

The Deregulatory Valence of Justice O'Connor's Federalism

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INTRODUCTION

Few would dispute that the constitutional relationship between the federal government and the states occupied a central place on the Supreme Court's docket during the tenure of William Rehnquist as Chief Justice. In a series of highly publicized decisions, the Rehnquist Court reinvigorated several federalism-based constraints on the national government, narrowing the breadth of Congress's legislative powers and expanding the states' immunity from federal regulation and from suits for damages. One might argue that, in terms of practical consequences, these decisions were more symbolic¹ than revolutionary.² But the Court clearly revived the salience of federalism as a principle of constitutional law.

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¹ 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."). See also Ann Althouse, *Inside the Federalism Cases: Concern About the Federal Courts*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 142 (2001); Jim Chen, *Filburn's Forgotten Footnote—Of Farm Team Federalism and Its Fate*, 82 MINN. L. REV. 249, 254 (1997); Jesse H. Choper & John C. Yoo, *Who's So Afraid of the Eleventh Amendment: The Limited Impact of the*

By most accounts, Justice O'Connor played a central role in this "federalism revival." Drawing on her experience as a state judge and legislator in Arizona, the story goes, O'Connor's decisionmaking emphasized the importance of independent state sovereignty within our constitutional system. She was a consistent member of the five-justice majority that invalidated federal legislation as beyond Congress's commerce power;³ that circumscribed Congress's authority to enact legislation under section 5 of the Fourteenth Amendment;⁴ that struck down federal legislation that directed the states to regulate in specific ways;⁵ and that narrowed Congress's capacity to the states to suits

Court's Sovereign Immunity Rulings, 106 COLUM. L. REV. 213 (2006); Douglas Laycock, *Protecting Liberty in a Federal System: The US Experience*, in PATTERNS OF REGIONALISM AND FEDERALISM: LESSONS FOR THE UK 119, 140 (Jorg Fedtke & B. S. Markesinis eds., 2005); Ernest A. Young, *Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance*, 81 TEX. L. REV. 1551 (2003) (book review). As Roderick Hills has succinctly summarized it, "Revolution, Schmevolution." Roderick M. Hills, *The End of States' Rights?*, Legal Affairs Debate Club, July 18, 2005 (available at http://legalaffairs.org/webexclusive/debateclub_fedrev0705.msp#Friday) (last visited July 27, 2005). Hills goes on to write that the Rehnquist Court's federalism decisions imposed an "extremely modest brake on the centripetal tendencies of American constitutional law," and that "[f]rom the outset, the Court made it perfectly clear to anyone who bothered to listen that its ambitions for trimming back on national powers were modest and largely apolitical." *Id.*

² A May 2006 search in the Westlaw Journals and Law Reviews database (JLR) found 52 documents using the terms "Rehnquist Court" and "federalism revolution" in the same paragraph. See, e.g., Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS L.J. 569, 618 (2003); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1690 (2004). The *New York Times* has used the term "federalism revolution" 30 times since June 2000. See, e.g., Linda Greenhouse, *Roberts Court Hears Its First Case in Federalism Debate*, N.Y. TIMES, Nov. 10, 2005, at A21; Jeffrey Rosen, *A Majority of One*, N.Y. TIMES MAG., June 3, 2001, at 32.

³ *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

⁴ *Morrison*, 529 U.S. 598; *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁵ *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

for damages when they violate federal law.⁶ And some of O'Connor's more notable opinions—for instance, her majority opinions in *Gregory v. Ashcroft*⁷ and *New York v. United States*⁸ and her dissents in *Garcia v. San Antonio Metropolitan Transit Authority*⁹ and *South Dakota v. Dole*¹⁰—exalted the importance of preserving the prerogatives of state governments as a counterweight to federal power.

Much of this storyline rings true. But as any student of American government will tell you, there is more to federalism than the limits on Congress's enumerated powers. The Constitution also places structural limits on *state* power that are designed to protect the interests of the nation as a whole. And in cases implicating these “union-preserving” provisions¹¹—the dormant Commerce Clause, the Privileges and Immunities Clause of Article IV, the Import-Export Clause, the doctrine of intergovernmental immunity, and, most significantly, the doctrine of preemption—O'Connor's voting record lacked a similar dedication to protecting the states' independent policymaking authority. In these cases, she essentially voted no differently than the average justice with whom she served.

O'Connor's approach to federalism was therefore more complicated than most observers seem to have appreciated. To be sure, she consistently voted in favor of enforcing the federalism-based limits on Congress's legislative powers. But she was

⁶ *Board of Trustees v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (ADEA); *Alden v. Maine*, 527 U.S. 706 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

⁷ 501 U.S. 452 (1991).

⁸ 505 U.S. 144 (1992).

⁹ 469 U.S. 528, 580–589 (1985) (O'Connor, J., dissenting).

¹⁰ 483 U.S. 203, 212–218 (1987).

¹¹ I borrow the term “union-preserving” from LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §6–1, at 1021 (3d ed. 2000).

relatively ambivalent about preserving the states' independent regulatory authority more generally. That is, she did not seem to care any more than the average justice about the states' autonomy to regulate as they see fit in areas of overlapping federal and state legislative jurisdiction.

This article presents a statistical summary of Justice O'Connor's votes in the full universe of cases addressing the Constitution's federalism-based constraints on governmental power. Specifically, it compares her voting record to those of the other justices who sat in the same cases. The results suggest that O'Connor's reputation as an ardent proponent of state autonomy needs to be tempered, for it is only accurate with respect to disputes about the powers of the national government. If we expand our definition of federalism to include those disputes that involved the Constitution's structural limits on state power, her dedication to state autonomy seems relatively tepid. In fact, an equally prominent theme—especially during her last eleven full terms on the Court—is that she tended to disfavor government regulation of any sort, whether it emanated from Congress or the states.

This is not to say that Justice O'Connor's voting behavior was normatively or jurisprudentially inconsistent; there may have been principled justifications for tending to favor state policymaking autonomy in one context but not the other. Nor is it to suggest that she consciously used the façade of federalism to accommodate a political preference for less regulation; the nature of human decisionmaking is such that the “true” reasons for a decision are often unknowable, especially to the decisionmaker herself.¹² Rather, the

¹² See ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 3 (1999) (describing how people tend to arrive at decisions that they are motivated to reach while being unaware of that motivation's influence); Mahzarin R. Banaji, *Ordinary Prejudice*,

point is strictly descriptive: in the full universe of decisions involving the constitutional boundaries between federal and state power, O'Connor was comparatively protective of state autonomy only in cases addressing the limits on congressional authority.

This article proceeds in four parts. Part I briefly describes the Rehnquist Court's federalism revival and Justice O'Connor's role in that project. Part II explains that, given the breadth of Congress's modern regulatory authority, the latitude afforded state governments in areas of concurrent federal and state jurisdiction may actually be more important to the values of federalism than enforcing of the outer limits of congressional power. Thus, to gain a complete understanding of a justice's attitude towards constitutional federalism, we need to review those cases implicating the structural provisions that constrain the states, not just those involving the limits on the national government. Part III summarizes Justice O'Connor's voting record in the entire universe of federalism cases, so defined, comparing her votes to those of the justices with whom she served. Finally, Part IV offers some observations about the study's results. Most interestingly, they show that O'Connor voted to limit regulation as frequently as she voted to enhance state autonomy. In other words, across the full run of federalism cases, O'Connor was as much a proponent of reducing government regulation as she was of enhancing state autonomy.

PSYCHOL. SCI. AGENDA, Jan.–Feb. 2001, at 8, 8 (“Consciousness . . . permits a view of who we are and what we are capable of that is independent of the knowledge and feelings that may drive beliefs, attitudes, and behavior.”); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 25–34 (2004) (reviewing literature on how human beings are largely unaware of the many influences on their decisionmaking).

I. THE FEDERALISM “REVIVAL”

This much is not news: the Rehnquist Court reshaped the constitutional rules governing the respective roles of the national government and the states in our federal republic.¹³ It articulated a new and arguably narrower standard for evaluating whether a

¹³ The thoughtful and perceptive commentary on the Rehnquist Court’s federalism jurisprudence is far too voluminous to cite in its entirety. Here is just a sampling: LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); JOHN T. NOONAN, JR., *NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002); MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* (2005); Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71; Vikram David Amar, *The New “New Federalism,”* 6 GREEN BAG 2d 349 (2003); 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); Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429 (2002); David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. (forthcoming 2006) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=887577); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002); Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225 (2001); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 U.C.L.A. LAW REV. (forthcoming 2006); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle*, 111 HARV. L. REV. 2180 (1998); Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311 (2001); Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125; John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002); Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343; Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS L.J. 569 (2003); J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSPECTIVES ON POLITICS 233 (2004); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and the Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995); Jed

federal statute falls within Congress's commerce power.¹⁴ It developed a fairly restrictive understanding of the breadth 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.¹⁵ It minted the so-called "anticommandeering" principle, which prohibits Congress from directing the states to enact or implement particular regulation.¹⁶ It held that Congress cannot use its Article I powers to enact legislation subjecting the states to suits for damages,¹⁷ overruling the relatively recent precedent of *Pennsylvania v. Union Gas*.¹⁸ And it extended this principle of sovereign immunity to suits brought in any court, whether state or federal,¹⁹ as well as to adjudicative proceedings before federal administrative agencies.²⁰

Rubinfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141 (2002); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005); Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78 (1995); Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477 (2001); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004).

¹⁴ See *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating the civil remedy provision of the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act).

¹⁵ See *Morrison*, 529 U.S. 598 (finding the civil remedy provision of the Violence Against Women Act invalid under section 5); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act).

¹⁶ See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

¹⁷ See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

¹⁸ 491 U.S. 1 (1989).

¹⁹ See *Alden v. Maine*, 527 U.S. 506 (1999) (holding that Congress lacked the authority to subject the states to private, unconsenting suits for damages in state court under the National Labor Relations Act).

