
Judicial Behavior and the Rehnquist Court's Federalism Revolution

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Attempts to demonstrate that law systematically influences the behavior of the justices of the Supreme Court have traditionally foundered on the inability to provide systematic tests for such influence. At the same time, attitudinalists have traditionally asserted that the influence of law and policy preferences must be mutually exclusive, which is an unreasonably high standard. In this article, I develop a model of what federalism might look like to a Supreme Court justice. In doing so, I emphasize the difference between constitutional and political federalism but in the context of the judicial role in federalism. The model is then tested by looking at the pro-state bloc in the late Rehnquist Court, finding that four of the five justices can be considered federalists. The evidence presented here can be taken as a test of the influence of law beyond the influence of ideology of Supreme Court justices.

Keywords: *judicial politics; federalism; Rehnquist Court; legal influence; judicial behavior; judicial ideology*

A rapidly growing component of scholarship in the field of judicial behavior has focused on the degree to which justices of the Supreme Court behave in accordance with legal rules or doctrine. Rather than accept that Supreme Court justices decide cases according solely to their policy preferences, researchers have endeavored to develop and test hypotheses that might indicate obedience to rules of law. The obstacles these efforts have encountered have proven difficult to surmount because scholars have struggled to fully appreciate the role of the legal model in explaining the behavior of Supreme Court justices. In particular, one might believe the

Author's Note: I am grateful to Ruth Colker, Rorie Spill Solberg, and Margie Williams for their advice and comments. Data collection assistance was provided by Reid Caryer, Nathan DeDino, Kerry Hodak, Matthew Kear, and Sabrina Riggs. The views expressed in this article are the views of the author and do not necessarily reflect the views of the Congressional Research Service or the Library of Congress.

argument that justices' votes are explained by their conceptions about what makes good law, independent of their policy preferences, can be seriously considered only as an alternative to the attitudinal model. But recent scholarship has started to view the legal model as a complement to the attitudinal model; legal considerations may not be the sole determinant of the justices' votes, but they may be one of a series of factors that systematically affect the votes of the justices of the Supreme Court.

In this article, I test the extent to which federalism, a component of the legal model that has gained increasing prominence, affects the behavior of Supreme Court justices. I derive a series of hypotheses about how judges who assert fealty to a doctrine of federalism should behave and test those hypotheses on data collected on decisions made by the nine justices who served together through the "second" Rehnquist Court (Merrill, 2003). Justices who claim to be federalists do appear to behave in a way that respects state prerogatives more so than their colleagues who do not articulate a belief that the Tenth and Eleventh Amendments provide substantive guarantees for the states. Perhaps most important, this behavior transcends ideology, suggesting that the behavior of Supreme Court justices is affected by more than attitudinal factors.

Supreme Court Justices and the Legal Model

Attempts to assess the pull of law on the justices of the Supreme Court have progressed empirically, but the general conclusions have not changed. Scholars first devoted attention to the explanatory power of case facts in predicting the votes of the justices. Moving from case facts models (Segal, 1984, 1985) to models that integrate facts and attitudes over time (George & Epstein, 1992), political scientists began to develop an understanding of how law and the justices' preferences interact in Supreme Court decision making. But case facts models do not necessarily indicate that the justices adhere to legal criteria when making their decisions:

Proponents of the legal model conjoin facts with legalistic considerations such as the intent of the Framers, the plain meaning of the law, and prior decisions of the Court, while proponents of the attitudinal model describe the justices' votes as an expression of fact situations applied to their personal policy preferences. (Segal & Spaeth, 2002, p. 319)

The failure of case facts models to be accepted as evidence that law matters has not ended the search for evidence that the law has an effect on the

behavior of the justices. Spaeth and Segal (1999) tested the proposition that Supreme Court justices change their voting behavior when the Court develops new precedent that should alter their votes. They hypothesized that if justices behave according to what the law dictates, then they should respect the Court's precedents. Spaeth and Segal found very little evidence of such behavior; in most cases, justices who dissented in an opinion that altered precedent did not change their behavior in progeny cases. It would be premature to conclude, though, that law does not affect the behavior of Supreme Court justices. As Gillman (2001) argues, "there is not a consensus among legalists that, as a general matter, the norm of *stare decisis* obligates justices to defer to precedents against which they have written dissents" (p. 482). The test developed by Spaeth and Segal requires justices to abandon their preferences in favor of precedent, a high bar for the legal model to clear. The failure of the justices to choose precedent over preferences does not necessarily dictate the conclusion that the law does not influence the behavior of Supreme Court justices.

