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Judicial Institutions and Judicial Decision-Making in Federal Political Systems

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In this project, I will examine the effect of different institutional rules on the outcomes of cases before high courts involving disputes between levels of government in federal and federal-like systems. More specifically I will examine the role of institutions in determining wins and losses in disputes between the central and peripheral or sub-national governments in federal and federal-like systems. Courts in these systems must be the arbiters of disputes between levels of government. Many of these disputes revolve around questions of the relative economic and political power of the several levels. Differences in institutional structures will result in differences in the kinds of political and economic pressures that a court faces. Thus, it is in the cases that arise from disputes over the distribution of economic and political power between levels of government in federal and federal-like systems that the effects of institutional differences on outcomes in cases will be most apparent.

While I will address judicial institutions in general, the bulk of my analysis will deal with the high courts of the United States and the European Union. As I will detail below, the Court of Justice of the European Union and the Supreme Court of the United States face vastly different institutional pressures, both because of the differences in their broader political structures and the rules relating to the staffing and operation of the Court. The institutional rules result in these two courts hearing different types of cases, and judges on these courts facing different types of pressures when reaching a decision. Because of these differences in institutional rules, I expect differences in outcomes of disputes between the central and peripheral governments before the high courts of these two systems. I expect the central European government will usually win in disputes with

the member states before the Court of Justice, and will win consistently over time. In disputes before the Supreme Court of the United States, the federal government will win less frequently and less consistently over time.

Dedication

This project would not have been possible without the help of many individuals. The members of my dissertation committee provided invaluable help. In particular, my chair Alberta Sbragia provided indefatigable support throughout the process and throughout my graduate school career. Guy Peters provided a great deal of support, along with a number of free meals in numerous cities around the globe. Bert Rockman helped not only with this project, but was instrumental in shaping the way I think about politics. My outside reader, Lee Weinberg, was instrumental in the final version of this project.

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Paul Fabian Mullen

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Chapter 1
Institutions and Judicial Decision Making

In this project, I will examine the effect of different institutional rules on the outcomes of cases before high courts involving disputes between levels of government in federal and federal-like systems. I will argue that different institutional rules will result in different outcomes affecting who wins before a court and how often. Studies of judicial behavior have offered a number of explanations as to why courts make decisions and who wins in cases including legal rules, the values and attitudes of judges, and institutions. I will argue that the institutional approach is the best for understanding the winners and losers in cases before high courts.

More specifically I will examine the role of institutions in determining wins and losses in disputes between the central and peripheral or sub-national governments in federal and federal-like systems. Courts in these systems must be the arbiters of disputes between levels of government. Systems with multi-level governance will have a variety of issues and court cases that are not present in unitary systems. Many of these disputes revolve around questions of the relative economic and political power of the several levels. Differences in institutional structures will result in differences in the kinds of political and economic pressures that a court faces. Thus, it is in the cases that arise from disputes over the distribution of economic and political power between levels of government in federal and federal-like systems that the effects of institutional differences on outcomes in cases will be most apparent.

While I will address judicial institutions in general, the bulk of my analysis will deal with the high courts of the United States and the European Union. As I will detail below, the Court of Justice of the European Union and the Supreme Court of the United

States face vastly different institutional pressures, both because of the differences in their broader political structures and the rules relating to the staffing and operation of the Court. The institutional rules result in these two courts hearing different types of cases, and judges on these courts facing different types of pressures when reaching a decision. Because of these differences in institutional rules, I expect differences in outcomes of disputes between the central and peripheral governments before the high courts of these two systems. I expect the central European government will usually win in disputes with the member states before the Court of Justice, and will win consistently over time. In disputes before the Supreme Court of the United States, the federal government will win less frequently and less consistently over time.

In the remainder of this chapter, I will detail my justification for using an institutional approach, outline the institutional structures that I believe will have the most effect on outcomes, and describe how I propose to test the effects of differences in these structures. In the first section of this chapter, I will examine the various approaches to studying judicial behavior and argue that the institutional approach offers the most complete explanation of judicial behavior. In the second section I will focus on institutional rules I believe to have the greatest effect on outcomes of cases before high courts. These institutional rules include rules relating to case selection (including the effect of the type of government system on the types of cases that reach the court), judicial selection tenure, and decision-making rules. The second section will introduce these institutional structures and my arguments as to why and how they affect judicial behavior. These issues will be dealt with in much greater detail in Chapters 2 and 3. In the final section of this chapter, I will explain how I plan to test the effects of these

institutional rules on outcomes in cases by examining my expectations for the effect of these institutional structures on who wins and how often in disputes between central and peripheral governments in the United States and the European Union.

I. Judicial Behavior: Literature Review

Explanations of judicial behavior are numerous and conflicting. These explanations fall into one of three general categories: legal, attitudinal, and institutional. In all of these models, the outcomes of cases—who wins and who loses—is the dependent variable. Where they differ widely is in the independent variable. In other words, they all have a different explanation for what determines winners and losers in cases. Each of these schools of thought has had strong advocates, and each has, at times, seemed to be supported by empirical evidence. In his book, *The Puzzle of Judicial Behavior,* Lawrence Baum (1997, 3) argues that "our progress towards an explanation of judicial behavior has been limited: what we do not know stands out more than what we do know." In this project, I will argue for adopting an institutional approach for explaining judicial behavior. The institutional approach leads to the conclusion that there is not one complete model of explanation for judicial behavior, but rather that judicial behavior is dependent on a particular institutional setting. Hopefully we may better understand and predict the behavior of individual courts by comparing the variety of pressures and incentive different courts face, and how these institutional differences affect outcomes across several courts. This remainder of this literature review will examine three competing schools of thought and how they have developed over the past Century.

A.) 19th Century Formal and Realism views of the law: the "old institutionalism of the law"

The traditional legal model finds its roots in the 19th Century law school classroom. Harvard Law School Dean Christopher Columbus Langdell's casebook *Selection of Cases on the Law of Contracts* (Langdell 1871) offered a new method of jurisprudence that claims a "scientific" approach to the study of law. In the preface to this volume, Langdell declares that: "It is indispensable to establish at least two things: first that the law is a science; second that all the available materials of that science are contained in the printed books" (p. i). Central to this approach was the idea that law is a complete, formal and conceptually ordered system that satisfies the legal norms of objectivity and consistency, and that the approach was capable of providing uniquely correct solutions to legal problems (Minda 1995, p. 13).

This approach has dominated the American legal academy for the past century and is still the predominant method taught at law schools. Judges who make decisions are thought to be relatively autonomous in the sense that they control their own thoughts and actions, but their freedom to act is limited by the legal texts they interpret (Minda 1995, p. 17). The main concept of the legalistic approach is that a divide exists between the subjective and contextual social and political mores of a community and the abstract, objective world of the law. Under this approach, the right answer can be reached through logical interpretation of the text. Yet, while this approach suggested that law could be scientific, self-contained, and predictable, the theory did not seem to match the actual performance of courts. Often, different courts would reach different results, and even the same court would reverse itself in cases with seemingly indistinguishable fact pattern, often after very short periods of time. Thus, many scholars, particularly those studying

law and courts from a sociological rather than a legalistic perspective began to challenge the assumptions of the legal model.

B.) Challenges to the Legal Model: Realism, Behaviorism, and the Attitudinal Model

The "legal model" first emerged in the late-19th Century. The 20th Century would bring challenges to this model of the law as "scientific" and uniquely situated to provide "correct" legal answers to all questions. The "legal realists" argued that judges were influenced by factors outside of the law. Building on realist challenges, the behaviorist movement sought to explain the behavior of judges by arguing that a judge's values explained why a judge would reach a particular decision in a case. The attitudinal model was the most developed statement of the behaviorist argument.

While the behaviorists would dominate thinking in the first half of the 20th Century, the first challenge to the assumption of the legal model came from Oliver Wendell Holmes and other "legal realists." The realist school offered a more pragmatic and contextual view of the law. However, this theory did not so much explain the behavior of courts as criticize the legal model and lay the groundwork for later explanatory theories. This approach was not simply reflective of a paradigm shift in the legal academy, but rather can be seen as part of larger movement toward "realism" in the social sciences and philosophy. While "old institutional" scholars such as Lawrence Lowell, Woodrow Wilson, and Charles Beard argued for a less idealized understanding of government institutions, legal realist scholars such as Jerome Frank, Karl Llewellyn, and Oliver Wendell Holmes were dispatching traditional mechanistic and formalistic conceptions of the law (Clayton and Gilman 1999, p. 15). For Holmes: "The life of the law is not logic, but experience" (Holmes 1881, 5). Holmes offered then a second view,

more related to the pragmatic version of philosophy associated with John Dewey, William James, and Charles Sanders Pierce, which accepted that knowledge and human thought are situated within social and habitual practices of culture. For Holmes, the law was neither universal nor objective, but rooted in custom and shared experiences (Minda 1995, p.17). The legal and realist approaches offer different tasks for judges in reaching a decision. For the Langdellian judges, application of logic to the received texts of the law would result in the "correct" legal decision being reached. Holmes rejected the formalistic approach and believed in a pragmatic and instrumental approach where logic should be subordinated to the "felt" experience of human history (Minda 1995, p. 18).

A major difficulty with the legal realist model is that it did not provide a clear model of court decision-making, but merely suggested that the formalistic approach was flawed. The legal realists called for the an empirical examination of how the courts reached decisions, and this call for empirical study of courts led to the behavioral approach to law and courts in the late 1940's and 1950's. The behaviorists were the first to examine the attitudes and values of judges as a dependant variable in the decision-making process. As Pritchett (1948) argued, judges are motivated by their own preferences, and these preferences can be uncovered by examining the numerous opinions written by justices. Schubert (1959) argued that the facts of cases could be used as stimuli and that these stimuli, along with the justices' values, could be ideologically scaled. Thus, one could place a justice on a simple liberal-conservative scale and the justices would vote for the policy result in a case that fell within their policy preferences. The behaviorists recognized that the beliefs of judges were integral to the court decision-making process, and that judges were, at least to a degree, autonomous actors.

Jeffrey Segal and Harold Spaeth (1993) offer the most comprehensive treatment of the behaviorist view of judicial decision-making in their book *The Supreme Court and the Attitudinal Model.* The main argument of the attitudinal model is that high courts decide cases as a result of the ideological attitudes and values of the judges deciding the case (Segal and Spaeth 1993). They argue that members of the U.S. Supreme Court can further their policy goals because they lack electoral or political accountability, ambition for higher office and comprise a court of last resort that controls their jurisdiction. The presence of these factors allows justices to vote as they individually see fit (Segal and Spaeth 1993, p. 69). Judges make decisions considering the facts of the case in light of their ideological values. Essentially, law, precedent and other traditionally considered factors in the court decision-making process serve mainly to disguise the policy preferences of judges in the American high court. Thus, the attitudes of judges are the independent variables that determine outcomes in cases rather than the law or some other factor.

The attitudinal model clearly has a great deal of merit. Segal and Spaeth present ample evidence that statistically tests the fit of this model to the decisions of the United States Supreme Court. But why should attitudes matter? This is where institutional theory is most useful. One question whether the model itself is behavioral or indeed, at its base, an institutional model. Segal and Spaeth argue that the Supreme Court being a court of last resort and the life tenure of justices create a situation where justices are largely free of most outside pressures and may vote in accordance with their policy preferences. Yet little time is devoted to why this structure exists, and the authors do not

address whether this structure is subject to change. The institutional structure is assumed to be a given and constant.

Thus, the attitudinal model may have little applicability beyond the peculiar institution of the United States Supreme Court. One would not expect the attitudinal model to fit courts where the structures which Segal and Spaeth note as important are absent. Judges who face reappointment, or who have other career goals, might very well feel constrained from pursuing ideological preferences. Thus, the institutional theory of judicial behavior accepts that judges may in fact desire to pursue their own policy goals, but that some institutional structures will make them less likely to pursue policy goals because some courts will have institutional structures which create pressures and incentives that discourage judges from this type of behavior. In essence, the institutional theory asked why and under what conditions a particular type of judicial behavior occurs, arguing that an examination of institutional structure can help explain why a particular court acts in a particular manner and help better explain why behavior across courts differs.

In using a comparative approach, and addressing courts as institutions, this project argues that the prior questions of institutional effects can be more fully addressed, and a more comprehensive approach to court decision-making is possible. It does not reject the attitudinal model as much as it argues that attitudinal behavior is conditional on the presence of certain institutional factors being present. Absent these factors, one would expect different sorts of behavior to be encouraged, and as a result, different sorts of outcomes in cases as institutional structures vary. In the next section of this chapter, I will address the foundations of institutional theory. I will discuss why and how

institutions affect behavior in general, and then I will discuss the specific institutions that I believe will influence judicial behavior and create several hypotheses as to why and how these particular institutions affect judicial behavior.

C.) Institutional Models of Judicial Decision-Making

Why should institutions influence individual behavior in general and judicial behavior in particular? Generally, new institutional theory arose as a response to behaviorism in the social sciences, and much of this theory is derived from the work of March and Olsen (March and Olsen 1984; March and Olsen 1995) and recently has become more widely accepted as a useful tool for explaining judicial behavior. Rules and understandings shape thought and behavior and constrain interpretations of what actions are acceptable and appropriate in any grouping of individuals (March and Olsen 1995, 31). March and Olsen argued that the centrality of values in political analysis was being replaced by individualistic assumptions which were inherently incapable of addressing or integrating individual action with fundamental normative premises, or with the collective nature of most important political activity (Peters 1999, 25). March and Olsen argue that human action can properly be described as driven by a logic of appropriateness reflected in a structure of rules and conceptions of identities rather than preferences and uncertainties (March and Olsen 1995, 28).

Thus, what an individual will do in any circumstance is to a large extent determined by institutional rules. Institutions help determine what types of behavior will be acceptable in any context. Simply put, institutions and rules should matter. Individuals follow rules most of the time if they can. However, institutions do not determine political behavior precisely. The process by which rules are translated into

actual behavior must be specified with regard to each particular institutional setting (March and Olsen 1995). Scholars have linked the structure of institutions to behavior in a number of ways. Given the variety of institutional pressures facing judges, insights from a variety of institutional points of view are relevant to this project. In addition to the normative institutions espoused by March and Olsen, historical institutionalist scholars argue that initial choices made in the development of institutions persist and are "path dependant." Simply put, initial institutional choices will continue to affect behavior until a sufficiently strong political force comes along to disrupt these patterns (Krasner 1984). Rational Choice institutionalists argue that rules and incentives created by institutions guide individual behaviors (Peters 1999). What these theories have in common is that they all argue that institutional structures affect individual behavior by defining the type of conduct that is acceptable, efficient or desirable on the part of an individual actor. Later in this Chapter and in Chapters 2 and 3, I will develop the links between institutional structure and the types of behavior I believe the institutions encourage.

As "new institutionalism" became more commonly used in social sciences, public law scholars began to use "new institutional" approaches to analyze the behavior of judges and courts. Smith (1988) argued that the study of public law is "strikingly" appropriate for new institutional analysis. He points out that judicial decisions in the past may determine the type of litigants who get into court at all, as well as the types of claims or rights persons believe they are entitled to assert, morally or legally. Smith called for a use of a new institutionalist approach that would allow scholars to be better able to

describe the role of normative ideas and to achieve a broader empirical agenda that could ground and inform normative debates.

Institutional analysis allows scholars to accept that judges were pursuing their preferences while recognizing that the set of choices available were limited by institutional structures. Thus, some structures might encourage behavior that fits the attitudinal model, while other structures might discourage judges from pursuing their policy preferences. The central argument of this project is that judicial behavior can best be explained by looking at the pressures created by the institutional rules facing an individual court. In other words, one cannot fully understand why courts make certain decisions until one fully understands what pressures institutions create for judges.

Lee Epstein and Jack Knight (1998) offer a view of judicial decision-making in the United States Supreme Court as strategic and influenced by the institutional rules pertaining to the need to establish a majority. In their book *The Choices Justices Make*, Epstein and Knight argue that while justices may have and pursue policy preferences, these preferences are not always available. Rather than being relatively unsophisticated characters making choices based purely on their own political preferences, Epstein and Knight view justices as strategic actors who realize that their ability to achieve their goals depends on the preferences of others, the choices they expect others to make, and of the institutional context in which they act. They point to the need to reach a majority opinion as an example of the effects of institutional constraints on judicial choice.

For example, a judge may have an optimal position in any given case and a least preferred position. If a judge cannot find sufficient support for an optimal position, he or she may be faced with accepting a sub-optimal outcome in order to avoid the court

reaching a decision that entails a least preferred position. Thus, while judges may have some autonomy in making decisions, they are often constrained by institutional factors, forcing them to modify their preferences, and act in a strategic manner. Formal and informal rules constrain justices in the same manner they constrain other actors in political systems. Understanding the factors that influence judicial choice is at the heart of a new institutional analysis of courts.

Gilmann (1999, p. 66) argues for a view that puts judges in a larger institutional context. He describes the shift from behaviorism to new institutionalism as involving the a shift in "focus away from the long-standing question of how institutions are affected by personal characteristics of judges and toward the question of how judges are affected by the institutional characteristics within which they are embedded." He points to an "increasing consensus" as to the advantage of exploring how judicial decision-making is shaped by institutional context rather than viewing courts primarily as a safe platform for the display of exogenous attitudes. This project is mainly an attempt to explore the institutional characteristics of court and the effects these characteristics have on the judges embedded in these institutions, and how this affects the outcomes in cases before a court.

Thus, the institutions in which judges find themselves embedded will help determine the types of behavior that will be encouraged or discouraged. For example, Segal and Spaeth argue that attitudes affect judicial decision-making on the American Supreme Court. However, this may only be true in cases where this type of behavior is not going to result in any adverse consequences for a justice such as in the case of the United States Supreme Court where justices enjoy lifetime tenure. If a justice could face

being removed from or not reappointed to the bench as result of basing decisions on their attitudes, justices might be more circumspect in the way they make decisions. Likewise, choices made in the division of power between central and peripheral governments when a new political system is formed may influence the behavior of judges if for no other reason than the fact that this division of power will determine where the conflicts will arise between levels of governments and thus what types of conflicts will come before the court for resolution. Since a court can only reach decisions in cases that come before it, the nature of its jurisprudence will be determined, at least in part, by the types of cases that come before it. Thus, why a given court makes a given decision in a given case will depend on the pressures that judges on that court face. By examining the institutional characteristics of the courts, we will better be able to understand these pressures and how judges behave and why certain outcomes occur in cases. Thus, the goal is to both explain and predict how judges will react in different institutional settings. In the next section of this chapter I will discuss the types of institutions I expect to have the greatest influence on judicial behavior and therefore the greatest effect on outcomes in cases.

II. Judicial Institutions

Several types of institutional structures will help shape the outcomes in cases. First, judges can only make decisions in cases that reach them, and, as I will argue below, different types of cases create different types of pressures. Those cases that result from disputes between the central government and peripheral government in federal or other multi-level government systems will be of particular importance because they create a class of cases not present in unitary systems. Not only can we expect an increase in the number of cases in federal systems, the cases generated by conflicts between levels of

government will almost always address questions regarding the relative political and economic powers of the various governments within the system. As I will argue below, the type of case generated by a political system will be an important source of difference in institutional pressures.

Second, once a case reaches the court, several sets of institutional rules will determine what pressures the sitting judge faces. The first of these rules relates to how and why a judge is picked for the bench. Different selection systems will place individuals with different types of motivations on the bench. Second, the institutional rules that relate to a judge's term of service on the bench should also have an effect on judicial behavior. Judges with lifetime appointments during good behavior are less susceptible to outside political pressures than judges who face reappointment or can be easily removed from the bench.

Finally, the decision rules of the court will help determine judicial behavior. Generally, the easier it is to reach a decision, the more likely it is that a judge can seek to pursue policy preferences. In courts where rules or norms require unanimous or other high thresholds for reaching a decision, a judge, particularly in cases of a politically fragmented court, will have to compromise in order to reach a decision acceptable to the entire court.

Case Selection

Judges can only make decisions in the types of cases that reach the court. Several factors determine the type of cases which reach a court's docket. Courts which have control over their docket will be able hear only the cases that they believe are important. Different types of cases exert different sorts of pressures on a court. While the relative

ability to pick and choose cases will have some effect on the jurisprudence of a court, judges can only choose among the cases that reach them. Perhaps the most important factor that determines the types of cases to reach a court is whether the court is part of a federal system. In a federal system, courts will necessarily hear a larger number of cases relating to government power than in a fully centralized system, and, as I will discuss below, the majority of pressures on court decision-making will come from disputes between the central level of government and the peripheral or sub-national government.

Federal Systems

While other institutional structures relate mainly to the internal working of the Court, the broader political system can also create pressures on judges. The most pertinent systemic pressure is the presence or absence of a federal system. Federalism has a variety of definitions and takes a variety of forms. As Elazar (1976) stated: "The great strength of federalism...lies in its flexibility (or adaptability), but that very strength makes federalism difficult to discuss satisfactorily on a theoretical level. Elazar (1976, 1) explains why federal theory is so elusive:

> ...federalism involves both structure and processes of government; federalism is directed to the maintenance of both unity and diversity; federalism is both a political and social phenomenon; federalism concerns both means and ends; federalism is pursued for both limited and comprehensive purposes; and there are several varieties of political arrangements to which the term federal has been properly applied (Elazar 1976, 2).

Federalism has been applied to many different types of intergovernmental arrangements and classified in wide variety of ways. Much of the literature concerning federalism has been directed at developing different classifications and comparing and contrasting the various types of federal systems. Elazar classifies different types of

federal arrangements as federations, confederations, associated states, federacies, condominiums, and political systems with federal arrangements (Elazar 1995, p. 2-7). Duchacek provides ten "yardsticks" for measuring the extent and nature of federal systems (Duchacek 1987). Earle (1968) nicely captures the phenomenon in the aptly named book *Federalism: Infinite Variety in Theory and Practice.*

Federalism can most simply be defined as a division of powers between an overarching central government and separate and distinct sub-national or peripheral governments, typically, though not exclusively based on territory.[1] Federal systems may vary from systems in which the power is highly concentrated in the central government that has powers in its own right, apart and aside from any power possessed by the sub-governments. On the other end of the spectrum are systems where the sub-governments are only loosely associated under a relatively weak central government with powers limited to a few areas and dependent for its power on the on the cooperation of the sub-governments. There is no consistent use of terminology in federalist literature. However, the most commonly used terminology defines the federal systems with strong overarching central government as federations, and those with a less powerful center and more powerful and autonomous sub-governments as confederations.[2]

The presence in a political system of a central governments and sub-governments will necessarily result in conflicts between levels of governments over how power will be dispersed. It is essential, as Duchacek (1987) notes, that there be a referee of some sort to

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[1] This project deals mainly with issues of territorial divisions. Thus, a minority group inside a nation may be able to retain rights and a form of autonomy unconnected to the possession of a specific territory.

[2] There are a number of classifications of governmental associations, and much literature has been devoted to describing federal-like relations. A weaker form of government association than a confederation would be a league, and a stronger form than federation, would, of course, be a unitary state with no sub-governments. The systems that have courts, and where these courts have some impact, fall in the confederal-federal range of forms of government.

settle conflicts over the demarcation of authority between levels of government. High courts serve this function, deciding the contours of power between the central and sub-national governments. Yet, while federalism may increase the number of cases regarding government powers, the rules by which the "referee" will decide these cases will vary from system to system. High courts in systems with multiple levels of government will then face different types of cases in federal systems than they will face in unitary systems.

The effect federal systems have on courts is a matter of debate. While there is little literature directly on courts, one can discern two views of the potential effect of federal systems. The first, and perhaps dominant view is that federal systems are overwhelmingly centralized. "In federal systems, judicialization usually works to the advantage of federal governments" (Smithey 1996, 85). This perspective views the high courts as favoring the central government in disputes with peripheral government. In general, high courts in federal systems are viewed as more hostile to policies adopted by sub-national governments than federal governments (Smithey 1996, Hogg, 1979, Baum 1998, Kincaid, 1989). Several authors have argued that courts such as the United States Supreme Court (McWhinney 1987), the Court of Justice of the European Community (Bzdera 1993, Stone Sweet and Sandholtz 1998, Weiler 1994), and the Supreme Court of Canada (Rainer and Morton (1985). Martin Shapiro argues constitutional review by the highest appeal courts in federal systems has been a principal device of centralized policy-making (Shapiro 1981, 55-56). The most developed statement of this position is Andre

[3] See Chapter 2, *infra*

Bzdera's 1993 article "Comparative Analysis of Federal High Courts" (Bzdera 1993). Bzdera has few doubts about the role of high courts in federal and federal-like systems:

> We thus conclude that the main political function of a federal high court is to favour and legitimize the gradual expansion of central legislative jurisdiction (Bzdera 1993, 19)

And:

> ...these courts do not hinder the centralist legislative activities of the central government and at times they actively encourage and invite such federal initiatives (Bzdera 1993, 20).

Thus Bzdera argues that, as an institution, a federal high court "clearly appears as an auxiliary of the central government" (Bzdera 1993, 21). According to this view, courts in federal and federal-like systems will assist in the central government's arrogation of power to the detriment of the power of the peripheral governments.

This view seems at odds with the federalist literature discussed above which emphasizes the difference in federal systems. Different federal systems create different institutional pressures depending on the nature of the federal system and the types of cases that arise. As I will detail below, there are a variety of federal systems, and these federal systems have been adopted for a variety of reasons. Some federal configurations are designed to aggregate power to the central government and promote unity. Other systems are configured to disperse power to the farthest extent possible and allow maximum diversity and autonomy while still maintaining a single political entity. The type of federal system will determine who is more likely to win in cases that come before high courts in federal systems.

My argument is that one of the defining characteristics of the literature on federalism in general is that federalism represents a variety of goals, and ideals, and that

power is divided in different federal systems along very different lines. If power is divided differently, then the disputes arising from these divisions of power will necessarily also differ. These divisions are seldom clear-cut, and even where they are formally clear-cut, there is no guarantee that these lines will not be blurred in practice. The "layer cake" model of federalism exists only in theory, and the "marble cake" model has more practical applicability. As Duchacek (1987) notes, courts act as referees in these conflicts. Their decisions determine the extent of "marbling" in any system. However, the type of conflicts that arise will depend on the type of case that reaches a court, and this will differ depending on how power is divided between levels of government in any given system. Different divisions of power will create different types of conflict. I argue that some conflicts will have a logic that requires the Court to support uniformity and thus will favor the central government in disputes between levels of government. Different types of systems will generate different types of conflict, generating different types of cases, and these different types of cases will generate different types of pressures depending on the policy area at issue. How power is divided between levels of government and why this power has been divided will help determine the pressures on courts in federal systems, and, in turn, will influence who wins and loses in cases that come before the court.

The purpose behind federal arrangements can determine the pressures exerted on courts in federal systems. Sometimes, an individual nation will wish to associate largely for reasons of economics and trade, with the peripheral governments retaining exclusive or near exclusive jurisdiction over all other policy areas. This is the typical rationale for most of the loosely based confederations (Elazar, 1998). In these types of systems we

would expect there to be centralizing pressures exerted on courts in these systems. That is, we would expect the central government to be more successful than the sub-governments in cases before that system's high court. The reason for this is that most of the cases generated by conflict between the levels of government that reach the court will concern economic matters, since these are the main reason for the association of sub-governments in this type of system. Therefore, the only power possessed by the central government is related to economic matters. Since this is the only area of power granted to the central government, economic matters will be the only grounds for conflict between the two levels of government.

In systems of multilevel government where the member states have associated for reason of economic efficiency rather than political unity, we would expect the cases that are generated in disputes between levels of government to have a centralizing impetus. Economic matters, particularly the opening of markets by the removal of local barriers to trade, will have a logic that is almost inherently centralizing. Tariffs and other barriers on trade between the sub-governments are inefficient, and therefore will face resistance. Protective tariffs will add to the costs of goods, invite retaliation by other sub-governments, and generally therefore reduce the overall economic well being of the entire system. Achieving a common market for goods and services will result in greater economic efficiency and gains in real income (Heller and Pelksman 1986; Norrie, Simeon et al. 1986, 207-209). Thus, because a single market is efficient and profitable, the impetus against local interference is great, and the centralizing pressures are strong. Thus, economic matters and other subjects tied to market maintenance will in most cases exert a strong centralizing pressure on courts (Sandalow and Stein 1982, Sanholtz and

Stone 2000). The most obvious example of this type of system is the European Union, perhaps the most narrowly drawn federal-like system in the world. The central feature driving this bargain is the formation and maintenance of a single market.

Federations, on the other hand, have central governments that have broader powers. As a result, a broader range of cases will come before the court. Many of these cases will lack the inherent centralizing logic of economic cases. They may exert pressures that are either neutral—not favoring either level of government—or in some cases, produce pressures that favor the sub-national government. Cases involving rights, particularly individual rights, should not result in pressures that inherently favor the central government and, in some instances, may actually favor the sub-national government in cases before the federation's high court. This is largely because rights protect against the encroachment of the government on individual freedoms. Thus, in the abstract, rights should mitigate against the increase of governmental power in general. As I will argue below, rights protections are often built in to guard citizens of the sub-government from encroachment by the central government, and as a result, the peripheral government will win more often in cases before the high court that pertain to rights than in any other cases. The United States is an example of this type of broad system. In the American federal bargain, a major goal was to restrain potential tyranny by the central government (McWhinney 1966; (Wheare 1964; Tushnet 1990). In the abstract, a federal system with a broad range of powers such as the United States will likely have both centralizing and decentralizing forces at work. Varat (Varat 1990) notes that the presence of greater political integration in the United States may account for the presence of anti-common market restrictions that would be impermissible in the European Communities.

Thus, to understand the institutional influence of the political system, one must examine how that system has constituted itself. Unitary government will not bring the same types of cases before court as a federal system, and the pressures created by the cases that reach them will differ depending on the nature of the federal system and the fact that different types of federal systems will bring different types of pressure to bear on courts in these systems. This, in turn, will influence who wins and who loses before the high courts of these systems.

Judicial Selection Methods

The selection system determines who selects the judges and what type of individual is selected for the bench. Judges are a subset of the population as a whole, and no selection system will result in an accurate reflection of this population (Baum 1997, 144-145). Thus, the type of individual, and the types of pressures and incentives that an individual will face, vary with selection systems. In addition, various systems will bring judges with different backgrounds and, as a result, different role conceptions to the bench. If the political regime is free to select a judge based solely on fidelity to their policy preferences, the type of judge who will be selected will be different than if these policy makers are removed from the process of appointment, or if their choice is constrained by actors with different political perspectives. Other factors, particularly the need to moderate choices to accommodate the divergent opinions of other actors having a role in the selection process, may militate against the selecting of a judge that is inclined to decide cases based on attitudinal factors.

Tenure

Tenure is another important factor in determining how judges will act. Segal and Spaeth (1994) note that lifetime tenure and the lack of further career goals leave judges free to pursue their policy preferences. Conversely, I argue that institutional structures which protect and insulate judges from outside pressure may result in the judges being less likely to pursue policy preferences, especially if doing so might result in their removal or failure to be reappointed to the bench or to otherwise impair their career prospects. Judges with life tenure will be much more likely to believe they are free to pursue their own policy goals than those who face reappointment or reelection. Also, some courts may not be seen as terminal positions, and judges on these courts may have further career goals. In a case where tenure is for a set term of years and non-renewable, then justices may have career goals beyond the Court, and their behavior while on the Court may be moderated in light of these future career goals.

Generally, if a judge's future career depends on others, then the judge may be pressured to modify his or her behavior in order to accommodate factors other than ideology. On the other hand, if judges have no further career goals, and they are insulated from threats to their tenure on the bench, then little external pressure can be brought to bear on them to constrain the pursuit of their policy preferences. In general, a secure judge is more likely to engage in an unfettered pursuit of policy than an insecure judge. The effect of shifts in political regimes and therefore changes in outcomes before courts will be most apparent when the judges picked by the regime are not constrained by outside pressures from pursuing policy preferences.

Decision Rules

Another constraint comes from the fact that no judge serves alone. Simply put, how do courts reach decisions? Particularly important is the question of how difficult it is to reach a decision. Where majorities are more difficult to establish, justices will be forced to accommodate other members of the court and will be less free to pursue their own policy preferences (Wahlbeck, Spriggs et al. 1998). Thus, even though a judge has a preferred policy position, he or she may not be able to form a majority coalition around that preferred position and may have to accommodate other members by accepting a less than optimum position in order to reach a consensus (Epstein and Knight 1998). When will they have moderated their preferred policy position in order to accommodate others on the court? Rules of unanimity, the presence of dissents and the degree of ideological fragmentation on the Court will all tend to determine the difficulty of reaching a decision on any given court.

If judges have to moderate their choices, then we would expect stability in outcomes over time. The stability results because if decision-making is difficult, then it should be particularly difficult to affect changes in outcomes. If we take a hypothetical 5-person court with a stable 3-2 conservative majority, a liberal regime appointing a replacement for one conservative judge could change the entire partisan balance of the court. In a situation where the Court is large and requires unanimous decisions, then the addition of one judge is not likely to have a great effect on the jurisprudence of the court.

Thus, the impact of the appointment of any single judge in large courts, particularly those with unanimous voting rules, will not have a great impact. On our hypothetical court, it would take the removal of all judges of the conservative majority before a liberal regime could have the unanimity needed in order for a judge to

effectively pursue policy. Absent long-term drastic political shifts, a large court with a high voting threshold necessary to reach a decision will be a court which requires its judges to compromise. This need to compromise will generally result in stability over time in outcomes before a court.

III. Institutions and Outcomes

My argument is that these institutional features—case selection, judicial selection, tenure, and decision rules--act as independent variables that affect who wins and how often before high courts. I argue that courts with different sets of institutional rules will have different patterns of case outcomes across policy areas and over time. Since I believe the nature of federal systems is an important variable, I will examine under what conditions the central or peripheral governments in federal systems win in cases before the high courts and the frequency with which they win these cases.

Specifically, I argue that economically based systems will see the central government more frequently because the cases they produce and place on the docket will have a largely centralizing impetus. Economically based systems are those systems, such as the European Union, where the central government's powers are confined to economic matters, and that much of the policy competence of the central government is related to the maintenance of a single market. When the court functions as a referee in these systems, the disputes generally revolve around issues related to the maintenance of a single market. Since, as argued above, local barriers to trade (such as tariffs and other requirements that inhibit free trade) are inefficient and costly, there will be a strong bias against these barriers. Courts in these systems will seek to remove local barriers to trade and enforce uniform standards. Therefore, in these economically based systems, we

would expect to find that, in the vast majority of cases, regulations of the central government are upheld when challenged by the peripheral governments, and local regulations which impinge on the maintenance of the a single market area will be struck down. Simply put, the central government will typically be the winner in economic cases related to the maintenance of a single market. Since most of the cases that reach the court in an economically based system will be related to the maintenance of a market, the central government will win most of the cases that come before a high court in these systems.

On the other hand, courts in federal systems that generate cases dealing with both economic and political issues will produce different types of pressures. Policy competences unrelated to the maintenance of single market will not necessarily favor local regulation over uniform central regulation in any systematic manner. In these systems with broader policy competences, we are likely to see cases that provide pressures that favor the peripheral government. In particular, cases pertaining to political rights will produce pressures opposite from those produced by market maintenance. In these cases, and as I will argue more fully in Chapter 2, federal systems are most likely to accept local variation in matters of individual rights. Local differences will be permissible for two reasons. First, there is no economic disincentive or tangible loss of efficiency as in the economic cases. Differences in political rights simply do not have the same economic cost as the removal of trade barrier. Second, there is ample evidence that many of the provisions regarding individual rights in federal systems in general and specifically with regard to the United States were directed against encroachments by the central government. At a minimum, these provisions are directed against both level

levels of government in general and thus should not overwhelmingly favor the central government to any greater extent. Thus, provisions relating to individual rights should exhibit no inherent pressures that systematically favor the central government. In some cases, such as that of the United States, these cases may create pressure that limit the power of the central government in conflicts with the peripheral government. The first question will be what types of cases are generated, and do the pressures that these cases present affect whether the central government or peripheral governments win in cases before the court?