²⁰ See *Federal Maritime Comm'n v. South Carolina Ports Authority*, 535 U.S. 743 (2002). Perhaps as notably, in fashioning these doctrinal innovations, the Court has asserted itself as the ultimate arbiter of questions concerning the breadth of Congress's power vis-à-vis the states, invalidating national legislation on federalism grounds at a rate

Aside from these constitutional rulings, the Rehnquist Court also invoked federalism principles in several cases of statutory interpretation to limit the encroachment of federal regulation on the states themselves or into areas historically regulated by the states alone. For instance, in *Will v. Michigan Dept. of State Police*,²¹ the Court stated that when “Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’”²² It therefore held 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 Similarly, the Court held in *Vermont Agency of Natural Resources v. United States*²⁴ 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. Alluding to “the doctrine that statutes should be construed so as to avoid difficult constitutional questions,” the Court noted that “there is ‘a serious doubt’” as to “whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment.”²⁵

unseen in several generations. *See, e.g.*, David Franklin, *Marijuana and Judicial Modesty*, CHICAGO TRIB., June 9, 2005, at 27; Jeffrey Rosen, *The End of Deference*, NEW REPUBLIC, Nov. 6, 2000, at 38.

²¹ 491 U.S. 58 (1989).

²² *Id.* at 65 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

²³ *Id.* at 71.

²⁴ 529 U.S. 765 (2000).

²⁵ *Id.* at 787. *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).

Some have argued—and with some force—that the practical effects of the Rehnquist Court’s federalism decisions have actually been quite modest.²⁶ For instance, the Court’s Commerce Clause decisions affect only a small spectrum of activity that Congress might otherwise regulate—activity that is non-commercial, non-economic, and purely intrastate. Its sovereign immunity decisions leave open a host of alternative means for enforcing federal law against state governments, most notably suits for injunctions under *Ex Parte Young*.²⁷ And its anticommandeering decisions prohibit a form of legislation that Congress had employed only rarely, and for which there are typically a number of effective substitutes. Perhaps most significantly, the Rehnquist Court did nothing to trim Congress’s authority under the Spending Clause, leaving Congress the ability to circumvent most of these constraints by enacting conditional spending legislation aimed at the states.²⁸

Still, even if the Rehnquist Court’s decisions did not constitute a “federalism revolution,” they seem to have done *something*. It is now clear (as it was not before 1995) that there are judicially enforceable limits on Congress’s commerce power, particularly with respect to activities that have historically been regulated by the states. Congress’s capacity to enact legislation to enforce the proscriptions of the Fourteenth Amendment has been narrowed, such that any legislative effort to enforce a constitutional right or to protect a class of citizens that the Court has not deemed deserving of heightened judicial scrutiny is virtually *per se* invalid. And because Congress can abrogate the sovereign immunity of states only through legislation enacted under the

²⁶ See note 1 *supra*.

²⁷ 209 U.S. 123 (1908).

²⁸ See Mark Tushnet, *Alarmism vs. Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 52 (2003).

Reconstruction Amendments, Congress has lost an important means for enforcing federal law against the states. These consequences are not trivial.

Moreover, if the Rehnquist Court did not move the law in revolutionary directions itself, it may nonetheless have laid the groundwork for a future Court to do so. As others have noted, the newly constituted Roberts Court could use the Rehnquist Court's precedents to disrupt some long-settled constitutional understandings.²⁹ It could hold that landmark environmental legislation, such as the Endangered Species Act or the Clean Water Act, is beyond Congress's commerce power, at least in many of its applications, because the regulated activity is not sufficiently connected to interstate commerce.³⁰ It could conclude that the anticommandeering decisions have effectively undermined *Garcia* and hold that Congress cannot use its commerce power to regulate certain functions of state governments. It could hold that the disparate impact provisions of Title VII of the Civil Rights Act of 1964 are unconstitutional as applied to state governments, at least with respect to private suits for damages, because they are not "congruent and proportional" to any purported constitutional violations.³¹ Or conceivably, though much

²⁹ See TUSHNET, *supra* note 13, at 320–29.

³⁰ See, e.g., *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286 (5th Cir. 2004) (six circuit judges dissenting from denial of rehearing en banc, suggesting that application of the Endangered Species Act to a species of cave bugs in Texas is unconstitutional); *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003) (two judges, including John Roberts, dissenting from denial of rehearing en banc and concluding that application of the Endangered Species Act to arroyo toads in California might be beyond Congress's commerce power); Bruce Ackerman, *The Art of Stealth*, LONDON REV. BOOKS, Feb. 17, 2005, available at http://www.lrb.co.uk/v27/n04/print/acke01_.html (last visited Aug. 10, 2005) ("It would be child's play for a neo-con majority to strike down the Endangered Species Act as beyond the Commerce Clause.").

³¹ See *Erickson v. Bd. of Governors*, 207 F.3d 945, 952 (7th Cir. 2000) (suggesting that Title VII's disparate impact standard exceeds Congress's Section 5 authority); TUSHNET, *supra* note 13, at 326–27; Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 494–95 (2003).

less likely, it could hold that most federal anti-discrimination legislation is beyond Congress's commerce power because the regulated activity of discrimination—whether based on race, gender, religion, age, or disability—is not “economic” or “commercial” in nature.³²

Whatever the ultimate significance of the Rehnquist Court's federalism project, the conventional wisdom seems to be that Justice O'Connor played a central role in its development. When O'Connor announced her retirement in July 2005, assessments of her legacy teemed with references to her views on the balance between federal and state power. In its tribute, the *New York Times* editorial page mentioned her “strong support for federalism,” and that “[s]he was fiercely protective of states' rights.”³³ Nina Totenberg observed that O'Connor “became part of a conservative states-rights majority,”³⁴ while Linda Greenhouse wrote that she had been “a loyal ally” of Rehnquist “in the court's continuing reappraisal of the relationship between the states and the federal government.”³⁵ Academics echoed these views. A.E. Dick Howard said that “it was O'Connor as much as Rehnquist . . . who revived the doctrine of states' rights,”³⁶ while John Yoo commented that O'Connor's “signature issue, . . . that historians will look back on, is that she really was the person who helped bring about and restore states' rights and more of a balance of powers between the federal government and the state

³² See TUSHNET, *supra* note 13, at 325–26.

³³ *Justice O'Connor*, N.Y. TIMES, July 2, 2005, at A14.

³⁴ *Sandra Day O'Connor*, National Public Radio, All Things Considered, July 1, 2005.

³⁵ Linda Greenhouse, *Consistently, A Pivotal Role*, N.Y. TIMES, July 2, 2005, at A1.

³⁶ Michael D. Lemonick & Viveca Novak, *The Power Broker*, TIME, July 11, 2005, at 30.

governments.”³⁷ Stephen Wermeil’s view nicely summarizes the prevailing sentiment:

O’Connor was

strongly motivated by her own abiding faith in good government at the state level and her belief that the Framers of the Constitution envisioned a genuine partnership of shared powers between the federal government and the states. Her experience as a state legislator and judge [gave] her a degree of trust in state government and state courts that [went] well beyond that of her colleagues.³⁸

There is a great deal of truth in these perceptions. Most prominently, O’Connor joined each of the Rehnquist Court’s landmark decisions that invalidated acts of Congress on federalism grounds.³⁹ And unlike in other areas of the law, O’Connor rarely swung over to the Court’s more liberal wing to form a majority coalition.⁴⁰ In fact, in the last

³⁷ John Yoo, PBS, Newshour with Jim Lehrer, July 1, 2005 (transcript available at http://www.pbs.org/newshour/bb/law/july-dec05/oconnor_7-1.html).

³⁸ Stephen J. Wermeil, *O’Connor: A Dual Role: Introduction*, 13 WOMEN’S RTS. L. REP. 129, 139 (1991). See also Marci Hamilton, *The Remarkable Legacy of Justice Sandra Day O’Connor*, FINDLAW, July 14, 2005 (available at <http://writ.news.findlaw.com/hamilton/20050714.html>) (writing of “Justice O’Connor’s belief in the decentralization of power in the constitutional scheme” and “in the importance of preserving a sphere of regulation for the states that may well differ from, and even pose a challenge to, the federal government’s larger public policy”); Rosen, *supra* note 2, at 32 (referring to O’Connor’s “attachment to states’ rights” and “the federalism revolution that O’Connor has led”); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 U.C.L.A. L. REV. 903, 928 (1994) (calling O’Connor one of “federalism’s most enthusiastic proponents”); Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival after Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 3 (calling O’Connor “the Court’s most consistently pro-federalism member”).

³⁹ See notes 3–6 *supra* and accompanying text.

⁴⁰ See Whittington, *supra* note 13, at 507. O’Connor’s only notable defections from the typical, five-justice pro-state majority in cases involving the federalism-based limits on Congress were in the two Eleventh Amendment decisions of *Tennessee v. Lane* and *Nevada v. Hibbs*. See Part III.B *infra*.

high-profile federalism decision of her tenure on the Court, *Gonzales v. Raich*,⁴¹ O'Connor authored a strident dissent from the Court's holding that Congress could regulate the possession of home-grown marijuana used exclusively for medicinal purposes. While Justices Scalia and Kennedy sided with the pro-Congress majority, O'Connor argued that such an application of the federal Controlled Substances Act ventured into a sphere reserved exclusively to the states: "If the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers."⁴²

Moreover, in addition to authoring some of the more significant opinions in the federalism revival,⁴³ O'Connor used her opinions to advance fairly deep theoretical justifications for federalism as an abiding constitutional principle—deeper than she tended to develop in other contexts. In her dissent in *FERC v. Mississippi*,⁴⁴ for instance, O'Connor contended that "the 50 states serve as laboratories for the development of new social, economic, and political ideas,"⁴⁵ citing the examples of women's suffrage, unemployment insurance, minimum wage laws, no-fault auto insurance, and environmental protection.⁴⁶ She also argued that "federalism enhances the opportunity of all citizens to participate in representative government";⁴⁷ citizens "cannot learn the lessons of self-government if their local efforts are devoted to reviewing proposals formulated by a faraway national legislature."⁴⁸ Finally, she posited that "our federal

⁴¹ 125 S. Ct. 2195 (2005).

