

*The U.S. Supreme Court and New Federalism: From the Rehnquist Court to the Roberts Court*, by Christopher Banks and John Blakeman. Lanham: Rowman & Littlefield Publishers, Inc., 2012, 348 pp, \$49.95 hardback.

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In *The U.S. Supreme Court and New Federalism*, Christopher Banks and John Blakeman examine the relationship between the political construction of “New Federalism” and the U.S. Supreme Court’s federalism jurisprudence. The analysis in the book is both comprehensive and focused: it is comprehensive in the sense that it considers the development of federalism from a broader historical perspective, but it also focuses on key developments in the Supreme Court since the mid-1990s under Chief Justices William Rehnquist and John Roberts. Scholars interested in federalism, the Supreme Court, and constitutional law will find this book a valuable resource on the modern Court’s role in debates over the boundaries between federal and state power.

After a brief introductory chapter, Chapters 2 and 3 trace the evolution of federalism across American history, with a particular emphasis on the development of “New Federalism” in the administrations of Presidents Richard Nixon and Ronald Reagan. Earlier periods of American history were characterized primarily by the centralization and consolidation of power at the federal level, especially with Reconstruction and Economic Nationalism in the late nineteenth century (pp. 36–44) and the New Deal and welfare state of the mid-twentieth century (pp. 44–51). The authors chronicle how Republicans began to advocate for New Federalism as a way of returning some level of authority to the states. Initially, during the first term of the Nixon administration, a document titled “New Federalist Paper No. 1” was circulated under the pseudonym “Publius” (the true author was William Safire, Special Assistant to the President at the time) (p. 51). The document made a number of arguments for securing “both national unity and local diversity” (quoted at 52). For the Nixon administration, these goals were pursued through mechanisms such as revenue sharing and block grants. The Reagan administration also advocated for New Federalism, but moved in a direction that emphasized, at least rhetorically, limiting federal power and “devolving” power to the states.

While Presidents Nixon and Reagan pursued New Federalism in a variety of ways with variable policy goals and mixed successes, the key point for this book is that the advocates of New Federalism also envisioned a role for the federal judiciary to enforce constitutional limits on federal power, a role the Supreme Court had largely abdicated in the New Deal era. The remainder of the book thus examines how the political construction of New Federalism

migrated to the Supreme Court through judicial appointments and resulted in a transformation of the Court's federalism jurisprudence.

In Chapter 3, the authors focus on the influence of William Rehnquist on that transformation. First appointed as an Associate Justice to the high court by Nixon in 1971, and elevated to Chief Justice by Reagan in 1986, Rehnquist was strongly committed to using judicial power to protect and bolster state sovereignty from the outset of his tenure on the Court. When Rehnquist was appointed to the Court, its constitutional doctrines and the conventional understanding of the role of the Court left little room for judicial intervention in matters of federalism. Nonetheless, Banks and Blakeman do an excellent job tracing and analyzing Rehnquist's written opinions—often dissents—in which he incrementally laid out a theory of state sovereignty protected under the U.S. Constitution. Although he wrote opinions in a range of cases involving civil rights, the dormant commerce clause, and sovereign immunity, perhaps the most significant ones were in *National League of Cities v. Usery* (1976) and *Garcia v. San Antonio Metropolitan Transit Authority* (1985). At issue in both cases was whether state and local governments had to comply with federal labor standards under the Fair Labor Standards Act (FLSA) regarding minimum wages and maximum hours for state and local government employees. In the 5-4 *Usery* decision, Rehnquist wrote the majority opinion in which he held that states could not be mandated by the federal government to comply with the FLSA. Notably, three of the other four justices in the majority were Nixon appointees (Burger, Powell, and Blackmun). Rehnquist made a number of strongly worded claims that the federal government could not encroach on states' "independent authority" in this way (quoted at 83). Less than a decade later however, the Court's decision in *Garcia* overruled *Usery*. Justice Blackmun switched his vote and wrote the majority in another 5-4 decision. Blackmun adopted the theory of "political safeguards of federalism," arguing that states could adequately protect their interests through normal political channels, and courts could not effectively police the boundaries of federalism. Rehnquist wrote a strongly worded dissent disagreeing with Blackmun's political safeguards approach and indicating a desire to overturn *Garcia* in the future.

While Rehnquist could not claim the majority in *Garcia*, he remained committed to his position on state sovereignty. By the 1990s, he had been elevated to the Chief Justiceship, and Republican Presidents Ronald Reagan and George H.W. Bush had appointed a total of five new Associate Justices (Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy by Reagan, and Clarence Thomas and David Souter by Bush). Banks and Blakeman provide detailed analysis of federalism decisions during the Rehnquist Court to show how the Chief Justice's earlier opinions, including dissents, began to command the majority in a series of cases in the 1990s and into the 2000s. They show statistically that the Rehnquist Court heard more federalism cases than its predecessors, and that it ruled in favor of states at a higher rate (p. 89). The authors also summarize the key decisions involving various constitutional and legal issues—Congress's commerce power, the Tenth Amendment, sovereign immunity under the Eleventh Amendment, pre-emption, Section 5 of the 14th Amendment, and the dormant commerce clause—and explain how the Rehnquist Court forged new ground advancing doctrine to protect state sovereignty and to limit federal power. Many of the key decisions were 5-4, with Republican appointees Rehnquist, O'Connor, Scalia, Kennedy, and Thomas comprising the majority.

