Federalism Lost: The Roberts Court's Failure to Continue Rehnquist's Federalism Revolution*

JOSHUA R. MEDDAUGH, PH.D**
JOHN R. THEADORE, ESQ***

Abstract:

Chief Justice Rehnquist, the Rehnquist Court, and the era of devolution have spawned a great deal of scholarly attention on the Court's role in federalism. The Rehnquist Court itself has been the decider in a number of cases that have strengthened the role of state government under the 10th Amendment, and has led some in the field to argue that this Court waged a revolution of sorts to reestablish the lines of federalism. To find out if this argument has merit, we ask if the conservative justices of the Rehnquist and Roberts' Courts based their vote decisions on their ideological policy attitudes or on their belief in federalism. We examine both conservative Courts to accomplish our goal, which is two fold. First, we are generally examining whether the prescribed federalism revolution of the Rehnquist Court is still being waged today, leading to the argument that conservative ideology produces more rulings in favor of state sovereignty, and if not, secondly, make the argument that the federalism doctrine of the Rehnquist Court was distinctive to that Court and not all conservative leaning Courts. In the end, this work seeks to add to the expanding literature on judicial decision-making, generally, and the Rehnquist and Roberts Courts, specifically.

Introduction

The term "federalism" has had a significant association with the United States since the Framers of the Constitution met to create a stable

---

* This work would not be possible without the tireless effort of our Research Assistants Lizeth Damaso and Caitlyn Huffschmidt, and beneficial comments/suggestions from Joshua J Dyck, Ph.D., Christina L. Boyd, Ph.D., Claude E. Welch, Ph.D., Lizeth Damaso and Caitlyn Huffschmidt.

** Assistant Professor of Political Science, Clayton State University, Morrow, Georgia.
*** Associate Attorney at Law, Law Offices of Brian P. Rourke, P.C., Liberty, New York.

central government over 200 years ago. The Framers sought a plan for the country that established a dual government structure comprised of a state and a strong national government that preserved the states' lawmaking abilities through the use of the Tenth Amendment.[1] The Framers believed that the state government structure allowed for easier passage of power to a national government, and that the state governments would limit the abuses that this new central government could potentially make.[3] This emphasis made by the Framers, and the importance placed on state sovereignty, went as far as creating both the Tenth and Eleventh Amendments, the passage of which guaranteed that all rights not delegated by the Constitution are reserved to the states, and forbidding of suit against the states, respectively.[2]

To the Framers, federalism provided a means of self-determination, as well as a check on government oppression. The Framers believed federalism allowed the national government to work within a limited scope of its enumerated powers and the states would employ the remainder of the sovereign authority, subject to the restraint of interstate competition of the other states.[4] Regardless of the previous, the majority of the Framers took for granted the sovereign powers of the states and focused on defining their powers through the use of negative implications, while specifically listing the powers of the national government. Although this lack of detail seemed to provide little problem for the first one hundred fifty years of the country's establishment, the nebulous delineation of state and federal government allowed for the growth of the national government at the states' expense during the Great Depression.[5]

For over half a century, from 1937 to 1986, federalism was

---

1. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1439-40 (1987).
2. GARRY WILLS, EXPLAINING AMERICA 172-73 (1st ed. 1981).
3. Patrick Garry, *A One-Sided Federalism Revolution: The Unaddressed Constitutional Compromise on Federalism and Individual Rights*, 36 SETON HALL L. REV. 851, 872 (1987).
4. William Pryor Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1175 (2002).
5. WILLS, *supra* note 2, at 851-853.

largely a forgotten issue.[6] But, prior to 1937, the Court was, by leaps and bounds, more willing to slow the infringement of federal power on state sovereignty.[7] Throughout the nineteenth and early twentieth centuries, the Supreme Court pursued a federalist vision, using the Tenth Amendment as a limit on congressional power. But in the aftermath of the court-packing scandal, the Court quickly adapted to a more nationalist approach, extending the powers of the federal government through the use of New Deal policies.[8] By the end of the 1936 term, the Court had eliminated most of the federalism constraints on Congress' power and was acting in complete deference to Congress with regard to any issues with the Tenth Amendment.[9] This trend, which continued for the next half-century, through and including the Warren Court, only began to change when Justice Rehnquist joined the Burger Court in the 1970's.[10]

William Rehnquist came to the Burger Court with a vocal willingness to limit Congress' power through the Tenth Amendment.[11] In cases such as *National League of Cities, Jones v. Rath*, and *Arizona v. Snead*, Justice Rehnquist's legal vision supporting state sovereignty was being established in the written record of the highest Court. As a result, a number of high-ranking individuals began to take notice, including future president Ronald Reagan. When Reagan, a well-known champion of federalism's preservation, had the opportunity to name the next chief justice upon Burger's retirement, William Rehnquist's name was near the top of the list.[12] Rehnquist's established voting record on the previous cases and his fourteen and one-half years as an Associate Justice, as well as his consistent adherence to federalism and protection of state's rights

---

6. *Id.*
7. Anuj C. Desai, *Filters and Federalism. Public Library Internet Access, Local Control, and the Federal Spending Power*, 7 U. PA. J. CONST. L. 3, 73 (2004).
8. DAVID B. WALKER, THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON 95 (Christopher J. Kelaher, 1995).
9. Desai, *supra* note 7, at 89-90.
10. WILLS, *supra* note 2, at 864-65.
11. JOHN W. DEAN, THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT 16 (2001).
12. HENRY ABRAHAM JR., JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 275 (3rd ed. 1992).

from intrusion from the federal government,[13] meant the nomination of Rehnquist to chief justice came with little surprise.

The Role of the Chief Justice

As we know, the mark of any era of the Supreme Court is ultimately determined by the nature of the decisions it renders during the term of a Chief Justice. The Chief Justice often sets the tone for which the Court will follow when weighing in on major decisions throughout his term, and history looks to the impact of the Court for the way in which it impacted the direction of the Country. As a result, the most important role of the Chief Justice is establishing precedent that will leave a lasting impact on both the study of constitutional law and this country as a whole. Among the most important cases that any given term of the Supreme Court must rule on are cases involving federalism. The outcome of how a Court decides these cases may have lasting impacts on the relationship between the states and federal government for decades after the decision is rendered. Therefore, when Justice Rehnquist became the Chief Justice in the mid-eighties, a change in Court vision loomed, and by the mid-1990s and the subsequent revival of federalism from its dormant state,[14] the Rehnquist Court, and the Chief Justice himself, solidified their roles in Supreme Court history. By aggressively using judicial review to restore power to the states, the 1990s saw a trend, albeit slow, towards curbing the power of the federal government. The Rehnquist Court sought, through the use of the Tenth Amendment,[15] to restore legitimacy and functions of the powers of the states by limiting the powers of the executive and legislative branches under the Commerce Clause. By limiting the powers of the executive and legislative branches under the Commerce Clause, through the use of the Tenth Amendment,[16] the Rehnquist Court sought to restore legitimacy to the powers of the

---

13. *Id.*
14. Daniel Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 658-59 (2005).
15. Robert Shaw, *Comment. The States, Balanced Budgets, and Fundamental Shifts in Federalism*, N.C. L. REV. 82, 1195-1217 (2004).
16. *Id.*

states. Consequently, Chief Justice Rehnquist and his federalism doctrine have received much academic attention.

