

NEITHER SWORD NOR PURSE: THE DEVELOPMENT OF
SUPREME COURT INFLUENCE
OVER LOWER COURTS

by

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ABSTRACT

Lower court compliance with the superior courts is now a norm in the judicial system of the United States. This dissertation will examine the development of the Supreme Court's ability to influence the decisions by lower courts. My general theory is that lower court compliance with the Supreme Court became more of a certainty as the federal judicial system developed statutorily, particularly after 1875. I will test the impact that three judicial reforms had (and continue to have) on Supreme Court power over lower courts: the Jurisdiction and Removal Act of 1875, the Judiciary Act of 1891, and the Judges Act of 1925. These reforms, I will argue, added characteristics to the judicial system that help predict compliance, all of which are still present in the system and can be shown to have an effect on compliance in contemporary times. These characteristics include the availability of federal forums for the implementation of constitutional policies, the authoritative communication of Court policies by intermediate courts to trial level courts, and the ability of the Court to select cases that allow it the opportunity to announce clear policy.

To test my theory, I will use a variety of historically important Supreme Court policies and employ a coding scheme for lower court cases to test whether a case presents an instance of compliance or non-compliance with the specific Supreme Court policy.

DEDICATION

This work is dedicated to my loving wife, Annie, whose patience, kindness, resourcefulness, wise counsel, editorial skills, and intelligence proved to be a constant help and motivation for me as I brought this project into being. Also, to Mr. Darcy and Buckley, who were always within my reach.

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CHAPTER 1

The Concept of Lower Court Compliance

On June 25, 2012, after an already momentous term, the U.S. Supreme Court handed down its decision in *Arizona v. United States*. The Court's five to three ruling in that case invalidated, on federal preemption grounds, most of a controversial 2010 Arizona law. This law was called the Support Our Law Enforcement and Safe Neighborhoods Act, or Senate Bill (S.B.) 1070.¹ The law authorized law enforcement to target, for reporting to the federal government, illegal aliens present in that state. The Court held that federal immigration law preempted a provision of S.B. 1070 law making it a misdemeanor for an illegal alien to register with the federal government. The Court held that another provision of S.B. 1070, making it a crime for "an unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor," conflicted with federal policy against criminalizing such activity. The Court struck down yet another provision of the law that authorized state police officers to arrest those who were suspected of having committed an offense that made them removable from the United States. "Decisions of this nature," the Court held, "touch on foreign relations and must be made with one voice" (2506-2507). The Court allowed only one of the four challenged provisions of the law to stand. The Court found that Arizona's requirement that its police officers verify the immigration status of those in custody, as written, did not conflict with any federal policy objective.

By the time of its review by the Court, Senate Bill 1070 had become something of a

model followed by other states that desired to legislate against illegal immigration. In 2011, Alabama and Georgia enacted laws similar to Arizona's.² While the *Arizona* case was still being decided, the U.S. Government and a host of civil rights groups brought suit in federal district court against Alabama's anti-illegal alien statute on preemption and Equal Protection Clause grounds. U.S. District Judge Sharon Blackburn, a Republican appointee of the Northern District of Alabama, allowed parts of the law to go into effect but placed an injunction on others (*United States v. Alabama* 2011). Meanwhile, a coalition of civil rights groups, business interests, and employee unions sued to challenge Georgia's anti-illegal immigration legislation in federal court in the Northern District of Georgia. District Judge Thomas W. Thrash, Jr., enjoined the enforcement of the entire Georgia law (*Georgia Latino Alliance for Human Rights v. Deal* 2011).

One year after Judge Thrash's decision, and nine months after Judge Blackburn's decision, the Court handed down its *Arizona* opinion.

The appeal of these two district court rulings provided the U.S. Court of Appeals for the Eleventh Circuit one of the earliest opportunities for any lower federal court to apply the Supreme Court's *Arizona* precedent. A three-judge panel of the court issued its unanimous opinion in *United States v. Alabama* in the late summer of 2012. Citing the recent *Arizona* case, the court struck down Alabama's requirement that unlawful aliens carry registration documents. Also citing the *Arizona* case, the court invalidated a provision that made it a crime for an illegal alien to seek employment in the state of Alabama and the state's ban on the harboring or transportation of illegal aliens. Reaching the same conclusion as the Court did in the *Arizona* case, the appeals court did not enjoin the Alabama provision requiring law enforcement officers to determine the immigration status of any detainee who the officer believes to be in the country

illegally. On the same day, the same panel of judges, again unanimously, issued its decision in the Georgia case (*Georgia Latino Alliance et al v. Governor of Georgia* 2012). Citing *Arizona* in each instance, the court invalidated Georgia's ban on transporting illegal aliens, its ban on concealing unlawful aliens from authorities, and the ban on encouraging illegal aliens to come into the State of Georgia. The court left intact the requirement that Georgia police investigate the immigration status of persons held for crimes.

Evidently satisfied that the Eleventh Circuit had faithfully followed its *Arizona* decision in the *Alabama* case, and despite the notoriety of it, the Supreme Court voted to decline review of the circuit panel's judgment.³ Since 2012, to date, the Eleventh Circuit's decision in the *Alabama* case has been cited twice by district courts within the Eleventh Circuit as an authority on federal preemption doctrine (*U.S. Commodities Future Trading Commission v. Hunter Wise Commodities, LLC* 2013; *America's Health Insurance Plans v. Hudgens* 2013). The decision in the *Georgia Latino Alliance* case, which was not pursued in the Supreme Court by either party to it, was cited in a subsequent decision by Judge Thrash upholding police investigations of immigration status (*Jane Doe 1 v. Hobson* 2013).

The *Arizona* example demonstrates the routine operation of the federal judicial hierarchy, many aspects of which are now completely taken for granted. Virtually every day, citizens or interest groups haul states into U.S. District Courts—bypassing the state's own courts—to challenge their laws with constitutional claims of the type arrayed against the Arizona, Alabama, and Georgia laws. Routinely, U.S. District Courts invalidate state laws on constitutional grounds. The U.S. Courts of Appeals routinely and often dutifully apply the decisions of the Supreme Court in the appeals of these cases. The Supreme Court, presumably satisfied that the Court of Appeals has been faithful in its handling of a particular case, almost always declines to dedicate

its spare judicial resources to the review of a Court of Appeals decision. The Court of Appeals' decision then stands as a reinforcement to Supreme Court authority in the district courts.

This dissertation explores how things came to be this way—how did the Supreme Court acquire the ability to make law for a vast, decentralized, and ideologically heterogeneous judicial hierarchy? What are the conditions that enable judicial policy making of the kind exemplified by the Court in the *Arizona* case? This work will seek to provide answers to these questions by looking, ultimately, at the overall development of the federal judicial system since 1789. It will explain modern Supreme Court power by going to its origins. This work will examine various statutory modifications of the judicial hierarchy, and it will review whether these enhancements served to increase Court influence over the broader judicial system.

The Importance of Lower Court Compliance

This idea of *hierarchy* in the federal judicial system finds root in the Constitution itself. Article III speaks of “inferior” courts—courts subordinate in position to the Supreme Court. It also recognizes certain classes of cases for which the jurisdiction of the Supreme Court is appellate in nature only, implying the necessity of separate courts for the initial hearing of these cases. From the very beginning, constitutional thinkers have focused on the importance of reliable, compliant inferior courts to the power of the Supreme Court. Alexander Hamilton, in the course of expounding on the judicial article in *Federalist* 81, argued that the power of Congress to institute inferior federal courts was a necessary one. To Hamilton, inferior federal courts would be more reliable than state courts in implementing national policy priorities, in the “inflexible execution of the national laws” (*Federalist Papers* 81). Their existence would eliminate the need for “an unrestrained course” of appeals to the Supreme Court, so that appeals “may be safely circumscribed within a narrow compass” (*Federalist Papers* 81). The creation of

inferior federal courts would enable the High Court to entrust the bulk of the judicial business of the United States to subordinate courts. Indeed, this has largely come to pass, albeit much later than Hamilton might have hoped.

As Hamilton and his fellow Federalists would no doubt agree, the ability of the Supreme Court to set policy for lower courts is vital to the functioning of a uniform constitutional system. Since the vast majority of cases in the federal system now terminate in the lower federal courts, as Hamilton envisioned, the Supreme Court's influence over the law can be felt only insofar as the inferior courts apply the Supreme Court's decisions faithfully. While this logic obviously applies to the U.S. Courts of Appeals, federal district court compliance is likewise crucial. The supervisory capacity of intermediate Courts of Appeals, while at times effective (Smith 2006), has its limits. It is in these most decentralized of courts where the force of localism is most likely to prevail (Baum 1976; Melnick 1983).

Moreover, if the lower courts are failing to follow Supreme Court guidance, the overwhelming emphasis placed upon Supreme Court decisions by legal and judicial scholars is misplaced. It would instead appear that ultimate legal policy making power resides in inferior courts. If, on the other hand, the Supreme Court routinely secures the implementation of its policies by lower federal courts, it is important to account for why this is the case. There is no intuitive explanation for the Supreme Court's effective exercise of power over lower courts. The Supreme Court has virtually no involvement with the staffing of inferior court judgeships. The justices lack the ability to reward, discipline, or fire inferior court judges. In Hamilton's oft-quoted words, the Court has neither the sword nor the purse to use to see to it that its opinions are obeyed (*Federalist 78*). Supreme Court justices and inferior court judges, with the possible exception of those judges based in Washington, D.C., would have little opportunity to interact

and form personal or professional relationships that could influence subordinate judicial behavior. And of course, many issues before American courts—like the constitutionality of a state’s response to the problem of illegal immigration—are intensely divisive along partisan and ideological lines. Partisan, ideological, or other group loyalty could easily trump an inferior court judge’s sense of duty to follow the Supreme Court. There is reason to believe that lower court judges, like Supreme Court justices, have preferred policy views that they would like to see enacted into law (Scott 2006; Segal and Spaeth 2002).

Judicial Impact Literature

The literature on just about every aspect concerning the implementation of U.S. Supreme Court decisions is vast and deep. The literature starts with the assumption that the U.S. Supreme Court intends to make policy in its judicial rulings that it expects to be followed (Canon and Johnson 1998; Carp and Stidham 1985; Casper 1976; Dahl 1957; Reid 1988). To be effective, however, the Court depends upon other actors for the implementation of its policies. These actors may have political and policy goals that might diverge from those of the Court. Supreme Court policies, therefore, are intended to alter the behavior of a definite implementing actor or set of actors (Canon and Johnson 1998; Horowitz 1972). These actors primarily consist of other judges (Hoekstra 2005; Reid 1988), but they may also be executive branch and agency actors (Spriggs 1997), state or federal legislative actors (Rush 1995; Sharp and Haider-Markel 2008), or private sector actors (Bond and Johnson 1982) including even the mass public (Giles and Gatlin 1980).

When it comes to influencing the behavior of lower courts within the federal judicial hierarchy in recent times, the Supreme Court appears to enjoy success in having its preferred policies implemented reasonably faithfully (Gruhl 1980; Klein and Hume 2003; Songer 1987; Songer, Segal and Cameron 1994; Smith and Todd forthcoming; Songer and Sheehan 1990).

