LITIGATING FEDERALISM

The States Before the U.S. Supreme Court

Eric N. Waltenburg, Bill Swinford

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For My Parents
—E.N.W.

For Regina and the Kids
—B.S.

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Introduction

The Seminole Tribe of Florida petitioned the state of Florida for permission to open a casino on its tribal land; Florida balked. Gambling on Native American reservations is a multibillion dollar a year industry, one that is regulated by the federal *Indian Gaming Regulatory Act* (IGRA). Congress enacted the IGRA in 1988 to promote tribal economic development and self-sufficiency, and to provide a federal regulatory mechanism to protect Native American gaming from organized crime. The Act also obliges the states to negotiate in "good faith" with Native American tribes toward the formation of a compact concerning gaming activities, and it authorizes a tribe to sue a state in federal court to compel performance of that duty.

When the state of Florida refused to allow the gambling operation, the Seminole Tribe brought suit against the state of Florida in September of 1991. Under the auspices of the IGRA, the Tribe alleged that the state had failed to enter into good faith negotiations. Florida, for its part, moved to dismiss the suit, arguing that the IGRA violated the states' Eleventh Amendment sovereign immunity. A federal district court dismissed Florida's motion. The Eleventh Circuit Court of Appeals reversed, and the Seminole Tribe petitioned the U.S. Supreme Court for *certiorari.*

Ours is a federal system — a union of separate and quasi-sovereign states with respect to jurisdiction and administration over their purely local concerns on the one hand, and a national government, sovereign in both internal and external affairs on the other. A system of two sovereign spheres operating over the same citizens is complex. It regularly occasions disputes over the proper location of sovereignty and the powers and autonomy reserved to each sovereign sphere. It inevitably has fallen to the Supreme Court to resolve these disputes — disputes such as the one presented in the petition for *certiorari* filed by the Seminole Tribe. The Court agreed to docket the case and on October 11, 1995, the High Court heard oral arguments in *Seminole Tribe of Florida v. Florida* (116 S.Ct. 1114 [1996]).

Concerning questions of congressional power and the sovereign immunity of the states, *Seminole Tribe* would lay bare the position of the Court and the individual justices on the subject of "our federalism."[1] The case also epitomizes the two key aspects of the recent relationship between state governments and the U.S. Supreme Court as the states seek to protect their policy interests: increasingly active participation before the Court on the part of the states and a Court that is seemingly predisposed to their arguments.

STATE PARTICIPATION

Thirty-one states participated as merits *amici* in support of Florida's position.[2] This is indicative of what has become an increasingly common occurrence over the last thirty years: state government participation before the Court in the capacity of party and/or *amici*. A primary reason for the substantial presence of state governments in this and other cases before the Supreme Court over the last quarter century or so is that the states are more successful there. A variety of studies have shown that state litigants are winning more often (see, for example, Epstein and O'Connor 1988; Kearney and Sheehan 1992). They are therefore rational litigators. That is, they adjust their litigious activity based upon their experiences — increasing it as they win, decreasing it in response to losses (see Cohen and Axelrod 1984).

What makes this increased activity and success all the more interesting is that until its most recent vintage, the Supreme Court of the post-1937 era has been very antagonistic to the policy interests of the states (see chapter 2). The Court had been part and parcel of an activist national government consistently pursuing a policy that eroded the states' position in the federal relationship. From its expansive reading of Congress's commerce power to sweeping judicial mandates requiring the states to reapportion their legislatures and bus their children, the Court repeatedly showed itself to be no great friend of the states.

Nevertheless, the states are more active and successful before the federal judiciary today than at any other point in American history. In part, state governments have recognized the practical reality that they must be active in national decision-making arenas to promote and protect their interests in an increasingly complex and nationally oriented policy environment. The Supreme Court is one of those arenas to be regularly engaged, much like Congress and the executive bureaucracy.

Consequently, the states have taken steps to improve the frequency and effectiveness of their interactions with it. The states have done so primarily through the enhancement of their offices of attorneys general and the formation of cooperative associations, such as the National Association of Attorneys General Supreme Court Project (see chapter 4).

THE SUPREME COURT OF THE POST-1960s ERA

As important, the Court of the 1990s has become an especially "state friendly" arena. Conventional wisdom and quantitative analyses alike (e.g., Kearney and Sheehan 1992) suggest that the states' increasing rate of litigation success is a

consequence of the appointees to the Court of presidents Nixon, Reagan, and Bush.[3] Republican presidents in the 1970s and 1980s made a series of appointments to the Court that operationally redounded to the advantage of the states. The appointees were generally marked by: (1) an ideological conservatism that read the Constitution narrowly and therefore viewed the expansion of federal authority with considerable skepticism, and (2) an identifiable affinity for the autonomy of the states that was distinct from their general ideological disposition (see chapter 3). Thus there can be little surprise in the appreciable improvement in the rate of the states' litigation success coincident to the mounting GOP presence on the Court (see Kearney and Sheehan 1992). The states, more professional litigators, perceived this development and increased their rate of activity accordingly.

Thus, something of an "action-reaction" process appears to be at work. In short, presidential appointments, state litigation proficiency, Court decisions, and state litigation actions form an interrelated causal structure wherein a force producing a change in one element will reverberate through the whole system. Because of the temporal ordering that exists, the key exogenous shock is the effect of presidential appointments. It produces a change in the Court's decisional behavior, and this in turn affects the states' decisions to engage the Court in the pursuit of their policy interests.

SEMINOLE TRIBE OF FLORIDA V. FLORIDA

When Florida's attorneys walked into the Supreme Court on October 11, they entered an environment in which a number of the justices were predisposed to their cause. The legislation at issue — the IGRA — was enacted under an element of Congress's commerce power. This had been the principal constitutional mechanism through which Congress (oftentimes abetted by the Court) had expanded the scope of its authority and simultaneously enervated the states' sovereignty and jurisdictional autonomy. But the Congress's power under the Commerce Clause[4] was increasingly the victim of the post-1968 enhancement of the Court's conservative and federalist wing. When he rose to address the Court, Jonathan A. Glaugow, attorney for the state of Florida, explicitly attacked that basis of congressional power, declaring "Congress does not have the authority under the Indian Commerce Clause to subject a state to suit in federal court."[5]

From Florida's perspective, *Seminole Tribe* dealt less with the regulation of gambling than with the powers, place, and legitimate activities of the states within our federal system. Responding to a question from Justice Ruth Bader Ginsburg concerning Florida's power to control gambling on Native American reservations, Glaugow asserted "The reason we are here is because this case speaks more to the question of federalism and the relationship between the states and the federal government rather than whether or not we are going to have gambling in Florida."

Such a declaration found substantial traction on the Court. During the oral arguments, several justices staked out territory clearly on the side of Florida. For instance, as Mr. Glaugow attempted to explain to Justice Ginsburg what Florida would gain by winning, Justice Antonin Scalia offered the following: "I had

thought from your brief that your answer to Justice Ginsburg's question would simply be 'because Floridians are *proud.* We'd rather have the federal government write the law than to have us pretend to write it as a flunky of the federal government subject ultimately to overruling by the federal government anyway.'" Similarly, when Glaugow discussed the nature of the IGRA's harm to Florida, Justice Anthony Kennedy focused Glaugow's states' rights argument, offering: "Your position is that being required to negotiate is itself a harm to the state . . . Not the least of these harms being that if a gambling establishment is instituted it ought to be very clear that it was done by the federal government without the participation of the states. That the states object." Alternatively, when Bruce Rogow, the Seminole Tribe's attorney, argued that Congress's authority over Native American commerce was plenary, Justice Anthony Kennedy noted that the sweep of that authority does not necessarily encompass the power to enlist the states *as states* in pursuit of a national goal: "Well, but there is a difference between assigning power and functions between the two branches of government — in this case all to the national government — and going the further step of saying this allows the national government to order the states to invoke their political processes on behalf of the national government."

As a practical matter, Florida's argument rested upon her Eleventh Amendment sovereign immunity. In recent years the High Court has questioned just how explicit the congressional legislation must be to abrogate that immunity. The evolving jurisprudence has generally held that the states' immunity from suit is not abrogated unless the federal statute reflects an unmistakably clear intent to do so (see McCulloch 1994). As a consequence, the states had enjoyed a string of limited victories in federal courts.[6] But one Supreme Court decision in particular probably gave the state of Florida confidence in its prospects for success before the Supreme Court in *Seminole Tribe.*

In 1991 the Court handed down *Blatchford, Commissioner v. Native Village of Poatak* (501 U.S. 775). Here, the Court ruled 6–3 that the Eleventh Amendment bars suits by Native American tribes without the states' consent unless the federal statute reflects an unmistakably clear intent to abrogate immunity. Most importantly for Florida, the *Blatchford* majority (Chief Justice William Rehnquist and Justices Byron White, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and David Souter) was still largely intact (only Justice White had left the bench). Thus, to a large degree the pro-state decisional environment of 1991 was unchanged in 1996.

Ultimately, the Court ruled in Florida's favor on a vote of 5–4. The majority found that the federal government's commerce authority was not sufficient to abrogate the states' Eleventh Amendment immunity.

THE DATA AND THE SCOPE OF THE BOOK

This book is directed toward developing a systematic and detailed understanding of state decisions to litigate in pursuit of their policy goals since 1954. The study rests upon a theoretical perspective that places those decisions within a

context that is characterized by a network of relationships. Obviously, state decisions to engage the Court are substantially influenced by its decisional environment — the nature of its recent decisions and its composition — as well as their own abilities with and experiences before the High Court. The data we use to explore these relationships are drawn primarily from three sources.

Survey and Interview Data

A mail survey was conducted of the offices of state attorneys general (see Appendix A). Each office was contacted by phone to solicit the name of a specific person to whom the survey should be directed. An initial wave was sent in June 1997, with two follow-up waves sent in July and September to those offices that had not previously responded. Our final response rate was 42 percent, and every region of the nation is represented.

To supplement the survey data, we also conducted confidential interviews in December 1997 with high-ranking officials in the offices of attorneys general of five states, and in October 1997 we interviewed Dan Schweitzer, the Supreme Court Counsel for the Supreme Court Project of the National Association of Attorneys General, the principal interstate association in the area of litigation.

Archival Data

We also have collected data on state *amicus* activity on the merits. In the analysis that follows, we argue that *amicus curiae* activity is a mechanism through which the states, in effect, "lobby" the Supreme Court. That is, states file *pre-certiorari* briefs *amicus curiae* in an effort to gain access to the Court's extremely limited discretionary agenda by giving additional notice to the Court of a petition about which the states are concerned.[7] If access is achieved, states can then use merits *amicus* briefs to lobby the Court on a particular set of beliefs.

We used the *Records and Briefs of the United States Supreme Court* to collect information on the incidence of the states' merits *amicus* activity from 1954 to 1989. To focus our data collection, we first used the Law Office Information System's CD-Rom of the *U.S. Reports* to identify those cases with state merits *amicus* activity. Data were collected on the identity of the filing state and the direction of the brief — that is, whether the brief urged affirmance or reversal.

Secondary Data

Finally, we utilize data on state *pre-certiorari amicus curiae* activity originally collected as part of the National Science Foundation "Project on Organized Interests and the United States Supreme Court."[8] These data also identify the filing state and the direction of the brief. For the purposes of gathering information on state fortunes as direct parties, we employ the *United States Supreme Court Judicial Data Base*.[9]

The Study's Plan

Together, these data constitute a rich vein from which to analyze state interactions with the U.S. Supreme Court since 1954. Of course disputes over the federal relationship are as old as the Union, and, therefore, we begin with a broader

historical perspective. We turn in chapter 2 to a discussion of the historical evolution of the Court's construction of the federal relationship in general, focusing on jurisprudence related to Congress's commerce power — the principal mechanism through which the national government has expanded its activities in domestic affairs.

This expansion of national power has been the subject of intense political debate, particularly in the second half of this century. The ever-increasing proliferation of national programs with their concomitant requirements of subnational implementation; the emergence of broad-gauge social regulation — including initiatives in civil rights, education, the environment, and health and safety; as well as sweeping judicial mandates, requiring, for example, the states to reapportion their legislatures and end prayer and racial segregation in their schools have both threatened to move the federal system toward one consolidated whole (see Walker 1995 for a thorough discussion of these and other forces) and triggered a firestorm of conservative criticism.

A focus of conservative attacks has been the Supreme Court. In response to what was perceived to be the Court's participation in the federalism equivalent of manifest destiny, Republican presidents at least since Richard Nixon have attempted to appoint justices who would be more narrow in their reading of constitutional rights and more solicitous of the states' position in the federal relationship. In chapter 3, we show that to the extent the Republican presidents appointed justices to the U.S. Supreme Court with an eye toward the arguments of states' rights advocates, they have been remarkably successful, producing a Court that has, in recent years, sought to reinvigorate the Tenth Amendment, signal limits on Congress's authority under the Commerce Clause, and expanded the scope of protection for states against suit.

Chapter 4 examines developments in the states' law offices. As a group, the states are now more active in the Supreme Court than at any other time. This is due in part to changes in national politics that have encouraged the states to be more active litigators. As the national government withdrew from the regulatory arena in the 1970s and, especially, the 1980s, the states assumed ever greater regulatory responsibilities. As a result, they have been left with little choice but to resort to litigation either to execute mandated statutes or to compel the national government to enforce its own laws and regulatory standards (see Clayton 1994, 531–37; Webster 1990). Indeed, the rate of state participation before the Court as appellants has increased appreciably since 1970 (see chapter 5). The increasing legal responsibilities of the states and the accumulation of high visibility enforcement functions, almost of necessity,[10] transformed the states' law offices into large, highly professional organizations.

Chapter 5 examines the activities of the states in the Court in their entirety — that is, as *pre-certiorari* and merits *amici curiae* as well as direct parties. We explore and explain the correlates of state participation before the Court over time. Again, we find that state interactions with the Court are defined by strategic considerations. That is, state decisions to engage the Court are profoundly

influenced by their capacity to litigate, their interest in doing so, and their estimated likelihood of success. In other words, the states are "procedurally rational" (Simon 1985); they arrive at a reasonable choice to litigate based upon the context in which they find themselves.

Building upon the conclusions of the preceding chapters, chapter 6 specifies and then tests a model of Court-state government interaction. The model demonstrates that states have increased their activities before the High Bench as they have won more often, and their increasing rates of success are coincident with the Republican appointments of conservative, federalist-oriented justices.

It is to state the obvious to say that the states have enjoyed a number of good years at the hands of the Supreme Court. In addition to *Seminole Tribe*, other recent decisions epitomize the state governments' decisions to engage the Court in response to national policies, and the Court's apparent intent to reorient constitutional federalism in favor of greater state autonomy. Accordingly, chapter 7 examines the development of an identifiable and consequential bloc of five Republican appointed justices (Chief Justice Rehnquist and Justices O'Connor, Kennedy, Scalia, and Clarence Thomas) whose support for the states has resulted in seminal victories for the states in the 1994–96 terms of the Court. Finally, chapter 8 builds upon that discussion. We take stock of our findings and offer some conclusions concerning the current state and future direction of the federal relationship in the U.S. Supreme Court.

NOTES

1. A system wherein the national government seeks to protect federal rights and interests in ways that do "not unduly interfere with the legitimate activities of the States" (*Younger v. Harris*, 403 U.S. 37, 44–45 [1971]).

2. The states of California and Washington authored a merits *amicus* brief that was joined by Alabama, Arizona, Arkansas, Colorado, Connecticut, Hawaii, Idaho, Kansas, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Virginia, and West Virginia. No states participated as *pre-certiorari amici*, and this is not surprising. As we will discuss in detail in chapter 5, quantitative analyses (Caldeira and Wright 1988) indicate that *pre-certiorari* briefs *amicus curiae* asserting that the Court should *not* take a particular case actually *increase the likelihood* that the Court will grant *certiorari*. Because the state of Florida (and thus state interests more generally) were victorious at the Court of Appeals in *Seminole Tribe*, it was strategically appropriate for state governments to remain silent at the *pre-certiorari* stage of the Court's deliberations.

3. We also include in this category President Gerald Ford's only appointee to the Court: John Paul Stevens. Clearly, Ford "made a pragmatic, rather than ideologically controversial, nomination based on Stevens' professional qualifications." (O'Brien 1996, 67). Still, from the view of the states, Stevens represented another link in the unbroken chain of ten straight GOP additions to the Court.

4. "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *U.S. Constitution*, Article I, Section 8, Clause 3.

5. All quotations from the *Seminole Tribe* oral arguments are transcribed from Jerry Goldman, "Oyez, Oyez, Oyez: A U.S. Supreme Court Database," http://court.it-services.nwu.edu/oyez.

6. See, for example, *Dellmuth v. Muth* (491 U.S. 223 [1989]); *Hoffman v. Connecticut Department of Income Maintenance* (492 U.S. 96 [1989]); *Poard Band of Creek Indians v. Alabama* (776 F. Supp. 550, 557 [1991]); *Spokane Tribe of Indians v. Washington* (790 F. Supp. 1057 [1991]); *Sault St. Marie Tribe of the Chippewa Indians v. Michigan* (800 F. Supp. 484 [1992]).

7. In this sense, we treat *pre-certiorari amicus* briefs as analogs of other tools of lobbying the states use (e.g., one-to-one lobbying or work within interstate associations; see Cigler 1995) to influence policies made by Congress or the bureaucracy.

8. Principal investigators: Gregory A. Caldeira (The Ohio State University) and John R. Wright (George Washington University).

9. ICPSR #9422. Principal investigator: Harold J. Spaeth (Michigan State University).

10. In a 1988 interview Warren Price, Attorney General of Hawaii, spoke to this point: "In the mid-seventies there was a sudden avalanche of new types of cases and matters. The reaction to that by the AG office was to add bodies" (Interview 1990, 107).

2

The States and the Commerce Power

It is impossible to neatly and succinctly describe either the Supreme Court's longitudinal behavior on questions about the nature of the federal relationship or the struggle between the national government and the states over policy purview. Historically, the Supreme Court has been neither consistent ally nor invariable antagonist to the policy authority of the state governments. Rather, the Court's approach to federalism has been marked by a series of ebbs and flows, fueled largely by changes in the Court's composition and the prevailing political environment. Concentrating on the Court's construction of Congress's commerce power, this chapter provides a relatively brief, general overview of this series of iterations.[1]

It has been within the general arena of "police power"[2] that the struggle over legitimate authority within the federal structure has been most acute. In the lexicon of federalism, perhaps no controversy better exemplifies the Supreme Court–induced fluctuations in the scope of national power *vis-à-vis* the legitimate activities of the states than does the question of the national government's authority to regulate the working conditions of the labor force. The specific authority to regulate the interaction between employer and employee was not explicitly delegated to the national government. Thus, with some exceptions, the first 150 years of the nation's jurisprudential history supported the view that such regulations, if they were to exist at all, were to emanate from the states. The occasional excursions of the federal government into this area most often met with defeat at the hands of the Court.

It was not until 1938 that the national government laid claim to this regulatory area and successfully defended it. In that year the Congress passed, and the president signed, the federal *Fair Labor Standards Act* (FLSA).[3] The main components of the original FLSA were provisions concerning federal minimum wage and maximum hour standards for workers involved in interstate commerce,

along with regulations regarding child labor. The statute was successfully defended before the Court in *U.S. v. Darby Lumber Company* (312 U.S. 100 [1941]).

What makes this statute peculiarly reflective of the Court's schizophrenic disposition on questions of state versus federal power is that the FLSA was passed by Congress under the auspices of the Commerce Clause.[4] As interpreted by the Court, this clause has been either the greatest obstacle to the expansion of federal power, or the primary vehicle for federal intervention into areas traditionally left to the states or the free market.

THE DOMINANCE OF DUAL FEDERALISM

The story of the FLSA best begins some fifty years before its passage, with the Supreme Court's decision in *Kidd v. Pearson* (128 U.S. 1 [1888]). In one of the first decisions issued after the confirmation of conservative Chief Justice Melville Fuller in 1888, the Court reviewed a suit involving an Iowa statute banning the manufacture of liquor. The statute was challenged by an Iowa distillery that made liquor destined for sale out of state. The plaintiffs argued that the product's ultimate departure from the state made it a part of interstate commerce, and thus subject to potential federal, but not state, regulation. The Fuller Court disagreed, asserting that manufacturing was distinct from distribution (and therefore commerce). Thus, said the Court, "manufacturing" was susceptible to state government regulation — and, by extension, it was immune to the regulatory powers of the national government.

The logic in support of state authority in *Kidd* demonstrated the Court's long-held affinity for dual federalist principles.[5] As the Court noted in the now famous passage from *Gibbons v. Ogden*:

> The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself. (9 Wheat. 1, 195 [1824])

Kidd also foreshadowed, however, how this commitment to dual federalism could be used by justices adhering to the judicial dogma of "liberty of contract" to block the federal government's regulation of commerce and the economy. Simply put, according to the logic of *Kidd*, if the activity in question was not *interstate* commerce (i.e., involving transportation across state lines), the activity was beyond the regulatory reach of the federal government.

The disposition toward constraining the government's regulatory power folded neatly into the prevailing jurisprudence of the later Nineteenth Century — a commitment to substantive due process in economic matters and liberty of contract. "Any legislative encroachment upon the existing economic order [was] infected

with unconstitutionality" (*AFL v. American Sash Company*, 335 U.S. 538, 543 [1947], quoted in Schwartz 1993, 179). Or, as Justice David Brewer put it, "The paternal theory of government is . . . odious" (*Budd v. New York*, 163 U.S. 517 [1892], quoted in Schwartz 1993, 178). With the tremendous turnover experienced by the Fuller Court,[6] it quickly came to be dominated by justices who shared Justice Brewer's strong affinity for the "Protection to Private Property from Public Attack."[7]

Meanwhile, in the other wing of the U.S. Capitol, the Congress was attempting to codify means of dealing with the economic realities of a modernizing, industrializing economy: "The passing of the frontier, the rise of an interstate industrialism, the shift from a rural to an urban distribution of population, the breakdown of nineteenth-century capitalism and the efforts to construct in its stead a twentieth century capitalism, the breakthrough in science and technology, the change in the society of nations brought about by global wars and the militant dialectic of totalitarianism" (Swindler 1969, 1–2 — as quoted in Biskupic and Witt 1997). Congressional responses to this "economy in flux" included the *Interstate Commerce Act* of 1887[8] and the *Sherman Anti-Trust Act* of 1890.[9] In addition, similar attempts to regulate the economic interaction between producers and consumers, as well as between employers and employees, were underway across the states.

The Fuller Court, however, signaled its unwillingness to sit idly by as the federal government extended its regulatory reach. Thus, while Congress attempted to expand economic regulation under the auspices of the Commerce Clause, the Court was declaring in clarion terms its conviction that the power of Congress under the Clause was actually quite limited. In a relatively unbroken line of precedents, the Court curtailed national expansion of authority, relying on its conservative views of federal power to regulate commerce,[10] as well as raise revenue[11] and enforce the Civil War Amendments (i.e., the Thirteenth, Fourteenth, and Fifteenth Amendments).[12] In all, the Fuller Court struck down fourteen acts of Congress during its twenty-two years, a level of activism on the Court heretofore unseen.[13]

An excellent example of the Fuller Court's anti-federal power mentality was its decision in *U.S. v. E.C. Knight Company* (156 U.S. 1 [1895]). Here, the Court used the production/distribution distinction articulated in *Kidd* to dramatically narrow the scope of the *Sherman Anti-Trust Act*. At issue was a federal government attempt to prohibit the purchase of a *de facto* monopoly on sugar refining by the American Sugar Refining Company. The Court ruled that sugar refining was manufacturing (not commerce) and therefore beyond the grasp of federal regulatory power.

But oftentimes the Fuller Court was just as suspicious of exercises of state regulatory authority. Take its infamous decision in *Lochner v. New York* (198 U.S. 45 [1905]). Faced with a challenge to a New York state law limiting the working hours of bakery employees, the Court declared that the Due Process Clause of the Fourteenth Amendment[14] stood as a substantive protection for the freedom of

contract against state interference (in the absence of a public health justification). Thus, at the same time the Court was on a crusade against the expansion of federal power, its laissez-faire mentality also led it to move against various state attempts to regulate economic interactions, often on the basis of the Fourteenth Amendment.[15]

Indeed, the Fuller Court was dominated by justices committed to liberty of contract, not necessarily to the protection of the states' policy authority within the federal relationship. This illustrates quite well the difficulty of attributing pro-state outcomes to a pro-state jurisprudence *per se* — a point of which we must be mindful when assessing the effect of Republican appointees to the Court since 1969 and to which we shall return in greater detail in chapter 3.

Making six appointments between 1910 and 1912, President William Howard Taft had a remarkable opportunity to shape the Court. His appointments helped to structure a Court that moderated this conservative approach to economic regulation. Among the most notable of the White Court's (1910–21) rulings came in cases such as *Hipolite Egg Company v. U.S.* (220 U.S. 45 [1911]), *Hoke v. U.S.* (227 U.S. 308 [1913]) and *Wilson v. New* (243 U.S. 332 [1917]). In these cases the Court stated its willingness to allow a limited *federal* "police power" constructed on the basis of Congress's Commerce Clause authority. These "progressive" decisions on federal authority generally involved statutes designed to regulate or prohibit some perceived immoral good or service from moving in interstate commerce[16] and therefore were quite consistent with the prevailing political environment of the "Progressive Era."[17]

The White Court upheld some significant regulatory actions on the part of the states as well. The most important such decision was no doubt *Bunting v. Oregon* (243 U.S. 426 [1917]). Here, the Court upheld a state measure that established maximum hours for all industrial workers, along with a minimum wage for women and minors in the work force. The Court thus used *Bunting* as a vehicle for reversing its holding in *Lochner v. New York* (1905).[18]

The momentum of this movement toward moderation, however, came to an abrupt halt with the Court's 1918 decision in *Hammer v. Dagenhart* (247 U.S. 251 [1918]). Here, the Court was faced with the federal *Child Labor Act*. The Act prohibited the interstate transportation of goods produced by companies that did not meet certain federal standards for child labor. The Court struck it down, returning to the distinction between manufacturing and commerce. It asserted that the intent of Congress under the Act was to regulate the method of production, which was clearly beyond its authority. "In our view, the necessary effect of this act is . . . to regulate the hours of labor of children . . . a purely state authority" (247 U.S. 251, 276).

Moreover, as the Court saw it, Congress's interstate commerce power, while "ample," must not be construed so as to allow the federal government to exercise a national police power. Indeed, for the Court, to allow the expansion of the commerce power in the manner envisioned by the Act threatened the very fabric of the Republic. As Justice William Day put it:

In interpreting the Constitution, it must never be forgotten that the nation is made up of states to which are entrusted the power of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. . . .

We have neither the authority nor disposition to question the motives of Congress in enacting this legislation. The purpose intended must be attained consistently with constitutional limitation, and not by an invasion of the power of the States. This Court has no more important function than . . . to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state. . . .

The act in a two-fold sense is repugnant to the Constitution. It not only transcends the power delegated to Congress over the commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend. The far-reaching result of upholding the act cannot be more plainly indicated than by pointing out that, if Congress can thus regulate matters entrusted to local authority by prohibitions of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and, thus, our system of government be practically destroyed. (247 U.S. 251, 275–76)

THE NEW DEAL CRISIS AND *THE SWITCH*

The cramped view of Congress's commerce power articulated in *Hammer* set the tone for the last years of the White Court and the life of the Taft Court (1921–30). The Taft Court again asserted a broad protection for the freedom of contract against state government regulation, seemingly reinvigorating the principles of *Lochner v. New York*.[19] It also sought again to curtail commercial regulation by the federal government.[20] Most devastating to federal regulatory authority was the Court's decision in *Adkins v. Children's Hospital* (261 U.S. 525 [1923]). Here, the Court struck down a federal law that established a minimum wage for female workers in the District of Columbia. The *Adkins* opinion became synonymous with the link between laissez-faire economics and constitutional interpretation, an approach that was to reign virtually without exception until 1937.

The doctrinal shift back to the right in the 1920s and 1930s once again was due in large measure to changes in the Court's composition. A series of appointments between 1911 and 1923 resulted in a solidly conservative wing on the Court: Justice Willis Van Devanter in 1911, Justice James McReynolds in 1914, Justice George Sutherland in 1921, and Justice Pierce Butler in 1923.[21] The Court's decision in *Adkins* marked the debut of this bloc, and its continued unified presence ultimately produced the dramatic confrontation between the Hughes Court (1930–41) and President Franklin Roosevelt over the constitutionality of major components of Roosevelt's New Deal.

A familiar pattern developed in the 1930s as President Roosevelt and the "New Deal Congress" set about the task of using federal power to alleviate the conditions associated with the Great Depression. The Congress would pass and the President would sign federal regulatory statutes, largely under the authority of the Commerce Clause. The regulations would then almost inevitably fall victim to constitutional challenges that would wind their way to the Supreme Court. The Court, led by the conservative bloc, would find the legislation unconstitutional. The litany of

decisions overturning activist federal policies is now familiar: *Panama Refining Company v. Ryan* (293 U.S. 388 [1935]), *Railroad Retirement Board v. Alton Railway Company* (295 U.S. 330 [1935]), *Schechter Poultry Corporation v. U.S.* (295 U.S. 495 [1935]), *Louisville Joint Stock Land Bank v. Radford* (295 U.S. 555 [1935]), *U.S. v. Butler* (297 U.S. 1 [1936]), *Carter v. Carter Coal Company* (298 U.S. 238 [1935]), *Ashton v. Cameron County District Court* (298 U.S. 513 [1936]), and others.

Then came "the switch." President Roosevelt, angry about the Court's behavior on New Deal legislation and fresh from a landslide reelection in the fall of 1936, set about the task of attempting to remove the Court as an obstacle to his economic program. Because no vacancies on the Court appeared during his first term and none seemed to be in the immediate offing, Roosevelt chose an alternative approach to reshaping the Court's collective disposition. He proposed a plan that would allow the president to appoint an additional justice to the Court for each sitting justice over the age of seventy. If passed, the plan would immediately give Roosevelt six appointments. Although Congress's reaction was generally hostile, it nevertheless began conducting formal hearings on the matter.

But as President Roosevelt attempted to line up votes for the plan, the Supreme Court abruptly retreated from its conservative position. In March of 1937 the Court announced its decision in *West Coast Hotel Company v. Parrish* (300 U.S. 379 [1937]). Here, the Court once again was faced with the question of whether a state could require a minimum wage. In a stunning reversal, the Court voted 5–4 to uphold a Washington state minimum wage statute. In doing so, the Court explicitly overturned *Adkins* and its progeny.

The same day the Court upheld two major pieces of New Deal legislation: the *Federal Farm Bankruptcy Act*[22] and the *Railway Labor Act*.[23] Two weeks later the Court upheld the federal *Wagner Act*, which guaranteed the right of workers to unionize and established the National Labor Relations Board (NLRB) to ensure that private employers did not engage in unfair labor practices.[24] The Court asserted that, contrary to the long line of precedents discussed above, industries engaged in production can affect commerce to a degree significant enough to warrant federal regulation. As a practical matter, the national government, then, had been given the Court's explicit blessing to increase its regulatory authority.

This fundamental shift in the Court's jurisprudence came from the votes of Justice Owen Roberts and, to a lesser degree, Chief Justice Charles Evans Hughes. The former had been a consistent ally of the Van Devanter / McReynolds / Sutherland / Butler cabal, demonstrated as late as 1936 when Justice Roberts cast the crucial vote to strike down a New York state minimum wage law.[25] The following year he provided the fifth vote for upholding the Washington minimum wage statute in *West Coast Hotel*.

Scholars disagree over the extent to which President Roosevelt intimidated the Court into this retreat. Indeed, by most accounts the Court had already decided *West Coast Hotel*, complete with the shift by Justice Roberts, before Roosevelt announced his "court-packing plan."[26] What is beyond dispute is that in a period

of about two weeks, the Court signaled its nearly complete withdrawal from the role of conservative protector of the free market, *and indirectly the states*, against the perceived excesses of the New Deal and its underlying expansive view of federal power. Indeed, the Court would not again directly strike down legislation as overstepping Congress's commerce power until 1995.[27]

THE CONSTRUCTION OF THE FEDERAL *POLICE POWER*

President Roosevelt and the Congress quickly seized the initiative and passed, among other statutes, the *Fair Labor Standards Act* in June of 1938, which sought to establish federal standards on wages and hours of workers and conditions on child labor. Three years and five Roosevelt appointments later, the Supreme Court declared the Act constitutional in *U.S. v. Darby Lumber Company* (312 U.S. 100 [1941]). Justice Harlan Fiske Stone, with the support of a unanimous Court, delivered the final requiem of sorts for the anti-nationalist mentality that had dominated the Court for so long. In doing so, he struck a devastating blow to the previously distinctive and substantive role of state governments in economic regulation. Dual federalism as a guiding principle was dead. In its place was a broad view of "commerce" that would ultimately allow Congress regulatory access to nearly every element of the nation's economy. The extremely circumscribed regulatory role of the states, of which Justice Day warned in *Hammer*, seemed to have come to pass:

> The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed by the constitution." *Gibbons v. Ogden* (9 Wheat. 1 [1824]). That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. Congress, following its own conception of public policy concerning restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use. . . .Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause [cites omitted]. (312 U.S. 100, 114–15)

Perhaps even more detrimental to state interests in the long-term was the Court's response to the assertion that the Tenth Amendment presented a "constitutional prohibition" on a federal exercise of power of this type:

> Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than a declaration of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might exercise powers not granted, and that the states might not be able to exercise fully their reserved powers. (312 U.S. 100, 123–24)

The next twenty years saw repeated federal forays into new realms of economic regulation that were regularly supported by the Court's new nationalist jurisprudence.[28] The Court required only that the regulation be rational — a standard that was easy to meet. No doubt emboldened by the Court's *carte blanche* acceptance of expansions of federal power across a broad swath of economic contexts, the Congress amended the FLSA in 1966. In the boldest attempt to that date at subjugating state power to national economic authority, the 1966 amendments extended the FLSA's reach to include certain employees of public hospitals and schools. Previously, the statute contained an explicit statement excepting state governments and their employees from coverage.

The state of Maryland challenged the 1966 amendments, asserting that the commerce power, though extensive, was not sufficient to over-ride the necessities of state sovereignty, which included the power to regulate state government interactions with its own employees.[29] The Court disagreed. In *Maryland v. Wirtz* (392 U.S. 183 [1968]), the Court voted 7–2 to uphold the 1966 amendments, arguing that the federal government had met the "rational basis" threshold requirement. As to the notion of state sovereignty, the Court argued

> It is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as "governmental" or "proprietary" in character. As long ago as *Sanitary District v. United States*, 266 U.S. 405 [1925], the Court put to rest the contention that state concerns might constitutionally "outweigh" the importance of an otherwise valid federal statute regulating commerce. (392 U.S. 183, 195–96)

THE MAKING OF THE REPUBLICAN COURT

But as the ink was drying on its opinion in *Wirtz*, the Court was once again approaching a fundamental transition. In his 1968 campaign for the presidency, Richard Nixon had made the Supreme Court an explicit political issue. Charging the Court with a series of violations of constitutional propriety — including "seriously hampering the peace forces in our society and strengthening the criminal forces" (quoted in Kelly, Harbison, and Belz 1991, 678) and eroding the power of state governments (an effect embodied in the Court's line of Commerce Clause decisions since 1937) — Nixon promised to appoint to the High Bench jurists dedicated to the philosophy of "strict construction" and greater respect for the states' position in the federal relationship. Here, Nixon was giving voice to basic Republican and conservative criticisms of the Warren Court's tendency to engage in activist, judicial law-making.

The political intention of this call for strict construction was to reconfigure the Court to be more sympathetic to conservative views. Its practical consequence, however, was a bit more nuanced, affecting not only the Court's response to conservative legal arguments but also the rates of success enjoyed by the states.