In the final Chapter of the book (Chapter 6) and a postscript, Banks and Blakeman examine how the Rehnquist Court's New Federalism jurisprudence has fared under the new Chief Justice, John Roberts, appointed by Republican President George W. Bush, as well as new Justices Samuel Alito (also appointed by W. Bush), Sonia Sotomayor, and Elena Kagan

(appointed by Democrat Barack Obama). Their analysis of the Roberts Court's docket and direction of decisions through 2011 indicates that the Roberts Court appears to be committed to the state sovereignty doctrines of the Rehnquist Court, and that a "fair argument can be made that the Roberts Court will chip away at the political safeguards approach to federalism defined in the divisive Garcia decision" (p. 299). Moreover, the Court remains closely divided on issues of federalism. But Banks and Blakeman also find that the Roberts Court agenda has shifted from federalism cases involving constitutional questions to case involving statutory construction, and especially issues of federal preemption of state law. Although the conservatives on the Court do vote in favor of states in many preemption cases, they have been more likely to vote in favor of federal preemption over state tort laws and other state regulations when doing so would have a "pro-business effect"; indeed in the fourteen preemption cases in which the Court ruled in favor of the federal government between 2005 and 2011, thirteen of those decisions were deemed pro-business (p. 280). This finding is consistent with numerous other studies on the pro-business orientation of the Roberts Court.

Along the way, Banks and Blakeman also analyze two other "less appreciated" aspects of federalism jurisprudence on the contemporary Court. In Chapter 4, they focus on Justice Clarence Thomas's views on religious freedom and federalism. While Thomas has been a stalwart new federalist arguing for an originalist view of Congress's commerce power and state sovereignty that would turn back the clock on the scope of federal power to the nineteenth century, the authors also illustrate how he "would extend the Court's new federalism jurisprudence" on religious freedom and church state relations (p. 134). For example, "In *Zelman v. Simmons-Harris* and *Elk Grove Unified School District v. Newdow*, Thomas argued for an interpretation of the establishment clause as a federalism provision limiting the power of the federal government over the states" (p. 135). Although they find that Thomas's views had some influence on the Rehnquist Court's church-state decision, they are skeptical that the Roberts Court will adopt or extend "establishment clause federalism." Nonetheless, there is evidence that some interest groups and religious organizations are active in pushing for accommodationist policies from state and local government toward religions, attributable at least in part to Thomas's written opinions according to Banks and Blakeman.

And finally, Chapter 5 addresses "federalism and globalization." Although traditionally the Court's federalism jurisprudence has only affected domestic issues, the authors examine potential tensions between the contemporary New Federalism jurisprudence of the Rehnquist and Roberts Court and other political and economic trends related to globalization. State laws designed to promote exports and promote state economies can come into conflict with federal trade laws. Federal intelligence efforts can conflict with state and local criminal law and privacy regulations. And increasingly, there are calls from inside and outside the Court to consult legal and constitutional precedents from constitutional courts outside the United States, especially those that encourage the adoption of unified standards for civil and human rights. Banks and Blakeman suggest that "the Roberts Court will [increasingly] be confronted with federalism conflicts caused by the interrelationship between the international system, the foreign policy powers of the national government and the increasing foreign policy activism of the states" (p. 245). They conclude, somewhat tentatively, that the Court "...is likely to continue to defer to the executive branches in most cases involving foreign policy powers of the national government" (p. 245). Their analysis indicates, however, that divisions on the Court do not follow the typical ideological split we have seen in other federalism cases, and further that "there is some evidence that the

Rehnquist and Roberts Courts that the Court may be less reliable partner in support for the national government” in these areas (p. 247).

As I wrote at the outset, this book does an excellent job tracing the political origins of New Federalism and how those principles influenced decision making and constitutional law on the Court. The authors also provide evidence for probable political and policy effects of the Court’s New Federalism jurisprudence, although some of their conclusions about the political and policy impacts seem tentative or even a little speculative at times. Nonetheless, I do have a few minor quibbles with the book. First, while I appreciate the inclusion of chapters 4 and 5, they seemed like a detour when I read the book cover to cover. Chapter 6 on the Roberts Court seems to follow more naturally from Chapter 3 on the Rehnquist Court, and so I wonder if there would have been a better way to organize the book to maintain that flow. Next, while I think some focus on Rehnquist, Roberts, and even Thomas’s views on federalism is warranted, the book may downplay too much the importance of justices Sandra Day O’Connor and Anthony Kennedy—especially O’Connor—on the development of New Federalism jurisprudence. To be fair, the book does discuss these justices in the context of key decisions, but their roles as so-called “swing justices” have been significant enough to warrant more attention in my view. And in particular, Justice O’Connor’s experience as a state legislator and state judge in Arizona prior to being appointed to the Supreme Court had a profound influence on her federalism philosophy; her dissent in *South Dakota v. Dole* (1987) and her majority opinion in *New York v. United States* (1992) were arguably as influential as many of Rehnquist’s early written opinions.

Those minor critiques aside, I highly recommend the book for anyone interested in the Supreme Court and federalism, especially in era of the Rehnquist and Roberts Court. Although the book does not situate itself explicitly in the scholarly literature on political regimes and on political and judicial safeguards of federalism, it makes important contributions to both of those literatures as well as constitutional law.

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