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Rehnquist and Federalism: An Empirical Perspective

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Abstract

We attempt to articulate a vision of federalism, particularly the Rehnquist version of federalism. We find that there is little consistent thought on the role of the judiciary in protecting federalism. This lack of consensus makes it difficult to predict the decisions federalists might make, but we attempt to outline Chief Justice Rehnquist's contributions to understanding the role courts should play in protecting federalism. We then attempt to assess if Rehnquist adheres to his own vision of federalism. Using his votes since his elevation to Chief Justice in 1986, we test several hypotheses designed to determine if Chief Justice Rehnquist demonstrates the respect for the balance between state and federal governments which he has articulated in so many of his opinions. We generally find support for the proposition that Chief Justice Rehnquist adheres to the tenets of federalism. We conclude that, while there is an ideological component to Chief Justice Rehnquist's jurisprudence, there also appears to be evidence of a sincere commitment to the protection of the line between national and state governments.

Rehnquist and Federalism: An Empirical Perspective

Ruth Colker*

Kevin Scott**

Commentators generally agree that the Supreme Court has spurred a "federalism revolution" during Chief Justice William Rehnquist's tenure.[1] Nonetheless, the term "federalism revolution," is unclear, in part, because the early federalists offered little commentary on the proper judicial role under federalism. Arguably, this uncertainty continues today.

Broadly speaking, we can think of federalism as reflecting a respect for the relationship between state and federal government. Under federalism principles, Congress should be hesitant to interfere with state sovereignty. Similarly, the states should respect Congress' authority and not take actions that would jeopardize our national interests. Historically, the federalists sought a *greater* role for the federal government than had existed under the Articles of Confederation. Today, by contrast, we often think of the federalists as seeking a more restrained role for Congress as compared with the states. But what is the role of the judiciary in this arrangement? Is a federalist inherently a restraintist, believing in a limited role for the judiciary? What is the role of the state judiciary as compared to the federal judiciary? The early federalists were restraintists and did not envision a broad role for the judiciary in maintaining the proper federalism balance.

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[1] *See generally* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New 'On the Record' Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001); William W. Buzbee, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001).

Today, by contrast, some might argue that the Court is more generally activist and that even the federalists consider the judiciary to have a significant role in maintaining what it considers to be the proper allocation of power between the federal and state governments. Finally, how does the ratification of the Fourteenth Amendment affect federalism? The early federalists could not have anticipated the ratification of the Fourteenth Amendment with its direct limitations on state action and allocation of greater power to Congress. We can only speculate as to how they may have modified their version of federalism had they known of the ratification of the Fourteenth Amendment.

Chief Justice Rehnquist has been a strong proponent of federalism. He has repeatedly invoked federalism principles, first in dissent, and then in majority opinions. As reflected in his opinions, Rehnquist's version of federalism appears to be more restraintist than the version propounded by Justice Antonin Scalia. Rehnquist also appears to consider the Fourteenth Amendment to create an important source of increased power for Congress in regulating the states.

In this chapter, we will use both qualitative and quantitative tools to understand more fully Rehnquist's version of federalism. Using qualitative analysis, we will argue that Rehnquist's version of federalism is different than the one propounded by the early federalists. In addition, we will argue that it differs from that of Justice Scalia. Then, using quantitative analysis, we will ask whether Rehnquist's decisions are consistent with the federalism model that he propounds in his opinions.

I. Three Versions of Federalism

A. The Classical View of Federalism

Today, federalism is often considered to be a states' rights perspective but the anti-federalists had the strongest states' rights perspective in the Eighteenth Century. James Madison sought to create a *balanced* system of government whereby both the federal

government and the states had an appropriate scope of power. To him, "the federal constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local, and particular to the state legislatures.[2]"

Madison emphasized that the proposed government would be a *federal*, not a *national* government. The federal character was achieved through the selection of the Senate and the selection of the President. Each state would receive the same number of Senators and those Senators would be chosen by the state legislatures. The Presidential election would use a winner-take-all method of counting electoral votes on a state by state basis. Madison believed that these rules would protect the states. "Thus, each of the principal branches of the federal government will owe its existence more or less to the favor of the state governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious, than too overbearing toward them.[3]"

In general, the Framers did not emphasize the importance of the judicial role in protecting the constitutional design. Alexander Hamilton gave the most consideration to the proper role of the judiciary. Hamilton understood that the judiciary, in some sense, is beholden to the other branches of government because it cannot enforce its rulings. Hence, some might call it the "weakest of the three departments of power.[4]" Yet, the independence of the judiciary was an essential aspect of the proposed new government. "[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers." He then delineated the role of the courts in the proposed system of government:

> The complete independence of the courts of justice is peculiarly essential in a limited constitution . . . . Limitations . . . can be preserved in practice no other way than through the medium of the courts of justice; whose duty is must be to declare all acts contrary to the manifest tenor of the constitution void.

[2]Federalist No. 10 at 22.
[3]Federalist No. 45 at 100.
[4]Federalist No. 78 at 143.

> Without this, all the reservations of particular rights or privileges would amount to nothing.

Hamilton does not specify whether this judicial role should be a broad or narrow one but his recognition that the judiciary is the weakest branch might suggest that he thought the judiciary should use its powers sparingly to maintain its integrity.

More modern writers also contemplated the judicial role under federalism. James Thayer and Herbert Wechsler have played a central role in the development of a judicial role for federalists, arguing for a restrained judicial role. Thayer defended the position that courts should only declare laws unconstitutional "when those who have the right to make laws have not merely made a mistake, but have made a very clear one, – so clear that it is not open to rational question."[5] Nonetheless, he considered it important for courts to have the power to declare laws unconstitutional. Otherwise, the constitution "is reduced to nothing."

