FEDERALISM BY CONVENIENCE: THE SUPREME COURT'S JUDICIAL FEDERALISTS ON THE DEATH PENALTY AND STATES' RIGHTS CONTROVERSIES

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"Nothing has more perplexed generations of conscientious judges than the search in juridical science, philosophy and practice for objective and impersonal criteria for solution of politico-legal questions put to our courts."[1]

I. INTRODUCTION

The Rehnquist Court has gained a reputation as the guardian of states' rights.[2] It is widely perceived that the current Court consistently enforces constitutional limits on the federal government's power, implying wide freedoms for the states.[3] Observers have noted that the Court, by repeatedly defining the powers of the federal government in a limited way and broadly characterizing the states' discretion, has fundamentally altered the power relationship in government.[4]

Consistent with its purported value of states' rights, the Court's conservative Justices have sought to quell Court scrutiny of state death penalty laws and practices, reasoning that the states should be left to exercise their own judgment and that the federal government and the Court itself need not have a role.[5] Consistency on states' rights, while extending to many issues beyond the death penalty, is noticeably absent in controversies in which deferring to the states would amount to deferring to a liberal agenda.[6] In cases ranging from how the states run their own

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1 Justice Robert H. Jackson, Maintaining Our Freedoms: The Role of the Judiciary (Aug. 24, 1953), *in* 19 VITAL SPEECHES OF THE DAY 738, 759 (Oct. 1, 1953).

2 *See, e.g.*, Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decision*, 69 U. CHI. L. REV. 429, 429-30 (2002).

3 *See id.* at 430-31.

4 *See* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 2-10 (2002).

5 *See, e.g.*, Shafer v. South Carolina, 532 U.S. 36, 57-58 (2001) (Thomas, J., dissenting); Simmons v. South Carolina, 512 U.S. 154, 183-184 (Scalia, J., dissenting).

6 *See* Fallon, *supra* note 2, at 434.

elections to how they regulate business, members of the Court's conservative block have weighed in against the freedoms of state and local governments.[7]

This Article explores the implications of the Court's selective embrace of states' rights. It suggests the possibility that political convenience, not democratic theory, guides the Court's conservative members as they urge for protection of state decisions regarding the death penalty while attacking their regulation of business. Part II of this Article explores the proper role of judicial review within the context of the rule of law. This Part briefly reviews contemporary prescriptions for legitimate judicial decision-making, including the Court's own pronouncements in a recent decision, and notes that despite a divergence of views among the leading commentators, there is a shared vision of jurisprudential consistency and legitimacy. Part II concludes with a review of recent scholarship that suggests despite the Rehnquist Court's reputation for states' rights (a theory we label judicial federalism), political ideology often plays a larger role than putative federalism. Part III explores the current climate on the Court that has led to its reputation as the guardian of states' rights. It discusses the Court's case for states' rights both as a matter of law and history, and it highlights the colorful rhetoric offered on behalf of states. It also discusses several analyses, including those from within the Court, that find the basis for states' rights less than overwhelming. Parts IV and V comprise the heart of the Article's analysis. Part IV examines the explicit and implicit invocations of judicial federalism in the Court's capital jurisprudence. Time and again the Court's judicial federalists urge deference to the states and a concomitant reining in of federal power in death penalty appeals. Part V, by way of contrast, analyzes a series of decisions in which the Court's judicial federalists seemingly ignore their stated preferences to defer to the states and instead assert federal control to assure a substantively conservative outcome. The Article suggests that the Rehnquist Court's reputation for judicial federalism is not entirely accurate. Rather, the conservative Justices on the current Court practice a form of convenient federalism, one which gives way to substantive conservatism. This has implications both for the legitimacy of the Court and for our cultural and legal understanding of the death penalty.

One matter of terminology should be addressed first. Numerous commentators have noted the Rehnquist Court's elevation of a "States' Rights" doctrine as an important principle when policing the boundaries

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[7] *See generally* Bush v. Gore, 531 U.S. 98 (2000) (per curium) (holding that the vote recount methodology implemented by the Florida Supreme Court during the 2000 presidential election was unconstitutional); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (holding that the FCC had jurisdiction to regulate purely intrastate telephone competition).

between federal and state sovereignty.[8] This Article adopts the term "judicial federalism" to describe this structural theory of constitutional interpretation. Judicial federalism is the doctrine that generally limits federal interference with state action where it "would be considered an improper intrusion" into the realm of state power.[9] This "improper intrusion" is defined in two important ways. First, judicial federalism promotes powerful state governments by limiting the reach of the federal government under the Commerce Clause, the Fourteenth Amendment, and the Eleventh Amendment.[10] Second, judicial federalism grants deference to state court decisions on matters of state law, factual and evidentiary matters, and even on matters of federal law.[11] In short, judicial federalism serves as the analytical focus of this Article's research and is a structural theory that grants great deference to state governments and courts. It, correspondingly, retracts the power of the federal government and federal appellate courts. In this respect, judicial federalism can be understood interchangeably with the terms "States' Rights" and "constitutional federalism."

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[8] *See, e.g.*, Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001); Fallon, *supra* note 2; Symposium, *Federalism after* Alden, 31 RUTGERS L.J. 631 (2000) [hereinafter Symposium, *Federalism after* Alden]; Symposium, *New Direction in Federalism*, 33 LOY. L.A. L. REV. 1275 (2000) [hereinafter Symposium, *New Directions*]; Symposium, *State Sovereign Immunity and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 817 (2000) [hereinafter Symposium, *State Sovereign Immunity*].

[9] BLACK'S LAW DICTIONARY 1128 (7th ed. 1999).

[10] Judicial federalism is evident in several Rehnquist Court decisions. *See, e.g.*, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd. 527 U.S. 666 (1999) (holding that the Trademark Remedy Clarification Act did not abrogate Florida's sovereign immunity and was inappropriate legislation under the Fourteenth Amendment); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (holding that Congress may not abrogate pursuant to Article I powers); Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991) (holding that the Eleventh Amendment protects states from nonconsensual suits by Indian tribes).

[11] *See, e.g.*, Arizonans for Official English v. Arizona, 520 U.S. 43, 77, 79 (1997) (stating that the Supreme Court will take a "cautious approach" to invalidating state law); Romano v. Oklahoma, 512 U.S. 1, 10-12 (1994) (arguing that the Court must not "fashion general evidentiary rules, under the guise of interpreting the Eighth Amendment" when considering the admissibility of evidence in state capital cases); Coleman v. Thompson, 501 U.S. 722, 729 (1991) (allowing state courts to rule on matters of federal law if there is an independent state law ground for the ruling); Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974) (noting that judicial federalism is the principle that the federal courts will defer to state courts on matters of state law).

II. JUDICIAL REVIEW, THE RULE OF LAW, AND SUPREME COURT LEGITIMACY

A critical component of the American conception of the rule of law is the power of judicial review. Simply put, judicial review is the power of courts to determine whether government actions or inactions violate the Constitution.[12] Although the nature, extent, and wisdom of judicial review have been the targets of sometimes heated debate,[13] judicial review is clearly an institution that continues to influence the landscape of the American political system. Indeed, judicial review is a jurisprudential fact,[14] and we assume its existence and importance. The concern is, given judicial review, how does the Supreme Court approach matters of constitutional adjudication? In other words, how does, and should, the Supreme Court exercise its authority?[15] Assuming that the Justices are individuals with intractable and deep-seated world views, constitutional adjudication nevertheless should be principled, transparent, and consistent rather than ideological, secretive, and results-driven. Constitutional adjudication should not be idiosyncratic or ad hoc.

We are certainly not alone in desiring consistency and principled predictability in constitutional adjudication; most contemporary theories of constitutional decision-making are based to a large extent on such notions. Ronald Dworkin argues that the Court should adopt morally coherent principles when deciding the cases.[16] The Constitution, Dworkin quickly concedes, is comprised of abstract clauses, but he proposes that the Court "interpret and apply these abstract clauses on the understanding that they

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[12] BLACK'S LAW DICTIONARY 852 (7th ed. 1999).

[13] *Compare* CHARLES A. BEARD, THE SUPREME COURT AND THE CONSTITUTION (1912) (finding support for judicial review among the Framers), *and* RAOUL BERGER, CONGRESS VS. THE SUPREME COURT (1969) (finding support for judicial review among the Framers), *with* LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY (1932) (expressing skepticism for judicial review), *and* 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATED 711-1046 (1953) (criticizing the exercise of judicial review).

[14] Judicial review has been an established jurisprudential practice since 1803, when Chief Justice John Marshall penned the landmark case, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-80 (1803).

[15] Herbert Wechsler states, which is conceded in part, that constitutional decision-making should move beyond politics. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 5-10 (1959).

[16] *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) [hereinafter DWORKIN, FREEDOM'S LAW]; Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718 (1998) [hereinafter Dworkin, *Darwin's New Bulldog*]; Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353 (1997) [hereinafter Dworkin, *In Praise of Theory*].

invoke moral principles about political decency and justice."[17] He argues that law is "drenched" in theory, even if we tend to disagree with what that theory might be.[18] For Dworkin, however, it is important—and unavoidable—that judges engage in reasoning from the "inside out."[19] In other words, when judges adjudicate the matter before them, they explicitly or implicitly climb the ladder of abstraction in order to evaluate how the case they decide can fit into their larger understanding of the legal, political, and moral world.[20] Even if observers disagree, then, at least the theory is transparent and future decisions can be expected to fit within that understanding of the world.[21]

Richard Posner takes great exception to Dworkin's approach, and the debate that rages between Dworkin and Posner can be equally entertaining and weighty.[22] While Dworkin urges that the role of moral philosophy is not only desirable but unavoidable,[23] Judge Posner argues for pragmatic, empirically grounded decisions based on the best outcomes as determined by the evidence.[24] When judges confront difficult cases and must consider whether to apply a scientific or philosophic methodology, Posner firmly urges for the scientific approach.[25]

Posner's pragmatism looks to past decisions—the deference to precedent—as one of a number of equally weighed considerations to be made when determining the outcome of a case.[26] "Judges often must choose between rendering substantive justice in the case at hand and maintaining the law's certainty and predictability."[27] Here, Posner points out that this trade-off is most starkly evident in cases where the statute of limitation is asserted as a defense.[28] In these instances, judges will typically rule in favor of the defendant regardless of the so-called merits of the case in order to protect law's certainty and predictability.[29] For the purposes of this Article, when judges consider how to reach the "best" outcome of a case, Posner argues that the law's certainty and predictability

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17 DWORKIN, FREEDOM'S LAW, *supra* note 16, at 2.

18 Dworkin, *In Praise of Theory*, *supra* note 16, at 360.

19 Dworkin, *Darwin's New Bulldog*, *supra* note 16, at 1723.

20 *See id.*

21 *See id.*

22 *See* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 252-53 (1999); *see also* Dworkin, *Darwin's New Bulldog*, *supra* note 16, at 1718.

23 Dworkin, *In Praise of Theory*, *supra* note 16, at 355.

24 POSNER, *supra* note 22, at viii.

25 *Id*.

26 *Id*. at 242.

27 *Id*.

28 *Id*.

29 *Id*.

should be, and are, valued commodities.[30]

Cass Sunstein suggests that judicial minimalism, or "saying no more than necessary to justify an outcome," is the preferred approach.[31] Sunstein argues that minimalism will allow judicial decision-making to be less burdensome, both because the justices will be able to agree on narrow grounds when they might otherwise disagree on broader grounds and because minimalist decisions are less prone to error.[32] Moreover, when there is error, the damage is less widespread.[33] Judicial minimalism also serves the important constitutional goals of respecting precedent and fostering popular democratic deliberation of the questions left unanswered.[34] Sunstein further argues that the moral judgments of the Justices are not always reliable, and he is openly skeptical about the futility of "judicial efforts to resolve questions of political morality."[35] Thus, for Sunstein, judicial minimalism is a safe, cautious approach to decision-making under which citizens can be confident that the Court will answer only those questions that come before it on the narrowest grounds possible and leave unanswered related questions to be resolved through democratic processes.[36]

Justice Scalia has lent his voice to this debate by arguing that "textualism" is the preferred method of constitutional interpretation.[37] He urges judges to determine what the text of the law means and nothing more.[38] He agrees with Justice Holmes that "[w]e do not inquire what the legislature meant; we ask only what the statute means."[39] This approach leads to remarkable consistency, Justice Scalia posits, and consistency is a particularly important part of judge-made law.[40] While the Legislature must undergo constant democratic review during its law-making process, judges, and more specifically, federal judges, are not typically subject to

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30 *See id.* at 243-52.

31 CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3-4 (1999).

32 *Id.* at 4.

33 *Id*.

34 *Id*.

35 *Id*. at 37.

36 *See id*.

37 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22-23 (Amy Gutmann ed., 1997) [hereinafter SCALIA, A MATTER OF INTERPRETATION].

38 *Id*.

39 *Id.* at 23 (quoting OLIVER WENDELL HOLMES, *Legal Interpretation*, *in* COLLECTED LEGAL PAPERS 203, 207 (1920)).

40 *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 588 (1989-90) [hereinafter Scalia, *Assorted Canards*].

such checks.[41] "The only checks on the arbitrariness of federal judges are the insistence upon consistency and the application of the teachings of the mother of consistency, logic."[42]

Justice Scalia balks at the notion that even a faint hint of personal values or ideology is at work in his thinking or that of his fellow judicial federalists.[43] Instead, in his view, their work is based on an undeniable and clear minded reading of the Constitution that steers clear of the dangers inherent to judicial flexibility.[44]

> As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making *value judgments* . . . , then a free and intelligent people's attitude toward us can be expected to be (*ought* to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. . . . Value judgments, after all, should be voted on, not dictated; and if our Constitution has somehow accidentally committed them to the Supreme Court, at least we can have a sort of plebiscite each time a new nominee to that body is put forward.[45]

Justice Scalia considers the Constitution to have a weight of permanency; it does not, and should not, change meaning over time.[46] For example, he mocks the Court's claim that the meaning of the Eighth Amendment shifts over time,[47] a pillar advanced by Chief Justice Warren and relied upon in subsequent decades as a means of critically examining criminal punishments.[48] "A society that adopts a bill of rights is skeptical that 'evolving standards of decency' always 'mark progress,' and that

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41 *Id*.

42 *Id*. As we shall see, however, Justice Scalia practices a special brand of consistency that is less related to textualism and more akin to conservatism.

43 *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 1000-01 (1992) (Scalia, J., dissenting).

44 *Id*.

45 *Id*. (Scalia, J., dissenting).

46 SCALIA, A MATTER OF INTERPRETATION, *supra* note 37, at 40.

47 *Id*.

