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Essay

***1301 DISSING STATES?: INVALIDATION OF STATE ACTION DURING THE REHNQUIST ERA**

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*1303 Introduction

THE "federalism revolution" under Chief Justice Rehnquist's leadership has been the subject of considerable discussion among both legal scholars and political scientists. Some legal commentators have suggested that the Court has invalidated federal action in order to protect state sovereignty. [\[FN1\]](#) By contrast, political scientists routinely argue that ideology, rather than federalism, can best explain the voting behavior of Supreme Court Justices. [\[FN2\]](#)

In a recent article, Professors Ruth Colker and James Brudney dispute the proposition that the Rehnquist Court invalidates federal *1304 legislation primarily to protect state sovereignty. [\[FN3\]](#) Instead, they argue that these invalidations reflect, in part, the desire of the so-called "federalist" Justices [\[FN4\]](#)--namely, Chief Justice Rehnquist and Justices Scalia, Thomas, O'Connor, and Kennedy--to assert more power for the Court at the expense of Congress by defining the substantive meaning of the Commerce Clause and the Fourteenth Amendment in an ideologically conservative way. [\[FN5\]](#)

Discussion of the Rehnquist Court by legal scholars has mostly focused on whether the Court's treatment of federal action has been consistent with a federalism agenda. Two important considerations have been largely absent from that discussion: (1) consideration of the Rehnquist Court's repeated invalidation of state laws or actions, [\[FN6\]](#) and (2) consideration of whether the decisions *1305 in those cases can be described on ideological rather than (or in addition to) federalism grounds. [\[FN7\]](#) We believe that examination of the Court's record [\[FN8\]](#) of invalidating state action [\[FN9\]](#) can offer added insight *1306 into whether the "federalism" label and/or the "conservative" [\[FN10\]](#) label properly applies to the Rehnquist Court. [\[FN11\]](#)

In addition to intervening to resolve the Florida election dispute in *Bush v. Gore*, [\[FN12\]](#) the Rehnquist Court invalidated state action on *1307 fourteen occasions during the 1999-2000 Term [\[FN13\]](#) and on thirteen occasions during the 2000-2001 Term. [\[FN14\]](#) Two or more federalist Justices joined the majority in all but one of the invalidation decisions during those two terms. [\[FN15\]](#)

*1308 Since the 1991 Term, when Justice Clarence Thomas's addition to the Court created a five-vote federalist majority, the Court invalidated state action in 111 of the 203 (54.7%) cases in which it granted certiorari. [\[FN16\]](#) The 1991-2000 invalidation rate is comparable to the invalidation rate of the supposedly activist Warren era, [\[FN17\]](#) when the Court invalidated state action in 128 of 239 (53.6%) cases in which it granted certiorari. From this perspective, the Rehnquist Court is as activist as the Warren Court. [\[FN18\]](#) Preliminarily, these figures suggest that the Rehnquist Court is not primarily acting on the basis of a strong version of judicial restraint when cases involve the validity of state action. [\[FN19\]](#)

In this Essay, we will try to determine which factors predict a vote by members of the Rehnquist Court to invalidate state action. *1309 [\[FN20\]](#) To this end, we will look at the voting practices of individual Justices, paying particular attention to the federalists. We will use quantitative [\[FN21\]](#) and qualitative analysis to make that assessment. [\[FN22\]](#) Ultimately, this Essay strives to answer the following questions: Are the federalists more restrained than the nonfederalists on the Rehnquist Court? Is their conduct in invalidating state action consistent with the basic tenets of federalism?

In Part I, we will define "federalism" and create an empirical model to test for the presence of that philosophy. Defining federalism, particularly in the context of cases involving state action, proved to be a difficult exercise. The majority of the literature on federalism focuses on the Court's proper role in invalidating congressional action when Congress allegedly interferes with the rights of the states. [FN23] Fewer commentators focus on the Court's proper role in invalidating state action when states allegedly interfere with the rights of the individual. Should a federalist Justice protect state sovereignty and the right of the states to make their own policies, even if those policies allegedly violate the rights of the individual? Should a federalist protect state sovereignty by deferring to the decisions *1310 of a state's highest court? Should a federalist only protect state sovereignty when Congress has overstepped its authority by interfering with the rights of the states? In this Essay, we will not take a position on the question of which of these models might reflect the proper definition of federalism. Instead, we will create multiple criteria for defining federalism that reflect each of these models. Hence, our Essay can retrospectively reflect on what federalism might mean for each of the so-called federalists, while recognizing that there is not universal agreement on the definition of federalism in the context of invalidating state action.

In Part II, we will use quantitative methods to assess which version of federalism, if any, helps explain the voting behavior of the federalists. First, we will present our data generally through bivariate analysis. Then, we will perform multivariate analysis to determine which results are statistically significant and assess quantitatively how the presence of various factors changes the results.

In Part III, we will use qualitative methods to assess the judicial philosophy of the federalists on the Rehnquist Court by examining the opinions in which they voted as a bloc. This discussion will permit us to consider the influence that issues and ideology may have on the votes in a particular case by contrasting the votes of federalists with the votes of the "nonfederalists." [FN24] Our qualitative analysis reinforces the quantitative findings, particularly for Justice Sandra Day O'Connor, by demonstrating that her decisions do not follow a consistent ideological thread.

We will conclude by asking whether the "federalism" label properly describes the voting behavior of the so-called federalists on the Rehnquist Court. We find that there is more than one version of federalism operating for members of the Rehnquist Court. Justice Thomas, and to a lesser extent Chief Justice Rehnquist and Justice Scalia, for example, are acting under principles of both federalism and conservatism. On the one hand, their versions of federalism may be restraining them from upholding the validity of state action; on the other hand, their conservative activism may be *1311 causing them to invalidate state action. Our findings indicate that Justice Scalia's voting record became more strongly significant on an ideologically conservative basis after Justice Thomas joined the Court in 1991. The voting records of Justices Kennedy and O'Connor are not predictable on an ideological basis. They also operate under different versions of federalism.

This investigation, in itself, does not demonstrate that any of the so-called federalists are not truly federalists. It does suggest, however, that one lasting legacy of the Rehnquist era may be to redefine federalism so as to include activism on behalf of a conservative political agenda. It also suggests that the term "federalism," as used by the Rehnquist Court, is an incoherent label because at least four different versions of federalism could be linked to the so-called federalists on the Rehnquist Court.

I. Federalism

In this Part, we review the literature on federalism to construct a model of federalism that we can test empirically. Because there is not one agreed-upon model of federalism, we have decided to break the concept of federalism into five components: judicial restraint, respect for policies that are important to the states, respect for separation of powers, protection of voting rights, and "ideological neutrality." [FN25]

A. Restraint

The conventional definition of federalism [FN26] supports a limited judicial role. [FN27] Some authors argue that the courts should have limited *1312 judicial powers to protect separation of powers principles, irrespective of whether the underlying action is state or federal. Other authors argue that the courts might have a proper activist role in ensuring that Congress does not interfere with state sovereignty but that the courts should nonetheless be restrained in reviewing actions by state governments. Both sets of authors, however, agree that the courts should be reluctant to use their power to interfere with state action.

Professors Herbert Wechsler and Alexander Bickel [FN28] hold the first view. Professor Wechsler, for example, believes in the importance of federalism but does not identify the courts as having an important role in implementing a federalist vision. [FN29] Under this version *1313 of federalism, the Court would not play a large role in safeguarding any aspect of federalism. The Court's opinion in *Garcia v. San Antonio Metropolitan Transit Authority* [FN30] best reflects the role for courts envisioned by Professors Bickel and Wechsler. In *Garcia*, the Court stated that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." [FN31] The Court concluded: "State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." [FN32] This holding is a classic combination of belief in judicial restraint and the importance of federalism.

Professor John Yoo, by contrast, holds the second view: that the courts should only be restrained in considering the validity of state action but might be activist in considering the validity of federal action. [FN33] He argues that the Bill of Rights can be best understood as restraining only Congress. [FN34] States, however, have an important political role in preserving federalism and individual rights: "In addition to creating individual rights, states also were to serve as the primary defenders of those rights against a national government that sought to exceed the boundaries of its powers." [FN35] Professor Yoo's perspective on judicial review of state action *1314 would appear to be consistent with that of Professors Bickel and Wechsler: the federal courts should have little role in guaranteeing individual rights at the state level. That task should be left to the states.

Professor Yoo sharply disagrees with the Court's decision in *Garcia*, because he believes that the courts should have a strong role in making sure that Congress does not exceed its authority at the expense of the states. [FN36] Nonetheless, he argues that the courts should not have a significant role in protecting individual rights when the states have allegedly violated those rights. [FN37] Therefore, like Professors Wechsler and Bickel, he agrees that courts should rarely invalidate state action, although he is comfortable with the Supreme Court displaying an activist role when Congress oversteps its authority.

To test these views empirically, we hypothesized that a federalist might be particularly likely to reverse a lower court when that court has invalidated state action. A federalist would consider reversal as a proper exercise of his or her "policing" function, making sure that lower courts do not inappropriately intrude into the affairs of state government. We therefore consider the judicial posture of the case on review (that is, the type of lower court and the decision of the lower court) in constructing our empirical model. We hypothesized that a federalist might aggressively use the Court's certiorari authority and his or her own voting authority to hear and reverse cases from the lower courts in which the lower courts invalidated state action.

None of these authors suggest directly that a federalist should defer to the decisions of a state's highest court in reviewing state action, but political scientists have made this argument. [FN38] We hypothesized,*1315 therefore, that a federalist might be particularly likely to validate state action when the state's highest court had concluded that the state action was constitutional. In such a situation, both the state's highest court and its legislative or executive branch are in agreement about the validity of the state action under question. Hence, we hypothesized that judicial restraint by the Supreme Court might be particularly apparent when the state's highest court and the state's executive branch or legislative branch agree about the validity

of state action.

In Part II, we will examine these hypotheses by determining whether the federalists were particularly inclined to validate state action and whether their validation rate increased when the lower court was a state court that had validated the state action.

B. Respect for Policies That Are Important to the States

A Justice's overall record of invalidating state action can provide us with a general measure of that Justice's activism with respect to matters involving state sovereignty. We also thought it would be helpful to develop a measure that expresses whether the states consider the particular issue to be important to state sovereignty. Not all matters involving state action are of equal importance to the states.

We use the presence of amicus briefs as a measure of how strongly states feel about an issue before the Court. There are three ways that amicus briefs might reflect the importance of an issue to state sovereignty. First, states can file or join an amicus brief indicating their support for the state action under review. Second, states can file or join an amicus brief indicating their opposition to the state action under review. Third, nonprofit organizations that purport to represent the states' interests can file an amicus brief in support of the state action under review.

With respect to the first method of indicating support for the state action under review, we did not expect to find a linear relationship between the number of states filing or joining briefs and votes by federalists. We hypothesized that federalists would be unlikely to be influenced by those briefs if ten or fewer states joined those briefs. The inability of the authors of these amici briefs to get the support of more than ten states might indicate that *1316 the silent states do not consider the issue to be important to state sovereignty. As the "piling on" of amicus briefs has proliferated in recent years, we did not expect that briefs filed by a small number of states would have a positive outcome on the federalist Justices. If anything, we hypothesized that this indication of low support might have a negative impact on the outcome. Hence, we coded the number of states joining these briefs into separate categories: no states submitting a brief; one state submitting a brief; two to ten states signing a brief; eleven to twenty-nine states signing a brief; and thirty or more states signing a brief. These separate categories permitted us to evaluate whether the presence of only a few signatories for amicus briefs has the opposite impact of the presence of a high number of signatories.

When some states file briefs opposing the state action under review, we hypothesized that this conduct would be a signal to the federalists that the issue is not at the core of state sovereignty. In such instances, the federalists might be more inclined to invalidate state action.

Finally, to test the third hypothesis, we coded the presence of briefs by the National Conference of State Legislatures, the National Governor's Association, and the Council of State Governments. [FN39] We hypothesized that the presence of their briefs would correlate with a lower state action invalidation rate for the federalist Justices because their briefs would be a signal that the issue was important to state sovereignty.

C. Protection of Separation of Powers

Although federalists generally endorse a restrained role for the Court in considering matters of state sovereignty, we will also show that they recognize that the Supremacy Clause leaves certain powers in the hands of the federal government. Protection of separation of powers principles might therefore cause federalists to *1317 deviate from their underlying commitment to judicial restraint, in some instances, by invalidating state action.

Professor James Thayer's article, "The Origin and Scope of the American Doctrine of Constitutional Law," [\[FN40\]](#) is useful in helping to understand the Court's proper role in safeguarding separation of powers principles. Professor Thayer's article was written before the courts had begun significant enforcement of the Civil War Amendments to the Constitution, so he does not consider what posture judges should take in reviewing state action under the Fourteenth Amendment. He offers a classic restrained approach to the role of a judge--that a court should be reluctant to invalidate an action taken by another branch of government. [\[FN41\]](#)

Although Professor Thayer has a generally restrained perspective on judicial invalidation of legislative action, he accepts the possibility that invalidation may sometimes be more appropriate for state rather than federal action when separation of powers issues are present in a case, because of the importance of the Supremacy Clause. [\[FN42\]](#) Based on these writings, we might expect a *1318 federalist judge to be more willing to invalidate state action when a case involves an issue of preemption than when it involves other issues. Hence, we will consider whether the preemption issue is a significant factor predicting invalidation of state action in our multivariate analysis in Section II.B.

D. Protecting Voting Rights

Professor John Yoo has also suggested that federalists might deviate from their generally restrained perspective by accepting certiorari on cases like *Bush v. Gore* [\[FN43\]](#) that involve contentious voting rights issues. Following the decision in *Bush v. Gore*, Professor Yoo defended the Court's involvement in that case by arguing:

A principled adherence to federalism, however, does not require the Court to refuse to review the presidential election procedures used by the states. Federalism does not create a free-fire zone where states may do anything they please.

....

This is nowhere truer than in the area of voting.

....

... [T]he state's power over the manner of the selection of presidential electors cannot go far beyond procedural matters such as when and where an election is to be held. Once a state began to use procedures, as in Florida, that may have advantaged one candidate over another, federalism principles justified judicial preservation of the integrity of the electoral process. [\[FN44\]](#) *1319 The fact that the Court chose to get involved in the Florida election process, of course, did not dictate the Court's ultimate holding. The Court still had to decide whether to validate or invalidate the state's action. Here, we found Professor Yoo's perspective to be ambiguous. On the one hand, we believe that his general thesis supports an activist, rather than a restrained, role for a Justice when the Court accepts certiorari in a state election case. He suggests, for example, that "[o]nce a state began to use procedures, as in Florida, that may have advantaged one candidate over another, federal principles justified judicial preservation of the integrity of the electoral process." [\[FN45\]](#) His use of the term "judicial preservation" would seem to support the use of the judicial power to invalidate state action.

On the other hand, Professor Yoo does argue that, in *Bush v. Gore*, the Court correctly validated the state's executive action by reversing the Florida Supreme Court. This result was appropriate, according to Professor Yoo, because *Bush v. Gore* happened to involve a situation in which the judicial branch rather than the executive branch was advantaging one candidate over another. [\[FN46\]](#) Thus, judicial intervention was appropriate to validate state action. [\[FN47\]](#)

At a minimum, therefore, it appears that Professor Yoo believes that federalists should act differently in cases involving voting rights. In addition, we hypothesized, based on his thesis, that a federalist would be inclined to invalidate state legislative or executive action to preserve the integrity of the election process. We made this hypothesis because, as a factual matter, the Court is more *1320 likely to hear cases in which the legislative or executive branch, rather than the judicial branch, arguably acted inappropriately during the election process.

As a result, we included a "voting rights issue" variable in our multivariate analysis to determine whether Professor Yoo's description of federalism accurately describes the voting patterns of any members of the Court. Are federalists more likely to invalidate state action when a case involves a voting rights issue? [\[FN48\]](#) We will report those results in Section II.B.

E. Ideology

None of the classical federalist authors described above support an ideological role for the Court. Critical legal theorists, however, argue that judges decide cases principally on ideological grounds. [\[FN49\]](#) Although few mainstream legal theorists urge judges to decide cases on ideological grounds, [\[FN50\]](#) Professor Ronald Dworkin is the theorist most associated with an ideological perspective. [\[FN51\]](#)

***1321** Nonetheless, a dominant view among political scientists is that judicial behavior by the Supreme Court in constitutional cases can be most readily explained on ideological or political grounds. [\[FN52\]](#) Professors Jeffrey Segal and Harold Spaeth call this model for explaining voting behavior an "attitudinal model." This model contrasts with a "legal model," under which judges decide cases based on "precedent, the plain meaning of the Constitution, the intent of the framers, and a balancing of societal versus constitutional interests." [\[FN53\]](#) Under this ideological perspective, precedent and other neutral factors certainly play a role in a Justice's decisions, but ideology is also understood to help predict judicial outcome. Political scientists, in fact, have questioned whether the votes of Justices can be accurately explained by notions of judicial restraint [\[FN54\]](#) or federalism. [\[FN55\]](#) They contend that ideology is a superior explanation. [\[FN56\]](#)

***1322** We coded whether the Court was asked to review a liberal or conservative state action and coded the issue at stake in the case. We defined the terms "liberal" and "conservative" according to the ideological direction of the public policy. [\[FN57\]](#) We discuss these results ***1323** in bivariate form in Section II.A and examine them more closely in Section II.B as part of our multivariate analysis. Although we quantitatively examined interaction terms between, for example, whether the state action was liberal and whether the issue involved in the case involved free speech, we did not find those results useful because of limitations with the coding system. [\[FN58\]](#) We examine such interactions through qualitative analysis in Part III.

