
ARTICLES

THE THREE FACES OF FEDERALISM: AN EMPIRICAL ASSESSMENT OF SUPREME COURT FEDERALISM JURISPRUDENCE

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INTRODUCTION

Federalism is “hot.” The most recent Supreme Court term devoted considerable attention to federalism, especially under the Eleventh Amendment, and was perceived to have aggressively advanced the interests of states’ rights vis-à-vis federal legislation.¹ Many recent law review

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1. The trio of recent decisions restricting the ability of individuals to sue states under federal legislation included *Alden v. Maine*, 526 U.S. 706 (1999), *Florida Prepaid Postsecondary Expense Board v. College Savings Bank*, 527 U.S. 627 (1999), and *College Savings Bank v. Florida Prepaid Postsecondary Expense Board*, 527 U.S. 660 (1999). Legal commentators immediately urged that these and other recent Supreme Court decisions revealed a surge in states’ rights at the Court. See, e.g., Marcia Coyle & Harvey Berkman, *Justices Weigh in on Side of States*, NAT’L L.J., July 5, 1999, at A1 (reporting a “wave of federalism” sweeping the Supreme Court); Curt A. Levey, *The Quiet Revolution: Conservatives Continue Federalism Resurgence by Expanding State Immunity*, LEGAL TIMES, July 12, 1999, at S23 (suggesting that the decisions might represent a “constitutional sea change”); Stuart Taylor, Jr., *Supreme Court Errs on States’ Rights*, N.Y.L.J., July 26, 1999, at 2 (identifying a trend and

articles have explored American federalism, and a number of these have rediscovered its virtues.² Most commonly, this research exalts the benefits of federalism in terms of efficiency³ or protecting liberty⁴ and the democratic community.⁵ Supreme Court opinions are analyzed for their dedication to a “new federalism” and their implications for the newly discovered virtues of federalism. Supreme Court review of state and national law is commonly regarded as central to the protection of federalism.⁶ While the Court’s opinions are commonly critiqued as

giving it a mixed review). For a contrary suggestion that the decisions were not terribly significant as a practical matter, see Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1312-24 (1999).

2. See, e.g., Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”*: *A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995); Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317 (1997); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988); Erwin Chemerinsky, *Rehabilitating Federalism*, 92 MICH. L. REV. 1333 (1994) (reviewing SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (1993)) [hereinafter Chemerinsky, *Rehabilitating Federalism*]; Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987)). *But see* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 907-09 (1994) (arguing that federalism has no intrinsic value).

3. Federalism is justified in terms of straightforward market efficiency. Different states may adopt different policies that best suit their divergent populations. See generally Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203 (1997); Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990); Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1 (1995).

Independently, federalism is justified through the “states as laboratories” theory. This suggests that the states may experiment with various policies and thereby discover the most efficacious. Then, presumably, they will all embrace the policy discovered to be optimal. See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998). Justice Brandeis discussed this theory in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (promoting role of states as a “laboratory” for addressing economic problems).

4. According to the Court, constitutional federalism was “adopted by the Framers to ensure the protection of ‘our fundamental liberties.’” *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (Powell, J., dissenting)).

5. The Court embraced this vision of federalism in *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (listing the benefits of federalism as providing a “decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes . . . and it makes government more responsive by putting the States in competition for a mobile citizenry”).

6. Periodically, there are arguments that judicial review of federalism is unnecessary because of the political safeguards of federalism built into federal institutions. See generally Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The history of

wrongly decided, virtually all of the recent research contains the explicit or implicit assumption that judicial review is the appropriate tool for governing the perimeters of the federal government. If we only apply reasoned analysis to the problem, the research assumes, courts will see the light and establish an optimal and coherent doctrine of federalism.⁷ This overwhelmingly normative pattern of research has ignored the descriptive analysis necessary to understand how and why the Court makes federalism decisions.⁸

This Article examines Supreme Court decisions in an attempt to identify the determinants of its federalism decisions. The assumption that some optimal state of federalism is realizable through judicial opinion idealizes the Court and the litigation process. Rather than make such an assumption, we explore the empirical experience with Supreme Court litigation and the reasons that doctrines of federalism have developed as they have. By so doing, we can ascertain why a certain federalism doctrine has emerged from the Court and whether proposed alternatives are realistically achievable.

Part I describes three potential determinants of federalism decisions. The first determinant—"political federalism"—addresses the effects of simple ideology (conservative vs. liberal). In other words, the Court's federalism decisions, in terms of being either pro-states' rights or pro-national power, are determined by the liberal or conservative nature of the outcome in a given case. The second—"institutional federalism"—reflects the Court's concern for the power of federal and state institutions over the Court itself. The Supreme Court would not want its own power or legitimacy undermined by a recalcitrant Congress and President. States, on the other hand, would have little ability to discipline the Court should the Court rule against their individual state rights. The third—"honest federalism"—can be thought of as true devotion to states' rights federalism for its own sake.

federalism protection, however, has been one of reliance on the Court. See, e.g., Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

7. This is a typical characteristic of legal research. See Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 312-18 (1997) (noting tendency of such research to focus on advising judges about correct state of the law).

8. See Cross, *supra* note 1, at 1304-05, 1313 (disputing the ability to create a consistent doctrine that would advance the neutral goals of federalism); Emerson H. Tiller, *Putting Politics Into the Positive Theory of Federalism: A Comment on Bednar and Eskridge*, 68 S. CAL. L. REV. 1493, 1496-97 (1995) (criticizing pure normative theories for failing to address the politics of implementing federalism).

Federalism influences the Court in a wide variety of legal areas, presenting an array of ideological and institutional concerns. Part II summarizes the areas in which the Justices themselves find federalism relevant, and the types of cases in which the relevance is most prominent. Part III presents some empirical findings regarding the factors affecting Supreme Court federalism decisions. In Part IV, we turn to a consideration of some of the doctrinal principles that have arisen from the federalism decisions. We suggest why these doctrines could have arisen for strategic purposes.⁹

I. DETERMINANTS OF FEDERALISM DOCTRINE

In searching for the determinants of Supreme Court federalism, one might naturally look to the text of the Constitution as a factor affecting the decisions of justices. Indeed, *every* federalism decision is justified by reference to the Constitution or its values. Yet such decisions are not infrequently reversed by a later Court decision.¹⁰ Clearly, the malleable constitutional principle of federalism leaves considerable discretionary space for different federalism decisions and doctrines.¹¹ Instead of focusing strictly on constitutional text, we focus on three potential key factors: conservative vs. liberal ideology (“political federalism”), concern for protecting Supreme Court power as an institution (“institutional federalism”), and honest concern for states’ rights (“honest federalism”). Justices are plausibly influenced by each of these factors. We consider each *seriatim*.

9. For discussion of the Court’s use of strategy, see generally LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998).

10. Federalism decisions are among the most prominent instances of the Court overruling its recent precedents. The Court’s most famous reversal came during the New Deal, with its dramatic expansion of federal authority under the Commerce Clause. See *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918) and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)). The Court overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968), and appeared to strike a blow for federalism in *National League of Cities v. Usery*, 426 U.S. 833, 852-55 (1976), limiting the federal ability to regulate state governments. However, the court soon overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-47, 557 (1985), taking back any gains for federalism.

11. Perhaps there is one “right” federalism doctrine under the Constitution, of the sort deduced by a Dworkinian Hercules. But it would be unduly presumptuous of us to purport to have found this doctrine. And because this Hercules cannot be found, much less cloned, it is unlikely that the nine Justices of the Court can be counted on to find the doctrine either.