Although Thayer argued for judicial restraint, he suggested that the Supreme Court should be sensitive to whether a case is being appealed from a state or federal court. In this context, he makes two important points. First, he emphasizes the importance of the supremacy clause. "If a State legislature passes a law which is impeached in the due course of litigation before the national courts, as being in conflict with the supreme law of the land, those courts may have to ask themselves a question different from that which would be applicable if the enactments were those of a co-ordinate department . . . The judiciary now speaks as representing a paramount constitution and government, whose duty it is, in all its departments, to allow to that constitution nothing less than its just and true interpretation; and have fixed this, to guard against any inroads from without."

[5] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893)

Second, and related, Thayer postulates that judges should be generally deferential to the views of a coordinate branch of government. Hence, state court judges would be deferential to the views of the state legislature and be disinclined to invalidate their legislation as violative of the constitution. By emphasizing the importance of deferring to the views of a coordinate branch of government, Thayer implied that a federal judge need *not* defer to the views of the state legislature, particularly when the state's highest court has validated those legislative acts. One might argue, then, that a federalist judge would be less deferential to a state court's review of state action than similar review by a federal court.

One must be careful not to overstate Thayer's view about the federal courts' relationship to state government. Thayer's view is predicated on the assumption that it will be extremely rare for state government to violate the Constitution because his work predates use of the Fourteenth Amendment as a vehicle for incorporation. From his perspective, states had broad authority to enact legislation. The only meaningful limitation on the states would be the Supremacy Clause – when Congress had the power to pre-empt a field, chose to pre-empt the field, and the states did not honor those limitations. Thayer would therefore have expected that courts would rarely deal with situations in which the states had arguably violated the Constitution. But in instances in which the states may have violated the Supremacy Clause, he did not consider it likely that the state courts would vigorously enforce that constitutional principle. Hence, the federal courts would play an important role in protecting the federal government's prerogatives.

Herbert Wechsler also did not consider courts to have a central role in the maintenance of a federal system. "[T]he national political process in the United States – and especially the role of the states in the composition and selection of the central government – is intrinsically well adapted to retarding or restraining new intrusions by the

center on the domain of the states . . . . Federal intervention as against the states is thus primarily a matter for congressional determination in our system as it stands."[6]

Like Thayer, Wechsler envisioned the function of the courts in a federal system to be preservation of the Supremacy Clause, but this did not mean that he envisioned the courts as actively engaged in the policy-making process—that was to be left to the elected branches. According to Wechsler, "while the Court has an important function in [pre-emption], the crucial point is that its judgments here are subject to reversal by Congress, which can consent to action by the states that otherwise would be invalidated . . . . The Court makes the decisive judgment only when – and to the extent that – Congress has not laid down the resolving rule." On the other hand, Wechsler saw a fundamentally different role for the courts in protecting individual rights:

> In this latter area of the constitutional protection of the individual against the government, both federal and state, subordination of the Court to Congress would defeat the purpose of judicial mediation. For this is where the political processes cannot be relied upon to introduce their own correctives – except to the limited extent that individuals or small minorities may find a champion in some important faction

The classical version of federalism and the Thayer/Wechsler version are only modestly different. Both versions are restraintist while recognizing a legitimate federal judicial role in protecting the Supremacy Clause. The important difference is that Wechsler envisions a somewhat active role for the courts in the protection of individual rights, because he takes account of the Fourteenth Amendment in the development of his views.

B. Federalism Since the 1970's: The Demise of Wechsler

Although the early federalists appear to have advocated a restrained role for the judiciary, a more activist version of federalism began to emerge in the 1970s and 1980s.

[6] Herbert Wechsler, *Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954)

Some political scientists have argued that this development was not a genuine reflection of federalist principles; instead, it was an example of the Supreme Court imposing its ideological preferences on Congress.[7] Within legal circles, a genuine federalism explanation is offered, with commentators suggesting that the Court has grown wary of Congress dramatically overstepping its proper authority.[8] We have entered the federalism versus political ideology debate in previous work but leave that issue to the side for the purposes of this chapter.[9]

The modern federalist position on the Tenth Amendment is reflected in Justice Powell's dissenting opinion in *Garcia v. San Antonio Metropolitan Transit Authority*.[10] Justice Powell argued for a vigorous judicial role to protect the states when Congress violates the Tenth Amendment by overreaching in its use of the commerce clause, stating: "Professor Wechsler, whose seminal article in 1954 proposed the view adopted by the Court today, predicated his argument on assumptions that simply do not accord with current reality." To Powell, the growth of the federal government had obviated the position advocated by Wechsler and his predecessors. Justice Powell also disagreed with Wechsler's premise that members of Congress, because they are elected from states, would protect state sovereignty. Instead, he posited that they would have a national, not local,

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[7] *See generally*, Sue Davis, *Rehnquist and State Courts: Federalism Revisited*, 45 THE WESTERN POLITICAL QUARTERLY 772 (1992); Harold J. Spaeth, *Justice Sandra Day O'Connor: An Assessment* in AN ESSENTIAL SAFEGUARD: ESSAYS ON THE UNITED STATES SUPREME COURT AND ITS JUSTICES 94-95 (D. Grier Stephenson, Jr. ed. 1991); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

[8] *See. e.g.*, Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643 (1996); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

[9] *See* Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VIRGINIA L. REV.1301 (2002).

