The Strategic Use of Clear Statement Rules by the U.S. Supreme Court in Federalism Cases

The judicial enforcement of federalism values is at the center of the judicial and political safeguards debate generated by National League of Cities v. Usery (1976) and Garcia v. SAMTA (1985). Although clear statement rules have long attempted to put substantive limits on federal power, it remains unclear whether the Burger and Rehnquist Courts differ from the Warren Court in their ideological use of clear statement rules. Prior literature infers that the moderate Burger Court enforced federalism canons with more vigor than the liberal Warren Court in order to limit federal interference and protect the states; and, that the Rehnquist Court adopted “super-strong” clear statement rules in federalism cases in a manner akin to the Burger Court, presumably for similar ideological reasons. Moreover, scholars have not fully examined if the Court has circumvented Garcia’s political safeguards approach by insisting that Congress speak clearly in statutory construction cases addressing federalism issues. It is plausible that the aggressive and ideological use of clear statement rules in federalism cases is positively correlated with outcomes limiting federal interference with state autonomy.

This study analyzes the use of clear statement rules by the Warren, Burger, Rehnquist, and Roberts Courts (1953-2010 Terms). Using logistic regression analysis and a dataset drawn from the Supreme Court Database and Westlaw, this study tests if the Burger or Rehnquist Court used clear statement rules more in federalism cases than the Warren Court, and for what ideological purpose. Of particular interest is determining if conservative Courts strategically use clear statement rules to protect states from federal incursions or to pursue ideological policy preferences. Thus, the analysis is directed at discovering if the Rehnquist Court has replaced Garcia’s political safeguards principle with a judicial safeguards approach by using clear statement rules, and whether that new federalism trend of judicial behavior has persisted in the Roberts Court.

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Paper prepared for delivery at the 2014 Meeting of the American Political Science Association


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In *Bond v. United States* (2014), a unanimous Supreme Court held that the federal government lacked the power to prosecute Bond under a federal statute that implemented the terms of an international treaty banning the use of chemical weapons. Chief Justice John Roberts’ opinion explained that the federal law did not reach what amounted to a local crime—in Pennsylvania, Bond used toxic chemicals to injure a friend who became pregnant after having an affair with Bond’s husband. Critical to the Court’s reasoning was the invocation of a “clear statement” rule that governed how the justices interpreted the statute in accordance with the “principles of federalism [that are] inherent in [the] constitutional structure.” In applying the rule, the Court stated that that the federal law, which prohibits possessing and using a chemical weapon, could not apply to Bond’s illicit conduct absent a clear statement from Congress that it intended to do so. To do otherwise, the Chief Justice said, would disrupt the “usual constitutional balance of federal and state powers” by interfering with the states’ capacity to prosecute local criminal conduct under its police powers.

Apart from *Bond*, the Roberts Court has used clear statement rules in other federalism cases, including *National Federation of Independent Business v. Sebelius* (2012) (health care) and *Arizona v. United States* (2012) (immigration) (Banks and Blakeman 2014, 313-321). As interpretative “canons” of statutory construction, clear statement rules are routinely used by judges to discover the meaning of ambiguous federal laws and congressional intent. But, as some critics assert (Manning 2009, 2010; Eskridge and Frickey 1992), clear statement rules are controversial because “they seek to enforce constitutional values in the abstract” (Manning 2010, 404). In other words, their application demonstrates that the Court is resting “its authority on the abstraction of a freestanding federalism found nowhere in the text” (Manning 2009, 2029). In this fashion, clear statement rules may operate as “quasi-constitutional” principles that limit federal power by enforcing substantive federalism values in favor of the states. Eskridge and Frickey (1992), for example, found that unlike the Burger Court, the Rehnquist
Court created and aggressively applied “super-strong clear statement rules” to cabin federal authority and advance states’ rights under the pretext of protecting the structural (constitutional) balance between the federal and state governments. Notably, scholars have suggested that the progressive early Warren Court also used clear statement rules for an ideological purpose by invalidating or questioning vague laws that diminished individual freedoms (Frickey 2005).

The alleged ideological use of clear statement rules assumes significance in light of the political (or judicial) safeguards debate. A key but relatively under-explored issue among empirical federalism studies is whether the Supreme Court is politically using clear statement rules to restrain federal powers while acting as an institutional trustee or protector of state rights, sovereignty, or autonomy. Whereas National League of Cities v. Usery (1976) is representative of the judicial safeguards principle—declaring that federal courts appropriately protect the states because the constitutional framework will not—Garcia v. San Antonio Metropolitan Transit Authority (1985) manifests a political safeguards approach—commanding that courts must refrain from aiding the states because the national political processes sufficiently defend their prerogatives (see Hamilton 2001; Kramer 2000; Yoo 1997).

While Garcia embodies a judicial choice to let the political processes, and not the courts, shield state governments from federal overreaching, the purported Rehnquist Court’s federalism revival in the mid-1990s—as well as the Warren and Burger Courts’ analogous use of clear statement rules in earlier cases—suggests a more activist judicial role. Furthermore, while scholars disagree on the scope and impact of the revival (Clayton and Pickerill 2004; Dinan 2011), there is little doubt that the Supreme Court proactively narrowed federal powers in a series of landmark cases involving the commerce clause, the Tenth and Eleventh Amendments, and Section Five of the Fourteenth Amendment (Chemerinsky 2008; Schwartz 2001; Sullivan 2006).
What is unknown is whether the Warren or Burger Court ideologically used process-based rationales in federalism cases, or if the Roberts Court (as suggested by Bond) is using state-centric political objectives to decide federalism issues in the same way that its predecessor allegedly did through clear statement rules. Accordingly, for federalism scholars in particular, it remains important to discover how clear statements were used in the past and whether clear statements are being applied today to circumvent Garcia's principle that discourages judicial activism by presuming that the states will be adequately protected by the national political process.

Our research thus investigates the use of clear statement rules by the Warren, Burger, Rehnquist, and Roberts Courts between 1953 and 2010. Using logistic regression analysis and a dataset drawn from the Supreme Court Database and Westlaw, this study tests if the Burger or Rehnquist Court used clear statement rules more in federalism cases than the Warren Court, and for what ideological purpose. Of particular interest is determining if conservative Courts strategically use clear statement rules to protect states from federal incursions or to pursue ideological policy preferences. Thus, the analysis is directed at investigating if the Rehnquist Court has replaced Garcia's political safeguards principle with a judicial safeguards approach by using clear statement rules, and whether that new federalism trend of judicial behavior has persisted in the Roberts Court.

I. The U.S. Supreme Court and Clear Statement Rules

The political and judicial controversies attendant to clear statements are not of recent origin. The judicial propensity to require plain statements from the political branches has been an established part of federalism jurisprudence, affecting the scope and application of the preemption doctrine and Supremacy Clause, the Commerce Clause, congressional spending and grant administration, and state immunity under the Eleventh Amendment (Young 2011, 217). Barrett (2010, 145) reports that an early application of clear statements can be traced to Justice Iredell's opinion in Chisholm v. Georgia (1793), a landmark
federalism ruling that interpreted whether Article III empowers the federal courts to review citizen suits against the states and override state sovereign immunity.