A. POLITICAL FEDERALISM

An obvious place to look for determinants of any Supreme Court opinion is political ideology. A surfeit of existing research suggests that the Justices' votes can often be explained by their political ideology, on a conservative to liberal spectrum.¹² The Court is a political institution, and ideological factors pervade it.¹³ While decisions in favor of states' rights are often considered conservative, defense of states' rights may sometimes have a liberal outcome, and liberal constitutional scholars have increasingly embraced federalism for their own ends.¹⁴

Perhaps federalism is invoked selectively as a justification for decisions grounded in ideological preference. Congress is notorious for its selective federalism, using the principle when convenient for ideological ends.¹⁵ The empirical research on courts more generally provides considerable evidence that Justices do use legal analysis as a post hoc rationalization for preferred policies in other areas of the law. And some commentators have observed that federalism doctrine appears to be only "a cloak for decisions reached on substantive policy grounds."¹⁶ For example, conservative Justices seem quite willing to strike down state affirmative

12. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993) (reporting extensive empirical research on ideological voting of Justices); Cross, *supra* note 7, at 275-79 (reviewing political science research on ideological voting patterns).

13. See Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 218-24 (1999).

14. Laurence Tribe may have been the first prominent liberal scholar to discover the liberal virtues of federalism. Justice Brennan, well known for his liberal leanings, has famously embraced constitutional federalism. See Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977). See also William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Christi R. Martin, Note, *Preemption in the Age of Local Regulatory Innovation: Fitting the Formula to a Different Kind of Conflict*, 70 TEX. L. REV. 1831, 1832 (1992) (reporting that "progressive activists" have turned much of their attention to state and local policies); Chemerinsky, *Rehabilitating Federalism*, *supra* note 2, at 1334 (Chemerinsky suggests that there is "nothing inherent in federalism that makes it conservative").

15. See, e.g., Dana Milbank, *States Find Federal Powers Grow Despite GOP Gains*, WALL ST. J., October 3, 1997, at A12 (observing that "Republicans in Congress lose their states-rights inclinations when their policies are better served by federal intervention").

16. Alison Grey Anderson, *The Meaning of Federalism: Interpreting the Securities Exchange Act of 1934*, 70 VA. L. REV. 813, 818 (1984). See also Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 761 (1987) (suggesting that the Court invokes federalism in habeas actions but that its true objective is pro-prosecution policy); Charles Fried, *Federalism—Why Should We Care?*, 6 HARV. J.L. & PUB. POL'Y 1, 1 (1982) (suggesting that federalism is an opportunistic "hobby horse" ridden in pursuit of unrelated ideological objectives); Rubin & Feeley, *supra* note 2, at 948 (observing generally that "claims of federalism are often nothing more than strategies to advance substantive positions"); Tiller, *supra* note 8, at 1498 (suggesting that major federalism decisions can be explained by ideology of the Justices).

action policies without regard for federalism concerns.¹⁷ Nor do the conservative Justices appear to consider principles of federalism when enforcing the Takings Clause against state environmental regulation.¹⁸ These observations are casual ones, however, without rigorous empirical testing.¹⁹

B. INSTITUTIONAL FEDERALISM

Another potential determinant of federalism doctrine is the Supreme Court's place in the constitutional structure. The Court is a national institution, which might presumably affect its federalism jurisprudence.²⁰ As a national institution, the Court may be more responsive to other national powers than to state legislatures. Congress and the President hold certain powers over the federal judiciary (such as budget, jurisdiction determination, and appointment powers) that state institutions do not. Moreover, the Court may seek to maximize its own power indirectly.²¹ As the final arbiter of federal law, the Court can expand its own influence by expanding the scope of federal law.

The Court may be responsive to the federal legislature and executive for a variety of reasons. The President and Congress, as the more accountable branches of government, exercise some control over the Court's resources and over its jurisdiction.²² Congress may even

17. See David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790, 844 (1991).

18. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

19. Segal and Spaeth report no statistically significant attitudinal voting on federalism issues in their general study. See SEGAL & SPAETH, *supra* note 12, at 259. However, their coding was based only on whether the decision favored the state or federal government and did not distinguish the ideological direction of the particular case. Hence, this test was really one of devotion to federalism qua federalism rather than the role of ideology. Segal and Spaeth did examine the role of ideology in a smaller sample of cases, by examining votes on state regulation of business and state regulation of unions. Liberal Justices would presumably favor the former and disfavor the latter. They found precisely this selective application of federalism for all Justices except Rehnquist, who appeared sincerely to defer to the state decision. One study of Burger Court federalism decisions found them to be largely explained by ideology rather than honest federalism. See Sue Davis, *Rehnquist and State Courts: Federalism Revisited*, 43 W. POL. Q. 773 (1991).

20. Much recent research has focused on the interaction of the Court with other government institutions and on how the latter may constrain the Court. See generally EPSTEIN & KNIGHT, *supra* note 9.

21. For a discussion regarding this proposition, see Cross, *supra* note 1, at 1313-27.

22. See, e.g., Eugenia F. Toma, *A Contractual Model of the Voting Behavior of the Supreme Court: The Role of the Chief Justice*, 16 INT'L REV. L. & ECON. 433 (1996) (reporting empirical evidence that Congress uses budgetary power to signal Court about its decisions and that Court responds to signal). See also John de Figueiredo & Emerson Tiller, *Congressional Control of the*

commence impeachment proceedings on judges. The “Court assumes institutional risks” whenever it employs federalist principles to strike down national legislation.²³ Congress and the President may functionally overrule the opinions of the Justices.²⁴ Moreover, the Justices are sitting on the Court only by virtue of their having been approved by the President and Congress.²⁵ The states have no direct say in composing the Court.

The Supreme Court’s general practice of deference to the other branches of the national government is very well established. When the Solicitor General requests that a case be taken on certiorari, the Court frequently complies.²⁶ When the federal government appears as a party before the Court, it has an unusually high rate of success.²⁷ Rare is the case recently that strikes down federal legislation on federalism grounds.²⁸ The history of judicial decisions on federalism has essentially been one of steadily transferring power from the states to the federal government.²⁹ Edward Rubin and Malcolm Feeley contend that the “Court has rejected federalism every time it really mattered.”³⁰

This may well be consistent with the original constitutional plan. But it is not the contemporary vision of ideal federalist structure, and judicial deference to Congress is not absolute. Twice this decade, the Court has struck down federal requirements forcing state and local officials to

Federal Judiciary: A Theoretical and Empirical Analysis of Judicial Expansion, 39 J.L. & ECON. 435 (1996).

23. Bednar & Eskridge, *supra* note 2, at 1481.

24. Considerable recent research has examined the instances when Congress has overridden a Supreme Court opinion and the strategic implications of such action. See, e.g., William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

25. For a discussion of politics in the appointment process, see Frank Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. (forthcoming 2000).

26. See EPSTEIN & KNIGHT, *supra* note 9, at 87 (reviewing research showing that government petitions for review are accepted at a rate many times higher than the overall average).

27. The federal government has won 63% of its cases before the Supreme Court, see LEE EPSTEIN, JEFFERY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM* 570 (1994), and over 70% of the cases in which it filed an amicus brief, see *id.* at 571. The states, by contrast, have won 48.3% of their cases. See *id.* at 578.

28. See, e.g., Bednar & Eskridge, *supra* note 2, at 1451 (observing that “[f]or sixty years (1936 to 1995), the Court deferred to Congress in every Commerce Clause federalism case it decided”).

29. See PHILIP B. KURLAND, *WATERGATE AND THE CONSTITUTION* 156-57 (1978) (contending that the court has nearly always favored national authority and made “substantial contributions to the ultimate demise of federalism”); MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 20 (1981) (characterizing the U.S. Supreme court as a device of “centralized policy-making”); Friedman, *supra* note 2, at 322 (observing that “the doctrine of federalism is a doctrine of blind and uncomprehending deference to national authority”).