***1324** II. Quantitative Analysis

A. Federalism: Bivariate Analysis

In order to distinguish the possible factors that contribute to each of the Justice's decisions when deciding whether to invalidate state action on federal constitutional law grounds, we collected data on all of the cases in which each Justice participated since Justice Rehnquist became Chief Justice. The collected cases ran from the beginning of the 1986 Term to the end of the 2000 Term. Using the Justice's vote as the dependent variable, we collected data on the features of the case, including lower court treatment of the case, the issue area of the state action, participation by amici curiae, and the ideological direction of the underlying state action. [\[FN59\]](#)

1. Restraint

We hypothesized that federalist Justices believe in judicial restraint and should therefore invalidate state action less frequently than their colleagues. We tested this hypothesis through bivariate analysis. Table 1 reports the absolute rates of invalidation of state action for Justices who decided more than 150 cases where a state action was at issue since Rehnquist became Chief Justice.

Table 1: Invalidation Rates Under Chief Justice Rehnquist
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*1325 The Justices most frequently considered to have a restrained perspective are, indeed, the least likely to invalidate state action. Justice Scalia, for example, has an invalidation rate of 36.5%, while Justices more typically associated with activism have much higher invalidation rates. For example, during their tenure on the Rehnquist Court, Justices Brennan and Marshall voted to invalidate more than three-quarters of the state actions subject to constitutional challenge in this time period.

This bivariate finding, however, does not support a restrained federalist perspective upon closer examination because we do not consider invalidation rates ranging from 30.6% to 48.3% for the federalists to be low in absolute terms. In absolute terms, we consider a "low" invalidation rate to be under 25% and a high invalidation rate to be over 75%. Under this quartile approach, Justices Brennan and Marshall would have high invalidation rates while the rest of the Justices would be in the moderate category.

In evaluating the absolute values involved, it is helpful to remember that the Court has considerable control over its docket and therefore tends to accept certiorari on cases in which it desires to reverse the lower court. As a matter of efficiency, it makes sense for the Court to hear cases to correct the errors of the lower court. But there is no reason that correcting those errors should cause the Court to have a high rate of invalidating state action. If anything, the influence should go in the opposite direction. A federalist might be particularly alarmed when a lower court improperly invalidates state action, thereby treading on the state's sovereignty. In searching for cases upon which to grant certiorari, a federalist might particularly want to grant certiorari in cases in which the lower court improperly invalidated state action, thereby giving the Supreme Court a high state validation rate. The selection bias problem, if anything, should therefore depress rather than raise the invalidation rate of the federalists.

Nonetheless, we do not want to overstate our observation that the federalists have a modest rather than a low invalidation rate. As a whole, the federalists have a lower invalidation rate than the nonfederalists, so it does appear that judicial restraint, as a comparative matter, is a feature of their judicial philosophy. In other words, the federalists appear to be somewhat more restrained than *1326 the nonfederalists. Through bivariate and multivariate analysis, we try to understand why this difference is not even more dramatic. What factors are causing the invalidation rate for the federalists to rise above the 25% mark? Does federalism itself act as a buffer on restraint, or does that influence come from outside of federalism?

2. Ideology

Our bivariate invalidation statistics suggest that some factor other than a hesitancy to invalidate state action may explain the invalidation rate for the federalists. Because political scientists believe that ideology is a significant predictor of judicial behavior, we inquired whether the federalists' ideological activism might be causing a low invalidation rate for cases involving state action. Although we explore this hypothesis in more depth in Section II.B, we can see preliminarily through bivariate analysis that ideology appears to be a significant factor in raising the invalidation rate of the federalists from the low to the moderate level.

Table 2 reports invalidation rates in relationship to the ideology of the underlying state action.

Table 2: Invalidation Rate and Ideology of State Action

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As Table 2 reflects, there appears to be a strong relationship between the likelihood of invalidating state action and political *1327 ideology for most of the federalists and nonfederalists. The Justices who deviate somewhat from this pattern are Justices White, Kennedy, and O'Connor. Justice White, in particular, appears to defy ideological characterization. His invalidation rate is only modestly higher when the state action was liberal rather than conservative. The figures for Justices Kennedy and O'Connor are also consistent with the common perception that they are the "swing" voters on the Court. They

are much more likely to invalidate conservative state action than the other federalists. The most ideological members of the Rehnquist Court appear to be Justices Brennan, a liberal, and Thomas, a conservative, because they have the highest values in the difference column.

These results suggest that a factor other than a hesitancy to invalidate state action predicts the voting behavior of the federalists on the Rehnquist Court. To the extent that voting pursuant to a conservative ideology causes federalists to invalidate state action, that ideological tendency may curb a Justice's overall federalist tendency to be restrained and validate state action. These results might even make us inquire whether federalism plays any role in predicting the voting behavior of the federalists in cases involving the validity of state action. As we discuss below, however, we do find some evidence that federalism plays a role in predicting the voting behavior of the federalists in state action cases.

B. Federalism: Multivariate Analysis

We conducted a multivariate regression analysis to determine the ability of our bivariate findings to withstand controls for other factors, including lower court disposition, presence of amicus briefs, different issue areas, and the ideology of the state action. [\[FN60\]](#) *1328 By controlling for the influence of other factors, we are able to make a stronger claim about the relationship between a given independent variable and the Justice's vote. This is necessary because we have competing expectations for what behavior might best represent federalism. Therefore, we need to control for some factors to understand the true causal relationship between variables of interest and the Justice's vote to validate or invalidate state action.

We report our results through a predicted probabilities analysis. [\[FN61\]](#) The value of each cell in the tables that follow is the predicted probability that a given Justice will vote to invalidate a state action, given a certain set of characteristics that form our "baseline" results. [\[FN62\]](#) The choice of this baseline is arbitrary, and we could alter it without changing any of the coefficient estimates or the predicted probabilities of invalidation. If a given factor makes a Justice significantly more or less likely than the baseline to invalidate a state action, we place that predicted probability in bold numbers and note it with an asterisk.

As discussed in Part I, four criteria to measure the presence of federalism in voting behavior emerge from the literature on federalism: (1) whether a state or federal lower court validates the underlying state action; (2) whether states or amicus organizations file briefs in support of or in opposition to the underlying state action; (3) whether a preemption or voting rights issue is present in *1329 the case; and (4) whether the underlying state action is ideologically conservative. Additionally, we coded whether the Court heard the case under its certiorari jurisdiction. Because the certiorari rules changed during the time period of our study, we needed to control for that rule change. [\[FN63\]](#) Finally, we coded the presence of the Solicitor General as amicus curiae because we hypothesized that the Solicitor General's position would be given deference by all members of the Court. [\[FN64\]](#) Because it is a factor that might predict judicial outcome, we had to include it in our equation even if we did not believe that it would distinguish federalists from nonfederalists.

In our model, the baseline has the following characteristics:

- the lower court is a federal court that validated the state action;
- the underlying state action is conservative;
- no amicus briefs are filed;
- the issue in the case is procedural due process;

- the Solicitor General does not file an amicus brief; and
- the Court hears the case under its certiorari jurisdiction.

The baseline results, summarized in Table 3, are also reported in the first column of Tables 4 through 8 below.

***1330** Table 3: Baseline Probability of Invalidating State Action [\[FN65\]](#)

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1. Restraint

In Part I, we hypothesized that a federalist should display restraint by being hesitant to invalidate state action. As an absolute matter, we have already reported in Section II.A our results with respect to the restrained voting pattern of the Justices.

We also generated two other hypotheses that we examine in this Section: (1) that a federalist might be most inclined to reverse a lower court decision when that decision results in the invalidity of state action, and (2) that a federalist might be particularly inclined ***1331** to affirm a lower court when that court is a state court that has ruled that the underlying state action was constitutional.

Table 4 below helps us explore these hypotheses. Probabilities that are significantly different from the baseline at $p < .05$ are in bold type and are followed by an asterisk. In order to determine whether the influence is to increase or decrease the likelihood of invalidating state action, one can compare the result with the baselines results listed in the first column. For example, Chief Justice Rehnquist has a significant value of 0.108 for the column "Federal Court Invalidated State Action." The baseline value is 0.455. Hence, his value for "Federal Court Invalidated State Action" is significantly lower from the baseline ("Federal Court Validated State Action") and is therefore in bold type and followed by an asterisk. In other words, he has a 45.5% propensity to invalidate state action when the lower federal court validated state action and only a 10.8% propensity to invalidate state action when the lower federal court invalidated state action.

Table 4: Predicted Probability of a Vote to Invalidate State Action

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Our data support the first hypothesis for the federalists: As seen in columns two and four, they are particularly likely to validate state action by reversing the lower court when the lower court had ***1332** invalidated state action. In other words, they understand it to be important to their judicial role to "police" the lower courts and reverse their decisions when, in their opinion, the lower court has incorrectly invalidated state action. Hence, the results in columns two and four are significant for the federalists and are therefore lower than the results in column one. [\[FN66\]](#)

Justice O'Connor fits the general picture we found for the other federalists with respect to columns one, two, and four. But Justice O'Connor's voting behavior also fits the second hypothesis--that a federalist might particularly defer to the decision of a lower state court. This conclusion can be drawn by comparing column three with column one. When the lower court validates state action, she is less likely to reverse state courts than federal courts (.626 compared ***1333** to .796). This suggests that she is less likely to invalidate state action when a lower state court agrees with either the state executive or legislature than when a lower federal court agrees with either the state executive or legislature. In other words, like the other federalists, Justice O'Connor is significantly likely to play a "policing" role in which she is likely to reverse lower courts when they invalidate state action. But she is also sensitive to whether the lower court is a state or a federal court. She is not likely to disagree with the policy decisions of state judicial and executive actors when those actors are in agreement with each other. [\[FN67\]](#)

In all, then, we found moderate invalidation rates for each of the federalist Justices that were somewhat lower than the inval-

idation rates for the nonfederalists. The rates, however, were not low in an absolute sense. We found a tendency by the federalists to intervene to reverse lower court decisions that had invalidated state action. We also found that Justice O'Connor differed from the other federalists in that she was sensitive to whether the lower court was state or federal.

2. Respect for Policies That Are Important to the States

We expected that the federalists would show respect both for amicus curiae briefs filed by states in support of other states and amicus briefs filed by the nonprofit organizations that lobby on behalf of the states. [\[FN68\]](#) We identified three methods for measuring a *1334 concern for state sovereignty as reflected by deference to views expressed in these amicus briefs. First, we hypothesized that a federalist might be inclined to invalidate state action when only a few states support the state action in question by filing amicus briefs but that a federalist would be inclined to validate state action when many states support state action. Hence, to see if votes to invalidate changed as the number of states changed, we created separate categories that varied according to the number of states supporting state action. [\[FN69\]](#) Second, we hypothesized that a federalist might be inclined to invalidate state action if some states actually opposed the state action. States rarely write amicus briefs urging the Court to invalidate state action, however, so we were not optimistic that this variable would be helpful. Third, we hypothesized that a federalist might be inclined to vote to validate state action when amicus organizations that purport to represent the states urge them to do so. We coded for the presence of amicus briefs by the National Conference of State Legislatures, the National Governors Association, or the Council of State Governments for this purpose.

Finally, as noted previously, we coded for the presence of the Solicitor General as amicus curiae. We coded whether the Solicitor General supported state action and whether the Solicitor General opposed state action. We hypothesized that the Solicitor General's position would correlate with the voting record of all members of the Court and would not vary on the basis of the federalism label.

Table 5 reports our results for our primary three hypotheses.

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*1336 The data do not support our first hypothesis--that the filing of amicus briefs by states would only influence the federalists when a significant number of states joined briefs in support of the state action. In fact, the only significant effect on federalists is in the opposite direction from what we predicted. Justice Scalia is significantly more likely to invalidate state action if more than thirty states filed an amicus brief in support of the state action. In the cases where thirty or more states "pile on" amicus briefs, therefore, Justice Scalia is more likely to invalidate state action.

We closely examined the group of cases in which more than thirty states signed amicus briefs to see if there is anything significant about these cases that might explain these results. We found that twelve out of eighteen of these cases involved review of criminal law issues. It may be that the federalism label is not a good predictor of votes on cases involving criminal law issues for Justice Scalia. [\[FN70\]](#)

Our data also do not support our second hypothesis--that the federalists would be inclined to invalidate state action when some states filed briefs opposing the state action. That fact is a perfect predictor for Justices Brennan, Marshall, and Souter: They always voted to invalidate state action when states filed briefs opposing the state action.

Our inability to find statistical significance for the federalist Justices may be explained by the small number of cases in the database fitting this description, as well as the ideological inclination of these cases. There were only eleven cases in our study in which some states filed briefs opposing the state action. In nine of these cases, the underlying state action was coded as conservative. More importantly, many of those cases involved very controversial political issues, such as gay rights, abor-

tion, and single-sex education, on which we would expect the Justices to have strong *1337 ideological preferences and, therefore, on which they would not easily be persuaded by amicus briefs. Our finding that most of the Justices vote on an ideological basis may explain the results in these eleven cases. We discuss this further in Section III.B.

Finally, our data provide only limited support for our third hypothesis: that federalists would be particularly influenced by the views expressed by nonprofit organizations. [FN71] The presence of amicus briefs by nonprofit organizations does appear to have an influence on Justices Blackmun and White-- neither of whom would be typically considered to be federalists. In addition, it does appear to have an effect on Justice Kennedy. Each of these Justices is significantly more likely to vote to validate state action if nonprofit organizations supported the state action.

We cannot explain the results for Justice Kennedy on ideological grounds. Of the fifty-six cases in the database in which the nonprofit organizations filed amicus briefs, twenty-nine involved review of liberal state action, and twenty-six involved review of conservative state action. The liberal state action cases, however, did not involve "hot button" liberal issues; rather, they tended to involve issues like preemption or commercial law. There are no cases involving liberal state action on the equal protection issue. Similarly, the conservative state action cases did not involve "hot button" conservative issues. Many of the conservative state action cases involved free speech issues upon which some commentators have suggested that the liberal/conservative distinction does not work well. [FN72] Hence, it may be true that the cases in which the nonprofit organizations file briefs are the moderate cases in which Justice Kennedy is open to persuasion. Alternatively, nonprofit organizations may tend to file briefs in cases in which Justice Kennedy is already inclined to validate state action. His federalism may be consistent with that of the nonprofit organizations.

*1338 As a whole, we see little evidence that the federalists are influenced for or against invalidation of state action by amicus briefs filed either by the states themselves or by nonprofit organizations. One reason that the federalists might not have been influenced by amicus briefs may be that the amici only wrote briefs on close cases that they thought required extra advocacy. It is hard to control for this form of strategic behavior but we see no evidence in support of that hypothesis from the data we have available. Of the 112 cases that were decided by a 5-4 vote, the nonprofit amicus organizations only filed briefs in nine instances (8.0%). By contrast, they filed briefs in fifty-one of the 305 cases (16.7%) which were not decided by a 5-4 vote. Of course, the vote of the Court is not a predictive factor that they could consider *ex ante* in deciding whether to file an amicus brief. And one might even argue that the filing of the amicus briefs helped ensure that the fifty-one cases would not to be decided by a close margin. But if we assume that the decision to file an amicus brief is an expression of the importance of a case rather than a prediction that the vote will be close, it appears that the presence of these briefs does not correlate with a pro-state action outcome in our database.

Finally, the federalists may not be particularly influenced by states filing briefs on behalf of each other because that practice has become so commonplace as to be rendered meaningless. In our study, states filed amicus briefs in support of each other in 151 of 417 (36.5%) cases. The practice of filing an amicus brief may not be noteworthy unless a large number of states sign briefs and, even then, only the nonfederalists may be open to persuasion on those cases. Our data would therefore suggest that authors of amicus briefs on state action issues should have the nonfederalists rather than the federalists in mind as their target audience, because the federalists do not appear to be persuaded by their efforts.

As discussed above, we also coded for the presence of the Solicitor General and considered whether the Solicitor General supported or opposed the state action. Table 6 reports our findings with respect to that variable.

*1339 Table 6: Predicted Probabilities by Presence of Amicus Brief by
Solicitor General

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As we hypothesized, this is a factor that seemingly influences both federalists and nonfederalists. There is a significantly increased likelihood that Chief Justice Rehnquist and Justices Blackmun, Brennan, Kennedy, O'Connor, Scalia, Souter, Stevens, and White will validate state action when the Solicitor General supports state action. Fewer Justices are influenced by the Solicitor General urging invalidation of state action, however. There is a significantly increased likelihood that Justices Kennedy and Thomas will invalidate state action when the Solicitor General opposes state action and that Justices Brennan and Marshall will validate state action when the Solicitor General opposes state action. Given the time period under question for Justices Brennan and Marshall, it may be that they resisted the requests of Republican Solicitors General.