⁴² *Id.* at 2223 (O'Connor, J., dissenting).

⁴³ *E.g.*, *Kimel v. Board of Regents*, 528 U.S. 62 (2000); *New York v. United States*, 505 U.S. 144 (1992); *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

⁴⁴ 456 U.S. 742 (1982).

⁴⁵ *Id.* at 788 (O'Connor, J., dissenting).

⁴⁶ *Id.* at 788–89.

⁴⁷ *Id.* at 789.

⁴⁸ *Id.* at 790.

system provides a salutary check on governmental power,” noting that “[u]nless we zealously protect” these divisions of authority, “we risk upsetting the balance of power that buttresses our basic liberties.”⁴⁹ Or, as she wrote in *Gregory v. Ashcroft*, “[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”⁵⁰

In short, there is much to be said for the conventional view of O’Connor as a strong defender of state autonomy. But the decisions on which these perceptions seem to be based all addressed the Constitution’s structural limits on the *national* government. From *New York* to *Lopez* to *Garrett* to *Raich*, the issue was whether Congress had exceeded its enumerated powers, and thus impermissibly intruded on state sovereignty. But, as explained further below, federalism is a two-way street. It is as much about the structural limits on the states as those on the national government. Thus, a conception of federalism that focuses solely on the breadth of the Congress’s authority is unduly narrow, for it ignores the degree to which states can (or cannot) exercise policymaking autonomy in areas of concurrent federal and state regulatory jurisdiction—which is to say, *most* areas of modern American life.⁵¹ To gain a more complete picture, we need to widen the lens of federalism, the point to which I now turn.

II. A BROADER CONCEPTION OF FEDERALISM

⁴⁹ *Id.*

⁵⁰ 501 U.S. 452, 458 (1991).

⁵¹ See Fallon, *supra* note 13, at 431–33; Massey, *supra* note 13, at 502–12; Young, *supra* note 13, at 130–34.

In its plainest terms, federalism is a system of governance in which two distinct governments simultaneously exercise sovereignty over the same population and geographic territory. It implies a constitutionalized division of power between these two centers of authority—between the national and state governments—with neither fully answerable to the other, each independent sovereigns in certain respects, yet all part of one nation.⁵² For this division of power to work in practice, there must be rules that delineate the respective roles of the national and state governments. These rules need not be enforced by the courts, nor must they be formally codified. But for a system of government to be accurately characterized as federal, such rules must exist in one form or another.⁵³

More to the point, these rules must limit *both* centers of power, not just the national government. While an unconstrained national government could potentially swallow up the independent existence of the states—a point the Rehnquist Court repeatedly emphasized—so, too, might the states act in ways that would effectively

⁵² See, e.g., *Knapp v. Schweitzer*, 357 U.S. 371, 375 (1958) (Frankfurter, J.) (“The essence of a constitutionally formulated federalism is the division of political and legal powers between two systems of government constituting a single Nation.”).

⁵³ It is worth noting that federalism has no particular ideological valence. See Cross, *supra* note 13, at 1307–1308 (“states’ rights arguments are not inherently ideological”). Although it has generally been associated with conservative political causes over the course of American history, that has not always been the case. Indeed, recent issues—such as the medicinal use of marijuana, physician-assisted suicide, and gay marriage, not to mention the presidential election dispute in Florida in 2000—have all involved circumstances in which progressive political causes have embraced the principle of state policymaking autonomy. Nor does the concept of federalism, in itself, dictate a specific balance of power between the national government and the states. Of course, for a system of federalism to be truly federalist, both centers of government must have some independent existence. But beyond that minimum, authentically federal systems can differ quite dramatically in the relative strengths of the national government and the states.

destroy the Union.⁵⁴ Indeed, problems of this sort under the Articles of Confederation, especially in commercial matters, were largely why the Constitution came into being.⁵⁵ A principal defect of the Articles was that they did little to prevent the states from acting in self-interested ways that undermined the interests of the nation as a whole. States imposed various barriers to interstate commerce, such as protective tariffs on goods from other states; they often failed to comply with the Continental Congress's requisitions, the chief mechanism for funding the federal government; they encroached on the federal government's authority, such as by entering into compacts with each other and signing their own treaties with Indian tribes; and they disregarded international agreements that the federal government had reached with other nations.⁵⁶ In the words of James Madison, the states had a "centrifugal tendency" to "fly out of their proper orbits and destroy the order & harmony of the political system."⁵⁷ A chief purpose of the Constitution, then, was to create a "firm union" that would preserve the "peace and liberty of the states"⁵⁸—

⁵⁴ 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.

⁵⁵ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 132-61, 354-63, 393-429, 463-67 (1969). See also KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 123 (15th ed. 2004) ("the poor condition of American commerce and the proliferating trade rivalries among the states were the immediate provocations for the calling of the Constitutional Convention").

⁵⁶ See SULLIVAN & GUNTHER, *supra* note 55, at 123; GEOFFREY R. STONE, ET AL. *CONSTITUTIONAL LAW* 9-10 (5th ed. 2005) (discussing Madison's memorandum to himself in April 1787 in preparation for the Constitutional Convention). See also 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 164 (Max Farrand ed., 1911) ("Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties; to infringe the rights & interests of each other.").

⁵⁷ 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 165 (Max Farrand ed., 1911).

⁵⁸ *THE FEDERALIST* No. 9, at 71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

to reduce “[t]he interfering and unneighborly regulations of some States” that had become “injurious impediments to the intercourse between the different parts of the Confederacy.”⁵⁹

Structural limits on state authority have thus been a central aspect of American federalism from the beginning. And those limits, manifested in several distinct constitutional provisions and doctrines, remain critical elements of our governmental structure.⁶⁰ The Supremacy Clause, through the doctrine of preemption, dictates that validly enacted federal laws shall negate any state laws with which they conflict. The dormant Commerce Clause generally nullifies state laws that discriminate against, or place undue burdens on, interstate commerce. The Privileges and Immunities Clause of Article IV forbids states from discriminating against the citizens of other states unless there is a substantial reason for doing so, and the discrimination is substantially related to that justification. The doctrine of intergovernmental immunity prohibits states from directly regulating the federal government or enacting laws that discriminate against the federal government’s interests.⁶¹ And the Import-Export and Duty of Tonnage Clauses impose very specific constraints on the states’ taxing powers.

Cases involving these union-preserving aspects of federalism tend to receive less attention than those addressing the breadth of Congress’s legislative authority. They are often fact-specific, turning on the precise scope or purpose of the state or federal laws at issue. They do not typically address broad constitutional principles. Still, the overall

⁵⁹ THE FEDERALIST No. 22, at 144–45 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁶⁰ TRIBE, *supra* note 11, at §6–1, 1021.

⁶¹ *See Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 811 (1989). This doctrine, as it affects government employees, is now codified in the Public Salary Tax Act, 4 U.S.C. §111. The Supreme Court has held that the scope of the statutory prohibition and the constitutional doctrine of intergovernmental tax immunity are coterminous.

trajectory of these decisions is quite important to the federal-state balance—perhaps even more important to the underlying values of federalism than the high-profile cases involving the limits on Congress’s enumerated powers, such as *Lopez*, *Printz*, or *Seminole Tribe*.

Consider the most pervasive of these limitations on state power, the doctrine of 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.⁶²

⁶² As the Court clarified in *Gonzales v. Raich*, 125 S. Ct. 2195, 2206 (2005), noneconomic, noncommercial, purely intrastate activities are still subject to federal regulation if Congress rationally “concludes that failing to regulate that class of activity would undercut” a larger, comprehensive scheme that, taken as a whole, plainly regulates interstate commerce. *Id.* at 2206. Moreover, Congress can cure any constitutionally deficient statute by adding a “jurisdictional element”—language that ensures, on a case-by-case basis, that the regulated activity has a sufficient connection to interstate commerce. *See United States v. Morrison*, 529 U.S. 598, 613 (2000); *United States v. Lopez*, 514 U.S. 549, 561 (1995). In fact, this is precisely what happened in the wake of the Court’s decision in *Lopez*. A year later, Congress amended the Gun-Free School Zones Act to add eleven words to 18 U.S.C. §922(q)(2)(A), defining the relevant offense as the knowing possession of “a firearm that *has moved in or that otherwise affects interstate or foreign commerce* at a place that the individual knows, or has reasonable cause to believe, is a school zone.” Pub. L. 104–208, 110 Stat. 3009, §657 (Sept. 30, 1996), codified at 18 U.S.C. §922(q)(2)(A) (emphasis added).

Thus, in a post-New Deal, post-Great Society world, the vast majority of human activity in the United States can be regulated by both the federal government and the states. Consequently, the frequency with which the Supreme Court concludes that federal statutes have displaced state law within this expansive realm of concurrent jurisdiction is critical to the breadth and significance of the states' residuary powers. To cite only a few recent examples, it determines the states' leeway to regulate the practices of health maintenance organizations;⁶³ whether states can regulate automobile emissions in an effort to reduce greenhouse gases;⁶⁴ whether states can use their investment and procurement practices to express their moral objections to the human rights records of foreign regimes;⁶⁵ and the terms on which states can regulate the advertising and labeling of tobacco products to promote the health of their citizens.⁶⁶ These questions might be considered narrow in a constitutional sense, but they are collectively quite important to the states' practical strength as centers of policymaking authority.

The contours of preemption doctrine, as well the other doctrines surrounding the Constitution's union-preserving federalism provisions, are therefore critical to the values that federalism is supposed to promote—the values that Justice O'Connor often highlighted. States can hardly operate as laboratories of democracy, or offer a diverse

⁶³ See *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004); *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002). See also Theodore W. Ruger, *The United States Supreme Court and Health Law: The Year in Review*, 32 J.L. MED. & ETHICS 528 (2004).

⁶⁴ See Miguel Bustillo, *Stakes High as State Targets Greenhouse Gas from Cars*, L.A. TIMES, Sept. 23, 2004, at A1 (describing a California law that imposes such regulations, and the car industry's plan to enjoin enforcement on the ground that that the law is preempted by federal fuel economy standards).