48 *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

societies always 'mature,' as opposed to rot."[49] Instead, most people believe that moral principles remain permanent.[50] Thus, a death penalty that was accepted in 1791 must still be acceptable today—as it was not cruel then, ergo, it cannot be cruel today.[51]

Justices who have used the Eighth Amendment as a means to invalidate death sentences simply have "no standard" to support them.[52] Indeed, Justices Marshall, Brennan, and Blackmun comprised part of the "Living Constitution" crowd who advanced a "morphing" Constitution that was distorted to produce outcomes which appeased the majority view.[53] Interestingly, some commentators have argued that Justice Scalia's textualist approach also allows for arbitrary judicial interpretation.[54] However, he has responded that "[n]o textualist-originalist interpretation that passes the laugh test could, for example, extract from the United States Constitution the prohibition of capital punishment that three nontextualist justices have discovered . . . ."[55]

While Justice Scalia's colleagues may differ on theories on interpretation, they share his commitment to clarity and consistency, as "[l]iberty finds no refuge in a jurisprudence of doubt."[56] The plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in making its case for respecting precedent, emphasized principles of consistency and the rule of law, noting that "[t]he obligation to follow precedent begins with necessity," and that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."[57] However, the issue facing the Court in *Casey* was not whether consistency and deference to precedent was desireable.[58] Rather, it was forced to decide under what conditions ought the Court disrupt consistency because the failure to do so would be a greater injury to the Constitution than following precedent.[59] In other words, under what conditions is following precedent so problematic that the Court should be willing to overrule its previous holding and thereby seemingly disrupt the reliability and legitimacy of the

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49 SCALIA, A MATTER OF INTERPRETATION, *supra* note 37, at 40-41.

50 *Id*. at 146.

51 *See id*.

52 *See id*. at 46.

53 *Id*. at 46-47 & n.62.

54 Gordon S. Wood, *Comment*, *in* SCALIA, A MATTER OF INTERPRETATION, *supra* note 37, at 63.

55 SCALIA, A MATTER OF INTERPRETATION, *supra* note 37, at 132.

56 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 844 (1992).

57 *Id*. at 854.

58 *See id*. at 854-55.

59 *Id*. at 854.

Court?

Casey establishes a number of important considerations designed to aid the Court in its determination of whether to overrule precedent.[60] Specifically, the Court may ask itself the following questions:

- whether the rule has proven to be intolerable simply in defying practical workability;
- whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation;
- whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or
- whether facts have so changed, or have come to be seen so differently, as to have robbed the old rule of significant application or justification.[61]

These considerations amount to a telling commentary on how highly the Court values the reliability of its decisions. Only a convergence of factors, carefully considered, will allow the Court to risk "seriously weaken[ing] the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."[62] The Court's legitimacy, which is its main political currency and power, is primarily at stake.[63] The discussion of legitimacy is made in the context of explaining why great caution must be exercised when the Court considers overruling a previous decision.[64] But the legitimacy discussion can also be viewed in the broader sense that the Court recognizes that it must be consistent and principled.[65]

> The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances

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60 *Id*. at 854-55.

61 *Id*. (internal citations omitted).

62 *Id*. at 865.

63 *Id*. "The Court's power lies . . . in its legitimacy, a product of substance and perception . . . ." *Id*.

64 *Id*. at 865-66.

65 *See id*.

> in which their principled character is sufficiently plausible to be accepted by the Nation.[66]

In *Casey*, the Court notes that when it overrules a case, the country generally perceives that as an assertion that the prior case was incorrectly decided.[67] Additionally, it concedes that only so much error can reasonably be assigned to prior courts.[68] As such, the Court recognizes that if it rules one way, then another, and then another again, the country would take the Court's actions as "evidence that justifiable reexamination of principle had given way to drives for particular results in the short term."[69] In other words, "[t]he legitimacy of the Court would fade with the frequency of its vacillation."[70]

The opinion ends the discussion fairly ominously, noting that "[t]he Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible."[71] For the purpose of this Article, the Court's legitimacy is understood to derive in part from notions of the rule of law, which in turn is based on the notion that principled judicial decisions emerge from consistent, transparent, and reliable processes that are not influenced by political ideology or results-driven preferences.

Other commentators agree. As David Kairys points out, "Judicial legitimacy rests . . . on notions of honesty and fairness and, most important, on popular perceptions of the judicial decision-making process."[72] Indeed, he relates the rule of law to the Court's legitimacy by explaining that the public perceives the judicial process based upon "the notion of government of law, not people."[73] Echoing the themes of *Casey*,[74] Dworkin,[75] Posner,[76] and Sunstein,[77] Kairys notes that the popular perception of law is separate from, and above, other aspects of government and society, including the values of a judge or any other person.[78] Central

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66 *Id*.

67 *Id*. at 866.

68 *Id*.

69 *Id*.

70 *Id*.

71 *Id*. at 868.

72 David Kairys, *Introduction* to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 1 (David Kairys ed., 3d ed. 1998).

73 *Id*.

74 *See* discussion *infra* Part III.A.

75 *See supra & infra* text accompanying notes 60-81.

76 *See supra & infra* text accompanying notes 71-91.

77 *See supra & infra* text accompanying notes 71-101.

78 Kairys, *supra* note 72, at 1.

to this concept is that the law has the ability to be fair and objective.[79]

But despite the *Casey* Court's remarkably candid self-analysis, Paul Campos is more blunt about the legitimacy of the Court's role in judicial review and the rule of law.[80] Campos notes that

> [t]he social role we give [judges] requires [them] to dispose of the most intractable social and political disputes by essentially arbitrary acts of fiat, while at the same time claiming their decisions are impelled by 'the law' or 'our constitutional traditions,' or 'fundamental rights inherent in the concept of ordered liberty,' or some similar magic phrase.[81]

The following analysis suggests that Campos is not necessarily misguided in his cynicism.

The Rehnquist Court enjoys a reputation as supportive of state sovereignty and critical of expansive federal power. But the current manifestation of judicial federalism on the Court gives way to substantive conservative ideology when allegiance to federalist principles would result in substantive liberal outcomes. Several commentators have made a similar observation.[82]

For instance, Richard Fallon examines the relationship between judicial federalism and judicial conservatism, and he concludes that although the current Court's judicial federalists are "committed to enforcing limits on national power and to protecting the integrity of the states," the Court "proves more substantively conservative than it does pro-federalism when deference to state processes would shield liberal outcomes from federal reversal."[83] Fallon explores three categories of cases—those regarding the regulation of private conduct under the Commerce Clause, those regarding Congress' authority to regulate state and local governments, and those regarding state sovereign immunity—that have dominated the recent scholarly and judicial discussion of

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79 *Id.*

80 *See* PAUL F. CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW 41 (1998).

81 *Id*.

82 *See, e.g.*, Fallon, *supra* note 2, at 433-34 (explaining that the Rehnquist Court is very conservative and has a commitment to constitutional federalism only if it supports substantive conservatism); Symposium, *Federalism after* Alden, *supra* note 8, at 636 (noting that the "personnel change" on the Court "enabled the federalism-enforcing side to gain ascendancy"); Symposium, *New Directions*, *supra* note 8, at 1275-76 (examining the new judicially enforceable federalism doctrine outlined by the Court in its 1999 sovereign immunity trilogy of cases); Symposium, *State Sovereign Immunity*, *supra* note 8, at 817-19 (examining the Court's Eleventh Amendment jurisprudence).

83 Fallon, *supra* note 2, at 429-30.

federalism.[84] He then broadens the discussion of federalism to include the federal preemption doctrine, federal review of state court decisions, the abstention doctrine, cannons of statutory interpretation, and the scope of the Dormant Commerce Clause.[85] After reviewing the larger trend of judicial federalism, Fallon concludes, in part, "The Court's pro-federalism majority is at least as substantively conservative as it is pro-federalism. When federalism and substantive conservatism come into conflict, substantive conservatism frequently dominates." [86]

Similarly, Michael Solimine notes the "federalism ironies" that mark the debate over federal products liability legislation, congressional limits on securities fraud litigation in state courts, and the *Bush v. Gore*[87] decision.[88] In related research, Robert Howard and Jeffery Segal systematically tested Supreme Court decision-making using a logistic probability model and concluded that ideology continues to explain the Court's decisions.[89] Kairys has also recognized a similar inconsistency, suggesting that there is "no evident hesitance, or any sign of self-reflection" by the Court's federalists when invalidating state and local laws that could be considered substantively progressive.[90]

Thus, this Article takes the position, as does much of the extant literature, that the Rehnquist Court "has an agenda of promoting constitutional federalism,"[91] but that it does so only to the extent that substantively conservative outcomes are protected.

This Article explores the ironies and inconsistencies of judicial federalism by picking up where those who have explored this area have left off. The Article examines the Court's death penalty jurisprudence and the implied or expressed invocation of judicial federalism contained therein. It then contrasts those principles of federalism to a series of non-capital cases in which the pro-federalism Justices seemingly disregard their stated preference for federalism. In a variety of cases, the putative judicial federalists violate their stated principles by overturning state regulatory schemes, anti-hate speech legislation, and state court interpretations of state law.

Crudely stated, then, the Article points out the distortion embedded in

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84 *Id*. at 431, 452-59.

85 *Id*. at 432, 459-68.

86 *Id*. at 434.

87 531 U.S. 98 (2000) (per curiam).

88 *See* Michael E. Solimine, *Judicial Federalism After* Bush v. Gore*: Some Observations*, 23 JUST. SYS. J. 45 (2002).

89 *See* Robert M. Howard & Jeffrey A. Segal, *An Original Look at Originalism*, 36 LAW & SOC'Y REV. 113, 133-34 (2002).

90 Kairys, *supra* note 72, at 7.

91 Fallon, *supra* note 2, at 429.

the Court's current reputation for federalism and states' rights. In capital cases, the Court appears to practice a hands-off approach: let the states decide. However, in cases where a liberal outcome appears at stake, the states' rights justices invoke other rationales to ensure a substantively conservative result.

III. THE PRO-STATE CLIMATE

Scholars have observed "doctrinal cycles" of federalism corresponding to the ideological makeup of the Court.[92] When liberals predominate, the thrust of the Court's decisions are grounded in the supremacy of the federal government and federal law.[93] When conservatives predominate, the thrust of the Court's decisions are grounded in the estimable stature of state and local governments and their laws.[94]

The preferences of the contemporary Court are not in doubt. Various legal, policy, and political scholars have observed that the Rehnquist Court has been actively "buttressing federalism,"[95] taking an "extremely deferential stance" toward the states,[96] and allowing "the realm of state institutional autonomy [to be] expanded consistently"[97] by assuming the position of "active guardian" of state interests.[98] Moreover, the Rehnquist Court is variously described as holding views "in marked contrast"[99] and "fundamentally at odds" with the Court's conception of federalism in the preceding five decades.[100] Michael Rappaport suggests the significance of the Court's fervent embrace of states is considerable, noting that "one of the most important developments in constitutional law has been the resurgence of federalism."[101]

The evidence of the Rehnquist Court's evolution from previous Courts

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[92] LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 282 (2d ed. 1995).

[93] *See id*. at 25-31, 281-316.

[94] *See id*.

[95] Charles Wise, *Judicial Federalism: The Resurgence of the Supreme Court's Role in the Protection of State Sovereignty*, 58 PUB. ADMIN. REV. 95, 95 (1998).

[96] SUE DAVIS, JUSTICE REHNQUIST AND THE CONSTITUTION 149 (1989).

[97] Timothy J. Conlan & Francois Vergniolle de Chantal, *The Rehnquist Court and Contemporary American Federalism*, 116 POL. SCI. Q. 253, 273 (2001).

[98] ERIC N. WALTENBURG & BILL SWINFORD, LITIGATING FEDERALISM: THE STATES BEFORE THE U.S. SUPREME COURT 123 (1999).

[99] Charles R. Wise, *The Supreme Court's New Constitutional Federalism: Implications for Public Administration*, 61 PUB. ADMIN. REV. 343, 343 (2001).

[100] DAVIS, *supra* note 96, at 149.

[101] Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 819 (1999).

is compelling. Richard Kearney and Reginald Sheehan found that state and local governments prevailed before the high court in less than 37% of cases heard under Chief Justice Warren.[102] Under Chief Justice Rehnquist, that number has climbed above 60%.[103] Scholars find, not surprisingly, that since sub-federal governments are more successful before the Rehnquist Court, they are significantly more apt to litigate.[104]

At the heart of the Court's federalist majorities typically sit the Court's most conservative members—Chief Justice Rehnquist, Justice Scalia, and Justice Thomas—whom this Article refers to as the "judicial federalists." Indeed, the three are ranked by state attorneys general as the most "pro-state" justices among the last nineteen to serve.[105] Studies of decisions statistically confirm their pro-state tendencies.[106] Moreover, this deference to the states most assuredly extends to the death penalty. As Martin Garbus notes, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas "form a solid wall of support for the death penalty."[107]

The Rehnquist Court does not merely tend to rule in favor of states, it is inclined to define controversies in such a way as to emphasize the power of states over that of citizens. Scholars have argued that criminal matters, including the death penalty, are increasingly portrayed as questions of state self-determination rather than questions of individual rights.[108] Justice Blackmun asserted in his dissent in *Coleman v. Thompson*[109] that the Court paid tribute to the role of states at the expense of the rights of citizens.[110] According to Justice Blackmun,

> Federalism; comity; state sovereignty; preservation of state resources; certainty: The majority methodically inventories these multifarious state interests . . . . One searches the majority's opinion in vain, however, for any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and

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[102] Richard C. Kearney & Reginald S. Sheehan, *Supreme Court Decision Making: The Impact of Court Composition on State and Local Government Litigation*, 54 J. POL. 1008, 1013 (1992).

[103] *See id*.

[104] WALTENBURG & SWINFORD, *supra* note 98, at 122.

[105] *Id*. at 50-51.

[106] *Id*. at 111.

[107] MARTIN GARBUS, COURTING DISASTER: THE SUPREME COURT AND THE UNMAKING OF AMERICAN LAW 68 (2002).

[108] *See, e.g.*, Katy J. Harriger, *The Federalism Debate in the Transformation of Federal* Habeas Corpus *Law*, PUBLIUS, Summer 1997, at 1.

[109] 501 U.S. 722 (1991).

[110] *Id*. at 758 (Blackmun, J., dissenting).

sentence of death.[111]

In fact, the judicial federalists' language regularly personifies states and emphasizes the need to offer them protection. For example, in *National League of Cities v. Usery*,[112] Justice Rehnquist wrote for the Court that the controversy before them threatened "to directly displace the States' freedom . . . ."[113]

In cases such as *New York v. United States*,[114] *Printz v. United States*,[115] and *Gregory v. Ashcroft*,[116] the Court has displayed the essence of its position on states' rights. In *New York*, the Court noted, "States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the federal government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart." [117] Indeed, as Justice Scalia wrote for the majority in *Printz*, "It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous . . . ."[118]

The implication of the states' rights position not only clouds the standing of the Supremacy Clause, but it also implies something approaching state superiority.[119] For example, in *Gregory*, the Court heard a challenge from Missouri judges seeking relief from a state law establishing a mandatory retirement age of seventy.[120] The Missouri judges sought protection under the Federal Age Discrimination in Employment Act (ADEA) of 1967,[121] which prohibited such practices.[122]

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111 *Id*. (Blackmun, J., dissenting).

112 426 U.S. 833 (1976).

113 *Id*. at 852.

114 505 U.S. 144 (1992).

115 521 U.S. 898 (1997).

116 501 U.S. 452 (1991).

117 *New York*, 505 U.S. at 188.

118 *Printz*, 521 U.S. at 928.

119 Indeed, the true implications of the states' rights position are hinted at but sometimes lost in semantics:

> In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States . . . .