These data are contrary to our initial hypothesis because the Solicitor General urging invalidation predominantly affects federalists. Consistent with our hypothesis, both federalists and nonfederalists are influenced by the Solicitor General urging validation of state action, and, consistent with our hypothesis, nearly all the federalists have at least a trend toward significance on that variable.

***1340** We examined the invalidation data more closely to understand why federalists were influenced more strongly when the Solicitor General urged invalidation of state action. There are thirty-six cases in which the Solicitor General urged invalidation of state action. Of those thirty-six cases, sixteen involve preemption issues. An additional six cases involve commercial law matters in which the underlying state action is ideologically liberal. The federalists' likelihood of invalidating state action in these types of cases might explain the significant variable. It may not be that the Solicitor General influenced their vote but instead chose to urge invalidation in cases in which the Justices were predisposed to invalidate state action on issue-specific (preemption) or ideological (liberal) grounds.

In sum, we see little evidence that federalists are influenced in their votes to invalidate or validate state action by the states' expressions of what issues are of the most importance to them. When the states filed amicus briefs, the only influence that we found for the federalists went in the opposite direction of our hypotheses. Justices Kennedy and Scalia were likely to invalidate state action when thirty or more states supported that action. By contrast, Justices Kennedy and Scalia were more likely to validate state action if nonprofit organizations support the validation of state action. The filing of briefs by nonprofit organizations appears to have had the most influence on the Justices but that influence is equally apparent among federalists and nonfederalists. It is not a distinguishing factor. Similarly, we were able to confirm previous studies that suggest that the Solicitor General's views influence judicial behavior. When the Solicitor General urged validation of state action, federalists and nonfederalists appeared equally influenced. In the rare case in which the Solicitor General urges invalidation of state action, however, some federalists appear influenced by that action. Overall, these data suggest that it makes more sense for states to persuade nonprofit organizations or the Solicitor General to file briefs urging validation of state action than for states to band together to file their own brief urging validation of state action. There is no evidence that federalists or nonfederalists are persuaded by their efforts in orchestrating briefs signed by thirty or more states.

***1341** 3. Issue Analysis

Although we expect federalists to have an overall restrained philosophy (that is, a likelihood to validate state action), we hypothesized that they might be inclined to invalidate state action in cases involving preemption issues or voting rights issues. These factors would mitigate against the restraint that we would otherwise expect to find for a federalist judge. The following table reports the results on all issues, including preemption and voting rights.

Table 7: Predicted Probabilities by Issue [\[FN73\]](#)

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*1342 a. Enforcing the Supremacy Clause

We expect federalists to be more likely to vote to invalidate state action when preemption is an issue. The multivariate results support that hypothesis: Chief Justice Rehnquist and Justices Kennedy, Scalia, Thomas, and White are significantly more likely to vote to invalidate state action when preemption issues are raised than in the baseline type of case. Of equal importance, the nonfederalists are not more likely to vote to invalidate when preemption is an issue, so there is clearly something about preemption cases that makes the federalist Justices more likely to invalidate state action than the nonfederalists. The presence of a preemption issue therefore counters the underlying tendency of federalists to act on the basis of judicial restraint.

b. Protecting Voting Rights

Professor Yoo postulates that a federalist would be particularly concerned about voting rights issues. If he is correct, then we would have another factor that would cause a federalist not to have a low invalidation rate for cases involving state action. Accordingly, we examined whether there was a significant correlation between the presence of a voting rights issue [\[FN74\]](#) and a Justice's vote to invalidate state action.

The predicted probabilities results reflect that the presence of a voting rights issue significantly increased the likelihood that Justice Kennedy would invalidate state action. [\[FN75\]](#) This description of Justice Kennedy as being particularly likely to invalidate state action in cases involving voting rights issues may harmonize with Professor Lawrence Friedman's argument that Justice Kennedy has become a more liberal, activist jurist in some areas. [\[FN76\]](#) As we discuss below, Justice *1343 Kennedy's voting behavior could not be explained on overall ideological grounds despite our initial bivariate findings. It may be the case that Justice Kennedy's voting behavior on cases involving procedural due process and criminal law are consistent with a conservative political ideology because he is likely to validate state limitations on individual rights, but his voting behavior on other issues--such as voting, free speech, and religion--are more consistent with a liberal political ideology. Because our definitions of "liberal" and "conservative" were global, rather than issue specific, we were only able to detect Justice Kennedy's political conservatism on an issue-by-issue basis.

Our results, therefore, suggest that Justice Kennedy may be described as a "Yoo" federalist in that he has an increased likelihood to invalidate state action in cases involving voting rights issues. That explanation, however, does not apply to the other federalists.

4. Ideology

As predicted by political scientists, we are not able to account for the federalists' moderate level of invalidating state action on the basis of federalism factors alone. Hence, we also assessed the role that ideology plays in predicting judicial behavior. Our data reflect that the role of ideology is significant for Justice Thomas and, to a lesser extent, for Chief Justice Rehnquist and Justice Scalia. Table 8 reflects our predicted probabilities results for political ideology.

Table 8: Predicted Probabilities by Ideology of State Action

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*1344 We find that the ideology of the state action played a significant role in the decisions of Justices Blackmun, Brennan, Marshall, Souter, Stevens, and Thomas, and there is a strong trend toward significance for Chief Justice Rehnquist and Justice Scalia. [\[FN77\]](#) The "Difference" column reflects, however, that the federalists act on a less pronounced ideological basis than the nonfederalists. [\[FN78\]](#) Chief Justice Rehnquist and Justices Scalia and Thomas are more likely to invalidate liberal state actions than conservative state actions. If they are federalists, then we would have to describe them as "conservative federalists." To the extent that some federalists insist that Justices must act on the basis of neutral, nonideological prin-

ciples, then these Justices would not fit the federalism label. But if one believes that federalism and conservatism are compatible, then we have demonstrated that these Justices belong in the conservative federalist category. Their ideological tendencies may be causing them to invalidate state action more than we would expect from a federalist who is committed to judicial restraint. These federalists are not merely invalidating state action to preserve separation of powers principles but are also invalidating state action to impose a conservative political ideology on the states.

The real surprise is that Justice Scalia does not have a strong, overall significant value for ideology, although there is a trend in that direction ($p=.071$). [FN79] We find, however, that Justice Scalia's results would be significant for ideology if we limited our investigation to the 1991 Term forward, when Justice Thomas joined the Court. [FN80] In other words, Justice Scalia's voting does not correlate with ideology for the entire Rehnquist Court era, but does for the period when the federalists are in the majority. His *1345 pattern of voting on an ideological basis, therefore, appears to have been influenced by the Court's membership. Possibly, Justice Thomas has influenced Justice Scalia's voting behavior in a conservative, ideological direction.

Our data, however, do not support the view that Justices Kennedy and O'Connor vote on a predictable, conservative basis. As discussed above, Justice Kennedy may be an eclectic conservative in that he voted as a conservative on cases involving procedural due process and criminal law but not in cases involving free speech and religion. Our data also support the commonly held view that Justice O'Connor is a moderate swing voter who cannot be described in predictable ideological terms. [FN81]

III. Qualitative Assessment

In the previous Part, we used quantitative analysis to assess whether principles of federalism can predict whether some members of the Court will vote to invalidate state action. These arguments do not stem from consideration of the votes of a bloc of Justices; they derive from empirical analysis in which the vote of a single Justice is the dependent variable. We also found that quantitative analysis was a limited vehicle for discussing the relevance of the issues present in a case. [FN82]

In this Part, we engage in qualitative analysis to discuss the votes of the so-called federalists when they vote as a bloc, with careful attention to the relevance of the issues in the cases. First, we will examine cases in which at least four of the federalist Justices voted to invalidate state action and no more than two of the nonfederalists voted to invalidate state action. Second, we will examine cases in which at least four of them voted to validate state action when *1346 no more than two of the nonfederalists voted to validate state action. These cases reflect the contrast between the federalists and nonfederalists because they reached different outcomes in these cases.

A. Votes to Invalidate State Action

The five federalists have now collectively been members of the Court for a decade. Of the 111 cases in which the Rehnquist Court voted to invalidate state action since 1991, forty-eight were matters that were decided by a unanimous vote. Of the sixty-three cases involving a divided Court, fifteen were not joined by a majority of the nonfederalists [FN83] on the Court. In all but one of those cases, all five federalists joined the majority and no more than two of the nonfederalists joined the majority. In the remaining case, four federalists joined the majority along with two nonfederalists.

In addition to the fifteen cases in which the federalists voted to invalidate state action and the Court also voted to invalidate state action, there were two more cases in which at least four federalists voted to invalidate state action, but the Court as a whole voted to validate state action. In these two remaining cases, all four nonfederalists plus one federalist formed a majority to validate state action over the objection of four federalists. Hence, there were a total of seventeen cases in which at least four federalists voted to invalidate state action and no more than two nonfederalists voted to invalidate state action.

Seven of these cases involved equal protection issues, four involved property issues, three involved religion issues, two involved free speech issues, and one involved preemption issues. In thinking about these seventeen cases, we asked why federalists would vote to invalidate state action when nonfederalists did not. Are these decisions consistent with any of the tenets of federalism or do they need to be explained on some other ground?

***1347** Table 9: Nonunanimous Cases in Which at Least Four Federalists and No More Than Two Nonfederalists Voted to Invalidate State Action

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In examining the list of cases in which the federalists created the decisive voting bloc, it appears that two important categories of cases are "takings" cases and equal protection cases involving Congressional redistricting. In addition, several of the cases involve different aspects of the First Amendment: the Free Exercise Clause, the right to free association, and the Religion Clause. We will examine cases from each of these categories to see whether they are consistent with the tenets of federalism or can instead be explained on ideological grounds.

***1348** 1. Takings Cases

We coded the "commercial" variable in the database, expecting to find a correlation between the presence of a property issue and the votes by some federalists. The variable is significant for Justice Kennedy but not for the other members of the Court. A qualitative assessment suggests that the Court has acted in an activist fashion to protect the rights of property owners. For some federalists, these results are reflected in the database through the significant factor of protecting conservative ideology. Justice O'Connor did not vote as consistently with the federalists on these cases as one might expect: She was not more likely to invalidate cases that reviewed a liberal state action than a conservative state action.

The first important takings case decided by the Rehnquist Court since 1991 was *Lucas v. South Carolina Coastal Council*. [\[FN84\]](#) The Lucas litigation stems from Congress's 1972 enactment of the Coastal Zone Management Act. [\[FN85\]](#) In the 1980 amendments to this Act, Congress gave states a financial incentive to develop a program to eliminate development and redevelopment in high-hazard areas. [\[FN86\]](#) South Carolina enacted various measures to implement this directive, including the 1988 Beachfront Management Act. [\[FN87\]](#) This Act enlarged the areas protected from development. This new boundary included property purchased by Lucas for redevelopment in 1986. After briefing and arguing before the South Carolina Supreme Court, but prior to issuance of the court's opinion, the Beachfront Management Act was amended to permit Lucas to seek a special use permit. [\[FN88\]](#) Lucas never applied for such a permit, and the possibility of his receiving such a permit was not a factor in the decision entered by the state supreme court. [\[FN89\]](#) The United States Supreme Court accepted certiorari in the case on the factual assumption from the trial court that the land had been rendered ***1349** valueless by the amendment to the Beachfront Management Act. [\[FN90\]](#) It ruled in favor of the property owner, Lucas. [\[FN91\]](#)

The Court had to interpret the ripeness doctrine liberally to hear the case at all. In his dissenting opinion, in which he argued that the writ should be dismissed because it was improvidently granted, Justice Stevens argued that there were facts in the record disputing Lucas's claim that his land had no value. [\[FN92\]](#) Justice Blackmun's dissent makes a similar assertion. [\[FN93\]](#) The fact that the five federalists on the Court were eager to hear the case is baffling in light of their general position on the question of ripeness and their previous decision in *Lujan v. Defenders of Wildlife*. [\[FN94\]](#) The temporary nature of the taking, coupled with Lucas's admission at trial that he was "in no hurry" to build "because the lot was appreciating in value" [\[FN95\]](#) ***1350** gave the Court ample foundation to conclude that intervention into this matter was unnecessary because there was no real economic loss. Nonetheless, the Court chose to decide Lucas on the merits.

More importantly, resolving Lucas on the merits appears to be inconsistent with principles of federalism. Due respect for sep-

aration of powers should have caused the Court to respect the legislative structure created in the federal Coastal Zone Management Act, whereby Congress used its spending power authority to encourage the state to implement certain policies. No one questioned whether South Carolina complied with that federal directive in the Beachfront Management Act. Nonetheless, Lucas made a constitutional argument that South Carolina's rules constituted a taking without just compensation. [\[FN96\]](#)

Lucas is the story of a Court eager to intervene to protect the rights of property owners. The decision of the Court was inconsistent with the policies of the State of South Carolina and the United States Congress, and contrary to the decision of the state's supreme court. Moreover, there were strong prudential considerations counseling the Court to dismiss the case as not ripe or dismiss the writ as improvidently granted. The Court's interference dismantled a program of federal-state cooperation.

The result can be better understood in terms of conservative ideology-- laissez-faire economics--than as an expression of protection of state sovereignty. Under a state sovereignty explanation, one would have expected it to matter to the Court that both the state legislature and the highest state court concluded that this partial taking was appropriate as a matter of policy (legislature) and of law (courts). Laissez-faire, conservative ideology appears to have trumped federalism in this case. [\[FN97\]](#)

*1351 2. Equal Protection Cases Involving Congressional Redistricting

We separated out voting cases from other types of equal protection cases, in part to test Professor Yoo's hypothesis about the importance of voting issues to federalists. Because we broke the equal protection cases into two categories--voting and non-voting--we had too few cases to examine the interaction between ideology and issues on a quantitative basis. Hence, we examined this interaction through qualitative analysis.

The equal protection cases involving congressional redistricting can be seen as reflecting the ideological trend that we found in our quantitative results. Aside from Justice O'Connor, the federalists voted consistently in voting rights cases that supported a "reverse discrimination" principle, commonly associated with political conservatism. Despite their consistent voting behavior on this issue, our quantitative results did not reflect that these results were significant on "issue" grounds; instead, they were significant on "ideological" grounds. [\[FN98\]](#)

The first and most complex case in this category is *Shaw v. Reno*. [\[FN99\]](#) In *Shaw*, the State of North Carolina became entitled to a twelfth seat in the United States House of Representatives as a result of the 1990 United States Census. The General Assembly enacted a reapportionment plan that included one majority-black congressional district. [\[FN100\]](#) The United States Attorney General objected to the plan pursuant to Section Five of the Voting Rights Act of 1965, and the General Assembly passed new legislation creating a second majority-black district. [\[FN101\]](#) A three-judge panel dismissed the action and an appeal was taken to the United States Supreme Court. [\[FN102\]](#) The Court held the plaintiffs had stated a proper claim upon which relief could be granted under the Equal Protection *1352 Clause and remanded the case for further consideration. [\[FN103\]](#) This decision reflected a dramatic change in precedent because the Court had never before sided with white plaintiffs in a voting rights case. [\[FN104\]](#)

On remand, the state continued to defend its second majority-minority district. Although a three-judge panel held that this apportionment scheme was constitutional, the Supreme Court again reversed, holding that the reapportionment scheme was not narrowly tailored to serve a compelling state interest. [\[FN105\]](#)

Following the Court's second decision involving the majority-minority district, the state redrew the second majority-minority district. [\[FN106\]](#) A three-judge panel granted summary judgment in favor of the plaintiffs, concluding that race was impermissibly used as a factor in this new congressional redistricting. [\[FN107\]](#) The Supreme Court unanimously reversed that decision, concluding that triable issues of fact existed regarding whether the state had an impermissible racial motive when it

drew the district lines. [FN108] On remand, the three-judge panel concluded that the state had unconstitutionally drawn the 1997 boundaries. [FN109] In a 5-4 decision, the Supreme Court again reversed the three-judge panel, with Justice O'Connor joining the Court's liberals. [FN110] Other than Justice O'Connor, the Court's federalists therefore concluded that the state's redistricting plan was unconstitutional. As we saw in the "takings" area, Justice O'Connor did not consistently acquiesce to the conservative ideology reflected in the opinions of the other federalists, which is consistent with our nonideological empirical finding for Justice O'Connor.

***1353** Of the three groups of opinions in this case--one group finding the state's conduct constitutional throughout, one group finding the state's conduct unconstitutional throughout, and one Justice finding the state's conduct moving from unconstitutional to constitutional--it would appear that Justice O'Connor's decision is the most federalist in that she tries to protect the integrity of the voting system while also respecting state sovereignty. Under this view, the State of North Carolina found itself in an untenable position. If it did not comply with the Attorney General's request that it create a second majority-minority district, then it would certainly face legal challenge from the Executive Branch. But if it did comply with the Attorney General's request, it would face legal challenge from white voters. Because North Carolina initially created only one majority-minority district, it would appear, at least at first, that it preferred not to comply with the Attorney General's request. Under that view, one might understand the Court's initial decision as respecting state sovereignty by giving the state an opportunity to defy the intrusion of the federal government. In the second round of litigation, however, one might understand the state to desire genuinely to create a second majority-minority district. This time, it apparently chose a configuration different from the one selected by the Attorney General. This configuration arguably reflected a desire by the legislature to protect its own political interests while also complying with federal law.