Legal scholars characterize clear statement rules as substantive canons that operate as interpretative presumptions and rules that are derived from the common law, constitutional norms, and legal traditions (Krishnakumar 2010, 240). Gluck and Bressman (2013, 939) observe there are more than 100 substantive canons that are “infamously conflicting, overlapping, and manipulable” because they intrinsically combine “judicial lawmaking,” “democracy protective,” and “constitutional law” interpretative behaviors. Their ubiquity helps explain why defenders of clear statement rules ground their legitimacy in legal process thinking. Young (2010), for example, asserts they are defensible because they are based in the principle of “reasoned elaboration” that allows for purposive statutory interpretation—a legal process that lets judges read statutes constitutively, and to broadly vindicate legislative purposes that support structural and constitutional conceptions of federalism. Under this view, clear statement rules are “not so much...substitutes for constitutional adjudication, but rather as a means by which constitutional principles are sometimes vindicated” (Young 2010, 1384). On the other hand, critics deny what Young embraces: clear statement rules illegitimately operate as a type of “‘stealth’ constitutionalism” that conveniently and disingenuously provide judges with a pretext for deciding to enforce preferred substantive values (see Eskridge and Frickey 1994, 81-82; see also Manning 2010).

In the federalism context, clear statement rules invoke a robust interpretative presumption that discourages judges from interpreting statutes in a way that interferes with state functions, laws, or processes unless Congress clearly indicates its intent to do so (Krishnakumar 2010, 241). Gluck and Bressman (2010, 942) identify three variations of “federalism-enforcing canons”: 1) the “federalism canon,” a principle cautioning judges to avoid interpreting statutes in a way that impairs “traditional
state functions”; 2) the “presumption against preemption,” a maxim indicating that vague statutes must not be construed to preempt state law; and, 3) clear statement rules, or presumptions that give judges the authority to enforce federalism norms, such as the proscription against abrogating sovereign immunity or restraining Congress’ capacity to impose conditions of giving federal grant monies to the states. In applying these substantive canons in the twentieth century, the Supreme Court has used clear statement rules in a variety of contexts and legal areas that squarely, but also peripherally, touch upon federalism norms.

Before the Warren Court, for example, in Rice v. Santa Fe Elevator Corporation (1947), a “presumption against preemption” principle was created, declaring that the “historic” exercise of a state’s police powers, or those commonly linked with the regulation of “traditional state functions,” are not preempted unless it is “the clear and manifest purpose of Congress” to do so. In contrast, Frickey (2005) observes that the early Warren Court used clear statement rationales in conjunction with the “avoidance” canon (which holds that the constitutional issues should not be decided unless the Court has no choice but to decide them) to uphold or strike down federal or state laws that might infringe upon personal freedoms in political subversive cases. While avoiding the constitutional issue of whether Congress violated the First Amendment during the exercise of its investigative powers, in United States v. Rumley (1953) the Court reversed a defendant’s conviction because the federal statute he was prosecuted under did not clearly show an intent to punish him for refusing to disclose to a congressional committee the names of persons who made bulk purchases of books having a “particular political tendentiousness.” Likewise, in Pennsylvania v. Nelson (1956), the Warren Court held that Pennsylvania’s anti-sedition law was preempted by an analogous Smith Act, a federal law that “occupied the field” of criminal prohibitions against sedition, thus prompting dissenting Justice Stanley
Reed to object that “this Court should not void state legislation without a clear mandate from Congress.” (see also Frickey 2005, 420).

The clear statement canon was ingrained into constitutional jurisprudence after the Warren Court as well. Two Burger Court cases, *Pennhurst State School and Hospital v. Halderman* (1981) and *Atascadero State Hospital v. Scanlon* (1985), used clear statement rules to fix Congress’ responsibilities in drafting statutes that imposed grant conditions on the states through the spending power (*Pennhurst*) and to ensure that the states’ immunity from federal lawsuits under the Eleventh Amendment was not lost unless Congress made its intention “unmistakably clear” (*Atascadero*). Moreover, Eskridge and Frickey (1992) assert the Rehnquist Court departed from the established judicial practice in the Burger Court that typically required offending legislation to be struck down on constitutional grounds through the exercise of judicial review. Under this view, the Rehnquist Court used clear statements to advance substantive goals by the creation of “super-strong clear statement rules,” a dynamic form of judicial activism. Such rules purport to give the justices considerable discretion to read into federal law constitutional values that can only be legislatively challenged by a “clear legislative override” in statutory interpretation cases.

The aggressive use of plain statements and super-strong rules in the 1980s and well into the mid-1990s translated into the creation of precedents that inhibit congressional and agency action over a wide range of policies and subject matter that had federalism and non-federalism consequences (Table 1). In these contexts clear statement rules operate instrumentally because they substantively frame judicial and political behavior (Cross and Tiller 2000, 741, 769). As applied to new federalism case law, strict iterations of clear statement rules advance the goal of limiting federal power in order to protect the structural, constitutional balance between the federal and state governments, a particular concern of the Rehnquist Court (Manning 2009, 2004-2005).
While the language of clear statement rules and the application of Rehnquist Court canons of statutory construction are inherently variable, scholars have linked precedents and the specific language that is used by the justices to safeguard federalism values and interests. Eskridge and Frickey (1992) infer the justices consistently adopt certain language and judicial strategies in the clear statement precedents they create. Doctrinally, the Court formulates legal principles that state explicitly they are applying a clear statement rule; or, less forthrightly, that Congress must “speak so clearly,” or “unambiguously” state its intention, or do so with a “clear and manifest purpose.” Eskridge’s (1994) study of statutory interpretation lists fifteen canons and rules as examples (Table 2).

Also, Eskridge and Frickey’s research (1992, 619-625) supplies a sense of how case language tends to be associated with specific areas of federalism judicial enforcement. With the Rice presumption against preemption, for example, the Court explicitly assumes that the “historic powers of the States” are not to be cast aside unless it is the “clear and manifest purpose of Congress” to do so. As applied to Article I conditional spending cases, such as Pennhurst State School and Hospital, the justices “insist” that Congress “speak with a clear voice” and “unambiguously” express its intent to impose a condition on the states before they receive federal grant monies. In Eleventh Amendment cases, like Atascadero State Hospital, the Court declares that federal abrogation of state immunity (to be sued in federal court) is permitted only if Congress makes “its intention unmistakably clear in the language of the statute.”