New York, 505 U.S. at 159.

120 *Gregory*, 501 U.S. at 455-56.

121 29 U.S.C. §§ 621-634 (2000).

122 *Gregory*, 501 U.S. at 455-56.

The ADEA, however, exempted from its protections elected officials and political appointees.[123] The judges in the case were, in some sense, both, as they were appointed by the governor and subject to retention election by the voters.[124] Thus, the Court ruled that the judges were not protected by the ADEA, and that the state could enforce its retirement rules against them.[125]

Given the rather straightforward limitation of the ADEA's protection, the Court's decision is notable for its federalism primer.[126] In other words, in a case that could have been decided based strictly on a consultation with the federal ADEA law, the Court nevertheless felt compelled to provide an expansive defense of states' rights.[127] "As every schoolchild learns," the Court noted, "our Constitution establishes a system of dual sovereignty between the States and the Federal Government."[128] Sovereignty leaves states "endowed with all the functions essential to separate and independent existence."[129] Quoting *Federalist 45*, the Court asserted:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course

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123 29 U.S.C. § 630(f).

124 *Gregory*, 501 U.S. at 455.

125 *Id*. at 467. Beyond ruling the judges ineligible for protection, and the question otherwise moot, the Court curiously constructed a justification for the Missouri retirement rules' application to their state court peers. "The people of Missouri have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform. It is an unfortunate fact of life that physical and mental capacity sometimes diminish with age." *Id*. at 472. "The people of Missouri rationally could conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal sufficiently inadequate, that they will require all judges to step aside at age 70." *Id*. at 473. Ironically, given their concern for diminishing capacities, two of the concurring Justices in the decision were already past their seventieth birthday when the case was heard (Justices White and Stevens), and at least two other members of the majority would go on to serve well into their seventies (Chief Justice Rehnquist and Justice O'Connor). *See* DAVIS, *supra* note 96, at 5; NANCY MAVEETY, JUSTICE SANDRA DAY O'CONNOR: STRATEGIST ON THE SUPREME COURT 12 (1996); David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1075 (2000).

126 *See Gregory*, 501 U.S. at 479-81 (White, J., dissenting).

127 *See id*.

128 *Id*. at 457.

129 *Id*. (quoting Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868), *overruled by* Morgan v. United States, 113 U.S. 476 (1885)).

> of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[130]

Not content with simply remarking upon the power of states, the Court explained that the role of federalism is no mere remnant of a legal structure, but is instead an asset continually providing for the common good.[131] The Court stated,

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[132]

A. *A False History of Federalism*

The case for the states is vigorously made in the writings of Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, as well as in their support for decisions penned by Justices O'Connor and Kennedy.[133] Yet, it is often a case built on a series of misrepresentations.

"[T]he States entered the federal system with their sovereignty intact," wrote Justice Scalia for the Court in *Blatchford v. Native Village of Noatak*.[134] It is a startling assertion.[135] In brief, states, in the Court's view, are not now, nor have they ever been, mere units within the United States.[136] While Justice Scalia makes his position, and that of the Court, unequivocal in the 1990s, circuit court judge John Noonan writes that had that same statement been uttered in the 1790s, it would have been taken as

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[130] *Id.* at 458 (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

[131] *See id*. at 458-59.

[132] *Id.* at 458. Notably, in *New York*, the Court admits that the presumed benefits of federalism are irrelevant when it writes, "Our task would be the same even if one could prove that federalism secured no advantages to anyone." New York v. United States, 505 U.S. 144, 157 (1992).

[133] *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000) (per curium); Alden v. Maine, 527 U.S. 706 (1999).

[134] 501 U.S. 775, 779 (1991).

[135] NOONAN, *supra* note 4, at 2.

[136] *Alden*, 527 U.S. at 714-15.

an attack against the Constitution, not a celebration of it.[137] Moreover, beyond the extreme political implications of the assertion, there is a strong factual challenge to the premise.[138] More than 70% of the states have not spent a single day as a sovereign entity.[139] Nevertheless, the judicial federalists maintain that their construction of the relationship between federal and state power is wholly derived from the "Founders' understanding" of federalism.[140] They added, "We seek to discover . . . only what the Framers and those who ratified the Constitution sought to accomplish when they created a federal system."[141]

This notion of a sovereignty that predates the Union and was codified by the framers would surely require continual recognition from the political and judicial system throughout the country's history. Yet, one of the main pillars of state sovereignty as depicted in the arguments of Justice Scalia—state immunity from lawsuit—was never embraced by any of the original Supreme Court Justices, the original Washington Administration, or members of the first Congress.[142] Indeed, the Court offered little support for such a concept when it grappled with the issue in the 1793 states' rights case *Chisholm v. Georgia*.[143] Notably, the Court at the time included multiple members who were among the Framers of the Constitution.[144] Yet, those Justices found no concept of sovereign immunity at hand; indeed, they found quite the contrary.[145] Justice Wilson, a participant in the Constitutional Convention, noted in his *Chisholm* concurrence, "*Georgia is* NOT *a sovereign State*."[146]

Clearly, states were much more significant political entities, relative to the federal government, in the early days of the United States.[147] This was not, however, by virtue of constitutional law, but by virtue of the minimalist agenda of the federal government.[148] Edward Rubin argues that the Court's nostalgia for Post-Revolutionary War America fuels its zeal for a federalist system based on strong and independent states even when their

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137 NOONAN, *supra* note 4, at 2.

138 *See id*. at 76.

139 *Id*. While a case could be made that the original 13 colonies and Texas were once sovereign, the other 36 states were never independent political entities. *Id*.

140 *Alden*, 527 U.S. at 734.

141 *Id.* at 758.

142 NOONAN, *supra* note 4, at 66.

143 2 U.S. (2 Dall.) 419 (1793).

144 NOONAN, *supra* note 4, at 64-65.

145 *Id*.

146 *Chisholm*, 2 U.S. (2 Dall.) at 457 (Wilson, J., concurring).

147 *See* NOONAN, *supra* note 4, at 70.

148 *See id*. at 81-83.

position has little basis in law.[149] More troubling, the Court's respect "for the simplicity of the premodern era" offers little contemplation of the rampant hegemonies that characterized early American history.[150]

Rather than placing the issue in terms of the country's founding and origins, though, the era in which advocacy of the notion of state sovereignty can more properly be credited is the period preceding the U.S. Civil War.[151] Southerners, seeking a means to avoid federal efforts to limit or abolish slavery, advanced the notion of state sovereignty and wrapped their argument in a cloak of—albeit false—history.[152] Rubin argues that the states' rights argument historically has had only one value: "Its only purpose . . . was to allow the southern states to maintain their system of apartheid."[153] In that light, Judge Noonan asks somewhat rhetorically, "Do decisions that return the country to a pre-Civil War understanding of the nation establish a more perfect union?"[154]

Several scholars highlight the absurdity of the Court's position. Far from an increasing and evolving need for independent states' rights, the thrust of the country's experience since the U.S. Civil War augers the need for federal supremacy and undercuts the value of state independence.[155] Katy Harriger argues, "The Civil War and Reconstruction altered the nature of the debate. . . . [A] strong national government was necessary to ensure the protection of civil rights for all citizens."[156] Without violent sectional differences, Rubin suggests that federalism simply outlived its purpose.[157] Indeed, the civil rights cases of the 1950s and 1960s, in which the Court applied the precepts of equal protection to establish the rights of minorities in a variety of educational and governmental accommodations, were a direct contradiction of the states' rights ideology.[158] Thus, the

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149 *See* Edward L. Rubin, *Puppy Federalism and the Blessings of America*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2001, at 37, 46-47.

150 *Id*. at 46.

151 *See id*. at 44.

152 *Id*.

153 *Id*. at 45.

154 NOONAN, *supra* note 4, at 12.

155 *See* Harriger, *supra* note 108, at 2-3.

156 *Id*. at 2.

157 *See* Rubin, *supra* note 149, at 47.

158 *See* Loving v. Virginia, 388 U.S. 1 (1967) (applying an Equal Protection analysis to a Virginia anti-miscegenation statute); McLaughlin v. Florida, 379 U.S. 184 (1964) (striking down a Florida Statute prohibiting unmarried interracial cohabitation); Johnson v. Virginia, 373 U.S. 61 (1963) (per curium) (holding that racial segregation of courtroom seating was unconstitutional); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (striking down a Kansas law allowing for segregation of races in public schools). Ironically, given his fervent support of states' rights, Rehnquist approvingly cites several such cases to justify (*continued*)

concept of federalism has only survived because our nation has forgotten the grave shortcomings of its application.[159]

Nevertheless, in *Gregory*, and numerous other cases, the Court continues to suggest that regional differences and other political divisions require a federalist system that affords diverse state systems to respond to diverse political realities.[160] Indeed, Justice Thomas and Chief Justice Rehnquist have both referred to the importance of the role states play as "laboratories" of democracy, politics, and policy.[161] Where is this diversity of response, Rubin wonders, when all fifty states have constructed three-branch governments, largely built from the blueprint of the U.S. Constitution.[162] Thus, as a practical matter, state governments reflect little of the inherent independence the Court imagines they exist to provide.[163]

Moreover, Rubin makes the case that a strong federal government reflects not only the needs of the country, but also its spirit.[164] A strong federal government complements the country's "sense of national unity, our belief that we constitute a single people and a single polity."[165] Rubin likens the Court's enthusiasm for states' rights to youthful infatuation, a concept he dubs "puppy federalism."[166] "[L]ike puppy love, it looks somewhat authentic but does not reflect the intense desires that give the real thing its inherent meaning."[167]

In sum, the differences that federalism exists to assuage—governmental and cultural differences—do not persist in a scope commensurate to the time of the nation's founding.[168] The Rehnquist Court's value of federalism, then, reflects "a profound failure to appreciate or even understand our federal structure"[169] based on a foundation of false

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his conclusion in *Bush v. Gore*. Bush v. Gore, 531 U.S. 98, 114-15 (2000) (Rehnquist, C.J., concurring).

159 Rubin, *supra* note 149, at 47.

160 *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

161 *See, e.g.*, Smith v. Robbins, 528 U.S. 259, 275 (2000); Arizona v. Evans, 514 U.S. 1, 8 (1995). Justice Brandeis originally referred to the states as laboratories in a 1932 dissenting opinion as he urged the Court not to impose Constitutional restrictions on a state's ability to "try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

162 Rubin, *supra* note 149, at 46.

163 *See id*.

164 *See id*. at 38.

165 *Id*.

166 *Id*.

167 *Id.*

168 *See id*. at 47.

169 ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM 42 (2001).

history and providing the decisions "an appearance of depth they do not deserve."[170]

B. *Protecting the States' Dignity from Evil: The Rhetoric of Federalism*

Beyond its assertions that strong states reflect the Constitution and benefit our society, the Court has demanded that deference be paid to the states because to do otherwise would be, in effect, insulting. Chief Justice Rehnquist, for example, refers to protecting states from "indignity" in *Seminole Tribe v. Florida*.[171] In *Alden v. Maine*, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas joined the majority in asserting that not only must we "retain the dignity"[172] and "preserve the dignity of the States,"[173] but we also "must respect"[174] the states, and we "must accord States the esteem due to them."[175] In *Coleman v. Thompson*, Chief Justice Rehnquist and Justice Scalia joined a decision that referred to the "significant harm to the States that results" when they fail to receive "respect."[176] Meanwhile, Justice Scalia in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* labels suits against states without their consent as "evil."[177]

Both Harriger and Judge Noonan question how the Court can defend the dignity and protect the respect due to states.[178] "What kind of thing do you imagine the court thinks dignity is?[,]" Judge Noonan asks, "You can't eat it, touch it, feel it. To be a little more philosophical, isn't it a tautology? . . . Dignity is not an explanation why immunity is granted."[179] Robert Nagel adds, "The conservative justices indulge in protestations about the importance of local control, but their reasoning is vague and easily evaded."[180]

Justice Souter, in his dissent in *Alden*, objected even more pointedly to the "dignity" rhetoric.[181] Dignity, Justice Souter wrote, was the language used to justify the supremacy of the crown.[182] Subjecting royalty to the

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170 NOONAN, *supra* note 4, at 2.

171 517 U.S. 44, 58 (1996).

172 Alden v. Maine, 527 U.S. 706, 715 (1999).

173 *Id.* at 749.

174 *Id.* at 758.

175 *Id.*

176 Coleman v. Thompson, 501 U.S. 722, 724 (1991).

177 Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 684 (1999).

178 Harriger, *supra* note 108, at 17; NOONAN, *supra* note 4, at 53.

179 NOONAN, *supra* note 4, at 53.

180 NAGEL, *supra* note 169, at 41.

181 Alden v. Maine, 527 U.S. 706, 802 (1999) (Souter, J., dissenting).

182 *Id*.

law, to the processes of the common person, was seen as an affront to the crown's dignity.[183] In a larger sense, Justice Souter asserted, the concept of dignity as justification for states' rights is "inimical to the republican conception" of government because it defiantly eschews a presumption of government of the people in favor of a government above the people.[184] Ultimately, Justice Souter finds the thinking of the judicial federalists in *Alden* and the foundations from which their thinking derives to be "unrealistic" and "indefensible."[185]

Despite the soft history and softer logic upon which the judicial federalists advance their case, there is no doubt that their position is of significant consequence. As Justice Brennan made clear in his dissent in *Usery*, the Court's steps down the path of states' rights lead to a "patent usurpation"[186] of federal government power, featuring a "startling restructuring of our federal system"[187] into one in which disputes between the federal government and states will be viewed by Justice Rehnquist and his adherents as "a controversy between equals."[188]

C. *Implied Federalism*

Justice Scalia, as previously noted, argues that the text—not legislative intent or any form of practical reality—must guide all interpretations of the Constitution and any law.[189] He claims, "Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver."[190]

Despite the advocacy of some form of textualism on the part of Justice Scalia and his judicial federalist colleagues, some commentators question whether their states' rights decisions have any basis in the Constitution. Their federalism decisions "do not depend on any words in the constitution. They are boldly innovative. . . . [and] highly original . . . ."[191] Although "[i]t was once asserted by some members of the present court that decisions were wrong if they were unfaithful to the text of the constitution or lacked fidelity to the original intent of its framers. . . , [the Court has taken] a turn toward a more adventurous reading of the

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183 *Id*.

184 *Id*.

185 *Id.* at 814.

186 Nat'l League of Cities v. Usery, 426 U.S. 833, 858 (1976) (Brennan, J., dissenting), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

187 *Id*. at 875.

188 *Id.* at 859 (quoting Sanitary Dist. v. United States, 266 U.S. 405, 425 (1925)).

189 *See infra* text accompanying notes 420-461.

