THE "FEDERALISM FIVE" AS SUPREME COURT NOMINEES, 1971-1991

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This article looks back at the Senate confirmation hearing testimonies of five Supreme Court nominees. Following their appointments to the Court, these justices—Chief Justice Rehnquist and Associate Justices O'Connor, Scalia, Kennedy and Thomas—generally voted together in path-breaking federalism cases. They reinvigorated constitutional law limits or decreed new ones on national legislative power, supported the "sovereignty" of state governments, and thus came to be known in some circles as the Rehnquist Court's "Federalism Five."[1]

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[1] It seems that syndicated columnist and Supreme Court watcher James J. Kilpatrick was the first to popularize "Federalism Five" as a nickname for the Rehnquist Court justices who comprised the majority that sometimes interpreted national government powers, vis-à-vis state government powers, quite restrictively. *See* James Kilpatrick, *The Court's Three Cheers for States' Rights*, NEWS & OBSERVER (RALEIGH, NC), July 1, 1999, at A19. *But see* Mark A. Miller, *Note, The Clean Air Act Amendments of 1990 and an Unbridled Spending Power: Will They Survive on the Supreme Court's Road to Substantive Federalism*, 46 CLEV. ST. L. REV. 159, 169 & n. 72 (1998) (naming these justices "the pro-federalism five" in a publication with an earlier cover date). *See also* Allison H. Eid, *Preemption & the Federalism Five*, 37 RUTGERS L.J. 1, 3 (2005) (using the moniker in an article title).

As nominees testifying before the Senate Judiciary Committee, however, these "federalism" justices did not announce, or for the most part even much hint at, what came to be their consequential judicial views of national power and state sovereignty.

WILLIAM H. REHNQUIST (1971)

During the 1971 Senate hearings on President Nixon's nomination of Assistant Attorney General William H. Rehnquist to the Supreme Court, the topic of federalism was entirely absent. The Rehnquist hearings were focused on the Nixon administration and presidential power, the Vietnam War, the anti-war movement and law enforcement surveillance methods.[2] Mr. Rehnquist faced questions about racial segregation in schools and about the treatment of minority voters, including in his home state of Arizona.[3] In response to one question, he identified Chief Justice John Marshall as the justice he most admired, explaining that he "made the Supreme Court what it is today more than any other person. . . . I think it is largely the responsibility of John Marshall and his establishment of the doctrine of judicial review which has made our Constitution a living document."[4] However, Rehnquist was not asked about, nor did he volunteer, any views concerning national power or "states'

2 *See generally Nominations of William H. Rehnquist and Lewis F. Powell, Jr., Hearings Before the Committee on the Judiciary United States Senate*, 92d Cong. (1971), *reprinted in* 8 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE (1916-1972) (*compiled by* Roy M. Mersky & J. Myron Jacobstein, William S. Hein & Co., Inc. 1975) [hereinafter 8 HEARINGS AND REPORTS].

3 Regarding civil rights, Senator Paul J. Fannin (R.-AZ), a strong supporter of the Rehnquist nomination, read a testimonial from his law school classmate (and of course later his Supreme Court colleague), Arizona State Senator Sandra Day O'Connor: "When Bill has expressed concern about any law or ordinance in the area of civil rights, it has been to express a concern for the preservation of individual liberties of which he is a stanch defender in the tradition of the late Justice Black." *Id.* at 12, *reprinted in* 8 HEARINGS AND REPORTS , *supra* note 2.

4 *Id*. at 192, *reprinted in* 8 HEARINGS AND REPORTS, *supra* note 2; *cf*. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694, 704 (1976) (elaborating his view of the sense in which the Constitution properly may be regarded as "living").

rights" in the context of the Tenth Amendment, the Eleventh Amendment or constitutional federalism.[5]

JUDGE SANDRA DAY O'CONNOR (1981)

Ten years later, as the Senate considered President Reagan's nomination of then-Arizona state court judge Sandra Day O'Connor, the constitutional law of federalism had new vitality. The Supreme Court's 1976 decision in *National League of Cities v. Usery*[6] had reinvigorated constitutional protection of states from national regulation, at least in certain functional areas. The O'Connor hearings thus came, not surprisingly, to focus explicitly on federalism.