The second question is whether the central government or peripheral governments will win consistently over time. I believe this depends on whether the appointment of judges to the court is tied to the political regime and thus whether the type of judge appointed is more likely to change as a result of changes in the appointing regime. If the appointment of a judge is tied to a political regime, we will see a variance in outcomes over time in the frequency of wins for the central or peripheral depending on whether the appointing regime favors an increase in power for the central government or a devolution of power to the peripheral governments.

Even if a judge is picked by a political regime for the purposes of political fidelity, the judge must be able to feel free to pursue policy preferences. In other words, a judge, no matter how politically faithful he or she is when picked, will not pursue policy if the pursuit of policy is discouraged by the institutional structures of a court. A judge may be constrained through pressure external to the judging process or from pressures inherent in the judging process. First, external actors might be able to exert pressure on a judge by threatening that judge's career prospects. If, for example, the

tenure rules do not protect a judge, pressures for reappointment or the threat of removal might constrain one who is otherwise pre-disposed to pursue the policy preferences of the appointing regime. Second, the internal decision rules might constrain judges from pursuing policy by creating a high threshold for decisions, causing them to moderate the view dictated by their values in order to reach a decision that is acceptable to whatever number of colleagues are needed to reach a decision. In general, more compromise will be necessary if a judge is from a large court, a court with a wide disparity of political opinions, or a court with unanimous decision rules.

To summarize, institutional rules will affect outcomes in cases in the following manner: First, narrow economically based systems will generate cases that reach their court's docket dealing with economic matters. Since these cases exert pressures that favor the central government, in these systems we would expect the central government to be generally successful in conflicts with the peripheral government. In more broadly based systems, we would expect the peripheral government to have a greater chance at success than in cases before the high court, particularly as cases move away from economic matters and deal with matters affecting individuals and political rights.

Whether either the central or peripheral governments will win consistently over time will depend on the degree to which judicial selection is tied to a current regime causing the choices to reflect the policy goals of the current regime and whether these politically faithful judges, once on the court, are unconstrained in their pursuit of policy preferences by tenure or decision-making rules. If the appointment of a judge is tied closely to the current political regime and this judge, once appointed can pursue policy in an unconstrained manner, then we would expect shifts in who wins and who loses as the

changes in court personnel reflects change in the political philosophy of current regime from one of favoring the increase of the central government's power to one that favors a retrenchment of this power. If the influence of the political regime is removed from the appointment process and the judges are constrained by the institutional rules in behavior once on the court, then the conditions will exist for some consistency in success before the court.

IV. Testing the Theory

To test the effect of institutions on case outcomes, we need to pick two cases that vary on the major independent variables of selection, tenure, decision rules and federalism. In no system is a judge completely free from political influences or outside pressures, nor does there exist a system where judges are perfectly constrained by their behavior. However, there are systems that are sufficiently different on all the variables that the differences in institutional variables should be sufficient to affect who wins and loses before a high court. As I will detail more fully in Chapters 2 and 3, I believe the case of the Supreme Court of the United States and the European Court of Justice vary sufficiently on these important variables to provide some expectation that there will be a variance in patterns of outcomes of cases before these courts. If such variance occurs, then we would have some support for the proposition that institutions affect outcomes in cases.

Who wins: Cases Reaching the Court: Different Systems, Different Pressures

The United States is an exemplary model of a broadly based federal political system. The federal courts in this system have dealt with a number of cases across a wide

variety of policy areas. From civil rights and freedom of speech[7] to determining the power of the central government to enforce economic regulations on the state governments,[8] the United States Supreme Court has dealt with a wide variety of policy issues. The European Union is a good example of an economically based system. While the Court has been credited with "consitutionalizing" the Treaties (Weiler 1999, Stone and Brunell 1998), the Court of Justice has largely been concerned with removing barriers to trade.[9] Since the types of cases that reach the court will also determine whether the central government or sub-national governments win in cases before the high court of any system, the differences in the type of cases that come before these high courts will affect the outcomes in cases. In the case of the United States and the European Union, the high courts in these two systems face vastly different types of cases that come to their dockets. The federal system of the United States is broad and includes policy matters well beyond economic and market maintenance. Thus, the cases that reach the court will create pressures that tend to favor the federal government in some policy areas and favor the state government in others. Specifically, we would expect the central government much more often in cases dealing with economic matters than in cases dealing with individual rights. On the other hand, the European Union has a much narrower policy scope, and the cases this system generates are tied to the maintenance of single market. Since cases dealing with market maintenance have a centralizing impetus,

[7] See, e.g. *Brown v. Board of Education*, 347 U.S. 483 (1954), *O'Brien v. United States*, 391 U.S. 367 (1968)
[8] See, e.g. *Wickard v Filburn*, 317 U.S. 111 (1942)
[9] See, e.g. See, *Van Gend en Loos v Netherlands Inland Revenue Administration* 26/62, *Defrenne v Sabena* 43/75, and *Van Duyn v Home Office* 41/74, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* Case C-120/78

we would assume that most cases that come before the Court of Justice would tend to favor the central European government over that of the member states.

Therefore, in Europe, the central government will have an advantage before the Court of Justice because most of the cases generated by the system will be influenced by the need to maintain a single market and thus will create pressures that will favor the central government. I would expect more consistently high level of success by the central government across all policy areas in Europe. In the United States, some cases will reach the court that favor the central government while other cases will create pressures that favor the prerogatives of the state governments. Thus, unlike the Court of Justice, I would expect the results to be mixed for the central government. In areas of economic regulation I would expect the federal government to win in most instances, with regulations of the central government upheld and local regulations that interfere with uniform national regulation struck down. When cases reach the court that do not pertain to economic regulation, particularly cases that deal with individual rights, I would not expect the federal government to win with anything approaching the frequency with which it wins in cases pertaining to economic regulations. In the United States, I would expect some variance in whether the federal government or state governments win across policy areas.

To test these systemic differences, I will examine decisions of the United States Supreme Court in the areas of regulation and individual rights. I would expect the federal government to win an overwhelmingly high percentage of cases relating economic matters and much less often in cases dealing with individual rights. In the European Union I will examine the relationship between economic regulation and social policy.

While social policy is not directly related to market maintenance, it is the policy area with perhaps the greatest chance for variance. However, I expect that the centripetal force exerted by the single market in the E.U. will cause the court to centralize in a roughly equal ratio to single market cases. Simply put, the EU has no policy areas that will not overwhelming favor the European level government.

Table 1
The United States

Economic Regulation	Individual Rights
Central Government overwhelmingly successful in cases before the U.S. Supreme Court	Central government less successful in cases before the U.S. Supreme Court

Table 2
The European Union

Economic Regulation	Social Policy
Central Government overwhelmingly successful in cases before the Court of Justice	Central Government overwhelmingly successful in cases before the Court of Justice

The federal system with a narrow scope will not see variance across subject areas, albeit a narrower range of subject areas. In other words, I expect no statistical difference in the levels of centralization across subject areas in the European Union, and I do expect to see such a statistical difference in the United States. The forces for decentralization that are present in the United States federal system are simply not present in the European Union.

How Consistently Do the Central and Peripheral Governments Win Before High Courts?

Does the jurisprudence of a Court change over time? In other words, can we expect the same parties to prevail in similar cases over time? In particular, can we expect any consistency in how often the central and peripheral governments win overtime? My argument is that the answer to this question lies in the relationship of the political regime

to the Court and the ability of the Court to place judges on high courts that are ideologically faithful and insulated from outside pressures that would prevent them from pursuing that regime's policy preferences. The question revolves around who picks judges and under what conditions they serve.

Selection Systems

The President of the United States selects Justices of the Supreme Court. Particularly in times of divided government, the need for approval of the President's nomination by the Senate may restrain the President. Typically, the Justices appointed are selected with an eye toward political fidelity and share partisan affiliation with the President. Thus, the appointment is tied to the current political regime of the central government. We would expect the type of justice appointed to vary with the political regime. This should result in judges with different political dispositions and policy preferences to be appointed over time. In short, changes in political regimes should result in changes on the Court and corresponding variance in the jurisprudence of the Court over time.

The European Union has a system that is divorced from the political regime of the central government, and the selection is left with the member states. But the member states are highly constrained by the need for unanimous approval of all member states. Thus, the need to pick judges who are acceptable to all member states severely restricts the ability to appoint individuals to in order to further the agenda of the political regime of any given member state. Member states will have to moderate their choices. Since all member states are subject to the same pressures to moderate, we would expect them to appoint similar judges across all of the member states and over time. Since the type of

judge will not vary, we would not expect the selection system to affect any variance in outcomes over time. Thus, we would expect, all other things being equal, for the selection system of the European Union to not encourage change over time, and we would expect to see consistency over time in the decision of the Court of Justice.

Tenure

Justices of the United States Supreme Court are insulated from outside pressure. Picked largely for political reasons, they are free to pursue policy preferences for the simple reason that they face little or risk in doing so. As Segal and Spaeth (1993) point out, the justices are appointed for life during good behavior, not easily removed, and typically have no career goals beyond the court. Thus, no direct way to punish judges for pursuing policy exists.

The European Court of Justice is a different matter. Members of the Courts, first and foremost, face reappointment. The selection process discourages judges from being picked for the purposes of pursuing an overt political agenda, and the desire to be reappointed constrains them from any overt pursuit of policy while on the bench.

Decision Rules

Decision rules can encourage or discourage consistency overtime. The more difficult it is to make a decision, the more likely the decision of court will be moderate and consistent overtime. In the United States Supreme Court, the presence of dissents and the fact that only a five-person majority is needed make it relatively easy to reach a decision. Also, the United States Court tends to be able to be broken down on a left-right continuum. Thus, the five-person majority should be stable over time across a number of

issues. A judge can expect to pursue a partisan agenda if there is some expectation of success.

The Court of Justice is a larger court, with no easy division of judges on a left-right scale and an appointment process that brings judges toward the middle of the scale. We would see judges who are, because of the selection process, less predisposed to disagree, and this makes the ability of any one judge to affect the decision-making process on the Court unlikely. On a large, 15-member court like the Court of Justice, the change of one vote has little effect on outcomes. In addition, the Court of Justice does have dissents, so there is no public forum to air disagreements. All of the judges involved in a decision must sign the opinion, and there is a real effort to accommodate judges and craft opinions that are acceptable to all judges. As I will explain in Chapter 3, this accommodationist norm results in a tendency toward a "European" solution to problems, since no single member state will be disadvantaged over time. A side effect noted by scholars is that this attempt to reach compromise often result in muddled opinions lacking in clear legal doctrines (Kenney 2000).

Thus, we would not expect much change over time in the jurisprudence of the Court of Justice. However, given the ties of the Supreme Court of the United States to the political regime of the central government, we would expect shifts in the jurisprudence of Court as larger shifts occur in the underlying political system. This is because the appointment process causes justices to be picked by the political regime based on presumed political fidelity. Justices are picked because presidents believe their nominees will pursue their political agendas. While this presumption, in practice, does not guarantee that judges will in fact pursue a president's policy preferences, I will argue

that all things being equal, a judge that is selected with regard to presumed political fidelity will be much more likely to pursue the president's policy preference than a judge pick on some other basis. In addition, justices on the Supreme Court can pursue policy preferences because of the insulation of they enjoy from the pressures of reappointment and removal. Also, the relative ease of reaching a decision on the Court and the presence of the dissents encourage, or at least in the main do not dissuade justices from pursuing policy preferences. Thus, in cases before the United States Supreme Court we would expect the frequency with which the central government wins before the Supreme Court to vary over time. We would expect the central to be more successful under Courts where most of the justices are appointed by regimes that favor a general expansion of the powers of the central government, and less successful on Courts appointed by regimes favoring a contraction of the central government. As Jeffrey Segal (1997, 42) notes: "The federal judiciary was designed to be independent, so we should not be surprised that in fact it is." Segal goes on to note that comparative studies of the institutional structures of other courts in diverse institutional settings could prove consequential.

On the other hand, the diverse institutions of the Court of Justice disperse the appointment of justices, ensuring that political regimes and political fidelity are minimized in the selection process. The judges that are picked will be similarly oriented towards the middle of the political spectrum because of the need to find a judge acceptable to all other member states. The same types of pressures are faced by all member states and have not changed over time. Thus, we would expect similar types of judges to be appointed over time. Thus, since there will be no shift in the types of judges appointed over time, there should be no real shifts in the jurisprudence of the Court of

Justice over time. Thus, the level of success of the central government will remain consistent over time.

In the cases at hand, I will argue that the Supreme Court's behavior is a virtual archetype of an unconstrained court, and the Court of Justice has an almost unique institutional structure that makes it perhaps the most constrained major court in existence. I will examine result cases decided by the Warren Court and compare this to results from the Rehnquist Court. The Rehnquist Court has largely been viewed as having policy preferences that favor a less activist central government and that are more receptive to the prerogatives of the states. The Warren Court was noted for allowing wide latitude for the federal government and for being less favorable to the states. All other things being equal, I expect the Rehnquist Court to be a less centralizing court than the Warren Court. In the Court of Justice, the President Judge is not appointed by a political regime, and thus the different "courts" based on changes in the President Judge are almost meaningless. Therefore, for the Court of Justice, I will examine a random sample of cases across at least two time periods, where the cohort change was as complete as that of the Rehnquist and Warren Courts in the United States.

My expectations regarding the effect of the scope of the federal system and the nature of the constraints provided by the judicial institutions are summarized in the following tables:

Table Three
The US Supreme Court

Warren Court	Federal Government wins more often
Rehnquist Court	Federal Government wins less often

Table Four
Court of Justice

First Period	*Union* overwhelming successful

Second Period	*Union* overwhelming successful

To summarize, in the United States, the particular institutional configuration of the United States Supreme Court is conducive to changes in the levels of success of the federal government over time. Some courts are appointed by regimes that favor an expansion of the federal government. In the United States, the political regime, even in time of divided government, is relatively free to pick judges based on fidelity to the regime's policy preferences. Recently, Democratic presidents have picked judges favoring a larger role for the federal government and Republican presidents have picked judges that are more tolerant of the claims of states' rights. Once on the Court, the justices are almost completely free from direct pressures on their career. Therefore, they are free to pursue the policy preferences of the appointing regime without fear of sanction. Of course, the choice of a justice in no way guarantees he or she will follow the regime's ideological preference in every case or that the occasional judge will not confound the appointing president. However, what I specifically argue is that the selection process allowed the appointments of Nixon and Reagan to place a conservative majority on the Court, and the effect of this new conservative majority will be obvious in both statistical and jurisprudential examination of the decisions of the Court. Relative to the Warren Court, largely a democratically appointed Court, the central government will win much less often under the Rehnquist Court.

The Court of Justice is not subject to the same dynamic as the United States Supreme Court. In the case of the European Court of Justice we would not expect political changes would have any measurable effect on the level of success of the Court of Justice over time. Indeed, during periods of stagnation at both the national and

European levels, the Court of Justice continued the integrative process (Weiler 1994), with the Court seemingly outpacing the other national and European institutions. The European level of government has been overwhelmingly successful before the Court and this high level of success for the central government has been consistent overtime (Varat 1990). The process of selection is divorced from any single national regime and therefore not liable to be influenced by a change in regime at the European or national levels. Thus, judges are not selected for reasons of fidelity to a regime, but rather for reasons of broad acceptability. In addition, the institutional structures of the Court subject judges to the need to be reappointed and also the need to reach a more consensual model of decision-making. Thus, there should be little change in the high rate of success of the central government over time because the structures of the Court of Justice discourage the pursuit of policy preferences.

V. Conclusion and Project Summary

Legal institutions matter and affect outcomes in cases before high courts. The goal of this Chapter has to been outline the basic theory about how these institutions matter. I have argued that whether a central government will win in disputes with peripheral governments will depend on the type of case before the court and the type of pressures exerted on the judges on a given court. To understand the pressures exerted by the type of case heard by the court, one must examine the underlying nature of the system and the different types of cases that different systems generate. To understand the pressures exerted on judges, one must examine the institutional rules regarding the selection of judges and under what conditions they serve once appointed to the bench. These two factors combine to determine how often central government wins in disputes

with the peripheral government. In general, the central government will win more often in narrow economically based systems than in broadly based systems that generate cases dealing with both political and economic matters. Whether the central government wins over time will depend on the ability of political regimes to exert influence on the Court. This, in turn, will depend on how free the regimes are to pick judges based on ideological fidelity and how free judges are to pursue policy once on the bench. Whether either the central or peripheral governments will win consistently over time will depend on the degree to which judicial selection is tied to a current regime causing the judges selected to the bench to share the policy goals of the current regime and whether these politically faithful judges, once on the court, are unconstrained in their pursuit of policy preferences by tenure or decision-making rules. If the appointment of a judge is tied closely to the current political regime and this judge, once appointed can pursue policy in an unconstrained manner, then we would expect shifts in who wins and who loses as the changes in court personnel reflect changes in the political philosophy of current regime from one of favoring the power to the central government to one that favors a retrenchment of this power. If the influence of the political regime is removed from the appointment process and the judges are constrained by the institutional rules in behavior once on the court, then the conditions will exist for some consistency in success levels before the court. In the remainder of this project, I will develop and test the issues and theories raised in this Chapter.

In Chapter Two I will address issues of case selection, including docket control issues and the differences in the types of cases that come before a high courts because of differences in the underlying political systems. Much of Chapter 2 will address the

pressures on courts in federal and federal like systems. Chapter 3 will address the institutional structures of judicial selection, tenure, and decision rules. In Chapter 4, I will state my hypotheses with regard to my two cases: the Supreme Court of the United States and the Court of Justice of the European Communities. I will then test these hypotheses against the available data to determine who wins and how often in disputes between the central and peripheral government in these two systems. Chapter 5 will examine the jurisprudence that underlies the statistical analysis in Chapter 4. The questions I raise in this Chapter will try to assess the actual legal impact of the statistical findings of Chapter 4. In final chapter, I will summarize my findings and briefly examine other political systems, suggesting that the institutional approach offers a better and more complete method of understanding judicial behavior.

Chapter 2
Case Selection

I. Introduction

Courts can only make decisions in the cases that come before them. Two major institutional structures most affect the type of case that comes before a court in federal and federal like systems. The first is the internal structure that determines the extent to which a court can control its own docket. The second is the type of political system in which the Court is embedded. Different systems present different classes of cases. The different types of cases present different pressures. Some cases create pressures that favor the central government in disputes between the central and peripheral governments. Other cases create pressures that favor the peripheral government in these disputes.

This chapter will discuss issues of case selection. I will first examine issues of docket control in general and then in the United States and European Union. Next, I will turn to the effect of the underlying political system, dealing at length with the effect of the presence and nature of federal systems. I will then briefly look at the history and structures of both the United States and the European Union. I will argue that these two systems are very different and, as a result, the courts in these systems hear very different types of cases. The net effect of these differences is that in cases arising from disputes between levels of government, the Court of Justice will hear cases that are related mainly to the maintenance of a single market and which create pressures that consistently favor the European government in these disputes, and I expect that the European level of government will be overwhelmingly successful in these disputes. The United States' federal system generates disputes between levels of government that include both economic and political questions. As a result, it will hear cases that have no inherent

logic that favors the central government in these disputes. Thus, we would not expect the federal government to be overwhelmingly successful in disputes between levels of governments, particularly in cases that do not involve economic matters and those that deal with political rights.

II. Docket Control

A great deal of literature deals with the United States Supreme Court's docket control. The contours of the Court's ability to determine the cases it will hear, as well as the impact of these decisions have been discussed by scholars. The first part of this section will discuss this literature and argue that the impact of the court's docket control powers is to amplify the impact of the Court's decisions. Since the court typically only takes important cases, when the states win in disputes with the federal government, these decisions are likely to have a tangible impact on governmental power.

The European Union is very different, having almost no control over its docket. The second part of this section will deal with the European Union's lack of docket control. While there is virtually no literature on the Court of Justice's lack of docket control, I will argue that this lack of control forces the court to take cases that can be at times trivial. It is in these cases that the member states win. I will conclude this section by arguing that the net effect of the Court of Justice's lack of docket control is that the Court favors the central government to an even greater degree than the statistical analysis indicates.

A) The United States Supreme Court

The rules relating to the Supreme Court's ability to control its own docket comes from three sources: 1) Article III of the Constitution; 2) Congressional legislation that

determines appellate jurisdiction; and 3) the Court's own rules and its interpretation of these constitutional and congressional provisions (O'Brien 1996, 194). Under Article III, the federal judicial power pertains to "all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties."[1] The Court's appellate jurisdiction is divided into three classes: appeals, certified questions, and petitions for certiorari. The Judiciary Act of 1925 expanded the Court's discretion, and most cases come to the Court under petitions for certiorari. Approximately 99% of the Court's docket is made up of petitions for certiorari and these are entirely discretionary (O'Brien 1996, 195). The Supreme Court exercises its discretion and hears only about one in every 80--well less than 2%--of the cases it receives on certiorari petitions (Baum 2001, 102).

Thus, except in extremely rare circumstances, the Court has complete discretion over its docket. The question then become why does the Court take a particular case and what effect does this discretion have on outcomes in cases? There is no dearth of scholarly literature pertaining to this question. The Court has developed an informal rule, the so-called "the rule of four" that provides that the Court will hear cases if four justices agree that a particular case should be heard (Baum 2001, 102). In practical terms, the "rule of four" operates in very few cases, since most of the cases (79% in a recent term) are accepted with the agreement at least five justices (O'Brien 1996, 239). Thus, the "rule

[1] The Court also has original jurisdiction, where it acts in the role of a finder of fact rather than as an appellate body. These cases involve ambassadors, consuls, and other public ministers, as well as suits where a state is the party. Congress has provided other federal courts with concurrent jurisdiction, and thus there are only about ten cases per year falling under the Court's original jurisdiction. These mostly pertain to disputes between states over such matters as water rights (O'Brien 1996, 195). These cases represent only a small part of the Court's caseload and have no impact on the cases pertinent to this study. Therefore, the above discussion will be limited to the Court's appellate jurisdiction.

of four" sets forth a minimum number of votes to hear a case, but in practice, the minimum number of votes is usually exceeded.

There are formal and informal rules that help guide the Court in its exercise of judicial discretion (Wasby 1988, 171-86). These include rules relevant to all courts, such as standing, ripeness, and mootness. In addition, the Court will not give advisory opinions absent a real case or controversy (Schwartz 1993). The Court will not hear political questions, such as those cases that raise questions that are left to the other branches through a textually demonstrable constitutional commitment or could produce a potentially embarrassing conflict between branches of government[2]

In addition, the Court has formalized rules that assist in the decision of whether to grant certiorari. United States Supreme Court Rule 10[3] states that granting a petition for writ of certiorari is not a matter of right and will only be granted for compelling reasons. Rule 10 is not meant to control but help guide the Court's actions. Among the reasons for granting the petition is if a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; or has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Court's supervisory power. The rule also states that the court may grant the petition if a state supreme court has decided a case in manner that conflicts with another state supreme court or a federal court of appeal. Finally, Rule 10 states that the Court will consider granting a petition if the United States Court of Appeals has decided

[2] See, for example, *Powell v. McCormick*, 395 U.S. 486, 89 S.Ct. 1944 (1969).
[3] Formerly, Rule 17

an important question of federal law that has not been addressed by the Court or has been decided in a way that conflicts with prior decision of the Court. Conflicts between levels of government will result in cases that meet the guidelines supplied by Rule 10.

However, Rule 10 does not bind the Court to accept a case, and scholars have tried to deduce the factors that increase the Court's propensity to accept a case. Scholars have argued that the justices look for cues--certain factors found in cases that are accepted that are absent in those the court declines to hear. Some scholars have noted that cases that feature the presence of the federal government as a party, those involving dissention in the lower courts, and those cases concerning civil rights and economic liberties are more likely to be accepted for a full hearing by the Court than cases where these factors are absent (Tanenhaus, Schick, Murashkin, and Rosen 1989). Other researchers have argued cues such as conflicting decisions (Ulmer 1984) and the presence of *amicus* briefs[4] will make a case more likely to be heard (Caldeira and Wright 1988). However, some scholars dispute the values of cues (Provine 1980).

Scholars also noted that the values of judges will be important, and judges may operate strategically to choose cases that they believe will result in an outcome they favor when decided on the merits and avoid those that might set a precedent that results in a decision on the merits which they would not agree with. As Epstein and Knight (1998, 78) suggest, justices are "forward thinkers" and will vote to grant certiorari based on what they think will happen at the merits stage. Strategic behavior may be either aggressive, that is a justice will vote to take a case because the justice believes that the characteristic of a case will make it particularly good for developing a doctrine in a certain way they prefer (Perry 1991). On the other hand, justices may decline to vote to

[4] *Amicus* brief are brief filed by interested parties, typically interest groups, with the leave of the Court.

hear case even if in disagreement with the lower court's decision because they believe the result decision on the merits will result in this unfavorable lower court decision being upheld (Epstein and Knight 1998, 79). A number of scholars accept that the justices act strategically in order to further their own legal agendas and avoid cases that would run counter to this agenda (see, Brenner and Krol 1989, Boucher and Segal 1995).

The United States Supreme Court has discretion over its decisions; both formal and informal rules, as well as the values of judges, will limit both the workload and the type of case that the Court hears. At a minimum, the Court is not likely to take trivial cases or cases that are repetitive, dealing with issues of settled law. Almost certainly, when a state government wins in a dispute before the Court, this win is likely to have an impact on the relative power of the levels of government. Two recent decisions upholding state prerogatives limited Congress's ability to legislate in the areas of violence against women[5] and gun violence.[6] When the state actions are struck down, they may impact the ability of the states to enact policy.

[5] *United States v. Morrison*, 529 U.S. ____ (2000)
[6] *United States v. Lopez*, 514 U.S. 549 (1995)

B) The European Court of Justice

When a court cannot control its own docket, the cases it hears may be trivial and not particularly affect the relative balance of power between levels of government. As I will detail below and in Chapter 5, in the case of the Court of Justice, not one case in which the member states prevailed over the European government in fact limited the power of the European government to enact policy. Rather, the member states prevailed in the cases that raise issues such as whether a pajama is a pajama.[7]

The Court of Justice has no control over its own docket and this has resulted in a great increase in the number of cases the Court hears and has strained the Court's resources (Mullen 2000). Unlike the Supreme Court, which hears the large majority of its cases though certiorari petitions, the Court of Justice can hear several types of cases. In all of these instances, the agenda of the Court lies within the control of external actors and not within the Court's discretion. While like most courts, the Court of Justice hears appeals and original actions.[8] Any member state, institution of the European Union, or affected citizen may bring actions under these provisions. Other than the lack of control over their docket, this type of case is similar to the cases heard by the United States Supreme Court. However the presence of preliminary references[9] creates a unique class of cases for the Court of Justice and involves the courts of the member states in setting the agenda of the Courts.

Under Section 234 of the Treaties of European Union, any court in a member state may request a ruling on whether an issue before the member state court is subject to European law. The Court cannot refuse the request, and will only allow the withdrawal

[7] *Weiner SI GmbH v Hautptzollamt Emmerich,* Case-C-338/95.
[8] Article 227-233 *Treaty on European Union* (Ex Articles 170-176);
[9] Article 234 *Treaty on European Union* (ex Article 177)

of the request by the court that initiated the request, not by the parties to the case (March 1996, 74). In essence, the case at the member state court is suspended, often for a period of years, while the Court of Justice considers whether European Law applies to the case. If the Court of Justice decides that European Union applies, it does not attempt to implement the decision directly. Rather, it instructs the national court to apply its rulings to the case at hand.

Thus, the member states' courts both aid the legitimacy of the Court of Justice and enhance their own power by virtue of the preliminary references (Alter 1996, Mullen 1998). The body that enforces the Court's rulings in these cases is not the Court itself, but the national court. The ability of the court to distance itself from the enforcement of its decision has enhanced the Court's power (Alter 1996). The reason is simple; member state citizens and institutions more readily accept European edicts when an instrument of the member states does the enforcing.

In addition to aiding in the legitimacy of the Court of Justice, the preliminary reference procedure may also serve to enhance the power of the national courts. Several courts that lack national judicial review have established a form of supranational judicial review. While Courts, such as the House of Lords in Great Britain, have no right to strike down Parliamentary statutes on any national law basis, they have been able to achieve the *de facto* nullification of national laws on the basis of European law as the result of rulings by the Court of Justice in preliminary references (Drewry 1992). Thus, a symbiotic relationship has arisen. Both the power of the European Court and the national courts have been enhanced by the preliminary reference procedure, a unique procedure that lets other courts completely control the agenda of the Court of Justice.

The Court of Justice has virtually no control over its docket. It hears cases of great import and many cases that are not important and would not reach the docket of a court with more discretion, such as the United States Supreme Court. The question for the scholar studying disputes between the European government and member states is whether these cases are more or less randomly distributed among those decisions that favor the central government and those that favor the member states. I will argue below and in more detail Chapter 5 that they are not.

The member states almost never win in cases that threaten the power of the European government to enact policies, and the European government always wins in cases where its power to enact policy is at issue (Varat 1990). The member states prevail on questions which are highly technical, procedural, or trivial and do not impact the European Government's ability to enact policy. A Court with strong docket control is unlikely to even hear this type of case. Thus, though a statistical analysis of the Court of Justice reveals a court where the central government is overwhelmingly successful, the statistical analysis underestimates the impact of the Court on the power of the central government to enact policy, since few cases in which the member states "win" have any impact on Europe's ability to enact policy. On the other hand, the cases in which Europe has prevailed have resulted in a wholesale transfer of authority for policy-making from the member states to the European level, and in effect have turned the international treaties establishing the European Communities into a constitutional document, having the effect of making European regulations a "higher law" (Stone and Caporaso 1998, Weiler 1999).

The main effect of the difference in docket control in the Supreme Court and Court of Justice is one of impact. In the United States, a ruling for or against a level of government is more likely to be in a case of some importance that will impact the ability of that level of government to enact policy. The Court of Justice has no discretion in controlling its docket. Unimportant cases abound. When examining the statistics, the question of the impact on the law of "wins" and "losses" can be indeterminate. In Chapter 5, I examine every case in which the member states have "won" in preliminary references. I will argue that the impact on policy-making power of the European Union in the cases in which the member states "won" is negligible. The impact on the policy-making power of the member states in cases in which the central government has won has produced a "quiet revolution" in which there has been an immense transfer of power to Europe from the member states (Weiler 1994).

III. Governmental Systems and Case Selection

Governmental power can be divided in a number of ways in any political system. The division of power has an effect on the type of cases heard by high courts in a political system. A national government may be unitary, such as the highly centralized Jacobin state of the French Republic, or the loose association of independent states found in the United States under the Articles of Confederation. In a highly centralized state, all power derives from the central government, and local authorities are mere appendages of central government. On the other hand, in federal and non-federal arrangements, these local authorities have separate sources of power and authority and in effect are separate entities from the central government. Thus, in these systems, two levels of government compete for and often engage in disputes over the division of power. Courts in multi-level

governmental systems are invariably the referees in these disputes and therefore have an entire class of cases that are not present in unitary systems. However, the type of case that arises in a particular federal or federal-like system will depend on the exact division of power between levels of government. To understand the division of power, one must examine the purposes and goals of a system.

In this section I will first address the difference between federal and unitary systems. Second, I will discuss the variety of federal and federal-like systems. In order to understand the effect the system of government has on a case before that comes before a high court, one must understand the nature of these systems. Third, I will discuss the effect of different governmental systems on courts in general, especially discussing how these differences affect winners and loser in disputes between central and peripheral governments before high courts in these systems. Finally, I will discuss governmental systems in both the United States and European Union and will discuss the effect that the differences in these systems will have on who wins and who loses in disputes between the central and peripheral governments.

A) Federal and Unitary Systems

The essence of a unitary system is the centralization of power in one level of government. The existence of local government is subordinate to the central government. Sub-national governments have "not an infinitely small particle of authority left" (Duchacek 1987, 112). In a unitary system it is the central government and the central government alone that determines how much or how little power may be delegated to peripheral governments (Duchacek 1987, 114).

Thus, while unitary systems suggest centralization, sub-national governments may exist in these systems. However, these governments derive all of their authority from grants from the central government and possess no separate source of authority. The process of government may be distributed, in a functional sense, to peripheral governments. Only government power is centralized. If the distribution of power to peripheral governments, and indeed the existence of peripheral governments are entirely within the purview of the central government, then no disputes as to the boundaries of power should reach the high courts in these systems. The reason is simple; peripheral governments can make no constitutional claim to having a right to self-governance other than as granted by the central government.

In federal and federal-like systems, governmental power is distributed. Both the central and peripheral governments have their own independent sources of and claims to power. Lijphart (1999, 186) defines federalism as a "guaranteed division of power between central and non-central governments." Riker (1975, 101) defined federal systems in the following way:

> Federalism is a political organization in which the activities of government are divided between regional governments and a central government in such a way that that each kind of government has activities on which it makes final decisions.

However, Duchacek (1987) notes that there may be divisions of power that are non-territorial in nature. Thus, insular minorities, with different cultural identities and values may be granted functional autonomy over cultural issues in their community at the nation-wide level without reference to territory. Thus, power may be distributed on a non-territorial basis.

Elazar (1997, 239) offers perhaps the most inclusive definition of federalism as a "fundamental distribution of power among multiple centers." The key difference between unitary and federal systems is that in the former, power is concentrated in single level of government. In the latter, power may have multiple sources. These rules may be more or less formalized, though typically modern federal systems have formal written constitutions. Giovanni Sartori (1997) has argued that constitutions "are 'forms' that structure and discipline the state's decision-making processes" (Sartori 1997, 200). He adds (1997, 201) that no organization can function on injunctions alone, without the appropriate structure of incentives. Constitutions create structures that spell out the basic contours of the distribution of power between the central and peripheral governments. These structures provide the incentives for the institutions of government in these systems. As with any other governmental institution, different governmental structures will provide differing pressures on courts.

B) Federal Systems: Infinite Variety?

As noted above, federalism has a variety of definitions and takes a variety of forms. As Elazar (1976) stated: "The great strength of federalism...lies in its flexibility (or adaptability), but that very strength makes federalism difficult to discuss satisfactorily on a theoretical level. Elazar (1976, 1) explains why federal theory is so elusive:

> ...federalism involves both structure and processes of government; federalism is directed to the maintenance of both unity and diversity; federalism is both a political and social phenomenon; federalism concerns both means and ends; federalism is pursued for both limited and comprehensive purposes; and there are several varieties of political arrangements to which the term federal has been properly applied (Elazar 1976, 2).

Federalism has been applied to many different types of intergovernmental arrangements and classified in wide variety of ways. Much of the literature concerning federalism has been directed at developing different classifications and comparing and contrasting the various types of federal systems. Elazar classifies different types of federal arrangements as federations, confederations, associated states, federacies, condominiums, and political systems with federal arrangements (Elazar 1995, p. 2-7). Duchacek provides ten "yardsticks" for measuring the extent and nature of federal systems (Duchacek 1987). Earle (1968) nicely captures the phenomenon in the aptly named book *Federalism: Infinite Variety in Theory and Practice.*

One of the defining characteristics of the literature on federalism in general is that federalism represents a variety of goals, and ideals, and that power is divided in different federal systems along very different lines. If power is divided differently, then the disputes arising from these divisions of power will necessarily also differ. These divisions are seldom clear-cut, and even where they are formally clear-cut, there is no guarantee that these lines will not be blurred in practice. The "layer cake" model of federalism exists only in theory, and the "marble cake" model has more practical applicability. As Duchacek (1987) notes, courts act as referees in these conflicts. Their decisions determine the extent of "marbling" in any system. However, the type of conflicts that arise will depend on the type of case that reaches a court, and this will differ depending on how power is divided between levels of government in any given system.

In reviewing the theoretical underpinnings of federalism, it is vital to understand that there is no "essential federalism" that is either centralizing, decentralizing or balanced (King 1982, Duchacek 1987, Wheare 1947). Rather, federal systems may be

established for multiple purposes. For example, the American Constitution had the goal of increasing the strength of the federal government from its relatively weak state under the Articles of Confederation. On the other hand, one of the goals of the German Constitution of 1949 was to create a less powerful center than under Hitler's Third Reich (King 1982).

Advocates of federalism see many different ends for a federal state. Some favor a more centralizing impetus while others see federalism as looser arrangement of states. Finally, some authors see danger in the abuse of power by a strong center, but also acknowledge the danger inherent in looser systems descending into lassitude or anarchy. These authors advocate a system where the powers of both levels of government are balanced. It is important then to look at what the advocates of a particular system see as the ultimate ends of a system to determine whether these advocates have a view of a federal state that is centralizing, decentralizing, or balanced (King 1982).