During his first term, President Nixon was able to replace four members of the *Wirtz* majority — Chief Justice Earl Warren (replaced by Warren Burger in 1969),

Justice Abe Fortas (replaced by Harry Blackmun in 1971), Justice Hugo Black (replaced by Lewis Powell in 1972), and Justice John Marshall Harlan (replaced by William Rehnquist, also in 1972). These four Nixon appointees were thought to be the vanguard of a movement to the right on the High Court. The subsequent Republican domination of the presidency through the 1970s and 1980s reshaped the Court, affecting its decisional behavior.[30]

With more conservative members, the "Republican Court" has shifted to the right in such issue areas as criminal procedure and equal protection. One result has been the states' increasing rate of success, both as respondents and petitioners actively pursuing their policy interests before the Supreme Court (see Epstein and O'Connor 1988; Kearney and Sheehan 1992). However, reminiscent of the perils of attributing pro-state outcomes to a pro-state jurisprudence for the Court at the turn of the century, it is difficult to tease out whether this greater support for the states by the GOP Court is a consequence of the post-1968 Republican appointees' support for the states *as states*. Rather, it may be that the general conservative ideological orientation of Republican appointees yields a pro-state decisional pattern as a matter of result rather than explicit intent. But as the next chapter will indicate, there is among the post-1968 Republican appointees a strong and independent strain of pro-state jurisprudence.

In 1974 Congress set the stage for a fundamental test of the Republican Court's disposition on federal/state relations. It did so by inflicting another substantial statutory blow to state autonomy. In that year the Congress again amended the FLSA, this time expanding its minimum wage and maximum hour requirements to virtually all employees of state government.

A challenge to the extension was ushered forward by a collection of states in *National League of Cities v. Usery* (426 U.S. 833 [1976]).[31] The reconstituted Court, now presumably more state-friendly because of the four Nixon appointees, seized the opportunity to reassess the Court's 1968 holding in *Wirtz*. The Nixon appointees, joined by Justice Potter Stewart — who had dissented in *Wirtz* — struck down the amendments as violative of the Constitution. Relying in large measure on the Tenth Amendment, then-Associate Justice Rehnquist asserted on behalf of the majority that determinations of wages, hours, and general compensation for their employees are "'functions essential to separate and independent existence,' so that Congress may not abrogate the States' otherwise plenary authority to make them." (426 U.S. 833, 845–46 — quoting *Lane County v. Oregon*, 7 Wall. 71, 76 [1869]). In something of a revival of the principles of dual federalism that guided much of the Court's nineteenth century jurisprudence, the 1976 Court used *National League of Cities* as a vehicle for reinvigorating the Tenth Amendment as a substantive limit on the Congress's commerce power for the first time in forty years. In doing so, the Court explicitly over-ruled the holding in *Wirtz*.

For their part, the dissenters in *National League of Cities* (Justices William Brennan, Byron White, Thurgood Marshall, and John Paul Stevens) bemoaned the

lack of clear standards, which they claimed made the application of the principles espoused in *National League of Cities* impossible:

> The 1966 FLSA amendments are struck down and *Wirtz* is overruled on the basis of the conceptually unworkable essential-function test; and that the test is unworkable is demonstrated by my Brethren's inability to articulate any meaningful distinctions among state-operated railroads, . . . state-operated schools and hospitals, and state-operated police and fire departments. We are left with a catastrophic judicial body blow at Congress's power under the Commerce Clause. (426 U.S. 833, 880 [1976])

The dissent proved prophetic, because a formula for determining "the functions essential to [the] separate and independent existence" of the states was elusive.[32] Perhaps as a consequence, the Court was reluctant to use it to further protect state interests from federal encroachment.[33] Meanwhile, there was great confusion in the federal courts over the application of the precepts announced in *National League of Cities*. Across a variety of cases, federal courts

> held that regulating ambulance services, licensing automobile drivers, operating a municipal airport, performing solid waste disposal, and operating a highway authority are functions protected under *National League of Cities*. At the same time, courts have held that issuance of industrial development bonds, regulation of intrastate natural gas sales, regulation of traffic on public roads, regulation of air transportation, operation of a telephone system, leasing and sale of natural gas, operation of a mental health facility, and provision of in-house domestic services for the aged and handicapped are not entitled to immunity [cites omitted]. (*Garcia v. San Antonio Metropolitan Transit Authority* (469 U.S. 528, 538–39 [1985])

Perhaps inevitably, then, *National League of Cities* was relatively short-lived.

THE SWITCH II

The policy autonomy of the states would again fall victim to another famous "switch." This time, it was Justice Blackmun who reconsidered his voting behavior, specifically in *National League of Cities*.[34] In 1979 the federal Department of Labor issued an interpretation of the Court's holding in *National League of Cities* determining that the San Antonio Metropolitan Transit Authority (SAMTA) was not immune from the regulations of the FLSA. SAMTA subsequently sought a judicial determination that the Department of Labor was in error in its interpretation.[35] During its 1984 term[36] the Court agreed to hear *Garcia v. San Antonio Metropolitan Transit Authority* (469 U.S. 528 [1985]). The case provided a full-blown opportunity to reconsider the Court's holding in *National League of Cities*.[37] Justice Blackmun, writing for a majority composed of himself and the four dissenters in *National League of Cities*, asserted in *Garcia* that

> Our examination of this "function" standard applied in these and other cases [involving federal regulation of state action] over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental

function" is not only unworkable but is also inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled. (469 U.S. 528, 531)

Justice Blackmun suggested in *Garcia* that the states are ultimately best left to secure the protection of their policy autonomy through the political process:

the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power. (469 U.S. 528, 552)

With that opinion, the Court again signaled a retreat from its role as protector of the states from the reach of over-zealous federal regulation.

The dissenters in *Garcia* (Chief Justice Burger and Justices Rehnquist, Powell, and Reagan appointee Sandra Day O'Connor) echoed the sentiments of states' rights advocates. According to Justice Powell in particular, the expansive views of the commerce power and the emasculation of the Tenth Amendment at work in *Garcia* caused the Court to endorse an unconstitutional balance of power at the expense of state sovereignty. As Justice Powell stated, "Despite some genuflecting in the Court's opinion to the concept of federalism, today's decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause" (469 U.S. 528, 560).

But the Court's pro-national interpretations of the Commerce Clause and the Tenth Amendment from 1937 forward, while devastating, were not solely responsible for the erosion of state sovereignty. Advocates of dual-federalist principles could point to a number of factors that had coalesced since the turn of the century to strip the states of their broad policy sovereignty. For example, the dissenters in *Garcia* pointed to structural changes in the nation's political processes that have eroded state influence at the national level and thus undercut the majority's assertion that it is those same processes that serve as the best arena in which states can protect their policy authority:

At one time in our history, the view that the structure of the Federal Government sufficed to protect the States might have had a somewhat more practical, although not a more logical, basis. Professor Wechsler, whose seminal article in 1954 proposed the view adopted by the Court today, predicated his argument on assumptions that simply do not accord with current reality. Professor Wechsler wrote: "National action has . . . always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case." Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," 54 *Colum. L. Rev.* 543, 544 (1954). Not only is the premise of this view clearly at odds with the proliferation of national legislation over the past 30 years, but "a variety of structural and political changes occurring in this century have combined to make Congress particularly insensitive to state and local values." Advisory Commission on Intergovernmental Relations (ACIR),

Regulatory Federalism: Policy, Process, Impact and Reform 50 (1984). The adoption of the Seventeenth Amendment (providing for direct election of Senators), the weakening of political parties on the local level, and the rise of national media, among other things, have made Congress increasingly less representative of state and local interests, and more likely to be responsive to the demands of various national constituencies. Id., at 50-51. (469 U.S. 528, 565 [note 9])

To be sure, the Supreme Court had been a willing participant in the expansion of federal power beyond questions of commerce (see O'Brien 1997, 641). The Court had acceded to the expansion of congressional authority under the Enabling Clause[38] of the Fourteenth Amendment.[39] The Court had also taken an expansive view of Congress's power to tax[40] and spend.[41] Finally, the Court's nationalization of the Bill of Rights had been a source of particularly great concern to the advocates of state power.[42]

The movement toward greater policy protection for the states, thrust forward largely by the Court's holding in *National League of Cities*, seemed to come to a halt, at least temporarily, in *Garcia*. With chagrin about the Court's decision and perhaps with an eye toward the narrowness of the Court's vote margin (5–4) in *Garcia*, Justice O'Connor asserted in dissent:

That the Court shuns the task [to reconcile the fundamental principle of federalism with the effectiveness of the commerce power] today by appealing to the "essence of federalism" can provide scant comfort to those who believe our federal system requires something more than a unitary, centralized government. I would not shirk the duty acknowledged by *National League of Cities* and its progeny, and I share JUSTICE REHNQUIST's belief that this Court will in time again assume its constitutional responsibility. (469 U.S. 528, 589 [1985])

Justice O'Connor's words seemed to prove reassuring to the states. Indeed, to the states, *Garcia* likely appeared to be but a mere bump in the road to a reinvigoration of state policy purview. There remained on the Court a pro-state core of four votes; the states continued to enjoy great rates of success before the High Bench; three justices in the *Garcia* majority were seventy-five years old or older; and recent electoral politics promised a continued Republican lock on the White House. Rationally, then, the states could continue to resort to the Court in pursuit of policy objectives at relatively great rates. And as we shall demonstrate in the following chapters, they did just that.

NOTES

1. More thorough examinations of the Court's role in the development of American federalism are located in other places. See, for example, Kelly, Harbison, and Belz 1991 and Schwartz 1993. The authors rely extensively here on these works, along with *The Oxford Companion to the Supreme Court of the United States* 1992; Epstein et al. 1994; Biskupic and Witt 1997; and O'Brien 1997.

2. The power of a polity to regulate, within constitutional limits, for the welfare, prosperity, health, and morals of its citizens.

3. 29 U.S.C. @ 201–19.

4. "The Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states" (*U.S. Constitution*, Article I, Section 8, Clause 3).

5. See, for example, *Gibbons v. Ogden* (9 Wheat. 1 [1824]); *Worcester v. Georgia* (6 Pet. 515 [1832]); *New York v. Miln* (11 Pet. 102 [1837]); *Cooley v. Board of Wardens of Port of Philadelphia* (12 How. 299 [1852]); *Texas v. White* (7 Wall. 700 [1869]); and *Lane County v. Oregon* (7 Wall. 71 [1869]).

6. During the span of the Fuller Court, there was an almost complete change in the Court's composition. Indeed, Justice John Marshall Harlan (1877–1911) was the only member of the preceding Waite Court who was not replaced during Fuller's tenure.

7. This was the title of an 1891 address to Yale Law School by Justice Brewer.

8. The Act created the first federal regulatory body — the Interstate Commerce Commission — which was charged with regulating interstate railroads.

9. The Act prohibited the formation of monopolies and trusts by businesses involved in interstate commerce. The Act gave the federal government the power to prosecute such collusion.

10. See, for example, *Louisville, New Orleans and Texas Railway Company v. Mississippi* (163 U.S. 537 [1896]); *The Employers' Liability Cases* (207 U.S. 463 [1908]); and *Adair v. U.S.* (208 U.S. 161 [1908]). But see *Wabash, St. Louis, and Pacific Railway Company v. Illinois* (118 U.S. 557 [1886]).

11. See, for example, *Pollock v. Farmers' Loan & Trust Company* (157 U.S. 429 [1895]); and *Fairbank v. U.S.* (181 U.S. 283 [1901]). But see *McCray v. U.S.* (195 U.S. 27 [1904]).

12. See, for example, *James v. Bowman* (190 U.S. 127 [1903]).

13. In the 102 years of its existence prior to the Fuller Court, the Court struck down only eighteen acts of Congress. The Fuller Court's exercises of judicial review against Congress included *Monongahela Navigation Company v. U.S.* (148 U.S. 312 [1893]); *Pollock v. Farmers' Loan & Trust Company* (157 U.S. 429 [1895]); *Wong Wing v. U.S.* (163 U.S. 228 [1896]); *Kirby v. U.S.* (174 U.S. 47 [1899]); *Jones v. Meehan* (175 U.S. 1 [1899]); *Fairbank v. U.S.* (181 U.S. 283 [1901]); *James v. Bowman* (190 U.S. 127 [1903]); *Matter of Heff* (197 U.S. 488 [1905]); *Rassmussen v. U.S.* (197 U.S. 516 [1905]); *Hodges v. U.S.* (203 U.S. 1 [1906]); *The Employers' Liability Cases* (207 U.S. 463 [1908]); *Adair v. U.S.* (208 U.S. 161 [1908]); *Keller v. U.S.* (213 U.S. 138 [1909]); and *U.S. v. Evans* (213 U.S. 297 [1909]). Taken from Epstein et al. 1994, p. 96.

14. "No state shall . . . deprive any person of life, liberty, or property, without due process of law" (*U.S. Constitution*, Amendment XIV, Section 1).

15. See, for example, *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota* (134 U.S. 418 [1890]); *Reagan v. Farmers' Loan and Trust Company* (154 U.S. 362 [1894]); *Allgeyer v. Louisiana* (165 U.S. 578 [1897]); *Chicago, Burlington & Quincy Railroad Company v. Chicago* (166 U.S. 226 [1897]); and *Smyth v. Ames* (169 U.S. 466 [1898]).

16. This pattern of decision was initially signaled during the Fuller Court; see *Champion v. Ames* (188 U.S. 321 [1903]) and *McCray v. U.S.* (195 U.S. 27 [1904]).

17. The "Progress Era" (ca. 1890–1920) was a broad scale reform impulse that arose in response to changes in American society occasioned by massive immigration and industrialization. It had a diffuse agenda of reform comprised of four broad categories — business regulation, political reform, social justice, and moral reform (see Chambers 1980). The development of a national police power fits nicely into the last two categories.

18. But it did so silently. Justice Joseph McKenna failed to mention *Lochner* in his opinion for the Court in *Bunting*.

19. See, for example, *Truax v. Corrigan* (257 U.S. 312 [1921]); *Wolff Packing Company v. Kansas Court of Industrial Relations* (262 U.S. 522 [1923]); *Tyson Brothers v. Banton* (273 U.S. 418 [1927]); *Ribnik v. McBride* (277 U.S. 350 [1928]); and *Williams v. Standard Oil Company* (278 U.S. 235 [1929]).

20. See, for example, *U.S. v. U.S. Steel* (251 U.S. 417 [1920]) and *Bailey v. Drexel Furniture Company* (259 U.S. 20 [1922]).

21. A group that Justice Felix Frankfurter would derisively refer to as "the four horsemen of the Apocalypse."

22. *Wright v. Vinton Branch* (300 U.S. 440 [1937]).

23. *Virginia Railway Company v. System Federation* (300 U.S. 515 [1937]).

24. *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (301 U.S. 1 [1937]).

25. *Morehead v. New York ex rel. Tipaldo* (298 U.S. 587 [1936]).

26. See Leuchtenburg 1995. As Schwartz 1993 asserts:

> It misconceives the nature of the Supreme Court and its manner of operation as a judicial tribunal to assume that the 1937 change in jurisprudence was solely the result of the Court-packing plan. The 1937 reversal reflected changes in legal ideology common to the entire legal profession. The extreme individualistic philosophy upon which the Justices had been nurtured had been shaken to its foundation. If laissez-faire jurisprudence gave way to judicial pragmatism, it simply reflected a similar movement that had taken place around the country as a whole . . . For the Supreme Court, Canute-like, to attempt to hold back indefinitely the waves of ever-increasing government authority was to set itself an impossible task. (pp. 234–35)

27. *U.S. v. Lopez* (514 U.S. 549 [1995]).

28. See, for example, *Wickard v. Filburn* (317 U.S. 111 [1942]); *U.S. v. Baltimore & Ohio Railroad Company* (317 U.S. 111 [1948]); *United States v. Women's Sportswear Manufacturing Association* (336 U.S. 460 [1949]); *Securities & Exchange Commission v. Ralston Purina Company* (346 U.S. 119 [1953]); *Radovich v. National Football League* (352 U.S. 445 [1957]); *Federal Trade Commission v. Mandel Brothers* (359 U.S. 385 [1959]); *Heart of Atlanta Motel, Inc. v. U.S.* (379 U.S. 241 [1964]); and *Katzenbach v. McClung* (379 U.S. 294 [1964]).

29. A brief *amicus curiae* in support of Maryland's argument was filed by the state of Texas. Signing on to the Texas brief were twenty-six other states: Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Vermont, Virginia, and Wyoming.

30. Of course Jimmy Carter occupied the White House from 1977 to 1980, breaking the Republican string. He had no opportunity, however, to make an appointment to the Supreme Court.

31. California was the lead party to the case, and was joined by nineteen other states: Delaware, Arizona, Indiana, Iowa, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, and Wyoming. In addition, a brief *amicus curiae* in support of striking the FLSA amendments was signed by Virginia and New York. Interestingly, an *amicus* brief in support of the amendments was submitted by Alabama, Colorado, Michigan, and Minnesota.

32. See Court opinion in *Garcia v. San Antonio Metropolitan Transit Authority* (469 U.S. 528 [1985]); alternatively, though, see *Hodel v. Virginia Surface Mining* (452 U.S. 264, 287–88 [1981]).

33. See, for example, *Hodel v. Virginia Surface Mining* (452 U.S. 264 [1981]); *FERC v. Mississippi* (456 U.S. 742 [1982]); *United Transportation Union v. Long Island Railroad Company* (455 U.S. 742 [1982]); and *Equal Employment Opportunities Commission v. Wyoming* (460 U.S. 222 [1983]). See O'Brien 1997, 640–45.

34. Justice Blackmun had, in essence, telegraphed that such a reconsideration of his support of the Court's holding in *National League of Cities* may be in the offing. In his concurrence in the case, Justice Blackmun noted that he was "not untroubled by certain possible implications of the Court's decision" (426 U.S. 833, 865), some of which, he noted, were raised in the dissent.

35. A brief *amicus curiae* urging the Court to overturn the Department of Labor's interpretation was filed by the State of California, which was joined by twenty-three other states: Massachusetts, Connecticut, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, Pennsylvania, South Carolina, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

36. Between the decision in *National League of Cities* (1976) and the 1984 term, there had only been one change in the Court's membership. Justice Sandra Day O'Connor, who would ultimately prove to be a strong advocate of state policy authority (see chapters 3 and 7), replaced Justice Potter Stewart, who was a member of the *National League of Cities* majority.

37. After initial oral arguments on the specific issues involved in *Garcia* (discussed in text below), the Court requested that the parties brief and argue "Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, should be reconsidered?"

38. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." (*U.S. Constitution*, Amendment XIV, Section 5)

39. See, for example, *City of Rome v. United States* (446 U.S. 156 [1980]) and *EEOC v. Wyoming* (460 U.S. 226 [1983]).

40. See, for example, *Graves v. New York ex rel. O'Keefe* (306 U.S. 466 [1939]); *Sunshine Anthracite Coal Company v. Adkins* (310 U.S. 381 [1940]); and *New York v. United States* (326 U.S. 572 [1946]).

41. See, for example, *U.S. v. Butler* (297 U.S. 1 [1936]); *Steward Machine Co. v. Davis* (301 U.S. 548 [1937]); *Helvering v. Davis* (301 U.S. 619 [1937]); and *Fullilove v. Klutznick* (448 U.S. 448 [1980]).

42. See, for example, *Fiske v. Kansas* (274 U.S. 380 [1927]); *Near v. Minnesota* (283 U.S. 697 [1931]); *Powell v. Alabama* (287 U.S. 45 [1932]); *Cantwell v. Connecticut* (310 U.S. 296 [1940]); *Everson v. Board of Education* (330 U.S. 1 [1947]); *Wolf v. Colorado* (338 U.S. 25 [1949]); *NAACP v. Alabama* (357 U.S. 449 [1958]); *Mapp v. Ohio* (367 U.S. 643 [1961]); *Robinson v. California* (370 U.S. 660 [1962]); *Gideon v. Wainwright* (372 U.S. 335 [1963]); *Malloy v. Hogan* (378 U.S. 1 [1964]); and *Duncan v. Louisiana* (391 U.S. 145 [1968]). Taken from Ducat 1996, 577–78.

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3

A Federalist Jurisprudence?

In a 1969 memo, an aide to then-President Richard Nixon wrote: "Through his appointments, a president has the opportunity to influence the course of national affairs for a quarter of a century after he leaves office. It is necessary to remember that the decision as to who will make the [judicial] decisions affects what decisions will be made. . . . [The president] may insist that some evidence exists as to the attitude of the prospective judge toward the *role of the court.*" Then-Deputy Attorney General Richard G. Kliendienst wrote back, "RN agrees — Have this analysis in mind in making judicial nominations" (quoted in Biskupic 1995, emphasis added).

One of the trademarks of the Nixon Administration was its unhesitant, explicit attempt to fill the federal bench with judges reflective of the president's ideological stripe. The Nixon Administration sought to pack the federal courts in general, and the U.S. Supreme Court in particular, with conservative judges who were narrow in their reading of the Bill of Rights and sympathetic to the policy authority of state governments. Subsequent Republican Administrations followed suit in this overt effort to change the ideological temperament of the Court. And they have had an effect.

Without a doubt, today's Supreme Court is more supportive of the states' interests than any Court since the New Deal. Recent "victories" for state interests such as *Gregory v. Ashcroft* (501 U.S. 452 [1991]), *New York v. U.S.* (504 U.S. 144 [1992]), *U.S. v. Lopez* (514 U.S. 549 [1995]), *Seminole Tribe of Florida v. Florida* (116 S.Ct. 1114 [1996]), and *Printz v. U.S.* (65 U.S.L.W. 4731 [1997]) have engendered discussions of a "New Era" for the states before the Court. This era of unprecedented success has coincided with the increased domination of the Court by post-1968 Republican appointees.

For example, Kearney and Sheehan report that the rate of success of state and local governments "leaped from 36.7% during the Warren Court to more than 61%

during the Burger/Rehnquist Court, making them the second-best performing category of litigants."[1] (Kearney and Sheehan 1992, 1013). In terms of the propensities of individual justices, these authors find that:

> From 1953 until the appointment of Chief Justice Burger in 1969, no justice voted for the SLGs [State and Local Governments] in more than 60% of their appearances before the Court. Since Burger's appointment, six justices have been strong supporters of state and local positions: Burger (70%), Powell (69%), Rehnquist (79%), O'Connor (71%), Scalia (69%), and Kennedy (74%). This indicates that some justices are more partisan toward the SLGs than others, and that the strongest partisans have been the appointees of Presidents Nixon and Reagan. (Kearney and Sheehan 1992, 1014)

But there has always been some uncertainty as to whether this greater support for the states is a consequence of the post-1968 Republican appointees' commitment to federalism, or an ideologically driven and "result oriented decision-making process in which the outcome desired by the majority is readily supported by a federalism rationale" (Ross 1985, 724). Indeed, while ideological conservatism and relatively strong support for the principle of dual federalism are often (if not usually) discussed as two sides of the same coin, it may well be that the broad ideological dimensions that generally structure decision-making in the Court do not fully correlate, much less coincide, with the justices' perceptions of the place of the states in the constitutional system.

This uncertainty is not without consequence. Simply put, whether these decisions are driven by ideological conservatism or a conscious commitment to the "essence of federalism"[2] has a great bearing on the scope of state powers and their role as managers of public policy. If ideological disposition drives the decision, this redounds to the advantage of state authority when conservative jurisprudence leads to the constraining of expansionist federal policies. But state policies can also fall victim to these same conservative views because they generally target government power *per se*. On the other hand, if the decision turns on a recognition of the states' legitimate activities within the constitutional system, the Court at once limits federal authority *and* creates a space of protection for state policy autonomy.[3]

Further, the consequences of the justices' views regarding the ground upon which cases will be decided can extend well beyond the immediate result of whether the state interest wins or loses. By determining whether considerations of the parameters of the federal relationship or government power *per se* are at issue, the justices can expand or contract the precedential impact of their rulings (see, for example, Ulmer 1982; McGuire and Palmer 1995). If a decision producing a "victory" for the state does not rest upon a consideration of the states' legitimate activities, it is of meager precedential value to the advocates of state authority.

To give a concrete example, consider the Court's decision in *Oklahoma Tax Commission v. Jefferson Van Lines* (115 S.Ct 1331 [1995]). There, the Court ruled in favor of a state sales tax on interstate bus tickets. Justice David Souter's opinion for the seven member majority found that the tax did bear a "substantial nexus" to

state activity. The tax was therefore preserved as a legitimate exercise of state power. Justices Antonin Scalia and Clarence Thomas concurred in the Court's result, but argued that the matter of the propriety of a state tax on a particular function is best left to the determination of Congress. Because the Congress had not acted, the Court should uphold the tax.

This concurrence indicates quite well the perils of attributing a pro-state vote to a pro-state view. In this instance, the state's interest attracted the votes of Justices Scalia and Thomas because of their conservative perceptions of judicial role rather than a commitment to the states' governing authority. Indeed, had Justice Scalia's concurrence been the opinion of the Court, then presumably *Oklahoma Tax Commission* would have yielded very limited protection for the states' authority to tax the proceeds of interstate commerce, even when that tax is "fairly related to the services provided by a state" (*Complete Auto Transit v. Brady* 430 U.S. 274, 279 [1977]).

Rarely (if ever), though, is the Court presented with a case that provides an unfettered opportunity to assess the breadth and depth of state government authority within the federal relationship. Rather, the question of state power is almost always a component of a larger, more complex dispute, one that is bound up with issues bearing upon each justice's ideological temperament and notions of judicial role. Therefore, to more fully understand the nature of the states' fate in Court, what is needed is a measure of the justices' support for the states that is as free as possible from the convoluting effects of ideology.

In this chapter we design just such a measure. We then test it by examining the voting behavior of members of the Rehnquist Court in cases in which at least one state was a litigant. We find that our measure of the individual justices' support for federalism has an independent and significant effect on their decisions.[4]

We begin by developing our measure of the individual justice's support for federalism. In this section we briefly present the methodology we employ for its construction and describe in broad strokes the variation in the justices' scores. We find that, as a group, the post-1968 appointees of Republican presidents are more supportive of the federal principle. At the same time, however, state success is not attributable solely to them. Several justices whose tenure began during the Warren Court era or earlier have measures of support for the states greater than some post-1968 Republican appointees. In the following section we turn our attention to a systematic test of the measure's explanatory power. Here, we include the measure in a model explaining the decisions of Rehnquist Court justices; we find that even in the context of multivariate controls, the measure has a statistically secure and theoretically consistent effect. We conclude by taking note of the effect of the Republican appointments on the improved state fortunes in the Supreme Court.

A MEASURE OF SUPPORT FOR THE "ESSENCE OF FEDERALISM"

Guttman scaling and factor analysis, as instruments for examining Supreme Court justices' decision-making behavior, have a long and successful history in judicial politics research (e.g., Ulmer 1960; Schubert 1965; Rohde and Spaeth

1976; Segal and Spaeth 1993). We use a variant of those methodologies here. Our intentions are (1) to construct as comprehensive a measure as possible of each individual justice's level of support for state power and autonomy within the federal system, and (2) to ensure that measure is essentially free of the justice's ideological disposition. Otherwise, it is impossible to disentangle ideology's effect from the justice's commitment to the principle that "The true 'essence' of federalism is that the States *as States* have legitimate interests which the National Government is bound to respect even though its laws are supreme" (Justice O'Connor in dissent in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 581 [1985] [emphasis in original]).

Since attitude is "an organization of beliefs," Rohde and Spaeth (1976) argue that measuring Supreme Court justices' attitudes through cumulatively scaling their votes requires the identification of not only the object of their attitude (e.g., labor unions, criminal defendants, or state governments) but also the legal setting or issue in which that object is encountered. Quite simply, justices may cast their votes in response to a particular type of litigant in markedly different ways depending upon the legal setting in which the litigant is found (i.e., the set(s) of issues in dispute in a given case). Thus, a justice might well have a variety of attitudes toward the states depending upon the particular situation.[5] To derive a comprehensive measure of the justices' attitudes toward the states, therefore, we must scale their votes regarding the states across as wide a range of issues as possible. At the same time, since we are interested in determining whether the appointees of the post-1968 Republican administrations are generally "different"in their levels of support for the states as litigants than were their Warren Court predecessors, we must scale the votes of post-1968 Court appointees as well as their predecessors.[6]

Accordingly, we constructed cumulative scales[7] of the justices' votes in all full opinion cases decided by a complete Court, where a state government was a litigant.[8] Therefore, the object of the attitude each scale measures is always state government.[9] Clearly, these are cases where at least one state has a intelligible stake in the outcome.[10] To identify the particular legal setting for each scale, we utilized the issue codes contained in the highly reliable *U.S. Supreme Court Judicial Data Base* (ICPSR #9422). Naturally, given the condition that a state is a litigant, not every issue area contained enough decisions or enough variation in the justices' voting alignments to be scalable, while in other issue areas the decisions contained too many "nonscale responses" to form an acceptable cumulative scale.[11] All in all, we were able to construct fourteen scales for the Warren Court, eighteen scales for the Burger Court, and thirteen scales for the Rehnquist Court.

It is worth discussing our decision to include cases involving criminal procedure. A substantial minority of our scales deal with criminal procedure and due process questions, and we recognize that these cases do not involve federalism questions as conventionally defined. However, since criminal justice is a policy area traditionally belonging to the states, and since approximately 90 percent of all criminal prosecutions occur at the state level, the Court's decisions in this area can

have a profound effect on state actions and policies.

Equating criminal procedure and due process with other issue areas touching on state policy authority seems to be a view shared by the Court:

> Under our federal system, the "'States possess primary authority for defining and enforcing the criminal law.'" . . . "Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States". . . . When Congress criminalizes conduct already denounced as criminal by the States, it effects a "'change in the sensitive relation between federal and state criminal jurisdiction.'" (*U.S. v. Lopez*, 115 S.Ct. 1624, 1631 [note three] [1995]) (cites omitted)

Two additional points are worth mentioning. First, the Supreme Court Counsel for NAAG's Supreme Court Project reports that state governments are of the view that coalescing as merits *amici* is particularly effective when the brief makes an argument regarding the breadth of ramifications of the Court's decision on state policies and governance (author interview). The average number of states present on a merits *amicus* brief in criminal justice cases is not statistically different from their average presence on briefs in federalism cases (mean number of states is 10.6 and 11.3 respectively). Therefore, states seem to be perceiving and subsequently treating criminal procedure cases in much the same way they respond to cases in other areas touching on state government authority.

Second, we extracted the criminal procedure and due process scales and recomputed the measure to determine whether the dimensional analysis captured some judicial attitude more unique to these issues than state powers. The two measures correlate at nearly .7, and the use of the modified measure in the multivariate analysis that follows had no appreciable effect on the results. Therefore, including cases involving criminal procedure does not seem to alter the validity of our measure. Ultimately, then, it seems appropriate to include these scales in deriving our measure of the justices' support for the states.[12]

Once the scales were constructed, we computed each justice's rank order on each scale (representing each justice's level of support for the states in various issue areas).[13] The rank orders, as well as a measure of each justice's ideology,[14] then were used to generate the correlation matrix to conduct a factor analysis (using the principal factor method and varimax rotation).[15] The factor analysis collapsed the scale scores into a smaller number of factors or dimensions. For both the Burger and Rehnquist Courts, only two factors emerged, and in both cases ideology had an especially high loading on only a single dimension. Three factors initially emerged in the Warren Court, with ideology having a high loading on only one of them. Of the remaining two factors, one seems to be comprised largely of economics scales rather than state prerogatives *per se*. Thus, like the Burger and Rehnquist Courts, two of the factors can be interpreted as latent forces reflecting the justices' ideology on the one hand and support for the states within the federal relationship on the other (see Table 3.1 for the factor loadings for each Court).

Table 3.1
Results of Principal Factor Analysis: Warren, Burger, and Rehnquist Court Justices' Scale Scores

	Rotated Factor Loadings WARREN COURT		
Variables (see Appendix B-1)	**Support for Federalism**	**State Economic Issues**	**Conservative - Liberal Ideology**
1	0.733	-0.431	-0.517
2	0.482	-0.435	-0.582
3	0.099	0.932	-0.012
4	0.814	0.42	-0.225
5	0.734	-0.66	-0.114
6	0.700	-0.156	-0.659
7	0.818	-0.51	-0.218
8	-0.205	-0.957	-0.029
9	0.698	-0.194	-0.163
10	0.915	-0.29	-0.136
11	0.891	0.08	0.146
12	0.978	-0.117	-0.13
13	0.898	0.024	-0.388
14	0.815	-0.332	-0.441
Ideology	-0.054	-0.152	0.973
Cumulative Proportion of Variance Explained	0.633	0.801	0.906

	BURGER COURT	
Variables (see Appendix B-1)	**Support for Federalism**	**Conservative - Liberal Ideology**
1	-0.89	-0.385
2	-0.753	0.613
3	-0.691	0.717

Table 3.1 (cont'd)

4	-0.407	0.901
5	-0.578	0.811
6	-0.661	0.686
7	-0.661	0.686
8	-0.423	0.841
9	0.661	-0.686
10	-0.898	0.432
11	-0.682	0.655
12	-0.405	0.884
13	-0.322	0.883
14	-0.689	0.688
15	-0.941	0.300
16	-0.97	0.116
17	-0.468	0.870
18	-0.963	0.103
Ideology	0.43	-0.895
Cumulative Proportion of Variance Explained	0.809	0.945

REHNQUIST COURT

Variables (see Appendix B-1)	**Support for Federalism**	**Conservative - Liberal Ideology**
1	-0.988	0.150
2	-0.730	0.678
3	-0.729	0.595
4	-0.371	0.921
5	-0.810	0.526
6	-0.864	0.485

Table 3.1 (cont'd)

7	-0.544	0.836
8	-0.729	0.595
9	-0.544	0.836
10	0.549	0.817
11	-0.999	0.010
12	0.252	-0.933
13	0.900	-0.020
Ideology	-0.120	-0.915
Cumulative Proportion of Variance Explained	0.774	0.944

The basic assumption of factor analysis is that there is some underlying set of forces that is responsible for the covariation among the observed variables (Kim and Mueller 1978). Therefore, each justice's commitment to the federal principle can be separated from his or her ideology by computing the scores for the factor on which ideology does not load. These factor scores, in turn, serve as our measure of the justices' support for the "essence of federalism."[16] This methodology resulted in scores for twenty-three justices of the Warren, Burger, and Rehnquist Courts. For those justices whose tenure extended across Courts, we used the mean of their factor scores to compute their overall measure of support for the states. The scores are displayed in Table 3.2.

Our measure of the individual justice's level of support for state powers is largely in line with the view that Republican appointees since 1968 have played a substantial role in the increased level of success enjoyed by the states. As a group, these justices have appreciably higher (i.e., positive and greater state support) scores than their counterparts who came to the Court earlier. The mean score for the post-1968 GOP appointments (Chief Justice Warren Burger and Justices Lewis Powell, William Rehnquist, Harry Blackmun, John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, David Souter, and Clarence Thomas) is .29, whereas the mean score for those justices who took the bench prior to the Nixon administration is -.44. Although the difference in the mean score of the two groups is not significant at conventional levels (.73; $t = 1.22$), neither is it so removed from statistical security that it can be dismissed out of hand.

At the same time, it is reassuring to note that those justices who are conventionally perceived as having a strong affinity for protecting the states' place in the

Table 3.2
Warren, Burger, and Rehnquist Court Justices' Support for the Federal Relationship

Justice	Support for the Federal Relationship	Ideology (Segal et al., 1995)
Fortas	-4.73	1.00
Whittaker	-2.48	0.00
Douglas	-1.38	0.46
Warren	-0.96	0.50
Marshall	-0.85	1.00
Blackmun	-0.76	-0.77
Scalia	-0.60	-1.00
Goldberg	-0.58	0.50
Brennan	-0.46	1.00
Stevens	-0.40	-0.50
Thomas	-0.05	-0.68
Souter	0.16	-0.34
Frankfurter	0.18	0.33
Powell	0.30	-0.67
Stewart	0.47	0.50
Clark	0.76	0.00
Burger	0.76	-0.77
Kennedy	0.81	-0.27
White	1.04	0.00
Black	1.27	0.75
Rehnquist	1.31	-0.91
O'Connor	1.39	-0.17
Harlan	1.94	0.75

constitutional system have scores demonstrative of this perception's veracity. Thus, for example, on the current Court, Chief Justice Rehnquist and Justice O'Connor in particular have made no secret of their advocacy for the states within the federal relationship.[17] And both justices' scores are by far the most supportive of federalism.