Qualitative,[17] as well as quantitative,[18] research has studied a wide variety of federalism topics in relation to the Rehnquist Court, but few have tried to uncover whether this doctrine was indeed related to this specific Court, or whether the emphasis on re-establishing state sovereignty is a trait of all conservative leaning courts. Specifically, we ask if the conservative justices of the Rehnquist and Roberts Court based their vote decisions on their ideological policy attitudes or on their belief in federalism. By examining both Chief Justice Rehnquist and Chief Justice Roberts, from nomination to opinions/dissents, our main hypothesis states that there will be more state sovereignty promoting rulings during the Rehnquist Court than the Roberts Court, because the Justices in the Rehnquist era not only were conservative, but the importance of re-establishing distinct lines of federalism were emphasized by Chief Justice Rehnquist.

This hypothesis arises from the attitudinal model of decision-making,[19] which argues that justices base their vote decisions on their personal ideologies and beliefs and the literature on the power of the Chief Justice,[20] that purports the Chief Justice's power of opinion assignment influences Court decision-making. Therefore, we argue that there was something special about federalism cases to Chief Justice Rehnquist that caused the Justices of the Rehnquist Court to rule in favor of said cases more frequently than the current conservative Supreme Court. Specifically, we are attempting to demonstrate that the

---

17. MARTIN H. BELSKY, THE REHNQUIST COURT: A RETROSPECTIVE *275* (3rd ed. 2002); A. Brooke Overby, *Our New Commercial Law Federalism*, TEMP. L. REV. 76, 297-305 (2003); GARRY, *supra* note 3, at 851.

18. Forrest Maltzman & Paul Wahlbeck, *Opinion Assignment on the Rehnquist Court*, JUDICATURE 89, 121-126 (2005); Paul Collins, *Towards an Integrated Model of the U.S. Supreme Court's Federalism Decision Making*, PUBLIUS: J. FEDERALISM 37, 505-531 (2007); Christopher Parker, *Ideological Voting in the Supreme Court Cases*, 1953-2007, JUST. SYS. J. 32, 206-234 (2011).

19. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86 (2002).

20. MALTZMAN, *supra* note 18, at 121-126.

conservative ideology of the Rehnquist Court, which manifested as support for federalism, was distinct to this Court.

The Beginnings of a Doctrine: The Rehnquist Nomination

The original nomination of William Rehnquist to the Supreme Court came as a surprise to many, including the Justice himself. Rehnquist believed President Nixon and his administration knew very little of him or his judicial philosophy, leading Rehnquist to believe that he was not realistically in the running to fill the vacant seats left by either Justice Black or Justice Harlan.[21] Nixon wanted judicial conservatives with constructionist values, but his true emphasis was to stack the courts with members holding similar Republican values.[22] It was of the highest importance to Nixon to move from the Warren Court, which he considered liberal and activist, to a Court reminiscent of the John Birch Society.[23] Based on this guideline, Nixon nominated the following individuals: Warren Burger, a strict-constructionist with a right-leaning judicial philosophy for the position of Chief Justice;[24] Harry Blackmun, a life-long Republican and personal friend, whose moderate tendencies caused him to vote consistently with the liberals after;[25] and Lewis Powell, a decided moderate who built a reputation for being the swing vote for compromise.[26]

Based on Nixon's nomination pattern as evidenced in the individuals enumerated above, it is easy to understand why Rehnquist was surprised with his nomination, as he was a political conservative, a

---

21. ABRAHAM, *supra* note 12 at 18.
22. DEAN, supra note 11 at 1-28.
23. HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 103 (1988). The John Birch Society is a political action group that supports candidates who are tout values of limited government, personal freedoms, and a Constitutional-Republic. Considered extremely right wing, Nixon wanted his nominations to resemble the group only not to be quite as strict.
24. KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA 202 (1993).
25. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 86-87 (1979).
26. JOHN JEFFERIES, JUSTICE LOUIS F. POWELL: A BIBLIOGRAPHY 12 (2001 ed.).

self-described Goldwater Republican with a lucid[27] intellectually and legally-oriented alive-mind, who possessed a devastating sense of humor and wit,[28] which he used to make his opinions known. It was Rehnquist's legal prowess and strong opinions that led his career aide Mary Lawton to say that the law and his orientation to state's rights always came first to him when making decisions, regardless of whether his colleagues agreed with him or not.[29] It was Rehnquist's awareness of these strong personality and political characteristics, which he knew to be so different from those of his colleagues that caused Rehnquist's surprise when Nixon nominated him.

Associate Justice Rehnquist and His Judicial Philosophy

Within months of taking his seat, Justice Rehnquist began establishing a judicial philosophy that had elements of ideological conservatism and a strong orientation towards preserving state sovereignty. The former can best be seen in cases that involve Congress' Commerce Clause power, specifically in instances where federal law conflicts or interferes with interstate commerce. In the earliest of these records, Rehnquist's deferential posture to state authority is easily recognizable.[30]

Prime examples of this deference to the power and authority of the states is best seen in a number of cases prior to Rehnquist taking over the role of Chief Justice. In Rehnquist's majority opinion in *National League of Cities v. Usery*,[31] the Court, for the first time since the Court Packing Scandal of 1937, ruled to limit Congress's Commerce Clause power. The majority held that the 1974 amendments that were added to the Fair Labor Standards Act of 1938 (FLSA) that regulated minimum wage and the overtime pay of state and local employees was an unconstitutional breach of Congressional authority. In light of the Tenth

---

27. DONALD BOLES, MR. REHNQUIST: JUDICIAL ACTIVIST THE EARLY YEARS 112 (1st ed. 1987).
28. ABRAHAM, *supra* note 12, at 16.
29. BOLES, *supra* note 27, at 121.
30. SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 138 (1989).
31. 426 U.S. 833, 851-52 (1976).

Amendment, Rehnquist argued that Congress is, "prohibited from enacting legislation, which operates to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions," and furthermore, that regardless of the fact that Congress's Commerce power is "plenary," the expansive use of such a power has run afoul and needs to be limited.[32] This decision lead Rehnquist to later argue that if the, "Court cannot find direct, explicit conflict between the federal and state laws, the latter should be upheld".[33]

Rehnquist follows the doctrine set forth by *NLC* in his dissenting opinion in *Jones v. Rath Packing Company*.[34] In this case, the majority held that the Fair Packing and Labeling Act of 1966 implicitly preempted a California State law that regulated weight variations in labeling; therefore, any state law regulating weight and labeling variations is superseded by this federal act. In his dissent, Rehnquist argued that the majority seriously misconceived the doctrine of preemption and failed to highlight any conflict between state and federal law.[35] As a result, he argued that the California law should be upheld.[36] In *Douglas v. Seacoast Products, Inc.*, Justice Rehnquist again discussed the doctrine of preemption.[37] Although concurring in part with the majority, Rehnquist dissented in part pertaining to preemption. By stating, with regard to preemption, that the majority, "cut a somewhat broader swath than is justifiable," they failed to adequately consider Virginia's interest in the State's conservation of fish and game. Rehnquist argued that by failing to do so the majority may be overruling necessary state regulatory action.[38] Lastly, in *Arizona Public Service Co. v. Snead*, Rehnquist wrote a concurring opinion where he once more questions the majority's willingness to uphold the preemption doctrine without properly uncovering conflict between state and federal law.[39] In pursuing this path,

---

32. *Id.*
33. DAVIS, *supra* note 30, at 137.
34. 430 U.S. 519 (1977).
35. Displacement of state law or regulation with federal law or regulation.
36. Jones, 430 U.S. at 543-44.
37. 431 U.S. 287-88 (1977).
38. *Id.*
39. 441 U.S. 141, 151-52 (1979).

he argues, the Court is doing a disservice to the states.[40]

