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Federalism, the Rehnquist Court, and the Modern Republican Party

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,

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¹ See, e.g., Symposium, *Looking Backward, Looking Forward: The Legacy of Chief Justice Rehnquist and Justice O'Connor*, 58 STAN. L. REV. 1661 (2006); Symposium, *The Rehnquist Court in Empirical and Statistical Retrospective*, 24 CONST. COMMENT. 3 (2007); Lori A. Ringhand, *The Rehnquist Court: A "By the Numbers" Retrospective*, 9 U. PA. J. CONST. L. 1033 (2007); *A Symposium on the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 869 (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.").

invalidating numerous federal statutes on the ground that they exceeded Congress's enumerated powers.³ Though the ultimate significance of these decisions remains unclear,⁴ 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, these assessments have tended to overlook an important aspect of the story. Specifically, by focusing almost exclusively on the Court's decisions addressing the structural limits on Congress's powers, scholars have largely ignored those disputes involving federalism-based constraints on the states.⁵ The most significant

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); *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 Fla. v. Florida*, 517 U.S. 44 (1996); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act as beyond Congress's commerce power); *New York v. United States*, 505 U.S. 144 (1992).

⁴ See, e.g., Ann Althouse, *Inside the Federalism Cases: Concern About the Federal Courts*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 142 (2001); Douglas Laycock, *Protecting Liberty in a Federal System: The US Experience*, in PATTERNS OF REGIONALISM AND FEDERALISM 119, 140 (Jörg Fedtke & Basil S. Markesinis eds., 2006); 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 Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213 (2006); 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."); 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., Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1313–14 (2004); Cross, *supra* note 4, at 1310–11; 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 UCLA 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.

of these constraints are the dormant Commerce Clause and the doctrine of preemption. The dormant Commerce Clause prohibits state laws (absent congressional authorization) that discriminate against, or impose an undue burden on, interstate commerce. And the doctrine of preemption, derived from the Supremacy Clause, dictates that federal law shall negate 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' policy-making 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 of the University of Alabama 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 the Rehnquist Court's record in the full range of federalism decisions shows that the five Justices most responsible for the Court's "federalism offensive"—Rehnquist, O'Connor, Scalia, Kennedy, and Thomas—were largely indifferent to state policy-making 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 initiatives would be preempted or invalidated on dormant Commerce Clause grounds.

In this Article, I make 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

REV. 343, 362–78; Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 130–34 (2004).

⁶ 514 U.S. 549 (1995).

⁷ 529 U.S. 598 (2000).

⁸ 531 U.S. 356 (2001).

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 down 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 greater state autonomy and less regulation—these Justices tended to vote for the outcome that reduced government regulation.

My interpretive claim is that these apparently inconsistent attitudes toward state autonomy are actually quite understandable once one considers 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 policy-making 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. In Part I, I briefly summarize the Rehnquist Court's federalism offensive. I suggest 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 policy-making autonomy than the high-

profile decisions on which the Rehnquist Court's reputation is based. In Part II, I present an empirical study of the Rehnquist Court's federalism decisions. I demonstrate that the Justices' concern for state autonomy differed markedly depending on whether the constitutional provision at issue constrained Congress or the states. Finally, in Part III, I suggest 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 and sustenance.

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 commerce

⁹ The thoughtful and perceptive commentary on the Rehnquist Court's federalism jurisprudence is far too voluminous to cite in its entirety. *See, e.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 230 (2004); JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER* (2002); MARK TUSHNET, *A COURT DIVIDED* (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); Issacharoff & Sharkey, *supra* note 5; Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311 (2001); Meltzer, *supra* note 5; Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003); J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSP. ON POL. 233 (2004); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and 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. Shapiro, *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.

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 legislation enacted under Article I to subject the states to private, unconsenting suits for damages,¹³ overruling the relatively recent precedent of *Pennsylvania v. Union Gas Co.*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

In addition to these constitutional rulings, the Rehnquist Court frequently 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

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

¹¹ See *Morrison*, 529 U.S. at 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 Fla. v. Florida*, 517 U.S. 44 (1996).

¹⁴ 491 U.S. 1 (1989).

¹⁵ See *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress lacked the authority to subject the states to private, unconsenting suits for damages in state court under the Fair Labor Standards Act).

¹⁶ See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 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*, CHI. TRIB., June 9, 2005, at 27; Jeffrey Rosen, *The End of Deference*, NEW REPUBLIC, Nov. 6, 2000, at 39.

¹⁷ 501 U.S. 452 (1991).

“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 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

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 noncommercial, noneconomic, and purely intrastate. The Court’s 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 the Court’s anticommandeering decisions prohibit a form of legislation that Congress had employed only rarely and for which there is typically a range of substitutes. Perhaps most significantly, the Rehnquist Court did

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, 173; 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); *Vt. Agency of Natural Res. v. United States*, 529 U.S. 765 (2000) (holding that a private individual could not bring a *qui tam* action against a state under the False Claims Act because the states are not “persons” subject to suit under the Act); *Will v. Mich. Dep’t 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 sources cited *supra* note 4.

²⁴ 209 U.S. 123 (1908).

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

But even if the Rehnquist Court's decisions did not amount to a "federalism revolution," they still marked a noteworthy constitutional event and thus have received a great deal of attention, scholarly and otherwise.²⁶ Importantly, though, this commentary has focused almost exclusively on only one half of the federalism equation, 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 Viewing federalism only in terms of the breadth of the national government's powers misses the less salient, but arguably no less significant, aspects of the federalism landscape. In particular, it ignores the degree to which state governments can (or cannot) exercise policy-making 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

²⁵ See Mark Tushnet, *Alarmism Versus 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").

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 Part draws freely from a similar discussion appearing in Bradley W. Joondeph, *The Deregulatory Valence of Justice O'Connor's Federalism*, 44 HOUS. L. REV. 507, 519–24 (2007).

ways that would effectively destroy the Union.³⁰ Indeed, it was problems of this sort under the Articles of Confederation 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. Among other things, states imposed various barriers to interstate commerce, such as protective tariffs on goods from other states; failed to comply with the Continental Congress's requisitions, the chief mechanism for funding the federal government; and 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 "If there was any one object riding over every other in the adoption of the constitution, it was to keep the 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 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

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.

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) ("[T]he 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 GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 9–11 (5th ed. 2005) (discussing Madison's memorandum to himself in April 1787 in preparation for the Constitutional Convention); SULLIVAN & GUNTHER, *supra* note 31, at 123; 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 28–29.

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

shall trump any state laws with which they conflict. The dormant Commerce Clause, on the other hand, 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

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." Act of Sept. 30, 1996, Pub. L. 104-208, 110 Stat. 3009, 3009-370 (codified at 18 U.S.C. § 922(q)(2)(A) (2008)) (emphasis added).

In short, the vast majority of human activity in the United States today is regulable by both the federal government and the states. As a result, 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, the scope of preemption 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 their moral objections to the human rights records of foreign regimes;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 issues might be narrow in a constitutional sense, but they are collectively quite important to the states' role in American government as centers of policy-making 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

³⁷ See, e.g., *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477, 518, 532 (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?*, S.F. CHRON., Sept. 30, 2007, at E1.

³⁸ See John M. Broder, *Federal Judge Upholds Law on Emissions in California*, N.Y. TIMES, Dec. 13, 2007, at A32 (reporting that the U.S. District Court for the Eastern District 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. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Bd. of Trs. v. Mayor and City Council of Balt.*, 562 A.2d 720 (Md. 1989).