Advocates of federalism as a decentralizing force all have shared the goal of limiting the power of states by dispersing power to regional or local governments (Duchacek 1987). Some, like Calhoun (1969), see the peripheral governments as a counterweight to what they view as the ever-increasing power of the center. The sovereignty of the state was, for Calhoun, the bulwark against the encroachment of the central government. Other more radical advocates of decentralization come from the anarchist vein, and see the dispersal of power from the center as a means to eventually eliminate the need for any authority. Though these authors differ widely as to the degree of decentralization, they share the ultimate goal of limiting the power of the nation-state by dispersing this power outward.

Many of the early advocates of a looser version of federalism were socialists like William Spence (1750-1814), William Godwin (1756-1836), Robert Owen (1771-1858) and Charles Fourier (1772-1837). These writers were bound by a common concern to replace the centralized state with a looser union of economic and territorial communes where these peripheral entities would enjoy considerable autonomy (King, 1983, 30).

The end of federalism envisioned by Proudhon was utopian and stood opposed to the centralized French state with which he was familiar (Elazar 1987, 146-147). Proudhon's goal was the decentralizing of all European states, reducing "nationality to liberty." As King argues, Proudhon saw federalism first and foremost as a means of promoting liberty and regarded the current European state structures as evil incarnate. As a result, rather than first constructing an overarching federal structure, he was chiefly concerned with domestic reforms that involved several varieties of decentralization (King, 1983).

The most extreme version of decentralization can be found in the writing of Bakunin and other anarchists of the late 19th and early 20th Centuries. Bakunin's ideas of decentralization resulted from his view that the state is antithetical to freedom. He argues:

> The state is a force.... However many pains it may take, it cannot conceal the fact that it is the legal maimer of our will, the constant negation of our liberty. Even when it commands good, it makes this valueless by commanding it, for every command slaps liberty in the face (cited in, Pyziur, 1955, at 131-132).

In order to curb the power of the state, Bakunin sought to disperse this power to the fullest extent possible. He believed that the building of a pyramidal federative structure must begin with the smallest unit, the commune, and proceed upward. He

believed that any federation that had autonomy bestowed upon it from above was doomed to failure. While in the end he envisioned an overarching, all-inclusive unity, he wished to give the fullest possible autonomy to the community (Pyziur, 1955, 131-132). While Bakunin was extreme in his beliefs, like other advocates of a decentralizing form of federalism, he saw federalism as a limit on governmental powers.

Advocates of a centralizing form of federalism see the ends of federalism as arrogating more and more power to the central government. Chief among the arguments in favor of this form of federalism is that a strong central government is efficient, promotes economic growth, allows the settling of intrastate disputes, and provides for a common and thereby stronger defense against external threats. In essence, the centralizing theorists propose that subordinating the power of these nation-states to the central government can cure one or more of the evils caused by the existence of nation-states.

Very few writers hold the position that that federalism is exclusively a centralizing idea. An exception is Herrarte who stated "historically and technically federalism had meant the will to unite, the desire to combine elements that were formerly distinct, the need for cooperation in order to overcome separatist forces" (in King, 1983, 38).

Saint-Simon felt greater centralization among European states would inhibit the occurrence of war, lay the foundations for an enduring peace, and as the result of ameliorating the need for the expense and disruption of war, lead to greater economic prosperity (King, 1983 #49). He argued that common institutions were a necessary precursor to a coming together of peoples. Without these institutions, only might

decides. He stated: "What is required is a compelling force to unite divergent wills, to concert their activity, to render their interests common and their commitments firm" (cited in, King, 1983, 31).

J. Hennessy was another French proponent of centralizing federalism and was its chief advocate between the two World Wars. He believed that a federal solution between European states was a method for achieving integration without force and containing both internal and external threats, particularly the threat of the expansion of communism (King, 1983). A major English proponent of centralizing federal was Lionel Curtis. He drew parallels between the weakness of the United States under the Articles of Confederation and the League of Nations and the United Nations. He felt that the same structural problems were present in both cases and that the solutions offered by the *Federalist* at the national level held promise for world federalism. The centralizing ideal of federalism took root in the aftermath of the Second World War. Churchill called for a "United States of Europe," and others saw this view as the only means to prevent a reoccurrence of the cataclysm that had twice enveloped Europe in this century. This centralizing idea not only took hold, but also began to be applied in the case of the European integration.

Others, while generally advocating a stronger center, are aware of the potential for decentralizing forces to remain an important part of the system in order to prevent an unlimited aggregation of power to the center. King (1983) sees the authors of the *Federalist Papers* as advocates of increased power of the center without taking the strong position advocated by Herrarte. He sees these authors as both advocating the benefits of a strong center while also, though secondarily, arguing for a defense against centralist

tyranny (King, 1983, 28). Thus, their defense of the proposed Constitution did not so much reflect a document of purely centralizing factors, but a document that incorporates decentralizing factors as well.

As King (1983, 29) notes:

> The authors of *The Federalist* were concerned to promote centralism, and in effect used many of the traditional arguments embedded in the doctrine of sovereignty to drive their points home. At the same time, they were sufficiently aware of the dangers attending any concentration of power to want to simultaneously defend against these, and hence place greater emphasis upon popular sovereignty and upon devising constitutional checks to inhibit such sovereignty. This dual orientation reflects a degree of incoherence.

I argue that this "incoherence" in the intent of the United States' Constitution created a system of both centralizing and decentralizing factors, and thus the system will create pressures that do not overwhelmingly favor either level of government in disputes before the Supreme Court. These different strains are evident in a number of different areas throughout *The Federalist.*

Thus, there is no essential theory of federalism. Some theorists saw federalism as centralizing and as a tool to eliminate the anarchy that resulted from the competition of nation-state against nation-state. On the other hand, other theorists saw the accumulation of power at the center to be almost inherently evil and that the best solution was to devolve power from the center to the smallest possible unit. The third group of theorists was cognizant of the danger of power that was too centralized and thus liable to turn tyrannical. On the other hand, they were aware of the danger—sometimes from experience—of a vacuum of power and the resultant anarchy. These theorists, including the authors of the *Federalist*, attempted to use federalism to gain the benefits and avoid

the pitfalls of both a strong central government. Therefore they balanced this strong central government with peripheral governments with significant autonomy. In effect, they saw merit in both centralized and diffused authority and tried to use a federal system to balance these two authorities.

I will argue below that courts face very different pressures depending on the system of government. The first issue is whether a government is unitary or distributed power in federal and federal-like systems. But, as I hope the above discussion has demonstrated, noting the mere presence of federal structure is not sufficient to understanding the nature of the pressures on courts. The presence of federalism simply indicates that power has been distributed. The key to understanding how courts are affected by this distribution of power is to understand how and why the power is distributed in these systems.

C) Courts and Systems of Government

i.) Federal v. Unitary

In federal systems, a class of cases involving the disputes between levels of government exists that is not present in unitary systems. Regardless of the nature of the division of power, the presence in a political system of a central government and sub-governments will necessarily result in conflicts between levels of government over how power will be dispersed. If local governments in unitary systems have no constitutional claim to independent power, there will be no disputes over the boundaries of government authority for the court in a unitary system to resolve.

Where there are multiple sources of powers, the boundaries between the various powers of the levels of government may be unclear. Disputes may arise as to the exact definition of these boundaries. As Martin Shapiro (1995, 43-4) notes:

> In a federal constitutional system, the Court almost invariably became the referee of many of the most controversial political issues that would arise, that is, issues about the boundaries between the state and national governments.

Holland (1991, 7) argues that there is a strong correlation between judicial activism and a federal system of government. He (1991, 7) notes that the four most active courts—the United States, Canada, Australia, and Germany--all have federal forms. In these federal systems, disputes over the distribution of power occur, and these disputes result in cases that are simply not present in unitary systems. The court activism caused by disputes between levels of government allows the court to have a great impact on the policy-making ability of government. Most of the questions arising from these disputes relate to questions of the relative power of governments, and the decisions of the courts in this area will typically enhance or limit the power of one of the levels of government. Thus, not only do federal systems create an entirely unique class of cases not present in unitary systems, this class of cases typically involves questions regarding governmental power.

ii.) Courts in Federal Systems

The effect federal systems have on courts is a matter of debate. While there is little literature directly on courts, one can discern two views of the potential effect of federal systems. The first, and perhaps dominant, view is that the increased activism of courts leads to increased centralization. "In federal systems, judicialization usually

works to the advantage of federal governments" (Smithey 1996, 85). This perspective views the high courts as favoring the central government in disputes with peripheral government. In general, high courts in federal systems are viewed as more hostile to policies adopted by sub-national governments than federal governments (Smithey 1996, Hogg, 1979, Baum 1998, Kincaid, 1989). Martin Shapiro argues constitutional review by the highest appeal courts in federal systems has been a principal device of centralized policy-making (Shapiro 1981, 55-56).

The most developed statement of this position is Andre Bzdera's 1993 article "Comparative Analysis of Federal High Courts" (Bzdera 1993). Bzdera has few doubts about the role of high courts in federal and federal-like systems:

> We thus conclude that the main political function of a federal high court is to favour and legitimize the gradual expansion of central legislative jurisdiction (Bzdera 1993, 19)

And:

> ...these courts do not hinder the centralist legislative activities of the central government and at times they actively encourage and invite such federal initiatives (Bzdera 1993, 20).

Thus Bzdera argues that, as an institution, a federal high court "clearly appears as an auxiliary of the central government" (Bzdera 1993, 21). According to this view, courts in federal and federal-like systems will assist in the central government's arrogation of power to the detriment of the power of the peripheral governments.

Several authors have argued that courts in individual systems such as the United States Supreme Court (McWhinney 1987), Court of Justice of the European Community (Bzdera 1993, Stone Sweet and Sandholtz 1998, Weiler 1994) and the Supreme Court of Canada (Knopff and Morton 1985) favor the central government. In the United States,

[10]See Chapter 2, *infra*

the Court has been seen as more frequently striking down more state laws than federal (Baum 1998). The Warren Court particularly has been noted as enhancing the power of the federal government at expense of the states. Powe (2000, 494) argued that the Warren Court "completed the eradication of federalism" and, in doing so, rejected the founders' idea that "limiting the scope of the national government protected the individual." Holland (1991, 7) notes that Supreme Court decisions have generally resulted in greater centralization.

In the European Union, the Court was seen as an agent of centralization and integration, greatly speeding the arrogation of power to the central European government. Though decisions such *Costa v. Enel* and the *Cassis de Dijon* (see below), the Court of Justice confirmed the supremacy of European law and struck down national regulations that were a hindrance to greater integration. Weiler (1999, 19) stated that starting in 1963 and continuing into the early 1970s, the Court decided a number of landmark cases that "fixed the relationship between Community law and Member State law and rendered that relationship indistinguishable from analogous relationships in constitutional federal states." The Court, in effect, achieved a "constitutional mutation" resulting in "the erosion of the limits" to European level policy competences (Weiler 1999, 63). Stone and Caporaso (1998, 130) note that the European legal system operates in favor of those individuals and firms who are advantaged by European rules and disadvantaged by national rules. The Court of Justice has been an engine of integration and has largely enhanced the power of the central European government to the detriment of the power of the peripheral member state governments.

The Australian Supreme Court has been recognized as centralizing (Hodgins, et al. 1989). Galligan (1991) notes that the centralization is a common theme among constitutional scholars addressing the role of the Australian Supreme Court. He argues that the High Court has contributed to national trends partly as a contributor by limiting the power of the states and partly by legitimizing the efforts of the national government to centralize (Galligan 1991, 74-5). In particular, the Court has been willing to limit greatly the policy-making power of the Australian States. The Court has gone as far as to strip the states of their concurrent power to levy income tax (Holland 1991, 7).

The addition of a charter of rights to the Canadian constitutional order was seen as enhancing the power of the central government at the expense of the state. Knopff and Morton (1985) argue that in Charter of Rights cases, the Canadian Supreme Court was twice as likely to overturn a provincial statute than a federal statute. The reason that some consider the Charter an essentially centralizing instrument is because it creates a national set of entrenched rights that apply equally in all jurisdictions (Smithey 1996, 85).

Canada is interesting because it has often been cited, particularly before the adoption of the Charter of Rights, as the premier example of a decentralizing court. Indeed, some questions exist as to whether the Charter of Rights has had the expected centralizing effect. In the Canadian case, Baar (1991) noted that under the Judicial Committee of the Privy Council and the pre-Charter jurisdiction of the Canadian Supreme Court, the Court was characterized by "small-c" conservative ideology. Russell (1985) noted that prior to the adoption of the Charter, the Court maintained an "uncanny balance" between federal and provisional governments. Smithey (1996) notes that even in Charter of Rights jurisprudence, the Supreme Court has not lived up to the centralist

predictions, being actually more supportive of provincial statutes than federal statutes. As late as 1989, scholars were arguing that the Canadian Supreme Court has prevented Parliament from intruding upon the power of the provinces and have generally served as a check on greater centralization (Russell 1989, 484).

Canada is the most notable example of a decentralizing court. Others point to the emergence of a strengthening of states rights under the Rehnquist Court (Yarborough 2000). The Rehnquist Court has been more willing to limit congressional power while enhancing the power of the state governments (Yarborough 2000). Indeed, early in the presidency of Franklin Roosevelt, many critics attacked the Court because it held much of the new president's "New Deal" legislation to be an unconstitutional exercise of federal power (Schwartz 1993, 225-245). Yet few authors outside the Canadian case have addressed the court's role in supporting the peripheral governments.

However, viewing courts in federal systems as necessarily or even generally centralizing is inconsistent with the prevailing literature on federalism that emphasizes difference. Different federal systems create different institutional pressures depending on the nature of the federal system and the types of cases that arise. As I will detail below, there are a variety of federal systems, and these federal systems have been adopted for a variety of reasons. Some federal configurations are designed to aggregate power to the central government and promote unity. Other systems are configured to disperse power to the farthest extent possible and allow maximum diversity and autonomy while still maintaining a single political entity. The type of federal system will determine who is more likely to win in cases that come before high courts in federal systems.

iii) Different Systems: Different Purposes: Different Pressures

Different divisions of power will create different types of conflict. I argue that some conflicts will have a logic that requires the Court to support uniformity and thus will favor the central government in disputes between levels of government. Different types of systems will generate different types of conflict, generating different types of cases, and these different types of cases will generate different types of pressures depending on the policy area at issue. How power is divided between levels of government and why this power has been divided will help determine the pressures on courts in federal systems, and, in turn, will influence who wins and loses in cases that come before the court. The first question in trying to assess the pressures created by courts in federal systems is to ask why a system was formed.

A federal bargain may be struck for a variety of purposes (Wheare 1964). In many instances, the peripheral governments may be diverse entities while in other cases they may consist of a more homogenous grouping of political entities. In some cases, the impetus of a federal bargain many entail a complex balancing of nationalistic, linguistic, political and economic factors. In other cases, the bargain may be simpler or more narrowly drawn. The nature of a federal system is not deterministic, but the system may create pressures and incentives that influence a court's behavior. Put simply, federations occur for different reasons and some of these reasons, all other things considered equal, will create pressures and incentives for courts to centralize while others will create pressures and incentives for courts to decentralize.

The reason for this is fairly simple. Other things being equal, in a system that has policies with both centralizing and decentralizing features, a court is liable to hear cases from both types of policy areas and is thus likely to face pressures to centralize and

decentralize. In a more narrowly based system where mainly centralizing pressures are present, we would expect the court to hear fewer cases that present a decentralizing impetus. I will argue below that narrowly based systems are typically economically based, and typically one finds only centralizing pressures in these systems. Thus, the kinds of cases that make it onto the court's docket in a narrowly-based system will be different than the kinds of cases that make it onto a court's docket in a more broadly based system. A court in a narrowly based system will quite simply hear fewer cases that present decentralizing pressures than courts in a broadly based system.

The most centralizing pressure in a federal system is the maintenance of a single market. Specifically, the prevailing view is that federal systems exhibit more of a centralizing tendency with regard to economic matters that any other policy area (Heller and Pelksman 1986). The most narrowly drawn federal-like system in the world is the European Union. The central feature driving this bargain is the formation and maintenance of a single market. The performance of the court in this narrowly drawn system has been overwhelmingly centralizing (Heller and Pelksman 1986; Elazar 1991). In fact, Varat (1990) notes that the United States' federal system is the most significantly centralizing when dealing with issues related to a single market. This theory of economic integration is based on the idea that achieving a common market for goods and services will result in greater economic efficiency and gains in real income (Heller and Pelksman 1986; Norrie, Simeon et al. 1986, 207-209). Thus, because a single market is efficient and profitable, the impetus against local interference is great and the centralizing pressures are strong. Thus, economic matters, and other subjects tied to market maintenance will exert a strong centralizing pressure on courts (Sandalow and Stein

1982). When faced with a case concerning the maintenance of a single market, other things being equal, a court will face overwhelmingly centralizing pressures. If these cases make up the majority of the court's docket, we would expect the court's overall jurisprudence to reflect a centralizing tendency.

On the other hand, as federal systems address matters beyond the preservation of a single market, the centralizing forces may be less apparent. Peripheral governments have retained significant roles with regard to maintaining political rights and in regulating other non-economic matters. These roles appear to be greater as the subject matter moves away from the maintenance of single market (Varat 1990).

The goal of the remainder of this chapter will be to examine the two federal systems in this study and to develop a set of predictions for the behavior of these systems. I will begin with a brief review of the history of these two systems and an outline of the main features of these systems. Of course, this overview will not be exhaustive, as there is a great deal of literature on both the development of both systems. This overview outlines the basic contours of both systems and discusses the whether centralizing, decentralizing or both types of forces are present. I will argue that in the European Union the pressures have been almost exclusively centralizing. In the United States, both types of pressure are present. We can expect, that other things being equal, the Court of Justice will centralize because it faces almost exclusively centralizing pressures. The variety of pressures exerted on the Supreme Court will result in the Court engaging in both centralizing and decentralizing behavior over time.

D.) Systemic Pressures of Courts in the United States and European Union

i) Introduction: Different Visions, Different Goals

The two systems were designed with different ends in mind. In the American federal bargain, a major goal was to restrain a potential tyranny by the central government (McWhinney 1966; (Wheare 1964; Tushnet 1990). In the abstract, a federal system with a broad range of powers such as the United States will likely have both centralizing and decentralizing forces at work, and I would expect the extent of centralizing behavior would vary across the different subject areas of the federal bargain. Varat (Varat 1990) notes that the presence of greater *political* integration in the United States may account for the presence of anti-common market restrictions that would be impermissible in the European Communities. With such characteristics, the bargain itself seems to indicate strong decentralizing factors will be present. On the other hand, despite being very heterogeneous, the European Union has a much narrower scope of federal bargain, and the single market impetus that is so prevalent in this bargain would likely tend to exhibit strong centralizing tendencies.

In the case of the European Union, the ties to economic policy and narrow goals have resulted in rulings consistently in favor of the center, and in fact it has never struck down an action of the Union as being beyond the power of the Treaties (Varat 1990). Conversely, complex federal arrangements leave more room for decentralizing behavior because they will cover a variety of non-economic issues, issues in which the constituent states may have a desire to retain a strong say, and the federal bargain may very well take this desire into account. The remainder of this section will examine the purposes and federal structures of the two main cases in this study.

ii.) The United States: Countervailing Pressures

The United States has always been committed to a federal path, even prior to its founding. New England was the cradle of federalism, with Connecticut and Rhode Island originally founded as federations of towns. They later joined with Massachusetts and Plymouth to form the New England Confederation. In exploring the possibilities of union, the colonies turned to a federal solution. At the time of the revolution, the colonies were committed to a looser union under the Articles of Confederation. The present Constitution of the United States was approved by 12 of the 13 states on March 4, 1789 (Rhode Island, the lone holdout, would ratify the Constitution the following year). Thus, the basic outline of the division of government between the federal and the state governments that exists today was in place by this time (Elazar 1979).

However, the actual balance of power between levels of government would vary over the next two centuries and continues to evolve today. I will argue in later chapters that this constitutional evolution was fueled in part by a system of judicial institutions that were tied to changes in the political regime. Thus when political regimes that favored a stronger central government came to power, they would appoint like-minded justices. During the time these judges were on the Court, the tendency for the Court to favor the central government would increase. Yet, from the time of the ratification of the Constitution, there were both centralizing and decentralizing pressure arising from the federal system. Economic matters were seen as centralizing, and I will argue that questions of individual rights were seen as much less centralizing.

Confederal arrangements of a limited sort existed before the Revolution. In 1643, the Plymouth Colony, the Massachusetts Bay Colony, Connecticut, and New Haven

organized the New England Confederation as a league for mutual defense against Indian attacks. In 1696, William Penn unsuccessfully proposed a league of colonies composed of a royal commissioner and two representatives from each colony. In 1954, Benjamin Franklin developed a plan to provide for mutual defense against the Iroquois that included a congress made up of representatives of the states. However, this "Albany Plan" was never adopted (Zimmerman 1992).

Thus, unlike Europe, federal ideas had been implicit prior to the formation of the United States. Europe was faced with ideas of sovereignty that developed over a thousand years of nation building. In colonial America, ideas of shared sovereignty were available from the days of the earliest settlers. American Colonies were territorial republics from the first (Elazar, 1987, 131). A federal solution was implicit in the history of the thirteen colonies. Theories of parliamentary sovereignty used after 1765 to justify Parliament's attempts to legislate for the American colonies were not widely accepted or as well grounded as once supposed (Rackove, 1990, 2-3). The colonies had substantial prior experience with self-government. The authority of empire never penetrated very deeply into the American countryside. The ordinary affairs of the predominantly agrarian American society were largely administered by county courts and town meetings without interference from imperial dictates. The idea that each colony possessed a customary constitution that could not be unilaterally superseded by parliament was deeply rooted in the political history of each of the colonies (Rackove, 1990).

Colonial leaders came to the controversies of the pre-revolutionary decade with well-prepared arguments that their individual assemblies were fully competent and fully entitled to exercise legislative authority over their internal affairs. However, they also felt

that there were great affairs of state—war, foreign affairs, and trade—that were not, individually or collectively, within their competence. They repeatedly attempted to reconcile the preservation of substantial provincial autonomy with membership in a larger polity (Rackove, 1990, 3). In the later debates about the constitution, this balancing of the local versus the nation would be implicit and would result in a constitution that would contain features tending to aggregate power to the center and yet also to build in significant safeguards for local autonomy.

Thus, under the proposed articles, Congress would control everything relating to external affairs, and the states would retain full legislative powers over their internal affairs. Further, the Articles required the states to act as administrative agents, but gave the central government little power to force the states to enact policy. Yet, as Rackove notes (1990, 6), this failure to empower the federal government came less from any fear of central encroachment than from the exigencies of the time:

> It made more sense to think that the states, with their knowledge of local situations, would prove effective at mobilizing their respective populations for war than to imagine how one could possibly create a national administrative apparatus out of whole cloth in the midst of the struggle. The initial decision to rely on the states *was* the pragmatic choice (emphasis in original).

Yet while this system was pragmatic, it depended on the good will of the states for compliance with congressional policy. The Articles did not obligate the states to enact policy nor did they give the Congress the right to coerce the states' compliance. As a result, Congress had difficulty dealing with the exigencies of war and entered a time of "imbecility" after the conclusion of the peace. By the time the Articles of Confederation were finally ratified in 1781, a number of national leaders were already arguing that

Congress needed an independent source of revenue as well as some authority to coerce states into to carrying out their federal duties. State noncompliance with treaties and the failure of the Congress to regulate foreign trade made the deficiencies of the Articles apparent. Congress proposed a series of discrete amendments to the Articles to deal with these problems. However, these amendments were never able to garner the unanimous approval of the states needed to amend the Articles of Confederation (Rackove, 1990).

Since none of these proposals were passed, supporters of a more effective federal government adopted the risky strategy of calling a general convention to revise the Articles of Confederation in order to surmount the barrier of unanimous approval by the states. The theoretical questions of local power and national sovereignty that were a part of the pre-revolutionary period would again come to the fore in the debate over the revision of the Articles of Confederation. But, while the power of the central government was at issue, the responsibility for the protection of rights in the post-Declaration of Independence period was not in doubt. Immediately after independence, the responsibility for protecting rights fell to the states (Tarr and Katz 1996, xii).

James Madison raised these questions in his famous preparation for the Convention, and the delegates to the Philadelphia Convention largely accepted his analysis of the defects of the Articles of Confederation by (Rackove, 1990). The experience with the weakness of the federal government under the Articles led Madison to two basic assumptions. First, the union had to be allowed to govern the American people directly through ordinary acts of legislation and taxation, circumventing the necessity of working through the states. Second, the national government would need further authority to restrain the states from interfering with or frustrating the acts of the

federal government. These assumptions raised two questions about federalism. The first asked how two law-making bodies could legislate for one people. The second question assumed that there would be disagreement between these two bodies and sought a system that would allow these disputes to be resolved without resort to force. Much of the debate of 1787 involved resolving these two questions (Rackove, 1990, 6). The result of these debates would be a system that had both centralizing and decentralizing forces. As Elazar notes, the task of the political system was to maintain the division of powers in the face of national pressures toward centralization or local pressures toward disunion. The central purpose of the federal idea was to maintain the liberties of the people from the vitiation through the consolidation of power in the hands of people far removed from popular control (Elazar 1969, 8).

The debates of the convention did not adopt any proposals that would have made the federal government clearly pre-eminent in all spheres. The delegates rejected Madison's suggestion that the federal government be given a veto power over the actions of the states. While the delegates clearly envisioned a national government far more powerful than under the Articles of Confederation, this Constitution was not merely a one-way transfer of power from the states to the federal government. The distribution of power did not so much transfer power from one level to another as find independent sources of energy upon which the federal government could draw (Rackove, 1990). The states accepted a "diminutive" notion of sovereignty that placed them within the context of a larger political system. If disputes between states were to be resolved by a federal government, and the integrity of states was to be guaranteed by this same government, then the states would never have to exercise what was normally thought of as sovereign

power, the power of war and peace. Since states were ceding these traditionally sovereign powers to the federal government, the Constitution provided numerous checks to prevent the expansion of the power of the federal government through the possession of such great power.

In the process of ratification of the Constitution, the founders saw a need for more coordination on economic matters. Providing bulwarks against the central government infringing on personal liberties was also a central theme behind the ratification of the Constitution. The ratification debates, along with the early jurisprudence of the Supreme Court, support the notion that the pressures of economic unity would largely be centralizing while protection of individual rights would be directed against the federal governments rather than the state governments. The addition of a Bill of Rights at the insistence of the Anti-Federalists did not take power from the states, since it imposed restrictions only on the federal government (Tarr and Katz 1996).

The efficacy of a single market was exposited in the *Federalist Papers* as well as the ratification debates in several of the states. In *Federalist #7,* Alexander Hamilton, argued that the "competitions of commerce" between the several states would be grounds for continuing hostility between the states. He argued:

> Each state, or separate confederacy, would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions that would beget discontent.

The efficacy of common economic policy would be a frequent topic in the ratification debates in the several states (Rackove 1990). However, it can be said that the founders were acutely aware that interstate competition in economics must be restrained (Dye

1990, 27). The central government was needed as "referee" to avert this damaging competition between states (Dye 1990).

On the other hand, there was much more ambivalence regarding the federal government's power to protect rights. The fear of a strong but remote central government encroaching on individual rights was a central concern of the Constitutional Convention, particularly among the Anti-federalists (Yarbrough 1996). Unlike Montesquieu, the supporters of small republics did not seek to foster civic virtue and devotion to the common good. Rather, they were more concerned with maintaining state sovereignty in order to protect liberty. The Anti-Federalists were committed to minimal government as a key to protecting liberty (Yarbrough 1996, 58).

Controlling the central government was a main argument in favor of the Bill of Rights, and placing a Bill of Rights into the Constitution became a main object of the Anti-Federalists during the ratification debates. During the debate, the need for a Bill of Rights was justified by an exaggerated fear that the new central government "would be a monster above the states, and might enslave the people" (Zimmerman 1992). Many of the opponents of the Constitution based their opposition on the absence of a Bill of Rights to protect from the encroachment of the new central government. Anti-federalists demanded adoption of the Bill as precondition to ratification of the Constitution. During the Virginia Convention, delegates raised this issue and it became a question as to whether the Constitution would fail to be ratified because of the lack of a Bill of Rights (Morgan 1988, 131-136). However, the price of ratification in key states was the promise that the first item to be placed on the agenda by Congress would be a proposal for a Bill of Rights as an amendment to the Constitution (Zimmerman 1992, 27).

Thus, the Union was established with both centralizing and decentralizing pressures. These pressures had an almost immediate impact on the jurisprudence of the Supreme Court. Even the decisions of the "nationalist" Marshall Court reflect the dual pressures created by the federal bargain. Though, commonly viewed as nationalistic, the Marshall Court was much more respectful of state prerogatives in the area of individual rights. The Marshall Court's "nationalism" was apparent chiefly in economic matters. Early cases regarding economic regulation show a pattern of centralization that is not seen with regard to federal regulation of individual rights. The Court's first statement regarding national commerce power came in *Gibbons v. Ogden.*[11] In this case the New York legislature granted Robert Livingston and Robert Fulton a monopoly to operate steamboats in New York waters. Livingston assigned this right to Ogden. Gibbons, a former partner of Ogden, began operating two boats, which were licensed "vessels employed in the coastal trade" under federal law. Ogden obtained an injunction against Gibbons. The United States Supreme Court, in an opinion by Chief Justice Marshall, gave an expansive reading to the federal government's power to regulate commerce by accepting a broad definition of this power and giving the national legislature broad power over the field.

Contrast this opinion with an early opinion of the Marshall Court regarding the Bill of Rights, which views the Bill explicitly as a restriction on the federal government and not a limit on the several states. In effect, this early jurisprudence allowed the Court to reject challenges to state powers based on federal constitutional provisions. The landmark case during this period was *Barron v. Baltimore.*[12] Barron owned a wharf in the

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[11] *9 Wheat. 1, 6 L.Ed. 23 (1824)*

[12] *Barron v. The Mayor and City Council of Baltimore,* 7 Pet. 243, 8. L. Ed. 673 (1833).

Baltimore harbor that was ruined when the city diverted the flow of streams as part of a public works project and caused large amounts of sand to be deposited near Barron's Wharf. Barron sued under the 5th Amendment's provision prohibiting the taking of private property for "public use, without just compensation." The Marshall Court, given the opportunity to limit the legislative power of the states in relation to individual rights refused to do so. Marshall wrote:

> These amendments demanded security against the apprehended encroachments of the central government—not against those of the local governments.... These Amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.

Thus, the prevailing duality of the United States federal system of government was evident from the earliest days of the republic. Not only do the forms of government reflect this duality, but also the earliest decisions of the court, even during a substantially nationalistic period, reflect the countervailing pressures present in the system.

The United States federal system was designed with centralizing and decentralizing features. Arguably, even at the founding, the need for basic maintenance of a single market was the most centralizing feature of the republic. The protection of rights was directed against the federal government rather than the states. Since this time, particularly through the adoption of the 14th Amendment, the Bill of Rights would have increasing applicability to the states. However, the primary purpose for including the Bill of Rights into the Constitution was to protect against the encroachment of the federal government, and it therefore has decentralizing characteristics. I do not suggest that the federal government's actions in the field of rights will always be struck down. However, I will argue that when attempting to find a policy area that is less centralizing than

economics, the history and original intent of individual rights makes this area a logical place to look.

ii.) The European Union: A Brief History

> It is no longer a time for vain words, but for a bold constructive act... For peace to have a chance, there must first be a Europe....
>
> Robert Schuman, May 9, 1950, Paris

The bold, constructive act Schuman had in mind was placing the coal and steel production of Europe, and thereby the means for waging modern war, under common European control. To be sure, there were sound economic reasons for common control of coal and steel—overproduction had caused steel prices to drop sharply—but this was clearly a.secondary consideration. In light of the escalating cold war, there was a need to strengthen the western alliance. To some, this meant the rearming of Germany. So recently after the carnage of the Second World War, there was little enthusiasm for a powerful Germany. Thus, the question "What to do about Germany?" was an obsession for Schuman (Fontaine, 2000).

The German question would be intrinsically connected to the idea of a united Europe. It was clear that the Soviet Union would not allow Eastern European countries to enter into agreements with the west. However, if the West Europe was to be united, it could hardly do so without West Germany (Henig, 1997). According to Harold Macmillan:

> The most important motive behind the movement for European Integration is the need to attach Germany permanently to Western Europe, but in such a manner that she cannot dominate it...After all, we have fought two wars about this in one generation (cited in Henig, 1997, 6).

In short, this was the "German question."

To answer this question, Jean Monnet and group of diplomats began working on a plan for greater unity in Europe. Monnet was mainly concerned with international politics, believing that the current cold war was a consequence of the previous competition between the two largest powers in Europe—France and Germany. He felt that fostering unity in Europe would reduce these tensions and establish world peace with a real role played by a reborn, reconciled Europe (Fontaine, 2000). Thus, the lack of unity and competition between nations was seen as the cause of much destruction in Europe. Thus, from the outset, a "closer union" of European Nations was a goal.

However, Monnet had watched previous attempts at European Integration—such as the European Organisation for Economic Cooperation—remain largely powerless. Monnet believed that the introduction of a comprehensive institutional structure was doomed to failure. Because the war was so recent, and nationalist feelings were still running so high, it was too early to envisage wholesale transfers of sovereignty. Rather, success depended on limiting objectives to specific areas with a major psychological impact, and a joint decision-making mechanism that would gradually be given additional responsibilities (Fontaine, 2000).

Monnet's proposal was given to Schuman who in turn had it delivered to German Chancellor Adenauer in Bonn. Schuman simultaneously placed the proposal before his own cabinet in France and Chancellor Adenaur in Germany (Dinan 1999). Both the French and German governments backed the proposal, and backed by the support of these two governments, Schuman made his May 9, 1950 proposal to the rest of Europe. The proposal envisioned a Europe built through practical considerations that would create real

solidarity. The immediate practical goal was to place Franco-German production of coal and steel under a common high authority whose decisions would be enforceable.

Beginning in June of 1950, the original six members[13] of what was to become the European Coal and Steel Community met and began negotiations. In these negotiations, a Council of Ministers was added to represent the member states and to give assent in certain matters. A weak parliament and Court of Justice were to complete the basic institutional structure of the Community. The Treaty establishing the European Coal and Steel Community was signed on April 18, 1951. After ratification by the original six member states, the High Authority, chaired by Jean Monnet, first met in Luxembourg on August 10, 1952 (Fontaine, 2000).

Thus, European integration began with an attempt to centralize the production of coal and steel. The impetus was centralizing and the goals were for unification. Unlike the American model, which was much more comprehensive, the European polity had no decentralizing impetus. It needed none. Because its competence was so narrow, there were no other protections built in to protect national sovereignty. Rather than balancing the central power against the peripheral, the ECSC Treaty simply limited the power to a specific area. Within that limited area, the focus was centralizing.

By 1954, the six original members had begun to consider proposals for a new economic initiative that would complement the ECSC and would cover specific sectors of the economy including transport and other forms of energy. About the same time, Monnet was continuing his gradual sectoral approach to integration by developing a European Atomic Energy industry. In May 1955, the three Benelux countries set forth a proposal that encompassed sectoral expansion and initiatives to establish a common

[13] France, German, Italy, Belgium, Luxembourg, and the Netherlands

market. As a result of detailed negotiation, these proposals would result in the Treaties establishing the European Economic Community and the European Atomic Energy Community (Euratom). The Treaty Establishing a European Economic Community provided for a customs union, the free movement of capital and labor, fair competition and common policies in transport. It also gave the institutions the power to achieve a balance of economic development in the Community, to prohibit monopolies, and assist the poorer regions of Europe. The institutional development of this legal order, independent of the member states, whose acts would have a direct effect in those states, was major step in the integrative process.