[10] 469 U.S. 528 (1984).

perspective. The modern federalist position has therefore evolved from one of judicial restraint to one of active judicial enforcement of the principles of state sovereignty.[11]

Justice Scalia has been the bluntest proponent of action by the Court in defense of federalism. He has said:

> My Court is fond of saying that acts of Congress come to the Court with the presumption of constitutionality. That presumption reflects Congress's status as a coequal branch of government with its own responsibilities to the Constitution. But if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution . . . then perhaps that presumption is unwarranted.[12]

This runs contrary to the assertions of some early federalists like Thayer and Wechsler. Thayer, in particular, argued that the Court should presume the constitutionality of Congress's conduct and only strike such legislation where there is "no room for reasonable doubt." Scalia criticized the Congress' recent practice of creating expedited procedures for the courts to assess the constitutionality of legislation. Scalia argued that by doing so, Congress is flouting its unconstitutional conduct by readily acknowledging that it may have passed unconstitutional legislation.

This second version of federalism is less restraintist than the view offered by the early federalists. In addition, it appears to be more protective of states' interests. We would therefore expect that if this model explained the voting behavior of a federalist jurist that voting behavior would be consistent with the views expressed by states in amicus briefs.

C. Rehnquist's Federalism

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[11] *See* Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILLANOVA L. REV. 951, 952 (2001) (arguing that "federal courts have a role in safeguarding state sovereignty that is as legitimate and essential as that generally acknowledged to be both necessary and constitutionally mandated for the protection of individual rights.")

[12] Antonin Scalia, Telecommunications Law and Policy Symposium (Apr. 18, 2000). (transcribed from a videotape loaned by the *Law Review* of Michigan State University – Detroit College of Law).

While Rehnquist played an early and active role in pushing the Court to adopt a more activist posture with respect to enforcing federalist principles, his version of federalism does not appear to be as activist as the one propounded by Scalia because, like Wechsler and Thayer, he seems to envision a role for the Court in the protection of individual rights even when Congressional protection of individual rights seems to trounce on state's rights.

Associate Justice Rehnquist played an early role in the articulation of a strong role for the federal courts in protecting federalism in his dissent in *Fry v. United States*,[13] three years after joining the Court. In 1975, he was the lone Justice to articulate this perspective. The issue in *Fry* was the constitutionality of the Economic Stabilization Act of 1970, which authorized the President to issue orders and regulations to stabilize wages and salaries at levels not less than those prevailing on May 25, 1970. Not only did this statute apply to the workforce generally, but it was understood to apply to the conduct of state government. Hence, two state employees brought suit to invalidate the statute so that they could receive a salary increase that the state of Ohio had approved. The state employees challenged the statute under the Tenth Amendment as improperly interfering with state sovereignty.

The majority upheld the constitutionality of the Economic Stabilization Act, relying on the Court's holding in *Maryland v. Wirtz*[14] that the Fair Labor Standards Act could constitutionally be applied to schools and hospitals run by states. (Douglas and Stewart dissented, arguing that the Tenth Amendment protected state sovereignty from such regulation, given the excessive cost that would accompany enforcement of the FLSA.) Justice Stewart joined the majority in *Fry*; Justice Douglas would have dismissed the writ

[13] 421 U.S. 542 (1975).
[14] 392 U.S. 183 (1968).

as improvidently granted. Hence, in dissent, Justice Rehnquist was alone in extending Douglas and Stewart's dissent in *Wirtz* to *Fry*.

Justice Rehnquist was not on the Court when *Wirtz* was decided so *Fry* was his first opportunity to convey his view of federalism and the judicial role. Building on the Court's decision in *Hans v. Louisiana*[15] in which it relied on the "pre-understanding" of the Eleventh Amendment to protect a state from litigation, Rehnquist argued that many aspects of state sovereignty are protected "quite apart from the provisions of the Tenth Amendment." "Both Amendments [the Tenth and Eleventh] are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation."

Having articulated an activist role for the judiciary in safeguarding federalism, Rehnquist still had a challenging set of facts to assess, because the wage and salary ceilings were put into place as part of national emergency legislation. One might argue under the early federalist model that the states should defer to Congress in times of national emergency, so the legislation should be upheld as constitutional. Rehnquist did not offer much scrutiny of the facts. He simply concluded: "nor do I believe that the showing of national emergency made here is sufficient to make this case one in which congressional authority may be derived from sources other than the Commerce Clause." He did acknowledge, however, that the Fourteenth and Fifteenth Amendments, as a general matter, can provide the authority for Congress to "impose significant restrictions on what would otherwise be thought state prerogatives." No Fourteenth or Fifteenth Amendment

[15] 134 U.S. 1 (1890).

argument, however, was available in this case. Rehnquist therefore argued that *Wirtz* should be overruled but that *South Carolina v. Katzenbach*,[16] upholding the Voting Rights Act, could still be understood to be valid precedent.

Rehnquist recognized that he was calling for the overturning of precedent which is inconsistent with the notion of *stare decisis*. He subscribed to a weak version of *stare decisis* in order to justify that step. He said: "important decisions of constitutional law are not subject to the same command of *stare decisis* as are decisions of statutory questions."[17] This weak version of *stare decisis* would be quite inconsistent with the tenor of Thayer's judicially cautious federalism. Rehnquist justified this weak version of stare decisis in the federalism context: "Surely there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments."

Rehnquist made two important contributions to the development of a federalism jurisprudence in *Fry*. First, he carved out an activist judicial role, even if that role required the overturning of precedent. Second, he recognized the power of Congress to regulate states and intrude on their sovereignty under the Fourteenth and Fifteenth Amendments, but not under the Commerce Clause. In 1975, he was alone in taking this view.