⁴⁰ See *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004); *Ky. Ass'n of Health Plans v. Miller*, 538 U.S. 329 (2003); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); see also Theodore W. Ruger, *The Supreme Court Federalizes Managed Care Liability*, 32 J.L. MED. & ETHICS 528 (2004).

⁴¹ See *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989 (2008); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

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 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' policy-making 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,

[I]n 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 its 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 therefore needs to 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 must grapple with the Court's record in preemption and dormant Commerce Clause cases, the subject to which I now turn.

⁴² See *Dep't of Rev. v. Davis*, 128 S. Ct. 1801 (2008).

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

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

⁴⁵ *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 160–61 (2001) (Breyer, J., dissenting) (citations omitted).

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.⁴⁶ 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 there was no federalism offensive with respect to preemption or the dormant Commerce Clause.⁴⁷ Whether one evaluates the Court's decisions qualitatively (in terms of their substantive legal content) or quantitatively (by counting the Justices' respective votes for particular outcomes), the same basic conclusion emerges: in this domain, the Rehnquist Court sided with the forces for centralization.

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 seventy-six 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.⁴⁸ 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, the Justices actually undermined state authority.

⁴⁶ Cf. Fallon, *supra* note 5, at 460 ("It is easy to imagine that a Supreme Court committed to revitalizing constitutional federalism might adopt a revisionist stance toward dormant Commerce Clause doctrine.").

⁴⁷ See *id.* at 469–72.

⁴⁸ Part II.A borrows from a similar, somewhat dated discussion in Bradley W. Joondeph, *Bush v. Gore, Federalism, and the Distrust of Politics*, 62 OHIO ST. L.J. 1781, 1790–1804 (2001).

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 on more than one occasion 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."⁴⁹ Likewise, Thomas embraced the view 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.'"⁵⁰ Scalia and Thomas offered not just two votes in favor of the states but also fairly detailed historical and theoretical 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.⁵¹

Moreover, state governments brought cases to the Court that presented the Justices with clear opportunities to remake the law. On at least three occasions, states litigating cases expressly called on the Court to discard broad swaths of its dormant Commerce Clause jurisprudence. For instance, in *Quill Corp. v. North Dakota*,⁵² the State of North Dakota (joined by at least twenty-nine other states as amici curiae) asked the Court to overturn its 1967 decision, *National Bellas Hess, Inc. v. Department of Revenue*,⁵³ 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.⁵⁴ Changed circumstances arguably rendered the physical presence requirement obsolete, and the dramatic growth of the mail-order industry had increased the rule's

⁴⁹ *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Rev.*, 483 U.S. 232, 260 (1987) (Scalia, J., concurring in part and dissenting in part).

⁵⁰ *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 612 (1997) (Thomas, J., dissenting).

⁵¹ *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").

⁵² 504 U.S. 298 (1992).

⁵³ 386 U.S. 753 (1967).

⁵⁴ *Id.* at 758–60.

financial burden (in foregone tax revenue) on the states.⁵⁵ Still, in an 8–1 decision, the Court sustained *Bellas Hess*.⁵⁶ 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 individuals”), and respecting the “substantial reliance” on the rule, which “has become part of the basic framework of a sizeable industry.”⁵⁷ To the Court, these practical economic benefits counted for more than the states’ ability to close a large loophole in their sales tax structures.⁵⁸

In *Allied-Signal, Inc. v. Director, Division of Taxation*,⁵⁹ the State of New Jersey asked the Justices to discard the centerpiece of the Court’s framework for analyzing state income taxes imposed on out-of-state businesses.⁶⁰ 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

⁵⁵ See *Quill*, 504 U.S. at 303–04.

⁵⁶ *Id.* at 314–19.

⁵⁷ *Id.* at 315–17.

⁵⁸ Presently, the federal Internet Tax Nondiscrimination Act, Pub. L. No. 108–435, §§ 1101–04, 118 Stat. 2615, 2615–17 (2004), prohibits states from imposing any “[m]ultiple or discriminatory taxes on electronic commerce.” § 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, 6–8 (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 Monzingo, *Taxing Electronic Commerce*, 20 ST. TAX NOTES 521 (2001). A University of Tennessee 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 in 2003. See David Brunori, *Mad on Main Street: Retailers and Internet Taxation*, 19 ST. TAX NOTES 765, 765 (2000).

⁵⁹ 504 U.S. 768 (1992).

⁶⁰ New Jersey made this argument as an alternative defense of the judgment below in its favor. *Id.* at 783–88. Because the state’s argument went well beyond the point on which the Court had originally granted certiorari, the Justices ordered the case reargued, and the parties filed supplemental briefs on the new, much broader question. See *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 503 U.S. 928 (1992).

state.⁶¹ Conversely, a state could not tax income derived from discrete business activities that were unrelated to the taxpayer's activities in the state.⁶² New Jersey argued that this "unitary business principle" was an unjustified restraint on the states' taxing powers and asked the Court to declare 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.⁶³ 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.⁶⁴

Finally, the State of Alabama, in defending its discriminatory capital stock tax, argued in *South Central Bell Telephone Co. v. Alabama*⁶⁵ that the Court's dormant Commerce Clause precedent represented "an unconstitutional assumption of powers by the Courts of the United States"⁶⁶ and "should be abandoned."⁶⁷ 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 Supremacy Clause."⁶⁸ 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.⁶⁹ 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."⁷⁰

⁶¹ *Allied-Signal*, 504 U.S. at 772.

⁶² *Id.* at 773.

⁶³ *See id.* at 777, 784.

⁶⁴ *See id.* at 777-88.

⁶⁵ 526 U.S. 160 (1999).

⁶⁶ Brief for Respondents at 7, *S. Cent. Bell*, 526 U.S. 160 (No. 97-2045) (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938)).

⁶⁷ *Id.* at 28.

⁶⁸ *Id.* at 42 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

⁶⁹ *S. Cent. Bell*, 526 U.S. at 171.

⁷⁰ *Id.* (O'Connor, J., concurring).

In addition to declining these invitations to broaden state regulatory autonomy, the Rehnquist Court effectively overruled precedent so as to strengthen the federalism-based restraints on state authority. Consider the Court's 2005 decision in *Granholm v. Heald*.⁷¹ 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.⁷² Several Supreme Court decisions handed down nearly contemporaneously 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.*,⁷³ 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 with the conditions which it prescribes."⁷⁴ The idea that the states must permit "imported liquors [to] compete with the domestic on equal terms," said the Court, "would involve not a construction of the Amendment, but a rewriting of it."⁷⁵ 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.⁷⁶

Or consider the broad conception of "facial discrimination" embraced by the Court in *C & A Carbone, Inc. v. Town of Clarkstown*,⁷⁷ which Justice Souter characterized in dissent as "greatly extending the Clause's dormant reach."⁷⁸ At issue was a

⁷¹ 544 U.S. 460 (2005).

⁷² *Id.* at 465–66.

⁷³ 299 U.S. 59 (1936).

⁷⁴ *Id.* at 62.

⁷⁵ *Id.*; see also *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); *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*).

⁷⁶ *Granholm*, 544 U.S. at 493.

⁷⁷ 511 U.S. 383 (1994).

⁷⁸ *Id.* at 411 (Souter, J., dissenting).

“flow control” ordinance enacted by 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.⁷⁹ The purpose was to guarantee sufficient revenue to pay for the facility’s construction, a facility that would ultimately be owned by the city.⁸⁰ 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 to a specific local transfer station.⁸¹ The Court nevertheless held that the ordinance facially discriminated against interstate commerce because the favored facility was local.⁸²

Other Rehnquist Court dormant Commerce Clause decisions have the same effect. In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,⁸³ 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.⁸⁴ In *West Lynn Creamery, Inc. v. Healy*,⁸⁵ 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 would likely have been considered constitutional had they been enacted separately.⁸⁶ And, in *American Trucking Ass’n v. Scheiner*,⁸⁷ the Court overruled a long line of precedent to hold that a flat axle tax imposed on truckers for the privilege of using a state’s highways was unconstitutional.⁸⁸

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

⁷⁹ *Id.* at 386.

