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*1023 STATE LAWS AND THE INDEPENDENT JUDICIARY: AN ANALYSIS OF THE EFFECTS OF THE SEVENTEENTH AMENDMENT ON THE NUMBER OF SUPREME COURT CASES HOLDING STATE LAWS UNCONSTITUTIONAL

Donald J. Kochan [d1]

Introduction

"How little we know what any amendment would produce!" exclaimed Senator Elihu Root on the floor of Congress in 1911. [1] Root was speaking during the debates leading to the direct election of United States Senators through ratification of the Seventeenth Amendment to the U.S. Constitution in 1913. [2] No longer would state legislatures elect the Senators for each state, [3] but instead, the Senators would be directly elected by the voters. In his preceding statement, Senator Root warned that "no one can foresee the far-reaching effect of changing the language of the Constitution in any manner which affects the relations of the States to the General Government." [4]

Another Senator thought he knew what the Seventeenth Amendment would bring for the United States when it was first debated: "[I]t was prophesied by Senator Hoar, who stood like *1024 Horatius at the bridge fighting for the old system, that popular election [of Senators] would in the end overthrow 'the whole scheme of the national Constitution as designed by the framers.'" [5] The original constitutional design of "[a]llowing state legislatures to select senators provided the states with an institutional weapon to defend their sphere of action." [6]

Debate over the Seventeenth Amendment--now ninety years old--and its effects on state power has hardly disappeared. In recent years, the Seventeenth Amendment has been the subject of legal scholarship, [7] congressional hearings and debate, [8] Supreme Court opinions, [9] popular press articles and commentary, [10] state *1025 legislative efforts aimed at repeal--one in Montana rejected as late as February 2003 [11] --and activist repeal movements. [12]

To date, the literature on the effects of the Seventeenth Amendment has focused almost exclusively on the effects on the political production of legislation and competition between legislative bodies. Very little attention has been given to the potential adverse effects of the Seventeenth Amendment on the relationship between state legislatures and the federal courts. This Article seeks to fill part of that literature gap, applying positive political theory to examine the potential effects of the Seventeenth Amendment while remaining generally agnostic concerning whether the hypothesized decrease in state power represents a sound governing structure.

Two primary phenomena related to the Seventeenth Amendment experience and its effect on state legislatures are explored in this Article. First, this Article generally looks at the federal/state relationship as it was altered by the Seventeenth Amendment,

including a brief survey of the literature that concludes that direct election divorced Senators from their allegiance with state legislatures and, indeed, put them in competition with state ***1026** legislatures for currying interest group favor. As a result of an elimination of the element of a vertical separation of powers between the states and the federal government, state legislatures lost power. [13]

Second, this Article proceeds by examining the institutional weapons available to state legislatures in the pre-Seventeenth Amendment world resulting from state legislatures' influence in Congress. It posits that these weapons could be used to influence outcomes at the Supreme Court and other federal courts if those courts threatened the institutional interests of state legislatures, mainly the durability of state legislative acts. This Article hypothesizes that the Seventeenth Amendment left federal courts free to hold state laws unconstitutional without significant fear that the institutional interests of the federal court system and the interests of individual judges would face retaliation for such holdings.

To accomplish this examination, Part I of this Article briefly explains the alteration in constitutional design accomplished by the Seventeenth Amendment without unduly repeating the literature. Part II presents two theories of institutional behavior affecting the outcomes of Supreme Court decisions. The first theory is based on congressional self interest as an explanation for the presence of an independent judiciary. This theory assumes that Congress will act in ways that preserve the independence of the judiciary, tending to cause judicial interpretations that uphold original legislative bargains and consequently result in a low occurrence of decisions finding laws unconstitutional. The second theory discussed in this part is based on the assumption that the federal courts act in a self-interested manner and that both Congress and the courts are responsive institutions. Under this theory, the Supreme Court generally refrains from holding laws unconstitutional in order to avoid retaliation or obtain favor from Congress. The final section in this Part synthesizes the theories to explain that Court and congressional self interest should both lead to a low occurrence of cases finding laws unconstitutional when those laws affect an interest of Congress.

Part III presents empirical material that supports the theory that the federal courts have treated the constitutionality of state laws ***1027** differently before and after the Seventeenth Amendment. Although evidence of causation must be explored further, there is substantial empirical evidence that suggests that the Seventeenth Amendment may have altered the relationship between state legislatures and federal courts.

Because the Seventeenth Amendment removed interests of state legislatures from that set of interests generally of concern to Congress, the conditions for a low occurrence of rulings of unconstitutionality fail to hold in relation to most state legislative acts. These conditions held prior to the Seventeenth Amendment for both acts of Congress and state legislatures but held only for acts of Congress in the post-ratification period; thus, it can be hypothesized that these theories of congressional and judicial behavior, if accurate, should predict a significant increase in the number of state laws ruled unconstitutional as a result of the Seventeenth Amendment.

I. The Alteration of the Congressional Landscape Through the Seventeenth Amendment

The Seventeenth Amendment provides for the direct election of United States Senators by the people of each state. [14] Prior to ratification of the Seventeenth Amendment in 1913, state legislatures were given the right to elect (or otherwise select the method of election for) United States Senators [15] --the voters in each state played only an indirect role through their state legislative representatives. As a result, Senators were direct agents of the state legislatures, not of the citizens of a state. [16]

The original constitutional design was intended to protect the states in the national legislative scheme. [17] As George Mason argued during the constitutional debates when defending the motion to give state legislatures the right to elect Senators, "'the state legislatures ***1028** also ought to have some means of defending themselves agst. [sic] encroachments of the Natl.

Govt."' [18] In addition, "Wilson argued that the legislative election of senators would afford adequate security for the states." [19] Rakove contends that "[i]t was probably this consideration that led all ten states . . . to approve" the provision for state legislature election of Senators. [20]

Many have argued that the Seventeenth Amendment has affected the federal-state power equation by, in varying ways, tipping the scales of power toward the federal government. [21] Although there will be a brief description of the conclusions of this literature, for purposes of this Article's contribution, there is no reason to completely rehash the analyses in this scholarship.

One of the primary arguments in that scholarship involves the elimination of a direct voice for state legislatures in Congress, decreasing the protection of state legislative interests at the federal level--whether it be from federal acts that encroach upon state sovereignty as protected under the Tenth and Eleventh Amendments, or otherwise. The scholarship, however, has not addressed the effect of the Seventeenth Amendment upon the influence of state legislatures in the federal judiciary.

Prior to the ratification of the Seventeenth Amendment, state legislatures had direct access to the powers of the Senate as the principals in the agency relationship. State legislatures were the ***1029** primary constituency of their respective Senators, and Senators were in many ways beholden to their state legislatures. "As long as states were represented in the Senate, that body was not likely to adopt legislation which was opposed by even a significant minority of states." [22]

A Senator's tie to a state legislature went beyond the initial electoral relationship--it was further tied by practices manifesting from the electoral relationship. For example, actions of Senators were sometimes controlled by state legislatures through the process of "instruction." [23] Bresler explains that "[t]he most notable instructions in America were from state legislatures to [United States] Senators . . . . As the 'constituency' of U.S. Senators, the state legislatures regularly instructed them. . . . Legislatures instructed [United States] Senators more during the second quarter of the [nineteenth] century than at any other time in American history." [24]

The failure to follow instructions from state legislatures was a serious offense, leading to the resignation of several non-complying Senators, precisely because those legislatures felt that senators should be bound by their instructions. [25] Zywicki explains that this agency relationship was fundamental to the protection of state legislative interests in the national forum:
The Senate was seen as the forum for the states to speak as sovereign entities. State governments ensured that senators represented their interests through the historic practice of "instructing" senators. Under this practice, state legislatures told senators how to vote on particular legislative items. A senator served as "an ambassador of the State to the nation while the [House] representative was simply a member of his branch of congress and not in any way subject to other authority than that of his constituents and of the nation as a whole." . . . Senators who failed to ***1030** heed their instructions were usually forced to resign, even if their terms were not complete. As agents of the state legislatures, the primary duty of senators was to protect the sphere in which state and local governments could operate, free from the potentially strong arm of Washington. [26]
The Seventeenth Amendment, however, "eliminated a major source of instructions to American legislators." [27] Thus, before the Seventeenth Amendment, a state legislature had both the ability and the tendency to use its influence in the United States Senate to achieve its own state institutional objectives. [28] Included in these powers were all of those that affect the institutional relationship between Congress and the courts. [29]

Through Senators, state legislatures had a strong influence in Congress and fairly direct access to any control mechanisms Congress had over the Supreme Court and other institutions. [30] After the Seventeenth Amendment, state legislatures' access

to Congress became much more attenuated.[31] As Bradley A. Smith has argued, the result of the Seventeenth Amendment was the elimination of the Senator as an agent for state legislative interests. He explains that "[t]he effect of the Seventeenth Amendment was to strip from the States one of their primary weapons to fight federal encroachment on state power."[32] As a consequence, "United States Senators, suddenly able to appeal directly to popular passions when seeking re-election, rather than to state officials jealously guarding their own power, were no longer a bulwark of states' rights against ***1031** the federal leviathan."[33] A state legislature could no longer count on its Senator to protect its institutional interests on the federal stage,[34] and the state legislatures "were reduced almost to the level of another lobby at the national level."[35]

McGinnis and Rappaport describe the result of the Seventeenth Amendment as not only decreasing a state legislature's power over its Senators, but also as creating a new incentive structure in which Senators would actually benefit from encroaching on state sovereignty because Congress would then be a more powerful institution vis-à-vis state legislatures, consequently making Congress a more attractive venue for interest group investment in legislation:

> [A]fter adoption of the amendment, senators possessed a natural inclination to encroach on state sovereignty; after all, states were a competing power center for servicing constituents and interest groups. As a result, the protection of the enumerated powers on which federalism depended lost a crucial institutional defense within the federal government. Second, because state legislators were superior to the general public at monitoring the behavior of senators, the amendment increased monitoring costs, making it easier for senators to prefer special interests to the interests of their constituents.[36] The Seventeenth Amendment split the state legislature/Senator agency relationship and, many argue, resulted in an alteration in ***1032** the constitutional landscape and the balance in our federal system.