Lower federal court compliance has been found in lower-salience economic matters, such as labor and antitrust cases (Songer 1987) as well as in high-salience constitutional matters, such as libel and slander and search and seizure (Songer, Segal and Cameron 1994; Songer and Sheehan 1990). Songer and Haire (1992) report “substantial” compliance with changes in Supreme Court jurisprudence on obscenity. Brent (1999) found similarly in an analysis of lower federal court compliance with the Supreme Court’s free exercise of religion decisions. Likewise, but to a more limited extent, this success has shown up in assessments of compliance by state judicial actors in recent decades (e.g. Camparato and McClurg 2007; Hoekstra 2005). In Chapter 6 of this work, I will examine numerous studies of state and lower federal court compliance with specific Supreme Court policies.

Compliance as a Norm in the Judicial System

My reading of this literature on lower federal court implementation points me toward an empirical norm of compliance—much like the other, systemic empirical norms of *stare decisis* and of consensus that have been noted by Knight and Epstein (1996) and Epstein, Segal, and Spaeth (2001), respectively. This norm of compliance exists among lower court judges and within the broader legal community. This norm urges judges of lower courts to look to higher courts for policy guidance, for making use of any guidance found, and for the higher courts to accept the responsibility of furnishing it. The norm supposes a powerful Supreme Court, and I am interested in accounting for whether, and how, Congress has facilitated this norm in the statutory development of the U.S. judicial system.

Theory and Research Focus

The argument of this dissertation is that the conditions of Supreme Court power were laid in Congress’s statutory organization of the federal judicial hierarchy. In settling upon certain

characteristics of the federal judicial system, Congress directly enhanced the ability of the Supreme Court to influence lower court behavior. I theorize—with support from existing research—that compliance is more likely than not to be the result of the Supreme Court’s communication of a clear policy articulated in a policy-setting case to a lower federal court. Separated out, these factors in compliance are 1) the Court’s use of case selection to choose those cases that further the Court’s policy goals; 2) the underlying clarity of the Supreme Court policy and opinion in each case; 3) the successful communication of the Supreme Court policy to the lower courts, and; 4) the availability of lower *federal* courts as the instruments of policy implementation.

My theory further entails that each of these conditions of Supreme Court power over lower courts can be linked to a specific, statutory enactment pertinent to the judicial hierarchy. Specifically, these statutes are the Jurisdiction and Removal Act of 1875, the Judiciary Act of 1891, and the Judges Act of 1925. With these statutes, the federal judicial hierarchy was shaped to encourage compliance by guaranteeing a federal forum to litigants who wish to assert federal rights (the Act of 1875), by allowing for a clear channel of communication of Supreme Court preferences within the federal system (the Act of 1891), and by the Supreme Court’s conscious acceptance of the role of policymaker atop the system in its case selection and policy articulation (the Act of 1925). A summary of these Acts is provided in Table 1.1, below. Furthermore, each statutory development may be linked to a specific theory of Supreme Court impact:

- federal courts are more likely to implement the decisions of the Supreme Court than state courts (*target audience thesis*);

- the federal district courts are more likely to apply Supreme Court cases where Courts of Appeals have adopted, or communicated, a circuit's preference for that decision (*communication thesis*);
- Supreme Court policy articulation to those (and other) courts is more likely to be clear where its decision is the result of the deliberate selection by the Court and when it does not compete with other, similar decisions in the record of decisions (*clarity thesis*).

I will show that as successive statutory changes to the federal hierarchy added these conditions to the system, the likelihood that the Supreme Court successfully had its decisions implemented by the subordinate courts increases. Thus, the present-day norm of compliance emerged through statutory changes.

The modern system is the result of successive changes that, as documented in most developmental accounts of the federal judicial system, were the result of short-term policy goals in Congress (e.g., Crowe 2012; Gillman 2002; Fish 1973; Frankfurter and Landis 1928a) as well as of presidential staffing of the courts (Barrow, Gryski, and Zuk 1996). The historical evolution of the federal judicial system presents an intriguing, and often overlooked, opportunity to account for the likelihood of compliant Court policy implementation. To my knowledge, political scientists and judicial historians have not investigated the development of Supreme Court influence over lower courts, or integrated historical factors systematically into the analysis of compliance. This lack of attention is despite the fact that, one may argue, the arc of the development of the federal system itself has been toward ever more compliance. Instead, most developmental treatments of the broader federal judiciary have looked at other goals within the system, such as relieving caseload (Buchman 2003; Frankfurter and Landis 1928b) and

improving judicial administration (Crowe 2007; Fish 1973; Murphy 1962), satisfying the political commitments of a particular political regime or of other influential political actors (Buchman 2003; Crowe 2012; Frymer 2008; Gillman 2002), responding to or bringing about social or political change (Freyer 1979; Frymer 2003), increasing the legitimacy of the Supreme Court vis-à-vis other political actors (Friedman 2009; McCloskey 1964; McGuire 2004), or improving judicial performance and access to the courts (Posner 1985).

At the same time most compliance studies begin and end with the modern (roughly post-New Deal) federal hierarchy, thus failing to account for any features specific to the modern hierarchy that enhance the capacity of the Supreme Court as national judicial policymaker. I propose to look at the evolution of the federal system in view of the Supreme Court's success in the implementation of legal policy within the system, assessing the development of the judicial hierarchy as an effective hierarchical system of legal policy making.

I am influenced in this enterprise by recent institutionalization research done by McGuire (2004), who built on the research done on Congress by Polsby (1968). McGuire notes the lack of longitudinal, as opposed to cross-sectional, treatments of the Supreme Court's power. To fill this gap he measures the growth of three modern attributes of the Court: its *durability*, *differentiation*, and *autonomy*, over a significant period of time (from 1790 to 1996). McGuire finds a rise in all three of these variables during the Court's history, as well as a correlation between these variables and the Court's willingness to overturn legislation and to hand down "landmark" decisions.

By the same token, I argue that compliance—as a function of Supreme Court power over the judicial system as a whole—developed alongside Supreme Court durability, differentiation, and autonomy. This emergence of compliance is evidenced by demonstrable improvements in

the Supreme Court's ability to influence lower court behavior. Just as McGuire (2004) focused on the institutionalization of Supreme Court power as against the other branches of the federal government, I will look at the institutionalization of Supreme Court power over a vertical system of courts.

Another source of inspiration is the work of Aldrich (1995), who examined a modern American political norm—the strong political party—and traced this norm back into history to account for the origins and development of strong parties. He accounted for the reasons why strong parties developed in the United States, and looked at episodes that explained the emergence of current party norms. I seek to approximate his approach to the question of strong parties in my examination of the question of lower court compliance with the Supreme Court.

It is surprising that little empirical work has been done on the effects, on compliance, arising from periods of transition from old to new arrangements in the federal judicial system. Usually, compliance studies look at the peculiar characteristics of a specific Supreme Court policy or opinion and theorize that those characteristics made lower court compliance more or less likely (e.g. Hall 2011). I aim to assess the development of lower court compliance as a phenomenon that distinctly emerged from the process of shaping the federal courts (and not in the articulation of specific judicial policies), the conditions for which cut across policy areas. The historical or developmental approach to the analysis allows one to single out variables that are important in understanding compliance in the modern judiciary.

I argue that the norm of compliance was not inevitable in American political development; in fact, it was very far from the reality for much of American history. A powerful Supreme Court—with power amounting to the ability to influence subordinate actors—is a modern phenomenon; like so many features of the federal government it is a product of

deliberate American state building (Skowronek 1982), even if the original purpose oftentimes was to serve short-sighted political goals (Gillman 2002). Part of the state building enterprise was the creation of a federal judicial system poised to extend the reach of federal policy on such things as economic regulation and civil rights (Frymer 2005; Gillman 2002), and not specifically to increase Supreme Court power *within* the judicial system itself.

Prior to the Civil War, there was no federal “system,” as localism was the defining characteristic of the scheme of federal justice (Frankfurter and Landis 1928a; Freyer 1979). This is despite the persistent belief of nationalists in the antebellum period, including Chief Justice Marshall and Justice Story, that a hierarchical system of federal courts must exist in order to implement national policy (LaCroix 2012). Prior to 1891, for instance, Supreme Court Justices rode circuit, and the touted value of this feature of the federal system was that it attempted to keep the justices in touch with local law, not the other way around (Fallon et al 2003; Frankfurter and Landis 1928a). Conditions were hardly ripe for a nationalization of justice with the Supreme Court atop the pyramid of legal policy making, even as the Court *sought* to influence other judicial actors by feats of persuasion in written opinions since its earliest days. It was only after certain institutional changes made later in the Court’s history that the Court was able consciously to make effective policy in those written opinions.

Understanding the nature and sources of any institution’s power or legitimacy is one of the key enterprises of political science. Nevertheless, accounts of the growth of the Supreme Court’s power over lower courts are in short supply. This study investigates whether—and if so, how—the federal judicial system transitioned from one characterized by localism in the administration of federal justice to one in which the Supreme Court sets judicial policy for the nation.

Table 1.1. Summary of the Jurisdiction Conferred by Major Judiciary Acts

<p style="text-align: center;">Judiciary Act of 1789 (1 Stat. 73)</p> <ul style="list-style-type: none">• Created U.S. district courts with admiralty and petty criminal jurisdiction• Created U.S. circuit courts with original jurisdiction over diversity cases (\$500), major federal criminal cases, civil cases brought by the United States, and appellate jurisdiction over the district courts• Created a Supreme Court with i) original jurisdiction over cases as provided in Article III, ii) writ of error jurisdiction over U.S. circuit courts (\$2,000), iii) writ of error jurisdiction over states' highest courts when they invalidated federal statutes or upheld state laws against federal or constitutional challenges, iv) certificates of division from U.S. circuit courts (after 1802)
<p style="text-align: center;">Jurisdiction and Removal Act of 1875 (18 Stat. 470)</p> <ul style="list-style-type: none">• Gave U.S. circuit courts jurisdiction over federal law, treaty, and constitutional cases (\$500)
<p style="text-align: center;">Circuit Courts of Appeals Act of 1891 (26 Stat. 826)</p> <ul style="list-style-type: none">• Created U.S. Circuit Courts of Appeals to hear appeals of all final decisions from district and circuit courts (except for federal law and constitutional cases)• Gave the U.S. Supreme Court writ of certiorari jurisdiction over diversity cases decided by the U.S. Circuit Courts of Appeals (\$1,000)• The U.S. circuit courts were abolished in 1911
<p style="text-align: center;">Judges Act of 1925 (43 Stat. 936)</p> <ul style="list-style-type: none">• Gave the U.S. Supreme Court writ of certiorari jurisdiction over all cases decided by the Circuit Courts of Appeals

Organization of the Work

Chapter 2 will focus on the Judiciary Act of 1789. It will serve as an essential predicate for the remainder of this dissertation. This chapter will analyze the implications of the Act in light of my overall theory about the conditions of lower court compliance. I will argue that the conditions of compliance were not present under the Act. Under the first Judiciary Act, the Supreme Court did not enjoy federal court implementation of its major constitutional decisions. The federal judicial hierarchy suffered from deficiencies in design and personnel that made it difficult to monitor. The Court lacked the ability to make policy by selecting only significant cases for review. The chapter will explore examples of why the Act was inadequate, from the perspective of Supreme Court influence over the broader legal system. This chapter will aid in understanding the assessment of the judicial reforms discussed in the succeeding chapters.