⁸⁰ *Id.* at 387, 393.

⁸¹ *See id.* at 403–04 (Souter, J., dissenting).

⁸² *Id.* at 391.

⁸³ 520 U.S. 564 (1997).

⁸⁴ *Id.* at 583–88, 595.

⁸⁵ 512 U.S. 186 (1994).

⁸⁶ *Id.* at 194–96, 199.

⁸⁷ 483 U.S. 266 (1987).

⁸⁸ *Id.* at 292–97 (overruling *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950), *Aero Mayflower Transit Co. v. Bd. of R.R. Comm’rs*, 332 U.S. 495 (1947), and *Aero Mayflower Transit Co. v. Ga. Pub. Serv. Comm’n*, 295 U.S. 285 (1935)).

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.⁸⁹ As a result, it has been the subject of substantial criticism, both for its tenuous theoretical foundation⁹⁰ and for its failure to afford sufficient respect for state sovereignty interests.⁹¹ Yet the Rehnquist Court evidenced few misgivings in using obstacle preemption to set aside a number of state laws.⁹²

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.*,⁹³

⁸⁹ As Justice Kennedy observed in *Gade v. National Solid Wastes Management Ass’n*, “A freewheeling 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 preempts state law.” 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment).

⁹⁰ 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) (arguing that “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”).

⁹¹ 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.”); Wolfson, *supra* note 90, at 114 (“The current jurisprudence of preemption . . . fails to protect the political and judicial safeguards of federalism.”).

⁹² See *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 Corp.*, 529 U.S. 861 (2000); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000); *United States v. Locke*, 529 U.S. 89 (2000).

⁹³ 505 U.S. 504 (1992).

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.⁹⁴ But only three years later, in *Freightliner Corp. v. Myrick*,⁹⁵ the Court backtracked, stating that *Cipollone* established no “categorical rule precluding the coexistence of express and implied pre-emption.”⁹⁶ Rather, *Cipollone* “[a]t best... supports an inference that an express pre-emption clause forecloses implied pre-emption.”⁹⁷ In *Geier v. American Honda Motor Corp.*,⁹⁸ the Court discarded this remaining “inference” left by *Myrick*, holding that the existence of an “express pre-emption provision imposes no unusual, ‘special burden’ against pre-emption”⁹⁹ and that “ordinary pre-emption principles” apply.¹⁰⁰ As the Court subsequently reiterated in *Buckman Co. v. Plaintiffs’ Legal Committee*,¹⁰¹ “[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.”¹⁰²

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.*,¹⁰³ 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

⁹⁴ *Id.* at 517 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978), and *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 282 (1987)).

⁹⁵ 514 U.S. 280 (1995).

⁹⁶ *Id.* at 288.

⁹⁷ *Id.* at 289.

⁹⁸ 529 U.S. 861 (2000).

⁹⁹ *Id.* at 873.

¹⁰⁰ *Id.* at 874.

¹⁰¹ 531 U.S. 341 (2001).

¹⁰² *Id.* at 352.

¹⁰³ 331 U.S. 218 (1947).

and manifest purpose of Congress.”¹⁰⁴ The Rehnquist Court continued to endorse this starting point for preemption analysis, invoking it on several occasions.¹⁰⁵ 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*¹⁰⁶ involved regulations imposed by the State of Washington on oil tankers traveling in Puget Sound.¹⁰⁷ Concluding that the state regulations were preempted by the federal Ports and Waterways Safety Act, the Court underscored that “an ‘assumption’ of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence.”¹⁰⁸ 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.¹⁰⁹ 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,”¹¹⁰ the Court emphasized in *Buckman* that “[p]olicing fraud against federal agencies is hardly ‘a field which the States have traditionally occupied.’”¹¹¹ Consequently, “no presumption against preemption obtain[ed].”¹¹²

To be sure, there were many cases in which the Rehnquist Court upheld state laws against preemption or dormant Commerce Clause challenges.¹¹³ Still, it is clear that, taken as a

¹⁰⁴ *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989) (quoting *Rice*, 331 U.S. at 230).

¹⁰⁵ See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540–41 (2001); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 146 (2001); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992).

¹⁰⁶ 529 U.S. 89 (2000).

¹⁰⁷ See *id.* at 97, 117–19.

¹⁰⁸ *Id.* at 108.

¹⁰⁹ *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341 (2001).

¹¹⁰ *Medtronic*, 518 U.S. at 475 (internal quotation marks omitted).

¹¹¹ *Buckman*, 531 U.S. at 347 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¹¹² *Id.* at 348.

¹¹³ See, e.g., *Mid-Con Freight Sys., Inc. v. Mich. Pub. Serv. Comm’n*, 545 U.S. 440 (2005); *Am. Trucking Ass’n v. Mich. Pub. Serv. Comm’n*, 545 U.S. 429 (2005);

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 placed a higher value on national uniformity and economic efficiency than on the preservation of states' policy-making authority.

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,¹¹⁴ such studies nonetheless can reveal general 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 about judicial

Bates v. Dow Agrosciences LLC, 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 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., U.S.A. v. Calhoun, 516 U.S. 199 (1996); Freightliner Corp. v. Myrick, 514 U.S. 280 (1995); Okla. 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 Bd., 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 Rev. v. ACF Indus., 510 U.S. 332 (1994); Trinova Corp. v. Mich. 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. Dir., 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's unapportioned gross receipts tax on all telecommunications that were billed to a service address in Illinois and were initiated or terminated in the state).

¹¹⁴ 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>.

decision making,¹¹⁵ it is an important part of the mix of tools that can shed light on the Court's behavior.¹¹⁶

To conduct such an analysis here, I compiled a unique data set of federalism decisions handed down by the Rehnquist Court.¹¹⁷ It includes every federalism decision in which the Court issued a signed opinion where the question presented fell into one of two categories.¹¹⁸ The first category consists of those decisions involving a structural constraint on the powers of the national government (i.e., the Commerce Clause, the Spending 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.¹¹⁹ The purpose of this categorization is

¹¹⁵ See Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 265–67 (2006).

¹¹⁶ See Howard Gillman, *What's Law Got to Do with It? Judicial Behaviorists Test the "Legal Model" of Judicial Decisionmaking*, 26 LAW & SOC. INQUIRY 465, 494–95 (2001) (describing the importance of such studies, even if they should be supplemented with historical and interpretivist inquiries).

¹¹⁷ The data set and accompanying codebook are available at <http://claranet.scu.edu/coursepage.asp?cid=2086&page=01> (last visited Oct. 4, 2008).

¹¹⁸ Every decision included in the study is listed in this Article's appendix *infra*.

¹¹⁹ 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.

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 the Justices' votes as either favoring or disfavoring the outcome that enhanced state autonomy.¹²⁰

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* commitments to state autonomy. Although imperfect in some respects, such comparative analysis can nonetheless be telling, as I believe the 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

* 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.

¹²⁰ 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: (1) whether the civil remedy provision of the Violence Against Women Act was within Congress's commerce power, and (2) whether it was valid legislation under Section 5 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 of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), 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 5 legislation. *Id.* at 374. One might deem this either an Eleventh Amendment decision or a Section 5 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 5 cases. Such judgments about categorization are only matters of form, as the study ultimately combines Eleventh Amendment and Section 5 cases under the broader heading of federalism decisions involving the limits on the national government.