Another key illustration coming from the Rehnquist Court is Gregory v. Ashcroft (1991). There, a clear statement rule was used to reject a congressional directive under the federal Age Discrimination and Employment Act (ADEA) relating to a state requirement to make state judges retire when they are 70 years old. Writing for a 7:2 Court, Justice O’Connor observed that the ADEA covers state
employees, but not appointees on the policymaking level. Critical to the case was the absence of a plain statement showing that the ADEA covered judges in a policymaking capacity—a conclusion that originated from a judge-made rule that declared Congress’ intention to displace the historic powers of the states is not “clear and manifest.” Thus the Court presumed that Congress is powerless to regulate an area of electoral politics traditionally falling to the states. As a result the judges were exempt from the ADEA and they had to retire at 70 under state law (Gregory 1991, 461).

The determination to validate or limit the reach of congressional commerce authority may depend, as Gregory v. Ashcroft (1991) infers, on whether the Court is “absolutely certain” that Congress intended to regulate “core state functions.” For Coenen (2001, 1618-1621), the Gregory “super-Clear-Statement rule” protects state autonomy by preventing Congress, through the Age Discrimination Employment Act, from controlling the retirement age of state judges, an issue that goes to the core values linked with representative government. In this and other instances, including the invocation of the Rice anti-preemption presumption, the Court’s rulings “are defensible on the ground that they help ensure that the national political process in fact does the job that Garcia assigned to it” (Coenen 2001, 1617).

Rehnquist Court cases reveal how applying linguistics is a choice registering new federalism policy objectives centering on structurally protecting the states (Seligmann 2010, 1085). In Davis v. Monroe County Board of Education (1999), in a 5:4 decision the Supreme Court authorized a private damages action under Title IX of the Education Amendments of 1972 (Title IX) against a school district that failed to act to stop student-on-student sexual harassment. For the majority, led by Justice Sandra Day O’Connor, Title IX imparted enough notice to alert the school district that it may incur civil damages if it did not appropriately act to stop the harassment. Notice sufficiency, O’Connor explained, is critical because districts must prevent discrimination in their schools as a condition for receiving Title
IX funds under congressional spending powers. Completing the obligation is akin to fulfilling a contractual duty between the federal and state governments. Yet the dissenters, Chief Justice William Rehnquist and Justices Anthony Kennedy, Antonin Scalia, and Clarence Thomas, saw the extension of liability as more than meeting a contractual standard of notice and conditions. Rather, since they squarely declared the case was “about federalism,” the notice requirement went beyond abstract contract principles and rose to the level of being a “concrete safeguard in the federal system” that cabins a wide-ranging federal spending authority. As a result, deciding to impose a liability standard that Congress did not clearly intend upsets the constitutional balance by letting federal administrators dictate school policies, a responsibility traditionally assigned to the states. For these reasons Justice Kennedy’s dissent equates federal overreaching with dire consequences for the constitutional system, intoning that “The Nation’s schoolchildren will learn their first lessons about federalism in classrooms where the federal government is the ever-present regulator. The federal government will have insinuated itself not only into one of the most traditional areas of state concern but also into one of the most sensitive areas of human affairs” (Davis 1999).

The foregoing discussion is highly suggestive that the judicial insistence on having clear statements is critical proxy for using the state-centric but repudiated *Usery* judicial safeguards approach, thus allowing process in and of itself to play a “leading role in the Court’s federalism jurisprudence” that gives its statutory cases within that subset of law “greater staying power” (Young 2011, 224). If the criticisms of alleged Rehnquist Court federalism activism are sound, clear statements are policy instruments that are manipulated by the judiciary to correct the failings the national political process, under the rhetorical goal of preserving the structural balance of the constitutional system, by safeguarding attributes of sovereignty inherent to the states. The weight of this powerful lament is
theoretically salient to the Roberts Court federalism jurisprudence that might be contextualized by the undercurrents of its predecessor’s new federalism principles.

**II. Hypotheses**

Empirical investigations into the Supreme Court’s statutory decision-making most often focus on if rulings conform to congressional preferences (e.g., Eskridge 1991; Segal 1997; Spiller and Gely 1992) rather than the Court’s reliance on different interpretive tools—such as canons of statutory construction or legislative history—and pragmatic policy concerns. Studies on statutory interpretation are generally descriptive and they examine multiple interpretive tools across one or more policy areas. Their findings are also limited to a specific time period or natural court (see, e.g., Brudney and Distlear 2005; Cross 2009; Eskridge 1994; Krishnakumar 2010; Schacter 1998; Zeppos 1992). Since there are no systematic analyses on statutory interpretation or the use of process-based federalism principles, our hypotheses are derived primarily from Eskridge and Frickey’s (1992) analysis of federalism-based canons and clear statement rules.

Although researchers have demonstrated that the Warren Court applied clear statement rules to restrict federal or state laws that undermined progressive rights and freedoms in certain cases (Frickey 2005; see also Powe 2000; Walker 2000), it remains unclear if an identical ideological approach was used in matters of federalism. Thereafter, however, scholars asserted that the Burger Court’s decision-making reflected an ideological use of federalism-based canons, a pattern of judicial behavior that allegedly was continued by the Rehnquist Court through its creation of super-strong clear statement rules. Eskridge and Frickey (1992) identified three types of federalism cases involving federal statutes in which the Burger and Rehnquist Courts utilized clear statement rules. Such cases involved whether Congress can place limitations on states receiving federal funding to finance state and federal programs; or if Congress can waive states’ Eleventh Amendment immunity right from suit in federal court; or if
Congress can regulate traditional state functions (Table 1). Eskridge and Frickey (1992) argue that the Court uses clear statement rules to protect the states by asserting that Congress cannot infringe upon states’ rights if the text of the statute is unclear with respect to these issues. Consequently, we expect that the Court will be more likely to use clear statement rules, and to rule in favor of the states in federalism cases. For the additional canons identified by Eskridge and Frickey (1992) listed in Table 1—presumptions against congressional regulation of intergovernmental taxation, state and local political processes, and state regulation of Indian country—it is hypothesized that rulings in these types of cases will support the states as well.

Moreover, the ideological use of clear statement rules has been linked to competing theories of statutory construction (Solon 2010, 2-3; see also Banks and Blakeman 2012; Brudney and Distlear 2005; Cross and Tiller 2000; Krishnakumar 2010). One view, textualism, favors the plain meaning of the statute and relies less on external referents (i.e. legislative history and the like) (Vermeule 2006); whereas pragmatism, which takes into account the consequences and purposes of a law, is comfortable with consulting such extrinsic sources to provide a framework for contextual analysis (Calabresi 1982; Eskridge 1994). These two interpretive philosophies align well with the Court’s ideological divisions in which conservatives are wary of congressional overstepping and more likely to adhere to textualism than their liberal counterparts (Krishnakumar 2010). From either perspective, the scholarship suggests that the justices enforce federalism-based canons and draw lines with clear statement requirements to achieve desirable ideological results that can generate judicial conflict and produce closely-decided federalism outcomes, especially in contested cases (Banks and Blakeman 2012; Brudney and Distlear 2005; Cross 2009; Greve and Klick 2006; Manning 2010; Young 2012). The relationship between judicial philosophy, ideological preferences, and changes in federalism jurisprudence is further underscored by findings that the use of clear statement rules and pro-state case outcomes increased as
the Rehnquist Court became more conservative (see Eskridge and Frickey 1992). As a result, we expect similar relationships in this study.