Chapter 3 will show how the Jurisdiction and Removal Act of 1875 enhanced the Supreme Court's power over the implementation of its decisions. This Act finally gave general federal and constitutional question jurisdiction to federal circuit courts. The chapter will examine patterns of decision making in lower courts before and after the Act. I will compare outcomes under the Act of 1789 to those occurring under the Act of 1875. This is the target audience thesis: I theorize that federal trial court judges more readily complied with Supreme Court decisions prohibiting state laws that conflicted with federal objectives. I will test this theory by looking at state versus federal court invalidations of state laws challenged under the Court's pro-federal reading of the Commerce Clause originating with *Gibbons v. Ogden* (1824) and *Brown v. Maryland* (1827), for the period of 1825 to 1891. The findings I will offer in this chapter provide support for the notion that federal forums, more likely than state courts, invalidated state laws that frustrated interstate commerce, which was consonant with the Supreme Court policy directives articulated not only in the *Gibbons* and *Brown* decisions but for the entire period under

consideration in this chapter.

In Chapter 4, I analyze decision communication in light of the Judiciary Act of 1891, also called either the Circuit Courts of Appeals Act or the Evarts Act. This act created the Circuit Courts of Appeals (later named the U.S. Courts of Appeals), ended compulsory circuit riding by Supreme Court justices, and authorized the staffing of these new courts with permanent appellate judges. My theory is that these courts enhance Supreme Court authority over federal trial courts by authoritatively communicating Supreme Court policy to the trial courts within each judicial circuit, and by monitoring the behavior of trial courts. This is the communication thesis. In the chapter, this theory will be tested by looking at cases heard by federal trial courts from 1870 to 1911 involving personal injuries caused by railroads. I will test hypotheses about how trial courts treated these cases before and after the adoption by Courts of Appeals of the pro-railroad Supreme Court policies announced in *Railroad Co. v. Jones* (1877) and *Railroad Co. v. Houston* (1877).

Chapter 5 will explore the implications of the Judges Act of 1925. This Act gave the Court a virtually discretionary docket, of the kind enjoyed by the Court today. My theory here is that the transition to the discretionary docket allowed the Court to craft clear policy in important, selected cases, rather than have to engage in lower court error correction the vast majority of the time. I will analyze the Court's judicial opinions in general constitutional cases from 1910 to 1941. The findings to be offered in this chapter support the idea that as the Court transitioned to a purely discretionary docket, it consciously sought, through case selection, to craft clear opinions in constitutional cases and to make policy for inferior courts in those cases.

Chapter 6 will examine multiple studies of lower court implementation of major Court policies since 1925. I will consider how this research supports the importance of the variables

developed in the earlier chapters that predict compliance: federal versus state court implementation, transmission of a legal policy through the intermediate courts, and the crafting of clear legal policy in Court constitutional cases. The purpose of this review is to demonstrate how these variables have come together in the modern hierarchy to bolster Court influence.

At the conclusion of this work, it is my hope that I have contributed to our understanding of Supreme Court authority, by going directly to the statutory origins of federal judicial operations in the United States.

CHAPTER 2

Lower Court Compliance and the Judiciary Act of 1789

The Judiciary Act of 1789 did three major things: it created inferior federal courts, fixed the number of Supreme Court Justices at six, and established the jurisdiction of all federal courts. The Act established federal judicial districts within state boundaries; each of these district courts was given one district judge (Surrency 2002). The district courts were to hear admiralty, import, navigation, and petty federal criminal cases.

Further, the Act divided the seaboard nation into three judicial circuits: the Eastern, Middle, and Southern Circuits. These judicial circuits had circuit courts that were to be composed of a district judge from within the circuit and two Supreme Court Justices (reduced to one justice in 1793) (Crowe 2012; Surrency 2002). These circuit courts were to be the chief trial courts in the federal system (Surrency 2002).⁴

The districts of Maine and Kentucky, and shortly thereafter Tennessee (1796) and Ohio (1802), were not initially placed in the circuit system. For these districts, and in all of the many future instances where a judicial district existed outside of a circuit, the district court had all of the jurisdiction of a circuit court (Surrency 2002).⁵

The Judiciary Act of 1789 is often credited as the forerunner of today's federal judicial system (Holt 1989; O'Conner, Sabato, and Yanus 2012). It is often stated that today's "three-tiered" federal judicial system finds an antecedent in this earliest legislation on federal courts (Epstein et al 2003). The Act is credited with allowing for Supreme Court supervision of the

states' highest courts through its Section 25, thus serving the purposes of judicial nationalism (Amar 1990; McCloskey 1964). Because the Act simply created inferior federal courts, Crowe (2012) deems the Act to be a pro-national enactment that served Federalist policy goals. And, the Act is considered a success because during its earliest period the Court availed itself of the great acts of judicial statesmanship involved in the establishment of judicial review over both federal and state law (Amar 1990).

In this chapter, I want to challenge these assumptions. I will show that the federal judicial system was two-tiered at its best, and for the vast majority of cases—those valued at less than \$2,000—it was one-tiered. Furthermore, these “tiers” often consisted of overlapping personnel. Since there was no independent, intermediate court in the federal system, lower federal court compliance with the Supreme Court was less likely. Further, Section 25 review of state decisions hardly guaranteed that the state courts would fall into compliance with the Supreme Court. This review instead acknowledged the realities (and drawbacks) involved in using the state judiciaries as the exclusive forums for important constitutional and federal cases. Lastly, the Act obliged the Supreme Court to hear every case that came to it, with no real brake in the docket. All of these issues will be discussed thoroughly below.

This chapter will focus on these deficiencies of the Act—deficiencies that made it difficult for the Supreme Court to supervise lower courts on matters of important national policy. As applied to my theory of Court influence over lower courts, in this period the Supreme Court suffered from an absence of all three determinants of compliance: federal circuit courts did not routinely implement the most important decisions of the Supreme Court, communication between the Supreme Court and inferior courts (state or federal) was tenuous at best, and the Supreme Court—ever careful of its legitimacy within the broader political system—could not

draw clear lines of policy that might undermine that legitimacy (McCloskey 1964) and, in any event, lacked the docket control to do so. In brief, under the Judiciary Act of 1789, deficiencies of which persisted until 1925, the Court primarily engaged in error correction, not judicial policy making.

Constitutional Questions in State Courts

Constitutional Cases as an Exception to U.S. Circuit Court Jurisdiction

Article III of the Constitution is often said to embody a “Madisonian compromise” on the matter of a national court system (Fallon et al 2003; Mazzone 2010). That is, while the Judicial Article of the Constitution creates the Supreme Court, it allows Congress to create courts inferior to the Supreme Court and, moreover, to set “exceptions and regulations” to the jurisdiction of all federal courts. The compromise involved in this was between ardent nationalists like Madison and Hamilton, who insisted that inferior federal courts were necessary and should be constitutionally obligatory to secure uniform federal justice, and those partial to states’ rights, who feared that inferior federal courts would supplant state judicial systems (Holt 1989; Marcus and Wexler 1992). The framers did not enshrine either preference in the Constitution but instead deferred to future lawmakers.

Inferior federal courts were indeed established by the first Congress in the Judiciary Act of 1789, but as part of the compromise that went into the Act (again, between nationalists and localists) they were not given jurisdiction over cases “arising under” the Constitution, treaties, or federal law, in the language of Article III, despite the power of Congress to grant this jurisdiction (Marcus and Wexler 1992). All such cases were to be heard in the state courts, subject to U.S. Supreme Court review if the state court had found in favor of a state law against a challenge grounded in the Constitution, a U.S. treaty, or a federal law. No Supreme Court review could be

had if a state court found a state law to violate the national Constitution, meaning that states could *broaden* the protections of the Constitution entirely without Supreme Court scrutiny (Mazzone 2010).⁶ For example, if a state court held that the First Amendment of the U.S. Constitution prohibited a certain state law, the Supreme Court could not review the decision even if it disagreed. The result was that major constitutional provisions, and Supreme Court interpretations of them, were to be implemented by state courts, not inferior federal courts.

Somewhat ironically, some of the best-remembered and most contentious decisions of the Supreme Court under John Marshall often concerned the limits of state power under the Constitution. Some dealt with express limits to state power under the Constitution, such as the prohibition on the impairment of contracts (e.g. *Fletcher v. Peck* 1810; *Dartmouth College v. Woodward* 1819). Others related to the limits to state power when pitted against the exercise of the enumerated powers of Congress, such as the power to regulate interstate commerce or to tax imports (e.g. *Gibbons v. Ogden* 1824; *Brown v. Maryland* 1827). While these decisions are justifiably remembered today, and are vital to any story of the development of American constitutional law, their impact is limited only to the immediate parties in them if it is demonstrated that state courts failed to follow them in future applications. As a rough measure of just how reliant the Court was on state courts for the implementation of its most anti-state power decisions, Table 2.1 lists six major decisions of the Marshall Court in which the Court invalidated a state's action on constitutional grounds, and compares the number of times these cases were treated in subsequent state court cases versus the number of times they were treated in subsequent federal district and circuit court cases prior to 1875. All of these decisions were treated much more often by state courts than they were by federal courts.

Table 2.1. Comparison of Subsequent Case Citations before 1875

	State Action Invalidated	State Court Citations	Lower Federal Court Citations
<i>Fletcher v. Peck</i> (1810)	state revocation of public land grant	312	27
<i>McCulloch v. Maryland</i> (1819)	state taxation of the Bank of the United States	203	38
<i>Dartmouth College v. Woodward</i> (1819)	state impairment of private contract	306	18
<i>Gibbons v. Ogden</i> (1824)	state regulation of federally-authorized use of interstate waterway	134	52
<i>Brown v. Maryland</i> (1827)	state taxation of international imports	83	10
<i>Cherokee Nation v. Georgia</i> (1831); <i>Worcester v. Georgia</i> (1832) (combined)	state regulation of Indian affairs	45	31
Total		1,083	176

Source: Derived from the Shepard's Citations feature of Lexis-Nexis. Each case was "Shepardized" to check for their subsequent treatment by all types of inferior courts.

What is missing is a measure of the quality of treatment of these precedents in the subsequent cases—whether it was positive, negative, or neutral—but the point for now is that the overwhelming majority of *any* treatment of Supreme Court opinions curtailing certain state actions, even if positive, had to occur and for the most part did occur in state courts. This, of course, is explained by the structure of the Act: parties pursuing a constitutional argument against their own state had no recourse except in their state courts; non-resident parties (who were U.S. citizens) pursuing a constitutional or other federal defense against the actions of a state had to avail themselves of the courts of the prosecuting state. This demonstrates the need for state courts to apply, with some frequency, Court precedents concerning state power over

commercial activity, over federal establishments, or over vested contractual rights.