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, facilitating a comparison of the Justices' records to one another in precisely the same, relatively large universe of decisions.

1. *October 1991 to September 2005*

Over these fourteen 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, twenty-seven cases involved the constitutional limits on Congress's powers (yielding twenty-nine 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 twenty nonunanimous votes, as Table 1 demonstrates. These differences, in all decisions and in nonunanimous decisions, are statistically significant at the $P=.01$ level.¹²¹ The Justices who led the federalism offensive were

¹²¹ 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, 520–24 (4th ed. 2007). The standard deviation (SD) of the differences equals the root of $((P_1 \times (I - P_1)) \div N_1) + ((P_2 \times (I - P_2)) \div N_2)$, 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 $(P_1 - P_2) \div SD$. 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.

remarkably unified in their drive to reinvigorate the structural constraints on Congress, and the Court almost always split five to four.

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 nonunanimous 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 AUGMENTING STATE
 AUTONOMY IN CASES INVOLVING THE FEDERALISM-BASED
 LIMITS ON THE NATIONAL GOVERNMENT,
 OCTOBER 1991 TO JUNE 2005

	All Decisions (N=29)	Nonunanimous Decisions (N=20)
Rehnquist, O'Connor, Scalia, Kennedy, and Thomas	69.7% N=145	91.0% N=100
Remaining four Justices	9.6% N=114	6.3% N=80

Over the same fourteen terms, the Court handed down seventy-six preemption and dormant Commerce Clause decisions (yielding seventy-nine distinct votes), which reveal a very different picture than the Congress-limiting cases, 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 nonunanimous preemption and dormant Commerce Clause cases, they were roughly fifteen percent more apt to vote to invalidate the state law at issue, a difference that is statistically significant at the $P=.01$ level.¹²²

¹²² The Z-score for the difference in voting records in nonunanimous 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.

TABLE 2

PROPORTION OF VOTES IN FAVOR OF AUGMENTING STATE
AUTONOMY IN CASES INVOLVING PREEMPTION AND THE
DORMANT COMMERCE CLAUSE,
OCTOBER 1991 TO JUNE 2005

	All Decisions (N=79)	Nonunanimous Decisions (N=43)
Rehnquist, O'Connor, Scalia, Kennedy, and Thomas	45.2% N=385	41.4% N=214
Remaining four Justices	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 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

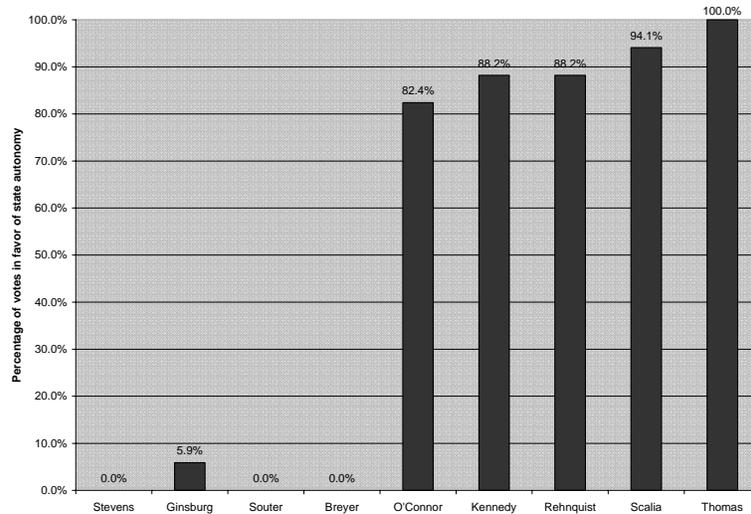
PROPORTION OF VOTES IN FAVOR OF AUGMENTING STATE
AUTONOMY IN CASES INVOLVING PREEMPTION AND THE
DORMANT COMMERCE CLAUSE,
OCTOBER 1991 TO JUNE 2005
(participation in a minimum of thirty decisions)

	All Decisions	Nonunanimous 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 twenty-four 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. Examining only the seventeen nonunanimous 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.

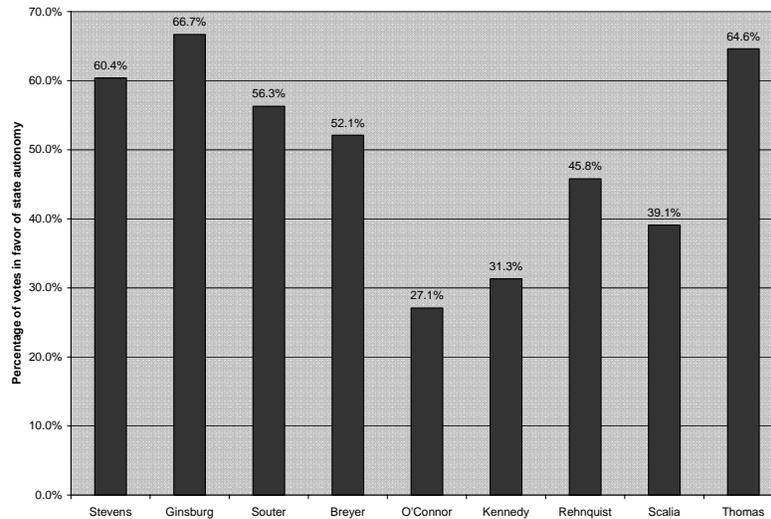
FIGURE 1
 PROPORTION OF VOTES IN FAVOR OF AUGMENTING STATE
 AUTONOMY IN FEDERALISM CASES ADDRESSING THE LIMITS
 ON CONGRESS—NONUNANIMOUS DECISIONS,
 OCTOBER 1994 TO JUNE 2005
 (N=17)



Over the same time period, the Court decided fifty-one cases involving preemption and the dormant Commerce Clause, yielding fifty-three distinct votes. In these decisions, Rehnquist, O'Connor, Scalia, Kennedy, and Thomas were much less unified. Moreover, as a group they were less likely than their colleagues to vote for the outcome that enhanced state policy-making authority, a result that is fairly clear when one isolates the Court's nonunanimous decisions. Indeed, as Figure 2 illustrates, in the twenty-four 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 AUGMENTING STATE
AUTONOMY IN FEDERALISM CASES ADDRESSING THE LIMITS
ON STATE GOVERNMENTS—NONUNANIMOUS DECISIONS,
OCTOBER 1994 TO JUNE 2005
(N=24)



III DISCUSSION

As the foregoing demonstrates, there were at least two 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.¹²³ Why would a Court clearly dedicated to state autonomy in one context be apparently indifferent to it in

¹²³ See Fallon, *supra* note 5, at 460–63.

another? What might account for these sharp differences in the two categories of cases, at least along the dimension of state policy-making authority?

Of course, there are several possible explanations, and I do not endeavor in this article to offer a fully developed account of the Rehnquist Court's federalism jurisprudence. But the discussion that follows makes two points important to that inquiry. First, and rather obviously, explanations of the Supreme Court's behavior must 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."¹²⁴ 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 national political coalition reflected in the Court's decisions. Reviewing the priorities of the political movement that gave rise to the Rehnquist Court—namely, the modern Republican Party—one tends to see its 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.¹²⁵ But the national GOP has never embraced a broader commitment to robust state autonomy as a matter of constitutional principle.¹²⁶ Most important for present purposes, leading Republican officials in the federal government have repeatedly prioritized the substantive goal of reducing economic regulation over the more procedural goal of enhancing state autonomy.¹²⁷ The Rehnquist Court's federalism decisions reflected those values.¹²⁸ Indeed, the decisions nicely translated

¹²⁴ MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 449 (2004).

