

TOWARDS AN INTEGRATED MODEL OF THE SUPREME COURT'S FEDERALISM DECISION MAKING*

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Disputes involving the boundaries of state versus federal power make up a substantial portion of the Supreme Court's docket and have undergone extensive analysis. Yet, the conventional wisdom regarding the justices' choices in these cases is that they are highly inconsistent. I argue that this is primarily a function of the failure of scholars to develop a comprehensive model of the justices' federalism decision making. To remedy this, I introduce an integrated model of the individual justices' choices in these cases, which is then subjected to empirical testing in the Rehnquist Court era (1986-2004). I explore a host of determinants of the justices' decision making, including attitudinal, institutional, legal, and personal attributes, as well as the role of organized interests in the Court. The findings reveal that the choices justices make in these cases are not as discordant as most commentators suggest. Rather, they are relatively predictable through the application of an integrated model of judicial choice.

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Each term, U.S. Supreme Court justices adjudicate disputes implicating the limits of federal versus state power. Through these federalism decisions, the justices are charged with determining the proper balance between the authority of states to operate as laboratories of democracy, free from federal interference, and the expansiveness of the federal government's reach under the Constitution. The importance of this debate is perhaps no more evident than in scholarly analyses of the Rehnquist Court's so-called "federalism revolution," in which the justices, under the leadership of Chief Justice Rehnquist, are argued to have reinvigorated the concept of taking states' rights seriously to a level that had not been witnessed since before the New Deal (e.g., Chen 2003; Greenhouse 2001; Pickerill and Clayton 2004). In so doing, the Rehnquist Court appeared to breath new life into conspicuously long-forgotten constitutional provisions involving federalism as it struck down federal laws involving a wide range of social policy, including the regulation of firearms on school property (*United States v. Lopez* [1995]), violence against women (*United States v. Morrison* [2000]), and the free exercise of religion (*City of Boerne v. Flores* [1997]). While these decisions, and many others, offer clear examples supporting the apparent importance of federalism to the justices, other scholars have noted that, rather than signaling a genuine shift in the Court's federalism jurisprudence, these cases are merely examples of Rehnquist Court justices using the guise of federalism to strike down politically liberal policies in pursuit of their own conservative political goals (e.g., Colker and Brudney 2001; Cross 1999; Segal and Spaeth 2002). Supporting this perspective, for example, one can point to *Bush v. Gore* (2000), in which the Court's federalist five abandoned their staunch support for states' rights to usher George W. Bush into the White House. Still, other scholars have noted that the Rehnquist Court's federalism revolution cannot be wholly captured by either of these perspectives, and instead, is best interpreted through a host of approaches, including a consideration of the justices' background characteristics (e.g., Schenker

1982; Young 2005) and institutional constraints implicated by these cases (e.g., Eskridge and Ferejohn 1994; Tiller 1995).

The purpose of this paper is to develop an integrated model of the justices' federalism decision making and to subject this account to empirical scrutiny in the Rehnquist Court era. Investigating the Court's federalism jurisprudence is significant in a number of ways. First, despite the fact that there are literally hundreds of books and articles devoted to the topic, the cyclical nature of the justices' federalism decisions makes it one of the most erratic issues confronted by the Court and the inconsistency with which constitutional provisions are applied to similar cases only increases this ambiguity (e.g., Baybeck and Lowry 2000; Perry 2005; Wise and O'Leary 1992; Young 2005). Perhaps Bednar and Eskridge (1995: 1447) put it most succinctly when they described the Court's federalism cases as "a mess." Thus, we are clearly in need of an explanation of federalism decision making that can resolve some of this confusion. Second, despite the elusive nature of the Court's federalism jurisprudence, the issues implicated by these cases are among the most significant in the American political system. For example, these cases encompass a wide array of perennially salient disputes, ranging from age discrimination (e.g., *Kimel v. Florida Board of Regents* [2000]) to physician assisted suicide (e.g., *Washington v. Glucksberg* [1997]) to reproductive rights (e.g., *Webster v. Reproductive Health Services* [1989]). Thus, absent a clear understanding of these cases, it is nearly impossible to comprehend the choices justices make in these highly important issue areas. Finally, unearthing the determinants of the justices' federalism decision making is important because the cases at issue involve one of the most important debates in American politics – the boundaries between state and federal power. Indeed, Justice O'Connor has referred to the Court's responsibility to define the boundaries of federalism as the nation's "oldest question of constitutional law."¹

¹ *New York v. United States*, 505 U.S. 144, at 149 (1992).

In an effort to develop a comprehensive explanation of the justices' federalism decision making, this analysis is distinguished from previous research in two ways. First, it is novel in that it is an initial foray into building an integrated model of the Rehnquist Court's federalism decisions. That is, rather than focusing on one or two attributes of decision making in these cases, I examine a host of factors, including judicial attitudes, background characteristics, institutional constraints, organized interests, as well as the possible influence of a jurisprudential regime created in *United States v. Lopez* (1995). As such, this research aims to offer a more thorough picture of the justices' federalism decision making than currently exists. Second, unlike previous examinations of the Court's federalism cases that focus on a small subset of cases², this analysis considers all cases in which a state or local law was in conflict with a provision of the U.S. Constitution or congressional statute, as well as those cases in which a federal law was challenged as being in conflict with a provision of the Constitution relating to state's rights. In short, this research contains the universe of cases that encompass the boundaries of states' rights versus federal power decided in the Rehnquist Court.

This paper proceeds as follows. In the next section, I develop and formulate several hypotheses related to the justices' decision making in federalism cases. I then subject these hypotheses to empirical testing using data on the justices' voting behavior in the Rehnquist Court. Next, I present an interpretation and discussion of the findings. I close with a brief conclusion section discussing how we might best characterize the justices' federalism jurisprudence.