⁶⁵ See *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Board of Trustees v. Mayor and City Council of Baltimore*, 562 A.2d 720 (Md. 1989).

⁶⁶ See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Cipollone v. Liggett Group*, 505 U.S. 504 (1992).

array of public goods, if their idiosyncratic policy initiatives are routinely displaced by federal law. As Ernest Young has explained, “[t]he whole point of preemption is generally to force national uniformity on a particular issue, stifling state-by-state diversity and experimentation.”⁶⁷ Preemption also pulls the relevant decisionmaking process further away from the affected citizens, eliminating the solutions reached by state and local communities and placing control of the issue in Washington.⁶⁸ Moreover, to the extent vibrant state autonomy operates as an important check on tyranny, preemption undermines this objective by centralizing more control over public policy in one government.⁶⁹

In short, if we want a complete picture of a justice’s approach to constitutional federalism, we need to look beyond the decisions addressing the limits of Congress’s powers. We must also consider those cases involving the various union-preserving provisions and doctrines that constrain state authority in areas where federal and state regulatory powers overlap.⁷⁰ As Justice Breyer has suggested, these cases arguably present the “true test” of a justice’s commitment to state policymaking autonomy within the modern framework of federalism.⁷¹

⁶⁷ Young, *supra* note 13, at 130.

⁶⁸ S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 687, 694 (1991).

⁶⁹ Young, *supra* note 13, at 132.

⁷⁰ Young, *supra* note 13, at 131 (“[d]octrines limiting federal preemption of state law . . . go straight to the heart of the reasons why we care about federalism in the first place”).

⁷¹ Justice Breyer’s full statement reads as follows: “[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 the edges, or to protect a State’s treasury from a private damages action, but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.” *Egelhoff v. Egelhoff*, 532 U.S. 141, 160–161 (2001) (Breyer, J., dissenting) (citations omitted).

III. JUSTICE O’CONNOR’S VOTING RECORD IN FEDERALISM CASES

I am hardly the first person to notice the apparent tension in Justice O’Connor’s approach to the two sides of federalism—that she seemed to care more about state autonomy in cases involving the limits on Congress than she did in cases involving the limits on state governments. Erwin Chemerinsky, Frank Cross, Richard Fallon, Michael Greve, Jonathon Klick, Seth Kreimer, Calvin Massey, Daniel Meltzer, Robert Schapiro, and Ernest Young—to name only a few—have made the same point about the five justices at the heart of the Rehnquist Court’s federalism revival.⁷² To date, however, no scholar has supported this assertion with a comprehensive summary of the justices’ voting records. This study does so, at least with respect to Justice O’Connor. It compares her votes to those of the other justices in every federalism case in which O’Connor participated during her tenure on the Court.

A. *Study design*

The purpose of the study is to test the descriptive accuracy of the common assumption that O’Connor tended to favor the states in cases involving constitutional federalism. My hypothesis was that, although this claim seemed generally correct as to cases involving the federalism-based limits on the national government, it did not

⁷² Erwin Chemerinsky, *Empowering the States When It Matters*, 69 BROOK. L. REV. 1313, 1313–14 (2004); Cross, *supra* note 1, at 1310; Fallon, *supra* note 13, at 432; Michael Greve & Jonathon Klick, *Preemption in the Rehnquist Court*, 14 SUP. CT. ECON. REV. 43 (2006); Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 68 (2001); Massey, *supra* note 13, at 436; Meltzer, *supra* note 13, at 343–44; Schapiro, *supra* note 13, at ____; Young, *supra* note 13, at 23.

accurately characterize O’Connor’s behavior in cases implicating the structural limits on the states. Because my hypothesis was purely descriptive, testing it only required a statistical summary (rather than a regression or some other tool designed to derive descriptive inferences).⁷³

The first step in compiling the data was to define the relevant universe of Supreme Court decisions. I included every case in which Justice O’Connor participated where the holding involved a constitutional provision or constitutionally based doctrine directly addressing the division of authority between the national government and the states.⁷⁴ And because my hypothesis was that O’Connor’s support for state autonomy

⁷³ On the potential value of statistical summaries to empirical legal studies—and the methodological rules governing their validity—see Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 24–29 (2002).

⁷⁴ 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.

varied depending on whether the constitutional provision at issue limited the national government or the states, I separated the cases into these two basic categories. Thus, with respect to the limits on the national government, the study included decisions where the holding involved the Commerce Clause, the Spending Clause, the Tenth Amendment (or the structural principles it confirms), the Eleventh Amendment (and the sovereign immunity it implies), and Section 5 of the Fourteenth Amendment. With respect to the limits on state governments, the study included decisions where the holding involved the doctrine of preemption, the dormant Commerce Clause, the Privileges and Immunities Clause of Article IV, the intergovernmental immunity doctrine, the Import-Export Clause, and the Qualifications Clauses of Article I (to the extent they limit the states' ability to regulate congressional elections).⁷⁵

Admittedly, this universe excludes a number of decisions in which the justices' views on federalism and state autonomy were relevant to the outcomes.⁷⁶ But expanding the scope of the study beyond these parameters would present a number of

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- 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.

⁷⁵ Every case included in the study universe is listed in the article's appendix, *infra*, separated by the constitutional provision or doctrine at issue and presented in reverse chronological order.

⁷⁶ For example, as discussed above, the Court on several occasions has invoked federalism principles in cases of statutory interpretation outside the context of preemption. In *Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), for instance, the Court rejected the Corps's interpretation of the Clean Water Act—which extended the Act's coverage to nonnavigable, intrastate waters—on the ground that it raised “significant constitutional and federalism questions” as to the breadth of Congress's commerce power. *Id.* at 174. It is no coincidence that the five justices adopting this construction of the statute were Rehnquist, O'Connor, Scalia, Kennedy, and Thomas, and that the four dissenters were Stevens, Souter, Ginsburg, and Breyer. The justices' underlying views about the breadth of Congress's commerce power plainly shaped their readings of the statute.

methodological complications. To state the obvious, virtually every case that the Court decides has *some* ramifications for the breadth of the states' policymaking autonomy.⁷⁷ Including every case decided by the Court, however, would lump together cases in which federalism was the predominant issue with those in which it was only marginally relevant.⁷⁸ A potential solution would be to include those cases in which the federalism issues seemed sufficiently salient, but it would be difficult (perhaps impossible) to devise selection criteria that would be both objective and meaningful. And absent such objective criteria for defining the universe, the study would violate the important standard of replication.⁷⁹

Next, I devised a structure for the data summary that would illuminate whether Justice O'Connor tended to favor state autonomy. Merely tabulating the percentage of her votes that enhanced state autonomy would tell us precious little. For instance, as the summary below shows, O'Connor voted for the outcome enhancing state autonomy in 48 percent of the cases involving the federalism-based limits on the states. By itself, though, this does not demonstrate whether O'Connor tended to support state autonomy, tended to

⁷⁷ In the area of criminal procedure, for instance, the dramatic expansion of the rights afforded to criminal defendants as a matter of federal constitutional law over the last fifty years has—for better or worse—substantially curtailed the states' freedom to experiment and resolve these questions as they see fit. *See generally* William Stutz, *Police Powers*, NEW REPUBLIC, July 25, 2005, at 20.

⁷⁸ For instance, federalism seems quite important in some of the Court's habeas corpus decisions, but it is essentially inapposite in others. Compare *Coleman v. Thompson*, 501 U.S. 722 (1991), where Justice O'Connor famously began her opinion with the sentence "This is a case about federalism," *id.* at 727, with *Williams v. Taylor*, 529 U.S. 362 (2000), which involved a careful parsing of the various ways in which the Anti-Terrorism and Effective Death Penalty Act amended the standards for habeas relief articulated in 28 U.S.C. §2254.

⁷⁹ On the importance of empirical work adhering to the replication standard—ensuring that "another researcher should be able to understand, evaluate, build on, and reproduce the research without any additional information from the author"—see Epstein & King, *supra* note 73, at 38–45.

oppose it, or was ambivalent about it. Needless to say, a host of other variables or influences could have affected her votes in the remaining 52 percent of the cases, all of which might be fully consistent with various attitudes about state autonomy. More to the point, the raw figure of 48 percent would mean something quite different depending on the context of her colleagues' behavior. If the other justices who sat in the same cases cast only 20 percent of their votes in favor of state autonomy, O'Connor would look like a strong ally of the states; but if 70 percent of her colleagues' votes in those cases favored the states, O'Connor would instead appear quite hostile to state autonomy.

The summary therefore captures Justice O'Connor's *relative* commitment to state autonomy. It compares her votes to those of the other eight justices who sat in precisely the same universe of federalism cases. As a result, all of the potentially relevant variables—the various legal texts and precedent, the preferences of other institutional actors, the policy consequences of the different outcomes, the quality of the parties' advocacy, etc.—are effectively held constant. Given identical stimuli, how often did Justice O'Connor, compared to her colleagues, vote for outcomes that enhanced state autonomy? My central premise is that, if O'Connor deserves her reputation, she should have voted for the states in federalism decisions at a higher rate than the average of the other justices who sat in the same cases.

The summary covers two distinct, overlapping time frames. The first is Justice O'Connor's entire 24-plus terms on the Court, from October 1981 to January 2006. Over this period, comparisons of O'Connor's record to those of other individual justices are fairly complicated, as they are only valid to the extent of concurrent service. Moreover, each would be only partially revealing of O'Connor's position relative to the rest of the

Court. Instead, the summary compares her votes to the cumulative record of the other justices sitting in the same cases, comparing her record to the average of the other justices with whom she served. The second time period is October 1994 to July 2005. I include this as a distinct frame of reference because the same nine justices served together for these eleven terms. The fortuity of this long-serving “natural court” allows us to compare O’Connor’s federalism record to that of other specific justices in a large universe of decisions.