Finally, our measure of the justices' support for the "essence of federalism" points out that the justices' votes for or against the states are not driven solely by their ideological disposition. The measure we develop correlates with the Segal and colleagues (1995) measure of the justices' ideology at only .27. Thus, the states had supporters on the High Bench (e.g., Justices Hugo Black, John Marshall Harlan, and Byron White) before the Court became decidedly more conservative in the 1970s and 1980s. In terms of state fortunes, what was crucial about the Republican appointments during those two decades is that they elevated enough jurists to the Court who were committed to protecting state powers (and who also happened to be conservative) that the states began to enjoy majority votes more regularly.[18]

"PREDICTING" THE JUSTICES' VOTES

One of the most common and damning criticisms of measures, such as the one we have developed, is that the same votes that are used to construct the measure are all too often used to gauge its predictive accuracy. Thus, the tests become tautological (see, for example, Segal and Spaeth 1993). To guard against this failing, we adopt the procedure suggested by Segal and Spaeth (1993). That is, we use the "holdover" justices'[19] scale scores, constructed from Burger Court votes, to "predict" their support for the states in Rehnquist Court decisions. Assuming the justices' attitudes are relatively stable, if our measure has a significant and theoretically consistent effect on the "holdover" justices' votes, then we will have provided evidence that our measure is a useful instrument for predicting the Rehnquist Court's support for the states.

It is well known that an array of disparate forces affect an individual justice's decision (see, for example, Baum 1996). Along with attitudes, forces such as judicial role, the facts presented by a given case, and exogenous effects like public opinion or interest group pressures all may bear upon a justice's vote. A fully specified model is beyond the scope of this (and perhaps any) analysis, but three forces can be identified that are of particular relevance to the litigation fortunes of the states.

First, it is beyond dispute that the justices' votes are affected by their ideological attitudes, values, and policy goals (see, generally, Segal and Spaeth 1993). As noted above, there is a positive — though not terribly strong — correlation between a justice's level of conservatism and her/his propensity to be supportive of state interests; and it has generally been shown that as the Court has become more conservative, state fortunes have improved (Epstein and O'Connor 1988; Kearney and Sheehan 1992). Thus, all things being equal, more conservative jurists should be more supportive of the states.

Second, in practical terms the states are classic "repeat players" (Galanter 1974). They possess relatively great financial resources, are relatively frequent Court participants, and are equipped with professional and expert legal counsel. Thus, the states should enjoy a clear advantage when squaring off against most other parties, who are presumably less well endowed.[20]

Finally, there is one litigant against whom the states' legal resources pale — the national government. It has an enormous financial capacity, is the Court's most frequent single litigator, and, like the states, has access to expert legal representation. Thus, studies have shown that the national government is phenomenally successful in Court, irrespective of time period, issue area, or the litigant it faces (Sheehan, Mishler, and Songer 1992). Consequently, any given justice should be appreciably less likely to vote for a state when its interests directly collide with those of the national government.

We include these forces along with our measure of the justice's support for the states in a model explaining the votes of the "holdover" Rehnquist Court justices in cases where a state is a litigant. Our dichotomous dependant variable is the vote of the individual justice (N = 1739), coded 1 if in support of the state, 0 otherwise. As regressors we include our measure of the justice's commitment to the federal relationship (higher scores indicate greater support), the Segal and colleagues (1995) measure of ideology (we reverse coded the measure, so higher scores indicate more conservative values), and dummy variables for whether or not the state's position is opposed by a private party[21] or the national government. With the exception of the variable measuring the presence of the national government, we expect each of these forces to be positively related to the justice's vote for the states. The results of the estimation are displayed in Table 3.3.

Quite simply, the model performs admirably. It correctly predicts 71.9 percent of the justices' votes, a 40.4 percent improvement in predictive accuracy. Every variable is signed in a theoretically consistent direction, and with the exception of the presence of the federal government as the states' opponent, attains conventional levels of statistical significance. Most importantly, our measure of the individual justice's commitment to preserving the prerogatives of the states shines through.

Figure 3.1 graphically displays the measure's effect on an individual justice's vote. Here, we allow the measure to vary across its empirical range (i.e., -.901 through 2.98) while holding the other variables constant at their means. Patently, as a justice becomes more supportive of the states in the federal relationship, he or she is appreciably more likely to vote for a state. In fact, the likelihood of the justice with the lowest federalism score (viz., Justice Marshall) siding with a state litigant is only .441. This stands in sharp contrast to Justice O'Connor's probability of voting for a state. With the most supportive federalism score (2.98), the likelihood that she will support the states (even controlling for ideology and the nature of the state's opposition) is a considerable .894.

It bears mentioning that the justices' ideological dispositions have an independent and statistically measurable effect on their votes for the states as well.

Table 3.3
Logit Results of Rehnquist Court Justices' Support for the States

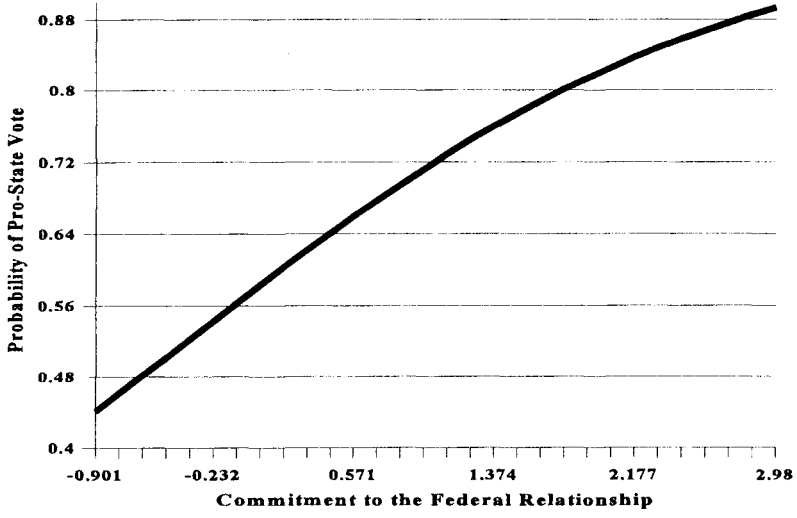
Variable	Coefficient	T-Statistic
Constant	-0.87*	-9.43
Opposed by the Federal Government	-0.05	-0.19
Opposed by a Private Party	0.25*	2.27
Segal et al. Ideology (Reverse Coded)	0.60*	6.35
Support for the Federal Relationship	0.61*	13.95

Note: Dependant Variable = whether the individual justice votes for the state litigant (1 = yes, 0 otherwise); N = 1739; $Chi^2 = 346.63$; $p > Chi^2 = 0.00$; Modal = 53.1; Percent Correctly Classified = 71.9; MLE Reduction in Error = 40.1%; * Significant at 0.01.

Now, in a multivariate context such as this, it can be difficult to grasp the substantive effects of combinations of forces on each justice's likelihood of supporting a state. One solution is to evaluate the probability of a justice voting for the state litigant with his or her measures of ideology and support for the federal relationship set at substantively interesting values,[22] while holding the remaining variables constant at their means. We made use of this tack; the results are displayed in Table 3.4.

As the data in Table 3.4 clearly indicate, more conservative jurists are more likely to support the states. At the same time, however, the fitted values show that our measure's effect on a justice's vote bores with a considerably larger auger. Thus, for instance, the probability that a very conservative justice with a below average respect for the federal relationship will support the state litigant is only .59. On the other hand, the probability that a more liberal justice with a profound commitment to the "essence of federalism" will side with a state is .752. Of course, the best possible condition for a state is to have its case decided by a justice committed to protecting state interests and prerogatives who also happens to be conservative. The likelihood that this type of justice will vote for the state is .878. It is little wonder, then, that the states' rate of success has improved substantially

Figure 3.1
Estimated Probabilities of Voting for a State Litigant



in the later Burger and Rehnquist Courts, as more justices of this type occupy the High Bench.

The effect of ideology also helps to expain, for example, Justice Scalia's generally pro-state record despite his relatively lower score (see Table 3.2). Of course, Justice Scalia is not a great antagonist to the power of the states. His placement on the scale, though lower than other members of the current Court, nevertheless approximates the mean produced over the full time period of analysis.

Table 3.4
Estimated Probabilities of a Rehnquist Court Justice Finding for a State Litigant

		Ideology	
Support for the Federal Relationship	**-Standard Deviation**	**Mean**	**+Standard Deviation**
-Standard Deviation	0.406	0.498	0.598
Mean	0.604	0.689	0.763
+Standard Deviation	0.752	0.815	0.878

But to get a better sense of Justice Scalia's behavior, we ran out-of-sample estimates on his voting behavior. That is, we used the coefficient estimates we obtained from our analysis of the "holdover" Rehnquist Court justices to calculate the probability of Justice Scalia voting in support of the state litigant. To put it more concretely, we inserted Scalia's state support and ideology scores into the parameter estimates from the logit analysis of the Rehnquist Court. We found that the probability of Justice Scalia supporting the state litigant is 58.8 percent. Thus, it appears that his voting pattern is generally supportive of the states and is particularly attributable to his strong conservative views.

CONCLUSION

This chapter has provided evidence that Republican appointees to the Supreme Court since 1968 have been primarily responsible for the Court's increasingly state-friendly behavior over the last three decades. We have provided a method for isolating the influence of support for the "essence of federalism" which is *distinctive from* a justice's more general ideological disposition.

The results presented here establish that a number of Republican appointees, led by Justice O'Connor and Chief Justice Rehnquist, have exhibited a pattern of decidedly pro-state behavior in cases in which state governments are parties. To the extent that Republican presidents appointed justices with an eye toward the arguments of states's rights advocates, they have been remarkably successful in producing a Court that has, in recent years, sought to reinvigorate the Tenth Amendment, signal limits on Congress's authority under the Commerce Clause, and expanded the scope of protection for states against suit. With its most recent set of decisions, the Rehnquist Court appears to be firmly establishing itself as a pro-state institution.

Such a friendly environment is largely wasted, however, if the potential beneficiaries are unable to take advantage of it. In the next chapter we examine the ways in which state governments have attempted to enhance their capacity to litigate in federal court.

NOTES

1. Only the federal government's rate of success was higher.

2. In response to the Court's opinion in *Garcia v. San Antonio Metropolitan Transit Authority* (469 U.S. 528 [1985]), Justice Sandra Day O'Connor asserts in dissent that the "essence" of federalism is that "the States as States have legitimate interests which the National Government is bound to respect even though its laws are supreme" (469 U.S. 528, 581).

3. An excellent example of the complexity created by the close association between ideology and federalism is provided by *CTS Corporation v. Dynamics Corporation of America, et al.* (107 S.Ct. 1637 [1987]). Here, the Court upheld an Indiana law related to stockholder voting rights against a challenge that it was preempted by federal statute. "Federalist" oriented conservatives supported the Court's decision on the grounds that the states constitutionally possessed the authority to regulate corporations based within their borders, while ideological conservatives opposed the decision, arguing that state efforts to regulate business undermined economic liberty (see Hickock 1990, 81; Rosengren 1988).

4. Here we consider "federalism" in its fullest sense. That is, we examine it in terms of the scope of state policy authority within the constitutional system. It is clear that a disparate group of decisions handed down by the Supreme Court have implications for the contours of state power. For example, the 1989 *Webster v. Reproductive Health Services* (492 U.S. 490) decision has a substantial bearing on the federal principle by establishing again the parameters of state government power to regulate abortion. More recently, *Vacco v. Quill* (No. 95-1858 [1997]) left the question of doctor assisted suicide at the doors of the state legislatures. And *Printz v. U.S.* (No. 95-1478 [1997]) was neither argued nor decided on Second Amendment "right to bear arms" grounds, but on state and local governmental autonomy and the subsequent lack of federal ability to mandate that these entities carry forth federal regulatory activity.

5. Previous research has indicated that the Court, more generally, fluctuates in its support for the states, depending upon the issue(s) involved (Kearney and Sheehan 1992).

6. The data set used for this analysis — *U.S. Supreme Court Judicial Data Base* (ICPSR # 9422) — does not allow us to also examine the behavior of the two most recent additions to the Court, Justices Ruth Bader Ginsburg and Stephen Breyer. The version of this Data Base used here stops with the 1995 Term of the Court.

7. Cumulative or Guttman Scaling is a procedure of unidimensional analysis that assumes there is one underlying scalable dimension for a set of items. These items can be ordered in terms of the "strength" of the attitude they are addressing. That is, the items become progressively more difficult to support. Therefore, an individual's response to any given item in the scale is predictive of his or her response to all the items that are "less difficult" to support.

To establish whether the scales do in fact possess the properties of a cumulative scale, we assessed their scalability using Guttman's "coefficient of reproducability" (CR). CR is a statistic used to assess the degree to which a scale deviates from its ideal pattern. It is simply "a measure of the relative degree with which the obtained multivariate distribution corresponds to the expected multivariate distribution of a perfect scale" (McIver and Carmines 1987, 47). A CR less than .9 is generally taken to mean that the items do not form a scale.

8. There were 413 such decisions decided by the Warren Court, 796 by the Burger Court, and 372 by the Rehnquist Court. Our data begin with the 1958 Term of the Court and extend through its 1995 term. We begin with the 1958 Term because no personnel changes occurred on the Warren Court for the next three and one-half years. As Rohde and Spaeth point out, "The construction of refined category scales becomes difficult if the Court is undergoing marked changes in membership" (1976. 135). Finally, we excluded all instances where states square off against one-another as litigants.

9. For the purposes of this analysis, "state government" is defined as: the three branches of state government, state executive agencies, state employees (when operating in their official capacities), publicly funded colleges and universities, and state prisons.

10. There are, of course, other means by which the states can demonstrate their interest in a case's disposition (e.g., the filing of *pre-certiorari* or merits briefs *amicus curiae*; see Swinford and Waltenburg 1996). Between 1953 and 1989 (we do not have *amicus* data available for the 1990 through 1993 Terms of the Court), however, there were only 188 instances (just over five cases per term) where a state or states filed any kind of *amicus* brief and a state was *not* a direct party to the litigation. Alternatively, there were 430 instances where state *amicus* activity accompanied state involvement as a party. Since *amicus* behavior without the accompaniment of a state party is relatively rare and since cases where a state is a direct party to the litigation are clearly instances where a state interest is at stake,

we opted to scale only those cases in which a state was a direct party.

11. We require that the Coefficient of Reproducability (CR) be at least .90. If CR is less than .90, "not enough consistency of response is present to consider the cases a scale" (Rohde and Spaeth 1976, 82).

12. Accordingly, in the text we focus our attention on only the more inclusive measure. See Appendix B, Table B-1 for the names of the scales and the number of cases comprising each, Table B-2 for each justices's score with the defendants' rights scales extracted, and Table B-3 for the results of the logit analysis using the revised measure.

13. Scale ranks were based upon the proportion of pro-state votes made by each justice relative to his or her colleagues.

14. We used the Segal and colleagues (1995) content analysis-based measure of the justices' ideology. This measure is quite reliable and appears to be valid. It has been used in a number of studies of Supreme Court decision-making (e.g., Kearney and Sheehan 1992; Sheehan, Mishler, and Songer 1992).

15. This is similar to the approach taken by Rohde and Spaeth (1976). In their analysis, they computed a tau-b correlation matrix of the justices' scale ranks then inputed that matrix for the factor analysis.

16. Now, we do not mean to imply that this measure is completely free of ideology, or that it solely taps the justices' underlying sense of deference to the states as quasi-sovereign entities. By its nature, ideology is a complex concept that may be related to notions such as judicial role, support for individual liberties, or economic values. Therefore, it is quite difficult to totally separate its multifaceted effects from judicial behavior. The notion of ideology that we have attempted to control is the same as Kearney and Sheehan (1992) — each justice's level of support for individuals versus institutions. Finally, we must note that because our definition of federalism is necessarily broad (see above), it is possible that some aspect of ideology piggybacks on it. However, as the subsequent tests of the measure demonstrate, it has an effect that is theoretically consistent, separate, and appreciably different from the conservative–liberal ideology that often is used to explain the states' litigation success (see, for example, Kearney and Sheehan 1992; Sheehan, Mishler, and Songer 1992).

17. See, for example, Chief Justice Rehnquist's majority opinions in *National League of Cities v. Usery* (426 U.S. 833, [1976]) and *U.S. v. Lopez* (115 S.Ct. 1624 [1995]) and his dissenting opinions in *Garcia v. San Antonio Metropolitan Transit Authority* (469 U.S. 528, 579 [1985]) and *West Lynn Creamery v. Healy* (114 S.Ct. 2205, 2221 [1994]). See also, for example, Justice O'Connor's dissenting opinion in *Garcia*)469 U.S. 528, 580 [1985]) and her majority opinions in *Gregory v. Ashcroft* (501 U.S. 452 [1991]) and *New York v. U.S.* (505 U.S. 144 [1992]).

18. Of course, it is well-documented that attempts to "pack the Court" with individuals of ideological kinship to the appointing President is uncertain at best. Witness, for example, President Harry Truman's appointment of Justice Harold Clark, President Dwight Eisenhower's appointments of Chief Justice Earl Warren and Justice William Brennan and President Kennedy's appointment of Justice Byron White. This makes the general success of Presidents Nixon, Ford, Reagan and Bush in appointing "federalist" justices all the more interesting.

19. Burger Court justices whose tenure extended to the Rehnquist Court. These are Justices Brennan, White, Marshall, Powell, Rehnquist, Blackmun, Stevens, and O'Connor.

20. This advantage should be even greater during the Rehnquist Court. As we will discuss in the next chapter, the states have experienced a substantial improvement in the caliber of their advocacy in Court since the 1970s.

21. For the purposes of this analysis, a private party or "one-shotter" refers to any party that is not a government, a corporation or business, or attorneys.

22. The values for both our measure of the support for federalism and ideology were variously set at their means and one standard deviation above and below that value. For interested readers, the means and standard deviations are as follow: Federal Government ($\bar{x}$ = .062, s = .23); One-Shotter ($\bar{x}$ = .5, s = .5); Ideology ($\bar{x}$ = .32, s = .62); Support for Federalism ($\bar{x}$ = .79. s = 1.32).

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4

The Evolution of Advocacy: The Offices of State Attorney General

No matter what the form, the states are prolific participants at the bar of the U.S. Supreme Court. Between the 1968 and 1989 Terms, the states were direct parties in nearly one-third of the cases on the Court's plenary docket[1]; in the 1986 Term of the Court, alone, state attorneys general accounted for fifty-eight of the 156 hours allotted for oral argument (see Catalano and Ross 1990, 326). As *amici*, the states are no less active. During the same twenty-one terms of the Court, for example, the states participated as merits *amici curiae* in just under one-fifth of the Court's orally argued cases, and of the *certiorari* petitions accompanied by *amicus* briefs, 18 percent were accompanied by briefs from the states. Finally, they comprised better than one-third of all the *pre-certiorari amicus curiae* participants.

As the states pursue their legal interests, they are usually represented by their office of attorney general. These offices are effectively the states' law firms with regard to Supreme Court litigation, although the extent to which they are the official representative of their state's legal interests differs somewhat depending upon the nature of the controversy and state law. For example, every state attorney general defends state law when it is challenged on federal constitutional grounds. But not all attorneys general necessarily appear for their state in criminal appeals to the U.S. Supreme Court. Thus in eighteen states the attorney general's office has exclusive jurisdiction in this area, while in eleven others the attorney general appears before the Court in only certain types of cases.[2]

Collectively, these offices provide the states with professional and expert legal counsel. Today, they are well staffed and well financed. According to the results of our survey, as of 1997 the median annual budget for these offices was $13.3 million; the mean number of full-time attorneys was 158.4. Moreover, beginning in the 1980s the states took a number of steps to improve the coordination and proficiency of their advocacy in Court. For example, the National Association of Attorneys General (NAAG) established the Supreme Court Project to enhance the

quality of the states' presentation of cases. These substantial resources and coordinated efforts appear to be paying off in terms of increased rates of success (Kearney and Sheehan 1992).

Yet, the states have neither always been so professional nor successful. Thus, it is useful to analyze the evolution and decisional calculus of these most important actors in the states' Supreme Court participation. We begin by briefly tracing the evolution of the office of the state attorney general since the 1950s. We show that these offices have undergone a rather dramatic facelift over the last four decades, becoming more capable of effectively engaging the Supreme Court in the pursuit of their state's policy goals. We then turn to an examination of the states' perspectives, strategies, and decisional calculus as they relate to engaging the High Court. Drawing upon our interview and survey data, we find that the state attorneys general view the conservative post-1968 GOP appointees as generally more sympathetic to state powers and policy autonomy. In addition, concern with broad-scale policy and estimates of likely success influences the states' decisions to pursue their interests in the Court.

EVOLUTION OF THE OFFICE OF STATE ATTORNEYS GENERAL

For years the Supreme Court justices were generally critical of the quality of the states' representation. For example, in 1974 Justice Lewis Powell baldly criticized the poor litigation performance of the states:

> As a general observation, it is safe to say — especially where important issues of constitutional law or criminal procedure are involved — that law enforcement [other than those instances where the U.S. is represented by the Solicitor General] is frequently outgunned and overmatched by the defense. . . . The situation is far from uniformly good where a state is before the court. . . . Some of the weakest briefs and arguments come from [the states] as representatives of the public interest. (Quoted in Catalano and Ross 1990, 333-334)

The poor quality of the states' advocacy was perceived by other members of the Supreme Court community as well. McGuire reports that of the counsel who argued cases before the Supreme Court between 1977 and 1982, only 4 percent of all state and local government lawyers were considered to be "experts" by their peers (1993a, Table 7.4). In a 1978 Federal Judicial Center survey of federal judges on the caliber of advocacy in the federal courts, state and local government lawyers were given the lowest votes of confidence. Fifty-seven percent of the respondents believed that there was a "serious problem" of inadequate appellate advocacy by state and local government lawyers. This was a full nineteen points greater than either private practitioners representing individuals or appointed counsel in criminal appeals — the next worst performing categories of the bar (see Partridge and Bermont 1978, Table 43).

Upon reflection, it is little wonder that the states' litigation performance would be viewed so dimly. As suggested by Justice Powell's criticism, the states *were* horribly ineffective Supreme Court litigants. Between 1953 and 1969, the states'

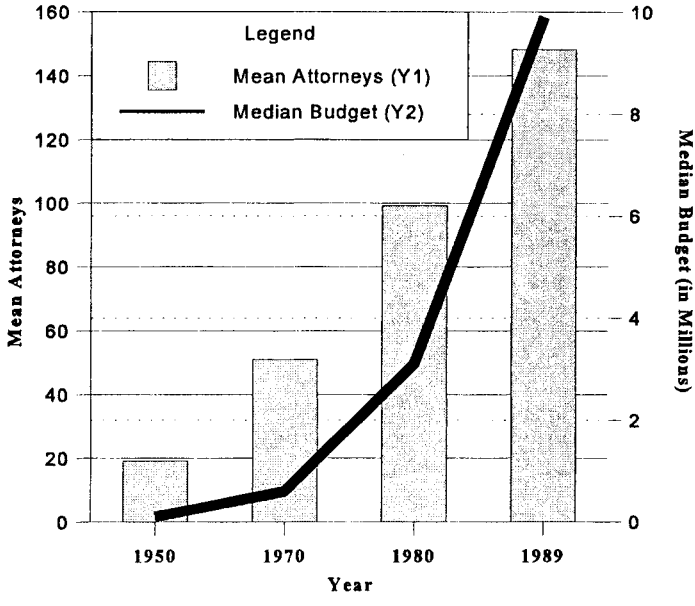
average rate of success in cases in which they had a stake was just a tick above 36 percent (see chapter 6, Figure 6.1).[3] Two forces lay at the heart of this rather dismal performance. First, it was a relatively rare event that any given state appeared in Court. Although collectively the states trail only the Solicitor General as the Court's most frequent litigator, no particular state appears with great regularity. Therefore, the law offices of the separate states do not develop the skills or expertise necessary for proficiency in the highly specialized arena of the Supreme Court (see Galanter 1974).

Second, until recently the state attorneys general offices were small, provincial environments unable or unwilling to mount an effective litigation effort before the Court (see Clayton 1994; McGuire 1993a). In 1950 the mean number of attorneys in the states' attorney general's office was 19.2, and the median budget was under $104,000. Even as late as 1970, there were still only fifty-one attorneys in the average state office, while the median budget remained well below a million dollars ($612,089).

Over the last three decades, but particularly in the 1980s, the states took a number of steps to improve their profile, the quality of their advocacy, and their results in Court. The state offices themselves became larger, more complex, and more capable legal entities. Clayton reports that during the 1980s, the rate of growth in the budget of the state attorney general's office outpaced the growth of general government spending for every state. This substantial rate of growth is clearly illustrated by the proportionate increases in the offices' personnel and budget. By 1989 the mean number of staff attorneys was 148.2; the median office budget, $9.9 million — increases of 300 percent and 1600 percent respectively since 1970. (See Figure 4.1 for an illustration of the rate of growth in the state attorneys general offices since 1950.)

In large measure this growth in the institutional capacity of the states' office of attorney general was a response to increasing responsibilities assumed by the states. In the 1970s and 1980s, political forces and soaring federal budget deficits resulted in the national government pursuing the politics of subtraction. The conservative administrations of Presidents Richard Nixon and, especially, Ronald Reagan sought to limit the role of the national government in domestic policy. Under Reagan in particular, the federal government expanded the states' control over federal aid and pursued a course of regulatory devolution. In addition, the growing federal budget deficit left the national government unable to launch any new, sweeping domestic initiatives or to adequately fund existing programs. Yet, interest in such programs did not abate. Congress responded by transferring the regulatory and enforcement responsibilities of federal programs to the states (see Conlan 1991), and organized interests and citizens groups followed suit, shifting their focus to the state capitals as well. Thus, as a consequence of the "New Federalism," the states were thrust forward to fill the void left by the retrenchment of the national government (see Van Horn 1989).

Figure 4.1
Growth of State Offices of Attorney General



Sources: 1950, *Book of the States*; 1970, NAAG, Committee on the Office of Attorney General, *Report on the Office of Attorney General*; 1980, NAAG Committee on the Office of Attorney General, *Selected Statistics on the Office of the Attorney General*; 1989, Lynn Ross, *State Attorneys General: Powers and Responsibilities*.

The institutions of state government were well equipped to undertake their new, more active roles. Since the 1960s, they had experienced a renaissance, becoming more professional, more capable, and more dynamic in the policy process (see Van Horn 1989).[4] But Clayton (1994) argues that the politics of the 1980s had an especially profound effect on the state offices of attorney general. As noted above, interest in regulatory programs and their enforcement did not slacken with federal retrenchment, and as the states undertook their administration, it most often fell to the attorney general's office in most states to enforce the programs and federal standards. Moreover, as the national government withdrew from the regulatory arena, public pressure encouraged many states to enact their own regulatory standards and aggressively enforce them — a duty that typically fell on the attorney general's office.

In the end, these newly acquired responsibilities had two principal and related effects. First, they made the state attorneys general more frequent litigators in the federal courts, as the states sought to force compliance from the targets of regulation, were called to task for perceived lax enforcement, and/or attempted to

compel the national government to enforce its own laws and regulatory standards (see Clayton 1994, 531–37; Webster 1990).[5] And second, the increasing legal responsibilities of the states and the accumulation of high visibility enforcement functions, almost of necessity, transformed the states' law offices into large, highly professional organizations.[6] For instance, since the 1970s several states have created appellate advocacy groups to monitor cases before the Court in which they are involved or have an interest. Ohio is an example. By institutionalizing their Supreme Court advocacy in this manner, these states increase both their activity and proficiency — a point colorfully made by one state informant's description of the Buckeye State: "Ohio is a lean, mean, *amicus* writing machine" (Confidential Interview).

Almost coincident with the state's increasing rate of federal litigation, then, there has been an appreciable improvement in the states' ability to engage the federal judiciary. Almost every state office of attorney general has seen its staff, full-time attorneys, and budget more than double since the 1960s (see Figure 4.1). As a group, they are better staffed and organized, better funded and headed by politically savvy individuals who recognize the policy "hay" that can be made by litigation actions. Clayton (1994), for example, argues that the office has become more attractive to a better educated and more politically ambitious breed of attorney.

THE SUPREME COURT PROJECT

Another important development is the establishment of the Supreme Court Project of the National Association of Attorneys General. Established in 1982, the Project began as an effort by the states and others to improve the quality of the states' advocacy before the Supreme Court. It is worth noting that the Supreme Court clearly telegraphed its interest in this goal; Chief Justice Warren Burger was one of the moving forces behind the Project's creation. As one state official told us, the Project "has brought order to a pretty haphazard system" (Confidential Interview).

The Project is funded from dues paid by the states to the National Association of Attorneys General (there is also a small "users' fee" assessed for some services) and is administered by a full-time counsel and employs a small staff. It holds annual seminars on Supreme Court advocacy, sponsors a rotating fellowship program for assistant state attorneys general,[7] and provides direct assistance to states' attorneys in drafting and editing their briefs for the Court. As to the latter, the Project's present Supreme Court Counsel estimates that the Project reviews about one-half of the briefs the states ultimately file. Thus, by reviewing a large proportion of the states' petitions at both the docketing and merits stages of Supreme Court litigation, the Project ensures more proficient case selection and presentation of legal arguments by state litigators (Author Interview; see also Clayton 1994; Catalano and Ross 1990).

The Project also provides considerable assistance in preparing states' attorneys for oral argument. In *Roe v. Wade* (401 U.S. 113 [1973]), Texas Assistant

Attorney General Jay Floyd opened his oral argument with an ill-advised and poorly paced joke. No one laughed, and observers noted that Chief Justice Burger looked annoyed.[8] The Supreme Court Project organizes "Moot Court Sessions" to prevent the recurrence of such a performance.

Nearly every state office of attorney general utilizes this service prior to going before the Court. Several days before its scheduled argument, the Project brings the state's legal team to Washington, D.C. The Project coordinates hotels, transportation of people, and the transportation and storage of files. At some point the state's advocates meet with the Court Marshall to go over protocol, and a moot court session is held. That session involves the state's legal team making their arguments to a group of highly experienced Supreme Court practitioners. The format of this session is not a true "mock-up" of an oral argument in the Court. Rather, it focuses on the state's primary legal arguments, the biases of individual justices, and the techniques of "effective" oral argument. Another particular area of emphasis here is the avoidance of "traps" laid by justices who are *not* sympathetic to the state's position (Author Interview). The goal of the Project is to ensure that the effectiveness of a state's presentation to the Court does not fall victim to mistakes of inexperience.

The Supreme Court Project is also quite busy with reference to briefs *amicus curiae*. The Project has worked to promote and coordinate the states' *amicus curiae* activity on issues where there is a common state interest, primarily by facilitating communications between the state attorneys general (Author Interview; see also Catalano and Ross 1990; Clayton 1994). For instance, when the Project's counsel identifies a case as being of potential interest to state governments, he or she sets up a conference call involving a variety of officials from several states who have an interest or expertise in the issue area. These "working groups" then discuss whether a brief should be written, and if so, who should write it and what it should contain. Additionally, when a state or states have determined that a brief ought to be submitted, the Project sends out a memo to other attorneys general. This memo acts as something of an "action alert." It apprises the attorneys general of the case and the general arguments contained in the brief, and it invites the attorneys general to sign on.

The results are striking. Since 1982 the states have become exceptionally active *amicus curiae* participants. They account for 20 percent of all *certiorari* petitions accompanied by an *amicus* brief and 18 percent of the *amicus* briefs on the merits. Moreover, NAAG's focus on the coordination of state *amicus* activity has resulted in substantial levels of joining behavior. Accordingly, where it is rare to find more than two *amici* joining together on a *pre-certiorari amicus* brief, on average six states coalesce (see Caldeira et al. 1994, Table 3). And for the 1982 Term of the Court, Caldeira and Wright found that on average six states were present on a merits *amicus* brief — a rate of joining well above the mean level of 2.5 *amici* per brief for all groups (see Caldeira and Wright 1990, Table 4).

Over the course of the past two decades, then, the states' law firms have made marked improvements in the caliber of their participation in the High Court; and,

institutionally, they have begun to accumulate the budgetary and personnel resources essential to successful Supreme Court litigation. They have also facilitated cooperation and coalition formation by virtue of the establishment of the Supreme Court Project. Court observers have perceived these developments. For example, before a conference on Supreme Court advocacy in 1984 Chief Justice Burger remarked, "I am . . . able to report that the quality of representation by state and local communities in the Court has improved significantly" (Burger 1984, 526).

Perhaps more importantly, they have translated into appreciably greater rates of success. Kearney and Sheehan (1992) report that the rate of success of state and local governments as direct parties rose nearly 12 percent between 1968 and 1989. And as we showed in chapter 3, the addition of Republican appointees had an appreciable positive bearing on the states' rate of success.

THE PERCEPTIONS AND STRATEGIES OF THE STATE ATTORNEYS GENERAL

As the last section illustrated, the states are well poised to pursue their interests in the High Court. Moreover, at present the Court seems to be a particularly accommodating venue. Yet, little is known about the character of the states' decisions to engage the Court. Based on our interviews and surveys, we find that the states clearly perceive the recent evolution of Supreme Court doctrine as generally favorable to their policy interests and that they see the post-1968 GOP appointees as largely responsible for that. We also find that the states are quite strategic in their litigation decisions.

The States' Perceptions of the Court's Decisional Environment

Conventional wisdom and empirical analyses attribute the states' improved litigation fortunes to the increasing presence of conservative, GOP appointed justices (Sheehan, Mishler, and Songer 1992; Kearney and Sheehan 1992; Rothfield 1992; Epstein and O'Connor 1988). Kearney and Sheehan (1992), for example, found that each conservative addition to the Court since 1968 increases the likelihood of a decision in favor of a state or local government litigant by 2.3 percent. This is an assertion that is not lost on the states. In a survey, we asked: "On a scale of 1–10, with 1 representing 'weak' and 10 representing 'strong,' please rate the following current and former members of the Supreme Court in terms of their general propensity to be sympathetic to the power and autonomy of state governments within the federal relationship." Examination of the states' ratings of the justices sitting on the Warren through Rehnquist Courts reveals that state decision makers do in fact see the GOP appointees as "friends" (see Table 4.1). The mean rating of the Republican appointees to the Court since 1968 is almost 3 full points greater than their brethren, a difference between the two groups of justices that is statistically secure ($t = 2.9$).

But state evaluations of individual justices is only one facet of their perception of the Republican Court. Of greater importance is whether the attorneys general

Table 4.1
Justices' Mean State Ratings

Justice	Mean State Rating
REHNQUIST	9.4
THOMAS	9.3
SCALIA	9.3
O'CONNOR	8.6
KENNEDY	7.8
BURGER	7.3
Harlan	6.7
White	6.3
POWELL	5.8
Stewart	5.6
Black	5.3
SOUTER	4.4
BLACKMUN	3.6
STEVENS	3.2
Breyer	3.2
Ginsburg	2.8
Brennan	2.3
Douglas	2.1
Marshall	1.9

Question: On a scale of 1–10, with 1 representing "weak" and 10 representing "strong," please rate the following current and former members of the Supreme Court in terms of their general propensity to be sympathetic to the power and autonomy of state governments within the federal relationship.

Note: Post-1968 GOP appointees listed in upper Case.

view the Court's collective jurisprudence as more amenable to state interests, for it is the Court's collective decision that determines whether the state interest wins or loses. One item in the survey provides a sounding on this. The state attorneys general were asked to evaluate the evolution of the Court's doctrine in seven issue areas in terms of their bearing on the scope of state authority[9]; a summary of their responses is displayed in Table 4.2.

In reference to the Court's Federalism jurisprudence, it is here that state attorneys general are most glowing in their praise for the Court. In those matters that most traditionally bear on the balance of power between the national and state governments, the states perceive the Court's emerging doctrine as particularly favorable to state power. Indeed, Federalism's mean score is the most "pro-state" of all the issue areas. In addition, and not surprisingly in light of the avowed "law and order" intent behind the Republican appointments to the High Bench,[10] state decision makers view developing Court doctrine in the area of Criminal Procedure as generally favorable to state powers.

State Decisions to Litigate

It is clear that state perceptions of individual justices and the Court as a collective influence state decision makers' litigation decisions. From the states' point of view, the past three decades have seen the Court's membership and its concomitant decisional behavior becoming more accommodating of state interests.