The 1960's were a time of some stagnation on the institutional front. France, without whom the Treaty of Rome would have ever been established, began to take a more circumspect approach to integration (Henig, 1997). With the return of Charles De Gaulle, France began to assert its national interests. First, it rejected the entry of the United Kingdom into the European Union in the early sixties. Later, because of De Gaulle's insistence that the institutions of the Community remain subject to the mandate of the member states, France began its "empty chair" policy of failing to participate in Community institutions. As a result, while existing mandates could be pursued, further integration was clearly impossible. The assertion of national interest culminated in the Luxembourg Compromise, under which the spirit of qualified majority voting was subjected to a nation veto in matters of "very important interest" to the member states. For as long as De Gaulle was President, France would insist on the right of a veto, regardless of the underlying treaty provisions.

Yet while further integration stagnated in the 1960's, the Court of Justice began to construct the supremacy of European law. While this "constitutionalization" of the Treaty's was a radical departure from the tenets of international law, the Court of Justice successfully argued that this "new legal order in international law" flowed from the transfer of power to the European level in limited areas. In *Van Gend en Loos* (case 26/62), the main question was whether Article 12 of the Treaties was directly effective. If so, Article 12 was in conflict with an earlier Dutch law, and it should take precedence over this earlier law. The implication was clear, a national law could be subject to and potentially voided by the Treaty of Rome. Ruling that the law had direct effect, the Court of Justice addressed the issue of national sovereignty:

> ...the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within limited fields.

Thus, while the Treaty was sovereign, and superior to *prior* law, the question still remained as to whether the Treaty was superior to *subsequent* laws. Since the Treaty was put into effect by national enabling statutes and ratified by the member states, one could argue that *Van Gend en Loos* simply was a matter of a later national law, albeit international in character, overriding an earlier law. The Court would address the question of whether the member states were prevented from enacting later conflicting statutes two years after *Van Gend.*

In *Costa v. Enel* (case 6/64), a conflict arose between a later Italian statute nationalizing electricity and the Treaty. The Court held:

> The transfer, by member states, from their national orders in favour of the Community order of the rights and obligations arising from the Treaty, carries with it a clear limitation of their of their sovereign right upon which a

> subsequent unilateral law, incompatible with the aims of the Community, cannot prevail

Later, the Court would apply this rule not only to ordinary statutes and regulations, but also to national constitutional provisions as well.[14]

Thus, on the surface, there was little change in the level of integration on the institutional level. However, during this period the Court established a "new legal order." In effect, while the other institutions were stagnant, the Court was establishing a firm legal basis for the relationship between Europe and the member states. Within its sphere, Europe would be supreme, and the Court's decisions would overwhelmingly enhance the central government's power. This centralization flowed from the goals of the Treaties, and these goals, within their narrow policy competence, were centralizing. While the early jurisprudence of the United States Supreme Court reflected the dual pressures present in the system, the Court of Justice's early jurisprudence reflected the overwhelmingly centralizing pressures created by the Treaties.

The 1970's were a time of major changes in membership, but little was achieved in the policy areas of integration. While a customs union was achieved in the late 1960's, little substantial progress was in the areas of economic and monetary union. The real gains during this stagnant decade were the accession of the United Kingdom, Ireland and the Netherlands in 1973. This was achieved largely because of Charles De Gaulle leaving the French Presidency. This, and the increasing economic power of West Germany, caused France to see the United Kingdom as less of a threat to France and more of a counter weight to the West Germans (Stirk, 1999).

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[14] (case 11/70)

Again, like the 1960's perhaps the Court of Justice made the most significant movement toward integration. Under the Customs Union, tariffs and restrictions on imports were untenable, however, the question arose as to measures having the equivalent effect of quantitative restrictions. In 1974, in the *Procureur du Roi v. Dassonville* (case 8/74), the Court held:

> All trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.

By giving these national laws "equivalent effect," the Court was able accelerate free trade by eliminating fewer overt restrictions on trade.

In 1978, the Court would further the *Dassonville* by establishing the principle of "mutual recognition" in the case *Cassis de Dijon.*[15] Essentially, the doctrine of mutual recognition permitted products that were legally manufactured in one member state to be legally introduced and sold in another member state. As David Cameron (1992) notes, the Court thereby created a simple standard for resolving trade disputes that would have far-reaching consequences in the years ahead. Through this decision, Europe had a means of bypassing what would have been a nearly impossible task in the creation of an internal single market—that of harmonizing the many European Laws pertaining to goods, services, capital, and labor. The process of creating a single market was greatly accelerated once the Commission could simply use mutual recognition to codify the lowest common denominators in one domain after another. In addition, the Court set forth for itself the role of final arbiter in these disputes over national regulations (Cameron, 1992).

[15] *Rewe-Zentral AG v Bundesmonopolverwaltung fur Brantwein* (case 120/78)

In the 1960's and 1970's, Europe became larger, and much progress was made on the establishment of a customs union. Yet many of the goals of the Treaty of Rome, not to mention the ideals of Schuman and Monnet remained unfulfilled. The Court, however, was quite active. Unlike the 1960's and1970's—and spurred on by the *Cassis,* the 1980's were a time of both the enlargement of membership and an acceleration of integration. Because of *Cassis,* the goal of a single market was now realistic, and the 1980's would see the beginning of the European Union.

Jacques Delors would become President of the Commission, and would become synonymous with the Community from 1985-1995 (Henig, 1997). As discussed above, the movement to a single market remained a "pious aspiration" (Henig, 1997, 76). But in 1985 the Commission produced a White Paper on establishing a single market that was to form the major agenda when the European Council met in Milan in June of that year and took the crucial decisions that were to lead to the negotiation and signature of the Single European Act (SEA) as a result of an Intergovernmental conference held from September to January (Henig, 1997).

The conference resulted in an agreement that seemed to revitalize the spirit of Schuman and Monnet and to a degree to subordinate the nationalistic emphasis of De Gaulle. The main features of the SEA were: 1) an agreement to implement the single market by 1992, 2) the establishment of a basis for political cooperation, and 3) several institutional reforms. One of the main indications that the spirit of the original treaties would apply was the fact that nearly all the provisions relating to the implementation of the single market would occur by majority vote (Henig, 1997). Thus, the national veto

introduced by the Luxembourg Compromise would no longer be an impediment to the single market.

Between the SEA in 1986, and the Maastricht Treaty in 1992, the implementation of the single market became the focus of the European Communities and Jacques Delors became a major reason the initiative went forward. Under Delors leadership, the Commission drafted the over 300 regulations that were needed to implement the single market. One of the major issues was the economic gap between the richer and poorer nations, and the proposal for dealing with this issue required an increase in Europe's budget, an increase whose burden would fall chiefly on the larger member states. Under the leadership of German Chancellor Helmut Kohl, Germany agreed to the proposals and as a result, the implementation of the single market moved forward and the stage was set for the Treaty of European Union, more commonly known as the Maastricht treaty.

The member states decided at Maastricht to establish a European Union with four basic objectives. The first of these is the promotion of economic and social progress facilitated by economic and monetary Union. This can be viewed as an extension of the previous commitments of the Union. Because of both the national sovereignty and psychology, the Maastricht Treaty clauses on Economic and Monetary Union may represent the biggest single leap forward for European Integration since the signature of the Treaty of Paris. This resulted in the full implementation of the transfer authority over virtually all aspects of economic and monetary policy to Europe (Henig, 1997, 89).

The latter three goals signify a widening of the Union, and including the implementation of a common foreign and security policy, co-operation in justice and home affairs, and the establishment of joint citizenship. Yet few of these goals have been

translated into policy and this potential "widening" has not yet had any effect on the jurisprudence of the Court of Justice. The reason for this is that with little policy output, there have been no cases reaching the court raising these issues, and there is no indication that they will have a major impact on the Court's jurisprudence in the future. Thus, the focus of the cases on the Court's docket has been, and remains, largely cases that have centralizing pressures.

In addition, the Treaty established the doctrine of subsidiarity. The doctrine was contained in a new article that states:

> In areas which do not fall within the exclusive competence, the Community shall take action, in accordance with the principal of subsidiarity, only if and in so far as the objectives of the proposed actions cannot be sufficiently achieved by the member states and can...be better achieved by the Community.

Although the there are claims, chiefly by the British, that this doctrine has reversed the onward march of integration, there is little reason to believe that this doctrine will have much practical impact. New powers require treaty amendments that necessitate unanimity or at least consensus, and therefore the doctrine of subsidiarity adds little other than rhetoric at the time of controversy (Henig, 1997, 87-88).

The treaty also enhanced the powers of Parliament, most significantly by providing the power over the appointment of the Commission. This has resulted in an increase of Parliament's institutional stature as recent events show, most notably the fall of the Santer Commission and the appointment of the Prodi Commission. In a number of areas, Parliament has co-equal powers with the Council. In areas including the internal market, free movement of persons, and consumer protection, both the approval of Parliament and the Council are required for legislation.

While Europe's power has expanded at the expense of the member states, this expansion has taken place largely in the economic sphere. Europe is broader than the original ECSC. However, much of Europe's "new" policy competence is related to the maintenance of a single market. Thus, this broader European policy competence may result in the presence of some lessoning of centralizing pressures; the overall tendency will still be toward overwhelmingly toward centralization. While attempts have been made to expand authority in other areas, the vast majority of cases before the Court of Justice still are related to the maintenance of the common market.

iv.) Courts in the United States and European Union

The pressures created by the federal systems will result in very different patterns of behavior in the Court of Justice of the European Communities. These pressures will almost always favor the European Union in disputes with the member states before the Court of Justice. In the United States, the policy area in question will largely determine who has the advantage in cases. The United States system is based on a balanced view of federalism. This balanced view creates both centralizing and decentralizing pressures on the Supreme Court. Generally, in economic matters, the Court can be expected to rule in favor of centralization and against local interference with commerce. At the time of the founding, economic barriers inhibited trade, and, in order to tear down these barriers, the founders provided strong commerce powers to the federal government. On the other hand, the founders had an innate fear of the centralization of power in the hands of a few, and long experience in relatively autonomous local governance. As a result, they left peripheral government with many powers and created strong protections for individual rights against the central government. Thus, as policy areas move away from the

maintenance of a single market, and particularly with regard to the maintenance of individual rights, the court will face less pressure to centralize and will be more likely to rule in favor of the state governments than in cases dealing with the maintenance of a single market.

In Europe, the ideas and the pressures are different. Faced with the aftermath of the two World Wars, the emphasis was mainly one of increasing concentration of power. From a philosophical standpoint, the founders of the European Union used intergovernmental relations to as a tool of greater centralization in an attempt to consolidate power. Since the political realities militated against any broad-based federal system, a more narrowly based structure was necessary. Thus, a sectoral approach was employed and economic integration was the pre-eminent goal. Since both the emphasis and subject matter of the European Union are inherently centralizing in nature, within the narrow scope of the European Union all the pressures are centralizing. Since the member states retain a great amount of sovereignty outside the area of economic integration, there was less need to "protect" the peripheral governments than in the American case. Therefore, unlike the American case, within its sphere of competence there is no check on the centralizing incentives created by the European Union. Thus, the Court of Justice should not face any great pressures to decentralize, and one would expect the decisions of the Court of Justice to favor the center routinely. Since all policy matters are closely tied to economic integration, we would expect all policy areas to share a similar centralizing set of incentives. Thus, the jurisprudence of the Court of Justice should remain fairly consistent across all policy areas.

IV. Conclusion: Cases and Courts

The type of cases that any high court hears may vary for a variety of reasons. First, the Court may or may not control its own docket. If a court controls its own docket, then it can exclude the unimportant or trivial questions. Individual decisions of a court with docket control are more likely to have a tangible impact on government power than cases heard by a court without docket control. This is an important factor to note for anyone attempting a statistical comparison across courts.

Further, the type of government system will influence the type of case that comes before a court. Federal systems have a class of cases concerning disputes over the distribution of power between central and peripheral governments that are not present in unitary systems. Different distributions of power between levels of government will create different pressures on courts, depending on the nature and purpose of the federal system. Where the central government's power is largely confined to the economic sphere such as the European Union, then only cases regarding economic regulation will come before the Court. These cases tend to have a logic that favors the central government in disputes with the peripheral governments before high courts. In systems such as the United States that encompass both political and economic rights, cases that reach the court will have a variety of pressures, some of which will favor the central government and some of which will favor the peripheral government. In the main cases, the Court of Justice will almost always favor the central government. Before the United States Supreme Court, the winner and losers on any given case will depend on the policy area involved.

Chapter 3
The Effect of Judicial Institutions

I. Introduction: Judicial Institutions and the Impact of Political Regimes

Brace and Hall (1993, 921) note that to ignore the effects of internal or external institutional rules and organizational structures on individual judicial decisions is to present a very incomplete picture of the process of judicial decision-making. Simply put, judicial institutions matter. In this chapter, I will discuss how institutional rules affect the winners and losers in disputes between central and peripheral governments that come before high courts in federal and federal like systems. Specifically, I will examine the institutional rules pertaining to the selection of judges, the rules under which they serve (tenure issues), and the rules by which a court reaches a decision. I will first examine these institutional roles in a more general abstract manner, and then I will discuss how these rules work in the two cases at hand.

The goal of this chapter is to argue that differences in these rules result in differences in who wins and who loses in cases before high courts. As I will explain below, most of these rules relate to whether either the central government or peripheral government wins consistently over time. If a political regime can appoint judges who will pursue their policy preferences, and these judges face no deterrence to the pursuit of the appointing regime's policy preferences, then we would expect some variance in the levels of success over time.

The reason for this is simple: political regimes change. As political regimes change, they can appoint new judges with a differing political philosophy than the previous regime. Presumably, these judges would attempt to change the legal landscape to reflect the policy preferences of the appointing regime. Thus, in systems where the

political regime is unconstrained in the appointment of judges, judges with drastically different perspectives on who should win in disputes between the central and peripheral governments may serve on the bench. On any court, as the judicial attitudes toward central-peripheral governmental relations change over time, we would expect the outcome of these disputes to vary correspondingly with the changes in attitudes.

An example is the American case. The Justices that are appointed by Democratic presidents typically favor an expanded role for the federal government. Those appointed by the Republican presidents tend to favor a smaller role for the federal government. As I will argue below, when there has been a shift from a court dominated by Democratic nominees to one dominated by a Republican majority, we would expect less success for the federal government and more for the states.

Whether either the central or peripheral governments will win consistently over time will depend on the degree to which judicial selection is tied to a current regime causing the choices to reflect the policy goals of the current regime and whether these politically faithful judges, once on the court, are unconstrained in their pursuit of policy preferences by tenure or decision-making rules. If the appointment of a judge is tied closely to the current political regime and this judge, once appointed, can pursue policy in an unconstrained manner, then we would expect shifts in who wins and who loses as the changes in court personnel reflect change in the political philosophy of the current regime from one of favoring the increase of the central government's power to one that favors a retrenchment of this power.

However, if the influence of the political regime is removed from the appointment process and the judges are constrained by the institutional rules in behavior once on the

court, then the conditions will exist for some consistency in success before the court. I will argue that the main factors that influence the ability of a political regime to appoint ideologically faithful policy seekers are 1) the manner in which judges are selected, 2) the conditions under which they serve and 3) the bargaining rules under which court decisions are reached.

Judicial Selection systems should matter. Where a political regime is relatively free to appoint its choice for judge, we would expect them to appoint a judge sharing its basic philosophy and goals. There is no reason to expect that the political regime would appoint someone who does not share its policy preferences, and there is ample research on the American supports the role of partisan affiliation and ideology as the main explanatory variables for a President's choice of justice (see, e.g. Segal, Cameron, and Cover 1992, Segal 1987, Abraham, 1992).

Also, a key to whether a judge will be free to pursue policy preferences will be whether he or she is insulated from outside pressures. As Segal and Spaeth (1994) note, one of the reasons the attitudinal model seems to fit the United States Supreme Court is that little direct outside pressure can be brought on judges. The American justices are free from threats to their judicial position by the pressure of external actors and have no further career goals that will be damaged by their pursuit of policy. On the other hand, if the pursuit of politics will result in a judge being removed or not reappointed to the bench, then we might well expect them to modify their behavior to please the external actors that have some control over their professional destiny.

Finally, judges on high courts do not act alone. A judge will be faced with the need to achieve at least a majority vote, and some courts have rules that require

unanimous voting. The harder it is to reach a decision, the more compromise will necessary on the part of individual judges. As I will discuss below, a number of factors determine how difficult it will be to reach a decision in any given case.

II. Judicial Institutions: An Overview of Structures and Incentives

A) Selecting Judges

The selection system determines who selects the judges and what type of individual is selected for the bench. Judges are a subset of the population as a whole, and no selection system results in an accurate reflection of this population (Baum 1997, 144-145). Thus, the type of individual, and the types of pressures and incentives that individual will face vary with selection systems. In addition, various systems will bring judges with different backgrounds and, as a result, different role conceptions to the bench. If the political regime is free to select a judge based solely on fidelity to its policy preferences, the type of judge who will be selected will be different than if these policy makers are removed from the process of appointment, or if their choice is constrained by actors with different political perspectives.

Judges of the high court are selected by a variety of methods. Some are essentially appointed by the current political regime. Several factors determine the type of judge that can be selected. First is the question of "who selects?" The current political regime is not always responsible for selecting judges, and the selection of judges may be removed entirely from the central government's purview. Second, even if the regime is able to select a judge for appointment, they may not be entirely free to select their ideal choice. The regime may face rules that limit the pool of candidates by placing certain requirements on all candidates for the bench. These requirements may relate to

either qualifications or demographics. Finally, and most importantly, a regime may be constrained by the need to consider the opinions of other actors who may have a veto over the selection of judges.

1) Who Selects?

Not all systems involve the current national political regimes. Justices can be appointed without the involvement of the political regime. There are several methods. First, judges may be appointed on merit. Under a true merit system, judges are selected on a neutral basis, such as a competitive exam. The candidate who scores highest and fulfills the other requirements of the office is appointed to the bench. Many lower courts, most notably in France, use a competitive merit selection process. However, no high court is selected in this manner.[1]

The selection may be distributed away from the center and given in whole or part to sub-governments. In the EU, the member states nominate judges, who are then approved by the remaining member states in the Council justice ministers. As I will argue at some length below, this makes the Court of Justice resistant to the effects of cohort change on the court's jurisprudence. Therefore, I predict that we will see few reversals of precedent over time. Likewise, in the German Federal Constitutional Court, the Bundestag selects half of the Court, and the Bundesrat—giving the Lander governments a role in the selection process—selects the other half.

Other nations separate the selection of judges, giving the different houses of parliament or different branches of government, and even the courts themselves, a role in the selection process. An example of this type of arrangement may be found in Austria. In 14-member Austrian Constitutional Court, the President of the State, upon

recommendation of the government appoints eight judges, while the National Council and the Federal Council appoint three each. France's semi-presidential system is reflected in its selection process. In addition to the ex-presidents of the Republic who may serve (though none have) on the French Constitutional Council, nine justices are appointed, three each, by the President of the Republic, the National Assembly, and the Senate. In Italy and Portugal, the Courts themselves are allowed a partial role in selecting judges.

2) Restraining the Regime

In most high courts the judges are selected, at least in part, by the political regime in power. However, in most cases the political regime is not an entirely free actor in this matter. The two most common ways of limiting the political regime's options are through limiting the pool of potential candidates by placing some standard or limit on the types of judge that can be appointed, or by creating veto points in the appointment process, causing the political regime to moderate their choice to accommodate other actors. In both instances, the limits on the regime can serve to moderate the judicial selection process, by either causing the political regime to pick a judge that will fulfill all the requirement of office, or causing the regime to select a judge that will be acceptable to the other players in the game.

a.) Limiting the Pool

In the case of the United States, there are fewer requirements for potential Supreme Court justices than there are for either house of Congress or the presidency. In most other democracies, there are at some requirements regarding education. In addition to the "professional" requirements, many political regimes, particularly in federal or

highly diverse societies, bring either a territorial, ethnic or religious cleavage into account when selecting judges. Polities that exist in consocial or federal backgrounds often seek to accommodate the forces present in system in selecting a central high court. The reason for this is logical and apparent; minorities, or other insular groups who have carved out rights in the constitutional order, would not be willing to have the court responsible for defining these minority group rights to consist entirely of the members of the majority of the society. For example, the twelve-member Belgian Court reflects the ethnic balance between the Flemish and Walloons. On the Belgian Court, six justices are Walloons, while the other six are Flemish. Thus, the qualifications and characteristics of the judges that are required by the laws and the constitutions of their nations may limit judicial selection and cause the regime to pick judges on characteristics other than political fidelity.

In addition to these formal requirements for the selection of judges, there may be informal limits placed on the government. Unsurprisingly to students of European politics, Italy was a fertile ground for informal political deals that restricted the selection of judges by the government. Italy's multi-party coalition governments have been the source of these informal side deals. When the Italian Constitutional Court was created in 1955, it took several years to staff the Court because of political infighting. Finally, an agreement was brokered that divided the seats on the court between the coalition members, and this system of patronage-based appointments continued until the downfall of the Christian Democrats in the scandals of 1992 and their aftermath (De Franciscis, 1992). Thus, while formal rules play an important part in limiting a political regime's ability to select judges, informal rules may also play a role as well. In the case of Italy,

informal rules and norms have, on occasion, forced the majority partners to acquiesce in the appointment of judges from parties opposed to their political agenda, severely limiting the majority party's ability to influence policy from the judiciary.

Perhaps the largest hurdle the political regime must overcome in selecting judges with fidelity to their preferred policies is the approval of other actors. Some selection systems leave the selection entirely to the political regime. Other systems allow parties outside the governing regime some say in the appointment process. This is perhaps the most common method of restraining the political regime, but the relative strength of the other actors varies greatly across systems, and, depending on the particular partisan configurations, may vary considerably even within a single system across different time periods. Thus, in some systems, the political regime is relatively free to appoint judges. In other systems, other actors can effectively block an appointment. In the latter situation, the political regime can be expected to moderate its choices to appease those actors that can block an appointment, and this may constrain their ability to choose judges solely on the basis of fidelity to the political regime's policy preferences.

Thus, the more individuals or groups of individuals who are capable of blocking a judicial selection, and the more diverse their views regarding the desirable characteristics of judicial appointees, the more a political regime will be forced to constrain its choices. For example, if the political executive chooses a judge and, effectively, this choice determines the selection, then range of potential candidates is only limited by the desires of the political executive. If, as in the case of a majority government in parliament, the preferences of the executive and legislature are more or less equivalent, then there will no

significant change from the candidates that would be acceptable to a political executive alone.

The situation changes under conditions of divided or coalition government. In a situation where the political executive is faced with an opposition majority that can block an appointment, then the more chance the political regime will have to compromise its choices. Also, the range of the acceptable candidates will shrink as the distance between parties increase. If one factors in a number of actors who can block an appointment, and if there is greater divergence in policy preferences between the regime and these other actors, one can expect the judges selected to be less overtly ideological than in systems where the selection of judges is by an unconstrained actor.

Obviously then, a prime minister with a majority or narrowly based coalition would face the fewest obstacles in choosing judges. Several European nations leave some or all of the their judicial selections within the unfettered purview of the head of government. With the presence of coalitions, this choice may be limited by side deals between partners, since agreement of all parties in coalition government may be necessary in order to approve a nomination. Simply put, a prime minister presiding over a majority government will not have to take into account the opinions of other parties in order to appoint a judge. A prime minister with coalition partners faces the prospect of having to moderate his or her choice in order to accommodate the other parties in the government.

Presidential systems, on the other hand, create a number of different institutional structures that can impinge on a president's ability to appoint judges. With the president elected separately from the legislature, and his tenure in office not dependent on winning

a majority of votes in the legislature, the success of the executive and legislature are not closely tied together. This allows parties to encompass a broader spectrum of political views and requires less discipline from rank and file members. Thus, even when both houses and the presidency are in the same hands, the President may have a more difficult time in appointing judges than a prime minister in a majority system. Of course, when there is divided government, and actors from another political party can block the president's choice, the president faces a higher hurdle in the nominating process.

Thus, in parliamentary systems we see the least potential for constraint on a regime, though coalition governments may complicate matters. However, presidential systems will always be more constrained than parliamentary systems with a clear majority. The reason is the nature of parties in a presidential system. Regardless of the system, in order to understand the type of judge selected and the reasons for this selection, one must understand the difficulties a regime faces in appointing a judge to the bench.

B.) Tenure Rules

Tenure is another important factor in determining how judges will act. Segal and Spaeth (1994) note that lifetime tenure and the lack of further career goals leave judges free to pursue their policy preferences. Conversely, I argue that institutional structures which fail to protect and insulate judges from outside pressure may result in the judges being less likely to pursue policy preferences, especially if doing so might result in their removal or failure to be reappointed to the bench or to otherwise impair their career prospects. Judges with life tenure will be much more likely to believe they are free to pursue their own policy goals than those who face reappointment or reelection. Also,

some courts may not be seen as terminal positions, and judges on these courts may have further career goals. In a case where tenure is for a set term of years and non-renewable, then justices may have career goals beyond the Court, and their behavior while on the Court may be moderated in light of these future career goals.

Generally, if a judge's future career depends on others, then the judge may be pressured to modify his or her behavior in order to accommodate factors other than ideology. On the other hand, if judges have no further career goals, and they are insulated from threats to their tenure on the bench, then little external pressure can be brought to bear on them to constrain the pursuit of their policy preferences. In general, a secure judge is more likely to engage in an unfettered pursuit of policy than an insecure judge. The effect of shifts in political regimes and therefore changes in outcomes before courts will be most apparent when the judges picked by the regime are not constrained by outside pressures from pursuing policy preferences.

If a judge has a lifetime appointment and the appointment to the bench is considered a capstone to a judicial career, then a judge is not likely to be faced with any disincentives from the pursuit of policy. Faced with little or no threat for removal from office, and no further career ambitions, all other things being equal, there will be few constraints on a judge that will prevent the pursuit of personal policy preferences. If a judge is appointed by the political regime, and insulated from career pressures, we would generally expect this judge to generally pursue policy preferences of the regime.

Often judges serve for a set term in office and then faces reappointment. Thus, a judge's reappointment may be based on others' assessment of how he or she performed in office. Judges can be expected to be cognizant to some degree of these expectations.

Rather than pursuing personal policy preferences, these judges may pursue a strategy that will ensure continued judicial employment. Thus, one must examine the process of reappointment in each system to decide whether the politics of reappointment will affect the performance of judges while in office.

Judges who serve life terms or the functional equivalent will be insulated from pressure to moderate their pursuit of policy. Judges who are appointed for a single term may, depending on their future career goals, have to moderate their pursuit of policy to some degree. Potentially, the desire for reappointment and the presence of future career goals will have a constraining effect on judicial behavior.

2.) Removal

The first potential limit on judges is removal. In most cases, judges are fairly well insulated from outright removal on account of the types of decisions they make. Typically, judges do not serve "at will" and can only be removed for "cause." Typically this requires malfeasance, if not outright criminal conduct, on the part of the judge. Still, in some cases removal is more difficult than in others. In the United States, for example, judges must be "impeached" by a vote of the majority of the House of Representatives and tried and convicted by a two-thirds majority vote of the Senate. In the case of the Supreme Court of the United States, no sitting justice has ever been removed by impeachment. In fact, only four federal judges of any level court have been removed since the ratification of the Constitution. In other courts, though the standards are still high, removal is less cumbersome.

Often, a judge's colleagues are responsible for his or her removal. In the case of the Court of Justice, a judge who is no longer fulfilling his or her duties may be removed

by a unanimous vote of the remaining judges of the Court of Justice. Judges on the German Constitutional Court may also be dismissed by a plenary session of the Court for "unfitness for service" or criminal sentence of six months or longer. Spain also requires a similar process. Unlike the United States, the removal in other countries rarely involves either the parliament or executive. In these cases, discipline of the judiciary is left to the judiciary.

C. Bargaining Rules

Another constraint comes from the fact that no judge serves alone. Simply put, how do courts reach decisions? Particularly important is the question of how difficult it is to reach a decision. Where majorities are more difficult to establish, justices will be forced to accommodate other members of the court and will be less free to pursue their own policy preferences (Wahlbeck, Spriggs et al. 1998). Thus, even though a judge has a preferred policy position, he or she may not be able to form a majority coalition around that preferred position and may have to accommodate other members by accepting a less than optimum position in order to reach a consensus. Rules of unanimity, the presence of dissents and the degree of ideological fragmentation on the Court will all tend to determine the difficulty of reaching a decision on any given court.

If judges have to moderate their choices, then we would expect stability in outcomes over time. The stability results because, if decision-making is difficult, then it should be particularly difficult to affect changes in outcomes. If we take a hypothetical 5-person court with a stable 3-2 conservative majority, a liberal regime appointing a replacement for one conservative judge could change the entire partisan balance of the

court. In a situation where the Court is large and requires unanimous decisions, then the addition of one judge is not likely to have a great effect on the jurisprudence of the court. Thus, the impact of the appointment of any single judge in large courts, particularly those with unanimous voting rules, will not have a great impact. On our hypothetical court, it would take the removal of all judges of the conservative majority before a liberal regime could have the unanimity needed in order for a judge to effectively pursue policy. Absent long-term drastic political shifts, a large court with a high voting threshold necessary to reach a decision will be a court which requires its judges to compromise. This need to compromise will generally result in stability over time in outcomes before a court.

Individual votes count for little, rather a judge must be joined by at least a majority of the members of the court, and in some cases all of the other members of the court. A judge's strategy will be determined by the particular institutional structures he or she faces. Some courts will have structures that allow judges to more easily pursue preferred policy by facilitating the building of coalitions, while other types of structures will constrain judges, forcing them to compromise in order to reach a decision that is at least acceptable to all judges on the court. No judge who serves on a panel with other judges is a completely free actor. However, I will argue that the degree of constraint on individual judges varies and can affect outcomes of cases. The factors that matter most are the size of the court, the range of ideologies on the court, and the voting rules.

These factors will determine the acceptable range of possible decisions by determining the majority needed to reach a decision. Generally, judges will be most unconstrained in a court that is small in size, in which the judges share a fairly narrow range of ideologies, and where only a simple majority is necessary to reach a decision.

a) Size and Ideological Range

The size of a court and the ideological range of its members will help determine how difficult it is for a court to reach a decision. All other things being equal, the smaller the necessary majority, the easier it will be to reach a decision. Second, the ideological range justices of justices will also be important. Judges on courts with a highly fragmented range of ideological beliefs will have more difficulty pursuing policy than judges on a court where the ideological makeup is more homogeneous and stable across issues. These issues are somewhat intertwined. A judge on a large court in which the judges share similar outlooks would not necessarily be less constrained than on a small court with highly fragmented ideologies. Generally, when the size of the court increases, there is a greater chance that more divergent points of view will have to be accommodated than on a smaller court.

Generally, the larger the Court, the more difficult it will be to reach a decision. This is fairly obvious, since the fewer the judges on a court the fewer the number of individuals that will have to agree to reach a decision. If there are large numbers of diverse opinions that must be accommodated in reaching a majority decision, then there will be a smaller range of potential decisions that will be acceptable to all of the necessary parties. On a large court there are potentially more preferences that must be accommodated, and the potential for the necessity of compromise on the part of any individual judge is increased. Simply put, in any group decision, the necessity to bring more parties into the agreement may necessitate more compromise and lessen the ability of any single judge to be a free actor.

However, the size is only one factor. Another factor is how fragmented the coalitions are and how stable these coalitions are over time. Hypothetically, one could have a five-member court with a bipolar distribution of ideologies. Suppose three members of a court always vote with a consistently conservative ideology and two judges vote consistently with a liberal ideology. If a simple majority makes the decisions, then the conservative majority would be relatively unconstrained, at least by minimum majority voting rules. In this case, the conservative majority would be relatively free to pursue their policy preferences.

Studies of coalitions show that the largest partner in a legislative coalition will seek the smallest number of possible partners (Riker 1962) and will choose partners that are the closest in ideology (Axelrod 1984). The rationale for this is clear. The smaller the number of coalition partners, the fewer compromises will have to be made. The closer these partners are in ideology, the easier it will be for the partners to agree on a policy closer their preferred position. What happens when judges cannot readily find sufficient like-minded coalition partners? I argue the situation will resemble that which is found in highly fragmented coalitions.

In highly fragmented coalitions, judges will not risk isolation by continuing to pursue their policy preferences if there is little chance for their preferred policy to be adopted. In highly fragmented coalitions, there may be little chance that any judge can successfully pursue his or her policy preferences with any likelihood of regular success. Thus, cooperation among the members of the court will be essential to avoid gridlock. As I will discuss in the case of the ECJ below, where the court has little chance to avoid making a decision, the need to avoid gridlock becomes even more important.

What behavior is to be expected then of judges in highly fragmented courts? Heisler and Kvavik (1974) argue that when members of coalitions face a situation where the chances of successfully implementing their preferred policy choices are small, they will tend to moderate their demands. The reason is that, in the long run, it is better to remain part of the bargaining process than to be isolated as a result of being seen as intransigent. Partners in highly fragmented coalitions can be expected to be accommodating in order to retain influence in the decision-making process. I suggest that the dynamic in a highly fragmented court is the same as in a highly fragmented coalition. Judges will moderate their preferences to be included in the decision making process. There is evidence that judges do in fact compromise from their ideal positions in reaching decisions (Epstein and Knight, 1999; Wahlbeck, Spriggs et al. 1998). My addition to this theory is to propose that a greater degree of compromise will be necessary on large highly fragmented courts. Greater compromise will also be necessary where the voting rules require unanimity rather than a simple majority.

b) Voting Rules

Voting rules compound the issues raised by court size and ideological fragmentation. Unanimous voting rules create a different dynamic than simple majority voting rules. In reaching a unanimous decision, each judge has a potential veto over the decision of the court. Thus, as with larger and more fragmented courts, a wider range of opinions must be accommodated in order for a court to reach a decision in a case under unanimity rules than where a simple majority is all that is needed. As in the case of a large court, unanimity rules tend to narrow the range of potential decisions. Since there are fewer acceptable decisions, a court is faced with the option of either gridlock or

compromise. I expect, particularly in cases where a court has few options to avoid or defer making a decision in a case, the unanimity rules will result in compromise.

Dennis Mueller (1989) discusses the problem of unanimous voting rules by using a simple example of whether smoking will be allowed on the train.[2] In Mueller's example, he supposes that the train will not be allowed to leave the station until the riders have made a decision on whether smoking will permitted on the train. If the decision were made between the choices of a smoking train or a non-smoking train, the potential would exist for the type of situation that that critics of unanimity rules fear most, an impasse. Out of this impasse, the minority might even be able to force the majority to capitulate if the benefit from continuing the trip was higher than the cost associated with losing on the smoking decision. In these cases where there is a prospect of an impasse, majority rule seems a better alternative than unanimity.

Yet, as Mueller notes, this position assumes that compromise is not possible. Where mutually beneficial alternatives are possible, then the situation is different and the chance of impasse is reduced and the ability to compromise is enhanced. For example, suppose the decision was not confined to a single car, but made by the riders of the entire train. Under majority rules, smoking would be permitted or prohibited over the entire train. However, if the unanimity rule were employed, then the riders would be forced to explore other alternatives to and find a positive sum solution to the problem. In this situation, a proposal to allow smoking to be permitted in some cars and prohibited in other cars might easily emerge as a compromise and win unanimous approval over the train remaining halted. Thus, while the majority might be somewhat inconvenienced by not having the entire train from which to choose their seat, the minority would be much

better off. Both groups would be better off than if the train remained stopped. As Mueller concludes that an impartial observer might easily prefer the compromise forced on the group by the unanimity rule.

The situation with high courts arguably resembles the latter situation. Compromise and bargaining have been observed as common behavior in courts (Epstein and Knight 1998). Thus, rarely will a court be faced with the situation where the choices it faces are dichotomous and zero sum. Yet Mueller's example does not fully capture the phenomena of court. Mueller's train riders are concerned only with a single transaction. Courts, on the other hand, are involved in iterative games. The judges on any given court will have to engage in repetitive bargaining. Intransigence in any one case might be punished in future cases. Thus, the cost of pursuing policy unsuccessfully may not only be the loss in that particular case but also loss of credibility as a partner in the decision-making process in the future. Thus, as Heisler and Kvavik note, the desire to be included in the decision process may override the desire to pursue policy in any one instance.

Axelrod (1984) has argued that that where neither party can gain an advantage through self-seeking behavior, then a tacit form of cooperation may emerge. He uses the example of "live and let live" behavior of troops on the Western Front in World War I. In "quiet" sectors, there was no incentive for troops to fire upon one another, as this would only result in retaliation from the other side. Typically, tacit agreements to leave each other alone would result. In essence, tacit cooperation results when neither side could see an advantage in acting unilaterally. I believe that in highly fragmented courts, a similar, albeit less literal, form of "live and let live" arises.