Although some Senators asked Judge O'Connor broad questions about federalism, she generally gave answers that did little more than mention *National League of Cities*. Senator Orrin Hatch, for example, asked her what powers are reserved to the states under the Tenth Amendment. She gave a long answer that reviewed its past dormancy, its revival in *National League of Cities*, the Court's subsequent failures to interpret the Tenth Amendment as barring other federal regulations of states, and the states' deep concerns about federal regulations that violate their rights.[7] She cautiously concluded that she expected *National League of Cities* to be cited in future litigation and said safely that "[t]he extent to which the Court will continue along that path I would say is somewhat uncertain."[8] When later questioners returned to the Tenth Amendment and other state-focused topics, Judge O'Connor—identifying herself as a westerner, an Arizonan and a state-minded person—generally gave the same answers: the *National League of Cities*

5 In his simultaneous Senate confirmation hearings, nominee Lewis F. Powell also did not face questions about national power, state power and federalism in the senses of their contemporary significance.

6 426 U.S. 833 (1976).

7 *See Nomination of Sandra Day O'Connor*, *Hearings Before the Committee on the Judiciary United States Senate*, 97th Cong. 85 (1981), *reprinted in* THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE (1916-1981) 197 (Supp. 1983, *compiled by* Roy M. Mersky & J. Myron Jacobstein, William S. Hein & Co., Inc. 1983) [hereinafter HEARINGS AND REPORTS SUPP.].

8 *Id.* at 86*, reprinted in* HEARINGS AND REPORTS SUPP., *supra* note 7, at 198.

interpretation of the Tenth Amendment was an area where, perhaps, more would be heard from the Supreme Court.[9]

Judge O'Connor of course was the first woman to be nominated to serve on the Supreme Court, and the Senators were predisposed to confirming her historic breakthrough. They were concerned, however, to check out her competence—sometimes in ways that seem jarringly sexist to read today, especially knowing the record of Justice O'Connor's twenty-five years of distinguished service on the Court. On federalism, as on most topics, the Senators probed the nominee's views only lightly.

ASSOCIATE JUSTICE REHNQUIST (1986)

In 1986, President Reagan nominated Justice Rehnquist to serve as chief justice and, assuming his confirmation and appointment, Judge Antonin Scalia of the United States Court of Appeals for the District of Columbia Circuit to succeed Rehnquist as an associate justice.

The constitutional law of federalism was, by that date, "new" again. Just one year earlier, the Supreme Court had, in *Garcia v. San Antonio Metropolitan Transit Authority*,[10] explicitly reversed its decision in *National League of Cities* and declared itself out of the business of enforcing Tenth Amendment limits on national government action. This decision had provoked then-Associate Justice Rehnquist, who nine years earlier had been part of the *National League of Cities* majority, to imitate then-actor Arnold Schwarzenegger's "I'll be back" Terminator.[11]

Yet in his 1986 confirmation hearings, Justice Rehnquist—who of course would go on to write the Court's *Lopez*[12] opinion and other federalism-related landmarks during his chief justiceship[13]—gave testimony suggesting that the limits of

9 *See id.* at 121-22 & 205-06, *reprinted in* HEARINGS AND REPORTS SUPP., *supra* note 7, at 233-34 & 317-18.

10 469 U.S. 528 (1985).

11 *See id.* at 580 (Rehnquist, J., dissenting) ("[U]nder any . . . approach[,] the judgment in these cases should be affirmed, and I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.").

12 United States v. Lopez, 514 U.S. 549 (1995).

13 *See*, *e.g.*, Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999); United States v. Morrison, 529 U.S. 598 (2000); Bd. of Trustees of the University of

national legislative power were non-justiciable. In response to one question about the proper division of powers in our federal system, Justice Rehnquist offered these thoughts:

> [S]ince the Supreme Court has so expansively construed Congress' power under the commerce clause, that how power is actually divided between the States and Congress is now very much a matter for Congress to decide and no longer that much of a constitutional question. And as to how Congress exercises that power, certainly that is not a judicial question in the ordinary sense. But my personal preference has always been for the feeling that if it can be done at the local level, do it there. If it cannot be done at the local level, try it at the State level, and if it cannot be done at the State level, then you go to the national level.[14]