II. The Seventeenth Amendment's Elimination of Direct Access By State Legislatures to Congress and Its Consequences for State Legislatures vis-à-vis the Federal Courts

This part provides a theoretical explanation of the relationship between state legislatures, Congress and the Court, illustrating that the alteration in the relationship between state legislatures and Congress effectuated by the Seventeenth Amendment should be expected to alter the judiciary's treatment of state laws. The analysis focuses on one particular loss for state legislatures as a result of the Seventeenth Amendment--the ability to influence decision-making in the federal judiciary.

The seminal thesis of Landes and Posner posits that legislators generally prefer an independent judiciary because the independent judiciary tends to uphold, and thereby increases the value of, legislative bargains.[37] As a result, Congress guards the independence of the judiciary -- i.e., generally refrains from interfering with its operation--because it serves Congress's own self interest.[38] Others argue that the federal courts too are self-interested and that the federal courts will generally uphold legislative bargains for fear of retaliatory measures from Congress that might be adverse to the courts' institutional interests[39] --measures, and the threat thereof, that actually help give the judiciary an incentive to remain independent and that provide the durability upon which Congress relies in its legislative bargaining with interest groups.[40]

When Congress or its members are not self-interested in legislation, such as that passed out of state legislatures, and when federal courts need not fear retaliation from those state legislatures ***1033** because they have no direct voice in Congress, the conditions and incentives for generally upholding legislative bargains disappear. When Senators broke free from the ties of state legislatures, their self interest was no longer aligned with state legislative sovereignty and indeed, as McGinnis and

Rappaport argue, became competitive with state legislative interests. [41] When state legislatures lost their access to Congress, they lost their ability to use any congressional control mechanisms to encourage the federal judiciary to uphold state laws. [42]

A. Congressional Self Interest in An Independent Judiciary and the Responsive Courts

The interest group or economic theory of legislation explains governmental behavior as the result of interest-group processes. [43] As Posner has described it: "The 'interest group' theory asserts that legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare." [44] The currency through which this sale of legislation is accomplished "consists of political support, promises of future favors, outright bribes, and whatever else politicians value," [45] traded for governmental action beneficial to the interest group. Additional ***1034** examples of methods for compensating legislators include honoraria for speaking engagements or promises of employment (in lobbying or elsewhere) after retirement. [46] Even if an individual legislator does not stand to benefit on any one deal, he may be willing to trade votes in the legislative market with other legislators in order to increase the support for (and consequently the price of) other legislation for which he will receive an interest-group benefit. [47] In addition to lobbying to receive legislation, interest groups often bargain to block legislation or to receive regulatory forbearance. [48]

Critical to the effective "sale" of legislation is the ability to offer a certain degree of durability in the bargain. [49] Landes and Posner explain that legislative sales carry with them the problems of non-simultaneity of performance exhibited in the private sphere of contracts. [50] Thus, interest groups must have some confidence that future performance will occur, both through the actual passing of legislation and also through its continuity as valid law. In the private realm of contracts, legal sanctions can be pursued upon the breach of a recognized promise to perform. In legislative bargaining, however, no such resort to legal sanctions can ensure that legislation will be created and applied--an interest group cannot take Congress to court for reneging on a deal. [51] Intuitively, the amount that an interest group is willing to pay to obtain legislation is proportional to the legislation's durability. [52] Just as with any goods, the rational consumer's willingness to pay is based on quality, including the consumer's confidence that the product will last.

Landes and Posner have explained the two factors that lend durability to legislative bargains. First is the difficulty of passing ***1035** legislation. [53] This difficulty may lower the incentive for investing in legislative approval because the chance of passing legislation is low, but it significantly raises the value of enacted legislation. Because it typically takes legislation to kill legislation, it is very difficult to alter or repeal legislation once passed, thereby adding durability to those legislative bargains that are consummated in statutory enactment. [54] When the value of legislation is increased because of durability, the demand is also increased. [55] While the difficulty of initially passing a law raises its cost, Landes and Posner argue that the increase in value this difficulty brings to enacted legislation can be assumed to exceed that cost, which explains why interest groups have empirically shown a willingness to invest in obtaining legislation. [56]

The second factor involved in adding durability to a legislative bargain-- along with continuity, stability, and an assurance of enforcement to its resulting legislation--is the "independent judiciary." [57] Landes and Posner explain it as follows: "If we assume that an independent judiciary would . . . interpret and apply legislation in accordance with the original legislative understanding . . . it follows that an independent judiciary facilitates rather than, as conventionally believed, limits the practice of interest-group politics." [58]

An independent judiciary tends to uphold legislative bargains according to their original terms.[59] If judges were not independent, they might be more willing to interpret statutes in favor of the interests of coalitions existing at the time of litigation. An independent judiciary, however, is more likely to view laws as separate from existing legislative sentiments.[60] In other words, an independent judiciary is more likely to be backward looking to the ***1036** terms of an original deal. Furthermore, McNollgast examined a variety of features of the American system that allow Congress to induce the courts to behave in such a fashion.[61] Crain and Tollison also explained that because durability can increase the price of legislation, "legislators have strong incentives to set up institutional arrangements that make legislation more durable,"[62] such as through fostering independence in the courts.

Eskridge and Frickey explain that both the courts and Congress have incentives to uphold original legislative deals.[63] For example, "[f]or rule-of-law reasons, the Court owes substantial loyalty to the Congress that enacts a statute."[64] But the courts will also reflect the will of the current Congress,[65] which itself has an incentive not to disrupt previous legislative bargains even when they may fall outside their immediate preferences. Only by respecting a prior deal--or encouraging the courts to do the same--can Congress make a credible guarantee of durability in present-day bargains against potentially competing substantive preferences of a future Congress. Eskridge and Frickey explain that "[b]ecause the Court and Congress are institutional repeat players, the current Congress will want the Court to respect the wishes of the enacting Congress, just as the current Congress hopes its own wishes will later be respected."[66]

Landes and Posner's empirical examination tested judicial behavior and showed a general reluctance on the part of the courts to declare laws unconstitutional. Holdings of unconstitutionality, they presumed, are a good proxy for judicial nullification and can thereby be used to test the "'unreliability"' of courts.[67] Their test concludes that courts tend empirically to "enforce the 'deals' made by effective interest groups with earlier legislatures."[68] Whether the ***1037** federal judiciary would exhibit the same tendencies in relation to deals made between interest groups and state legislatures is less clear, but the next sections seek to explain why such tendencies might not be expected. Indeed, Landes and Posner themselves recognized that the role of the judiciary in upholding legislative bargains will decline "as we move from regulation that is less local to regulation that is more local,"[69] although their assumption is based on the fact that mobility and jurisdictional competition makes rent-seeking less valuable in smaller jurisdictions rather than on the relationship between state legislatures and federal courts.

B. Congress and the Courts as Responsive and Self-Interested Institutions

Several scholars have sought to explain the power struggles that can occur between the elected branches of the federal government and the courts-- particularly the Supreme Court.[70] Generally, "[g]overnment institutions can be expected to engage in . . . anticipated response calculations"[71] to preserve their interests from attack from coordinating or competing institutions. Congress and the federal courts are responsive and interdependent institutions:

***1038** Interdependent decision-makers cannot achieve their rational goals simply by choosing the course of action that directly satisfies those goals. Instead, decision-makers will behave strategically, choosing the course of action that best achieves their goals in light of how they anticipate other decision-makers will respond to their own possible choices.[72] As previously stated, Congress has an interest in encouraging courts to uphold legislative bargains according to their original terms; the courts, understanding this, should be expected to behave strategically to avoid discipline from a Congress that may find a court's actions as nonconforming to this preference. McNollgast, for example, identifies various political control mechanisms that work to decrease or increase the influence of the courts on policy in the United States and the judicial response mechanisms available to circumvent the impact of such exercises.[73] It is argued that "the creation of a disjuncture between the preferred policies of the

Supreme Court and . . . the elected branches" instigates the use of the weapons available to fight a type of turf war. [74] Under this theory, rulings finding congressional legislation unconstitutional can often be characterized as a disjuncture in preferred policies, and the Court could reasonably expect that Congress might use its weapons to retaliate. McNollgast posits that the Court is responsive to the threat of congressional employment of control mechanisms and will often act to avoid confrontations as a result of the threat posed by the existence of those mechanisms. [75] The ultimate result is a timid approach toward holding congressional acts unconstitutional or otherwise invalidating the will of Congress. [76]

McNollgast's description is of a complex set of interactions ***1039** between the Court and the elected branches. Throughout the article, McNollgast identifies several control mechanisms, [77] some of which cause off-setting impacts if employed together. The McNollgast study is detailed and its full analysis need not be repeated here. [78] Some of the key control mechanisms, however, are identified below.