190 SCALIA, A MATTER OF INTERPRETATION, *supra* note 37, at 17.

191 NOONAN, *supra* note 4, at 9.

constitution."[192]

In fact, the Court has taken a more adventurous turn by its own admission. In *Blatchford*, a Native American tribe sought the restoration of an Alaska state revenue sharing plan that benefited community groups.[193] The Eleventh Amendment, of course, prohibits suits against states by "Citizens of another State" or "Citizens or Subjects of any Foreign State" without the state's consent.[194] The Native Americans, however, were "tribal entities"; thus, they were neither "of another state" nor "of any foreign state."[195] Justice Scalia wrote for the Court that they were, nonetheless, ineligible to sue Alaska.[196] As he admitted, the basis of this ruling could not be found in the text of the Constitution: "[W]e have understood the Eleventh Amendment to stand *not so much for what it says*," Scalia explained, "but for the presupposition of our constitutional structure which it confirms . . . ."[197] Similarly, in other cases featuring vigorous defenses of states' rights, the Court has admitted it was relying not on the Constitution itself, but rather on a "background principle" to the text.[198]

Despite their commitment to "reading text," when reading the text leads to an unpleasant outcome, the judicial federalists conclude that the text can be followed too closely. In *Alden*, the judicial federalists signed on to the Court's opinion advancing the interesting notion of "ahistorical literalism."[199] The Court defined the phrase to mean losing sight of the true purpose of the Constitution by focusing on its precise wording.[200] The Court applied this approach to argue that the absence of a discussion of state sovereign immunity in the original U.S. Constitution is evidence not of the absence of the principle, but is instead evidence of its very central importance to the Framers.[201] The Court noted, "[T]he Founders' silence is best explained by the simple fact that no one . . . suggested the document

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192 *Id*. at 9.

193 Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 777-78 (1991).

194 U.S. CONST. amend. XI.

195 *Blatchford*, 501 U.S. at 790 (Blackmun, J., dissenting).

196 *Id*. at 782.

197 *Id*. at 779 (emphasis added). Justice Stevens later argued that Justice Scalia's statement was an "expansive and judicially crafted protection of States' right" that was based upon the "majority's perception of constitutional penumbras rather than constitutional text." Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 665 (1999) (Stevens, J., dissenting).

198 Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996).

199 Alden v. Maine, 527 U.S. 706, 730 (1999).

200 *See id.* at 728-30.

201 *Id*. at 741.

might strip the States of the immunity."[202] Going somewhat beyond the words they would use to describe themselves, ahistorical literalism could thus be defined as the creative rewriting of constitutional text by textualists in service of their preferences.

Studying Chief Justice Rehnquist's writings on federalism issues, Sue Davis comes to a similar conclusion:

> What is the source of the federalism that Rehnquist values so highly? Given his approach to constitutional interpretation, the justice might be expected to ground his principles of federalism firmly in the text of the Constitution or in long-established precedent and to avoid relying on principles that are not found within the confines of the document.[203]

Instead, Davis concludes, Chief Justice Rehnquist must rely upon "more than the text," he must see an "evolving" document, and he must see his job ultimately as goal-driven "rather than simply as a set of rules."[204] Similarly, in his dissent in *Usery*, Justice Brennan wrote that Justice Rehnquist's states' rights opinion was "an abstraction without substance, founded neither in the words of the Constitution nor on precedent."[205]

Despite the vehement argument for a value-free process in Court decision-making, Justice Scalia admits that he and others who agree with his legal philosophy are but "faint-hearted originalist[s]"[206] who would likely object to a punishment of public lashings for a crime, even without a constitutional foundation upon which to build.[207] In this situation, originalists come to resemble, in effect, non-originalists.[208] Non-originalists would, however, presumably size up the situation and rule against the lashings without the fictional pretense of following a founding constitutional philosophy.[209]

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202 *Id.*

203 DAVIS, *supra* note 96, at 149.

204 *Id*. at 150.

205 Nat'l League of Cities v. Usery, 426 U.S. 833, 860 (1976) (Brennan, J., dissenting), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Continuing the notion, Justice Brennan added, "My Brethren boldly assert that the decision as to wages and hours is an 'undoubted attribute of state sovereignty,' and then never say why." *Id*. at 873-74 (citations omitted).

206 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989). Justice Scalia wrote, "I hasten to confess that in a crunch I may prove a faint-hearted originalist." *Id*. at 864.

207 *See id*. at 861-62.

208 *Id*.

209 *See id*. at 862.

In truth, Justice Scalia will use the Constitution, pre-enactment history, post-enactment practices, and judicial precedents.[210] Thus, he is a foundationalist with at least four different approaches available, which gives him a level of flexibility he claims to abhor.[211] That flexibility is on display in the subsequent two sections of this Article. The first highlights the role of federalism as a foundation for the judicial federalists' opinions on death penalty controversies. The second highlights the absence of federalist principles in those same jurists' opinions on several states' rights controversies notable for their ideological implications.

IV. JUDICIAL FEDERALISM IN THE SUPREME COURT'S CAPITAL JURISPRUDENCE

The death penalty has received overwhelming attention, both in the popular media and in scholarship.[212] Lay and academic observers are understandably concerned about the length of death penalty appeals, the high rate of error during capital trials, and the possibility that innocent people have been sentenced to death.[213] The current state of capital punishment in the United States has led one commentator to note that it is a

> system that will not only execute a poor man, but will also spend $2,000,000 trying to determine whether that man was represented adequately by a court-appointed drunkard who was paid $500 for his services. Justice, we are told, isn't cheap. Indeed it isn't: especially when, despite the egalitarian rhetoric within which they are routinely cloaked, the excesses of American legal ideology tend to transform the rule of law into a kind of luxury good.[214]

The concern, however, is with the Supreme Court's application of judicial federalism in capital cases. Of specific interest is how judicial federalism is employed to turn back attacks on the way states impose death sentences.

A. *Capital Cases on Direct Appeal*

Perhaps the earliest comprehensive articulation of the judicial

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[210] DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 54 (2002).

[211] *Id*.

[212] Guy Goldberg & Gena Bunn, *Balancing Fairness & Finality: A Comprehensive Review of the Texas Death Penalty*, 5 TEX. REV. L. & POL. 49, 51-52 & n.4 (2000).

[213] James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1844 (2000); *see also* Michael L. Radelet, *More Trends Toward Moratoria on Executions*, 33 CONN. L. REV. 845 (2001) (arguing that recent developments have caused a trend toward a worldwide abolition of the death penalty).

[214] CAMPOS, *supra* note 80, at 24.

federalists' position in the Court's capital jurisprudence came from Justice Scalia's dissent in *Simmons v. South Carolina*.[215] The Court overturned Simmons' death sentence, with Justice Blackmun's plurality opinion holding that it was a violation of due process for the prosecution to present evidence of future dangerousness when the defendant was not allowed to present evidence of the length of imprisonment to which he could be sentenced.[216]

The issue in *Simmons* for Justice Blackmun concerned whether a capital defendant could receive a fair trial when (a) the prosecution presents evidence of the defendant's future dangerousness, (b) the jury asks whether the defendant would be eligible for parole should he be sentenced to life in prison, and (c) the trial judge refuses to answer the jury's question about parole eligibility.[217] However, for Justice Scalia, the issue boiled down to a matter of judicial federalism and a technical question of evidence.[218] "As a general matter, the Court leaves it to the States to strike what *they* consider the appropriate balance among the many factors . . . that determine whether evidence ought to be admissible."[219] Indeed, Justice Scalia's dissent, joined by Justice Thomas, serves as a quintessential example of the judicial federalism that this Article analyzes. Justice Scalia emphasized his belief that evidence of parole eligibility in capital cases is an area best left to the states, and he bemoaned the "sweeping" rule of the majority's decision as one in which "the Due Process Clause overrides state law limiting the admissibility of information concerning parole *whenever* the prosecution argues future dangerousness."[220] According to Justice Scalia, the majority had, in a sense, newly minted a "Federal Rules of Death Penalty Evidence" that will come at "great expense to the swiftness and predictability of justice."[221]

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[215] 512 U.S. 154 (1994). In that case, Jonathan Dale Simmons had been convicted and sentenced to die for beating an elderly woman to death in 1990. *Id*. at 156. At trial, the judge refused to allow Simmons' attorney to inform the jury that Simmons was ineligible for parole should he be sentenced to life imprisonment. *Id*. at 160. During the sentencing phase, however, the prosecution argued to the jury that they should consider his "future dangerousness" when fixing the appropriate penalty. *Id*. at 157. Even after the jury sent a note to the trial judge asking whether the imposition of a life sentence included the possibility of parole, the trial judge merely cautioned the jury "not to consider parole or parole eligibility" when determining a sentence. *Id*. at 160. Twenty five minutes later, the jury returned a death sentence. *Id.*

[216] *Id.* at 163-64.

[217] *Id*. at 162-69.

[218] *Id*. at 183 (Scalia, J., dissenting).

[219] *Id*.

[220] *Id*.

[221] *Id*. at 185.

Deference to state courts on evidentiary matters, Justice Scalia noted, was sound judicial policy because "a sensible code of evidence cannot be invented piecemeal."[222] Indeed, Justice Scalia's deference to state courts is quite extensive, and he goes so far as to urge the Court to affirm capital appeals "unless the isolated state evidentiary rule that the Court has before it is not merely less than ideal, but beyond a high threshold of unconstitutionality."[223] Principles of judicial federalism, then, require the Court to avoid imposing a death penalty "regime" from "coast to coast," even if that regime is "undoubtedly reasonable as a matter of policy."[224]

The *Simmons* decision led to a series of cases in which the Court overturned death sentences where the capital defendant had been prohibited from presenting evidence of parole ineligibility, and in each of those decisions, Justices Scalia and Thomas dissented, taking up the mantle of judicial federalism. For instance, in *Shafer v. South Carolina*,[225] the Court essentially reiterated its holding in *Simmons* by stating that "whenever future dangerousness is at issue in a capital sentencing proceeding . . . due process requires that the jury be informed that a life sentence carries no possibility of parole."[226] Justice Scalia again dissented, arguing that regardless of the Court's disagreement over the state's decision to exclude evidence of parole eligibility in capital trials, the Due Process Clause does not grant the "authority for federal courts to promulgate wise national rules of criminal procedure."[227] Justice Thomas, in a separate dissenting opinion, agreed, suggesting that "it is not this Court's role to micromanage state sentencing proceedings or to develop

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[222] *Id*. at 183.

[223] *Id*. at 184. One is left to wonder, perhaps rhetorically, whether Scalia believes that low levels of unconstitutionality would be permissible in *Simmons*.

[224] *Id*. at 185. Scalia goes on to worry that the decision is "the first page of a whole new chapter in the 'death-is-different' jurisprudence which this Court is in the apparently continuous process of composing." *Id*. As the next section of this Article demonstrates, death *is* different for Justice Scalia and the other judicial federalists—federalism matters when the issue is death.

[225] 532 U.S. 36 (2001). In *Shafer*, a state trial court denied Shafer's request for a jury instruction regarding his ineligibility for parole and likewise denied his request to read the pertinent sentencing statute to the jury. *Id*. at 42. This occurred even after the prosecutor notified Shafer that the State would seek the death penalty for the murder and stated its intent to present evidence of Shafer's future dangerousness. *Id*. at 40. After several hours of deliberation, the jury sent a note to the trial judge asking about Shafer's eligibility for parole should he be sentenced to life imprisonment. *Id*. at 44. The trial court responded by informing the jury, "Parole eligibility or ineligibility is not for your consideration." *Id*. at 45. Less than an hour and a half later, the jury recommended the death penalty. *Id*.

[226] *Id*. at 51.

[227] *Id*. at 55 (Scalia, J., dissenting).

model jury instructions. I would decline to interfere further with matters that the Constitution leaves to the States."[228]

Similarly, in *Kelly v. South Carolina*,[229] the Court reiterated the holding in *Shafer* and *Simmons*.[230] Justice Thomas, joined by Justice Scalia, dissented and made it clear that he believes the Court should stay out of the dispute when he stated, "Today's decision allows the Court to meddle further in a State's sentencing proceedings under the guise that the Constitution requires us to do so."[231] Even if it is "preferable for a trial court to give such an instruction,"[232] Justice Thomas continued, capital trial evidentiary matters are those "that the Constitution leaves to the States."[233]

In *Romano v. Oklahoma*,[234] Chief Justice Rehnquist, like Justices Scalia and Thomas, was reluctant to impose national evidentiary standards. During the sentencing phase of Romano's murder trial, the prosecution presented evidence of the death sentence he had received during an earlier trial for another murder.[235] Romano complained that this irrelevant evidence denied him a fair trial in violation of the Eighth and Fourteenth Amendments, but Rehnquist held that, although irrelevant, it did not amount to constitutional error.[236] In pushing aside Romano's appeal, Chief Justice Rehnquist noted that

> Petitioner's argument, pared down, seems to be a request that we fashion general evidentiary rules, under the guise of interpreting the Eighth Amendment, which would govern the admissibility of evidence at capital sentencing proceedings. We have not done so in the past, however, and we will not do so today. The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings.[237]

Judicial federalists have also exhibited a reluctance to interfere with state courts even when constitutional provisions are directly implicated. In *Richmond v. Lewis*,[238] the Court overturned the death sentence of Willie Lee Richmond, who had been convicted of beating, robbing, and killing a

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228 *Id*. at 58 (Thomas, J., dissenting).

229 534 U.S. 246 (2002).

230 *Id*. at 248.

231 *Id*. at 265 (Thomas, J., dissenting).

232 *Id*.

233 *Id*. (quoting *Shafer*, 532 U.S. at 58 (Thomas, J., dissenting)).

234 512 U.S. 1 (1994).

235 *Id*. at 3.

236 *Id*.

237 *Id*. at 11-12.

238 506 U.S. 40 (1992).

new acquaintance.[239] The Court held that Richmond's sentence violated the Eighth Amendment because one of the aggravating factors used to sentence him—that the crime was committed in an "especially heinous, cruel or depraved manner"[240]—was unconstitutionally vague and because the state supreme court did not appropriately reweigh the remaining constitutional aggravating factors against the mitigating circumstances.[241]

Justice Scalia's dissent urged the Court to not "impos[e] upon the States a further constitutional requirement that the sentencer consider mitigating evidence."[242] He expressed concern that imposing such a requirement on state courts "has introduced not only a mandated arbitrariness" that is inconsistent with precedent, "but also an impenetrable complexity and hence a propensity to error that make a scandal and a mockery of the capital sentencing process."[243]

B. *Habeas Corpus and Judicial Federalism: Multiple Layers of Deference*

Habeas corpus decisions by the Supreme Court offer judicial federalists additional lines of reasoning to urge restraint on the Court. On direct capital appeal, judicial federalists argue that deference to state court decisions, lower court findings of fact, and state law all promote efficiency and legitimacy.[244] Habeas corpus review is another animal altogether. Once the case has been placed on the Supreme Court's docket, the death row inmate has already made his or her way through the direct appeals process in state and federal courts and is left to make "last-gasp" claims of ineffective assistance of counsel, to present newly discovered constitutional violations, or to argue about newly discovered exculpatory evidence.

An early sign of the current judicial federalists' habeas jurisprudence came in *McFarland v. Scott*,[245] which involved the overtly technical question of whether a capital defendant was required to file a federal habeas petition before invoking his right to counsel under federal habeas law and thereby establishing a federal court's jurisdiction to enter a stay of execution.[246] The majority held that a formal habeas petition was not required,[247] but Justice Thomas, in dissent, worried that the decision would

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239 *Id*. at 41-42, 52.

240 *Id*. at 42 (quoting ARIZ. REV. STAT. § 13-703(F)(6) (1989), *amended by* ARIZ. REV. STAT. § 13-703(G)(6) (Supp. 2004)).

