Federalism Outcomes and Ideological Preferences: The U.S. Supreme Court and Preemption Cases

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The record of the U.S. Supreme Court in decisions affecting federal-state relations has been one of inconsistency between states' rights and national supremacy. This inconsistency has perplexed both legal and political science scholars who have had great difficulty placing decision-making regarding federalism outcomes by the Court in any sort of theoretical context. Contrary to much conventional wisdom, ideological preferences do not automatically translate into federalism outcomes. We extend models of judicial decision-making in political environments by including state policy. State policy outcomes may be either more liberal or more conservative than the policy would be under federal control. Thus, the ideological preferences of the justices may contradict their preferences toward nationalism or states' rights. Testing the model using 94 preemption cases, we find that individual justices and most Courts are willing to sacrifice their federalism values in the pursuit of some other policy goal. This finding has implications for both the federalism literature and strategic models of Court behavior, as well as for cases the Court is currently reviewing.

Federalism, defined as a system that divides supremacy between member states and a general government,[1] inevitably creates tension between governments. Recognizing this inevitability, the framers of the U.S. Constitution (Article III, Section 2) designated the U.S. Supreme Court as the ultimate and, in some cases, the original, arbiter of federalism disputes. Thus, throughout its history, the Court has ruled on monumental cases involving federalism questions such as *McCulloch* v. *Maryland*, *Dred Scott* v. *Sandford*, and *Roe* v. *Wade*.[2] Just in the last few years, federalism cases have involved such controversial issues as the Brady Bill on gun control (*Printz* v. *U.S*) and late-term abortion procedures (*Carhart* v. *Stenberg*).[3] Conflicts between federal power and state autonomy have been and remain a primary concern for the Supreme Court.

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[1]Martin Diamond, "What the Framers Meant by Federalism," *A Nation of States*, ed. Robert A. Goldwin (Chicago: Rand McNally, 1974), pp. 25-41.

[2]*McCulloch* v. *Maryland*, 4 Wheat. 316 (1819); *Dred Scott* v. *Sanford*, 19 How. 393 (1857); *Roe* v. *Wade* 410 U.S. 113 (1973).

[3]*Printz* v. *United States*, 521 U.S. 98 (1996); *Sternberg* v. *Carhart*, Docket No. 99-830 (2000).

The Court still struggles with these conflicts. In a preemption case decided in May 2000, petitioner Alexis Geier sought damages from Honda after she was injured in an accident while driving in a car without airbags.[4] Geier claimed damages under District of Columbia tort law, but Honda responded that U.S. Department of Transportation regulations under the authority of federal law did not require airbags and thus preempted the lawsuit. The Supreme Court ruled in favor of Honda by a 5-4 vote. For our purposes, the most interesting aspect of the case is who voted on each side. Agreeing with Associate Justice John Paul Stevens in his dissent were Justices Ruth Bader Ginsburg, David Souter, and Clarence Thomas. The majority, ruling for federal preemption, consisted of Justices Stephen Breyer, Anthony Kennedy, Sandra Day O'Connor, Antonin Scalia and Chief Justice William Rehnquist. Can we explain these votes in terms of federalism outcomes? Thomas maintained a consistent states' rights position even though his opinion meant supporting an ideologically liberal verdict against Honda. However, Chief Justice Rehnquist and Antonin Scalia, both prominent advocates of states' rights, abandoned federalism and joined the majority in protecting Honda's interests.

Preemption cases are only one type of case, but they are at the heart of federal-state conflicts. Preemption cases involve issues wherein justices must decide which government will have power in a particular area. Specifically, these cases result when both the federal government and a state claim jurisdiction over the same subject. Although Stevens attempted valiantly to describe a test for legitimate federal preemption, his effort was only the latest in a long line of cases that defied easily applicable guidelines, thus resulting in an "ad hoc balancing of federal-state interests."[5] Indeed, the record of Supreme Court decisions on federalism cases in general and in preemption cases particularly is one of vacillation between defending states' rights and promoting national supremacy.

Perhaps not surprisingly, social scientists have struggled with providing a compelling theoretical explanation for the Court's decisions in federalism cases. Many characterizations of this issue in the literature are either mainly descriptive or strongly normative.[6] Recently, scholars have moved toward more systematic analysis by explicitly recognizing that neither courts nor individual justices are always consistent in their interpretations of cases in-

[4]*Geier* v. *American Honda Motor Co.* 166 F.3d 1236 (2000), affirmed.

[5]Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America*, 2nd ed. (Washington, DC: CQ Press, 1995), pp. 322-323.

[6]Jesse H. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980); Bruce LaPierre, "The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation," *Washington University Law Quarterly* 60 (Fall 1982): 779-1056.

volving federalism.[7] We extend these recent works in a simple way and provide empirical analysis of the Court's record on preemption cases. In short, we argue that federalism is of secondary importance to the justices. Although they may talk of states' rights or national supremacy, their rulings are more determined by ideological preferences than by federalism values. Contrary to much conventional wisdom, conservative justices do not always vote for states' rights, and liberals do not always vote for national supremacy. Rather, their vote depends on the state policy position relative to that of the federal government's position.

The analysis is organized as follows. The first section reviews existing perspectives on the Court's behavior regarding federalism and then presents our own view. The following section describes a model of judicial behavior in preemption cases. We focus on preemption cases because this area provides a unique opportunity to examine federalism preferences. The Court and its justices decide between the national and the state governments for policy implementation when both have explicitly claimed jurisdiction. The next section examines the evidence through analysis of nearly 100 preemption cases decided by the Court. Finally, we discuss implications and possible future research, applying our findings to general principles of federalism.

FEDERALISM OUTCOMES AND IDEOLOGICAL PREFERENCES

What are the expectations regarding the relationship between judicial outcomes affecting federalism and the ideological preferences of courts and justices? We describe the conventional wisdom held by the public, the media, and many academics and then discuss the inconsistencies in that relationship warranting systematic analysis.

The Conventional Wisdom

The conventional wisdom regarding Court behavior on questions of federalism has deep roots. Traditionally, judicial attitudes toward federalism are expected to be consistent with party affiliation and ideological preferences. Republicans and conservatives favor states' rights. Democrats and liberals favor national supremacy.

Academic accounts of Supreme Court behavior anticipate and find evidence of this relationship.[8] As one example, Lawrence Baum discusses

[7]Richard Brisbin, "The Reconstitution of American Federalism?" *Publius: The Journal of Federalism* 28 (Winter 1998): 189-215; Charles Rothfeld, "Federalism in a Conservative Supreme Court" *Publius: The Journal of Federalism* 22 (Summer 1992): 21-31; Bill Swinford and Eric N. Waltenburg, "The Consistency of the U.S. Supreme Court's 'Pro-State' Bloc," *Publius: The Journal of Federalism* 28 (Spring 1998): 25-42.

