopher, Mr. Dooley, who quipped: '. . . th' supreme coort follows th' iliction returns.'") (quoting PETER FINLEY DUNNE, MR. DOOLEY'S OPINIONS (1901)).

¹⁴⁵ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

¹⁴⁶ See Mark A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates*, 81 CHI.-KENT L. REV. 923 (2006).

The Supreme Court of the late 1930s and 1940s effectively cemented the central priorities of FDR's New Deal coalition into constitutional doctrine, particularly in its federalism and Due Process Clause decisions, which virtually eliminated the judiciary's role in reviewing the propriety of economic regulation. And the Warren Court's decisions in the areas of race discrimination, civil liberties, voting rights, and criminal procedure generally reflected the consensus of political elites during the Great Society, a coalition comprised of progressive Democrats and moderate Republicans.¹⁴⁷ In each case, the Court functioned more as a policy-making partner of the elected branches than as an independent check on them.

In short, the Supreme Court's "decisions are influenced by specific patterns of party politics, partisan electoral realignments, and control of national electoral institutions," such that "even when the justices adhere to 'principled' jurisprudence and follow constitutional norms, the meaning of such principles will, over time, reflect changes in the substantive values of the national political regime."¹⁴⁸ It is not that the Court's decisions are *only* about politics, but that they are *always* about politics, at least in important ways. And with this in mind, we might approach a better understanding of the apparent tensions in the Rehnquist Court's federalism decisions.

¹⁴⁷ See generally LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000).

¹⁴⁸ Pickerill & Clayton, *supra* note 144, at 236.

B. Federalism and the Modern Republican Party

Again, the political movement that empowered the Rehnquist Court was the post-Watergate Republican Party, which appointed or promoted seven of its members.¹⁴⁹ And it is well known that, beginning with the presidency of Ronald Reagan, the modern GOP has generally embraced the goal of devolving greater authority to state and local governments.¹⁵⁰ For instance, Reagan stated in his first inaugural address that he intended

to curb the size and influence of the Federal establishment and to demand recognition of the distinction between powers granted to the Federal Government and those reserved to the States or the People. All of us need to be reminded that the federal government did not create the states; the states created the federal government.¹⁵¹

Reagan later issued Executive Order 12,612, which sought to “restore the division of governmental responsibilities between the national government and the States that

¹⁴⁹ President Ford appointed John Paul Stevens. President Reagan appointed Sandra Day O’Connor, Antonin Scalia, and Anthony Kennedy, and he elevated William Rehnquist from Associate to Chief Justice. President George H.W. Bush appointed David Souter and Clarence Thomas. See LEE EPSTEIN, JEFFREY SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS* 254 (3d ed. 2003) (Table 4–1).

¹⁵⁰ See Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 *Ind. L.J.* 363, 383–99 (2003).

¹⁵¹ President Ronald Reagan, Inaugural Address, *PUB. PAPERS* 1, 2 (Jan 20, 1981).

was intended by the Framers of the Constitution.”¹⁵² The order required all Executive Branch departments and agencies to formulate and implement policy in a manner consistent with nine “fundamental federalism principles.”¹⁵³ Among those principles were the admonitions that “[i]n most areas of governmental concern, the States uniquely possess the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly,” and that “[i]n the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States.”¹⁵⁴

Post-Watergate GOP party platforms have likewise endorsed the idea of shifting greater authority from the federal government to the states. The 1980 platform, for example, stated that the “Republican Party reaffirms its belief in the decentralization of the federal government and in the traditional American principle that the best government is the one closest to the people,” where “it is less costly, more accountable, and more responsive to people’s needs.”¹⁵⁵ In 1988, the GOP “reassert[ed] adherence to the Tenth Amendment, reserving to the States and to the people all powers not expressly delegated to the national government.”¹⁵⁶ The 1992 platform emphasized “the crucial importance of the Tenth Amendment” and pledged that the party would “not initiate any federal activity that can be conducted better

¹⁵² Exec. Order No. 12,612, 3 C.F.R. 252, 252–53 (1987), *repealed by* Exec. Order No. 13,132, 3 C.F.R. 206 (1999), *reprinted in* 5 U.S.C. § 601 (2000).