Explaining the Justices' Federalism Decision Making

This section addresses factors that are hypothesized to influence the individual justices' decision making in federalism cases. These proposed determinants include the application and

² See, for example, Baybeck and Lowry (2000) examining only preemption cases, Colker and Scott (2002) investigating only cases involving the invalidation of state actions, Cross and Tiller (2000) classifying as federalism cases only those cases in which the word "federalism" appeared in an opinion, and Eskridge and Ferejohn (1994) analyzing only Commerce Clause cases.

extension of the attitudinal model, background characteristics, a jurisprudential regime, institutional constraints, and the role of organized interests. I treat each in turn.

The Attitudinal Model

According to the attitudinal model of Supreme Court decision making, the justices' voting behavior is primarily motivated by their policy preferences (e.g., Segal and Spaeth 2002). That is, liberal justices vote liberally, while conservative justices vote conservatively. Although the attitudinal model is generally applied to explaining cases on the basis of the policy dimension implicated in the case (e.g., defining the case in terms of the liberal or conservative direction of the policy), scholars have also explored the model's applicability to federalism cases (e.g., Solberg and Lindquist 2006; Spaeth 1985; Young 2005) by investigating the application of the justices' attitudes as they relate to cases that also embody a federalism dimension (that is, the boundaries of state versus federal power). At its most basic level, the attitudinal model predicts that conservative justice will be more likely to vote to uphold the validity of state or local laws under challenge, while liberal justices will vote to strike down those laws in an effort to expand the powers of the federal government. This is the case because conservative justices – following in part the pro-states' rights position held by the Republican Party – are expected to attach special significance to decisions that allow the states to operate as laboratories of democracy with minimum federal interference. Conversely, liberal justices – following in part the pro-federal government position held by the Democratic Party – are expected to push for decisions that stress social and economic equality and thus require action by the federal government (Fallon 2002). As such, I hypothesize that conservative justices will be more likely than their liberal counterparts to endorse positions forwarded by state and local governments.

Of course, it is important to note that this somewhat reductionist version of the attitudinal model assumes that the justices deem federalism to be an important consideration in their decision making. That is, it presupposes that the justices take the federalism dimension seriously, regardless

of how a case measures up on its policy dimension. However, it is not uncommon for a case's federalism dimension to conflict with its policy dimension (Baybeck and Lowry 2000). Consider, for example, *Bush v. Vera* (1996), in which the Court adjudicated the constitutionality of a Texas redistricting plan that was aimed at increasing minority representation. The liberal position on the policy dimension is in support of the redistricting plan as the plan sought to expand the voting power of minorities in three Texas congressional districts. The liberal position on the federalism dimension is against the plan as it sought to supersede the ability of Congress and the federal courts to regulate electoral practices under the Voting Rights Act. Thus, this case provided almost ideal conditions to test how seriously the justices take federalism issues. That is, would the federalist five (Kennedy, O'Connor, Rehnquist, Scalia, and Thomas) stick by their staunch support for states' rights and authorize the redistricting plan or would they abandon this position and strike down the plan as a violation of the Fourteenth Amendment? In the end, the policy dimension prevailed. By a 5-4 majority, the Court's majority struck down the plan as a violation of the Fourteenth Amendment and the only serious discussion of the federalism issues implicated by the case appeared in the dissenting opinion joined by Breyer, Ginsburg, and Souter (Cross 1999: 1310). It is precisely cases similar to *Bush v. Vera* that have lead scholars to posit that the justices do not take federalism issues seriously, unless the federalism and policy dimensions both allow the justices to further their ultimate policy goals (Abernathy 1996; Baybeck and Lowry 2000; Colker and Scott 2002; Cross 1999; Solberg and Lindquist 2006; Tiller 1995; Young 2005). Instead, scholars in the attitudinal tradition have developed a theory of results-oriented federalism in which the justices – liberal and conservative – use the rhetoric of federalism to advance their policy goals. Following this, I hypothesize that, as the ideological proximity between a justice and the state or local policy increases, so too will the likelihood that the justice will vote in favor of the state or local policy at issue.

As a final extension of the attitudinal model, I expect that a case's salience will serve to enhance the extent to which the justices' rely on their policy preferences in adjudicating federalism disputes. When a case involves a substantial policy issue, it compels a justice to more seriously consider how voting in favor of the federalism dimension might be at odds with his or her more general policy goals (Young 2005: 2). Conversely, in a case that does not activate a justices' substantial policy concerns, that justice might be more willing to sacrifice his or her policy goals for the sake of appearing to seriously consider the federalism issues subsumed by the case. This is perhaps no more evident than in *Bush v. Gore*, where the conservative federalist five abandoned their commitment to protecting states' rights to ensure an electoral victory for George W. Bush (e.g., Solimine 2002). Indeed, recent analyses of the relationship between case salience and the attitudinal model appear to support this perspective. For example, Unah and Hancock (2006) provide evidence that the attitudinal model better explains high salience cases precisely because the issues presented in important cases are most likely to implicate substantial policy concerns. While not addressing federalism cases, their logic is nonetheless applicable to the current analysis. If case salience matters, I expect that attitudinal-based voting will become especially enhanced in prominent cases. Thus, I hypothesize that salient cases will increase the likelihood of observing justices who are ideologically distant from the state or local policy cast votes against those policies.

Background Characteristics

In addition to attitudinal considerations, I also theorize that a justice's experience in state or local politics will influence his or her decision making. While students of judicial politics have long noted the import of background characteristics in explaining judicial choice (e.g., Tate 1981), there application to federalism cases has been limited (but see Schenker 1982; Young 2005). My expectation is that justices who have served in state or local government offices prior to their appointment to the Court will be more sympathetic to states' rights claims due to deeply held

attachments to the notion that states should be free to experiment with policy innovations, free from federal interference, on the basis of having personal experiences in developing those policies themselves. Justice O'Connor perhaps best personifies this. O'Connor, who served as an assistant state attorney general, a state legislator, and a state appellate judge in Arizona, brought to the bench an intensely local perspective having been versed in the many dilemmas confronting state and local governments and this sense of localism shaped her federalism positions on the state appellate bench through increased empathy for state and local governments (Schenker 1982). If O'Connor's experience is generalizable to her counterparts with similar ties to state and local politics, and to her own experience on the Supreme Court, I hypothesize that justices with prior state or local political experience will be more likely to support state or local policies than justices without such experience.