[8]Lucas A. Powe, Jr., *The Warren Court and American Politics* (Cambridge, MA: Harvard University Press, 2000), p. 494; John D. Sprague, *Voting Patterns of the United States Supreme Court: Cases in Federalism 1889-1959* (Indianapolis, IN: Bobbs-Merrill, 1968), p. 146.

"greater support for the states in state-federal conflicts, generally regarded as a conservative position."[9] Accounts of individual Courts are consistent, associating liberal courts with national supremacy and conservative Courts with increased states' rights. Lucas Powe describes the Warren Court as representing "the purest strain of Kennedy-Johnson liberalism" and then concludes that: "The Warren Court completed the eradication of federalism."[10] In contrast, Bernard Schwartz discusses the tendency of the conservative Taney Court to "give the benefit of the doubt to the existence of state power . . ."[11] Other legal scholars have examined the Court's record over time and identified seven "doctrinal cycles" in decision-making regarding federalism.[12] The term "cycles" refers to the Court switching back and forth between dual and cooperative federalism. Dual (or "layer cake") federalism refers to periods when public sector functions are sorted out between the national and state governments, a result conducive to autonomous state behavior.[13] Cooperative (or "marble cake") federalism occurs when governmental functions are so closely intertwined that state sovereignty is difficult to discern.[14] To some extent, at least, those Courts widely perceived as liberal, such as that sitting during and after the late New Deal, seem supportive of national supremacy through cooperative federalism and those commonly described as conservative (e.g., Taney) as protective of states' rights.

These conventional expectations have certainly been voiced regarding the present Court. At the start of the 1999-2000 Supreme Court term, major newspaper articles predicted that the conservative majority would protect the states' "sovereign immunity."[15] A *Brookings Review* article described how the conservative majority of the current Supreme Court "attaches importance to preserving federalism."[16] Even the most current and scholarly accounts of Supreme Court behavior anticipate such a relationship. In describing the Rehnquist Court, Charles Rothfeld states, "The growing group of conservative justices has shown an increased willingness to preclude federal interference with, or direct regulation of, state and local government."[17]

[9]Lawrence Baum, *The Supreme Court*, 6th ed., (Washington, DC: CQ Press, 1998), p. 216.

[10]Powe, *The Warren Court and American Politics*, p. 494.

[11]Bernard Schwartz, *A History of the Supreme Court* (New York: Oxford University Press, 1993), pp. 102-103.

[12]Epstein and Walker, *Constitutional Law for a Changing America*, pp. 282-283.

[13]Morton Grodzins, *The American System* (Chicago: Rand-McNally, 1966); Paul E. Peterson, *The Price of Federalism* (Washington, DC: Brookings, 1995).

[14]Daniel J. Elazar, *The American Partnership* (Chicago: University of Chicago Press, 1962); Grodzins, *The American System.*

[15]David G. Savage, "High Court's New Term may Boost States' Rights," *St. Louis Post-Dispatch*, 1 October 1999, p. A8.

[16]Martha Derthick, "American Federalism: Half-Full or Half-Empty?" *The Brookings Review* 18 (Winter 2000): 24.

[17]Rothfeld, "Federalism in a Conservative Supreme Court," 21.

Finally, the comprehensive *Guide to the U.S. Supreme Court* describes how recent appointments to the Court have led to "a more conservative posture" and a resulting "Court characterized by a new fervor to check government's race-conscious decision-making, to curb the reach of the federal government, and to shore up state sovereignty."[18]

Analyses of the behavior of specific justices also support this wisdom. For instance, Bill Swinford and Eric Waltenburg use a series of important cases in the 1990s to show a strong states' rights bloc among the justices.[19] Not surprisingly, the most consistent protectors of states' rights are also the justices (i.e., Thomas, Rehnquist, and Scalia) with the most conservative voting records.

Inconsistencies in the Relationship

However prevalent the perceptions of a relationship between ideological preferences and federalism outcomes, inconsistencies in that relationship are evident. In regard to the historical record, even those describing the doctrinal cycles acknowledge that many case decisions are not consistent with the dominant principle. In addition, Courts perceived as conservative may well issue decisions reflecting cooperative federalism.[20] For example, Schwartz's analysis of the Taney Court recognized a willingness to uphold federal supremacy.[21] Several analyses describe the overall impact of Courts in recent years as contributing to the growth of federal power, regardless of how many conservative justices were sitting.[22] Martha Derthick realistically admitted that this Court's rulings do not always give primacy to the states. In 1995, for instance, the Court struck down both a federal law banning guns at schools[23] and state limits on terms for congressional representatives.[24] In summarizing the Rehnquist Court's overall record, Richard Brisbin characterizes its behavior as revitalizing debate over federalism rather than initiating a sea change and recognizes "occasional inconsistencies in both conservative and moderate justices' interpretive preferences."[25]

Not surprisingly then, scholars have attempted some preliminary assessments of the relationship between ideology and outcomes. Richard Kearney and Reginald Sheehan tested ideological preferences as an explanation of

[18]Joan Biskupic and Elder Witt, *Guide to the U.S. Supreme Court*, 3rd ed. (Washington, DC: CQ Press), p. 64.

[19]Swinford and Waltenburg, "The Consistency of the U.S. Supreme Court's 'Pro-State' Bloc," 25.

[20]Ibid, 327.

[21]Schwartz, *A History of the Supreme Court*, p. 103.

[22]David M. O'Brien, "The Rehnquist Court and Federal Preemption: In Search of a Theory," *Publius: The Journal of Federalism* 23 (Fall 1993): 22; U.S. Advisory Commission on Intergovernmental Relations, *Federal Regulation of State and Local Governments: The Mixed Record of the 1980's* (Washington, DC: ACIR, 1993), p. 75; David B. Walker, *The Rebirth of Federalism* (Chatham, NJ: Chatham House, 1995), p. 10.

[23]*U.S.* v. *Lopez*, 115 S. Ct. 1624 (1995).

[24]*U.S. Term Limits* v. *Thornton*, 115 S. Ct. 1842 (1995).

[25]Brisbin, "The Reconstitution of American Federalism?" 215.

decisions involving state governments.[26] They hypothesized that the increasing conservatism of the recent Court would translate into greater deference to state authority. They found supporting evidence in some issue areas but not in federalism cases. Although this study has since been questioned on methodological grounds,[27] their failure to find evidence of increasing deference to states in federalism cases is counter to the conventional perspective.