¹²⁵ See *infra* Part III.B.

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See Fallon, *supra* note 5, at 469 (noting that the Rehnquist Court's "most pro-federalism justices are also substantively conservative, and when substantive

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.

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 one seeks to explain. If the object of inquiry is the Justices' conscious intentions, the conventional sources of constitutional law—the text, structure, history, tradition, and precedent—surely have a significant impact.¹²⁹ 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.¹³⁰ 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.¹³¹ Still, it seems plain that the Justices largely pursue their sincere understandings of what the Constitution requires.¹³²

conservatism conflicts with federalism values, substantive conservatism frequently prevails").

¹²⁹ See HOWARD GILLMAN, *THE CONSTITUTION BESEIGED* 17 (1993) ("Generally speaking, when judges decide cases they do not feel completely unencumbered by existing legal rules and doctrines.").

¹³⁰ 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., *Gonzales v. Raich*, 545 U.S. 1, 57 (2005) (O'Connor, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting); Matt Labash, *Evicting David Souter*, *WEEKLY STANDARD*, Feb. 13, 2006, at 20 (reporting on a speech given by Justice Stevens in which Stevens stated that in *Kelo v. New London*, 545 U.S. 469 (2005)—a majority opinion 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 *infra* notes 133–39 and accompanying text. But my point here is simply that we have no reason to believe that these expressions are cynical or insincere.

¹³¹ For instance, consider these remarks from Justice Breyer:

[P]olitics in our decision-making process does not exist. By politics, I mean Republicans versus Democrats, is this a popular action or not, will it help certain individuals be elected? . . . Personal ideology or philosophy is a different matter. . . . [J]udges have had different life experiences and different kinds of training, and they come from different backgrounds.

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.¹³³ As humans, we feel ourselves thinking, preferring, and choosing, but our subjective experiences are largely misleading.¹³⁴ 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.¹³⁵ 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.¹³⁶ More than we realize, our experience of conscious will is often an illusion.¹³⁷ As Jon Hanson and David Yosifon have explained,

Judges appointed by different presidents of different political parties may have different basic views about the interpretation of the law and its relation to the world. Those kinds of differences of view are relevant to the legal questions before us and have an effect. One cannot escape one's own training or background. . . . Those differences of legal philosophy do matter. I think the Constitution foresees such differences, and results that reflect such differences are perfectly proper.

Patricia M. Wald, *Last Thoughts*, 99 COLUM. L. REV. 270, 271 (1999) (some alterations in original).

¹³² See Gillman, *supra* note 116, at 490 (“When we set aside the unrealistic premise that legalistic behavior must look like formalistic decision making, then it has been fairly easy for empirical social scientists to find legal influences, even at the level of the Supreme Court in so-called hard cases.”).

¹³³ See Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 25 (2004) (arguing that 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”).

¹³⁴ See *id.* at 25–34.

¹³⁵ See generally *id.* at 34–133.

¹³⁶ See, e.g., SUSAN T. FISKE, SOCIAL BEINGS 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 133, 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.”).

¹³⁷ See generally DANIEL M. WEGNER, THE ILLUSION OF CONSCIOUS WILL (2002); see also Hanson & Yosifon, *supra* note 133, at 124–33.

Though 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 others, these intuitive conceptions of the will are fundamentally unreliable indicators¹³⁸ of both the reality of our will and the source of our behavior.

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,¹³⁹ 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 assuming the Justices do no more than interpret and apply the law—acting as umpires calling balls and strikes, in Chief Justice Roberts’ famous analogy¹⁴⁰—the Court’s decisions will inevitably depend on the 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

¹³⁸ Hanson & Yosifon, *supra* note 133, at 131.

¹³⁹ For example, a day after one of the clearest examples in the Court’s history of the influence of politics on the justices’ decision making, *Bush v. Gore*, 531 U.S. 98 (2000), Justice Thomas told an audience that a Justice’s political affiliation had “[z]ero” role in shaping his decisions. HOWARD GILLMAN, *THE VOTES THAT COUNTED* 172 (2001). When asked later that day whether he agreed with Thomas’s comment, Chief Justice Rehnquist stated, “[a]bsolutely, absolutely.” *Id.* at 173 (alteration in original). And in January 2001, a month after *Bush v. Gore*, Justice Breyer asserted that it was the law that determined the Court’s decisions—“it isn’t ideology, and it isn’t politics.” *Id.*

¹⁴⁰ *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) (“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 plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.”).

in cases that reach the Supreme Court.¹⁴¹ Consequently, a Justice's constitutional ideology, worldview, and personal experiences affect the way she approaches the project of constitutional interpretation.¹⁴² Thus, an account of the Court's decisions that fails to address the forces leading to the composition of its membership is, at best, incomplete. Why was the Court 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 and the various institutions with which the Court interacts.¹⁴³ The point can be overstated, and it is often oversimplified, but Robert Dahl's famous insight of more than fifty years ago remains largely valid: at least in a general sense, "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."¹⁴⁴

The mechanisms supporting this relationship are fairly straightforward. First, the appointment 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.¹⁴⁵ Presidents select nominees based largely on their perceived constitutional views, and senators cast their

¹⁴¹ See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 39–54 (2005).

¹⁴² KLARMAN, *supra* note 124, 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.").

¹⁴³ See generally THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT (Ronald Kahn & Ken I. Kersch eds., 2006); SUPREME COURT DECISION-MAKING (Cornell W. Clayton & Howard Gillman eds., 1999); THE SUPREME COURT IN AMERICAN POLITICS (Howard Gillman & Cornell Clayton eds., 1999).

¹⁴⁴ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court As a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

¹⁴⁵ See, e.g., LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 132 (2005); TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* 100 (1999); Balkin & Levinson, *supra* note 9, at 1066–70.

confirmation votes for much the same reason.¹⁴⁶ 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 capacity to frustrate the Court's objectives.¹⁴⁷ Without at least the tacit cooperation of these other power holders, the Court's decisions are largely irrelevant.¹⁴⁸ Finally, like all human beings, the 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.¹⁴⁹ This basic human need for approval tends to push the Justices toward results that are consistent with prevailing political sentiments.¹⁵⁰

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,... they rarely adopt a course of action that is opposed by that coalition."¹⁵¹

¹⁴⁶ See PERETTI, *supra* note 145, at 84–101.

¹⁴⁷ See *id.* at 133–51; Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 295–329 (2005).

¹⁴⁸ 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, ninety-nine percent of African-American children in the Deep South were still attending schools that were completely segregated. GERALD N. ROSENBERG, *THE HOLLOW HOPE* 50 tbl.2.1 (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. See *id.* at 42–57. Or consider the Court's more recent decision in *Santa Fe Independent School District 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 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, at 1A.

¹⁴⁹ See LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES* (2006).

¹⁵⁰ See Bradley W. Joondeph, *Judging and Self-Presentation: Towards a More Realistic Conception of the Human (Judicial) Animal*, 48 SANTA CLARA L. REV. 523 (2008).

¹⁵¹ Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U. L. REV. 859, 864 (2005).

Of course, the point should not be overstated.¹⁵² As Howard Gillman has explained, the evolution of constitutional law “never quite works out as a simple story of judges merely acting as faithful ‘agents’ in service of their ‘principals.’”¹⁵³ The Court does not march in lockstep with any political coalition or partisan agenda, and constitutional law often evolves in haphazard ways. As Thomas Keck has pointed out, “constitutional development does not in fact proceed by means of the smooth, wholesale replacement of an existing constitutional order with an emergent one,” but instead usually occurs “by means of a slow, halting transition.”¹⁵⁴

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.¹⁵⁵ Another is that the governing regime is often fractured, either 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).¹⁵⁶ Moreover, most of the cases that the Court decides are not politically salient, such that elected officials generally do not care how the issues are resolved.¹⁵⁷ Finally,

¹⁵² See generally Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511 (2007).