Most importantly, this case reflects the ideological nature of this line of decisions for the federalists. Until the Court decided *Shaw v. Reno*, it was considered constitutional for a state to use race in drawing district lines. Although the Court was growing increasingly divided on this question, Justice White, joined by Justices Brennan, Blackmun and Stevens, had stated in a plurality opinion in *United Jewish Organizations v. Carey* [FN111] ["UJO"] that the Court's prior decisions implied that [T]he Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5 Section 5 and its ***1354** authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color are constitutional. [FN112]

The only member of the current federalist majority who was on the Court when UJO was decided was then-Justice Rehnquist. Justice Rehnquist joined Part IV of the plurality opinion in which Justices White, Stevens, and Rehnquist concluded that the Constitution permits the State to draw lines deliberately in such a way that the percentage of districts with a nonwhite majority roughly approximates the percentage of nonwhites in the county, because there was no cognizable discrimination against whites. [FN113] Part IV of the Court's opinion in UJO, however, did suggest that a state would have to employ "sound districting principles such as compactness and population equality" to draw district lines in a race-conscious fashion. [FN114] Only Chief Justice Burger dissented, concluding that the Court's prior precedent held that "drawing of political boundary lines with the sole, explicit objective of reaching a predetermined racial result cannot ordinarily be squared with the Constitution." [FN115]

The Supreme Court did not expressly question the UJO holding in *Shaw*, although it did emphasize the "sound district principles" and "compactness" language from UJO that no more than four members of the Court (if one includes Chief Justice Burger) had accepted. The emphasis on these *Shaw* principles therefore reflects a philosophical shift on the part of the Court. It no longer was sufficient for a state to argue that its use of explicit racial criteria in redistricting was necessary and appropriate under the Voting Rights Act as a remedial measure to comply with the Fourteenth ***1355** and Fifteenth Amendments. A

state also needed to show that the redistricting was consistent with traditional districting principles. One legacy of the Rehnquist Court will be that it created this philosophical or doctrinal change in the law of voting. [\[FN116\]](#)

3. First Amendment Cases

For the purpose of quantitative analysis, we grouped together cases involving free speech and freedom of association. Religion cases were coded separately but they included both Free Exercise and Establishment Clause issues. Because these First Amendment cases involved a multitude of issues, we thought it would be useful to examine them qualitatively.

The religion cases in which the federalists voted as a bloc involved Establishment Clause principles. [\[FN117\]](#) In both cases, the Court held that intermingling of the State with private parties that were expressing a religious belief did not violate Establishment Clause principles. [\[FN118\]](#) These decisions were consistent with our finding that the federalists act in support of a conservative political ideology. As we will discuss in Section III.B, the votes of the federalists in *1356 cases in which they voted to validate state action also follow this trend toward the Court supporting a conservative political ideology.

Another cluster of First Amendment cases reflect the evolution of a conservative jurisprudence on the freedom to associate or freedom not to associate. The first of these cases, California Democratic Party v. Jones, [\[FN119\]](#) involved a novel issue of a state initiative that created a new blanket primary system to replace the state's closed partisan primary. The Court held that California's blanket primary violated the political parties' First Amendment right of association. Although the decision in this case may have appeared relatively noncontroversial at the time and was decided by a 7-2 vote, it reflected the beginning of a reinigorated "freedom to associate" which seems to be ideologically important to the federalists.

At first glance, the votes by the federalists in California Democratic Party are surprising. The issue in the case was the right of the citizens of California to enforce a statewide initiative that imposed a blanket primary on the state of California. Four political parties challenged this new state rule, arguing that it violated their freedom not to associate by possibly forcing them to accept a nominee for a particular party when that nominee's positions were not consistent with those of the party. [\[FN120\]](#) The federalists, joined by Justices Breyer and Souter, voted to invalidate this state law. [\[FN121\]](#) In dissent, Justices Stevens and Ginsburg observed that "principles of federalism require us to respect the policy choice made by the State's voters in approving Proposition 198." [\[FN122\]](#)

Even if principles of federalism did not compel the decision in this case for the federalists, it is also surprising that the federalists interpreted the freedom not to associate so broadly. The First Amendment does not explicitly refer to a "freedom to associate." Such a broad construction of an implied term is usually the hallmark of liberalism, not federalism. Hence, it is not surprising that the Court supported its reference to the importance of the freedom *1357 not to associate with citation to Professor Lawrence Tribe's treatise on American Constitutional Law [\[FN123\]](#) and a "liberal" decision from the Burger era--Roberts v. United States Jaycees [\[FN124\]](#)--in which the Court found that the state regulation had not impermissibly interfered with the right not to associate. [\[FN125\]](#) The decision in California Democratic Party, coupled with the Court's unanimous decision in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, [\[FN126\]](#) appears to reflect the federalists' increasing comfort with a newly invigorated freedom not to associate. Although this view has not been expressed in any of the theoretical writings on federalism, it may be consistent with the laissez-faire, conservative ideology discussed above. Under that view, state governments, like the federal government, should not interfere with the decisions of private individuals. The right to be free from government interference trumps federalism.

A First Amendment case from the 2000 Term reinforces the increasing importance to the federalists of the freedom not to associate. In Boy Scouts of America v. Dale, [\[FN127\]](#) the Court had to determine whether applying New Jersey's public accommodation law to the Boy Scouts violated their First Amendment right of expressive association. Once again, the federalist

majority cited *Roberts v. United States Jaycees* for the proposition that the right of freedom of association "plainly presupposes a freedom not to associate." [\[FN128\]](#)

Like the Court's earlier decision in *Hunt v. Cromartie*, [\[FN129\]](#) the Court had to contend with some factual issues to reach its holding. But unlike *Cromartie*, the federalists expressed a willingness to "independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression." [\[FN130\]](#) *1358 The Justices needed to determine whether the Boy Scouts engaged in expressive association and, if so, whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints. [\[FN131\]](#) The Court concluded that the Boy Scouts engages in expressive association without any reference to the holdings of the lower courts on this issue. [\[FN132\]](#) It then turned to resolution of the second issue. It noted that the New Jersey Supreme Court had determined that the Boy Scouts' ability to disseminate its message was not significantly altered by the forced inclusion of Dale as an assistant scoutmaster. [\[FN133\]](#) The Court disagreed with those findings. [\[FN134\]](#) An independent review of the record therefore caused the majority to reach a conclusion that was contrary to the conclusion of the state supreme court. The dissenters agreed that an independent review of the factual record was appropriate, but, based on that review, the dissent would have upheld the conclusions of the state's highest court. [\[FN135\]](#)

Neither the majority nor the dissent in *Boy Scouts* discussed the federalism issues that are implicit in the case. The dissent made a passing reference to the fact that:

The State of New Jersey has decided that people who are open and frank about their sexual orientation are entitled to equal access to employment as schoolteachers, police officers, librarians, athletic coaches, and a host of other jobs filled by citizens who serve as role models for children and adults alike. [\[FN136\]](#) But the dissenters did not note the irony in the fact that the federalists were invalidating a provision of a state statute that had also been upheld by the state's highest court in a judicial framework in which they did not need to defer to the findings of that court. Nor did the dissenters note the irony in the willingness of the Court's "conservatives" to develop a constitutional protection that is, at best, implied in the Constitution. In the hands of the majority, the right to free speech became a right to associate, which became a *1359 right not to associate, which then became a right not to expressively associate. One might have expected the federalists to be more cautious in developing these unwritten rights.

The majority's decision, however, can be explained by the Court's conservative assumption that state regulation of conduct is suspect. New Jersey's public accommodation law therefore did not receive the same level of presumed judicial acceptance as the public accommodation law at issue in *Roberts v. United States Jaycees*. It is hard to know if the Court is generally more skeptical of public accommodation laws, or simply skeptical of ones that regulate discrimination on the basis of sexual orientation. This Court's willingness to strike down portions of the Age Discrimination in Employment Act [\[FN137\]](#) and the Americans with Disabilities Act [\[FN138\]](#) suggests that its conservative attitude is not limited to sexual orientation matters.

It is probably not surprising that we could not discern a federalist thread to the First Amendment cases, because it has been a bedrock principle for several generations that the free speech, religion, and freedom of association doctrines are the same in actions involving the state and federal governments. [\[FN139\]](#) As a theoretical matter, however, it would have been possible for the Court to have sought to develop a more state-friendly jurisprudence in the *1360 speech, religion, and association areas when state action rather than federal action was at stake. [\[FN140\]](#) Until recently, in fact, the Court accepted different equal protection principles when evaluating state and federal action. [\[FN141\]](#) But we see no evidence that the federalists have tried to create more deferential standards for the states than the federal government in the speech, religion, and association areas.

B. Votes to Validate State Action

There were twenty-seven cases in which the federalists voted to validate state action and the nonfederalists predominantly voted to invalidate state action. It is not surprising that federalists would vote to validate state action given our hypothesis with regard to judicial restraint and respect for state sovereignty for federalists. Nonetheless, these cases also support the ideological trends that we found in the invalidation cases.

Seventeen of these cases involved criminal law issues, two involved religion issues, five involved free speech or association issues, and the remaining involved assorted issues like substantive due process, property issues, and equal protection. They are reported in Table 10.

***1361** Table 10: Nonunanimous Cases in Which at Least Four Federalists and No More Than Two Nonfederalists Voted to Validate State Action

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***1362** 1. Criminal Law Cases

Although there were seventeen criminal law cases in which at least four of the federalists voted to invalidate state action, none of the federalists had a significant negative coefficient on the criminal law variable. Their votes on these cases can be best understood as reflecting the significant value of the conservative ideology variable, because these cases all reflect states seeking to limit the rights of prisoners or individuals accused of crimes. Of the seventeen cases, Justice O'Connor did not vote with the federalists in five, [\[FN142\]](#) which is consistent with the fact that we did not find that Justice O'Connor had significant values on the criminal law or ideologically conservative variable. [\[FN143\]](#)

2. Religion Cases

The two religion cases in which the federalists voted to validate state action and the liberals voted to invalidate state action--*Zobrest v. Catalina Foothills School District* [\[FN144\]](#) and *Agostini v. Felton* [\[FN145\]](#)-- involved the Establishment Clause. Justice O'Connor dissented in one of these cases, continuing her pattern of not voting identically with the other federalists. [\[FN146\]](#) Justice O'Connor would ***1363** have vacated and remanded the case to avoid reaching the constitutional question. [\[FN147\]](#)

The decisions in these two cases evince a conservative political ideology because the Court concluded in each case that state financial assistance to schools in various forms did not violate the Establishment Clause. In *Zobrest*, the Court held that the Establishment Clause did not prohibit a state from providing a sign language interpreter to a student attending a Catholic high school, despite the fact that some of the messages transmitted by the interpreter would be religious. [\[FN148\]](#) In *Agostini*, the Court held that it did not violate the Establishment Clause for a Board of Education to provide supplemental on-site remedial education to children attending parochial schools. [\[FN149\]](#) The Court overruled its prior precedent to reach that result. [\[FN150\]](#) As discussed above, these cases support a conservative political ideology that can be found in all of the Court's recent Establishment Clause jurisprudence, but we see no evidence of deference to state government as motivating this development.

3. Free Speech or Association Cases

There were five cases involving free speech or association issues. One case-- *Florida Bar v. Went For It, Inc.* [\[FN151\]](#)--involved a commercial speech issue. The federalists (minus Justice Kennedy) voted to validate state action, holding that a state could constitutionally bar lawyers from using direct mail to solicit personal injury or wrongful death clients within thirty days of an accident. [\[FN152\]](#) The decision reflected four of the federalists (plus Justice Breyer) protecting the state's right to regulate a speech and property interest.

Three of the remaining cases involved state regulation of the political process. In *Burdick v. Takushi*, [\[FN153\]](#) the Court held that Hawaii's prohibition on write-in voting did not unreasonably infringe *1364 upon its citizens' rights under the First and Fourteenth Amendments. [\[FN154\]](#) In *Timmons v. Twin Cities Area New Party*, [\[FN155\]](#) the Court held that a state law prohibiting candidates from appearing on ballots as a candidate of more than one political party did not violate the freedom of association. [\[FN156\]](#) In *Arkansas Educational Television Commission v. Forbes*, [\[FN157\]](#) the Court held that a broadcaster could constitutionally exclude an independent political candidate from a state-owned public television broadcast. [\[FN158\]](#) All five federalists joined the majority opinion in the latter two cases, but Justice Kennedy dissented from the Court's decision in *Burdick*. [\[FN159\]](#) If Professor Yoo is correct that the federalists are particularly interested in protecting the integrity of the political process, one might have expected those cases to have been decided differently. Under Professor Yoo's theory, the Court should have protected voting rights at the state level by protecting the rights of voters to write-in candidates, facilitating the appearance of additional candidates on ballots, and facilitating the free speech interests of candidates.

Finally, in *City of Erie v. Pap's A.M.*, [\[FN160\]](#) the Court held that a city's public indecency ordinance, which proscribed nudity in public places, was a constitutional restriction of symbolic speech. [\[FN161\]](#) Like the decision in *Florida Bar*, the Court validated a free speech restriction that had an impact on the rights of property owners. [\[FN162\]](#)

*1365 4. Other Issues

There is only one case involving a substantive due process issue in Table 10--*Sandin v. Conner*--but the decision in that case can be understood as consistent with the criminal law results as reported above. [\[FN163\]](#) *Sandin* involved a due process liberty interest of a prisoner. The state action was conservative and involved the conduct of a prisoner. [\[FN164\]](#) All five federalists voted to validate the state action. Our regression results support the argument that the votes of Chief Justice Rehnquist, Justice Scalia, and Justice Thomas can be explained by the fact that the state action was conservative. [\[FN165\]](#) (The case was decided after 1991, when Justice Scalia's votes could be predicted on an ideological basis.)

Similarly, there is only one case in Table 10 involving a property interest: *Bennis v. Michigan*. [\[FN166\]](#) In Section III.A, we saw that the federalists were often nonprotective of state property interests when they perceived the state to be taking property from private citizens. Nonetheless, *Bennis* is a takings case involving the validation of state action in which the federalists voted as a bloc. [\[FN167\]](#) In *Bennis*, the state seized property after the spouse was convicted of violating state law. The "private citizen" had a criminal law connection and the challenged state action was conservative. Hence, we can understand the votes of Chief Justice Rehnquist, Justice Scalia, and Justice Thomas as being consistent with their ideological voting. Justice Kennedy voted with the nonfederalists on this case, which is consistent with the fact that he does not have a significant coefficient for the liberal state action or criminal law variables.

*1366 Finally, there is the infamous decision in *Bush v. Gore*, [\[FN168\]](#) which technically validated the decision of the Florida Secretary of State to certify the results of the 2000 Presidential election on behalf of George W. Bush. In considering the votes in this case, it is important to remember that our data cannot predict the result in any discrete case. Our data merely reflect the pattern that emerges from a series of decisions. We coded *Bush v. Gore* consistently with our larger coding scheme--as an example of the Court validating conservative state action--because it ruled for the state in a challenge brought on behalf of the voters.

Nevertheless, we determined the predicted probabilities for the likelihood that various members of the Rehnquist Court would vote to invalidate state action in *Bush v. Gore* given the characteristics of the case: the fact that the state action was conservative, that the Court accepted the case under its certiorari jurisdiction, that no amicus briefs were filed, and that voting was at issue. We found that the likelihood of voting to invalidate state action (that is, voting for Gore) was as follows:

- Justice Kennedy (.598): His inclination to invalidate state action on cases involving voting rights would make him more likely than not to invalidate state action in this case, but the fact that his likelihood of invalidating here is close to 0.5 suggests that the case would be a close one for him.
- Justice O'Connor (.329): Her strong inclination to reverse lower courts that invalidate state action would make her more likely to vote to validate state action by reversing the state's highest court. Her deference to lower state courts is overridden by her even stronger propensity to reverse lower courts that invalidate state action.
- Chief Justice Rehnquist (.367): His desire to preserve conservative state action coupled with his desire to reverse lower courts that invalidate state action would make him more likely than not to validate state action.
- Justice Scalia (.437): His desire to preserve conservative state action coupled with his desire to reverse lower courts that invalidate state action would make him more likely than not to ***1367** validate state action, but it would be a close case for him because of a trend toward significance on the voting rights variable.
- Justice Souter (.761): His desire to invalidate conservative state action would make him more likely than not to invalidate state action.
- Justice Stevens (.187): His results are a bit surprising, but are explained by the fact that he has a trend toward significance on the voting rights issue ($p=0.13$) in the direction of validating state action when voting is the issue. That factor would cause him to be more likely than not to put aside consideration of the ideology of the state action and vote to validate the state action.
- Justice Thomas (.272): His desire to preserve conservative state action coupled with his desire to reverse lower courts that invalidate state action would make him more likely than not to validate state action.

Our results therefore suggest that ideological conservatism plus a "policing function" (that is, reversing a lower court that had invalidated state action) would predict that Chief Justice Rehnquist and Justices Scalia, Thomas, and O'Connor would vote to validate the state action in *Bush v. Gore*. For Justice Kennedy, however, we would predict that his concern for voting rights issues would outweigh his desire to perform a "policing function." But, oddly, we would predict a 5-4 vote with a majority comprised of Justices O'Connor, Rehnquist, Scalia, Thomas, and Stevens. We would also presume that Justices Breyer and Ginsburg, whom we did not study, would vote consistently with Justice Souter for the purpose of this prediction. We would predict that Justice Stevens's desire to validate state action on voting rights cases would override his ideological liberalism. Justices Stevens and Kennedy, however, both voted inconsistently with their overall trend lines. As we said previously, of course, our data are not designed to predict the votes in discrete cases. The data is merely supposed to identify trends that one could use to hypothesize a result.