In order for any party to pursue a constitutional claim in a lower federal court there must have been jurisdiction arising from the citizenship status of the parties in the case. This precluded the vast majority of the typical constitutional claims, since states (or their agents), and not individual citizens, often initiated constitutional cases involving state power. Using, again, Lexis-Nexis case retrieval, from 1790 to 1875, the highest courts of the states heard 1,153 cases that squarely presented at least one federal constitutional question. On the other hand, only 67 U.S. circuit court cases invoked the “U.S. Constitution” in the opinion for this time period; 643 states’ highest court cases did. Forty-four opinions in federal circuit court from 1790 to 1875 cited the language of the Commerce Clause of Article I. The comparable number for states’ highest courts during this time is 148 cases. Given the available data, which it must be acknowledged is incomplete because circuit court cases did not always lead to a written opinion, it is conceivable that state court treatments of constitutional questions outnumbered federal circuit court treatments of similar questions by a factor of 9 or 10. Freyer (1995) notes how frequently inferior federal courts had to apply state laws in their cases; constitutional cases in inferior federal courts were rare. The next chapter will explore this matter in more detail.

Under the Act, simply put, the inferior federal courts were not in a position to play a major role in the implementation of the constitutional decisions of the Supreme Court. “As a result of the limited jurisdiction of the federal courts,” notes Mazzone (2010, 985), “the early state courts decided what the federal Constitution meant.” When federal court jurisdiction was needed the most—in cases involving a challenge to state action—it was least likely available. Given this, the prospect of routine lower court implementation of Supreme Court decisions was not really a viable one; the Court had to fend for itself.

Supreme Court Review of State Cases Under Section 25 of the Judiciary Act

Under Section 25 of the Judiciary Act of 1789, the Supreme Court enjoyed the right of review of all states' highest courts' final judgments in favor of a state law that had been challenged on federal or constitutional grounds, or of a state court's invalidation of a federal law. The Court found Section 25 to be constitutional in *Martin v. Hunter's Lessee* (1816) as applied to the interpretation of state obligations under treaties and in *Cohens v. Virginia* (1821) as applied to state criminal cases where defenses under federal law were asserted. "If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the constitution without control," Justice Story reasoned in *Martin*, "the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intention of the constitution" (339). Story went on to stress "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution" (348). The Court existed to serve as a "revising authority to control [over] jarring and discordant judgments," and to "harmonize them into uniformity" so that the Constitution, laws, and treaties of the United States would not "be different in different states" and lack "precisely the same construction, obligation, or efficacy in any two states" (348). Section 25 was clearly intended to remedy—as "the only adequate remedy for such evils"—any of the state court misapplications or abuses of Court precedents invalidating certain state actions under the Constitution or federal law. Again, however, Justice Story was only partly correct about the uniformity purpose of Section 25, since Section 25 offered no prospect of national uniformity in the application of Supreme Court decisions that *empowered* state action. State decisions against the constitutionality of their own laws were not subject to further review.⁷

It bears mentioning that the frequency of the Court's exercise of Section 25 review, important as it was in an era of strong assertions of states' rights (McDonald 2000), is inversely

related to the effectiveness the Court has had in *setting policy* for state courts. If the Court felt the need to review *every* state court decision in favor of the constitutionality of a state law, for example, the Court cannot be said to have set policy for these subordinate courts. Policy making should be distinguished from policy enforcement or error correction. My definition of Court policy making is that it requires the use of one or of a small number of representative cases in which the Court may demonstrate, for the benefit of other courts, the proper treatment of a legal issue that may recur in future cases. The implied understanding is that for the vast majority of subsequent cases of the same type there will be no Supreme Court review; finality will lie in lower courts. The extent to which the Court feels it necessary to review lower court decisions of the type covered by its own precedents, therefore, is a measure of the lack of faithfulness in implementation that is present in inferior courts. As Hamilton put it, “[i]n proportion to the grounds of confidence in, or distrust of, subordinate tribunals, ought to be the facility or difficulty of appeals” (*Federalist Papers* 81). The need for every case to be appealed to the Supreme Court in order to secure the “correct” judicial outcome, that is, suggests a problem in the judicial hierarchy.

According to statistics compiled by Goebel, Jr. (1971), the Court reviewed the judgments of states’ highest court, under Section 25, seven times between 1789 and 1801. Warren (1922) counts 16 exercises of review of state decisions under Section 25 up until the *Martin v. Hunter’s Lessee* (1816) decision. After the Court definitively came down in favor of the constitutional necessity of this review, the practice became more routine. I have accounted for an additional 23 exercises of Section 25 review by the Marshall Court from 1816 to 1836. The Taney Court (1836 to 1864) exercised Section 25 review 88 times.⁸

Of course, the quantity of state court cases addressing constitutional and federal law

claims is not as significant, from the perspective of compliance, as is the quality of those judgments. The more interesting question is how many times the Supreme Court felt the need to *reverse* a state court decision, not simply review it. Epstein et al (2003) indicate that the Court ruled four state laws to be unconstitutional before the *Martin* decision, and 78 from that decision until 1876. The comparable number of federal laws invalidated for this entire period is 10.⁹ Of the 23 Marshall Court writ of error cases, the Court invalidated the state action 16 times (69.5%), while the more pro-state Taney Court by comparison invalidated the state action 33 of 88 times (37.5%).

State courts bristled with hostility toward the Supreme Court's review of their judgments. Wiecek (1992) details the "persistent confrontation" between proponents of states' rights, as advocates of the finality of state court judgments, and nationalist proponents of Section 25 review, during the Nineteenth Century. In addition to Virginia, the states of Pennsylvania, Georgia, South Carolina, Maryland, Ohio, and Missouri at some point rejected Supreme Court authority—almost to the point of armed conflict between state and federal officials—under Section 25 (McDonald 2000; Wiecek 1992). Warren (1913) adds to this tally some resistance by the courts and legislatures of North Carolina and Kentucky prior to *Martin v. Hunter's Lessee*, and by Massachusetts in the year after. Crowe (2012) notes that at least eight states' highest courts explicitly found Section 25 to be unconstitutional on their own, including the Virginia Court of Appeals decision that precipitated the Supreme Court's decision in *Martin*. Nine state legislatures adopted resolutions or statutes against Section 25 review (Warren 1913). And, according to Warren (1913), at least 10 unsuccessful bills were introduced in Congress between 1821 and 1882 to repeal Section 25 or to amend the constitutional grant of the Court's appellate jurisdiction in Article III.

Given the hostility that so many state courts demonstrated toward the Supreme Court, a major responsibility of the Court under the Judiciary Act of 1789 was to correct the constitutional errors made by defiant state courts to the extent that it could. This duty was complicated by state and even Congressional attacks on the very legitimacy of Court review of state decisions—if not of the Court—itsself.

Communication and Monitoring in the Circuit System

The Business of the U.S. Circuit Courts: Diversity Cases and Federal Common Law

I have shown that the Supreme Court enjoyed a right to review denials of constitutional and federal law claims by state courts. This review of state courts was in order to protect federal interests from state impairment and to promote the uniform application of Court constitutional judgments limiting state power. This alone was a heady responsibility. Under the Act of 1789, however, the Court had no less a responsibility to ensure uniformity and compliance in the legal pronouncements of the inferior federal courts. While, as noted above, circuit courts did not frequently pass upon the constitutionality of state action, they nevertheless handled many cases with constitutional implications, such as trials of federal crimes. Freyer (1995) details how constitutional issues tended to arise in lower federal courts before the Civil War through admiralty cases and in U.S. prosecutions of those who violated the ban on the slave trade. Justice Samuel Chase was impeached for his pro-Federalist judicial conduct while presiding over federal prosecutions under the Alien and Sedition Acts (Warren 1922). Chief Justice Marshall himself presided in circuit court over the 1807 treason trial of Vice President Aaron Burr (Haskins and Johnson 2010). Over fifty years later, Chief Justice Taney presided over the trial in the case of *Ex Parte Merryman* (1861), where he invalidated President Lincoln's suspension of habeas corpus (Swisher 1976). And, constitutional issues most certainly could arise in the circuit courts

in diversity cases, the most likely type of case to appear on the federal docket until 1875. As long as the court had jurisdiction due to the diversity of citizenship of the parties in the case, it could entertain all of the legal issues in the case.¹⁰ As will be discussed below, state laws were applicable in diversity cases most of the time, leading to potential scrutiny of them on constitutional grounds. If the constitutionality of a state law was drawn into question, the federal court could decide the question.

Nevertheless, the primary concern in implementation as the Nineteenth Century progressed was Supreme Court policy making for cases between parties of diverse citizenship heard by the U.S. circuit courts. Since most cases heard in the circuit courts under the Judiciary Act were diversity of citizenship cases, these cases should not have escaped the monitoring capacity of the Supreme Court if the Court was to have any supervisory role over inferior federal courts. Usually these cases were mundane civil disputes. They involved the application of state laws or even judge-made law (common law) concerning property, contracts, business, and personal injury. In 1825, for instance, almost half of the cases disposed of by the Supreme Court were common law cases between two individual parties of the type heard by circuit courts (Frankfurter and Landis 1928a). Fifty years later, with the configuration of the circuit courts largely unchanged, a full 81 of 193 cases disposed of by the Court were common law cases (Frankfurter and Landis 1928a). White (1988) finds that non-constitutional cases made up the bulk of the docket for the Marshall Court. He calculates that for the period of 1815 to 1835, the Court decided with full opinion 791 non-constitutional cases, while in the same period it decided 66 constitutional cases (747). It would seem, then, that the diversity work of the circuit courts—where, as discussed *supra*, common law and often state law applied—preoccupied the Court.

Seven Impediments to Supreme Court Policy Implementation in Federal Circuit Courts

There are several reasons why Court supervision of the circuit courts in these diversity cases would have been a more confounding task than may appear on the surface. The Judiciary Act of 1789 created problems that are especially stark when judged against the high-compliance standards of the modern, three-tiered federal hierarchy. Here, I highlight seven distinct problems that may have served to limit the power of the Supreme Court within the circuit court structure.

Lack of Circuit Judges. First, the Judiciary Act of 1789 did not create much of a hierarchy. Under the Act, each state would have at least one judicial district staffed by a district judge (who might serve multiple districts in his state), and each state, with some notable exceptions, would be part of a multi-state judicial circuit. The supposed intermediate-level courts—the circuit courts—were staffed by judges from the Supreme Court and the district court. The original Act of 1789 provided that two justices (often called while on circuit duty “circuit justices”) and one district judge would comprise a circuit court. The requirement of two justices in a circuit was reduced to one by Congress in 1793; in 1802, Congress authorized the holding of a circuit court by a single judge. In the first eighty years of national judicial organization, until 1869,¹¹ there was no such thing as a U.S. circuit judge: circuit courts could be composed of a single Supreme Court justice, a single district judge, or both.