First, Congress can expand the federal judiciary, i.e., pack the lower courts, thereby forcing the Supreme Court to alter its doctrine. [79] This result occurs because the Court can only review a limited number of cases. A larger number of lower courts, especially when filled with judges more aligned with the preferences of the sitting Congress, can be expected to lead to the creation of more inconsistent law. [80] This would cause the Court to review these issues, thereby crowding out some of the cases that the Supreme Court might, as a policy or doctrinal matter, prefer to review. Alternatively, the Court would be forced to find a wider range of lower court opinions acceptable. [81]

Second, through its advice and consent power, the United States Senate has the power to fill both Supreme Court and lower federal court seats on the bench with judges whose preferences are more compatible with congressional preferences. [82] When this power is used in response to a confrontation, the United States Senate can appoint judges whose preferences are incompatible with the existing Court. Appointments to the Supreme Court impact that institution directly; appointments to lower courts affect change to the equilibrium between the Supreme Court and lower courts--which ultimately alters Supreme Court doctrine bringing it more in line with congressional preferences. [83]

***1040** Third, Congress can alter the jurisdiction of all courts. [84] This can be accomplished directly against the Supreme Court through the Article III Exceptions Clause or by withholding or withdrawing jurisdictional grants under the non-self-executing Article III. Altering the jurisdiction of the lower courts also decreases the types of cases available for review by the Supreme Court and thereby limits the Court's ability to inject its preferences into law. [85]

Fourth, Congress can control the resources available to all courts through its appropriations power. [86] This can be done against Supreme Court appropriations directly or against lower courts, thereby diminishing the pool of cases that are decided and available for review. [87]

Fifth, Congress can pass substantive legislation that would affect citizen access to courts, such as fee shifting statutes, caps on jury awards, or the creation or reduction of standing. [88] Again, control over the amount of litigation is a control over the number of cases from which the Court can choose cases to establish doctrine or create policy. [89] Certain access control mechanisms can be tailored to disproportionately affect particular types of litigation. [90]

Sixth, Congress can also explicitly override or constrain court doctrine through legislation. [91] Congress can always override Supreme Court statutory interpretation decisions. If the choice to override such a decision is made strategically, it can affect the Supreme Court's policy preferences and act as an additional control mechanism. [92]

Seventh, Congress can pass laws that alter the issues and ***1041** methods that the courts must address before deciding a particular case, such as burdens and standards of proof or justiciability requirements, thereby decreasing the Court's flexibility to create policy in certain cases. [93] Another example is Congress' ability to pass legislation affecting the review of agency decisions by altering an agency's mandate, decision process, burden of proof, and the rights to judicial review of agency decisions. [94] This too could remove or expand cases from the pool. [95]

Each of these powers to act may also function as a control--even when only the threat of exercise is created. [96] And, each may indeed be a functional control mechanism when Congress abstains from exercising one of them or exercises one in favor of the Court as a type of bribe or carrot in an effort to obtain some future benefit. A strategic court [97] will remain aware of these potential control mechanisms when making decisions so as to avoid acts by Congress that limit either the durability of the Court's interests or the ability to implement effectively its interests in future cases. [98]

Gely and Spiller also argue that the Court will pursue its own self interest "as long as its preferences are not at either extreme of the political spectrum." [99] In other words, theirs is a model through which the Court is a reactive institution to the constraints arising from the political institutions, primarily Congress. [100] They begin their analysis with a simple bargaining game among the House of Representatives, the Senate, the President, and the Supreme Court to demonstrate the Court's contribution to political equilibrium. [101] In essence, the Court need only fear a negative response from Congress if its action lies outside the point at which the United States House and Senate are in equilibrium on that action. This conclusion assumes that the Court will only act so far as not to be ***1042** reversed or otherwise punished for its decision. [102] Gely and Spiller also argue that alterations in equilibrium can explain the position of the Court even without changes in its composition. [103] At the same time, "changes in the composition of Congress open the possibility for the Supreme Court to modify the status quo." [104]

Applying the Gely and Spiller analysis, the Seventeenth Amendment can be described as changing the federal equilibrium--or at least removing state legislatures from it. The constituencies of the United States House and Senate became more closely aligned after the Seventeenth Amendment, pushing the state legislatures outside that area of the contract curve protected against Court intrusion by the House and Senate equilibrium. While "[i]t is usually claimed, for example, that, so as to retain its political capital, the Court will strategically retreat from politically untenable positions," [105] the risk of losing political capital when invalidating a state law was nearly eliminated after the Seventeenth Amendment. [106] When state legislatures are removed from Congress's political constituency and when a federal court is deciding whether or not to invalidate a state law, along with the legislative deal that the state law concomitantly consummated, the federal courts can inject their individual preferences without typically disturbing the equilibrium.

Eskridge and Frickey reach a similar conclusion, arguing that the Supreme Court has a variety of incentives for acting in a manner that avoids disciplinary actions from Congress:
Although we believe that the Supreme Court is not as often influenced by the anticipated response feature of institutional decisionmaking as are agencies and lower courts, there is a growing body of empirical evidence indicating that the Court bends its decisions to avoid overrides or other political discipline . . . .[S]uch behavior is rational, whether the Supreme Court's

preferences are dominated by rule-of-law, instrumental, or institutional concerns. [107] ***1043** This can be expected to occur regardless of doctrinal preferences of the Court or its member Justices:

Those members of the Court whose ideologies conflict with the current governing coalition will likely be fearful of overrides and other forms of discipline from other institutions. Even were the Court inclined to be counter-hegemonic, the complex system of implicit bargains the Court has made with the coordinate branches of national government narrow the Court's doctrinal options, preventing the Court from challenging the positions of other branches. [108] This type of interdependence continues to exist between the federal courts and Congress but has been broken between federal courts and state legislatures.

The durability of federal, congressional legislation is presumably unaffected (or advanced) by adverse rulings on most state laws; therefore, it would not be in Congress's self interest to protect the legislative deals struck in state legislatures. A federal court not fearful of an adverse responsive measure from Congress will be more likely to pursue its own self interest when interpreting state laws, unless of course the state law is somehow congruent with the policy preferences of Congress. [109]

C. Synthesizing the Models in Relation to Holdings of Unconstitutionality and the Implications for State Legislatures After the Seventeenth Amendment

Landes and Posner argue that Congress will tend to support an independent judiciary because the interpretations of those courts will lend durability to legislation. [110] Others expand on this analysis, ***1044** arguing that each current Congress has a variety of mechanisms to control and discipline the courts. [111] These two theories can be reconciled if we accept Landes and Posner's theory that Congress generally will not disturb the independent judiciary to facilitate invalidation of a deal made by a prior Congress. [112] To do so would jeopardize the durability of current legislation by setting a precedent that could encourage future Congresses to disturb their predecessor's deals. Thus, the control mechanisms described by McNollgast and others typically are unlikely to be used in a manner that does not further the independent judiciary. [113]

It is precisely because retaining the independent judiciary is in the best interest of each Congress that any one Congress does not feel placed in a prisoner's dilemma, [114] not knowing what another Congress will do. If the current Congress A was not confident that a future Congress B would also have an independent incentive to preserve the independent judiciary, Congress A's rational reaction might be to make the courts highly dependent upon the controlling Congress. Of course, the gains to be realized from deals made under such a regime are short-lived and therefore much less profitable. As a result, both Congress A and Congress B--as rational economic actors--will prefer to make sure that the more profitable and durable, long-term deals are protected by encouraging an independent judiciary. [115]

Consequently, when a court finds a prior legislative deal unconstitutional, even if that outcome is desirable policy for the sitting Congress, it may nonetheless punish the court for its holding precisely because it generally decreases the confidence in the durability of deals in which that sitting Congress wishes to engage. By decreasing the durability, the Court will have made it more difficult for the sitting Congress to extract optimal payments in the rent-seeking transactions they engage in with interest groups. As Landes and Posner describe in relation to acts of Congress ruled ***1045** unconstitutional, declarations of unconstitutionality are particularly well suited to test the “unreliability” of courts. [116] Such declarations are also particularly damaging to the promise of durability and raise the potential for retaliation from Congress. [117]

Combining the theories discussed above, one could assume that the courts are likely to find laws constitutional because Congress supports the presence of independence in the judiciary and because threats from the courts to the durability of federal legislation may cause congressional retaliation. As one set of scholars explained:

> [I]n their study of the independent judiciary, Landes and Posner failed to identify an incentive for judges to support the demands of interest groups and legislators. However, Tollison and his co-workers recognized such an incentive by noting that judicial budgets and salaries are decided by legislatures. They found that legislatures which provide larger judicial budgets tend to have their laws confirmed more often by judges. In short, many people concerned in the legislative process have plausible self-interests that serve to perpetuate longstanding laws. [118] One might assume, then, that the Court generally finds laws constitutional out of its own strategic self interest, responding to the threats available for use against that institution by the sitting Congress. [119] Landes and Posner's theory assumes that the probability of a responsive measure from Congress is directly correlated with whether that responsive measure will disturb the independent judiciary. Thus, the sitting Congress has an interest in responding only to a court upsetting prior legislative deals. [120] A self-interested court aware of this tendency in Congress therefore has an incentive to uphold deals according to their original terms. ***1046** The synthesis of Landes and Posner's hypothesis with those of McNollgast, Gely, Spiller, and others supports the assumption that the outcome at the Court should generally be the same whether the Court is a disinterested and independent institution or a self-interested institution.