30. Rubin & Feeley, *supra* note 2, at 949.

implement federal standards.³¹ In *United States v. Lopez*,³² the Court invalidated a federal law regulating firearms near school grounds.³³ Some suggest that these and other decisions reveal a new judicial activism in the defense of federalism.³⁴

States lack the influence over the Court possessed by the federal government. State governments cannot punish or reward the Court in any meaningful way. Acquiescing to state authority does not enhance the Court's authority; to the contrary, states' rights tend to limit the power of the Court in future decisions. State governments are repeat players who do reasonably well before the Court but not so well as the federal government. State laws are vacated with some regularity. States appear to fare particularly poorly in federalism actions.³⁵ When states prevail in other areas of the law, it is often attributable to judicial ideology.³⁶ The same may be true for federalism.

C. STATES' RIGHTS FEDERALISM

By states' rights federalism, we mean judicial action upholding the rights of states to govern themselves. Thus, 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 legislative authority. State authority alone would be sufficient reason for those Justices dedicated to the maintenance of federalism qua federalism.

31. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that federal government could not commandeer state officials for purpose of implementing federal gun control law); *New York v. United States*, 505 U.S. 144, 186-87 (1992) (holding that Congress could not require the states to take title of radioactive waste).

32. 514 U.S. 549 (1995).

33. See *id.* at 567-68.

34. See Yoo, *supra* note 6, at 1312-13, 1334-57. Many others have suggested that the victories for federalism are essentially symbolic and of little practical importance. See Jesse H. Choper, *Did Last Term Reveal "A Revolutionary States' Rights Movement Within the Supreme Court"?*, 46 CASE W. RES. L. REV. 663, 660-61 (1996); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 676 (1995); Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 660-61 (1996).

35. See Richard C. Kearney & Reginald S. Sheehan, *Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation*, 54 J. POL. 1008, 1014-15 (1992) (finding that in the 1980s, for example, states won over 61% of their cases before the court but only 38.6% of federalism cases).

36. See *id.* at 1019 (finding that state success correlated with ideology, that is, winning criminal law cases before a more conservative Court); Lee Epstein & Karen O'Connor, *States and the U.S. Supreme Court: An Examination of Litigation Outcomes*, 69 SOC. SCI. Q. 660, 670-73 (1988) (finding state success explained by relative litigation skill and general political position of state).

Of course, consistent adherence to states' rights federalism could be a masquerade for ideological preference. States' rights has historically been regarded as a doctrine leading to conservative outcomes.³⁷ The Court can review only a tiny fraction of circuit court decisions, so the Justices may have more concern for the future applications of the doctrine by lower courts than they do for the result in the individual case under review. A conservative Justice might therefore protect states' rights even when the particular case involves a liberal outcome, because the Justice believes that subsequent lower court applications of the doctrine will tend to produce conservative results over the long run.³⁸ Hence, even an apparently sincere devotion to states' rights may simply reflect a strategic ideological decision.

It may be unfair simply to assume, however, that a general devotion to states' rights *must* be only a beard for ideological preference. First, a Justice may sincerely believe in states' rights as an institutional matter and may care more about this preference than about ideological ends.³⁹ While political scientists commonly assume that ideological policy is the primary

37. See Chemerinsky, *Rehabilitating Federalism*, *supra* note 2, at 1333 (observing that "federalism has appeared in political debate primarily as an argument to support conservative causes").

38. An example of this strategy from civil rights jurisprudence might be found in *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989). The case involved a white male football coach suing his school and black principal under 42 U.S.C. §§ 1981 and 1983 [hereinafter sections 1981 and 1983] for racially-motivated reassignment. A five-Justice conservative majority held that the municipality could not be liable under respondeat superior for its employees' violations. *See id.* at 735-36. Justices Brennan, Marshall, Blackmun and Stevens dissented. Thus, the Justices remained true to their past interpretations of these sections, notwithstanding the fact that the plaintiff was a white male. While the ruling may have been perfectly sincere, it is also plausible that the Justices were looking at the likely future lower court applications of the doctrine in the more typical case with a black plaintiff.

The recent Eleventh Amendment cases at least arguably reflect this strategy in a federalism context. The *Florida Prepaid* decisions held for a state government against private interests in intellectual property disputes, holding that the private parties could not enforce federal law against the states. This might be considered a liberal result or an ideologically neutral one, but its general implications are more conservative, as most private enforcement of federal laws against the states involve liberal objectives (for example, civil rights). For the test involving this matter, see *infra* notes 55-59 and accompanying text.

39. Bednar and Eskridge, for example, complain that "a substance-driven theory of federalism strikes us as one that too quickly gives up on rule of law values." Bednar and Eskridge, *supra* note 2, at 1491. Justice O'Connor is perceived as a devotee of federalism for its own sake, perhaps because of her experience in state government. *See* M. David Gelfand & Keith Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443, 1448-56 (1990); Richard A. Cordray & James T. Vradelis, Comment, *The Emerging Jurisprudence of Justice O'Connor*, 52 U. CHI. L. REV. 389, 422-23 (1985). The authors concede, though, that her position "may simply indicate her willingness to have the Court examine and possibly overturn these typically 'liberal' results." *Id.* at 436. She has been far less deferential to the states' ability to create affirmative action programs. *See* Gelfand & Werhan, *supra*, at 1454-55.

or exclusive concern of Justices, most legal researchers believe that Justices care about the law and legal policy.⁴⁰ There is some theoretical reason to believe that the Court might care about the law, over and above its ideological policy implications.⁴¹ The shifting political control of the national and state governments complicates the ideological implications of any facially neutral doctrine.⁴² Thus, the consistent application of states' rights federalism may lead to great variability in outcomes (in terms of the conservative or liberal nature of the outcome).

II. FACES OF FEDERALISM

To study federalism, one must first define the concept. Certain topics are common in the research on federalism, such as the Commerce Clause and the dormant commerce clause. The Tenth and Eleventh Amendments are obviously relevant, as is preemption under the Supremacy Clause of the Constitution. Often ignored are other judicial doctrines, such as abstention, that are grounded in federalism. A variety of other legal issues involve the scope of state power and might be considered aspects of federalism.

A. CRIMINAL LAW

Research on federalism by legal scholars often overlooks issues of criminal law, but the Court considers federalism to be central to these issues. Habeas corpus jurisdiction involves federal court review of state convictions, and the Court frequently invokes federalism as a basis for its decisions.⁴³ The appeal is usually brought by a criminal defendant, and the deference to federalism therefore means affirming a conviction. In this context, the invocation of federalism is almost always conservative in direction. Political scientists have taken note of the politics of habeas corpus jurisprudence.⁴⁴

40. See, e.g., Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 LAW & CONTEMP. PROBS. 65, 71 (1994) (suggesting that "judges derive utility from legal procedures as well as from policy outcomes").

41. See Cross, *supra* note 7, at 298-303 (noting that judges trained in the law and sworn to uphold the law should plausibly care about legal values as well as policy values); Thomas O. McGarity, *On Making Judges Do the Right Thing*, 44 DUKE L.J. 1104, 1105 (1995) (proclaiming that "some judges feel an obligation to do the job right").

42. See Tiller, *supra* note 8, at 1498-1501.

43. See, e.g., Schlup v. Delo, 513 U.S. 298, 318 (1995) (majority opinion declaring that habeas "filings also posed a threat to the finality of state court judgments and to principles of comity and federalism").

44. See, e.g., Gregory J. Rathjen & Harold J. Spaeth, *Access to the Federal Courts: An Analysis of Burger Court Policymaking*, 23 AM. J. POL. SCI. 360, 363-64 (1979).