Table 2.2. Changes in Circuit Court Composition, 1789-1911

Legislation	Circuit Court Composition	Extent of Supreme Court Justice Involvement	Number of Circuits
1789	Two Supreme Court justices and one district judge	Two circuit court sessions per year in each judicial district	3
1793	One Supreme Court justice and one district judge	One circuit court session per year in each judicial district	3
1802	Allowed a district judge to conduct circuit business alone	One circuit court session per year in each judicial district	6
1869	The Supreme Court justice, or the circuit judge, or a district judge alone, or any combination of two	One circuit court session per every two years in each judicial district	9
1891	Authorized an additional circuit judge for each circuit	Circuit court participation abolished; justices could sit on new Courts of Appeals	9
1911	Circuit courts abolished		

Disagreements among the Justices on Supreme Court Policy. Having a Supreme Court justice to hear cases in the circuit would seem to be a suitable way to implement Supreme Court decisions at the circuit level. But this assumes that dissenters from a particular Supreme Court decision would nonetheless serve as faithful followers of that decision in the future, while on circuit duty. This assumption clashes with anecdotal instances of non-compliance. Justice Story, while sitting on circuit, rejected the Court’s decision in *United States v. Hudson and Goodwin* (1812) because he explicitly wanted to force the Court’s reconsideration of that case (*United States v. Coolidge* 1813). He contrived to have the district judge who sat with him on the circuit case vote in favor of the Supreme Court precedent, in order to force a review by the Court. The Court, in *United States v. Coolidge* (1816), reaffirmed its holding in the *Hudson and Goodwin* case—a precedent

so recently settled and so squarely on point that the United States did not even send counsel to argue the *Coolidge* case.

Justice McLean, a dissenter in *Dred Scott v. Sandford* (1857), refused to apply the *Dred Scott* opinion's racially restrictive definition of "citizenship" in two instances while on circuit duty (Fehrenbacher 1978). His position in these cases was supported each time by the district judge, a fact that allowed these cases to escape Supreme Court review and inevitable reversal.¹² Chief Justice Taney, so frustrated by this fact, issued a supplement to his original opinion in *Dred Scott v. Sandford*, reaffirming and clarifying the Court's position denying citizenship to blacks (Fehrenbacher 1978).

The Infrequency of Circuit Justice Participation in Circuit Court. Even if circuit justices were on average more faithful to Supreme Court policy than Justices Story and McLean were in the instances cited above, the justices had to be present in order to exert any influence in circuit court. However, the circuit courts were often comprised of a single district judge. In such a circumstance, there would be no participation of the circuit justice at any phase of the case. This district judge could preside over a district court trial and then hear the *appeal of the same case* in the circuit court, alone. Or, the district judge could preside, alone, over a trial in circuit court.

This problem of the solo district judge was obviously present in the many districts that existed outside of circuits. For large periods of time, including multiple decades for some districts, entire judicial districts operated outside of the circuit system (See Table 2.3, below). "At no period before 1866," notes Surrency (2002, 41) "were all the districts included in a circuit." This meant that there was no circuit justice assigned to the district. The ruling of the district judge was final, subject of course to the writ of error to the Supreme Court (but only for cases with more than \$2,000 in controversy). Criminal cases heard by these courts got no review.

The legal and practical effect of this was that the district judge had all the trial and appellate powers of a circuit court. And in that he was final.

Even within the circuit system, the burdens of travel and the growth of the nation's size made a justice's participation in circuit court less likely as time passed. As early as 1802, circuit justices were allowed to attend only one circuit session per district per year; sessions held in the absence of the justice were presided over by the district judge (Glick 2003). For no decade after the 1820s did circuit justices participate in more than half of all circuit court cases reported (see the compilation provided in Table 2.4, below). In 1869, the annual requirement of circuit duty was statutorily reduced to a biennial requirement (Crowe 2012). This made circuit justice participation even less likely for a given case. According to data presented in Table 2.4 below, of the 1,850 circuit court cases between 1871 and 1875, for which a written opinion was produced, only 239 of these (13%) involved the participation of a circuit justice. In the decade of the 1880s, circuit justice participation in circuit court cases was almost entirely a thing of the past, until the requirement was finally ended in 1891. Frankfurter and Landis (1928a) observe the number of times in which a district judge sat as the circuit court in review of his own judgments. "By the later [1880's], eight-ninths of the litigation in circuit courts was disposed of by single judges, for the most part district judges.... Frequently...the district judge sitting in the circuit court would sit in sole judgment upon himself as judge of the district court" (87). The circuit-riding justices and (after 1869) circuit judges simply could not keep up with the circuit workload; the burden of it fell on district judges. The conclusion is inescapable: insofar as circuit justice participation in circuit cases actually constrained a district judge's behavior, this constraint could only occur in a small percentage of the overall docket of circuit court cases. In the vast majority of cases, there was no court or judge to represent the policy preferences of the Supreme Court, if any, in the

circuit system. The legal policy of the Supreme Court was unlikely to be followed if the district judge disapproved of it.

The Limitations on Circuit Justice Influence in Circuit Court. A fourth factor cutting against the implementation of Supreme Court policy in the circuit courts is that even when a circuit justice did participate, he hardly served a watchdog for fidelity to Supreme Court policy to the other circuit member. While the justice would preside in the trial, for all intents and purposes the district judge or (after 1869) circuit judge had an equal vote on the legal questions to be decided in the case. After 1802, a division of opinion between the judges on a circuit court gave rise to full Supreme Court review of the legal question causing the division—what was called a certificate of division (Surrency 2002). In this event, the views of the circuit justice gave way to the views of a majority of his Supreme Court colleagues, who could of course choose to side with the district judge. This limited the communicative impact of the judgment of the justice while sitting in circuit. His word on matters of Supreme Court policy carried no greater weight, in terms of voting, than did the opinion of the supposedly inferior judge. The circuit justice had no means by which he might admonish and overrule the district judge in a circuit court case. Swisher (1974, 270-271) notes that the justices of the Taney Court had varied relationships with the district judges with whom they worked on circuit duty. Some of the justices, like Story and to a lesser extent Taney, were accorded great deference and respect for their legal acumen by their circuit's district judges. Others, like Justices Nelson and McKinley, were not. As Brown (2012) observes: "District judges were appointed from and lived full-time within the area they served. They were generally well educated and well regarded and were not always inclined to be deferential to the justices who slipped in and out of town for circuit court" (139). The relationship might best be described as symbiotic. Justices needed the district judges to conduct

an overwhelming amount of circuit business in their absence, and district judges knew it, while

Table 2.3. Federal Judicial Districts Operating Outside of the Circuit System, 1789-1866

Judicial District	Period outside of a Circuit	Number of Years
North Carolina	Nov. 1789 to April 1802	13
Rhode Island	May 1790 to April 1802	12
Vermont	March 1791 to April 1802	11
Kentucky	Sept. 1789 to May 1807	18
Maine	Sept. 1789 to March 1820	31
Tennessee (Eastern and Western)	June 1796 to May 1807	11
Ohio	March 1803 to May 1807	4
Eastern Louisiana	Oct. 1804 to March 1837	33
Western Louisiana	Oct. 1804 to Aug. 1842; March 1849 to July 1866	38, 17
Indiana	Dec. 1816 to March 1837	20
Northern Mississippi	Dec. 1817 to March 1837; 1842 to March 1891	19, 49
Southern Mississippi	Dec. 1817 to March 1837	19
Illinois	Dec. 1818 to March 1837	18
Northern Alabama	April 1820 to March 1837; 1842 to March 1891	17, 49
Middle Alabama	April 1820 to March 1837; 1842 to March 1891	17, 49
Southern Alabama	April 1820 to March 1837	17
Missouri	Aug. 1821 to March 1837	16
Arkansas	June 1836 to March 1837	1
Michigan	Jan. 1837 to March 1837	0.25
Florida	March 1845 to July 1862	21
Texas	Dec. 1845 to July 1862	17
Iowa	Dec. 1846 to July 1862	16
Wisconsin	May 1848 to July 1862	14
California	Sept. 1850 to March 1855	5
Minnesota	May 1858 to July 1866	8
Northern Georgia	1855 to March 1891	36
Western Arkansas	1855 to July 1866	11
Oregon	Feb. 1859 to March 1863	4
Kansas	Jan. 1861 to July 1866	5
West Virginia	June 1863 to July 1866	3
Nevada	Oct. 1864 to July 1866	2

Source: Compiled from historical resources available through the Federal Judicial Center (www.fjc.gov).

the district judges often relied on “their” justices for patronage and other benefits that justices could help secure for their districts in Washington (Swisher 1974).

Table 2.4. Proportion of Circuit Court Cases Involving a Circuit Justice, By Decade

Decade	Percentage of Cases Attended by a Circuit Justice
1791-1800	79/119 (66%)
1801-1810	244/1,105 (22%)
1811-1820	484/813 (60%)
1821-1830	459/1,181 (39%)
1831-1840	266/886 (26%)
1841-1850	510/1,218 (42%)
1851-1860	697/1,427 (49%)
1861-1870	518/1,270 (41%)
1871-1880	515/4,539 (11%)
1881-1890	72/7,412 (0.9%)

Source: Compiled by review of all circuit court opinions in Lexis-Nexis in which the term “circuit justice” appears at any point in the opinion, including in the list of judges in the case.

The bare fact of the matter was that circuit riding was justified by Congress not as a way in which Supreme Court policy could be authoritatively communicated downward, or as a way to make certain that district court judges were adequately monitored by members of the High Court. The rationale was Jeffersonian localism, of keeping the justices in tune with local law and practice (Crowe 2012; Glick 2003). Circuit riding was to serve the interests of a decentralized system, not the interests of Court power and influence. If anything, circuit duty was designed to *diminish* Court power as a nationalizing agent. According to Goebel, Jr., (1971) the district judge was considered to be the “expert” on the circuit bench, since he—as a citizen of the district—was able to inform the justice of local law and practice. Presidents often evaluated a potential nominee to the Court according to his knowledge of the particular legal culture of the circuit he

would serve as circuit justice (Crowe 2012). This turns the hierarchy of justice on its head.

The Lack of Reliable, Published Supreme Court Opinions. Fifth, as a practical matter, the publishing and circulation of official Supreme Court opinions was by no means a straightforward business. The dissemination of written Court opinions, obviously, is an overriding concern to the question of communication of the decisions of the Supreme Court. In the early Marshall years (1801-1815), the publication of the Court's written opinions routinely ran anywhere from four to eight years behind (Joyce 1985). In no year prior to 1817 did the Supreme Court, much less the inferior courts, have access to printed copies of the previous year's Supreme Court decisions by the beginning of a term (Joyce 1985). In retrospect, it seems that this ought to have enhanced the position of the circuit justice, who, if he had participated in a particular Supreme Court case, could apply perhaps from memory the Court's prior rulings in the circuit in the absence of a published opinion. Again, however, this assumes a justice's fidelity to the Court's own precedents that was not always present.

The Circuit Courts were Primarily Trial Courts. Sixth, monitoring for fidelity to the Supreme Court was not a major function of the circuit courts vis-a-vis the district courts because their appellate jurisdiction was limited mostly to admiralty ("laws of the sea") cases; trial responsibilities filled the circuit courts' time (Glick 2003; Surrency 2002). In this respect the circuit court panels of the pre-1891 period are much more analogous to the present-day federal district courts than they are to the present day Courts of Appeals. Even though the circuit courts functioned as trial courts for almost all of their judicial business, their judgments made in cases valued at less than \$2,000, (and after 1887, \$3,000), *where there was no division of opinion on the court* were not reviewable by the Supreme Court. The circuit court was final regardless of the

composition of the court in the case, hence accusations that a single district judge exercised potentially tyrannical power (Frankfurter and Landis 1928a).

Complications Arising from Choice-of-Law Questions. Seventh, and lastly, the problem of deciding which system of law applied to a particular case complicated the duty of the circuit courts in diversity cases. This created a problem of multiple potential sources of law, competing for the attention of circuit courts: the legislative authority of a particular state, state court interpretation of state statutes and of the common law, the U.S. Supreme Court's common law decisions, and principles of "general law" to be drawn from other sources.