¹⁵³ Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT 141 (Ronald Kahn & Ken I. Kersch eds., 2006).

¹⁵⁴ THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY 4 (2004).

¹⁵⁵ See Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007).

¹⁵⁶ See Keck, *supra* note 152, at 517 (“[T]he governing coalition is so often divided on important matters that the justices will have multiple acceptable alternatives in most cases.”); Mark Tushnet, *The Supreme Court and the National Political Order: Collaboration and Confrontation*, in THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 117, 131 (Ronald Kahn & Ken I. Kersch eds., 2006).

¹⁵⁷ See Howard Gillman, *Judicial Independence Through the Lens of Bush v. Gore: Four Lessons from Political Science*, 64 OHIO ST. L.J. 249, 254 (2003) (“[M]ost of what courts do (especially lower courts) is of little or no interest to

election results do not automatically translate into legal change. As Steven Teles has explained, various social institutions, such “professional associations, the politically motivated parts of the bar, and law schools” all can play a significant role in the evolution of the law.¹⁵⁸ Specifically, “groups with disproportionate control of the institutions that produce and legitimate legal ideas, groups who have legal ‘authority,’ will enjoy a significant advantage in persuading judges and other significant legal actors that their demands are reasonable and appropriate.”¹⁵⁹ Thus, effecting legal change can require the “nonelectoral mobilization” of powerful elites, a mobilization that might be “only weakly coupled with the cycles of electoral politics.”¹⁶⁰

As a consequence, the Court often enjoys a fairly broad expanse in which to act autonomously, especially in cases of low political salience, and it frequently reaches results that, in an immediate sense, contravene public opinion and the views of the ascendant political coalition.¹⁶¹ But one 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 of the institutions that surround it.¹⁶²

policy-makers (beyond a general interest in relatively efficient case processing), which means that deference to courts is normally a byproduct of the overall political banality of the judiciary’s work, rather than its sensitivity or salience.”).

¹⁵⁸ STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 11 (2008).

¹⁵⁹ *Id.* at 12.

¹⁶⁰ *Id.* at 12, 14.

¹⁶¹ See Howard Gillman, *The Court As an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING*, *supra* note 143, at 65, 70 (“[W]hile there are some notorious examples of the Court retreating in the face of external pressure from other powerholders, there is still reason to believe that the justices are not particularly concerned with the possibility that their decisions might be overturned or that their jobs might be in jeopardy”); Keck, *supra* note 152, at 533 (“In most cases that reach the Supreme Court, every conceivable decision would be supported by some powerful political actor, and we could always then conclude that the decision happened because that actor demanded it.”).

¹⁶² See Pickerill & Clayton, *supra* note 9, at 236 (“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.

To oversimplify a bit, the Taney Court's jurisprudence, and particularly its decision in *Dred Scott*,¹⁶³ was an extension of the values animating the Jacksonian political regime that had dominated American politics since the 1820s.¹⁶⁴ 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 essentially eliminated the judiciary's role in reviewing the propriety of economic regulation.¹⁶⁵ The Warren Court's decisions of the 1960s in the areas of racial discrimination, civil liberties, voting rights, and criminal procedure, to cite another example, generally reflected the consensus of political elites during the Great Society, a coalition composed of non-Southern Democrats and liberal Republicans.¹⁶⁶ In each case, the Court functioned more as a policy-making partner of the elected branches than as an independent check on them.

In many respects, then, 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."¹⁶⁷ Of course, the Court's decision making is not *only* about politics. But it is *always* about politics, at least in important ways, and keeping this in mind might shed some light on the apparent tensions

Dooley, who quipped: ". . . th' supreme coort follows th' iliction returns.'" (quoting FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901)).

¹⁶³ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

¹⁶⁴ See Mark A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates*, 81 CHI.-KENT L. REV. 923 (2006).

¹⁶⁵ See Tushnet, *supra* note 156, at 118–19.

¹⁶⁶ See generally LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000); Gillman, *supra* note 153, at 145–58; Tushnet, *supra* note 156, at 121–24.

¹⁶⁷ Pickerill & Clayton, *supra* note 9, at 236; see also JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH* 185 (2006) ("[T]he Supreme Court has followed the public's views about constitutional questions throughout its history, and, on the rare occasions that it has been even modestly out of line with popular majorities, it has gotten into trouble."); Richard Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 1021–25 (2004).

concerning state autonomy in the Rehnquist Court's federalism decisions.

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.¹⁶⁸ It is well known that, beginning with the presidency of Ronald Reagan, the national GOP has generally embraced the goal of devolving greater authority to state and local governments.¹⁶⁹ As Reagan stated in his first inaugural address, he intended as president

to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people. All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government.¹⁷⁰

In 1987, Reagan issued Executive Order 12,612, which sought to “restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution.”¹⁷¹ The order required all executive branch departments and agencies to formulate and implement policy in a manner consistent with nine “fundamental federalism principles.”¹⁷² 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

¹⁶⁸ 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 A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM* 254 tbl.4-1 (3d ed. 2003).

¹⁶⁹ 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).

¹⁷⁰ Inaugural Address, 1 PUB. PAPERS 1, 2 (Jan. 20, 1981).

¹⁷¹ Exec. Order No. 12,612, 3 C.F.R. 252, 252–53 (1987), *revoked by* Exec. Order No. 13,132, 3 C.F.R. 206, 211 (1999), *reprinted in* 5 U.S.C. § 601 (2008).

¹⁷² *Id.* at 253–54.

clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States.”¹⁷³

Post-Watergate national GOP party platforms have likewise endorsed 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.”¹⁷⁴ 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.”¹⁷⁵ 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 on the State or local level.”¹⁷⁶ 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.”¹⁷⁷

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 W. 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.”¹⁷⁸ As just one indication, consider an influential document issued by the Justice

¹⁷³ *Id.*

¹⁷⁴ REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1980 (1980), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25844>.

¹⁷⁵ REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1988 (1988), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25846>.

¹⁷⁶ REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1992 (1992), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25847>.

¹⁷⁷ REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2000 (2000), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25849>.

¹⁷⁸ Pickerill & Clayton, *supra* note 9, at 238; *see also id.* (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).

Department's Office of Legal Policy in 1988, *Guidelines on Constitutional Litigation*,¹⁷⁹ a sort of field guide for government lawyers. Among other things, the *Guidelines* suggested that the basic rationale of *Garcia v. San Antonio Metropolitan Transit Authority*¹⁸⁰—that “State sovereign interests... are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power”¹⁸¹—was wrong.¹⁸² 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.”¹⁸³ Further, it contended that the Supreme Court's decisions in *Perez v. United States*¹⁸⁴ and *Wickard v. Filburn*,¹⁸⁵ both of which adopted expansive interpretations of the commerce power, and *Katzenbach v. Morgan*,¹⁸⁶ which indicated that Congress, in using its enforcement powers, could interpret the Reconstruction Amendments' substantive protections more broadly than the Court, had been incorrectly decided and should not form the basis for arguments presented by the United States in litigation.¹⁸⁷

Or consider again the GOP's national 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 decisionmaking power to state and local elected officials.”¹⁸⁸ 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.”¹⁸⁹ And the 1996 platform was more emphatic still:

¹⁷⁹ OFFICE OF LEGAL POLICY, U.S. DEPT OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988).

¹⁸⁰ 469 U.S. 528 (1985).