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[2] As Mueller notes, Barry (1965) and Rae (1975) used similar examples.

Policy seeking judges in highly fragmented courts with high decision thresholds such as unanimous voting rules are essentially in a no-win situation. Unable to count on any assuredness that they will be able to maintain winning coalitions over time, the individual judges will not typically attempt to pursue personal policy goals. Rather, the important goal over time is to remain an influential member of the court and not isolate oneself from one's colleagues and the decision making process, as Heilser and Kvavik suggest will be the case in fragmented coalitions. From this "no win" situation, I believe a "no man's land" form of cooperation will evolve. Since judges realize that policy seeking is fruitless, they will tacitly agree to forgo such behavior. Instead, they will work to build consensus around a decision that will be acceptable to the broadest possible coalition and prevent individual members from being retaliated against.

This would also be true in situations where unanimity is not necessarily required, but where dissents are prohibited. Dissents allow a public outlet for judges to voice their disagreement publicly. This may be a goal in and of itself, as judges can use dissent to put their views on the political agenda or undermine the legitimacy of the majority's holdings. Where dissents are not permitted, judges run the risk of being voted down in private and, over time, being excluded from the decision-making process.

Thus, a judge will be least constrained when on a court with a smaller number of judges who have a fairly narrow and stable ideological range and a simple majority can reach a decision. The larger the range of ideologies, and the larger the number of ideologies that must be accounted for in reaching a decision (either through size or voting rules), the more difficult it will be for a particular judge to pursue personal policy

preferences. In situations of high fragmentation and high decision thresholds, a judge will be constrained from pursuing policy by the need to compromise.

Of course, there is another obvious factor that relates to voting rules and size of a court. On a smaller court, the appointment of one judge should, all other things being equal, have a greater potential impact than the appointment of a single judge on a large court. If we take our hypothetical 5-person court with a stable 3-2 conservative majority, a liberal regime appointing a replacement for one conservative judge could change the entire partisan balance of the court. In a situation where the Court is large and requires unanimous decisions, then the addition of one judge is not likely to have a great effect on the jurisprudence of the court.

III. The Constrained Court

How then do differences in these institutions affect winners and losers before a high court? If a political regime is free to choose justices and these justices are free to pursue their policy preferences, then we would expect variance in the level of success in central-peripheral disputes over time. An unconstrained court of this type would be viewed as a virtual extension of the political regime. The regime would be free to appoint the judges of their choice, and these judges would be free from outside pressures because of life tenure and high standards for removal. Judges would face simple majority voting rules, minimizing the need for compromise, and maximizing the potential for a smaller number of appointments to cause a shift in the jurisprudence of a court.

On the other hand, institutional rules may greatly constrain the individual pursuit of policy by judges. A constrained court would see a lessened influence of the political regime and judges who must compromise. Regarding judicial selection, the regime would

be removed entirely from the selection process and judges would be appointed without reference to policy preference. Once on the bench, judge would face reappointment. If the reappointment is divorced from the political process in the same manner as the initial selection, then judges will not see the pursuit of policy as winning strategy for reappointment. Finally, a constrained court is an ideologically fragmented court. When judges are forced to compromise to make decisions, they will not be readily able to pursue individual policy goals. Fragmentation coupled with a high threshold for reaching a decision, such as unanimous voting rules and lack of dissent, will make consensus building an essential component of the decision making process of this court.

Comparing Unconstrained and Constrained Courts

	Unconstrained Court	**Constrained Court**
Selection	Tied to current political regime with few or no impediments to selecting ideologically faithful policy seekers	Current political regime excluded or highly constrained from appointing ideologically faithful policy seekers
Tenure	Life or equivalent, terminal position	Reappointment, career goals
Decision-making rules	Low fragmentation, low decision threshold (i.e. simple majority)	High fragmentation, high decision threshold (i.e. unanimous or super-majority rules

In an unconstrained court we would expect a change in jurisprudence over time as a cohort change takes place on the court and ideologically faithful judges generally pursue the policy preferences of the regime that appointed them. On a constrained court we would not expect cohort change to have an effect on the jurisprudence of the Court. As I will argue below, a Justice of the United States Supreme Court faces very few institutional constraints. While not an ideal type of the ideologically faithful unconstrained judge, the Justice on the Supreme Court faces a relatively small number of

institutional constraints. A Judge on the Court of Justice faces perhaps more institutional constraints than any other high court. The selection system fragments the court; the reappointment process and high threshold decision-making process further constrain the judges. I will argue that the easiest path to consensus in the fragmented Court of Justice is a European solution, and this is responsible in large part for the Court's consistently centralizing European-oriented behavior over time.

IV. Judicial Institutions in the United States and the European Union

What will be the impact of different judicial institutions in the United States and the European Union? I will argue in the next section that the net effect is to make it much more likely the United States Supreme Court will be influenced by political regimes than the Court of Justice. Justices of the Supreme Court will also be less constrained while on the bench than a judge of the Court of Justice. Therefore, the jurisprudence of United States Supreme Court is more subject to variance over time than the jurisprudence of the Court of Justice.

There has been a significant amount of research on the decision-making process of the United States Supreme Court. In developing expectations for this court, one may rely on a large amount of literature approaching the court from legal, behavioral, and institutional approaches.[3] The votes of individual judges are available, as are the memoirs of past judges, albeit not for some time after their death. On the other hand, the information on the European Court of Justice is less readily available. First, the rules of confidentiality extend beyond the judge's service on the bench. A judge who reveals the details of the deliberation may be removed from the bench, and after retirement may lose his or her pension. Also, there are fewer source materials, and even the briefs and

observations filed before the Court are not available, so tracing the judicial opinions back though briefs is not an option. Most damaging of all, there are no recorded votes or dissents, so garnering information about the behavior of individual judges is virtually impossible.

The task then with the Court of Justice is more difficult. What I will do is to make some predictions based on what we know about the behavior in other decision-making situations. Judges in all courts bargain and compromise to some extent (Wahlbeck, 1998, Clayton, 1999, Epstein and Knight, 1998). We know what the basic decision-making rules of the Court are (unanimous voting). We also know how the judges are selected. From these two facts, and utilizing literature from other decision-making situations, I will construct a set of expectations for the Court of Justice that can be tested against the data in Chapter 4. I believe the data will support my expectations and thus lend support for my theories regarding decision-making on the Court of Justice.

A) Judicial Selection in the United States and European Union

How do these two systems compare to our ideal of a political regime that can pick ideologically faithful jurists without hindrance? In the United States, the President faces the necessity of taking his nominee before the Senate. While this creates a hurdle, I will argue that the President can still largely choose the type of candidate he wants on the bench, if not a particular individual. Because of the low threshold for majorities and relatively small court, the appointment of any one judge can have a great effect on outcomes in the United States.

Appointments to the Court of Justice are much more constrained and result in more of a compromise than on the United States Supreme Court. Thus, I will suggest

[3] See discussion, Chapter 1.

that nominating an ideologically faithful judge is difficult and, as I will point out below, the ability of any one appointment or even series of appointments to affect the jurisprudence of the court over the long run is questionable. Thus, the United States is much closer to our ideal type of court, and the Court of Justice shares few characteristics with this ideal. After discussing the characteristics of these courts below, I will develop of set of expectations for the behavior of these two courts and test these expectations against the data in Chapter 4.

The President of the United States has the power of appointment to the Supreme Court, but these nominations must be approved by a majority of the Senate. Thus, a President is not an entirely free actor in the process, and depending on whether there is divided or united government; the president may face a higher hurdle with nominations to the bench. Yet, the picture is neither as dramatically difficult as divided government might suggest, nor is party government necessarily a clearer path. The nature of the political parties in the United States leaves the zone of potential candidates narrower under conditions of party government and broader under conditions of divided government than one would initially expect.

The implication for the judicial appointment process is that when the president has a majority in the Senate he is not able to guarantee a win for his nominee since he may lack congruence between his preferences and those of his party because he lacks control over the rank and file members of the party. In the case of divided government, the opposition cannot guarantee that they will be able to effectively block the president's choice because their leadership faces the same hurdles of inter-party diversity of opinion and effective lack of control. The president's choices are not universally accepted when

his party is in the majority nor are there any insurmountable barriers when his party does not control the Senate. We would expect that the president's nominees would be more likely to be confirmed when his party has control of the Senate and less likely to be confirmed in instances of divided government. The data support this conclusion. Segal and Spaeth (1993) find that presidential nominees are confirmed 90% of the time when the president's party controls the Senate and 59% of the time during divided government.

The implication for the appointment of judges is that the President is not a completely free actor even when his party is in the majority. If there is great ideological distance between the President and the median vote of the party in control of the Senate, the President may have to move away from his ideal characteristics in a nominee. Thus, the president, particularly in times of divided government must moderate his choice for a Supreme Court Justice. But this should not be overestimated. The president's initial nominee is confirmed in most instances, and the presidents always have someone confirmed. These nominees may not completely share the president's preferences and he must moderate his choices somewhat for the Supreme Court. Segal and Spaeth (1993, 159) assert that presidents nominate individuals to the court to pursue certain goals. Although the Senate routinely confirms most nominations, whether a senator votes to confirm an individual nominee depends on the ideological distance between that senator's constituents and those of the nominee and the perceived qualifications of the two (Segal and Spaeth 1993). When the president is faced with great ideological difference between his nominee and the senate, then he may have to moderate his choice to some degree. Thus, while extreme ideologues may be screened out in cases where the President and the Senate are ideologically distant, the president typically can choose

someone of at least a similar ideological bent. Thus, in the United States, the President's choices for justice may be constrained to some degree, but does not prevent the President from nominating approximately the type of person he desires to the court. Of course, there is no guarantee that a justice that is appointed will pursue the preferences of the appointing President while on the bench. However, I will argue that a judge who is appointed as a result of ideological fidelity is, all other things being equal, more likely to pursue the preferences of the appointing regime than a judge who is appointed for other reasons.

The case of the European Union is entirely different. In fact, the case in the European Union is different than in any other court system in the world. Other than systems that appoint purely by merit, there is no selection system in the world that places as many potential clearance points in the selection of judges as does the Court of Justice. The selection process is removed entirely from the purview of the central government and left with the member states. However, the member states are highly constrained by the fact that every other member state has veto power over their choice. Effectively, each of the 14 other member states can block a nomination, and the distance in policy preferences reflects the difference of all 15 members government of the European Union. Member states will have to moderate their choices to accommodate a large number of other actors with a wide divergence of policy preferences. A judge with extreme ideological or nationalistic views is likely to pique the ire of at least one of the other member states. Since one negative vote is sufficient to block a nomination, we would expect the member states to make a choice they believe will have the broadest possible

support. Overcoming the objections of 14 other member states can become more important than choosing a judge for political fidelity.

What would be necessary then for the political regimes to effect a change in the jurisprudence of the two courts in this study? In the United States, one party holding the White House for an extended period would typically be able to cause a cohort change that could affect the outcomes in cases. Both the judges appointed by the Roosevelt-Truman administration and those appointed by the Nixon-Reagan-Bush administration had a profound effect on the outcome in cases.[4] As I hope to show below, the cohort change achieved by the latter three administrations had a profound effect on the Court's treatment of federal state relationships. Of course, with a simple majority of five votes necessary for a decision, the appointment of any one judge will have a greater impact than the appointment of a single judge to a larger court.

In the European Union, even if the individual member states were free to choose their ideal judges, one would need to have different governments appoint like-minded individuals to the Court of Justice, and in the process these nominees would have to be acceptable to each and every other member. It would take 12 years for a cohort change to take place, and for this period all appointing nations would have to share a conception of the ideal type of judge. Put mildly, this kind of cohesive action on the part of the European Union is unlikely. First, governments would have to share the same political goals and share these same goals over a long period of time. Nor is it a matter of sharing the same left-right political orientation. The views of the member-state governments vis-à-vis Europe and questions of greater or lesser levels of integration would have to be

[4] Of course, the one Democratic president, Jimmy Carter, made no Supreme Court appointments. So effectively, from 1968, until 1992, a Republican appointed every justice appointed.

nearly identical as well. With roughly half the court appointed every six years, there would not only have to be agreement across governments as to the type of judge to be appointed, but also within the same government. Thus, the change of government between the Euro-skeptic Thatcher government and the pro-European Blair government in the United Kingdom would likely result in a change in the ideal type of judge in the eyes of these two governments.

This type of cohesion between and within nations is a virtual impossibility. More importantly, the governments are not able to exercise a free hand in the selection of judges. They must select a nominee that is acceptable to all governments. For example, a judge selected in the 1980's would have had to be acceptable to the French socialist government of Mitterand and the British conservative government of Thatcher. This nominee would have had to be acceptable to large and small nations, northern and Mediterranean nations, nations that were net contributors to the European Union and those that were drew funds from the Union. In short, the nominee would have to pass though a large number of potential veto points with a broad range of ideological differences. The choice therefore should be quite constrained, and thus we would expect a more moderate type of judge that was less overtly ideological. Yet, as I will argue below, even if these judges were overtly ideological, the European Union places many more constraints on the pursuit of policy preferences than does the United States.

B) Restraints on judges in the United States and European Union

1) Tenure and Removal

Justices on the Untied States Supreme Court are among the most insulated judges in the world. Under Article III, Section 2, of the United States Constitution, they shall

"hold their offices in times of good Behavior" and their salaries cannot be reduced while in office. Essentially, they are appointed for life because of their political preferences and can be removed only by impeachment, requiring the House of Representatives and tried by the Senate. No justice has ever been impeached. Segal and Spaeth note that these institutional features provide the justices with the freedom to pursue their policy preferences. They state (1993, 69):

> Members of the Supreme Court further their policy goals because they lack electoral or political accountability, ambition for higher office, and comprise a court of last resort that controls its own jurisdiction. Although the absence of these factors may hinder the personal policy-making capabilities of lower court judges, their presence enables the justices to vote as they individually see fit.

The Supreme Court places justices in an almost unique position to pursue policy preferences. They cannot be removed except in case of misconduct and typically have no career goals beyond the position on the Court. It is virtually impossible to directly threaten a justice's current position or future. The only restraints on their behavior come from the need to prevent a backlash from the other branches. Congress can control the jurisdiction of the court and, controlling neither the "purse" nor "sword," the Court is at times dependent on the other branches to enforce its decisions. Thus justices are not completely free to do as they please, since if they deviate too far from the mainstream, they may damage the jurisdiction or legitimacy of the Court. However, they are free from direct personal threats to their professional standing, and thus within the general political mainstream are free to pursue their policy preferences with little threat of backlash in most instances. This leaves judges relatively unconstrained allowing for the pursuit of policy.

On the other hand, the judges on the Court of Justice face an entirely different set of institutional structures. Judges in the Court of Justice are appointed for a renewable term of six years with agreement of all the member states. This term has been criticized for being too short and President Judge Mackenzie Stuart implied that this short of a term allowed member states to replace judges for political reasons (Kenney 1999, 146-147). If we take this statement of Mackenzie Stuart as true, then judges on the Court of Justice face the threat of removal for purely political reasons and we can expect them to be cognizant of this threat. The presence of such a threat can potentially constrain the behavior of judges. Not only can their own nations remove them, but other nations can also remove them, since the same unanimous consent that is necessary for appointment to the Court is necessary for reappointment. As Segal and Spaeth (1993, 69) note, the absence of life tenure and the presence of future career goals "may hinder the personal policy-making capabilities" of judges. Because of these two factors, we can expect judges of the Court of Justice to be more constrained than Supreme Court Justices.

2) Decision-Rules

Even absent any of the above factors, judges on the Court of Justice would be more constrained than justices of the United States Supreme Court because it is more difficult to reach a decision in the Court of Justice. The chief reasons for this are the differences in size, potential ideological range, and, especially, the voting rules. The latter is perhaps the most important factor, since the need for unanimity on the Court of Justice necessitates greater compromise than the need to reach a simple majority on the Supreme Court.

The Supreme Court is a comparatively small court with nine justices and only the agreement of a simple majority of five justices needed for an opinion. The addition of a single justice can change the balance of the court, and thus individual appointments are of great importance. The ideological makeup of the court varies, but essentially the justices come from one of the two major national political parties. Justices who have a disagreement with the majority can find a voice through writing a dissenting opinion. Generally, then, though not unconstrained, judges of the Supreme Court have a relatively easier time in reaching decisions than their counterparts on the Court of Justice. Even if a Justice loses, the presence of a dissenting opinion at least allows a public forum for airing his or her disagreement with majority.

The Court of Justice has fifteen members, and all judges must sign an opinion without the possibility of dissent.[5] The president judge assigns the opinion to a judge rapporteur who issues a single unsigned opinion, with no dissents. As Kenney (1999, 146) notes, the judgment reflects the views of the court as a whole and may be muddled or vague because of the need for compromise. This also tends to mask any disagreement and provide the Court more authority. One judge remarked that the process was one of "consensus building" rather than of bargaining.[6] A decision that would be acceptable to all members of the Court of Justice tends to emerge from discussions and there is very little bargaining over the results in any case.[7]

[5] The full court decides the most important issues, including those relating to the power of the European Union or that will have a great impact on national regulatory policies. For less important cases, the court divides into smaller "chambers." In both cases, unanimity is necessary to reach a compromise. Thus, the chief difference is the size, but in both instances the need for unanimity forces the judges to compromise to a greater degree than simply majority voting.
[6] Personal Interviews with Judge of Court of Justice
[7] Personal Interviews with Judge of Court of Justice

This is consistent with predictions of Heisler and Kvavik (1974) and Alexrod (1984). Because they are appointed by a variety of governments, we can assume, even if they do not have strong or overt ideological records, there are at least the variety of opinions found across the mainstream of political opinion in fifteen different nations. Thus, we can expect them to behave as members of fragmented coalitions, and, as Heisler and Kvavik (1974) suggest, this will lead to compromise. Since judges cannot hope to have any consistent success over time because of this fragmentation and these multiple veto points, we can expect, as Axelrod (1984) suggests, that they will forgo self-seeking behavior in order to remain part of the decision making process. All these factors point to compromise. The next question is what is the most likely compromise.

In essence, what I argue occurs on the Court of Justice is that judges, both because of the potential political pressures they face and the need to compromise, tend to coalesce most easily around a European solution. Given the close ties between the need for the maintenance of a single market and the need for consensus, this European solution offers the best way to bridge the ideological and practical concerns in cases. No single judge can ensure that his or her position will be accepted on a consistent basis. However, every judge can create an obstruction to a decision they oppose. Thus, the large member states cannot push an agenda favorable to them because of the potential of the veto by members of small states and vice versa. However, by adopting a pro-European position they are able to ensure they do not consistently lose because a decision favoring Europe should not necessarily hurt either the large or the small nations disproportionately over time.

For example, under the doctrine of mutual recognition, most member states have had some national regulations struck down. German beer, French cheese, Dutch butter, and Italian pasta have all had favorable national regulations that have had the equivalent effect of acting as a trade barrier for similar goods from other member states. These cases all raise issues dealing with important national symbols and should be of importance to citizens of the various nations (Grosskopf 2000). In each case, these barriers were struck down. In each case, some national industry suffered. In each case, the judge from the member state could have interposed their veto and protected their national interests. However, in none of these cases did a judge stop his or her nation's regulatory scheme from being struck down. The overall effect was to open trade for all member states, and thus none of the member states suffered disproportionately as a result of the pro-European trend in these cases. Every member of the Court may not have seen the European solution as ideal in each individual case, but neither was a European solution disproportionately detrimental to any single member state in the long run. Thus, the need for compromise constrains judges from acting in a purely nationalistic or policy seeking manner. It pushes them toward consensus, and the easiest way to reach consensus on the Court of Justice is to adopt a European solution.

Without a possibility for dissent, the Court has adopted a consensus building form of decision-making. A judge who consistently objects and obfuscates in discussions runs the risk of being isolated. Therefore, judges on the court of justice typically find a European solution the easier point of agreement. As Kenney (1999) note, one result is opinions that are often muddled. Another result is that compromise will be the norm over time. Thus, in the case of the Court of Justice, we would expect the patterns of winners

and losers in disputes between the central and peripheral governments to remain consistent over time.

V. Conclusion

The institutional rules relating to judicial selection, tenure, and decision rules will help determine who wins and loses in central-peripheral governmental disputes before high courts in systems with multi-level governance. Specifically, as the rules apply to the United States Supreme Court, we would expect justices to be selected on the basis of political fidelity and to be relatively free to pursue policy preferences. Therefore, as political regimes are able to affect a cohort change on the Court, then we would expect variance over time. Specifically, when the Court is dominated by the appointees of conservative regimes—typically in this century Republican nominees—the central government will win less often and the states more often. In a court dominated by liberal—typically democratic nominees—we would expect the federal government to have a higher level of success in disputes with the state governments.

The European Union has an entirely different set of rules. Europe itself has no role in the appointment process. The member states nominate judges but are constrained by the need to obtain the approval of every other member state before their nominee takes a seat on the bench. Once the judge is on the bench, the difficulty in reaching a decision and the futility of disagreement result in a consensus building process in reaching judicial decisions. Compromise is the norm. As a result of the appointment process, tenure rules and decision rules, neither the European nor the member state governments gain an advantage over time. As discussed in Chapter 2, the type of case that reaches the court

tends to encourage decisions favoring the central government. Nothing in these institutional rules indicates that there should be any change in this tendency over time.

Chapter 4
Data Analysis

In federal and federal-like systems, there will inevitably be disputes between the central and peripheral government. As I argued in Chapter 2, the type of case that reaches the court will be important in determining which level of government is more likely to wins these disputes. Some cases will favor the central government; some will favor the peripheral governments.

The second question is whether the political regime can exert control over the appointment process. If so, and if the judges are unconstrained by other factors, then we would expect a change in winners and losers over time, as the political regime appoints judges who will pursue their policy end on the court. Thus, the institutional factors—judicial selection, tenure, and decision rules—that control the influence of the political regime and determine whether the judges on a court are constrained will determine whether the winners and losers in these disputes will remain consistent over time.

To test the effect of institutions on case outcomes, we need to pick two cases that vary on the major independent variables of case selection, judicial selection, tenure, and decision rules. As detailed more fully in Chapters 2 and 3, I believe the case of the Supreme Court of the United States and the European Court of Justice vary sufficiently on these important variables to provide some expectation that there will be a variance in patterns of outcomes of cases before these courts. If such variance occurs, then we would have some support for the proposition that institutions affect outcomes in cases.

Who wins: Cases Reaching the Court: Different Systems, Different Pressures

The United States is an exemplary model of a broadly based federal political system. The federal courts in this system have dealt with a number of cases across a wide

variety of policy areas. From civil rights and freedom of speech[1] to determining the power of the central government to enforce economic regulations on the state governments,[2] the United States Supreme Court has dealt with a wide variety of policy issues. The European Union is a good example of an economically based system. While the Court has been credited with "consitutionalizing" the Treaties (Weiler 1999, Stone and Brunell 1998), the Court of Justice has largely been concerned with removing barriers to trade.[3]

In the case of the United States and the European Union, the high courts in these two systems face vastly different types of cases on their dockets. The federal system of the United States is broad and includes policy matters well beyond economic and market maintenance. Thus, the cases that reach the court will create pressures that tend to favor the federal government in some policy areas and favor the state governments in others. Specifically, we would expect the federal government to prevail much more often in cases dealing with economic matters than in cases dealing with individual rights. On the other hand, the European Union has a much narrower policy scope, and the cases this system generates are tied to the maintenance of single market. Since cases dealing with market maintenance have a centralizing impetus, we would assume that most cases that come before the Court of Justice would tend to favor the central European government over that of the member states.

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[1] See, e.g. *Brown v. Board of Education*, 347 U.S. 483 (1954), *O'Brien v. United States*, 391 U.S. 367 (1968)

[2] See, e.g. *Wickard v Filburn*, 317 U.S. 111 (1942)

[3] See, e.g. See, *Van Gend en Loos v Netherlands Inland Revenue Administration* 26/62, *Defrenne v Sabena* 43/75, and *Van Duyn v Home Office* 41/74, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* Case C-120/78

Therefore, in Europe, the central government will have an advantage before the Court of Justice because most of the cases generated by the system will be influenced by the need to maintain a single market and thus will create pressures that favor the central government. I would expect a more consistently high level of success by the central government across all policy areas in Europe. In the United States, some cases will reach the court that favor the central government while other cases will create pressures that favor the prerogatives of the state governments. Thus I would expect the results to be mixed for the central government, unlike the Court of Justice. In areas of economic regulation I would expect the federal government to win in most instances, with regulations of the central government upheld, and local regulations that interfere with uniform national regulation struck down. When cases reach the court that do not pertain to economic regulation, particularly cases that deal with individual rights, I would not expect the federal government to win with anything approaching the frequency with which it wins in cases pertaining to economic regulations. In the United States, I would expect some variance in whether the federal government or state governments win across policy areas.

In order to test these systemic differences, I will examine decisions of the United States Supreme Court in the areas of regulation and individual rights. I would expect the federal government to win an overwhelmingly high percentage of cases relating to economic matters and much less often in cases dealing with individual rights. In the European Union I will examine the relationship between economic regulation and social policy. While social policy is not directly related to market maintenance, it is the policy area with perhaps the greatest chance for variance. However, I expect that the centripetal

force exerted by the single market in the E.U. will cause the court to centralize in a roughly equal ratio to single market cases. Simply put, the EU has no policy areas creating pressures that will favor the member states over the European Union in disputes before the Court of Justice. Thus, in the two cases at hand, I expect the following:

> Hypothesis 1a: In the United States, the decisions of the Supreme Court will not overwhelmingly favor the central government in disputes with the state governments
>
> Hypothesis 1b: In the European Union, the decisions of the Court of Justice will overwhelmingly favor the European government in disputes with the member states.
>
> Hypothesis 2a: In the United States, the federal government will win more often in disputes with the state governments before the Supreme Court if the case concerns economic regulation than in cases dealing with individual rights.
>
> Hypothesis 2b: In the European Union, the European government will have similar levels of success across all policy areas.

How Consistently Do the Central and Peripheral Governments Win Before High Courts?

Does the jurisprudence of a Court change over time? In other words, can we expect the same parties to prevail in similar cases over time? In particular, can we expect any consistency in how often the central and peripheral governments win over time? My argument is that the answer to this question lies in the relationship of the political regime to the Court and the ability of the Court to place judges on high courts that are ideologically faithful and insulated from outside pressures that would prevent them from pursuing that regime's policy preferences. The question revolves around who picks judges and under what conditions they serve. As I argue in Chapter 3, the Supreme Court and Court of Justice vary considerably on these factors.

Selection Systems

The President of the United States selects Justices of the Supreme Court. Particularly in times of divided government, the need for approval of the President's nomination by the Senate may restrain the President. Typically, the Justices appointed are selected with an eye toward political fidelity and share partisan affiliation with the President. Thus, the appointment is tied to the current political regime of the central government. We would expect the type of justice appointed to vary with the political regime. This should result in judges with different political dispositions and policy preferences to be appointed over time. In short, changes in political regimes should result in changes on the Court and corresponding variance in the jurisprudence of the Court over time.

The European Union has a system that is divorced from the political regime of the central government, and the selection is left with the member states. But the member states are highly constrained by the need for unanimous approval of all member states. Thus, the need to pick judges who are acceptable to all member states severely restricts the ability to appoint individuals to in order to further the agenda of the political regime of any given member state. Member states will have to moderate their choices. Since all member states are subject to the same pressures to moderate, we would expect them to appoint similar judges across all of the member states and over time. Since the type of judge will not vary, we would not expect the selection system to affect any variance in outcomes over time. Thus, we would expect, all other things being equal, for the selection system of the European Union to not encourage change over time, and we would expect to see consistency over time in the decision of the Court of Justice.

Tenure

Justices of the United States Supreme Court are insulated from outside pressure. Picked largely for political reasons, they are free to pursue policy preferences for the simple reason that they face little or risk in doing so. As Segal and Spaeth (1993) point out, the justices are appointed for life during good behavior, not easily removed, and typically have no career goals beyond the court. Thus, no direct way to punish judges for pursuing policy exists.

The European Court of Justice is a different matter. Members of the Courts, first and foremost, face reappointment. The selection process discourages judges from being picked for the purposes of pursuing an overt political agenda, and the desire to be reappointed constrains them from any overt pursuit of policy while on the bench.

Decision Rules

Decision rules can encourage or discourage consistency overtime. The more difficult it is to make a decision, the more likely the decision of court will be moderate and consistent over time. In the United States Supreme Court, the presence of dissents and the fact that only a five-person majority is needed make it relatively easy to reach a decision. Also, the United States Court tends to be divisible on a left-right continuum. Thus, the five-person majority should be stable over time across a number of issues. A judge can expect to pursue a partisan agenda if there is some expectation of success.

The Court of Justice is a larger court, with no easy division of judges on a left-right scale and an appointment process that brings judges toward the middle of the scale. We would see judges who are, because of the selection process, less predisposed to disagree, and this makes the ability of any one judge to affect the decision-making

process on the Court unlikely. On a large, 15-member court like the Court of Justice, the change of one vote has little effect on outcomes. In addition, the Court of Justice does not have dissents, so there is no public forum to air disagreements. All of the judges involved in a decision must sign the opinion, and there is a real effort to accommodate judges and craft opinions that are acceptable to all judges. As I will explain in Chapter 3, this accommodationist norm results in a tendency toward a "European" solution to problems, since no single member state will be disadvantaged over time. A side effect noted by scholars is that this attempt to reach compromise often result in muddled opinions lacking in clear legal doctrines (Kenney 2000).

I will examine result cases decided by the Warren Court and compare this to results from the Rehnquist Court. The Rehnquist Court has largely been viewed as having policy preferences that favor a less activist central government and that are more receptive to the prerogatives of the states. The Warren Court was noted for allowing wide latitude for the federal government and for being less favorable to the states. All other things being equal, I expect the Rehnquist Court to be a less centralizing court than the Warren Court. In the Court of Justice, the President Judge is not appointed by a political regime, and thus the different "courts" based on changes in the President Judge are almost meaningless. Therefore, for the Court of Justice, I will examine a random sample of cases across at least two time periods, where the cohort change was as complete as that of the Rehnquist and Warren Courts in the United States. My expectation as to the effect of the difference in institutional structures in the Supreme Court and the Court of Justice on the level of success of the central government over time is as follows:

Hypothesis 3a: In the United States, the federal government will win more often in disputes with state governments during the Warren Court than during the Rehnquist Court.

Hypothesis 3b: In the European Union, change in personnel will have no effect on the high level of success of the European government in disputes with the member states

Data

The data on the United States Supreme Court are from a data set developed by Harold J. Spaeth.[4] This is the most widely used and cited Supreme Court database, and has been used in articles, scholarly papers and textbooks. The database encompasses all aspects of Supreme Court decision-making from 1953-1997. It enables the user to analyze a case on factors such as the era, subject matter, and direction of decision. It has been widely used by scholars and is regularly updated. Its subject matter classifications are based on the head notes of the cases, and this is a standard tool for classifying the subject matter of court decisions.

For data on the Court of Justice of the European Communities, I adapted Alec Stone Sweet and Thomas L. Brunell's The European Court and the National Courts Data Set on Preliminary References in EC Law, 1958-98.[5] Professors Stone and Brunell coded all preliminary references (Article 177) brought to the Court since 1961 for subject matter, and date. This is the only data set available for the Court of Justice and has been used in numerous articles appearing in journals such as the *American Political Science Review*. This data was coded for different purposes, and thus did not code results in cases.

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[4] Spaeth, Harold J. UNITED STATES SUPREME COURT JUDICIAL DATA BASE, 1953-1997 TERMS. 9th ICPSR Version. East Lansing, MI.

[5] Alec Stone Sweet and Thomas L. Brunell Data Set on Preliminary References in EC Law, Robert Schuman Centre, European University Institute (San Domenico di Fiesole, Italy, 1999).

The original data was coded as to subject matter by using the classifications in the head notes and summaries of the cases. This coding also provided information on the Treaty provisions in question. Using the Stone and Brunell data with regard to date and subject matter, I coded all preliminary references in the subject matter areas of "Free Movement of Goods and Services" and "Social Provisions" and developed a data base that included information on all cases where the Court made an explicit judgment on the validity of either a national or European level regulation.

I coded 748 cases in the "Free Movement Area" and 248 cases in the "Social Provision" and of these, there were 548 in "Free Movement" and 126 cases in "Social Provisions" where a final decision was reached. Of these cases, I coded all cases where the court struck down a regulation and have data on whether a European regulation or national regulation was at issue, and whether the Court ruled to uphold or invalidate the particular statute.[6]

Analysis

Who Wins: Overall Levels of Success

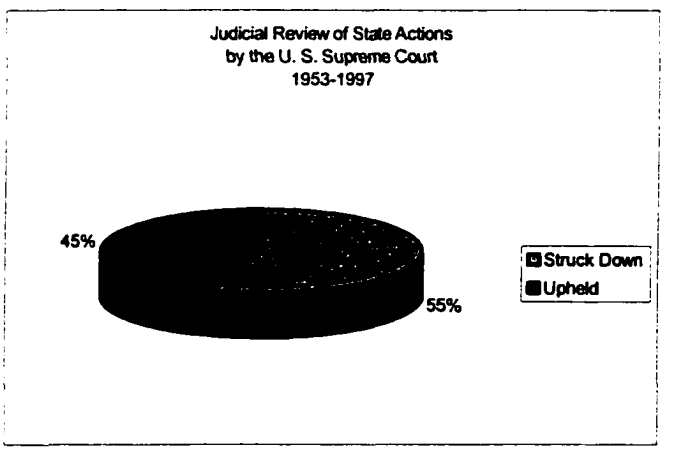
The first question is who wins in disputes between the central and peripheral governments before high courts in federal and federal-like systems. The first hypothesis concerns overall levels of success in disputes between the central and peripheral governments in the United States and European Union. The hypothesis is as follows:

> Hypothesis 1a: In the United States, the decisions of the Supreme Court will not overwhelmingly favor the central government in disputes with the state governments
>
> Hypothesis 1b: In the European Union, the decisions of the Court of Justice will overwhelmingly favor the European government in disputes with the member states.

[6] For detailed coding information, see Appendix I

Hypothesis 1 regarding the Supreme Court of the United States is that the central government is not overwhelming successful. To examine this, I looked at all cases in which a final determination was made on federal and state actions between 1953 and 1997. This review of the statutes and regulations of both the state and federal governments gives the best overview of the relative success of the two levels of government before the United States Supreme Court.

Figures 1 and 2



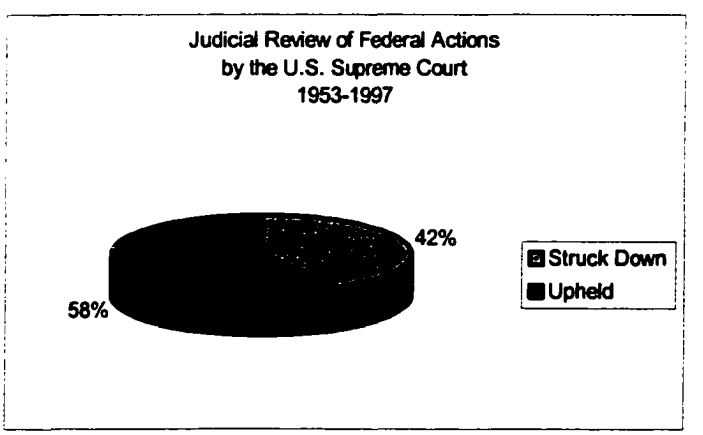


Table 1

	Struck Down	Upheld	Total Reviewed
Federal Actions	550 (42 %)	759 (58 %)	1309 (100%)
State Actions	1200 (55 %)	980 (45%)	2180 (100%)

As Figures 1 and 2 show, the federal government loses a significant portion (42%) of the time and the states prevail a significant portion of the time (45%). These results tend to show that the Supreme Court favors the central government somewhat more often than they do the states. However, these figures do reject the claim that courts do not "hinder" the centralist activities of the central government." (Bzdera 1993). The United States Supreme Court seems to hinder the centrist activities a little less than about half the time. The data support the first hypothesis that courts in broadly based systems will not exhibit an overwhelming level of success for the federal government in disputes with the states.