The *Lopez* Regime

Students of courts have long debated, and tested, whether the law influences Supreme Court decision making (e.g., Mendelson 1964; Segal and Spaeth 2002). Most recently, Richards and Kritzer (2002) developed a model of jurisprudential regimes, which are precedents that are said to constrain the justices' decision making by establishing which case factors are relevant to their decision making. While the justices are free to ignore these regimes if they see fit, these authors provide compelling evidence that the justices take regimes seriously in a variety of contexts, deciding cases differently after the establishment of various regimes (Kritzer and Richards 2003, 2005). Following, Richards and Kritzer (2002), I identified a candidate regime by examining key precedents that implicated the justices' federalism decision making decided during the Rehnquist Court era and established which case facts were relevant to that regime. While a variety of important federalism cases were decided during this time frame, *United States v. Lopez* (1995) stands out as a particularly relevant candidate. In that case, the Supreme Court struck down the Gun-Free School Zones Act, which prohibited the possession of a firearm on school property, as an unconstitutional exercise of Congress's Commerce

Clause authority, marking the first time since the New Deal that the Court invalidated congressional legislation passed under its Commerce Clause authority. Thus, the key case fact is the exercise of the Commerce Clause as justification for a congressional action. To be sure, *Lopez* was a major decision. Perry (2005: 29) refers to it as the “counterrevolution that was,” while Abernathy (1996: 617) notes that Lopez marked “the return of federalism as an important issue at the Supreme Court.” Still others went further. The subtitle of Homan’s (1995) treatment of the decision and its impact was not-so-subtly titled “The Supreme Court Guns Down the Commerce Clause,” and St. Laurent (1997: 61) describes the decision as “firmly [setting] to rest the notion that the Commerce Clause is the ‘Hey, you-can-do-whatever-you-feel like Clause.’”³ While others have sought to determine the relevance of *Lopez* on Commerce Clause cases in a variety of case studies, involving issue areas as wide ranging as crime control (Brickey 1996) and environmental law (Holman 1995), it has not yet been subjected to empirical validity as a jurisprudential regime. Accordingly, I do so here. If *Lopez* marked a major shift in the Court’s treatment of Congress’s Commerce Clause authority, I hypothesize that, following *Lopez*, the justices will be more likely to vote in favor of states’ rights challenges to congressional legislation passed under the authority of the Commerce Clause.

Institutional Constraints

By its very nature, the Court’s federalism jurisprudence involves the scope of the power of the federal government vis-à-vis that of the states. As such, it is expected that the justices will be attentive to institutional constraints that are implicated in these cases in two ways. First, as a national policy making institution, I expect that the Court will be particularly sensitive to striking down congressional laws, as opposed to state or local legislation (e.g., Dahl 1957). Such is the case for two reasons. First, because Congress has authority over the Court that state and local governments do

³ Further corroborating the importance of this decision is the fact that a Lexis search of law reviews for “*United States v. Lopez*” in the title from 1995-2006 returns 83 separate articles.

not, such as control over the federal judiciary's budget and jurisdiction, this has the potential to create a constraint on the justices to avoid drawing the ire of their legislative counterpart (e.g., Cross and Tiller 2000). In this sense, by ruling in favor of the pro-federal government side of the coin, a justice is able to sidestep separation of powers concerns that have the potential to undermine the Court's power and legitimacy. Second, a justice might avoid striking down congressional legislation in order to enlarge the Court's influence by expanding the breath of federal law. For example, by striking down state legislation that conflicts with federal laws, a justice is able to enhance the Court's authority to adjudicate future litigation falling under the same issue area – a consideration that the justices, in their capacity as policy maximizers, might find particularly attractive. Conversely, by striking down federal legislation, a justice puts the Court in a position to potentially limit its authority to conduct judicial review, particularly if Congress fails to act by revising the legislation in question. Accordingly, I hypothesize that a justice will be less likely to support the states' rights position if the case implicates congressional authority.

Above, I have posited that the justices will consider the ramifications of their decisions in federalist cases on the legislative branch of the federal government. However, it is important to note that the executive branch can also potentially constrain the justices' decision making by ignoring or indifferently enforcing the Court's decisions (Epstein and Knight 1999). As such, it is not surprising that the President regularly sends the justices unambiguous signals regarding the preference of the executive branch via the Solicitor General's participation as both a party and an *amicus curiae* to a case.⁴ Indeed, scholars have found robust support for the important role of the Solicitor General in shaping the justices' decision making, both as a party (e.g., Cohen and Spitzer 2000) and as an

⁴ Note that, on rare occasions, members of Congress also file *amicus curiae* briefs. However, unlike the Solicitor General, scholars have revealed that these briefs have virtually no influence on the justices' decision making (Heberlig and Spill 2000; McLauchlan 2005). As such, I exclude congressional *amicus* briefs from consideration.

amicus (e.g., Salokar 1992). Of course, it is important to note that, although federalism cases necessarily involve the powers of the federal government versus those of the states, the Solicitor General does not uniformly support the anti-states' rights position, even as a party. For example, in *Ewing v. California* (2003), the Solicitor General filed an amicus brief supporting California's "three strikes" law, which required a life sentence for persons convicted of their third felony, despite concerns that the policy was at odds with the Eighth Amendment of federal Constitution. Similarly, in *Mitchell v. Helms* (2000), the Solicitor General, representing the Secretary of Education as a nominal respondent, supported a local government policy that loaned federally-subsidized educational materials to religious instructors, despite the First Amendment issue implicated by the case. Conversely, in *Gonzales v. Raich* (2005), the Solicitor General argued that California's Compassionate Use Act, which authorized the medicinal use of marijuana, was outside the scope of state authority as it conflicted with the congressionally-passed Controlled Substances Act. As these examples make clear, the Solicitor General participates both in support of, and in opposition to, states' rights positions subsumed by federalism cases. As such, I hypothesize that, when the Solicitor General supports the states' rights position, a justice will be more likely to vote in favor of that position. Conversely, when the Solicitor General opposes the states' rights position, a justice is expected to be more likely to vote against that position.