¹⁵³ *Id.*, 3 C.F.R. 253–54 (1987).

¹⁵⁴ *Id.*

¹⁵⁵ Republican Party Platform of 1980, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25844> (last visited Dec. 6, 2007).

¹⁵⁶ Republican Party Platform of 1988, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25846> (last visited Dec. 6, 2007).

on the State or local level.”¹⁵⁷ And the 2000 platform proclaimed that the leadership of Republican state governors had strengthened the party’s “commitment to restore the force of the Tenth Amendment, the best protection the American people have against federal intrusion and bullying.”¹⁵⁸

More important for present purposes, the belief that the federal judiciary should enforce the federalism-based limits on Congress’s enumerated powers has become a sort of modern Republican orthodoxy. As a study by J. Mitchell Pickerill and Cornell Clayton concluded, by the 1980s Republicans had “clearly incorporated the courts and constitutional law into their strategy for reining in federal power and addressing the balance of power between state and federal government.”¹⁵⁹ As just one indication, consider an influential document issued by the Justice Department’s Office of Legal Policy (OLP) in 1988, *Guidelines on Constitutional Litigation*,¹⁶⁰ a sort of field guide for government lawyers. Among other things, the *Guidelines* suggested that the basic rationale of *Garcia v. Metropolitan Transit Authority*¹⁶¹—that “State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created

¹⁵⁷ Republican Party Platform of 1992, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25847> (last visited Dec. 6, 2007).

¹⁵⁸ Republican Party Platform of 2000, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25849> (last visited Dec. 6, 2007).

¹⁵⁹ Pickerill & Clayton, *supra* note 144, at 238. *See also id.* at 238 (stating that, by the 1980s, Republicans “clearly began to focus on the role of courts, judges, and constitutional law as a key” to protecting state sovereignty).

¹⁶⁰ OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988).

¹⁶¹ 469 U.S. 528 (1985).

limitations on federal power”¹⁶²—was wrong.¹⁶³ The document instructed government attorneys to use various passages from Justice Powell’s *Garcia* dissent “as a basis for arguing, in appropriate cases, for judicial protection of state sovereignty.”¹⁶⁴ Further, it contended that the Supreme Court’s decisions in *Perez v. United States*¹⁶⁵ and *Wickard v. Filburn*,¹⁶⁶ both of which adopted expansive interpretations of the commerce power, and *Katzenbach v. Morgan*,¹⁶⁷ which indicated that Congress, in using its enforcement powers, could interpret the Reconstruction Amendments’ substantive protections more broadly than the Court, had been wrongly decided and should not form the basis of government arguments.¹⁶⁸

Or again consider the GOP’s platforms. The 1980 platform committed the party to appointing judges “whose judicial philosophy . . . is consistent with the belief in the decentralization of the federal government and efforts to return decision-making power to state and local elected officials.”¹⁶⁹ The 1988 platform argued that federal “judicial power must be exercised with deference toward State and local authority; it must not expand at the expense of our representative institutions.”¹⁷⁰ And the 1996 platform was more emphatic still: “For more than

¹⁶² *Id.* at 552.

¹⁶³ See GUIDELINES, *supra* note 160, at 54–56.

¹⁶⁴ *Id.* at 55.

¹⁶⁵ 402 U.S. 146 (1971).

¹⁶⁶ 317 U.S. 111 (1942).

¹⁶⁷ 384 U.S. 641 (1966).

¹⁶⁸ GUIDELINES, *supra* note 160, at 52–54, 59.

¹⁶⁹ Republican Party Platform of 1980, *supra* note 155.

¹⁷⁰ Republican Party Platform of 1988, *supra* note 156.

half a century, [the Tenth Amendment] has been scorned by liberal Democrats and the judicial activism of the judges they have appointed. We will restore the force of the Tenth Amendment and, in the process, renew the trust and respect which hold together a free society.”¹⁷¹ Thus, as Pickerill and Clayton concluded, “the Republicans explicitly linked their stronger philosophical vision of federalism with a judicial agenda, advocating the judicial-safeguards approach.”¹⁷²

Of course, another central commitment of the modern GOP—perhaps *the* central commitment of the modern GOP—has been to reduce the level and stringency of government regulation on private business activity. As Reagan famously stated, again in his first inaugural (and before the passage addressing federalism), “government is not the solution to our problem; government *is* the problem.”¹⁷³ From antitrust enforcement to labor and employment issues to consumer safety to environmental protection, a centerpiece of modern Republican philosophy has been a belief in free markets—that is, a conviction that private ordering tends better to serve social welfare than government regulation.