A variety of criminal law decisions not involving habeas corpus jurisdiction tend to present the same lineup of federalism concerns. In response to an arrestee's section 1983 action against a county sheriff, for example, a conservative majority created "stringent culpability and causation requirements," because a failure to do so would raise "serious federalism concerns."⁴⁵ The functional effect of the holding was to protect law enforcement officers and limit the remedies of criminal defendants. An ideologically divided Court held that a state's declaration of a person as "sexually dangerous" was not criminal and therefore outside the Fifth Amendment privilege against self-incrimination, once again limiting defendants' rights.⁴⁶ Other divided Courts found that a defendant could not collaterally attack past state convictions used for sentence enhancement purposes under federal law,⁴⁷ and that severe, mandatory state penalties for drug offenses did not constitute cruel and unusual punishment.⁴⁸

B. CIVIL RIGHTS

Civil rights litigation has been the historic crucible of federalism. Historically, of course, the federal government has overridden states to protect the interests of blacks and other minorities. States' rights generally opposed the liberal objectives of civil rights law. Our recent cases often have a different fact pattern. Many involve voting rights challenges to state redistricting plans that seek to enhance the representation of minorities. The plaintiff in such actions would be considered conservative. In these cases, federalism concerns are in parallel with the interests of minorities and the liberal position on civil rights law. There remain, however, a number of traditional civil rights actions, with minority plaintiffs challenging state action. Hence, federalism is increasingly an ideologically neutral doctrine in civil rights law.

The contrasting ideological interests in civil rights actions demonstrate how federalism may be selectively invoked rather than neutrally applied. Conservative Justices may employ federalism to deflect liberal claims, but they ignore the doctrine in the face of conservative claims. For example, in an action in which the Attorney General challenged the preclearance of a local redistricting plan that arguably hurt minority interests, a conservative

45. *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 415 (1997).

46. *See Allen v. Illinois*, 478 U.S. 364, 375 (1986).

47. *See Custis v. United States*, 511 U.S. 485, 497 (1994).

48. *See Harmelin v. Michigan*, 501 U.S. 959, 994-96 (1991).

majority invoked federalism in ruling against the federal challenge.⁴⁹ The Court held that a liberal policy of federal preclearance had to be sacrificed to federalism concerns. When a redistricting plan is intended to enhance minority representation, however, the conservative majority has been willing to strike down the plan's requirements, and the only mention of federalism can be found in the liberals' dissent.⁵⁰ Perhaps the most striking opinion in this regard was Justice O'Connor's for the majority in *City of Richmond v. Croson*,⁵¹ in which the Court struck down a city's affirmative action program and held that the states had less discretion to adopt such programs than does the federal government.⁵² The ideological conservatives apparently lost interest in federalism values, when those values furthered liberal ends.

The shift in the direction of the civil rights cases has exposed the selective use of federalism by the Court. As a result of the conservative decisions striking down redistricting programs, one commentator observed that "the principles of federalism have been reversed."⁵³ There may be a principled distinction for the reversal, but the conservative Justices, possessing the requisite five votes, have not bothered to engage the issue. One is left with the suspicion that federalism in the civil rights cases is selectively applied for instrumental ends.⁵⁴

C. ELEVENTH AMENDMENT

While Eleventh Amendment decisions may be considered classic in federalism jurisprudence, these cases have some conventional ideological component as well.⁵⁵ One typical Eleventh Amendment action involves a

49. See *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1996). See also *Grove v. Emison*, 507 U.S. 25, 32 (1993) (rejecting minority representation challenge to redistricting plan in interest of "principles of federalism and comity"); *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992) (interpreting Voting Rights Act narrowly in response to challenge by minority officials).

50. See *Bush v. Vera*, 517 U.S. 952, 1069 (1996) (dissenting opinion of Justices Souter, Ginsburg, and Breyer complaining that Court violates "principles of federalism"); *Shaw v. Hunt*, 517 U.S. 899, 949 (1996) (dissent of Justices Stevens, Ginsburg, and Breyer lamenting majority rule that "confounds basic principles of federalism").

51. 488 U.S. 469 (1989).

52. See *id.* at 489-90.

53. M. Elaine Hammond, *Toward a More Colorblind Society?: Congressional Redistricting After Shaw v. Hunt and Bush v. Vera*, 75 N.C. L. REV. 2151, 2181 (1997).

54. See Charles F. Abernathy, *Foreword: Federalism and Anti-Federalism as Civil Rights Tools*, 39 How. L.J. 615 (1996) (suggesting that both conservatives and liberals deploy federalism selectively to advance their ideological agenda).

55. For a further explanation, see *infra* notes 83-84 and accompanying text. See also Gene R. Shreve, *Letting Go of the Eleventh Amendment*, 64 IND. L.J. 601, 606 (1989) (describing the Eleventh Amendment as a "political battleground").

state's efforts to escape duties under federal law, often the Fourteenth Amendment or other civil rights laws.⁵⁶ These duties are typically liberal in orientation. Justice Stevens, lamenting the pro-federalism decision in *Seminole Tribe v. Florida*,⁵⁷ complained that the holding would shelter the states from actions enforcing a broad range of federal laws, including "environmental law and the regulation of our vast national economy."⁵⁸ An alternative Eleventh Amendment scenario involves an injured person trying to recover from a state.⁵⁹ While ideological values are implicated in these cases, the intensity of the preferences might be less than in some other legal issues, such as criminal law or civil rights law.

D. PREEMPTION

Preemption is an area of the law in which a Justice's ideological inclinations may conflict with a devotion to federalism. The typical contemporary preemption action involves an effort by business to strike down a state regulatory statute as inconsistent with federal regulation.⁶⁰ The conservative Justices most associated with federalism might be expected to favor preemption in such cases, for political reasons. In some cases, though, the state statute may be conservative in nature, so preemption would produce liberal results. Preemption decisions present a promising field for the study of political decisionmaking; unlike the criminal rights cases, federalism has no consistent ideological direction in preemption actions.

There is some indication of political decisionmaking and selective invocation of federalism in the preemption decisions. An eight-member

56. See, e.g., *Dellmuth v. Muth*, 491 U.S. 223 (1989) (holding that father could not sue state under Education of the Handicapped Act); *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) (holding that neither states nor state officials were persons who could be sued under § 1983).

57. 517 U.S. 44 (1996).

58. *Id.* at 77.

59. See, e.g., *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) (holding that injured railroad workers could sue bistate railway, notwithstanding Eleventh Amendment, over dissent of Justices O'Connor, Rehnquist, Scalia, and Thomas); *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468 (1987) (an ideologically divided Court holding that an injured worker could not sue state in admiralty).

60. See Paula A. Sinozich, Sanjoy K. Bose, Joy I. Cummings, Michael J. Funk, Elizabeth A. Hallock, Kathryn R. Hu, Jeffrey A. Huber, Nancy L. Killien, Peter S. Liaskos, Mark L. Lofgren, John D. Maxwell, Ann R. Rogers & Jarrell D. Wright, *Project: The Role of Preemption in Administrative Law*, 45 ADMIN. L. REV. 107, 124-25 (1993). The authors note that business generally favors preemption but believe that conservative Justices will remain true to states' rights and not find preemption in such cases. See also Charles Rothfeld, *Federalism's Smoking Guns*, LEGAL TIMES, Sept. 30, 1991, at 34 (suggesting that we may see a "conservative Court's blessing on what look to be very liberal states' policies").

majority has set forth in a tax case the general doctrine that federalism principles establish a presumption against finding state law to be preempted by federal legislation.⁶¹ The Court has even declared that preemptive effect would not be given to a federal statute unless the Justices could be “absolutely certain” that preemption was intended by Congress.⁶² When a maker of pacemakers sought to avoid state tort liability claims, arguing preemption by the federal Medical Devices Act, a five-member liberal majority cited “federalism concerns” as a reason to find no such preemption.⁶³ Justices O’Connor, Rehnquist, Scalia, and Thomas dissented, finding that the state action should have been preempted and making no mention of the federalism issue.⁶⁴ A conservative majority found that state deceptive advertising practices litigation against airlines was preempted by the Airline Deregulation Act, thus freeing businesses from state regulation.⁶⁵ The more liberal Justices Stevens and Blackmun dissented, joined by Justice Rehnquist in perhaps a sincere federalism vote.