Organized Interests

Interest group amicus curiae participation has become an important feature of Supreme Court litigation, particularly in the Rehnquist Court's federalism cases. Indeed, in the cases under analysis here, the justices saw an average of 8 briefs per case (standard deviation = 10). While the levels of interest group amicus activity are well documented in the Rehnquist Court (e.g., Collins and Solowiej n.d.; Owens and Epstein 2005), the influence of amici on the justices' decision making is less clear (compare, for example, Songer and Sheehan 1993 to Collins 2004), particularly in

federalism cases (but see Colker and Scott 2002). Thus, this analysis provides an auspicious opportunity to determine if amici shape the choices justices make in federalism litigation. In federalism issues, the justices are confronted, not only with a case's ramifications for the future of federalism, but also with its potential implications for public policy. Thus, I expect that the justices will be receptive to information that assists them in determining the correct application of the law in a case, a task amicus briefs can perform in two ways. First, amicus briefs often provide the justices with information regarding the preferences of other actors in the political system, such as Congress, the President, and state and local governments (e.g. Epstein and Knight 1999: 215). Inasmuch as federalism cases are expected to make the justices particularly sensitive to other actors in the political arena (as they necessarily implicate both state and federal activities), it is expected that the justices will pay close attention to the information provided to them in amicus briefs regarding these actors' preferences. Second, in addition to providing the justices with information regarding the preferences of other actors, amicus briefs also serve as a primary method by which the justices obtain information regarding the potential societal consequences of a decision (e.g., Collins 2004). In this capacity, amicus briefs inform the justices of how upholding or striking down a statute will affect members of society at large, information the justices are expected to find particularly useful for maximizing their policy goals. Of course, it is important to recall that, despite their literal translation ("friend of the court"), amicus briefs, are, in fact, adversarial in nature – almost always advocating for a particular outcome (Kearney and Merrill 2000). In this sense, amicus briefs are instruments of persuasion, directing the justices towards endorsing a particular outcome. As such, when a large number of amicus briefs are filed supporting, for example, the pro-states' rights position, these briefs provide the justices with information regarding both the breadth of support for the state policy in question and persuasive argumentation regarding why the states' rights position is jurisprudentially correct. Accordingly, I hypothesize that, as the number of amicus briefs supporting

the states' rights perspective increases, so too will the likelihood of observing a justice cast a vote in favor of the states' rights position. Conversely, I expect that, as the number of amicus briefs opposing the states' rights position increases, a justice will be less likely to endorse the states' rights position.

While all pressure groups have the potential to influence the justices' decision making in federalism cases, there exists a number of groups who specifically represent the interests of state and local governments through the filing of amicus curiae briefs. Here I consider four such organizations, the Council of State Governments, the National Conference of State Legislatures, the National Governor's Association, and the National League of Cities. Beginning in the 1960s, and with increased persistence over time, these organizations have been extremely active in their Washington lobbying efforts and frequently work together in the judicial arena by orchestrating litigation strategies on behalf of state and local governments (e.g., Chen 2003; Pickerill 2003). Most commonly, these organizations do so by cosigning amicus curiae briefs (e.g., Colker and Scott 2002). As Pickerill and Clayton (2004: 239) note, in their litigation efforts, these organizations do much more than defend the constitutional principles of federalism, they also counter challenges to state and local policies involving federal preemption and national supremacy. Surprisingly, though, there has been little research that has evaluated the effectiveness of these organizations in the Court (but see Colker and Scott 2002). If these organizations are influential at fending off challenges to the constitutionality of state or local authority, I expect that a justice will be more likely to vote in favor of the states' rights position when one or more of these organizations participate as amicus curiae.⁵

⁵ There are, of course, a host of other organizations that represent the interests of state and local governments through the filing of amicus curiae briefs, such as the National Association of Attorneys General, the National Association of Counties, and the National Institute of Municipal Law Officers, to name a few. I focus my attention here on the Council of State Governments, the National Conference of State Legislatures, the National Governor's Association, and the National League of Cities as they are the most

Data and Methodology

Past studies investigating the justices' decision making in federalism cases have utilized a variety of strategies to select cases for analysis. For example, Kearney and Sheehan (1992) examine only cases in which state or local governments appear as litigants, while others select an even more limited typology of cases, such as those involving the possible invalidation of state (Colker and Scott 2002) or federal law (Colker and Brudney 2001). Still others utilize a more restrictive strategy, such as only including cases in which the word "federalism" appeared in an opinion (Cross and Tiller 2000) or those cases in which the Supreme Court reviewed a decision from a state court of last resort (Davis 1992). As such, none of these previous studies contain the full universe of federalism cases before the Court, which I do so here by examining every case that implicated a federalism dimension during the Rehnquist Court (1986-2004). In order to select cases for analysis, I first start with a working definition of federalism. Following Cross (1999: 1304), I define federalism as the division of powers between a central government and its peripheral units, in which the central conflict involves the power of the states to operate free from federal interference (see also Solimine 2002). Thus, federalism disputes typically involve two types of cases: challenges to state and local laws alleged to be in discord with the federal Constitution (in its capacity as supreme law of the land), congressional legislation, and/or federal bureaucratic policies; and challenges to federal legislation or administrative policies that are argued to be inconsistent with state sovereignty. In order to capture all cases that involve federalism in the Rehnquist Court, I utilized a three-prong

frequent amici representing the interest of local and state governments in the Court (e.g., Colker and Scott 2002; O'Connor and Epstein 1989). Further, because these organizations participate almost exclusively together (see, for example, *Gregory v. Ashcroft* [1991] and *Smith v. City of Jackson* [2005]), I do not consider the influence of each organization separately. Likewise, I do not consider the influence of amicus briefs filed by state or local governments separately from the briefs filed by these organizations because of the high frequency with which both types of organizations participate on the same side of a case (see, for example, *Atwater v. City of Lago Vista* [2001] and *College Savings Bank v. Florida* [1999]).