Table 4.2
Mean State Ratings of Court Doctrine Across Issue Areas

Issue	Mean Rating
Criminal Procedure	1.7
First Amendment	2.5
Civil Rights	2.3
Judicial Process	2.2
Federalism	1.4
Due Process	2.3
Economics	2.6

Question: In what areas of law has the recent evolution of U.S. Supreme Court doctrine been most favorable to state power? On a scale of 1–4, with 1 being "very favorable" and 4 being "very unfavorable," please rate the following issue areas.

And the states appear to have responded by appreciably increasing their participation in Court as appellants. Beginning in the 1970s the states became much more likely to appear in Court as a consequence of their own filing efforts. For instance, during the Warren Court era, only 16 percent of the states' appearances in Court were as appellants; by the Rehnquist Court that proportion had increased to 56 percent.[11]

The distinction between appellants and appellees is an important one. First, the Court generally accepts for review cases that it will reverse (Perry 1991b). Thus, appellants and appellees do not enter Court on an equal footing. Second, and more importantly in the context of this research, parties appearing before the Court as appellants have actively decided to press their policy goals before the High Bench.

In general terms, political actors will locate a controversy in the judiciary when they believe a favorable outcome will result (see Schlozman and Tierney 1986; Kobylka 1987; O'Connor and Epstein 1983a, 1983b). At the same time, though, there are different types of "favorable outcomes," depending upon the litigant's broader interests. Some litigants are concerned only with the immediate result of a case — did they win or lose? — while others see a specific case's outcome merely as incidental to its more general policy ramifications (see Casper 1972; Galanter 1974).

When they are not defending themselves, the states can be selective when they choose to pursue a case in the Supreme Court, and this flexibility facilitates the states' ability to litigate in the pursuit of policy goals. Our survey and interview responses suggest that long-term policy considerations in fact motivate the state attorneys general to engage the Supreme Court. Views about an issue's policy ramifications loom large in the states' decisions to litigate — whether as a direct party or *amicus curiae* (see Table 4.3).

Simply, the states are more likely to engage the Court when the issue at stake is one of importance *and* they estimate their chances of success are relatively great. And this makes sense. First, although questions dealing with state power comprise a good share of the Court's agenda, not all controversies that involve the states are of equal interest to them. "Federalism" in its fullest sense — the scope of state policy authority within the constitutional system — can take on a constitutional quality such that many decisions handed down by the Supreme Court have implications for the contours of state power (see Hickock 1990). Yet, for the states as sovereign entities, there certainly is a difference among cases as to scope and import. Some cases do not strike a chord with states to the extent necessary to warrant *amicus* participation, even if those cases have ramifications for state policy autonomy. For example, when a Louisiana statute was challenged as preempted by the federal *Employee Retirement Income Security Act* of 1974 (ERISA) (*Boggs v. Boggs*, 65 U.S.L.W. 4418 [1997]), no states entered the fray. When the Court addressed whether federal courts have the authority to issue injunctions in state tax cases where administrative remedy is available, state amicus participation was absent as well (*National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 115 S.Ct. 2351 [1995]). On the other hand, there are those cases which draw

Table 4.3
Influence of Forces Motivating State Litigation Decisions

	MEAN INFLUENCE RATING ON STATE DECISIONS			
Force	**Direct Party**	**Author Merits *Amicus***	**Author *Pre-Cert. Amicus***	***Amicus* Joining Decisions**
Chance of Winning	1.3	1.4	1.4	1.4
Nature of Relation	2.9	2.9	3	3
Position of Federal Government	3	3.1	3.1	3.1
Position of State Governments	3.3	2.5	2.5	2.5
Budgetary Resources	2.1	2.4	2.3	3
Staff Resources	1.8	1.9	1.8	3
Public Opinion	3.3	3	3	3
Chance of Forcing Settlement	3.1	NA	NA	NA
Need to Test Constitutionality	1.8	NA	NA	NA
Importance of Issue	NA	1	1	1

Question: When your state is considering [specified activity] in the U.S. Supreme Court in a civil suit, what factors do you consider? On a scale of 1–4 (with 1 being "very important" and 4 being "not important at all"), please rate the following factors.

considerable state attention and energy, such as *Vacco v. Quill* (No. 95-1858 [1997]) where the Court ruled on the extent to which states can prohibit assisted suicide, or (*Seminole Tribe of Florida v. Florida* 116 S.Ct. 1114 [1996]) where the constitutionality of congressional legislation abrogating their Eleventh Amendment sovereign immunity was at issue. In the former, twenty states participated as merits *amici*; thirty-one, in the latter.

The states' interest in engaging the Supreme Court is thus variable, depending

on the nature of the case. This point is nicely illustrated by Warren Price, Attorney General of Hawaii: "Our philosophy here is that you do not take an appeal for appeal's sake. If it is a lousy appeal, we are not going to take it. . . . So, the attorney must appear before the committee and state why an appeal is necessary, why they are going to prevail on this issue, and what is the basis for the appeal" (Interview 1990, 111).

Second, the substantial number of controversies arriving in Court and affecting the scope of state authority allows the states to pick only those cases where they are apt to win. Unlike a death row inmate, for example, a state can pass on a case and live to litigate another day. Moreover, as astute and practiced Supreme Court litigators, the states are well aware that litigation entails risk. Namely, the state interest might lose, and, even worse, this disadvantaged position is then bolstered by the permanency accompanying a Supreme Court ruling. As one state respondent explained, "We will not put good precedent at risk" (Confidential Interview).

Other factors are also at work, affecting the states' decisions. For instance, as Attorney General Price's comments point out, the states' attorneys are mindful of the costs involved in Supreme Court litigation, and this is echoed by our data. Staff resources in particular weigh heavily in a state's litigation decision — and for good reason. Unlike a typical private litigant, today a state effectively has unlimited financial resources. Thus, for example, the substantial monetary costs involved in preparing a brief,[12] although daunting to most private litigants, are easily borne. But the preparation of a case for litigation in the Supreme Court consumes more than money. It also exhausts a state office's time, energy, and productivity.

For example, one state advocate reported that taking a recent, single case before the Supreme Court involved two lawyers working full time for two months just to prepare the case for the advocate. The office then had to learn the relevant statutory law, write the *certiorari* petition, write the merits brief, drum up *amicus* support among the other states, and prepare for oral argument. This preparation involved six moot court sessions in his home state and two additional sessions with the Project.

Even after the Court ruled on the case, time and energy of the state's attorney were required. The media had to be informed and client agencies and the state's legislature had to be advised. All in all, that advocate alone had 1500 hours involved in the litigation effort. "[There is] a tremendous amount of human capital for a single case [in the Supreme Court] if done right" (Confidential Interview). And for the states, this human capital is far more limited.

Finally, although the U.S. Government is the Supreme Court's most prolific and successful litigant, the states do not appear to worry much about the U.S. position in a particular case. Nor are they likely to concern themselves with public opinion.

CONCLUSIONS

The picture that emerges of the states' law offices and decisional behavior contains several points that deserve emphasis. First, all evidence points to a

substantial improvement in the caliber of the states' advocacy in the Supreme Court. After decades of disappointing and ineffective appearances before the High Bench, by the 1980s the states had taken a number of important steps to improve their litigation proficiency. Better funded, staffed, trained, and prepared, the majority of state attorneys general offices have experienced appreciable professional growth. And this is a crucial development in understanding state decisions to pursue their policy goals in the Court. As a group, the states are more capable Supreme Court litigators, and they win more often.

Second, since the advent of the Nixon administration, the Court increasingly has taken on a "pro-state" persona, and the attorneys general are aware of this development. They perceive their increasing rates of success in several issue areas (most importantly Federalism), and they appear to attribute much of their improving fortunes to the Republican appointees. Coincident with the states becoming more proficient Supreme Court litigators, then, their perceptions of the Court encouraged them to increase their pursuit of policy goals before the High Bench.

Finally, the states appear to be "procedurally rational" (Simon 1985) when they decide to interact with the Court. One of the most important factors entering into the states' decisions to engage the judiciary in the first place is the likelihood of their success. Thus, the states should adjust their rate of litigation in the Court depending upon their estimated chances of success. And without a doubt, the composition of the Court affects these estimates.

NOTES

1. Computed from Epstein et al. 1994.

2. In the remaining states the attorney general may appear under a variety of circumstances — when assisting the local prosecutor, under his or her own discretion, or when authorized by the governor. For example, the Attorney General of Washington state may appear in criminal appeals only when assisting the local prosecutor and when authorized to do so by the governor.

3. We define "stake" as those instances in which at least one state is a direct party to the litigation or has filed either a *pre-certiorari amicus curiae* brief or a merits *amicus* brief. A "win" is operationalized in terms of the nature of the state's participation. Thus, we designate a decision as a win for a state when the Court (1) decides in the direction of the state party, (2) decides in the direction urged by the state merits *amicus* brief, or (3) finds for the appellant in instances where a state has filed a *pre-certiorari amicus* brief.

4. For discussions of the evolution and increased professionalization of specific state offices in the 1960s and 1970s, see Sabato (1983), governor; Rosenthal (1981), legislature; and Tarr and Porter (1988), state supreme courts.

5. Indeed, the rate of participation of those instances where the states bring the case to the Supreme Court appears to have increased appreciably since 1970. Unfortunately, we cannot speak directly to whether the states' and the Court's behavior concerning *certiorari* petitions changed. Our data on the incidence of state activity before the Court as direct parties are only for those cases decided by full opinion, presently only about 1 percent of the cases appealed to the Court. The data do make clear, however, that the emergence of the Republican Court brought about a fundamental change in the nature of the states' presence

in Court.

6. In a 1988 interview Warren Price, Attorney General of Hawaii, spoke to this point: "In the mid-seventies there was a sudden avalanche of new types of cases and matters. The reaction to that by the AG office was to add bodies" (Interview 1990, 107).

7. Two fellows work at the Project for approximately three months. Three pairs of fellows rotate in and out during the course of one Court term. The fellows view oral arguments, write *amicus* briefs, and assist with the publication of the Project's *Supreme Court Report* — essentially a tracking service of the Court's docket and decisions of interest to the states.

8. "Mr. Chief Justice, may it please the Court. It's an old joke, but when a man argues against two beautiful ladies like these, they're going to have the last word." (Irons and Guitton 1993, 346).

9. The specific issue areas were taken from Kearney and Sheehan (1992).

10. For example, in his 1968 campaign for the Presidency, Richard Nixon attacked the Warren Court, charging it with "seriously hamstringing the peace forces in our society and strengthening the criminal forces" (quoted in Kelly, Harbison, and Belz 1991, 678). He promised to appoint to the Court conservative jurists who would refrain from reading new rights and protections for criminal defendants into the Constitution.

11. Again, we must note that we cannot speak directly to whether the states' and/or the Court's behavior concerning *certiorari* petitions changed.

12. Caldeira and Wright (1988) report that organized interests estimate the cost of preparing a *pre-certiorari amicus* brief ranges between $15,000 and $20,000.

5

Patterns of State Participation Before the Court

There are two general forms of organized activity before the Supreme Court of the United States: participation as *amicus curiae* — both at the docketing and merits stages of Court deliberation — and directly litigating a case as parties, sponsors, or intervenors. Briefs *amicus curiae* are formal written arguments filed with the Court by actors who are not direct parties to the case. At the docketing stage, these third parties generally make the argument that the Court should grant a formal hearing to the particular case. At the merits stage, the third parties' briefs typically present legal arguments supporting the substantive claims of one of the litigants. Directly litigating the issue, on the other hand, involves organized interests providing the legal expertise and human and/or monetary resources necessary for pursuing a case in Court.

The states make great use of both forms. Between 1954 and 1989, a state appeared as a *pre-certiorari amicus* nearly 4,000 times, as a merits *amicus* over 6,500 times. And during that same thirty-six-year span, better than 1,800 Supreme Court cases involved at least one state as a direct party. Clearly, "what the Supreme Court does is . . . of interest to the states" (Caldeira and Wright 1990, 794). Embedded in that simple observation, however, is a rich pattern of state litigation activity.

In this chapter we assay the nature of the states' participation in the Supreme Court. Our aim is to explore in detail the incidence and character of that participation in all its forms. We divide the exploration into four sections. We begin with an assessment of the patterns of state litigation activity before the Court. In general, we find a rapidly increasing level of participation in all its forms. However, while the state governments share the same general incentives to engage the High Court, they differ in a number of relevant characteristics that may account for variation in the incidence of their litigation activity. In the second section, we examine coalitional behavior among the states. Following a discussion of the

states' litigation success in the third section, we take stock of our findings and discuss their implications.

LOBBYING THE COURT

That state governments regularly engage national policy makers is well known. Recent research has documented that "state and local governments have come to understand that they must be represented in Washington if they are to take advantage of political opportunities and protect their interests" (Cigler and Loomis 1995, 131). This scholarship, however, has focused primarily upon state government engagement of policy makers in the legislative and executive branches of the national government. Much less attention has been paid to state government interaction with the "third branch." Few studies have analyzed, in detail, state government attempts to engage the federal courts as a component of this effort to "take advantage of opportunities and protect interests."

But certainly, the federal judiciary is an arena in which the states must be, and are, active. Since the mid-1960s, state governments have increasingly sought to engage the Supreme Court in the business of defining the scope of state policy prerogative. This attempt is a consequence of the forces discussed in preceding chapters: (1) the Supreme Court's inevitable involvement in decisions affecting the states' powers and responsibilities, (2) the ideological evolution of the Court over the last thirty years into an arena that is increasingly "state-friendly," and (3) the enhancement of the abilities of state governments to be effective advocates for their causes within this arena. In other words, state government participation before the Supreme Court is a function not only of necessity, but also a strategic calculation that state concerns will receive a positive response within this policy arena combined with an increased ability to take advantage of this arrangement.

Knocking on the Door

Through its discretionary jurisdiction, the U.S. Supreme Court exercises nearly total control to decide which cases it will hear. This power enables the Court to set its own agenda, and it presents those parties resorting to the Court in pursuit of their policy goals with the challenge first of securing the Court's attention. This is no mean feat. In each term since 1950, the Court has received over 1,000 petitions for writs of *certiorari* or requests to note probable jurisdiction. In 1990 alone, it received over 6,300 of them. Meanwhile, it has never granted more than 11 percent of these requests. In the 1980s and 1990s, it has closed its docket even more, agreeing to hear only about 2 percent of the petitions brought to it. On average between 1950 and 1990, the Supreme Court was bombarded with over 3,500 petitions for a writ of *certiorari* or jurisdictional statement.[1] Overall, it agreed to hear only about 5 percent of them.

Although the Supreme Court has established a number of formal rules and informal policies that affect its selection of cases (see Perry 1991a), in the end it is a matter of whether at least four justices[2] believe a case presents an issue important enough to hear that determines whether it is bound over for review (see O'Brien 1991, 114). Consequently, actors looking to engage the Supreme Court must take

steps to increase the likelihood that cases of interest to them will capture the justices' attention. This is where the use of the *pre-certiorari amicus curiae* brief becomes instrumental to the task. As the leading manual of practice before the Court states, "where there is doubt, as there usually is, that a petition will be granted, statements by *amici* which show that the case is generally important can be of significant aid to the petitioner" (Stern, Gressman, and Shapiro 1986, 391).

Caldeira and Wright (1988) have demonstrated that *certiorari* petitions or jurisdictional statements accompanied by *amicus* briefs *are* significantly more likely to win a hearing by the Court. Apparently, these briefs alert the justices to the potential significance of a case by providing signals about its political, social, and economic ramifications (see Caldeira and Wright 1988; McGuire and Caldeira 1993). According to the current Supreme Court Counsel of the National Association of Attorneys General (NAAG) Supreme Court Project (hereinafter referred to as "NAAG's Supreme Court Counsel"), the states are well aware of the effectiveness of *pre-certiorari* briefs, given that a relatively high number of petitions accompanied by state briefs are placed on the Court's docket (Author Interview). And we would expect that as the states have come to see the Court as a more amenable arena in which to pursue their policy goals and as states have become more proficient litigators (see chapter 4), their use of briefs urging the Court to hear a particular case would increase over time.

Of course, state governments, like all third parties, are not formally precluded from filing briefs arguing that the Court should *not* docket a case. However, the leading manual of practice advises against such an action (see Stern, Gressman, and Shapiro, 1986), and quantitative analyses (Caldeira and Wright 1988) have demonstrated that *amicus* briefs arguing against jurisdiction or urging denial of *certiorari* actually increase the likelihood that a case will be docketed. Third parties appear to be well aware of this. Of the 4,652 *amicus curiae* briefs filed between 1948 and 1989, only 778 (16.7 percent) briefs urging denial were filed (calculated from Caldeira et al. 1994).

Table 5.1 displays results bearing upon the question of the longitudinal variation in the states' rate of participation as *pre-certiorari amici*. It depicts the distributions of state and nonstate participants in terms of total numbers of cases, briefs, and individual *amici* between 1954 and 1989. Several facets of this table deserve comment. First, on a general level, organized activity before the Supreme Court in the form of *pre-certiorari amicus curiae* has increased considerably over the four decades described in the table. On average, the number of *certiorari* petitions accompanied by at least one *amicus* brief has increased by five petitions with each passing term, while the number of *amici* participating has grown at an even greater rate. On average, nearly twenty-five more *amici* are active with each new term between 1954 and 1989.[3]

Second, the states have not always been active *pre-certiorari amicus* participants. They did not even attempt to influence the Court's docketing decisions until the 1957 Term. And their activity remained both low and episodic until the latter half of the 1970s — the point at which the more "state-friendly"

Table 5.1
Longitudinal Incidence of State and Nonstate *Pre-Certiorari Amicus* Participation: Cases, Briefs, and *Amici*

	NUMBER OF CASES IN WHICH *AMICUS* BRIEFS APPEAR		NUMBER OF *AMICUS* BRIEFS FILED		NUMBER OF INDIVIDUAL *AMICI* PARTICIPATING	
Term	State (%)	Nonstate	State (%)	Nonstate	State (%)	Nonstate
54	0 (0)	8	0 (0)	8	0 (0)	8
55	0 (0)	15	0 (0)	19	0 (0)	21
56	0 (0)	11	0 (0)	11	0 (0)	11
57	4 (13.8)	25	6 (14.6)	35	12 (21.4)	44
58	4 (15.4)	22	4 (13.8)	25	4 (8.3)	44
59	7 (25.9)	20	11 (21.6)	40	13 (20.3)	51
60	1 (6.3)	15	1 (5.9)	16	2 (8)	23
61	2 (6.3)	30	2 (4.6)	42	2 (3.8)	51
62	9 (29)	22	13 (25.5)	38	20 (26.3)	56
63	2 (4.6)	42	2 (3.6)	53	2 (3.3)	58
64	8 (16.3)	41	24 (31.6)	52	42 (37.2)	71
65	2 (4.8)	40	2 (3.7)	52	7 (9.5)	67
66	11 (20)	44	17 (21.5)	62	56 (34.2)	108
67	11 (18.3)	50	12 (16)	63	12 (12.2)	86
68	5 (10.6)	42	6 (9.7)	56	24 (15.3)	133
69	7 (12.7)	48	13 (15.7)	70	13 (8.2)	145
70	11 (13.3)	72	13 (12.3)	93	42 (23.7)	135
71	12 (15)	68	17 (14.8)	98	93 (38.9)	146
72	10 (12.2)	72	15 (12.2)	108	15 (9.3)	146
73	16 (17.8)	74	17 (11.5)	131	70 (28)	180
74	13 (15.7)	70	14 (13.3)	91	69 (31.1)	153
75	16 (15.1)	90	22 (13.2)	145	91 (23.5)	296

Table 5.1 (cont'd)

76	22 (22.2)	77	28 (21)	108	79 (25.9)	226
77	12 (10.9)	98	18 (8.8)	187	65 (13.9)	402
78	11 (11.7)	83	13 (9.7)	121	172 (38.2)	278
79	16 (16)	84	20 (13.5)	128	125 (38.1)	203
80	24 (17.5)	113	35 (15.8)	136	259 (42.7)	347
81	34 (17.8)	157	58 (16.3)	298	237 (26.4)	662
82	33 (20.8)	126	55 (19)	235	270 (35.4)	492
83	31 (21.8)	111	32 (15.5)	174	257 (44.3)	232
84	27 (18.9)	116	28 (12.1)	203	230 (35.7)	414
85	39 (25.8)	112	42 (18.6)	184	428 (43.9)	547
86	35 (24.5)	108	39 (18.1)	176	322 (45.4)	387
87	14 (15.6)	76	21 (15.4)	115	95 (30.4)	218
88	25 (14.9)	143	30 (12.2)	216	282 (35.3)	517
89	30 (19.4)	125	31 (13.3)	202	380 (40.7)	554
TOTAL	504 (16.5)	2550	661 (14.2)	3988	3790 (32.8)	7751

brand of GOP appointees began to assert a substantial presence on the Court. This also coincided with the Court's decision in *National League of Cities v. Usery* (426 U.S. 833 [1976]).

Finally, on average, the states' presence relative to all other *amicus* participants has grown considerably since they first became active in 1957. Between 1957 and 1977, 19.2 percent of amicus participants were state governments. This share fluctuated wildly, ranging from a low of 3.3 percent to a high of 38.9 percent.[4] Then, beginning in the 1978 term, the average levels of state participation increased, and the swings in relative participation dropped appreciably, sinking no lower than 26.4 percent and rising as high as 45.4 percent.[5] In fact, the estimates obtained by regressing the states' relative presence as *amici* per term indicates that each new term saw the states' share increasing by more than one point.[6] Clearly, then, an appreciable share of the increased docketing activity of *amici* in general is a consequence of the increasing efforts of state governments to engage the Supreme Court as a policy maker.

In the Chamber

Ultimately, *pre-certiorari amicus curiae* briefs are nothing more than tools used to enable state governments to gain access to the Court by requesting that it address policy issues in which they are interested. Once the Court's attention is secured (i.e., once access is achieved), state governments can then lobby the Court on the merits of the case by filing merits *amicus* briefs. Thus, gaining access to the Court by shaping its docket provides a way to lobby the Court in pursuit of policy.

In this sense, *pre-certiorari amicus* briefs can be treated as analogous to other, more recognizable, tools of lobbying used by state governments to affect policies produced by Congress and the federal bureaucracy — rallying the public, working within interstate associations, and the like (see Cigler 1995). As is the case with *pre-certiorari* briefs *amicus curiae*, these lobbying tools are designed to gain access to the appropriate decision maker. Only after access is achieved can discussions on the merits of a particular policy commence.

Thus, state efforts to gain access to the Court's plenary docket have increased over time, as has the incidence of the states lobbying the Court on the merits of the issue. Further, it should come as no surprise that a relationship exists between state efforts to gain access to the Court's docket and eventual state "lobbying" actions on the merits. At least one state filed a merits *amicus* briefs in 62 percent of the cases where the states had urged the Court to docket a case in the first place ($Chi^2 = 267.4$, $p > Chi^2 = 0.00$).

Table 5.2 displays evidence bearing upon this relationship. It contains the incidence of state activity as *amici* at the merits stage of the Court's deliberations from 1954 to 1989. Based on these data, it is clear that state participation before the Court has grown steadily since the first days of the Warren Court. In fact, on average across the time period, the incidence of state appearances as merits *amici* increased by more than one case per term.[7]

A similar pattern holds for state participation as appellants. As in other chapters, we focus on state litigation as *appellants* because these instances are clear examples of a state actively resorting to the Court in pursuit of policy. Although appellees certainly can arrive in Court in the hopes of achieving a favorable judicial policy, by definition they are not driving the litigation. As Table 5.2 indicates, there has been an appreciable increase in state participation before the Court as appellants — more than one case per term.[8]

Consistent with the themes of this book, state efforts before the Court have become hyperactive since GOP appointees began to take their places on the High Bench. Consider that during the Republican Court era (1968–89), state merits *amicus* briefs accompanied an average of 25.8 cases per term, compared with 6.5 cases during the Warren Court. What is more, the typical term during the Republican Court has seen nearly thirty cases in which a state is the appellant. By contrast, a state appeared as the appellant on average a mere 5.8 times per term during the Warren Court era. And as we noted in chapter 4, during the Warren Court era, only 16 percent of the states' appearances in Court were as appellants; by the Rehnquist Court, that proportion had increased to 56 percent.[9]

Table 5.2
Longitudinal Analysis of State Merits Activity: Incidence as *Amicus* and Appellant

Term	Number of Cases in which Merits *Amici* Are Active	Number of States Participating as Merits *Amici*	Number of Cases in which States Were Appellants
54	3	9	4
55	2	7	2
56	5	17	2
57	5	19	8
58	8	60	7
59	6	46	4
60	2	2	2
61	5	12	2
62	3	29	13
63	8	102	5
64	10	27	5
65	5	10	8
66	9	96	6
67	14	24	10
68	12	47	9
69	12	83	11
70	7	55	21
71	17	64	21
72	14	56	33
73	23	70	27
74	13	69	28
75	14	73	34
76	25	142	44

Table 5.2 (cont'd)

77	18	164	25
78	17	75	43
79	20	121	22
80	19	169	27
81	16	298	36
82	29	524	38
83	29	509	43
84	33	470	46
85	58	585	42
86	23	581	39
87	66	678	20
88	39	553	27
89	50	692	30
TOTAL	639	6538	744

As further discussed in the previous chapter, two obvious forces accounting for the states' increased litigation activities are the new regulatory and enforcement responsibilities the states assumed in the 1970s and 1980s and the establishment of the Supreme Court Project. The expanded role of the states in the nation's regulatory framework, as a matter of necessity, has made them resort to the federal judiciary more often. Meanwhile, the Project's efforts to promote and coordinate state *amicus* activity has had marked results. It has made the states more aware of the value and use of participation as *amicus curiae*, and its monitoring functions (through the weekly publication of the *Supreme Court Report* and the *amicus* brief conference calls) alert the states to issues of interest to them on the Court's docket.

But surely another important force is again the pro-state persona the Court assumed with the string of Republican appointments beginning in the early 1970s. As we demonstrated in chapter 3, the Republican presidents of the 1970s and 1980s were remarkably successful in appointing to the Court jurists who were supportive and protective of the states' position within the federal relationship. And the states, sensing the Court's new decisional environment, have resorted to it more often. On average per term during the era of the Republican Court, state briefs *amicus curiae*

accompanied nearly five times as many *certiorari* petitions, and more than thirteen times as many states were active as *pre-certiorari amici* than during the Warren Court. The states were also markedly more likely to "lobby" the Court on the merits of the issue.

At the same time, however, the presence of the Republican Court has not resulted in the states deciding to engage it in a reckless way. As indicated in the surveys and interviews we conducted, the states are strategic in their decisions to interact with the Court — when possible opting to engage it only in those cases where the issue is deemed especially important and/or where their interest is likely to win. This decisional calculus clearly guides their decisions to file *pre-certiorari* briefs. First, the argument posed in such a brief concerns the gravity of a case, and that assertion dissipates if it is used with too great a frequency. Second, the states are conscious that "political capital" is involved when they urge the Court to docket a case. The states do not want to waste that capital by supporting a place on the Court's docket for a case that a significant number of the justices view as frivolous. Also, the Court's declining docket (see Baum 1997, 126) places a premium on selecting cases that will have the greatest policy ramifications for the states within the federal relationship. The present NAAG's Supreme Court Counsel estimates that there are only about fifteen spots on the Court's docket for cases of interest to the states. Consequently, the states must choose carefully (Author Interview). Finally, of course, not all cases are "winners." Even though the Court is generally state-friendly, there will inevitably be cases that — because of configuration of issue(s), status of precedent, and the like — are unlikely to receive a positive response from the Court (see chapter 7). The states will not want such cases before the Court because they will take up valuable docket space and will likely yield negative precedent.

The Correlates of State Activity

So far in our analysis, we have focused on trends in the total incidence of state participation before the Supreme Court. The overall frequency, however, masks variation in the rates of participation of individual states. Simply put, not all states were equally active in their efforts to gain access to, and then lobby, the Court. From 1954 to 1989, the mean rate of participation of individual states as *pre-certiorari amici* was 75.8 appearances (or 2.1 appearances per term). But the standard deviation of 18.6 speaks to the extent of the dispersion. Similar patterns exist for the states' efforts to lobby the Court on the merits. On average, individual states filed 81.5 merits *amicus* briefs from 1954 to 1989. Here, too, there is the presence of substantial variation among the states; the distribution's standard deviation is nearly twenty. Also, states appeared as direct parties at an average rate of 16.4 times during the time period, and a standard deviation of 19.1 indicates the magnitude of variation in the states' appearance before the Court in this capacity.

Table 5.3 displays the rate of litigation activity for the individual states in each form of participation before the Court. As we would expect, there is a strong correspondence between the states' incidence of activity as both *pre-certiorari* and

merits *amici curiae* in a particular case (Pearson's r = .68) — further evidence suggesting that the states use *pre-certiorari* briefs to gain access to the Court and merits *amicus curiae* briefs to lobby the justices on the substantive points of the issue.

There is also a moderate association between a state's frequency of appearances as an appellant and its activity as a merits *amicus* (Pearson's r = .53). At the same time, however, it is worth noting that there is not a strong correspondence across all three forms of engaging the Court. The correlation between a state's frequency of filing *pre-certiorari* briefs *amicus curiae* and appearing as an appellant is only .12. Indeed, only California is an exceptionally active state in all three forms of participation.

Examination of Table 5.3 reveals that the most active filers of *pre-certiorari amicus* briefs tend to be states rich in natural resources and/or containing large tracts of land area owned by the federal government, while the most active states at the merits stage of Court deliberations are the nation's most populous. And this makes sense. Both our survey and interview data indicate that the various modes of state activity arise from different sets of forces.

The states are *very selective* when they decide to litigate a case themselves. This is because activity as direct parties before the Court involves a tremendous outlay of human resources and capital (see chapter 4). Thus, the more populous states, which tend to have larger, more institutionalized offices of attorney general, are more apt to possess the resources necessary for appearing relatively often as parties in the Supreme Court. It also bears mentioning that the more populous states may simply have occasion to engage the legal system more often. As Grossman and Sarat put it, "increased reliance on formal law and its processes appears to parallel changes in the complexity of a society which are produced by economic growth and development" (1975, 323). Thus, states with larger populations would seem both more likely and better able to appear as direct parties before the Court than their smaller counterparts.

Of course, as a group the nation's less populated states have occasion to engage the Court in pursuit of their policy goals as well. Geographical fate has left these states relatively rich in natural resources, and historical fate has left the national government in possession of large tracts of their land area. Now, disputes between these states and the national government often arise over that land's management, regulation, and development, and the disposition of any revenues that might be generated from it. Therefore, these states turn to the judiciary to protect their more vulnerable policy interests. And when they do so, they make frequent use of *pre-certiorari amicus* briefs. These briefs require relatively little in the way of state resources, and they are invaluable tools in signaling to the Court that a particular case is worthy of its fuller attention.

For a more systematic accounting of these patterns, we examined the correlations between a state's incidence of participation before the Court (as both appellants and *amici curiae*) and measures of the state's size of population, amount of land area owned by the national government, and the institutional capacity[10] of

Table 5.3
Incidence of Individual State Litigation Activities

State	As *Pre-Certiorari Amicus*	As Merits *Amicus*	As Appellant
AL	55	79	14
AK	53	71	4
AZ	100	101	21
AR	60	55	10
CA	107	168	100
CO	61	69	11
CT	77	82	19
DE	64	60	4
FL	92	97	24
GA	44	63	21
HI	73	85	4
ID	98	77	4
IL	86	90	45
IN	87	107	7
IA	61	64	16
KS	87	89	2
KY	53	60	13
LA	92	103	9
ME	50	53	5
MD	70	73	20
MA	38	63	32
MI	63	72	11
MN	78	91	14
MS	61	73	7

Table 5.3 (cont'd)

MO	82	101	11
MT	86	86	10
NE	78	72	10
NV	95	80	7
NH	60	66	2
NJ	57	84	17
NM	85	64	4
NY	65	94	90
NC	97	94	17
ND	91	76	3
OH	75	91	31
OK	74	67	10
OR	70	63	14
PA	94	81	43
RI	39	54	6
SC	67	82	7
SD	98	80	9
TN	62	70	13
TX	70	87	36
UT	103	90	5
VT	64	70	4
VA	62	86	16
WA	101	105	18
WV	67	24	4
WY	118	113	1
WI	79	102	14

its attorney general's office. As Table 5.4 shows, the geographic presence of the national government does have a significant effect on a state's incidence of *amicus curiae* activity, even when controlling for the other state characteristics. It seems, then, that a substantial federal presence makes a state more likely to engage in *amicus curiae* activity. By the same token, the federal government's ownership of land does not significantly affect the frequency of a state appearing as an appellant in Court. Rather, the size of a state's population (an indicator of its social complexity) and the institutional capacity of its office of attorney general help to explain this. Indeed, the size of a state's population explains 53 percent of the total variation in the frequency of its interactions with the Court as an appellant not explained by the other state factors. And, importantly, the institutional capacity of a state attorney general's office has a separate, measurable effect as well — a point echoed in our survey results. Of those forces motivating a state's litigation decisions, the resources available to the office of attorney general are evaluated as some of the most influential.

COMPETITION AND COOPERATION

Competition

The pursuit of policy goals often entails competition and conflict over scarce resources. Because organized interests come into being to pursue policy goals in the political system, James Madison's argument (enunciated perhaps most clearly in *The Federalist Papers*) that group competition is a central feature of our decision-making arenas has proven prophetic (see, for example, Bentley 1908; Schlozman and Tierney 1986; Salisbury et al. 1987). But the level of group

Table 5.4
Partial Correlations of State Attributes and Participation Before the U.S. Supreme Court

State Attribute	Total Incidence of *Pre-Certiorari Amicus* Filings	Total Incidence of Merits *Amicus* Filings	Total Incidence of Appearances as Appellants
Population	0.22	0.41*	0.73*
Amount of Land Owned by the National Government	0.42*	0.36*	0.20
Capacity of Attorney General Office	-0.14	-0.06	0.30*

*Significant at .05

competition lacks uniformity, even within specific arenas. For example, Robert Salisbury and his colleagues (1987) found that the level of group acrimony varied by policy domain.

Explicit conflict at the *pre-certiorari amicus* stage is virtually nonexistent. The signaling function of *amicus* briefs at the Court's docketing stage militates against groups filing briefs in opposition to *certiorari* (Stern, Gressman, and Shapiro, 1986; Caldeira and Wright 1988; Caldeira et al. 1994). The tendency *not* to file briefs in opposition to *certiorari* is certainly apparent in the behavior of the states. Across the span of our focus, 476 petitions for *certiorari* found support from at least one state acting as a *pre-certiorari amici.* On the other hand, there were only twenty-eight occasions when a state filed an *amicus* brief opposing *certiorari.* This reluctance to file briefs recommending against the Court granting *certiorari* is even more telling when it is examined in light of the total incidence of state activity. From 1957 to 1989, there were 3,790 separate instances in which a state was active as an *amicus*; only thirty-seven of these (1 percent) were in opposition to *certiorari.* Finally, the phenomenon of states opposing one another is virtually nonexistent. Only three cases (0.6 percent) involved a state filing a brief opposing *certiorari* while at least one other state filed a brief recommending that the Court grant the petition.

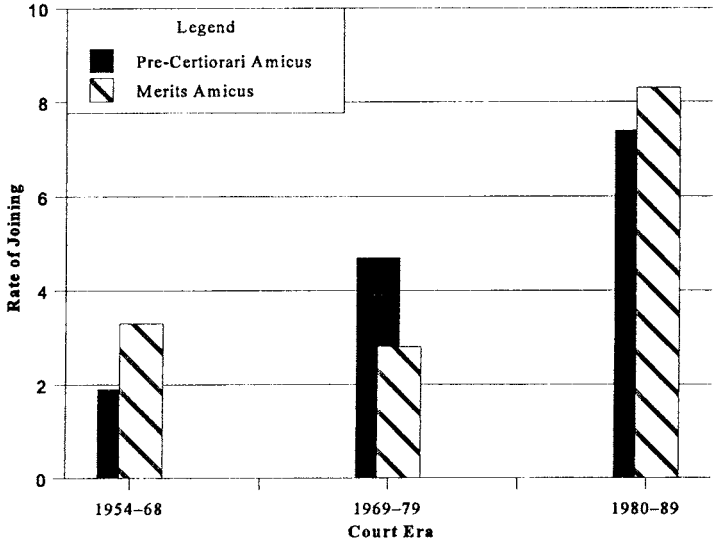
Public splits among the states are also quite rare at the merits stage of Court deliberations. Between 1954 and 1989 the states filed merits *amicus* briefs on alternative sides of a case twenty-five times, and at least two states squared off against each other as direct parties on fifty-three separate occasions. Aside from border and property disputes between the states, the lion's share of these conflicts concerned economic matters — for instance, questions of state taxation or environmental regulation. On occasion in the 1950s and 1960s, there was also a North-South split in some civil rights cases.