What, then, has happened when these core GOP commitments have collided? How have Republicans prioritized their distinct policy goals of devolving greater power to the states and reducing economic regulation? To be sure, Republican views on the subject have not been uniform. But the balance of evidence suggests that the substantive goal of reducing economic regulation has been more important to the

¹⁷¹ Republican Party Platform of 1996, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25848> (last visited Dec. 7, 2007).

¹⁷² Pickerill & Clayton, *supra* note 144, at 242.

¹⁷³ Reagan, *supra* note 151, at 1.

modern GOP than the more abstract, procedural goal of devolving greater power to the states.

First, consider the Contract with America, one of the defining documents of the modern conservative movement. Led by Representative Newt Gingrich, a team of House Republican leaders drafted the Contract six weeks in advance of the 1994 midterm elections.¹⁷⁴ More than 300 Republican House candidates signed the Contract, and it effectively became the platform for the GOP's national campaign.¹⁷⁵ The heart of the Contract was a pledge to bring ten bills to the House floor in the first 100 days of the 104th Congress.¹⁷⁶ Tellingly, none of the proposed bills would have enhanced the policymaking autonomy of state governments, save the "effective death penalty provisions" in the proposed "Taking Back Our Streets Act," which sought to limit the power of federal courts to grant habeas corpus relief to state prisoners.¹⁷⁷ But the ninth listed bill, "The Common Sense Legal Reform Act," proposed fairly significant changes to the tort system that would have displaced large swaths of state law, mandating "[l]oser pays' laws, reasonable limits on punitive damages and reform of product liability laws to stem the endless tide of litigation."¹⁷⁸ Following the 1994 election, these proposals materialized in the

¹⁷⁴ See David E. Rosenbaum, *Republicans Offer Voters a Deal for Takeover of House*, N.Y. TIMES, Sep. 28, 1994, at A16.

¹⁷⁵ See Katherine Q. Seelye, *Files Show How Gingrich Laid a Grand G.O.P. Plan*, N.Y. TIMES, Dec. 3.

¹⁷⁶ REPUBLICAN CONTRACT WITH AMERICA, available at <http://www.house.gov/house/Contract/CONTRACT.html> (last visited Dec. 11, 2007).

¹⁷⁷ See *id.*

¹⁷⁸ *Id.*

Common Sense Product Liability Legal Reform Act of 1996,¹⁷⁹ which passed both houses of Congress before being vetoed by President Clinton.¹⁸⁰ The Act would have covered “any product liability action brought in any State or Federal court,” and it would have heightened the requirements for establishing a defendant’s liability, provided for additional affirmative defenses, limited the availability of punitive damages, and restricted the awarding of noneconomic damages.¹⁸¹

Or consider once more the GOP’s recent platforms. Since 1980, Republicans have consistently called for significant changes to the nation’s legal system, particularly with respect to tort litigation, that would override state policies on matters that have traditionally be reserved to state governments. For example, the platforms have regularly taken aim at punitive damage awards. In 1992, for instance, the GOP pledged to “restore fairness and predictability to punitive damages by placing appropriate limits on them, dividing trials into two phases to determine liability separately from damages, and requiring clear proof of wrongdoing.”¹⁸² Republicans have also called for federal legislation governing products liability. For instance, the 1996 platform argued that the absence of a federal products liability law “not only penalizes consumers with higher costs and keeps needed products off the market, but also gives foreign nations a competitive

¹⁷⁹ H.R. 956, 104th Cong. (1996).

¹⁸⁰ See Neil A. Lewis, *President Vetoes Limits on Liability*, N.Y. TIMES, May 3, 1996.

¹⁸¹ Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, §§ 102(a)(1), 103–111.