The judicial construction and application of clear statement rules arguably affects the political dynamics between Congress and the judiciary. In that political dialogue, a court-imposed clear statement rule signals that the statute’s language is ambiguous and that the background surrounding the law’s enactment—often captured in non-textual sources such as legislative history—is irrelevant as an interpretative guide when determining the law’s purpose or intent (Brudney and Distlear 2005; Eskridge 1994). These specificity requirements imposed by the Supreme Court are greater and more difficult to satisfy even though less congressional heavy-lifting is usually required to re-enact another statute (or pass a constitutional amendment) While Congress’ willingness to adjust statutory language may work to protect the states from federal overreaching, it is plausible that the Supreme Court is in effect, setting the congressional agenda in federalism matters (see Eskridge 1994, 280-285). Rather than encouraging a constructive legal and political dialogue, the Court is using its activism to bypass the constraints imposed on it through Garcia to enforce its own substantive conception of constitutional federalism and politically protect the states (Brudney and Distlear 2005, 8-12; Eskridge and Frickey 1992). As a result, judicial preferences prevail and the Court escapes retaliation from Congress (Cross and Tiller 2000), especially if Congress does not amend the legislation (see Bressman and Gluck 2013, 2014). If the Court is most concerned with pursuing ideological policy preferences on issues of federalism, the Court is posited to use clear statement rules without considering if Congress can amend the legislation.

While the Court generally approaches federalism cases similarly, the statutory construction literature has observed differences among the Warren, Burger, and Rehnquist Courts (Coenen 2001; Eskridge and Frickey 1992; Manning 2010). The Burger and Rehnquist Courts have been inclined to apply the federalism-based canons or use clear statement rules (Eskridge and Frickey 1992) that may,
arguably, favor the states (Banks and Blakeman 2012, 88). In particular, Eskridge and Frickey (1992) find that the Rehnquist Court created “super-strong” clear statement rules, which can make amending the legislation even more difficult. These differences lead to the hypothesis that the Burger and Rehnquist Courts use clear statement rules more often and make decisions that favor the states, and presumably more often than the Warren Court.\footnote{It is unclear how the Warren Court used clear statement rules. Eskridge and Frickey (1992, 596) did not examine the Warren Court, but did state that “the most remarkable development in the 1980s was the greater enthusiasm the Court brought to the federalism-based canons” (619). This infers that the Burger and Rehnquist Courts used clear statement rules and enforced the federalism-based canons more than the Warren Court. As a result, our hypothesis tests this inference.} If the Roberts Court has continued consistently using Rehnquist-style process federalism rules to protect the states from federal incursion will also be tested because previous studies have produced mixed results most often due to the limited number of cases available at the time or examining only one or a few constitutional provisions (e.g., Banks and Blakeman 2012; Merrill 2005; Seligmann 2010; Somin 2006).

III. Data and Methods

Data Set

In order to examine the Supreme Court’s use of clear statement rules, and whether they are used to protect states’ rights during the Warren, Burger, Rehnquist, and Roberts Court (1953-2010 Terms), an original dataset was constructed by searching the Supreme Court Database and Westlaw.\footnote{In Westlaw, federalism cases were identified by searching the headnotes for the following constitutional provisions: 10th Amendment, 11th Amendment, 14th Amendment Section 5, Article I Section 8 Clause 1 (Taxing and Spending Clause), Article I Section 8 Clause 3 (Commerce Clause), and Article I Section 8 Clause 18 (Necessary and Proper Clause). Searches were also run using the following Westlaw keys: 170BV Suits Against States; Eleventh Amendment and Sovereign Immunity; 92XXVIII Enforcement of Fourteenth Amendment, 3601 (A) In General 1-18, and 3601(B) Federal Supremacy; Preemption. To identify cases dealing with federal statutes, the headnotes were then searched for “U.S.C.A. §” and Act, so each search was ran twice. In the Supreme Court Database (using Case Centered Data Release SCDB_2013_01), cases were included if “issue” was coded as federalism (10) and if one of the following was the case: “lawType” was coded as federal statute (3), “lawSupp” or “lawMinor” listed a federal statute, or the case’s headnotes in Westlaw cited a federal statute. To determine if the cases identified by Banks and Blakeman (2012), Eskridge (1994), and Eskridge and Frickey (1992) involved a federal statute, the case’s headnotes in Westlaw were searched.} Cases were selected if a federalism issue arose over a federal statute. A total of 637 cases were identified, but the inherent limitations of the searches may have missed some cases. Additional sources were consulted—namely Banks and Blakeman (2012, Appendix, 323-327), Eskridge (1994, Appendix 3, 326, n45-61)
and Eskridge and Frickey (1992, 619-629)—that produced 23 more cases, for a total of 660. Since there is not a comprehensive list of Supreme Court federalism cases, it is still possible that cases are missing from the dataset; however, the methods employed here ensure a fairly representative sample of federalism cases.

**Dependent Variables**

Since the empirical analysis examines both when and how clear statement rules are used by the Supreme Court in federalism cases, two dependent variables will be needed. Accordingly, the dependent variable for the first model is a dichotomous indicator measuring the Court’s use of clear statement rules. Although it is impracticable to generate a definitive set of search terms capturing all conceivable judicial applications of clear statement rules, Eskridge and Frickey (1992) demonstrate that specific rules adopt identifiable phrases and words that are readily associated with discernible federalism topics and substantive policy results (see Table 1). With this in mind, a list of cases using clear statement rule language is gathered through Westlaw. If the Court uses a clear statement rule in the majority opinion, the case is coded as one while all others are coded as zero. The second model will use the first dependent variable as an independent variable to explore if the Court uses clear statement rules to protect the states. The outcome of cases was obtained from searches of the Supreme Court Database.

A dichotomous variable was then constructed in which decisions that favor the states are coded as one and all others as zero.

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1 Cases using clear statement rules were identified in Westlaw by searching the majority opinions for the following phrases: "CLEAR STATEMENT" "CLEAR AND MANIFEST PURPOSE" "UNMISTAKEABLE CLEAR" "ABSOLUTELY CERTAIN" "PREJUDICE AGAINST PREEMPTION" "UNLESS REFUTED BY THE CLEAR LANGUAGE OF THE STATUTE" "CLEAR LANGUAGE OF THE STATUTE" "STATUTE’S CLEAR LANGUAGE" "BY INSISTING THAT CONGRESS SPEAK WITH A CLEAR VOICE" "CONGRESS SPEAK WITH A CLEAR VOICE" "IN AREAS TRADITIONALLY REGULATED BY THE STATES" "CORE STATE FUNCTION" & ‘CLEARLY’ "TRADITIONAL STATE FUNCTION’ & ‘CLEARLY’ ‘TRADITIONAL STATE FUNCTION’ & ‘AFFECTS’ ‘TRADITIONAL STATE FUNCTION’ & ‘DOUBT CONGRESS’ ‘CLEARLY A TRADITIONAL STATE FUNCTION’ ‘AFFECTS TRADITIONAL STATE FUNCTION’ ‘DOUBT CONGRESS MEANT TO INTERVENTE’ ‘CONGRESS CLEARLY’