The seminal Supreme Court case on this matter is *Swift v. Tyson* (1842). Section 34 of the Judiciary Act required that in the circuit courts "the laws of the several states...shall be regarded as rules of decision in trials at common law."¹³ Since common law diversity cases were the bread and butter of circuit business, circuit court judges mostly had to work with state law (Glick 2003). Freyer (1995) discusses just how much discretion that the very important matter of which state's law, if any, applied to a case gave to the judges of a circuit court. He notes that federal judges rarely felt the pressure of *stare decisis* (18). "Only rarely did federal courts address large constitutional questions," Freyer notes. "The great bulk of federal cases was routine, involving the determination of and choices between state laws" (20).

In *Swift*, the Court ruled that the "laws of the several states" only meant state statutes and the interpretation of them by state courts, not a state's judge-made law. According to Justice Story, for the Court: "In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws" (18). Because of this ruling, circuit courts were put on notice that in

certain cases they must apply common law doctrines adopted by the Supreme Court rather than the body of judge-made law developed by the courts of a particular state.

* * *

In summary, authoritative interpretation and adaptation of Supreme Court decisions by inferior federal courts could not exist given the peculiarities of the judicial system created by the Judiciary Act of 1789. To recap (in abbreviated fashion) the seven reasons for this, they are:

- 1) The circuit courts lacked their own judges—circuit courts consisted of a district judge (who might have already heard the case under review) and a circuit justice (who might participate in the further appeal of the case);
- 2) Circuit justices often used their position in circuit court to protest Court policy;
- 3) Assuming that circuit justices were faithful to Court policy, various factors made circuit justice participation in circuit cases rare. The district judge was often the final arbiter of a case;
- 4) A district judge had an equal vote with the circuit justice on a circuit panel and, in fact, might be more knowledgeable about the legal principles in the case than the justice;
- 5) Court opinions were not widely available in the circuits;
- 6) Circuit courts were mostly trial courts, not courts that monitored the district courts;
- 7) Because of *Swift v. Tyson* (1842), circuit courts were often faced with the question whether Court policy was even applicable to a case at all.

Docket Control and Decisional Clarity

The Lack of Docket Control

The Judiciary Act of 1789 gave the Court very little discretion over its docket. Other than

the requirement of circuit riding, this feature, perhaps, puts the greatest distance between the Court of today and its pre-1925 predecessor. The Court was called upon to handle as many routine matters as qualified under the grant of appellate jurisdiction provided to it. In addition to the Section 25 cases coming from state courts discussed earlier, Section 22 of the Act provided that any case may be brought from the circuit courts if the matter in controversy exceeded \$2,000. Lack of docket control, I argue, over-taxed the justices in a way that diminished Court authority over lower courts. The justices had less time to spend in the careful drafting of opinions that would be influential to lower courts.

The Court's Docket under Marshall and Taney. Unlike the other problems of the Act discussed in this chapter, which manifested themselves almost immediately in the judicial hierarchy, clearing the docket was a manageable task for the Court in the first 50 years of the Republic (Swisher 1976). Epstein et al (2003) report an average number of 27 cases disposed of per term from 1789 to 1825. In fact, White (1988) notes that Chief Justice Marshall looked for ways to bring *more* cases onto the Court's docket in pursuit of greater influence over lower federal courts. In the following two decades, the average number of cases disposed rose to 56 per term. Docket problems really began during the tenure of Chief Justice Taney (1836-64) (Swisher 1976). According to caseload statistics provided by the Federal Judicial Center, in the first decade of Taney's tenure the Court averaged 124 docketed cases per term, it disposed of an average of 53 docketed cases per term, and it had remaining in a term an average of 71 undisposed of cases. It would seem from this that the Court's docket consisted principally of undisposed-of cases carried over from the prior year.

There is evidence that the Court felt the press of so much unfinished business each term. In 1849, for the first time, the Court had to limit the time allotted to argument to two hours per

side (Swisher 1976; Frankfurter and Landis 1928a). An exasperated Justice Story repeatedly pleaded with Chief Justice Taney to keep litigants' arguments brief, to the point, and within the allotted time (Swisher 1976, 279).

Circuit Riding and Docket Backlog. The real drain on the justices' time was circuit duty (Glick 2003). The amount of time spent on circuit, obviously, cut into the time the justices could spend deciding Supreme Court cases. Beginning in 1803, the Court was allowed only one term per year in Washington, called the February term. This term began on the first Monday in February and continued until late March. At that point in the year, the justices were eager to leave for the spring term of their circuits, some of which were statutorily set to convene in early April; those more distant from Washington were allowed to begin in May (Glick 2003). Consequently, the justices spent up to nine months of the year in their assigned circuits hearing circuit cases (Rehnquist 2004). In 1823, Congress responded to the extremely compressed Supreme Court session (that it had created) by moving the beginning of the Court's term back a month, to the first Monday in January, and then further back in 1844 to the beginning of December (Swisher 1976). In the Antebellum Period, Congress would not agree to the justices' preferred remedies—relief from tedious circuit work, intermediate appellate judges, or a reduction in the number and types of cases that could be appealed to the Court. Members of Congress who were in favor of circuit riding argued that a justice's presence in the circuit was beneficial to the authority of the Court. The justices should impress upon local communities the importance of republican principles. But if it were the case that circuit riding really helped the Court supervise the lower courts (rather than serve the interests of localist members of Congress), it is unlikely that the practice would have been as universally despised by justices as it was (Frankfurter and Landis 1928a; Glick 2003).

Docket Growth after the Civil War. As federal judicial business increased after the Civil War, more and more cases poured onto the Court's docket from the circuits (Rehnquist 2004). These were diversity of citizenship cases that easily met the jurisdictional minimum because large corporations were involved. Also, after 1875, circuit cases that presented general federal and constitutional questions started coming out of the circuits. Corporations often availed themselves of constitutional or federal law defenses to state regulatory action and, hence, removed their cases from state court to the federal circuits (Freyer 1979; Gillman 2002). Corporations were considered by the Court to be citizens only of their state of incorporation, which meant that for the purposes of diversity jurisdiction they qualified as out of state "citizens" in every state in which they did business (Frankfurter and Landis 1928a). Routine corporate cases had essentially become federal cases.

The Court's lack of docket control comes through in caseload statistics for the end of Reconstruction and beyond. As a frame of reference, the Court selected 77 out of over 10,000 appealed cases in 2012 for which to hear arguments, and disposed of all of them with either a signed or *per curiam* opinion. In other words, the Court added a mere 77 new precedents to the supply of those available to lower courts. No other cases for the 2012 term resulted in an opinion from the Court.

One hundred and thirty years ago the situation was much different. Referring again to the Federal Judicial Center statistics, in 1880, the court had 1,212 cases on its docket, and managed to dispose of only 369 of them. As I demonstrate in the calculations provided in Table 2.5 below, for the decade of the 1880's the disposed-to-docketed cases rate for the Court did not exceed 35% in any year. In 1890, the docket hit its high water mark with 1,816 cases. Only 617 of these were disposed of during the term. New filings each year combined with leftover business to

create a “snowball effect” for the Court’s docket. And, recall, all docketed cases had to receive the Court’s attention, eventually.

Docket Relief in the Judiciary Act of 1891. After the justices were excused from circuit duty in 1891, the Court was better able to manage its docket. They were not only allowed more time in Washington, but fewer new cases came onto the Court’s docket; new filings decreased by 39.8% in 1891 and by another 24.3% in 1892 (Epstein et al 2003).¹⁴ The Judiciary Act of 1891 modified the Act of 1789 in two major ways. First, it provided intermediate appellate courts, called Circuit Courts of Appeals, that could handle many routine appeals that would otherwise go to the Supreme Court. The Courts of Appeals’ handling of these cases was for all practical purposes final. Second, the 1891 Act gave the Supreme Court, for the first time, some discretion over case selection through the use of the writ of certiorari. It could use certiorari to review cases that had been decided by the Courts of Appeals. The Court still had no right to refuse to hear cases involving constitutional questions, federal law, or capital crimes—these cases went directly to the Supreme Court if appealed, bypassing the Courts of Appeals altogether (Frankfurter and Landis 1928). The Courts of Appeals instead bore the brunt of the appeals of diversity cases that had so backlogged the Court’s docket prior to 1891.

The case disposal trend shown in Table 2.5 below indicates how the 1891 Act gave the Court greater leverage over its docket.¹⁵ In Table 2.5, I incorporate into the Federal Judicial Center’s caseload statistics a number that represents the total of published opinions issued for each year from 1880 to 1900. Also, I have constructed a statistic that represents the percentage of docketed cases actually disposed (*% disposed*), as well as a percentage of the disposed cases that resulted in a published Court opinion (*% written opinion*). From the perspective of judicial policy making, the relevant matter is how many cases the Court *must* dispose of *on the merits*

each term. The Court can either have control over that number or not. In a situation where a party has a statutory right to have the Court judge the merits of his case, the Court is not in control. The number of such cases could exceed, and has historically exceeded, the capacity of the Court in each term. On the other hand, if the Court can control the input of cases that must result in some decision on the merits it can keep the number of cases to be decided to a manageable level. The Court can do this by dismissing the case, summarily deciding it, or denying review of the

Table 2.5. Supreme Court Docket Control, 1880-1900

Year	Total Docket	Cases Disposed	% disposed	% disposed by written opinion
1880	1,212	369	30.45%	63.14%
1881	1,254	403	32.14%	59.80%
1882	1,275	390	30.59%	68.21%
1883	1,313	450	34.27%	62.22%
1884	1,325	464	35.02%	57.97%
1885	1,348	444	32.94%	65.32%
1886	1,403	455	32.43%	99.34%
1887	1,437	422	29.37%	73.22%
1888	1,571	423	26.93%	90.54%
1889	1,648	468	28.40%	95.30%
1890	1,816	617	33.98%	81.20%
1891	1,582	503	31.80%	92.05%
1892	1,369	430	31.41%	91.63%
1893	1,214	503	41.43%	94.43%
1894	1,062	415	39.08%	95.66%
1895	1,033	494	47.82%	93.72%
1896	834	447	53.60%	73.38%
1897	689	373	54.14%	80.43%
1898	839	531	63.29%	58.38%
1899	692	375	54.19%	88.00%
1900	723	377	52.14%	86.74%

Source: Federal Judicial Center Caseload Statistics. The number of opinions published is derived from a Lexis-Nexis search of all Supreme Court cases for the period.

case. Congress may also assist the Court by limiting party or case access to the Court, or by simply putting the court in control of case selection.

A higher percentage of cases disposed each term equals more docket control, because this suggests that the Court has more tools at its disposal short of full case review by which to dispatch cases. As the number of things that allow a case to be considered “disposed” goes up, the disposal rate goes up. However, the higher the proportion of disposed cases that are done so with a written opinion suggests less docket control, because it indicates that disposal *must* take the form of a written opinion. Cases are not considered “disposed” until they are given full review with a decision about some or all of the legal points raised in them. If disposal rids the Court of docketed cases, and if disposal must take the form of a written opinion in each case, there is little that the Court can do that would be what Wasby (1978) calls “skimming off review”—clearing the docket of cases while not deciding them (143).