241 *Id*. at 52.

242 *Id*. at 54 (Scalia, J., dissenting).

243 *Id*.

244 *See* discussion *infra* Part VI.

245 512 U.S. 849 (1994).

246 *Id*. at 852-54.

247 *Id*. at 856-57.

"expand the power of the federal courts to interfere with States' legitimate interests in enforcing the judgments of their criminal justice systems."[248] Indeed, he invoked principles of federalism in urging restraint by the Court when he stated, "Federal habeas review 'disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'"[249]

Another case that displayed the judicial federalists' early habeas jurisprudence was *Kyles v. Whitley*,[250] a particularly intriguing case. After exhausting his direct state court appeals, Kyles discovered that the prosecution had failed to disclose evidence favorable to his case.[251] Although the state court post-conviction proceedings and the federal habeas procedure affirmed his conviction, the Supreme Court ulitimately overturned Kyles' conviction.[252] Justice Scalia, in a dissent joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Thomas, was troubled by the Court's willingness to engage in fact-finding as a habeas reviewing Court after multiple lower courts considered the same fact-specific claim.[253] Justice Scalia noted, "The reality is that responsibility for factual accuracy, in capital cases as in other cases, rests elsewhere—with trial judges and juries, state appellate courts, and the lower federal courts; we do nothing but encourage foolish reliance to pretend otherwise."[254]

However, the Court has erected significant barriers to habeas review. Notably, in *Teague v. Lane*,[255] the Court established the principle that new constitutional rules of criminal procedure will not be applicable to cases that have become final before new rules are announced by the Court, except in limited circumstances.[256] Thus, "the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place."[257] The so-called *Teague* doctrine plays an important role in the judicial federalists' decisions in habeas appeals and is oftentimes manifested as a reluctance to impose "new rules" of criminal

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248 *Id*. at 870-71 (Thomas, J., dissenting).

249 *Id*. at 872-73 (quoting Duckworth v. Eagan, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring)).

250 514 U.S. 419 (1995).

251 *Id*. at 422.

252 *Id*. at 421-22.

253 *Id*. at 458 (Scalia, J., dissenting).

254 *Id*.

255 489 U.S. 288 (1989).

256 *Id*. at 310.

257 *Id*. at 306 (quoting Desist v. United States, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting)).

procedure.[258]

Additionally, the Court now relies on congressional help in limiting its review of habeas appeals.[259] With the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996,[260] Congress severely restricted, through a mandated deference to state court proceedings, the Court's habeas jurisdiction.[261] In short, judicial federalists have two additional reasons to exercise deference towards the states during habeas appeals: strict Court-made doctrine and congressional legislation.

The *Teague* doctrine plays an important and recurring role in the Court's habeas jurisprudence. For instance, in *Gray v. Netherland*,[262] the Court denied a capital defendant's habeas claim that he did not receive adequate constitutional notice of evidence against him at trial, reasoning that adoption of the defendant's argument would amount to a new rule.[263] The Court "concluded that the writ's purpose may be fulfilled with the least intrusion necessary on States' interest of the finality of criminal proceedings by applying constitutional standards contemporaneous with the habeas petitioner's conviction to review his petition."[264] Likewise, in *O'Dell v. Netherland*,[265] Justice Thomas applied the deferential *Teague* new-rule to deny relief to a defendant who was not allowed to present parole eligibility evidence—a right clearly enjoyed by other capital defendants after *Simmons*—merely because he had the misfortune to have been convicted before the Court decided *Simmons*.[266]

The AEDPA has served a role for judicial federalists as well. In *Wiggins v. Smith*,[267] the capital defendant was sentenced to death for the murder of a 77-year-old woman, whom he robbed and drowned in a bathtub.[268] He challenged the adequacy of his representation at sentencing because his attorneys failed to investigate and present mitigating evidence

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[258] *See* James S. Liebman, *More than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 537-44 (1990-91).

[259] *See* 28 U.S.C. §§ 2241-2266 (2000).

[260] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 19, 21, 22, 28, 42, and 49 U.S.C.).

[261] 28 U.S.C. § 2254(b)-(f).

[262] 518 U.S. 152 (1996).

[263] *Id*. at 166.

[264] *Id*.

[265] 521 U.S. 151 (1997).

[266] *See id.* at 153; *see also* Lambrix v. Singletary, 520 U.S. 518 (1997) (invoking the *Teague* doctrine).

[267] 539 U.S. 510 (2003).

[268] *Id*. at 514-16.

of his dysfunctional background.[269] The Court ruled in favor of Wiggins, finding that his counsel, upon reasonable investigation, could have discovered and presented powerful mitigating evidence.[270] In his dissent, Justice Scalia demonstrated a federalist's willingness to defer to questionable factual determinations made by state courts when directed by federal statute to presume such determinations to be correct.[271] The *Wiggins* decision, Justice Scalia argued, "fails to give effect to [the Congressional] requirement that state court factual determinations be presumed correct."[272]

Likewise, in *Penry v. Johnson*,[273] the Court concluded that a capital jury was instructed in such a way that mitigating evidence regarding mental retardation and childhood abuse was not given proper consideration.[274] Justice Thomas dissented, reminding the majority of his belief that the purpose of a habeas reviewing court is not to decide whether a jury instruction should have taken mitigating evidence into account.[275] Rather, he noted, "Our job is much simpler, and it is significantly removed from writing the instruction in the first instance. We must decide merely whether the conclusion of the [state court] . . . was 'objectively unreasonable.'"[276]

Justice Scalia, joined in dissent by Justice Thomas, took the Court to task in *Stewart v. Martinez-Villareal*,[277] after the majority concluded that a claim was not barred by a statutory restriction on "second or successive" applications for habeas relief.[278] He wrote,

> It seems . . . much further removed from the "perverse" to deny second-time collateral federal review than it is to treat state-court proceedings as nothing more than a procedural prelude to lower-federal court review of state supreme-court determinations. The latter was the regime that our habeas jurisprudence established and that the Antiterrorism and Effective Death Penalty Act (AEDPA) intentionally revised—to require extraordinary showings before a state prisoner can take a second trip around the extended district-court-to-Supreme-Court federal track. It

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269 *Id*. at 516.

270 *Id*. at 534.

271 *See id*. at 538 (Scalia, J., dissenting).

272 *Id*. at 557.

273 532 U.S. 782 (2001).

274 *Id*. at 800.

275 *Id*. at 805 (Thomas, J., dissenting).

276 *Id*. (quoting Williams v. Taylor, 529 U.S. 362, 409 (2000)).

277 523 U.S. 637 (1998).

278 *Id*. at 644-46.

> is wrong for us to reshape that revision on the very lathe of judge-made habeas jurisprudence it was designed to repair.[279]

Additionally, Justice Thomas, in *Hopkins v. Reeves*,[280] rejected a defendant's habeas challenge that the trial court committed constitutional error because it failed to instruct the jury on a lesser-included charge in his felony-murder case.[281] In that state, however, second degree murder was not a lesser-included charge of felony murder.[282] Justice Thomas expressed reluctance to limit state sovereignty, noting that a blanket requirement to include a lesser-included instruction "is unquestionably a greater limitation on a State's prerogative to structure its criminal law . . . ."[283]

In short, the Court's judicial federalists—most notably Justices Scalia and Thomas, but also Chief Justice Rehnquist—urge restraint on the Court's wielding of federal power. Whether on direct appeal or in habeas corpus proceedings, the judicial federalists in capital cases consistently demonstrate allegiance to a political theory that grants the states broad discretion in sentencing people to death. The rationales for their theory are hardly controversial—judicial federalism promotes state sovereignty (and dignity), fosters judicial efficiency, and eschews federal bullying on matters of procedure. However, the next section, displays a series of decisions in which the judicial federalists appear to turn their backs on these rationales.

V. THE CASES AGAINST THE STATES

Despite the passionate verbiage offered by the current Court in support of states' rights, historically, the Court has not been a model of consistency in dealing with the prerogatives of the states. Justice O'Connor wrote for the Court in *New York v. United States*, "The Court's jurisprudence in this area has traveled an unsteady path[284] . . . [because] the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases."[285] Similarly, in his dissent in *Alden v. Maine*, Justice Souter noted, "The Court has swung back and forth with regrettable disruption" on numerous federalism controversies.[286]

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279 *Id*. at 647 (Scalia, J., dissenting).

280 524 U.S. 88 (1998).

281 *Id*. at 90-91, 93-94.

282 *Id*. at 96.

283 *Id*. at 97.

284 New York v. United States, 505 U.S. 144, 160 (1992).

285 *Id*. at 155.

286 Alden v. Maine, 527 U.S. 706, 814 (1999).

More notable than the generational inconsistency of the Court, however, is the inconsistency of the judicial federalists themselves. Building on a long line of states' rights controversies, to which they have spoken in case after case regarding the death penalty, the judicial federalists not only lean on the legal structure of federalism, but also what they find to be its associated benefits.[287] While one may dispute their ultimate interpretations, their reliance on federalism provides a highly defensible posture from which to repeatedly deny challenges to death sentences and death sentencing procedures. Justice Scalia once observed that "'[t]he Federalist reads with a split personality on matters of federalism."[288] Unfortunately, the same could be said of him and his judicial federalist brethren. That is, despite a well earned reputation for advancing the place of states in the federal structure, the judicial federalists prove quick to abandon the states when the states advocate for consumers, minority groups, or threaten to advance liberal politics.

We explore several cases with implications for consumers' rights (*Rush Prudential HMO, Inc. v. Moran*,[289] *AT&T Corp. v. Iowa Utilities Board*,[290] and *Geier v. American Honda Motor Co.*[291]), minority rights (*City of Richmond v. J.A. Croson Co.*,[292] and *R.A.V. v. City of St. Paul*[293]), and political rights (*Bush v. Gore*[294]), in which the judicial federalists abandoned their deference to the states in favor of a more powerful federal government. This Part shows that there is no principle of federalism that supports the judicial federalists' wide deference to the states in general, contrasted with their revulsion from the states in these particular cases. Instead, the sole linking feature between their vigorous defense of states in most cases and their attack on states in these cases is that such a stance allows them to advance a conservative political agenda.[295] That is, when the judicial federalists argue the Court should not "meddle"[296] in state affairs, it is because ruling for the federal government would impose a

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[287] *See, e.g.*, Kelly v. South Carolina, 534 U.S. 246, 265 (2002) (Thomas, J., dissenting); Shafer v. South Carolina, 532 U.S. 36, 58 (2001) (Thomas, J., dissenting); Simmons v. South Carolina, 512 U.S. 154, 183 (1994) (Scalia, J., dissenting).

[288] Printz v. United States, 521 U.S. 898, 916 n.9 (1997) (quoting DAAN BRAVEMAN ET AL., CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 198-99 (3d ed. 1996).

[289] 536 U.S. 355 (2002).

[290] 525 U.S. 366 (1999).

[291] 529 U.S. 861 (2000).

[292] 488 U.S. 469 (1989).

[293] 505 U.S. 377 (1992).

[294] 531 U.S. 98 (2000).

[295] *See* Fallon, *supra* note 2, at 434.

[296] Kelly v. South Carolina, 534 U.S. 246, 265 (2002) (Thomas, J., dissenting).

more expansive view of personal rights than the states favor. Conversely, when the judicial federalists rule against the "conflict" and "uncertainty"[297] obtained when states are permitted to act without federal government oversight, it is because ruling for the states would allow a more expansive view of personal rights than the federal government favors. The judicial federalist's preference for the states, then, seems to stem largely from the fact that it is the federal government that more generally supports a more expansive view of personal rights. Indeed, a sideways acknowledgment of that relationship is present in Justice Scalia's concurring opinion in *J.A. Croson*, in which he argues that lower levels of government are inherently less likely to treat citizens fairly than is the federal government.[298]

A. *When States Protect Consumers*

The three consumer cases discussed below presented the Court with the opportunity to rule on behalf of either an interventionist federal government or on behalf of the independence of the states. In each of the three cases, the active power of the federal government clearly represented a benefit to major business interests. In each case, the judicial federalists found a need for a powerful, activist federal government.

In *AT&T*, the Court was faced with deciding whether the Federal Communications Commission (FCC) had jurisdiction to regulate local telephone competition within a state.[299] Under the Telecommunications Act of 1996,[300] Congress charged the FCC with setting the rules under which local companies would be required to grant competitors access to their networks.[301] Respondents emphasized, and the court of appeals agreed, that since its inception, the FCC had been authorized to regulate *interstate* matters, while the states had "exclusive authority" to regulate *intrastate* communications.[302] In fact, the court of appeals found that the Communication Acts of 1934 preserved state authority over intrastate communications and wrote that the Act created a metaphorical fence protecting the states from FCC intrusion.[303] This metaphorical fence was, in the court's words, "hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf."[304]

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297 *Geier*, 529 U.S. at 871.

298 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 522 (1989).

299 AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 370, 374 (1999).

300 Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

301 *AT&T*, 525 U.S. at 377 (citing 47 U.S.C. § 201(b) (2000)).

302 *Id.* at 374-75.

303 *Id.* at 375 (citing 47 U.S.C. § 152(b)).

304 *Id.* (quoting Iowa Utils. Bd. v. FCC, 120 F.3d 753, 800 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom.* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999)).

Justice Scalia, writing for the Court and joined in part by Chief Justice Rehnquist and Justice Thomas, reversed, finding for the petitioners and against the states.[305] Justice Breyer, writing separately, questioned why the Court was so eager to limit the states' ability to regulate matters within their borders and asked where the Court's presumption against pre-emption of state law had gone.[306] The presumption in this case, Justice Scalia answered, was not against pre-emption of states, but against having "50 independent state agencies" regulating communication, an outcome he said would be "surpassing strange."[307] Justice Breyer noted the incongruous abandonment of deference to the states,[308] but Justice Scalia answered that "appeals . . . to what might loosely be called 'States' rights' are most peculiar" in this case.[309]

Surely, given the dramatic contradiction of their pro-state analysis of the federal system, Justice Scalia and his colleagues made their decision in *AT&T* in response to an unambiguous act of Congress that simply provided no room for uncertainty. On the contrary, the circumstances could hardly have been more ambiguous. Justice Scalia wrote, "It would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction."[310] Even more curiously, Justice Scalia and his judicial federalist colleagues signed a 1995 decision in which they asserted that state regulations should be subsumed under federal regulations only when federal law was *indisputable*.[311] "[T]he historic police powers of the States were not [meant] to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[312]

Nevertheless, Justice Scalia went on to amplify his lament. He wrote that the ambiguity of the law was "most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars."[313] Presumably, that is what truly lies at the heart of this decision and the consumer cases profiled here. To rule in favor of the states was to empower "50 independent state agencies" to make decisions on behalf of consumers and against the likes of AT&T.[314]

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305 *Id*. at 385.

306 *See id.* at 420 (Breyer, J., concurring in part and dissenting in part).

307 *Id.* at 379 n.6.

308 *Id*. at 378-79 n.6.

309 *Id.* at 379 n.6.

310 *Id.* at 397.

311 N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995).

312 *Id*. (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

313 *AT&T*, 525 U.S. at 397.