Only when prevailing political sentiments are so strong and recognition of their desires is so profitable that they outweigh the benefits of preserving an independent judiciary should courts anticipate that Congress will respond negatively to a judicial action that fails to protect the present preference over the original deal. [121] Under general operating conditions, this will not occur due to the overwhelming benefits of a general presumption in favor of fostering durability in original legislative bargains. [122]

Assuming that the low occurrence of federal cases holding acts of Congress unconstitutional is attributable to the institutional interactions between the federal courts and Congress, one can posit that those laws in which members of Congress have a direct interest are most likely to be protected from invalidation in this interaction. [123] Prior to the Seventeenth Amendment, those members of Congress acting as agents of state legislatures had an interest in protecting both state laws--to satisfy their constituency--and federal laws--to satisfy their individual agenda--from judicial invalidation. After the Seventeenth Amendment, however, there is no reason to assume that any member of Congress is directly interested in using his or her powers to protect state laws from judicial invalidation, but all members can be assumed to remain interested in protecting federal laws. [124] Because the States cannot respond as effectively as Congress to decisions by the court that threaten their respective legislative interests, one should expect differential treatment. [125] The ***1047** Seventeenth Amendment is one of the primary reasons that states are disabled in their responsive capabilities.

Generally, an action by the courts adverse to the durability of only federal legislative bargains--not state ones--will draw the ire of a member of Congress. Thus, one could hypothesize that the Seventeenth Amendment caused a significant increase in the number of state laws ruled unconstitutional while having no major effect on the number of federal laws ruled unconstitutional.

If one accepts a theory about the checking effect of congressional control mechanisms, leading the Court to avoid excessive confrontation with Congress, [126] the influence of the Seventeenth Amendment on the balance between state legislatures and the Court becomes clearer. In the pre-Seventeenth Amendment world, a court's confrontation with state legislatures also meant a confrontation with Congress. In the post-Seventeenth Amendment world, a confrontation with state legislatures does not directly mean a confrontation with Congress. Fear of repercussions from state legislatures acting through agents in Congress

is--theoretically--no longer present at the Supreme Court. Applying the theories of congressional control over the independent judiciary discussed above, it might be expected that the Court is more willing to invalidate state legislative acts in the post-Seventeenth Amendment world than it was in the pre-Seventeenth Amendment world. The next part explores empirical evidence for that theory.

III. The Seventeenth Amendment's Effects on the Number of Cases Holding State Laws Unconstitutional

After the Seventeenth Amendment eliminated the direct relationship between state legislatures and Congress by mandating the direct election of senators, state legislatures lost the institutional ability to use the United States Senate for disciplining the federal courts. The Supreme Court, as a result, might be less fearful of discipline from state legislatures in the post-Seventeenth ***1048** Amendment world, and Congress will be less interested in preserving the aspects of the independent judiciary in relation to cases reviewing state legislative acts. [127] Thus, one might expect that the judiciary will be less likely to enforce legislative bargains struck at the state level, with the number of cases finding state laws unconstitutional evidence of that tendency. This Article provides some tests of this hypothesis.

As an initial matter, it is interesting to anecdotally note that almost all provisions of the Bill of Rights that were incorporated by the federal courts as applying against the States through the Fourteenth Amendment occurred after the Seventeenth Amendment, [128] at a time when the federal courts were freed from ***1049** potential retaliation from state legislatures. Incorporation constituted a significant, systematic intrusion on state legislative autonomy and interests. [129] "[A]pply the Bill of Rights to the states . . . and you weaken the states tremendously by handing over control of large areas of public policy to the federal judges." [130]

Incorporation accomplished a major means of bringing symmetry to constitutional limitations on federal and state legislative power. As a result of incorporation, certain potential limitations on durability at the federal level became on par with limitations on state legislative durability. No longer would legislative bargains struck at the state level be immune from limitations already placed on federal bargains by Bill of Rights' constraints. Had such incorporation occurred prior to the Seventeenth Amendment to limit the scope of constitutional state legislation, one might have expected the states to use their congressional access to punish the Court through available control mechanisms. Only the Takings Clause was incorporated against state legislatures prior to 1924, [131] and prior to the Seventeenth Amendment, the Supreme Court repeatedly rejected the argument that the Bill of Rights applied to the states even after ratification of the Fourteenth Amendment. [132]

The simple numeric comparison [133] of the number of cases holding state laws unconstitutional before and after the Seventeenth ***1050** Amendment in Table 1 illustrates an apparently large difference in treatment of those laws between the two relevant time periods--pre- and post-ratification of the Seventeenth Amendment.

Table 1: Supreme Court Cases Holding State and Municipal Laws Unconstitutional

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***1051** Table 2 separates the numerical data for the treatment of acts of Congress by these same two time periods.

Table 2: Supreme Court Cases Holding Acts of Congress Unconstitutional

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On its face, the difference in treatment of state and federal laws between the two relevant time periods is substantially different. A number of factors, however, could have influenced this result. Further empirical analysis would be necessary to isolate any potential causation.

One scholar has sought to empirically examine the treatment of state and local policies at the Supreme Court. Marshall studied the influence on nationwide public opinion and Supreme Court decision-making. [134] One model in his book studied the relationship between public opinion and state and local policies considered by the Court. [135] His results lend support to the thesis advanced in this Article but do so by merely comparing the simple percentage relationship of state policies upheld and public support for the policies. Marshall explained his model as follows:

> The state/local policy process linkage . . . assumes that disputed state or local policies do not reflect nationwide polls accurately; that the Court does not necessarily defer to state/local policies; and that Court decisions more often ***1052** reflect nationwide polls than state/local policies whenever national polls and state or local policies differ. [136]

Marshall found "considerable support" for this conclusion that the courts should tend to be less deferential towards state and local policies than national ones:

> Considerable support appeared for this model. First, challenged state/local laws and policies were less often consistent with nationwide polls . . . . The Supreme Court was also far less deferential toward state/local laws and policies--upholding only 49 percent (or 38 of 78) of them. The Court upheld just over half of the 39 state/local laws and policies that were consistent with nationwide polls, and even fewer (only 43 percent) of state/local actions that were inconsistent with national polls . . . . These results suggest that state and local policies do not mediate the linkage between nationwide public opinion and Supreme Court policy making as effectively as do federal policies. [137]

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***1053** Marshall's analysis is instructive that the modern Supreme Court is less deferential to state and local laws and policies and consistent with the analysis of the data considered in this Article. It also supports the theory that the interests of states are not as well protected as federal policies or nationally supported laws. The lack of a co-dependent relationship between state legislatures and the Supreme Court precipitated by the direct election of Senators might explain this outcome.

A very simple comparison between the two relevant time periods--pre- and post-Seventeenth Amendment ratification--provides some interesting results. Isolating the number of cases holding state or municipal laws unconstitutional into two separate samples, one with the case information for terms through 1912--pre-Seventeenth Amendment--and the other with the case information from terms after 1912--post-Seventeenth Amendment--one can test the null hypothesis that there is no difference between the respective means of the two samples.

Thus, looking only at the actual number of cases holding state laws unconstitutional per term, both pre- and post-submission of the Seventeenth Amendment, one can attempt to determine whether there is a statistically significant difference between these two time periods. The test produced a p-value well below zero causing a rejection of the null hypothesis in favor of the alternative hypothesis that there exists a statistically significant difference between the number of cases holding state laws unconstitutional across the two time periods. The results are reported in Table 3.

Table 3: Results of Two Sample T-Tests for Supreme Court Cases Ruling State and Municipal Laws Unconstitutional

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A similar t-test on cases holding acts of Congress unconstitutional using a separation into the same two time periods reveals a result that also shows a statistically significant difference. Table 4 reports these results. Under this test, the null hypothesis of no difference between the relevant time periods cannot be rejected.

***1054 Table 4: Results of Two Sample T-Tests for Supreme Court Cases Ruling Acts of Congress Unconstitutional**

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This simple comparison across time periods reveals that there is reason to believe that something important happened in 1913 affecting the judicial treatment of the constitutionality of laws--whether state or federal. That this simple test cannot support the hypothesis that the Court has not shown a general hostility to political institutions, but instead has exhibited, since the ratification of the Seventeenth Amendment, a much higher tendency to invalidate state laws as compared to federal ones, is troubling for the strength of the theories discussed herein. The tests reported in Tables 3 and 4, however, are rudimentary and do not identify any potential causes for the difference.