The more appropriate test for law as an influence on the behavior of Supreme Court justices is not to insist that law trumps preferences but to establish that law has a "gravitational impact" (Howard & Segal, 2002, p. 121) on the behavior of the justices. There are two research strains that demonstrate how the search for such a gravitational influence can be assessed. First, work by Howard and Segal (2002) has assessed the impact of litigant requests on the behavior of Supreme Court justices. Howard and Segal (2002) tested the influence of original intent and plain meaning of the text on the behavior of the justices. Finding no evidence that any of the justices respond to arguments made by petitioners that refer to text or to the original intent of the legislation, they observe that "ideological predispositions to vote a particular way overwhelm Supreme Court decision making, regardless of whether or not one premises it on an originalist interpretive method or on some vague notion of justice" (p. 134). Howard and Segal (2004) also tested the influence of law by looking at how the justices respond to litigant requests to declare laws unconstitutional. They find that none of the justices in their analysis is more (or less) likely to declare a government action unconstitutional if either party requests such an action. Some of the justices, however, are responsive to requests to strike legislation when the solicitor general, acting as *amicus*, requests such an action.¹

The second major attempt to demonstrate that the law is at least one of many factors the justices consider is the development of the notion of jurisprudential regimes. Jurisprudential regimes "structure Supreme Court decision making by establishing which case factors are relevant for decision making and/or by setting the level of scrutiny or balancing the justices are

to employ in assessing case factors” (Richards & Kritzer, 2002, p. 305; see also Kritzer & Richards, 2003, 2005). In the area of search and seizure, for example, Supreme Court decisions in 1983 and 1984 made several changes in how courts assessed the admission of evidence taken in police searches. These changes meant that the Supreme Court grew more deferential to the lower court’s finding that the police had probable cause to conduct the search and that the location of the search mattered less, and the justices became more likely to uphold a search where a warrant had been issued after the new regime began.² Kritzer and Richards (2003, 2005; Richards & Kritzer, 2002) take this as evidence that the justices respond to the changes in their own precedent and that they behave differently once a new jurisprudential regime has been established.

These two efforts to ascertain an influence for law are not perfect. One may interpret Howard and Segal’s (2002, 2004) findings as a general lack of responsiveness to the desires of litigants rather than a rejection of the tools of law in their decisions. The work on jurisprudential regimes does not specify the source of change in the behavior of Supreme Court justices: If scholars accept the conclusions of Spaeth and Segal (1999) that justices who disagree with a change in precedent will not abandon those preferences (except in the most limited circumstances), the findings of the work on jurisprudential regimes may be driven by the justices who were in the majority behaving in ways to reinforce the precedents that they created.³ More generally, instead of rejecting the argument that the legal model cannot explain the behavior of Supreme Court justices, the efforts to this point should generate a desire for more systematic analysis of ways in which the law should shape the justices’ decisions.

The strategy adopted by Howard and Segal, although yet to bear fruit, may still hold promise for testing the argument that the justices are responsive to arguments concerning legal doctrine. There is, however, an important difference in their two works. Plain meaning and framers’ intent are methods of interpretation of statutes or of the Constitution. Although they can be used to justify nearly any outcome (Phelps & Gates, 1991), Howard and Segal (2002, 2004) tested the proposition that they had an independent effect on the justices’ behavior beyond ideology. Judicial restraint (or judicial activism) is not a method of interpretation. Rather, it is a justice’s view about the proper role of the courts in a system of shared power and separate branches. Critics of the Court and of the justices have rightly been dubious of claims that justices believe in judicial restraint or judicial activism independent of their ideological preferences (Spaeth, 1964), and “judicial activism” has clearly gained currency as an epithet for those who disagree with specific decisions judges and justices make.

Federalism and the Behavior of Supreme Court Justices

Federalism is the belief that the boundaries between the powers of the national and state governments outlined in the Constitution should be closely guarded. As straightforward as that statement may appear, there has been considerable disagreement about how (and by whom) those boundaries should be policed. The belief that the judiciary bears some responsibility for defining the contours of those boundaries has fluctuated somewhat through history but enjoyed a resurgence during William Rehnquist's tenure as chief justice. Although many scholars have offered their perspective on this "federalism revolution" (e.g., Dinan, 1999; Gardbaum, 1996; Merrill, 2003; Whittington, 2001; Young, 2004), few have seriously considered what role the judiciary should play in officiating the give-and-take between the different levels of government in a federal system. Outlining the role for the judiciary in enforcing federalism may help clarify how the behavior of a federalist justice might differ from one who does not claim such a role.⁴

Some of the clearest expositions of the role the judiciary should play in enforcing the federal system suggest that judicial restraint should be the hallmark of judges who believe in protecting federalism (Thayer, 1893; Wechsler, 1954). But judicial restraint and federalism are not necessarily synonymous; one can envision justices who believe that the courts may need to resist intrusions by the federal government on state powers and prerogatives (Keck, 2004; Yoo, 1997). In essence, one could argue that the courts, as an arm of the federal government, may be better equipped to protect states from intrusions by Congress than the states themselves.

Absent judicial restraint, justices' commitment to federalism may reveal itself in other behaviors. At its core, federalism suggests that justices should not accept the subservience of states to the federal government that non-federalists would accept as a fundamental tenet of American government organization. Justices who are not federalists (those who assert no special attachment to federalism as a jurisprudential principle) will be more likely to strike state statutes than federal statutes. Nonfederalists may privilege the national government over state governments for a number of reasons. First, the Supremacy Clause clearly places federal law above state law to the extent that federal law is made pursuant to a legitimate grant of authority. Second, the Court may be cognizant of the weapons Congress can wield in any battle with the Court (Epstein & Knight, 1998; Murphy, 1964; Rogers, 2001), and the Court's reliance on Congress and the president for implementation of its decisions may dictate more acquiescence to the wishes of coordinate branches than to those of the states.