The behavior of individual justices, as well, reveals an imperfect connection between ideological preference and federalism outcomes. At the very end of their analysis of the "bloc" of states' rights advocates on the Rehnquist Court, Swinford and Waltenburg admit that "an expansion of the list of cases of interest to the states does lead to a fraying of the coalition . . ."[28] Other studies also show inconsistencies. In an assessment of Rehnquist Court rulings on economic regulations, Jeffrey Segal and Harold Spaeth found that conservatives would usually vote for state regulation of labor but against state regulation of business while liberals would do just the opposite.[29]

The overall result of these inconsistencies, then, is that the Court's impact on federalism can shift dramatically, even during a short period of time. One widely recognized example involves labor standards. In the 1941 case *U.S.* v. *Darby Lumber*, the Court upheld the exemptions for state and local governments from the 1938 Fair Labor Standards Act prescribing minimum-wage and overtime laws for private employers. After Congress extended the law to cover public employees in quasi-governmental institutions such as schools, the Court in 1968 upheld this form of cooperative federalism in *Maryland* v. *Wirtz*. Only eight years later, the Court explicitly overruled *Wirtz* in *National League of Cities* v. *Usery*, stating that the national government could not "impermissibly interfere with the integral governmental functions of these bodies." This switch to dual federalism lasted nine years. Then, with virtually no change in Court composition other than the replacement of one justice supposedly sympathetic to states' rights (Potter Stewart) by another (Sandra Day O'Connor), the Court overruled *National League of Cities*. The Court found "no freestanding conception of state sovereignty" in *Garcia* v. *San Antonio Metropolitan Transit Authority*.[30]

[26]Richard C. Kearney and Reginald S. Sheehan, "Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation," *Journal of Politics* 54 (November 1992): 1008.

[27]Lee Epstein and Carol Mershon, "Measuring Political Preferences," *American Journal of Political Science* 40 (February 1996): 261.

[28]Swinford and Waltenburg, "The Consistency of the U.S. Supreme Court's 'Pro-State' Bloc," 42.

[29]Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993), p. 308.

[30]*United States* v. *Darby Lumber*, 312 U.S. 100 (1941); *Maryland* v. *Wirtz*, 392 U.S. 183 (1968); *National League of Cities* v. *Usery*, 426 U.S. 833 (1976); *Garcia* v. *San Antonio Metropolitan Authority*, 469 U.S. 578 (1985). See also, John Kincaid, "Constitutional Federalism: Labor's Role in Displacing Places to Benefit Persons," *PS: Political Science & Politics* 26 (June 1993): 172-177.

Even in this one issue area in a limited time period, the Court was inconsistent in terms of federalism impact.

Explaining the Inconsistencies

Although scholars have thus dented the conventional wisdom with recognition of these inconsistencies, an explanation for the lack of a consistent relationship is still lacking. How, then, can we explain the seemingly inconsistent relationship between ideological preferences and federalism outcomes?

Analyses of judicial decision-making emphasize the fact that courts do not operate in a vacuum where they can simply ignore the attitudes of other institutional actors such as Congress and the president.[31] Rather, because of the separation of powers in government, courts must necessarily be cognizant of the strategic implications of their decisions. Some scholars have applied these strategic models of decision-making to issues of federalism.[32] In these models, justices have their own policy preferences but they also reflect the preferences of the majorities that appointed them. Further, justices also possess institutional preferences, for example a willingness to apply preemption when Congress makes a clear statement to do so. Finally, justices respect policies emerging from a national political process that adequately represents all interests. Thus, the Court displays some tendency to rule against the states, which justices perceive to be less representative than the national government.[33] So far, these models have been applied to explaining decisions regarding civil rights,[34] Reconstruction-era *habeas corpus*,[35] and religious freedom.[36]

These models add some needed realism to characterizations of judicial behavior, but in regard to federalism, they are as yet incomplete. In particular, these models largely ignore state behavior. The most prominent modelers themselves acknowledge this inadequacy: "A more complete theory would explain the actions of the legislature, the executive, and the

[31]Lee Epstein and Jack Knight, *The Choice Justices Make* (Washington, DC: CQ Press, 1997); Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964); Paul J. Wahlbeck, James F. Spriggs II, and Forrest Maltzman, "Marshalling the Court," *American Journal of Political Science* 42 (January 1998): 294-315.

[32]Jenna Bednar, William N. Eskridge, Jr., and John Ferejohn, *A Political Theory of Federalism* (Paper presented at Washington University, February 1995); William N. Eskridge, Jr. and John Ferejohn, "The Elastic Commerce Clause: A Political Theory of American Federalism," *Vanderbilt Law Review* 47 (October 1994): 1355.

[33]Eskridge and Ferejohn, "The Elastic Commerce Clause," 1367.

[34]William N. Eskridge, Jr., "Reneging on History? Playing the Court/Congress/President Civil Rights Game," *California Law Review* 79 (May 1991): 613.

[35]Lee Epstein and Thomas G. Walker, "The Role of the Supreme Court in American Society: Playing the Reconstruction Game," *Contemplating Courts*, Lee Epstein, ed., (Washington, DC: CQ Press, 1995), p. 315.

[36]Christina Wolbrecht, *Strategy, Change, and Policy Outcomes: Separation of Powers and Freedom of Religion*, (Unpublished Working Paper, Washington University in St. Louis, 1994).

states in explaining variation and stability in federal boundaries."[37] The lack of attention to the states is somewhat puzzling, as states often play a key role in the implementation of Court decisions. One obvious example is the lack of initial southern state compliance to the Court's school desegregation decision in *Brown* v. *Board of Education*.[38] In general, the Court has to decide which government will implement a decision. This is a key decision in that the national and state governments, with quite different constituencies, can pursue very different goals.

We build upon the discussed literature, taking the general idea of a Court that is strategic in nature, with one specific but compelling extension. We include states as important policy actors. Simply equating conservatism with states' rights ignores the possibility that state governments may actually be promoting a more liberal outcome in the context of a specific case than is the national government. Indeed, as recent cases have shown, state governments may pursue outcomes either more liberal than federal policy (as in the Oregon case on assisted suicide) or more conservative (as in the Nebraska case on late-term abortion). Alternatively, federal preemption does not necessarily guarantee a more liberal outcome.

Putting states into the mix entails more than merely adding an extra actor. The interaction across institutions may also change. Justices are quite aware of the preferences of other policy actors, including those of the state government in the case at hand. Thus, a conservative justice will not simply and uniformly protect states' rights but may instead rule in favor of federal preemption. Liberals may protect states' rights. We argue that extending the models this way enables explanation of the inconsistencies between ideological preferences and federalism outcomes as well as the lack of uniform application of federalism principles within cycles, specific courts, even specific issue areas.

A MODEL OF JUDICIAL BEHAVIOR IN PREEMPTION CASES

We describe a simple model to analyze judicial behavior in preemption cases. As stated earlier, preemption cases provide crucial decisions for state-federal relations. To be specific, we are examining cases where both the Congress and a state have taken action in some policy area. Thus, we do not examine cases involving concurrent powers, such as the regulation of commerce, where states have taken some action when Congress has not acted but may have some authority. We argue later that our model could also be applied more generally to all federalism cases. We characterize the primary policy actors in the preemption cases and offer two sets of hypotheses.