Cooperation

Obviously, the states are not monolithic. At the same time, however, they recognize that their ability to affect national policy rests on their capacity to coordinate their efforts. Caldeira and several coauthors (Caldeira and Wright 1990; Caldeira et al. 1994) found that the states are notable for their extensive level of cooperation before the Court. We begin an assessment of this behavior by measuring the frequency of joining among pairs of states for both their *pre-certiorari* and merits *amicus* activity.[11]

At the threshold, we find that there is considerable coalitional activity among state governments. On average, across the time period we examine here, approximately six states share a single *pre-certiorari amicus* brief, and 5.7 states appear on a single merits brief. Moreover, the states' tendency to join one another's briefs has grown steadily over time. During the Warren Court era, the average was fewer than two states coalescing on *pre-certiorari amicus* briefs, and just three states were present on the typical merits *amicus* brief. These rates of joining jumped to 7.4 and 8.3 states, respectively, by the 1980s. Figure 5.1

Figure 5.1
Growth in Rate of State Joining Behavior



illustrates the appreciable growth in state cooperative efforts.

Clayton (1994; see also Baker and Asperger 1982a, 1982b; Caldeira and Wright 1990) suggests that one important force leading to this increased coalitional behavior was the emergence of various state networks and associations aimed at integrating the states' pursuit of policy before the federal judiciary (e.g., the Legal Advisory Committee in 1979, the State and Local Legal Center in 1983, and the Supreme Court Project in 1982). Thus, by the early 1980s — the point at which state cooperative activity exploded — there were a variety of institutions in existence working to promote a sense of shared interests and a common approach to federal litigation.

At the same time, it bears mentioning that despite these forces promoting shared interests and encouraging cooperative activity among the states, not all states are invited to join one another's briefs *amicus curiae* at equal rates; nor do they always accept the invitations. Thus, one state reported that on average it receives over 200 invitations to join briefs *amicus curiae* each year, and with that number it can be fairly selective, accepting only about 15 percent of the invitations. At the other end of the continuum are those states that receive fifty or fewer invitations. They too appear to weigh the invitations carefully, choosing to accept fewer than half of them. On average, the states receive about seventy-one invitations each year with an average rate of acceptance of 36 percent. Of course, the standard deviations of 46.1 and 15.3 speak to the extent of the dispersion in both instances.

Because different cases will affect states in different ways, and because of the different frequencies of invitations and acceptances among the states, not all of them join together at equal rates. For example, at the docketing stage, Wyoming and Idaho form the strongest dyad, coalescing on average 46 percent of the time, whereas the New York–Nevada dyad is the least active — the two states are together on a brief only 7 percent of the time. At the merits stage, Missouri and Kansas find their way on to the same *amicus* briefs most frequently. The two states are jointly present 45 percent of the time. New York again is a member of the least active dyad; both it and Texas are together on the same merits *amicus* briefs a mere 6 percent of the time.

For a broader understanding of the patterns of state coalitions, we conducted cluster analyses of the states' *pre-certiorari* and merits *amicus* joining behavior using Ward's method (see Aldenderfer and Blashfield 1984). The results are displayed in Tables 5.5 and 5.6. In responding to our survey, the states indicated that they join one another's *amicus* briefs largely on an *ad hoc* basis, and the cluster analyses bear this out. When we analyzed the states' joining patterns on *pre-certiorari* briefs, four "coalitions" emerged. At first blush, there does appear to be some regional cohesion. Coalition 1 is dominated by states in the west the outlier being New York. Equally, Coalition 2 is made up exclusively of states west of the Mississippi River. Regional biases are less apparent in the remaining two coalitions (see Table 5.5).

These results make sense. In responses to interviews and surveys, officials assert that there are a wide variety of motivations underlying a state's decision to join an amicus brief. All else being equal, cases involving broad issues of federalism (i.e., taxation, commerce, and criminal procedure) would garner significant interest among most, if not all, of the states. Also, the efforts of the Supreme Court Project to facilitate communication among states across the country and its encouragement of states to join one another's *amicus* briefs may militate against these coalitions being constrained to regional cohorts. In addition, there are likely a variety of idiosyncratic and interpersonal forces at work that are not regionally based. For instance, personal contact and informal relations with counterparts in other states might encourage some attorneys general to cooperate with one another more often (Confidential Interview). By the same token, a state's lack of support in previous cooperative efforts is likely to discourage an attorney general from deciding to join that state's brief (Zimmerman 1997). And finally, NAAG's Supreme Court Counsel suggests that simple logistics play a role. Some states may be more reluctant to sign on to a brief they have not read or had the opportunity to edit (Author Interview).

On the other hand, there does remain some level of regional bias. Clearly, the interests of a more limited group of states are touched by particular issues, such as water rights or relations with Native American tribes. Some issues that resonate with only a segment of the states may, in turn, have a regional bias. For example, cases involving disputes over the use of public land affects different states in different ways, given that some states, particularly in the west, contain relatively

Table 5.5
State *Pre-Certiorari Amicus Curiae* Coalitional Memberships

COALITION 1	COALITION 2	COALITION 3	COALITION 4	
New York	Kansas	New Hampshire	Connecticut	Tennessee
Texas	Nebraska	Vermont	Rhode Island	West Virginia
California	North Dakota	Delaware	New Jersey	Colorado
Oregon	South Dakota	Pennsylvania	Michigan	Hawaii
Washington	Arizona	Illinois	Ohio	Maine
Alaska	Idaho	Indiana	Wisconsin	Georgia
	Montana	Missouri	Iowa	Maryland
	Nevada	Florida	Minnesota	
	New Mexico	Mississippi	Virginia	
	Utah	North Carolina	Alabama	
	Wyoming	South Carolina	Arkansas	
		Kentucky	Louisiana	
			Oklahoma	

large tracts of federally owned property. Thus, such states would seem more likely to coalesce when cases involving this issue come before the Court.

For these same reasons, weak regional patterns are also apparent in the states' merits *amicus* joining behavior. This cluster analysis brought out three broad groups of states. One grouping consists largely of states from the "Old South" (e.g., Virginia, South Carolina, and Mississippi), but states from the Midwest (e.g., Kansas and Indiana) and one state from New England (New Hampshire) are present as well. The second grouping could be labeled the "Big Sky" coalition. Most of the Mountain and Desert Southwest states (e.g., Idaho, Colorado, Arizona, and Nevada) comprise it; yet, states from the Great Lakes (Michigan), the Pacific Northwest (Washington), and the South (Arkansas) are also members. The last grouping contains states from nearly every region of the nation (see Table 5.6).

Table 5.6
State Merits *Amicus Curiae* Coalitional Memberships

COALITION 1	COALITION 2	COALITION 3	
Georgia	Michigan	California	Iowa
Virginia	North Dakota	Ohio	Texas
South Carolina	Colorado	Louisiana	Delaware
Kentucky	Arkansas	Vermont	Maryland
Alabama	South Dakota	Hawaii	Maine
Florida	Washington	Illinois	Massachusetts
Mississippi	Montana	Connecticut	New York
Oklahoma	Wyoming	New Jersey	
Nebraska	Arizona	West Virginia	
Kansas	Utah	Rhode Island	
Missouri	Idaho	Alaska	
Indiana	Nevada	Pennsylvania	
North Carolina	New Mexico	Minnesota	
Tennessee		Oregon	
New Hampshire		Wisconsin	

The Strategy of State Joining Behavior

According to NAAG's Supreme Court Counsel, the states join one another's *amicus* briefs because cooperation affects their likelihood of success (Author Interview). As we noted above, the principal goal of state *pre-certiorari amicus* activity is to signal to the justices that a particular case is important and deserves to be heard on the merits. One clear way to elevate a case above the din of filings and general *amicus* activity is to band together in coalitions. Increasing the number of states present on a single brief should signal to the justices the broader social, political, and economic ramifications of a particular case, which should in turn increase the likelihood of the justices choosing to place the case on their limited agenda.

We examined the relative success of the states' coalitional activity as *pre-*

certiorari amici and found that when multiple states cooperate on a single brief, they are significantly more likely to convince the Court that a case is worthy of its fuller attention. Indeed, when a coalition of states files a *pre-certiorari amicus* brief recommending that the Court docket a case, they are successful 50 percent of the time — a rate of success that is nearly the same as that of the United States. Meanwhile, when a state acts alone, it is successful only 41 percent of the time.[12] Thus, strategically, it makes sense for states to coalesce.

And this finding stands up in the context of multivariate controls. Aside from the presence of *pre-certiorari amicus* briefs, a variety of forces have been shown to enhance the likelihood that a case will be docketed. For instance, Joseph Tanenhaus and his coauthors (1963) found that the presence of the United States as a party, a civil liberties issue, and dissension in the lower courts increased the probability that the Court will accept the case. Similarly, a number of scholars have shown that the justices' docketing decisions are affected by their ideological preferences (see for example, Armstrong and Johnson 1982; Songer 1979). Finally, other scholars have focused on the Court's responsibilities within the hierarchical judicial system. Building on Tanenhaus and colleagues, they have found that conflict within and between the lower courts is a cue the justices use to identify a case as worthy of a closer look (see, for example, Ulmer 1984; for a fuller accounting of these forces, see Caldeira and Wright 1988).

Ideally, we would estimate the influence of state *amicus* activity individually and within coalitions as part of a model of the Court's docketing decisions across the full time period of our analysis. Unfortunately, however, the data necessary to such a task have not been amassed. Instead, we estimated the model's coefficients using data from the 1982 Term of the Court (Caldeira and Wright 1988). We calculated the effect of the states acting jointly on the Court's docketing decisions, while controlling for other forces. Table 5.7 displays the results.

These data confirm that when a group of states submits a brief *amicus curiae* in favor of *certiorari* the likelihood that the case will win review is improved substantially (2.63, t = 4.07). Indeed, holding the other variables constant at their means, the presence of a multi-state *amicus* brief improves the probability of *certiorari* being granted by 19.6 percent.[13] On the other hand, the coefficient measuring the effect of states acting individually is not statistically different from zero. Given the introduction of the large number of controls, the strength of the states' effect when they join together is impressive.

SUCCESS

From the information we present above, a fairly clear portrait of the states' litigation activity in the U. S. Supreme Court emerges. But the picture is less than complete without a discussion of the states' rate of success. Between 1954 and 1989 the states successfully used their *amicus* briefs to gain access to the Court 39.9 percent of the time — a rate of success that is below the success of the United States (successful 49.9 percent of the time) but is significantly greater than the rate

Table 5.7
Logit Coefficients for Model Predicting the Supreme Court's *Certiorari* Decision

Variables	Coefficient	T-Statistic
Solicitor General	3.73*	7.65
Disagreement in Lower Courts	0.98*	3.21
Ideological Direction of Court Below	-1.57*	-5.25
Alleged Conflict	0.79*	2.27
Actual Conflict	3.97*	12.06
Presence of Civil Liberties Issue	-0.12	-0.44
Presence of Non-State *Amicus Curiae*	2.37*	7.73
Individual State *Amicus*	0.92	1.13
Multiple State *Amicus*	2.63*	4.07
Constant	-4.08*	11.47

Note: N = 1891; dependant variable equals whether *certiorari* was granted; $Chi^2 = 548.7$; $p > Chi^2 = 0.00$; Pseudo $R^2 = .54$; *Significant at .05. We are indebted to Dr. Gregory A. Caldeira and Dr. John R. Wright for making these data available to us.

of success of nongovernmental entities (average rate of success = 30.9, difference = 9, t = 3.75).[14] In their 1994 analysis of *pre-certiorari amici curiae*, Caldeira and his coauthors attributed these differential rates of success of *amici* to differences in legal skills, experience, resources, and reputation. That is, those *amici* — such as state governments — who possess greater legal resources are more likely to see the Court follow their docketing recommendations. The advantages present at the docketing stage should carry through to the Court's merits deliberations as well. Therefore, we anticipate that the states, endowed with substantial legal resources, should be relatively successful in having the Court adopt their legal position at the merits stage of its deliberations.

Both as merits *amici* and as parties, the states have won a substantial proportion of those cases in which they took a position.[15] Across the time period we examine,

the states won 56 percent of the cases in which they appeared as merits *amici*. In addition, they won 48.9 percent of the cases in which they were direct parties. Worth noting is the fact that the states won an impressive 64.9 percent of cases in which they were the petitioner. These rates of success compare favorably to other participants before the Court (see Epstein 1993, Table 10). In general, the states are more successful than any other litigator save the United States. Between the 1954 and 1989 Terms, the United States won 76.4 percent of the time it was the petitioner and 71.9 percent of the cases in which it was a merits *amicus*.

Finally, it must be noted that the states' rate of success has not remained constant across time. As the number of Republican appointments to the Court mounted in the 1970s and 1980s, and as the states took active steps to improve their proficiency before the High Bench in the last decade, their litigation efforts have become substantially more effective. Indeed, as merits *amici* their rate of success grew from 42.9 percent during the Warren Court era to 58.6 percent during the Rehnquist Court. A similar trajectory is evident for the states' fate as direct parties, rising from 35.6 percent in the 1950s and 1960s to 56.8 percent from 1986 to 1989.

CONCLUSION

Without a doubt the Supreme Court increasingly has taken on a pro-state persona since the advent of the Nixon administration. Because the states are such frequent litigators in the Court, the opportunity exists to test an interconnected causal structure comprised of relationships between the Court's composition, its decisions, and the states' litigation actions. Here, a change in any of the elements should reverberate through the full system. Thus, a shock to the system produced by a presidential appointment would result in changes in the Court's decisional behavior and eventually adjustments by the states as they respond to the Court's changed decisional context. It is to the development and test of that causal structure that we now turn.

NOTES

1. Formal, written requests made by a party directly involved in a dispute that the Supreme Court hear their case.

2. Under their discretionary jurisdiction, the justices have developed the informal "Rule of Four." During conference at least four justices must agree that a case presents an issue or controversy important enough to warrant oral argument and the full Court's attention.

3. More formally, regressing the number of petitions and the number of *pre-certiorari amici* per term yields: petitions = -243.5 + 4.5Term ($t = 15.2$), $r^2 = .78$; *amici* = -1467.5 + 24.9Term ($t = 11.1$), $r^2 = .78$.

4. A range of 33.6%; CRV = 57.3; s = 11; median = 20.3.

5. A range of 19%; CRV = 15.3; s = 5.8; mean = 38; median = 38.2.

6. More formally: %state *amici* = -51.5 + 1.05Term ($t = 6.9$), $r^2 = .57$.

7. The regression's yield: -69 + 1.2Term ($t = 8.6$), $r^2 = .68$.

8. The regression's yield: appellants = -56.9 + 1.1Term ($t = 7.1$), $r^2 = .59$.

9. Unfortunately, we cannot speak directly to whether the states' and the Court's behavior concerning *certiorari* petitions changed. Our data on the incidence of state activity before the Court as direct parties are only for those cases decided by full opinion — presently only about 1 percent of the cases appealed to the Court. The data do make clear, however, that the emergence of the Republican Court brought about a fundamental change in the nature of the states' presence in Court.

10. Here we use the median budget allocated to state offices of attorneys general during the time period (calculated from survey results).

11. All binary similarity data were computed using Jaccard's dichotomy coefficient. This measures the proportion of pairs of states present, given *at least one* state is active. This coefficient yields a fairly conservative estimate of the similarity of a pair of states' *amicus* behavior because it omits instances where both states are absent. Jaccard's coefficient measures only instances of state *amicus* activity between states that have positive co-occurrences. Consider the following 2 x 2 association table where 1 represents the presence of a state on an *amicus* brief and 0 represents its absence:

	1	0
1	a	b
0	c	d

Jaccard's coefficient is defined as S = a / (a+b+c)

12. These probabilities were derived by estimating a logit of the Court's decision to grant *certiorari* or note probable jurisdiction on indicator variables measuring whether a state acted as an *amicus* with other states or unilaterally, as well as the presence of the United States and any nongovernmental *amici*. The logit results are displayed in the table below. Each *amicus's* relative probability of success was computed by allowing the variable measuring its presence to vary between 0 and 1, while holding the remaining variables constant at their means. These mean values are as follow: state coalition, .026; unilateral state action, .013; United States, .019; nongovernmental *amicus*, .74.

Variables	**Coefficient**	**T-Statistic**
Coalitional State Action	.76*	2.33
Unilateral State Action	.36	.74
United States	.91**	7.06
Nongovernmental *Amicus*	.09	.77
Constant	-1.00**	8.50

Note: N = 2758; dependent variable equals whether the *amicus* participant's recommendation was followed; $Chi^2 = 56.5$; $p > Chi^2 = 0.00$; * $p < .05$; ** $p < .001$.

13. This was computed by allowing the variable measuring the presence of a coalition of states to vary between 0 and 1, while holding the other independent variables constant at their means. These mean values are as follow: solicitor general, .02; disagreement in the lower courts, .11; alleged conflict, .61; actual conflict, .68; civil liberties issue, .48; nonstate *amicus*, .07; single state *amicus*, .01.

14. Here we examine only *pre-certiorari amicus* activity urging the Court to grant *certiorari* or note probable jurisdiction.

15. Here we define a "win" as those instances where the Court adopted the same legal position urged by a state litigant.

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6

A Model of State Participation Before the Court

When the states (or organized interests more generally for that matter) decide to turn to the U.S. Supreme Court to achieve their policy objectives, they enter a hierarchically ordered system of relationships. In this system, the president's appointment power influences the decisional context of the Court (i.e., its personnel and rulings). That decisional context, in turn, affects the litigation choices and successes of organized interests. Heretofore, we have dealt with each of these components of the system in isolation.

Our aim in this chapter is to explore more fully and more systematically the relationships among the various forces at work here. We do so by developing a theoretical framework that explains both the increasing incidence of state interactions with the Court and the improving rate of state success. This framework incorporates the influence of presidential appointments, changes in the states' law offices, and Court decisions on the states' litigation choices.

In the next section we lay out that framework in greater detail. By recognizing that presidential appointments and judicial outputs are interrelated, we can then investigate their effect on the litigation decisions of the states. In the third section we perform various quantitative analyses to test these relationships. We begin with time series analyses using the Box-Jenkins methodology[1] to examine the effect of both the post-1968 Republican appointees and the institutional development of the state offices of attorney general on increases in the states' rate of litigation success and the incidence of their activity in the Court. We find that the growing number of Republican appointments to the Bench is strongly related to both developments. Next, we use logit analysis to analyze the likelihood of state success before the Supreme Court under multivariate controls. Finally, we perform an adaptive expectations regression to test whether the states' decisions to engage the Court are affected by the decisional context of the Court and the states' estimated

probabilities of success. In the chapter's concluding section, we take stock of our findings and discuss some of their implications.

THEORETICAL FRAMEWORK

We posit that there is a circular process of signals and response at work. The increase in the number of Republican appointees during the 1970s and 1980s transformed the Court's decisional behavior and signaled a willingness — and in some ways an explicit desire — to enhance state authority. Recognizing the possibilities available in this new decisional environment, the states attempted to get more cases involving state interests before the Court. This strategy was no doubt facilitated by the states' increasing litigation capacity. The Court cooperated with the states by first heeding their greater solicitation — thereby increasing the mix of cases it decided that the states actively pursued in the judiciary — and then moving to substantively enhance the states' policy authority by issuing decisions favorable to them on the merits.

An appreciation of this complex interaction is crucial to understanding the use of the judiciary in the pursuit of public policy. The power of the Supreme Court is quite broad by virtue of the institutional and societal acceptance of judicial review; yet, this power is also constrained by the fundamental nature of the judiciary itself. Unlike the president and Congress, the Court is a relatively reactive policy participant. It must await parties affected by particular policies to solicit its involvement before the High Bench has the opportunity to become a participant in the shaping of specific areas of public policy. Of course, the thousands of petitions presented to it each term and its almost complete discretion over its docket generally allow the justices to pursue their policy preferences, but the fact remains that the justices cannot make policy until cases embracing relevant issues are presented to them.

Our explanation of the states' participation and the Court's decisional behavior is an adaptation of the theoretical framework Moe (1985) developed in his analysis of the National Labor Relations Board (see also Bendor and Moe 1985). Like Moe (1985), we envision a core set of relationships characterized by learning and adaptation (see Cohen and Axelrod 1984; Gerber and Jackson 1993). In our framework the states and other interests concerned with the federal relationship file petitions with the Court in pursuit of their policy objectives; these legal participants attempt to cue the Court as to the importance of particular cases by filing briefs *amicus curiae*; the Court ultimately decides those cases. We assume each relationship is a potential cause of the other. For instance, the Court's rulings for or against these interests results from forces such as the Court's composite ideological composition, guiding precedent in the issue area, or the merits of a case. But as a reactive institution, the Court is dependent upon parties for presenting it with cases to adjudicate. Thus, the states' and their opposition's decisions as to which cases to file, which cases to draw the Court's attention to via briefs *amicus curiae*, which issues to present to the Court, establish the contours of the Court's decisions and help shape the Court's decisional behavior concerning the federal

relationship.[2]

Interests will resort to the Court when they expect the benefits of acting there will outweigh the costs. Crucial to this decision is their estimated probability of success. Since the Supreme Court has nearly total control over its docket, that probability of success is really a function of two estimated probabilities: the likelihood that the Court will decide that a case of interest to the litigant warrants a closer look and the likelihood that the litigant will prevail at the merits stage of deliberations.[3]

When the states make their decisions to file a petition for *certiorari* or participate as *amici*, they form these expectations. As we noted in the previous chapter, the states are conscious that "political capital" is involved when they urge the Court to docket a case, and they do not want to exhaust that capital on cases that are certain losers or that the justices perceive as frivolous. Further, our discussions with state officials indicate that the likelihood of success has a strong bearing on the states' decision to resort to the Court. Now, when the states estimate their probabilities of success, they likely base them, to some degree, on actual outcomes. That is, they will estimate that their likelihood of future success in Court is greater when they have previously been able to docket a greater proportion of cases and when they have won more often on the merits. Thus, the Court's decisions affects the states' filing behavior. Indeed, the Court's decisions act as signals guiding the states' decisions.

Like Moe (1985), then, we have a dynamic system of reciprocal relationships. In this system the Court makes its decisions concerning the federal relationship constrained by the mix of cases brought to it by the states and their opposition. Meanwhile, the states and their opposition base their decisions to file petitions or submit *amicus* briefs on their estimated chances of success. These estimates, in turn, are adjusted to changes in the merits decisions produced by the Court. Clearly, this system of relationships produces an interconnected casual structure. And since the two elements in the system adapt and adjust to one another, any shock to the system (e.g., a presidential appointment to the Court) producing a change in one of the elements will eventually trigger a change in the other.

What implications does this framework have for explaining changes in the states' participation before the Court? Assume the system is initially in equilibrium, and that a shock to the system is produced by a series of GOP appointments to the Court, shifting its decisional behavior in a more pro-state direction (such as occurred between 1969 and 1991). The immediate effect is simply that the states win more often, and that immediate effect eventually triggers a reaction in the filing behavior of parties interested in the federal relationship. After some lag as cases already in the system are adjudicated, the states will perceive their greater likelihood of success and will resort to the Court more often. Those interests seeking to limit the states' role in the federal relationship, on the other hand, will reduce their litigation actions against the states. The net effect should be that the proportionate rate of the states' participation as appellants before the Court should increase appreciably.

Of course, presidential appointments are not the only shock that affects the hierarchical system of relationships. Changes in the states' capacity to litigate also have an impact. As we discussed in chapter 4, since the 1970s the states' offices of attorney general have experienced substantial growth and moved toward greater professionalism. As a result, the states are far more capable Supreme Court litigators. Thus, their rates of success and participation before the Court are not affected solely by changes in the Court's composition. At the same time, however, these developments do not fully discount the effect of the GOP's judicial appointments. Indeed, a byproduct of the states' improved ability to monitor the Court was the recognition that the Republican-induced shift in the Court's temperament made it a more hospitable arena in which the states could pursue their policy goals. And this improved recognition, in turn, would lead to increasing efforts by the states to interact with the Court.

AN ACTION-REACTION MODEL OF STATE LITIGATION

Our thesis is that with Republican appointments to the High Bench and state efforts to improve their litigation performance before the Court, the states began to experience greater rates of success. This improving success, in turn, induced the states to use the Court more often in pursuit of their policy goals. Thus, something of a chain reaction is at work: The GOP appointments to the Court in the 1970s and 1980s shifted the Court's decisions in favor of the states; the states, becoming more proficient litigators, reacted to their improved fortunes in Court by increasing their interactions with it.

Trends in State Success

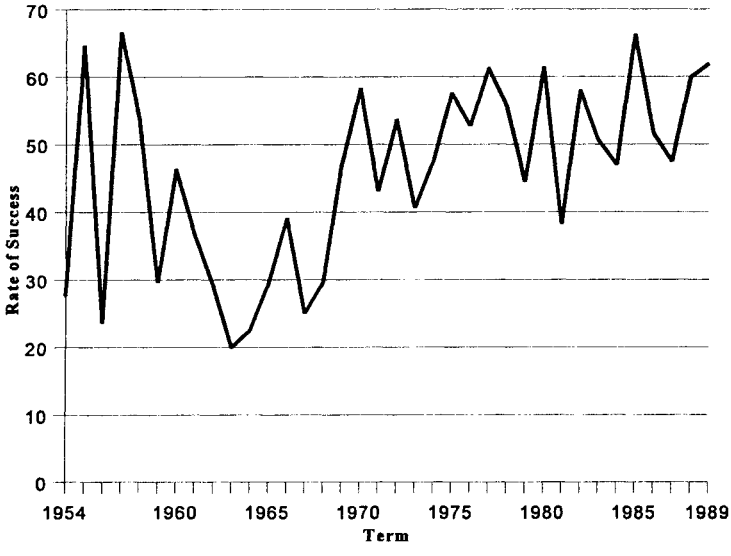
As we pointed out in the previous chapter, the states, in fact, enjoyed greater rates of success since the Republican Court took shape and their offices of attorney general became more professional and capable Supreme Court litigators. In short, the states have won a greater proportion of the cases in which they indicate that they have a stake.[4]

Figure 6.1 reiterates this point. State rates of success (i.e., percentage of "wins"[5]) have fluctuated quite a bit over time. The general trend, however, is clearly toward improving success rates. On average, from 1954 to 1989 the states enjoyed a 48.1 percent rate of success in all the cases in which they had a stake. This, however, partially masks the substantial improvement in overall success rates the states have experienced since the 1970s. During the Warren Court the states' average success rate was 35.4 percent. Since 1970 that has improved to 53 percent. As direct parties in particular, the states have generally registered impressive gains in rates of success as well. As appellants their average rate of success has increased from 52.2 percent during the Warren Court era to 66 percent since the 1970s; as appellees, from 33.8 percent to 41.6 percent.[6]

Trends in State Activity

Undoubtedly, the states' litigation fortunes improved markedly with the emergence of the Republican Court and the institutional growth of the states' law

Figure 6.1
State Rate of Success in the U.S. Supreme Court, 1954–89



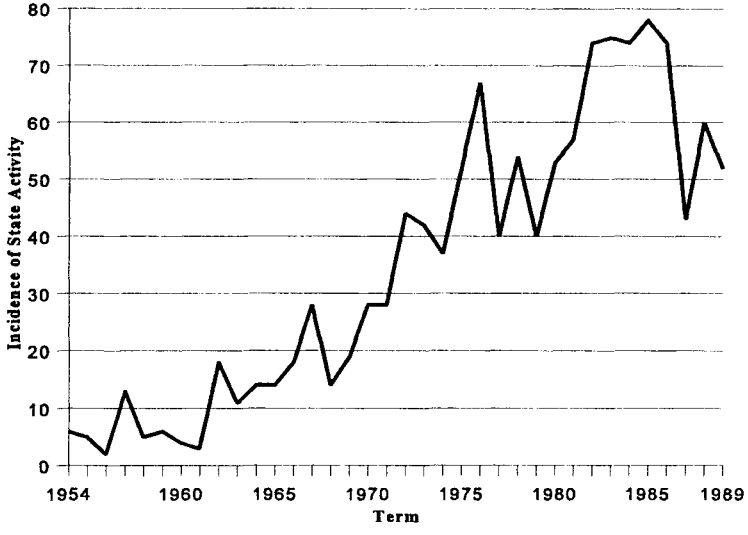
office. As we demonstrated in chapter 5, the states reacted to their improving fortunes by attempting to resort to the Court more often. As *pre-certiorari amici* and as petitioners, state governments have increased appreciably their efforts to engage the Court since the 1960s. Moreover, state activity as merits *amici* exploded with the advent of the Republican Court.

Figure 6.2 displays one way to grasp the substantial increase in the states' overall incidence of activity in the Court. It depicts the growth in the number of cases heard by the Court in which the states have a demonstrated stake—either as an appellant or *amicus*, whether at the *pre-certiorari* or merits stage. Thus, on average during the Warren Court era, the states had a stake in just under eleven cases per term. By the Rehnquist Court, the number of cases per term in which the states were actively resorting to the Court in pursuit of policy had grown to nearly sixty. Indeed, the difference in the incidence of state activity between the Warren Court and Republican Court eras (46.3) is highly significant ($t = 9.82$).

The Effects of Republican Appointments and Changes in the States' Law Offices

To test more directly the effects of the post-1968 Republican appointments and the institutional growth of the state attorney general offices on the states' rate of success and incidence of activity, we estimated moving average models. We

Figure 6.2
Growth in State Activity in the U.S. Supreme Court, 1954–89



presume that each new GOP appointment to the Court will result in an appreciable and positive change — both in the likelihood of the Court finding for the states and the states' rate of activity — that will level off until the next appointment.

Our operationalization of the Republican Court is an index with a starting value of zero that increases by one for each Republican appointment to the Bench after 1968.[7] To measure the development of the state offices of attorney general, we used the median annual budget as a proxy for the offices' institutional growth. Although this measure fails to tap the more intangible developments in the states' law office (e.g., the improved caliber of state Supreme Court litigation and the better training and preparation of state advocates since the establishment of the Supreme Court Project), it does capture a factor that figures prominently in the decisions of the attorneys general to pursue a policy objective in the Court — staff and budgetary resources (see chapter 4). Our measure of state activity is the aggregate number of cases in which at least one state is actively resorting to the Court in pursuit of policy, either as a *pre-certiorari amicus curiae* (whether successfully or not), merits *amici,* or appellant. Finally, state success is measured in the same manner as above. We hypothesize that the addition of GOP appointments to the Court and increases in the budgets of the states' office of attorney general are associated with increases in the states' rate of success and activity. Table 6.1 provides the results of the analysis of state success; Table 6.2, the states' activity.

As we hypothesized, Republican additions are positively and significantly related to both state rates of success and activity. Increases in the attorney general's budget, however, fails to attain significance in either analysis. Each Republican appointment improved the states' rate of success by about 3 percent (see Table 6.1), and, perhaps more importantly, each of these appointments increased state interactions with the Court by almost eight events per term (see Table 6.2). Thus, between 1968 and the full numerical emergence of the GOP Court with the appointment of Justice O'Connor, state success rates increased by a total of 18 percent, and their active pursuit of policy in the Court grew from about ten to nearly sixty events per term.

Based upon these results, then, it appears that the principal force precipitating both the improvement in the states' rate of litigation success and their increased activity before the Court since 1969 is the emergence of the Republican Court. Indeed, the Court that emerged after the series of GOP administrations was far more favorable to the states' interests and policy goals than its predecessor, and, for their part, the states were "procedurally rational" (see Simon 1985) by increasing their interactions with it. The importance of the appointments is even more profound when one considers that state activity and success does not appear to be strongly tied to litigation capacity.

Multivariate Analysis: Success

A variety of studies have shown that an array of disparate forces affects the Court's decisional behavior (Baum 1996). Although a fully specified model of the Court's decisions is beyond the scope of this research, several forces can be

Table 6.1
Time Series Model of State Government Success Before the U.S. Supreme Court, 1954–89

Variables	Coefficient	T-Statistic
Constant	36.06**	12.47
Republican Court Appointments	3.31*	2.78
Growth in Capacity of State Attorney General Office	-0.001	-0.11
MA(2)	-0.65	-0.37

Box-Pierce = 12.4 (ns); df = 9, H_0 = Series is nonautocorrelleated; p = 0, d = 0, q = 2; N = 36;
**Significant at .01; *Significant at .05

Table 6.2
Time Series Model of State Government Activity in the U.S. Supreme Court, 1954–89

Variables	Coefficient	T-Statistic
Constant	10.50*	7.41
Republican Court Appointments	7.79*	11.11
Growth in Capacity of State Attorneys General Office	-0.009	-1.22
MA(3)	-0.15	-0.66

Box-Pierce = 10.54 (ns); df = 9; H_0 = Series is nonautocorrellated; p = 0, d = 0, q = 3, N = 36;
*Significant at .01

identified that are of particular relevance to the litigation fortunes of the states. First, in practical terms, the states have become well positioned to be strong advocates for their causes in Court (see chapter 4). Presently, they are equipped with professional and expert legal counsel, and great financial resources are available to them. Further, throughout the 1980s the caliber of the states' advocacy in the Court has improved appreciably. Thus, the states should enjoy a clear advantage when facing most other parties, who would presumably be less well endowed (see Galanter 1974 and McGuire 1993a for discussions of the differential effect of resources and quality of advocacy on litigation outcomes).

By the same token, state action in the Supreme Court often entails confronting the national government. Against this particular litigant, the states' legal resources pale. The federal government has enormous monetary resources and access to expert legal representation. Moreover, as a part of the national government, the Court seems disposed to defer to the other branches. Thus, studies have shown that the national government is phenomenally successful in the Supreme Court, irrespective of the issue area or the litigant it faces (see Kearney and Sheehan 1992; Sheehan, Mishler, and Songer 1992). Consequently, the likelihood of a state's success should be appreciably lower when it squares off against the United States.

Also, because of the Court's tendency to accept cases in order to reverse them, the states should be more likely to win when their position is consistent with that of the appellant. Epstein and O'Connor (1988), for example, have shown that in criminal cases the states' role as appellant or appellee significantly affected whether they won or lost.

Finally, a number of scholars have demonstrated that the Court's decisions are affected by the broader political environment. In our constitutional system, the

president and Congress hold a number of powers that the justices cannot ignore — powers beyond their obvious nomination and confirmation roles. For instance, Congress can restrict the Court's appellate jurisdiction, propose constitutional amendments, or enact legislation in response to judicial decisions (see Wasby 1988; Baum 1997).[8] Further, because the Court, in Alexander Hamilton's words, has "neither Force nor Will, but merely judgement; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements" (*Federalist 78*, Wills 1992, 394), it must be attentive to the support of the other branches.

Thus, there is reason to believe that the Court's outputs are influenced by the larger political environment in which the justices find themselves. And as George and Epstein (1992) point out, the direction of this influence seems to revolve around partisan politics (see, for example, Dahl 1957). For instance, they quote Stuart Nagel to make the point that interbranch relations are "'significantly shaped by such political considerations as the degree of party difference between Congress and the Court, the nature of the party in power in the national government, and the party affiliations' of the individual Justices" (Nagel 1969 as quoted in George and Epstein 1992, 326). Thus, when the nation and the national government move toward the party more conservative or supportive of the states (the GOP), the Court will become more supportive of those views as well.