Evidence of this judicial philosophy continues in Rehnquist's dissents in *Kassel v. Consolidated Freightways Corp.* and *Armco Inc v. Hardesty*. Rehnquist argued that the majority in *Kassel*, "seriously intruded upon the fundamental rights of States to pass laws to secure the safety of their citizens,"[41] when they ruled an Iowa State law limiting the length of truck beds was a violation of interstate commerce.[42] Also, by ruling that a West Virginia State tax that has an exemption for in-state business, does not necessarily give an economic advantage to in-state business.[43] Rehnquist solidified his role in protecting states from the crushing regulation they faced under Congress' commerce power, even though he found himself, more times than not, on the opposite side of the majority. Regardless of the fact that Rehnquist's state deference position did win a battle in *White v. Massachusetts Council of Construction Employers* (where a mayor's executive order required that at least half of all Boston's workforce on construction projects funded by either city money or a combination of city and federal money, was to be composed of area residents)[44] the writing was on the wall regarding the Court's shifting position on Congress' commerce power and the ruling in *NLC.*

In 1976, *NLC* set a new precedent, and signaled what was believed at the time to be a change in ideological vision. In all reality, the Court, over the following eight years slowly shifted its stance on the Tenth Amendment's state sovereignty protections and re-established the precedent set in *United States v. Darby Lumber Co.* when deciding *Garcia v. San Antonio Metropolitan Transit Authority*, a subsequent change on federalist rulings was still signaled by the arguments made in the dissenting opinion. Justices Rehnquist, O'Connor, and Powell, who would make up the early core of federalism sympathizers under the

---

39. 441 U.S. 141, 151-52 (1979).
40. *Id.*
41. Kassel v. Consol. Freightways Corp., 450 U.S. 662, 687 (1981).
42. *Id.*
43. Armco Inc v. Hardesty, 467 U.S. 638, 641 (1984).
44. 460 U.S. 204, 205-06 (1983).

Rehnquist Court after Chief Justice Burger stepped down in 1985, argued that the Court's decision to not grant stare decisis to *NLC* was incorrect. In so doing, Justice Powell held that the Court was heading down a crude path of distinction between traditional and non-traditional governmental functions,[45] therefore allowing Congress to constitutionally intrude into areas previously left to the states. Justice O'Connor continued the argument set forth by Justice Powell, stating that due to the scope and size of the national economy, Congress' commerce power had changed from barring interstate tariffs to an unlimited power to regulate every area of economic life, and needed to be limited in order to protect the interests of the states in employment relations.[46] Therefore, the power lies with the Court, and the Court alone may determine if an exercise of the Commerce Clause is warranted. For this reason, the unchecked grant of power that stems from the ruling in *Garcia* is unconstitutional. Finally, Justice Rehnquist added that the Tenth Amendment's main purpose is to limit the power of the federal government and that the Court's majority was incorrect in arguing that state sovereignty is, by nature, protected by the creation of a federal governmental system.[47]

Despite the fact that the Court shifted its stance on commerce from *NLC* to *Garcia*, the few decisions, and, in most cases, dissents, handed down during this time-period squarely established the federalism doctrine that would become synonymous with the Rehnquist Court after Burger retired as Chief. Due to his established voting record on the previous cases in his fourteen and one-half years as an Associate Justice, and his consistent adherence to federalism and protection of state's rights from intrusion by the federal government,[48] Rehnquist's nomination to Chief Justice by President Reagan would be met with little surprise.

Chief Justice Rehnquist and His Federalism Doctrine

President Reagan took advantage of the unique opportunity he was afforded when Warren Burger retired from office by nominating a

---

45. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 542 (1985).
46. *Id*. at 559-60.
47. *Id.* at 579-80.
48. ABRAHAM, *supra* note 12, at 276.

chief justice who would establish precedent that would leave a lasting impact on the country as a whole many years past the expiration of his term in office. When Reagan, a well known public champion of preserving federalism,[49] nominated the established pro-federalism Supreme Court Associate Justice William Rehnquist for the position of Chief Justice, the President was seeking to secure his that his own policy agenda of limiting the size and scope of the centralized federal government would continue for many years past his term in office.[50] With Justice Rehnquist as Chief Justice, a change in Court vision loomed, as the last-minute Nixon nomination,[51] a man with an established Supreme Court record of supporting state sovereignty, took the reins. Combined with the nomination of Rehnquist to Chief Justice, Reagan also made the strategic nominations of Sandra O'Connor, Antonin Scalia, and Anthony Kennedy to Associate Justice to assist Rehnquist in furthering the federalist agenda.[52] Due to these nominations, the first signs of federalism's reclamation from dormancy came in the 1990s as the Court aggressively used judicial review to restore power to the states.[53]

In *New York v. United States*, the Court ruled that the Tenth Amendment's federalism principles prohibited Congress from requiring the states to abide by federal regulatory policy.[54] By requiring states to

---

49. Exec. Order No. 12,612, 3 C.F.R. 252 (1987) Throughout his two terms in office, President Reagan warned the country of the ills of 'big government', and frequently spoke on the issue of the expanding power of the national government coming from the states. In one of his more famous attempts to secure the levels of federalism, Reagan signed Presidential Executive Order 12612, which detailed the restoring the of the division of governmental power to levels established by the framers in the U.S. Constitution. *See id.*

50. Joseph F. Zimmerman, *Federal Preemption under Reagan's New Federalism*, PUBLIUS: J. FEDERALISM 7, 27 (1991). Even though President Reagan outwardly supported a limited federal government, he signed a number of Congressional preemption enactments that centralized the federal power over the states, specifically in terms of limiting state economic regulatory control on industry. *See id.*

51. DEAN, *supra* note 11, at 251.

52. DAVIS, *supra* 30, at 138.

53. Hulsebosch, *supra* note 14, at 653.

54. 505 U.S. 144, 162 (1992).

take legal control of low levels of radioactive waste, through the Low-Level Radioactive Waste Management Act Amendments of 1985, Congress violated the Tenth Amendment. Justice O'Connor, on behalf of the majority, stated that by enforcing the, "*take-title"* qualification of said act, the federal government was 'commandeer[ing]' the states into the regulatory service of the federal government, which is violation of the separation of powers doctrine of the U.S. Constitution.[55] *Printz v. United States* expanded the ruling in *New York*, as the Court held that Congress again overstepped its Tenth Amendment boundaries by enforcing certain provisions of the Brady Handgun Violence Prevention Act.[56] Justice Scalia, on behalf of the Court, held that, "the federal government could neither issue directives requiring the States to address particular problems, nor command the States' officers… [t]o administer or enforce a federal regulatory program," as it violated, "the constitutional system of dual sovereignty."[57] Besides *New York* and *Printz,* the Rehnquist Court ruled in a similar manner in the cases of *City of Boerne v. Flores* and *Kimel v. Florida Board of Regents*. In both cases, the Court found that Congress had violated the Equal Protection Clause of the Fourteenth Amendment by interpreting the meaning of their own statutes (the 1993 Religious Freedom Restoration Act and the Age Discrimination in Employment Act of 1967), a power specifically delegated to the Courts and therefore in violation of each state's rights.[58] Hence, these rulings demonstrate the Rehnquist Court's movement to reestablish, what they believed to be, the appropriate levels of governmental sovereignty.

The most important and influential decisions of the Rehnquist Court's federalism doctrine came from the Chief Justice himself regarding the topic of commerce. In *United States v. Lopez*,[59] the Court, for the first time since *Garcia*, ruled a congressional enactment using the

---

55. *New York*, 505 U.S. at 162; GARRY, *supra* note 4, at 851.
56. *Id.*
57. Printz v. United States, 512 U.S. 898, 935 (1997).
58. City of Boerne v. Flores, 521 U.S. 507, (1997), Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000).
59. 514 U.S. 549 (1995).