314 *Id*. at 379 n.6.

Indeed, Justice Breyer's opinion notes that the Act's provisions "foresee the traditional allocation of ratemaking authority—an allocation that within broad limits assumes local rates are local matters for local regulators."[315] To showcase Justice Scalia's significant reversal of course in *AT&T*, Justice Breyer compared it with one of the many pro-state decisions advanced by the judicial federalists, stating, "Today's decision does deprive the States of practically significant power, a camel compared with *Printz's* gnat."[316]

The second consumer case arose when Alexis Geier had a traffic accident and sustained injuries while driving her 1987 Honda automobile.[317] The Court was asked to decide whether she could recover damages due to the lack of an airbag in her car.[318] At the time of the accident, the Federal Motor Vehicle Safety Standard required only that a percentage of cars (10%) manufactured in that year come equipped with some type of passive restraint system.[319] Honda met that percentage.[320] Geier sought damages based on state safety guidelines, which required the installation of an airbag, while respondents asserted that any state safety guideline was pre-empted by the federal standard.[321]

The Court, in a decision joined by Chief Justice Rehnquist and Justice Scalia, ruled that the federal standard did pre-empt any standard of a lower jurisdiction.[322] The decision not only supported the federal standard, but made a vigorous case for the advantages of following federal standards:

> [T]he pre-emption provision itself reflects a desire to subject the industry to a single, uniform set of federal safety standards. Its pre-emption of *all* state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the *conflict*, *uncertainty*, *cost*, and occasional *risk* to safety itself that too many different safety-standard cooks might otherwise create.[323]

The decision quotes the legislative history of the National Traffic and Motor Vehicle Safety Act of 1966,[324] which states that "preemption . . . is

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315 *Id.* at 420 (Breyer, J., concurring in part and dissenting in part).

316 *Id.* at 427.

317 Geier v. Am. Honda Motor Co., 529 U.S. 861, 865 (2000).

318 *Id*.

319 *Id*. at 879.

320 *Id*. at 865.

321 *Id*.

322 *Id*.

323 *Id.* at 871 (second emphasis added).

324 Pub. L. No. 89-563, 80 Stat. 718 (current version at 49 U.S.C. §§ 30101-30170 (2000)).

intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards."[325] Indeed, the Court found that pre-emption is important because state court proceedings would create confusion, and "the rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict . . . ."[326] Asserting the strength of their support for pre-emption, the Court concluded that the details of a particular automotive safety case are not relevant because weighing pre-emption on a case-by-case basis would be dangerous.[327] "That kind of analysis, moreover, would engender legal uncertainty with its inevitable systemwide costs (*e.g.*, conflicts, delay, and expense) as courts tried sensibly to distinguish among varieties of 'conflict . . . .'"[328]

Beyond the dangers of inconsistency that the Court fears, the majority made the case that allowing the states to set standards for safety would impede progress and variety in safety features.[329] The decision goes on to repeatedly refer to state standards as an obstacle to the advancement of safety and new safety ideas.[330] "Because the rule of law for which petitioners contend would have stood 'as an obstacle to the accomplishment and execution of' the important means-related federal objectives that we have just discussed, it is pre-empted."[331] Meanwhile, the Court noted that putting the Federal Department of Transportation (DOT) in charge of automotive safety is preferable because the subject matter is "technical" and "complex," and the DOT is "uniquely qualified."[332]

The dissenters in *Geier*, like those who wrote separately in *AT&T*,[333] were flabbergasted by the scope of the ruling.[334] In his dissent, Justice Stevens called the ruling an "unprecedented extension of the doctrine of pre-emption."[335] Not surprisingly, given its contrasting vision of

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325 *Geier*, 529 U.S. at 871 (quoting H.R. REP. NO. 89-1776, at 17 (1966)).

326 *Id.*

327 *Id*. at 874.

328 *Id.*

329 *See id.* at 881. State standards "would have presented an obstacle to the variety and mix of devices that the federal regulation sought." *Id*.

330 *Id*.

331 *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

332 *Id.* at 883.

333 *See* AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 397-98 (1999) (Souter, J., concurring in part and dissenting in part); *Id*. at 402 (Thomas, J., concurring in part and dissenting in part); *Id*. at 427 (Breyer, J., concurring in part and dissenting in part).

334 *See Geier*, 529 U.S. at 886 (Stevens, J., dissenting).

335 *Id.*

federalism, he had difficulty reconciling the ruling with the Court's findings in cases such as *Coleman v. Thompson* and *Alden*.[336] He questioned how the Court could suggest that those cases demonstrated the central role of federalism and the respect owed the states when the *Geier* decision will "oust state courts of their traditional jurisdiction over common-law tort actions."[337] Indeed, Justice Stevens added, "[O]ur presumption against pre-emption is rooted in the concept of federalism," in the belief that the Court should "defend state interests from undue infringement."[338]

Justice Stevens wondered if the heart of the decision lay not in laws and lives, but dollars.[339] DOT rules, and by extension the Court's decision, are founded on offering "manufacturers adequate time for compliance" rather than imposing a harsh economic burden.[340] Ultimately, he argued, the case was about Honda's desire for "uniform national safety standards,"[341] presumably because uniform standards are easier and cheaper to meet.[342]

Justice Stevens took particular umbrage with the assertion that federal standards inherently advance safety.[343] He noted, "[T]he Court completely ignores the important fact that by definition all of the standards established under the Safety Act . . . impose minimum, rather than fixed or maximum, requirements."[344] More to the point, "[A]llowing a suit like petitioners' to proceed against a manufacturer that had installed no passive restraint system in a particular vehicle would not even arguably pose an 'obstacle' to the auto manufacturers' freedom to choose among several different passive restraint device options."[345] Justice Stevens concluded that the ruling finds no clear basis in acts of Congress or "the text of any Executive Order or regulation."[346]

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336 *Id*. at 887.

337 *Id*.

338 *Id*. at 907.

339 *See id*. at 899-905.

340 *Id*. at 891.

341 *Id*. at 896.

342 *See* Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 261 (2004) (Souter, J., dissenting) (noting that "[t]he auto industry . . . was adamant that the nature of their manufacturing mechanisms required a single national standard in order to eliminate undue economic strain," during the Clean Air Act legislative hearings) (alteration in original) (quoting S. REP. NO. 90-403, at 33 (1967)).

343 *Geier*, 529 U.S. at 903 (Stevens, J., dissenting).

344 *Id*. Justice Stevens added, "Those requirements were not ceilings, and it is obvious that the Secretary favored a more rapid increase." *Id*.

345 *Id*. at 904 n.20.

346 *Id*. at 887.

Reconciling the premise of these decisions with the assertions of the judicial federalists in death penalty and other states' rights issues requires a profound flexibility. In these decisions we learn from the judicial federalists that it would be "surpassing strange"[347] and would create "conflict, uncertainty, cost, and occasional risk" to allow states to make their own policies.[348] Moreover, giving the states input would impede "variety."[349] Where, one wonders, is the rhetoric on laboratories of democracy which, in death penalty cases, the judicial federalists rely upon to explain that the creativity of diverse states' responses allows for "testing" that produces "solutions to novel legal problems?"[350] Where is the argument, advanced in *Gregory*, that states are "more sensitive" and "more responsive" to the people?[351]

It seems that when the states' positions imply liberal outcomes, their various policies portend "too many cooks" causing "conflict, uncertainty, cost, and occasional risk,"[352] while the federal government must be allowed to rule because it is "uniquely qualified."[353] However, when the states are on the conservative side of the political ledger—in death penalty cases, for example—it is federal standards that are the foe of "swiftness" and "predictability"[354] and the ally of "arbitrariness," "complexity,"[355] and "piecemeal"[356] thinking.[357]

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[347] *AT&T*, 525 U.S. at 379 n.6.

[348] *Geier*, 529 U.S. at 871.

[349] *Id.* at 881.

[350] Smith v. Robbins, 528 U.S. 259, 275 (2000) (quoting Arizona v. Evans, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting)).

[351] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[352] *Geier*, 529 U.S. at 871.

[353] *Id.* at 883.

[354] Simmons v. South Carolina, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting).

[355] Richmond v. Lewis, 506 U.S. 40, 54 (1992) (Scalia, J., dissenting).

[356] *Simmons*, 512 U.S. at 183 (Scalia, J., dissenting).

[357] In *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004), the judicial federalists again found on behalf of automotive interests and against a state policy. *Id*. at 258-59. Writing for the Court, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, concluded that a California state regulation establishing emission limits for certain operators of fleets when they purchased new cars and trucks was partially pre-empted by the federal Clean Air Act. *Id*. The Clean Air Act enjoined states from any "attempt to enforce any standard relating to the control of emissions . . . as condition precedent to the initial retail sale" of any motor vehicle. *Id*. at 252 (citing 42 U.S.C. § 7543(a) (2000)). In his dissent, Justice Souter questioned how the "presumption against federal preemption" could not only be ignored, *id.* at 260 (Souter, J., dissenting), but ignored in service of an "expansive" reading of federal law, *id.* at 265. That is, a federal regulation prohibiting state proscription of the *sale* of vehicles was read as a

(*continued*)

A third case further demonstrates the finicky nature of the judicial federalists when states represent citizens against corporate interests. In *Rush Prudential HMO Inc. v. Moran*,[358] the question before the Court was whether federal or state government regulations governed the medical standards of HMO treatment decisions.[359] When Debra Moran's doctor advised her to receive a special surgical treatment to address painful numbness in her shoulder, her HMO refused to pay, disputing that the treatment was medically necessary.[360] Following Illinois state law, Moran ultimately sought an independent medical review that would support her doctor's assessment.[361] Under state law, the favorable independent medical review obligated the HMO to pay for the treatment.[362] The Petitioner claimed that the Federal Employee Retirement Income Security Act[363] (ERISA) pre-empted the state HMO law.[364]

ERISA is intended to "'safeguar[d] . . . the establishment, operation, and administration' of employee benefit plans" by setting "minimum standards."[365] The Court was unwilling to pre-empt state law and found for Moran because ERISA specifically addresses the pre-emption of state regulations. The Court stated, "Nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."[366]

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, dissented from the pro-state decision.[367] Like the two previously addressed cases, the judicial federalists again incongruously extract great value in national uniformity:

> [E]xclusivity of remedies is necessary to further Congress'

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federal regulation prohibiting state proscription of the *purchase* of vehicles. *Id*. at 261-62. The distinction, Justice Souter argues, is great because regulating the sale of vehicles places a direct limitation on manufacturers, while regulating the purchase of vehicles by certain entities requires only that the buyer, which in this case included city and state motor pools, seek vehicles with low emissions. *Id*. at 262-63. Regulating the purchase of vehicles thus offers manufacturers, if they are so inclined, the opportunity to produce low emissions vehicles to compete for the affected buyers and the opportunity to continue producing high emissions vehicles for other buyers. *Id*. at 263.

358 536 U.S. 355 (2002).

359 *Id*. at 359.

360 *Id*. at 360.

361 *Id*. at 361.

362 *Id*.

363 29 U.S.C. §§ 1001-1461 (2000).

364 *Rush Prudential*, 536 U.S. at 362.

365 *Id*. at 364 (quoting 29 U.S.C. § 1001(a) (2000)).

366 *Id*. (quoting 29 U.S.C. § 1144(b)(2)(A) (2000)).

367 *Id*. at 388 (Thomas, J., dissenting).

> interest in establishing a uniform federal law of employee benefits so that employers are encouraged to provide benefits to their employees: 'To require plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits.'[368]

Justice Thomas also noted, "This decision . . . eviscerates the uniformity of ERISA . . . ."[369] Federal law, he wrote, should not be "supplemented or supplanted by varying state laws."[370] In other words, the variation and independence of the states, which is otherwise highly valued, becomes an active threat to employees' health in this situation. Justice Thomas goes on to assert that allowing the state to regulate HMOs is a threat to "prompt and fair claims settlement" and discourages "the formation of employee benefit plans."[371]

The implication, as in the aforementioned cases, is that to allow states to formulate their own policies is an invitation to chaos. Justice Thomas noted that in addition to the Illinois law central to the case, "some 40 other States have similar laws, though these vary as to applicability, procedures, standards, deadlines, and consequences of independent review."[372] Yet, instead of valuing their unique perspectives, Justice Thomas argues that states must defer to the federal government to "minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government."[373] Clearly, the true threat of an Illinois state law that required Rush Prudential to pay for shoulder surgery is simply that any state regulation that reviews treatment is going to occasionally find for the patient.[374] This, Justice Thomas writes, means "HMOs will have to subsidize beneficiaries' treatments of choice" and will "undermine the ability of HMOs to control costs."[375]

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[368] *Id.* at 388 (quoting FMC Corp. v. Holliday, 498 U.S. 52, 60 (1990)).

[369] *Id.* at 389.

[370] *Id.* at 388 (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987), *overruled in part by* Ky. Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003)).

[371] *Id.* at 389 (quoting *Pilot Life*, 481 U.S. at 54).

[372] *Id.* at 400.

[373] *Id.* at 401 n.8 (quoting Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990)).

[374] *Id*. at 402.

[375] *Id.* The Court would again grapple with questions of state HMO regulation in *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488 (2004). In *Aetna*, Justice Thomas wrote for a unanimous Court that the Texas legislative scheme to regulate HMO coverage was pre-empted by ERISA. *Id*. at 2492-93. The Texas legislation itself offered a case study in political inconsistency. The legislation was originally vetoed by then Governor George W. (*continued*)

Again, one must attempt to understand how, in the vision of the judicial federalists, the federal government is indisputably a threat to uniformity in death penalty cases,[376] but the states are threats to uniformity in *Rush Prudential*,[377] *AT&T*,[378] and *Geier*.[379] Similarly, where is the value of the states' creative approach to problems, cherished in criminal[380] and death penalty cases,[381] but cast aside here as nothing more than a "burden?"[382] *Rush Prudential*, *AT&T*, and *Geier* feature the judicial federalists supporting the federal government against the states despite federal legislation that ranges from contradictory in *AT&T*[383] to explicitly pro-state in *Rush Prudential*.[384] Indeed, the only consistent aspect of the three cases is that ruling on behalf of the states would represent a victory for consumers and a defeat of major business interests. In other words, the judicial federalists cast aside the foundation of their states' rights philosophy because in these cases states' rights did not produce a conservative political outcome.

B. *When States Protect Minorities*

The judicial federalists' deference to the states is also conspicuously missing from two cases dealing with minority political issues.

R.A.V., at the time a juvenile, was accused of burning a cross on an African American family's front lawn.[385] He was convicted under a St.

Bush. Charles Lane, *Justices Limit Suits Against HMOs*, WASH. POST, June 22, 2004, at A1. In 1997, when it passed the Texas legislature a second time, Bush allowed it to become law without his signature rather than mount what was universally viewed as a hopeless fight against the bill. *See id*. Despite his overt opposition to the bill, during the 2000 presidential campaign Bush cited its passage as proof that he was, as he put it, "[a] reformer with results." *See* Bob Kemper, *Bush: Personality, not Wrangling with Minutiae, Is Key to Success*, CHI. TRIB., Oct. 29, 2000, at 1. When that same legislation that he took credit for was under scrutiny by the Court in *Aetna*, the Bush Administration supported the plaintiff and argued that law should be overturned. *See* Lane, *supra*.