JUDGE ANTONIN SCALIA (1986)

Justice Rehnquist's 1986 co-nominee Judge Scalia, responding to a direct question regarding his "general philosophy of the role of the judiciary relative to federalism," also gave suggestively deferential testimony about the 20th century history of judicial review of the constitutionality of national legislative acts:

> Well, I can give you my view of what it has been up to now, anyway, or at least in this century. The fact is, it seems to me, that the primary defender of the constitutional balance, the Federal Government versus the States—maybe "versus" is not the way to put it—but the primary institution to strike the right balance is the Congress. It is a principle of the Constitution that there are certain responsibilities that belong to the State and some that belong to the Federal Government, but it is essentially the function of the Congress—the Congress, which takes the same oath to uphold and defend the Constitution that I do as a judge, to have that constitutional prescription in mind

Alabama v. Garrett, 531 U.S. 356 (2001); *but see* Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003).

14 *Nomination of Justice William Hubbs Rehnquist*, *Hearings Before the Committee on the Judiciary United States Senate*, 99th Cong. 209 (1986), *reprinted in* 12 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE (1916-1986) 519 (*compiled by* Roy M. Mersky & J. Myron Jacobstein, William S. Hein & Co., Inc. 1989).

> when it enacts the laws [a]nd I think the history of this century, at least, shows that by and large those congressional determinations will be respected by the courts. . . . I think what I am saying is that on the basis of the [C]ourt's past decisions, at any rate, the main protection for [the Constitution's division of work between the national government and 50 independent states] is in the policymaking area, is in the Congress. The [C]ourt's struggles to prescribe what is the proper role of the Federal Government vis-à-vis the State have essentially been abandoned for quite a while.[15]

In response to a follow up question, however, Judge Scalia clarified that he was not describing his own judicial views or making commitments about future cases:

> I think that is right, Senator. I think what the Supreme Court decisions on the subject show is that it is very hard to find a distinct, justiciable line between those matters that are appropriate for the States and those that are appropriate for the Federal Government, that finding that line is much easier for a legislator than for a court, and by and large the courts have not interfered. I expect there will be more arguments urging that they do so in the future, and I will of course keep an open mind.[16]

JUDGE ANTHONY M. KENNEDY (1987)

One year later, President Reagan nominated Judge Anthony Kennedy of the United States Court of Appeals for the Ninth Circuit to serve as an associate justice. On this occasion, the President explicitly invoked federalism values as one of Judge Kennedy's relevant credentials:

> Judge Kennedy is what many in recent weeks have referred to as a true conservative—one who believes that our constitutional system is one of enumerated

15 *Nomination of Judge Antonin Scalia*, *Hearings Before the Committee on the Judiciary United States Senate*, 99th Cong. 81-82 (1986), *reprinted in* 13 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE (1916-1986) 175-76 (*compiled by* Roy M. Mersky & J. Myron Jacobstein, William S. Hein & Co., Inc. 1989) [hereinafter 13 HEARINGS AND REPORTS].

16 *Id.* at 82, *reprinted in* 13 HEARINGS AND REPORTS, *supra* note 15, at 176.

> powers—that it is we, the people who have granted certain rights to the Government, not the other way around. And that unless the Constitution grants a power to the Federal Government, or restricts a State's exercise of that power, it remains with the States or the people.[17]

In his Senate hearing testimony regarding federalism, Judge Kennedy largely walked the path of Judge Scalia's 1986 testimony. In one exchange, Judge Kennedy referred deferentially to the role of Congress but also mentioned a general judicial role to protect federalism. He explained that the Constitution contains

> few automatic mechanisms for the States to protect themselves. The Congress of the United States is charged, in my view, with the principle duty of preserving the independence of the States, and it can do so in many ways; in the way that it designs its conditional grant-in-aid bills, in the ways that it passes its statutes.
>
> The courts, too, have a role, and the courts have devised some very important doctrines to protect federalism. The idea of abstention in *Younger v. Harris*[18], the *Erie*[19] rule, the independent State ground rule,[20] have all been designed by the courts out of respect for the States.
>
> But in my view, this is the job of every branch of the government.[21]

17 Remarks Announcing the Nomination of Anthony M. Kennedy to Be an Associate Justice of the Supreme Court of the United States, 23 WEEKLY COMP. PRES. DOC. 1321 (Nov. 11, 1987).