[37]Eskridge and Ferejohn, "The Elastic Commerce Clause," 1398.
[38]*Brown* v. *Board of Education*, 347 U.S. 483 (1954).

The Court

In preemption cases, the Court is given a choice: allow either the states or the federal government to implement a policy. Court decisions will, of course, be affected by binding precedents, the particulars of the case, and legal arguments. However, the Court is also affected by strategic consideration of other political actors, including state governments. The Court is not simply the impartial "umpire" of disputes in the federal system.[39] Rather, individual justices have both ideological (i.e., liberal vs. conservative) and federalism (i.e., nationalism vs. states' rights) preferences. Further, those preferences may conflict, or one may be subservient to the other. In our analysis, we examine both the votes of individual justices and the decisions of whole Courts.

The State Policy Position

The states are an important actor in the process, but we argue that their preferences are predetermined. That is, the state policies are already in place prior to the case being brought before the Court. In many cases, it is state policy that gives rise to controversy in the first place. Of course, states may look to existing federal law and policy before passing legislation, but in general, a state policy must exist before it clashes with a national one. In this model, we use the state policy as brought up in the controversy, that is, the case, as the indicator of the state policy position. This is consistent with the spirit of the strategic models.

The Federal Policy Position

The federal policy position is the alternative outcome to state implementation of the issue in question. Rather than modeling the preferences of the president and each house of Congress, we simply take one outcome as the national position. Generally, the outcome is the policy, but this position may be expressed in a congressional statute, a presidential proclamation, or some other form. What is important to our model is that the federal policy is apparent to the justices on the Court and different from the state policy.

Hypotheses

We examine two sets of hypotheses, one from the level of the Court as decision-maker, the other from the point of view of individual justices. First, we examine the Court-level decision, that is, the rulings of entire Courts. A potential relationship exists between the ideology of a Court's decision based on the issue and the outcome of the decision in terms of federalism. One dimension represents the issue ideology of the decision, for example,

[39]The umpire metaphor received new life after the *Garcia* decision. See Walker, *The Rebirth of Federalism*, Chapter 7.

whether a decision on unions is liberal (i.e., pro-union) or conservative (i.e., anti-union). The vertical dimension represents the federalism outcome of the decision, for example, whether the union decision is pro-states' rights or pro-nationalism.

If the relationship between federalism values and ideological preferences is as consistent as anticipated by the conventional wisdom, then most cases would fall into two conditions: (1)conservative and states' rights or (2) liberal and national preemption. We hypothesize instead that no such pattern will be apparent. The inconsistencies suggested in very recent analyses of judicial behavior will be apparent in preemption cases too. Thus, liberal outcomes may enhance states' rights, and conservative outcomes may involve national preemption. Further, we hypothesize that this absence of consistency will be apparent across cycles, Courts, and issues.

Our second set of hypotheses examines the values of individual justices on the U.S. Supreme Court. Examining justices as individuals changes the perspective, and allows us to make claims about individual preferences and policy interests. We hypothesize that federalism is merely one preference that affects a justice in making his or her decision. These hypotheses are theoretical predictions, suggesting how an individual justice may vote given the conditions he or she faces. When the ideological and federalism preferences of an individual justice conflict, we argue that the ideological preferences will dominate. Ideology in this case refers to specific issues at hand–for instance, a conservative justice will tend to be pro-business and anti-union.

Table 1 displays the two possible situations. First, assume we are examining a justice with conservative tendencies. Her tendencies are displayed in regular type. When faced with a more liberal state outcome than national outcome, she will sacrifice her federalism preferences and vote for national preemption. When state outcomes are more conservative, then she can use the principle of states' rights as justification for a vote against preemption. Second, assume the opposite situation with a liberal justice, as displayed in italics. When faced with a liberal outcome from a state government, she can sacrifice her federalism preferences, vote against preemption, and claim some justification in deference to state authority.

What can we hypothesize about decisions in Cells I and III? In these cells, the state and national policies are similar ideologically, either both conservative or both liberal. One possibility is that justices will simply follow their own federalism preferences. Thus, a liberal justice will vote for national preemption, and a conservative justice will vote for states' rights. This simple prediction ignores, however, two aspects of the Supreme Court already posited as important. First, the Court is part of the national government and may, therefore, have a predilection or a "deferential jurisprudence" toward moving decisions to the national gov-

ernment.[40] Second, the ideological preferences of justices remain important. Thus, we need to differentiate between liberal and conservative outcomes. We hypothesize that justices will be more likely to vote to move issues to the national government when outcomes are undesirable. To be more specific, a conservative justice will more often vote to send liberal policies (Cell I) to the national government than conservative policies (Cell III). A liberal justice will vote for national preemption more often with conservative policies (III) than liberal ones (I).

Table 1
A Typology of Federalism Decision-Making on the United States Supreme Court

Federal Policy	State Policy	
	Liberal	Conservative
Liberal	I	II
	Federalism[a]	*Nationalism*[b]
	Pure Ideology[c]	States' Rights[d]
Conservative	IV	III
	States' Rights[e]	*Pure Ideology*
	Nationalism	Federalism

[a]Federalism: justice makes decision based on preference for state or federal government.
[b]Nationalism: justice makes decision based on ideology, but justifies it with nationalism.
[c]Pure Ideology: justice makes decision based purely on ideological preferences.
[d]States' Rights: justice makes decision based on ideology, but justifies it by arguing for states' rights.
[e]Italics: rationale for decisions of a liberal justice; non-italics: rationale for decisions of a conservative justice.

TESTING FEDERALISM AND IDEOLOGY IN PREEMPTION DECISIONS

Our tests of the preceding hypotheses are straightforward. We examine the decisions of entire Courts and then the behavior of individual justices.

The Data

To examine the relationship between philosophies of federalism and case outcomes, we utilize the extensive *United States Supreme Court Judicial Database, 1953-1997 Terms.*[41] This database allows the analyst to extract Supreme Court decisions by issue. Each case discussion contains a considerable amount of data, ranging from factual case-specific variables to the votes of the individual justices. Both case-level and individual-level analyses of voting behavior are possible because one can attach justice-specific data.

[40]Bednar, et. al., *A Political Theory of Federalism*, p. 11; Eskridge and Ferejohn, "The Elastic Commerce Clause," 1367.
[41]Spaeth, *Supreme Court Database.*

We extracted all preemption cases in which the Court heard oral arguments and issued a signed opinion. This allows us to examine the substance of the case (through reading the opinions) as well as the votes of the individual justices. We examine preemption cases dealing with conflicts in regulation wherein the justices must decide which government will have power in a particular policy area. Specifically, each justice votes in these cases as to whether policy will be determined by the national government (nationalism) or by the states (states' rights). The database contains a direction of decision measure, with the direction being either pro-federal power/anti-state or the reverse.