Commerce Clause unconstitutional.[60] In the Opinion of the Court, Chief Justice Rehnquist states that The Gun Free School Zone Act of 1990 is unconstitutional because the possession of a gun in a school zone does not constitute an economic activity, and therefore does not/cannot substantially affect interstate commerce. Hence, the enactment of the Gun-Free School Zone Act exceeds the regulatory power Congress has over commerce. Due to this, *Lopez* should have been tried under Texas State law, not federal statute.[61]

In *United States v. Morrison*, the Court more clearly defined when Congress could use the Commerce Clause to create law. Chief Justice Rehnquist argued that commerce could only apply to, "economic endeavors,"[62] and the Violence Against Women Act of 1994, which provided federal monetary remedy for "gender motivated violence,"[63] was regulating a deed that had no interstate commerce ties. As a result, the act was unconstitutional, and monetary remedy for such crimes needed to come from the state where the attack occurred.[64]

When *Morrison* is viewed in combination with *Lopez*, it can be seen that the Rehnquist Court limited the scope of the Commerce Clause to its historical power, ruling, "family law, criminal law enforcement, and education are beyond Congress' power under the Commerce Clause."[65] Besides taking the lead in the case that limited the Commerce Clause, Chief Justice Rehnquist also wrote important decisions on the Equal Protection Clause of the Eleventh Amendment. In *Seminole Tribe of Florida v. Florida*, Chief Justice Rehnquist ruled that states are sovereign entities as provided by the Eleventh Amendment, and are immune to being sued without their consent.[66]

Combining this with the ruling in *Board of Trustees of the University of Alabama v. Garrett*, where Chief Justice Rehnquist wrote

---

59. 514 U.S. 549 (1995).
60. WILLS, *supra* note 2, at 870.
61. *Lopez*, 514 U.S. at 549.
62. 529 U.S. 598, 611 (2000).
63. *Id.* at 602.
64. *Id.* at 627.
65. WILLS, *supra* note 2, at 871.
66. 517 U.S. 44, 76 (1996).

that Congress went beyond their regulatory powers by instituting the Americans with Disabilities Act, as they could not find a pattern of work place discrimination against the disabled, therefore making the necessity of the Act null in void, it is seen that, a suit against a state, even in acts where Congress allows for the abrogation of states sovereign immunity, is unconstitutional.[67] Overall, it can be seen that the Rehnquist Court, and the Chief Justice himself, took an, "aggressive stance in safeguarding states from perceived overreaching by the federal government,"[68] and used three different approaches to restore the levels of federalism.[69] By extending state immunity under the Eleventh Amendment, limiting powers of Congress under the Commerce Clause, and breathing life into the Tenth Amendment, the Rehnquist Court became synonymous with a pro-state sovereignty stance. As seen throughout the previous decisions and dissents, Chief Justice Rehnquist compiled a Supreme Court record that supported a limited role of the central government in federalism cases. As a result, the Chief Justice was said to have a federalism doctrine, but the question remains as to whether this federalism doctrine was unique to this particular conservative chief justice or whether conservative majorities lead to higher rates of state sovereignty supporting Supreme Court decisions.

Confirming a New Chief Justice

Upon Chief Justice Rehnquist's death in 2005, President George W. Bush had the rare opportunity to appoint a new Chief Justice to the Supreme Court. However, during the tumultuous political environment of the mid-2000s, the confirmation process in the Senate proved to be rather challenging. John G. Roberts, Jr. was nominated for a position on the D.C. Circuit in 2003, after the Republicans had taken control of Congress once more. Roberts had previously been nominated for a judicial position twice before, once in 2001 by George W. Bush, and also

---

67. 531 U.S. 356, 374 (2001).
68. A. Brooke Overby, *Our New Commercial Law Federalism*, 76 Temp. L. Rev. 297, 305 (2003).
69. WILLS, *supra* note 2, at 868.

in 1992 by George H. W. Bush, but was never confirmed by the Senate. In the summer of 2005, George W. Bush nominated Roberts to the U.S. Supreme Court to fill the vacancy that would soon be created by the retirement of Justice Sandra Day O'Connor. Roberts' path to the Supreme Court would take yet another odd turn though, as Chief Justice Rehnquist died in early September of that year. This sudden opening for the country's highest judicial post prompted Bush to withdraw Robert's nomination for the Associate Justice position, and re-nominate Roberts for the office of Chief Justice.

Although perceived as a conservative-minded jurist, Roberts described himself as not having any comprehensive judicial philosophy or all-encompassing approach to interpreting the Constitution during his own confirmation hearings. Roberts likened himself to a baseball umpire, in that he merely rendered decisions on plays, rather than play the game itself. Roberts exhibited an extremely proficient knowledge of constitutional precedent during his confirmation hearings.

During the confirmation process, Roberts asserted his belief in the principles of federalism, stating, "I think it was part of the genius of the Founding Fathers to establish a Federal system with a national government to address issues of national concern; State and local government more close to the people to address issues of State and local concern; obviously, issues of overlap as well."[70] This view was reinforced regarding his discussion of the Commerce Clause, in which Roberts cited the decision in *Lopez* as one of the most important cases of recent times. He went on to say, "many of us had learned in law school that it was just sort of a formality to say that interstate commerce was affected and that cases weren't going to be thrown out that way."[71] Although this opinion supported Roberts' federalist principles, recognizing that the Commerce Clause had become an extremely powerful tool for Congress to rely on as it worked to expand the powers

---

70. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 190 (2005) (statement of John Roberts, Supreme Court Nominee).
71. *Id.* at 164.

of the Federal Government, the soon-to-be Chief signaled that his support of state-sovereignty would not be as strong as his predecessor.

Justice Roberts on the D.C. Circuit

The United States Court of Appeals for the District of Columbia Circuit has the responsibility of directly reviewing the decisions and rulemaking of many federal independent agencies that are based in the nation's capital. The nature of these decisions provides a glimpse of Justice Roberts' interpretation of the relationship of the federal government with the state governments' in their division of power. Although Roberts spent just over two years on the court, he authored several decisions during his tenure that present some insight into his judicial philosophy in this area.

A month after Roberts took the bench, he issued a strong dissent focused on the scope of the Commerce Clause in *Rancho Viejo v. Norton.* In this case, the developers of a proposed housing development were seeking a rehearing en banc, following the Department of the Interior's blockage of the construction due to claims that the development would disrupt the habitat of an endangered toad.[72] In his dissent, Roberts stated that the court's analysis focused on whether the challenged regulation substantially affected interstate commerce, rather than whether the activity itself did so.[73]

Roberts argued that the approach was inconsistent with the Supreme Court's holdings in *United States v. Lopez* and *United States v. Morrison*, where the Court upheld facial Commerce Clause challenges; as such a challenge can only succeed if there are no circumstances in which the Act at issue can be applied without violating the Commerce Clause.[74] The approach used by the D.C. Circuit in this case, said Roberts, "leads to the result that the regulating of a toad that spends its entire life in California constitutes regulating Commerce among the States."[75] Accordingly, he would have granted *en banc* review due to the

---

72. Rancho Viejo, LLC v. Norton, 323 F.3d 1158 (D.C. Cir. 2003).
73. *Id.* at 1158-59.
74. *See* 514 U.S. 549 (1995); 529 U.S. 598 (2000).
75. Rancho Viejo, LLC, 323 F.3d at 72.

conflict between this ruling and those of the other Circuit Courts. In this decision, Roberts demonstrates his support of the limitations that the Rehnquist Court had begun placing on the Commerce Clause during the past two decades.