4 Decisions favoring the states were obtained from the Supreme Court Database by identifying cases in which state education boards, state commissions or authorities, interstate compacts, or states (coded as 2, 4, 7, 15, or 28 on “petitioner” or “respondent”) won cases (winning petitioners and respondents are coded respectively as 1 and 0 on “partyWinning”).
Independent Variables

Federalism Canons of Statutory Construction. These independent variables identify whether the case involves a federalism issue that would encourage the Court to use a clear statement rule and/or protect the states. Some canons (see Table 1) lend themselves to codification better than others, so in addition to the cases identified by Eskridge (1994) and Eskridge and Frickey (1992) when the canons have been used, additional cases were identified primarily by searching Westlaw and consulting the Supreme Court Database and Banks and Blakeman (2012). In general, cases were identified based on the specific constitutional provision or federal statute(s) related to the canon as identified by Eskridge and Frickey (1992). For each canon, a dichotomous variable was constructed in which the cases identified as involving that federalism issue are coded as one and all others as zero.

Judicial Ideology. A common way to determine the Supreme Court’s ideological composition is to measure the preferences of the median justice because that justice is essential for securing a majority and decisions tend to favor their preferences (see Martin, Quinn, and Epstein 2005). Various different measures have been developed but most assign each justice a score—ranging from negative to positive (liberal to conservative) values—based on how they voted in previous cases (Bailey 2007, 2013; Bailey

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5 The specific searches for each canon are as follows: Federal Suit Immunity Canon: In Westlaw cases were identified through the key, 170BV Suits Against States; Eleventh Amendment and Sovereign Immunity, and headnote searches for “REHABILITATION ACT” and “28 U.S.C.A. § 1362”. Cases were also identified if coded as involving the 11th Amendment by either the Supreme Court Database (224 on “lawSupp”) or by Banks and Blakeman (2012). Federal Funding Canon: In Westlaw cases were identified by searching the headnotes of Article I Section 8 Clause 1 (Taxing and Spending Clause) cases for the following phrases: “SPENDING CLAUSE” and “SPENDING POWER”. Additional cases were identified through headnote searches for: “DEVELOPMENTAL DISABILITIES ASSISTANCE AND BILL OF RIGHTS ACT” and “23 U.S.C.A. § 158”. Cases were also identified if coded as involving the Spending Clause by Banks and Blakeman (2012). Core State Functions Canon: In Westlaw cases were identified by using the topics that code crime law, family law, labor and employment, and health law. Westlaw does not have a topic code for education, another area traditionally regulated by the state, so cases were identified through a headnote search for “EDUCATION”. Additional cases were identified through a headnote search for “AGE DISCRIMINATION IN EMPLOYMENT ACT”. Political Process Canon: In Westlaw cases were identified by searching the headnotes for the following: “18 U.S.C.A. § 1341” “18 U.S.C.A. § 1951” “SHERMAN ANTI-TRUST ACT” “SHERMAN ANTI-TRUST ACT §1 ET SEQ., AS AMENDED” “15 U.S.C.A. §1 ET SEQ”. Taxation Canon: In Westlaw cases were identified by searching the headnotes of Article 1 Section 8 Clause 1 (Taxing and Spending Clause) cases for “TAX”. Additional cases were identified through a headnote search for “4 U.S.C. § 111”. In the Supreme Court Database cases were identified if “issue” was coded as Supremacy: Tax Immunity (100060) or Supremacy: State Tax (100110). Indian Country Canon: In Westlaw cases were identified by searching the headnotes for: “INDIAN” NATIVE AMERICAN” INDIAN MINERAL LEASING ACT".

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and Maltzman 2011; Martin and Quinn 2002; Epstein et al. 2007). However, those that are comparable across time (of primary importance for this study) and institutions are preferred, so the most recent release (2013) of the ideal point estimates developed by Bailey (2007, 2013; Bailey and Maltzman 2011) is used to measure the median justice on the Court at the time the case was decided.

**Divided Government.** If the Court is attempting to set the congressional agenda and encourage policy change on federalism issues, a general signal is needed that can indicate the ease in which Congress can amend the legislation deemed to be too vague. Since the Court can rarely monitor congressional preferences and policymaking dynamics (Segal 1997; Segal and Westerland 2005), divided government is an ideal signal because the Court only needs to take into account the partisan control of the executive and legislative branches. As a result, the Court should use clear statement rules more during unified government when there is more consensus between Congress and the President (e.g., Fiorina 1996) and less during divided government when legislative gridlock is common (e.g., Binder 1999; Krehbiel 1996, 1998). Cases that are decided in years during divided government, or when both chambers of Congress are controlled by one party and the President by another, are coded as one, with all other cases as zero. A strict definition of divided government is followed because during periods of unified and quasi-divided government (one chamber is controlled by each party) there tends to be more ideological agreement and less legislative gridlock (Binder 1999).

**Chief Justice.** Since the Court’s federalism jurisprudence is relatively static during the tenure of a chief justice and does not fluctuate markedly with each natural court—when justices join and leave the bench (see Banks 1992)—(e.g., Coenen 2001; Eskridge and Frickey 1992, Manning 2010), court composition is measured as the chief justice at the time the case was decided: Warren, Burger, Rehnquist, or Roberts.

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6 See Bailey (2007, Bailey and Maltzman 2011) for a complete discussion of the weaknesses of Martin Quinn and Judicial Common Space scores and the strengths of the ideal point estimates.

7 In 2001 and 2002 neither party held a majority in the Senate, but both the House and the presidency were controlled by the Republicans so these years were coded as zero. In 2007 and 2008, neither party controlled the Senate but the House was controlled by the Democrats and the presidency by the Republicans so these years were coded as one.
A set of dummy variables were constructed from data obtained from the Supreme Court Database in which cases the chief justice was active are coded as one and all others as zero.