18 401 U.S. 37 (1971).

19 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

20 *See*, *e.g.*, Michigan v. Long, 463 U.S. 1032 (1983).

21 *Nominations of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States*, *Hearings before the Committee on the Judiciary United States Senate*, 100th Cong. 93 (1987), *reprinted in* 15 THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE (1916-1987) 367 (*compiled by* Roy M. Mersky & Gary R. Hartman, William S. Hein & Co., Inc. 1991) [hereinafter 15 HEARINGS AND REPORTS].

In later testimony, Judge Kennedy reemphasized Congress's primacy in determining

> the shape of federalism. It seems to me that the independence of the States, or their non-independence, as the case may be, is really largely now committed to the Congress of the United States, in the enactment of its grants-in-aid programs, and in the determination whether or not to impose conditions that the States must comply with in order to receive federal monies; that kind of thing.[22]

When Senator Gordon Humphrey expressed at the close of his questioning a "[h]ope" that Kennedy as a Supreme Court justice would "not intrude on our [i.e., Congress's] turf," the Judge pledged sincerely, but only, that he would "try to comply. . . ."[23]

JUDGE CLARENCE THOMAS (1991)

In 1991, President George H.W. Bush nominated to the Supreme Court Judge Clarence Thomas of the United States Court of Appeals for the District of Columbia Circuit.

Judge Thomas also, in his Senate testimony, gave very general answers regarding federalism. For example, in response to Senator Strom Thurmond's question "about the proper relationship between the Federal and State governments" and whether "there has been a . . . substantial increase in Federal authority over the last few decades," Judge Thomas gave a historically descriptive answer that foreclosed none of his options as a prospective justice:

> Senator, I think that it is clear that our country has grown and expanded in very important ways. Through the commerce clause,[24] for example, there has been growth in the national scope of our Government. Through the 14th amendment, there has been application of our Bill of Rights, or portions, to the State governments. Through the growth in

22 *Id.* at 222, *reprinted in* 15 HEARINGS AND REPORTS, *supra* note 21, at 496.
23 *Id.* at 234, *reprinted in* 15 HEARINGS AND REPORTS, *supra* note 21, at 508.
24 U.S. CONST., Art. I, § 8, cl. 3.

> communications and travel, of course, we are more nationalized than we were in the past.
>
> I think what the Court has attempted to do is to preserve in a way as best it possibly could the autonomy of the State governments, but at the same time recognize the growth and expansion and the natural growth and expansion of our National Government.[25]

In response to a later question about the scope of national power under the Interstate Commerce Clause, Judge Thomas drew on powerful personal experiences to suggest, but he did not commit himself to, judicial deference to national legislative acts:

> [T]he [Supreme] Court has read those provisions rather broadly. But . . . I don't have any objection or basis to object or at this point any quarrel with the way that the Court has interpreted the interstate commerce clause. . . .
>
> I have heard some academic objections from time to time. But I can remember reading the *Heart of Atlanta Motel*[26] case which challenged, I believe, the accommodations provisions in the Civil Rights Act of 1964, which is based on the interstate commerce powers. And one of the factors that was used there was that blacks who traveled across the country were impeded from traveling because of the lack of accommodations.
>
> What that brought to mind was that when I was a kid and we would travel occasionally—I think two or three times during my childhood—by highways from Savannah to New York, my grandfather would go through this long exercise of making sure that the car

25 *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States*, *Hearings Before the Committee on the Judiciary United States Senate*, 102d Cong. 132, *reprinted in* 17A THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE (1916-1991) 1360 (*compiled by* Roy M. Mersky, J. Myron Jacobstein & Bonnie L. Koneski-White, William S. Hein & Co., Inc. 1995) [hereinafter 17A HEARINGS AND REPORTS].