We use a dichotomous dependent variable to measure state success (1 = success). As regressors, we include the measure of Republican appointments to the Court we used in the time series analyses (see above) and indicator variables for each of the following: whether or not the state position favors the appellant, whether or not the opponent to the states' position is a "one-shotter,"[9] and whether or not the states' position is opposed by the national government.[10] With the exception of the latter variable, we expect each of these forces to be positively related to state success. To control for the greater capacity of the states to pursue policy through litigation, we include the median annual budget of the states' offices of attorney general. And to capture the political environment in which the Court decides, we computed an index of the "Republican-ness" of the political branches.[11] We presume that as the political branches become more Republican, the Court's decisions will become more likely to favor the states. Finally, we compute interaction terms to measure the change in the effect of each of these forces on the states' rate of success across both the partisan composition of the Court and the states' growing institutional capacity.

The estimation results are displayed in Table 6.3. The model correctly predicts 62.7 percent of the cases, a 22.3 percent improvement in predictive accuracy. As we anticipated, whether or not the states are urging the Court to reverse a lower court decision affects their success. When the states' policy goals can be achieved through a reversal, they are significantly more likely to win (1.07, t = 4.33). Indeed, as the appellant, and controlling for the other forces, the likelihood of a state victory is 64.1 percent.[12]

The estimation yielded mixed results for the hypotheses concerning the effect of the opponents of the states' policy goals. Our hypothesis that the presence of the

Table 6.3
Logit Analysis of State Success in the Supreme Court, 1954–89

Independent Variable	Coefficient	T-Statistic
Constant	-0.83***	6.68
State as Appellant	1.07***	4.33
Opposed by National Government	-1.04***	-2.92
Opposed by "One-Shotter"	-0.54**	-2.10
Political Environment	0.62***	4.02
Republican Court Appointments	0.12**	1.99
Growth in Capacity of State Attorney General Offices	-0.01	-0.13
Interaction Effects		
Court X State Appellant	0.02	0.25
Court X National Government	0.15	1.19
Court X "One-Shotter"	0.18**	2.18
Court X Political Environment	-0.24***	-4.25
Institutional Growth of State AG Office X State as Appellant	-0.09*	-1.49
Institutional Growth of State AG Office X National Government	-0.10	-0.90
Institutional Growth of State AG Office X "One-Shotter"	-0.04	-0.70
Institutional Growth of State AG Office X Political Environment	0.12**	1.96

Note: Dependent Variable = "State Success," (1,0) — whether the Court decides in the direction of the state party, in the direction urged by the state merits *amicus*, or finds for the appellant when at least one state has filed a *pre-certiorari amicus* brief. N = 2008; Chi^2 = 179.0; p > Chi^2 = 0.00; Modal = 52.2; Percent Correctly Classified = 62.7; MLE Reduction in Error = 23.3%; *Significant at .1; **Significant at .05; ***Significant at .01.

United States as an opponent reduces the likelihood of state success was borne out. When the states' policy positions are at odds with the litigation interests of the national government, the chances that they will win are reduced by 21.8 percent.[13] Contrary to our expectations, however, when the states face parties with limited legal resources, they are significantly less likely to win. When a state is facing a "one-shotter," the probability of the Court deciding in its favor drops .33.[14]

A possible explanation for this is that the probability model is picking up the states' poor performance against "underdogs" early in the time series.[15] The states quite likely defended a large number of "lost causes" before the Court involving criminal procedure and civil rights issues during the 1950s and 1960s. For instance, such seminal cases as *Brown v. Board of Education* (347 U.S. 483 [1954]), *Cooper v. Aaron* (358 U.S. 1 [1958]), *Gideon v. Wainwright* (372 U.S. 335 [1963]), *Pointer v. Texas* (380 U.S. 400 [1965]), and *Loving v. Virginia* (388 U.S. 1 [1967]) were unanimously decided against the states' interests. Over all, during the Warren Court era, the states *lost* 47.6 percent of the civil rights or criminal procedure cases where they were the respondent by *unanimous or near unanimous votes* (i.e., 8-1).[16] The interaction effects show that as the Court became decidedly more Republican (and conservative), however, the states became significantly more likely to prevail against parties with limited legal resources (.83, t = 2.18).

The effect of the GOP Court stands out. The results of the probability model indicate that the Republican additions to the Court had a positive and measurable effect on the likelihood of state success. Thus, with Justice Sandra Day O'Connor's ascent to the High Bench in 1981, the states' likelihood of success had grown by 17.4 percent.[17] Meanwhile, the shock of improvements in the states' capacity to litigate had no direct effect on the states' rate of success in Court.

Further evidence of the beneficial effect of the Republican appointments on the states' litigation fortunes can be seen by examining the interaction between it and the opposition of the federal government. Although the coefficient is not significant at conventional levels, it is close enough to suggest that the Court of the 1970s and 1980s was more likely to find for the states' interests when they were opposed by the federal government than was the Warren Court. Indeed, by 1981 the likelihood that the Court would find for the state against the federal government had grown by 22 percent.[18] Since disputes over the federal relationship in their purest form involve collisions between the national and state governments, the impact of the post-1968 Republican appointees on the states' use of the Court in pursuit of their policy objectives cannot be overstated.

Finally, as we anticipated, as the public and the government's political institutions move toward the party more supportive of the states' position in the federal relationship, the Court becomes appreciably more likely to find for the states' interest. Indeed, when the political environment is "most Republican," the likelihood that the Court will find for the state claim is .636.[19] And this effect is increased significantly with the improved capacity of the states to resort to the Court. The interaction of the political environment and the growth in the median budget of the state offices of attorney general indicates that as the political

environment became more Republican and the states more capable of litigating before the Court, their likelihood of success grew (.12, t = 1.96).

Interestingly, however, as the Court becomes more Republican, and more supportive of the states, the broader political environment begins to have a negative effect on the states' litigation success (-.24, t = -4.25). The same effect is apparent for the interaction between the states' capacity to participate in the Court and their role as petitioners. As the states become more capable of, and likely to, pursue their interests in the Court, their chances of winning as the appellant drops (-.09, t = -1.49).

This suggests that there are equilibrating forces at work in the Court's decisional behavior (see Moe 1985). Over time, as the changes in the composition of the Court and the political environment yield greater rates of state success, the mix of cases involving state interests heard by the Court changes — shifting from a high proportion of cases favoring the states' interests to a more balanced mix. This is a consequence of the filing decisions of the states and their opposition. Enjoying greater rates of success, the states become less conservative and selective in their appeals to the Court, whereas the states' opposition becomes more so. This was also suggested by one of the state officials we interviewed. He worried that as the states have had greater rates of success in Court, they might be becoming *less* selective in their decisions to resort to the Court (Confidential Interview). As a result, the mix of cases available to the Court are more "difficult" to decide in support of the states. Thus, the decline in the states' rate of success is not the result of actual moderation in the Court's decisional behavior. Rather, it reflects an adjustment in the filing decisions of parties interested in the federal relationship.

To test further this effect, we examined the nature of the votes for the states and their opposition — other than the federal government — across time. If the states and their opponents[20] are rationally adjusting their filing behavior in response to changes in the Court, then as the Court becomes more Republican (i.e., more supportive of the states), cases brought to it by the states should become more difficult to decide in the states' favor. Cases filed by the states' opponents, on the other hand, should become "easier" to decide against the states' interests. Put in clearer terms, the states should win (defined above) a greater proportion of the cases they bring to the High Bench during the Republican Court era, but a larger proportion of them should be decided by a narrow vote (i.e., minimum winning decisions). Similarly, opponents to the states should win relatively fewer cases they pursue in the Republican Court than they did in the Warren Court, but they should win a greater proportion of them by a unanimous or near unanimous vote. The results, while tentative, do appear to confirm this logic.

During the Warren Court era, opponents of the states won 77 percent of the petitions they filed where the state interest was the same as that of the respondent; 44 percent of these cases were decided by a unanimous or near unanimous vote. In the Republican Court era, the rate of success of the states' opponents slipped to 60 percent, but they won nearly 50 percent of these cases by a wide vote.

The differential vote margins are even more telling in the states' case. In the

Warren Court the states won 49 percent of the cases against parties with limited resources in which the states' interest was the same as that of the petitioner; 56 percent of these decisions were decided overwhelmingly in the states' favor. During the GOP Court era, the states' rate of success increased to 66 percent, but the strength of their victories dropped precipitately. They won less than 30 percent of these cases by unanimous or near unanimous votes.

Although the model demonstrates the GOP appointees' effect on the states' rate of success in the Supreme Court, much of that story remains untold. Overall, the model has only modest explanatory power, and several key forces left out of the base probability model could weigh on the states' litigation fortunes. For instance, it is well known that the facts of a case affect its outcome (see, for example, Segal 1984, 1986; George and Epstein 1992). Further, Kearney and Sheehan (1992) showed that the states' rate of success varied with the issue area.

Kearney and Sheehan (1992) also raise the possibility that litigation activity of other interested parties influences the outcome of cases in which the states have an interest. During the time period of our analysis, the participation of organized interests generally in the Supreme Court exploded (Epstein 1993). It may be that the involvement as *amici curiae* of either sympathetic groups (e.g., the National League of Cities or the State and Local Legal Center) or organizations generally opposed to the states' exercise of authority (e.g., the NAACP or the ACLU) has an effect on the states' litigation fortunes.

Finally, a variety of forces bearing on the caliber of the states' advocacy in Court may have an effect. For instance, the Supreme Court Project's moot court sessions and seminars have helped to ensure that state advocates are better prepared for their appearances before the Court. Similarly, the Project's assistance in drafting and editing briefs has improved their quality and effectiveness (see chapter 4).

We reestimated the probability model attempting to control for several of these forces. We included indicator variables for the seven issue areas examined by Kearney and Sheehan (1992), and we computed interaction terms to measure whether there were changes in the states' rate of success in the issue areas across the partisan composition of the Court. Finally, to account for the improved caliber of the states' Supreme Court advocacy, we included a control for the year 1982 (the first year of the Supreme Court Project). The logic for this is similar to that discussed by Segal (1987).

The results of the reestimation are reported in Appendix C. The model's explanatory power was only marginally improved (from 62.7 percent to 64.4 percent), and only the coefficient measuring the effect of GOP appointments to the Court was substantially altered, losing statistical significance. And this is surely an effect of multicollinearity (see Appendix C, Table C-1).

Multivariate Analysis: Activity

Clearly, the Court's decisional context changed with the Republican appointments of the 1970s and 1980s. Even when controlling for other forces, the

addition of Republican appointed justices improved the states' litigation fortunes. Our theoretical framework suggests that the frequency of state interactions with the Supreme Court should also be affected by this change in decisional context. More specifically, we posit that the states opt to engage the Court based upon their estimated probabilities of success, and these estimates are conditioned by the decisional context the Court presents. That is, as the Court's personnel and decisional history become more amicable to state interests, the states will estimate that their probabilities of success are greater and thus increase their participation before the Court. When success appears unlikely, though, the states will reduce their judicial activities. Thus, we hypothesize that the states have a memory, and that not only does the nature of the Court's personnel affect their litigation decisions, so too does the way in which those justices ruled. Moreover, we expect that the states' recent experiences before the Court weigh more heavily in their decisional calculus than do relatively distant outcomes.

To test this, we estimated an adaptive expectations model (see Gujarati 1988, 516–19) of the effect of state rates of success and the Court's composition on the incidence of state activity, while controlling for changes in the states' capacity to participate before the Court. In other words, we model the states' rate of activity before the Court as a function of *anticipated* success. Results are displayed in Table 6.4. Here again, the importance of the effect of presidential appointments is apparent. With each Republican appointment to the Court, the states increased their activity by nearly three and one-half events. Meanwhile, the variables

Table 6.4
Adaptive Expectations Regression of State Activity in the U.S. Supreme Court, 1954–89

Independent Variable	Coefficient	T-Statistic
Constant	-2.99	-0.64
Institutional Growth of State Attorney General Office	-0.12	-0.14
Republican Court Appointments	3.48*	2.09
Success	0.67**	2.78
$Action_{t-1}$	0.36*	2.38

Note: Dependent Variable = Instances of state interaction withe the Court per term; N= 36; F = 67.8; p > F = 0.00; R^2 = 0.90; Durbin-Watson d = 1.89; Durbin-Watson h = 0.98; *Significant at .05; **Significant at .01.

measuring the effect of growth in the institutional capacity of the states' law offices fail to attain even the most forgiving levels of statistical security.

The coefficient estimates for the lagged variable and the effect of success alone allow us to determine both the immediate average effect of improved state fortunes in Court as well as their effect if these greater success rates are sustained. Thus, the states' marginal propensity to interact with the Court is 0.67. This suggests that a 1 percent increase in the states' rate of success is accompanied by the states, on average, increasing their interactions with the Court by about two-thirds of an event. And if this improvement in state fortunes is sustained, then eventually the states will increase their activity in Court by more then one event.[21] Over the long haul, then, and controlling for both the composition of the Court and the growth of the states' institutional ability, improvements in the states' rate of success have an appreciable bearing on the incidence of state interactions with the Court.

CONCLUSIONS

These empirical results tell us something about the complex interactions that exist between presidential appointments, the Court's composition, its decisional behavior concerning the federal relationship, and the states' decisions to resort to the Court in pursuit of policy. We have shown that an action-reaction process is at work. The post-1968 GOP appointments to the High Bench positively affected the states' rate of success in Court. These improving rates of success, in turn, influenced the states' decisions to engage the Court in pursuit of their policy goals. Finally, because of the nature of the Court in the policy process, the filing decisions of the states help shape the Court's decisions regarding the federal relationship.

Presidents, through their appointment power, can influence both Supreme Court decisionmaking and the litigation decisions of organized interests. Indeed, we have presented a framework of judicial outputs that incorporates presidents, the Court, and litigants in a dynamic set of relationships. Moreover, because of the temporal ordering intrinsic to this framework, we have presented a mechanism that takes us a step closer to understanding changes in the behavior of the principals in the judicial process.

Critics may argue that the quantitative analysis presented thus far fails to pick up some of the important developments in the federal relationship that have been articulated by the Rehnquist Court in the latter 1990s; and therefore is of limited value to understanding the subject of "litigating federalism." Unfortunately, limitations of data make a systematic analysis of the most recent terms of the Court impossible. On the other hand, a careful examination of the decisional behavior of the justices on the present natural court demonstrates the continued operation of one of the crucial dynamics illustrated above. It finds that on the current Court, the appointments of Presidents Nixon, Reagan, and Bush have come together to form an identifiable pro-state bloc whose support has been instrumental in producing such recent, notable victories for the states' interests as *U.S. v. Lopez* (514 U.S. 549 [1995]), *Seminole Tribe of Florida v. Florida* (116 S.Ct. 1114 [1996]), and *Printz v. U.S.* (65 U.S.L.W. 4731 [1997]). Thus, one would expect that the action-

reaction model continues to operate.

It is an examination of the current natural Court to which we now turn.

NOTES

Authors' Note: An earlier version of this analysis was presented at the 1996 Annual Meetings of the American Political Science Association. We appreciate the comments and suggestions of Jay McCann.

1. Box-Jenkins procedures were developed to estimate models on data that violate the assumption that the error terms are independent — that is, data with serial correlation. The procedure makes time a sequencing variable rather than a predictor of the phenomenon under investigation. More specifically, we estimate moving average models. That is, we model each series as a culmination of disturbances. These models represent an observation as a function of the previous observations' errors (see King 1989, Chapter 7; more generally, see Box and Jenkins 1976).

2. This is identical to the dynamic Moe (1985) describes in his article on regulatory politics. He writes, "The prior decisions shape the raw materials the Board has to work with in generating outcomes, and are fundamental causes of what we see as agency performance" (1985, 1097).

3. Again, this dynamic is nearly the same as that outlined by Moe (1985). Describing the filing decisions of the NLRB's constituency, he writes, "they will want to pursue grievances when they expect the benefits to outweigh the costs . . . a major conditioning factor is the perceived probability of success. This probability is a composite of two separate probabilities: the probability that a charge will make it past the staff filter, and the probability that the filtered charge will subsequently prove successful at the Board level" (1985, 1098).

4. We define those cases in which a state has a "stake" as instances where at least one state is a party to the case, filed a merits *amicus* brief, or filed a *pre-certiorari amicus* brief urging that the Court docket the case. For the purposes of this analysis, we exclude all instances where one or more states square off against each other. See chapter 1 for data sources used to identify instances where a state has a stake.

5. A "win" is operationalized in terms of the nature of the states' participation. Thus a decision is coded as win when the Court (1) decides in the direction of the state party, (2) decides in the direction urged by state merits *amici*, or (3) finds for the appellant in instances when a state has filed a *pre-certiorari amicus* brief.

6. As noted earlier, the states' rate of success as direct parties before the Supreme Court compares quite favorably to the success rate of the United States, the Court's most successful litigator (see, for example, Sheehan, Mishler, and Songer 1992). Across the full time series, the United States' success rate as an appellant was 76.3 percent; the states', 64.9 percent And the national government's rate of success as an appellee was 50.7 percent; the states', 38.1 percent.

7. This variable ranges from 0 for all terms prior to Warren Burger's appointment in 1969 to 6 after Sandra Day O'Connor's appointment in 1981. Although both Antonin Scalia's and Anthony Kennedy's ascent to the Bench occurred during our time series, they replaced previous Republican appointments (Warren Burger and Lewis Powell respectively). Therefore, we do not include their appointments in our index value.

Of course, alternative operationalizations for change on the Court exist. Kearney and Sheehan (1992) tally the number of liberal and conservative additions to the Bench to gauge

the Court's ideological temperament, while Sheehan, Mishler, and Songer (1992) use the Segal and Cover (1989) ideology scores to compute aggregate measures of ideology for the Court across time. Inasmuch as our conceptual perspective presumes that it is the signals sent to the states by the GOP appointments that engenders their increasing activity, we feel that our operationalization is most appropriate. Furthermore, as we showed in chapter 3, as a group, the post-1968 GOP appointees to the Court are remarkable for their support of state litigants. That level of support is distinct from their more general ideological disposition and is nearly one full point greater than the average level of support of the justices sitting on the Bench prior to the Nixon Administration. Even more telling, the mean measure of support for the states of the justices we include in our index variable is nearly six points greater than the mean level of support of those justices they replaced (2.6 as opposed to -3.39). Incidentally, the three measures — from Kearney and Sheehan (1992) and Sheehan, Mishler, and Songer (1992) and that used here — correlate at better than 0.9 with one another.

8. For example, according to Baum (1997), "Over the past three decades, on average, more than ten statutory decisions have been overturned in each two-year Congress. Of the statutory decisions in the Court's 1978–89 terms, Congress had overridden more than five percent by 1996" (1997, 246).

9. For the purposes of this analysis, "one-shotter" refers to any party that is not a government, a corporation or businesses, or attorneys.

10. Ideally, we would include the *amicus curiae* participation of the Solicitor General in the measurement of this force. Unfortunately, such data had not been collected at the time of this writing. Consequently, our measure of the national government's opposition to the states is constrained to instances where the United States, as a direct party, is in opposition to the indicated position of the state.

11. The variable equals 0 when the president and the Senate are both held by the Democrat Party; it equals 1 when the Republicans control either of them, and 2 if the GOP controls both. This measure is the same as that used by George and Epstein (1992).

12. This is computed by setting the variable measuring whether the state interest is the same as that of the appellant equal to 1 and holding all the other independent variables at their mean. These mean values are as follow: state as appellant, .21; opposed by the national government, .03; opposed by "one-shotter," .18; political environment, .89; GOP Court, 3.29; growth in state attorney general office, 2.77; court * state appellant, .94; court * opposed by the national government, .12. court * "one-shotter," .83; court * political environment, 3.91; AG growth * state appellant, .77; AG growth * opposed by national government, .1; AG growth * "one-shotter," .68; and AG growth * political environment, 3.54.

13. This is computed by setting the variable measuring whether the state is opposed by the national government equal to 1 and holding all the other independent variables at their mean.. See also *supra* at note 12.

14. This is computed by setting the variable measuring whether the state is opposed by a "one-shotter" equal to 1 and holding all the other independent variables at their mean. See also *supra* at note 12.

15. Justice Lewis Powell, for one, commented on the states' poor showing:

> As a general observation, it is safe to say — especially where important issues of constitutional law or criminal procedure are involved — that law enforcement [other than those instances where the U.S. is represented by the Solicitor General] is frequently outgunned and overmatched by the defense.... The situation is far from uniformly good where a state is before the court. . . . Some of the weakest briefs and arguments come from [the states] as representatives of the public interest. (quoted in

Catalano and Ross 1990, 333–34)

16. To identify these cases we used the issue codes contained in the *United States Supreme Court Judicial DataBase*, ICPSR #9422.

17. This is computed by varying the value of the GOP Court variable between 0 (the value prior to President Nixon's appointment of Warren Burger in 1969) and 6 (the value following President Reagan's appointment of Sandra Day O'Connor in 1981). See also *supra* at note 12.

18. *Supra* at note 12.

19. This is computed by setting the variable measuring the political environment equal to 2 and holding all the other independent variables at their mean. See also *supra* at note 12.

20. In the analysis that follows, we do not include the federal government in the category of "opponents of the states."

21. This is computed by dividing the immediate effect by 1 minus the lag coefficient, or [0.67/ (1 - .36)].

7

The Recent Court and the Pro-State Bloc

Between 1969 and 1992 ten new justices joined the U.S. Supreme Court. Each of them was the appointment of a Republican president — a collection of presidents who were intent on reconfiguring the Court to be both more sympathetic to conservative views and more respectful of the states' position in the federal relationship. As we showed in chapter 3, although not all of their appointees have been solid defenders of the states (for example, the wandering Justice David Souter or Justice Harry Blackmun's switch in *Garcia*), to the extent Presidents Nixon, Ford, Reagan, and Bush attempted to structure a Court that was solicitous of the authority and autonomy of the state governments, they were remarkably successful. Indeed, on the current "natural court" (1994 to the present), their appointments have come together to form an identifiable pro-state bloc (comprised of Chief Justice William Rehnquist, and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas) that has been instrumental in producing such state "victories" as *U.S. v. Lopez* (514 U.S. 549 [1994]), *Seminole Tribe of Florida v. Florida* (116 S.Ct. 1114 [1996]) and *Printz v. U.S.* (65 U.S.L.W. 4731 [1997]).

In this chapter, we look at the development of the pro-state bloc on the current Court and examine its behavior over three full terms (1994–96). We find that on the current Court, "adequate" support for the states (i.e., whether the state interest wins or loses on the merits) is a function of the degree to which "the legitimate activities of the states"[1] drives the controversy, unencumbered by the Supremacy Clause and/or the national government's enumerated powers.

THE PRESENT "NATURAL" COURT

As we suggested at the conclusion of chapter 2, Justice O'Connor's dissent in *Garcia* was very much a call to arms. And although the decision stopped short the Court's movement of returning power to the states, the more important issue left after *Garcia* was how long that decision would survive. Justice Blackmun's switch

made the *Garcia* majority possible, but that majority was on precarious ground: it was quite narrow, Republicans maintained their stranglehold on the White House, and retirements were expected from the camp of the *Garcia* majority. Just as importantly, the states continued to pursue their interests in Court at great rates, giving the Court ample opportunities to return to the course urged by Justice O'Connor.

The first two Reagan appointees following *Garcia*, however, merely replaced members of the minority in that case — Justice Antonin Scalia's replacement of Chief Justice Warren Burger in 1986[2] and Justice Anthony Kennedy's replacement of Justice Lewis Powell in 1987. But ultimately President Bush had the opportunity to replace two members of the *Garcia* majority. Following the Court's 1989 term, President Bush replaced Justice William Brennan with David Souter. Then, at the end of the 1990 Term of the Court, President Bush appointed Clarence Thomas to fill the seat of the retiring Thurgood Marshall. Both new justices were expected to add their strength to the Court's pro-state wing.

Justice Souter was given the opportunity to signal his suitability for the role of the fifth vote in his first term when the Court agreed to hear *Gregory v. Ashcroft* (501 U.S. 452 1991]). At issue was whether a Missouri state constitutional requirement that state judges retire at age seventy violated the federal *Age Discrimination in Employment Act* (ADEA). For its part, the ADEA was unclear as to whether state judges were covered. Justice Souter joined Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy in asserting that in instances where Congress is not clear as to whether it intends to subvert a traditional state function — such as regulating the qualifications of state officials[3] — the benefit of the doubt should be given to the authority of state government.[4] Apparently the newly constituted Court contained at least five votes to defend the constitutional position of the states against at least some types of overt federal encroachment.[5]

The Court's membership was altered again following the end of the 1990 term, when Justice Thomas assumed his seat on the bench. In Justice Thomas' first term, the Court heard arguments in *New York v. U.S.* (505 U.S. 144 [1992]). At issue was the *Low-Level Radioactive Waste Policy Amendments Act* of 1985, which included, among other things, a "take-title provision" that required states that did not provide sufficient waste disposal sites to take title of, and assume liability for, all undisposed waste produced by private entities. Justice Thomas joined the *Gregory* majority in an opinion that represented a clear transition toward a more "state-friendly" view of the ability of Congress to force states to take particular actions.[6] Justice O'Connor again wrote for the majority, asserting that the Congress's power under the Commerce Clause[7] must be read in light of the Tenth Amendment and its underlying premise. According to the Court, that premise protects the states from becoming merely administrative arms of the national government.[8] Thus, with the first two replacements of the *Garcia* majority, the Court's jurisprudence once again appeared to be turning in the direction of greater respect for the states in the federal relationship.

Following two terms that lacked dramatic and substantive pro-state declarations from the Court,[9] Justice Stephen Breyer's elevation prior to the 1994 term completed the membership of the current Court.[10] The justices have since had considerable opportunity to express their individual and collective dispositions toward the balance of power between the national government and the states. We now turn our attention to the cases in which the current Court and its members can most readily indicate their level of support for the states and their autonomy. The goal is to assess the extent to which the current pro-state bloc has developed and maintained itself across cases where state interests are at issue.

THE EMERGENCE OF THE PRO-STATE BLOC

It is worth noting at the outset that an exercise such as this is extremely difficult because it is inevitably imprecise. The threshold problem is choosing a method of case selection that will yield a portrait of the Supreme Court justices' individual and collective views on matters of state autonomy. But the search for the "right cases" for analysis is fraught with problems. As we noted in chapter 3, rarely (if ever) is the Court presented with a case that provides an unfettered opportunity to assess the breadth and depth of state government authority within the federal relationship. Rather, the question of state power is almost always a component of a larger, more complex dispute. It is rarer still for any case to be viewed in the exact same way by all nine members of the Court.

Here, we cut a broad swath in terms of the cases selected for discussion. All cases decided on the merits and in which authored opinions were issued (i.e., non-*per curiam* decisions) between the 1994–95 and the 1996–97 terms were analyzed. The thirty-five cases discussed here were selected because they arose out of a dispute over (1) what a state can or cannot do in terms of policy action, or (2) what the national government can or cannot do in terms of policy *vis-à-vis* the states.[11] This approach leads us to the examination of cases that can be broken down into four general categories: the scope of the Eleventh Amendment, state government taxation authority, the power of state governments to regulate elections, and the preemption of state law by federal law. All such cases will have a direct and perceptible impact on state authority regardless of the view the justices bring to their decisional calculus regarding the germaneness of particular issues.

Cases were omitted from consideration if they involve issues related to governmental power *per se* and not necessarily state government power in particular. Thus, cases that relate primarily, if not exclusively, to individual rights are not considered here. Though we include such cases in our analyses in chapter 3, we do not do so here because the main objective of the current chapter is to get a better sense of the Court's general direction on matters of federalism. This task naturally requires a more limited focus. As in chapter 3, however, we fully recognize the importance of individual rights cases as they relate to state policy authority, particularly in the area of criminal procedure and due process.[12] Cases were also omitted that dealt specifically with the nature of the power of the federal courts in matters of state policy.[13]

No case elevated the profile of the federalism debate within the Court more than *U.S. v. Lopez*, decided during the 1994 term. *Lopez* involved a challenge to the 1990 *Gun-Free School Zones Act*, which made it a federal crime to possess a firearm within 1,000 feet of a school. The law was challenged as an unconstitutional exercise of Congress's power under the Commerce Clause. A five member majority (Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas) agreed, striking the law as violative of the Constitution.

Lopez marks the first time since 1936 that the Court had struck a federal law on the basis of the Commerce Clause.[14] Culling the broader implications of Chief Justice Rehnquist's opinion for the Court in *Lopez* is somewhat difficult.[15] On the one hand, the opinion clearly and cogently expresses great skepticism that the Commerce Clause allows the federal government to extend its reach so as to regulate the possession of firearms on or near school grounds. Chief Justice Rehnquist has obvious disdain for what he perceived to be the federal government's argument that virtually any activity can be connected to interstate commerce, no matter how remotely or indirectly. Most importantly, *Lopez* affords the Chief Justice the opportunity to establish the "substantial effects" doctrine for determining what federal regulation is appropriate under the Commerce Clause. This is clearly a higher standard than the Court had previously utilized.[16]

The *Lopez* opinion does, however, seem somewhat tentative and narrow. The Chief Justice leaves untouched the core principles of the Court's post-1936 Commerce Clause doctrine (see chapter 2). The Chief Justice also concedes – at least implicitly — that the legislation at issue in *Lopez* is exceptional. The statute contained no official finding by the Congress that the activity subject to the regulation bore a reasonable relationship to commerce.[17] More importantly, the legislation focuses on the intersection between law enforcement and education, traditionally two of the most subnational functions in the American constitutional system.

The majority opinion in *Lopez* is, then, perhaps more appropriately defined as the explication of a refusal to further expand congressional authority, rather than a contraction of it. The reason the Court did not take more fundamental steps to alter the federal balance in *Lopez* lay in the attitudes of three of the justices who were in the majority in both *Gregory* and *New York*. First, Justice Souter abandons his position in the pro-state bloc and dissents from the Court's opinion in *Lopez* (514 U.S. 549, 605). Second, Justice Kennedy pens a concurrence in *Lopez*, which Justice O'Connor joins (514 U.S. 549, 568). The concurrence indicates that the *Lopez* majority is not seamless. Justice Kennedy's opinion stresses the narrowness of the Court's decision in *Lopez*, paying particular attention to the fact that education is a traditional state/local function. Thus, the Chief Justice may simply have lacked the votes to move further faster.[18]

Unlike the somewhat ill-defined nature of *Lopez*, the Court issued a statement of relatively greater clarity in *Printz v. U.S.* (65 U.S.L.W. 4731 [1997]) two years later. At issue was the *Brady Handgun Violence Prevention Act* of 1993 (hereafter referred to as the Brady Act). The Brady Act required the U.S. Justice Department

to establish a system capable of providing an instant computerized background check of any individual who desired to purchase a handgun. But until the national system became operable, the Brady Act required the "chief law enforcement officer" of each local jurisdiction to perform the checks. This interim provision was challenged as a violation of the U.S. Constitution.

The Supreme Court divided 5–4 (along lines identical to *Lopez*), striking down this provision of the legislation as unconstitutional. Justice Scalia's opinion for the Court in *Printz* can be read as something of a culmination, at least thus far, of the Court's post-*Garcia* jurisprudence on state-federal relations. According to Justice Scalia, the Court's decisions in *Gregory* and *New York* (among others) clearly established the "incontestable" proposition that the Constitution established a system of "dual sovereignty" (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 [1991]). To Justice Scalia and the *Printz* majority, the Constitution established a national government of limited and enumerated powers. Thus, unless the Constitution specifically vested in Congress a power, or that power could be directly attached to one of Congress's enumerated powers, Congress could not act.[19] The policy area was thus left to the states. Such a system of dual sovereignty, which was designed to protect liberty and insure accountability, is clearly violated by the Brady Act's requirement that state officials are to be active participants in the enforcement of federal law.

Lopez and *Printz*, along with *Seminole Tribe* (see chapter 1), indicate the presence of a rather cohesive set of voting blocs. This is not to say that the blocs were static across the high profile cases involving state sovereignty. Among the most salient and important cases decided by the current Court was *U.S. Term Limits v. Thornton* (514 U.S. 779 [1995]), coming during the 1994 term.[20] In *U.S. Term Limits*, Justice Kennedy abandoned the pro-state bloc, casting the deciding vote to strike down measures limiting congressional terms as violative of the Qualifications Clauses of Article I.[21]

The opinions emanating from the Court make clear that the justices agreed that the case is, fundamentally, about the locus of sovereignty – whether it lies, ultimately, with the people of a unified nation, or with the states. The opinions read very much like expositions on the three traditional schools of thought on the matter – nationalism, state sovereignty, and dual federalism. The majority opinion by Justice Stevens clearly is seated in the nationalist perspective. It asserts that the Constitution rises from the people as a unified whole, rather than from the individual states. Thus greater value is placed on national unity and uniformity, rather than state sovereignty. For its part, the Tenth Amendment is but a truism. Rather than a statement issuing from the states as to their policy autonomy, it merely declares that the states possess powers that are not granted to the federal government *and* that they possessed them prior to the ratification of the Constitution. This philosophy necessarily limits the utility of the Tenth Amendment as a source of state authority. As a practical matter, since the Constitution makes no mention of state power to limit terms, and the states did not possess that authority

under the Articles of Confederation, the people did not confer it via the Tenth Amendment.

In dissent, Justice Thomas (joined by Chief Justice Rehnquist and Justices O'Connor and Scalia) articulates a version of the state sovereignty perspective (514 U.S. 779, 845). Attacking the majority opinion's fundamental premise, he asserts that the Constitution rises from the states, rather than from the citizenry at large. Reading the language of the Tenth Amendment in a completely different light, the dissenters argue that it protects all those powers not specifically delegated to the national government, nor prohibited to the states, through ratification, regardless of whether they were powers originally possessed by the states. Pointing out that the Constitution was silent as to whether the Qualifications Clause provided an exclusive and complete list, Justice Thomas asserts that the states enjoy the power to add qualifications if they so choose, or so the notion goes.

Justice Kennedy wrote a concurrence (514 U.S. 779, 838) that is both a philosophical discussion of the "classic" dual federalism perspective and a practical attempt to construct a middle ground between the competing views enunciated by Justices Stevens and Thomas. Justice Kennedy stresses both the duality of the governmental system and the existence of definitive spheres of authority — that is, there are some issue areas subject exclusively to federal control and others subject only to state governance. But Kennedy readily admits to the problem of constructing the boundaries in a clear way. He concludes that there are occasions in which the Court must referee those boundaries. In this particular case, Justice Kennedy finds that the balance favors uniformity across the states.

To assess the extent to which *Lopez*, *Seminole Tribe,* and *Printz* are reflective of the current balance of the membership of the Court, we turn our attention to the variety of cases in which the current Court has handed down decisions implicating state policy authority. For the purposes of this discussion, the cases selected break nicely into four areas that seem germane to the policy autonomy of the state governments: the scope of the Eleventh Amendment, state government taxation authority, the power of state governments to regulate elections, and the preemption of state law by federal law.[22]

The Eleventh Amendment[23]

In 1995 the Court dealt a significant setback to the Eleventh Amendment's protective capacity in *Hess v. Port Authority Trans-Hudson Corporation* (513 U.S. 30 [1994]). In *Hess* the Court refused (5–4) to grant an inter-state agency protection from suit. Justice Ginsburg — on behalf of Justice Kennedy as well as Justices Stevens, Souter, and Breyer — argued that the Eleventh Amendment was not abridged because the agency at issue was financially independent; thus the states as states were sheltered from liability for damages. The Court also asserted that the Congress's consent to the compact creating the agency (by virtue of the Compact Clause[24]) did not specifically address the immunity issue; thus it was assumed not to exist. Later in the 1995 term, however, the Court revisited the Eleventh Amendment's scope and subsequently handed the states what was their

most significant victory of the term — *Seminole Tribe of Florida v. Florida* (116 S.Ct. 1114 [1996]).

In the 1996 term the Court again broke 5–4 in barring a lawsuit brought against a state by a Native American tribe (*Idaho v. Coeur d'Alene Tribe of Idaho* 65 U.S.L.W. 4540 [1997]). The states also scored two unanimous victories for their Eleventh Amendment immunity during the 1996 term. In *Regents of the University of California v. John Doe* (65 U.S.L.W. 4129 [1997]), the Court ruled that even when the federal government agrees to pay litigation costs for a state entity, the entity's Eleventh Amendment protection is not diluted.[25] In *Blessing v. Freestone* (65 U.S.L.W. 4265 [1997]) the Court ruled that individuals could not sue a state government for failure to substantially comply with the mandates of a federal statute.[26]

State Government Taxation Authority

The ability to raise revenue is critical to the performance of state policy objectives. In addition, state tax codes are replete with tax incentives designed to attract and keep businesses in the state, as well as provide mechanisms for the economic stability of industries important to the state's economic condition (Enrich 1996).