**Control Variables**

**Constitutional Provision.** Since the Supreme Court uses plain statement standards widely across a full gamut of enumerated powers—Article I provisions (Commerce, Spending, and Necessary and Proper Clauses) and the Tenth, Eleventh, and Fourteenth (Section Five) Amendments—and in cases concerning federal statutes with preemption provisions, (Young 2007, 249-276) it is important to control for the possibility that cases dealing with certain constitutional provisions elicit more clear statement rules and pro-state outcomes. Using data from Westlaw and the Supreme Court Database dichotomous variables were created in which cases dealing with the following constitutional provisions and issues were coded as one and zero otherwise: Tenth Amendment, Fourteenth Amendment (Section 5), Commerce Clause, Necessary and Proper Clause, and Preemption.9

**Area of Regulation.** A concern related to the Court using process-based federalism principles in cases dealing with a variety of constitutional provisions and issues is that these same cases involve various
different policy areas; for example, taxation, labor and employment, education, economic, and

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8 Using the “chief” variable in the SCDB_2013_01 Case Centered Data Release.
9 Cases previously identified through Westlaw searches as these constitutional provisions and issues were coded as such for these variables (see n2). In the Supreme Court Database searches were run using the “lawSupp” variable (Commerce Clause: 111, Necessary and Proper Clause: 120, Tenth Amendment: 223, and 14th Amendment Section 5: 232). Banks and Blakeman (2012), Eskridge (1994), and Eskridge and Frickey (1992) were also consulted to code cases obtained from those sources. Variables for the Eleventh Amendment and Taxing and Spending Clause were considered but eventually dropped from the analysis due to multicollinearity and concerns relating to goodness of fit. Included in the Eleventh Amendment control variable and Eleventh Amendment immunity from suit in federal court statutory construction independent variable in both models resulted in multicollinearity. The Pearson’s r between the two variables is .98 (p < .01) and inclusion of the control variable resulted in a tolerance level of .04 for the statutory construction variable. Removing the control variable results in a tolerance level of .7 for the statutory construction variable in both models, which is well above the .2 recommended cutoff, and indicates that the multicollinearity issue has been eliminated (Menard 1995). A control variable was also considered for Article 1 Section 8 Taxing and Spending Clause cases; however, there were potential issues of multicollinearity with the independent variables for the statutory canons of conditions on federal funding and regulation of intergovernmental taxation in both models. The Pearson’s r between the control variable and the federal funding independent variable is .58 and .48 with the intergovernmental taxation independent variable. When the control variable is included in both models, the tolerance level for the variable is fairly low: .47. Because of these issues, the goodness of fit of both models was assessed with and without the control variable using the Bayesian information criterion (BIC). The difference between the BICs is 6.3 for the clear statement rule model and 6.4 for the State rights model and provides strong support for the models without the control variable for taxing and spending clause cases (see Raftery 1996). As a result this variable is not included in either model.
environmental policy (see Banks and Blakeman 2012; Merrill 2003). Since there are many different types of policies before the Court in federalism cases, a simple way to categorize the cases is by if the policy is regulating public or private laws in which public laws regulate the relationship governments have with its citizens and other governments and private laws regulate relationships between individuals (Banks and O’Brien 2008). To control for the possibility that clear statement rules and pro-state decisions occur more often when Congress is regulating public or private laws, a dichotomous variable was created using the Westlaw case topics for each case. Since most cases receive more than one topic coding, cases were only coded as one if the case dealt with the regulation of one or more areas of public law and zero if the case dealt with only the regulation of private law or a combination of public and private law.10

Individual Rights Cases. In addition to changes in the use of clear statement rules and enforcement of federalism canons, the Court became less protective of individual rights; instead, opting to safeguard constitutional structures (Eskridge and Frickey 1992). To control for the possibility that the Court is less likely to use clear statement rules and arrive at pro-state outcomes in cases dealing with individual rights, a dichotomous variable was constructed using data obtained from Westlaw and the Supreme Court Database.11 Individual rights cases were identified as those involving Section 1983 (civil action for deprivation of rights) of the Civil Rights Act of 1871, which makes government officials acting on

10 The Westlaw case topics were divided into public and private law using Banks and O’Brien (2008) as a guide. Public law regulation topics include: admiralty and marine, antitrust, bankruptcy, criminal law, environmental law, finance and banking, government contracts, immigration, military law, municipal law, securities, and tax. Private law regulation topics include: commercial law, construction law, corporations, estate planning, family law, health law, insurance law, intellectual property, labor and employment, pension and retirement benefits, products liability, and real property. A set of dummy variables representing cases dealing with the regulation of public law, private law, and a combination of public and private law was considered in both models, but an issue with multicollinearity resulted between the private law and combination law variables. The Pearson’s $r$ between the two variables is -.91 ($p < .01$) and inclusion of both variables in both models results in a tolerance level of .16, which is below the recommended cutoff of .2 (Menard 1995). The two variables are linear combinations of each other in the sense that they are both measuring when a case is not dealing with the regulation of public law. This is likely because most of the combination law cases predominantly deal with private law issues. As a result, these two variables are removed from the analysis.

11 Cases were identified in Westlaw by searching the headnotes for “42 U.S.C.A. § 1983” and in the Supreme Court Database by searching the “lawMinor” variable for “42 U.S.C. § 1983”.

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behalf of the state personally liable for violating a citizen’s constitutional rights and allows citizens to seek relief in the form of monetary damages. Individual rights cases are coded as one and all others as zero.

**Methods**

Since the dependent variables are dichotomous indicators of if a clear statement rule is used in the majority opinion and if the Court arrived at a decision that favors the states (see the Appendix for descriptive statistics), logistic regression analysis is used (Menard 1995). The diagnostic tests did not reveal any issues with multicollinearity and the chi-squares for both models in Table 3 are significant at the .01 level, which indicates that the independent variables accurately explain both types of judicial behavior. However, the reduction of error and Nagelkerke $r$-square statistics reveal that both models have marginal explanatory power (Nagelkerke 1991). The models tend to underestimate when the Court uses clear statement rules and only marginally reduces the error of predicting pro-state outcomes by roughly 3%. It appears that there are other factors that have not been identified by the literature that increases the likelihood of the Court using clear statement rules. Nevertheless, the next section will discuss the effect that the political environment, Court composition, and case characteristics have on the application of clear statement rules and pro-state outcomes in federalism decision-making.

**IV. Results**

**The Supreme Court’s Use of Clear Statement Rules**

Very few independent variables influence the Court’s use of clear statement rules as predicted (see Table 3). Regarding the federalism-based canons of statutory construction, the Court is not more likely to use clear statement rules in these cases. The direction of the relationships is as predicted,

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12 The tolerance levels for all the independent variables in both models are all above the recommended cutoff of .2 (Menard 1995).

13 A model was considered that removed cases involving issues in which presumption federalism-based canons of construction are typically applied: federal regulation of intergovernmental taxation, state and local political processes, and
except in cases relating to federal regulation of intergovernmental taxation and state and local political processes. In those cases, inverse relationships are evidenced. The application of clear statement rules is also not more likely to increase as the Court becomes more conservative. Although clear statement rule language is evidenced less often during divided government—those instances when it would be more difficult for Congress to amend and re-pass legislation—this relationship fails to achieve conventional levels of statistical significance. As a result, the Court does appear to use clear statement rules in an attempt to set the congressional agenda with respect to federalism issues.