The data reported in Table 2.5 reveal that the Court, for the period of 1880 to 1900, achieved a fairly low disposal rate, albeit with some improvement after 1891. However, in most years the overwhelming percentage of disposed cases were done so by means of a written opinion of the Court. These two facts, considered together, suggest weak docket control.

Dispute Resolution versus Policy Making

Two models of docket control emerge. The first could be called the dispute-resolution or (as used elsewhere in this chapter) the error-correction model. With this model, the Court must handle a multitude of cases in order to satisfy some right each aggrieved party enjoys to “have his day in court” before the highest court in the land (Rehnquist 2004). Here, the Court focuses less on the policy impact of any one case and instead audits the lower courts for their proficiency in deciding disputes according to the applicable legal principles. Because of the sheer volume of

cases reviewed that this task would entail, decisions tend to be made quickly. The idea is to render justice between the parties on a case-by-case basis. There may be a way to differentiate “important” cases from “unimportant” ones. However, the concept of *policy importance* is less significant if all cases are equally entitled to a share of the Court’s attention. Perhaps importance refers instead to the tangible matters at stake (such as life, money, or property) in each case. The policy impact of the case, the clarity of the Court’s opinion, the novelty of the legal issues involved, and communication to subordinate courts all recede in importance because it is likely that the Court itself will hear all future, similar cases. The Court uses written opinions merely to demonstrate to the public that each case is disposed of according to the law, as a matter of the Court’s own legitimacy as a final arbiter of legal disputes in society.

The alternate model may be called the case-selection or judicial policy making model. Under this model, the number of cases disposed of by written opinion will be lower than is the case in the dispute-resolution model. The primary reason for this is that the Court, under the model, has only to consider and decide the cases it chooses. The assumption is that the Court would choose fewer cases than exist in the universe of possible ones to be chosen, because the Court has finite time and ability to expend in these tasks. A second reason is that if the Court may choose its cases, it will do so carefully and according to certain criteria. It will decide the most important disputes, and entrust the remainder to subordinate courts. “Importance” here would be with reference, in part, to the value of the case in sending a signal to the subordinate courts or even to the broader legal and political community. A case may be valuable from this perspective if it has within it a legal issue that has occasioned difficulty for the subordinate courts, as evidenced by a multitude of conflicting judgments in the lower courts about that issue. Important cases are those that allow the Court to bring certainty to the law, to undertake its

responsibility, according to Chief Justice Marshall in *Marbury v. Madison* (1803), to “say what the law is” (177). Third, when the Court can limit the number of cases it has to grant a full review and for which it must render a decision, it can focus more on the policy implications and opinion drafting of any one case.

The Judiciary Act of 1789 statutorily wed the Court to the dispute-resolution model of docket control. While it set a minimum amount in controversy for cases that it must review from the circuit courts, it was required to hear all appealed cases above that minimum. The amount in controversy minimum was designed to send only “important” cases to the Court, but under the dispute resolution model, “importance” is with reference to the importance of the case not from the perspective of the Court or the legal community, but from the perspective of the parties.

Table 2.6. Two Models of Court Docket Control

<u>Dispute Resolution Model</u>	<u>Policy making Model</u>
<ul style="list-style-type: none"> • The Court must decide every case within a certain class of cases, regardless of case “importance” • The ideal is to ensure justice for every party • Case importance is not measured according to legal policy • Written opinions serve a legitimacy purpose 	<ul style="list-style-type: none"> • The Court may select only “important” cases for review, according to the Court’s own notion of “importance” • Justice for all parties is largely the concern of subordinate courts • Case importance is measured according to the policy stakes of a case • Written opinions serve to communicate policy to subordinates

Hence, a jurisdictional minimum that was expressed in monetary terms. If there is much at stake, financially, between the parties in the case it is important to them, even if the facts and legal issues involved are highly routine and thoroughly treated in the precedents of the Court. For the period highlighted in Table 2.5 above, 1880 to 1900 (selected in part because of available statistics, but also because the docket was historically large), one may see factors that are

indicative of weak docket control. The Court disposed of a low percentage of its docket, especially before the changes made in 1891. At the same time, for every year over half of the case disposals was by means of a written opinion.

The Relationship between Docket Control and Decisional Clarity

Lastly, the specific model of docket control in place has a bearing on the capacity of the Court for judicial policy making. A non-discretionary docket results in more Court opinions, a factor that could confound the policy making process. From the perspective of a lower court judge seeking to comply with the Supreme Court, it is much easier to discern the law when it is clearly distilled into one or just a few precedents. As the number of precedents decreases, the likelihood of a doctrinal conflict or unacknowledged tension within the body of cases decreases. Clarity in the law increases—hence the clarity theory of lower court compliance that has been discussed in Chapter 1. This theory states that clear opinions are more likely followed by lower courts. Clarity in the form of one or two major cases in a given policy area, in turn, limits lower court discretion in picking and choosing among multifarious precedents to generate a desired legal outcome. Docket relief also gives the Court more time to spend in the consideration of any one case. This allows for fuller consideration of the policy implications of a case, and for the consensus-seeking fashioning of clear doctrine that can be applied by other courts in future cases (See Wasby 1978, 138-139).

These matters will be examined more fully in Chapter 5. For now, it is sufficient to note that the Judiciary Act of 1789 did not allow the Court to select cases using the writ of certiorari. The Act of 1891 gave the Court partial relief from its mandatory docket by allowing to the Court discretionary review of diversity cases. Full certiorari power would not be given to the Court until 1925.

CHAPTER 3

Interstate Commerce, Lower Courts, and Supreme Court Power

As has been discussed, the Judiciary Act of 1789 did not grant federal trial courts general jurisdiction over federal law, U.S. treaty, or constitutional cases. As a result of this, state courts, not federal courts, principally heard these types of cases. The relationship between state courts and the Supreme Court was not always smooth, especially when it came to matters of states' rights under the Constitution.

This chapter will review the implementation of pro-national Supreme Court doctrine in state supreme courts for the period of 1825 to 1891. The expectation is that state courts were usually not receptive forums for this doctrine. Insofar as state courts were the implementers of Court doctrine, Court influence was weak.

Second, in addition to this empirical effort involving state courts, this chapter will also look at the Jurisdiction and Removal Act of 1875. This Act stands as the first major institutional improvement on the Judiciary Act of 1789. The Act gave federal trial courts the federal law, treaty, and constitutional case jurisdiction that had been denied to them up until 1875. This chapter will examine the consequence of this policy change for Supreme Court power. It will demonstrate how the federal courts, after 1875, more likely than state courts implemented pro-national policy at any point in time.

* * *

In 1842, the City Council of Savannah, Georgia enacted a gross receipts tax in the amount of fifty cents per every one hundred dollars of merchandise sold within the corporate

limits of the city. A Savannah commission merchant firm named Padelford, Fay & Co., refused to pay this tax on any goods it sold that were still in the packaging that they had been contained in when they were imported from abroad. The firm's attorney argued that this tax, as applied to these imported goods, violated two constitutional provisions: the requirement that "[n]o State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its Inspection Laws" found in Article I, Section 10, and the power of Congress "to regulate commerce with foreign nations...and among the several states..." provided in Article I, Section 8. The trial judge in the case, Judge Fleming, rejected this argument and ordered that Padelford, Fay & Co. pay the tax. The company appealed.

By the time the litigation over the Savannah tax began, the two constitutional provisions at issue in the *Padelford* case had already been given considerable, if not altogether clear, treatment by the U.S. Supreme Court. In fact, the Commerce Clause and the Import-Export Clause were the basis of some of the pro-national decisions of the Court under Chief Justice Marshall's leadership (1801-1836) (McCloskey 1964). Preemptive federal power over interstate and international commerce was a vital part of Marshall's treatment of what McCloskey (1964) calls the "nation-state problem." The seminal Marshall Court in which the Commerce Clause was at issue was in *Gibbons v. Ogden* (1824). In this decision, Marshall propounded a broad interpretation of the enumerated powers of Congress. He defined "commerce" to include navigation on U.S. waterways. He added to this rendering of "commerce" a broad construction of the Constitution's phrase "among the several states." To this expression he supplied a meaning that suggested that, for commerce to be interstate, it merely needed to concern more states than one (195). The Court broadly interpreted what it meant for Congress to have the

power to “regulate,” stating that the term carried with it no inherent limitation, “that [the power] may be exercised to its utmost extent” (196). Marshall characterized the power to regulate interstate commerce as “plenary” and as “vested in Congress as absolutely as it would be in a single government” (197). Most importantly, perhaps, from the perspective of inferior court judges looking to apply the *Gibbons* decision in subsequent cases, Marshall held that federal power over interstate commerce, when exercised by Congress, was exclusive of conflicting state actions impairing the same commercial activity, and perhaps exclusive in any event. The state action is unconstitutional under the Supremacy Clause of Article VI of the Constitution.

The question that the *Gibbons* case left open—a question not necessary to the disposal of the *Gibbons* case, and that would cause problems for the succeeding Taney Court—was whether the states could regulate interstate commerce either in the absence of Congressional regulation or in a manner that does not conflict with existing federal regulation of the same commerce. The *Gibbons* opinion suggested that they could, to some extent, regulate commerce not otherwise regulated by the federal government, by enumerating permissible state regulations that had only an incidental effect on interstate commerce, such as pilotage and health and safety laws (238-9). The Marshall Court supplied a more pointed answer to this question in a later case, *Willson et al v. Black Bird Creek Marsh Co.* (1829), by holding that a state may authorize a dam of a navigable creek in the absence of a federal law protecting the navigability of the same creek.

By the time of the *Padelford* case, the Marshall Court had applied a robust protection not only to things and activities regulated by Congress pursuant to the commerce power, but also to goods imported from outside of the United States. In *Brown v. Maryland* (1827), the Court invalidated a license that was required by the State of Maryland for all importers or sellers of foreign articles or commodities. Chief Justice Marshall, for the Court, held that the state license

was an unconstitutional duty on imports, as prohibited by Article I, Section 9 of the Constitution. The Court held that the Constitution's prohibition not only applied to duties on the "act of importation," but also duties on the *thing* imported (438-9). Thus, the thing imported enjoyed a protected status even after the physical act of importation. Marshall reasoned that "[t]here is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country" (439). Both actions would equally frustrate international commerce, and the prohibition involved in this case was put in the Constitution in order to give Congress, not the states, the power to tax such commerce. Further, importers already paid a duty to the United States, and the payment of this duty conferred a federal right to sell the imported goods, giving rise to an additional conflict between the Maryland tax and a federal statute concerning international commerce.

But when may the state begin to tax the goods brought into its borders? In answering this question in the *Brown* case, Marshall offered what has been called the "original package" doctrine:

"...[W]hen the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution" (441-2).

The Court found that the Maryland license tax, as applied to a seller of a package of dry goods sold in the package in which they were imported, was unconstitutional. Furthermore, the tax conflicted with the right to sell imports free of state taxation as contemplated by the seller's payment of federal import duties on the same goods. Drawing on his own reasoning in *Gibbons*,

Marshall found that Congress had the power to authorize the sale of imports under the Commerce Clause.