Within a year, Rehnquist commanded a 5-4 majority of support for his federalism views as articulated in *National League of Cities v. Usery*.[18] Justice Blackmun filed the pivotal concurrence to give Rehnquist a five vote majority. (Ironically, Robert Bork defended the federal statute as Solicitor General.) The issue in *Usery* was essentially the issue in *Wirtz* – the constitutionality of Congress applying the Fair Labor Standards Act to state employees. Only two members of the Court had dissented from that conclusion in

[16] 388 U.S. 301 (1966).
[17] 421 U.S. at 559.
[18] 426 U.S. 833 (1976).

1968. Now, however, a majority of the Court is willing to strike down the FLSA as applied to the states because it results in the "forced relinquishment of important governmental activities." Not only did the FLSA impose substantial costs on state and local government but it "displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require."

Although the decision had far-reaching implications in reversing the recent decision in *Wirtz*, the decision had cautious elements. First, Rehnquist was careful to note that the decision applied only to Congress' use of the commerce clause. He left open the possibility that Congress might regulate the states and "affect integral operations" under the spending power or Section Five of the Fourteenth Amendment. Second, Rehnquist distinguished rather than overruled *Fry*. In contrast to the FLSA, he found that the Economic Stabilization Act, at issue in *Fry*, was a limited, temporary, national measure which reduced the pressures upon state budgets rather than increased them. Thus, Rehnquist left open the door the possibility that Congress, in the future, could use its emergency powers to enact legislation which might intrude upon state sovereignty. Nonetheless, Rehnquist made no attempt to distinguish *Wirtz*. He directly overruled that precedent, implicitly relying on his view expressed in *Fry* that constitutional decisions are entitled to less weight as *stare decisis*.

Rehnquist reiterated the moderate aspects of his federalism in *Fitzpatrick v. Bitzer*.[19] With no dissenters, Rehnquist again wrote the opinion of the Court. The issue in this case was the authority of Congress to permit monetary damage awards against the states in suits brought under Title VII of the Civil Rights Act of 1964. The Court upheld this congressional authority, finding that Congress' powers under Section Five of the Fourteenth Amendment necessarily limited the principle of state sovereignty embodied in

[19] 427 U.S. 445 (1976).

the Constitution. *Fitzpatrick* therefore continued the line of reasoning that Rehnquist had acknowledged in *Fry* – that cases involving Congress' authority under Section Five present different problems than cases involving Congress' commerce clause authority.

Although Rehnquist still adhered to the view that Congress' Section Five authority is broader than its Commerce Clause authority, with respect to regulating state action, his decision in *Rome v. United States*[20] suggested that he had moderated his views on the extent of Congress' authority under Section Five.

The issue in *Rome* was the constitutionality of the Voting Rights Act of 1965, as applied to Rome, Georgia. In 1965, the city of Rome made a number of changes to its electoral scheme; under Section 5 of the Voting Rights Act, these changes required preclearance. Section 5 of the Voting Rights Act required that the Attorney General may only preclear a voting change if it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[21] The City claimed that Section 5 was unconstitutional, because Congress does not have authority under the Fourteenth Amendment to ban practices that are discriminatory in effect, but lack discriminatory intent.

In a 6-3 decision, the majority upheld Congress' use of its Fourteenth Amendment authority to create the preclearance rules. Justice Rehnquist dissented, issuing an opinion that was joined by Justice Stewart. (Justice Stewart, of course, had dissented from the majority's holding in *Wirtz* and had a longstanding concern for federalism.) Echoing his strong dissent in *Fry*, he castigated the Court for abandoning its proper judicial role. He said:

> While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately

[20] 446 U.S. 156 (1980).
[21] 42 U.S.C. § 1973c.

> responsible for deciding challenges to the exercise of power by those entities. Marbury v. Madison, 1 Cranch 137 (1803); United States v. Nixon, 418 U.S. 683 (1974). Today's decision is nothing less than a total abdication of that authority, rather than an exercise of the deference due to a coordinate branch of the government.

The difference in tone between *Rome* and *Usery* is striking. In *Usery*, Rehnquist was willing to revisit his own dissenting opinion in *Fry* and suggest limiting principles to a far-reaching decision. In *Rome*, he came close to Scalia's view of abandoning deference to a coordinate branch of government altogether. The difference in tone, however, can easily be attributed to the different role of these decisions. *Usery* was a majority decision for the Court in which Rehnquist was trying to keep together a flimsy five vote majority (which disappeared in less than a decade in *Garcia v. San Antonio Metropolitan Transit Authority.*)[22] In *Rome*, Rehnquist was writing freely in dissent, only trying to maintain the vote of one of his longstanding federalist compatriots. It is not surprising that his language in dissent would be more extreme although it probably hints to his future path where he often joins other federalists in striking down federal legislation, even legislation enacted pursuant to Congress' Section Five authority.

Rehnquist's opinions lend support to two different models of federalism. When he writes in dissent, he sometimes sounds more like the activist Scalia model of federalism than like the early restraintist model of federalism. But when he writes the opinion of the Court, he sounds more restraintist and more deferential to Congress' powers under the Fourteenth Amendment. Which model best describes his opinions from a quantitative perspective? Does Rehnquist's model of federalism have restraintist elements? Is he more deferential to Congress when it has invoked its powers under the Fourteenth Amendment?

III. Hypotheses

[22] 469 U.S. 528 (1985).