[Insert Table 3 about here]

Even though issues related to the federalism-based canons, judicial ideology, and congressional policymaking dynamics do not influence the use of clear statement rules, each Court does tend to significantly differ from one another, a finding we expected. The use of clear statement rules increased during the Burger and Rehnquist Courts; however, of the two, only the Rehnquist Court significantly differs from the Warren Court (Figure 1). The likelihood of clear statement rule language appearing in the majority opinion of federalism cases under average conditions was less than 10% for the Warren and Burger Courts, but rose to 24.5% during the Rehnquist Court.\textsuperscript{14} Despite almost a 7.5% decrease in the use of clear statement rules by the Roberts Court, it is not significantly different from the Rehnquist Court. The results also reveal that the Court is more likely to use clear statement rules in preemption

\footnote{Disfavoring state regulation of Indian country. The difference between the BIC statistics of 18.7 provides very strong support for the model without these variables, but the reduction in error actually increases to -2.4% while very little change is evidenced in the Nagelkerke $r$-square statistics (difference of -0.002). However, there is no substantive difference between the results of the two models, so the model with the presumption federalism-based canons of construction is presented to control for the possibility that the Court uses clear statement rules to enforce these canons.}

\footnote{Predicted probabilities were calculated using SPost in Stata 11 (Long and Freese 2005). All continuous variables are set at the mean and all dichotomous variables are set at the mode. Except for the regulation of core state function canon variable, the modal category for all the dichotomous variables in the model is zero.}
cases (see Figure 1, in which the Court is roughly 4.5% [in the case of the Warren Court] to as much as 18.5% [in the case of the Rehnquist Court] more likely to use a clear statement rule).  

[Insert Figure 1 about here]

**The Supreme Court’s Protection of States’ Rights**

Table 3 presents the results for the model testing the conditions in which the Court’s decisions protect the states’ interest. Pro-state outcomes were usually reached in cases that typically elicit the application of federalism-based canons of statutory construction as predicted, but most of these relationships fail to achieve statistical significance. Cases involving Eleventh Amendment immunity from suit in federal court is the only canon-related issue that increases the likelihood of a pro-state outcome. As seen in Figure 2, the likelihood of the Court protecting the states in Eleventh Amendment immunity cases peaked during the Burger Court at 59%, but leveled off during the Rehnquist and Roberts Court in which decisions only reflect state interests about half of the time. Contrary to our predictions, inverse relationships were evidenced for cases dealing with federal regulation of core state functions and state and local political processes. However, only cases involving federal regulation of core state functions decrease the likelihood of a pro-state outcome. Decisions favoring states’ interests was also highest during the Burger Court with about a 15% likelihood but has since decreased to roughly 10% for the Rehnquist and Roberts Courts. This is shown in Figure 2 and stands in stark contrast to how the Court approaches Eleventh Amendment immunity cases.

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15 See n14 for a discussion of how the predicted probabilities are calculated. The only exception is that the preemption variable is now set at one.

16 A model was considered that included interactions between the clear statement rule variable and each federalism -based canon predicting the use of clear statement rules (federal funding canon, federal suit immunity canon, and core state functions canon) and chief justice variable. Since none of the interactive terms were statistically significant, pro-state outcomes are not more likely to occur when certain Courts use clear statement rules or in cases involving issues that tend to elicit clear statement rules. The difference between the BIC statistics of 32.06 provides very strong support for the model without the interactive terms even though there is very little difference between the Nagelkerke r-square statistics (difference of .015) and no change in the reduction in error. Since the substantive results of the model did not change, the model without the interactions will be presented.

17 See n14 for a discussion of how the predicted probabilities are calculated. The only exception is that the regulation of core state functions variable is set at the zero because Eleventh Amendment immunity is another federalism-based statutory construction canon.
Although the likelihood that each Court protects the states varies, only the Warren and Burger Courts significantly differ from one another. In both types of cases depicted in Figure 2, a sharp increase is evidenced for the Burger Court in handing down decisions that favor states’ interests that then gradually decreases. Furthermore, no empirical relationship is evidenced between pro-state outcomes and Court conservatism or the use of clear statement rules. The Court also does not take into account the policymaking dynamics of Congress. As for the control variables, only cases involving congressional regulation of public law are more likely to result in decisions that favor the states. This relationship is similar to the others also depicted in Figure 2 in which the likelihood that each Court reaches a pro-state decision in these cases increases from 24% for the Warren Court to 46% for the Burger Court and then decreases to 41% and 36% for the Rehnquist and Roberts Courts, respectively.

V. Discussion

The results indicate there are empirical differences among the Court in the use of clear statement rules and which types of cases elicit pro-state outcomes. The Court’s use of clear statement rules is generally consistent with previous descriptive studies observing that this behavior increased during the Burger and Rehnquist Courts (Banks and Blakeman 2012; Eskridge and Frickey 1992). However, the findings presented here show that this behavior was not significantly different from the Warren Court until the Rehnquist Court, and that the Roberts Court has continued the Rehnquist Court’s tradition of process federalism. Despite these apparent differences, neither conservative judicial preferences nor cases dealing with issues that typically lead to the application of federalism-based canons of construction are linked to the increased use of clear statement rules as previous studies suggest (e.g., Eskridge 1994; Eskridge and Frickey 1992). Additionally, the results do not lend support to the idea that the Court uses clear statement rules to pursue ideological policy preferences by manipulating the
congressional agenda on federalism issues and encouraging Congress to amend the legislation (Cross and Tiller 2000; Eskridge 1994).

The types of federalism cases prompting the Court to use various interpretative tools (i.e., federalism-based canons of statutory construction and clear statement rules) identified by the literature—mainly Eskridge and Frickey (1992)—do not empirically explain when the Court uses clear statement rules. It is possible these types of cases are not descriptive enough to capture the dynamics of process-based federalism jurisprudence, and that the Court applies clear statement language across many issue areas whenever it wants to enforce state-centric federalism values and guard the states from federal intrusions. With the exception of preemption cases eliciting the use of clear statement rules, which is unsurprising given the presumption against preemption doctrine, the results did not support this conclusion. With respect to cases involving issues when the federalism-based canons are typically applied, there is mixed support for whether pro-state decisions are handed down more often. Eleventh Amendment immunity cases are more likely to result in decisions that favored the states; however, the opposite is true of cases involving the federal regulation of core state functions. The aggressive protection of the states in Eleventh Amendment immunity cases is typically attributed to the Rehnquist Court (Eskridge and Frickey 1992); however, the results suggest that it was actually the Burger Court that began this tradition. Although it appears that the Rehnquist Court played less of a role in the revival of state-centric federalism jurisprudence—via the enforcement of federalism-based statutory canons and clear statement rules—this accords well with observations that the aggressive enforcement of states’ rights began with the Burger Court and was continued by the Rehnquist (Eskridge and Frickey 1992) and the Roberts Court. With the exception of Eleventh Amendment immunity cases, the findings do not demonstrate that a large-scale shift in the Court’s federalism jurisprudence has occurred resulting in more pro-state outcomes and clear differences among each Court as some researchers suggest (e.g.,
Eskridge and Frickey 1992; Young 2010). Likewise, the results are contrary to descriptive findings that conservative Courts are more protective of the states (e.g., Brudney and Distlear 2005).