strategy.⁶ First, I include all cases in which a state or local government, or an agent of a state or local government (e.g., governor, secretary of education), appeared as a party to litigation. These cases include challenges to state and local policies alleging a conflict with congressional legislation, administrative policies, and/or the federal Constitution. Second, I examined all cases in which the Supreme Court reviewed a decision from a state court of last resort. I then analyzed each of these cases to determine if they implicated federalism (i.e., involved challenges to federal law based on the doctrine of state sovereignty or challenges to state law based on federal supremacy). For example, I include *Bush v. Gore* (2000), which involved the power of states to set their own standards for counting contested electoral ballots, but exclude *Chesapeake and Ohio Railway v. Schwalb* (1989), which centered on whether injured railway laborers were covered by the Federal Employers' Liability Act or the Longshoremen's and Harbor Workers' Compensation Act, as the case did not involve either national supremacy or state sovereignty. Third, I examined all cases falling under the Constitution's Commerce Clause, Contract Clause, Extradition Clause, Guarantee Clause, Privileges and Immunities Clause, and Supremacy Clause to determine whether they encompass a federalism dimension. The majority of these cases were identified using the previous two methods, but this third strategy located a number of highly salient cases, including *United States v. Lopez* (1995), *United States v. Morrison* (2000), and *Gonzalez v. Raich* (2005). After excluding cases falling under the Court's original jurisdiction, and those in which a state or local government squared off against another state or local government, I was left with 809 cases, which, using the case citation as the unit of analysis, made up 31% of the Rehnquist Court's docket (1986-2004).⁷

⁶ I began by locating cases in Spaeth's (2006) Supreme Court Database and read the individual cases as necessary. Unless otherwise noted, all of the data under analysis come from this dataset.

⁷ In actuality, I located 844 cases. However, due to an inability to code the direction of the state policy at issue distinctly from the federalism dimension, I was forced to exclude 35 of these cases from this analysis. See, for

The unit of analysis used in this investigation is the justice-vote (i.e., each justice's vote in each case). The dependent variable is scored 1 for a vote consistent with the states' rights position and 0 for a vote consistent with federal supremacy. In cases involving constitutional challenges to state or local policies, this means a pro-states' right vote supports the state or local policy at issue, while a pro-federal government vote supports the litigant challenging the state or local policy as being in violation of the federal Constitution. In cases involving pre-emption, a pro-states' rights vote is anti-federal preemption, while a pro-federal government vote supports federal preemption of a state or local policy. In the context of the Commerce Clause, a pro-states' rights vote supports limitations on Congress's Commerce Clause authority, while a pro-federal government vote validates the congressional action at issue. Because the dependent variable is dichotomous, I employ a probit model. To control for the non-independence of observations (the fact that there are, on average, nine observations for each case in the data) and to limit the effects of model misspecification, the model is estimated using robust standard errors, clustered on case citation (e.g., King 1998: 34).

In order to capture each justice's *Ideology*, I utilize the Martin and Quinn (2002) scores. These scores are based on a dynamic item response model with Bayesian inference and thus vary over time.⁸ To facilitate interpretation, I have standardized these scores by adding 4.332 to each ideal point; as such, this variable ranges from 0 to 7.784. Higher scores on this variable reflect more conservative ideologies. Accordingly, the expectation is that this variable will be positively signed,

example, *Rose v. Rose* (1987), *Utah Division of Lands v. United States* (1987), and *Verizon v. Public Service Commission* (2002).

⁸ While these scores are based on the justices' actual voting behavior, thus potentially introducing a circularity problem, their use is appropriate here because the voting behavior from which the vast majority of these votes (95%) are based deal with the policy dimension implicated by the case, not a case's federalism dimension (see also Baybeck and Lowry 2000).

indicating that conservative justices are more likely to support state and local policies under challenge.

To measure a justice's ideological proximity to the state policy at issue, I began by coding each case on its policy dimension. To do this, I relied on Spaeth's (2006) ideological direction variable for cases Spaeth did not categorize as involving federalism issues. I then determined the ideological direction of the state or local policy at issue.⁹ For example, if the lower court made a conservative ruling, in favor of the state policy at issue, I assume the state's policy is conservative in direction. Conversely, if the lower court rendered a liberal ruling, in favor of the state policy at issue, I assume the state's policy direction is liberal in direction. For cases Spaeth categorized as solely involving federalism issues, I applied his coding scheme to these cases to determine the ideological direction of the state policy at issue. Thus, for example, I code the state policy in *Howlett v. Rose* (1990) as conservative because the state action in question involved an allegedly illegal search of a high school student's car. Similarly, I code the state policy in *Lorillard Tobacco v. Reilly* (2001) as conservative since the state policy in question sought to restrict the free speech rights of Lorillard Tobacco. I then adapted the method developed by Johnson, Wahlbeck, and Spriggs (2006) to determine each justice's *Ideological Proximity* to the state or local policy at issue. To do this, I first created a variable that measured each justice's ideological proximity to the state or local policy based on the unadjusted Martin and Quinn scores (which range from -4.332 to 3.452) by assigning liberal state policies the negative value of each justice's Martin and Quinn score and conservative policies