For every case in the universe, I coded the vote of each justice as either enhancing state autonomy (1) or reducing it (0). In most instances, this was simple.⁸⁰ Nevertheless, three issues are worth mentioning. First, nine cases presented two separate federalism issues that addressed distinct constitutional provisions or doctrines. For example, in *United States v. 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. In cases like this, I treated the justices’ positions on the two issues as two separate votes (and coded each as 1 or 0).⁸¹ Because the different issues were essentially

⁸⁰ For example, I coded the five votes to invalidate the Gun-Free School Zones Act in *Lopez* as enhancing state autonomy, as this result left the regulation of the relevant activity exclusively to the states. Likewise, I coded the five votes to hold that Massachusetts’s regulations governing cigarette advertising were preempted by the Federal Cigarette Labeling and Advertising Act in *Lorillard Tobacco Co. v. Reilly* as reducing state autonomy, as this result curtailed the states’ capacity to regulate tobacco products.

⁸¹ Thus, the number of votes by O’Connor included in the study is 246, which she participated in 237 cases.

independent, treating them as separate votes seemed the best reflection of the justices' behavior.⁸²

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 treated 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 (and thus coded it as 0.5). This follows the protocol of another recent empirical study of the Rehnquist Court's voting patterns in preemption cases.⁸³ This is essentially an arbitrary judgment, but treating each claim within a preemption case as a separate case risked distorting the results through an overpopulation of preemption votes.⁸⁴

Finally, some cases defied simple classification as to the constitutional provision at issue. For instance, in *Board of Trustees v. Garrett*, the Court held that Congress had not validly abrogated the states' sovereign immunity from private suits for damages because Title I of the ADA was not valid Section 5 legislation. One might deem this either an Eleventh Amendment decision or a Section 5 decision, but including it in both would double-count a single vote. Thus, I simply assigned these cases to one category or the other. (I classified *Garrett* and similar decisions, for example, as Eleventh Amendment cases.) Such judgments about categorization are only matters of form, as the

⁸² Because only nine cases presented two distinct issues, this choice of treatment has only a minor impact on the study's overall results.

⁸³ See Greve & Klick, *supra* note 72, at ____.

⁸⁴ Again, the number of such cases is rather small, so the choice of treatment has only a minor impact on the overall results.

study ultimately combines Eleventh Amendment and Section 5 cases under the broader heading of federalism decisions involving the limits on the national government.

It is worth noting that, because the study aims to describe the justices' behavior by tallying their votes favoring one outcome or another, it suffers from the same shortcomings as other studies employing similar vote-counting, outcome-focused methodologies.⁸⁵ First, it ignores what the justices have actually written in their opinions. And at the Supreme Court of the United States, the content of the opinions can be just as important—indeed, much more important—than whether the judgment under review is affirmed, reversed, or vacated.⁸⁶ For example, in the 2004 case of *Tennessee v. Lane*,⁸⁷ the Court held that Congress had validly abrogated the states' sovereign immunity in enacting Title II of the Americans with Disabilities Act, at least with respect to its application to state judicial facilities. The vote was 5–4, and Justice O'Connor joined the majority. I therefore coded her vote as reducing state autonomy.

But focusing exclusively on the outcome her vote supported misses much of what happened in *Lane*. The majority substantially limited the scope of its holding (presumably to hold O'Connor's vote) by only addressing Title II's application to state courthouses. The Court did not address the much broader question, pressed by the parties, as to whether Title II validly abrogates state immunity when applied to the thousands of other public accommodations covered by the ADA. Thus, while O'Connor

⁸⁵ On the weaknesses inherent in such studies, see Frank B. Cross, Thomas A. Smith & Antonio Tomarchio, *The Reagan Revolution in the Network of Law*, at 7–8 (2006) (working paper available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909217); Barry Friedman, *Taking Law Seriously*, 4 PERSPECTIVES ON POLITICS 261, 265–266 (2006).

⁸⁶ See Friedman, *supra* note 85, at 265–266 (discussing the importance of the content of Supreme Court's opinions in evaluating the significance of the Court's work).

⁸⁷ 541 U.S. 509 (2004).

sided with Congress, she did so on limited terms, a nuance that binary vote counting necessarily misses.

By presenting O'Connor's voting record in federalism cases *relative* to the justices with whom she served, I have substantially mitigated this problem. Regardless of how the majority framed the question in a given case, the justices voted in ways that expressed their relative preferences. For instance, one might question whether O'Connor's vote in *Lane* was unfavorable to state autonomy in an absolute sense, but it clearly was *less* protective of state autonomy than to those registered by Rehnquist, Scalia, Kennedy, and Thomas. Still, had Justice Stevens (the majority opinion writer) framed the issue more broadly, O'Connor might well have switched sides. That is, Stevens's discretionary choices about the content of his opinion may well have altered O'Connor's vote. Thus, focusing on the justices' relative voting records does not solve the problem entirely; some votes to affirm or reverse (as opposed to just decisions to concur separately) probably depend on the content of the Court's opinions.

Another weakness of outcome-based vote counting is that it places equal weight on each decision, even though some cases are clearly more significant than others. The Court's decision in *Lopez* to hold for the first time in sixty years that Congress had exceeded its authority under the Commerce Clause seems a more important data point in measuring the justices' respective views on federalism than its decision in *California v. Deep Sea Research, Inc.*⁸⁸ that the Eleventh Amendment does not bar federal jurisdiction over *in rem* admiralty actions when the state does not possess the property at issue. Again, one could try to weight the cases according to some assessment of their relative

⁸⁸ 523 U.S. 491 (1998).

significance, but doing so would raise the same issue of replication discussed earlier. By not doing so, though, we obviously sacrifice a finer grained appreciation of the importance of the justices' various votes.

But these weaknesses should not be overstated. Outcomes may be a rather crude measure of the Court's decisional output,⁸⁹ but they can still tell us a great deal about patterns of judicial behavior. After all, the outcome a justice supports in a given case is often—perhaps even typically—the most revealing single piece of information about her views on the issue. Moreover, focusing on outcomes allows us to record the justices' positions quite objectively, reducing the potential for various biases in our data collection. Of course, outcome-based studies cannot answer all the interesting questions we have about judicial decisionmaking.⁹⁰ But they nonetheless can constitute a significant part of the mix of methodological tools that shed light on the Court's behavior.⁹¹

B. Results

1. October 1981 to January 2006

⁸⁹ See Cross, Smith & Tomarchio, *supra* note 85, at 7 (describing outcome-based studies as “a very crude measure of Supreme Court output”).

⁹⁰ See Friedman, *supra* note 85, at 265–266.

⁹¹ See Howard Gillman, *What's Law Got to Do with It? Judicial Behavioralists Test the “Legal Model” of Judicial Decisionmaking*, 26 L. & SOC. INQUIRY 465, 494–495 (2001) (describing the importance of such studies, even if they should be supplemented with historical and interpretivist inquiries).

From October 1981, when O'Connor was sworn in Associate Justice, until January 2006, when she was replaced by Samuel Alito, O'Connor participated in 239 federalism decisions, casting 248 votes (as counted under the terms discussed earlier). Fifty-seven of these votes addressed the structural limits on the national government's power. O'Connor cast 67 percent of her votes in these cases to invalidate the action of the national government, and thus in favor of enhancing state autonomy. As Table 1 shows, this was a significantly higher rate than that of her fellow justices.

Table 1

Votes in Favor of State Autonomy in Federalism Cases Addressing the Limits on the National Government—All Decisions, October 1981 to January 2006

	O'Connor	Other justices
Eleventh Amendment	64% (n=39)	38% (n=308)
Tenth Amendment	67% (n=9)	24% (n=72)
Commerce Clause	60% (n=5)	25% (n=40)
Section 5	100% (n=2)	71% (n=14)
Spending Clause	50% (n=2)	6% (n=16)
TOTAL	67% (n=57)	35% (n=450)

O'Connor's record of favoring state autonomy in these cases is even clearer if we confine our review to the Court's non-unanimous decisions. In the 39 such cases (yielding 40 distinct votes), O'Connor was substantially more likely to vote for the result enhancing the states' autonomy than her colleagues: 88 percent of her votes were to

invalidate the federal action at issue, compared to a rate of 45 percent among the other justices ($n = 318$). This is entirely consistent with her popular reputation as a strong supporter of the states' independent sovereignty and autonomy.

The picture is quite different in federalism cases involving the structural limits on state authority. Over her full tenure on the Court, O'Connor participated in 185 cases in which a state law was challenged on federalism grounds, yielding 192 distinct votes. Roughly half of O'Connor's votes in these cases—52 percent, precisely—were to invalidate the state law at issue. As Table 2 illustrates, this was essentially indistinguishable from the average voting record of her colleagues.

Table 2

Votes in Favor of State Autonomy in Federalism Cases Addressing the Limits on State Governments—All Decisions, October 1981 to January 2006

	O'Connor	Other justices
Preemption	48% ($n=127$)	48% ($n=991$)
Dormant Commerce Clause	46% ($n=48$)	42% ($n=366$)
Intergovernmental immunity	43% ($n=5$)	50% ($n=52$)
Privileges and Immunities Clause of Art. IV	17% ($n=6$)	19% ($n=48$)
Import-Export Clause	100% ($n=3$)	100% ($n=23$)
Qualifications Clauses	100% ($n=1$)	38% ($n=8$)
TOTAL	48% ($n=192$)	47% ($n=1488$)

Isolating the non-unanimous decisions reveals the same basic picture: in cases involving the federalism-based limits on the states, O’Connor’s voting record over her full tenure on the Court was no different than the average remaining justice. She cast 46 percent of her 108 votes in these cases to uphold the state law at issue, compared to an average of 45 percent among the remaining justices ($n = 837$).

2. *October 1994 to July 2005*

The same dichotomous pattern holds for O’Connor’s last eleven full terms on the Court, though her record in the union-preserving federalism cases is even more intriguing. From October 1994 to July 2005, the Court decided 25 cases involving the limits on Congress’s enumerated powers, yielding 27 distinct votes. As Table 3 illustrates, the justices’ voting patterns in these cases conform to the common perception of the Rehnquist Court: 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.