[376] *See, e.g.*, Shafer v. South Carolina, 532 U.S. 36, 58 (2001) (Thomas, J., dissenting); Romano v. Oklahoma, 512 U.S. 1, 11-12 (1994).

[377] *Rush Prudential*, 536 U.S. at 388-89 (Thomas, J., dissenting).

[378] AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 379 n.6 (1999).

[379] Geier v. Am. Honda Motor Co., 529 U.S. 861, 881 (2000).

[380] *See* Smith v. Robbins, 528 U.S. 259, 275 (2000); Arizona v. Evans, 514 U.S. 1, 8 (1995).

[381] *See* Kelly v. South Carolina, 534 U.S. 246, 263 (2002) (Thomas, J., dissenting).

[382] *See Rush Prudential*, 536 U.S. at 401 n.8 (Thomas, J., dissenting).

[383] *AT&T*, 525 U.S. at 397.

[384] *Rush Prudential*, 536 U.S. at 364.

[385] R.A.V. v. City of St. Paul, 505 U.S. 377, 379 (1992).

Paul, Minnesota city ordinance against "Bias-Motivated" crime.[386] R.A.V. challenged the ordinance as a facial violation of First Amendment free speech rights.[387] The Minnesota Supreme Court upheld the conviction, ruling that the ordinance was permissible because it only reached "fighting words," which, under Supreme Court precedent, were not protected by the First Amendment.[388]

Justice Scalia's majority opinion, which was joined by Chief Justice Rehnquist and Justice Thomas, overturned R.A.V.'s conviction, determining that the city ordinance was unconstitutional because it "prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresse[d]."[389] In other words, Justice Scalia objected to the ordinance's "selective limitations upon speech" in which "fighting words" in general were not targeted, but specific "bias-motivated" fighting words were.[390]

The City of St. Paul and its amici defended the ordinance as meeting the traditional strict scrutiny standard.[391] They asserted that "the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination."[392] The Court did not dispute this characterization, as Justice Scalia conceded "that these interests are compelling, and . . . the ordinance can be said to promote them."[393] However, the justification presented by St. Paul and backed by its state supreme court was simply insufficient.[394]

Even as they agreed as to the disposition of the case, Justices White and Blackmun faulted the reasoning of the majority opinion. Justice White called the Court ruling "mischievous" and "an arid, doctrinaire interpretation."[395] He added, "I join the judgment, but not the folly of the opinion."[396] Justice Blackmun saw devastating potential consequences for the Court's ruling.[397] "[D]eciding that a State cannot regulate speech that causes great harm unless it also regulates speech that does not" would not only disregard law and logic, but would also actually clear the way for far

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386 *Id*. at 380.

387 *Id*.

388 *Id*. at 380-81.

389 *Id*. at 381.

390 *Id.* at 392.

391 *Id*. at 395.

392 *Id.*

393 *Id.*

394 *Id*. at 395-96.

395 *Id.* at 415 (White, J., concurring).

396 *Id*.

397 *See id*. at 415-16 (Blackmun, J., concurring).

more restrictions on speech.[398] Instead, Justice Blackmun questioned why the City of St. Paul should be restrained in its efforts to protect its citizenry:

> I see no First Amendment values that are compromised by a law that prohibits hoodlums from driving minorities out of their homes by burning crosses on their lawns, but I see great harm in preventing the people of Saint Paul from specifically punishing the race-based fighting words that so prejudice their community.[399]

Ultimately, Justice Blackmun saw the majority opinion as having little to do with true First Amendment concerns and more to do with politics.[400]

The Court was similarly skeptical of the race-related ordinance in Richmond, Virginia in which the city instituted a program to redress discrimination in construction and city contracting.[401] Although the city's population was more than 50% minority, less than 1% of city construction contracts went to minority-owned businesses.[402] The city passed an ordinance requiring all city construction contracts to have at least 30% of subcontracting work performed by minority-owned businesses.[403] The ordinance was openly patterned after a similar program passed by Congress governing federal contracts,[404] a program the Court had found permissible.[405] The J.A. Croson Company lost a city contract for failing to fulfill the 30% requirement and subsequently challenged the legality of the ordinance.[406]

The Court found in favor of J.A. Croson.[407] Chief Justice Rehnquist joined the majority,[408] while Justice Scalia submitted a concurring opinion.[409] The majority opinion did not mention the place of states as

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398 *Id*. at 415.

399 *Id.* at 416.

400 *See id*. at 415-16. Justice Blackmun wrote, "I fear that the Court has been distracted from its proper mission by the temptation to decide the issue over 'politically correct speech' and 'cultural diversity . . . .'"

401 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 477-78, 490-91 (1989).

402 *Id*. at 479-80.

403 *Id*. at 477.

404 *Id*. at 480 (citing Fullilove v. Klutznick, 448 U.S. 448, 453 (1980)).

405 *Id*. at 477 (citing *Fulliove*, 448 U.S. at 492).

406 *Id*. at 483.

407 *Id*. at 511.

408 *Id*. at 476.

409 *Id*. at 520-28 (Scalia, J., concurring). Justice Thomas was not yet on the court. He was nominated by George Bush and took his seat on October 23, 1991. The Supreme Court of the United States, *The Justices of the Supreme Court*, *at* http://www.- (*continued*)

equals or sovereigns. Instead, the Court made clear that Congress was permitted to address a history of discrimination with a race-based remedy, but a city or state was not.[410] "That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate."[411] In his concurring opinion, Justice Scalia similarly noted that the Court has occasionally "approved the use of racial classifications by the Federal Government to remedy the effects of past discrimination. I do not believe that we must or should extend those holdings to the States."[412]

The Court argued that the Fourteenth Amendment empowered an activist Congress, but specifically sought to limit the states' ability to enact legislation using race as a factor.[413] Indeed, the limits on States were based on their disreputable history. "[T]he Fourteenth Amendment stemmed from a distrust of state legislative enactments based on race . . . ."[414]

However, Justice Marshall's dissent points out that the Court took the history of the Fourteenth Amendment, which was passed to prevent subjugation of minorities in an era barely removed from state sanctioning of slavery, and reinvented it to mean that state efforts to redress discrimination are barred.[415] In other words, the Court took an Amendment written to protect against racist lawmaking as a means to prevent lawmaking meant to redress racism.[416] Justice Marshall wrote, "To interpret any aspect of these Amendments as proscribing state remedial responses to these very problems turns the Amendments on their heads."[417]

Nevertheless, the Court found no evidence of a problem in Richmond's contracting outcomes.[418] The fact that minorities won fewer than one percent of city construction contracts had an obvious explanation: "Blacks may be disproportionately attracted to industries other than

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supremecourtus.gov/about/biographiescurrent.pdf (last visited Apr. 17, 2005).

410 *J.A. Croson*, 488 U.S. at 490.

411 *Id.* at 490. Justice Marshall could not reconcile the Court's ruling on Richmond's program with their previous ruling on the federal program. Justice Marshall wrote, "Indeed, Richmond's set-aside program is indistinguishable in all meaningful respects from—and in fact was patterned upon—the federal set-aside plan which this Court upheld . . . ." *Id*. at 528 (Marshall, J., dissenting).

412 *Id.* at 521 (Scalia, J., concurring).

413 *Id.* at 490-91.

414 *Id.* at 491.

415 *See id*. at 558-59 (Marshall, J., dissenting).

416 *See id*.

417 *Id.* at 559.

418 *Id*. at 503.

construction."[419] In phrasing similar to that used in the cases in which the judicial federalists turn against the states, here too the Court warns against the dangers of having "50 state legislatures and their myriad political subdivisions" weigh in on an issue.[420]

Justice Scalia offered an even more startling position. He purported that not only would the country suffer under the burden of 50 different state policies, but minorities would suffer because states and localities are inherently more likely to discriminate![421] He wrote that efforts to eliminate "past or present discrimination . . . are substantially less likely to exist at the state or local level. The struggle for racial justice has historically been a struggle by the national society against oppression in the individual States."[422] Justice Scalia restated his position with complete clarity when he said, "What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level."[423] Far from being a relic of the past, "the struggle retains that character in modern times."[424]

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[419] *Id.*

[420] *Id.* at 490.

[421] *Id*. at 522-23 (Scalia, J., concurring).

[422] *Id.* at 522.

[423] *Id.* at 523. To buttress his position, Justice Scalia cited the following discussion of the point in *The Federalist Papers*:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan [sic] of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.

Id. (quoting THE FEDERALIST PAPERS, NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961)).

[424] *Id*. at 522. Justice Scalia concluded, "The prophesy of these words came to fruition in Richmond in the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group." *Id.* at 524. While Richmond had a majority African-American city council at the time the ordinance was passed, *id*. at 495, the ordinance inclusively defined minority owned contractors to include, for example, Asian-Americans and Native Americans, *id*. at 478. Oddly, the Court faulted the ordinance for being overly broad: "There is *absolutely no evidence* of past

(*continued*)

The City of Richmond, not surprisingly given the Court's general proclivities, raised a states' rights defense, arguing that it "would be a perversion of federalism" to allow the federal government to remedy the effects of racial discrimination in its public works programs, but not allow a city to do the same.[425] Similarly, in his dissent, Justice Marshall noted that "[n]o principle of federalism or of federal power" could justify the Court's decision.[426] However, the majority, and to an even greater extent Justice Scalia,[427] found that this issue was not merely one on which the federal government predominates; it is one in which the states cannot be trusted.[428]

Yet, one searches in vain to find even a single reference to such concerns in a judicial federalist's opinion when a state was accused of using its death sentence in a racially biased manner, or in any death penalty cases, for that matter, given the racial disparity with which the sentence is used.[429] Instead, both *R.A.V.* and *J.A. Croson* seem to be little more than extensions of the consumer rights cases, encouraging Justice Scalia and Chief Justice Rehnquist to suddenly develop a "theory" of convenient federalism that is generally unshakable except when its invisible.

C. *When States Protect Voters*

While the consumer rights and the minority rights cases represent clear disregard for states' rights among the judicial federalists, surely the most famous divergence from their position of deference to states' rights, state law, and state courts was on display in *Bush v. Gore*.[430]

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discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry." *Id*. at 506. However, Justice Scalia faulted it for being selfishly narrow. *See id*. at 526-27.

425 *Id.* at 489.

426 *Id.* at 547 (Marshall, J., dissenting).

427 *Id*. at 522-23 (Scalia, J., concurring).

428 *Id*. at 490-91.

429 On race and the death penalty, see generally David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Thomas J. Keil & Gennaro F. Vito, *The Effects of the* Furman *and* Gregg *Decisions on Black-White Execution Ratios in the South*, 20 J. CRIM. JUST. 217 (1992); Laura I. Langbein, *Politics, Rules, and Death Row: Why States Eschew or Execute Executions*, 80 SOC. SCI. Q. 629 (1999); Michael L. Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981); Ernie Thomson, *Discrimination and the Death Penalty in Arizona*, 22 CRIM. JUST. REV. 65 (1997).

430 Herman Schwartz, for example, calls *Bush v. Gore* "the most prominent recent example of Republican fickleness" on federalism. Herman Schwartz, *The Supreme Court's Federalism: Fig Leaf for Conservatives*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2001, at 119, 127.

After the Florida Supreme Court, basing its decision on state law, ordered a statewide recount of the vote tallies in the 2000 presidential election, the petitioner filed an emergency application to the U.S. Supreme Court based on two central claims.[431] First, federal law protected the states' roster of Electoral College members from congressional scrutiny if the roster was established by December 12.[432] Second, no uniform definition of recount procedures existed; that is, the state supreme court charged each county with counting each vote in which the intent of the voter could be determined, but did not define the parameters of determining intent.[433] As such, different counties could implement different standards for review.[434]

In the per curium opinion, supported by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas through a concurring opinion penned by the Chief Justice, the Court found "the absence of specific standards"[435] for the recount to be in "violation of the Equal Protection Clause."[436] The Court noted that the "fundamental nature" of the right to vote requires "equal weight accorded to each vote and the equal dignity owed to each voter"[437] because "the State may not . . . value one person's vote over that of another."[438]

The Court then incorporated that finding with the calendar, which already read December 12.[439] It asserted, "The press of time does not diminish the constitutional concern. A desire for speed is not a general excuse for ignoring equal protection guarantees."[440] In short, the recount could not comply with "requirements of equal protection and due process" because new "statewide standards" and "practicable procedures" would have been needed immediately.[441]

Critics of the decision have raised two main objections. First, as the

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431 Bush v. Gore, 531 U.S. 98, 100-03 (2000) (per curiam).

432 *Id*. at 110.

433 *See id*. at 105-06. At the time, a majority of states used the "intent of the voter" standard to decide whether to count a ballot. *Id*. at 124 n.2 (Stevens, J., dissenting).

434 *Id*. at 107 (per curiam).

435 *Id*. at 106.

436 *Id*. at 103.

437 *Id.* at 104. Here, curiously and temporarily, the dignity owed to the states has been reassigned to its citizens.

438 *Id.* at 104-05. Oddly, even as he joined the per curium decision calling for the equal treatment of all votes, Chief Justice Rehnquist notes in his concurrence that attempting to accurately count each vote was an "elusive—perhaps delusive" goal. *Id.* at 121 (Rehnquist, C.J., concurring).

439 *Id*. at 110 (per curium).

440 *Id.* at 108.

441 *Id.* at 110.

per curium opinion admitted, the voting apparatus varied from county to county,[442] resulting in an unequal chance of a legal vote being recorded long before any recount procedure or lack of recount procedure had been contemplated.[443] Thus, following the Court's reasoning, any notion that the Equal Protection Clause would demand identical *recounting* of votes would surely demand identical *counting* of votes, which would require equivalent equipment to be provided in each jurisdiction.[444] Amplifying their point about the need for identical recount procedures, but seemingly also amplifying the implication that identical voting machinery is required, the Court quoted *Moore v. Ogilvie*,[445] which stated, "The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government."[446] Justice Stevens responded in his dissent that if the Court believed its own argument, then each county's use of a different "balloting system" must surely "run afoul of equal protection."[447]

The second major objection, voiced notably by Justice Stevens in his dissent, was that the December 12 deadline did not represent a significant threat to the plaintiff.[448] Indeed, he noted that in the 1960 presidential election, Hawaii did not establish its roster of electoral college members until January 4, 1961, yet those electoral votes were still honored.[449]

Critics of the decision again wondered how the often stated deference to state courts making decisions based on state law had evaporated. Chief Justice Rehnquist's concurrence acknowledged those concerns: "In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law. That practice reflects our understanding that the decisions of state courts are definitive pronouncements of the will of the States as sovereigns."[450] The Chief Justice said that he and his colleagues "generally defer to state courts on the interpretation of state law," but he noted there are circumstances that

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442 For example, some counties used ballots requiring a hole be punched to record a vote; other counties used ballots requiring voters to mark their ballot with a pen. *Id*. at 106.

443 *See id*. at 106-07. "This case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter." *Id.* at 104. Justice Stevens noted in his dissent that nearly 4% of punch card ballots failed to produce a recorded vote in Florida, while that rate was under 1.5% for optical scan ballots in the state. *Id.* at 126 n.4 (Stevens, J., dissenting).