¹⁸² The Republican Party Platform of 1992, *supra* note 157.

edge over American workers.”¹⁸³ And the 2000 platform stated that “[a]n integral part of legal reform is a federal product liability law. Without it, consumers face higher costs, needed products don’t make it to the market, and American jobs are lost to foreign competitors.”¹⁸⁴ Moreover, every GOP platform since 1988 has endorsed changes in the medical malpractice system that would reduce the liability of health care providers, including “reasonable caps on non-economic awards.”¹⁸⁵

Unsurprisingly, these policy ideas have surfaced in hundreds of Republican-sponsored bills introduced in Congress. Time and again, Republican legislators have pushed laws seeking to displace state tort law by limiting the availability of punitive damages, restricting the amount of noneconomic damages that could be awarded (particularly in medical malpractice cases), providing defendants with additional safe harbors from liability, increasing the requirements for establishing liability in the first instance, and forcing plaintiffs to bear the defendant’s legal costs in unsuccessful lawsuits.¹⁸⁶ For example, the Product Liability Reform Act of 1997,¹⁸⁷ which would have governed “any product liability action brought in any State or

¹⁸³ The Republican Party Platform of 1996, *supra* note 171.

¹⁸⁴ The Republican Party Platform of 2000, *supra* note 158.

¹⁸⁵ The Republican Party Platform of 2004, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=25850> (last visited Dec. 7, 2007).

¹⁸⁶ *See, e.g.*, Common Sense Product Liability Reform Act, H.R. 917, 104th Cong (1995); Product Liability Fairness Act of 1995, S. 565, 104th Cong. (1995); Product Liability reform Act of 1997, S. 5, 105th Cong. (1997); Small Business Liability Reform Act of 1999, H.R. 2366, 106th Cong. (1999); Small Business Liability Reform Act of 2001, S. 865, 107th Cong. (2001); Small Business Liability Reform Act of 2001, H.R. 1805, 107th Cong. (2001); Small Business Liability Reform Act of 2003, S. 1546, 108th Cong. (2003); Small Business Liability Reform Act of 2003, H.R. 2813, 108th Cong. (2003); Innocent Sellers Fairness Act, H.R. 989, 110th Cong. (2007).

¹⁸⁷ S. 5, 105th Cong (1997).

Federal Court,” would have imposed national (and generally stricter) liability rules; created “a complete defense” to such actions when “the claimant was intoxicated or under the influence of intoxicating alcohol or any drug when the accident” occurred; created a national, two-year statute of limitations; prohibited the award of punitive damages except when “the claimant establishes by clear and convincing evidence” that the defendant acted “with a conscious, flagrant indifference to the rights or safety of others”; limited the size of most punitive damage awards to \$250,000; bifurcated the proceedings for determining compensatory and punitive damages; and mandated that liability for noneconomic damages among multiple defendants would be several, but not joint.¹⁸⁸ Likewise, the Medical Injury Compensation Reform Act of 1995¹⁸⁹ would have imposed a uniform two-year statute of limitations on medical malpractice claims, limited the contingency fees that lawyers could charge plaintiffs in malpractice cases, and prohibited any punitive damages award exceeding \$250,000, and it would have applied to any malpractice action “brought in a State or Federal court against a health care provider or health care professional.”¹⁹⁰ Almost all of these legislative efforts have thus far been unsuccessful. But Republicans were able to enact the Class Action Fairness Act of 2005,¹⁹¹ which places limits on the recovery of plaintiffs’ attorneys’ fees¹⁹² and makes it easier for defendants to

¹⁸⁸ *Id.* §§10102(a)(1); 103(a); 104(a)(1); 106(a); 108(a), (b)(1), (c); 110(a).

¹⁸⁹ H.R. 229, 104th Cong. (1995).

¹⁹⁰ *Id.* § 3(6); 5(a); 6(a); 7(a); 10(a).

¹⁹¹ Pub. L. No. 109–2, 119 Stat. 4, 5 (codified as note to 28 U.S.C. § 1711 (2006)).