Just a few months later, Roberts had the opportunity to write for the majority of the court in *Ramaprakash v. FAA*, another case involving issues of federalism. That case involved a petitioner who was convicted of DUI in Georgia, and due to his status as a licensed pilot, was required to provide a written report of any motor vehicle action within sixty days to the Federal Aviation Administration (FAA).[76] *Ramaprakash* failed to make the necessary report, but on his appeal to the National Transportation Safety Board (NTSB), argued that the FAA failed to meet its own deadline rule in taking action to suspend his pilot's certificate.

The court ruled that the NTSB departed from its own precedent in its ruling on this matter, by changing the triggering requirement to be discovery of the violation itself, rather than the receipt of information concerning possible violations. Roberts ruled that the NTSB's decision must be vacated as arbitrary and capricious due to their departure from established precedent without reason. In doing so, Roberts demonstrated his willingness making rulings that keep governmental agencies in check. Irrespective of the state law violation, the federal government was required to maintain uniform consistency in its enforcement of aviation regulations. Despite being granted the distinct authority to regulate pilot certificates, the court forced the FAA to maintain consistency in its approach to these standards.

Just prior to ascending to the Supreme Court, Roberts provided another example of his judicial philosophy regarding the status of federal governmental agencies and their relationships with state governments', which can be found in *Brady v. FERC*. This was a case involving a dispute over the Federal Energy Regulatory Commission's (FERC) approval of an amendment to expand a commercial marina.[77] The marina in question was located on a lake that is regulated by the Grand River Dam Authority (GRDA), an Oklahoma State agency, pursuant to a

---

76. Ramaprakash v. FAA, 346 F. 3d 1121, 1122 (D.C. Cir. 2003).

license issued by the FERC.

Due to the fact that the GRDA failed to complete its comprehensive shoreline management plan, the court held that FERC was forced to consider license requirements on a case-by-case basis, and so long as the resulting decisions are not arbitrary, capricious, or lacking in substantial evidence, they would not alter the Commission's judgment.[78] Thus, the petition to review the marina expansion approval was denied.

In comparison to the decision in *Ramaprakash*, this decision demonstrates Roberts' equal willingness to force a State agency to comply with the terms of its regulatory authority as well. Even though the lake in question was within the boundaries of Oklahoma, the GRDA's failure to abide by licensing requirements set forth by the FERC resulted in a loss of its power. Compared to *Rancho Viejo*, the holding in *Brady* reveals that Roberts' interpretation of the federalism doctrine is not just a mere exertion of States' rights, but rather the management of the spheres of authority between the State and Federal governments.

The Roberts Court Brings Change: A Reassertion of Federal Authority

The Roberts Court ushered in a new era of the Supreme Court in a way that had not been felt in more than three decades. After nearly twenty years on the bench as Chief Justice, William H. Rehnquist had passed on, leaving the Supreme Court without a leader or without any clear-cut successor to his post. Although he became Chief Justice during the Reagan administration, Rehnquist's presence had influenced the Court since his appointment as an Associate Justice under Richard M. Nixon in January of 1972. To say that the Court was moving into unfamiliar territory would be a gross understatement.

Although not a member of the Supreme Court before his appointment to Chief Justice, to the casual observer it would seem that George W. Bush's nomination of D.C. Circuit Court of Appeals Judge John Roberts should be more of the same types of policies that had been in place under his predecessor. Roberts, like Rehnquist, had been

---

77. 406 F.3d 1, 3-4 (D.C. Cir. 2005).
78. *Id.* at 5.

appointed by a conservative-minded president, and was inheriting most of the same Associate Justices that had been in place for over a decade. However, the tenure of the Roberts Court has shown that not all conservative courts operate the same way, particularly when considering cases involving questions of federalism.

An analysis of the decisions made during the first ten years of the Roberts Court reveals that the Court is largely backing away from this era of, "new federalism," and is instead reverting back to decisions that push the balance of power in favor of the federal government once again. Reviewing the body of federalism-oriented cases that have been decided during the Roberts Court era reveals that the instances in which Roberts himself authors the decision for the Court are infrequent to begin with. In those decisions in which Roberts does write the decision, the Court usually is on the side of expanding the authority of the Federal government to the detriment of the states.

The first federalism case of the Roberts Court era in which the Chief Justice himself wrote the majority decision can be found in the case of *Medellín v. Texas*.[79] This case brought before the Court the question of whether or not a Texas State law limiting the filing of *habeas corpus* petitions was limited by U.S. treaty obligations under the Vienna Convention after when the President issued a memorandum to the attorney general effectively forcing Texas to comply with a decision by the International Court of Justice. Writing for the majority, Chief Justice Roberts determined that while a self-executing treaty automatically binds law in the United States, a non-self-executing treaty does not automatically bind law, unless Congress passes legislation to do so. Rather, according to the Court, the United States has merely expressed its commitment to abide by further International Court of Justice decisions, but has not bound itself to these individual provisions. Thus, in this case, while the rights of the State of Texas to limit the filing of *habeas corpus* petitions were upheld, the Court did open the doorway for future treaties to be automatically binding on the states, if in fact a treaty was self-

79. 552 U.S. 491 (2008).

executing, or if legislation was passed by Congress to call for a non-self-executing treaty to bind the states.

Perhaps there is no case which further drives home the shift in judicial philosophy that the Court has gone through in the last eight years than *National Federation of Independent Business v. Sebelius*, also known as the "Obamacare" case."[80] Writing for the majority, Chief Justice Roberts fell short of ruling that the Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance was justified under the Commerce Clause or the Necessary and Proper Clause of the Constitution. A majority of the Court agreed with Roberts in this finding, stating that Congress did not have the authority to regulate economic inactivity, but only an action taken in the affirmative that would have an effect on the economy.

Nevertheless, the law was upheld as constitutional, as Justice Roberts joined with a majority of the liberal justices on the position that the individual mandate to obtain health insurance could reasonably be characterized as a tax. The Court held that such tax was indeed permitted under the Constitution, and found that, "it is not our role to forbid it, or to pass upon its wisdom or fairness."[81]

By walking the fine line between the position of the conservative-minded justices and the liberal-oriented justices of the Court, Roberts nonetheless expanded the power of the federal government by providing a mechanism for it to create an individual mandate. Although not as strong of a position as if the law had been upheld as constitutional under the Commerce Clause,[82] by finding a means of upholding the law as within Congress' taxing authority, the balance of power under federalism was shifted in favor of the federal government unlike any other case in recent history. Such a decision obviously creates a precedent for further individual mandates on the country's populace, as Congress now has the power to levy a penalty against individuals that make a choice to not

---

80. 132 S. Ct. 2566 (2012).
81. *Id.* at 2600.
82. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 133 (1942); Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241, 261-62 (1964); Katzenbach v. McClung, 379 U.S. 294, 305 (1964).

purchase something and have such a law upheld as a constitutionally valid tax. It is hard to imagine that a holding of this kind that falls squarely in-between the opinions of the other eight justices on the bench would have ever taken place during the tenure of the previous Court.

Another recent example of the Roberts Court's expansion of the federalism doctrine in favor of the federal government can be found in *Wos v. E.M.A.* This case called into question a North Carolina law that required Medicaid beneficiaries who received money from a tort judgment or settlement to reimburse the State with one-third of that money in return for the free medical care that had been provided to them.[83] In a 6-3 decision, the Court found that the "anti-lien provision" of the federal Medicaid law preempted the North Carolina State law, and that as a result the individuals did not have to provide the State with any reimbursement.[84]

Chief Justice Roberts authored a dissent in this case, in which he argued that nothing in the Medicaid Act worked to shift the power away from the states and to the federal government. Citing the Court's earlier decision in *Wyeth v. Levine*, Roberts set forth the basic premise that, "the historic police powers of the States were not superseded by the Federal Act unless that was the clear manifest purpose of Congress."85 Roberts believed that Congress did not specify enough that it was their intent to override the State's powers, as they merely mentioned State laws existed that provided for the, "State to be considered to have acquired the rights of such individual to payment by any other party for such health care items or services."[86] Nowhere in the law, said Roberts, did Congress specify what recovery a state must allow, despite being aware that states traditionally have the power to regulate recoveries under private law.