More importantly, our data support the argument that the decision in *Bush v. Gore* is consistent with one model of federalism--the "policing function" model--and inconsistent with another ***1368** model of federalism--a concern for voting rights. Conservative ideology appears to have been the tie-breaker between the pulls of these two models of federalism, because conservative ideology rendered results consistent with the "policing function" model. Although *Bush v. Gore* caused some commentators to complain that the federalists are sometimes inclined to vote on an ideological basis, [\[FN169\]](#) we believe that a broader examination of the legacy of the Rehnquist Court reflects that *Bush v. Gore* was not an unusual intrusion at all. Three of the federalists have shown themselves willing to intervene in matters of state sovereignty for ideological reasons, and those interventions can also be consistent with some federalism principles. Thus, *Bush v. Gore* can be understood as reflecting both conservative ideology and federalism.

Conclusion: The Federalism Label Revisited

Our results suggest that there is not one model of federalism operating for the so-called federalists on the Rehnquist Court. Table 11 summarizes the results of our study. [\[FN170\]](#)

***1369** Table 11: Summary of Federalism Results

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***1370** Our data suggest that the current federalist Justices employ at least four different versions of federalism. Our results suggest that the voting of the federalists can be predicted, in part, on the basis of a "policing function," in that they are likely to reverse lower courts that invalidate state action. Justice O'Connor's version of federalism is consistent with this "policing" function, but she is also more likely to affirm a lower state court than a lower federal court when it validates state action. This result suggests that she has more respect for lower state courts than lower federal courts. We have fewer significant results for Justice O'Connor than for any other Justice, making her voting record the hardest to predict. Her reputation as the "swing vote" seems appropriate in light of our data.

The second version of federalism predicts the voting behavior of Chief Justice Rehnquist and Justice Thomas. Like each of the federalists, they perform a "policing" function. They protect state sovereignty by correcting errors by lower courts when they invalidate state action. They also often protect separation of powers principles by invalidating state action when a preemption issue is present. Finally, they have an increased likelihood of invalidating state action when the underlying state action is liberal.

The third version of federalism is very similar to the second version and matches the voting behavior of Justice Scalia. Like the other federalists, his results are consistent with the "policing" function. In addition, he has an increased likelihood of invalidating state action when thirty or more states file briefs supporting state action. This factor provides some evidence for the view of Justice Scalia as independent. [\[FN171\]](#) Finally, Justice Scalia has a strong trend toward significant results on the ideology factor for the entire time period of our database and his results are significant after 1991, when Justice Thomas joined the Court. These results suggest that Justice Thomas's presence on the Court may have affected the likelihood that Justice Scalia will vote on a conservative, ideological basis. Although Justice Scalia does not have a significant value on the voting rights variable, he voted identically with Justice ***1371** Thomas on all but one of the voting rights cases. Aside from Justice Scalia's tendency to invalidate state action when thirty or more states support state action, Justices Scalia's voting records look very similar to Justice Thomas's.

The fourth version of federalism predicts the voting behavior of Justice Kennedy. Like the other federalists, his voting behavior reflects the "policing" function for the Court. In addition, he is more likely to invalidate state action when a voting rights or preemption issue is in a case. He also has an increased likelihood of validating state action when nonprofit organizations support state action. Finally, he does not have a predisposition to vote on an ideological basis.

Our data suggest that there is not one universally-followed model for federalism on the Rehnquist Court. In other words, federalism does not appear to be a coherent philosophy for the federalists on the Rehnquist Court. This inconsistency might suggest that the Justices are using federalism instrumentally to achieve ideological results that they desire rather than applying federalism consistently. In a previous article, Professors Colker and Brudney argued that the Court's Eleventh Amendment jurisprudence is not best understood as a federalism story. [\[FN172\]](#) Instead, Professors Colker and Brudney describe that jurisprudence, in part, as reflecting a story about the Court wanting to assert more power for itself at the expense of Congress, by defining the substantive meaning of the Commerce Clause and the Fourteenth Amendment. While our current examination of cases involving the validity of state action supports the notion that the federalists do operate under some federalism principles, our data also reflect that the core federalists--Chief Justice Rehnquist, Justice Thomas, and Justice Scalia (after

1991)--have a propensity to act on the basis of conservative ideology.

Our data do not support the argument expressed by some political scientists that federalism plays no role in explaining the voting behavior of the Supreme Court. [\[FN173\]](#) But it is also true that, while law is not only politics, conservative ideology is an important predictor *1372 of the voting behavior of the core federalists on the Rehnquist Court. The operation of ideology may help create the incoherency of federalism among the federalists on the Rehnquist Court.

*1373 Appendix

Regression Results For Each Justice

The coding rules for most of the variables should be self-evident. A positive result means that the Justice was inclined to invalidate state action when the variable was significant. We have listed below the coding of some variables that require explanation.

Liberal State Action: 0=conservative; 1=liberal

Appellate Review: 0=before Rule change, mandatory; 1=after Rule change, discretionary

Free Speech: Includes Free Speech & Religion Clauses

Equal Protection: Includes equal protection excluding voting rights issues

Voting: Voting issues under Fourteenth or Fifteenth Amendments

Commercial/Property: Noncriminal takings cases & Dormant Commerce Clause

Religion: Freedom of Religion and Establishment Clause

Criminal: Criminal law issues relating to persons accused of crime or in prison

Preemption: Supremacy clause

We also report results for interaction effects. Those effects are noted in the results through the use of a multiplication symbol, such as "Free Speech X Liberal State Action." An interaction result allows us to investigate whether a Justice's propensity to invalidate state action was contingent not just on the issue area but, for example, on the issue and the ideology of the state action under review. For example, it may be the case that Justice Blackmun would be less likely to invalidate state action that expanded freedom of speech (liberal) but more likely to invalidate state action that constricts free speech rights (conservative). This conclusion would not be obvious from the results on the free speech variable, so we constructed interaction terms to test this effect. We found no cases where the interaction term was significant. This lack of significance *1374 may be due to the fact that an interaction investigation makes a small number of cases in any category even smaller. We did not create an interaction term for preemption cases or those dealing with commercial/property issues, because these issues did not clearly fall on an ideological dimension. (Commercial/property primarily included Dormant Commerce Clause which appeared to be nonideological.)

There are incomplete results for Justices when a variable was a perfect predictor, that is, the Justice either voted to invalidate all the cases in the sub-category or voted to invalidate all of them. In such an instance, it is not statistically appropriate to report the results. Typically, this problem occurred when there were few instances of that variable being present in the database, such as when we were examining interaction effects.

Significant Results ($p < .05$, two-tailed test) are printed in boldface Type and marked with an asterisk. The time period under investigation for each Justice is indicated in parentheses. The database is current through the 2000-2001 term of the Rehnquist Court.

***1375** Blackmun (1986-1994)

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***1376** Brennan (1986-1990)

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***1377** Kennedy (1988-2001)

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***1378** Marshall (1986-1991)

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***1379** O'Connor (1986-2001)

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***1380** Rehnquist (1986-2001)

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***1381** Scalia (1986-2001)

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***1382** Scalia (1991-2001) (After Thomas Joined the Court)

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***1383** Souter (1990-2001)

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***1384** Stevens (1986-2001)

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***1385** Thomas (1991-2001)

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***1386** White (1986-1993)

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[FN1]. See, e.g., Mitchell S. Lustig, *Rehnquist Court Redefines the Commerce Clause*, 224 N.Y. L.J. 1 (2000) (describing the new mantra of the Rehnquist Court as "the Tenth Amendment and States' Rights"); Tony Mauro & Jonathan Ringel, *Supreme Court Wrap-Up: U.S. Supreme Court 1999-2000 Term Review*, 161 N.J. L.J. 709 (2000) (describing the Court as responding to "direct attacks on state sovereignty"); see also Vicki C. Jackson, [Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity](#), 75 *Notre Dame L. Rev.* 953 (2000) (condemning the Court's expansion of governmental immunity); Robert F. Nagel, *The Future of Federalism*, 46 *Case W. Res. L. Rev.* 643 (1996) (arguing that the Court's states' rights decisions do not signal a shift in federal-state relations); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 *S. Cal. L. Rev.* 1311 (1997) (arguing that the Court's "political safeguards" approach to judicial review and state sovereignty endangers state protection of individual rights).

[FN2]. See, e.g., Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (1993) (contending that a Justice's votes may be predicted based on his or her ideology); Sue Davis, *Rehnquist and State Courts: Federalism Revisited*, 45 *W. Pol. Q.* 773 (1992) (arguing that conservative ideology dictates Chief Justice Rehnquist's votes); Harold J. Spaeth, *Justice Sandra Day O'Connor: An Assessment*, in *An Essential Safeguard: Essays on the United States Supreme Court and its Justices 81, 94-95* (D. Grier Stephenson, Jr. ed., 1991) (assessing Justice O'Connor's ideology, as evidenced by her votes); Harold J. Spaeth, *The Judicial Restraint of Mr. Justice Frankfurter-- Myth or Reality*, 8 *Midwest J. Pol. Sci.* 22 (1964) (arguing that judicial decisions result from a Justice's stance on public policy issues). For further discussion, see *infra* Section I.E.

[FN3]. Ruth Colker & James J. Brudney, [Dissing Congress](#), 100 *Mich. L. Rev.* 80, 80-84 (2001). For other commentary that offers alternatives to the federalism explanation, see A. Christopher Bryant & Timothy J. Simeone, [Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes](#), 86 *Cornell L. Rev.* 328 (2001); William W. Buzbee & Robert A. Shapiro, [Legislative Record Review](#), 54 *Stan. L. Rev.* 87 (2001).

[FN4]. We label these Justices federalists (on a provisional basis) because they constitute a core of Justices who have consistently used the Eleventh Amendment to invalidate federal action, purportedly to protect state sovereignty. They have frequently formed a five-vote majority to invalidate federal action. See, e.g., [Bd. of Trs. v. Garrett](#), 531 U.S. 356 (2001) (5-4 vote); [Kimel v. Fla. Bd. of Regents](#), 528 U.S. 62 (2000) (same); [United States v. Morrison](#), 529 U.S. 598 (2000) (same); [Alden v. Maine](#), 527 U.S. 706 (1999) (same); [Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank](#), 527 U.S. 627 (1999) (same); [Printz v. United States](#), 521 U.S. 898 (1997) (same). Assuming that these Justices' votes on cases involving federal action are consistent with federalism, we are asking whether their votes on cases involving state action are consistent with federalism. By contrast, we label as nonfederalists Justices Blackmun, Brennan, Breyer, Ginsburg, Marshall, Souter, and Stevens. We also generally consider Justice White to be a nonfederalist because he voted with the "nonfederalist" bloc on most cases outside the abortion context during the 1991 and 1992 Terms. See *infra* note 83.

[FN5]. See Colker & Brudney, *supra* note 3, at 111. Although Professors Colker and Brudney do not call that substantive view "ideological conservatism," we believe that label describes the Court's decisions in the equal protection cases most accurately. We will discuss the expression of the Rehnquist Court's political conservatism in Part III, focusing some attention on how the Court has articulated a conservative ideology in both the federal and state action cases.

[FN6]. Professor Erwin Chemerinsky hints at such an analysis when he contrasts Justice O'Connor's opinion in [Bush v. Gore](#), 531 U.S. 98 (2000), with her opinion in other federalism cases. Erwin Chemerinsky, [Justice O'Connor and Federalism](#), 32

[McGeorge L. Rev. 877, 892 \(2001\)](#). He observes:

The conclusion is that federalism is a value that the conservative Justices, including Justice O'Connor, invoke when it advances their conservative agenda. Justice O'Connor, and the other four Justices who join her, want to limit federal power, as conservatives generally do. Federalism is the guise for doing this. But in *Bush v. Gore*, where the conservative Justices wanted to see George W. Bush prevail, federalism was given no weight whatsoever. Justice O'Connor's vote in *Bush v. Gore* speaks volumes as to what her commitment to federalism is really all about.

Id. Professor Chemerinsky, however, follows other commentators in focusing nearly exclusively on the cases involving the validity of federal law to determine whether the Court is acting consistently with federalism. *Id.* at 879-85.

[FN7]. A few commentators have examined the ideological underpinnings of some of the "federalists." See, e.g., Lawrence Friedman, The [Limitations of Labeling: Justice Anthony M. Kennedy and the First Amendment](#), 20 *Ohio N.U. L. Rev.* 225 (1993) (arguing that Justice Kennedy's decisions cannot be easily categorized on partisan or ideological grounds); Stephen E. Gottlieb, Three Justices in Search of a Character: The [Moral Agendas of Justices O'Connor, Scalia and Kennedy](#), 49 *Rutgers L. Rev.* 219 (1996) (describing the non-process values that motivate the conservative bloc).

Justice O'Connor's decisions have been particularly subject to discussion on ideological grounds. See, e.g., Richard A. Cordray & James T. Vradelis, Comment, The [Emerging Jurisprudence of Justice O'Connor](#), 52 *U. Chi. L. Rev.* 389, 423-36 (1985) (documenting Justice O'Connor's federalist views); Charles D. Kelso & R. Randall Kelson, [Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law](#), 32 *McGeorge L. Rev.* 915 (2001) (discussing Justice O'Connor's impact on the Court's decisions); Suzanna Sherry, [Civic Virtue and the Feminine Voice in Constitutional Adjudication](#), 72 *Va. L. Rev.* 543, 592-616 (1986) (hypothesizing that Justice O'Connor's feminist perspective might result in a feminist jurisprudence); Spaeth, Justice Sandra Day O'Connor: An Assessment, *supra* note 2, at 94-95 (arguing that Justice O'Connor's votes illustrate a conservative ideology).

[FN8]. In order to collect the legal decisions that we studied for this Essay, we examined several sources. First, we obtained a list of decisions from the Congressional Research Service in which CRS concluded that the Court had invalidated state constitutions, statutes, or municipal ordinances. This list, however, only included invalidations of state action. We also wanted to study validation of state action. For that purpose, we used the Supreme Court Database contained on the website of the Michigan State University Program for Law and Judicial Politics at <http://www.ssc.msu.edu/pljp/sctdata1.html>. We also used the Supreme Court Database to ascertain the ideological direction of the underlying state action: If for example, the Supreme Court's decision was conservative and invalidated the state action, then we coded the underlying state action as liberal. In addition, we checked our results against a list of cases involving invalidation of state action listed in a well known political science publication. See Lee Epstein et al., *The Supreme Court Compendium: Data, Decisions, and Developments* 162-74 (2d ed. 1996). Finally, to account for decisions from the past year, which are not yet included in these sources, we examined every decision in the most recent volumes of the United States Reports to determine what recent cases involved the question of the validity of state action. For each of the secondary sources that we used, we found errors in those sources that we corrected, such as incorrect citations, incorrect characterizations of the major issue in a case or an incorrect statement of the lower court holding.

[FN9]. For the purposes of this Essay, "state action" includes cases in which the Court is asked to invalidate action taken at the city or county level, as well as directly by the state, as violative of the United States Constitution. Because we understand federalists to believe that decisions can often be best made at the local government level as opposed to the national level, we believe this definition best helps us understand whether a federalism perspective can explain the Rehnquist Court's record of invalidating governmental action. The cases involving cities and counties, however, represent less than 10% of the cases the Rehnquist Court has considered, so we do not believe that this definition of "state action" has affected our results significantly.

For the purposes of this Essay, we have also excluded certain cases that arguably could be included within the meaning of "state action" because they would not contribute to meaningful results for our purposes. Thus, we have excluded cases in which the Court did not reach a decision on the merits-- such as cases involving standing, mootness, and justiciability--because the Court did not reach the substantive constitutional issues in these cases. In addition, we have excluded cases involving states as both plaintiffs and defendants because, by definition, the Court had to choose a state as the winner (and loser), and these cases cannot inform us as to the Court's predisposition to invalidate state action on ideological or federalist grounds.

[FN10]. The term "conservative" has multiple meanings. For an excellent survey of those multiple meanings, see Gottlieb, *supra* note 7, at 223 n.3. The term "conservative" can include moral conservatives, economic conservatives, and traditional conservatives--those who simply stress caution. *Id.* For the purposes of this Essay, however, we use the term "conservative" in the moral or economic sense because those are the meanings employed in political science. For further discussion, see *infra* note 57.

[FN11]. As a theoretical matter, we believe that a pure "federalist" should be ideologically neutral. See *infra* note 55. As a practical matter, however, we recognize that some people might argue that one can be both a federalist and a conservative. We have separated those labels to see if one or both of them apply to the so-called "federalists" on the Rehnquist Court.