¹⁸¹ *Id.* at 552.

¹⁸² See OFFICE OF LEGAL POLICY, *supra* note 179, at 54–56.

¹⁸³ *Id.* at 55.

¹⁸⁴ 402 U.S. 146 (1971).

¹⁸⁵ 317 U.S. 111 (1942).

¹⁸⁶ 384 U.S. 641 (1966).

¹⁸⁷ OFFICE OF LEGAL POLICY, *supra* note 179, at 52–54, 59.

¹⁸⁸ REPUBLICAN PARTY PLATFORM OF 1980, *supra* note 174.

¹⁸⁹ REPUBLICAN PARTY PLATFORM OF 1988, *supra* note 175.

“For more than 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.”¹⁹⁰ Thus, as Pickerill and Clayton concluded, “the Republicans explicitly linked their stronger philosophical version of federalism with a judicial agenda, advocating the judicial-safeguards approach.”¹⁹¹

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, also in his first inaugural (and before the passage addressing federalism), “government is not the solution to our problem; government is the problem.”¹⁹² 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—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. The balance of evidence nonetheless suggests that the substantive goal of reducing economic regulation has been more important to the national 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.¹⁹³ Led by

¹⁹⁰ REPUBLICAN NAT’L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1996 (1996), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25848>.

¹⁹¹ Pickerill & Clayton, *supra* note 9, at 242; see also Gillman, *supra* note 153, at 159 (noting that “one of the explicit goals of the Reagan Justice Department was to use judicial appointments, not simply to reverse some of the more unwelcome features of the modern judicial liberalism, but also to institutionalize key features of the political agenda of the New Right, including a rollback of the scope of federal power over commerce and civil rights and an expansion of the idea of state sovereignty”).

¹⁹² Inaugural Address, *supra* note 170, at 1.

¹⁹³ REPUBLICAN CONTRACT WITH AMERICA, <http://www.house.gov/house/Contract/CONTRACT.html> (last visited Oct. 4, 2008).

Representative Newt Gingrich, a team of House Republican leaders drafted the Contract six weeks in advance of the 1994 midterm elections.¹⁹⁴ More than 300 Republican House candidates signed the Contract, and it effectively became the platform for the GOP's national campaign.¹⁹⁵ 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.¹⁹⁶ Tellingly, none of the proposed bills would have enhanced the policy-making autonomy of state governments, save the "effective death penalty provisions" in the proposed "Taking Back Our Streets Act,"¹⁹⁷ which sought to limit the power of federal courts to grant habeas corpus relief to state prisoners.¹⁹⁸ But the ninth listed bill, "The Common Sense Legal Reform Act,"¹⁹⁹ 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.²⁰⁰ Following the 1994 election, these proposals materialized in the Common Sense Product Liability Legal Reform Act of 1996,²⁰¹ which passed both houses of Congress before being vetoed by President Clinton.²⁰² 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.²⁰³

¹⁹⁴ See David E. Rosenbaum, *Republicans Offer Voters a Deal for Takeover of House*, N.Y. TIMES, Sept. 28, 1994, at A16.

¹⁹⁵ See Katharine Q. Seelye, *Files Show How Gingrich Laid a Grand G.O.P. Plan*, N.Y. TIMES, Dec. 3, 1995, at A1.

¹⁹⁶ See REPUBLICAN CONTRACT WITH AMERICA, *supra* note 193.

¹⁹⁷ *Id.*

¹⁹⁸ See Taking Back Our Streets Act of 1995, H.R. 3, 104th Cong. §§ 101–104 (1995).

¹⁹⁹ REPUBLICAN CONTRACT WITH AMERICA, *supra* note 193.

²⁰⁰ *Id.*

²⁰¹ H.R. 956, 104th Cong. (1996).

²⁰² See Neil A. Lewis, *President Vetoes Limits on Liability*, N.Y. TIMES, May 3, 1996, at A1.

²⁰³ H.R. 956, §§ 102(a)(1), 103–111.

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, reforms that would override state policies on matters that have traditionally been reserved to state governments. For example, GOP platforms have regularly taken aim at punitive damage awards. In 1992, Republicans 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."²⁰⁴ 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 edge over American workers."²⁰⁵ The 2000 platform also 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."²⁰⁶ 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."²⁰⁷

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

²⁰⁴ REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1992, *supra* note 176.

²⁰⁵ REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 1996, *supra* note 190.

²⁰⁶ REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2000, *supra* note 177.

²⁰⁷ REPUBLICAN NAT'L CONVENTION, REPUBLICAN PARTY PLATFORM OF 2004 (2004), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25850>.

in unsuccessful lawsuits.²⁰⁸ For example, the Product Liability Reform Act of 1997,²⁰⁹ which would have governed “any product liability action brought in any State or Federal court;”²¹⁰ imposed national (and generally stricter) liability rules;²¹¹ created “a complete defense” to such actions when “the claimant was intoxicated or was under the influence of intoxicating alcohol or any drug when the accident” occurred;²¹² created a national, two-year statute of limitations;²¹³ 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”;²¹⁴ limited the size of most punitive damage awards to \$250,000;²¹⁵ bifurcated the proceedings for determining compensatory and punitive damages;²¹⁶ and mandated that liability for noneconomic damages among multiple defendants would be several, but not joint.²¹⁷ Likewise, the Medical Injury Compensation Reform Act of 1995²¹⁸ would have imposed a uniform two-year statute of limitations on medical malpractice claims,²¹⁹ limited the contingency fees that lawyers could charge plaintiffs in malpractice cases,²²⁰ and prohibited any punitive damages award exceeding \$250,000,²²¹ and it would have applied

²⁰⁸ See, e.g., Innocent Sellers Fairness Act, H.R. 989, 110th Cong. (2007); Small Business Liability Reform Act of 2003, H.R. 2813, 108th Cong. (2003); Small Business Liability Reform Act of 2003, S. 1546, 108th Cong. (2003); Small Business Liability Reform Act of 2001, H.R. 1805, 107th Cong. (2001); Small Business Liability Reform Act of 2001, S. 865, 107th Cong. (2001); Small Business Liability Reform Act of 1999, H.R. 2366, 106th Cong. (1999); Product Liability Reform Act of 1997, S. 5, 105th Cong. (1997); Product Liability Fairness Act of 1995, S. 565, 104th Cong. (1995); Common Sense Product Liability Reform Act, H.R. 917, 104th Cong. (1995).

²⁰⁹ S. 5, 105th Cong. (1997).

²¹⁰ *Id.* § 102(a)(1).

²¹¹ *Id.* § 103(a).

²¹² *Id.* § 104(a), (a)(1).

²¹³ *Id.* § 106(a).

²¹⁴ *Id.* § 108(a).

²¹⁵ *Id.* § 108(b)(1).

²¹⁶ *Id.* § 108(c).

²¹⁷ *Id.* § 110(a).

²¹⁸ H.R. 229, 104th Cong. (1995).

²¹⁹ *Id.* § 5(a).

²²⁰ *Id.* § 6(a).

²²¹ *Id.* § 7(a).

to any malpractice action “brought in a State or Federal court against a health care provider or health care professional.”²²²

Almost all of these legislative efforts have been unsuccessful. But Republicans were able to enact the Class Action Fairness Act of 2005,²²³ which places limits on the recovery of plaintiffs’ attorneys’ fees²²⁴ and makes it easier for defendants to remove class actions to federal court, where businesses are more apt to obtain summary judgments.²²⁵

Federal 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 vaccines;²²⁶ the Protection of Lawful Commerce in Arms Act preempts most civil actions brought under state law against firearms and ammunition dealers or manufacturers;²²⁷ the Fair and Accurate Credit Transactions Act of 2003 preempts a number of state credit reporting and identity theft laws;²²⁸ and the Energy Policy Act of 2005 preempts a number of stricter state energy efficiency standards for a variety of consumer appliances.²²⁹ 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 2001 and 2006,

²²² *Id.* § 3(6); *see also id.* § 10(a) (expressly preempting state statutes of limitation and greater recovery amounts).