In the European Union, the Court of Justice exhibits a much higher level of success, though as I pointed out in Chapter 2 and will reiterate below, a direct comparison between courts must be interpreted with some care. The European Union cases I examine are preliminary references that are brought to the Court of Justice at the request of national judicial bodies. The court also hears several other types of cases, but virtually all the cases dealing with the relative power of the European Union result from Article 177 actions. All of the cases that have, in effect, "constitutionalized" the Treaty are a result of Article 177 actions.[7] Under an Article 177 action, the Court of Justice must hear cases regarding the validity of EU or national statutes. A major difference between the United States Supreme Court and the Court of Justice of the European Communities is that the Court of Justice does not have any control over its docket. It

[7] These included the *Cassis de Dijon* (1979) decision, regarding mutual recognition, *Costa v. Enel* (1964), which established the supremacy of Treaties over national law and, *Van Gend en Loos* (1963) which establish the doctrine of direct effect. Thus, these are the most important class of cases, the only class of cases where the relative powers of the individual levels of government come into question and therefore, the class of cases that are appropriate for these studies. Numerous other authors have focused on these cases exclusively. See, Stone and Brunell (1998) and Weiler (1987). The other cases mainly involve challenge to the specific application of European regulations.

must hear all cases referred to it by the national courts. Like the United States Supreme Court, the activism of the Court of Justice has engendered much commentary (Stone Sweet and Brunell, 1998; Weiler, 1986, Cappelletti, 1987; Volcansek, 1992; Alter, 1996). However, unlike the United States Supreme Court, the Court of Justice is called upon to rule on issues of little legal significance and on matters that are largely routine (Kenney, 1990). This presents some problems for direct numerical comparison across these two cases. However, for the purpose of this study, it is the presence or absence of patterns of behavior that must be compared.

It is difficult to make a meaningful comparison of overall levels of centralization on the basis of European Union regulations. The Court of Justice is more centralizing. Across our two very different policy areas, the European Regulations are upheld about 75% of the time. However, any statement of the relative levels of centralization must be with the caveat that the two courts simply hear different types of cases. The standard that the Court of Justice uses to review administrative acts is somewhat lower than in the United States, with the court invading areas that would be traditionally within administrative discretion. In effect, the Court acts as a "code" court and will, on occasion, overturn administrative judgments. Thus, the Court is not making any challenges to the power of the central government to enact regulations, but rather whether the European institution in question has acted correctly. Thus, in deciding technical issues, the Court of Justice may rule against the European institution more because these technically rulings do not necessarily challenge any fundamental powers of the central government. As I will discuss in Chapter 5 below, many of these cases deal with issues such as tariff classification and other highly technical determinations that in the United

States are left to administrative bodies or, at best, lower federal courts. Thus, while the European Union has a higher level of success than the United States federal government, as expected, the direct comparison is somewhat misleading as it understates the impact of this difference. As I will discuss at length in Chapter 5, the lack of docket control results in the Court of Justice hearing many more less important cases than the Supreme Court. It is these unimportant cases where the member states win. The impact of wins by the member states on the power of the European government is less than the impact of wins by state governments on the power of the United States federal government.

Who Wins: Success of the Central Government Across Policy Areas

> Hypothesis 2a: In the United States, the federal government will win more often in disputes with the state governments before the Supreme Court if the case concerns economic regulation than in cases dealing with individual rights.
>
> Hypothesis 2b: In the European Union, the European government will have similar level of success across all policy areas.

Hypothesis 2a proposes that with respect to a broad based system such as the United States Supreme Court, the level of success of the central government will vary across subject matter. As delineated above in Chapter 2 and the second expectation, cases revolving around economic matters should be much more centralizing than those pertaining to freedom of expression.

In examining all 1st Amendment cases and Economic Regulation cases where the Court held a statute unconstitutional, we find that the Court strikes down far fewer federal statutes in economic areas than in 1st Amendment areas, and, that relative to

federal economic regulations, state economic regulations are struck down much more often.

Table 2
Statutes Declared Unconstitutional
1953-1997

	First Amendment	Economic Activity	Total Held Unconstitutional
State Action	110 (23.4%)	64 (13.6%)	470
Federal Action	54 (27.7%)	3 (1.5%)	195

When the Supreme Court strikes down a state statute, the ratio of First Amendment cases to economic regulation cases struck down is approximately 1.7:1. When the Supreme Court strikes down a federal statute, the ratio of First Amendment cases to economic regulation cases struck down is approximately 18.5:1. Thus, there are less than two State First Amendment statutes struck down for every one state economic statute. On the other hand, regarding federal statutes, there are over eighteen federal First Amendment statutes struck down for every federal economic regulation statute struck down. Clearly, federal statutes dealing with First Amendment issues are invalidated at much higher ratio than economic cases, and this ratio is 10.8 times as high as the ratio of state First Amendment cases to economic regulations cases. Table 2 supports the expectation that the degree to which the central government wins may in fact depend greatly on the subject matter it is addressing since state economic regulations are far more likely than federal statutes to be struck down. This supports hypothesis 2a that states that in broadly based systems we would expect variance across policy areas. This finding also confounds the theory of judicial centralization.

While the United States is expected to have variance across subject areas, we would expect the success rate for the European Union to have no statistically significant

variance across policy areas. The European Union does not have as broad a range of policy areas as the United States. It does not deal with fundamental rights questions. Therefore, it is necessary to look at the policy areas where variance is most likely to be found. As argued above, these two areas are social policy and free movement of goods; if there were any decentralization, it would be in these two areas. In choosing these two policy areas, we are somewhat limited. First, the European Union hears cases from a smaller variety of policy areas. Thus, we will not have as categorically different a choice as in the American case, and this fact is consistent with our theoretical expectations. The goal is to find the area that shares the least in common with maintenance of the single market. Second, the Court hears many more cases concerning the maintenance of the single market than in any other policy area. In most other areas there are simply too few cases to make a meaningful statistical analysis. Finally, there was some expansion in policy competence in some policy areas in the post-Maastricht era, but cases only began to be decided by the Court in these areas in the early 1990's, and therefore there are not a sufficient number of cases spread over a long enough time period necessary to make a temporal comparison.

For these reasons, if there were to be any variance, the most logical place to look for this would be in the area of social policy. First, from a practical standpoint, the Court of Justice began hearing social policy cases in the early 1970's only a few years after they began hearing the bulk of market maintenance case in the mid-1960's. Thus, there are a sufficient number of cases that deal with social policy, and these cases are sufficiently distributed across time. Thus, while the Court has heard some cases in the area of environmental policy, and this area might have some attractiveness from a theoretical

standpoint, there are simply too few cases, particularly spread over time, for a meaningful statistical analysis.

Further, and more importantly, there is a theoretical justification for examining this area since it has less centralizing impetus than the maintenance of the market. The centralizing impetus of single market maintenance is based on efficiency arguments. The theory of economic integration is based on the idea that achieving a common market for goods and services will result in greater economic efficiency and gains in real income (Heller and Pelksman 1986; Norrie, Simeon et al. 1986, 207-209). Thus, because a single market is efficient and profitable, the impetus against local interference is great and the centralizing pressures are strong. Social policy includes areas such as workers' rights, the right to employment by the disabled, women's right to equal pay, worker protection, pensions, and matters related to the welfare state. The efficiency arguments present in market maintenance cases are not present in social policy cases. In fact, there has been substantial debate as to the proper level of European regulation of these matters. One theoretical viewpoint calls for a more decentralized system where the decisions about the content of social policy would be made at the lowest possible level, allowing for national differences in social policy so as to be able to deal with unique local problems in an efficient manner. Under this viewpoint, a "one size fits all" approach would be counter-productive given the range of social conditions across the European Union. For example, Portugal and Greece may have different problems that call for different solutions than in Great Britain and Germany, and thus should be able to tailor their social policies to their local needs. Another viewpoint calls for a more interventionist approach, with the European Union taking a stronger, more interventionist approach, raising standards

across Europe so that there would be fewer impediments to worker movement, thereby enhancing the free movement of persons and furthering integration (Lange 1992).

Thus, we have a plausible "decentralizing" explanation for social policy that has some acceptance in the literature. There is no similar expectation regarding market maintenance. Other areas seem too closely tied to the integrative process. Competition policy, for example, has "explicit" ties to the integration process in Europe (Cini, 1998). Thus, with competition policy, we have no theoretical expectation that there would be any decentralizing behavior. From a theoretical standpoint, if there were going to be any variance across policy areas, we should expect to see variance between cases dealing with market maintenance and social provisions. The policy area also meets our practical considerations for data analysis.

The data support the expectation that the European Union will enjoy a similarly high level of success across all policy areas.

Table 3
National Regulations Precluded
1954-1996 Terms

	Struck Down	Upheld
Free Movement	271 (70%)	80 (30%)
Social Provision	45 (77%)	13 (23%)

Pearson's Chi-square of < .0008 (Not significant)

Thus, given the institutional structure of the Court of Justice, one would expect a model of the central government to win frequently across subject areas. The data above support this prediction. By better than a seven in ten ratio, the Court strikes down national regulations at a similarly high level regardless of the policy area.

These findings are important for two reasons. First, they support the view that the institutional structures of the Court of Justice favor the central government. Second, the

fact that the behavior of the European Court of Justice is different from the pattern of behavior found in the United States Supreme Court supports the proposition that the differing federal systems place differing pressures on the two courts. The United States Supreme Court faces pressures that favor the central government to a greater degree in some policy areas than others, and evidence of the effect of these different pressures is supported by the variance in the level of the federal government's success across policy areas. The Court of Justice faces pressures that favor the central government regardless of policy area, and this is evidenced by a lack of variance in Europe's success rate across policy areas. The data support the assertions of Hypothesis 2b, which states that we would not expect variance across policy areas in narrowly based policy areas.

Variance Over Time

Finally, Hypothesis 3 suggests that the court is open to political shifts and thus court behavior should change even within a particular subject area over time. The expectations regarding the two cases are:

> Hypothesis 3a: In the United States, the federal government will win more often in disputes with state governments during the Warren Court than during the Rehnquist Court.
>
> Hypothesis 3b: In the European Union, change in personnel will have no affect on the high level of success of the European government in disputes with the member states.

To test the hypothesis regarding the United States, I have examined all First Amendment cases adjudicated before the Warren Court and the Rehnquist Court.[8] The

[8] There are not enough economic cases to make a meaningful statistical comparison between the Warren and Rehnquist courts. Yet, I believe the behavior of the Courts in this area does not confound the theoretical expectations. I will examine the case law in Chapter 5, and argue that the behavior of the Rehnquist Court has been more willing to set aside federal economic regulation than the Warren Court, in line with the expectations of institutional theory.

Rehnquist Court has largely been viewed as having policy preferences that favor a less activist central government and are more receptive to the prerogatives of the states. The Warren Court was noted for allowing wide latitude to the federal government and less favorable treatment to the states. All other things being equal, I expect the Rehnquist Court to be a less centralizing Court than the Warren Court since the Rehnquist Court is widely viewed as more conservative and thus more suspicious of the actions of the federal government and more receptive to actions by state government (Schwartz 1993, 376).

Table 4
First Amendment Cases
The Warren and Rehnquist Courts

	Struck Down	Upheld	Total Reviewed
Warren-Federal	14 (29.2%)	34 (70.8%)	48 (100.0%)
Rehnquist-Federal	28 (41.2%)	40 (58.8%)	68 (100.0%)
Warren-State	91 (76.6%)	31 (25.4%)	122 (100.0%)
Rehnquist-State	55 (57.3%)	41 (42.7%)	96 (100.0%)

Source: United States Supreme Court Database: 1953-1997

Table 4 shows that the Rehnquist Court strikes down 12% more federal cases than the Warren Court. This difference behaves in the expected direction, but the difference does not quite reach a level of statistical significance. On the other hand, the Warren Court strikes down 19.3% more state cases than the Rehnquist Court, and this difference in the expected direction is statistically significant. On all variables, the Courts behave in the expected direction. There is a statistically significant difference in their treatment of state regulations.

In the case of the United States, we would expect there to be changes over time as cohort changes take place on the Court, since the appointment of a Justice to the Supreme

Court is tied to the desires of the current President. Also, once on the bench, these justices are largely unconstrained by any other structures and face few tangible pressures to deviate from their policy preferences. A judge on the European Court of Justice faces completely different institutional pressures from a Justice on the United States Supreme Court. The selection system narrows the range of acceptable candidates, and the pressures these judges face once on the Court discourage new judges from engaging in pursuing personal policy goals. Thus, whereas we have seen a great deal of variance across time in outcomes in the United States, we would expect little difference across time in the European Union.

Since judges of the Court of Justice are appointed to a term of years, rather than lifetime appointment, cohort change occurs more quickly. The President Judge is not appointed by a political regime, and thus ascribing difference in behavior to different "courts" based on changes in the President Judge is almost meaningless. What is needed to detect whether changes in the Court result in changes over time is to test periods when there has been a complete turnover in personnel. In addition, there must be a sufficient number of cases to make a statistical comparison. I will argue for several reasons, the appropriate period to examine is before 1990 and after 1990.

There are several reasons this period is appropriate. First, while the period tested for the Supreme Court is longer, the turnover on the Court of Justice was just as great as the turnover between the Warren and Rehnquist Courts. The average length of tenure for Judges on the Court of Justice is just over nine years, and the average tenure of United States Supreme Court judges is slightly over fifteen (Kenney, 1999). However, several of the early justices stayed on the Court for quite some time. For example, between 1952

and 1984 there were only two judges from Belgium, Delvaux and Mertens de Wilmars. Likewise, Italy and the Netherlands had two and France three during this period. Beginning in the early 1980's there was a great deal of turnover, with no individual who was judge in 1979, continuing to be a judge in by 1990. The largest cohort change started in the 1980's and continued until about 1990. Thus, turnover until the 1980's tended to be gradual, and prior to this period there was always a great deal of overlap from the previous courts. Thus, I expect any change in jurisprudence that would occur as a result of cohort change on the Court would have occurred as the Court had virtually a complete turnover in personnel by 1990. The post-1990 Court of Justice can be considered a different court than the pre-1990 court. There was ample opportunity for these changes to affect the level of centralization. The key then, rather than the tenure of the President Judges, is the period when the court experienced high turnover rates. After a rather stable membership, rapid change in the membership occurred after 1980. Therefore, when looking for the evidence of change in jurisprudence, we should look at periods before and after profound change in the membership. For this reason, I will examine the cases that occurred prior to the 1990's and compare them to the cases that occurred after 1990, by which time there had been a complete turnover in Court personnel.

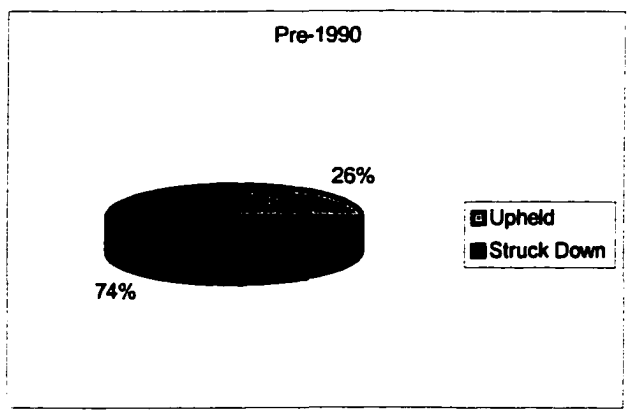
Thus, I have grouped the cases pre-1990 and post-1990.[9] Within these two periods, there is little change evident over time, though the structure of the Court has

[9] The level of centralization is nearly identical in the across all data where there is available data. I have also run equations for post- and pre-Maastricht, and by decades, though in each of these cases there was not the level of turnover in Court personnel that occurred during the period I have tested above. Thus, I did not include these results in the main body since they are not theoretically interesting for the questions asked. In all of my testing, I found no shift in the level of centralization except in the case national regulation of Free Movement of Goods where the Court became slightly more favorable to national regulation from the

changed during this period both through cohort change and the addition of new member states and their judges.

The first step is to look at the treatment of European Regulations by the Court. As noted above, only in the areas of free movement of goods are there a sufficient number of cases to undertake a statistical analysis over time. There is no statistical difference in the high level of success of the European Union before the Court of Justice. I have examined the behavior of the Court of Justice in upholding European Regulations in both pre-1990 and post-1990 period.

Figures 3 and 4



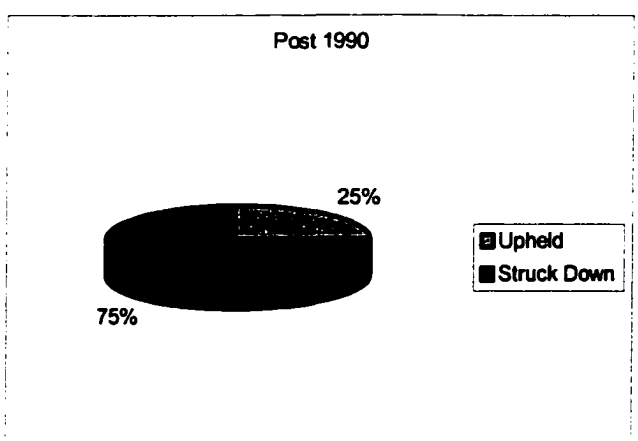


Table 5

1960's to the 1970's. Thus, this shift is attributable to time in which there was little cohort change on the Court. I attribute this shift to the growth in numbers of cases and the type of case that the court heard.

Cases Challenging European Regulations
Free Movement of Goods

	Upheld	Struck Down
Pre-1990	9	26
Post 1990	3	9

Pearson's Chi-square < .0000 (not significant)

Despite cohort change on the Court, there have been no statistically significant changes in the levels of success for the central government.

I will examine whether any change in the level of success of the European government occurs over time in the behavior of the Court of Justice regarding national regulations. In the case of social provisions, there is no statistically significant change over time in the level of centralization.

Table 6
Cases Challenging National Regulations
Social Provisions

	Struck Down	**Upheld**
Pre-1990	15	5
Post 1990	30	8

Chi-square = .12 (not significant)

The Table 7 concerns the Court of Justices' jurisprudence in the area of free movement of goods and services.

Table 7
Cases Challenging National Regulations
Free Movement of Goods

	Struck Down	**Upheld**
Pre-1990	43 (66.2%)	22 (33.8%)
Post 1990	147 (71.9%)	58 (28.1)

Chi-square = 1.528 (not significant)

Once again we see no statistically significant change over time in the European Union's level of success in either of the two policy areas we have studied, and this pattern is different from the pattern at work the United States Supreme Court. Thus,

these findings support Hypothesis 3b, which states that in courts where the appointment of judges is divorced from the desires of the current political regime, and judges face disincentives for the pursuit of individual policy preferences, then the level of centralization should not vary over time, regardless of cohort change on the Court.

Discussion

Different institutional structures affect the winners and losers in disputes between central and peripheral governments. In the United States, we would expect a lower level of success because of the variety of cases—including both political and economic regulation—that come before the court. The data support this expectation. The Court of Justice hears a narrower variety of cases, mostly tied to the maintenance of a single market, and these cases create pressures that almost exclusively favor the European Union in disputes with the member states. Statistically we find that Europe is highly successful, and I will argue in Chapter 5 that the statistics do not fully express how favorable the Court of Justice is to Europe in disputes with the member states. The type of governmental system matters because different types of systems generate different kinds of cases with different pressures. To understand who wins disputes between the central and peripheral governments, one must understand where the boundaries of governmental power in these systems are, and therefore where the disputes between levels of government are likely to occur.

Since appointments to the United States Supreme Court are tied to the political regime, and the justices, once on the Court, are relatively free actors, we would expect the jurisprudence of the Court to change over time, even within the same policy area, as cohort replacement occurs. Largely, the justices that make up the current conservative

majority were part of an explicit effort by Presidents Nixon, Reagan, and Bush to place judges of a more conservative bent on the Court. We would expect this Court to be less favorable to federal government and more favorable to the state governments than the liberal dominated Warren Court and the data support this expectation.

The main implication of this research is that judicial institutions matter. Different systems and different structures will encourage different types of behavior for Courts. Therefore, in cross-national judicial research, one size should not fit all. Traditional legal or behavioralist models may not travel if the judicial institutions of a political system do not encourage the behavior they predict. To understand who wins and who loses in disputes before high courts, one must understand the type of case that reaches the court, the type of judge that is appointed bench, and the pressure this judge faces once on the court.

Chapter 5
Centralizing and Decentralizing Decisions: The Effects on Jurisprudence

The United States Supreme Court has faced a variety of pressures. In some cases, particularly those dealing with economic regulation, the central government has enjoyed high-levels of success in dispute with the state governments. In other areas, particularly those concerning rights, the state governments have seen increased levels of success. Thus, the jurisprudence of the Court has varied over time and across policy areas. In economic cases, the federal government has been overwhelmingly successful, while in other areas the states have seen increased levels of success. The jurisprudence of the Court of Justice of the European Communities has not varied across time because it faces few pressures that would favor the member states in disputes with Europe. This chapter will discuss the nature of the jurisprudence of both these Courts and argue that the influences discussed in the previous chapters—the type of governmental system and the judicial institutions—can explain actual changes in doctrine as well as changes in overall statistical patterns.

In the case of the European Union, I will argue that the integrative function of the single market is ever-present and overwhelming in its jurisprudence. Thus, in discussing the European Union, I will examine the sources of high levels of success of the federal government. My conclusion is that an examination of the jurisprudence of the Court shows an even greater level of centralization than the statistics demonstrate. When the Court rules against the center and in favor of the member states, it tends to be in cases that do not have a large impact on the relative power of the central and peripheral governments. On the other hand, the relative power of the two levels of government has

been greatly impacted by the Court's decisions that have favored the central government and struck down national regulations.

The United States Supreme Court is a more complex matter. I will argue that in general, in cases dealing with economic regulations the federal government is always more centralizing than in rights cases. The discussion of cases in this area will be more generally oriented, since there were not enough cases to make a statistical analysis of commerce cases in across the Warren and Rehnquist Courts. To be sure, in different eras the Court would expand or contract the federal and state jurisdiction in this area, but I will argue that there was always more of a centralizing impetus in economic cases. In essence, the Court could not permit local interference with the flow of commerce, although at times the Court would narrowly define "commerce" and regulate matters the Court believed were of "local" impact. This fact was evidence of the play of politics permitted by the institutional structures of the Court. However, regulations relating to the interstate flow of commerce were always more favorable to the central government, and always created some limits on state action, even in periods where the Court was generally less favorably inclined toward the central government.

There are statistical changes to explain in the area of rights, and I argue that state regulation of rights has been a more plausible policy option in this area because it lacks any of the centralizing logic of economic regulation. For most of the Court's history it has been willing to accept state regulation, and except during the era of the Warren Court, local variation in these rights was seen as a philosophically and politically acceptable option. The restoration of the philosophical and political acceptance of a state role in rights regulation has allowed the appointment of judges to the Rehnquist Court who are

more willing to give latitude to state regulation than those in the Warren Court. As a result, we see that the Rehnquist Court does, in fact, uphold a greater number of state regulations.

In this Chapter I will outline the history of the jurisprudence regarding interstate commerce and rights in the United States. I will examine the different Court eras and argue that the institutional model of judicial federalism can help explain the jurisprudence in these eras. As I indicated earlier, I do not expect the Courts to act exclusively in conformance with the model. The facts of individual cases vary, and, at times, the issues do easily lend themselves to a particular political philosophy. That said I believe a trend will emerge in which the Rehnquist Court appears clearly more decentralizing than the Warren Court, and the Court of Justice will appear even more centralizing than the statistics tend to indicate.

The United States Supreme Court: Different Eras, Different Decisions

Introduction

Justice Robert H. Jackson (1953) once suggested that Supreme Court rulings have "a mortality rate as high as their authors." This suggests that as judges change, the rules of law they make change. The United States Supreme Court has been characterized by periods in which it has enhanced the central government's power and periods when it has restrained the central government. In these periods, the level of centralization has varied across policy areas. However, I will argue that the Supreme Court's jurisdiction in the regulation of commerce has always been more centralizing than the Court's jurisprudence in maintenance of individual rights. Thus, even in periods when the Court restrained the federal commerce power, there were limits beyond which the states could not interfere

with federal prerogatives. In periods of the expansion of federal commerce power, the power of the federal government was almost limitless and the power of states to challenge this power severely constrained. In the areas of rights, the power of the federal government never reached the extent it did under commerce regulations, and the power of the state to pursue local differences in policy was never as curtailed in the regulation of individual rights as it was in the areas of commerce.

Stages of American Judicial Federalism: Commerce and Rights in the Early Republic

The history of American judicial federalism is one of a varied distribution of power between the federal and state governments. After one of the most expansive periods of power during the Warren Court we have seen a retrenchment of rights under the Rehnquist Court. Typically, these periods of expansion of federal power have been tied to judges appointed by regimes more favorable to the central government. At other times, the regime appointed judges with policy preferences that did not favor the central government, and we would see a period where the Court would limit the power of the federal government.[1]

As discussed in Chapter 2, there is evidence for the more centralizing power of the federal government in commerce regulation in both the founding and the early jurisprudence of the Marshall Court. The Court's first statement regarding national commerce power came in *Gibbons v. Ogden.*[2] The Court, in an opinion by Chief Justice Marshall, gave an expansive reading to the federal government's power to regulate commerce by accepting a broad definition of this power and giving the national

[1] For a discussion of the variety of views regarding the periods of expansion and contraction of the power of government, see Schlesinger (1986), especially Chapters 1 and 2.
[2] 9 Wheat. 1, 6 L.Ed. 23 (1824)

legislature broad power over the field. However, an early opinion of the Marshall Court regarding the Bill of Rights views the Bill explicitly as a restriction on the federal government and not a limit on the several states. Given the opportunity to limit the legislative power of the states in relation to individual rights, the Court held in *Barron v. City of Baltimore*[3] that: "These amendments demanded security against the apprehended encroachments of the central government—not against those of the local governments..." In so holding, the Court failed to extend the protection of the Bill of Rights to the States. Because of this, most of the jurisprudence of the Marshall Court and the Taney Court would be in the area of commerce. Of course, the place of the Bill of Rights in the federal order would change with the addition of the 14th Amendment after the Civil War.

Post-Gibbons Interstate Commerce Clause Litigation: Limits on States

There were a number of other decisions of the Marshall Court that defined the relative powers of the federal and state government. Marshall further explicated the federal government's power over commerce in the case of *Brown v. State of Maryland.*[4] In this case the Court struck down a tax on importers of "foreign articles, or commodities, of dry goods, wares, or merchandises." One of Maryland's Attorneys, Roger Taney, argued that this did not place a tax on imports and therefore was not repugnant to the constitution. Marshall, writing for the Court, held that a tax on the occupation of an importer is a tax on importation. He then discussed the background of the "oppressed and degraded" state of commerce prior to the adoption of the Constitution and provided one of the most concise statements of the background and necessity of Congress power to regulate commerce with foreign nations and among the states:

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[3] 7 Pet. 243, 8 L.Ed. 672, 32 US 243 (1833)
[4] 12 Wheat. 419, 25 US 419, 6 L.Ed. 678 (1827)

> It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States. To construe the power so as to impair its efficacy would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.[5]

There could be no doubt then that the Maryland statute would be unconstitutional. Marshall held that any charge on the introduction of articles into the country, "must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation." Thus, the Marshall Court was known for enhancing the power of the central government in the areas of commerce while the subsequent Taney Court was noted for retrenching the power of the federal government (Graves 1964, Corwin 1919, Frankfurter, 1964, Schwartz, 1993). However, as I will argue below, even Taney, the champion of states rights and the lead attorney for the state in *Brown v. Maryland,* would find limits on the powers of the states and issue opinions not dissimilar to the one found in *Brown.*

The case that the Taney Court's states rights jurisprudence has been most associated with was the infamous case of *Dred Scott v. Sanford.*[6] In this case the Court rejected Congress's power to legislate slavery in territories and overturned the Missouri Compromise. Taney also discussed black citizenship stating that those individuals of African descent were of an "inferior order" and "had no rights which the white man was

[5] 25 US 419, 445-446
[6] 60 U.S. 393, 19 How. 393, 15 L.Ed. 691 (1856)

bound to respect." Taney was excoriated for this opinion both by contemporary and modern observers. An anonymous pamphlet written shortly after Taney's death stated, "he was, next to Pontius Pilate, perhaps the worst that ever occupied the seat of judgment among men."[7] The legacy of this case was to paint Taney as an inveterate supporter of states rights. While the Taney Court certainly deserves criticism for *Dred Scott,* the shadow this case casts has obscured the fact that even the state-centered Taney court found that there were limits to state discretion, and these limits were most evident in the area of regulating commerce.

The Taney Court would distinguish several cases from *Brown v. Maryland,* and would, to some extent limit the power of the central government over commerce. In *Cooley v. Board of Wardens,*[8] the Taney Court recognized local aspects of the regulation of commerce. He found nothing repugnant to the Constitution in Pennsylvania's requirement that ship entering Philadelphia harbor take on a pilot and that ships pay a fixed fee for these services. He differentiated between local and national concerns, stating:

> Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

With regard to matters requiring uniform legislation, Congress may regulate, but if Congress remains silent, then commerce is free to move without interference. States are

[7] Cited in Schwartz (1993, 105)
[8] 53 U.S. 299, 12 How. 299, 13 L.Ed. 996 (1851)

free to legislate purely local aspects (Zimmerman 1992, 91). Yet even Taney recognized limits on the power states to interfere with the flow of imports.

In *Almy v.California,*[9] virtually the same Court that heard *Dred Scott* would review a California statute that placed a stamp tax on "bills of lading" for the shipment of goods.[10] The question that arose was whether this tax constituted a tax or duty on commerce. Would the Taney Court restrict the states power to impose such a tax or duty, or would the Taney Court further enhance the power of the state governments as it did in *Scott, Charles River, and Cooley?*

Somewhat surprisingly, the Taney Court unanimously struck down the California statute with little discussion. Taney, writing for the Court, took an opposite position than he maintained as an attorney for the state in *Brown v. Maryland.* The Court held:

> A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported. And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the State, provided the tax is imposed in the form of a tax on the bill of lading, and this in direct opposition to the plain and express prohibition in the Constitution of the United States.[11]

As a result, Taney would find the California statute "repugnant" to the constitution.

Interestingly, this example of Taney's "nationalism" is little noted. For example, it is not listed in any major law school textbook or in one of the most popular histories of the Supreme Court.[12] The characterization of Taney as favoring states rights is, of course,

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[9] 65 U.S. 169, 24 How. 169, 16 L. Ed.644 (1860)

[10] Justice Clifford, a Buchanan appointee, replaced Justice Curtis. Justice Daniel died before the term in which *Almy* was decided, but, due to the pending Presidential election, was not replaced until after Lincoln took office in 1861. Curtis joined the dissent in *Scott* and Daniel was the only member of the 7-2 majority in *Scott* not to hear *Almy.*

[11] 65 U.S. 169, 174

[12] See, for example Gunther (1980), Cohen and Varat (2001) and Schwartz (1993)

correct and was a result of a larger political shift of power from the federal to the state governments with advent of the populist Jacksonian democracy. President Jackson would have chance to remake the Court by staffing it with more justices than anyone before except Washington and anyone after until Roosevelt. There was apprehension that he would staff the Court in a manner that would undo much of Marshall's nationalism. He staffed the Court with Democrats and Southerners—individuals with a generally less nationalistic outlook than the federalist dominated Marshall Court. Thus, the retrenchment of federal power under the Taney Court could be expected as a result of the appointment process (Schwartz 1993, 70-72). The institutional theory of judicial federalism predicts this, however, the theory also predicts that commerce would exhibit the most resistance to this trend for decentralization. In *Almy*, even the Court that took the strong states rights position in *Dred Scott,* would find centralizing limits on state power in the area of interstate commerce. To the extent the Taney Court exhibited "nationalism" it was in the area institutional theory would predict, commerce. Even to the Court under Chief Justice Taney, the logic of preventing local discrimination against commerce was obvious and strong enough for this Court to strike down a state law in favor of national constitutional provision.

After Taney until 1935, the Court engaged in a decentralizing period. Institutional theory predicts that the political shifts occurring during this period would result in changes in jurisprudence. However, it also predicts that the need to maintain a single market will be strong. Thus, even in times of political decentralization, we would expect centralization, if it were to occur, to occur in the area market maintenance and in preventing local interference with commerce. The Courts of this time were noted for

placing *laissez faire* economics into the constitutional legal order. In a series of cases after the civil war, the Court gradually began to limit Congress's discretion over the economy. This began, as Graves (1964, 321) noted, a "period of weakness, wavering and uncertainty" that would result in a half century of decisions that "severely restricted the power of Congress to regulate interstate commerce."

During this period, the Supreme Court's jurisdiction was generally not favorable to the power of the federal government. The Court struck down many statutes dealing with economic regulation by the federal government. Yet, as I will argue below, even in these cases, interstate commerce and the maintenance of a common market provided a limit on state powers, even in areas where the Court permitted state action generally. This was a period of negative Supreme Court jurisprudence when government was denied the essential power that it was to assume in the 20th Century. The Court adopted limits of legislation that restricted economic activity and adopted the dominant social theory of the day, *laissez faire* (Schwartz, 1993, 174). During this period they limited Congress's ability to regulate monopolies in *United States v. E.C. Knight,*[13] and child labor laws in *Hammer v. Dagenhart.*[14] The Court progressively cut away at Congress's power to enact economic regulation, and this line of jurisprudence would culminate in the Court's dismantling of much of Franklin Roosevelt's "New Deal" legislation.[15]

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[13] 156 U.S. 1,

[14] 247 U.S. 251, 62 L.Ed. 1101 (1918)

[15] See, for example *Panama Refining Co. v. Ryan, 293 U.S. 388, 79 L. Ed. 446,* (1935) and, *A. L. A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 79 L. Ed. 1570 (1935) (striking down parts of the National Industrial Recovery Act), *Railroad Retirement Bd. v. Alton R. Co.,* 295 U.S. 330, 79 L. Ed. 1468, 55 S. Ct. 758 (1935) (striking down Railroad Retirement Act of 1934), *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 79 L. Ed. 1593 (1935) (Striking down Frazier-Lemke Act concerning bankruptcy), and *Carter v. Carter Coal Co.,* 298 U.S. 238, 80 L. Ed. 1160 (1936) (Striking down Bituminous Coal Conservation Act)

Yet even in this period of great contraction, there was at least some recognition of a role, albeit a limited one, for federal regulation. In *Houston, E. & W. T. R. Co. v. United States,*[16] the Court upheld a federal regulation of railroad rates over the attempts by a state regulatory agency to set lower rates for in-state rail lines giving them an unfair advantage in competing with interstate lines. The Court held:

> ...Congress, in the exercise of its paramount power, may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.[17]

The nature of the intrastate railroad was so "interwoven" with interstate aspects of rail transport; Congress could reach this field with regulation.