Table 3

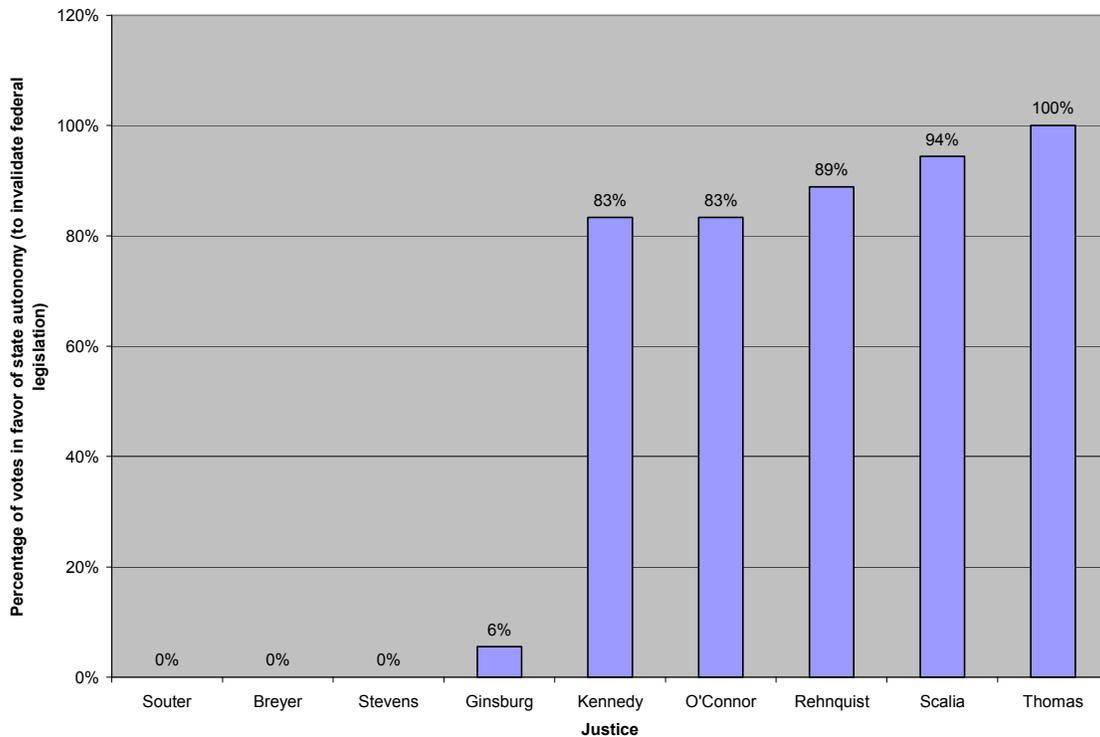
Votes in Favor of State Autonomy in Federalism Cases Addressing the Limits on the National Government—All Decisions, October 1994 to June 2005
($n = 27$)

Issue	Souter	Breyer	Stevens	Ginsburg	Kennedy	O’Connor	Rehnquist	Scalia	Thomas
Eleventh Amendment (n=17)	6%	6%	6%	12%	71%	65%	71%	82%	82%
Commerce Clause (n=5)	0%	0%	0%	0%	40%	60%	60%	40%	60%
Section 5 (n=2)	0%	0%	50%	50%	100%	100%	100%	100%	100%
Tenth Amendment (n=2)	0%	0%	0%	0%	50%	50%	50%	50%	50%
Spending Clause (n=1)	0%	0%	0%	0%	0%	0%	0%	0%	0%
Total (n=27)	4%	4%	7%	11%	63%	63%	67%	70%	74%

The Court’s polarization is even clearer when we limit our review to its non-unanimous decisions. In these 17 cases (yielding 18 votes), the Court almost always split 5–4 along the same lines. Justice O’Connor’s record in these cases thus substantiates her reputation as a strong proponent of state autonomy. Over these eleven terms, there were only three non-unanimous decisions in which O’Connor voted to uphold the exercise of federal authority: *Nevada v. Hibbs*, *Tennessee v. Lane*, and *Tennessee Student Assistance Corp. v. Hood*.

Table 4

Votes in Favor of State Autonomy in Federalism Cases Addressing the Limits on the National Government—Non-unanimous Decisions, October 1994 to June 2005
(*n* = 18)



Again, O'Connor's record was quite different in cases addressing the federalism-based limits on the states. Over the same time period, the Court decided 55 cases involving the constitutional provisions constraining state power, yielding 57 distinct votes. More than two-thirds of these votes (42) involved the doctrine of preemption. In these state-limiting cases, Justice O'Connor was hardly sympathetic to the states' policy initiatives—indeed, she was the justice *least* likely to sustain the assertion of state authority.

Table 5

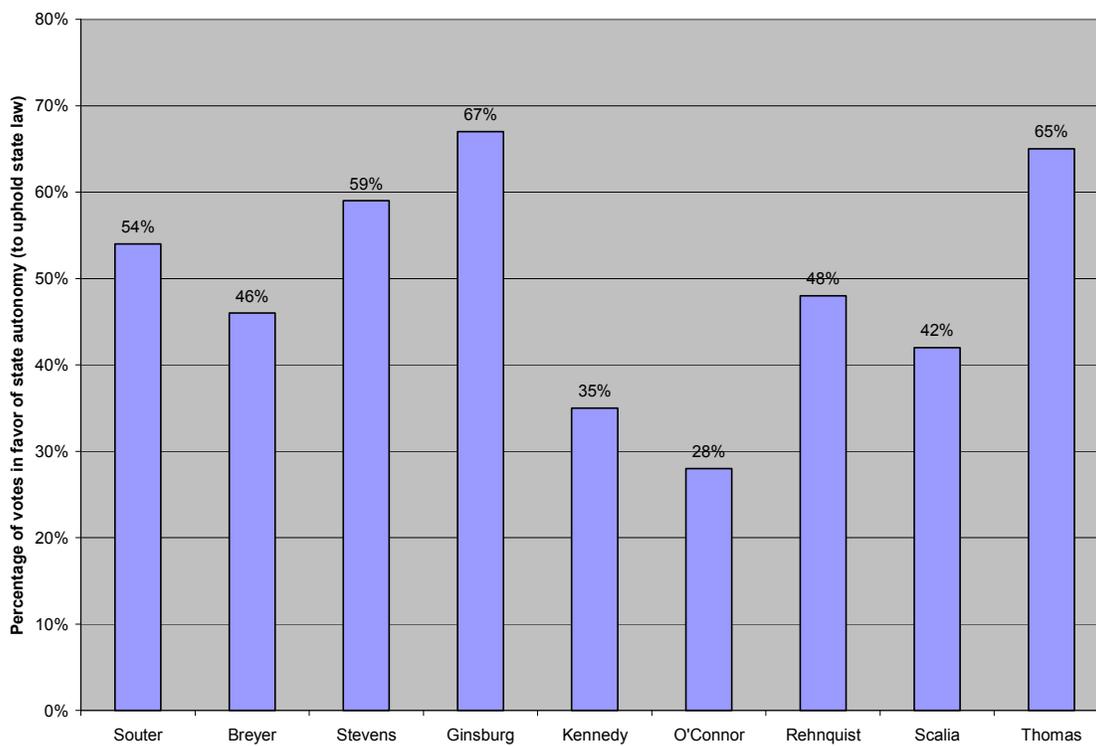
Votes in Favor of State Autonomy in Federalism Cases Addressing the Limits on State Governments—All Decisions, October 1994 to June 2005
(*n* = 57)

Issue	Souter	Breyer	Stevens	Ginsburg	Kennedy	O'Connor	Rehnquist	Scalia	Thomas
Preemption (n=42)	55%	55%	58%	58%	40%	38%	46%	42%	54%
Dormant Commerce Clause (n=11)	36%	27%	36%	45%	36%	36%	55%	45%	64%
Privileges and Immunities Clause (n=2)	0%	0%	0%	50%	50%	0%	50%	0%	0%
Intergovernmental tax immunity (n=1)	100%	0%	100%	100%	100%	0%	100%	100%	100%
Qualifications Clauses (n=1)	0%	0%	0%	0%	0%	100%	100%	100%	100%
Total (n=57)	49%	46%	52%	55%	40%	37%	50%	44%	55%

O'Connor's indifference to state autonomy in this context is even starker when we isolate the Court's non-unanimous decisions. In the 27 cases since October 1994 in which the Court disagreed over the application of a federalism-based limit on the states, O'Connor cast only 7.5 votes (28 percent) to uphold the challenged state law. As Table 6 shows, this was a lower rate than any of the justices with whom she usually kept company in cases involving the other side of federalism. In other words, in decisions in which the justices disagreed, O'Connor cast nearly three-fourths of her votes in favor of invalidating the state law, the highest rate on the Court.

Table 6

Votes in Favor of State Autonomy in Federalism Cases Addressing the Limits on State Governments—Non-unanimous Decisions, October 1994 to June 2005
(*n* = 27)



IV. DISCUSSION

In her first public address after announcing her retirement, Justice O'Connor said that she viewed the states as "laboratories": we should "let them try things and see how it works."⁹² The sentiment is one commonly associated with O'Connor, but it is not one that she consistently expressed in her voting record as a justice, at least in cases directly presenting federalism questions. To be sure, O'Connor consistently voted for results that protected state prerogatives in cases implicating the structural limits on the national government. But in cases involving the Constitution's union-preserving federalism provisions—its structural limits on the states—she did not show a similar inclination to "let them try things." In these cases, her record was essentially indistinguishable from the average justice with whom she served.

If O'Connor was not the ardent proponent of state autonomy that many have presumed, are there alternative descriptions that capture her behavior in the full universe of federalism cases? Developing a positive theory of O'Connor's approach to federalism—whether quantitative or qualitative—would require the aggregation of additional data and the application of more sophisticated methods, both of which go beyond the scope of my study here. But let me at least suggest a line of inquiry—one that would be fully consistent with the priorities of the Republican Party of the late twentieth century that propelled O'Connor onto the Court.