Although we have identified three different models of federalism, there are some elements common to each of these versions. Under these common elements, we posit that a judge who adheres to federalism would:

- First, demonstrate greater respect for the decisions of state courts than federal courts.[23]
- Second, respect the articulated wishes of the states, as demonstrated by amici briefs submitted by the states.
- Third, treat states more as an equal to the federal government than a non-federalist would. This is not to say that a federalist would treat states as equals to the federal government, but they should be less willing to invalidate state action than those of non-federalists.
- Fourth, there should be some notion of judicial restraint. The federalists should be more restrained than the nonfederalists even if there is a range of restrained behavior among the federalists.
- Fifth, federalists should not hesitate to favor the federal government over the states when the Supremacy Clause is at issue.

Additionally, these behaviors should be observable regardless of the ideological implications of a vote to validate or invalidate action. We do not expect ideology to fail to explain the votes of justices who have articulated a special interest in preserving the federalist structure, but we do expect an independent effect for the hypothesized behaviors once we have accounted for the ideological implications of each case.

Finally, there may be different views of federalism articulated by current members of the Court. Chief Justice Rehnquist has suggested that there is a special place for the rights of the individual and that the courts might be part of the scheme of protection of

[23] Although Thayer might reject this hypothesis, it does appear to be central to modern federalism as discussed by Sue Davis. See *infra* note 26.

those rights. This position, articulated first by Thayer and later by Wechsler, may manifest itself in the voting record of Chief Justice Rehnquist, but it may not emerge in the voting behavior of Justice Scalia, who has not articulated a similar commitment.

III. Research Design

Very little quantitative analysis of judicial adherence to doctrine has occurred in either political science or legal literature. The advantage of such an approach is that it permits us to ascertain the degree to which the justices' votes match the language they craft in their opinions. Several political scientists have attempted similar analyses of legal doctrines, but few have carefully tested an interest in federalism as a guiding judicial principle.[24] For this analysis, we collected data on any case decided by the Supreme Court where the constitutionality of a state action was considered during the 1986-2002 terms of the Supreme Court. Details of the research design, including a discussion of how the ideology of the underlying state action was measures, are discussed in Appendix A.[25] Additionally, each case was coded for the issue area covered by the Court, and we included independent variables to measure cases that covered individual rights and raised Supremacy Clause issues. Because the dependent variable (the justice votes to invalidate or validate the government action under review) is dichotomous, probit is an appropriate statistical tool, as we discuss in Appendix A. We present the results as the predicted probability that a justice will vote to invalidate a state action.

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[24] Robert M. Howard & Jeffrey A. Segal, *A Preference for Deference? The Supreme Court and Judicial Review*, 57 POLITICAL RESEARCH QUARTERLY 131 (2004); Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW AND SOCIETY REVIEW 113 (2002). *See* also Sue Davis, *Rehnquist and State Courts: Federalism* Revisited, 45 WESTERN POL. Q. 774 (1992).

[25] For a discussion of the role of these organizations, see J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSPECTIVES ON POLITICS 233, 239 (2004). These two variables were, on average, negative. If states or state organizations file amicus curiae briefs, they generally do so to urge the Court to uphold a state action.

Turning to our first hypothesis, we suggest that a federalist will be sensitive to the decisions rendered by state courts, particularly when state courts uphold choices made by the other branches of state government.

Table 1: Predicted Probability of Rehnquist Voting to Affirm by Lower Court Treatment

		Type of Lower Court	
		Federal Court: Probability of Vote to Affirm	State Court: Probability of Vote to Affirm
Lower Court Decision	Invalidated State Action	18.67%	**12.24%**
	Validated State Action	**62.38%**	**75.92%**

Table 1 reflects the predicted probability that Rehnquist will vote to affirm the lower court decision. (Bold cell entries in all tables are statistically significant.) Chief Justice Rehnquist votes to affirm state courts more often when they validate state action than when they invalidate state action. And when the lower court has validated state action, he votes to affirm state courts more frequently than he does federal courts.[26] Sue Davis argues for this view of federalism in her assessment of then-Associate Justice Rehnquist's votes on reviews of criminal convictions, concluding that a commitment to state autonomy means allowing state courts to be the final arbiters of state policy.[27] We observe this pattern of

[26] The difference in rate of affirmance when the lower court *invalidated* state action is not statistically significant. All of the other differences in predicted probabilities in Tables 1 are statistically significant. For all of the tables, the baseline predicted probability is calculated based on a case which was invalidated by a lower state court, was a conservative state action, did not involve individual rights or premption, and had the average number of net amici for states (-6.07, or 6.07 states favoring validation) and state organizations (-.54, or .54 organizations favoring validation). That baseline is 9.02% predicted probability of a vote to invalidate. Differences which are statistically significantly different from that value will be marked by bold cell entries.

[27] Sue Davis, *Rehnquist and State Courts: Federalism Revisited* , 45 WESTERN POL Q. 774 (1992). Davis argues that Rehnquist rejects this respect for state courts in favor of ideology (reversing decisions which overturn convictions and affirming those which uphold convictions). Our results demonstrate that there appears to be some deference to state courts even after ideology has been accounted for.

greater deference to state court than federal court decisions, but only when a lower court has validated the state action.

A federalist should also be sensitive to the articulated wishes of the states, expressed by the states themselves in amicus briefs, or by organizations which represent several state governments or government officials. In any given case, the justices may not be familiar with the sentiments of the states as a group: Massachusetts (or Texas) may be pursuing a policy which many of the other states find odious, so a federalist may not know where the weight of state interests lie. However, if states themselves or the organizations which represent the states weigh in on the case in the form of *amicus curiae* briefs, then the justices have a better sense of the collective wishes of the states. We argue that the more states that favor invalidation of a state action, the more a federalist justice should be willing to vote to invalidate the state action (the reverse would also be true). But we find that amicus participation by state governments or by state government organizations does not correlate with the voting behavior of Chief Justice Rehnquist.