444 *See id*. at 106-10 (per curiam).

445 394 U.S. 814 (1969).

446 *Bush*, 531 U.S. at 107 (per curiam) (quoting *Moore*, 394 U.S. at 819).

447 *Id*. at 126 (Stevens, J., dissenting).

448 *Id*. at 127.

449 *Id.*

450 *Id.* at 112 (Rehnquist, C.J., concurring).

require "this Court to undertake an independent, if still deferential, analysis of state law."[451] He then cited *NAACP v. Alabama*[452]and *Bouie v. City of Columbia*[453] as examples of when the Court had disregarded internal state court proceedings.[454] Both of these cases were civil rights cases in which the state courts were found to be, to put it charitably, deferential to racist interests.[455] Thus, Chief Justice Rehnquist seemed to suggest the need for scrutiny of the states' racist proclivities,[456] seconding the notion advanced by Justice Scalia in *J.A. Croson*.[457]

However, in her dissent, Justice Ginsburg questioned the propriety of sullying the modern day Florida Supreme Court by comparing it to "state high courts of the Jim Crow South."[458] Moreover, she questioned "[t]he Chief Justice's casual citation of these cases," which might falsely lead one to believe that the Court regularly casts "a skeptical eye on a state court's portrayal of state law."[459] Justice Ginsburg argued that it would be difficult to find precedent to support that point.[460]

Nevertheless, their newfound, even if temporary, skepticism of states' procedures left the Chief Justice and his judicial federalist colleagues in the uncomfortable position of telling the *Florida Supreme Court* what the *Florida Legislature* meant to say in passing a *Florida statute*.[461] In his words, "Surely when the Florida Legislature empowered the courts of the State to grant 'appropriate' relief, *it must have meant* relief that would have become final" by the December 12 date for Electoral College submission.[462]

The four dissents in the case[463] marveled at the new found doubt of

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451 *Id.* at 114.

452 357 U.S. 449, 454-55, 466 (1958).

453 378 U.S. 347, 348-49, 362-63 (1964).

454 *Bush*, 531 U.S. at 114-115 (Rehnquist, C.J., concurring).

455 *Bouie*, 378 U.S. at 348-49; *NAACP*, 357 U.S. at 451-54.

456 *See Bush*, 531 U.S. at 114-15 (Rehnquist, C.J., concurring).

457 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-21 (1989) (Scalia, J., concurring).

458 *Bush*, 531 U.S. at 141 (Ginsburg, J., dissenting).

459 *Id*. at 140.

460 *Id.* One might also be skeptical that the Chief Justice agreed with the decisions he was citing. In the 1950s, Rehnquist was among the Court clerks most associated with asserting that civil rights cases were "sociological" and not legal controversies and should not occupy the Court's time. *See* TINSLEY E. YARBROUGH, THE REHNQUIST COURT AND THE CONSTITUTION 1-2 (2000).

461 *Bush*, 531 U.S. at 115 (Rehnquist, C.J. concurring).

462 *Id.* at 121 (emphasis added).

463 *Id*. at 123-29 (Stevens, J., dissenting); *Id*. at 129-35 (Souter, J., dissenting); *Id*. at 135-44 (Ginsburg, J., dissenting); *Id*. at 144-58 (Breyer, J., dissenting).

state court proceedings. Justice Ginsburg said it "contradict[ed] the basic principle" of state sovereignty,[464] Justice Souter called it a reversal from "customary" thinking,[465] and Justice Stevens called it an abandonment of the Court's "settled practice to accept the opinions of the highest courts of the States as providing the final answers."[466] Both Justices Stevens and Ginsburg questioned how that longstanding priority could be jettisoned without evidence of judicial bias or misconduct.[467] Justice Stevens wrote, referring to the Florida Supreme Court, "If we assume—as I do—that the members of that court and the judges who would have carried out its mandate are impartial, its decision does not even raise a colorable federal question."[468]

Justice Ginsburg directly stated that the case fit the very essence of what the judicial federalists on the Court claim is a state matter not to be muddled by federal intervention.[469] "Were the other members of the Court as mindful as they generally are of our system of dual sovereignty, they would affirm the judgment of the Florida Supreme Court."[470] She added that the decision "contradict[ed] the basic principle that a State may organize itself as it sees fit"[471] affirmed—and supported by Chief Justice Rehnquist and Justice Scalia—in *Gregory v. Ashcroft*.[472]

While the *Bush v. Gore* decision was obviously controversial and contentious, for the context of this Article, what is most interesting about it is the majority opinion's violation of a number of the central premises long advanced by the judicial federalists.[473] In a case where a person's life is at

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464 *Id*. at 141 (Ginsburg, J., dissenting).

465 *See id*. at 133 (Souter, J., dissenting).

466 *Id*. at 123 (Stevens, J., dissenting).

467 *See id*. at 128 (Stevens, J., dissenting); *Id*. at 135-40 (Ginsburg, J., dissenting). "There is no cause here to believe that the members of Florida's high court have done less than 'their mortal best to discharge their oath of office,' and no cause to upset their reasoned interpretation of Florida law." *Id*. at 136 (Ginsburg, J., dissenting) (internal citation omitted) (quoting Sumner v. Mata, 449 U.S. 539, 549 (1981)).

468 *Id.* at 128 (Stevens, J., dissenting). Similarly, Justice Breyer concluded that "this Court should resist the temptation unnecessarily to resolve tangential legal disputes." *Id.* at 153 (Breyer, J., dissenting).

469 *Id*. at 142-43 (Ginsburg, J., dissenting).

470 *Id*.

471 *Id*. at 141.

472 501 U.S. 452, 460 (1991).

473 As Schwartz points out, the Court has "continually invoked states' rights and lofty rhetoric about our system of dual sovereignty in order to overturn numerous federal laws granting individuals rights against state authority. In the *Bush* cases, the conservative majority ignored all of their prior states'-rights rulings and rhetoric to intervene in the electoral process" and suddenly fell in love with equal protection. Schwartz, *supra* note

(*continued*)

stake, such as *Penry v. Johnson*,[474] Justice Thomas argued that it was not for the Court to create a system of "ideal instruction."[475] Similarly in *Shafer v. South Carolina*, Justice Scalia asserted that the Court need not "promulgate wise national rules of criminal procedure."[476] Yet in *Bush*, the judicial federalists promulgated wise national rules of vote counting.[477] The Court cast aside the "intent of the voter" standard used by Florida and a majority of the states and demanded precise "equal weight accorded to each vote."[478]

Hostility to differences between the counties' voting processes also raised the issue of the long asserted salutary effects of the political laboratory. As Justice Souter argued in his dissent in *Bush*, the Equal Protection Clause has never before been held to require precise duplication in voting procedures for many reasons, including the idea that "local variety can be justified by concerns about cost, the potential value of innovation, and so on."[479] Yet, here the judicial federalists did not acknowledge the value of difference and innovation that they so regularly use to justify supporting state independence.

Indeed, as was the case in several of their anti-state opinions, the judicial federalists here decried the absence of a "uniform" process and the presence of what the Court considers an "arbitrary and disparate" policy derived from state input.[480] However, when the judicial federalists grapple with the death penalty cases, it is clear that they believe that when the Court intervenes into state issues, its results are arbitrary and incapable of producing uniformity.[481]

Finally, in *Kyles v. Whitley*,[482] Justice Scalia found that it is not for the Court to establish the factual accuracy of information in weighing the fate of a person condemned to death.[483] Yet in *Bush*, as Justice Breyer pointed out in his dissent, the Court arrived at a crucial factual finding—that the recount could not be finished in a timely fashion given the requirement for statewide standards—that contradicted state court factual findings, even though the state courts were obviously better situated to make such

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430, at 129.

474 532 U.S. 782 (2001).

475 *Id*. at 805 (Thomas, J., concurring in part and dissenting in part).

476 Shafer v. South Carolina, 532 U.S. 36, 55 (2001) (Scalia, J., dissenting).

477 *Bush*, 531 U.S. at 106 (per curium) ("The formulation of uniform rules to determine [voter] intent . . . is practicable and . . . necessary.").

478 *Id.* at 104-05.

479 *Id.* at 134 (Souter, J., dissenting).

480 *Id*. at 105-06 (per curium).

481 *See, e.g.*, Richmond v. Lewis, 506 U.S. 40, 54 (1992) (Scalia, J., dissenting).

482 514 U.S. 419 (1995).

483 *Id*. at 458 (Scalia, J., dissenting).

determinations.[484]

What links *Bush* to the minority rights and consumer rights cases is that in each of the six cases, the judicial federalists asserted the supremacy of the federal government when the states were on the side of liberal policy. Meanwhile, in death penalty and many other controversies in which Chief Justice Rehnquist, Justice Scalia, and Justice Thomas advanced the argument for state sovereignty, the federal government was on the side of liberal policy.

These exceptions to the foundations of federalism lead numerous critics to question if there is any substance to the judicial federalists' positions.[485] As Judge Noonan put it, "A principle with many exceptions is barely a principle."[486] Instead, those principles are sacrificed "in the service of more material interests."[487] Whether it be in service of limiting regulation[488] or some other ideological goal,[489] the judicial federalists ultimately honor only a federalism of convenience. "State government is selected as the lesser of evils"[490] in most cases, but when the state is actively regulating or represents some other threat to conservative political outcomes, then the commitment to states withers.[491]

VI. UNDERSTANDING THE DEATH PENALTY UNDER CONVENIENT FEDERALISM

A gross inconsistency exists between the judicial federalists' position on death penalty controversies and their position on matters of state activism in consumer, minority, and voter rights. Although holding up any series of cases to the light of close scrutiny may produce innumerable inconsistencies, there is considerable value to this exercise as it relates to

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484 *Bush*, 531 U.S. at 146 (Breyer, J., dissenting). "The majority finds facts outside of the record on matters that state courts are in a far better position to address." *Id*.

485 *See, e.g.*, FARBER & SHERRY, *supra* note 210, at 48-53; GARBUS, *supra* note 107, at 121-22; Rubin, *supra* note 149, at 47, 49.

486 NOONAN, *supra* note 4, at 10.

487 Schwartz, *supra* note 430, at 129. *See also* Brady Baybeck & William Lowry, *Federalism Outcomes and Ideological Preferences: The U.S. Supreme Court and Preemption Cases*, PUBLIUS, Summer 2000, at 75 ("Although [the judicial federalists] may talk of states' rights . . . , their rulings are more determined by ideological preferences than by federalism values."); Rubin, *supra* note 149, at 49 (noting that the Court's recent federalism decisions have been based on the "ideology of the justices").

488 *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 308-10 (1993); FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 83 (2003).

489 Baybeck & Lowry, *supra* note 487, at 91.

490 ZIMRING, *supra* note 488, at 83.

491 *See* NAGEL, *supra* note 169, at 42.

these sets of cases for two reasons. First, the importance of consistency has been extolled by scholars and the judicial federalists alike. Second, the unassailable real life significance of each death penalty decision demands a sincere process.

The Court must be principled, transparent, and consistent in its thinking and writing rather than ideological and results-driven. Constitutional adjudication by idiosyncratic, ad hoc, or unprincipled means is a dereliction of duty by a Court ill-suited to measure its decisions on a practical or popular metric. Indeed, the judicial federalists are particularly vociferous on this point. In Justice Scalia's words, "The only checks on the arbitrariness of federal judges are the insistence upon consistency and the application of the teachings of the mother of consistency, logic."[492]

More importantly, inconsistency in death penalty jurisprudence represents a failure of the Court to meaningfully address the ultimate expression of government power. The judicial federalists contribute to decisions that result in the state sanctioned execution of human beings, and more generally, contribute to a political culture in which such action is viewed as not only legal, but just.

Consider the *New York Times*' depiction of Chief Justice Rehnquist's decision-making in death penalty cases.[493] The continual inclination to limit death penalty appeals, the *Times* finds, "reflects not some sort of personal blood lust for the death penalty. It instead bespeaks his commitment to a federalism-centered view of American politics and government, which encompasses many other issues in addition to Federal court respect for the finality of state court criminal convictions."[494] The theory at the center of his consistent support for death penalty "is the idea of state sovereignty."[495]

Clearly, the judicial federalists have spread their vision of limited federal responsibility on the death penalty with a vigorous embrace of federalism, of states' rights, and of the independence of state courts. Scholars find that death penalty cases are at the "emotional center of federalism" filled with "the politics of localism and the rhetoric of states' rights."[496] While critics have called state death penalty jurisprudence "dysfunctional"[497] and a "Frankenstein's monster" of policy,[498] the judicial federalists continually argue there is no room or reason for federal

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[492] Scalia, *Assorted Canards*, *supra* note 40, at 588.

[493] *See* David J. Garrow, *The Rehnquist Reins*, N.Y. TIMES, Oct. 6, 1996, § 6 (Magazine), at 65.

[494] *Id*.

[495] *Id*.

[496] ZIMRING, *supra* note 488, at 71.

[497] *Id*. at 67.

[498] *Id*. at 68.

intervention.

One must struggle to understand how the judicial federalists can extol the virtues of federal uniformity, as they did in the anti-state cases discussed here, while they tolerate vast differences in the legal systems and death penalty laws of the states. How, one wonders, can the judicial federalists assert that a person has a precise equal right to have their vote recounted regardless of their geographic location, an equal right to passive restraint systems in a car, even an equal right to access telecommunications networks, yet that same person enjoys nothing approaching an equal right to life? The same crime may be punishable by death in some states and not in others, [499] and it may consistently attract a capital prosecution in some jurisdictions within a state, while rarely in others within that same state.[500] Even after being sentenced to death, the differences persist, as a person has a 100 times greater chance of actually being killed by the state on Virginia death row than on Tennessee death row.[501]

In effect, the Court *trusts* the states with the death penalty, but not with regulating cars, telephone companies, or recounting votes. It is that glaring difference, that glaring hole in the logic and consistency of the Court, that leads this Article to question the very foundation of the judicial federalists' thinking on the death penalty. Ultimately, under the guise of federalism, the judicial federalists present themselves as principled observers compelled to passively accept state action on capital punishment. In truth, the judicial federalists have only a philosophy of convenience, polished off to justify their lack of interest in death sentences, which is then tossed aside when it occasionally produces liberal policy outcomes.

As a final note, the judicial federalists have signed a number of decisions in which the argument is advanced that the very point of federalism is the protection of individual rights. "Perhaps the principal benefit of the federalist system is a check on abuses of government power," the Court found in *Gregory*.[502] In *New York*, the Court concluded, "the Constitution divides authority between federal and state governments for the protection of individuals."[503] Those claims ring hollow for the judicial federalists, however, as they invoke states' rights only for use against individuals and not for them.

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499 *See id*. at 74-75.

500 *See, e.g.*, Joseph R. McCarthy, Note, *Implications of County Variance in New Jersey Capital Murder Cases: Arbitrary Decision-Making by County Prosecutors*, 19 N.Y.L. SCH. J. HUM. RTS. 969 (2003) (examining how prosecutorial discretion has effected the administration of death penalties in New Jersey).

501 ZIMRING, *supra* note 488, at 75.

502 Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

503 New York v. United States, 505 U.S. 144, 181 (1992).