Further research is needed to identify causation and to refine the distinction in treatment between state and federal laws. It is nonetheless informative that the federal courts appear to have treated state laws differently and with greater hostility after ratification of the Seventeenth Amendment, without as correspondingly stark a change in the treatment of federal laws. Appendix A to this article seeks to provide data in support of additional empirical research, identifying the number of state and federal legislative acts found unconstitutional between 1801 and 1994, and Appendix A also provides some potential control information. Appendix B aggregates this information in relation to Chief Justice terms between 1801 and 1989.

Conclusion

Because the Court and Congress are in an institutional relationship that affects the Court's decision-making, alterations in the constituencies of Congress should be expected to alter the Court's analysis of institutionally acceptable case outcomes. The Seventeenth Amendment marked an important change in the United States Senate's constituency, eliminating state legislatures ***1055** from that group. Whereas the Court was once institutionally tied to the interests of state legislatures through the state's agents in the Senate, the ratification of the Seventeenth Amendment significantly altered that relationship.

The Court is only responsive to the preferences of another institution when it must anticipate a controlling response, either fearing the exercise of a constraining power or anticipating a reward if it acts congruously with the will of the controlling institution. The Court is not substantially concerned with the reactions of an institution that has little, if any, direct control over its interests. Once state legislatures were cut out of the Court-Congress relationship, it could be hypothesized that the response of state legislatures no longer was a significantly relevant factor in deciding cases, precisely because those legislatures had no structural means for affecting the institutional interests of the Court.

As a result, one could expect that the Court's attitude toward state legislatures would shift after the Seventeenth Amendment. Prior to the Seventeenth Amendment, the Court's preferences were presumably more aligned with the preferences of state legislatures. Therefore, the Court's desire for institutional stability and preservation, and avoidance of reprisal, made it in the Court's interest to preserve state legislative preferences. After the Seventeenth Amendment, the Court could freely pursue its own policy preferences (or, to curry favor with its controllers in Congress, effectuate Congress's policy preferences even if they conflicted with those of the States) and no longer have particular concern for state legislative preferences.

Without an alignment with state legislatures, one should expect that the Court and States diverge in their preferences more often after the Seventeenth Amendment. Through discussion of the theoretical foundations and further development of empirical data, we may be able to learn more not just about the influence of the Seventeenth Amendment on the power of the States, but also about the interaction between the judiciary and the elected branches at both the federal and state levels.

*1056 APPENDIX A: Data Relevant To The Supreme Court & State Legislatures, 1801-1994

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*1062 APPENDIX B: Decisions Declaring Legislation Unconstitutional, 1801-1989 Terms, Collected by Court (Identified by sitting Chief Justice)

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Footnotes

d1 Visiting Assistant Professor of Law at George Mason University School of Law. B.A., 1995, Western Michigan University; J.D., 1998, Cornell Law School. The Author appreciates helpful comments received from Jon Macey, Fred McChesney, Kelly Jane Torrance, Todd Zywicki, and members of the George Mason University School of Law faculty in conjunction with a workshop in April, 2002.

1 See 46 Cong. Rec. 2242 (1911); see also id. at 2243 (Root contending that “the tide that now sets toward the Federal Government will swell in volume and power”); id. (Root arguing that “The time will come when the Government of the United States will be driven to the exercise of more arbitrary and unconsidered power, will be driven to greater concentration, will be driven to extend its functions into the internal affairs of the States.”).

2 U.S. Const. amend. XVII.

3 See U.S. Const. art. I, § 3.

4 46 Cong. Rec. 2242 (1911).

5 Charles A. Beard, American Government and Politics 240 (1924); see also S. Doc. No. 232, 59th Cong., 1st Sess., 21 (1906) (Massachusetts Senator George Hoar defending indirect election of the Senate as “a great security for the rights of the States”); Ralph A. Rossum, The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment, 36 San Diego L. Rev. 671, 711-14 (1999) (describing the debates surrounding ratification of the Seventeenth Amendment). Rossum collects statements of concern over state power made during the debates leading to ratification but also finds that: “What is particularly noteworthy of the lengthy debate over the adoption and ratification of the Seventeenth Amendment is the absence of any serious or systematic consideration of its potential impact on federalism. The consequences of the Seventeenth Amendment on federalism went unexplored,” with only a few exceptions. Id. at 711.

6 Todd J. Zywicki, Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment, 73 Or. L. Rev. 1007, 1034 (1994). Berger has also explained that this constitutional design intimately affected the relationship between state legislatures and the federal courts: “No one remotely intimated that there would be judicial power to rewrite the Constitution. Nothing could have been better calculated to defeat ratification than a claim of judicial power that would leave the States altogether at the mercy of the federal courts....” Raoul Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 309 (1977).

7 See infra note 21 and accompanying text.

8 See, e.g., Regulation of the Preemption of State Laws: Hearing Before the Subcomm. On National Economic Growth, Natural Resources and Regulatory Affairs of the House Government Reform Comm., 106th Cong. (June 30, 1999).

9 See, e.g. United States v. Morrison, 529 U.S. 598, 616 n.7 (2000). In Morrison, Justice Souter acknowledged that "the power of the States has been drawn down by the Seventeenth Amendment," but Justice Souter argued that it was not the role of the Court to fill any power gap left as a result. Id. at 650 (Souter., J. dissenting). "[T]he Amendment was ratified, and today it is only the ratification, not the predictions, which this Court can legitimately heed." Id. at 651. Justice Souter continued that "The Seventeenth Amendment may indeed have lessened the enthusiasm of the Senate to represent the States as discrete sovereignties, but the Amendment did not convert the judiciary into an alternate shield against the commerce power." Id. at 652; see also, e.g., Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 565 n.9, 584 (1985) (Powell, J. and O'Connor, J., dissenting).

10 For an example of popular press commentary, an essay by former Counsel to the President of the United States, John W. Dean, calls for the repeal of the Seventeenth Amendment because of its effects on state governments:
[T]here is widespread agreement that the change was to the detriment of the states, and that it played a large part in dramatically changing the role of the national government. Before the Seventeenth Amendment the federal government remained stable and small. Following the Amendment's adoption it has grown dramatically.... Repeal of the amendment would restore both federalism and bicameralism.
John W. Dean, The Seventeenth Amendment: Should it be Repealed?, Writ: FindLaw's Legal Commentary, Sept. 13, 2002, at http:// writ.news.findlaw.com/dean/20020913.html (last visited June 5, 2003); see also, e.g., Junius W. Peake, Scrap 17th Amendment, Denver Bus. J., Jan. 1, 1999, available at http:// denver.bizjournals.com/denver/stories/1999/01/04/editorial3.html (last visited June 5, 2003).

11 See, e.g., S.J. Res. 10, 2003 Leg. Sess. (MT 2003), Urge Congressional Amendment of 17th Amendment (defeated by vote of 9-40 on Feb. 19, 2003). The Montana bill proposed: "[D]eclaring as defective the current process of choosing United States Senators; requesting congress to transmit for consideration by States of the United States an amendment to the [Seventeenth] Amendment to the United States Constitution that provides for State legislatures to elect members of the United States Senate...." Id. Furthermore, the proposed bill argued that:
the election of the United States Senators by the State Legislatures was the political mechanism against congressional encroachment into the sovereignty of the states; and... one of the essential aspects of the states' exercise of this political mechanism is the United States Senate's advice and consent for treaties and appointments of executive and judicial officers made by the President of the United States; and...[the Seventeenth Amendment] divest[ed] the states of any direct voice in the federal government; and... the Congress of the United States has, since ratification of the [Seventeenth] amendment, steadily encroached upon the sovereignty of this and the other states.
Id. (emphasis added). As such, it sought to "find and declare to be defective the current process of electing United States Senators, which fails to represent the interests of the individual states." Id.; see also, e.g., Ariz. Res. No. HCR2024 (proposed resolution calling for Congress to propose amendment to repeal the Seventeenth Amendment).

12 See, e.g., Repeal 17th (identifying organizations and efforts nationally and in several states that support the repeal of the Seventeenth Amendment), at http://www.articlev.com/repeal17.htm (last visited Apr. 7, 2003).

13 "The Seventeenth Amendment to the U.S. Constitution, for example, profoundly altered the primary political safeguard for state institutional interests." Ernest A. Young, Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism, 77 N.Y.U. L. Rev. 1612, 1722 (2002).

14 U.S. Const. amend. XVII. "[S]tate legislatures, and not the people themselves, originally had the power to choose senators, making the Senate a body that was more beholden to state legislative interests than to popular constituencies. The [Seventeenth] Amendment changed all that by abolishing legislative election." Vikram Amar, The 20th Century - The Amendments and the Populist Century, 47 Fed. Law. 32, 34 (2000).

15 See U.S. Const. art. I, § 3, cl. 1.

16 Indeed, the agency relationship was often exercised rigidly, especially through a process known as “instruction”, in which the state legislatures retained the right to control the actions and votes of a senator. See generally Kenneth Bresler, Rediscovering the Right to Instruct Legislators, 26 New Eng. L. Rev. 355 (1991); see also infra notes 23-27 and accompanying text.