E. DORMANT COMMERCE CLAUSE

The dormant commerce clause has been regarded as a major federal intrusion into states’ rights.⁶⁶ The ideology of the dormant commerce clause is more ambiguous.⁶⁷ The typical dormant commerce clause case involves a state action that somehow benefits local business at the expense of out-of-state competitors. A “Main Street” Republican might favor such pro-business legislation, but a “Wall Street” Republican would view the law as an unreasonable restraint on free competition. A traditional liberal might not care much about the state legislation in question. Of course, particular dormant commerce clause disputes may have an ideological component, such as when environmentalist legislation is claimed to be protectionist.⁶⁸

61. See *Department of Revenue v. ACF Indus.*, 510 U.S. 332, 333 (1994).

62. See *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

63. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

64. See *id.* at 508.

65. See *Morales v. Trans World Airlines*, 504 U.S. 374 (1992).

66. See, e.g., Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569 (contending that the clause improperly undermines federalism).

67. See Paul H. Edelman & Jim Chen, *The Most Dangerous Justice: The Supreme Court at the Bar of Mathematics*, 70 S. CAL. L. REV. 63, 80 (1996) (defying anyone to distinguish ideological component of dormant commerce clause decisionmaking).

68. See Tiller, *supra* note 8, at 1501.

The dormant commerce clause jurisprudence, perhaps more than other areas, introduces concerns of institutional federalism. These cases involve review of state legislatures without direct influence over the Supreme Court. In consequence, “the Court is more willing to impose constitutional review upon the offending state than it would be upon an offending national government.”⁶⁹ One might therefore expect more judicial activism under the dormant commerce clause than under the commerce clause itself. When the judiciary strikes down a state law under the dormant commerce clause, it may offend a state or states, but benefits other states and a national economic policy.⁷⁰ By contrast, when the judiciary strikes down a national law under the Commerce Clause, it risks offending the federal legislature that supplies its funding.

F. OTHER CATEGORIES

Federalism has been cited by the Supreme Court as a relevant factor in a wide variety of other cases. Federalism issues have arisen in several tort law actions,⁷¹ antitrust actions,⁷² and cases reviewing state tax statutes.⁷³ Other Supreme Court federalism cases involved purely procedural judicial rules, such as abstention.⁷⁴ Our sample also included some more direct federalism cases, including the famous *Printz v. United States*,⁷⁵ *New York v. United States*,⁷⁶ which involved the Tenth Amendment, and *United States v. Lopez*,⁷⁷ which limited the scope of federal power under the Commerce Clause.

69. *Id.*

70. See Christopher R. Drahozal, *Preserving the American Common Market: State and Local Governments in the United States Supreme Court*, 7 SUP. CT. ECON. REV. 233 (1999) (discussing the interest in the national market and the Court’s use of complaining states as a cue to strike down the legislation of other states).

71. See, e.g., *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

72. See, e.g., *Federal Trade Comm’n v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991); *Patrick v. Burget*, 486 U.S. 94 (1988); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

73. See, e.g., *Camp Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997).

74. See, e.g., *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350 (1989); *Pennzoil Co. v. Texaco*, 481 U.S. 1 (1987). These rules may have an ideological substantive content. See, e.g., *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) (permitting county sheriff’s motion to modify consent decree requiring new prison construction); *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804 (1986) (involving the issue of federal removal power and dividing court ideologically).

75. 521 U.S. 898 (1997).

76. 505 U.S. 144 (1992).

77. 514 U.S. 549 (1995).

III. ANALYSIS OF FEDERALISM DECISIONS

A. DATA—SUPREME COURT FEDERALISM DECISIONS

We examined every Supreme Court federalism decision between the years 1985 and 1997 in which any Justice used the word “federalism” in an opinion, concurrence, or dissent.⁷⁸ After irrelevant references were excluded, our search yielded 85 Supreme Court opinions (and 738 votes of Justices). The Court’s majority may not mention federalism in an attempt to elide an uncomfortable doctrine, so we have surely omitted some decisions implicating federalism. But dissenters can be expected routinely to call the majority on any efforts to evade federalism concerns by explicitly mentioning any federalism aspects of the case. Thus, the sample should be a reasonably representative set.⁷⁹

We coded each federalism case on several variables. First, we coded individual votes (pro-states’ rights/anti-states’ rights) for each Justice for each case. We needed to code this outcome variable in order to determine the “legal” basis for the decision. If this factor varies based on the ideological or institutional variables, then the neutrality of federalism doctrine may come into question. There are many examples in our set of pro-states’ rights and national power votes. For example, a vote not to preempt a state’s legislation is pro-states’ rights, while a vote for preemption would not be. Civil rights decisions that defer to state action (whether pro- or anti-affirmative action) would be pro-states’ rights, while contrary decisions striking down state action would not be.

Second, we coded ideological variables that (1) characterize individual cases or votes as having a liberal or conservative result, and (2) characterize the political ideologies of the Justices. We follow the binary-coding scheme now well established in political science research in characterizing outcomes as liberal or conservative.⁸⁰ The purpose for

78. The search simply used the key word “federalism” in the Westlaw SCT database for the relevant years. We excluded a number of cases in which the only reference to “federalism” was a Justice’s explanation of how the concept was not implicated. A case was also excluded for a citation to an article containing “federalism” in the title, if the point of the citation was unrelated to federalism.

79. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564 (1997) (striking down state law providing favorable tax treatment for charitable institutions serving in-state residents). The majority did not mention federalism, but Justice Thomas’s dissent complained that the opinion of the Court undermined federalism. Relying on a dissent to expose a majority’s infidelity to federalism is imperfectly reliable, but the liberal and conservative dissents are sufficiently frequent to yield a fairly balanced set of cases.

80. See *Cross*, *supra* note 1.

coding these outcomes and votes is to help determine the political nature of Supreme Court decisionmaking in federalism jurisprudence. The following examples illustrate some of the more common coding decisions: a vote for the defendant in a habeas corpus action is considered liberal; a vote rejecting an affirmative action plan is considered conservative; a vote favoring minority group plaintiffs in a civil rights action is considered liberal; a vote upholding state government regulation of business to protect a social good such as the environment is considered liberal. Only the vote for the outcome of the case is coded—no differentiation is made regarding the doctrinal basis for the decision. In other words, we would not code a case outcome “conservative” merely because the case came out in favor of states’ rights, or liberal because it favored national power. The political ideologies of the Justices are coded liberal and conservative based on other Supreme Court studies not involving our sample set of cases, nor more generally, exclusively on federalism decisions.⁸¹

Third, the cases are coded for the institution being challenged (that is, state or national). We coded for this variable out of concern for the institutional constraints that the Court may view as relevant. As mentioned earlier, if institutional threats are the primary concern of the Court, it would be particularly deferential to national governmental actions. We also coded for the specific branch being challenged (that is, executive, legislative and judicial). Thus, when a statute is under review, the challenged institution may be coded as state legislative or federal legislative. Other cases challenged the federal or state executive authority, or the federal or state judicial authority.