Federalists, however, would elevate the states to a level nearly equal to that of the federal government. Actions taken by Congress may, in the minds of federalists, be designed to overrun the states. Because the states may be unable to resist the trampling of their prerogatives by the federal government, the Court may need to step in to defend state interests by striking congressional enactments. As Bednar and Eskridge (1995) argue, the Supreme Court's "legal interest in promoting a rule of law and its institutional interest in situating itself as an arbiter of national power dynamics" (p. 1479) provide the justices with incentives to prevent the states from cheating on one another and to prevent Congress from violating the federal structure by imposing requirements on the states in violation of the constitutional design.

This problem is familiar to students of the development of constitutional law. Under the view of Herbert Wechsler, the Constitution provides political safeguards for federalism—states are represented in the Senate, members of the Electoral College are elected by states—and these protections should suggest that if the states (through their senators or electors) give away some sovereign right, the judicial system should not interfere on their behalf. But procedural protections for federalism may be inadequate, and substantive protections of states' rights may be necessary. These substantive protections need to be provided by the courts, as the states' interests are no longer adequately represented in the legislative process. Accordingly, the heirs to Wechsler have suggested a need (and constitutional support) for judicial defense of federalist prerogatives. As John Yoo (1997) argues,

Judicial review provides an important check on the temptation to surrender state sovereignty voluntarily. To some extent, judicial review also may guard against the threat of legislative instability or the possibility of unconstitutional actions taken in the heat of emotion. Just as importantly, however, judicial review prevents states that are fully informed from sacrificing their sovereignty for some greater financial gain. Put in public choice terms, federalism and the maintenance of a federal government of limited, enumerated powers may be a positive externality that no individual state acting individually or collectively fully internalizes. The Framers viewed federalism as a normative good which ought to be promoted despite any state's momentary interest in reducing its rights. (p. 1402; see also Calabresi, 2001)

Accordingly, I hypothesize that justices who do not articulate a particular interest in federalism will be more likely to declare state actions to be invalid than federal actions. If justices believe that one of the functions of the Court is to preserve the balance between federal and state power, that justice will be no more likely to strike state than federal statutes (Hypothesis 1).⁵

Federalism is built as much on the states respecting their sphere of authority as the federal government respecting its sphere of power, and as a result, federalists consider preemption cases to be an important component of preserving the balance between levels of government. Thayer, for example, believed that the Supremacy Clause played an important role in governing the relationship between the federal government and the states. In an era where the Fourteenth Amendment had not been used to incorporate the Bill of Rights, the states had considerably greater latitude to make policy choices. In such a framework, then, the Supremacy Clause was one of the few resources the federal government had to constrain the states. As Stephen Gardbaum (1996) argues, "In areas of concurrent power, Congress has unlimited constitutional authority to preempt the states—that is, legislatively to abolish constitutionally concurrent state lawmaking power and to convert concurrent federal power into exclusive power" (p. 797). Federalism, as defined above, should be construed somewhat more broadly than offering protection to the states in the federal system. Rather, it can be viewed as an interest in using the judicial power to preserve the balance between federal and state governments. Given that framework, one would expect that modern justices who adopt federalism as a jurisprudential tool would still respect federal prerogatives when a state action is alleged to be preempted by federal action (Swinford & Waltenburg, 1998b). If justices construe federalism as a desire to preserve the proper spheres of authority for both state and federal governments, and the judicial role is to police those spheres, then federalists should be more willing to strike state action when the federal government asserts that its powers are threatened (Hypothesis 2).⁶

The provisions of the Constitution that govern the relationship between the federal and state governments are quite limited, and no mention is made of the role of the Court in policing the boundary between the two spheres of power. One might consider justices who follow the behavior patterns predicted by the first two hypotheses as adherents of *constitutional federalism*. The primary focus of any constitutional analysis of federalism has been on the Supremacy Clause and the Tenth and Eleventh Amendments, which specify the relationship between federal and state governments and provide (somewhat limited) guidance as to what powers the federal government can use to coerce the states into action. Adherence to these principles in the form of treating the state and federal governments as equal whereas respecting federal government preemption claims beyond the ideological implications of the justices' votes would demonstrate a commitment to the text of the Constitution insofar as it relates to federalism.

Justices' adherence to federalism may not be confined to respect for the constitutional structure that creates federalism; justices may also attend to different indications that the states' wishes are being trampled in the policy-making process. In this context, juxtaposition between constitutional and political federalism might be useful. In fact, this distinction is quite familiar to students of federalism; in political federalism, the protection of the states comes not from the courts but from a political process that incorporates the states at the national level. As Justice Blackmun argued in *Garcia v. San Antonio Metropolitan Transit Authority* (1985),

The Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power. (p 552)

In Blackmun's (reformed) view, the states were not protected by the courts but by the elected branches. But the states may not always have the option of turning to Congress to enact its policy wishes; rather, the states may turn to the courts to seek protection of their interests once the policymaking process in the elected branches of government has proven unsuccessful (Pickerill & Clayton, 2004). This *political federalism* may be observed in two ways: respect by the Supreme Court for decisions made by state courts and response to the states as *amici curiae* before the Court.⁷

Respect for the decisions of state courts would be based on a "commitment to state autonomy—the idea that the state should be free to make its own decisions regarding criminal justice without interference from the federal judiciary" (Davis, 1992, p. 774).⁸ This respect for state court decisions may seem difficult to square with the argument that justices who assert an adherence to the principles of federalism will not necessarily respect the policy choices made by state legislatures relative to those choices made by Congress. But the Constitution more clearly specifies a subservient role for state legislatures relative to Congress than it does for state courts. State court judges have made the overwhelming majority of decisions in trials since the early days of the republic; the Judiciary Act of 1789 and subsequent expansions of the federal judiciary have always made the assumption that state courts and their judges would continue to play an essential role in interpretation of state and federal law. Accordingly, a federalist justice may give more respect to state court decisions than those of federal judges (Hypothesis 3).