17 John O. McGinnis, The Original Constitution and Its Decline: A Public Choice Perspective, 21 Harv. J.L. & Pub. Pol'y 195, 205-206 (1997).

18 Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 62 (1996). See also 26 Cong. Rec. 7774 (1894) (statement of Representative Franklin Bartlett). Representative Bartlett, after quoting Madison's Federalist No. 62, along with remarks by George Mason and John Dickinson during the Philadelphia Convention, felt that the Seventeenth Amendment went entirely against the Founders' design for state protection:
It follows, therefore, that the framers of the Constitution, were they present in this House to-day [sic], would inevitably regard this resolution as a most direct blow at the doctrine of State's rights and at the integrity of the State sovereignties; for if you once deprive a State as a collective organism of all share in the General Government, you annihilate its federative importance.
Id.

19 Rakove, supra note 18, at 76.

20 Id. at 62.

21 See generally Zywicki, supra note 6; Todd J. Zywicki, Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and its Implications for Current Reform Proposals, 45 Clev. St. L. Rev. 165 (1997); Rossum, supra note 5; Jay S. Bybee, Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment, 91 Nw. U. L. Rev. 500 (1997); Vik D. Amar, Note, The Senate and the Constitution, 97 Yale L.J. 1111 (1988); Timothy Zick, The Consent of the Governed: Recall of United States Senators, 103 Dick. L. Rev. 567 (1999); Vikram David Amar, Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment, 49 Vand. L. Rev. 1347 (1996); Roger G. Brooks, Comment, Garcia, the Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism, 10 Harv. J.L. & Pub. Pol'y 189, 196-208 (1987).

22 Regulation of the Preemption of State Laws: Hearing Before the Subcomm. on National Economic Growth, Natural Resources and Regulatory Affairs of the House Government Reform Comm., 106th Cong. (June 30, 1999) (testimony of Professor John S. Baker, Jr.) [hereinafter “Baker Testimony”], available at 1999 WL 461860.

23 See generally Bresler, supra note 16; see also generally Kris W. Kobach, May “We the People” Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution, 33 U.C. Davis L. Rev. 1 (1999); William E. Dodd, The Principle of Instructing United States Senators, 1 S. Atlantic Q. 326 (1902). Although there is some debate whether state legislatures could issue binding instructions, a senator would ignore such an instruction at his own peril.

24 Bresler, supra note 16, at 365.

25 Id. at 365-67.

26 Zywicki, supra note 6, at 1036 (citations omitted).

27 Bresler, supra note 16, at 367; see also Richard Briffault, “What About the ‘Ism?”: Normative and Formal Concerns in Contemporary Federalism, 47 Vand. L. Rev. 1303, 1351 (1994) (explaining that since the passage of the Seventeenth Amendment state governments have had no representation in Congress).

28 Bresler, supra note 16, at 365.

29 See infra Part II.B.

30 See Baker Testimony, supra note 22 (noting that “[t]he Senate made the states a constituent part of the Congress. Senators who owed their election to state legislatures were naturally responsive to those legislatures”).

31 See, e.g., id. (arguing that "[t]he adoption of the Seventeenth Amendment damaged federalism by changing the responsiveness of the Senate to the States").

32 Bradley A. Smith, Hamilton at Wit's End: The Lost Discipline of the Spending Clause vs. The False Discipline of Campaign Finance Reform, 4 Chap. L. Rev. 117, 127 (2001); see also Maxwell L. Stearns, Restoring Positive Law and Economics: Introduction to Public Choice Theme Issue, 6 Geo. Mason L. Rev. 709, 737 n.101 (1998) ("Not surprisingly, this structural change [brought on by the Seventeenth Amendment] has reduced the power of states as states to protect their interests in the federal political process."); Baker Testimony, supra note 22 ("The direct connection between each Senator and his own state legislator had previously served as a major obstacle to the consolidation of national power.... [T]he Seventeenth Amendment eliminated the voting role of state legislatures.")

33 Smith, supra note 32, at 127.

34 See, e.g., John O. McGinnis, In Praise of the Efficiency of Decentralized Traditions and Their Preconditions, 77 N.C. L. Rev. 523, 528 (1999) (arguing that the Seventeenth Amendment "weakened the structure of federalism by stripping the states of their institutional protectors in the Senate"); Michael C. Dorf, No Federalists Here: Anti-Federalism and Nationalism on the Rehnquist Court, 31 Rutgers L.J. 741, 747 (2000) (asserting that the Seventeenth Amendment distanced the members of Congress from their states); A.C. Pritchard & Todd J. Zywicki, Constitutions and Spontaneous Orders: A Response to Professor McGinnis, 77 N.C. L. Rev. 537, 545 (1999) (opining that the states lost their most important tool in controlling the Congressional agenda when the Seventeenth Amendment was passed).

35 Baker Testimony, supra note 22.

36 John O. McGinnis & Michael B. Rappaport, Supermajority Rules as a Constitutional Solution, 40 Wm. & Mary L. Rev. 365, 391-92 (1999); see also Pritchard & Zywicki, supra note 34, at 544 n.31 (1999) (noting that the passage of the Sixteenth and Seventeenth Amendments resulted in "the growth of the federal government, and particularly the growth of the federal government as a machine for the production of rent-seeking legislation on the national level); Todd J. Zywicki, Environmental Externalities and Political Externalities: The Political Economy of Environmental Regulation and Reform, 73 Tul. L. Rev. 845, 921 n.332 (1999) (asserting that "[t]he rise of the federal government may accurately be traced to the Progressive Era and the constitutional changes made at that time, most notably the passage of the Seventeenth Amendment, which destroyed the states' institutional protection of federalism and paved the way for increased special interest activity on the federal level").

37 William M. Landes & Richard A. Posner, The Independent Judiciary in an Interest-Group Perspective, 18 J.L. & Econ. 875, 878-82 (1975) (demonstrating through the use of a demand-curve model that legislation will have less value if courts are loyal to each successive legislature since they will be less willing to uphold the enactments of previous bodies of lawmakers).

38 See id. at 882 (arguing that a legislative body has powerful reasons to ensure that its legislative deals will endure).

39 See id. at 885 (listing the legislature's ability to affect salaries, budgets, and jurisdictions as methods by which pressure could be brought to bear on judges and courts).

40 See id. (explaining that the very existence of possible means of coercion makes independence more valuable); see also infra Part II.B.

41 See McGinnis & Rappaport, supra note 36, at 391 (noting that "after adoption of the amendment, senators possessed a natural inclination to encroach on state sovereignty... [as] states were a competing power center for servicing constituents and interest groups").

42 See id. at 392-93 (noting that in the aftermath of the Seventeenth Amendment, the Supreme Court was able to curtail congressional trampling of the Constitution through overspending, but the Court gave up on this effort by the mid-1940s).

43 See generally Toward a Theory of the Rent-Seeking Society (James M. Buchanan et al. eds., 1980); Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 Tex. L. Rev. 873, 890 (1987) (explaining that economists have come to view legislation as a result of activities of special interests); Richard A. Posner, Theories of Economic Regulation, 5 Bell J. Econ. & Mgmt. Sci. 335 (1974); George Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971); Robert D. Tollison, Public Choice and Legislation, 74 Va. L. Rev. 339 (1988) (offering a legislative model positing that legislation is a function of the

variables of population, income, the number of trade associations, the size of the legislature, the ratio of the house to the senate, and the size of the majority).

44 Richard A. Posner, Economics, Politics, and the Reading of Statutes and the Constitution, 49 U. Chi. L. Rev. 263, 265 (1982). Put differently, "Interest group theory treats statutes as commodities that are purchased by particular interest groups or coalitions of interest groups that outbid and outmaneuver competing interest groups." Jonathan R. Macy, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 Colum. L. Rev. 223, 227 (1986).

45 Macey, supra note 44, at 228-30 (arguing that in order to obtain further currency, politicians also have an incentive to act as brokers of information for interest groups by facilitating legislation that distributes wealth from less efficient groups to more efficient groups).

46 See, e.g., Gregg Easterbrook, What's Wrong With Congress?: Before Congress Can Lead the Nation, It Must Be Able to Lead Itself, The Atlantic, Dec. 1984, at 57, 70-72.

47 See William H. Riker & Steven J. Brams, The Paradox of Vote Trading, 67 Am. Pol. Sci. Rev. 1235, 1236 (1973) (describing the incentives for legislators to engage in vote-trading).

48 See generally Fred S. McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 J. Legal Stud. 101, 104 (1987) (offering the example of an industry in which there are very few competitors and in which the likely willingness of those competitors to pay highly to avoid deregulation, which would open the market up to new entrants).

49 See Landes & Posner, supra note 37, at 875-901 (discussing the paramount importance of the purchaser's ability to rely on successive bodies of legislators allowing previous legislation to stand).

50 See id. at 877 (explaining that when performance is not simultaneous, the parties do not anticipate future dealings, so the threat of legal proceedings constitutes the only deterrence to bad faith).

51 See id.

52 See Robert D. Tollison & W. Mark Crain, Constitutional Change in an Interest-Group Perspective, 8 J. Legal Stud. 165, 166 (1979).

53 See Landes & Posner, supra note 37, at 878-79 (listing bicameralism, the committee system, and the filibuster as "characteristics of the legislative process [that] ...create resistance to both the speedy enactment of new laws and the repeal of old ones").