¹⁹² *See id.* § 3.

remove class actions to federal court, where businesses are more apt to obtain summary judgments.¹⁹³

GOP legislators have also sought to displace state law in a more limited and targeted fashion through the inclusion of various express preemption provisions in scores of Republican-sponsored bills. Consider these recently-enacted laws, all passed when Republicans controlled the House, the Senate, and the White House: The Department of Defense Appropriations Act for 2006 preempts all state tort law with respect to injuries from certain drugs and vaccines¹⁹⁴; the Protection of Lawful Commerce in Arms Act preempts most civil actions brought under state law against firearms and ammunition dealers or manufacturers¹⁹⁵; the Fair and Accurate Credit Transactions Act of 2003 preempts a number of state credit reporting and identity theft laws¹⁹⁶; and the Energy Policy Act of 2005 preempts a number of stricter state energy efficiency standards for a variety of consumer appliances.¹⁹⁷ According to a report prepared by the minority staff of the House Committee on Government Reform for Democratic Representative Henry Waxman, the Republican-controlled House and Senate “voted 57 times to preempt state laws and regulations” between

¹⁹³ See *id.* § 5. See also *A Dismal Class-Action Finale*, N.Y. TIMES, Feb. 12, 2005, at A16.

¹⁹⁴ Pub. L. No. 109–148, 119 Stat. 2680 (2005) (codified at 42 U.S.C. § 319F–3(b)(8) (2007)).

¹⁹⁵ Pub. L. No. 109–92, 119 Stat. 2095, 2096 (2005) (to be codified at 15 U.S.C. §§7901 et seq.).

¹⁹⁶ Pub. L. No. 108–159, 117 Stat. 1952, 1961, 1972–73 (codified as amended at 15 U.S.C. §§ 1681 et seq. (2006)).

¹⁹⁷ Pub. L. 109–58, 119 Stat. 594, 685–86 (codified as amended at 15 U.S.C. §§ 717 et seq. (2006)).

2001 and 2006, “result[ing] in 27 laws, signed by the President, that preempt state authority.”¹⁹⁸

Moreover, when federal statutes have been ambiguous, executive departments and agencies in the current Bush administration have often attempted to effect preemption through agency rulemaking.¹⁹⁹ To cite just two examples, in March 2006 the Consumer Products Safety Commission promulgated a new rule governing mattress flammability, the preamble of which states that the Commission “intends and expects that the new mattress flammability standard will preempt inconsistent state standards and requirements, whether in the form of positive enactments or court created requirements.”²⁰⁰ This was the first time in the Commission’s history that it has expressed such intention.²⁰¹ And in January 2006, the Food and Drug Administration issued a new rule concerning the labeling of prescription drugs and biological products, in which it asserted that “FDA approval of labeling . . . preempts conflicting or contrary State law.”²⁰² As Catherine Sharkey has noted, agencies have previously been “more reticent about including forceful

¹⁹⁸ UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON GOVERNMENT REFORM—MINORITY STAFF, SPECIAL INVESTIGATIONS DIVISION, CONGRESSIONAL PREEMPTION OF STATE LAWS AND REGULATIONS, at 1 (2006), *available at* <http://oversight.house.gov/documents/20060606095331-23055.pdf> (last visited Dec. 10, 2007).

¹⁹⁹ See Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007).

²⁰⁰ Final Rule: Standard for the Flammability (Open Flame) of Mattress Sets, 71 Fed. Reg. 13472, 13496 (Mar. 15, 2006) (codified at 16 C.F.R. pt. 1633).

²⁰¹ See Stephen Labaton, *‘Silent Tort Reform’ Is Overriding States’ Powers*, N.Y. TIMES, Mar. 10, 2006, at C5.

²⁰² Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3934 (Jan. 24, 2006) (codified at 21 C.F.R. pts. 201, 314, 601).

preemptive statements in their regulations,” making these recent assertions a sort of “sea change in agency action.”²⁰³

Finally, consider the arguments that Republican-led Justice Departments have presented to the Supreme Court in preemption cases since Ronald Reagan’s election in 1980. Between October 1981 and July 2007, the Supreme Court handed down opinions in 102 preemption cases where, at the time of briefing, the Solicitor General was a Republican appointee.²⁰⁴ The United States participated in 62 of those cases, five as a party and 57 as *amicus curiae*. In 40 of these 62 cases, the Solicitor General argued that the state law at issue was completely preempted, and in four additional cases the United States argued that the state law was preempted in part. Moreover, in all three of the preemption cases argued thus far in October Term 2007, Solicitor General Paul Clement has contended that state law is preempted.²⁰⁵ All told, then, Republican Solicitors General have argued in favor of complete or partial preemption in more than 70 percent of the cases in which the United States has participated since October 1981.