B. FINDINGS ON POLITICAL FEDERALISM

Table 1 below broadly summarizes all Supreme Court federalism decisions. The cases are categorized by (1) whether the plaintiff was arguing for a “states’ rights” outcome or a “national power” outcome; (2) whether the characteristics of the plaintiff were liberal, conservative, or neutral; and (3) whether the Court rendered a “states’ rights” or “national power” decision.

Consider first the overall tendency of the Court to rule in favor of “states’ rights.” In 58.1% (75 of 129) of the cases, the Supreme Court ruled in favor of states’ rights. The rate varies, however, based on whether

81. Justices counted as conservative included: Rehnquist, Thomas, Scalia, Powell, Burger, O’Connor, White, and Kennedy. Justices counted as liberal included: Brennan, Marshall, Stevens, Blackmun, Souter, Ginsburg, and Breyer.

the plaintiff challenging the governmental power was a liberal or conservative plaintiff. When a liberal plaintiff was involved, the Court ruled in favor of states' rights 69.7% of the time (49 of 82 cases). When a conservative plaintiff was involved, the Court ruled in favor of states' rights 60.6% of the time (20 of 33 cases). The data are more interesting if we look at the actual positions of the liberal and conservative plaintiffs. Liberal plaintiffs argued in favor of states' rights in 12 of the 82 cases they brought before the Court. Of those 12 cases, the liberal plaintiffs succeeded in their states' rights argument only 50% (6 of 12 cases) of the time. When the liberal plaintiffs made national power arguments, the Court used states' rights federalism to defeat them 61.4% of the time (43 of 70 cases). By comparison, when conservative plaintiffs made national power arguments, the Court used states' rights federalism to defeat them only 46.7% of the time (7 of 15 cases).⁸² In short, conservative outcomes appear to have been favored over liberal outcomes when federalism doctrines were applied.

Table 1 reports the details of these results. The upper left-hand cell shows that when the plaintiff in the action took a liberal position that was also pro-states' rights, that plaintiff prevailed 50% of the time. The upper right hand cell shows that when the plaintiff took a liberal position that favored national power, the plaintiff prevailed 38.6% of the time. Conservative plaintiffs who favored the national power position prevailed 53.3% of the time.

82. There are too few cases (3) for comparison of how strongly the Court would have supported states' rights arguments made by conservative plaintiffs compared to liberal plaintiffs.

TABLE 1: ALL FEDERALISM DECISIONS CAST BY
SUPREME COURT, 1985-1997

	States' Rights Plaintiff		National Power Plaintiff	
	States' Rights Judgment	Nat'l Power Judgment	States' Rights Judgment	Nat'l Power Judgment
Liberal Plaintiff Challenge	50.0% (6 of 12)	50.0% (6 of 12)	61.4% (43 of 70)	38.6% (27 of 70)
Conservative Plaintiff Challenge	72.2% (13 of 18)	27.8% (5 of 18)	46.7% (7 of 15)	53.3% (8 of 15)
Neutral Plaintiff Challenge	60.0% (3 of 5)	40.0% (2 of 5)	33.0% (3 of 9)	70% (6 of 9)
Total	62.9% (22 of 35)	37.1% (13 of 35)	56.4% (53 of 94)	43.6% (41 of 94)

From the data above, one might speculate that a conservative majority on the Court was driving the disparate application of states' rights federalism in favor of conservative plaintiffs and against liberal plaintiffs. Although we know that the Court was generally considered conservative during our time frame, that does not necessarily mean that the conservatives on the Court were driving these outcomes. Indeed, from the data above, we can only speculate as to the voting arrangements among justices on the Court. It could be that the greater success of conservative plaintiffs was due to a coalition of liberal and conservative Justices voting for what they believed jointly were the right outcomes, ideological or not, rather than a dominating conservative Justice coalition. Knowing the individual votes of Justices would then be useful for our analysis. Accordingly, we break the data down by the votes of conservative and liberal Justices. Table 2 uses the same format to summarize the results for conservative Justices.

TABLE 2: TOTAL FEDERALISM VOTES CAST BY CONSERVATIVE SUPREME COURT JUSTICES, 1985-1997

	States' Rights Plaintiff		National Power Plaintiff	
	States' Rights Judgment	Nat'l Power Judgment	States' Rights Judgment	Nat'l Power Judgment
Liberal Plaintiff Challenge	37.5% (24 of 64)	62.5% (40 of 64)	69.8% (238 of 341)	20.2% (103 of 341)
Conservative Plaintiff Challenge	74.2% (72 of 97)	25.8% (25 of 97)	46.7% (35 of 75)	53.3% (40 of 75)
Neutral Plaintiff Challenge	60.0% (39 of 65)	40.0% (26 of 65)	50.8% (32 of 63)	49.2% (31 of 63)
Total	59.7% (135 of 226)	40.3% (91 of 226)	63.7% (305 of 479)	36.3% (174 of 479)

Looking at the aggregated votes of conservative Justices, the data on the right hand side of Table 2 suggest that conservative Justices were much more inclined to use states' rights federalism to defeat a liberal plaintiff (69.8%) than to defeat a conservative plaintiff (46.7%). Even if we were to exclude the most obvious ideological cases—that is, habeas corpus cases—from our sample, the data still suggest such an effect. Conservative Justices also used states' rights federalism more often to support a conservative plaintiff's claim than a liberal plaintiff's claim. Consider the right hand side of Table 2. The conservative Justices used states' rights federalism to support a conservative plaintiff 74.2% of the time, while using states' rights federalism to support a liberal plaintiff only 37.5% of the time. Another comparison illustrating the differences would be the differential use of states' rights federalism when liberal plaintiffs argued for and against states' rights. When a liberal plaintiff argued in favor of states' rights, the conservative Justices only supported states' rights 37.5% of the time (left side of Table 2). When the liberal plaintiffs argued for national power over states' rights, the conservative Justices supported states' rights 69.8% of the time (right side of Table 2). In sum, it appears

that the conservative Justices used states' rights most effectively in defeating the claims made by liberal plaintiffs. Now consider the liberal Justices in Table 3.

TABLE 3: TOTAL FEDERALISM VOTES CAST BY LIBERAL SUPREME COURT JUSTICES, 1985-1997

	States' Rights Plaintiff		National Power Plaintiff	
	States' Rights Judgment	Nat'l Power Judgment	States' Rights Judgment	Nat'l Power Judgment
Liberal Plaintiff Challenge	77.3% (34 of 44)	22.7% (10 of 44)	29.2% (69 of 236)	70.8% (167 of 236)
Conservative Plaintiff Challenge	39.2% (29 of 74)	60.8% (45 of 74)	66.1% (37 of 56)	33.9% (19 of 56)
Neutral Plaintiff Challenge	48.9% (23 of 47)	51.1% (24 of 47)	30.2% (13 of 43)	69.8% (30 of 43)
Total	52.1% (86 of 165)	47.9% (79 of 165)	35.5% (119 of 335)	64.5% (216 of 335)

Table 3 shows that liberal Justices are selective in their application of states' rights federalism as well. Consider the right side of Table 3. The data suggest that liberal Justices were much more inclined to use states' rights federalism to defeat a conservative plaintiff (66.1%) than to defeat a liberal plaintiff (29.2%). Again, if we were to exclude the most obvious ideological cases—that is, habeas corpus cases—from our sample, the data still suggest such an effect. Now consider the left side of Table 3. Liberal Justices were also more willing to use a states' rights doctrine to support liberal plaintiff positions (77.3%) than to support conservative plaintiff positions (39.2%).