26 Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

> was working perfectly, that you had new tires, that we had a trunk full of food, et cetera, because there were no accommodations. And should you break down, you would be met with hostilities. That was the reality. So there was indeed some, I would consider [it] significant, impediment on the ability of us to travel and certainly, by extension, on the flow of commerce or travel in our society.
>
> I have no quarrel, Senator, with the approach that the Court has taken and certainly have had no opportunity to review all of the cases.[27]

In a later exchange, when Senator Specter asked Judge Thomas directly whether there are justiciable constitutional limits on national legislative power, he in effect said that he was not sure, and that time would tell:

> Senator Specter. Let me move . . . to a very complicated subject and just ask one question about it. That is the subject of federalism, and it is this: Does our modern Constitution, as it has been interpreted, place any restriction on Federal power vis-à-vis the States? Or is the political answer by Congress now the measure of the constitutional power issue?
>
> Judge Thomas. Senator, I don't know whether we know what the limits are. I think we realize there is much more involvement on the part of the National Government in our day-to-day affairs, certainly through the 14th amendment and through the commerce clause.
>
> I think that that issue and similar issues come into focus in cases such as the *Garcia*[28] case, and I think that that is something that will continued to be explored and debated in the judicial arena, as well as, I am sure, in this body and at the State government level.

27 *Hearings Before the Committee on the Judiciary on the Nomination of Clarence Thomas*, *supra* note 25, at 373-74, *reprinted in* 17A HEARINGS AND REPORTS, at 1601-02.

28 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

> Senator Specter. So, you think the commerce clause might not have the full sweep of enabling the Congress to do what it chooses in the field of commerce and regulatory and legislative power?
>
> Judge Thomas. I don't question the current development of the commerce clause, Senator. As I have noted earlier, my point is that I don't think that any of us know precisely what the limits are now, with the advances in communications, with the increased role of the Federal Government, with the increased involvement of the Federal Government in our day-to-day lives. I think that is something that certainly was at least to some extent a concern in the *Garcia* case.[29]

CONCLUSION

These snippets of Senate confirmation hearing testimony demonstrate the luxury and the fiction of hindsight. We know in 2006 how the doctrines of constitutional federalism developed over the nineteen years of the Rehnquist Court, and it is only that knowledge that allows us to look back on each justice's confirmation hearing testimony in an effort to discern disclosures, clues and/or possible concealments of what was to come. In fact, that process of searching backward seeks, artificially, traces of cases and contexts and colleagues and judicial writings that none of these nominees could have imagined concretely as he or she testified.

Our backward-looking evaluations also should be tempered by our knowledge that any Supreme Court nominee tends to testify before the Senate only as expansively as he or she concludes is required to obtain confirmation. Without meaning to cast aspersions on any particular confirmation hearing or senator, we know that Senate questioning tends to fall short of a judicial nominee's abilities to answer, and not to answer, and to understand the significance of the topics being discussed. Thus while isolated moments in some of the federalism discussions in these confirmation hearings may call Pinocchio to contemporary

29 *Hearings Before the Committee on the Judiciary on the Nomination of Clarence Thomas*, *supra* note 25, at 491-92, *reprinted in* 17A HEARINGS AND REPORTS, at 1719-20.

minds, such hindsight judgments are unfair assessments of the human, cautious, politically informed and strategic testimony that each Supreme Court nominee properly gave before a Senate that did not require more explicit answers or commitments before giving its consent to the nomination. Federalism, each nominee recognized when asked, is part of what we are nationally, locally and constitutionally, and these nominees wrestled with it in the abstract as much as they were asked and required to do.

And then, following confirmation, each nominee moved into the realities of Supreme Court service, including judging federalism issues. Perhaps that is what nominee William Rehnquist, age 47 in 1971, was intuiting about the job to come when he testified—while perhaps imagining faintly the prospect of himself becoming at some later point a chief justice—to his admiration for Chief Justice John Marshall and described the Constitution as "a living document." Time and real cases will bring new and perhaps even unexpected, interpretive developments to pass for any justice.

Justice Kennedy shared, from actual Supreme Court experience, a piece of this at St. John's University in 2000. Here to speak to a large public audience of law students, alumni and others, the Justice first met privately with faculty members and informally fielded questions. A colleague asked if there was any issue that turned out to be other than what he had expected before his appointment to the Court. In a moment that has stayed with many, Justice Kennedy paused, furrowed his brow, and then all but blurted out, "It turns out that there is a lot more to our federalism than I had realized."[30]

30 Remarks of Justice Anthony M. Kennedy at St. John's University School of Law, Jan. 28, 2000.