We focus our analysis on preemption cases dealing with conflicts in regulation and not on cases of constitutional interpretation for three reasons. First, we choose existing conflicts in regulation, as justices must decide which government will have power in a particular policy area. Specifically, each justice votes in these cases as to whether the national regulation or the state regulation prevails. Second, constitutional issues (as opposed to regulation) are more complex, and any model would have to factor in issues related to constitutional law. Finally, constitutional decisions tend not to be a clear choice between a federal policy and a state policy, because issues of state supremacy and absence of federal action arise as well. Regulation cases exclusively focus on times when laws, rules, or policy prescribed by the state and federal governments conflict with each other. Thus, there is a clear choice for the Court or a justice to make in these cases.

This extraction yielded a universe of 94 cases, ranging from the 1954 to the 1997 terms. Out of the 481 federalism cases in the *Supreme Court Database*, this represents a (not random) sample of 20 percent. The cases fall into three categories: economics cases, labor cases, or civil liberties cases. Economics cases deal with state regulation in the context of business; labor cases deal with state policy on unions; and civil liberties cases are ones in which a state regulation limits or grants freedoms. Of the categories, economics is the most prevalent; 66 of the cases (70 percent) are economics, followed by 26 (27 percent) labor cases, and 2 (3 percent) civil liberties cases.

To further understand the dynamics of the 94 cases, we examined the opinions of the cases themselves to obtain the facts as well as the ideological direction of the decision.[42] We coded each decision as either liberal or conservative, following the scheme used in the Spaeth database. For example, in economics cases, a liberal policy was one that was pro-union, anti-business, pro-liability, or pro-consumer. A conservative decision was the opposite. All told, 44 percent of the 94 cases were decided as liberal. We did a similar computation for the votes of the individual justices, obtaining two measures (i.e., federalism outcome and ideological preference).

[42]A list of the decisions is available from the authors.

Case-Level Analysis

Examining the case-level data by outcome provides some interesting results that are counter to many conventional expectations. Even a simple cross-tabulation generates results that provide evidence for the underwhelming importance of federalism values on the Supreme Court. Particularly regarding the ideological issues the Court is facing in a case, federalism carries little weight. Table 2 shows the outcome of cases in terms of federalism and ideology.

Table 2
Federalism Decision Outcomes by Issue Outcome, Case-Level, All Decisions

Federalism Direction	Issue Direction		
	Conservative	Liberal	Total
States' Rights	11% (10)	28% (26)	39% (36)
Nationalist	45% (42)	16% (15)	61% (57)
Total	56% (52)	44% (41)	100% (93)

chi^2 (Naïve Model)=18.9; chi^2 (Conventional Wisdom Model)=439.4; 1 degree of freedom.

The results support the first set of hypotheses. The relationships between federalism outcomes and ideological preferences are inconsistent. Specifically, given the conservative appointments of Republican presidents (particularly Ronald Reagan), it is not surprising to find that most of the Courts' decisions (56 percent) are conservative in outcome. The inconsistencies between ideology and federalism, however, are readily apparent in the bias toward nationalism in conservative decisions. Generally speaking, when one thinks conservatism, one thinks states' rights. But our data show a negative correlation between conservatism and nationalism and between liberalism and states' rights. There is a correlation coefficient of -.45, meaning that a liberal decision tends to be for states' rights while a conservative decision preserves national power. Of the Court decisions that were decided conservatively, 81 percent were also nationalist in outcome. For example, in a case that examines whether a state law regarding labor unions conflicted with a federal one, a conservative decision (against the union position) is likely to result in the Court ruling in favor of the national government. An opposite trend occurs for liberal decisions; liberal decisions tend also to have the outcome of being pro-state government.

To understand the strength of the relationships in these tables, one needs to calculate relational statistics such as chi-square. The chi-square statistic defines a null model (usually a "hypothesis of no association," but it can be defined by the analyst). One then calculates a test statistic, from which one can test whether the null model accurately captures the relationship in the data. We term the base model, one where the numbers in the cells reflect "no association," the "naïve model." The chi-square value of our table of

observed outcomes is 18.9 (with one degree of freedom), which suggests that there is a relationship in the data. The conventional wisdom hypothesizes a relationship of liberal outcomes being nationalist and conservative decisions being for states' rights. We term this the "conventional wisdom" model. We used different numbers to generate expectations based on this model, but consistently, the observed values minus those expected values generate chi-square statistics that reject the expected outcomes. For instance, using expected values based on 45 percent in each of Cells I and III and on 5 percent each in the other two, the chi-square statistic is 439.4. Clearly, there is a relationship in the observed values, and a model based on the conventional wisdom does not capture it. The ideologies of liberalism and conservatism are not consistent with their respective counterparts, nationalism and states' rights.

Although the exact statistics vary for individual Courts, however they are measured, the inconsistencies between ideology and federalism remain. We tested across Courts, using the chief justice at the time as our category (a much-used conception of natural courts[43] cannot apply here because the number of cases per natural court is too small). Table 3 presents the results across the Warren, Burger, and Rehnquist Courts. If anything, the inconsistency between federalism and ideology has increased slightly; from the Burger to the Rehnquist Courts, for example, there have been more decisions that are conservative but also pro-national or liberal but pro-state government. In more specific terms, the largest category for the Rehnquist Court is pro-national, conservative decisions (lower-left in box, 47 percent). It is also interesting to note that the number of preemption cases decided has increased from the Warren Court (12) to the Burger Court (36) to the Rehnquist Court (45). The Rehnquist Court is handling more preemption cases. This holds even after controlling for the length of the tenure of the chief justice. Finally, the relational statistics suggest that the conventional wisdom is incorrect using both the naïve model (where the expected value is based upon randomness) and our "conventional wisdom" model (in which we use a relationship predicted by the conventional wisdom). Almost uniformly, except when the number of observations is too low, our data suggest that neither of the null hypotheses capture the relationship; the chi-square statistics are significant at the .005 level. The chi-square values are presented in Table 3.

[43]Spaeth, *Supreme Court Database.*

Table 3
Federalism Decision Outcomes by Issue Outcome, Case Level, All Outcomes, by Chief Justice

All Cases, Warren Court

	Conservative	Liberal	Total
States" Rights	17% (2)	17% (2)	33% (4)
Nationalist	43% (5)	25% (3)	67% (8)
Total	58% (7)	42% (5)	100% (12)

chi^2 (Naïve Model)=0.2; chi^2 (Conventional Wisdom Model)=12.0; 1 degree of freedom.