[FN12]. [531 U.S. 98 \(2000\)](#). We do not consider *Bush v. Gore* to be an example of the Court invalidating state action because its holding in that case technically affirmed the result certified by Florida's Secretary of State. The case, however, was very difficult to categorize for our purposes. The Court did conclude that Florida violated equal protection principles by counting votes without a clear, uniform standard but refused to remand the case to the Florida courts because it found that Florida law required that the counting be completed by December 12, 2000. *Id.* at 109, 110-11. Nonetheless, the Court's decision in *Bush v. Gore* did result in an unprecedented interference with a state's election process and, for that reason, has generally been seen as an example of conservative activism on the part of the Court. See, e.g., Jack M. Balkin, [Bush v. Gore and the Boundary Between Law and Politics](#), 110 *Yale L.J.* 1407, 1432 (2001) (criticizing the Court for accepting certiorari in *Bush v. Gore*); Erwin Chemerinsky, [Bush v. Gore Was Not Justiciable](#), 76 *Notre Dame L. Rev.* 1093 (2001) (arguing that the Court should have used self-restraint and not granted certiorari). Some commentators have tried to explain why the Court was entitled to interfere in a state election process. See, e.g., Richard A. Epstein, "In Such Manner as the Legislature Thereof May Direct": The Outcome in [Bush v. Gore Defended](#), 68 *U. Chi. L. Rev.* 613 (2001); Richard A. Posner, [Bush v. Gore: Prolegomenon To An Assessment](#), 68 *U. Chi. L. Rev.* 719 (2001); John C. Yoo, In [Defense of the Court's Legitimacy](#), 68 *U. Chi. L. Rev.* 775 (2001). Other commentators have suggested that Congress could have resolved the election dispute without a constitutional crisis and that the Court was wrong to end the recounting process. See, e.g., Michael W. McConnell, [Two-and-a-Half Cheers for Bush v. Gore](#), 68 *U. Chi. L. Rev.* 657 (2001); see also Samuel Issacharoff, [Political Judgments](#), 68 *U. Chi. L. Rev.* 637 (2001) (arguing that the Court should have used self-restraint and not resolved the election dispute itself). Nonetheless, for purposes of our study, we did not consider *Bush v. Gore* to be an example of the Supreme Court invalidating state action.

[FN13]. [Stenberg v. Carhart](#), 530 U.S. 914 (2000) (5-4 majority included only Justice O'Connor); [Boy Scouts of Am. v. Dale](#), 530 U.S. 640 (2000) (5-4 majority included all five federalist Justices); [Cal. Democratic Party v. Jones](#), 530 U.S. 567 (2000) (7-2 majority included all five federalists); [Apprendi v. New Jersey](#), 530 U.S. 466 (5-4 vote included Justices Scalia and Thomas); [Crosby v. Nat'l Foreign Trade Council](#), 530 U.S. 363 (2000) (9-0 vote); [Santa Fe Indep. Sch. Dist. v. Doe](#), 530 U.S. 290 (2000) (6-3 majority included Justices O'Connor and Kennedy); [Troxel v. Granville](#), 530 U.S. 57 (2000) (6-3 majority included Chief Justice Rehnquist and Justice O'Connor; Justice Thomas concurred in the result); [Carmell v. Texas](#), 529 U.S. 513 (2000) (5-4 majority included Justices Scalia and Thomas); [Florida v. J.L.](#), 529 U.S. 266 (2000) (9-0 vote); [United States v. Locke](#), 529 U.S. 89 (2000) (9-0 vote); [Vill. of Willowbrook v. Olech](#), 528 U.S. 562 (2000) (9-0 vote); [Rice v. Cayetano](#),

[528 U.S. 495 \(2000\)](#) (7-2 majority included all five federalists); [Hunt-Wesson, Inc. v. Franchise Tax Bd., 528 U.S. 458 \(2000\)](#) (9-0 vote); [Flippo v. West Virginia, 528 U.S. 11 \(1999\)](#) (9-0 vote).

[FN14]. [Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 \(2001\)](#) (6-3 majority included all five federalist Justices); [Palazzolo v. Rhode Island, 533 U.S. 606 \(2001\)](#) (5-4 vote included all five federalists); [Good News Club v. Milford Cent. Sch., 533 U.S. 98 \(2001\)](#) (6-3 majority included all five federalists); [Penry v. Johnson, 532 U.S. 782 \(2001\)](#) (6-3 majority included Justices O'Connor and Kennedy); [Bartnicki v. Vopper, 532 U.S. 514 \(2001\)](#) (6-3 vote included Justices O'Connor and Kennedy); [Egelhoff v. Egelhoff, 532 U.S. 141 \(2001\)](#) (7-2 majority included all five federalists); [Ferguson v. City of Charleston, 532 U.S. 67 \(2001\)](#) (6-3 majority included Justice O'Connor; Justice Kennedy concurred in the result); [Shafer v. South Carolina, 532 U.S. 36 \(2001\)](#) (7-2 majority included Chief Justice Rehnquist and Justices Kennedy and O'Connor); [Cook v. Gralike, 531 U.S. 510 \(2001\)](#) (9-0 vote; Chief Justice Rehnquist and Justice O'Connor concurred in the result); [Ohio v. Reiner, 532 U.S. 17 \(2001\)](#) (9-0 vote); [Buckman v. Plaintiffs Legal Comm., 531 U.S. 341 \(2001\)](#) (9-0 vote; Justices Stevens and Thomas concurred in the result); [Fiore v. White, 531 U.S. 225 \(2001\)](#) (9-0 vote); [City of Indianapolis v. Edmond, 531 U.S. 32 \(2000\)](#) (6-3 vote included Justices O'Connor and Kennedy).

[FN15]. *Supra* notes 13-14.

[FN16]. This data includes the period between the 1991 Term and the 2000 Term. As mentioned previously, "state action" includes cases in which the Court is asked to invalidate action taken at the city or county level, as well as directly by the state. *Supra* note 9. It also includes both legislative and executive action by governmental officials. For an excellent discussion of the transformation of the Court from 1986, when Justice Rehnquist became Chief Justice, to 1991, when Justice Thomas joined the Court, see generally David Savage, *Turning Right: The Making of the Rehnquist Supreme Court* (1992). For an account that disputes that a conservative revolution has occurred under Chief Justice Rehnquist's leadership, see James F. Simon, *The Center Holds* (1995). Writing in 1995, however, Professor Simon may have missed the most important period under Chief Justice Rehnquist's leadership and predicted too soon that the Court would be moderate in its decisions.

[FN17]. For an excellent discussion of the decisions of the Warren Court, see *The Warren Court: A Retrospective* (Bernard Schwartz ed., 1996). In writing about the Warren Court's decisions in the area of racial equality, Professor Julius Chambers argued: "It simply cannot be denied, however, that the decisions of the Warren Court in the area of race revolutionized our society by beginning in earnest the ongoing challenge to eliminate, root and branch, the ugly vestiges of American slavery." Julius Chambers, *Race and Equality: The Still Unfinished Business of the Warren Court*, in *The Warren Court*, *supra*, at 21.

[FN18]. We recognize that this is at best an imperfect comparison given substantial differences in subject matter over this broad time period.

[FN19]. A conventional definition of federalism would require that a federalist Justice be both neutral ideologically and restrained judicially. See *infra* Part I. Hence, some might argue that a Justice is not a "true" federalist if he or she invalidates state action to protect conservative political values even if that Justice also invalidates state action to protect separation of powers principles. In this Essay, we will discuss federalism as being comprised of five components--judicial restraint, respect for policies that are important to the state, protection of separation of powers principles, protection of voting rights, and neutral ideology--so that we can determine if Justices fit some but not all of these criteria for federalism.

[FN20]. We have only examined judicial philosophy as applied to Supreme Court Justices. Although these categories may also apply to lower court judges, precedent should play a greater role in predicting the votes of lower court judges and might mediate the effect of a judge's judicial philosophy on voting behavior, and our model will therefore be less useful in predicting the votes of lower court judges. Hence, we confine our analysis in this Essay to the Justices of the Supreme Court.

[FN21]. In order to engage in quantitative analysis, we coded the votes of individual Justices in cases in which the Court had to decide whether to invalidate state action during the Warren, Burger, and Rehnquist Courts. We also coded the characteristics of these cases such as whether the lower court was a state or federal court, whether the Supreme Court decision was liberal or conservative, whether the Supreme Court invalidated the government action under review, whether the lower court invalidated the government action, and whether various amici participated in the case by filing briefs with the Supreme Court. Our complete regression results are contained in the Appendix.

[FN22]. For a detailed discussion of our quantitative methodology, see *infra* Part II. Our qualitative approach is described *infra* Part III.

[FN23]. See, e.g., Earl M. Maltz, [Justice Kennedy's Vision of Federalism](#), 31 *Rutgers L.J.* 761, 770 (2000) (arguing that Justice Kennedy's endorsement of state sovereignty in [Alden v. Maine](#), 527 U.S. 706 (1999), "has a hollow ring"); Robert F. Nagel, [Judges and Federalism: A Comment on "Justice Kennedy's Vision of Federalism."](#) 31 *Rutgers L.J.* 825, 827-28 (2000) (attributing Justice Kennedy's lack of support for state rights to attitudes towards authority inherent in judging).

[FN24]. We tried to conduct this kind of analysis by looking quantitatively at the interaction effects between ideology and issues, but we found that issue coding was too inaccurate to yield reliable results, especially in light of the small number of cases within each issue category.

[FN25]. For an explanation for our inclusion of "ideological neutrality," see *supra* note 19. Our rationale for choosing these five factors is discussed when we describe each factor individually. See *infra* Sections I.A.-I.E.

[FN26]. The Federalist Society has a web page on which it offers suggested reading for pre-law students. See The Conservative & Libertarian Pre-Law Reading List: An Introduction to American Law for Undergraduates and Others, <http://www.fed-soc.org/Publications/readinglist/readinglist.htm> (last visited on May 13, 2002). We used that web page to identify authors whose work is central to a federalist perspective. Each of the authors we discuss in Part I is highlighted prominently on the Federalist Society web page.

[FN27]. While most federalists argue that the Court should act with restraint, some federalists support an activist role for the Court. For example, Scott Fruehwald recently praised what he described as the "new judicial activism" as "a healthy reaction to the Court's previous failure to police the structural lines inherent in the Constitution." Scott Fruehwald, [If Men Were Angels: The New Judicial Activism in Theory and Practice](#), 83 *Marq. L. Rev.* 435, 494-95 (1999). He argues that this activism in the service of federalism has been "substantively neutral" as evidenced by the fact that "courts using this philosophy have struck down both liberal and conservative statutes, on subjects ranging from laws relating to violence against women and the environment to laws protecting religion." *Id.* Fruehwald would therefore describe the current Rehnquist Court as activist, federalist, and non-ideological.

[FN28]. Professor Alexander M. Bickel offered a very strong version of a restrained federalist perspective. Alexander Bickel, *The Supreme Court and the Idea of Progress* 94 (1978). He was a vocal critic of the activism of the Warren Court, arguing that the Court could not continue to earn respect if it repeatedly invalidated state action. He stated:

The Court's effectiveness, it is often remarked, depends substantially on confidence, on what is called prestige. It is likely, therefore--the proposition has never previously had a real empirical test, but the Warren Court may have provided one--that there is a natural quantitative limit to the number of major, principled interventions the Court can permit itself per decade, let us say. It is a matter of credibility. Will anyone who is not in a revolutionary state of wholesale disillusionment with the society continue to believe that basic principle is in question if the Court puts it in question every other Monday? And will anyone whose frame of mind is one of total disillusionment with the system be long content to take his principles from the

Court? Revolutionaries are not a reliable constituency for judges.
Id.

[FN29]. Herbert Wechsler, *Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 558-60 (1954). He notes that legal scholarship has emphasized the importance of legal processes to enforce the distribution of authority between the nation and the states. *Id.* at 543-44. Professor Wechsler argues, however, that "the existence of the states as governmental entities and as the sources of the standing law is in itself the prime determinant of our working federalism, coloring the nature and the scope of our national legislative processes from their inception." *Id.* at 546. He also argues that federalism is served through the selection and composition of the national authority: "[T]he states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics." *Id.*

[FN30]. [469 U.S. 528 \(1985\)](#).

[FN31]. [Id. at 550](#).

[FN32]. [Id. at 552](#).

[FN33]. In 1998, Professor Yoo authored an article in which he tried to provide guidance on "where the line between the two spheres of government ought to rest." John C. Yoo, [Sounds of Sovereignty: Defining Federalism in the 1990s](#), 32 *Ind. L. Rev.* 27, 28 (1998).

[FN34]. "A reading of the Bill of Rights reveals that many of its guarantees [sic] are not written as individual rights as such, but as restrictions on what the federal government may do with its enumerated powers." [Id. at 33](#). He goes on to argue: "Furthermore, the Bill of Rights, to the extent that it protects rights rather than restricts powers, recognizes rights that belong to those in the majority, rather than the minority, to the States, rather than to individuals." [Id. at 34](#).

[FN35]. [Id. at 36](#).

[FN36]. See Yoo, *supra* note 1, at 1311-15.

[FN37]. See *id.* at 1396-97 (arguing that state legislatures play a more important role in protecting individual rights than do the courts); see also Yoo, *supra* note 33 (arguing that federalism is about keeping the state and national governments in their respective spheres).

[FN38]. See Davis, *supra* note 2, at 774; see also [Bush v. Gore](#), 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) ("In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns.").

[FN39]. Although we had originally intended to consider each of these organizations separately for the purpose of quantitative analysis, we ultimately combined them because they usually acted consistently. When one of these organizations filed an amicus brief, usually at least one other organization did so as well. Of the fifty-seven cases in which these organizations filed amicus briefs, there were only nine instances in which only one of them filed an amicus brief.

[FN40]. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129 (1893).

[\[FN41\]](#). *Id.* at 148-49. He states:

The judicial function is merely that of fixing the outside border of reasonable legislative action, the boundary beyond which the taxing power, the power of eminent domain, police power, and legislative power in general, cannot go without violating the prohibitions of the constitution or crossing the line of its grants.

Id. at 148.

[\[FN42\]](#). He argues:

If a State legislature passes a law which is impeached in the due course of litigation before the national courts, as being in conflict with the supreme law of the land, those courts may have to ask themselves a question different from that which would be applicable if the enactments were those of a co-ordinate department[. W]hen the question is whether State action be or be not conformable to the paramount constitution, the supreme law of the land, we have a different matter in hand. Fundamentally, it involves the allotment of power between the two governments,--where the line is to be drawn. True, the judiciary is still debating whether a legislature has transgressed its limit; but the departments are not co-ordinate, and the limit is at a different point. The judiciary now speaks as representing a paramount constitution and government, whose duty it is, in all its departments, to allow to that constitution nothing less than its just and true interpretation; and having fixed this, to guard it against any inroads from without.

Id. at 154-55.

[\[FN43\]](#). [531 U.S. 98 \(2000\)](#).

[\[FN44\]](#). *Yoo*, supra note 12, at 784-86 (2001). Professor Yoo's argument does not apply merely to Presidential elections. He argues that the Court has a legitimate role in overseeing all state elections despite principles of federalism that provide some state autonomy with respect to voting rights matters. He says:

Nonetheless, our constitutional system today permits substantial federal intervention into state elections. Congress, for example, has required states to use single-member districts for congressional elections since 1842. The Fourteenth and Fifteenth Amendments to the Constitution guarantee the individual right of each citizen to vote on an equal basis and prohibit states from attempting to discriminate against protected groups by denying them access to the voting booth . *Bush v. Gore*'s per curiam holding found that the Fourteenth Amendment's guarantee of equal treatment in voting applied not just to access to the ballot box, but also to a state's treatment of a vote after it is cast.

Id. at 784 (internal citations omitted).

[\[FN45\]](#). *Id.* at 786.

[\[FN46\]](#). Of course, others might conclude that it was the executive branch rather than the judicial branch in the Florida Presidential election that was violating the integrity of the election process, making *Bush v. Gore* a typical rather than unusual election case.

[\[FN47\]](#). Professor Yoo appears to reject the argument "that national intervention into state electoral systems violates the basic structure of our federal system of government." *Yoo*, supra note 12, at 785.

[\[FN48\]](#). Of course, if our hypothesis is incorrect (in terms of the direction of influence) then we would be able to learn that fact when we analyze our results. As we will discuss, *infra* Section II.B, we found that Justice Kennedy is inclined to invalidate state action in cases involving voting rights issues. Thus, it appears that we did pick a plausible hypothesis for one federalist.

[\[FN49\]](#). See generally *The Politics of Law: A Progressive Critique* (David Kairys ed., 1982) (suggesting that the idealized

model of judicial decisionmaking hides a value-laden system of law).

[FN50]. Judge Richard Posner is willing to accept the possibility that legal decisions may have to be defended on pragmatic, political grounds rather than on neutral principles. See Richard A. Posner, *Interpretation Revisited*, in *Contemporary Perspectives on Constitutional Interpretation* 101, 114-15 (Susan J. Brison & Walter Sinnott-Armstrong eds., 1993) (offering a pragmatic defense of the Court's decision in [Brown v. Board of Education, 349 U.S. 294 \(1995\)](#)). Professor Michael Perry has also defended the judge's proper role in constitutional adjudication as involving "both law and politics." Michael J. Perry, *The Constitution in the Courts* 204 (1994). By contrast, Professor Robert Bork offered a strong articulation of the need for judges to render decisions on "neutral" rather than ideological grounds when he argued:

The Madisonian dilemma is resolved in the way that the founders resolved it, and the judge accepts the fact that he is bound by that resolution as law. He need not, and must not, make unguided value judgments of his own.