54 Id. at 878.

55 See id. at 877-78. See also McGinnis, The Original Constitution and Its Decline, supra note 17, at 202 (pointing out that "[s]pecial-interest groups seek to contract with politicians for durable legislation because the stream of rents they receive directly depends on its durability." (citing Richard A. Posner, Economic Analysis of Law 526 (1992))).

56 See Landes & Posner, supra note 37, at 879.

57 Id. at 878.

58 Id. at 879.

59 See id. at 885 (pointing out that upholding legislative agreements might be part of the price the judiciary must pay in order to retain their independence).

60 See id. (opining that the practice of adhering to the original interpretation of statutory language enhances the judiciary's predictability, which is something that interest groups value).

61 See Matthew McCubbins, Roger G. Noll, and Barry R. Weingast, Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law, 68 S. Cal. L. Rev. 1631, 1635 (1995) (listing the power of the elected branches of government to alter size, political make-up, and jurisdiction of the courts as ways in which the judiciary can be controlled) (writing as McNollGast).

62 Tollison & Crain, supra note 52, at 167.

63 William N. Eskridge, Jr. & Philip P. Frickey, Foreword: Law as Equilibrium, 108 Harv. L. Rev. 26 (1994).

64 Id. at 56.

65 See id. (commenting that "[a] Court engaged in statutory interpretation will also be attuned to the interests of the current Congress, whose preferences will be complex").

66 Id.

67 Landes & Posner, supra note 37, at 883 n.18 (reporting that between the years of 1789 and 1972, only ninety-seven congressional acts were held unconstitutional by the Supreme Court).

68 Id. at 894. For additional literature examining the Landes and Posner thesis, see Tollison & Crain, supra note 52, at 165-67; Rafael Gely & Pablo T. Spiller, A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases, 6 J.L. Econ. & Org. 263 (1990).

69 Landes & Posner, supra note 37, at 891.

70 See generally, McNollgast, Politics and the Courts, supra note 61; John Ferejohn & Barry Weingast, Limitation of Statutes: Strategic Statutory Interpretation, 80 Geo. L. J. 565 (1992); McNollgast, Positive Canons: The Role of Legislative Bargains in Statutory Interpretation, 80 Geo. L.J. 705 (1992).

71 Eskridge & Frickey, supra note 63, at 36 (arguing that there are a variety of mechanisms by which Congress and the Court can communicate preferences and control behaviors).
Overrides are hardly the only means by which interdependent law-making institutions communicate with one another. Lawmaking institutions routinely send "signals" to one another--expressions of preference that have no traditionally understood legal "authority." Nonetheless, a signal may have legal consequences, and these consequences may have been precisely the reason for the signal. ... This kind of signalling [sic] among lawmaking institutions has the systemic advantage of resolving most institutional disputes without open, mutually destructive conflict. Over a period of time, moreover, signals and actions consistent with those signals can be a way that interdependent institutions create implicit bargains. Institutions have differing priorities as well as preferences about public law issues. Their differing preferences create risks of conflict, but their differing priorities offer ways to minimize or to avoid conflict. By a series of signals and actions, the coordinate institutions can indicate their priorities and their willingness to reach deals whereby each institution defers to the most important preferences of the others.
Id. at 39-41.

72 See id. at 36.

73 See generally McNollgast, Politics and the Courts, supra note 61, (describing the mechanisms previously identified by others and empirically testing the effectiveness of those mechanisms). Others who have identified the institutional ties between the Court and Congress include Katzmann, for example, who explains the following:
Long after the Senate has exercised its power of advice and consent, the judiciary and the legislature affect each other in many ways. Congress can influence the "administration of justice" through laws having to do with the structure, function, and well-being of the courts. It is Congress, after all, that creates judgeships, provides appropriations, determines court jurisdiction, sets judicial compensation, enacts criminal and civil laws, and passes legislation affecting the way courts manage cases.
Robert A. Katzmann, Courts and Congress 83 (1997).

74 McNollgast, Politics and the Courts, supra note 61, at 1633.

75 See id. at 1653-55.

76 See id. at 1651-52 (outlining the effects on the judiciary if the legislative branch acted to increase the number of lower courts).

77 See id. at 1647-49.

78 McNollgast summarizes their conclusions as follows:
In essence, we argue that the elected branches have the long-term advantage in battling the courts, and in so doing we identify the potent weapons that the elected branches possess: the power to fill vacant lower court seats with judges whose preferences are more compatible with the preferences of the elected branches; the power to expand the lower courts and therefore increase the proportion of judges who share their beliefs; and the power to affect the productivity of the judicial system by altering jurisdictions and controlling the resources available to the courts for hearing cases.
Id. at 1635.

79 See id. at 1649-52, 1657, 1662 (explaining that packing the lower courts would likely result in an increase of the total amount of litigation, "which will force the Court to widen its doctrinal intervals").

80 Id.

81 See id. at 1649-52 (pointing out that this could result if the President and Senate "appoint judges who are prone to noncomplying decisions").

82 See id. at 1649.

83 See id. at 1649-52.

84 See id. at 1652, 1662 (explaining that the alteration occurs when Congress creates specialized courts, which remove the jurisdiction of a set of issues from both the lower courts and the Supreme Court).

85 See id at 1662-63 (noting further that altering the jurisdiction by creating specialized courts "allow[s] political officials to populate the new courts with judges whose views closely accord with their own").

86 See id. at 1662.

87 See id.

88 See id. at 1648 (pointing out that such legislation would tend to reduce litigation, which would also reduce appeals to the Supreme Court).

89 See id. at 1649.

90 See id (concluding that "if the elected branches seek to weaken the authority of the Supreme Court, one way to do so is to pass laws that increase the caseload of the lower courts").

91 See id. at 1652-54, 1662; see also William N. Eskridge, Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331 (1991); Roger Handberg & Harold F. Hill, Court Curbing, Court Reversals, and Judicial Review: The Supreme Court Versus Congress, 14 L. & Society Rev. 309 (1980); Ferejohn & Weingast, Limitation of Statutes, supra note 70.

92 McNollgast, supra note 61, at 1652-56.

93 See id. at 1648, 1662.

94 See id.

95 See id.

96 See id. at 1634-35.

97 Id.

98 See Gely & Spiller, supra note 68, at 282-83 (articulating that "the Court, while behaving strategically, is not able to impose its preferences, but rather is constrained by the other institutions of government"). "When the Court makes its decision, it will consider the optimal response of the legislature." Id. at 280; see also Gary M. Anderson, et. al., On the Incentives for Judges to Enforce Legislative Wealth Transfers, 32 J.L. & Econ. 215 (1989) (providing the data from one study, which showed that the greater the independence of the judiciary in a state, the higher the judicial salary scale).

99 Gely & Spiller, supra note 68, at 296.

100 See id. at 264-65, 283

101 See id. at 268-70.

102 See id. at 265 (commenting that "[t]he ability of other political actors to take actions to reverse the Supreme Court decisions is what constrains the scope and power of the Court").

103 See id.

104 Id. at 266.

105 Id. at 266 n.9.

106 See id. at 276 (explaining that inability to control a nonconforming Court eliminates the equilibrium calculus by the Court).

107 Eskridge & Frickey, supra note 63, at 37. The Court and individual justices have an interest in avoiding discipline, in part, so that the freedom that they do have to exhibit their own preferences does not become threatened. "Thus, where the substantive preferences of key Justices dominate their rule-of-law preferences (even if unconsciously), the Court...is likely to calibrate its response to avoid an override that would set back its substantive agenda." Id.; see also id. at 38 (noting that "[t]he Court's avoidance of overrides may also be animated by its concern for its institutional position").

108 Id. at 53.

109 For example, some cases hold a state law unconstitutional, which will decrease the scope of available congressional legislation. If this were not true, one might assume that the disassociation of state legislatures from Congress accomplished through the Seventeenth Amendment would have an even larger impact on the number of cases holding state laws unconstitutional. See Macey, supra note 44, at 235 n.55 (explaining that "[w]hen a federal court declares a state statute unconstitutional, it will be clear that the same statute would also be unconstitutional if enacted by Congress"). This is true in most cases, although cases in which the federal government has superior powers, such as those involving the Supremacy or Commerce Clauses, may not equally affect the states and the federal government.

110 See supra Part II.A.

111 See supra Part II.B.

112 Landes & Posner, supra note 37, at 879, 885-87 (identifying the "high costs" that result from legislative attempts to coerce particular judicial action, and further examining methods for strengthening judicial independence).

113 See id. at 885 (recognizing that such pressuring tactics are used "infrequently, even in periods of intense hostility to judicial rulings").

114 See Thomas W. Merrill, Pluralism, the Prisoner's Dilemma, and the Behavior of the Independent Judiciary, 88 Nw. U. L. Rev. 396, 402 (1993) (depicting the prisoner's dilemma as one occurring in social groups where "individual rational actors have incentives to adopt self-regarding solutions that leave them worse off than they would be if they and other similarly situated actors consistently adhered to cooperative solutions").