All Cases, Burger Court

	Conservative	Liberal	Total
States' Rights	11% (4)	31% (11)	42% (15)
Nationalist	44% (16)	14% (5)	58% (21)
Total	56% (20)	44% (16)	100% (36)

chi^2 (Native Model)=11.3; chi^2 (Conventional Wisdom Model=61.3; 1 degree of freedom.

All Cases, Rehnquist Court

	Conservative	Liberal	Total
States' Rights	9% (4)	29% (13)	38% (17)
Nationalist	47% (21)	16% (7)	62% (28)
Total	56% (25)	44% (20)	100% (45)

chi^2 (Naïve Model)=15.3; chi^2 (Conventional Wisdom Model)=80.0; 1 degree of freedom.

Individual-Level Analysis

In this section, we consider the hypotheses regarding behavior by individual justices, thereby allowing us to make inferences about individual preferences and behavior. We proceed by analyzing the votes of the individual justices on the preemption cases discussed earlier. In the first portion of this analysis, we exclude unanimous decisions because there is no variance to explain in the behavior of individual justices in these cases.[44] Also, unanimity acts as a proxy for legal issues that may overwhelm any ideological predisposition held by the justices. For example, a unanimous decision on a liability case suggests that there is a point of law that overrides any ideology the justice may possess. Finally, non-unanimous decisions at the individual-level provide a glimpse into individual-justice preference. Aggregate, Court-level decisions deal with *outcomes*, so including unanimous decisions makes sense; for the individual-level model, on the other hand, we are interested in *preference*. The argument here is that the individual-

[44]David Rhode and Harold J. Spaeth, *Supreme Court Decision Making* (San Francisco: W. H. Freeman & Co., 1976).

level votes are a function of the facts, policy, and strategy. Later in the section, we provide the findings for all cases, but for now, removing the unanimous decisions leaves 454 votes across 53 cases.

As discussed in the second set of hypotheses, we are interested in how a justice votes, given his or her ideological predisposition and the policies of the national and state governments brought before the Court. We also want to examine whether a pattern emerges in the context of individual decisions on federalism. To address this, we need to be able to characterize individual justices as either liberal or conservative as shown in Table 1. We classify a justice as liberal or conservative based on the voting behavior of the justice in issue categories other than those we are examining, using the classification developed by Lee Epstein and her colleagues in *The Supreme Court Compendium.*[45] They provide aggregated measures of ideology for each of the justices, by category. For example, Justice Harry Blackmun voted liberally 62 percent of the time in labor cases, 54 percent of the time in economics cases, and 62 percent of the time in civil liberties cases. Using these scores provides us with an independent measure of justice ideology (not determined from our cases) and is consistent with suggestions offered by scholars who study judicial voting behavior to use independent and appropriate measures of judicial ideology.[46] Based on these aggregate measures, our cut point for liberal or conservative is the median ideology given our data. Justices who vote liberal on issues more than 54 percent of the time are classified liberal, those less than 54 percent as conservative. The use of this relative measure is logical, given that justice ideology measures are clustered around 54 percent, not 50 percent.

Table 4 provides the results of our analysis. The rows and columns variables are the same as those in Table 1. The justices are split into two categories, liberal and conservative, and the numbers in the cells represent the percentage of time that a justice of that ideological persuasion voted nationalist on preemption cases that had non-unanimous votes. In purely descriptive terms, we find that the number of liberal and conservative justice votes was nearly even; 201 of the votes were by liberal justices and 193 were by conservative justices.

Interpreting Table 4 is somewhat subtle, but it generates a key finding. First examine the liberal justice, particularly the upper right-hand cell. For a liberal justice facing a decision between a conservative state policy and a liberal federal policy, she votes for the national government 90 percent of the time. Conversely, for the same justice facing a liberal state policy and a conservative federal one, she votes for the national government 52 percent

[45]Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium* (Washington, DC: CQ Press, 1996), pp. 452-455.

[46]Epstein and Mershon, "Measuring Political Preferences."

of the time. This suggests that a liberal justice has a built-in bias toward nationalism, but that this bias is exacerbated when she faces a conservative state policy.

Table 4
Issue Ideology, Median Split, Non-Unanimous Decisions

Liberal Justice			
Federal Policy	**State Policy**		
	Liberal	Conservative	Total
Liberal	58%[a]	90%	73%
	(14/24)	(18/20)	(32/44)
Conservative	52%	70%	53%
	(76/147)	(7/10)	(83/157)
Total	53%	83%	57%
	(90/171)	(25/30)	(115/201)

chi² (Naïve Model=9.3; chi² (Conventional Wisdom Model)=5666.8; 3 degrees of freedom.

Conservative Justice			
Federal Policy	**State Policy**		
	Liberal	Conservative	Total
Liberal	67%	31%	50%
	(12/18)	(5/16)	(17/34)
Conservative	59%	47%	41%
	(85/144)	(7/15)	(65/150)
Total	60%	39%	42%
	(97/162)	(12/31)	(82/193)

chi² (Naïve Model)=8.0; chi² (Conventinal Wisdom Model)=3406.6; 3 degrees of freedom.
[a]Percentages are the number of times a justice votes pro-nationalist.

For a conservative justice, the opposite holds true. A conservative justice facing a conservative state policy and a liberal federal policy votes nationalist only 31 percent of the time. For the same justice facing a liberal state policy and a conservative federal policy, however, he votes nationalist 59 percent of the time. A conservative state policy, then, introduces a bias toward states' rights for the conservative justice. If the state policy is liberal, the bias is toward nationalism. In short, a conservative justice is not oriented toward states' rights exclusively. Rather, the character of the state policy being scrutinized is relevant to the decision of a justice.

The results in Cells III and I are also consistent with expectations discussed in the second set of hypotheses. When state and federal policies are ideologically similar, liberal justices are more likely to try to send conservative policies to the national government (70 percent) than liberal policies (58 percent). Conservative justices are more likely to send liberal policies to the national government (67 percent) than conservative policies (47 percent). To reiterate the logic, justices on the U.S. Supreme Court have a slight predisposition to move issues to the national government, a predis-

position that is enhanced when policies reflect an undesirable ideological position. One can easily imagine a conservative justice faced with policy outcomes that are liberal in both the state and national governments being eager to move the issue to the national government where one change in Congress can change the policy behavior of all 50 states.

The totals in this table are also revealing. Certainly, the relationship between ideology and federalism preferences described by the conventional wisdom is evident. A liberal justice does vote for nationalism (57 percent) more often than does a conservative justice (42 percent). When state policies are conservative, regardless of the ideology of federal policies, the differences between liberal and conservative justices are dramatic. The liberal justice votes nationalist 83 percent of the time whereas the conservative justice does so in only 39 percent of the cases. Nevertheless, the basic finding in these data is that the decisions of individual justices on questions of federalism are not one-dimensional. Rather, ideology influences how justices decide questions of states' rights and nationalism.