²²³ Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. §§ 1711-1715 (2008)).

²²⁴ *See id.* § 3, 119 Stat. at 6.

²²⁵ *See id.* § 5, 119 Stat. at 12-13; *see also* Editorial, *A Dismal Class-Action Finale*, N.Y. TIMES, Feb. 12, 2005, at A16.

²²⁶ *See* Public Readiness and Emergency Preparedness Act, Pub. L. No. 109-148, 119 Stat. 2818, 2821 (2005) (codified at 42 U.S.C. § 247d-6d (2008)).

²²⁷ *See* Pub. L. No. 109-92, § 3, 119 Stat. 2095, 2096-97 (2005) (codified at 15 U.S.C. §§ 7901-7903 (2008)).

²²⁸ *See* Pub. L. No. 108-159, 117 Stat. 1952, 1961-64, 1972-73 (codified as amended at 15 U.S.C. §§ 1681-1681t (2008)).

²²⁹ *See* Pub. L. No. 109-58, § 135, 119 Stat. 594, 624-34 (codified as amended at 42 U.S.C. §§ 6295, 6297 (2008)).

“result[ing] in 27 laws, signed by the President, that preempt state authority.”²³⁰

Moreover, when federal statutes have been ambiguous, executive departments and agencies in the current Bush administration have attempted on a number of occasions to effect preemption through agency rulemaking.²³¹ 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.”²³² This was the first time in the Commission’s history that it expressed such an intention.²³³ 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.”²³⁴ As Catherine Sharkey noted, agencies have previously been “more reticent about including forceful preemptive statements in their regulations,” making these recent assertions a sort of “sea change in agency action.”²³⁵

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

²³⁰ MINORITY STAFF SPECIAL INVESTIGATIONS DIV. U.S. H.R. COMM. ON GOV’T REFORM, 109TH CONG., CONGRESSIONAL PREEMPTION OF STATE LAWS AND REGULATIONS 1 (2006), available at <http://oversight.house.gov/documents/20060606095331-23055.pdf>.

²³¹ See Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227 (2007).

²³² Final Rule: Standard for the Flammability (Open Flame) of Mattress Sets, 71 Fed. Reg. 13,472, 13,496 (Mar. 15, 2006) (codified at 16 C.F.R. § 1633 (2008)).

²³³ See Stephen Labaton, ‘Silent Tort Reform’ Is Overriding States’ Powers, N.Y. TIMES, Mar. 10, 2006, at C5.

²³⁴ 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. §§ 201, 314, 601 (2008)).

²³⁵ Sharkey, *supra* note 231, at 242.

appointee.²³⁶ The United States participated in sixty-two of those cases, five as a party and fifty-seven as amicus curiae. In forty of these sixty-two 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.²³⁷ Moreover, in all four of the preemption cases in which the United States participated during the 2007 October Term, Solicitor General Paul Clement contended that state law was preempted.²³⁸ All told, then, Republican Solicitors General have argued in favor of complete or partial preemption in more than seventy percent of the cases in which the United States has participated since October 1981.²³⁹

Again, the point should not be overstated. By no means has Republican opinion on these questions been monolithic. According to Charles Fried, Reagan's Solicitor General from 1985 to 1989, there were vigorous debates within the Justice Department concerning the government's position on preemption, especially between Fried and more ideologically committed conservatives such as Charles Cooper and William Bradford Reynolds.²⁴⁰ And the ideological conservatives sometimes prevailed. Consider Reagan's Executive Order 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."²⁴¹ Or consider again the *Guidelines on Constitutional Litigation* ("Guidelines") issued in

²³⁶ The data set used to compile these figures is available at <http://claranet.scu.edu/coursepage.asp?cid=2086&page=01> (last visited Oct. 4, 2008).

²³⁷ See *id.*

²³⁸ Those cases were *Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008), *Warner-Lambert Co. v. Kent*, 128 S. Ct. 1168 (2008) (mem.), *Rowe v. N.H. Motor Transport Ass'n*, 128 S. Ct. 989 (2008), and *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008). The briefs filed by the Solicitor General in each case are available at <http://www.usdoj.gov/osg/briefs/2007/3mer/1ami/toc3index.html> (last visited Oct. 4, 2008).

²³⁹ These figures come from the data set described *supra* note 236.

²⁴⁰ See CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 35, 186–88 (1991).

²⁴¹ Exec. Order 12,612, 3 C.F.R. 252, 255 (1987), *revoked by* Exec. Order No. 13,132, 3 C.F.R. 206 (1999), *reprinted in* 5 U.S.C. § 601 (2008).

1988 by the Justice Department's Office of Legal Policy under the direction of Attorney General Edwin Meese. The *Guidelines* contended that *Pike v. Bruce Church, Inc.*,²⁴² which held that state laws imposing burdens on interstate commerce that are clearly excessive in relation to their putative benefits violate the dormant Commerce Clause,²⁴³ was wrongly decided.²⁴⁴ 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."²⁴⁵ A separate 1988 document prepared by Office of Legal Policy, *The Constitution in the Year 2000*, stated that "the 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 regulation."²⁴⁶ For the future, the Office of Legal Policy 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."²⁴⁷

Thus, influential voices in the GOP have plainly pushed for a more robust vision of state autonomy, even when it might result in more stringent state-level economic regulation. But on balance, the post-Watergate Republican Party as a whole appears generally to have been unconcerned about intrusions on state policy-making 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.

²⁴² 397 U.S. 137 (1970).

²⁴³ *Id.* at 142.

²⁴⁴ OFFICE OF LEGAL POLICY, *supra* note 179, at 53.

²⁴⁵ *Id.*

²⁴⁶ OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, *THE CONSTITUTION IN THE YEAR 2000* 135 (1988).

²⁴⁷ *Id.* at 139.

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 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 toward state autonomy were inconsistent or even hypocritical,²⁴⁸ 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 understandable if not fully predictable. Though the Court's concern for state autonomy may have varied by context, the broad arc of its decisions reflected the priorities of national political 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 the majority of national Republican officials preferred. The Justices of the Rehnquist Court crafted constitutional doctrines that generally facilitated these objectives.

In this sense, the Rehnquist Court's federalism decisions largely mimicked the Court's broader political dynamic.²⁴⁹ As Mark Tushnet and Thomas Keck have observed, 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 Kennedy) and its more ideological, movement conservatives (Thomas, Scalia, and to some degree Rehnquist) could agree, such as criminal procedure

²⁴⁸ 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.").

²⁴⁹ See generally KECK, *supra* note 154; TUSHNET, *supra* note 9.

and school desegregation.²⁵⁰ 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.²⁵¹

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—reflected, for instance, in the desires of Scalia and Thomas 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 ideological center of the national GOP, 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 such a turn in the Court's jurisprudence occurs, it will be something new. It will not be a legacy of the Rehnquist Court.

²⁵⁰ See KECK, *supra* note 154, at 279–83; TUSHNET, *supra* note 9.

²⁵¹ See KECK, *supra* note 154, at 279–83; TUSHNET, *supra* note 9.

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*

Gonzales v. Raich, 545 U.S. 1 (2005)
Pierce County v. Guillen, 537 U.S. 129 (2003)
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 5 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)
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