This means, of course, that a judge, no matter on what court he sits, may never create new constitutional rights or destroy old ones. Any time he does so, he violates not only the limits to his own authority but, and for that reason, also violates the rights of the legislature and the people.

Robert H. Bork, *The Original Understanding*, in *Contemporary Perspectives on Constitutional Interpretation*, supra, at 48, 53. Similarly, Chief Justice William Rehnquist has argued that it is dangerous for judges to interpret the Constitution on the basis of "contemporary, fashionable notions of what a living Constitution should contain." William H. Rehnquist, *The Notion of a Living Constitution*, in *Taking the Constitution Seriously* 69, 73 (Gary L. McDowell ed., 1981). He concludes that it is "genuinely corrosive of the fundamental values of our democratic society" if a judge is able to act based on deeply felt value judgments. *Id.* at 78.

[FN51]. See, e.g., Ronald Dworkin, *Law's Empire*, at ix (1986).

[FN52]. If this Essay had been written primarily to a political science audience, our primary hypothesis would have been that the Justices' votes could be most easily predicted on an ideological basis. We would have then asked if any factors other than ideology could also predict the judicial outcomes. We have chosen, however, to write this Essay primarily to a legal audience that is accustomed to viewing the Court in more ideologically neutral terms. Hence, our primary hypothesis is that the Justices' voting behavior can be explained in federalism terms, but we also explore whether ideology can also predict judicial behavior.

[FN53]. Segal & Spaeth, supra note 2, at 64-65.

[FN54]. Professor Harold Spaeth wrote the seminal article in political science which disputed that judicial restraint plays a dominant role in explaining voting behavior by Supreme Court Justices. Spaeth, *Judicial Restraint*, supra note 2, at 22-23. He started with one of our premises--that judicial restraint is a component of federalism. *Id.* at 23. Based on his data, Professor Spaeth concluded that judicial restraint did not play a significant role in guiding judicial behavior during the Warren Court era:

In conclusion then, the answer to the question posed in the title to this paper is that the judicial restraint of Justice Frankfurter, in the cases decided formally during the first seven terms of the Warren Court which involve state or administrative agency action regulatory of business or labor unions, is a myth. Judicial restraint is thoroughly subordinated to the attitudes of the justices toward business and labor. The concept serves only to cloak the political character of the judicial process and thereby helps to preserve the traditional view that judges merely find and do not make law. Not only for Frankfurter, but for all the Warren Court justices, the concept of judicial restraint is an effective means of rationalizing response to policy-oriented values.

Id. at 38.

Our primary focus is the Rehnquist Court, not the Warren Court. Like Professor Spaeth, we examine whether judicial restraint is an important component of the voting behavior of the so-called "federalists." Unlike Professor Spaeth, however, we will be examining cases involving state action rather than federal action.

[FN55]. Professor Sue Davis has examined Chief Justice Rehnquist's voting behavior before he became Chief Justice, in cases in which the Court reviewed a decision of a state's highest court. She compared those votes with cases that came to the Supreme Court from the lower federal court. Based on that data, she concluded that federalism is not an important predictor of Chief Justice Rehnquist's voting behavior. She stated:

Rehnquist's hierarchy of values should be redefined as follows. At the top: conservative results. Federalism is important only when it coincides with such results. Most notably, in the area of criminal procedure law and order ranks well above federalism. Consequently, "Rehnquist's Judicial Philosophy" should be discarded and replaced with "Rehnquist's Conservative Political Agenda."

Davis, *supra* note 2, at 781.

Our database examines Rehnquist's votes since he became Chief Justice. We also operationalize federalism differently than Professor Davis. She hypothesizes, for example, that a "federalist" Justice would affirm the highest state court when that court overturns a criminal conviction because a federalist should be committed to the principle of state autonomy and therefore would not want to displace the decision of the state's highest court. *Id.* at 774. We hypothesized, by contrast, that a federalist would be inclined to reverse lower court decisions--state or federal--that invalidated state action, because a federalist would view himself or herself as performing an important "policing" function to prevent the courts from interfering with state legislative or executive policies. In addition, we hypothesized that a federalist might be more deferential to lower state courts than lower federal courts but, ultimately, we hypothesized that a federalist would be interested in protecting the sovereignty of state legislative or executive action rather than state judicial action. For further discussion of our hypotheses, see *supra* Part I.

[FN56]. See Anthony Champagne & Stuart S. Nagel, *The Advocates of Restraint: Holmes, Brandeis, Stone, and Frankfurter, in Supreme Court Activism and Restraint* 303, 315-16 (Stephen C. Halpern & Charles M. Lamb eds., 1982); Harold J. Spaeth & Stuart H. Teger, *Activism and Restraint: A Cloak for the Justices' Policy References, in Supreme Court Activism and Restraint*, *supra*, at 277, 278.

[FN57]. Although the term "conservative" often means "restrained," we are not using it in that manner. See *supra* note 21. Instead, we use that term as it is used in the Supreme Court Database described in note 8, *supra*. The codebook for the Supreme Court Database says that it used "conventional" definitions of conservative and liberal; we worked backward from the coding in the Supreme Court Database to discern what it considered to be "conventional." *Id.* at 54. Conservatism, as used in the Supreme Court Database, can be viewed as supporting economic liberty (for example, freedom of contract) and opposing personal liberty (for example, expression, abortion rights). *Id.* at 55-56. Liberalism is defined as limiting economic liberty and enhancing personal liberty. *Id.* For example, a liberal state action would be one that enhances the rights of those accused of crimes, expands abortion rights, favors affirmative action policies, supports union rights, and generally favors the underprivileged. Conservative state action would improve the relative standing of business vis-à-vis consumers, restrict the rights of criminal defendants, and oppose increased environmental protection.

We were able to confirm that the Supreme Court Database did use the term "conservative" as understood in contemporary American politics. Though traditional views of conservatism may suggest opposition to economic liberty--see Andrew Vincent, *Modern Political Ideologies* 79 (2d ed. 1995)--the New Right and the American heirs of the conservative tradition, the Republican party, can certainly be characterized as supportive of economic freedom in terms of fewer government regulations, lower taxes, and weaker unions. See *id.* at 79-80; Republican Platform 2000, [http:// www.rnc.org/gopinfor/platform](http://www.rnc.org/gopinfor/platform) (last visited Aug. 30, 2002). Accordingly, we used the Supreme Court Database's variable for ideological direction ("DIR") of

Court outcome variable to code the ideology of the underlying state action. The state action is coded as conservative if the Supreme Court decision validated state action and was conservative or the state action was invalidated and the decision was liberal. We coded the state action as liberal if the Court validated the state action and the Court decision was liberal or if the Court invalidated the state action and its decision was conservative.

[FN58]. We defined the issue categories broadly in order to have sufficient numbers of cases in each category. That breadth, however, did distort some of the categories. As we discuss in Part III, the free speech and religion categories did not work well as single categories because of the multitude of sub-issues within each of those categories. The free speech category included both free speech and freedom of association cases. The religion category included both free exercise and establishment clause cases. A Justice might not vote consistently on these subcategory of cases. We had no significant results on the interaction between issues and ideology, as reported in the Appendix.

[FN59]. Our complete results for each Justice are reported in the Appendix.

[FN60]. We used probit, a maximum likelihood estimator, because the dependent variable was dichotomous and Ordinary Least Squares ("OLS") regression would produce biased results. J. Scott Long, *Regression Models for Categorical and Limited Dependent Variables* 38 (1997). Maximum likelihood estimates can only be reliable when there are a large number of cases, so we excluded Justices Breyer and Ginsburg, neither of whom have enough votes to sustain our analysis. As we present the analyses below, we report the predicted probability of an invalidation vote for each Justice because interpretation of probit coefficients on their own is not as straightforward as for OLS coefficients. Multivariate regression allows us to subject our expectations about federalist behavior to a test that also allows us to look at the ideological orientation of the underlying state action. The Appendix reports the full regression models for each Justice.

[FN61]. Predicted probabilities allow us to demonstrate the change in likelihood of an event (here, the probability that a Justice will vote to invalidate the state action) when we change some of the characteristics of the hypothetical case that the justice is reviewing. In OLS, a coefficient itself can be given substantive meaning: it is the unit change in Y expected with a one-unit change in X. Such simple interpretation can not be given to a coefficient from maximum likelihood estimation like probit. Using predicted probabilities is a commonly accepted method of interpreting coefficients like those calculated in our analysis. See Long, *supra* note 60, at 64; Gary King et al., *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 *Am. J. Pol. Sci.* 348, 348 (2000). Using OLS regression has the virtue of producing easily interpretable coefficients: an OLS coefficient-- a partial slope coefficient--can be understood as the change in Y resulting from a one-unit change in X when all else is held constant. Such a straightforward interpretation of probit coefficients is not possible. Accordingly, we present our results as predicted probabilities.

[FN62]. See *infra* note 65 and accompanying text for a description of the characteristics that form our baseline results. Table 3 summarizes these results.

[FN63]. The Court abandoned its mandatory appellate jurisdiction in 1988. See [28 U.S.C. §1257 \(1994\)](#); David D. Siegel, *Commentary on 1988 Revision*, reprinted in [28 U.S.C.A. §1257 \(1993\)](#). Before 1988, the Court had to hear all cases from the lower federal courts where those courts had invalidated state action or where state courts had validated state action on federal constitutional grounds. Today, it can deny certiorari for those cases in which the lower federal court properly invalidated state action, which has the effect of leaving the lower court invalidation intact. Thus, one would expect the percentage of cases in which the Court affirms a lower federal court invalidation to have declined since 1988 because the Court can achieve the same result by denying certiorari.

[FN64]. Political scientists have found that the presence of the Solicitor General correlates with a Supreme Court decision ad-

opting the Solicitor General's position. See, e.g., Segal & Spaeth, *supra* note 2, at 238 (1993) (reporting that the party supported by the Solicitor General won 87% of the time for the years 1943, 1944, 1963, and 1965). We thank Greg Caldeira and Corey Ditslear for helping us locate data about the Solicitor General's amicus briefs. We used the home page of the Office of the Solicitor General to locate the Solicitor General's amicus curiae briefs. See Office of the Solicitor General, at <http://www.usdoj.gov/osg> (last visited Sep. 6, 2002). We used LEXIS-NEXIS to gather the information regarding a few missing cases.

[FN65]. Under our baseline model, Chief Justice Rehnquist and Justices Thomas, Kennedy, and Scalia are the least likely to vote to invalidate state action, followed, interestingly, by Justice Marshall. These results, however, are not meaningful standing by themselves because they make important assumptions about the cases, such as that the underlying state action is conservative. The key importance of these statistics is that they give us a baseline upon which to make comparisons for further analysis. We can see how these probabilities change when we change one factor in the equation. If the variable is a statistically significant predictor of a Justice's vote to invalidate (positive or negative), then the change in predicted probability can be considered real and not merely a matter of chance. We typically use a conventional level of significance, $p < .05$, in a two-tailed test, to determine how confident we are that the observed influence of a given variable is real and not a matter of chance. This is analogous to claiming that we are 95% confident that each of the variables that is bold is a real predictor of a Justice's vote to invalidate state action. The baseline figure is therefore not very important in itself, but it helps us understand the meaning of the predicted probabilities results that follow.

[FN66]. These findings are also consistent with a notion of the Justices as strategic policy seekers. See generally Lee Epstein & Jack Knight, *The Choices Justices Make*, at xiii (1998) (arguing that the Justices' votes are the product of strategic decisionmaking, not just a result of ideology or of a stance on judicial activism or restraint). A strategically minded, policy-driven Justice would engage in aggressive grants of certiorari on cases she can win and defensive denials of cases she thought she would lose at the merits stage. See Gregory A. Caldeira et al., [Sophisticated Voting and Gate-Keeping in the Supreme Court](#), 15 *J.L. Econ. & Org.* 549, 570-71 (1999). Since Justice Thomas joined the Court, the five Justices we study here have had a clear majority of the Court, allowing those Justices to control the cases the Court hears. If the Justices in control of the certiorari decision take cases they want to reverse, then our findings also provide support of strategic behavior by the Justices in pursuit of policy goals, as they are generally more likely to vote to invalidate when the lower court validated and vice versa.

Political scientists have also found that the Justices are more likely to grant review if a conflict exists between the circuits on an issue. But such a finding is not inconsistent with arguing that the Justices who control the merits outcomes grant review in cases they seek to reverse. The Court may be able to choose which case to review when a conflict exists, and it often grants certiorari to hear the case which it is inclined to reverse. Compare [Good News/Good Sports Club v. Sch. Dist.](#), 28 F.3d 1501 (8th Cir. 1995), cert. denied, 515 U.S. 1173 (1995), with [Good News Club v. Milford Cent. Sch.](#), 202 F.3d 502 (2d Cir. 2000), cert. granted, 531 U.S. 923 (2000), rev'd, 533 U.S. 98 (2001). Nonetheless, on the whole, the affirmance rate is higher for cases taken to resolve conflicts (44%) than for all cases (23.5%). (These numbers are derived from the Michigan State Supreme Court Database, see *supra* note 8; they include all cases decided between 1953 and the end of the 2000 Term.) The number of cases taken to resolve circuit splits is quite low, 14.5% of the cases decided between 1953 and 2001. If circuit splits reduce the incidence of votes to reverse lower court decisions, the findings reported in Table 4 would be even less likely to occur. That there is evidence of the five Justices taking cases to reverse lower court decisions despite this higher affirmance rate for cases taken to resolve lower court disagreements suggests that their behavior is even more pronounced in cases where court conflict is not an issue.

[FN67]. Justice O'Connor is the only member of the Rehnquist Court to have served in both the state legislature and the state judiciary. It is possible that her experience in these institutions caused her to be particularly respectful of those institutions

when they are in agreement with each other. This hypothesis is contrary to the views expressed by Professor Jeffrey Rosen in his article, "A Majority of One," N.Y. Times, June 3, 2001, §6, at 32. He observes that:

O'Connor's experience as a state legislator seems to have given her a robust skepticism about the state and federal legislative process. "Somebody was making the case about a state legislature, and the gist of her comment was, 'I was in a state legislature--I know how foolishly they can act,'" a former clerk remembers. "Having been there, she understands that these were not such wise deliberative bodies."

Id.

[FN68]. In some categories of this (and other variables), we encountered a problem of perfect prediction. In these cases, a Justice voted to invalidate state action in all of the cases in a certain category of the variable. In Table 5, we found that every time states filed a brief opposing the state action under review, Justices Brennan, Marshall, and Souter voted to invalidate that action. That means that the variable gives us no leverage on predicting votes to invalidate and had to be excluded from the analysis. This happens with some of the issue categories reported in Table 7, and with some of the interactions we used to calculate the multivariate models. See *infra* note 73. We discuss the problems with the interaction terms in more detail in the Appendix.

[FN69]. We looked at the invalidation rate of the Justices based on five categories of state participation: no states submitting an amicus brief, only one state submitting an amicus brief, only a few states (2-10) submitting an amicus brief, several states (11-29) submitting an amicus brief, and a substantial majority of states (30 or more) submitting an amicus brief.

[FN70]. Others have described Justice Scalia's pattern of decisions as reflecting a strong sense of judicial independence. For example, Professor Gottlieb argues that Justice Scalia is "Darwinian" in his outlook, although Justice Scalia himself has rejected that position. See Antonin Scalia, *Morality, Pragmatism and the Legal Order*, 9 Harv. J.L. & Pub. Pol'y 123, 124 (1986). In his article, however, Scalia does not purport to describe how he decides cases; he, instead, is suggesting how one might determine public policy. Id.

[FN71]. This was a dichotomous variable--whether the nonprofit organizations did or did not file an amicus brief. The variable was positive when at least one of the nonprofit organizations filed an amicus brief.

[FN72]. See, e.g., Friedman, *supra* note 7 (arguing that the conservative label does not fit Justice Kennedy's decisions under the Free Speech and Religion Clauses).

[FN73]. Beyond preemption and voting rights issues, we coded each case for the issue that was presented, and we also included interaction effects to see if the Justices behaved differently within issues if the state action was conservative or liberal. We found no significant results for interaction effects. The issues we coded were procedural due process, free speech (including freedom of association), equal protection (other than voting), commercial or property issues (including noncriminal "takings" cases and Dormant Commerce Clause cases), and religion (Establishment and Free Exercise Clause cases). Because the issue category compresses related issues into a single category, we decided to employ qualitative analysis to see if there was within-group variation by the justices that might not be observed in quantitative analysis.

[FN74]. For the purposes of our database, a voting rights issue was present in a case when a case involved a voting-related equal protection question under the Fourteenth or Fifteenth Amendment.

[FN75]. For Justices Brennan and Marshall, the presence of a voting rights issue was a perfect predictor: They voted to invalidate state action in every voting rights case before the Court when Rehnquist was Chief Justice. However, there was only one voting rights case before the Court while they served under Chief Justice Rehnquist, making this predictor not statistic-

ally meaningful.

[FN76]. See Friedman, *supra* note 7, at 226.

[FN77]. For Chief Justice Rehnquist, $p=0.062$ and for Justice Scalia, $p=0.071$.

[FN78]. The difference column ranged from -0.217 to -0.559 for the nonfederalists and from -0.026 to $+0.420$ for the federalists.