The relational statistics support our contention that the relationship is not as predicted by the existing theories. For the liberal and conservative justices, the chi-square statistics for the naïve model are 9.3 and 8.0, respectively, with 3 degrees of freedom; this is significant at the .05 level, meaning that the relationship is probably not a random one. Furthermore, calculating the chi-square statistic based on a "conventional wisdom" hypothesized model suggests that the existing conceptions of federalism do not hold up very well. For example, we developed expected values based on the idea that a liberal justice facing a state policy and a conservative federal one would virtually always vote for the state government, with a conservative justice voting in the opposite fashion. Calculating the model in this fashion puts the values of the statistic even higher, at 5666.8 for a liberal justice and 3406 for a conservative justice. It appears that there is a relationship, but that the conventional wisdom does not capture it well.

Examining the results across time (in terms of eras) is also revealing. Table 5 presents the results for individual-level votes, by ideology, by chief justice era. We define era as the terms in which a particular chief justice presides over the Court. The existence of low numbers in some of the cells is somewhat problematic, but there are interesting findings nonetheless. First are the totals in the lower right-hand corner of each subtable. There has been a marked shift in the difference between liberal and conservative justices as eras change. In the Warren Court, liberal justices were more likely to vote pro-national government than conservative justices (62 percent to 44 percent). By the Rehnquist Court, however, the relationship had flipped; conservative justices voted in favor of the national government more times (65 percent) than did liberal ones.

Second, the results from this time-sensitive analysis are interesting when one examines the cells. In the Burger and Rehnquist Courts, liberal justices vote in favor of the national government more often than their conservative counterparts when faced with a conservative state policy and a liberal federal one (Cell II). The difference is 87 percent versus 25 percent in the Burger Court and 100 percent versus 50 percent in the Rehnquist Court (the Warren era is not calculated due to the presence of empty cells). Overall, though, the interesting finding is the bias toward nationalism by conservative justices on the Rehnquist Court. To these conservative justices, states' rights do not seem to be an important component of their ideology.

The statistical tests also present results similar to Table 4; the chi-square statistic is significant at high levels, even across Courts. It appears that the relationship is less strong, but still significant, as one proceeds with the naïve model from the Warren to the Burger to the Rehnquist Courts. It is probable that this relationship occurs due to problems with the number of observations in the cells, but the chi-square statistics remain significant to the 0.05 level. The naïve model (expected values calculated based upon chance) and the conventional wisdom model (expected values derived from previous theories and predictions) do not capture the relationship in the data.

Finally, in the interests of full disclosure, we provide the results for only unanimous cases in Table 6. Unlike the previous individual-level tables, there is virtually no distinction between a liberal justice and a conservative justice in any of the cells. For example, justices of both ideological dispositions, when faced with a liberal state policy and a conservative federal policy, vote in favor of the national government around 50 percent of the time. This is different from the non-unanimous data, and suggests that the theoretical justification for separating the two is justified. Combining unanimous with non-unanimous decisions would have hidden the results we discuss above.

DISCUSSION

In contrast to many conventional expectations, the record of the U.S. Supreme Court is neither consistent nor predictable in preemption cases when focusing on the single dimension of federalism. Instead, as the preceding analyses show, priorities regarding federalism often take a back seat to ideological preferences. Thus, conservative justices often vote in favor of preempting state prerogatives, and liberal justices often, even if only implicitly, promote states' rights. Court decisions on preemption cases involving state-national interactions are therefore not predictable on the basis of the federalism dimension alone. These findings prompt several questions.

Table 5
Individual-Level Votes, Issue Ideology, Median Split, Non-Unanimous Decisions, by Chief Justice

Warren Court: Liberal Justice

Federal Policy	State Policy		
	Liberal	Conservative	Total
Liberal	83%[a]	–	83%
	(5/6)	(0/0)	(5/6)
Conservative	58%	–	58%
	(18/31)	(0/0)	(18/31)
Total	62%	–	62%
	(23/37)	(0/0)	(23/27)

chi² (Naïve Model)=NA (due to low n); chi² (Conventional Wisdom Model)=454.3;
3 degrees of feedom

Burger Court: Liberal Justice

Federal Policy	State Policy		
	Liberal	Conservative	Total
Liberal	56%	87%	75%
	(5/9)	(13/15)	(18/24)
Conservative	44%	67%	45%
	(24/55)	(2/3)	(26/58)
Total	45%	83%	54%
	(29/64)	(15/18)	(44/82)

chi² (Naïve Model)=9.9; chi² (Conventional Wisdom Model)=636.9;
3 degrees of freedom.

Rehnquist Court: Liberal Justice

Federal Policy	State Policy		
	Liberal	Conservative	Total
Liberal	44%	100%	64%
	(4/9)	(5/5)	(9/14)
Conservative	56%	71%	57%
	(34/61)	(5/7)	(39/68)
Total	54%	83%	59%
	(38/70)	(10/12)	(48/82)

chi² (Naïve Model)=3.7; chi² (Conventional Wisdom Model)=1208.5;
3 degrees of freedom.

[a]Percentages are the number of times a justice votes pro-nationalist.

Table 5 (con't)
Individual-Level Votes, Issue Ideology, Median Split, Non-Unanimous Decisions, by Chief Justice

Warren Court: Conservative Justice

Federal Policy	State Policy		
	Liberal	Conservative	Total
Liberal	67%	–	67%
	(2/3)	(0/0)	(2/3)
Conservative	33%	–	33%
	(2/6)	(0/0)	(2/6)
Total	44%	–	44%
	(4/9)	(0/0)	(4/9)

chi^2 (Naïve Model)=NA (due to low n); chi^2 (Conventional Wisdom Model)=191.6;
3 degrees of freedom.

Burger Court: Conservative Justice

Federal Policy	State Policy		
	Liberal	Conservative	Total
Liberal	43%	25%	32%
	(3/7)	(3/12)	(6/19)
Conservative	55%	25%	53%
	(27/49)	(1/4)	(28/53)
Total	54%	25%	47%
	(30/56)	(4/16)	(34/72)

chi^2 (Naïve Model)=7.9; chi^2 (Conventional Wisdom Model)=556.6;
3 degrees of freedom.

Rehnquist Court: Conservative Justice

Federal Policy	State Policy		
	Liberal	Conservative	Total
Liberal	88%	50%	75%
	(7/8)	(2/4)	(9/12)
Conservative	64%	55%	63%
	(56/87)	(6/11)	(62/98)
Total	67%	53%	65%
	(64/95)	(8/15)	(71/110)

chi^2 (Naïve Model)=3.6; chi^2 (Conventional Wisdom Model)=973.9;
3 degrees of freedom.

[a]Percentages are the number of times a justice votes pro-nationalist.