Respecting the powers of states may also be observed as justices respond to signals outside of the case itself, particularly those provided by amicus curiae briefs (Collins, in press; Nicholson-Crotty, 2006). States and the intergovernmental lobby have played an increasing role in filing amicus briefs at the Supreme Court and have become increasingly successful in, at the very least, picking the winning side of cases (Clayton & McGuire, 2001; Pickerill & Clayton, 2004). One might suspect, then, that not only are the states and their lobbying groups becoming more cognizant of the rewards that participation before the Supreme Court offers, but the justices are more sympathetic to the amicus claims of states and organizations that support their interests. If justices are sensitive to the demands of federalism, then they should respond to wishes of the states expressed in amicus briefs filed by the states and the intergovernmental lobby. That is, a federalist justice should be more likely to uphold a government action when the states seek such an outcome via amicus participation or when the intergovernmental lobby participates as amicus (Hypothesis 4).

Federalism as a Legal, Strategic, and Attitudinal Consideration

Federalism can be said to have both ideological and legal components. That is, justices may advocate federalism as a companion to ideological conservatism (or liberalism, though modern political debate tends to associate federalism with conservatism), but federalism may have a value that transcends its ideological component. When confronted with a choice between following a legal principle and ideology, the justices may often choose ideology over some belief about the proper role of the judiciary in the system of separation of powers (judicial restraint or activism) or some belief about the proper balance of the state and federal governments. But as Howard and Segal suggest, the proper test of extraattitudinal factors is not if those factors trump preferences but merely that they influence the behavior of the justices.

For federalism to constitute a component of the *legal* model, one must demonstrate that its pull on the behavior of the justices is independent of ideology. As Cross and Tiller (2000) argue,

A true devotee of states' rights would establish doctrines that protect those rights, without respect to whether the case outcome is likely to benefit liberal or conservative causes or whether Congress is likely to "punish" the Court for subjugating national authority. (p. 748)

That is, one must demonstrate that the justices adhere to the tenets of federalism independent of the influence of ideology on their votes. Cross and Tiller, however, require that justices vote “contrary to their ideological policy preferences” (p. 765) rather than allowing for the possibility that both federalism and ideology play a role in shaping justices’ votes. A more appropriate test allows for both possibilities but also requires a clear expectation of how federalism will lead the justices to behave.

The other complaint one might lodge against federalism as a legal constraint is that rather than being a legal or ideological consideration, federalism respects a strategic awareness of the Court’s status in the political system. That is, the justices may seek to favor state governments at the expense of the federal government because they are interested, from a separation-of-powers perspective, in preserving their authority relative to the executive and legislature. But this strategic behavior (as may be suggested by Bednar and Eskridge) would differ from legally oriented behavior in two respects. First, if the justices were more concerned about the Court’s strategic position than following the framework of the Constitution, there would be no reason for some justices to favor federalism whereas others choose not to do so. That is, all of the justices of the Court should be equally concerned about the Court’s institutional position and equally interested in preserving the Court’s power relative to the other branches of the federal government. Second, if the justices’ sole concern were reining in legislative and executive power at the federal level, then the justices would ignore (or at least demonstrate no special deference to) federal concerns about state intrusion into the federal sphere of power. That is, if the justices’ considerations are merely strategic, they should exploit any opportunity to curtail the power of Congress and the president.

Research Methodology

Using the U.S. Supreme Court database (Spaeth, 2004) and the decision as the unit of analysis ($ANALU = 0$), I identified cases that reviewed the constitutionality of state and federal actions between the 1986 and 2002 terms. I located cases using the authority-for-decision ($AUTHDEC$) variables; cases where the constitutionality of a federal action ($AUTHDEC = 1$) or the constitutionality of a state action ($AUTHDEC = 2$) was challenged were included in the data set. For each case included in the data set, a variety of case attributes were coded, including justice vote (coded 1 if the justice voted to invalidate the government action, 0 if the justice voted to validate

the government action) (see Lindquist & Spill Solberg, 2007; Segal & Spaeth, 2002, chap. 10), whether the government action under review was a federal or state action, the disposition of the case at the lower court,⁹ whether the lower court was a federal or state court, and the presence of a Supremacy Clause claim. Additionally, each case was coded for the ideological direction of the government action under review. If the Court decision was coded in the Supreme Court database as conservative and it invalidated a government action, the underlying government action was coded as liberal (and vice versa for liberal Supreme Court decisions). If the decision was conservative and upheld the government action, the government action was coded as conservative (and vice versa for liberal Court decisions). More conservative justices should vote to permit conservative government actions and strike liberal government actions (and the reverse should be true for more liberal justices) (Lindquist & Spill Solberg 2007; Segal & Spaeth, 2002, p. 415; Spill Solberg & Lindquist, 2006).¹⁰