Table 2: Predicted Probability of Vote for Invalidation, States and Intergovernmental Lobby as Amicus

		States	State Orgs.
Number of signers on briefs	Above Average favoring Invalidation	12.68%	11.72%
	Average	12.24%	12.24%
	Above Average favoring Validation	11.82%	12.78%

A change in the number of states or state organizations signing briefs has no effect on the predicted probability of Chief Justice Rehnquist voting to invalidate the government action. On average, 4.7 states sign briefs to favor validation of state action. Increasing that number by one standard deviation (16.6 states favoring validation) has no statistically significant impact on the likelihood of Chief Justice Rehnquist voting to validate the government action (the reverse is true as well). The effect of the intergovernmental lobby

also lacks statistical significance: if anything, it is in the direction opposite of the one we predicted. It appears that the efforts of states and of organizations which represent their interests are wasted, at least insofar as Chief Justice Rehnquist is concerned.

We also hypothesize that federalists will be more deferential to the states than their brethren who reject the label of federalist. This suggests that there is no absolute standard by which a federalist can be judged, but rather that the justices' behavior can only be explained in relation to one another. For comparison to Chief Justice Rehnquist, we turn to Justice Stevens, primarily because they have both served over the entire 1986-2002 period under analysis here. If we expand our regression to include review of both state and federal actions (and retain the same independent variables), it becomes clear that Justice Stevens approaches state statutes with a more critical eye than he does federal statutes. The same can not be said, however, for Chief Justice Rehnquist.

Table 3: Predicted Probability of Rehnquist and Stevens Voting to Invalidate Government Action by Type of Government

		Justice	
		Rehnquist	Stevens
Type of Action Under Review	State Action	12.24%	71.47%
	Federal Action	9.41%	**49.47%**

Justice Stevens is more than 20% more likely to vote to invalidate an action taken by a state government than one taken by the federal government, even after the ideological direction of the underlying action (though it is assumed to be conservative for these models) and the treatment by the lower courts are considered. Justice Rehnquist appears nominally more likely to invalidate state than federal action, but the difference is not statistically significant (it is for Justice Stevens). These results suggest that Chief Justice Rehnquist comes closer to treating state governments as equal to the federal government than does Justice Stevens.

Like respect for state versus federal action, judicial restraint can only be understood in a comparative context. To determine if Chief Justice Rehnquist and other justices who claim to be federalists refrain from invalidating state action more than their colleagues, we calculated overall invalidation rates for each of the nine current justices, and then assessed the rate at which they invalidated liberal and conservative actions taken by the states.

Table 4: Predicted Invalidation Rate by Justice, Conservative and Liberal State Action

	Ideology of State Action		
Justice	Conservative	Liberal	Absolute Difference
Rehnquist	12.24%	28.53%	16.29%
Scalia	12.86%	33.25%	20.39%
Thomas	10.03%	31.99%	21.96%
O'Connor	21.83%	37.73%	15.90%
Kennedy	22.89%	33.97%	11.08%
Ginsburg	80.66%	39.31%	41.35%
Souter	57.92%	28.29%	29.63%
Breyer	64.50%	33.01%	31.49%
Stevens	71.47%	32.74%	38.73%

Chief Justice Rehnquist seems to qualify as a practitioner of judicial restraint, if only by relative terms. While he certainly invalidates liberal state actions at a much greater rate than he invalidates conservative state action, the difference in his predicted invalidation rates for liberal and conservative state actions (16.29%) is smaller than every other justice except Justices Kennedy and O'Connor. Notably, the predicted difference is much smaller than that of the more liberal justices as well.[28] Justice Rehnquist's predicted invalidation rate is also the lowest of the current nine justices on the Court. If judicial restraint can be read as a reluctance to interfere with the policy decisions made by officials

[28] Other quantitative analyses have suggested that the liberal justices appear to be more ideological than the conservative justices. See Robert M. Howard & Jeffrey A. Segal, *A Preference for Deference? The Supreme Court and Judicial Review*, 57 POLITICAL RESEARCH QUARTERLY 131 (2004).

of the other branches, then Chief Justice Rehnquist, at least in relative terms, appears to demonstrate some evidence of restraintist behavior. As reflected in the writings of Rehnquist and Scalia, we also see that Scalia has a less restraintist perspective than Rehnquist although he is more restrained than the nonfederalists. Our data therefore supports the view that federalists are comparatively restrained even if they differ among themselves in the degree to which they are restrained.

When looking at votes which assess the constitutionality of *federal* action, we find that the overall rates do not change significantly, but the difference between rates of invalidation for liberal and conservative government action are considerably greater. Table 5 reports these results.

Table 5: Invalidation Rate by Justice, Conservative and Liberal Federal Action

	Ideology of Federal Action		
Justice	Conservative	Liberal	Absolute Difference
Rehnquist	9.41%	23.57%	14.16%
Scalia	9.32%	26.71%	17.39%
Thomas	17.59%	45.25%	27.66%
O'Connor	9.91%	20.58%	10.67%
Kennedy	15.68%	24.87%	9.19%
Ginsburg	81.25%	40.15%	41.10%
Souter	54.60%	25.50%	29.10%
Breyer	51.3%	21.80%	29.50%
Stevens	49.47%	15.20%	34.27%

The liberal-conservative difference for Chief Justice Rehnquist is 14.16% for federal actions, compared to 16.29% for state actions. Chief Justice Rehnquist does therefore appear to engage in some form of judicial restraint, but an ideological component exists to his decisions to validate or invalidate government actions.