It is in this dissent that Roberts helps re-establish himself from what seemed to be a departure from Federalist principles in the "Obamacare" case, and asserts his belief that Congress must use specificity in the drafting of laws if it intends to override the powers of the states.

---

83. Wos v E.M.A., 133 S. Ct. 1391, 1394-95 (2013).
84. *Id.* at 1395.
85. Wyeth v. Levine, 555 U.S. 555, 565 (2009).
86. *Wos*, 133 S. Ct. at 1396.

However, it should be noted that this strict interpretation remains distinct from that of Rehnquist, who would have been more likely to argue that if the power is not enumerated in the Constitution, Congress lacks any ability whatsoever to adjust the power in favor of the Federal government.

A Lack of Influence

There are several other examples of cases during the Roberts Court's tenure that indicate that there has been a great reassertion of federal authority, even when the Chief Justice argues on the side of states' rights. These cases suggest that although John Roberts himself still may take a "new federalism" approach to such cases, his influence is not strong enough to sway the opinions of a majority of the justices on the Court. As a result, the federalism principles that were in place under the Rehnquist Court are beginning to erode.

One such example, in which the Roberts Court again addressed a federalism issue, was *Central Virginia Community College v. Katz*.[87] This case concerned the bankruptcy trustee for a defunct bookstore that did business with Central Virginia Community made to the State to satisfy debts. In response to this claim, Virginia raised the defense of sovereign immunity. In a decision written by Justice John Paul Stevens, the Court found that the Bankruptcy Clause of the Constitution, giving Congress the power to make, "uniform laws on the subject of bankruptcies," included the power to abrogate the sovereign immunity of the states.[88] This decision was largely grounded in historical comparisons of how bankruptcy laws of the States functioned under the Articles of Confederation, and failed to give any credit to the *dicta* of the earlier *Seminole Tribe of Florida v. Florida*,[89] which also addressed the sovereign immunity issue. Essentially, this case allowed for a greater expansion of federal power by expanding the breadth of the Bankruptcy Clause in favor of Congress and against the state.

---

87. 546 U.S. 356 (2006).
88. *Cent. Va. Cmty. Coll.*, 546 U.S. at 359.
89. 517 U.S. 44 (1996).

Several years later, the Court gave more authority to the federal government by expanding the scope of the Family and Medical Leave Act (FMLA). In *Coleman v. Court of Appeals*, the petitioner, a former Maryland Court of Appeals employee, filed a lawsuit under the self-care provision of FMLA, alleging that he was fired after requesting sick leave for a documented medical condition.[90] In Justice Anthony Kennedy's decision, the Court held that the self-care provision did not validly abrogate Maryland's immunity from suits for damages. In passing the medical leave portion of the Act, Congress considered evidence that there are roughly equal numbers of men and women on medical leave, and thus the self-care leave provision was not a congruent and proportional response to discriminatory conduct under §5 of the Fourteenth Amendment. As a result, that portion of the Act was not found to abrogate Maryland's sovereign immunity under the Eleventh Amendment. The Court's interpretation in this 5-4 decision provided the federal government with another means of passing legislation that supersedes the individual authority of the states.

Most recently, the authority of the federal government over that of the states was demonstrated in *Mutual Pharmaceutical Co. v. Bartlett*. This case involved a dispute between a New Hampshire State law and the Drug Price Competition and Patent Term Restoration Act of 1984.[91] The New Hampshire product liability law imposes a duty on drug manufacturers that the drugs they produce are not unreasonably unsafe, the basis of which is established by the drugs chemical properties and its warning label. The 1984 Federal Act provides that once a generic drug is approved for use, the manufacturer is prohibited from making any changes in the drug or from making any changes to the pre-approved label of the drug's brand-name counterpart. The respondent in this case had brought her original claim as a result of toxic epidermal necrolysis she suffered as a result of the warning label failing to disclose this specific skin reaction. On review, the Supreme Court ruled that it would be impossible for the generic drug manufacturer to meet its obligations under both the State and federal laws, and therefore the Supremacy

---

90. 132 S. Ct. 1327 (2012).
91. Mut. Pharm. Co. v. Bartlett, 133 S. Ct. 2466 (2013).

Clause dictates that the State law must be struck down. As a result, irrespective of the State's efforts to protect its residents by ensuring drugs sold there have adequate warning labels, the Federal law prevailed, thus eroding the State's authority to pass product liability laws if there is any conflict with a Federal Act.

Another example of the Court's recent expansion of federal authority can be found in their interpretation of the Federal Arbitration Act. In *Preston v. Ferrer*, the Court was faced with deciding if the issue of the validity of a contract agreement between a California attorney who was owed fees from a client under a personal management contract should be decided through arbitration. The contract itself called for arbitration to take place, while Judge Alex Ferrer argued that all administrative remedies had to be exhausted before the matter could go to arbitration, as per California State law. In an 8-1 decision, the Court ruled in favor of arbitration, citing the Federal Arbitration Act as a "national policy" in favor of arbitration.[92] The remaining four justices joined in a dissent stating that the Federal Arbitration Act should not apply, because the issue as to the contract's validity had to be decided in state courts, rather than through arbitration called for in the very contract that was in dispute. This case is an obvious assertion of the federal government's enforcement of its own law through the Federal Arbitration Act. The real effect, however, is an undermining of the authority of the state courts to rule on the validity of a simple contract, in favor of the Federal arbitration policy.

Among the most high-profile cases that the Roberts Court addressed on the issue of federalism in recent times was *Arizona v. United States*. The Court was presented with the question of whether the Federal immigration laws preclude Arizona's efforts at cooperative law enforcement under the provisions of the, "Support Our Law Enforcement and Safe Neighborhoods Act."[93] Specifically at issue were provisions of the Act which created state-law crimes for being unlawfully present in the United States, for working or seeking work while not authorized to do so, which required state and local officers to verify the relationship or

---

92. Preston v. Ferrer, 552 U.S. 346 (2008).
93. Arizona v. United States, 132 S. Ct. 2492(2012).

alien status of anyone who were lawfully arrested or detained, and which authorized warrantless arrests of aliens believed to be removable from the United States. The Court rendered a mixed opinion in this case, holding that the provisions creating state-law crimes conflicted with federal alien registration requirements and enforcement already in place and federal laws regarding the unauthorized employment of aliens. The provision regarding warrantless arrests of aliens was similarly preempted because it was found to usurp the federal government's discretion in the removal process.[94] The provision regarding the verification of a detainee's alien status was upheld, as it merely allows state law enforcement officials to communicate with the Federal Immigrations and Customs Enforcement office during arrests that are otherwise lawful.[95] The ruling in this case strongly reaffirmed the Federal government's sole authority to act in the area of immigration by essentially rendering Arizona's efforts to take authority into its own hands null and void. On a larger scale, due to the high volume of illegal immigration issues that Arizona was facing, the Court's ruling forced the state to rely solely on the federal government's judgment when seeking to project itself in this area.