⁹ For cases that implicate civil rights and liberties, liberal policies promote, for example, civil rights and liberties doctrines, such as the freedoms of speech and religion, and the right to privacy; conservative policies are the opposite thereof. In criminal justices cases, liberal policies promote the rights of the criminally accused, while conservative policies favor limiting these rights. In the realm of labor and economic regulations, policies that favor business over the interests of labor (or government regulators) are coded as conservative, while pro-labor and pro-government/anti-business policies are coded as liberal.

each justice's Martin and Quinn score. I then added 4.332 to this variable to facilitate interpretation. As such, higher scores on this variable reflect increased ideological proximity to the state policy at issue. Accordingly, the expected sign of this variable is positive, indicating that a justice is more likely to support state or local policies that are ideologically in-line with his or her preferences. To capture a case's salience, I use the measure created by Epstein and Segal (2000).¹⁰ This *Case Salience* variable is scored 1 if the case appeared on the front page of the *New York Times* on the day after the decision and 0 if it did not. Note that I have no expectations for the direction of this variable alone.¹¹ Instead, I use it to determine whether salient cases enhance the likelihood of observing a justice who is ideologically distant from the state or local policy cast a vote against the state or local policy in question, by including an interaction term in the model *Ideological Proximity* × *Case Salience*. Because I cannot infer from the magnitude and significance of the interaction term whether ideology mediates the influence of amicus briefs (Ai and Norton 2003), it is necessary to calculate the marginal effect and confidence intervals for the interaction term, holding all other variables at their mean or modal values. To do this, I utilize the method developed by Brambor, Clark, and Golder (2006).

In order to evaluate whether a justice's state or local political experience influences his or her decision making in federalism cases, I include a variable labeled *State Office*, scored 1 if a justice held state or local office prior to his or her appointment to the bench and 0 otherwise, using information provided by the Federal Judicial Center (www.fjc.gov). Thus, this variable is scored 1 for Justices Powell (School Board Chairman), O'Connor (Assistant State Attorney General, State Senator, state judge), Souter (Assistant State Attorney General, Deputy State Attorney General, State Attorney

¹⁰ These data were collected by Epstein and Segal (2000) for the 1986-1995 terms and collected by the author for the remaining terms, using the coding rules established by Epstein and Segal.

¹¹ I, nonetheless, include this constituent term, and those of the other interaction term, in the model because failure to do so leads to biased and inconsistent estimates of the interaction terms (e.g., Brambor, Clark, and Golder 2006: 66-70).

General, state judge), and Thomas (Assistant Attorney General).¹² The expectation of the sign of this variable is positive, indicating that a justice with prior experience in state or local politics will be more likely to support state or local policies in question.

To capture the possible affects of the *Lopez* regime, I include three variables in the model. *Lopez* is scored 0 prior to the *Lopez* decision and 1 after the decision. *Commerce Clause* is scored 1 if the justification for the congressional legislation at issue involved the Commerce Clause and 0 otherwise. Note that I do not have expectations regarding the direction of these constituent variables. Instead, I utilize them to form an interaction term, $Lopez \times Commerce\ Clause$, which allows me to test the possible effects of the *Lopez* regime. As with the previously mentioned interaction term, it is necessary to calculate the marginal effect of this term and its significance level, as the parameter estimate does not necessarily indicate the effect of an interaction term in maximum likelihood estimation. If the *Lopez* regime significantly altered the justices' decision making in Commerce Clause cases, I expect the marginal effect of this interaction term will positive, indicating that a justices is more likely to vote against congressional legislation passed under the Commerce Clause after the establishment of the *Lopez* regime.

In order to account for institutional constraints, I include three variables in the model. To determine whether a justice is less likely vote against congressional legislation due to possible retaliation by Congress, I include a *Congress* variable in the model, scored 1 if the Supreme Court's decision involved federal statutory interpretation and 0 otherwise. The expected direction of this variable is negative, indicating that a justice is less likely to vote against congressional legislation. To

¹² Justice Thomas is the only Rehnquist Court justice who held both local and federal offices prior to his service on the Court. That is, in addition to serving as Assistant Attorney General for Jefferson City, Missouri, Thomas also served as the Assistant Secretary for Civil Rights in the U.S. Department of Education and as the Chairman of the Equal Employment Opportunity Commission. When Thomas is excluded from consideration in the coding of this variable, the results do not substantively differ.

capture the influence of the Solicitor General in the Court, I include two variables.¹³ *SG Party* is scored 1 if the Solicitor General appeared as a litigant (or cross-litigant) supporting the state or local policy in question, 0 if the Solicitor General did not participate as a party in the case, and -1 if the Solicitor General represented the litigant opposed to the state or local policy at issue (i.e., the federal government). Similarly, *SG Amicus* is scored 1 if the Solicitor General filed an amicus brief in support of the state or local policy being challenged, 0 if the Solicitor General did not participate as amicus, and -1 if the Solicitor General filed an amicus brief opposed to the state or local policy. Accordingly, I expect these variables will be positively signed, indicating that a justice is more likely to endorse the state or local policy when it is supported by the executive branch of the federal government.