When a claim about the use of the Supremacy Clause is raised, we hypothesize that a federalist will be more likely to strike state action out of a desire to preserve the proper

place of the federal and state government. Calculating the predicted probability for cases where federal preemption of state law is an issue, we find that Chief Justice Rehnquist is much more likely to strike the state action than when preemption claims have not been raised.

Table 6: Predicted Probability of Rehnquist Voting to Invalidate State Action, Supremacy Clause Cases

		Rehnquist
State Action:	Preemption Not Issue	**12.24%**
	Preemption is the Issue	**45.97%**

When the Court chooses to decide a case on Supremacy Clause grounds, Chief Justice Rehnquist becomes far more critical of state actions. In cases in the baseline category, the invocation of a Supremacy Clause claim makes Rehnquist more than three times more likely to vote to invalidate the state action under review. Most of the clearest articulations of federalist doctrine have acknowledged that the preservation of a federal system of government requires that both the state and federal government respect the spheres of authority for one another. Our analysis here clearly suggests that Chief Justice Rehnquist is not reluctant to use the authority of the Supreme Court to police those boundaries when necessary.

Finally, one might expect that Rehnquist would be more protective of individual rights than Justice Scalia, because he envisions a bigger role for Congress' right to enforce the Fourteenth Amendment under its Section Five powers. These different views play out when one evaluates their votes cast in cases where the validity of state action is at issue.[29] The results for Rehnquist and Scalia are comparable as reflected in the table below. They

[29] Cases dealing with individual rights are those dealing with First Amendment freedoms, Equal Protection claims, Procedural Due Process, Substantive Due Process, and Sect. 1983 damage suits.

are both somewhat more likely to invalidate state action when cases involve individual rights but the difference is not statistically significant.

Table 7: Predicted Probability of Rehnquist Vote to Invalidate, Individual Rights Cases

		Justice	
		Rehnquist	Scalia
State Action:	Does not Involve Indiv. Rights	12.24%	12.86%
	Involves Indiv. Rights	15.54%	15.28%

Finally, we note that the patterns which we have observed above generally transcend voting strictly related to ideology. In the most absolute sense, a conservative justice motivated solely by ideology would strike liberal state actions and uphold conservative state actions. We find evidence of ideological behavior in Chief Justice Rehnquist's votes, but the ideological direction of the underlying statute is clearly not the sole determinant of his votes. He is significantly more likely to strike liberal state actions than conservative state actions, as demonstrated in Table 6.

Table 8: Predicted Probability of Vote to Invalidate, by Ideology of State Action

		Rehnquist
State Action:	Conservative	**12.24%**
	Liberal	**28.53%**

But ideology is not the sole determinant of Rehnquist's voting behavior. As demonstrated above, he is also sensitive to whether the case involves the issue of pre-emption, which government, state or federal, is acting, and what lower court handled the case and what decision the lower court reached. If Chief Justice Rehnquist were motivated only by ideology, we would not expect any other factor to be a significant predictor of his votes.

IV. Conclusion

Overall, we find general support for the proposition that Rehnquist behaves according to the dictates of federalism. He demonstrates more respect for state courts than federal courts, particularly when state courts validate state action. Rehnquist's vision of federalism appears to equate to that articulated by Sue Davis—respect for the decisions of state courts, particularly when the state court affirms state action.

Rehnquist does not seem particularly solicitous of the requests made by the states or the intergovernmental lobbyists as *amicus curiae*. Our results suggest that amicus briefs by state actors do not have a significant effect on Rehnquist's voting behavior. Because of the increased proliferation of amicus briefs in recent years, this may be an important finding. One explanation for this lack of effect is that the authors of amicus briefs do not typically target Rehnquist because they consider his vote to be predictable. Instead, they may be targeting the perceived "swing Justice" such as Justice O'Connor. We expect to explore this issue further in future research.

Nonetheless, Rehnquist does fulfill the other criteria we outline for a federalist: treating the states on a more equal basis to the federal government than nonfederalists, exercising what appears to be judicial restraint, and respecting the proper role of the federal and state governments when the Supremacy Clause is invoked.

Our empirical results suggest that the more restrained version of Rehnquist's federalism that appears in his opinions for the Court better reflect his federalism than his dissents. His recent opinion in *Nevada Department of Human Resources v. Hibbs*[30] in which he wrote the opinion for the Court upholding the constitutionality of the Family and Medical Leave Act is consistent with this restrained version of Rehnquist's federalism. Despite Rehnquist's purported concern for the Fourteenth Amendment as an important contributor to our system of government, we could find no evidence that Rehnquist has

[30] 538 U.S. 721 (2003).

incorporated the ratification of the Fourteenth Amendment into his version of federalism in his individual rights decisions decided under Section One of the Fourteenth Amendment.[31] Like the federalism of Scalia, Rehnquist's federalism does not seem to be sensitive to the importance of the Fourteenth Amendment in our federalist system.

One of our most interesting findings was that Rehnquist's voting behavior can be explained, in part, by the ideology of the underlying state action. This result is certainly not surprising to social scientists who think that judicial voting behavior can be explained entirely by politics. But, maybe surprisingly, we found that Rehnquist's ideological influence may be *less* than the ideological influence of many of the Courts' liberals. This finding also would benefit from further research but may be affected by the Court's role in defining its own docket, as well as the difficulty in applying the conservative/liberal label. Whether government action is liberal or conservative appears to be a factor influencing whether the Court accepts certiorari in a particular case. In our data base, the Supreme Court reviewed (i.e. granted certiorari) in 455 instances of conservative government action and only 153 liberal government actions. The large number of conservative government actions under review is attributable, in large part, to the substantial number of criminal law cases reviewed by the Court. Of the 455 conservative governmental actions, 209 involved criminal law cases.