Aside from conceptualizing federalism cases as presenting a choice between more or less state autonomy, we might also see them as presenting choices about the extent of

⁹² Ralph Thomas, *Retiring Justice Worries About Loss of States' Rights*, SEATTLE TIMES, July 22, 2005, at A1.

government regulation generally. Whether they involve the breadth of Congress’s enumerated powers or the union-preserving limits on the states, at stake are limits on the government’s power to regulate. Of course, when the Court holds that that a state law has been preempted—and often when it concludes that a state law violates the dormant Commerce Clause—federal regulation of the same activity remains in place. But a judgment invalidating the state law necessarily reduces the aggregate level and stringency of the regulation of that activity. In other words, every federalism case presents some version of a choice between more or less regulation.

From this perspective, we can derive an alternative characterization O’Connor’s voting record in federalism cases: a general disposition towards reducing government regulation, regardless of its source.⁹³ To demonstrate this, we need to adjust the coding of the justices’ votes only slightly. No adjustment is necessary for the cases involving the limits on the national government, as a vote in favor of state autonomy in this context also favors reducing the government’s regulatory authority. We simply need to reverse the coding of the cases involving the federalism-based limits on the states, as a vote favoring state autonomy in this context is one to uphold a greater level of regulation.

With these adjustments in mind, consider again Justice O’Connor’s 148 votes in non-unanimous federalism cases over her 24-plus terms on the Court: 63 percent of those votes favored a reduction in government regulation, while the average among the other

⁹³ Others, such as Frank Cross and Richard Fallon—taking a bluntly political view of the Rehnquist Court’s behavior—have noted the deregulatory valence to aspects of the Court’s federalism project. *See* Cross, *supra* note 1, at 1322–1324 (describing the deregulatory nature of the Rehnquist Court’s 1999 federalism decisions that limited the legislative authority of Congress); Fallon, *supra* note 13, at 470–471 (positing that “the substantive conservatism of Justices O’Connor and Kennedy” may well lead “them to view the Commerce Clause as embodying antiregulatory, procompetitive ideals”).

justices sitting in the same cases was 52 percent. Thus, her distance from the average voting record of the other justices was essentially the same along the two dimensions of greater state autonomy and less government regulation. That is, she was 12 percent more likely than her colleagues to vote for outcomes that enhanced state autonomy, and she was 11 percent more likely than her colleagues to vote for outcomes that reduced the stringency of government regulation.

Table 7

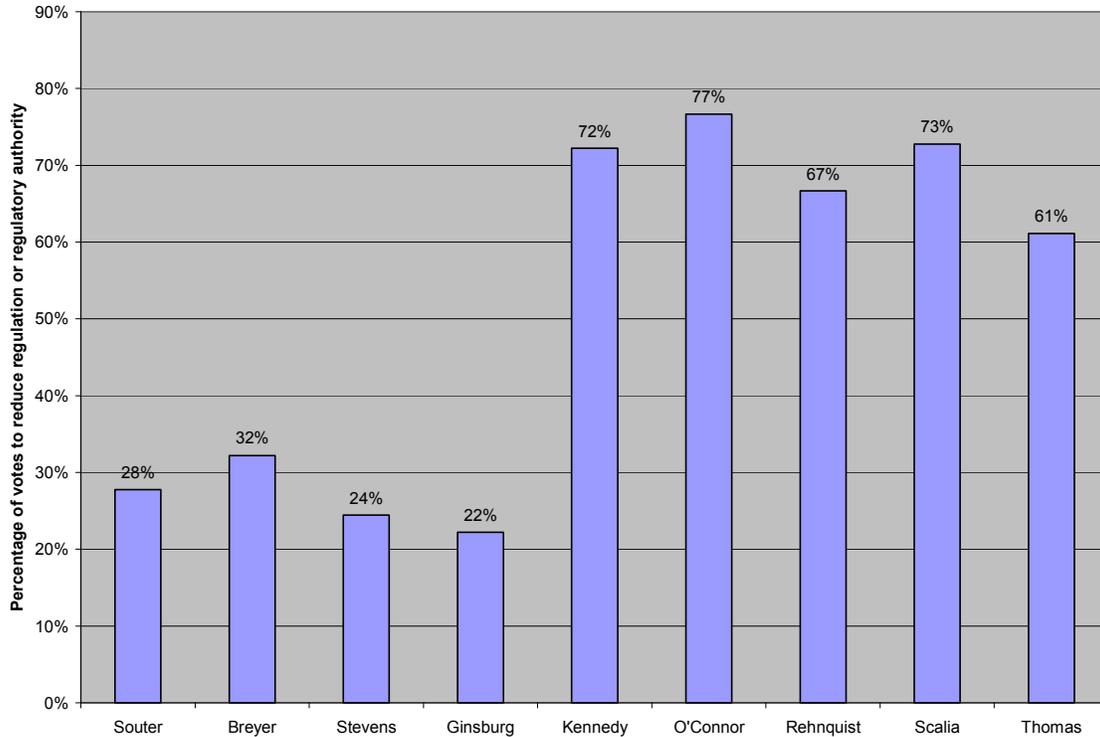
Votes in Non-unanimous Federalism Cases—October 1981 to January 2006

	O'Connor (n=148)	Other justices (n=1155)
Votes to invalidate regulation	63%	52%
Votes in favor of state autonomy	57%	45%

The deregulatory nature of O'Connor's voting record in federalism cases was especially pronounced in her last eleven full terms on the Court. She cast 34.5 of her 45 votes in these cases (77 percent) to invalidate the regulation at issue, whether it emanated from the federal government or the states. Thus, from October 1994 to July 2005, O'Connor's voting record in federalism cases was the single most hostile on the Court to government regulation.

Table 8

Votes in Favor of Reducing Regulation or Regulatory Authority in Federalism Cases Combined
—Non-unanimous Decisions, October 1994 to June 2005
(*n* = 45)



Again, these statistics alone do not support the inference that O'Connor voted as she did *because* of a preference to reduce government regulation; my claims here are purely descriptive. Still, the findings are interesting, if not altogether surprising. First, O'Connor's tendency to support state autonomy—though greater than the average justice—only manifested itself in cases involving the limits on the federal government; she was no more protective of state autonomy than the average justice in cases involving the structural limits on the states. Second, in the full run of federalism cases, O'Connor voted as frequently to reduce regulation as she did to enhance state policymaking

autonomy, and she did so much *more* frequently over her last eleven full terms on the Court.

CONCLUSION

In his pathbreaking 1957 article “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,” Robert Dahl wrote that “the policy views dominant on the [Supreme] Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.”⁹⁴ More recently, a number of political scientists have extended and refined Dahl’s thesis, forming a school of thought commonly known as the “regime politics” approach to judicial behavior. The basic theory—advanced by such scholars as Mark Graber, Howard Gillman, Cornell Clayton, Mitch Pickerill, Keith Whittington, and Terri Peretti—is that the Court’s power and substantive views are deliberately constructed by the dominant national political coalition. Though the Court certainly exercises independent judgment on a case-by-case basis, its general ideological direction is shaped by political developments external to the Court. Constitutional evolution is more the product of shifts in the governing national coalition than the occasion of the justices finally being won over by particular legal arguments. Thus, the Court is best conceived as an integral policy-making partner of the ascendant political majority, or at least an influential segment of that majority.⁹⁵

⁹⁴ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957).

⁹⁵ There are two principal mechanisms by which this might occur. First, the President and the Senate select justices based largely on their ideology, ensuring that the justices’ substantive views will tend to reflect those of the dominant coalition at the time of their

Regime politics theory might be better suited to explain the behavior of the Court as a whole than the actions of a single justice. But Justice O'Connor's voting record in federalism cases largely resembles the political priorities of the conservative movement that gave rise to her career. While the Republican Party of the last thirty years has often emphasized the importance of the independent sovereignty of the states, it has generally done so by advocating for enforcement of the structural limits on Congress's authority and for a reduction of the size of the federal government.⁹⁶ To be sure, GOP thought on the subject has not been monolithic, and those genuinely committed to state autonomy have achieved some policy successes, such as the Unfunded Mandates Reform Act of 1995.⁹⁷ But the modern Republican Party as a whole has never embraced a broader constitutional program to substantially enhance the legislative autonomy of the states.⁹⁸ This seems especially true in the area of commercial regulation. Consider such GOP initiatives as the decades-long effort to enact federal tort reform legislation (recently resulting in the Class Action Fairness Act⁹⁹), the inclusion of express preemption clauses

nominations. Second, regardless of the views that they take to the bench, the Court as an institution is substantially constrained by the preferences of the contemporary Congress and President. Without the sword or the purse, the justices must be cognizant—consciously or unconsciously—of the views of the extant political regime in making their decisions.

⁹⁶ See Pickerill & Clayton, *supra* note 13, at 236–239 (discussing the Republican Party's federalism initiatives since the 1970s).

⁹⁷ Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§1501–1538, 1571 (2000).

⁹⁸ For instance, consider such Republican-sponsored initiatives as the Defense of Marriage Act, Pub. L. 104–199, 110 Stat. 2419 (1996); the No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425 (2002); the effort to intervene in the Terri Schiavo saga, To Provide for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109–3 (2005); and the Department of Justice's attempts to undercut California's legalization of medical marijuana, *see* Gonzales v. Raich, 545 U.S. 1 (2005), and Oregon's legalization of physician-assisted suicide, *see* Gonzales v. Oregon, 126 S. Ct. 904 (2006).

⁹⁹ Class Action Fairness Act of 2005, Pub. L. No. 109–2, 119 Stat. 4.

in numerous Republican-sponsored statutes,¹⁰⁰ and the use of agency rulemaking by the present Bush Administration to preempt wide swaths of state law, just to name a few.¹⁰¹

Justice O'Connor clearly cared about federalism, and she clearly believed in the judicial enforcement of the structural limits on the national government. But her voting record in cases involving the federalism-based constraints on state governments did not reveal a particular concern for state policymaking autonomy more generally. Like the political coalition that placed her on the Court—or at least an influential aspect of that coalition—she tended to favor outcomes that enhanced state autonomy, but to no greater degree than she favored outcomes that reduced the stringency of government regulation. In this way, she appears to have reflected the priorities of the modern Republican Party, a fact we should probably find unsurprising.