When a state tax is challenged, a justice sympathetic to the autonomy of the states has a number of means available for preserving the tax. For example, a justice can uphold a state tax if (s)he finds that the tax "is applied to an activity with a substantial nexus with the State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State" (*Oklahoma Tax Commission v. Jefferson Van Lines*, 115 S.Ct. 1331, 1337 [1995]) — quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 [1977]). Justices can also produce pro-state outcomes in tax cases by: declaring the tax "compensatory" (i.e., designed to make out-of-state interests liable for costs already incurred by in-state interests),[27] carving out exceptions to the general assumption that taxes affecting inter-state commerce are void,[28] or finding that the absence of congressional action in the area indicates the federal government's acquiescence.[29] Finally, of course, a justice can find that the entity being taxed is not involved in interstate commerce.[30]

Between the 1994 and 1996 terms, the Court reviewed six cases in which state taxation authority was of central concern. Across the cases the Court provided the states with four "wins" and two "losses." Statements about the proclivities of individual justices are rendered difficult, however, by the fact that there were two unanimous decisions, one in favor of state tax authority (*Nebraska Department of Revenue v. Loewenstein* 513 U.S. 123 [1994])[31] and one against (*Fulton Corporation v. Faulkner* 116 S.Ct. 848 [1996]).[32] Only Justice Stevens dissented from a decision upholding an Ohio tax which, *de facto*, treated in-state and out-of-state natural gas producers in a discriminatory fashion (*General Motors Corporation v. Tracy*, 65 U.S.L.W. 4086 [1997]).[33]

Across the other three cases — *Oklahoma Tax Commission v. Jefferson Van*

Lines (115 S.Ct. 1331 [1995]),[34] *Camps Newfound/Owatonna, Inc. v. Town of Harrison* (65 U.S.L.W. 4337 [1997]),[35] and *Oklahoma Tax Commission v. Chickasaw Nation* (115 S.Ct. 2214 [1995])[36] — the pro-state bloc was deeply divided in its level of support for state tax authority. While Chief Justice Rehnquist and Justices Scalia and Thomas voted in favor of state interests in all three (giving them a total of five pro-state votes across the six taxation cases), Justice Kennedy cast a single pro-state vote.

Most notably, Justice O'Connor did not cast any votes in full support of state tax authority.[37] This absence of support for state governments on tax questions is surprising because of her relatively consistent voicing of concern for states' rights, her relatively high support for the "essence of federalism" (see chapter 3), and her background as a state legislator. It would seem that state pleas for leeway in the raising of revenue or protecting economically vital industries through tax provisions would resonate particularly well with this former state legislative leader.[38]

The Regulation of Elections

The level of state government control over the procedures for elections and the qualifications of elected officials has been a constant theme. The disposition of the Court in *Gregory v. Ashcroft* suggested significant sympathy for the preservation of broad state authority in regulating electoral processes. On the other hand, Justice Kennedy's abandonment of the bloc in *U.S. Term Limits* clearly indicates that such sympathy has limits.

Counting *U.S. Term Limits*, the Court heard eight cases involving these processes in the 1994 through 1996 terms. Positions advocating the greatest level of state discretion came almost exclusively from the pro-state bloc. Among the eight cases, Chief Justice Rehnquist cast pro-state votes in seven; Justices O'Connor, Scalia, and Thomas voted as such in six; and Justice Kennedy did so on five occasions. On the other hand, the other four justices had only three pro-state votes between them — Justice Breyer two and Justice Ginsburg one. Neither Justice Stevens nor Justice Souter cast a single pro-state vote in the area. In general, the pro-state bloc was able to deliver five "wins" for state interests.

There were four instances, all from the 1996 term, in which the Court was faced with questions regarding state control over election procedures. In *Chandler v. Miller* (65 U.S.L.W. 4243 [1997]) the Court struck down a Georgia statute that required candidates for state office to pass a drug test.[39] In *Timmons v. Twin Cities Area New Party* (65 U.S.L.W. 4273 [1997]), the Court upheld a Minnesota statute that prohibited an individual from appearing on the ballot as a candidate for more than one party. Justices Stevens, Souter, and Ginsburg dissented.

In two opportunities to judge the scope of the federal government's regulatory authority over state elections under the *Voting Rights Act* of 1965 (VRA), the Court came to opposite conclusions, finding against a state in one (*Young v. Fordice* 65 U.S.L.W. 4236 [1997])[40] and in favor of it in another (*Reno v. Bossier Parish School Board* 65 U.S.L.W. 4308 [1997]).[41]

Finally, there were the high-profile cases in which the Court examined the intersection between race and legislative apportionment — *Miller v. Johnson* (115 S.Ct. 2475 [1995]), *Shaw v. Hunt* (116 S.Ct. 1894 [1996]), and *Bush v. Vera* (116 S.Ct. 1941 [1996]). The pro-state bloc, in 5–4 votes all, voided congressional districts constructed primarily on the basis of the race of the constituents. While state governments are the party of record on the losing end in such cases, the larger dimension of state sovereignty is, in fact, enhanced by the Court's holdings. In all three cases, states were constructing districts on the basis of direction provided by the U.S. Justice Department under the auspices of the VRA. When the Court declares void the practice of race-based apportionment, it is stripping the weapon of choice from the Justice Department in its effort to insure greater minority representation in Congress. While these battles were fought largely on Fourteenth Amendment grounds, the majority opinions in all three are laced with a noticeable undercurrent of disdain for the heavy hand of federal authority that, according to the Court, lay at the genesis of the disputes.[42]

Federal Preemption of State Law

The boundaries of power between the levels of government in specific policy areas is another consistent theme in Supreme Court adjudication. It would seem likely that a Court composed of several "pro-state" justices would attempt to accommodate the coexistence of state and federal legislation.

Alternatively, preemption cases are arguably the most complex among the cases examined here, thus offering the justices a relatively obstructed view of the issue of federalism. In fact, research has indicated that, unlike other areas, the Court's increasingly conservative hue since 1968 has not yielded a dramatic retrenchment on issues of preemption. For example, between 1986 and 1993 the Rehnquist Court heard fifty-five cases in which federal preemption was at issue. It preserved the existence of state laws and regulations in barely half (28) (O'Brien 1993).

The current Court has continued this habit of relatively tepid support for the states in this area.[43] On fourteen occasions over the last three terms, the Court has dealt with instances of potential preemption. The Court allowed the state statutes to remain in force in only eight (50 percent) — and some of those endorsements have come with considerable caveats regarding the supremacy of federal law.

Of the decisions preserving the state legislation, the Court was clearly unanimous in support of state law in five — *Anderson v. Edwards* (514 U.S. 143 [1995]), *Freightliner Corporation v. Myrick* (514 U.S. 280 [1995]), *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Company* (514 U.S. 645 [1995]), *Yamaha Motor Corporation v. Calhoun* (116 S.Ct. 619 [1996]), and *Atherton v. Federal Deposit Insurance Corporation* (65 U.S.L.W. 4062 [1997]). The Court also voted 7–2 in favor of a state law in *De Buono v. NYSA-ILA Medical and Clinical Fund* (116 S.Ct. 1847 [1996]). The states, however, gained a *de facto* unanimous victory because, as we noted in chapter 3, Justices Scalia and Thomas dissented, but did so on the basis of the assertion that the federal courts lacked jurisdiction to decide the case. Their view is relatively

more pro-state, given that a ruling that federal courts lack jurisdiction removes even the possibility of judicial declarations of preemption.

The Court also was unanimous in upholding a California statute against challenge in *California Division of Labor Standards Enforcement v. Dillingham Construction* (65 U.S.L.W. 4097 [1997]). But the Court's ruling was far from a decisive victory for the states. While preserving a state law regarding the conduct of officers of federally insured savings institutions, the Court asserted that the federal government retains unadulterated supremacy here. The California law survived because it went further than a federal law in the same area.

In *Medtronic, Inc. v. Lohr* (116 S.Ct. 2240 [1996]), all nine justices agreed that the *Medical Devices Act* of 1976 does not necessarily bar consumers from suing manufacturers in state court under relevant state law. The Court divided 5–4, however, over what types of suits are preempted. The majority opinion from Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer significantly narrowed the range of suits possible under color of state law. Thus, while the Court's rulings in *California Division of Labor Standards Enforcement* and *Medtronic, Inc.* were "pro-state," they embodied relatively weak support of state autonomy (though we count them as "wins" here).

On the other hand, only once was the Court unanimous in striking a state law — *Barnett Bank of Marion Country v. Nelson* (116 S.Ct. 1103 [1996]) — as preempted. Thus, in what some would recognize as "harder" cases (i.e., nonunanimous), the Court was more hostile to state interests, voting against those interests in four of the six. In these nonunanimous decisions, the fluctuating voting coalitions yield no clear pattern of behavior.

In *American Airlines v. Wolens* (513 U.S. 219 [1995]), Justice Ginsburg argued on behalf of Chief Justice Rehnquist and Justices Kennedy, Souter, and Breyer that the *Airline Deregulation Act* of 1978 prohibited states from imposing regulations on air carriers. The majority asserted that it was still possible to sue airlines in state court over breach of contract, but declared fraud claims preempted. Justice Stevens took the most pro-state position, arguing separately that both claims should be allowed to move forward. On the other hand, Justices O'Connor and Thomas asserted that both suits were preempted.[44]

In three cases the Court held that the *Federal Arbitration Act* (FAA) preempted state arbitration laws. In *Allied-Bruce Terminix Companies, Inc. v. Dobson* (513 U.S. 265 [1995]), Justice O'Connor filed a concurrence in which she announced that she was giving up her long-standing attempt to force the Court to recognize that Congress had designed the FAA to be applicable only to federal court proceedings. Justice Scalia voiced a similar surrender in dissent. However, Justice Thomas refused to raise the white flag, maintaining the FAA's lack of application to state court proceedings. The result was that in subsequent cases regarding the FAA — *Mastrobuono v. Shearson Lehman Hutton, Inc.* (514 U.S. 52 [1995]) and *Doctor's Associates, Inc. v. Casarotto* (64 U.S.L.W. 4370 [1996]) — only Justice Thomas dissented from the Court's holding that state arbitration rules were preempted.

Finally, in *Boggs v. Boggs* (65 U.S.L.W. 4418 [1997]) a divided Court ruled that the ERISA did preempt a Louisiana law dealing with the bequeath of pension benefits. Only Justices O'Connor and Breyer dissented.

The results here are a bit mixed. Thanks to his consistent refusal to apply the FAA to state cases, Justice Thomas cast the most pro-state votes in preemption cases, doing so in four of the five nonunanimous decisions in which the full Court took part.[45] Justices O'Connor and Scalia cast two such votes, with Justice Breyer and the Chief Justice taking the pro-state position on one occasion. The other justices — including Justice Kennedy — cast no pro-state votes.

ANALYSIS AND DISCUSSION

The Court's Performance

Here, we have reviewed thirty-five cases in which the current natural Court has dealt with controversies of interest to the states. On a general level, the Court has proven to be a friendly environment for the protection and enhancement of state policy authority, issuing twenty-three decisions which can be classified as pro-state.[46] This rate of success (roughly 66 percent) is consistent with the results of analyses of Court behavior in previous terms on state-related issues (Kearney and Sheehan 1992).

This overall success rate for the states, however, masks a bit of variation across issue type. Table 7.1 provides a glimpse at state rates of success across the four areas discussed here.

It is reasonable to assert that across the four areas, Eleventh Amendment cases provide the Court with the greatest opportunity to enunciate their beliefs about federalism, unencumbered by the cross-currents brought on by other issues. And freed from these cross-currents, it is here that the states find their greatest success. Indeed, if it were not for Justice Kennedy's vote against the state in *Hess*, the states' record here would be perfect. Alternatively, the cases with the potential for greatest complexity and perhaps the most likely collision with the Supremacy Clause,[47] preemption, are where states fair the poorest. The low rate of success here relative to other policy areas should not, however, obscure the fact that the states were still successful in better than half of the cases in which they sought to protect their statutes against preemption — though, again, the success was sometimes marred by the narrow range of the ruling.

More interesting, and much more dramatic perhaps, is the Court's behavior depending upon whether the state interest is embodied in the case as appellant or appellee. Of the cases examined here, thirty-three involved clear losers at the lower court who sought Supreme Court review.[48] Of those, state interests were represented by the appellants in fifteen instances.[49] When the Court accepted a case in which the state interests lost at the lower court level, the Court *reversed the lower court holding 93 percent of the time.* Moreover, states as appellants were just a single vote (Justice Kennedy's in *U.S. Term Limits*) away from a perfect record on appeal. This is a remarkable statistic. When the Court accepts a case in which state interests are adversely affected, a reversal is nearly guaranteed. This rate of

Table 7.1
State Rates of Success in Four Issue Areas, 1994–96 Terms

Type of Issue	Number (%of Wins)
Eleventh Amendment	4 wins in 5 cases (80%)
State Taxation Authority	4 wins in 6 cases (67%)
Regulation of Elections	5 wins in 8 cases (63%)
Federal Preemption	8 wins in 14 cases (57%)
TOTAL	22 wins in 35 cases (66%)

reversal compares impressively with the Court's overall rate of reversal in the 1994 (61.6 percent),[50] 1995 (56 percent),[51] and 1996 (56 percent)[52] terms respectively. On the other hand, when the Court accepted for review a case in which state interests paralleled the appellee position,[53] the Court reversed the lower court holding in only nine of eighteen instances (50 percent).[54]

Comparing the Justices

While cases such as *Lopez*, *U.S. Term Limits*, *Seminole Tribe,* and *Printz* capture — and, because of their salience and import, merit — the lion's share of attention, they provide only a partial glimpse at the behavior of individual justices on matters of importance to state governments. Nevertheless, whether intentionally "pro-state" or simply protective of state interests as a result of conservative disposition, the bloc of justices that produced state wins in *Lopez*, *Seminole Tribe,* and *Printz* has been remarkably consistent across a variety of matters of interest to the states.

In this chapter, we have examined thirty-four cases in which all nine justices participated.[55] Table 7.2 provides the number of "pro-state" votes that each justice cast across these thirty-four cases.[56]

As Table 7.2 indicates, the five justice pro-state bloc on the Rehnquist Court is quite conspicuous in its coherence. Those justices who struck the substantial blows for state autonomy in *Lopez, Seminole Tribe*, and *Printz* were relatively consistent in their propensity to side with state interests. On average, these five justices supported the states 76 percent of the time in cases discussed here. This stands in sharp contrast to the much more modest levels of support offered by the four other justices. On average, the cadre of Justices Stevens, Souter, Ginsburg, and Breyer sided with state interests only 40 percent of the time.[57]

Table 7.2
Individual Justices' Rate of Support for the States, 1994–96 Terms

Justice	Number of Pro-State Votes in 34 Decisions
Thomas	29 (85%)
Rehnquist	27 (79%)
Scalia	27 (79%)
O'Connor	24 (71%)
Kennedy	23 (68%)
Ginsburg	16 (47%)
Breyer	15 (44%)
Souter	13 (38%)
Stevens	11 (32%)

The differences become even more pronounced when one considers the twenty-one relatively "hard" cases — that is, those with nonunanimous votes.[58] In those instances in which there is at least some dissension, the members of the pro-state bloc take the state-friendly position 73 percent of the time, on average; the other four muster a paultry 11 percent rate of support. Across the twenty-one cases the justices outside the pro-state bloc cast *a total of nine pro-state votes* (see Table 7.3).

Justice Thomas is the most consistent in his support of state interests. His separation from his colleagues comes because of his refusal to apply the *Federal Arbitration Act* to state cases. Indeed, in cases with divided votes, he abandons state interests on only two occasions: in *Chandler* and *Boggs*. Justice O'Connor's slightly lower rate of support (relative to the Chief Justice and Justices Scalia and Thomas) comes, as discussed, from her rather surprising unwillingness to support state governments when their tax provisions are challenged.

Perhaps the most startling of all is the crucial nature of Justice Kennedy's vote. In the thirty-four cases examined here in which all justices participated, Justice Kennedy voted in the majority *in every case*. If one considers only the twenty-one nonunanimous cases, while Justice Kennedy never dissents, each of his colleagues dissented at least five times.[59] In short, the conventional wisdom that Justice

Table 7.3
Individual Justices' Rate of Support for the States, Nonunanimous Decisions, 1994–96 Terms

Justice	Number of Pro-State Votes in 21 Nonunanimous Decisions
Thomas	19 (91%)
Rehnquist	17 (81%)
Scalia	17 (81%)
O'Connor	14 (67%)
Kennedy	11 (43%)
Breyer	4 (19%)
Ginsburg	3 (14%)
Souter	2 (10%)
Stevens	0 (0%)

Kennedy is a "swing" justice is clearly and completely verified in this assessment. In general, his recent behavior has been to provide the crucial fifth vote to the benefit of the states. But as his votes in cases such as *Hess*, *Medtronic, Inc.*, and most notably *U.S. Term Limits* show, his pro-state bias is not as seamless as it is among his more pro-state colleagues.

CONCLUSION

Clearly, in what are considered the "major" decisions of the current Court — *Lopez*; *Seminole Tribe*; *Printz;* and the reapportionment cases (*Miller*, *Shaw* and *Bush*) — the pro-state bloc is consistent. The other "major" decision — *U.S. Term Limits* — is unusual only in the vote of Justice Kennedy. Further, the bloc remains consistent across other issue areas, particularly the Eleventh Amendment (excepting Justice Kennedy's vote in *Hess*). It is also worth noting that the bloc remained solid in several important cases from the 1996 term — such as *City of Boerne v. Flores* (65 U.S.L.W. 4612 [1997]), *Gilbert v. Homar* (65 U.S.L.W. 4442 (1997]) and *Abrams v. Johnson* (65 U.S.L.W. 4478 [1997]) — that are not discussed here, but that clearly have substantial relevance to state policy-making.

If we expand our list of "cases of interest to the states" to include cases involving questions of state taxation authority and, more disruptively, federal preemption of state law, the voting patterns are much less consistent. As to the former, Justice O'Connor in particular does not seem willing to extend her pro-state bias in this area. It may be that, as discussed previously, she simply does not see such cases as "about state autonomy" — or at least that component of the dispute does not appear dispositive for her. As to the latter, the Court more generally has not extended its pro-state pattern of behavior here.

The lesson, then, is that the current Court is, in fact, decidedly pro-state, particularly when the issue of state autonomy is clear.

NOTES

Authors' Note: A version of this chapter appears under the title "The Supreme Court and the States: Do *Lopez* and *Printz* Represent a Broader Pro-State Movement?" in the *Journal of Law and Politics* 14. Also, portions of this chapter will appear in "The Consistency of the U.S. Supreme Court's 'Pro-State' Bloc," *Publius: The Journal of Federalism.*

1. *Younger v. Harris*, 403 U.S. 37, 44–45 (1971).

2. More specifically, Justice Scalia was appointed to William Rehnquist's seat as Associate Justice when the latter was elevated to Chief Justice as a replacement for Burger.

3. Justice O'Connor asserts, on behalf of the Court, that this interest is explicitly protected under the Tenth Amendment ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" — *U.S. Constitution*, Amendment X) and the Guarantee Clause ("The United States shall guarantee to every state in this union a republican form of government" — *U.S. Constitution*, Article IV, Section 4) (501 U.S. 452, 464).

4. This "plain statement" rule proved to be less of a tool for state protection than originally anticipated. For example, in *Hilton v. South Carolina Public Highways Commission*, 502 U.S. 196 (1991), a six justice majority (which included Chief Justice Rehnquist and Justice Kennedy) created an exception to the rule by allowing causes of action against state-owned railway systems under the *Fair Labor Standards Act*. Only Justices O'Connor and Scalia dissented, arguing that such an exception essentially gutted the rule. Justice Clarence Thomas — who came to the Court in 1991 — did not participate.

5. It is worth noting that Justice O'Connor's majority opinion includes an impassioned defense of the autonomous nature of the states within the federal relationship — one that consumes seven pages of volume 501 of *U.S. Reports* (see 501 U.S. 452, 457–64), a soliloquy that strikes at the heart of much of the logic that lay at the foundation of *Garcia*. Ultimately, however, the Court leaves *Garcia* intact.

6. Heretofore the Court had been quite reluctant to override coercive policies passed by Congress. See Tolley and Wallin 1995.

7. "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes" *U.S. Constitution*, Article I, Section 8, Clause 3.

8. This holding provides the foundation for, and thus seemingly foreshadowed, the Court's decision in *Printz v. U.S.* (65 U.S.L.W. 4731 [1997]).

9. But see *Planned Parenthood of Southeastern Pennsylvania v. Casey* (505 U.S. 833 [1992]) and *Shaw v. Reno* (509 U.S. 630 [1994]).

10. Justice Breyer's appointment in 1994 and Justice Ruth Bader Ginsburg's elevation a year earlier represented the first Democratic appointees to the Court since 1967. They replaced Justices White and Blackmun, respectively. The views of Justices Ginsburg and Breyer on the subject of federal-state relations were unclear at the time of their appointments. There was little reason to believe, however, that, given their shared moderate approach to the law and records of tremendous fidelity to precedent, they would be candidates to join the Court's pro-state bloc (see Silverstein and Halton 1996). Alternatively, given that they replaced *Garcia* supporters, there was also little reason to believe their selections would affect the Court's pro-state direction.

11. This is akin to the approach taken by Rothfeld 1992.

12. In the area of criminal procedure/due process, see for example *Arizona v. Evans* (514 U.S. 1 [1995]); *Wilson v. Arkansas* (514 U.S. 927 [1995]); *Bennis v. Michigan* (64 U.S.L.W. 4124 [1996]); *Whren v. U.S.* (116 S.Ct. 1769 [1996]); and *Maryland v. Wilson* (65 U.S.L.W. 4125 [1997]). For cases related to individual rights bearing on state policy authority, see *McIntyre v. Ohio Elections Commission* (514 U.S. 334 [1995]); *Capitol Square Review and Advisory Board v. Pinette* (115 S.Ct. 2440 [1995]); *Rosenberger v. Rector and Visitors of University of Virginia* (115 S.Ct. 2510 [1995]); *44 Liquormart, Inc. v. Rhode Island* (64 U.S.L.W. 4313 [1996]); and *City of Boerne v. Flores* (65 U.S.L.W. 4612 [1997]).

13. See, for example, *National Private Truck Council, Inc. v. Oklahoma Tax Commission* (115 S.Ct. 2351 [1995]); *Missouri v. Jenkins* (63 U.S.L.W. 4486 [1995]); *Arkansas v. Farm Credit Services of Central Arkansas* (65 U.S.L.W. 4414 [1997]); and *Abrams v. Johnson* (65 U.S.L.W. 4478 [1997]).

14. *Carter v. Carter Coal Company* (298 U.S. 238 [1936]).

15. For a summary of the disparate interpretations of *Lopez*, see Nagel 1996. For examples of such commentary, see contributions of Choper and colleagues 1996.

16. It is worth noting that *Lopez* perhaps marks a moment when the Chief Justice and his pro-state colleagues begin to de-emphasize the importance of the Tenth Amendment. While the majority opinion in *Lopez* acknowledges the substantive status of the Tenth Amendment, the dispositive test substantial effects on commerce focuses on the national government's commerce authority, rather than the premise of the Tenth Amendment. This is interesting given the centrality of the Amendment to the Court's holdings in *Gregory* and *New York*, as well as its importance to other opinions penned by the Chief Justice and Justice O'Connor. See, for example, Chief Justice Rehnquist's majority opinions in *National League of Cities v. Usery* (426 U.S. 833 [1976]) and his dissenting opinions in *Garcia v. San Antonio Metropolitan Transit Authority* (469 U.S. 528, 579 [1985]) and *West Lynn Creamery v. Healy* (114 S.Ct. 2205, 2221 [1994]). See also, for example, Justice O'Connor's dissenting opinion in *Garcia* (469 U.S. 528, 580 [1985]) and O'Connor 1994.

17. Presumably, Congress could have written the statute in such a way as to only regulate firearms that had traveled in interstate commerce. This "jurisdictional nexus" is a common tool used by Congress to regulate various activities. See, for example, the Court's application of the *Civil Rights Act* of 1964 in *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964). As Frickey (1996) points out, Chief Justice Rehnquist's opinion devotes little space to the matter, calling such findings helpful, but not necessary (514 U.S. 549, 562). Nevertheless, the absence of such findings did differentiate the *Gun-Free School Zones Act* from previous Commerce Clause legislation that the Court had upheld.

18. On the other hand, Justice Clarence Thomas's concurrence indicates he was willing to undertake a rather dramatic reevaluation of the Court's jurisprudence in this area. He asserts that the "substantial effects" doctrine is inappropriate because is still gives too broad

a reading to the word "commerce" and thus still allows for too much national authority (514 U.S. 549, 584).

19. It is worth noting that Justice Scalia — like Chief Justice Rehnquist in *Lopez* — finds the primary defense of state autonomy not in the Tenth Amendment, but rather in Article I (65 U.S.L.W. 4731, 4738). Justice Scalia's decision to understate the importance of the Tenth Amendment apparently compelled Justice Thomas to write a short concurrence in which he stresses the Tenth (65 U.S.L.W. 4731, 4742 [1997]).

20. For extensive discussions of *U.S. Term Limits*, see Cates 1996, Richards 1996, and Baker 1996.

21. "No person shall be a representative who shall not have attained to the age of twenty five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen" (*U.S. Constitution*, Article I, Section 2, Clause 2). "No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen" (*U.S. Constitution*, Article I, Section 3, Clause 3).

22. Again, though, this categorization suffers from the same maladies bemoaned above namely that the labeling of cases assumes that all the justices view them in a manner identical to the researcher.

23. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State" (*U.S. Constitution*, Amendment XI).

24. "No State Shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State" *U.S. Constitution*, Article I, Section 10.

25. An individual sued the University of California for breach of contract. The work involved was to be performed under the auspices of a contract between the University and the U.S. Department of Energy. Under the terms of the agreement between the University and the Department, the federal government agreed to assume legal liability for any suits involving the project.

26. At issue was Arizona's alleged failure to comply with requirements for the pursuit of child support payments under the Social Security Act.

27. Considered and rejected by the Court in *Fulton Corporation v. Faulkner* (116 S.Ct. 848 [1996]).

28. See Court opinion in *General Motors Corporation v. Tracy* (65 U.S.L.W. 4086 [1997]) and Justice Scalia's dissent in *Camps Newfound/Owatonna, Inc. v. Town of Harrison* (65 U.S.L.W. 4337, 4346 [1997]).

29. See concurrence from Justice Scalia (which Justice Thomas joined) in *Oklahoma Tax Commission v. Jefferson Van Lines* (115 S.Ct. 1331, 1346 [1995]).

30. See dissent from Justice Thomas in *Camps Newfound/Owatonna, Inc. v. Town of Harrison* (65 U.S.L.W. 4337, 4350 [1997]).

31. The Court upheld a Nebraska tax on income from agreements involving federal debt securities.

32. The Court struck a North Carolina "intangibles tax" on corporate stock. The amount of tax owed was based upon the corporation's susceptibility to state taxation: the greater the proportion of the corporation's profits subject to taxation, the lower the stockholder's tax rate.

33. The tax was imposed on natural gas purchases from sellers that did not meet a statutory definition of "natural gas company." The natural gas utilities regulated by the state of Ohio met the definition, while all others did not.

34. The Court upheld a state sales tax on interstate bus tickets. Justices Breyer and O'Connor dissented. As we discussed in chapter 3, notable here is that Justices Scalia and Thomas concurred in the Court's result, but argued that the matter of the propriety of a state tax on a particular function is best left to the determination of Congress. Because the Congress had not acted in a fashion counter to the tax, the Court should uphold the tax. This concurrence indicates quite well the perils of attributing a pro-state vote to a pro-state mentality. In this instance, the state benefitted from these justices' conservative views of judicial role.

35. The Court struck down a Maine statute that exempted from property taxes charitable institutions that operated primarily for the benefit of residents; charities not incorporated in Maine did not receive an automatic exemption. Justices Kennedy and O'Connor voted along with Justices Stevens, Souter, and Breyer to strike the tax as impairing interstate commerce.

36. Justice Ginsburg joined the pro-state bloc, *sans* Justice O'Connor, in determining that states could enforce an income tax on members of a Native American tribe that do not reside on a reservation, even if they work for a tribal-owned business.

37. Meanwhile, Justice Ginsburg cast three pro-state votes, Justices Souter and Stevens cast one each, and Justice Stephen Breyer had no such votes.

38. Of course, the other former state government official on the Court, Justice Souter, has proven generally unsympathetic to state interests across the range of issues discussed here.

39. Though primarily fought on Fourth Amendment grounds, attorneys for the state of Georgia argued that *Gregory* should be controlling, given its endorsement of the principle that states have broad leeway to control qualifications for state office. Justice Ginsburg's majority opinion responded that while a state does have considerable discretion in its treatment of its elected officials, that discretion does not stretch to the violation of constitutional rights guarantees. Only Chief Justice Rehnquist dissented.

40. The state of Mississippi — subject to the pre-clearance provisions of the Voting Rights Act — attempted to comply with the National Voter Registration Act of 1993 by proposing a simplified plan for voter registration. The plan was approved by the U.S. Justice Department. The state did not, however, pass legislation applying the new procedures to state elections and thus operated a bifurcated registration system — one for state and local elections and one for federal elections. The Court unanimously ruled that the state of Mississippi must have that specific system pre-cleared and that it had not done so.

41. The Court held that for the federal government to refuse to approve changes in voting procedures, there must be a showing that such procedures negatively affect African Americans. Justices Stevens and Souter dissented.

42. See, for example, *Miller v. Johnson* (115 S.Ct. 2475, 2488) and *Shaw v. Hunt* (116 S.Ct. 1894, 1904).

43. The ensuing analysis should not be interpreted as a direct comparison with O'Brien 1993.

44. Justice Scalia did not take part.

45. Votes classified as "pro-state": partial dissent in *Medtronic, Inc.* (116 S.Ct. 2240 [1996]); dissenting opinions in *Allied-Bruce Terminix Companies* (513 U.S. 265 [1995]); dissenting opinion in *Mastrobuono* (514 U.S. 52 [1995]); dissenting opinion in *Doctor's Associates, Inc.* (64 U.S.L.W. 4370 [1996]); majority and dissenting opinions in *De Buono*

(116 S.Ct. 1847 [1996]) and dissenting opinion of Justices Breyer and O'Connor in *Boggs* (65 U.S.L.W. 4418 [1997]). *American Airlines* (513 U.S. 219 [1995]) is not included here because Justice Scalia did not take part.

46. Listed in order of discussion above, the following decisions are classified as "pro-state": *Lopez* (514 U.S. 549 [1995]); *Printz* (65 U.S.L.W. 4731 [1997]); *Seminole Tribe* (116 S.Ct. 1114 [1996]); *Coeur d'Alene Tribe* (65 U.S.L.W. 4540 [1997]); *Regents of the University of California* (65 U.S.L.W. 4129 [1997]); *Blessing* (65 U.S.L.W. 4265 [1997]); *Reno* (65 U.S.L.W. 4308 [1997]); *Nebraska Department of Revenue* (513 U.S. 123 [1994]); *General Motors Corporation* (65 U.S.L.W. 4086 [1997]); *Jefferson Van Lines* (115 S.Ct. 1331 [1995]); *Chickasaw Nation* (115 S.Ct. 2214 [1995]); *Timmons* (65 U.S.L.W. 4273 [1997]); *Anderson* (514 U.S. 143 [1995]); *Freightliner Corporation* (514 U.S. 280 [1995]); *New York State Blue Cross & Blue Shield* (514 U.S. 645 [1995]); *Yamaha Motor Corporation* (116 S.Ct. 619 [1996]); *Atherton* (65 U.S.L.W. 4062 [1997]); *California Division of Labor Standards Enforcement* (65 U.S.L.W. 4097 [1997]); *De Buono* (116 S.Ct. 1847 [1996]); and *Medtronic, Inc.* (116 S.Ct. 2240 [1996]). Here, we also include *Miller* (115 S.Ct. 2475 [1995]); *Shaw* (116 S.Ct. 1894 [1996]); and *Bush* (116 S.Ct. 1941 [1996]) because as discussed above, even though the state government is the loser of record, it is reasonable to suggest that the position that state governments argued on behalf of in the reapportionment cases is in reality counter to their long-term interests.

47. "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land" (U.S. Constitution, Article VI, Clause 2).

48. *Medtronic* (116 S.Ct. 2240 [1996]) is not included, given that both sides in the case sought review. *Hess* (513 U.S.[(1994]) is not included, because the Court consolidated that case with *Feeney v. Port Authority Trans-Hudson Corporation* (873 F.2d 628 [1993]), wherein the U.S. Court of Appeals for the Second Circuit reached a conclusion different from the Third Circuit's conclusion in *Hess*.

49. Listed in order of discussion above, state interests were represented by the appellant in the following cases: *Printz* (65 U.S.L.W. 4731 [1997]); *Coeur d'Alene* (65 U.S.L.W. 4540 [1997]); *Regents of the University of California* (65 U.S.L.W. 4129 [1997]); *Blessing* (65 U.S.L.W. 4265 [1997]); *Nebraska Department of Revenue* (513 U.S. 123 [1994]); *Jefferson Van Lines* (115 S.Ct. 1331 [1995]); *Chickasaw Nation* (115 S.Ct. 2214 [1995]); *U.S. Term Limits* (514 U.S. 779 [1995]); *Timmons* (65 U.S.L.W. 4273 [1997]); *Shaw* (116 S.Ct. 1894 [1996]); *Anderson* (514 U.S. 143 [1995]); *New York State Blue Cross & Blue Shield* (514 U.S. 645 [1995]); *California Division of Labor Standards Enforcement* (65 U.S.L.W. 4097 [1997]); *Mastrobuono* (514 U.S. 52 [1995]); and *De Buono* (116 S.Ct. 1847 [1996]).

50. "The Supreme Court: 1994 Term," *Harvard Law Review* 109 (November 1995) at p. 349.

51. "The Supreme Court: 1995 Term," *Harvard Law Review* 110 (November 1996) at p. 372.

52. "The Supreme Court: 1996 Term," *Harvard Law Review* 111 (November 1997) at p. 436.

53. Listed in order of discussion above, state interests were represented by the appellee in the following cases: *Lopez* (514 U.S. 549 [1995]); *Seminole Tribe* (116 S.Ct. 1114 [1996]); *General Motors Corporation* (65 U.S.L.W. 4086 [1997]); *Fulton Corporation* (116 S.Ct. 848 [1996]); *Camps Newfound/Owatonna* (65 U.S.L.W. 4337 [1997]); *Chandler* (65 U.S.L.W. 4243 [1997]); *Young* (65 U.S.L.W. 4236 [1997]); *Reno* (65 U.S.L.W. 4308 [1997]); *Miller* (115 S.Ct. 2475 [1995]); *Bush* (116 S.Ct. 1941 [1996]); *Freightliner*

Corporation (514 U.S. 280 [1995]); *Yamaha Motor Corporation* (116 S.Ct. 619 [1996]); *Atherton* (65 U.S.L.W. 4062 [1997]); *Barnett Bank* (116 S.Ct. 1103 [1996]); *American Airlines* (513 U.S. 219 [1995]); *Allied-Bruce Terminix Companies* (513 U.S. 265 [1995]); *Doctor's Associates* (64 U.S.L.W. 4370 [1996]); and *Boggs* (65 U.S.L.W. 4418 [1997]).

54. Listed in order of discussion above, state interests were represented by the appellee in the following cases in which the Supreme Court reversed the lower court holding: *Camps Newfound/Owatonna* (65 U.S.L.W. 4337 [1997]); *Fulton Corporation* (116 S.Ct. 848 [1996]); *Chandler* (65 U.S.L.W. 4243 [1997]); *Young* (65 U.S.L.W. 4236 [1997]); *Barnett Bank* (116 S.Ct. 1103 [1996]); *Allied-Bruce Terminix Companies* (513 U.S. 265 [1995]); *Doctor's Associates* (64 U.S.L.W. 4370 [1996]); *American Airlines* (513 U.S. 219 [1995]); and *Boggs* (65 U.S.L.W. 4418 [1997]).