So, in a few narrow instances, if the impact on interstate commerce was quite apparent, the Court, even in this era ruled in favor of federal power.[18] Yet institutional theory would suggest that even in a period of contraction, local interference in interstate commerce should be struck down in favor of national uniformity. In fact, we find that even the Court of this era, which exhibited hostility to federal prerogatives in general, would defer to the federal constitutional order in areas of local interference with commerce. An example of this is found in a line of cases dealing with a number of tax schemes that amounted to charges for the purpose of doing business. Typically a state would affix an annual fee to a corporate charter of other documents required for doing

[16] 234 U.S. 342, 58 L. Ed. 1341 (1914)
[17] 234 U.S. 342, 353 (1914)
[18] See also *Swift & Co. v. United States* 196 U.S. 375, 49 L. Ed. 518 (1905)

business. These types of fees, when assessed purely in state matters were constitutionally permissible and did not fall within the overall limits on governmental action that flowed from the *laissez faire* notions that Courts of this era imposed on the Constitutional order.[19] In several cases where this type of tax impinged on interstate commerce, the Court would strike down these statutes as violating the principles set forth in *Brown v. Maryland.*

In the case of *Anglo-Chilean Nitrate Sales Corp. v. State of Alabama,*[20] the Court struck down an Alabama statute that assessed a tax on bags of nitrate imported from Chile into the state of Alabama. The Court found that this statue was "repugnant to the imports and commerce clauses"[21] and was therefore unconstitutional. Likewise in the case *Dahnke-Walker Milling Co. v. Bondurant,*[22] the Court struck down an otherwise permissible state regulation on federal constitutional grounds because it impacted interstate commerce. In this case, Justice Van Devanter, a member of the majority in both *Carter Coal* and *Schechter Poultry,* wrote the opinion that struck down a Kentucky statute that regulated the conditions under which a corporation could transact business in Kentucky. He stated:

> The commerce clause of the Constitution (article 1, 8, cl. 3) expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one state to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into another for purposes of sale, the commerce does not end with the transportation, but

[19] For example, see *Gulf Fisheries Co. v. MacInerney*, 276 U.S. 124, 72 L. Ed. 495, (1928) and *Macallen Co. v. Massachusetts*, 279 U.S. 620, 73 L. Ed. 874 (1929)
[20] 288 U.S. 218, 77 L. Ed. 710 (1933)
[21] 288 U.S. 218, 229 (1933)
[22] 257 U.S. 282, 66 L. Ed. 239 (1921)

> embraces as well the sale of the goods after they reach their destination and while they are in the original packages.[23]

The Court held, since in this case the Kentucky statute was broad enough to regulate companies whose only presence in Kentucky was to buy goods to be shipped in interstate commerce, that it was unconstitutional. Since the statute "imposed burdensome conditions," it was "invalid because repugnant to the commerce clause."[24]

There are several other cases that were consistent with *Brown v. Maryland.*[25] The Court exhibited a remarkable consistency in striking down state statutes on federal constitutional grounds. This was not simply an exercise of *laissez faire* economics, because these statutes were upheld when affecting purely intrastate matters. Therefore, it was their impact on interstate commerce rather than any general repugnance to economic regulation that caused the Court to make what was in effect a centralizing decision.

This is not to suggest that these Courts did not exhibit a bias against the central government. Given the political background of the times, institutional theory would suggest Courts of this era would have an anti-regulatory stance, particularly with respect to the federal government. We see the effects of the political regimes of the time on the Court. However, if any decisions favoring the central government were to be made by this Court they would be in the area of the maintenance of a single market. While the Court would narrow the definition of commerce and thus narrow the scope of congressional power during this period, the doctrines first espoused in *Brown v. Maryland* and followed by the states rights oriented Taney Court in *Almy v California,*

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[23] 257 U.S. 282, 291
[24] 257 U.S. 282, 293
[25] See for example *Willcuts v. Bunn*, 282 U.S. 216, 75 L. Ed. 304 (1931), *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555, 69 L. Ed. 439 (1925), *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 62 L. Ed. 295 (1917), and *Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19, 59 L. Ed. 821, 35 S. Ct. 496* (1915)

would persist through the next decentralizing period of the Supreme Court. Even the *laissez faire* Courts of the early 20th Century recognized some need for centralized power. The need to maintain a single national market first announced in *Brown v. Maryland* limited the decentralization of even these Courts.

Thus, these Courts narrowed the definition of commerce to exclude matters such as the production of goods and the regulation of working conditions from the federal ambit. The "New Deal" and Warren Courts would expand this definition to include matters that merely impacted commerce, allowing Congressional regulations in fields that were heretofore traditionally matters for state regulation. In a series of cases the Court extended Congress's power to regulate the economy in an unprecedented manner, reversing most of the pre-New Deal jurisprudence. The Court permitted Congress to regulate manufacturing,[26] agriculture, [27] labor relations,[28] and wage and hour laws.[29] By the time of the Warren Court the commerce power was extended to a point where only minimal impacts on commerce were necessary.[30] This, of course, reflected the orientation of the "New Deal" regime that dominated the Court from the middle 1930's until the end of the 1960's, where we begin to see a change in regimes and the beginnings of a change of the Court back to the right with the Republican appointments of the Nixon, Ford, Reagan, and Bush Administrations. These appointments, which would form the core of conservative majority of the Rehnquist Court, would begin to change the ideological makeup of the Court in the 1990's. It would be in the 1990's that we would

[26] *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58, 81 L. Ed. 921 (1937)
[27] *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 82 L. Ed. 954 (1938), *Mulford v. Smith*, 307 U.S. 38, 83 L. Ed. 1092 (1939), and *Wickard v. Filburn*, 317 U.S. 111, 87 L. Ed. 122 (1942)
[28] *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49, 81 L. Ed. 918 (1937)
[29] *United States v. Darby*, 312 U.S. 100, 85 L. Ed. 609 (1941)
[30] *Daniel v. Paul*, 395 U.S. 298, 23 L. Ed. 2d 318 (1969)

see the first Congressional statutes based on the commerce power and directed at individual conduct overturned since the 1930's.[31]

The Court seemed to narrow the scope of Congressional power by more closely examining whether there was, in the Court's opinion, a substantial impact on commerce. The Rehnquist Court was more willing to question Congress's judgment and strike down statutes where it found an insufficient nexus with interstate commerce. It has done so three times, of which the first was when it struck down the federal Gun Free School Zones Act of 1990. In *United States v. Lopez*[32] the Court reasoned that making it a federal crime to carry a gun in a school zone was beyond the power of Congress to regulate under its commerce clause authority. Chief Justice Rehnquist, writing for the Court, stated that even the cumulative affects of carrying a gun would not "substantially affect any sort of interstate commerce." He went on to state:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further.[33]

The Court distinguished this case from the previous cases but did not overrule the prior law. Several dissents were filed arguing that in fact this did represent a retrenchment from previous laws. Justice Breyer's dissent concluded that: "upholding

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[31] *National League of Cities v. Usery*, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976) began a line of cases where questions arose as to Congress's power to regulate traditional functions of state government. *National League of Cities* was eventually overturned by *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016 (1985). These issues would arise again in *New York v. United States*, 505 U.S. 144, 120 L. Ed. 2d 120 (1992), *Printz v. United States*, 521 U.S. 898, 138 L. Ed. 2d 914 (1997), and *Alden v. Maine*, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999)

[32] *United States v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626 (1995)

[33] 514 U.S. 549, 643

this legislation would do no more than simply recognize that Congress had a 'rational basis' for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce they threaten."

The Court would next strike down, on similar grounds, the civil remedies portion of the Violence Against Women Act of 1994 in *United States v. Morrison.*[34] In this case, Chief Justice Rehnquist, again writing for the majority, stated: "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." Once again the dissent would accuse the court of retrenching from existing commerce clause legislation. The dissent would state that the majority's emphasis on the noncommercial nature of regulated activity does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority's view of the national economy. "The essential issue is rather the strength of the majority's claim to have a constitutional warrant for its current conception of a federal relationship enforceable by this Court through limits on otherwise plenary commerce power."

As the institutional theory predicts, the resurgence of the political right and their ability to place a majority of judges on the Court has caused greater restrictions on the central government's ability to regulate through the commerce clause. We have seen several periods when this has been the case in the Court's history. However, past "decentralizing" has seen some limits on the power of the state and given some leeway to national standards. Even the Courts of *Carter Coal* and *E.C. Knight* found limits in the *Shreveport Rate Case* and the progeny of *Brown v. Maryland.* The current court in *Lopez* and *Morrison* has not rejected exercise of Congressional power over commerce in

[34] 529 U.S. ___

economic matters, but in cases the majority believes only tangentially impact interstate commerce. The ability to regulate interstate matters has been implicitly accepted, though some current justices seem to favor narrowing this reading of the commerce power.[35] The current court has yet to rule on any cases that would allow local interference with the flow of goods in interstate commerce. History would suggest that even this Court would recognize some limits on local interference with commerce.

Thus, there has been an ebb and flow of the power of Congress with changes in political regimes. The regimes that appointed the majority of the New Deal and Warren Courts judges were among the most predisposed to a strong role for the federal government. The judges they appointed expanded the power of the federal government. The political regimes that appointed the majority of the Rehnquist Court were in favor of rolling back the power of the federal government. The judges they appointed have helped roll back federal power. The institutional structures of the Supreme Court both permit and encourage this type of behavior. However, even in periods of retrenchment of federal power, when centralizing tendencies exist, we see them in the area of the maintenance of a single market.

United States Federalism and Rights

The statistical findings in Chapter 4 show little difference between the Warren and Rehnquist Courts' treatment of the federal government in First Amendment rights cases. However, there is a large difference in the treatment of state laws regarding these same rights, with the Rehnquist Court more likely to uphold a state regulation than the Warren Court. These results reflect the place of rights in the American system and a

[35] See for example Justice Thomas's dissent in *Printz v. United States*, 521 U.S. 898, 138 L. Ed. 2d 914 (1997).

political change in attitudes toward the role of states in protecting these rights over the past four decades.

The jurisprudence regarding the First Amendment has largely been a 20th Century phenomena. Writing in 1969, University of Chicago law professor Harry Kalven (1969) compared the progress of First Amendment litigation to a chart at the Chicago Museum of Science and Industry detailing the technological progress of humanity to the First Amendment litigation since 1791. He noted just there had been more technological advances in past 100 years than the previous 49,000 years of human history. He noted a similar acceleration in First Amendment litigation during the term of the Warren Court, opposed to the entire history of the Court to that point. Kalven (1969, 104) states that this reflects the Courts "willingness to confront 1st Amendment Cases at an unprecedented rate." Thus, there are only a few cases of after *Barron* that are of any real impact on the relative powers of the state and federal government to litigate in these areas until the 20th Century, and the real changes in jurisprudence occurred with the Warren Court.

At the beginning of the Republic, the Bill of Rights was not held to apply to the state governments. While, as I will trace below, the Bill of Rights has become applicable, at least in part to states as well as the federal government, we would expect, if anything, it would be somewhat less favorable to the federal government overall, and without major inherent impetus, the jurisprudence in the area of First Amendment litigation should be amenable to change over time.

As noted above, the case of *Barron v. Baltimore* limited the applicability of the Bill of Rights—including the First Amendment freedoms—to the states. In the Court's

opinion, the Bill of Rights "apprehended encroachments of the central government" not the states. This standard would govern the jurisprudence of the Court for most of the next Century. Thus, for much of its history, the Bill of Rights was inherently decentralizing, as it placed restraints on the exercise of power by the federal government, and did not place any comparable limits on the states.

The foundations of a change for this approach came with enactment of the 14th Amendment, though change would not be immediately forthcoming. The 14th Amendment has three provisions; a "privileges and immunities" provision, a "due process" provision, and an "equal protection" provision. As Henry Abraham and Barbara Perry (1998, 31-32) somewhat understate, "lively disagreement continues over the purpose of the framers of the amendment and the extent of its intended application, if any, to the several states." A major cause of disagreement, according to Abraham and Perry (1998, 33) was whether the framers of the amendment intend to "incorporate" or "nationalize" or "carry over" the entire Bill of Rights through the wording of the "due process" thereby making it applicable to the several states.[36]

The Court's first attempt to decide whether the Bill of Rights was incorporated by the 14th Amendment and therefore applicable to the states was in the *Slaughterhouse Cases.*[37] In this case, the Court, in an opinion by Justice Miller, held if the Court accepted the incorporation of the Bill of Rights that the:

> ...consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade

[36] For competing analysis of the intent of the 14th Amendment, for pro-incorporation see ten Broek (1951), Curtis (1986), Flack (1909), and James (1956); for anti-incorporation see for example Berger (1978) and Fairman (1949)

[37] *The Butchers' Benevolent Association of New Orleans v. Crescent City Live-Stock Landing and Slaughter-House Co.*, 16 Wallace 36, 83 U.S. 36; 21 L. Ed. 394 (1872)

> the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.[38]

To the Court, the Bill of Rights (and thus the First Amendment protections) would remain a decentralizing force, restraining only the federal government.

The Court would not adopt incorporation until the 20th Century. Justice Harlan championed the doctrine in several dissents (often solitary) throughout the latter part of the 19th Century. In these dissents, he espoused a belief that the 14th Amendment was meant to incorporate all of the amendments of the Bill of Rights to the states.[39] The Bill of Rights protections would not be applied to the states for the first time in 1925 in the case *Gitlow v. New York*.[40] In this case, the Court upheld against 1st Amendment claims a New York statute that made advocating the overthrow of the government a state crime. However, the Court, while holding that the present statute was not an "arbitrary or unreasonable exercise of the police power...and we must and do sustain its constitutionality,"[41] stated:

> For present purposes we may and do assume that freedom of speech and of the press-which are protected by the First Amendment from abridgment by Congress-are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.[42]

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[38] 83 U.S. 36, 78
[39] See *Hurtado v. California*, 110 U.S. 516, 28 L. Ed. 232 (1884), *Maxwell v. Dow*, 176 U.S. 582, 44 L. Ed. 597 (1900), and *Twining v. New Jersey*, 211 U.S. 78, 53 L. Ed. 97 (1908)
[40] 268 U.S. 652, 69 L. Ed. 1138
[41] 268 U.S. 652, 670
[42] 268 U.S. 652, 666

Since the incorporation of the freedom of speech into the Constitution, the other First Amendment protections were incorporated to the states via the 14th Amendment by the late 1930's.[43] The Court affirmed the incorporation of freedom of speech in 1927 in the case of *Fiske v. Kansas.*[44] In this case the Court found that the application of a Kansas's Syndicalism Act was "unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment."[45] Freedom of the press was incorporated in *Near v Minnesota.*[46] They confirmed the incorporation of freedom of religion in *Hamilton v. Regents of the University of California.*[47] The Court held, regarding the 14th Amendment: "Undoubtedly it does include the right to entertain the beliefs, to adhere to the principles, and to teach the doctrines"[48] of religion. The right of assembly, based on the First Amendment right to assemble and petition the government for redress of grievances was addressed in *De Jonge v. Oregon.*[49] In *Palko v. Connecticut,* the Court held that the 14th Amendment incorporated those rights that represent "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.[50] These include all the First Amendment protections, and since 1937 these rights have been applicable to the states as well as the federal government.

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[43] At this time, many, but not all of the other Amendment's protections have been incorporated to the states. The unincorporated include: The 5th Amendment's provision for indictment by a grand jury; the 7th Amendment's provision right to a jury trial in civil cases; the 8th Amendment's prohibition of excessive bail; and the 2nd Amendment's provisions regarding the right to bear arms. The 3rd Amendment's prohibition on the quartering of troops has not been incorporated, but has, with the advent of a professional standing army, unlikely to become an issue. For an exhaustive discussion of the history of the incorporation doctrine, see generally Abraham and Perry (1998), especially Chapter 3.

[44] 274 U.S. 380, 71 L. Ed. 1108 (1927)

[45] 274 U.S. 380, 387

[46] 283 U.S. 697, 75 L. Ed. 1357(1931)

[47] 293 U.S. 245, 79 L. Ed. 343 (1934)

[48] 293 U.S. 245, 262

[49] *De Jonge v. Oregon,* 299 U.S. 353, 81 L. Ed. 278 (1937)

[50] *Palko v. Connecticut,* 302 U.S. 319, 82 L. Ed. 288 (1937), quoted at 302 U.S. 319, 328.

With the advent of the Warren Court, there was a great acceleration of the willingness of the Court to enforce the First Amendment protections (Kalven 1969). Of course, as a review of First Amendment litigation will show, there has been little consistency. Often, these cases do not lend themselves to an easy attitudinal position, and often the issues raised in these cases cause a conflict between different provisions of the First Amendment.[51] However, I will argue that in a number of cases, the Rehnquist Court was generally more favorable to state law than the Warren Court. Without any overall centralizing impetus, the Rehnquist Court's generally more favorable attitude with regard to state regulation would make them less likely to strike down state regulations than the Warren Court. What is at work is not simply the jurisprudence of rights, but a more overarching question of the roles of the states and federal government in the protection of rights. The original constitutional position is that the federal government is a threat to rights and that the Bill of Rights is needed to protect against encroachment from the federal government. In the mid-20th Century, particularly with regard to civil rights, it appeared that the states were the main threat to civil liberties, hence the doctrine of incorporation. This is based on the premise that national enforcement of rights is essential to their protection.

Jesse Choper (1977) argues that it is the federal constitution through the federal judiciary, not the processes of state and local governments, that provides the most effective enforcement of rights. As Jacobsohn (1996, 43) notes: "Where rights are

[51] See *Wooley v. Maynard*, 430 U.S. 705, 51 L. Ed. 2d 752 (1977), involving both speech and religion issues.

involved, local communities have become the problem."[52] However, there has been resurgence in the viability of local communities as a protector of rights in recent years. Amar (1991) argues: "that localism and liberty can sometimes work together, rather than at cross-purposes." Cass Sunstein (1988) argues against centralizing in order to promote rights as the "outcome of a well-functioning deliberative process." This traditional republican goal was best fostered by the Constitution's original "simultaneous provision of deliberative representation at the national level and self-determination at the local level, furnishing a sphere for traditional republican goals. Robert Bork has been one of the most outspoken critics of the nationalization of rights arguing that by allowing differences in rights among states, federalism permits the individual the choice to move to another state, leaving the choice what freedom to value entirely within the hands of the individual: He argues (1990, 53):

> In this sense, federalism is the constitutional guarantee most protective of individual's freedom to make his own choices. There is much to be said, therefore, for a Court that attempted to preserve federalism, which is a real constitutional principle, by setting limits to national power.

Thus, theoretically, federalism as a guarantor of rights has seen an increasing number of proponents. This echoes the sentiments toward federalism espoused by the Nixon and Reagan administrations that were responsible for nominating the current conservative majority on the Court.

With the backdrop of the idea that the state governments were damaging to individual rights, the Warren Court decided cases during a period when the federal government was seen as necessary and politically acceptable to the protection of

[52] See also Ely (1981) for a process oriented approach; and Ackerman (1991) for support of the Warren Court's transformational jurisprudence.

individual rights. This, of course, was contrary to the concerns of the founders regarding the dangers inherent in a central government and the idea that federalism best guaranteed rights by distributing power. Thus, the Warren Court sat in during the culmination of an anomalous period in American history: a period when the political regime in the central government was seen a better guarantor of political rights than the deliberative political process at the local level. Against this backdrop, we would expect judges who were appointed to the Court during this period to favor an expanded role for the federal government in the protection of rights, and we would expect to see corresponding changes in jurisprudence reflecting these appointments. In fact, this is what occurred.

The Warren Court presided over an unprecedented expansion in individual rights. Shortly after Chief Justice Warren's retirement, Anthony Lewis (1968, 1) wrote that it was not much of an exaggeration to refer to Warren's tenure as a "revolution made by judges." He argued (1968, 1) that the Warren Court:

> "greatly broadened the citizen's freedom to criticize public figures, and the artist's to express himself in unconventional and even shocking ways; it greatly restricted government authority to penalize the individual because of his beliefs or associations."

As a result, the Warren Court would greatly limit the state governments' ability to regulate the freedoms protected by the First Amendment by the most expansive application of this Amendment to the states.

Almost all of the First Amendment freedoms were enhanced under the Warren Court. Many of these cases built on previous jurisprudence and simply expanded existing law by placing greater restrictions on state governments. In the case of *Engle v. Vitale*[53]

[53] 370 U.S. 421, 8 L.Ed2d. 601 (1962)

the Court built on existing jurisprudence on the "establishment"[54] clause of the First Amendment and held the daily use of New York's "Regent's Prayer" to be unconstitutional.

In other areas, the Warren Court would initiate an entirely new jurisprudence. Most of the jurisprudence on obscenity would originate in the Warren Court era, and this jurisprudence would place limits on the ability of state government regulation of freedom of speech (Kalven, 1968). While recognizing that some limits existed, the Court generally restricted the type of materials that could be judged obscene by allowing restrictions only on items appealing chiefly to "prurient interests" and thereby striking down regulation of items with artistic or other values.[55] The Court held that: "The portrayal of sex, *e. g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."[56] The Court found that the standard for evaluating obscenity would be: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[57] The Court also decided that the "community standard" that would hold for judging whether items were in fact obscene would be a national standard.[58] In *Stanley* v. *Georgia*,[59] the Warren Court held that States could not punish the mere possession of obscenity in the privacy of one's own home.

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[54] See *Everson v. Board of Education*, 330 U.S. 1 (1947)
[55] *Roth v. United States* and *Alberts v. California* 354 U.S. 476, 1 L. Ed. 2d 1498 (1957)
[56] 354 U.S. 476, 487
[57] 354 U.S. 476, 489
[58] *Jacobellis v. Ohio* 378 U.S. 184 (1964). This standard would be localized by the Burger Court in *Miller v. California* 413 U.S. 15, 37 L.Ed.2d. 419 (1973)
[59] 394 U.S. 557, 22 L. Ed. 2d 542 (1969)

Of course, the Warren Court's impact in restricting states went well beyond First Amendment cases. I have provided a few examples of how this Court placed limits on the states and these limits were politically acceptable. Both a philosophical resurgence of conservatism on a political and philosophical basis took place in the 1970's and 1980's that would culminate in the appointment of the Rehnquist Court. State regulation of rights would be more acceptable to this court than the Warren Court. This was not so much a new philosophy, but a reappearance of old ideas regarding the place of the states and local deliberative political process as having a role in defining and protecting rights and a lessening of the nationalization seen in the Warren Court.

Both Nixon and Reagan looked to turn back the nationalization of rights that had taken place since the thirties and especially during the reign of the Warren Court. Yarborough (2000) argues that Nixon and Reagan campaigned against the rights rulings of the Supreme Court. These administrations, particularly Ronald Reagan's administration, tried a variety of legislative and constitutional approaches to implementing their agenda. "Most significant in terms of potential long-term impact, though, was the administration's use of presidential control over judicial appointments to perpetuate and expand its conservative human rights legacy" (Yarborough 2000, x).

My argument is, given the backdrop of the abuses in civil rights by states, nationalization of rights was acceptable, and the role of the states was quite limited to the regime that appointed the Warren Court. Recently, federalism has become both politically and theoretically a more viable option for courts and state regulation on rights issues is more acceptable to the Supreme Court. That the Nixon-Reagan appointees were picked in part to overturn this nationalization of rights should result in a Court that is

more predisposed to allow state regulation to stand. We see a more favorable treatment of state's rights under in our statistical results, and I believe this statistical change reflects the philosophical change resulting from the appointment of the Nixon-Reagan nominees. The jurisprudential changes are more difficult to see. However, I will argue that there have been noticeable patterns of decentralization in both areas of free speech and freedom of religion. In the former, the state governments have been more willing to regulate than the federal government and the current Rehnquist Court has been more willing to let them regulate, and the net result has been a greater decentralization in First Amendment freedoms under Rehnquist Court than under the Warren Court. While not threatening the basic premise of incorporation, these shifts in jurisprudence are sufficient to explain the statistical differences outlined in Chapter 4 and reflect the conservatism of the Rehnquist Court.

The difficulty is in finding doctrinal coherence in First Amendment cases. While generally the Warren Court was more suspicious of government regulation of religion or of expressive conduct, one can point to numerous cases where the converse is true. This is because these issues, at least since the doctrine of incorporation was adopted, have neither an overwhelmingly centralizing or decentralizing impetus. If anything, we would expect the Rehnquist Court to be more cognizant of states rights in general, and therefore more willing to uphold state statutes in general.

In the area of religious freedom, the Court has been willing to give governments greater leeway to uphold religious displays,[60] and permitted states to provide teachers for remedial education to disadvantaged students in religious schools.[61] Thus, it has generally

[60] *County of Allegheny v. ACLU,* 492 U.S. 573, 106 L.Ed.2d 472 (1989)
[61] *Zobrest v. Catalina Foothills School District* 509 U. S. 1 (1993)

allowed a somewhat greater level of entanglement between government and religious schools. However, there are limits, as the Court has struck down state laws establishing a special school district for handicapped Hasidic children in New York,[62] and student-led prayer at commencement and at football games.[63] In the area of free exercise, the Court has been willing to permit New Jersey prison officials to prevent Muslims from attending congregational service held on Friday afternoons,[64] holding that the official had not violated the inmates' rights under the Free Exercise Clause. The Rehnquist Court upheld the denial of unemployment benefits under Oregon law to drug counselors who were fired for the ceremonial use of peyote.[65] However, the Court upheld a statute prohibiting ritual animal sacrifice that allowed the slaughter of animals in almost all other cases.[66] Yarborough (2000) notes that there has been a general weakening of the "wall of separation" during the Rehnquist years. This weakening can help explain the statistics that show the Rehnquist Court upholding a greater proportion of state laws in First Amendment cases.

The Rehnquist Court has been more likely to uphold state regulations limiting or prohibiting "obscene" expression than the Warren Court. Like religion, this area has been mixed, with the Court expanding power in some areas such as commercial speech, while being looking more favorably on government regulation of "obscene" material (Yarborough 2000). For example, the Court upheld Indiana's ban on nude dancing.[67] In this case the Court rejected the argument that prohibiting the performance of nude

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[62] *Board of Education of Kiryas Joel v. Grumet,* 512 U.S. 687, 129 L. Ed. 2d 546 (1994)
[63] *Lee v. Weisman,* 505 U.S. 577, 120 L. Ed. 2d 467 (1992)
[64] *Ione v Shabazz,* 482 U.S. 342, 96 L. Ed. 2d 282 (1987)
[65] *Employment Division v. Smith,* 494 U.S. 872, 108 L. Ed. 2d 876 (1990)
[66] *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 124 L. Ed. 2d 472 (1993)
[67] *Barnes v. Glen Theater* 501 U.S. 560,115 L. Ed. 2d 504 (1991)

dancing was related to expression because the state sought to prevent its erotic message. Justice White in his dissent argued that the majority was "distorting and ignoring settled doctrine."[68] In this case the Court was departing from previous jurisprudence by upholding a regulation that targets the expressive activity itself.

The role of the states and the Bill of Rights is complex. We see a statistical difference in these two courts regarding state regulation of First Amendment rights. During the period of the Warren Court, states were seen as an impediment to rights and the ideal of federalism as a guardian of rights was discounted. For better or worse, the current Court was staffed by a regime that had a greater appreciation for the role of states in the enforcement of rights. The philosophy of Bork and Berger, along with the politics of Nixon/Reagan, results in a Court that is more amenable to allowing states to develop their own notions of rights. The philosophy and politics are reflected in the statistics, though admittedly, the jurisprudence does not lend itself to easy characterization.

Conclusion: Commerce and the First Amendment

Maintenance of a single market is the policy area where the federal government is most likely to prevail in disputes with the states. Even in period of contraction in the power of the federal government's authority, there has still been a strong bias against local interference in interstate commerce. The reason that commerce is more centralizing is not necessarily found in uniform support of federal power, but in the consistent prohibition on direct burdens by state governments on interstate commerce. While the Court has allowed some local regulation of matters such as pilots, it has rejected anything that resembles a tariff or other direct burden on commerce.

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[68] 501 U.S. 560, 593.

First Amendment rights are more neutral in their applicability and therefore will always lack the centralizing logic of market maintenance. For the first 100 years of constitutional history, the rights were applicable *only* against the federal government. The incorporation of rights though the 14th Amendment would change the overwhelmingly decentralizing nature of these rights and allow, for the first time, their applicability to the states. Under the Warren Court, states were increasingly limited in their ability to regulate in the areas of rights. Because of the nationalization of politics in this era, we would expect this to happen, as states were seen as impediments to the exercise of rights. Under the Rehnquist Court, we expect to see a revival of greater state autonomy in these areas. This has occurred to some extent. The appointment process allows the President to place individuals he believes will pursue his policy preferences on the Court, but it is not a guarantee that these judges will always act in accordance with these preferences, just that they are more likely to follow these preferences when they are selected largely on ideological fidelity. As Yarborough (2000) notes that the appointments, while not necessarily producing a constitutional counterrevolution, have resulted in cases with substantial impact on future decisional trends. As conservative Circuit Judge Clifford Wallace argues:

> The Framers did not intend to inhibit religion, only to prevent Congress from favoring one over another. At the state level, citizens were left free to develop religious policy through representative democracy. The merits of a system providing for "separation of church and state" was not decided by the First Amendment; rather, it specified only where that decision might be made. Based upon the original intent of the Framers, that forum was to be located in the several states, not in the federal courtroom.

Judge Wallace notes that three members of the Court including the Chief Justice share this view. These Justices, Scalia, Thomas, and Chief Justice Rehnquist, are all appointees of conservative regimes. Wallace concludes: "Perhaps others will follow." Should Justice O'Connor or Souter, or one of the Clinton appointees die or retire during the current administration, then the ability of states to regulate in this area may very well be expanded with addition of a judge who shares the policy preferences of George W. Bush and "follows" the ideal of Judge Wallace. Should this occur, one would likely see a much more substantial and consistent trend toward increased powers of the states to regulate First Amendment rights.

The Court of Justice: Constant Centralization

Introduction

The Court of Justice fairly consistently favors the center. Thus, we have no change in jurisprudence to explain. Given the institutional characteristics of the Court of Justice, what is surprising is that the Court favors the peripheral governments as much as it does. However, upon closer examination of the jurisprudence of the Court of Justice, this "preference" for the peripheral governments is not as great as it may seem at first glance. The Court, for the most part, rules in favor of the central government under two circumstances.

First, the Court of Justice is more likely to review administrative actions and question the judgment of the Commission than the Courts in the United States. Therefore, in these narrow technical areas, the Court is more likely to strike down the actions of the center. While these have some impact in practice by making the administrative process more open to judicial review, they do not amount to a challenge to

the policy-making competence of the center or augment in any meaningful way the power of the periphery. What occurs in these cases is not a challenge to European power, but typically these cases involve whether Europe has properly followed its own rules and procedures. For example, the Court may hold that the Commission acted improperly in exercising its power, but it has never held that Europe lacked the power to enact a regulation (Varat 1990).

The type of case that the Court of Justice deals with is striking. While not every case before the United States Supreme Court is of the notoriety or importance of *Brown v. Board of Education* or *Roe v. Wade,* the mundane nature of some of the matters that reach the Court of Justice is surprising to find on the docket of a high court. For example, in the case *Weiner SI GmbH v Hautptzollamt Emmerich,*[69] the Court of Justice addressed the question of when is a pajama a pajama. In this case, the Court dealt with the issue of whether an article of clothing that could be either as sleepwear or loungewear should be classified as a "woman's nightdress" for purposes of the Common Custom Tariff. The Court held that the Common Custom Tariff for "woman's nightdress" must be construed as "covering undergarments which, by reason of their objective characteristics, are intended to be worn exclusively or essentially in bed." It was for the national court of the member state bringing the reference to decide whether these garments had these objective characteristics or not.

The other main instance is when the center itself backs the upholding of a statute. The way the Court is configured, not all the challenges are direct assaults by the member states on the power of the Europe. Rather, cases come to the court in a variety of ways and under a number of different circumstances. Often the Commission will argue in its

[69] Case-C-338/95

observations that the national statute is valid. One common type of case where this occurs is where the Commission argues that the national statute actually favors the process integration, despite claims by appellants that it does the opposite.

In the cases of consequence to fundamental intergovernmental powers, the Court of Justice overwhelmingly rules in favor of the center. In the next section I will discuss challenges to both European and National level regulations and argue that in both cases the Court has favored Europe over the member states. In the case of Europe, they have never found an act to be beyond the authority of Europe.

European Regulation

The Court has, over the past 40 years, carved out more power for Europe and a larger role for itself in defining this power. In effect, the Court has turned a treaty into a constitutional legal order superior within its sphere and has done so through several mechanisms. First, it established the doctrine of supremacy of the Treaties over national law. Then, it gave individuals a method to enforce rights granted by the Treaties through the doctrine of direct effect. It devised a method by which the process of harmonization of laws could be rapidly achieved through the doctrine mutual recognition. Finally, it gave the European institutions the power to enforce European regulations by allowing damages for the failure by member states to comply with European regulations. Below, I will discuss these cases in greater detail. However, there has been little or no discussion of the cases in which the Court of Justice strikes down European regulations. A closer examination of these cases shows that invalidating European regulations did not have any impact on the power of Europe versus the member states and makes the Court of Justice appear even more centralizing that the statistical analysis would lead one to believe.

In the few instances when the Court rules against a European regulation, these decisions are not likely to have a substantial effect on the power of either level. In the few cases where European regulations were at stake, the matters in question were narrow, technical interpretations rather than broad issues of great consequence for intergovernmental powers. For example, in the case of *GoldStar Europe GmbH v Hauptzollamt Ludwigshafen,*[70] the Court ruled on the validity of a Commission Regulation. The issue in this case was whether the General Rule 2(a) for the interpretation of the combined tariff nomenclature, under which any reference in a heading to an article is to be taken to include that article in incomplete or unfinished form, provided that the incomplete or unfinished article has the essential character of the complete or finished article. In this case the Court invalidated the Commission's classification of components consisting of magnetic tape drive mechanisms as apparatus for video recording or reproducing. These mechanisms represented only 30 to 40% of the value of the complete apparatus of video recording or reproducing apparatus, and the Court held that, by classifying these drives as complete video recorders when they constituted less than half the value of the finished product as a finished product under General Rule 2a, the Commission committed a "manifest error of assessment." Thus, the Commission regulation was struck down, but not the Commission's power to make such a classification. In other words, while the Commission may have abused its discretion in this matter, it did not lack discretion. Similar results can be seen in other cases where a European regulation was struck down.

[70] Case C-401/93

In *Yoshida GmbH v Industrie- und Handelskammer Kassel,*[71] the Court ruled that, in adopting Regulation 2067/77 concerning the determination of the origin of slide fasteners, the Commission exceeded its power under Council regulations. *In Nicolet Instrument GmbH v Hauptzollamt Frankfurt am Main – Flughafen* and *Johann-Wolfgang-Goethe-Universität v Hauptzollamt Frankfurt am Main - Flughafen,*[72] A Commission classification of an apparatus under the heading of "scientific apparatus" was struck down. In *Gebr. Vismans Nederland BV v Inspecteur der Invoerrechten en Accijnzen,*[73] the Court held that the Commission exceeded the limits of its discretion by misclassifying partly de-sugared sliced sugar beets, whether or not pelletized either directly by compression or by the addition of a binder having a sucrose content exceeding 10% by weight by reference to the dry matter, as beet pulp. In fact, eleven of the twelve actions of the European level government struck down by the Court in the area of free movement of goods pertained to "misclassifications" in tariff regulations. In general, the Court did not rule that European law did not apply, but that a different European law should have been applied. In cases where there has been a direct and substantial challenge to European powers or a direct conflict between a national and European level regulation, the Court has consistently ruled in favor of the central government.

In cases where a European level regulation has been challenged, the Court has never once ruled that a matter was beyond power of Europe. While the Court has struck down some actions of the central government, they have struck these actions down

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[71] Case C-114/78

[72] Case C-30/84, Case C-4/84. In four of the 12 cases where the Court struck down a European regulation, the regulation dealt with certain equipment imported for scientific and research use. Equipment imported for such use was to be exempted from import duties. The Court held in a number of cases that the Commission had too broadly defined "scientific" to include commercial or other uses.

[73] Case C-265/89

because of the central government's failure to follow its own procedures or because the decision was taken by the wrong European institution. Typically, this involves the Commission either performing a task that the Court rules should be made by or with the cooperation of the Council or Parliament or that the Commission's action were outside what was authorized by a current European Regulation. They have never ruled that an action was outside Europe's power if done in a procedurally correct manner.

Several lines of cases involved direct challenges to European power. In these cases the Court consistently favored the central government and cases of this type form the basis for the "constitutionalization" and the development of the institutional power of the European Union. In the case of *Costa v. ENEL,*[74] the Court established the doctrine of supremacy of European law. The Court stated that in contrast with ordinary international treaties, the Treaties establishing the European Economic Community have created a legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply. By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves. This makes it impossible for the member states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot be inconsistent with that legal system. And a law stemming from the treaty, an independent source of law, could not because of

[74] Case c-64/1964

its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question.

Thus, the Court held that within their sphere, the Treaties were superior and would override any national statute that conflicted with them. As Joseph Weiler (1999, 20-21) points out, "starting in 1964 the Court has pronounced an uncompromising version of supremacy: in the sphere of application of law, any Community norm, be it an article of the Treaty (the Constitutional charter) or a miniscule regulation enacted by the Commission, 'trumps' conflicting national law whether enacted before or after the Community norm." In conflicts between national and European regulations, European regulations always win.

The Court has also held that it is the only institution that could even potentially hold a European regulation invalid. In *Foto-Frost v Hauptzollamt Lübeck-Ost,*[75] the Court held that national courts against whose decisions there is a judicial remedy under national law might consider the validity of a community act. If they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. In contrast, national courts themselves have no jurisdiction to declare that acts of community institutions are invalid.