¹⁰⁰ See, e.g., Department of Defense Appropriations Act for 2006, Pub. L. No. 109–148 (preempting state tort law with respect to injuries from certain drugs and vaccines); Protection of Lawful Commerce in Arms Act, Pub. L. No. 109–92 (preempting state authority to file civil actions against gun manufacturers); Energy Policy Act of 2005, Pub. L. No. 109–58 (preempting various state environmental protections); CAN SPAM Act of 2003, Pub. L. 108–187 (preempting state laws regulating unsolicited e-mail spam); Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108–159 (preempting some state credit reporting and identity theft laws).

¹⁰¹ See Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Reform*, 56 DEPAUL L. REV. (forthcoming 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900020 (discussing efforts to preempt state laws through rulemaking by the Food and Drug Administration, the Consumer Products Safety Commission, and the National Highway and Transportation Safety Administration). See also Stephen Labaton, 'Silent Tort Reform' Is Overriding States' Powers, N.Y. TIMES, Mar. 10, 2006, at C5.

Appendix

The following is a list of all the cases that were included in the study, sorted by subject matter, and presented in reverse chronological order.

DECISIONS ADDRESSING THE LIMITS ON THE NATIONAL GOVERNMENT

Commerce Clause

Gonzalez v. Raich, 125 S. Ct. 2195 (2005)
Guillen v. Pierce County, 537 U.S. 129 (2005)
United States v. Morrison, 529 U.S. 598 (2000)
Reno v. Condon, 528 U.S. 141 (2000)
United States v. Lopez, 514 U.S. 549 (1995)

Section 5 of the Fourteenth Amendment

United States v. Morrison, 529 U.S. 598 (2000)
City of Boerne v. Flores, 521 U.S. 307 (1997)

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)
South Carolina v. Baker, 485 U.S. 505 (1988)
Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)
Bell v. New Jersey, 461 U.S. 773 (1983)
EEOC v. Wyoming, 460 U.S. 226 (1983)
FERC v. Mississippi, 456 U.S. 742 (1982)
United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982)

Spending Clause

Sabri v. United States, 541 U.S. 600 (2004)
South Dakota v. Dole, 483 U.S. 203 (1987)

Eleventh Amendment

Central Virginia Comm. Coll. V. Katz, 126 S. Ct. 990 (2006)
United States v. Georgia, 126 S. Ct. 877 (2006)
Tennessee v. Lane, 541 U.S. 509 (2004)
Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440 (2004)
Frew v. Hawkins, 540 U.S. 431 (2004)
Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003)

FMC v. S.C. State Ports Auth., 535 U.S. 743 (2002)
Lapides v. Bd. of Regents of the Univ. System of Ga., 535 U.S. 613 (2002)
Raygor v. Regents of the Univ. of Minn., 534 U.S. 533 (2002)
Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001)
Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000)
Alden v. Maine, 527 U.S. 706 (1999)
College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999)
Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999)
California v. Deep Sea Research, Inc., 523 U.S. 491 (1998)
Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997)
Regents of the Univ. of Cal. v. Doe, 519 U.S. 425 (1997)
Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996)
Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994)
Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993)
Hafer v. Melo, 502 U.S. 21 (1991)
Blatchford v. Native Village of Notak, 501 U.S. 775 (1991)
McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18 (1990)
Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990)
Hoffman v. Conn. Dep't of Income Maintenance, 492 U.S. 96 (1989)
Missouri v. Jenkins, 491 U.S. 274 (1989)
Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)
Dellmuth v. Muth, 491 U.S. 223 (1989)
Welch v. Texas Dep't of Highways & Public Transp., 483 U.S. 468 (1987)
Papasan v. Allain, 478 U.S. 265 (1986)
Green v. Mansour, 474 U.S. 64 (1985)
Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)
Oneida County v. Oneida Indian Nation, 470 U.S. 226 (1985)
Pennhurst State Sch. & Hosp. v. Halderma, 465 U.S. 89 (1984)
Arizona v. California, 460 U.S. 605 (1983)
Colorado v. New Mexico, 459 U.S. 176 (1982)
Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982)
Patsy v. Bd. of Regents of the State of Fla., 457 U.S. 496 (1982)
Cory v. White, 457 U.S. 85 (1982)

DECISIONS ADDRESSING THE UNION-PRESERVING LIMITS ON THE STATES

Intergovernmental Immunity

Jefferson County v. Acker, 527 U.S. 423 (1999)
Barker v. Kansas, 503 U.S. 594 (1992)
North Dakota v. United States, 495 U.S. 423 (1990)
Cal. State Bd. of Equalization v. Sierra Summit, Inc., 490 U.S. 844 (1989)
Davis v. Mich. Dep't of Treasury, 489 U.S. 803 (1989)
Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988)
Rockford Life Ins. Co. v. Ill. Dep't of Revenue, 482 U.S. 182 (1987)

Import-Export Clause

IteL Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993)
R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130 (1986)
Limbach v. Hooven & Allison Co., 466 U.S. 353 (1984)

Privileges and Immunities Clause of Article IV, §2

Hillside Dairy, Inc. v. Lyons, 539 U.S. 59 (2003)
Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287 (1998)
Barnard v. Thorstenn, 489 U.S. 546 (1989)
Supreme Court of Va. v. Friedman, 487 U.S. 59 (1988)
Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985)
United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208 (1984)

Dormant Commerce Clause

Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n, No. 03-1230 (2005)
Granholm v. Heald, 125 S. Ct. 1885 (2005)
Hillside Dairy, Inc. v. Lyons, 539 U.S. 59 (2003)
Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003)
Hunt-Wesson, Inc. v. Franchise Tax Bd. of Cal., 528 U.S. 458 (2000)
South Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999)
Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564 (1997)
General Motors Corp. v. Tracy, 519 U.S. 278 (1997)
Fulton Corp. v. Faulkner, 516 U.S. 325 (1996)
Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995)
Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175 (1995)
Barclays Bank PLC v. Francise Tax Bd. of Cal., 512 U.S. 298 (1994)
W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994)
Assoc. Indus. v. Lohman, 511 U.S. 641 (1994)
C & A Carbone v. Town of Clarkstown, 511 U.S. 383 (1994)
Or. Waste Sys. v. Dep't of Env'tl. Quality, 511 U.S. 93 (1994)
Northwest Airlines, Inc. v. County of Kent, 510 U.S. 355 (1994)
IteL Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993)
Kraft General Foods, Inc. v. Iowa Dep't of Revenue and Fin., 505 U.S. 71 (1992)
Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768 (1992)
Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353 (1992)
Chemical Waste Management, Inc. v. Hunt, 504 U.S. 334 (1992)
Quill Corp. v. North Dakota, 504 U.S. 298 (1992)
Wyoming v. Oklahoma, 502 U.S. 437 (1992)
Trinova Corp. v. Mich. Dep't of Treasury, 498 U.S. 358 (1991)
Healy v. Beer Inst., 491 U.S. 324 (1989)
Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493 (1989)
Goldberg v. Sweet, 488 U.S. 252 (1989)

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988)
New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988)
D.H. Holmes Co. v. McNamara, 486 U.S. 24 (1988)
Am. Trucking Ass'n v. Scheiner, 483 U.S. 266 (1987)
Tyler Pipe Indus. v. Wash. State Dep't of Revenue, 483 U.S. 232 (1987)
CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987)
Maine v. Taylor, 477 U.S. 131 (1986)
Wardair Canada, Inc. v. Fla. Dep't of Revenue, 477 U.S. 1 (1986)
Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986)
Northeast Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 472 U.S. 159 (1985)
Bacchus Imps., Ltd. v. Dias, 468 U.S. 263 (1984)
Armco, Inc. v. Hardesty, 467 U.S. 638 (1984)
South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984)
Westinghouse Elec. Corp. v. Tully, 466 U.S. 388 (1984)
Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983)
Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n, 461 U.S. 375 (1983)
White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204 (1983)
Sporhase v. Nebraska, 458 U.S. 941 (1982)
Edgar v. Mite Corp., 457 U.S. 624 (1982)
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982)

Qualifications Clauses

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995)

Preemption

Mid-Con Freight Systems, Inc. v. Mich. Pub. Serv. Comm'n, 03-1234 (2005)
Bates v. Dow Agrosciences L.L.C., 125 S. Ct. 1788 (2005)
Aetna Health Inc. v. Davila, 542 U.S. 200 (2004)
Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246 (2004)
Nixon v. Mo. Mun. League, 541 U.S. 125 (2004)
Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003)
Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39 (2003)
Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003)
Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003)
Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003)
Sprietsma v. Mercury Marine, 537 U.S. 51 (2002)
City of Columbus v. Ours Garage & Wrecking Serv., Inc., 536 U.S. 424 (2002)
Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355 (2002)
Wis. Dep't of Health & Family Servs. v. Blumer, 534 U.S. 473 (2002)
Chao v. Mallard Bay Drilling, Inc., 534 U.S. 235 (2002)
Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)
Egelhoff v. Egelhoff, 532 U.S. 141 (2001)
Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001)
Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000)

Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000)
Norfolk Southern Ry. v. Shanklin, 529 U.S. 344 (2000)
United States v. Locke, 529 U.S. 89 (2000)
Unum Life Ins. Co. of Am. v. Ward, 526 U.S. 358 (1999)
El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999)
Foster v. Love, 522 U.S. 67 (1997)
Johnson v. Fankell, 520 U.S. 911 (1997)
Boggs v. Boggs, 520 U.S. 833 (1997)
De Buono v. NYSA-ILA Med. & Clinical Servs. Found., 520 U.S. 806 (1997)
Cal. Div. of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc., 519
U.S. 316 (1997)
Atherton v. FDIC, 519 U.S. 213 (1997)
Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)
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