To test Hypothesis 4, a measure of amicus participation by the states and by the intergovernmental lobby was created. Amicus data were collected using several sources. Lexis served as the primary source, but given incomplete coverage in the "Supreme Court Briefs" records of signatories to amicus briefs, all cases were checked according to the briefs on file with the Supreme Court using microfiche records of the briefs. From that data, the net number of states and state government organizations favoring invalidation was calculated by subtracting the number favoring validation from the number favoring invalidation. Although the number of cosigners may not matter on most briefs, the number of states signing on to a brief should serve as a direct indicator to the justices of the importance of a case to the perceived self-interest of the states. Amicus participation by the states and by groups that represent state interests has been the subject of increasing scholarly interest in its own right (Clayton & McGuire, 2001; Waltenburg & Swinford, 1999), and that scholarship makes a strong case that the justices who articulate a concern about state sovereignty should respond to the wishes of the states as expressed in amicus briefs.

The same methodology was used to count the net number of briefs favoring invalidation in the case. Amici were coded as favoring or opposing invalidation only if they expressly stated such a position in the summary statement of the briefs; briefs seeking "clarification" of a line of cases from the Court or other request that did not expressly favor one party over the other were not included in the data. Controls were included for amicus participation by other parties in each case; the net number of overall briefs favoring invalidation was included in the model. Amicus participation by

the solicitor general (SG) was also accounted for. The effect of the solicitor general should be contingent on his request (to strike or uphold a law; Howard & Segal, 2004) and on ideology (Bailey, Kamoie, & Maltzman, 2005). Conservative justices may be responsive to requests from Republican solicitors general but not Democratic solicitors general (and vice versa), so four variables (Republican SG–validate, Republican SG–invalidate, Democratic SG–validate, and Democratic SG–invalidate) are used, leaving no amicus participation by the solicitor general as the comparison category.

Of the justices included in this analysis, Justices Scalia, Thomas, Rehnquist, O'Connor, and Kennedy are the justices most likely to exhibit behavioral patterns consistent with federalism (Spill Solberg & Lindquist, 2006; Swinford & Waltenburg, 1998a). Several commentaries have identified these justices, who emerged as a “pro-state bloc” as early as *New York v. United States* (1992) as the justices most interested in using judicial power to preserve the balance of state and federal interests (see, e.g., Colker & Scott, 2006; Dinan, 1999; Young, 2004).

Results

Table 1 presents the results of estimation for the votes of Justices Rehnquist, O'Connor, Scalia, Kennedy, Thomas, Stevens, Souter, Ginsburg, and Breyer during the 1986 to 2002 terms. Focusing first on the justices who have claimed to be (or are labeled as) federalists, there are no clear patterns of behavior consistent with federalism. Justices Rehnquist, Scalia, and Thomas are no more likely to strike federal actions than state actions once the other case factors have been controlled for (Hypothesis 1); the same can be said for Justices Souter, Ginsburg, and Breyer. Justices O'Connor and Kennedy are more likely to vote to strike state actions than federal actions, suggesting that their reputations as federalists, at least in the constitutional sense, may be inaccurate.

Justices Rehnquist and Scalia are significantly more likely to vote to invalidate government action when the federal government asserts that federal law preempts state action (Hypothesis 2). This concern for the balance of power between the federal and state governments suggests that federalism cuts both ways and that the justices may not feel obligated to stand aside as the different levels of government struggle over the apportionment of power between the national and state governments. If, as Thayer (1893) argued, the Supremacy Clause can be viewed as the flip side of federalism, reserving to the federal government its sphere of authority where federalism

Table 1
Predictors of Justices' Votes to Invalidate Government Action

	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
Federal government action	-0.335 (0.273)	-1.065** (0.263)	-0.997** (0.271)	-0.337 (0.263)	-0.583* (0.280)	-0.343 (0.318)	0.473 (0.351)	0.013 (0.391)	-0.708 (0.402)
Lower court decision									
Federal court validated	1.037** (0.262)	0.222 (0.258)	1.215** (0.261)	0.815** (0.251)	0.960** (0.274)	0.496 (0.309)	1.033** (0.337)	0.459 (0.380)	1.252** (0.396)
State court validated	0.338 (0.281)	0.417 (0.275)	0.586* (0.264)	0.472 (0.264)	0.912** (0.292)	1.132** (0.350)	1.197** (0.381)	1.087* (0.438)	1.468** (0.472)
State court invalidated	-0.366 (0.396)	-0.450 (0.312)	-0.382 (0.351)	-0.735 (0.385)	-0.373 (0.373)	0.180 (0.419)	-0.542 (0.629)	0.796 (0.527)	0.291 (0.525)
Criminal case	-0.456 (0.237)	0.474* (0.222)	-0.618** (0.221)	-0.455* (0.224)	-0.801** (0.239)	-0.261 (0.276)	-0.692* (0.318)	0.757* (0.350)	0.140 (0.365)
Preemption case	1.551** (0.408)	-1.006* (0.403)	0.335 (0.411)	1.274** (0.409)	1.002 (0.546)	-0.527 (0.626)	0.748 (0.595)	-0.464 (0.790)	-0.395 (0.842)
Amicus participation									
Net number of states favoring invalidation	0.003 (0.009)	-0.011 (0.009)	0.022* (0.009)	0.003 (0.009)	0.011 (0.010)	0.006 (0.010)	0.010 (0.011)	0.013 (0.012)	0.009 (0.012)
Net number of state government organizations favoring invalidation	-0.022 (0.055)	0.090 (0.060)	-0.023 (0.060)	-0.048 (0.061)	0.001 (0.073)	-0.014 (0.080)	-0.112 (0.101)	-0.088 (0.112)	-0.027 (0.100)
Net number of amicus briefs favoring invalidation	0.028 (0.023)	0.035 (0.025)	0.088** (0.029)	0.011 (0.022)	0.006 (0.025)	0.041 (0.029)	-0.010 (0.029)	0.027 (0.034)	0.031 (0.033)