That conclusion is dictated by the requirement for community law to be applied uniformly because divergences between courts in the member states as to the validity of community acts would be liable to place in jeopardy the very unity of the community legal order and detract from the fundamental requirement of legal certainty.

[75] Case c-314/85

Secondly, the Court held that it is necessary because coherence of the system of judicial protection established by the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Since Article 173 gives the Court exclusive jurisdiction to declare void an act of a community institution, the coherence of the system requires that where the validity of an act is challenged before a national court the power to declare the act invalid must also be reserved for the Court of Justice.[76]

The second major foundation of European law that affects the relative power of the European and member state governments is the doctrine of direct effect. Simply put the doctrine of direct effect states that Community regulations confer rights on individuals that may be enforced by national courts.[77] This doctrine enhances the powers of the center by providing additional avenues of enforcement of Community regulations and additional methods by which conflicting national statutes are struck down. The main way this is accomplished is by allowing citizens of member states to invoke Community law against a public authority of a member state, forcing the member state to comply with Community law.

In *van Gend & Loos v Netherlands Inland Revenue Administration*,[78] the Court of Justice held that the European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals. Thus, independently of the legislation of member states,

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[76] For additional analysis of the doctrines of supremacy, see also, Mancini (1989), Stein (1981), and Green (1969)

[77] See, *Van Gend en Loos v Netherlands Inland Revenue Administration* 26/62, *Defrenne v Sabena* 43/75, and *Van Duyn v Home Office* 41/74.

[78] Case 26/62

community law not only imposes obligations on individuals but is also intended to confer upon them rights that become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaties but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community. According to the spirit, the general scheme and the wording of the EEC treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.[79] The doctrine of direct effect applies to all forms of Community norms including regulations, directives and decision of Community institutions.

For example, in *SpA SACE v Finance Minister of the Italian Republic,*[80] the Court held that an Italian Corporation could invoke the doctrine of direct effect to avoid paying duties levied by the Italian Finance Minister. In this case, charges such as these were to have been gradually abolished in accordance with a Commission directive, but the Italian authorities failed to implement the provisions of directive in a timely manner. The company sued to prevent Italy from collecting this levy, which should have been abolished under the terms of the directive. The Court held that the clear and precise prohibition on exacting these charges lends itself, by its very nature, to producing direct effects in the legal relations between member states and their subjects, and confer on individuals these rights that the national courts must protect. In other words, the Company did not have to pay the charges because the actions of the Commission established a right that overrode an existing Italian statute, and the individual could directly enforce this right.

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[79] For a further examination of the doctrine of direct effect, see Dashwood (1978) and Hartley (1981), particularly pp. 185-223.
[80] Case C-33/70

The Court of Justice has also given weight to European regulations by allowing for the damage claims against member states by individuals for failing to comply with Community law. This doctrine was established and takes its name from the case of *Francovich v Italian State.*[81] The *Francovich* doctrine states that the rights granted by Community law would be weakened if individuals were unable to obtain reparations when their rights are infringed by a breach of this law for which a member state can be held responsible. The possibility of reparation by a member state is particularly indispensable where the full effectiveness of Community rules is subject to prior action on the part of a member state. In the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law. The Court held that therefore it follows that the principle whereby a State must be liable for loss and damage caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty. A further basis for this obligation can be found in Article 5 of the Treaty, under which they are required to take all appropriate measures, whether general or particular, to ensure the implementation of Community law, and consequently to nullify the unlawful consequences of a breach of Community law. The importance of the *Francovich* doctrine for intergovernmental relations is apparent. If nations attempt to avoid implementing Community laws, they can be held financially responsible for damages resulting from the failure of implementation.

The Court will strike down a European regulation if it believes an institution has acted improperly, but in these cases it typically prefers one European law to another European law. Thus, the Court has ruled in several cases that the Commission should

[81] Case c-9/90

have classified beet pulp as sugar beets or scientific equipment as commercial equipment. However, the Court has never struck down a European law in favor of a national law. Rather, in conflicts between European and national laws, the Court has always favored the center. Many of these cases involved mundane matters, but they have also involved the establishment of *Francovich* doctrine, and the doctrines of supremacy and direct effect, the cornerstones of the Community legal order.

National Regulations

Thus, the jurisprudence of Court of Justice is at once more consistent and more complicated than in the United States. The Court gives less deference to technical interpretations of the law but tends to not adopt a knee jerk approach to invalidating national laws. Rather, they evidence a willingness to defer to the Commission in its view of whether a national regulation furthers the ultimate goal of integration. But, the Court also deals with fairly minor matters and hears cases of far less importance than does the United States Supreme Court.

When challenges are made to national regulations, the Court will often follow the lead of the central government in making a decision.[82] Often, a third party makes challenges to the validity of a member state's regulations as a result of a conflict with European regulations. The European government may not agree with the challenging party's interpretation of European law and may file an independent observation with the Court of Justice setting forth its position.

[82] Examining the position of the central government in cases is not a simple matter. These observations are not published or readily available to researchers. However, they are often citing in the opinion of the advocate general with some specificity. The information in this chapter on the positions taken by the European Commission are from Advocate General's opinions

The case of *H. Krantz & Co. v Directe Belastingen and Netherlands*[83] dealt with an instance where national legislation authorized a tax collector to seize goods that were delivered from another member state even if the supplier of these goods held a reservation of title. In this case, the company challenged the seizure of goods based on the grounds that it would inhibit installment sales and serve as a restriction on imports in violation of Article 30 of the Treaties. The Netherlands argued that this provision was compatible with the Treaties and did not constitute a restriction on imports. The European Commission agreed with this interpretation, stating that the national regulation did not fall within the provisions of the Treaty because it had no bearing on imports. The Court of Justice concurred with the Commission's observation and upheld the national statute and the Netherlands' seizure of the goods.

I have examined cases since 1987 in the area of free movement of goods and services where national regulations have been struck down. I have found that in cases where there were factual or legal issues in dispute, and the Commission's position with regard to these disputes was identifiable, the Court followed the Commission's position approximately 78% of the time. Thus, in the vast majority of cases where the Court strikes down a national regulation, it does so with the agreement of the representative of the European government before the Court. Thus, even when a national regulation is upheld, more often than not, there is a European reason for doing so. In these situations, the Commission's observation to the Court suggests that the national regulation does not inhibit or in fact aids the goals of integration. There are 220 Common Custom Tariff Cases that make up 29% of all 756 Free Movement cases. The Court has dealt with issues such as whether bull semen was for commercial or non-commercial use, whether

[83] Case 69/88

meat from boars that were raised domestically fell under the heading of wild boars or domestic swine, and whether a brassiere and panty set constituted a brassiere or panty for the Common Custom Tariff. These largely administrative matters would likely never reach the United States Supreme Court and many would not merit consideration by any American court. Thus, overall, the Court generally upholds national regulations when the Commission favors them and in cases where the national law is not in direct conflict with a European statute, in which case the Court has always held that the European regulation controls.

National regulations that conflict with provisions or goals of the Treaties are almost always struck down. The process of integration was facilitated by the elimination of national laws having the equivalent effect of tariffs. Laws pertaining to packaging, labeling, and product standards are no longer permitted to prevent the import of non-complying goods from another member state. If a product is legally produced in one member state, then its sale is legal in all member states. In the case of *Procureur du Roi v Benoît and Gustave Dassonville,*[84] the Court held that all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-community trade are to be considered as measures having an effect equivalent to quantitative restrictions. The Court furthered this rule in *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein,*[85] the Court held that the concept of "measures having an effect equivalent to quantitative restrictions on imports" contained in article 30 of the EEC Treaty is to be understood to include legislation that prohibits the importation of products into the market in one member state's products that are lawfully

[84] Case c-8/74
[85] Case C-120/78

produced and marketed in another member state. In this case, German authorities prohibited the importation of flavored liqueurs with an alcohol content of less 25%. The effect of this was to prohibit the import the French liqueur *Cassis de Dijon,* which had an alcohol content of 15-20% on average. While member states could prohibit the import of products on grounds of public health, consumer protection, or other similar grounds, the Court rejected the German government's claim that the sale of lower alcohol content beverages would cause a public health problem because they would "more easily induce a tolerance towards alcohol than more highly alcoholic beverages." The Court noted the German market provided "an extremely wide range of weakly or moderately alcoholic products and furthermore a large proportion of alcoholic beverages with a high alcohol content freely sold on the German market is generally consumed in a diluted form." Thus, with these two cases, the Court struck down an entire class of national regulations along with much of the power to regulate the standards under which products are sold in their nations.

The Court has allowed some exceptions, but only to the extent that the purpose of the regulation did not discriminate against the products of other states. Under Article 36, a member state may set its own standards of public morality, but could not use these standards simply to ban products from other member states. For example, in *Regina v. Henn and Darby,*[86] the Court held that importers could be prosecuted for importing pornography from the Netherlands where there was a general prohibition on such products, whether produced locally or imported. On the other hand, a prohibition of obscene materials is not valid if this type of product is readily available and legally for

[86] Case C-34/79

sale in the member state. In *Conegate v. Customs and Excise Commissioners*,[87] the court made a ruling concerning the seizure by the United Kingdom customs authorities of various consignments of goods imported from the Federal Republic of Germany by Conegate Limited. In the course of an inspection at the airport where the consignments arrived, customs officials discovered that the goods consisted essentially of inflatable dolls that were clearly of a sexual nature and other erotic articles. Following a complaint made by the customs authorities, the Uxbridge Magistrates Court ordered the forfeiture of the goods. Conegate appealed, contending that in the particular circumstances the forfeiture of the goods in question constituted an infringement of Article 30 of the EEC which could not be justified on grounds of public morality within the meaning of Article 36 of the Treaty because goods such as these were being legally manufactured and sold in the United Kingdom. The Court held that a member state could not rely on grounds of public morality in order to prohibit the importation of goods from other member states when its legislation contains no prohibition on the manufacture or marketing of the same goods on its territory. Thus, the effect of the prohibition was not to ban these adult novelty products in general, but to ban the sale of *German* adult novelty products. This type of restriction would not be exempt from the provisions of Article 30 on grounds on public morality.

Thus, while there are some exceptions to the prohibition on measures having equivalent effects, they do not take claims of public morality or safety under Article 36 at face value and search for disproportionate effects on imports. Among the national provisions held invalid by the Court were excessive roadworthiness tests,[88] government

[87] Case C-121/85
[88] Case C-50/85 *Schloh v Auto Controle Technique*

assistance for the purchase of domestic products,[89] a "Buy Irish" campaign,[90]and the protection of national art treasures and antiquities.[91] Thus, the power of the member states to control any aspect of the import or export of legally manufactured products, a traditional function of national governments, has been all but eliminated by the Court of Justice.

Europe: Conclusion

The European Central Government is overwhelmingly successful in disputes with the member states before the Court of Justice, as the statistical analysis in Chapter 4 demonstrates. If anything, the review of case law in this Chapter shows that the Court is even more favorable to Europe than the statistical analysis indicates. While we see some European regulations invalidated, we see none invalidated because they conflict with national laws. We find that most national laws are struck down if they appear to conflict with a European regulation. In cases of conflict, Europe wins. In upholding the power of European law, the Court has established many of the cornerstones of the European legal order. In reviewing national statutes, the Court has limited the sovereign power of the member states with regard to most restrictions on the imports of products. The net effect of the Court's jurisprudence in this area has been a virtually unidirectional transfer of power to the central government.

[89] Case C-103/84 *Commission v. Italy*
[90] Case C-244/81 *Commission v. Ireland*
[91] Case C7/68 *Commission v. Italy.* This case concerned an Italian statute that taxed the export of cultural treasures. The Italian government argued that art treasures were outside the scope of the treaty but the Court held that they held an economic value and this charge was a violation of the Treaties.

Chapter 6
Conclusion: Institutional Model and Courts

In his book, *The Puzzle of Judicial Behavior,* Lawrence Baum (1997, 3) argues that "our progress towards an explanation of judicial behavior has been limited: what we do not know stands out more than what we do know." He argues that the best way to counter this weakness is through research that takes differing approaches and forms. The goal of this project has been to advance the knowledge of judicial behavior by incorporating cross-national and institutional perspectives to create a model of judicial behavior that can account for differences in political systems and court structures and better explain who wins and who loses in disputes between central and peripheral governments in disputes over the boundaries of power in federal and federal-like systems. This work is at best another incremental step toward a better understanding of judicial behavior through the prism of institutional theory.

As first steps are likely to be, much of the findings are tentative, but I will argue that this research has made several valuable contributions to the field of public law. First, I believe the institutional method provides a better means for understanding the behavior of high courts than the legal or attitudinal model. The institutional method can provide an explanation for the variance in behavior across courts. Second, I believe I have provided a model for a comparative analysis of the judicial institutional features, of case selection, judicial selection, tenure and judicial decision-making that can be a useful way to look at these factors in a number of situations. I will suggest several other political systems where an institutional form of analysis can be used to explain behavior in courts. Third, this project has implications for the study of judicial behavior, suggesting that several commonly used approaches, specifically the strategic and attitudinal approaches,

can be complemented by institutional analysis. Finally, I believe this research has practical implications for the design of courts.

Judicial Institutions

The differences in patterns of behavior between the United States Supreme Court and the European Court of Justice seem to provide support for an institutional analysis of judicial decision-making. I make no claims that this method exhausts all potential influences on judicial behavior, but I believe it allows for a truly cross-national approach to understanding Courts that has more utility for comparative research than either the attitudinal model or legalistic approaches. Because the entire European Union system is tied so closely to maintenance of the single market, most of the disputes over the boundaries of governmental authority between Europe and the member states involve economic regulation. Since cases involving economic regulation should favor central government control, we would expect the Court to favor overwhelmingly the European government in disputes with the member states. The evidence shows that the European government is successful in the vast majority of disputes with the member states. The federal system of the United States is broad and produces a variety of pressures on the Court. In cases involving economic regulation, the federal government is highly successful. In cases involving rights, this level of success is reduced, and the state will win a higher percentage of cases. The type of case that a court hears will significantly influence who wins and who loses.

In addition, some polities do not pick judges with regard to their fidelity to the political preferences of the current regime, but rather tend to isolate party politics from the decision-making process. The European Union is an example of such a system.

Therefore, we would not expect attitudes to matter as much in decision-making when they do not matter in judicial selection. Because of this, there should be little change over time. The data show little variance over time in the jurisprudence of the European Union. An examination of the decisions behind these statistics reveals an even greater aggregation of power towards the center than the statistics alone tend to indicate. In the United States, the selection of judges is largely a choice for the President. Despite the need for Senate approval, the President usually can appoint someone he believes will share his core policy preferences. Once appointed, these individuals are wholly insulated from direct outside pressures to their career or finances. If one party can affect a change on the Court by appointing a majority of like-minded justices, then we should see a change in the jurisprudence of the Court as a result of cohort change. Currently, we would expect a court dominated by democratic nominees to be more favorable to the federal government than one nominated by republican presidents, and the data support this conclusion. During the tenure of the republican-dominated Rehnquist Court, the states had a higher level of success in disputes with the federal government than under the more liberal democratic appointee-dominated Warren Court.

The type of federal system and the judicial structures that control how these judges are selected, serve, and make decisions will influence the behavior of high courts and therefore who wins and loses in disputes before these courts. Regarding questions of governmental power, some systems will bring cases to the docket that have differing logics and sets of pressures. Even within systems, we may see change over time if the institutional structures allow the political regimes to influence the selection of judges and these judges are relatively unconstrained in their actions while on the bench. To truly

begin to understand how high courts affect center-peripheral governmental boundaries, one must first ask what type of system and what type of court is involved in defining this relationship.

Judicial Institutions in Comparative Perspective

The research also provides a new framework for looking at both judicial selection and judicial decision-making that can travel and allow for comparison across systems. In this project, I have argued that some of the ideas about representation and voting that have been used mainly in the realm of coalition decision-making can also be adapted and applied to the structures of judicial decision-making. By using these basic tools of political science to examine judicial decision-making, I believe I have provided a more complete method of analyzing comparative judicial behavior.

The selection of a single judge has less impact in the European Union than in the United States. The appointment of a single judge on the Court of Justice has much less of an impact of the makeup of the Court than the appointment of single justice to the Supreme Court of the United States. Voting on the Supreme Court is by a simple majority rule, so in a closely divided court, a change of one justice could change the outcome in a case. The impact of a single judge of the Court of Justice is nowhere near as drastic.

But selecting a judge is only the first step in the process. Judges operate in different environments that create different pressures on judges. Some like the United States insulate these judges from external pressures. Thus, once selected for political fidelity, they are free to pursue their own, and typically, their appointing regime's political preferences. On the other hand, the judges on the Court of Justice seem to be at

least somewhat more open to pressures than their Supreme Court counterparts. Since willingness to pursue partisan outcomes would not have aided in their appointment, we can expect them to avoid such behavior as the result of the desire for reappointment.

Also, voting rules can impact judicial decision-making. Unanimity rules will force greater compromise in decision-making by limiting the acceptable judgments in any single case. Justices of the Supreme Court are more likely to pursue policy preferences because the voting rules on the Court make it more likely that will be able to successfully pursue policy. Voting rules on the Court of Justice make it much less likely that the pursuit of policy will be successful, and in fact, evidence from other voting situations indicates that repeated futile pursuit of policy could isolate a judge and remove his or her influence from the process. Thus, we do not expect a judge on the Court of Justice to engage in the pursuit of personal preferences because there is no payoff for doing so, and in fact, such pursuit of policy may be injurious to the judge's long-term ability to remain a factor in the process.

This research suggests that there will be real differences in outcomes depending on the combination of judicial institutions present in any Court. A broader study of more courts with different structures and analyzing behaviors in federal and non-federal situations is a logical next step in this research. However, this research strongly suggests that cross-national studies of courts that look at attitudes, law, or attempt to understand strategic behavior will have to account for institutional differences in order to explain more completely differences in outcomes among different courts.

The underlying institutional structures can account for how courts behave. In the following section I will examine three other systems and argue that the particular

behavior that other scholars have uncovered can be attributed to the institutional structures of these courts.

The United Kingdom, Changing Structures, Changing Courts

The United Kingdom has long been a country with a strong unitary system of government and strong rules of parliamentary supremacy (Drewry 1992). Scholars have long seen courts as distinct from politics (Kritzer 1996). While the courts in Britain may interpret laws, they have not been traditionally able to overturn laws though judicial review. Lacking a formal written constitution or any real distribution of power between levels of government, the Courts of the United Kingdom have had no basis under which they could overturn a law, and the Courts in the United Kingdom are much less active than courts in other western democracies. However, three systemic changes have altered the role of Courts in the United Kingdom.

While Parliament is, in the end, supreme, the Court has assumed a much more activist role vis-à-vis parliament because of adding additional layers of government through membership in the European Union, the passage of the Human Rights Act, and the devolution of power to the center. The first two events have added to the role of the courts by changing adding disputes between levels of government, and if the devolution of power continues in any real sense, the disagreement between levels of government will almost invariably increase the activism of the Courts. The institutional model suggests that judicial activism is related to multi-level governance. In the case of the United Kingdom, some powers that were traditionally part of the central government's prerogative have been transferred to other entities, creating a system with multiple

sources of authority. The court has become active because of the need to act as a referee between these levels of government.

The European Court of Justice has ruled that member states have transferred sovereignty to the European level of government, and that in the areas where sovereignty has been transferred, European law is supreme (see Chapter 2). This creates the potential for conflict between levels of government over the contours of judicial authority. The Courts of the United Kingdom are compelled by European traditions to void any national statute, but the legal tradition of the United Kingdom does not provide them the power to undertake this act. Institutional theory would suggest that the court in the United Kingdom must act as a referee. The court does perform this function, and does void national laws that conflict with European regulation, but does so in a manner that at least formally preserves parliamentary supremacy. The courts assume parliament did not intend to violate its obligations under the Treaties and "interpret" the law in a manner that allows it to be read consistently with the European regulations. Unless parliament explicitly states it intends to override the Treaties, the court will void any and all provisions of a law that conflict with a European regulation (Mullen 1998).

Likewise, the acceptance of the European Convention on Human Rights into British law through the Human Rights Act has given the British courts another means for striking down conflicting British law. Since 2 October 2000, anyone who believes his or her human rights have been or will be violated can bring a case in British Courts. The courts can issue a declaration that the particular law (whenever passed) is incompatible with the Human Rights Act. Subsequently passed laws do not have to comply with the Convention, but the minister promoting the legislation must state whether, in his or her

opinion, the legislation conflicts with Convention rights. In this way the United Kingdom has reconciled parliamentary sovereignty and the enforcement of fundamental rights (Webber 2001).

Recently, Parliament has granted some local autonomy to Scotland and Wales, and the cross border agreement between Northern Ireland and the Irish Republic. This devolution of power has the potential to result in an even more activist court. However, in all of these cases, all devolved grants of authority still come from parliament and thus parliament can define these grants of autonomy as it sees fit. If however, these newly empowered governments ever obtain an irrevocable transfer of power then disputes may arise as to the exact limits and borders of authority between competing levels of government.

The entry of Europe into the European Union and the European convention on human right has created in effect multi-level governance where none existed. As Holland (1991) predicted, the presence of multiple sources of authority leads to judicial activism. Europe has adopted two new systems of "higher law." The further devolution of power may heighten this new activism. Scholars can no longer separate long from politics in the United Kingdom. Systemic changes have changed the nature of the cases that reach the court and the nature of winners and losers before the courts.

Germany: Appointing Federal Judges to Define Federalism

The method of judicial selection can explain the relatively high levels of success of the German *Lander* in disputes with the federal government. In Germany, the borders between the federal government and the *Lander* have always been more sharply enforced than in the United States. The government of Germany has numerous all-party

compromises regarding federalism (Blankenberg 1996). Much of this compromise is reflect in the structures of government found in the German *Basic Law.* The lower house, German *Bundestag* is a traditional parliament. The German upper house, the *Bundesrat,* consists of 16 cabinet members appointed by the *Lander* governments. The effect of this is to add elements of intergovernmental cooperation in the government. This cooperation extends to the appointment of judges to the Federal Constitutional Court. The appointment power is divided between the *Bundestag* and *Bundesrat,* giving the *Lander* a form of representation on the Court (Blankenberg 1996).

A distinguishing feature of the court has been the Court's willingness to uphold the prerogatives of the *Lander* government. The Court has been respectful of the boundaries of *Lander* authority and has been willing to strike down federal encroachments on this authority (Kommers 1989). This outcome is not surprising because the *Lander* have had a role in the appointment of half of the court, and these judges have, in general, protected the authority of the *Lander.* The German federal system is a bargain agreed to by all political parties. The appointment of judges to the Federal Constitutional Court is part of this bargain. As a result, the Court enforces the bargain, and is protective of the peripheral governments. The structures of the court, specifically the staffing of the Court, help determine the outcomes in cases before the Court.

Canada: Quebec and Ethnic Autonomy

Canada is a broadly based federal system. To understand the winners and losers in this system, one must look beyond the formal powers of the federal government and the provinces, and to the broader goals of the federal system. The Canadian federation

was established in 1867 by an Act of the British Parliament, the British North America Act.[1] Four provinces formed the new federal union, but others were quickly added so that Canada would have seven provinces by 1873.[2] Created shortly after the American Civil War, Canada was cognizant of the weaknesses in the American system that led to secession and rebellion and designed a stronger central government (Cairns 1971). Thus, like the United States Constitution, the Canadian Constitution enumerates subject areas (29) given to the Federal Government. Unlike the United States Constitution, the Federal Government has a residuary clause, permitting the Federal Legislature to enact "Laws for the Peace, Order, and good Government of Canada..."

In the abstract, the Canadian federal system provided a more powerful central government than the United States Constitution. In practice, the courts in Canada[3] have not augmented the power of the center. These courts have not been active, nor did they enhance the power of the federal government (Baar 1991) prior to the adoption of a Charter of Rights in 1982. The reason that the federal government has not become stronger is because Canada, unlike the United States, must balance the interest of the English-speaking majority against the minority *Quebecois*. In Canada, the institutions of federalism parallel and reinforce the historically dominant cleavages. French speakers

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[1]The British North America Act, 1867, 30-31 Vict. c.3 (UK). This Act is now known as the Constitution Act since 1982 as enacted by the Canada Act, 1982, Eliz. II c. 11 (UK).

[2]The original four provinces, Ontario, Quebec, Nova Scotia and new Brunswick, were joined in 1870 by Manitoba, 1871 by British Columbia, and 1873 by Prince Edward Island. IN 1905 Saskatchewan and Alberta joined in 1905. Finally, Newfoundland, which had been a member of the British Commonwealth with its own government joined the federation by ratifying the Terms of Union in 1949 (Soberman 1986).

[3] Originally the highest court was the Judicial Committee of the Privy Council of the United Kingdom. In 1949, the Supreme Court of Canada replaced the Privy Council as the court of last resort for Canadian constitutional questions.

are concentrated in Quebec, and therefore the provincial boundaries parallel the countries main ethnic cleavage. The desire for the *Quebecois* to maintain a distinct cultural identity dictated a federal model. One institutional manner in which this cleavage has been accommodated is by guaranteeing that Quebec will have three of the nine seats on the Court. Canadian federalism has been able to reflect, accommodate and reconcile the different communities (Simeon 1995, 253-254). Because Canada is a broad system, we would expect more balance than in the European Union. But the presence of a geographically concentrated ethnic minority provides a decentralizing pressure not present in the United States. We would expect the Canadian Court to be less centralizing than the broadly based American court, and we find that this is the case.

Generally, the Court would effectuate the purposes of Canadian federalism. Until 1949, the Judicial Committee of the Privy Council expanded provincial powers and limited the power of the central government. Since then, the Supreme Court has self-consciously tried to balance federal and provincial power and has been a much more active umpire of federal boundaries than the United States Supreme Court (Simeon 1996, 252-253). The adoption of the Charter of Rights in 1982 was supposed to have a centralizing effect because it created a national standard for rights litigation to which provincial legislation would be subject (Knopff and Morton 1985). However, recent research has shown that even the adoption of a "national bill of rights" has not benefited the national government's power. The Supreme Court has been slightly more supportive of provincial laws than federal laws, and clearly the Canadian Supreme Court has not lived up to the centralist predictions regarding the Charter of Rights (Smithey 1996)

Daniel Elazar (1976) noted that Canadian federalism was intended to promote unity. Somewhat ironically, it has promoted this unity by allowing more provincial diversity. Without this diversity, the Canadian system would be unable to maintain a balance between its two distinct constituent cultures. Canadian federalism protects minorities and enables cultural, linguistic, religious and ideological diversity to flourish (Stevenson 1989). If the Court had favored the central government in disputes with the provinces, then the ability to protect the diverse cultures would be limited. The need to protect this diversity provides a powerful pressure that tends to favor the provinces in disputes with the center. As a result, the goal of the political system to promote unity by accommodating diversity militates against the transfer of power from the province to the federal government by the court.

Implications for Research in Judicial Behavior

I believe this project is also of some help in advancing the state of knowledge on the broader question of judicial behavior. Baum's view that what we know is less than what we don't know is still true. However, this research does contribute by providing a greater variety of approaches to the study of courts by augmenting the existing models of judicial behavior. With regard to the attitudinal model, this research complements it rather than disputes it because, at its base, the attitudinal model is an institutional model, albeit dealing with only a single institution. I argue that the attitudinal model is a good fit for the United States Court because it has the institutional features of political selection, lifetime tenure, and fairly easily maintained majorities. Given these structures, the attitudinal model explains a great deal, but I believe that the more structures vary from the American model, the less explanatory power this model will have. However, this

research argues that there are some areas that may be more resistant to attitude changes than others. For example, even the Courts that were the most favorably disposed to state governments have typically struck down local discrimination against out-of-state competitors. Thus, in some policy areas, attitudes seem to go only so far to change behavior.

This raises an intriguing question as to whether the policy area controls the level of discretion a judge can exercise in any given case. This would have implications both for attitudinal models and strategic actor models. That Marshall felt compelled to not "nationalize" the Bill of Rights in *Barron v. Baltimore,* despite his general favoring of an expansion of national power, suggests that though attitudes in the aggregate may explain much, the driving purpose behind a constitutional provision may mitigate against a judge following his or her attitudes. Similarly, the logic of free market would have seemed to provide limits even to the Taney Court in *Almy,* despite evidence in a long line of cases culminating with *Cooley* and *Dred Scott* that seemed to indicate a strong predilection for ruling in favor of states rights. The supporters of the attitudinal model argue that their model is the best fit. Yet even in this highly significant model there remain some areas that are unexplained. I would argue that the evidence in this study suggest institutional influences can help explain these decisions. Thus, an implication of the institutional model is that not all cases should be equally open to attitudinal change. The attitudinal and strategic models may not pay enough attention to inputs. A case regarding state interference with the common market brings to the conference table a vastly different set of impacts than a case regarding first amendment.

This also raises the possibility that judges may be more or less willing to engage in strategic behavior, either because of the type of issue before them or their own preferences. In some instances, judges' attitudes, because of the strength of their feelings on an issue, may be the only thing that matters. Thus, on an issue like abortion, one could imagine an unwillingness to engage in compromise on the part of Justice Scalia and Thomas. In these instances, the ability to dissent loudly and vehemently may be of more personal value than any compromise from their preferred position could possibly afford. In other cases, the policy area might demand that a judge abandon his or her preferences. A judge might be willing to compromise and engage in strategic behavior because the issue is simply not of enough importance or there are no pressures created by the policy question at issue that it outweighs all the available compromises. Thus, one future interesting project provoked by this research would be to look at how and why judges vote *against* attitudes. Is there any pattern to these contrary votes, and do different policy areas play a role in judges voting against their attitudes? Hopefully, the institutional and cross-national research presented here will advance the study of courts in new direction and encourage, as Baum suggests, research from a variety of directions.

Designing Judicial Institutions: Practical Impact

This research indicates that institutional design has an impact on judicial performance. By implication, this suggests that one can encourage certain sorts of behavior and discourage different sorts of behavior in judges by altering the design of judicial institutions. This comes with a large caveat that no institution can completely determine behavior, but the evidence from the European Union suggests that some behavior can be encouraged or discouraged. For example, the United States Supreme

Court often reverses precedent. This can be accounted for by the fact that the political regimes have a typically unfettered choice of at least the type of judge they prefer, if not their first choice in all cases. Also, precedent can often hang by the thread of a 5-4 vote, so Supreme Court decisions have, as Justice Jackson noted, a mortality rate as high as the judges who make this precedent.

In the case of *Planned Parenthood v. Casey*,[4] the Court by a 5-4 margin upheld the basic tenants of *Roe v. Wade*.[5] If one of the majority justices were to retire, then President Bush would likely attempt to nominate someone who shares his philosophy on this matter. A single nomination, made by a President who received less than a plurality of the vote in his election and approved by a bare majority of the Senate could affect the equivalent of a constitutional amendment and overturn the existing constitutional order by voting contrary to the retiring justice's position in *Casey*.

The Founders made a constitutional amendment difficult, but the selection of this one justice could effect a change that the political process has failed to do for the past 20 years. One might argue that there would be opposition to this appointment, but presidents have good success in getting their nominees appointees to the bench even during periods of divided government. The question I raise is should a single judge have this power? If constitutional law is a higher law that it can be changed so readily through the political appointment of judges seems a constitutional anomaly. Whether this is healthy for the constitutional order is beyond the scope of this project.

What this project suggests is that it does not have to be so. Either by amending the constitution to allow for a less partisan means of selection, or by simply raising the

[4] 505 U.S. 833, 129 L.Ed.2d 669 (1992)
[5] 410 U.S. 113, 35 L.Ed.2d 147 (1973)

number of Senators necessary for appointment to the bench, one could force moderation on the Court. Shrinking the zone of acceptance for any candidate for the high court could make the president less focused on political fidelity and more on the broad appeal of a candidate based on qualities such as moderation and experience. The Court of Justice has in many ways diffused the selection of judges from the whims of a political regime. I argue that doing the same with the American Court could moderate the Court and result in a more steady jurisprudence over time.

Also, eliminating dissents and requiring a unanimous decision would lead to compromise or at least more narrowly drawn constitutional decisions. It would change the dynamic of the decision-making process, and the Court's decisions would not contain contradictory opinions found in dissents. In addition, the Court's current decision-making process allows for disagreement in opinions without disagreement in outcome. What happens in cases of multiple concurrences, the Court agrees on results, but provides only mixed or limited guidance for lower court in future case. Again one can debate the value of this, however institutional theory suggests it need not be so.

Thus, the United States Supreme Court does not have to function in the manner it currently functions. While admittedly reform in these matters are not likely to be forthcoming, the important point is to realize the United States Supreme Court behaves the way it does because it has a design that allows it to behave in such a manner. This design is a choice, not an inherent characteristic of courts in general. The European Court has a structure that lends itself to an overwhelming pattern of centralization that has been remarkably consistent over time. It is designed to be particularly resistant to the vicissitudes of politics. The design of the United States Supreme Court allows it to be

influenced by the political process in selection, and then insulates the judges on this bench from any direct threats to their careers and only pressures of an indirect sort one on the bench. The conduct of the United States Supreme Court is not surprising, but nor is it inevitable. As Jeffrey Segal (1997, 42) notes: "The federal judiciary was designed to be independent, so we should not be surprised that in fact it is." But this independence is due to the design. By changing the design, we can change the dynamics on the Court

Finally, this research has implications for the designs of courts in any multi-level society. Selection will be very important in this area. My suggestion is that it is possible to design a court to account for any variety of federal situations and to account for either unifying or diversifying factors. For example, if a concern is the legitimacy of a court in multi-ethnic society, one might set a court up along a "consocial" model that accounted for all the major groups in the selection process, allowing these groups to pick their representative to the Court. Once on the Court, a unanimous decision-making system would cause either compromise or conflict. I would suggest even a minimal willingness to make such a system work would result in a compromise rather than gridlock, as the European model seems to indicate. Thus, institutional research may be important for courts in multi-ethnic developing democracy in areas such as the Balkans, or in newly emerging international or supranational organizations as the pressures of globalization create the need for conflict resolution on a world-wide scale.

Concluding Remarks

The institutional theory provides a better explanation of the differences in outcomes in these two courts than either a legal or attitudinal approaches. Neither the legal model nor the attitudinal model explains the variety in outcomes in patterns of

behavior across the two courts in this study. Political systems and court structures represent an institutional choice. The different federal systems can choose from a variety court structures to fit the needs of their system. A court in a federal system, like federal systems themselves, can preserve unity or encourage diversity, depending on the needs of the system. We should expect different courts, embedded in different political systems, having different court structures will tend to act differently. Generalizations about the behavior of courts in a cross-national setting are difficult. Cross-national models that ignore institutional structures will be under specified.

Appendix
Data Coding

European Data

The European Court of Justice data were derived from Alec Stone Sweet and Thomas L. Brunell Data Set on Preliminary References in EC Law, Robert Schuman Centre, European University Institute (San Domenico di Fiesole, Italy, 1999). This data set contained the first 2,978 references filed, which invoked 3,805 different claims of EC law (see the discussion of legal subject matters in Appendix D below. From this data set, I was able to obtain a list of all cases in which final decisions were reached between 1954-1998. From these I was able to obtain the subject matter and date of cases from from the existing data file and have files with all cases relating to the free movement of goods and social provisions. The existing data coded the source of the case and type of case, but not the results. To this list of cases in the areas of free movement (FREEMOV) and social provisions (SOPRO), I coded three additional variables for all cases in which a final decision was reached.

The new variables are

STATUTE—Was the validity of a statute or regulation challenged?

Coding:

0= No Statute
1= National Statute/Regulation Challenged
2= European Level Statute Challenged

PRECLUDE—did European Law preclude a National Statute?

0= No
1= Yes

VALID=Was a European Statute Valid?

0= N0
1=Yes

Using the Stone and Brunell data with regard to date and subject matter, I coded all preliminary references in the subject matter areas of "Free Movement of Goods and Services" and "Social Provisions" and developed a data base that included information on all cases where the Court made an explicit judgment on the validity of either a national or European level regulation. I coded 748 cases in the "Free Movement Area" and 248

cases in the "Social Provision" and of these, there were 548 in "Free Movement" and 126 cases in "Social Provisions" where a final decision was reached.

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