55. For the purposes of this portion of the discussion, *American Airlines* (513 U.S. 219 [1995]) is excluded because Justice Scalia did not take part.

56. Listed in order of discussion above, pro-state votes were cast via the majority opinion in *Lopez* (514 U.S. 549 [1995]); majority opinion in *Printz* (65 U.S.L.W. 4731 [1997]); dissenting opinions in *Hess*(513 U.S. 30 [1994]); majority opinion in *Seminole Tribe* (116 S.Ct. 1114 [1996]); majority opinion in *Coeur d'Alene Tribe* (65 U.S.L.W. 4540 [1997]); majority opinion in *Regents of the University of California* (65 U.S.L.W. 4129 [1997]); majority opinion in *Blessing* (65 U.S.L.W. 4265 [1997]); majority opinion in *Nebraska Department of Revenue* (513 U.S. 123 [1994]); majority opinion in *General Motors Corporation* (65 U.S.L.W. 4086 [1997]); majority and Scalia concurring opinion in *Jefferson Van Lines* (115 S.Ct. 1331 [1995]); dissenting opinions in *Camps Newfound/Owatonna* (65 U.S.L.W. 4337 [1997]); majority opinion in *Chickasaw Nation* (115 S.Ct. 2214 [1995]); dissenting opinions in *U.S. Term Limits* (514 U.S. 779 [1995]); dissenting opinion in *Chandler* (65 U.S.L.W. 4243 [1997]); majority opinion in *Timmons* (65 U.S.L.W. 4273 [1997]); majority and concurring opinions in *Reno* (65 U.S.L.W. 4308 [1997]); majority opinion in *Miller* (115 S.Ct. 2475 [1995]); majority opinion in *Shaw* (116 S.Ct. 1894 [1996]); majority and concurring opinions in *Bush* (116 S.Ct. 1941 [1996]); majority opinion in *Anderson* (514 U.S. 143 [1995]); majority opinion in *Freightliner Corporation* (514 U.S. 280 [1995]); majority opinion in *New York State Blue Cross & Blue Shield* (514 U.S. 645 [1995]); majority opinion in *Yamaha Motor Corporation* (116 S.Ct. 619 [1996]); majority opinion in *Atherton* (65 U.S.L.W. 4062 [1997]); majority opinion in *California Division of Labor Standards Enforcement* (65 U.S.L.W. 4097 [1997]); partial dissent in *Medtronic* (116 S.Ct. 2240 [1996]); dissenting opinions in *Allied-Bruce* (513 U.S. 265 [1995]); dissenting opinion in *Mastrobuono* (514 U.S. 52 [1995]); dissenting opinion in *Doctor's Associates* (64 U.S.L.W. 4370 [1996]); majority and dissenting opinions in *De Buono* (116 S.Ct. 1847 [1996]); and dissenting opinion of Justices Breyer and O'Connor in *Boggs* (65 U.S.L.W. 4418 [1997]). No justice took a pro-state position in *Fulton Corporation* (116 S.Ct. 848 [1996]); *Young* (65 U.S.L.W. 4236 [1997]); or *Barnett Bank* (116 S.Ct. 1103 [1996]).

57. The difference in the two blocs' incidence of support for the states is significant at better than .01; $Chi^2 = 41$; 1 df.

58. Listed in order of discussion above, the Court was non unanimous in the following cases: *Lopez* (514 U.S. 549 [1995]); *Printz* (65 U.S.L.W. 4731 [1997]); *Hess* (513 U.S. 30 [1994]); *Seminole Tribe* (116 S.Ct. 1114 [1996]); *Coeur d'Alene Tribe* (65 U.S.L.W. 4540 [1997]); *General Motors Corporation* (65 U.S.L.W. 4086 [1997]); *Jefferson Van Lines* (115 S.Ct. 1331 [1995]); *Camps Newfound/Owatonna* (65 U.S.L.W. 4337 [1997]); *Chickasaw Nation* (115 S.Ct. 2214 [1995]); *U.S. Term Limits* (514 U.S. 779 [1995]); *Chandler* (65 U.S.L.W. 4243 [1997]); *Timmons* (65 U.S.L.W. 4273 [1997]); *Miller* (115 S.Ct. 2475

[1995]); *Shaw* (116 S.Ct. 1894 [1996]); *Bush* (116 S.Ct. 1941 [1996]); *Medtronic* (116 S.Ct. 2240 [1996]); *Allied-Bruce* (513 U.S. 265 [1995]); *Mastrobuono* (514 U.S. 52 [1995]); *Doctor's Associates* (64 U.S.L.W. 4370 [1996]); *De Buono* (116 S.Ct. 1847 [1996]); and *Boggs* (65 U.S.L.W. 4418 [1997]).

59. The other justices dissented in the nonunanimous decisions discussed here at the following rates: Rehnquist (5 times), O'Connor (6), Scalia (6), Thomas (8), Ginsburg (9), Souter (10), Breyer (10), and Stevens (11).

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8

Conclusion

In *Seminole Tribe of Florida v. Florida* (116 S.Ct. 1114 [1996]), the Court split 5–4 in support of the states' Eleventh Amendment sovereign immunity from suit. The decision — like *U.S. v. Lopez* (115 S.Ct. 1624 [1995]) and *Printz v. U.S.* (65 U.S.L.W. 4731 [1997]) — was only a decade separated from the retreat from the field of federalism Justice O'Connor had decried in *Garcia v. S.A.M.T.A.* (469 U.S. 528 [1985]). But the jurisprudential distance between these decisions was enormous. The *Seminole Tribe* decision exemplified the Court's increasingly adamant refusal to countenance the headlong expansion of Congress's regulatory power under the Constitution's Commerce Clause. *Garcia* seems now more a bump in the road than a change in direction.

With their lock on Supreme Court appointments from 1969 to 1992, Republican presidents configured a High Bench that contains a critical mass of justices whose aggregate conservatism and support for the states yields decisions in line with the states' interests at a clip greater than any Court since 1936. Indeed, given the mix between the facts of *Seminole Tribe* and the configuration of the Court, there was better than a 50 percent chance that the pro-state bloc would come together in support of Florida's claim. This illustrates one on the most fundamental findings of this study — the influence of presidents on the construction of federalism.

Republican Presidents, at least since Richard Nixon, have seen their appointments to the U.S. Supreme Court as a key mechanism to direct national politics down a more conservative path. After all, to these presidents and conservatives more generally, the Court was one of the principal conspirators in the nationalization of most areas of public policy since the "switch" in 1937. Thus, it seemed only reasonable that the institution could also become the locus for reversing those trends. Accordingly, the Republican presidents became intent on appointing to the High Bench jurists dedicated to the philosophy of "strict construction" and greater respect for the states' position in the federal relationship. Importantly, they have

been remarkably successful at doing just that.

As we have demonstrated in the foregoing analysis, the effect of the Republican presidents' appointments has been a pivotal force in the complexion of the federal relationship. Their appointments have altered the composition of the Court, producing the identifiable and highly consequential bloc of pro-state justices that has yielded decisions such as *Seminole Tribe*. The presence of this bloc has a great bearing on the decisional context the Court presents to the states, and that decisional context influences their decisions as to when and how to participate. As the states win more often, they resort to the Court with increasing frequency in pursuit of policy, giving a state-friendly Court ample opportunity to shape the federal relationship in line with the states' policy interests.

But the emergence of the GOP Court has not been the only force affecting either the states' incidence of litigation or success. As the number of GOP appointees to the Court mounted, the states' law offices became more capable and professional Supreme Court advocates — better funded, better staffed, and more adept. They have established the Supreme Court Project to help ensure that the effectiveness of their litigation efforts is not hindered by a lack of direct experience at the bar of the Court. And they have come to perceive the wisdom of litigating in pursuit of long-term policy goals rather than being concerned only with the immediate outcome of a specific case. Thus, the states selectively resort to the Court in pursuit of policy. Effectively, then, today, more than any time in their history, the states are "specialized" Supreme Court advocates (see McGuire 1993a) with all the attendant advantages (see also Galanter 1974).

Finally, the states' fate before the Court has broader repercussions for the political system *writ large*. First, the states are quite active in the policy process. Since the 1970s they have had ever greater responsibilities and powers turned over to them by a federal government mired in budget deficits and unable generally to launch new, sweeping programs. Moreover, in the era of "New Federalism," many states have seized the opportunity to enact their own regulatory standards and programs as the national government withdrew from regulatory arenas. With economies and populations the size of many nations, state actions and decisions have a tremendous bearing on American politics and society.

Second, and more importantly, the states are integral components of the constitutional system. They are protected, and the national government's actions must be made in accordance with the legitimate activities of the states. Of course, the boundaries of the states' "legitimate activities" are determined largely by the Court. Thus, depending upon the Court's disposition, the existence of the states effectively can constrain the powers and actions of the national government. To put it in more concrete terms, if the Court is solicitous of the states' constitutional prerogatives, the states' existence can determine the range of the national government's powers and activity.

At bottom, *Seminole Tribe* was a controversy over the nature of "our federalism." Now, few questions in constitutional law have been either as enduring or vexing as the proper relationship between the states and the national government

— a point neatly illustrated by the broad swings across history in the Court's construction of that relationship. From the age of Marshall to Taney, from Reconstruction to the Gilded Age, from the Progressive Era to the New Deal, the Court has tacked back and forth between nationalism and states' rights. Today, as the twentieth century draws to a close, the Court again acts as an active guardian of the states' position in the federal relationship, and the states are well positioned to take advantage of this more accommodating Court.

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Appendix A: Survey Instrument

PART I - ***PROFILE OF THE OFFICE OF ATTORNEY GENERAL***

In this section, we are interested in assessing the current status of human and capital resources at the disposal of the Attorney General and the extent to which those resources have changed over time.

A. STAFF

1a. How many individuals are currently ***employed full-time*** in the Attorney General's Office? _____

1b. Approximately how much has the number of full-time employees changed since the 1960s? Based on your best guess, would you say that the percentage of full-time employees in the Attorney General's Office has:

_____ increased by 100% (i.e., doubled) or more.
_____ increased by 50%.
_____ increased only marginally.
_____ remained stable.
_____ decreased.

2a. Of the individuals employed full-time in the Attorney General's Office, what percentage are ***appointed by the Attorney General***? _____

2b. Approximately how much appointment power does the Attorney General have now compared to the1960s? Based on your best guess, would you say that the percentage of full-time employees appointed by the Attorney General has:

_____ increased by 100% (i.e., doubled) or more.
_____ increased by 50%.
_____ increased only marginally.
_____ remained stable.
_____ decreased.

3a. Of the full-time employees in the Attorney General's Office, how many are ***attorneys***? _____

3b. Approximately how much has the number of full-time attorneys in your office increased in size since the 1960s? Based on your best guess, would you say that the number of full-time attorneys has:
_____ increased by 100% (i.e., doubled) or more.
_____ increased by 50%.
_____ increased only marginally.
_____ remained stable.
_____ decreased.

4. In addition to full-time staff attorneys, does your office hire ***private attorneys*** on a part-time or case-by-case basis? If so, on average, how many part-time attorneys are on the payroll at any one time? _____

B. BUDGET

5a. What is the approximate ***annual budget*** of the Attorney General's Office?

_____

5b. How much has the annual budget of the Attorney General's Office changed since 1967? Based on your best guess, would you say that the annual budget — discounting inflation — has:
_____ increased by 100% (i.e., doubled) or more.
_____ increased by 50%.
_____ increased only marginally.
_____ remained stable.
_____ decreased.

6a. How much discretion does the legislature provide to the Attorney General in allocating financial resources? On a scale of 1 to 10 (with 1 being "the Attorney General has total discretion over his/her spending authority" and 10 being "the Attorney General has no discretion over his/her spending authority") how would you characterize the current level of budgetary discretion possessed by the Attorney General? _____

6b. In reference to budgetary authority, how much has the discretion of the Attorney General changed since the 1960s? Based on your best guess, would you say that the discretion provided by the legislature to the Attorney General has:

_____ increased by 100% (i.e., doubled) or more.
_____ increased by 50%.
_____ increased only marginally.
_____ remained stable.
_____ decreased.

PART II — *STATE GOVERNMENT ACTIVITY IN CIVIL CASES IN FEDERAL COURT*

Here we are interested in the nature and extent of your state government's involvement in ***civil litigation in federal court.*** For the purposes of this section of the survey, ***state government*** refers to the three branches of state government, state executive departments and agencies, state employees (when operating in their official capacities), publicly funded colleges and universities, and state departments of corrections.

7. On average, how many civil cases in the three levels of federal court does your state participate in ***as a direct party*** at any one time?

_____ number active/pending in a federal district court
_____ number active/pending in a federal court of appeals
_____ number active/pending at the U.S. Supreme Court

8. On average, how many civil cases in federal court ***originally instigated by another party*** specifically against your state government are active/pending at any one time?

_____ number active/pending in a federal district court
_____ number active/pending in a federal court of appeals
_____ number active/pending at the U.S. Supreme Court

9. On average, how many civil cases in federal court ***originally instigated by your state government*** are active/pending at any one time?

_____ number active/pending in a federal district court
_____ number active/pending in a federal court of appeals
_____ number active/pending at the U.S. Supreme Court

10. On average, how many civil cases does your state participate in ***as an intervening party*** at any one time?

_____ number active/pending in a federal district court
_____ number active/pending in a federal court of appeals
_____ number active/pending at the U.S. Supreme Court

11. On average, how many civil cases does your state participate in ***as a filer or joiner of a brief amicus curiae***?

_____ number active/pending in a federal district court
_____ number active/pending in a federal court of appeals
_____ number active/pending at the U.S. Supreme Court

12. Of the civil cases in which your state is involved (as a direct or intervening party or as a filer of a brief *amicus curiae*), how many involve ***national government activity*** (as a direct or intervening party or as a filer of a brief *amicus curiae*) ***in support*** of your state's position?

_____ number active/pending in a federal district court
_____ number active/pending in a federal court of appeals
_____ number active/pending at the U.S. Supreme Court

13. Of the civil cases in which your state is involved (as a direct or intervening party or as a filer of a brief *amicus curiae*), how many involve ***national government activity*** (as a direct or intervening party or as a filer of a brief *amicus curiae*) ***in opposition*** to your state's position?

_____ number active/pending in a federal district court
_____ number active/pending in a federal court of appeals
_____ number active/pending at the U.S. Supreme Court

14a. How many ***attorneys are assigned full-time*** to monitoring cases involving your state government (as a direct or intervening party or as a filer of a brief *amicus curiae*) which are active/pending at any level of federal court? _____

14b. How many ***attorneys are assigned part-time*** to monitoring cases involving your state government (as a direct or intervening party or as a filer of a brief *amicus curiae*) which are active/pending at any level of federal court? _____

PART III — *DECISION MAKING IN THE ATTORNEY GENERAL'S OFFICE*

15a. When your state is considering ***filing a formal civil suit in federal court***, what factors do you consider? On a scale of 1 to 4 (with 1 being "very important" and 4 being "not at all important"), please rate the following factors:

_____ chance of winning on the merits
_____ chance of forcing an out-of-court settlement by commencing litigation
_____ nature of relationship (i.e., continuous v. limited) with the party at whom suit would be targeted

_____ position of the federal government on the issue
_____ position of other state governments on the issue
_____ need to test the constitutionality or applicability of a law
_____ availability of monetary resources
_____ availability of human resources
_____ public opinion
_____ other (please specify) _____
_____ other (please specify) _____

15b. When your state is considering filing a formal civil suit, what is the level of involvement of parties external to the Office of Attorney General? On a scale of 1 to 4 (with 1 being "very important" and 4 being "not at all important"), please rate the following parties:

_____ the governor's office
_____ members of the state legislature and/or their staffs
_____ other state offices of attorneys general
_____ interstate associations
_____ federal government officials
_____ interest organizations
_____ other (please specify) _____
_____ other (please specify) _____

16a. When your state is considering ***filing a pre-certiorari amicus curiae brief*** with the U.S. Supreme Court in a civil suit, what factors do you consider? On a scale of 1 to 4 (with 1 being "very important" and 4 being "not at all important"), please rate the following factors:

_____ importance of issue
_____ chance of influencing the Court to accept the case
_____ nature of relationship (i.e., continuous v. limited) with the party at whom suit would be targeted
_____ position of the federal government on the issue
_____ position of other state governments on the issue
_____ availability of monetary resources
_____ availability of human resources
_____ public opinion
_____ other (please specify) _____
_____ other (please specify) _____

16b. When your state is considering ***filing a merits amicus curiae brief*** with the U.S. Supreme Court in a civil suit, what factors do you consider? On a scale of 1 to 4 (with 1 being "very important" and 4 being "not at all important"), please rate the following factors:

_____ importance of issue
_____ chance of influencing the Court on the merits

_____ nature of relationship (i.e., continuous v. limited) with the party at whom suit would be targeted
_____ position of the federal government on the issue
_____ position of other state governments on the issue
_____ availability of monetary resources
_____ availability of human resources
_____ public opinion
_____ other (please specify) _____
_____ other (please specify) _____

16c. When your state is considering ***joining a pre-certiorari or merits amicus curiae brief filed by another party*** with the U.S. Supreme Court in a civil suit, what factors do you consider? On a scale of 1 to 4 (with 1 being "very important" and 4 being "not at all important"), please rate the following factors:

_____ importance of issue
_____ chance of influencing the Court on the merits
_____ nature of relationship (i.e., continuous v. limited) with the parties involved in the case
_____ position of the federal government on the issue
_____ position of other state governments on the issue
_____ availability of monetary resources
_____ availability of human resources
_____ public opinion
_____ other (please specify) _____
_____ other (please specify) _____

16d. On average, when your state is considering ***filing or joining an amicus curiae brief*** in a civil suit before the Supreme Court, what is the level of involvement of parties external to the Office of Attorney General? On a scale of 1 to 4 (with 1 being "very important" and 4 being "not at all important"), please rate the following parties:

_____ the governor's office
_____ members of the state legislature and/or their staffs
_____ other state offices of attorneys general
_____ interstate associations
_____ federal government officials
_____ interest organizations
_____ other (please specify) _____
_____ other (please specify) _____

17a. On average, how often per year are you ***invited by other states to join pre-certiorari or merits amicus curiae briefs*** filed with the U.S. Supreme

Court?_____

17b. On average, what percentage of invitations to join *amicus curiae* briefs do you accept? _____

PART IV — *RELATIONS WITH OFFICES OF ATTORNEY GENERAL IN OTHER STATES*

18. In terms of collecting information on active or potential suits involving other state governments, what are
your most important sources of information? On a scale of 1-4 (with 1 being "very important" and 4 being "not at all important"), please rate the following sources of information:

_____ personal contact with counterparts in other offices of state attorneys general
_____ formal letters, memos and reports from other states sent specifically to your office
_____ formal letters, memos, and reports from other states sent to all states
_____ formal reports created and maintained by the Council on State Government
_____ formal reports created and maintained by the National Association of Attorneys General
_____ other (please specify) _____
_____ other (please specify) _____

20. With which state(s) do you maintain the most formal and informal contact regarding civil litigation activity in federal court? Please list up to 12 "most important states" in terms of level of contact.

_____ _____ _____

_____ _____ _____

_____ _____ _____

PART V — *THE U.S. SUPREME COURT*

We are interested in your perceptions of the evolution of the U.S. Supreme Court on issues related to state autonomy within the federal relationship.

21. On a scale of 1 to 10, with 1 representing "no influence" and 10 representing "great influence," please rate each of the following Supreme Court decisions in terms of their importance to the current scope of state government

policy authority within the federal relationship.

_____ *Maryland v. Wirtz* (1968) — The Fair Labor Standards Act applies to employees of state hospitals and schools.

_____ *Shapiro v. Thompson* (1969) — The right to travel is constitutionally protected.

_____ *Swann v. Charlotte-Mecklenburg County Board of Education* (1971) — Busing, racial balance ratios, and gerrymandered school districts are permissible interim methods for desegregating school systems.

_____ *San Antonio Independent School District v. Rodriguez* (1973) — The use of local property taxes to finance public schools is constitutional.

_____ *Roe v. Wade* (1973) — The right to privacy includes a woman's decision as to whether to bear a child.

_____ *National League of Cities v. Usery* (1976) — The Fair Labor Standards Act cannot apply to state and local government employees.

_____ *Gregg v. Georgia* (1976) — The death penalty does not violate the Eighth Amendment.

_____ *Craig v. Boren* (1976) — Classifications based on gender are invalid unless substantially related toachieving an important governmental objective.

_____ *Complete Auto Transit, Inc. v. Brady* (1977) — The Commerce Clause does not forbid states from taxing interstate enterprises under certain conditions.

_____ *University of California Regents v. Bakke* (1978) — The use of race as a selection criteria in university admissions programs does not violate the Constitution.

_____ *Garcia v. San Antonio Metropolitan Transit Authority* (1985) — Overturned *National League of Cities v. Usery* (see above).

_____ *Bowers v. Hardwick* (1986) — State anti-sodomy laws do not violate the right to privacy.

_____ *City of Richmond v. J.A. Croson Co.* (1989) — Minority set-aside programs for the dispersion of government contracts are valid only as a remedy for proven instances of past discrimination.

_____ *New York v. United States* (1992) — Congress may use monetary and access incentives to attempt to get states to act in a particular way (in this case, toward the disposal of low-level radioactive waste). However, Congress may not order a state to assume title of and liability for such waste if it fails to dispose of it.

_____ *U.S. Term Limits v. Thornton* (1995) — States may not add to the qualifications established in the U.S. Constitution for membership in Congress.

_____ *U.S. v. Lopez* (1995) — Congress may not prohibit the possession of a firearm within 1,000 feet of school grounds on the basis of its Commerce Clause authority.

_____ *Missouri v. Jenkins* (1995) — This decision restricts the remedial authority of federal courts in suits involving alleged discrimination in public education.

_____ *Miller v. Johnson* (1995) — States may not construct congressional districts primarily on the basis of considerations of race.

_____ *Romer v. Evans* (1996) — An amendment to the Colorado Constitution — adopted via referendum in 1992 — that repealed local ordinances that barred discrimination on the basis of sexual orientation violates the U.S. Constitution.

_____ *Seminole Tribe of Florida v. Florida* (1996) — Congress may not grant private individuals the power to sue state governments in federal court without the state's permission.

_____ Other (please specify) _____

_____ Other (please specify) _____

_____ Other (please specify) _____

_____ Other (please specify) _____

22. In what areas of law has the recent evolution of U.S. Supreme Court doctrine been most favorable to state power? On a scale of 1 to 4, with 1 being "very favorable" and 4 being "very unfavorable," please rate the following issue areas.

_____ Criminal Procedure
_____ First Amendment
_____ Civil Rights
_____ Judicial Process
_____ Federalism
_____ Due Process
_____ Economics

23. On a scale of 1 to 10, with 1 representing "weak" and 10 representing "strong," please rate the following current and former members of the Supreme Court in terms of their general propensity to by sympathetic to the power and autonomy of state governments within the federal relationship.

_____ Stephen G. Breyer
_____ Ruth Bader Ginsburg
_____ Clarence Thomas
_____ David H. Souter
_____ Anthony M. Kennedy
_____ Antonin Scalia
_____ William H. Rehnquist
_____ Sandra Day O'Connor
_____ John Paul Stevens

_____ Harry Blackmun
_____ Byron White
_____ Thurgood Marshall
_____ William J. Brennan
_____ Lewis F. Powell
_____ Warren E. Burger
_____ Potter Stewart
_____ William O. Douglas
_____ John Marshall Harlan
_____ Hugo Black

Appendix B: Additional Information on Chapter 3 Scores

Below are the names of the 14 Warren, 18 Burger, and 12 Rehnquist Court scales. The number in the far left column identifies each scale. The number immediately to its right reports the number of decisions that comprises each scale. Each scale's Coefficient of Reproducability (CR) and the difference between the scale's CR and its Minimum Marginal Reproducability (MMR) are reported as well.

Table B-1
Scale Scores

Scale	N		CR	CR - MMR
		WARREN COURT		
1	5	Due Process Hearing	.952	.202
2	5	Supreme Court Jurisdiction	.921	.251
3	8	State Regulation of Business	.962	.215
4	7	Protest Demonstrations	.911	.226
5	5	Self Incrimination	.970	.300
6	5	Habeas Corpus	1.000	.250
7	7	Immunity from Prosecution	1.000	.327
8	26	State Tax	.916	.022
9	13	Obscenity	.980	.152

Table B-1 (cont'd)

10	15	Reapportionment	.944	.091
11	11	Sit in Demonstrations	.953	.161
12	15	Desegregation: Other than Schools	.943	.105
13	17	Right to Counsel	.970	.116
14	16	Involuntary Confession	.937	.067
		BURGER COURT		
1	4	Commercial Speech	1.000	.250
2	9	Poverty Law: Constitutional Challenges	.902	.146
3	22	Right to Counsel	.923	.040
4	18	Poverty Law: Statutory Challenges	1.000	.172
5	13	Due Process: Hearing	.941	.070
6	5	Due Process: Impartial Decision Maker	1.000	.333
7	7	Federal Court Deference to State Proceedings: First Amendment	1.000	.220
8	12	Writ Improvidently Granted	.958	.205
9	18	Federal Preemption	.977	.146
10	10	Plea Bargaining	.942	.142
11	10	Right to Confront Witnesses	.985	.152
12	13	Search and Seizure: Vehicles	.941	.111
13	15	School Desegregation	1.000	.147
14	14	Prisoners' Rights	.980	.130
15	11	Attorneys' Fees	.935	.143
16	13	Federal Court Deference to State Proceedings: Civil Procedure	.914	.118
17	5	Protest Demonstrations	.947	.280
18	9	1965 Voting Rights Act	.914	.065
		REHNQUIST COURT		
1	17	Search and Seizure other than Vehicles	.913	.039

Table B-1 (cont'd)

2	7	Double Jeopardy	.902	.038
3	6	Right to Counsel	.962	.295
4	6	Jury Instructions	1.000	.253
5	6	Free Exercise of Religion	1.000	.202
6	7	Due Process: Miscellaneous	.935	.155
7	6	Attorneys' Fees	.943	.193
8	24	Habeas Corpus	.901	.015
9	8	Search and Seizure: Vehicles	.940	.273
10	10	First Amendment: Miscellaneous	.967	.110
11	8	Right to Confront Witness	.935	.139
12	9	State Jurisdiction over Indians	1.000	.175
	Warren Court Mean CR		.954	
	Burger Court Mean CR		.959	
	Rehnquist Court Mean CR		.950	

Table B-2
Warren, Burger, and Rehnquist Court Justices' Support for the Federal Relationship, Defendants' Rights Scales Removed

Justice	Support for the Federal Relationship, Defendants' Rights Scales Removed	Support for the Federal Relationship
Fortas	-2.96	-4.73
Whittaker	2.10	-2.48
Douglas	-1.12	-1.38
Blackmun	-0.63	-1.18
Marshall	-1.03	-1.00
Warren	-0.89	-0.96
Brennan	-1.03	-0.63
Stevens	-0.57	-0.61
Goldberg	-0.58	-0.58
Scalia	-0.34	-0.47
Thomas	1.12	-0.33
Frankfurter	1.48	0.18
Kennedy	0.45	0.35
Souter	0.92	0.41
Stewart	0.46	0.47
Clark	0.65	0.76
Burger	0.77	0.76
Powell	1.33	0.96
White	1.56	1.19
Rehnquist	1.48	1.20
Black	1.28	1.27
O'Connor	0.18	1.36
Harlan	1.91	1.94

Table B-3
Logit Results of Rehnquist Court Justices' Support for the States, Defendants' Rights Scales Removed

Variable	Coefficient	Standard Error
Constant	-0.45*	0.08
Opposed by the Federal Government	-0.02	0.24
Opposed by a Private Party	0.28*	0.11
Segal et al. Ideology (Reverse Coded)	0.41*	0.10
Support for the Federal Relationship (Defendants' Rights Scales Removed)	0.78*	0.06

Note: Dependant Variable = whether the individual justice votes for the state litigant (1 = yes, 0 otherwise); N = 1668; $Chi^2 = 319.67$; $p > Chi^2 = 0.00$; Modal = 52.5; Percent Correctly Classified = 70.2; MLE Reduction in Error = 37.5%; * Significant at 0.01

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Appendix C: Additional Information on Chapter 6 Analysis

Table C-1
Logit Analysis of State Success in the U.S. Supreme Court, 1954–89 (Controlling for Issue and the Supreme Court Project)

Independent Variable	Coefficient	T-Statistic
Constant	0.17	0.68
State as Appellant	0.78***	2.89
Opposed by National Government	-1.15***	-3.11
Opposed by "One-Shotter"	-0.2	-0.72
Political Environment	0.43***	2.63
Republican Court Appointments	0.05	0.62
Growth in Capacity of State Attorney General Offices	-0.07	-0.81
Emergence of Supreme Court Project	0.57*	1.62
Issues		
Criminal Procudure	-.081***	-2.88
First Amendment	-1.52***	-4.16
Civil Rights	-1.78***	-5.75
Federalism	-1.08***	-2.54

Table C-1 (cont'd)

Due Process	-1.42***	-2.54
Economics	-0.09	-0.29
Interaction Effects		
Court X State Appellant	0.07	0.8
Court X National Government	0.20*	1.56
Court X "One-Shotter"	0.13*	1.55
Court X Political Environment	-0.21***	-3.54
Institutional Growth of State AG Office X State as Appellant	-0.09	-1.35
Institutional Growth of State AG Office X National Government	-0.13	-1.21
Institutional Growth of State AG Office X "One-Shotter"	-0.06	-0.97
Institutional Growth of State AG Office X Political Environment	0.09	1.34
Court X Criminal Procedure	0.13**	1.95
Court X First Amendment	0.12*	1.49
Court X Civil Rights	0.19***	2.71
Court X Federalism	0.11	1.23
Court X Due Process	0.23**	1.94
Court X Economics	-0.1	-1.31

Note: Dependant Variable = "State Success" (1,0) — whether the Court decides in the direction of the state party, decides in the direction urged by state merits *amici*, or finds for the appellant in instances when a state has filed a *pre-certiorari amicus* brief; N = 2008; $Chi^2 = 266.7$; $p > Chi^2 = 0.00$; Modal = 52.2; Percent Correctly Classified = 65.4; MLE Reduction in Error = 25.8%; * Significant at 0.15; ** Significant at 0.05; ***Significant at 0.01

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Bibliographical Essay

THE SUPREME COURT IN AMERICAN POLITICS

The Supreme Court as a policy-making institution may be explored in a variety of works. There is a rich body of studies on the Court, its jurisprudence, and its effect on American politics and policy. Two particularly good historical works are Bernard Schwartz's *A History of the Supreme Court* (1993) and *The American Constitution: Its Origins and Development* (1991) by Alfred H. Kelly, Winfred A Harbison, and Herman Belz. The former concentrates on the High Court, the justices, and their jurisprudence, while the latter does a superb job of clearly enunciating how social and political forces bear on the development of constitutional law and the Court's adjudication of cases.

Also noteworthy is David O'Brien's *Storm Center* (1996) is a highly readable examination of the Court, its actors, and its actions. Filled with anecdotes, it does an excellent job of informing scholars and lay readers alike as to both the subtle nuances of the High Court's institutional character as well as its unique role and position in American politics.

Perhaps the finest collection of essays on the various aspects of the American judiciary and policymaking in particular is John B. Gates' and Charles A. Johnson's *The American Courts: A Critical Assessment* (1991). With selections examining both state and federal courts, it is a remarkably thorough resource for judicial politics research. Particularly relevant to the research presented here are articles by H. W. Perry on the Supreme Court's agenda setting and case selection and Lee Epstein on organized interests and the courts.

THE SUPREME COURT AND AMERICAN FEDERALISM

There are a wide variety of resources available for gathering perspective on the Court's treatment of the federal relationship in particular. In addition to those sources cited above, see David M. O'Brien's *Constitutional Law and Politics:*

Struggles for Power and Governmental Accountability (1997), chapter 7. For a recent accounting of the effect of the Court's more contemporary decisions on the state of federalism and the states' position within the constitutional system, see *Case Western Reserve Law Review's* "Symposium: The New Federalism after *United States v. Lopez*" (1996). And for examples of the perspectives of the current justices on the parameters of federalism, see *U.S. Term Limits v. Thornton* (514 U.S. 779 [1995]) and the opinions penned by Justice John Paul Stevens (for the majority) and Justice Anthony Kennedy (concurring at 838), and Justice Clarence Thomas (dissenting at 845).

JUDICIAL DECISIONMAKING

Perhaps no field in judicial politics has been more thoroughly examined than the justices' decisional behavior. Beginning with Glendon Schubert's seminal analysis of the Vinson and Warren Courts' justices' ideologies (*The Judicial Mind: Attitudes and Ideologies of Supreme Court Justices, 1946 - 1963* [1965]), political scientists repeatedly have turned to measures of the justices' attitudes as predictors of judicial behavior. Two works in particular are relevant to this study — David W. Rohde's and Harold J. Spaeth's *Supreme Court Decision Making* (1976) and Jeffrey A. Segal's and Harold J. Spaeth's *The Supreme Court and the Attitudinal Model* (1993). In both works the authors examine the full decisionmaking processes of the Court from an attitudinal perspective. Just as importantly, they provide thorough and clear descriptions of the methodology employed to operationalize the justices' attitudes.

Of course, judicial behavior itself is highly complex. In "What Motivates Supreme Court Justices? Assessing the Evidence on Justice's Goals" (1996) Lawrence Baum provides a thoughtful discussion of the variety of forces, and their interrelationships, that affect a justice's decisional behavior.

STATE PARTICIPATION

An extensive literature has developed on the litigation efforts of organized interests in the Court. For example, in a pair of highly influential studies ("Organized Interests and Agenda-Setting in the U.S. Supreme Court" [1988] and "*Amici Curiae* Before the Supreme Court: Who Participates, When, and How Much?" [1990]), Gregory A. Caldeira and John R. Wright laid out the consequence and nature of organized interests' (including the states') activities in the Supreme Court. Their 1990 article in particular provides excellent evidence to serve as a baseline against with to compare the states' litigation activity. Similarly, Lee Epstein's "Interest Group Litigation During the Rehnquist Court Era" (1993) details the explosive growth of organized interest litigation activity since the end of the Warren Court. Focusing more directly on the states, in "Supreme Court Decision-Making: The Impact of Court Composition on State and Local Government Litigation" (1992), Richard C. Kearney and Reginald S. Sheehan draw a strong link between the Court's nature and the rates of success of the states as litigants. Indeed, they show that changes in the Court's personnel have an

appreciable bearing on the states' likelihood of success, even when controlling for a variety of forces known to affect judicial outcomes.

A MODEL OF STATE LITIGATION

In "Control and Feedback in Economic Regulation: The Case of the NLRB" (1985), Terry Moe lays out a theoretical framework linking together presidential appointments, judicial outcomes, and litigation decisions. Mindful of Kearney and Sheehan's findings (1992), we adopt this framework to explain changes in the states' patterns of litigation before the Court. Analyses shedding further light on adaptive behavior and "rationality" in contexts of repeated interactions include Michael D. Cohen and Robert Axelrod "Coping with Complexity: The Adaptive Value of Changing Utility" (1984) and Herbert A. Simon "Human Nature in Politics: The Dialogue of Psychology with Political Science" (1985).

THE OFFICE OF STATE ATTORNEY GENERAL

There is a genuine paucity of information on the development and role of the state offices of attorney general on the litigation choices of the states. Perhaps the single best study on the subject is Cornell W. Clayton's "Law, Politics and the New Federalism: State Attorneys General as National Policymakers" (1994). In it, Clayton examines the effect of New Federalism, the growth of shared policy goals among the states, and the rise of interstate associations on the increasing rates of state litigation efforts in federal courts. Lynne M. Ross edits *State Attorneys General: Powers and Responsibilities* (1990), a collection of essays on a variety of aspects concerning the present day state offices of attorney general.

Finally, Stewart A. Baker and James R. Arsperger provide the only detailed, systematic discussions of the rise and effect of the National Association of Attorneys General's Supreme Court Project ("Forward: Towards a Center for State and Local Legal Advocacy" [1982a], "Afterword: More About the Center" [1982b]).

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