Empirical analysis, however, has its limitations. We were not able to use empirical tools to see if Rehnquist tended to be more deferential to Congress when Congress invoked its authority under Section Five of the Fourteenth Amendment than under the commerce clause or spending power. The large number of criminal law cases may have skewed our analysis. (230 of the 608 cases in the data base involved criminal law.) We did run our

[31] *Hibbs* was decided under Section Five, not Section One, of the Fourteenth Amendment. Section Five cases involve the scope of Congress' power; Section One cases involve the question of whether states violated the due process or equal protection rights of individuals.

analysis, however, without the criminal law cases and the results did not change significantly. Nonetheless, a more refined analysis of the criminal law category would be useful given its large contribution to the data base. Finally, the amicus brief results deserve further qualitative analysis. It may be obvious from reading the opinions of Chief Justice Rehnquist, or another Justice, that a particular brief helped influence a result even if that influence cannot be demonstrated through empirical research. A combination of qualitative and quantitative analysis may be more appropriate in considering the influence of amicus briefs on the voting behavior of a Justice.

Despite these limitations, our work can contribute to the research on the legacy of Chief Justice Rehnquist. We are able to confirm that federalism, as opposed to purely "politics," predicts Chief Justice Rehnquist's voting behavior over time. We are also able to describe the judicial role that is consistent with his federalism: deference to state courts, concern about protecting federal pre-emption, and a comparatively restrained judicial role with some influence from political ideology. Although the Rehnquist Court may be well known for its "federalism revolution," Rehnquist appears to have helped move the Court in that direction through a relatively cautious judicial approach.

Appendix A: Methodology

Data was collected on any Supreme Court decision in the 1986-2002 terms which considered the constitutionality of a state or federal action. The data was drawn from the Supreme Court Database created by Harold Spaeth and archived by the S. Sidney Ulmer Project at the University of Kentucky.[32] The cases were then coded for several attributes, including the primary issue considered in the case, the number of amicus briefs, and the types and number of groups and individuals which signed on to briefs urging the Court to validate or invalidate the government action under review. Information on the amicus briefs was retrieved from the LEXIS Supreme Court briefs collection. If the LEXIS copies of the briefs had incomplete information, student assistants looked at the microfiche copy of the brief to get the total number of signers for each brief. Cases were coded for how the lower court treated the government action under review (if it was a federal or state court, if the lower court validated or invalidated the state action). Intergovernmental organizations include groups like the National Conference of State Legislatures and the National Governors Association.

Each case was also coded to reflect the ideology of the underlying government action. Liberal actions are those which favored the person accused of a crime, favored the civil rights or civil liberties claimant, favored affirmative action, favored neutrality in religion cases, and are pro-union, pro-environmental protection, and pro-underdog in economic disputes. The determination of the ideology of the underlying government action relied on these definitions, derived from the Supreme Court database. A government action was coded as liberal if the government action was invalidated and the Court decision was considered conservative (in the Supreme Court database) or if the government action was validated and the Court decision was coded as liberal. The underlying government action was considered conservative if the government action was invalidated and the Court decision was considered liberal (in the Supreme Court database) or if the government action was validated and the Court decision was coded as conservative.

To calculate the predicted probabilities for the other justices in Tables 3, 4, 5, and 7, models were run for each of the other 8 justices currently sitting on the Supreme Court. Because the dependent variable is dichotomous—a justice votes to invalidate the case or to not invalidate (that is, validate) the government action—the appropriate statistical technique is probit, a maximum likelihood estimator. Probit coefficients are not particularly meaningful on their own merits, so one way to bring meaning to them is to look at predicted probabilities of a vote to invalidate given a particular case profile. The baseline profile we use in the analyses in this chapter is a case which reviews a state government action (as opposed to a federal government action), was invalidated by a state court before it came to the Supreme Court, had no participation by the Solicitor General as an amicus, had the average number of states supporting invalidation (-4.70 states, or 4.7 states favoring *validation*), had the average number of intergovernmental lobby organizations (-.39, or .39 groups favoring *validation*) as amici. Additionally, the baseline case did not involve individual rights or preemption. Perhaps most importantly, the baseline case is a review of a government action that is conservative.

[32] http://www.as.uky.edu/polisci/ulmerproject/databases.htm

The full probit model for Chief Justice Rehnquist's votes is below, with standard errors in parentheses. There are 604 observations, and * denotes coefficients significant at the .05 level (two-tailed test), and ** denotes coefficients significant at the .01 level.

Federal Action	-0.1532 (0.1636)
Lower Court-Federal Court Validated	0.8474** (0.2298)
Lower Court-State Court Validated	0.4590* (0.2085)
Lower Court-Federal Court Invalidated	0.2727 (0.2205)
Solicitor General Amicus Favoring Validation	-0.4575** (0.1610)
Solicitor General Amicus Favoring Invalidation	0.4491* (0.2198)
Net Number of States Favoring Invalidation	0.0018 (0.0053)
State Government Organizations Favoring Invalidation	-0.0145 (0.0330)
Ideology of Challenged Government Action	0.5959** (0.1291)
Issue in case is individual rights	0.1495 (0.1245)
Issue in case is preemption	1.0573** (0.2394)
Constant	-1.1602** (.1993)