Another interesting aspect of the data is the treatment of "neutral" plaintiff challenges in comparison with liberal and conservative plaintiff challenges. The right side of Table 2 reveals that neutral and conservative

plaintiffs are treated similarly in the use of states' rights federalism by conservative Justices to defeat the plaintiff's claims (50.8% and 46.7%, respectively) while the liberal plaintiffs were treated more harshly (69.8%). Similarly, Table 3 reveals that neutral and liberal plaintiffs are treated similarly in the use of states' rights federalism by liberal Justices to defeat the plaintiff's claims (30.2% and 29.2%) while the conservative plaintiffs were treated more harshly (66.1%). This suggests that states' rights federalism is used more by the Justices as a sword to defeat opposing political-ideological plaintiffs, than as a tool to further the claims of aligned political-ideological plaintiffs.

To sum up, there is support in the data for the political federalism perspective of Supreme Court federalism jurisprudence. Whether viewed by Justice votes or Court decisions, one might conclude that politics appears to have an effect on outcomes.

C. FINDINGS ON INSTITUTIONAL FEDERALISM

One might ask that if politics influences judicial decisionmaking—why would Justices ever vote against their assumed political preferences in a case? We suggested that there were institutional power concerns that may affect the Court's willingness to exercise its political preferences or apply, even-handedly, states' rights federalism doctrine. In particular, we suggested that the Supreme Court may be more deferential to the national government than to state governments when a challenge is brought by a litigant. As mentioned above, the national government wields more institutional threats (jurisdiction, budget, and legislative overrides) over the Supreme Court than do state governments. These institutional power concerns could constrain both political preferences and dedicated application of states' rights protection by the Court. Tables 4 through 6 present data regarding the institutional effects.

Table 4 below presents data regarding the Court's deference to state and national power in rendering its federalism decisions. What is immediately obvious is that the Court is less willing to render a states' rights decision when a national institution (such as Congress) is involved (45.5%) than when a state institution is involved (59.8%). However, we do not know if this effect is due more to fear of national power over the Court than just general deference to the governmental institution involved. This confounding rests in the fact that states' rights federalism should be favored by the state institutions, while not by the national institutions when their policy is challenged. Thus, the differing results could simply be showing

that the Court defers to all government institutions in the face of a federalism challenge.

TABLE 4: ALL FEDERALISM DECISIONS BY SUPREME COURT INVOLVING STATE AND NATIONAL INSTITUTIONS, 1985-1997

	States' Rights Decision	National Power Decision
National Policy or Institution	45.5% (10 of 22)	54.5% (12 of 22)
State Policy or Institution	59.8% (70 of 117)	40.2% (47 of 117)

The aggregate individual votes of the Justices in Table 5 below generally accord with the findings in Table 4. There is still a greater preference for using states' rights federalism when a state institution or policy is involved than when a national policy or institution is involved. The effects, however, are less stark.

TABLE 5: ALL FEDERALISM VOTES BY SUPREME COURT JUSTICES INVOLVING STATE AND NATIONAL INSTITUTIONS, 1985-1997

	States' Rights Decision	National Power Decision
National Policy or Institution	44.3% (81 of 183)	53.7% (102 of 183)
State Policy or Institution	54.4% (559 of 1027)	45.6% (468 of 1027)

If we break the votes down by ideological groupings for Justices and governmental unit whose policy was at issue (state or national), we do not observe any special effects of institutional federalism. Justices continue to show political-ideological leanings in their voting regardless of which institution is involved. If institutional federalism were a significant factor, we would observe more restraint in the use of states' rights doctrines to defeat plaintiffs arguing in favor of national power in those cases where a national institution initiated the policy under dispute. Table 6 below shows that conservative Justices continued to use states' rights doctrines at an

inflated rate to defeat liberal plaintiffs who argued for national power (when compared to supporting liberal plaintiffs who argued for state rights). The Justices show no particular deference to state institutions that were challenged. Moreover, the conservative Justices continued to use states' rights doctrines to defeat liberal plaintiffs arguing for national power at a greater rate than conservative plaintiffs arguing for national power. Table 7 reveals a similar pattern for liberal Justices.

TABLE 6: TOTAL FEDERALISM VOTES CAST BY CONSERVATIVE SUPREME COURT JUSTICES INVOLVING STATE INSTITUTIONS, 1985-1997

	States' Rights Plaintiff		National Power Plaintiff	
	States' Rights Judgment	Nat'l Power Judgment	States' Rights Judgment	Nat'l Power Judgment
Liberal Plaintiff Challenge	45.3% (24 of 53)	54.7% (29 of 53)	70.6% (216 of 306)	29.4% (90 of 306)
Conservative Plaintiff Challenge	81.1% (60 of 74)	18.9% (14 of 74)	45.6% (31 of 68)	54.4% (37 of 68)
Neutral Plaintiff Challenge	63.8% (30 of 47)	36.2% (17 of 47)	50.0% (26 of 52)	50.0% (26 of 52)
Total	65.5% (114 of 174)	34.5% (60 of 174)	64.1% (273 of 426)	35.9% (153 of 426)

TABLE 7: TOTAL FEDERALISM VOTES CAST BY LIBERAL SUPREME COURT JUSTICES INVOLVING STATE INSTITUTIONS, 1985-1997

	States' Rights Plaintiff		National Power Plaintiff	
	States' Rights Judgment	Nat'l Power Judgment	States' Rights Judgment	Nat'l Power Judgment
Liberal Plaintiff Challenge	77.8% (28 of 36)	22.2% (8 of 36)	28.9% (63 of 218)	71.1% (155 of 218)
Conservative Plaintiff Challenge	41.2% (21 of 51)	58.8% (30 of 51)	62.7% (32 of 51)	37.3% (19 of 51)
Neutral Plaintiff Challenge	51.4% (18 of 35)	48.6% (17 of 35)	29.7% (9 of 37)	70.3% (26 of 37)
Total	80% (67 of 122)	20% (55 of 122)	33.1% (104 of 314)	66.9% (200 of 314)

If the Justices were deferring to states' institutions, one would expect to see their ruling in favor of those institutions, even when contrary to their ideological policy preferences. However, neither the liberals nor the conservatives show much deference in this regard. Tables 8 and 9 show that conservative and liberal justices, respectively, engage in much the same behavior with national institutions as when dealing with state institutions. Unfortunately, the data are too small to put too much confidence in the pattern.

TABLE 8: TOTAL FEDERALISM VOTES CAST BY CONSERVATIVE SUPREME COURT JUSTICES INVOLVING NATIONAL INSTITUTIONS, 1985-1997

	States' Rights Plaintiff		National Power Plaintiff	
	States' Rights Judgment	Non-Fed Judgment	States' Rights Judgment	Non-Fed Judgment
Liberal Plaintiff Challenge	0.0% (0 of 11)	100.0% (11 of 1)	62.9% (22 of 35)	37.1% (13 of 35)
Conservative Plaintiff Challenge	35.3% (6 of 17)	64.7% (11 of 17)	57.1% (4 of 7)	42.9% (3 of 7)
Neutral Plaintiff Challenge	50.0% (9 of 18)	50.0% (9 of 18)	54.5% (6 of 11)	45.5% (5 of 11)
Total	32.6% (15 of 46)	67.4% (31 of 46)	58.8% (30 of 51)	41.2% (21 of 51)

TABLE 9: TOTAL FEDERALISM VOTES CAST BY LIBERAL SUPREME COURT JUSTICES INVOLVING NATIONAL INSTITUTIONS, 1985-1997

	States' Rights Plaintiff		National Power Plaintiff	
	States' Rights Judgment	Nat'l Power Judgment	States' Rights Judgment	Nat'l Power Judgment
Liberal Plaintiff	75.0%	25.0%	21.4%	79.6%
Challenge	(6 of 8)	(2 of 8)	(6 of 28)	(22 of 28)
Conservative Plaintiff	34.8%	65.2%	100.0%	0.0%
Challenge	(8 of 23)	(15 of 23)	(5 of 5)	(0 of 5)
Neutral Plaintiff	41.7%	58.3%	50.0%	50.0%
Challenge	(5 of 12)	(7 of 12)	(4 of 8)	(4 of 8)
Total	44.2%	55.8%	36.6%	63.4%
	(19 of 43)	(24 of 43)	(15 of 41)	(26 of 41)

In sum, we find little to support the effects of institutional federalism. Political ideology continues to dominate the data.