115 See supra notes 63-65 and accompanying text.

116 Landes & Posner, supra note 37, at 883 & n.18.

117 See Eskridge & Frickey, supra note 63, at 42 (recognizing that the “wide-ranging lawmaking opportunities” afforded to the Court in Constitutional cases results in “substantial institutional peril”). “The costs or risks of such constitutional activism are substantial, however. Judicial invalidation of congressional or presidential action on constitutional grounds is a challenge to powerful national institutions.” Id. at 43.

118 William C. Mitchell & Randy T. Simmons, Public Choice and the Judiciary: Introductory Notes, 1990 BYU L. Rev. 729, 742 (1990).

119 McNollgast, supra note 61, at 1663, 1673-74 (hypothesizing that the “evolution of judicial doctrine” is connected to and influenced by “unsettled politics... lower court appointments... [and] legislation relating to the structure of the judiciary”); Gely & Spiller, supra note 68, at 264-65, 283 (portraying the Court as a “self-interested, politically motivated actor”).

120 See Landes & Posner, supra note 37, at 875, 879. Landes and Posner contend that an independent judiciary--one that does not act solely to serve the interests of the sitting Congress--actually increases the durability of long-term legislation. See id. at 879.

121 See Merrill, supra note 114, at 405-07.

122 See id. at 404-07 (surmising that although a pattern of judicial interpretation that adheres to the legislature's original intent is beneficial to the “long-run interest of the legislature and dominant groups,” this “faithful agent interpretation” is essentially a presumption that may be overcome by “sufficiently strong group and legislative defection from the long-run solution”); see also supra notes 63-65, 117 and accompanying text.

123 See Eskridge & Frickey, supra note 63, at 49.

124 See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 565 n.9 (1985) (Powell, J., dissenting) (stating that “[t]he adoption of the Seventeenth Amendment (providing for direct election of Senators...among other things, [has] made Congress increasingly less representative of state and local interests, and more likely to be responsive to the demands of various national constituencies”). see also id. at 584 (O'Connor, J., dissenting) (noting that structural change “may well have lessened the weight Congress gives to the legitimate interests of States as States”).

125 Eskridge and Frickey came to the same theoretical conclusion and noted examples of this differential exhibited during the Supreme Court's 1993 term:
The contrast between Shaw and De Grandy suggests that the Court is less deferential to institutions that cannot respond as effectively (the states as opposed to Congress); in such cases, the Court's conservative values tend to manifest themselves most strikingly. Not surprisingly, the Court that during the 1993 Term upheld virtually all challenged federal policies against attack struck down all or part of local laws or policies in eleven of nineteen individual rights cases and laid out new constitutional restrictions on state action in two cases. The differential level of activism must not be overstated, however.
Eskridge & Frickey, supra note 63, at 49 (emphasis added).

126 See supra Part II.B.

127 One popular press commentary briefly posited a similar thesis:
Some court-watchers argue that the justices will strike down any law that disputes their holdings...[b]ut except during the 1930s, the justices have usually been less willing to make war on the national legislature than to cross swords with the states. And there's good reason for the court to be more wary of Congress than of state legislatures. The states, after all, can't raise or reduce the number of justices on the court; Congress can. The States can't change the court's jurisdiction; Congress can. The states can't make and unmake the federal court system; Congress can. The states can't impeach federal judges; Congress can.
Dennis Teti, The Ten Commandments and the Constitution, Weekly Standard, July 21, 1997, at 21.

128 See, e.g., Crist v. Bretz, 437 U.S. 28, 32, 38 (1978) (incorporating the Fifth Amendment's conditions for the attachment of jeopardy to the states via the Fourteenth Amendment); Benton v. Maryland, 395 U.S. 784, 794 (1969) (finding that the Fifth Amendment's protection against double jeopardy “represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment”); Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (professing that the Sixth Amendment's right

to a jury trial "in serious criminal cases...qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and therefore [must] be respected by the States"); Washington v. Texas, 388 U.S. 14, 23 (1967) (including the Sixth Amendment's right to compulsory process to obtain witnesses as a requirement that must be met by the states); Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (asserting that the Sixth Amendment's protection of a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment" and incorporating this right to the states through the Fourteenth Amendment); Pointer v. Texas, 380 U.S. 400, 406 (1965) (adding the Sixth Amendment's right to confront and cross-examine adverse witnesses to the list of guarantees that should be applied to the states pursuant to the Fourteenth Amendment); Malloy v. Hogan, 378 U.S. 1, 6 (1964) (requiring that the Fifth Amendment's protection against self-incrimination be protected by the Fourteenth Amendment to thwart abridgment by the states); Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (applying the Sixth Amendment's right to counsel to the states in order to impede State action and explaining that "a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment"); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (embracing the Fourth Amendment's exclusionary rule--by way of the Fourteenth Amendment's due process clause--to restrict State action); Wolf v. Colorado, 338 U.S. 25, 28, 33 (1949) (integrating the Fourth Amendment's protection against unreasonable searches and seizures through the Fourteenth Amendment to confine State action); In re Oliver, 333 U.S. 257, 272-73 (1948) (incorporating the Sixth Amendment's right to a public trial--via the Fourteenth Amendment's due process clause--to curb State action); Everson v. Board of Education, 330 U.S. 1, 16, 18 (1947) (maintaining that the First Amendment's Establishment Clause "erect[s] a wall between church and state," asserting that the wall "must be kept high and impregnable," and applying the Fourteenth Amendment to restrict State action); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (stating that the First Amendment's concept of the free exercise of religion is a liberty safeguarded by the Fourteenth Amendment); DeJonge v. Oregon, 299 U.S. 353, 364 (1937) (designating the First Amendment's clause on freedom of assembly--along with the freedoms of speech and press--as fundamental liberties that are sheltered by the Fourteenth Amendment); Gitlow v. New York, 268 U.S. 652, 666 (1925) (including the First Amendment's clauses on the freedom of speech and press "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment").

129 See, e.g., Attorney General Edwin Meese III, Speech Before the American Bar Association, July 9, 1985 (asserting that "nowhere else has the principle of federalism been dealt so politically violent and constitutionally suspect a blow as by the theory of incorporation"), available at http:// www.politics.pomona.edu/dml/LabMeese.htm (last visited June 5, 2003); see also generally Berger, supra note 6.

130 Richard A. Posner, The Federal Courts: Crisis and Reform 194, 195 (1985).

131 See Chicago, Burlington & Quincy R. Co. v. Chicago, 166 U.S. 226, 241 (1897) (evincing the Fourteenth Amendment's application to the Fifth Amendment's Takings Clause as it relates to the states by exclaiming that whenever "private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, [this] is, upon principle and authority, wanting in the due process of law required by the [F]ourteenth [A]mendment").

132 For a discussion of some of these cases, see generally Stanley Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 140 (1949).

133 See Lee Epstein et al., The Supreme Court Compendium: Data, Decisions and Developments 148-74 (2d ed. 1996) (listing citations of the cases that hold state and municipal laws unconstitutional).

134 See Thomas R. Marshall, Public Opinion and the Supreme Court (1989).

135 See id. at 17-20, 84-85.

136 Id. at 84-85.

137 Id. at 85.

138 Lee Epstein et al., The Supreme Court Compendium: Data, Decisions, and Developments 148-74 (Congressional Quarterly Inc. ed., 2d ed. 1996) (Table 2-13). Although the compilation of cases holding state laws and municipal ordinances unconstitutional was primarily derived from this source, the cases used were examined in their entirety in their respective official versions appearing in the United States Reports. The reliable number of state statutes actually contested is not available. However, for some grouped data on this subject through 1911, see Blain Free Moore, The Supreme Court and Unconstitutional Legislation 139-41 (1968). Because the

Supreme Court has control over its docket, however, if it is expressing a political interest in finding state legislation unconstitutional, it may do so regardless of the number contested and vice versa. Self-selection by petitioners plays a similar role.

139 Epstein et.al., supra note 138, at 144-47 (Table 2-12). Although the compilation of cases holding acts of Congress unconstitutional was primarily derived from this source, the cases used were examined in their entirety in their respective official versions appearing in the United States Reports.

140 Epstein et al., supra note 138, at 175-89 (Table 2-14). Although the compilation of cases overruling prior Supreme Court decisions was primarily derived from this source, the cases used were examined in their entirety in their respective official versions appearing in the United States Reports.

141 Albert P. Blaustein & Roy M. Mersky, The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States 137-41 (1978) (Table 9) (providing the number of opinions produced by the Supreme Court per court term from 1801 to 1810 and from 1812 to 1971); Epstein et al., supra note 1, at 84-85 (Table 2-7) (listing the number of opinions written by the Supreme Court from 1972 to 1995).

142 Epstein et al., supra note 138, at 71-76 (Table 2-2).

143 The World Almanac and Book of Facts 607 (2003).

144 Lee Epstein et. al, The Supreme Court Compendium 148-74 tbl.2-13 (2d ed. 1996) (listing cases by name without directly providing numerical data).

145 David M. O'Brien, 1 Constitutional Law and Politics: Struggles for Power and Governmental Accountability 38 (1991).

146 Epstein et. al, supra note 144, at 144-47 tbl. 2-12.

147 O'Brien, supra note 2.

148 Epstein et. al, supra note 144, at 175-89 tbl. 2-14.

149 O'Brien, supra note 145.

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