Again, the point should not be overstated. By no means has Republican opinion on these questions been monolithic. Consider Reagan’s Executive Order

²⁰³ Sharkey, *supra* note 199, at 242.

²⁰⁴ The data set used to compile these figures is freely available for download (as a Microsoft Excel file) at <http://claranet.scu.edu/coursepage.asp?cid=2086&page=01>.

²⁰⁵ Those cases are *Warner-Lambert Co. v. Kent*, 128 S. Ct. 31 (2007) (order granting certiorari), *Rowe v. New Hampshire Motor Trans. Ass’n*, 127 S. Ct. 3037 (2007) (same), and *Riegel v. Medtronic, Inc.*, 127 S. Ct. 3000 (2007) (same). The briefs filed by the Solicitor General in each case can be found here: <http://www.usdoj.gov/osg/briefs/2007/3mer/1ami/toc3index.html> (last visited Dec. 13, 2007).

12,612, discussed above. Section 4 of that order stated that “Executive departments and agencies shall construe . . . a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law.”²⁰⁶ Or consider again the *Guidelines on Constitutional Litigation* issued in 1988 by the Justice Department’s OLP under the direction of Attorney General Edwin Meese. The *Guidelines* contended that *Pike v. Bruce Church*²⁰⁷—which holds that state laws imposing burdens on interstate commerce that are clearly excessive in relation to their putative benefits violate the dormant Commerce Clause²⁰⁸—was wrongly decided.²⁰⁹ Specifically, *Pike* is “not easily supported by the text of the commerce clause itself, nor necessitated by the purpose of the clause,” and it “raises important questions regarding federal invasion of powers reserved to the states under the Tenth Amendment.”²¹⁰ A separate 1988 document prepared by OLP, *The Constitution in the Year 2000*, stated that “the [Supreme] Court has weakened state authority by giving a wide scope to federal preemption,” noting that the Court had “invalidated state laws that did not explicitly conflict with federal laws by presuming or inferring a congressional intent to fully occupy a given field of

²⁰⁶ Exec. Order 12,612, §4(a), 3 C.F.R. 252, 252–53 (1987), *repealed by* Exec. Order No. 13,132, 3 C.F.R. 206 (1999), *reprinted in* 5 U.S.C. § 601 (2000).

²⁰⁷ 397 U.S. 137 (1970).

²⁰⁸ *Id.* at 142.

²⁰⁹ GUIDELINES, *supra* note 160, at 53.

²¹⁰ *Id.*

regulation.”²¹¹ For the future, OLP suggested that “the Court could refuse to find Congressional occupation of a regulatory field absent either clear Congressional intent to displace the states or an actual conflict with state law.”²¹²

Thus, there plainly have been influential voices in the GOP pushing for a more robust vision of state autonomy, even when it leads to more stringent economic regulation. But on balance, the evidence indicates that the post-Watergate Republican Party as a whole was generally unconcerned about intrusions on state policymaking autonomy when those intrusions furthered the goal of reducing the level of regulation on private enterprise. And in the main, this was the balance struck by the Rehnquist Court. In their preemption and dormant Commerce Clause decisions, the justices tended to find the cause of protecting state prerogatives less compelling than the need for consistent, uniform, and less stringent economic regulation.

Conclusion

Empirical analysis of the Rehnquist Court’s federalism decisions reveals that the justices’ approach to state autonomy was more complicated than many have assumed. In cases involving the federalism-based limits on Congress’s enumerated powers, Rehnquist, O’Connor, Scalia, Kennedy, and Thomas consistently voted for

²¹¹ OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, *THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION* 135 (1988).

²¹² *Id.* at 139.

outcomes that promoted state governmental authority. But in preemption and dormant Commerce Clause cases, the same five justices tended to support results that diminished the states' capacity to set their own policy agendas.