D. IMPLICATIONS FOR HONEST FEDERALISM

We did not find much institutional effect in federalism doctrine, contrary to expectations and some prior research. This result is not a basis for ruling out any important institutional effect, however. Our period may have been anomalous, as it included the first decision in decades striking down federal law under the Commerce Clause. The institutional effect may also show up in certiorari decisions. The Court took many fewer cases challenging the national institution and accordingly struck down fewer actions of the national institution. Deference to national institutions may be reflected by simply denying certiorari. Or such deference may be found in doctrines, rather than results, as explained below.⁸³ It is clear from our results, though, that the ideological variable is much stronger than the institutional variable.

83. See *infra* notes 84-90 and accompanying text.

Our data showed a significant ideological component of federalism decisionmaking. While the existence of political federalism has *strong* support in the data, we cannot count out the possibility that honest federalism continues to play an important role in Supreme Court federalism jurisprudence. First, it is clear that politics does not explain everything. If so, there would be no cases where liberal Justices used states' rights doctrines to defeat liberal plaintiffs and no cases where conservative Justices used states' rights doctrines to defeat conservative plaintiffs. We know that liberal Justices voted 28.8% of the time to defeat liberal plaintiffs arguing for national power (see Table 3). While this amount may seem paltry compared with the 77.3% rate at which they used states' rights doctrines to support liberal plaintiffs arguing for states' rights, it nonetheless suggests something is at work—something not explained well by politics or institutional federalism concerns. As for the conservative Justices, they used states' rights to defeat conservative plaintiffs 46.7% of the time—an argument that other forces such as honest federalism may be at work.

IV. FURTHER ANALYSIS OF FEDERALISM DOCTRINES

Part III provided an empirical analysis of the outcomes of the Court's federalism decisions but did not consider the doctrines employed in reaching those outcomes. A given result can be reached in different doctrinal ways, and the choice of doctrines may have significance beyond the mere result reached. Some doctrines may better bind subsequent lower court decisions.⁸⁴ Some doctrines may have ideological directional tendencies, while others are ideologically neutral. Moreover, not all decisions are of equal importance, yet each is equally weighted in the study. Consequently, the empirical analysis may be highly informative but cannot provide a full description of federalism doctrine. This Part will seek to explain the doctrinal bases of the decisions through positive political theory.

Consider the Court's choice of a "clear statement" rule under the Eleventh Amendment cases. This type of ruling follows a pattern of Court decisions that have been called "quasi-constitutional law."⁸⁵ Rather than

84. See Cross, *supra* note 1, at 1313 (discussing how legal rules may have greater or lesser binding power).

85. William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992). The authors indicate that the "precise way in which a Court deploys substantive canons of statutory construction reflects an underlying 'ideology,' or mix of values and strategies that the Court brings to statutory interpretation." *Id.* at 596.

declare that some action is beyond the constitutional power of Congress, the clear statement rule creates a presumption against application of legislative action to states, absent a very specific statement that such a result was intended. While the clear statement rule may produce the same outcome as a constitutional rule, the former doctrine has a very different effect on future cases. Congress may override an opinion with a new statute containing the requisite clear statement, without the difficulty of constitutional amendment.

Clear statement rules are a very strategic exercise of judicial decisionmaking.⁸⁶ First, the Court gets its way on the outcome of the case under review. If the Court disapproves of the cause of action, it finds no clear statement, and subsequent decisions in the area should follow. Second, the Court protects itself against congressional retribution. If the contemporary Congress does not particularly care about the invalidated legislation, it will not act and the Court gets its way. If that Congress does care intensely, the clear statement rule invites an override through a new clear statement, rather than some other form of punishment of the Court. The invalidation under the clear statement rule is fundamentally a test of congressional concern for the issue and a deferential submission of the Court, if that concern is sufficiently great. Otherwise, the Court gets its way. Through this approach, the Justices need not guess about congressional preferences and the intensity of those preferences. The doctrine simply tests the congressional preferences and ensures that the Court's preference prevails as the default answer. The clear statement rule appears to be a strategic use of doctrine.⁸⁷

The recent Eleventh Amendment decisions have gone beyond the initial creation of the clear statement rule. Congress now must not only make a clear statement of its intent to abrogate state sovereign immunity but must also justify that statement to the Court's satisfaction.⁸⁸ Yet this strengthened doctrine is still a strategic and relatively deferential one. The

86. The approach is strategic if the Court has moderate preferences for federalism. When judicial preferences are particularly strong, the Court would lay down a strict constitutional rule that requires a supermajority override, as in the case of some First Amendment doctrines. Eskridge and Frickey have a different take on the strong statement rules of federalism. They note that straight constitutional rules of federalism have never been strongly enforced, so the strong statement rules are simply the Court's approach to increasing federalism's protection. *See id.* at 597. But of course the Court could at any time create strong constitutional protections of states' rights, so there must be a political reason why the Justices took the more cautious route.

87. For a criticism of the rule under conventional doctrinal analysis, see Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959 (1994).

88. *See Florida Prepaid Postsecondary Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999).

Eleventh Amendment, by its nature, does not call for striking down federal substantive requirements; it simply requires that they be enforced directly against the states and not through private rights of action. Consequently, the decisions strike at most a glancing blow and are not direct challenges to federal government power.⁸⁹ The decisions may add transaction costs to legislation and may slightly undermine enforcement, but they do nothing to preclude federal action when the national government has a strong preference for taking such action.

Many other doctrinal choices also matter. For example, the Justices often may choose between use of the Due Process Clause or the Commerce Clause to strike down state legislation. Justice O'Connor contends that there should be a lower threshold for invalidating state legislation under the Commerce Clause than under the Due Process Clause,⁹⁰ because the former basis may be more easily overcome by the legislature. This approach seems consistent with federalist deference to state powers, but the Court has not adopted the differential thresholds.

The Court structured its clear statement rules so as to show deference to strong federal legislative preferences. The rejection of Justice O'Connor's position of differential thresholds shows a converse lack of deference to strong state legislative preferences. This distinction cannot be explained ideologically but surely reflects the different institutional settings. So an institutional effect not observed in decision outcomes may be found in choice of doctrine.

CONCLUSION

Federalism has three faces, but our data suggest that the ideological face of it predominates in the Supreme Court's federalism decisions. While the Court may have some concern for deference to institutions and may have some sincere concern for the neutral principles of federalism, the latter faces fade when a significant ideological controversy confronts the Justices. Signs of institutional concern and honest federalism are subtle and relatively infrequent. This must be kept in mind when legal research perceives a states' rights "wave" or trend in the Court's federalism decisions. Rather than representing a sea of change, those decisions more

89. See, e.g., Kathleen Sullivan, *Federal Power, Undimmed*, N.Y. TIMES, June 27, 1999, § 4, at 17 (noting that "the striking feature of these rulings is how little they challenged the federal government's substantive power").

90. See *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 350 n.14 (1982) (O'Connor, J., dissenting). The distinction is discussed in Cordray & Vradelis, *supra* note 39, at 419.

likely reflect a strike at policy outcomes that the Justices consider ideologically undesirable.