To capture the influence of organized interests in the Court, three variables are utilized. *Amici Supporting State* indicates the number of amicus briefs filed in support of the state or local policy at issue, while *Amici Opposing State* represents the number of amicus briefs filed in opposition to the state or local policy implicated in the case. The expected direction of the former variable is positive in direction, while I expect the latter variable will be negatively signed. To account for the amicus curiae participation of the Council of State Governments, the National Conference of State Legislatures, the National Governor's Association, and the National League of Cities, I include a variable labeled *State Interest Groups*, scored 1 if one or more of these organizations filed an amicus brief in support of the state or local policy and 0 otherwise. The expected direction of this variable is positive, indicating that a justice is more likely to endorse the states' rights position if these organizations filed an amicus brief in support of it. Finally, in order to capture the justices' well-

¹³ The data for the variables indicating the Solicitor General's participation in a case as party and amicus, as well as those representing the participation of organized interests as amicus, come from the Kearney and Merrill (2000) amicus database for the 1986-1995 terms and were collected by the author for the remaining terms (1996-2004).

known practice of accepting cases for review in order to reverse lower court decisions (e.g., Segal and Spaeth 2002), I include a *Lower Court Opposed State* variable, scored 0 if the lower court the Supreme Court is reviewing rendered a decision in support of the state or local policy and 1 if it rendered a decision against the state or local policy. The expected direction of this variable is positive, indicating that a justice is more likely to support the state or local policy if the lower court opposed it.

Results

Table 1 reports the results of the probit model that examines influences on the justices' decision making in federalism cases. Overall, the model performs exceptionally well – it correctly predicts more than 70% of votes for a percent reduction in error of 40%. In the 821 cases under analysis, 3,721 votes were cast supporting the state or local policies at issue (51%), while 3,542 votes were cast opposing these policies (49%). In order to facilitate the interpretation of these results, I report marginal effects, which are calculated by altering the variables of interest from 0 to 1 for dichotomous variables and from the mean to one standard deviation above the mean for continuous variables, holding all other variables at their mean or modal values.

*** Table 1 About Here ***

Beginning with the results consistent with attitudinal theories of judicial decision making, first, note that all of these variables are signed in the correct direction and are statistically significant. The *Ideology* variable indicates that conservative justices are more likely than their liberal counterparts to support state and local policies. For example, compared to a moderate justice (*Ideology* = 4.4) a relatively conservative justice (*Ideology* = 6.4) is 10% more likely to vote in support the states' rights position. This effect is especially evident when we consider the difference between an extremely liberal (*Ideology* = 1.2) and an extremely conservative justice (*Ideology* = 7.2): the liberal justice is 26% more likely to take the pro-federal government stance in the case. In addition, the *Ideological Proximity*

variable indicates that, the more proximate a justice is to the state or local policy, the more likely that justice is to support it. For example, a one standard deviation change in this variable increases the likelihood of observing a justice take the states' rights position by almost 14% in a non-salient case. Thus, not only are conservative justices more likely to support states' rights, but they are particularly likely to do so when those policies match their political preferences.

***** Figure 1 About Here *****

Figure 1 examines how a case's salience further exacerbates the effect of a justice's ideological proximity to the state or local policy implicated the case. The solid line indicates the change in the predicted probability of observing a justice cast a vote in favor of states' rights in a salient case as a justice becomes more ideologically proximate to the state or local policy, as compared to a non-salient case. Significance levels are denoted by the 95% confidence intervals drawn around this line. The marginal effect is significant whenever the upper and lower bounds of the confidence intervals are both below (or above) the zero line. Consistent with my hypothesis, justices who are ideologically distant from the state or local policy are especially likely to vote against that policy in salient cases. To more lucidly illustrate this point, consider the following scenario. When the state policy is conservative in direction, and the justice is very liberal, and the case is salient, that justice is 10% more likely to vote against the state policy, compared to a non-salient case. Interestingly, this effect only holds for justices whose ideologies are relatively strong. For the more moderate justices on the Court, whose ideological distance to the policy at issue are within 4 points, a case's salience does not further enhance their likelihood of supporting or opposing the states' rights position. Thus, taken as a whole, Table 1 illustrates strong support for the attitudinal model of judicial decision making in federalism cases. Conservative justices are more likely than their liberal counterparts to endorse state and local policies, and this particularly true if the state policy at issue is ideologically proximate to the justices' political preferences. Further, those justices who are

ideologically distant from state policies are not only more likely to endorse the pro-federal government position, but are particularly likely to do so in salient cases.

Turning now to the variable that captures whether or not a justice had experience in state or local politics prior to serving on the Supreme Court, the results fail to support my expectation. In fact, the marginal effect of this variable indicates that justices who have held state or local office are 2% less likely to support state and local governments. While not a particularly strong effect, this result nonetheless suggests that, once on the bench, these justices become increasingly geared towards expanding the powers of the federal government.

The results of the *Lopez* regime are particularly interesting. Contrary to my hypothesis, there was not a significant change in the justices' treatment of Commerce Clause cases following the establishment of *Lopez* doctrine. In fact, the constituent term, which indicates the justices' voting behavior in Commerce Clause cases prior to *Lopez*, suggests that the Rehnquist Court justices were generally supportive of limitations to Congress's Commerce Clause authority, even before *Lopez*. Thus, it appears that the effect of *Lopez* has likely been overstated. While *Lopez* was the first instance in which the Court struck down an act of Congress under its Commerce Clause authority since the New Deal, this does not mean that the Court entirely deferred to Congress on such matters (e.g., Bednar and Eskridge 1995: 1451). For example, in *CTS Corporation v. Dynamics Corporation* (1987), the Court declined to strike down an Indiana statute as being in violation of the Commerce Clause, in addition to refusing to determine that the law was preempted by the Williams Act, thus further increasing the power of states to regulate the acquisition of control shares in certain types of corporations. Similarly, in *Northwest Central v. State Corporation Commission* (1988), the Court refused to invalidate a state law involving gas regulation and also refused to rule that it was preempted by the Natural Gas Act. Therefore, it appears unlikely that *Lopez* signaled a major shift in the justices' treatment of Congress's Commerce Clause authority.