Several commentators have argued that these differing attitudes towards state autonomy were inconsistent or even hypocritical,²¹³ and perhaps by some measures they were. But as a historical or political matter, this apparent tension in the Rehnquist Court's federalism jurisprudence is quite logical and understandable. Though the Court's concern for state autonomy may have varied by context, its decisions consistently reflected the political priorities of national coalition that empowered and sustained most of the justices. Reinvigorating federalism's constraints on the national government, while simultaneously reducing the level of regulation on private businesses, appears to have been the policy path that most post-Watergate Republicans preferred. The justices of the Rehnquist Court crafted constitutional doctrines that facilitated these objectives.

In this sense, the Rehnquist Court's federalism decisions mimicked the Court's broader political dynamic.²¹⁴ As Mark Tushnet has explained, under Rehnquist's leadership the Court was quite successful in transforming the law on matters over which its more traditional, pragmatic conservatives (O'Connor and

²¹³ See, e.g., Chemerinsky, *supra* note 5, at 1318 ("The Supreme Court's recent preemption decisions are striking because they are so at odds with the Court's insistence on deference to the states in Commerce Clause and state sovereign immunity cases.").

²¹⁴ See generally THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* (2004); TUSHNET, *supra* note 9.

Kennedy) and its more ideological, movement conservatives (Thomas, Scalia, and to some degree Rehnquist) could agree, such as criminal procedure and school desegregation.²¹⁵ But on several other issues—such as gay rights, abortion, and affirmative action—the conservative majority fractured, with the views held by the traditional Republicans, in team with the Court’s more liberal justices, prevailing.²¹⁶

Federalism, broadly defined, seems to have followed a similar pattern. Rehnquist, O’Connor, Scalia, Kennedy, and Thomas were remarkably united in their drive to reinvigorate the structural constraints on Congress, and that unity produced the federalism offensive for which the Rehnquist Court is known. But with respect to the federalism-based limits on state governments, the views of those more ideologically committed to state autonomy—such as Scalia and Thomas, with their desire to inter the dormant Commerce Clause—never took root. Instead, it was the position held by the Court’s more moderate, establishment Republicans, and not coincidentally the GOP as a whole, that was ultimately reflected in the Court’s decisions.

Perhaps the Roberts Court will take federalism in different directions. Both John Roberts and Samuel Alito served as political appointees in Ronald Reagan’s Justice Department, and they may well prove more ideologically committed to the principle of robust state autonomy than their predecessors. But if we see such a turn in the Court’s jurisprudence, it will be something new. It will not be a legacy of the Rehnquist Court.

²¹⁵ See TUSHNET, *supra* note 9.

²¹⁶ See *id.*

Appendix

The following lists all of the cases included in the empirical study, sorted by subject matter, and presented in reverse chronological order.

Decisions addressing the limits on Congress's enumerated powers

Commerce Clause

Gonzalez v. Raich, 545 U.S. 1 (2005)
Guillen v. Pierce County, 537 U.S. 129 (2005)
United States v. Morrison, 529 U.S. 598 (2000)
Reno v. Condon, 528 U.S. 141 (2000)
United States v. Lopez, 514 U.S. 549 (1995)

Tenth Amendment

Reno v. Condon, 528 U.S. 141 (2000)
Printz v. United States, 521 U.S. 898 (1997)
New York v. United States, 505 U.S. 144 (1992)

Spending Clause

Sabri v. United States, 541 U.S. 600 (2004)

Section Five of the Fourteenth Amendment

Tennessee v. Lane, 541 U.S. 509 (2004)
Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003)
Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743 (2002)
Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001)
United States v. Morrison, 529 U.S. 598 (2000)
Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000)
Alden v. Maine, 527 U.S. 706 (1999)
College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999)
Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999)
City of Boerne v. Flores, 521 U.S. 507 (1997)
Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996)

Eleventh Amendment

Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440 (2004)
Frew v. Hawkins, 540 U.S. 431 (2004)
Lapides v. Bd. of Regents of the Univ. Sys. of Ga., 535 U.S. 613 (2002)
Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002)
California v. Deep Sea Research, Inc., 523 U.S. 491 (1998)
Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997)

Federalism, the Rehnquist Court, and the Modern Republican Party

Regents of the Univ. of Cal. v. Doe, 519 U.S. 425 (1997)
Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994)
P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993)