[FN79]. In other words, the probability of observing these data were there no association between our ideology variable and Justice Scalia's votes is approximately 7%.

[FN80]. Justice Scalia's predicted probability for invalidating conservative state action is 28.0%, and his predicted probability for invalidating liberal state action is 8.3%. These results are significant at the $p < 0.001$ level. Full results for Justice Scalia after 1991 are reported in the Appendix. Chief Justice Rehnquist's voting behavior after 1991 did not follow the pattern of Justice Scalia. His results for ideology were not significant after 1991.

[FN81]. Although President Reagan described Anthony Kennedy as a "true conservative" when he nominated him to the Supreme Court, Professor Lawrence Friedman argues that Justice Kennedy's decisions on free speech and religion cases defy that label. Friedman, *supra* note 7, at 225-28. Similarly, Justice O'Connor is often portrayed as the moderate, swing vote on the Court. See, e.g., Charles D. Kelso & R. Randall Kelso, [Sandra Day O'Connor: A Justice Who Has Made a Difference in Constitutional Law](#), 32 *McGeorge L. Rev.* 915, 926-35 (2001) (discussing cases where Justice O'Connor provided the fifth deciding vote).

[FN82]. As noted above, *supra* note 73, the issue categories included too many different subject areas for meaningful quantitative analysis.

[FN83]. For the purpose of this discussion, we are including Justice White in the "nonfederalist" category because he voted with the "nonfederalist" bloc on most cases outside the abortion context during the 1991 and 1992 Terms. As noted above, *supra* note 4, the other Justices whom we include in the "nonfederalist" category are Justices Blackmun, Breyer, Marshall, Souter, Stevens, and Ginsburg.

[FN84]. [505 U.S. 1003 \(1992\)](#).

[FN85]. [16 U.S.C. §§1451-1465 \(2000\)](#).

[FN86]. [16 U.S.C. §1456b\(a\)\(2\)](#).

[FN87]. [Lucas, 505 U.S. at 1008](#).

[FN88]. [Id. at 1010-11](#).

[FN89]. [Id. at 1011](#).

[FN90]. [Id. at 1020](#).

[FN91]. [Id. at 1031-32](#).

[FN92]. [Id. at 1061-62](#) (Stevens, J., dissenting).

[FN93]. Justice Blackmun noted that the lot had increased in value despite no construction on the property. [Id. at 1043 n.5](#) (Blackmun, J., dissenting).

[FN94]. Two weeks before deciding the Lucas case, the Court held in an environmental law case--[Lujan v. Defenders of Wildlife, 504 U.S. 555 \(1992\)](#)--that the plaintiffs had not demonstrated a concrete injury sufficient to support standing under existing precedent. The plaintiffs claimed that their desire to use or observe an animal species was potentially harmed by a regulation of the Department of Interior. This regulation allegedly increased the rate of extinction of endangered or threatened species. [Id. at 562-67](#). The 7-2 majority decision was joined by Chief Justice Rehnquist and Justices Kennedy, Scalia, Souter, Stevens, Thomas, and White, although Justice Stevens would have reversed on grounds other than standing. [Id. at 581-82](#) (Stevens, J., concurring) (arguing that Congress did not intend the consultation requirement to apply to activities in foreign countries). Justices Blackmun and O'Connor dissented. The Court required that the plaintiffs offer a "description of concrete plans" to return to places where they observed the animals, [id. at 564](#), or that the "injury proceed with a high degree of immediacy," [id. at 565 n.2](#), to support a finding of the actual or imminent injury required by the law of standing. "Where there is no actual harm," the Court required that its "imminence (though not its precise extent) must be established." *Id.* In the majority's opinion, the mere fact that the plaintiffs had visited in the past the areas that would be potentially affected by the new regulation "proves nothing." *Id.* at 564. Such "some day" intentions did not meet the Court's requirement of an "actual or imminent" injury. *Id.*

The ripeness decision in Lujan is perfectly explainable as being consistent with a conservative judicial philosophy that avoids adjudication unless a case is properly ripe for dispute. Justice O'Connor's dissent from the ripeness issue reflects the quantitative result that her votes do not significantly associate with a conservative ideological perspective.

[FN95]. [Lucas, 505 U.S. at 1052 n.5](#) (Blackmun, J., dissenting).

[FN96]. [Id. at 1008-09](#) (Scalia, J., dissenting).

[FN97]. Laissez-faire ideology can also explain the results in [Dolan v. City of Tigard, 512 U.S. 374, 386 \(1994\)](#) (requiring city to meet an "essential nexus" test between legitimate state interests and the permit condition exacted by city), and [Palazzolo v. Rhode Island, 533 U.S. 606, 616 \(2001\)](#) (finding the case ripe for review and remanding for determination under analytic scheme established in [Penn Central Transp. Co. v. New York City, 438 U.S. 104 \(1978\)](#)). In Dolan, the Court created a new and higher standard that a city must meet when it conditions a permit on certain land-use conditions. This new standard gives increased protection for landowners subject to state regulation. In Palazzolo, the Court was activist, as in Lucas, in hearing a case with arguable ripeness problems. The holding in the case also reflected laissez-faire principles in protecting the interests of the private property owner.

[FN98]. The only exception to this trend was Justice Kennedy, whose votes were predictable on the basis of the voting rights issue rather than ideology. See *supra* Section II.B for a discussion of Kennedy's quantitative results on the voting issue.

[FN99]. [509 U.S. 630 \(1993\)](#).

[FN100]. [Id. at 634](#).

[FN101]. [Id. at 634-35](#).

[FN102]. [Id. at 637-39](#) (citing [Shaw v. Barr, 808 F.Supp. 461 \(E.D.N.C. 1992\)](#)).

[FN103]. [Id. at 658](#).

[FN104]. The most fractured earlier case on this issue was [United Jewish Organizations v. Carey, 430 U.S. 144 \(1977\)](#), in which the Court upheld the use of race in drawing district lines.

[FN105]. [Shaw v. Hunt, 517 U.S. 899, 902 \(1996\)](#).

[FN106]. See [Hunt v. Cromartie, 526 U.S. 541, 543-44 \(1999\)](#).

[FN107]. [Id. at 545](#) (citing [Cromartie v. Hunt, 34 F.Supp.2d 1029 \(E.D.N.C. 1998\)](#)).

[FN108]. [Id. at 554](#).

[FN109]. [Easley v. Cromartie, 532 U.S. 234, 239-41 \(2001\)](#) (citing [Cromartie v. Hunt, 133 F.Supp.2d 407 \(E.D.N.C. 2000\)](#)).

[FN110]. [Id. at 237, 258-59](#).

[FN111]. [430 U.S. 144, 147 \(1977\)](#).

[FN112]. [Id. at 161](#).

[FN113]. Justice White wrote:

There is no doubt that in preparing the 1974 legislation the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment nor any abridgement of the right to vote on account of race within the meaning of the Fifteenth Amendment.

[Id. at 165](#) (White, Stevens, & Rehnquist, JJ.).

[FN114]. [Id. at 168](#).

[FN115]. [Id. at 181](#) (Burger, C.J., dissenting).

[FN116]. In its most recent voting rights case, [Hunt v. Cromartie, 532 U.S. 234 \(2001\)](#), the Court reversed the finding of the three-judge district court that North Carolina violated the Constitution in its attempt to comply with [Shaw v. Reno, 509 U.S. 630 \(1993\)](#). In reaching this conclusion, the Court relied on the "traditional districting principles" framework established in [Reno v. Hunt, 532 U.S. at 258](#). The only member of the majority in [Hunt v. Cromartie](#) who had been a member of the Court when [UJO](#) was decided was Justice Stevens, and he had joined the traditional districting principles language in [UJO](#). The other nonfederalists on the current Court--Justices Breyer, Souter, and Ginsburg--joined the majority in [Hunt v. Cromartie](#) without a separate concurrence. Hence, no liberal member of the Court has recently taken a position similar to the [UJO](#) position that race can be a legitimate factor in the remedial, racial context without further justification such as concerns for traditional districting principles. Although four of the Court's federalists did not join the majority opinion in [Hunt v. Cromartie](#), their dissenting opinion clearly supports the legal framework in which considerations of traditional districting principles are important to the determination of constitutionality. [Hunt, 532 U.S. at 256-57](#). The "price" for the holding in [Hunt](#) that the State acted constitutionally may therefore have been a doctrinal shift by the Court's liberal wing to require more justification than under [UJO](#) for race-conscious redistricting principles. Equal protection embraced a more conservative ideology.

[FN117]. [Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 \(1995\)](#); [Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 \(1995\)](#).

[FN118]. [Pinette, 515 U.S. at 763; Rosenberger, 515 U.S. at 845-46.](#)

[FN119]. [530 U.S. 567 \(2000\).](#)

[FN120]. See [id. at 571.](#)

[FN121]. [Id. at 576.](#)

[FN122]. [Id. at 591](#) (Stevens & Ginsburg, JJ., dissenting).

[FN123]. [Id. at 574-75](#) (quoting Professor Lawrence Tribe, *American Constitutional Law* 791 (1978)).

[FN124]. [468 U.S. 609 \(1984\).](#)

[FN125]. [Id. at 630-31.](#)

[FN126]. [515 U.S. 557 \(1995\).](#)

[FN127]. [530 U.S. 640 \(2000\).](#)

[FN128]. [Id. at 647-48.](#)

[FN129]. [526 U.S. 541 \(1999\)](#) (investigating whether state's congressional redistricting plan met the factual criteria for an unconstitutional racial gerrymander); see also *supra* note 116.

[FN130]. [Boy Scouts, 530 U.S. at 648-49.](#)

[FN131]. [Id. at 650.](#)

[FN132]. [Id. at 652.](#)

[FN133]. [Id. at 654.](#)

[FN134]. [Id. at 655.](#)

[FN135]. [Id. at 687-88](#) (Stevens, J., dissenting).

[FN136]. [Id. at 698](#) (Stevens, J., dissenting).

[FN137]. See [Kimel v. Fla. Bd. of Regents, 528 U.S. 62 \(2000\).](#)

[FN138]. See [Bd. of Trs. v. Garrett, 531 U.S. 356 \(2001\).](#)

[FN139]. In [Barron v. Mayor and City Council of Baltimore, 32 U.S. \(7 Pet.\) 243, 249 \(1833\)](#), the Court held that the rights guaranteed in the Fifth Amendment do not apply to the states. This principle has since been extended to the first eight amendments. In 1873, the Court held in the [Slaughter-House Cases, 83 U.S. \(16 Wall.\) 36, 77-82 \(1873\)](#), that the rights guaranteed in the first eight amendments are not "privileges or immunities of citizens of the United States" and therefore do not apply to the states via the Privileges and Immunities Clause of the Fourteenth Amendment. Since *Slaughter-House*, the Court has gradually incorporated the first eight amendments into the Due Process Clause of the Fourteenth Amendment, applying the

same principles for state and federal conduct. See, e.g., [Duncan v. Louisiana, 391 U.S. 145 \(1968\)](#) (incorporating the Sixth Amendment right to a jury trial); [Sch. Dist. v. Schempp, 374 U.S. 203 \(1963\)](#) (incorporating the Religion Clause); [Adamson v. California, 332 U.S. 46 \(1947\)](#) (incorporating the privilege against self-incrimination); [Palko v. Connecticut, 302 U.S. 319 \(1937\)](#) (incorporating the Double Jeopardy Clause). The Court, however, has never embraced the total incorporation theory articulated by Justice Black in *Adamson v. California* and, specifically, has never incorporated "the Second and Third Amendments, the Fifth Amendment's requirement of grand jury indictment, and the Seventh Amendment." Geoffrey R. Stone et al., *Constitutional Law* 784 (2nd ed. 1991).

[FN140]. Professor John Yoo, in fact, would appear to support that development in constitutional law. See Yoo, *supra* note 33.

[FN141]. The Court created a uniform equality standard in [Adarand Constructors, Inc. v. Peña, 515 U.S. 200 \(1995\)](#). We note, however, that the different equality standards that the Court employed before *Adarand* were actually more stringent with respect to state than federal conduct because the Constitution does not explicitly contain an equal protection clause that governs federal action. The equal protection principle had to be inferred from the Fifth Amendment's Due Process Clause to cover the federal government. The differing equality standards, however, were based on the language and history of the Constitution. Hence, it was theoretically possible for the Court to have determined that the free speech principle should be applied more strictly against the federal government than state governments given that the principle is explicitly mentioned with respect to the federal government and only impliedly found for state government.

[FN142]. See [Atwater v. City of Lago Vista, 532 U.S. 318 \(2001\)](#); [Montana v. Egelhoff, 518 U.S. 37 \(1996\)](#); [Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 \(1995\)](#); [Johnson v. Texas, 509 U.S. 350 \(1993\)](#); [Heller v. Doe, 509 U.S. 312 \(1993\)](#).

[FN143]. Justice Kennedy's qualitative results are a bit difficult to explain in light of the quantitative findings. He did vote to validate state action in each of the criminal law cases discussed above, yet his predicted probability score for cases involving criminal law issues was not significant. That fact may be explained by closer examination of the model we used for the predicted probabilities analysis. The issue of procedural due process was the baseline issue in our predicted probabilities analysis. Justice Kennedy had a relatively low rate of invalidating state action for that subject area with an overall predicted probability of 43.0%. His predicted probability for criminal law was also comparatively low at 46.5%. Hence, he had a low value for both procedural due process and criminal law. Because our predicted probabilities model compared each issue with procedural due process, Justice Kennedy did not have a significant result for criminal law. Had our baseline model used, by contrast, equal protection, then we would have had a significantly lower result for criminal law. Thus, our predicted probability result of 46.5% for Justice Kennedy on criminal law is consistent with our qualitative findings.

[FN144]. [509 U.S. 1 \(1993\)](#).

[FN145]. [521 U.S. 203 \(1997\)](#).

[FN146]. [Zobrest, 509 U.S. at 24](#) (O'Connor, J., dissenting).

[FN147]. *Id.* (O'Connor, J., dissenting).

[FN148]. *Id.* at 3.

[FN149]. [521 U.S. at 234-35](#).

[FN150]. [Id. at 208-09](#) (holding that [Aguilar v. Felton, 473 U.S. 402 \(1985\)](#), is not consistent with the Court's subsequent Establishment Clause decisions and should be overruled).

[FN151]. [515 U.S. 618 \(1995\)](#).

[FN152]. See [id. at 620 \(1995\)](#).

[FN153]. [504 U.S. 428 \(1992\)](#).

[FN154]. [Id. at 430](#).

[FN155]. [520 U.S. 351 \(1997\)](#).

[FN156]. [Id. at 370](#).

[FN157]. [523 U.S. 666 \(1998\)](#).

[FN158]. [Id. at 669](#).

[FN159]. This result is consistent with the commentary stating that Justice Kennedy does not have a conservative voting pattern on free speech issues. See Friedman, *supra* note 7.

[FN160]. [529 U.S. 277 \(2000\)](#).

[FN161]. [Id. at 282-83](#).

[FN162]. Like the decision in Florida Bar, the Court's vote in *City of Erie* might reflect the federalist Justices' ideological expression of what they consider to be distasteful conduct. In *City of Erie*, they voted on the basis of what they considered to be morally distasteful: public nudity. In Florida Bar, they voted on the basis of what they considered to be professionally distasteful: lawyers soliciting clients by direct mail.

[FN163]. [Sandin v. Conner, 515 U.S. 472 \(1995\)](#).

[FN164]. See [id. at 474-77](#).

[FN165]. The issue in the case was whether a prisoner had a liberty interest in remaining free of disciplinary segregation. In our coding, such a state action was deemed conservative because it involved the restriction of individual rights in the criminal law context. See *supra* note 57 (defining conservatism as including cases which restrict the rights of criminal defendants).

[FN166]. [516 U.S. 442 \(1996\)](#).

[FN167]. See *id.* Justice Kennedy dissented from the other federalists, while Justice O'Connor concurred with the federalists and disagreed with the nonfederalists.

[FN168]. [531 U.S. 98 \(2000\)](#).

[FN169]. For example, Professor Jack Balkin argued that: The same five conservative Justices who formed the majority in *Bush v. Gore* had been engaged, for over a decade, in a verit-

able revolution in constitutional doctrines concerning civil rights and federalism. In those decisions, the five conservatives had been promoting a relatively consistent set of ideological positions like colorblindness, respect for state autonomy from federal interference, and protection of state governmental processes from federal supervision. But the decision in *Bush v. Gore* did not seem to further those values, at least not directly. Rather, the five conservatives seemed to adopt whatever legal arguments would further the election of the Republican candidate, George W. Bush.

Balkin, *supra* note 12, at 1408-09.

[\[FN170\]](#). Because we predicted that all Justices, irrespective of the "federalism" label, would tend to vote consistently with the Solicitor General, we are not reporting those results in this table. As reported previously, voting consistently with the Solicitor General does not typically distinguish federalists from nonfederalists. See *supra* note 64 & Section II.B.

[\[FN171\]](#). Our results support the view that Justice Scalia acts independently on criminal law cases. See *supra* note 70 and accompanying text.

[\[FN172\]](#). See Colker & Brudney, *supra* note 3.

[\[FN173\]](#). See *supra* notes 54-56 and accompanying text.

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