(continued)

Table 1 (continued)

	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg	Breyer
Solicitor general amicus									
Democratic SG-validate	-0.137 (0.424)	-0.773* (0.381)	-0.022 (0.397)	0.005 (0.394)	-0.204 (0.384)	-0.295 (0.379)	0.122 (0.440)	-1.221** (0.433)	-1.241** (0.459)
Democratic SG-invalidate	1.597* (0.652)	0.754 (0.718)	2.979** (1.089)	0.870 (0.626)	1.658* (0.803)	2.291* (1.088)	1.151 (0.649)	2.431* (1.106)	2.308* (1.143)
Republican SG-validate	-1.185** (0.377)	-0.471 (0.281)	-1.152** (0.324)	-1.263** (0.346)	-1.732** (0.379)	-1.363** (0.405)	-1.190* (0.560)	-0.672 (0.605)	-1.015 (0.623)
Republican SG-invalidate	0.417 (0.461)	-0.202 (0.465)	0.536 (0.503)	-0.143 (0.460)	1.206 (0.666)	0.344 (0.622)	0.555 (0.705)	-0.048 (1.056)	-0.171 (1.066)
Liberal government action	0.881** (0.229)	-1.488** (0.228)	0.654** (0.228)	1.036** (0.225)	0.271 (0.245)	-1.339** (0.296)	1.208** (0.308)	-1.539** (0.363)	-1.175** (0.386)
Constant	-1.200** (0.244)	1.119** (0.229)	-0.320 (0.223)	-0.825** (0.226)	-0.112 (0.238)	0.485 (0.285)	-1.203** (0.327)	0.205 (0.359)	0.265 (0.369)
Observations	604	605	600	601	503	357	315	247	225

Note: Cell entries are logit coefficients. Standard errors are in parentheses.
 * $p < .05$. ** $p < .01$, two-tailed tests.

reserves to the states their sphere of power, then federalist justices should be more likely to invalidate a statute when a preemption claim is raised. Interestingly, Justice Stevens is *less* likely to invalidate a statute when a preemption claim is raised.

Turning to the hypotheses that reflect political federalism, it is clear that respect for state courts relative to federal courts is largely contingent on the decision made by the lower courts. None of the justices demonstrates any differential behavior between state and federal courts when the lower court invalidates the government action (Hypothesis 3).¹¹ Justices Rehnquist and O'Connor are significantly more deferential to state courts than to federal courts but only when the lower court upholds the government action.¹² The absence of any consistent evidence that the justices are more deferential to state courts than federal courts suggests that the lower court treatment of the government action is more important than what kind of court (state or federal) the appeal comes from.

The lack of independent effect of *amicus curiae* briefs (Hypothesis 4) is perhaps one of the most notable findings. The *amicus* briefs filed by the intergovernmental lobby have no effect on any of the justices. For justices Rehnquist, O'Connor, Scalia, and Thomas, they are even signed incorrectly (though not statistically different from 0). Furthermore, Justice O'Connor is more likely to invalidate state action when the balance of states as *amici curiae* favors invalidation. If Justice O'Connor truly was the "swing vote" (Martin, Quinn, & Epstein, 2005) during this era, then states may have been gearing the arguments made in their briefs toward her, with some success. That success may be sufficient to win cases by influencing the pivotal justice on a closely divided Court, but the lack of influence for justices Rehnquist, Scalia, Kennedy, and Thomas might cause state governments to question their strategy.

Not surprisingly, all of the justices behave as predicted when looking at the ideology of the challenged government action: Justices Rehnquist, O'Connor, Scalia, and Thomas are more likely to invalidate liberal government actions, whereas Justices Stevens, Souter, Ginsburg, and Breyer are more likely to vote to invalidate conservative government actions. For Justice Kennedy, the ideology of the underlying government action does not have a statistically significant effect.

The patterns of the responsiveness to the solicitor general as *amicus curiae* are also interesting. When a Democratic solicitor general seeks to validate a government action, Justices Breyer and Ginsburg are more likely to agree, whereas such a request does not have a statistically significant effect on any of the other justices. When a Democratic solicitor general seeks to invalidate

Table 2
Changes in Predicted Probabilities: State–Federal Government
Action and Liberal–Conservative Action

Justice	Change in Predicted Probability		
	From Baseline Probability	From Conservative to Liberal	From State to Federal
Rehnquist	.23	.18*	–.05
Stevens	.76	–.34*	–.24*
O’Connor	.40	.16*	–.20*
Scalia	.31	.24*	–.06
Kennedy	.46	.07	–.14*
Souter	.61	–.31*	–.08
Thomas	.23	.27*	.09
Ginsburg	.54	–.34*	.00
Breyer	.55	–.28*	–.17

Note: Baseline case involves Court review of a conservative state government action, invalidated by a lower federal court. The baseline case has the mean number of amicus briefs by states and state government organizations favoring invalidation (varies by justice) and has no solicitor general amicus participation.