In one recent federalism case, the Court actually reaffirmed the power of the state governments in *Cuomo v. Clearing House Association*.[96] Roberts, however, was not part of the majority that did so. In this case, the New York State Attorney General was investigating possible racial discrimination in the real estate lending practices of several national banks, and was requesting that the implicated banks turn over certain non-public information as part of his investigation. The Attorney General argued that the Federal Housing Act provided an exception to authorize his investigation into matters otherwise regulated by the Office of the Comptroller of the Currency, a federal agency, under the National Bank Act (NBA). The Court distinguished between a state's supervisory powers and its enforcement powers, and held that the NBA only prevented a state from exercising its supervisory powers over banks,

---

94. *Id.*
95. *Id.*
96. 557 U.S. 519 (2009).

and therefore could exercise its ordinary powers to enforce state laws.[97] This case, a 5-4 decision, provides one of few examples where the Roberts Court actually expanded the authority of the State governments over an area normally reserved for the Federal government.[98] Despite the authority of the Office of the Comptroller of the Currency, the Court still allowed New York to conduct an investigation to enforce its own banking laws without first getting federal approval to do so.

These cases indicate an important trend in the Roberts Court. In all but one of them, the role of the federal government was expanded at the expense of the states, regardless of the fact that five conservatives still sit on the bench. The presence of Chief Justice Roberts signifies a shift in federalism vision, and, in fact in *Arizona v. United States*,[99] Roberts himself even joined with the liberal wing of the Court on the vote in favor of the federal government.[100] The one case where the Court favored the rights of the states, *Cuomo*, found Roberts actually voting with the dissenting justices.[101] This pattern of decisions indicates that the Court is moving away from the Rehnquist Court's "new federalism," and that Chief Justice Roberts lacks an adherence to preserve state sovereignty that was synonymous to his predecessor term. Overall, it can be seen that regardless of the fact that both chief justices are conservative in ideology, conservatism during the Rehnquist Court manifested itself as a state-sovereignty protecting ideology, or one that re-establishes the lines of federalism.

An Evolution in Judicial Consensus?

In a fair number of cases during Roberts' tenure, the Court has actually unanimously favored the federal government over that of the states on federalism issues. Unanimous cases in favor of the federal government would be almost unheard of during the Rehnquist Court era, but now appear relatively common. For example, in *United States v. Georgia*, the Supreme Court expanded the scope of the application of the

---

97. *Id.* at 520-21.
98. *Id.*
99. *Arizona*, 132 S. Ct. at 2497.
100. *Id.*
101. *Cuomo*, 557 U.S. at 536.

Americans with Disabilities Act of 1990 (ADA).[102] There, a paraplegic prisoner using a wheelchair sued the State of Georgia on allegations that the state prisons violated the ADA, as he was kept in his narrow cell for twenty-three hours per day and denied access to programs and classes from which other prisoners benefitted.[103] In response, Georgia argued that the U.S. Congress had exceeded its constitutional authority in authorizing suits for damages against the individual states under the ADA. The Court, in a decision by Justice Antonin Scalia, unanimously ruled that the Constitution allowed the ADA to be applied to the administration of state prisons to the extent that it relates to conduct that violates the Fourteenth Amendment, and therefore expanded Federal authority in the area of disability rights.[104]

During the same term of the Court as the *United States v. Georgia* ruling, the Court also upheld a statute that further expanded the power of the federal government. In *Arkansas Department of Health and Human Services v. Ahlborn*, the Court had to interpret the ability of States to claim personal injury settlements to reimburse themselves for Medicaid benefits expended for the treatment of injuries.[105] The Court ruled, in a unanimous decision, that Federal Medicaid law and the Federal anti-lien provision provided no authorization for State agencies, like the Arkansas Department of Human Services, to assert liens against personal injury settlements beyond the amount specifically stipulated.[106] Thus, the Court struck down the power of the states to offset their losses expended under the Medicaid system, thereby further limiting their sovereign ability to help manage their own fiscal responsibilities.

The trend of the Roberts Court toward federalism rulings unanimously favoring the federal government is also well-demonstrated in a pair of rulings involving the Federal Aviation Administration Authorization Act of 1994 (FAAAA). The first of these, *Rowe v. New Hampshire Motor Transport Association*, was about a Maine law which

---

102. 546 U.S. 151 (2006).
103. *Id.* at 156.
104. *Id.* at 159.
105. 547 U.S. 268, 282 (2006).
106. *Id.* at 292.

imposed certain requirements on air and motor carriers of tobacco products, including that retailers could only use carriers that verified the age of each tobacco purchaser, and that carriers had to ensure that no tobacco was shipped to unlicensed retailers.[107] The petitioner contended that the Maine law was preempted by the FAAAA, which prohibits states from enacting laws related to the prices, routes, or services of air and motor carriers, and that it placed a burden on the delivery procedures of the carriers that significantly affected their prices and services. The Court unanimously ruled that the FAAAA preempted the Maine laws, asserting that the laws had a significant and adverse impact on the congressional goal of precluding State regulation in lieu of competitive market forces.[108]

Five years later, the Court again addressed the FAAAA in *American Trucking Associations v. City of Los Angeles*. There, Los Angeles had adopted a Clean Air Action Plan (CAAP) to reduce emissions and specifically target drayage trucks from the Port of Los Angeles by forcing them to enter into a series of concession agreements imposing a progressive ban on older, less environmentally-friendly trucks.[109] The petitioner challenged several provisions of CAAP, arguing that the FAAAA prohibits a state from enacting any regulation related to the price, route, or service of any motor carrier. The Court unanimously ruled that Los Angeles wielded a coercive power over private companies by threatening criminal punishment for non-compliance with concession agreements.[110] Such actions, said the Court, fit within the FAAAA's prohibition on government regulating the price, route or service of any motor carrier, and thus placed the city government into a regulator role reserved for the federal government.[111]

In both *American Trucking Associations* and *Rowe*, the Court unanimously reinforced the power of the federal government over the area of interstate travel and aviation regulations by striking down state

---

107. 552 U.S. 364, 372 (2008).
108. *Id.* at 367.
109. *Am. Trucking Ass'ns v. City of L.A.*, 133 S. Ct. 2096, 2100 (2013).
110. *Id.* at 2103.
111. I*d.*

laws that sought to usurp the FAAAA. Despite the intent of the laws here being put in place to help regulate tobacco products and to strengthen environmental standards, the state laws' attempts to override provisions of the Federal Act resulted in them being declared invalid.

One of the most surprising cases regarding this relationship between the state and federal government is found in *National Meat Association v. Harris*. In this case, the Court established that federal and state laws do not necessarily need to be contradictory of one another for the state law to be struck down.[112] The relevant facts show that the State of California had passed a statute in order to strengthen regulations governing the treatment of nonambulatory animals and apply that statute to slaughterhouses within the state. Such regulations, and the slaughterhouses in question, however, were already regulated under the Federal Meat Inspection Act (FMIA), which had been in effect since 1906, following the famous Upton Sinclair novel *The Jungle*. California argued its statute should be upheld, as the State law does not require anything that FMIA forbid, or vice-versa. The Court held in its unanimous decision, written by Justice Elena Kagan, that FMIA's preemption clause covers not only conflicting, but also different or additional State requirements.[113] Thus, because the State statute attempted to regulate the same matter, at the same time, in the same place, while imposing different requirements, the Federal Act must prevail. The resulting outcome of the case is that a state is precluded from passing any regulations that attempt to regulate the same issue that are already covered in a Federal Act, even if there are not any conflicts found between the two. When federal legislation places an issue within the purview of the federal government to regulate it, the states are thus precluded from attempting to regulate the same issue in any manner.

These cases appear to show a significant shift in the overall ideology of the Court as a whole. Although the Court is still predominantly conservative in makeup, cases such as these show that the Court is willing to unanimously rule against allowing the state governments even niche rights to impose individual regulations if there is

---

112. Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 970 (2012).
113. *Id.*

any claim of federal authority over the given subject matter. While most of the cases would seem to be simple Supremacy Clause issues, where the federal government wins out due to a conflict, *National Meat Association*[114] provides an example where the Court deprived a state of any regulatory authority where no actual conflict existed between the two laws. Such trends show a stark change in the consensus thinking of the Court during the last decade since Rehnquist was last on the bench.