Table 6
Individual-Level Votes, Issue Ideology, Median Split, by Chief Justice, Unanimous Decisions Only

All Courts, Unanimous Liberal Justice			
Federal Policy	**State Policy**		
	Liberal	Conservative	Total
Liberal	100%[a]	100%	100%
	(4/4)	(36/36)	(40/40)
Conservative	46%	–	46%
	(51/110)	(0/0)	(51/100)
Total	48%	100%	61%
	(55/114)	(36/36)	(91/150)

chi² (Naïve Model)=34.3; chi² (Conventional Wisdom Model)=2595.4; 3 degrees of freedom.

All Courts, Unanimous Conservative Justice			
Federal Policy	**State Policy**		
	Liberal	Conservative	Total
Liberal	100%	100%	100%
	(5/5)	(16/16)	(21/21)
Conservative	48%	–	48%
	(63/132)	(0/0)	(63/132)
Total	50%	100%	55%
	(68/137)	(16/16)	(84/153)

chi² (Naïve Model)=16.6; chi² (Conventional Wisdom Model)=4934.5; 3 degrees of freedom.
[a]Percentages are the number of times a justice votes pro-nationalist.

First, can we generalize our findings beyond preemption cases to all Court cases involving national-state relations? We argue that applying the model to the broader set of cases involving nation-state relations is not problematic. The dynamics involved in our cases are comparable to other federalism cases, notably those involving concurrent powers. Again, both the state government and the national government have policy preferences. Again, justices may face tensions between their ideological preferences and their beliefs regarding federalism. The major difference, at least regarding concurrent cases, is that the national government has not yet taken action in the same issue area. This may have an impact and, thus, we recognize that further research would be useful.

Second, would more sophisticated analyses support this finding? Admittedly, we used a limited number of cases and mere cross-tabulations for our analysis. Yet, the cases we did use are at the heart of state-national questions on federalism: the preemption of state authority. Further, we looked at all such cases between 1954 and 1997 when oral arguments were heard. In other words, these are the controversial decisions on which Court rulings determine legal precedents regarding federalism. As far as using rather elementary statistical analysis, even with the simplest methods, we have been

able to differentiate between the impact of ideology and the impact of federalism preferences. Multivariate analyses may be able to place both these dimensions within a larger framework that predicts the decisions of justices, but they will not alter the fundamental result that preferences on states' rights or national supremacy do not alone determine the outcomes of cases.

Third, a related methodological question involves the set of cases analyzed here. As the figures in the tables show, the majority of cases the Supreme Court has chosen to hear in these areas of preemption involve liberal state policies. This may mean that the sample is somewhat skewed, but it does not diminish our findings. Rather, it reinforces the importance of ideology. The relatively conservative Courts of recent decades have shown more willingness to hear cases involving liberal state policies than cases involving conservative ones. While we have shown that ideology is an important factor in judicial decision-making, this result suggests that ideology is also important to case selection. Further research on the impact of ideological and federalism preferences affecting justices granting *certiorari* may be quite useful.

Fourth, how do these findings relate to the current Court? Recent scholarly analyses suggest that the sitting justices have engaged in a spirited debate over questions of federalism in various cases.[47] This is certainly true. What is also true is that even the most conservative of these justices have not ruled uniformly for states' rights. Indeed, even the chief justice, a noted states-righter, has voted against the pro-state position more than one-fifth of the time.[48] Even Justice Thomas, who stuck with his federalism principles in the *Geier* case, has referred to the states' rights issue as a "constitutional sideshow."[49] Rehnquist's votes in these cases and Thomas's comments generally may be inconsistent with expectations about federalism outcomes, but true to our findings, the outcomes have been consistent with the justices' ideological preferences. Without question, the majority of this Court is sympathetic to notions of states' rights and decentralization of government power. Nevertheless, they have not and will not always act in ways consistent with those sympathies.

Our data back these assertions about specific justices. In Table 7, we examine the behavior of the justice (now chief justice) considered by most to be strongly pro-states' rights–Chief Justice Rehnquist. Table 7 provides the voting behavior of Rehnquist in non-unanimous cases. If Rehnquist's behavior were dogmatically states' rights, we would expect him to vote in

[47]Brisbin, "The Reconstitution of American Federalism?"; Swinford and Waltenburg, "The Consistency of the U.S. Supreme Court's 'Pro-State' Bloc."

[48]Swinford and Waltenburg, "The Consistency of the U.S. Supreme Court's 'Pro-State' Bloc," 41.

[49]Cited in Lawrence Tribe, "'Natural Law' and the Nominee," *The New York Times*, 15 July 1991, p A15.

favor of state governments the majority of the time. In fact, Rehnquist voted pro-national government 51 percent of the time. Furthermore, in the lower right-hand quadrant (conservative state policy and conservative federal policy), Rehnquist voted in favor of the national government 67 percent of the time. Although the numbers of cases in the cells are sometimes quite small, this is not the behavior of someone dogmatically in favor of states' rights.

Table 7
Voting of Chief Justice/Justice Rehnquist, Individual-Level Votes, Issue Ideology, Non-Unanimous Decisions

Federal Policy	State Policy		
	Liberal	Conservative	Total
Liberal	25%[a]	0%	57%
	(1/4)	(0/3)	(4/7)
Conservative	48%	67%	50%
	(13/27)	(2/3)	(15/30)
Total	45%	33%	51%
	(14/31)	(2/6)	(19/37)

chi^2 (Naïve Model)=2.0; chi^2 (Conventional Wisdom Model)=317.2; 3 degrees of freedom.
[a]Percentages are the number of times Rehnquist votes pro-nationalist.

Finally, just how important is federalism in determining judicial rulings? Just because a justice's preferences on the federalism dimension are less important than his or her ideological priorities does not mean that federalism has no impact. As the total figures in Table 3 show, liberal and conservative justices have federalism preferences. In other words, all else being equal, conservative justices will protect states' rights and liberal justices will favor preemption. What must be kept in mind, however, is that all else is often not equal.

CONCLUSION

The record of U.S. Supreme Court decisions on questions of federalism has been inconsistent historically, in specific time periods, and even in specific issue areas. Why? The preferences of individual justices regarding the appropriate level of government authority are often outweighed by their ideological preferences toward liberalism and conservatism. Thus, concepts of states' rights and national supremacy are used opportunistically, when convenient, to defend specific rulings, but not as guiding principles for decision-making. The empirical evidence supports this argument, both in terms of overall Court decisions and in the decisions of individual justices. Thus, counter to conventional wisdom, conservative justices often vote for national preemption; liberal justices often vote for states' rights; national preemption rulings may actually generate conservative outcomes;

and decisions favoring states' rights may actually produce liberal results. When considering federalism cases, therefore, analysts need to examine the ideological issues underlying state policies and national alternatives as well as the ideological preferences of justices rather than simply resorting to general characterizations of judicial tendencies.