*Marginal effect statistically significant ($p < .05$, two-tailed).

a government action, Justices Rehnquist, O’Connor, Kennedy, Thomas, Souter, Ginsburg, and Breyer are likely to agree. Republican solicitors general, on the other hand, are most successful when they file amicus briefs in favor of validation of government action. When they do so, all of the justices save Justices Stevens, Ginsburg, and Breyer are more likely to agree. When Democratic solicitors general seek invalidation of a government action, Justices Rehnquist, O’Connor, Kennedy, Souter, Ginsburg, and Breyer are all more likely to vote to invalidate the government action. Republican requests to invalidate government action were universally ineffective: They did not exert a statistically significant effect on any of the justices.

To accurately assess the impact of the different variables, marginal effects are reported in Table 2. Setting all of the other independent variables at their means and medians, the baseline case is a conservative action taken by a state government, invalidated by a federal lower court, with no amicus participation by the solicitor general.

Though the amicus participation was set at justice-specific levels, the average for the entire 1986-to-2002 period was 4.46 states, 0.38 inter-governmental organizations, and 0.05 amici briefs (all signers) in favor of validation. With the baseline in mind, one can see that ideology is substantially

more influential than the difference between state and federal action. Chief Justice Rehnquist, for example, was 18% more likely to invalidate a liberal government action than a conservative government action. He was no more likely to invalidate federal action than state action (the marginal effect, 5%, is not statistically significant). The only justice who demonstrated any evidence of valuing state action over federal action was Justice Thomas, but again, the effect is not statistically significant.

State amicus curiae participation affected only Justice O'Connor. A one-standard-deviation increase in the number of states filing amici in favor of the action under review by the Court decreases the probability of a vote to invalidate by Justice O'Connor by 5.9% (39.8% to 33.9%). None of the justices' propensity to invalidate is significantly affected by briefs filed by the intergovernmental lobby.

Discussion

John Dinan (1999) argues that

although the degree of concern for federalism varies depending on the particular Justice and the particular area of law, a majority of the justices of the current Court (including the Chief Justice and Justices O'Connor, Scalia, Kennedy, and Thomas) has for the first time engaged in an extended inquiry into the original understanding and contemporary value of the federal principle. Arguing that their predecessors were insufficiently concerned with federalism, these Justices have brought the principle to the forefront of the decision-making process and have explained why it ought to be honored. (pp. 130-131)

Dinan's work, like most contemporary work on federalism, fails to ascertain the extent to which federalism operates independent of ideology. If federalism serves only to justify conservative decisions, one cannot argue for the creation of a federalist jurisprudence. Indeed, the Court seemed untroubled by concerns of federalism in its most partisan decision, ending the Florida recount in *Bush v. Gore* (2000). Nonetheless, a modest amount of evidence exists that federalism operates for four of the five justices who formed a conservative majority between 1991 and 2005. But if Justices Rehnquist, O'Connor, Scalia, and Thomas are federalists, their vision of federalism is certainly not a shared one.

Justice O'Connor appears to hold a view of political but not constitutional federalism. She was, on balance, more respectful of state courts than any of

her colleagues save Chief Justice Rehnquist. Justice O'Connor was also responsive to states as *amicus curiae* where no other justice (federalist or not) was, thereby meeting the criteria outlined as political federalism (Hypotheses 3 and 4). At the same time, Justice O'Connor actually was more willing to strike state than federal statutes (Hypothesis 1) and did not use preemption claims to police the boundaries between federal and state government (Hypothesis 2). Her federalism, then, appears to focus not on constitutional provisions protecting the separate spheres of sovereignty but on evidence that the states have internally (state court ratification of a state policy choice) or collectively (states submitting amici in defense of an action) agreed on a policy as the best course of action.

Chief Justice Rehnquist met most of the hypothesized behaviors of a federalist judge: He was not predisposed against state actions relative to federal actions (Hypothesis 1), he used preemption claims as a tool to police the boundaries between state and federal sovereignty (Hypothesis 2), and he demonstrated some willingness to leave the decisions of state courts undisturbed (Hypothesis 3). He, like Justice O'Connor, was less likely to reverse a state court than a federal court when the lower court upheld the government action. That said, the chief justice was no more likely to uphold an action when the states, as amici, sought validation by the Supreme Court. Rehnquist's federalism was more clearly grounded in the Constitution than O'Connor's; his decisions flowed from what the Constitution has to say about the treatment of states relative to the federal government, and it is noteworthy that he, along with Justices Scalia and Thomas, does not treat state government decisions as more suspect than the decisions of the federal government, and this is perhaps the clearest indicator of federalist jurisprudence.