Decisions addressing the federalism-based limits on state governments

Preemption

Mid-Con Freight Systems, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 440 (2005)
Bates v. Dow Agrosciences L.L.C., 544 U.S. 431 (2005)
Aetna Health Inc. v. Davila, 542 U.S. 200 (2004)
Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004)
Nixon v. Mo. Mun. League, 541 U.S. 125 (2004)
Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003)
Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39 (2003)
Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003)
Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003)
Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003)
Sprietsma v. Mercury Marine, 537 U.S. 51 (2002)
City of Columbus v. Ours Garage & Wrecking Serv., Inc., 536 U.S. 424 (2002)
Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355 (2002)
Wis. Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473 (2002)
Chao v. Mallard Bay Drilling, Inc., 534 U.S. 235 (2002)
Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)
Egelhoff v. Egelhoff *ex. rel.* Breiner, 532 U.S. 141 (2001)
Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001)
Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000)
Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000)
Norfolk Southern Ry. v. Shanklin, 529 U.S. 344 (2000)
United States v. Locke, 529 U.S. 89 (2000)
Unum Life Ins. Co. of Am. v. Ward, 526 U.S. 358 (1999)
El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999)
Foster v. Love, 522 U.S. 67 (1997)
Johnson v. Fankell, 520 U.S. 911 (1997)
Boggs v. Boggs, 520 U.S. 833 (1997)
De Buono v. NYSA-ILA Med. & Clinical Servs. Found., 520 U.S. 806 (1997)
Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316 (1997)
Atherton v. FDIC, 519 U.S. 213 (1997)
Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)
Smiley v. Citibank (S.D.), N.A., 517 U.S. 735 (1996)
Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996)
Barnett Bank, N.A. v. Nelson, 517 U.S. 25 (1996)
Yamaha Motor Corp., N.A., U.S.A. v. Calhoun, 516 U.S. 199 (1996)
Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995)
N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995)
Freightliner Corp. v. Myrick, 514 U.S. 280 (1995)
Anderson v. Edwards, 514 U.S. 143 (1995)
Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)

Federalism, the Rehnquist Court, and the Modern Republican Party

Am. Airlines, Inc. v. Wolens, 513 U.S. 219 (1995)
Neb. Dep't of Revenue v. Loewenstein, 513 U.S. 123 (1994)
Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994)
Livadas v. Bradshaw, 512 U.S. 107 (1994)
Dep't of Taxation and Fin. of N.Y. v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994)
Am. Dredging Co. v. Miller, 510 U.S. 443 (1994)
Dep't of Revenue of Ore. v. ACF Indus., 510 U.S. 332 (1994)
U.S. Dep't of Treasury v. Fabe, 508 U.S. 491 (1993)
CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993)
Bldg. & Constr. Trades Council v. Assoc. Builders & Contractors, 507 U.S. 218 (1993)
Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993)
District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125 (1992)
Cipollone v. Liggett Group, 505 U.S. 504 (1992)
Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88 (1992)
Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992)

Dormant Commerce Clause

Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, 545 U.S. 429 (2005)
Granholt v. Heald, 544 U.S. 460 (2005)
Hillside Dairy, Inc. v. Lyons, 539 U.S. 59 (2003)
Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003)
Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal., 528 U.S. 458 (2000)
S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999)
Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997)
Gen. Motors Corp. v. Tracy, 519 U.S. 278 (1997)
Fulton Corp. v. Faulkner, 516 U.S. 325 (1996)
Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995)
Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175 (1995)
Barclays Bank PLC v. Franchise Tax Bd. of Cal., 512 U.S. 298 (1994)
W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994)
Assoc. Indus. v. Lohman, 511 U.S. 641 (1994)
C & A Carbone v. Town of Clarkstown, 511 U.S. 383 (1994)
Or. Waste Sys. v. Dep't of Env'tl. Quality, 511 U.S. 93 (1994)
Nw. Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994)
Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993)
Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Fin., 505 U.S. 71 (1992)
Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768 (1992)
Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353 (1992)
Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334 (1992)
Quill Corp. v. North Dakota, 504 U.S. 298 (1992)
Wyoming v. Oklahoma, 502 U.S. 437 (1992)