Since pro-state outcomes are not consistently handed down in decisions using clear statement rules, it remains uncertain whether the justices use them to mask their ideological preferences and reach certain ideological results in the fashion suggested by Eskridge and Frickey (1992). Some scholars suggest that conservative ideology does not explain pro-state outcomes, such as Banks and Blakeman (2012) in their examination of dormant commerce clause cases, because other legal and political factors may be at work including precedent, interest group pressure, and legal arguments. Others argue that the justices are constrained by state court rulings validating the actions of the state (e.g., Colker and Scott 2005). Still, the application of some federalism canons—especially the one pertaining to Eleventh Amendment immunity—may have some ideological significance. What may account for these findings is suggested by Cross (2009). For Cross (2009), the federalism canons do tend to produce more conservative outcomes, but pragmatism and legislative intent leads to more liberal outcomes.

The findings reported also provide some support for claims that clear statement rules are ideologically neutral and do not lead to specific ideological outcomes (e.g., Young 2010). Cross (2009, 165-166) shows this with respect to textualism in which, “if textualism were indeed intrinsically conservative, a justice’s conservative results could be explained by his or her dedication to a particular legal interpretive approach, not personal ideological preferences.” As a result, the reliance on textualism or the “plain meaning” of a statute is ideologically manipulable and the justices tend to use multiple interpretive tools in decision-making and to reach certain ideological outcomes. Justices Ginsburg, Rehnquist, and Scalia are more likely to use textualism to reach conservative decisions, so there may be differences in how each justice uses process-based federalism principles and that possibility should be explored by future research.
Additional opportunities for future research involving the behavior of individual justices is to examine if there are characteristics related to the preferences of the individual justices, particularly those included in the majority coalition, and the process of drafting majority opinions (e.g., see Maltzman, Spriggs, and Wahlbeck 2000) that encourages the Court to apply clear statement rules in pro-state outcomes. Another possibility is to identify case characteristics and political dynamics that explain when and why the Court applies process-federalism principles. This would help identify additional variables that would help improve the explanatory power of empirical models because the model used here tends to underestimate when the Court uses clear statement rules. Thus, the Court may be more likely to use clear statement rules if Congress tends to amend and repass the legislation, or if amicus briefs are filed that urge a pro-state decision.

VI. Conclusion

The empirical evidence is mixed on whether the Supreme Court consistently uses clear statement rules to enforce state-centric federalism values by protecting the states. The results show that cases dealing with issues when the federalism-based canons of statutory construction are usually applied rarely resulted in pro-state outcomes. The Court is only more likely to protect the states in Eleventh Amendment immunity cases and actually less likely in cases involving the federal regulation of core state functions. The application of process-based federalism principles was as expected by increasing during the Burger and Rehnquist Courts. While clear statement rule usage peaked during the Rehnquist Court, there was little difference among the Courts when it came to protecting the states; only the Burger Court was more likely to hand down pro-state rulings. As a result, the Burger Court played more of a role in protecting the states than scholars have previously acknowledged (e.g., Eskridge and Frickey 1992; Young 2010). The findings also indicate that the Roberts Court has continued utilizing process-
based federalism principles in a manner akin to the Rehnquist Court; and, therefore, has implications for the judicial and political safeguards debate emanating from the decisions in *Usery* and *Garcia*.

Overall, it does not appear that *Garcia*'s political safeguard standard has been effectively replaced or consistently circumvented by the conservative justices on the bench through the use of clear statement rules in statutory federalism cases. Findings that Eleventh Amendment immunity cases result in pro-state outcomes provide marginal support to claims that the Court is actively attempting to protect the states because in most other types of cases dealing with the federalism-based canons of statutory construction and/or using clear statement rule language the states do not prevail. This should help assuage concerns that the Court is engaging in judicial activism through the use of clear statement rules to enforce its conception of state rights at least with respect to the Court’s decision-making in statutory construction cases (e.g., Eskridge and Frickey 1992; Manning 2010). In this respect, the Roberts Court is identical to the Rehnquist Court in its approach to protecting the States. Additional research would need to be conducted on the Court’s constitutional federalism decision-making to determine if judicial activism severely hampers federal power. While process-based federalism jurisprudence may not be a dominant trend, the findings nonetheless reinforce perhaps the unremarkable conclusion that judicially-inspired clear statement rules are likely to remain key procedural enforcement mechanisms to safeguard judicially-protected values of federalism on behalf of state governments at least some of the time.

The research is important though because the contested application of process-based rules underscore that the collective policy judgments of the Supreme Court represent the individual choices of justices who are constrained by their own preferences as well as by their own textual or non-textual understandings of statutory text, as framed by judicial philosophy. The only element of judicial behavior that seems certain is that those constraints will continue to push and pull the justices in distinct ideological directions that often cut across ideological lines in federalism cases. While it remains an
open question if clear statement rules will actually function as a substitute for judicial review in the Roberts Court in the way that Eskridge and Frickey (1992) criticize in their study of the Burger and Rehnquist Courts, it is worth noting that the National Federation of Independent Business decision regarding Medicaid expansion, plus cases such as Arizona v. United States (2012) and Bond (2014), may indicate that the justices might be inclined in the future to continue to narrow congressional conditional spending authority. The same could be said about using process federalism to insulate the states against federal lawsuits in Eleventh Amendment immunity cases. Whether the Roberts Court will find a consistent new federalism voice that is more protective of traditional state functions is far less likely. The justices seem more intent on sparring over the proper methodology to interpret statutory text, a struggle that pre-dates the Roberts Court and which probably only reflects fundamental disagreements over judicial philosophy, instead of conclusively drawing judicial lines to defend the states proactively from a new federalist orientation.
<table>
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References


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Chisholm v. Georgia. 1793. 2 U.S. (Dall.) 419.


|---|---|

Source: Eskridge and Frickey (1992)
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<th><strong>Table 2. Rehnquist Court Federalism Canons and Rules</strong></th>
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<td><strong>Finley v. US (1989)</strong></td>
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<td><strong>Cipollone v. Ligget Group, Inc. (1992); California v. ARC American Corp. (1989)</strong></td>
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<td><strong>Rose v. Rose (1987)(O’Connor, J., concurring in part and dissenting in the judgment)</strong></td>
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<td><strong>Spallone v. US (1990)</strong></td>
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<td><strong>Lampf, Pleva, Lipkind, Prupis &amp; Petigrow v. Gilbertson (1991)</strong></td>
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**Source:** Eskridge (1994, 326, 330-331 notes 46 to 61)**
### Table 3. Logistic Regression Results on Supreme Court Federalism Cases, 1953-2010 Terms

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*p < .05, **p < .01 (two tailed tests)

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Note: Omitted category for the chief justice variable is the Warren Court.
Figure 1. The Court's Use of Clear Statement Rules in Federalism Cases

Probability of Clear Statement Rule (%)
Figure 2. Supreme Court Federalism Decisions Favoring State Interests

Probability of a Pro-State Outcome (%)

Chief Justice

Warren Burger Rehnquist Roberts

11th Amendment Immunity Case
Core State Function Case
Public Law Case