Justices Scalia and Thomas, contrary to Justice O'Connor, are more likely to follow the dictates of constitutional federalism (placing the states on equal footing with the federal government and a willingness to strike favor the federal government in preemption cases). Justice Thomas may, in fact, be more likely to strike federal action than state action ($p = .179$, two-tailed). This constitutional federalism demonstrated by Scalia and Thomas is distinct from the political federalism to which Justice O'Connor appears to adhere. Notably, Justice Kennedy really cannot be considered to be a federalist, at least as federalism is conceived here. He, like Justices Scalia, Thomas, and Rehnquist, feels comfortable siding with the federal government on preemption claims but also is more likely to declare state action unconstitutional than federal action. A reluctance to place the states on equal footing with the federal government may be justified by adherence to political federalism, but even this version of federalism is not practiced by Justice Kennedy.

In short, it may be difficult to claim that there are “five faces of federalism” (Dailey, 2001), but there clearly is no consistent view of federalism to which all five justices adhered. Justices Scalia and Thomas have a view of federalism rooted in constitutional design, Justice O’Connor has a view of federalism rooted in the political process, and Chief Justice Rehnquist’s view of federalism contained both constitutional and political components. The distinction between political and constitutional federalism may be a useful way to consider the justices’ behavior.

Conclusion

Ongoing attempts to identify ways in which law systematically influences the behavior of Supreme Court justices have struggled on several fronts. Study of the behavior of the justices of the Supreme Court has moved past the belief that the attitudinal and legal models are mutually exclusive, but even clearing this hurdle has not translated into a wealth of evidence that law systematically affects the behavior of Supreme Court justices. Federalism as a legal construction can be translated into hypotheses that can be tested in ways that satisfy the demands of social scientists. There appear to be two versions of federalism at work among the justices who served together between 1994 and 2005. Justices Thomas and Scalia appear to adhere to a doctrine of constitutional federalism, which focuses on the existence of judicially enforceable boundaries between state governments and the national government. Justice O’Connor, on the other hand, appears to follow a doctrine of political federalism, paying less attention to constitutional prescriptions for the role of the different governments in a federal system and paying closer attention to the states’ requests, either by respecting state court ratification of state policies or by responding favorably to amicus requests by the states. Chief Justice Rehnquist appears to accept tenets of both political and constitutional federalism, though he demonstrated no responsiveness to amicus requests by the states or the intergovernmental lobby.

Future work on the role of federalism in the decisions of the Supreme Court should attend to the independent effect of federalism beyond ideology. More broadly, the approach taken here demonstrates the value of acknowledging that legal and ideological considerations can coexist in the behavior of Supreme Court justices. The justices of the Court who assert that federalism provides judicially enforceable guarantees to the spheres of power reserved to the state and national governments behave in a way that suggests their adherence to federalism is more than mere unctuousness.

Notes

1. This finding reflects work on the response of the justices to the solicitor general, but much of that work now suggests that justices' response to the solicitor general as an amicus is conditioned on ideology (Bailey, Kamoie, & Maltzman, 2005).

2. Kritzer and Richards (2005) note that this last finding fails to reach conventional levels of statistical significance, but "the nature of the difference suggests that whether a warrant was issued may have more importance after the regime change; this would be consistent with the good faith, inevitable discovery, and independent source exceptions to the exclusionary rule" (p. 47).

3. See, however, Scott (2006).

4. As I argue, the justices do not disagree as to whether there are limits on the national government relative to the states; rather, they disagree on how those limits should be enforced. Those justices labeled here as federalists are those who believe it is the responsibility of the courts, particularly the Supreme Court, to keep the national and state governments in their respective spheres. Justices labeled as nonfederalists tend to argue that the elected branches have that responsibility.

5. Howard and Segal (2004) turn this proposition on its head when they suggest that federalism suggests that the justices give "greater latitude to the states than to the federal government" (p. 137). Lindquist and Spill Solberg (2007, p. 74) hypothesize that conservatives of the Rehnquist Court will be more likely to strike federal statutes and liberal justices will be more likely to strike state statutes. I argue that federalism would manifest itself in putting state and federal actions on the same level.

6. Some commentators (Conlan & Dudley, 2005; Young, 2004) find reliance on preemption to strike state statutes inconsistent with federalism's respect for the states. But if one reads federalism as a doctrine focused on maintaining clear lines between the state and federal governments, decisions striking state statutes on preemption grounds can flow from the same judicial philosophy as decisions to strike federal statutes on the grounds Congress has exceeded its power.

7. The terms *constitutional federalism* and *political federalism* may engender confusion because they are used differently here than in other contexts. The more accurate terms may be *constitutional judicial federalism* and *political judicial federalism* to reflect the focus on the Court's role in protecting federalism.

8. Davis's (1992) focus is on criminal justice decisions of Justice Rehnquist. I extend that logic here.

9. Brace, Hall, and Langer (2001) note that this strategy helps control for the nonrandom selection of cases courts review. For an application to the U.S. Supreme Court, see Lindquist and Spill Solberg (2007).

10. This approach differs from the strategy adopted by Howard and Segal (2004), who code the ideological stance of the party. The effect should, in practice, create a similar result—liberal parties will generally seek to strike conservative state actions and vice versa.

11. This would be reflected, in Table 1, with a significant coefficient for lower court–state court invalidated, as lower court–federal court invalidated is the comparison category.

12. These results were generated by changing the comparison category for lower court treatment from federal court invalidated (as in Table 1) to federal court validated. A negative coefficient on state court validated meant that the justice was less likely to reverse (more likely to validate) if the state court had validated than if a federal court had done so. Because changing the comparison category has no effect on the other coefficients, those results are not presented here.

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