Another example of the Court's recent expansion of Federal Authority can be found in their interpretation of the Federal Arbitration Act. In *Preston v. Ferrer*, the Court was faced with deciding if the issue of the validity of a contract agreement between a California attorney, who was owed fees from a client under a personal management contract, should be decided through arbitration.[115] The contract itself called for arbitration to take place, while Judge Alex Ferrer argued that all administrative remedies had to be exhausted before the matter could go to arbitration, as per California State law. In an 8-1 decision, the Court ruled in favor of arbitration, citing the Federal Arbitration Act as a "national policy" in favor of arbitration. The remaining four justices joined in a dissent stating that the Federal Arbitration Act should not apply, because the issue as to the contract's validity had to be decided in state courts, rather than through arbitration called for in the very contract that was in dispute. This case is an obvious assertion of the federal government's enforcement of its own law through the Federal Arbitration Act. The real effect, however, is an undermining of the authority of the State Courts to rule on the validity of a simple contract, in favor of the federal arbitration policy.

These cases indicate an important trend in the Roberts Court. In each of them, the role of the federal government was expanded at the expense of the states, regardless of the fact that five conservatives still sit on the bench. The presence of Chief Justice Roberts signifies a shift in federalism vision and, in fact, in *Arkansas Department of Health and Human Services*,[116] Roberts himself even joined in the vote in favor of the federal government. This pattern of decisions indicates that

---

114. *Id.*
115. 552 U.S. 346 (2008).
116. *Ark. HHS*, 547 U.S. at 268.

the Court is moving away from the Rehnquist Court's "new federalism," and that Chief Justice Roberts lacks an adherence to preserving state sovereignty that was synonymous to his predecessor's term.

The most recent example of this trend is seen with the decision in *Obergefell v. Hodges*.[117] Although Chief Justice Roberts writes the dissent to Justice Anthony Kennedy's opinion that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as a fundamental liberty, his argument is that the Constitution is silent on the topic and, therefore, is a topic that should be decided by state legislatures. Although this sounds similar to an argument that could be made by Chief Justice Rehnquist, the substantial difference is that Chief Justice Roberts is arguing that the states are to be the decision maker by virtue of a silent document, and not that marriage is a state issue. Much like the ruling in *National Federation of Independent Business v. Sebelius,* if the Constitution provides for a power, in that instance taxation, he would uphold such power over the states, which is a clear deviation from Rehnquist. Even though Roberts' dissent has a state sovereignty flavor, it is far from the federalist doctrine supported by Chief Justice Rehnquist and his Court. Overall, it can be seen, based on the two Chief Justice's voting records, and regardless of the fact that both chief justices are conservative in ideology, conservatism during the Rehnquist Court manifested itself as a state-sovereignty protecting ideology, or one that re-establishes the lines of federalism and is a unique characteristic of that Court.

Conclusion: Chief Justice Rehnquist's Influence Over the Conservative Justices of His Court and that Court's Support of State Sovereignty

During William Rehnquist's confirmation hearings to become Chief Justice, he openly stated that the Chief Justice can influence the other justices through powers such as opinion assignment. Specifically, Rehnquist stated that opinion assignment during his tenure would be taken more seriously then it was during the Burger Court, as it is an

---

117. 135 S. Ct. 2584 (2015).

important responsibility, and would be, "discharged carefully and fairly."[118] Specifically, Chief Justice Rehnquist sought equal distribution of assignments across the bench and assigned cases based on a justices' legal expertise, and how efficient they were with completing their work.[119] Rehnquist made sure that no justice, including himself, was assigned a second opinion before everyone else had one and made no attempt to interfere with assignments when he was in the minority.[120] The Chief Justice himself stated, "I tried to be as evenhanded as possible as far as number of cases assigned to each justice."[121] Even though Rehnquist himself promoted an assignment method based on equality and keeping the operations of the Court running smoothly, empirical analysis suggests that the Chief Justice was not, "entirely devoid of strategic calculations" and policy considerations.[122]

Specifically, Maltzman and Walbeck found that ideology of a justice played a prominent role in opinion assignment for Rehnquist under two separate conditions; (1) when cases were considered important and (2) when the majority margin at the conference was minimal.[123] When a case was of high salience, Chief Justice Rehnquist would disproportionately assign opinions to justices ideologically similar to him or save them for himself. Rehnquist stated, "The Chief Justice is expected to retain for himself some opinions that he regards as of great

---

118. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 297 (1987).

119. Forrest Maltzman & Paul Wahlbeck, *Opinion Assignment on the Rehnquist Court*, JUDICATURE 89, 121-126 (2005); FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000); FORREST MALTZMAN & PAUL J. WAHLBECK, *May It Please the Chief? Opinion Assignment in the Rehnquist Court, 40* AMERICAN JOURNAL OF POLITICAL SCIENCE 421-443 (1996); Sue Davis, Power on the Court: Chief Justice Rehnquist Opinion Assignments, 74 JUDICATURE 66-72 (1990).

120. Jeffrey Toobin, *Money Unlimited: How Chief Justice John Roberts Orchestrated the Citizens United Decision*, THE NEW YORKER, May 21, 2012.

121. REHNQUIST, *supra* note 118, at 297.

122. Forrest Maltzman & Paul Wahlbeck, *Opinion Assignment on the Rehnquist Court*, JUDICATURE 89, 121(2005); FORREST Maltzman & Paul J. Wahlbeck, *May It Please the Chief? Opinion Assignment in the Rehnquist Court, 40* AMERICAN JOURNAL OF POLITICAL SCIENCE 421-443 (1996).

123. Forrest Maltzman & Paul Wahlbeck, *Opinion Assignment on the Rehnquist Court*, JUDICATURE 89, 121-126(2005).

significance,"[124] and used this philosophy to influence his conservative colleagues towards voting to preserve state sovereignty when deciding federalism cases. Seeing that Rehnquist wrote a majority of the Court opinions supporting a limited central governmental authority in federalism cases, it is reasonable to argue that Rehnquist believed federalism, and the devolution of federal power, were the most salient issues during his tenure. As this topic was of high importance, it is also reasonable to believe that Rehnquist would seek out justices ideologically similar to him, on said cases, to write opinions when his workload was full. By either writing opinions himself, or assigning opinions to justices with similar policy preferences on this topic, such as Justices White, Powell, and O'Connor, the Chief Justice was attempting to influence the Court to rule in favor of state sovereignty. Having opinions crafted by him, or any of the previous justices, Rehnquist was transposing his federalism doctrine onto the conservative justices, who composed the majority of the Court's membership. In comparison to the Roberts Court, the majority of the Rehnquist Court Justices' vote choices were directly related to preserving what they considered to be the appropriate powers for the different levels of government. It seems that the Justices of that Court relied on the most fundamental conservative ideal of supporting a limited national government, and took voting cues from the Chief Justice himself and cast their votes accordingly to preserve their definition of federalism. Due to the fact that Rehnquist's influence is no longer present on the Court and the de-emphasis of importance on federalism cases by Roberts, it is safe to conclude that the topic of federalism does not hold the same weight with all conservative courts. In fact, the promotion of distinct lines of federal and state sovereignty was unique to the Rehnquist era. As a result, Chief Justice Rehnquist's influence on his conservative counterparts lead to the increased number of state-sovereignty promoting rulings that uniquely occurred during that era.

124. *See* REHNQUIST, *supra* note 118, at 297.