The findings regarding the variables that capture institutional constraints facing the justices reveal mixed results. On the one hand, a justice is not more likely to cast a pro-federal government vote when the case involves congressional legislation, as compared to the federal Constitution. In fact, this variable is signed in the wrong direction and statistically significant, indicating that a justice is 6% more likely to take the states' rights position when the case implicates an act of Congress. Thus, these results appear to corroborate Pickerill's (2003) conclusion that one can properly view the Rehnquist Court's federalism decisions as limiting federal legislative powers. On the other hand, Table 1 reveals strong evidence that the justices defer to the Solicitor General. When the Solicitor General appears as a party opposing a state government, a justice is 12% more likely to vote against the state policy as compared to a case in which the SG does not appear as a party. Conversely, when the Solicitor General appears as a litigant supporting the state or local policy, a justice is 13% more likely to take the states' rights position. This strong influence also holds for cases in which the Solicitor General appears as an *amicus curiae*: compared to a case in which the SG does not file an amicus brief, when the Solicitor General files an amicus brief in support of the state policy, a justice is 13% more likely to take the pro-states' rights position. Thus, while the justices do not appear to respond to congressional constraints, they do defer to the interests of the executive branch in federalism cases.

Turning now the findings with respect to the influence of organized interests, Table 1 reveals that organized interests who support state or local policies have a significant influence on the justices' decision making. Compared to a case in which there are 4 briefs supporting the state or local policy, in a case with 11 briefs (a one standard deviation change), a justice is 4% more likely to take the states' rights position. Moreover, when the Council of State Governments, the National Conference of State Legislatures, the National Governor's Association, and/or the National League of Cities participate as *amicus curiae*, a justice is 8% more likely to endorse the state or local policy at

issue. As such, the results indicate that these organizations are particularly effective in persuading the justices to endorse states' rights positions. Interestingly, Table 1 indicates that amicus briefs filed in opposition to state or local policies do not influence the justices' decision making in federalism cases. Finally, the control variable reveals that, when the lower court opposed the state policy, a justice is 16% more likely to take the states' rights position, thus confirming the justices' tendency to take cases on appeal in order to reverse lower courts.¹⁴

Conclusions

The purpose of this paper was to develop an integrated model of judicial decision making in federalism cases and subject it to empirical scrutiny in the Rehnquist Court. The results clearly reveal that the justices' decisions in federalism cases are not as inconsistent and bewildering as some commentators believe. In fact, they are quite predictable: the model was able to correctly classify more than 70% of the justices' votes in cases that implicated the boundaries of state versus federal power. How then can we best characterize the justices' federalism decisions? First, it is evident that attitudes matter. Conservative justices are more likely than their liberal counterparts to support state and local policies. Moreover, a justice's ideological proximity to the state policy is also consequential: the further a justice is from the state policy, the less likely the justice is to support that policy and this effect is exacerbated in salient cases. Thus, to the extent that the justices take federalism seriously, they clearly do so – in part – to further their policy goals. However, attitudes are not the only determinant in federalism cases. Clearly, the preferences of the President matter, as relayed to the Court via the Solicitor General. But, the Court is not especially deferential to congressional

¹⁴ While the *Case Salience* variable appears to have an enormous influence on the justices' decision making, it is inappropriate to make much of this effect because it only captures the influence of case salience on the most liberal justice in the data when the state policy is conservative. There are only 8 observations that meet this criteria in the data, all of which involve Justice Marshall in the 1988 term. In each of these cases, Marshall voted against the state policy in question.

legislation, suggesting that one of the legacies of the Rehnquist Court's federalism jurisprudence was to limit federal legislative powers. In addition, the results reveal that amicus curiae participation matters by enabling organized interests to show broader support for state and local policies, while buttressing the arguments made by the litigants they support. And, while the *Lopez* regime does not appear to mark a major shift in the Court's federalism jurisprudence, taken as whole, the results of the integrated model of federalism decision making are promising in their ability to illustrate consistent patterns in what many believe to be one of the most ambiguous issue areas of Supreme Court decision making. Further, given that seven justices analyzed here carried over to the Roberts Court, and the two new appointees are at least as conservative as their predecessors, it is likely that we will see these trends continue through the Roberts Court era.

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Table 1. Probit Model of the Justices' Federalism Decision Making in the Rehnquist Court Era

VARIABLE	EXPECTED DIRECTION	PARAMETER ESTIMATE	MARGINAL EFFECT
<u>ATTITUDES</u>			
Ideology	+	.115 (.013)***	+9.8***
Ideological Proximity	+	.174 (.014)***	+13.9***
Ideological Proximity × Case Salience	+	.090 (.032)**	see Figure 1
<u>BACKGROUND</u>			
State Office	+	-.055 (.023)*	-2.2*
<u>JURISPRUDENTIAL REGIME</u>			
<i>Lopez</i> × Commerce Clause	+	-.293 (.303)	-11.6
<u>INSTITUTIONAL CONSTRAINTS</u>			
Congress	-	.155 (.078)*	+6.1*
SG Party	+	.325 (.137)*	+13.0*
SG Amicus	+	.339 (.058)***	+13.5***
<u>ORGANIZED INTERESTS</u>			
Amici Supporting State	+	.015 (.004)**	+4.3***
Amici Opposing State	-	.0006 (.008)	+0.1
State Interest Groups	+	.198 (.097)*	+7.8*
<u>CONTROL AND CONSTITUENT VARIABLES</u>			
Lower Court Opposed State	+	.393 (.066)***	+15.6***
Commerce Clause	none	.907 (.236)***	+34.2***
<i>Lopez</i>	none	-.049 (.072)	-1.9
Case Salience	none	-.508 (.159)**	-17.9***
Constant	none	-1.59 (.093)***	
<u>MODEL DIAGNOSTICS</u>			
N	7,263	Percent Correctly Predicted	70.7
Wald χ^2 (<i>df</i> = 16)	503.9***	Percent Reduction in Error	40.0

Numbers in parenthesis indicate robust standard errors, clustered on case citation.

* *p* < .05; ** *p* < .01; *** *p* < .001 (two-tailed tests).

Figure 1. The Marginal Effect of Case Salience on a Justice's Ideological Proximity to State and Local Policies