The Taney Court (1836-64) is generally seen as having pulled Commerce Clause doctrine in the direction of states' rights, but this is an oversimplification. The Court continued to maintain (for the most part) that Congress's exercise of the commerce power was exclusive (McCloskey 1964). In fact, the exclusive power of Congress over interstate and international commerce was supported and reaffirmed by certain decisions of the Taney Court (*Passenger Cases* 1849; *Pennsylvania v. Wheeling and Belmont Bridge Co.* 1850). In the first decade of the Taney Court, the Court handed down two pro-state Commerce Clause decisions: *Mayor of New York v. Miln* (1837), and a consolidated review of three states' liquor regulations called the *License Cases* (1847). However, two years later, in what are known as the *Passenger Cases* (1849), the Court continued with its attempted line-drawing between exclusive federal regulations of commerce and exclusive matters of internal police. In these cases, involving two different states' laws, the Court invalidated New York's requirement that the master of every incoming vessel pay a tax per person aboard the vessel to support certain state objectives. The Court also invalidated a Massachusetts law that taxed incoming vessels in the amount of two dollars per passenger. The Court held that the power of Congress over interstate commerce, *even if not exercised with respect to specific commerce*, was exclusive (396).

Lastly, in *Cooley v. Board of Wardens* (1851), the Court attempted to reconcile the discordant Taney Court opinions on the Commerce Clause into something resembling a workable doctrine. This case involved a Pennsylvania law requiring every ship entering and exiting the port of Philadelphia to make a report to the port's warden and to use the services of a local pilot (or pay a fee intended to support the families of infirm local pilots). The Court found

the pilotage requirement to be a regulation of commerce (316-7). However, the Court found the regulation to be compatible with federal commercial statutes on the same subject. According to Justice Curtis, the pilotage of ports of the United States, albeit a matter of commerce, is of the type of commercial activity that will tolerate a diversity of state requirements, even if these requirements are concurrent with federal statutes on the same subject. To evidence this, the Court pointed to a federal statute authorizing state and local regulation of the subject of pilots. Some other subjects pertaining to interstate commerce, however, “are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress” (319). In these matters, there should be no concurrent state regulation.

In summary, the Marshall Court opinions of *Gibbons*, *Willson*, and *Brown* set the framework for analysis in the subsequent Commerce Clause cases heard by the Taney Court, all of which finally reached something of a synthesis in *Cooley*. Chief Justice Marshall’s opinions in *Gibbons* and *Brown* were taken by all subsequent cases to mean that any exercise of the broad grant of Congressional power under the Commerce Clause was supreme over conflicting state actions, however these state actions might be characterized. State actions were upheld on two different theories: either they were found not to be regulations of interstate commerce (*Miln*) or, even if they *were* considered regulations of commerce, they were lawful up until the point where they encroached upon a federal law (Taney’s opinion in the *License Cases*) but only if their subject matter was by its nature amenable to different rules from state to state (*Cooley*). *Cooley* settled on the doctrine that some commercial subjects required uniform, exclusive treatment by Congress while others allowed for disparate, local regulation (subject to the preemptive power of Congress). The subject matter of the state regulation in question was to be the decisive issue in

whether the regulation was constitutional. That species of commerce involving imports of goods or persons from abroad was protected from state impairment until the imported objects left the custody of the importer or otherwise became mixed with the general, taxable property or population of the state (*Brown, Passenger Cases*), but this protection did not apply equally to things transported from one state to another unless there was a federal statute protecting them (*License Cases*).

* * *

The *Padelford, Fay, & Co. v. Savannah* (1854) case, now before the Supreme Court of Georgia, brought into focus the U.S. Supreme Court's precedents in the matter of state power over international and interstate commerce, and it also carried with it strong implications for Section 25 of the Judiciary Act. Recall that Section 25 gave the Supreme Court jurisdiction over cases in which a state had rendered a final judgment against the validity of a federal law or in favor of a state law that had been challenged on federal or constitutional grounds. As will be seen, the members of the Georgia Supreme Court understood that their failure to apply, properly, a U.S. Supreme Court constitutional precedent that limited state powers could give rise to an appeal, by writ of error, to that Court. Nevertheless, the court upheld the tax, unanimously.

The attorney for the merchant rested his argument on the simple proposition that the law, as applied to the primary sale of imported goods, violated the "original package" doctrine of *Brown v. Maryland* (1827). No one disputed that the tax clearly fell on the proceeds of imported goods sold in wholesale, while they were in their original packaging.

Judge Henry L. Benning, for the court, began his opinion by distinguishing Savannah's tax from the regulatory action invalidated in *Brown*. While in *Brown* the license requirement prohibited altogether the sale of the import (without a license), the Savannah tax merely taxed

the gross receipts derived from the sale of an import. According to Judge Benning, the tax applied to money, not the import (443). Monetary proceeds are necessarily “mixed with the mass of property” that is properly taxable by the state (443). In an effort to distinguish a tax on “imports” from a tax on the “gross amount of sales” of imports, Benning argued that the proceeds represented not just the cost of the import to the seller but also the profit made by selling the import plus a recoupment of the seller’s expenses in marketing the good (443-4). Judge Benning further rested his conclusion on the fact that the tax applies to all sales in Savannah, not just sales of imports (444). Lastly, Benning rejected completely the suggestion that the tax was an improper regulation of international commerce, since the “gross amount of sales” derived from goods was not an item of commerce and it did not cross state lines (445).

Benning failed to address the possibility that the tax—which could in principle take on any rate, without limit—might serve as an impediment to imports. He did not address the fact that the tax applied even to proceeds of goods sold while in their original package, or that importers in Savannah (as elsewhere) paid federal tax on their imported goods. An exemption from state taxation on sales of these items would, in reality, make sellers of imports equal to sellers of non-imports in Savannah. This, after all, was a major part of Chief Justice Marshall’s reasoning against the license in *Brown*. Importers already paid a federal excise, which as Marshall noted in *Brown* purchases for them the privilege of selling their imports without further impediments created by their states. Benning’s logic allowed imports sold in Savannah to be double taxed, creating a bias in favor of home grown products.¹⁶ The *License Cases*, insofar as a decision with nine separate opinions can be distilled into a rule, perhaps modified the original package doctrine by holding that a state could regulate the subsequent sale of an import within the state if the good was deemed to be harmful to the public. However, there was no suggestion

by Savannah that it was using its police power to protect the public from a certain kind of import.¹⁷ And Benning's distinction between a tax on "imports" and a tax on "gross amount of sales" of imports is feeble. If, as the *Passenger Cases* suggested, the power to tax is the power to ban, then the tax in question could effectively ban imports by making their sale uneconomical to the importer (especially considering that the tax was assessed on top of a federal excise). Also, the Maryland license at issue in *Brown* could easily have been characterized as a license to receive "gross amounts of sales" of imports rather than a license for the sale of imports. There is no distinction, in practice, between the right to sell an import and the right to receive proceeds from the sale of an import. Basically, Savannah was trying to accomplish with a tax what Maryland was not allowed to do with a license.

Judge Benning could have rested his conclusion about the validity of the Savannah tax on his dodge of the original package doctrine. But Benning continued:

"I am not willing to let the decision rest on this ground alone. I do not wish to be considered, by implication, as admitting that I think the decision in *Brown vs. Maryland* to be right, or as admitting that I think a decision of the Supreme Court of the U.S. is a binding precedent for this Court" (445).

Judge Benning then proceeded to offer his own interpretation of the Constitution and of the Court's commerce jurisprudence. He claimed that the *License Cases* had overruled *Brown* by allowing a state to ban the retail sale, but not the wholesale sale, of certain imports (445). To Benning, there was no difference between the two. However, Benning expresses frustration that the Court, in the *License Cases*, was not clearer in overruling *Brown*: "When a case is overruled, why ought it not to be overruled effectually, so that it may no longer mislead?" (445). In fact, as Benning acknowledged, the justices in the *License Cases* merely differed on how to apply *Brown* to the case—none sought to overrule it and some justices expressly affirmed its core holding.

Chief Justice Taney did in his opinion, even though he had represented the State of Maryland as its attorney general in *Brown*. Benning further claimed that the *Passenger Cases* had overruled *Brown* (452). Since the passengers were held to be immune from state taxation while they were on board the ship in these cases, Benning interpreted the Court as saying that the passengers would be subject to taxation the moment they set foot upon the shore. If the same doctrine were applied to packaged goods, Benning reasoned, such would obliterate the original package immunity conferred on landed imports (452).

What is obvious, of course, is that the ruling in the *Passenger Cases* is not at all inconsistent with the original package doctrine of *Brown*. Imports cannot be taxed while on the ship *or* after they have landed and remain in their original package. In the *Passenger Cases*, the Court merely made the point that the passengers had to mingle with the state population before they became subject to state jurisdiction, just as goods had to be unbundled and mixed with state property before they became subject to state taxation.

Judge Benning then let slip that he was not interpreting the Supreme Court's subsequent treatment of *Brown* in good faith. "But if the case of *Brown vs. Maryland* has not been overruled," Benning argued, "I think it should be. I consider it to be a decision not warranted by the Constitution" (454). Benning argued that *Brown* was unconstitutional because the Court did not strictly construe federal power, and because it did not acknowledge an alleged concurrent state power to tax imports. Benning tried to extract from the state ratification debates on the Constitution the idea that the states did not surrender *any* taxing authority upon their ratification of the Constitution, despite the clear prohibition of a state tax on imports in Article I. He then trotted out two historical cases—*Chisolm v. Georgia* (1793)¹⁸ and *Worcester v. Georgia* (1832)¹⁹—in which Georgia officials refused to comply, successfully as it turned out, with the

Supreme Court because the Court had not interpreted federal power “*with the utmost strictness,*” to his state’s detriment (480) (emphasis in original). After the Court’s decision in *Chisolm*, according to Benning, the State of Georgia “treated the Court with contempt,” and after *Worcester* “[t]hrough every department of her Government she treated the mandate and the writ of error with contempt the most profound” (482). Benning further explained that another celebrated decision of the Marshall Court, *McCulloch v. Maryland* (1819), stood for the proposition that the federal government could appoint a dictator to carry out its enumerated powers, and that the states had no authority to tax at all—indeed, that the states had no power remaining to attend to their “self-preservation” (498). This led Benning to a discourse on the inappropriateness of the existing judicial hierarchy in the United States:

“The Supreme Court of the United States has no jurisdiction over this Court, or over any department of the Government of Georgia. This Court is not a United States Court; and therefore, neither the Government of the United States, nor any department of it, can give this Court an order. It follows, if this be true, that decisions of that Court, are not precedents for this Court” (499).

Benning argued for the complete separation between the state and federal judiciaries, thereby rejecting Section 25 of the Judiciary Act of 1789, *Martin v. Hunter’s Lessee* (1816), and *Cohens v. Virginia* (1821). He argued that a “*liberal* rule of construction” of the Constitution combined with Section 25 opened the door to Supreme Court review of any state case at any level of state courts (504) (emphasis in original). Benning then put forward a concluding truism (which was contradicted in part by his belief—elsewhere stated—that the Supreme Court may never review the judgment of a state court) (499). Even allowing for such review, given Benning’s extremely crabbed view of federal power under the Constitution, his view of the judicial hierarchy effectively ended Supreme Court review of state action:

“The conclusion is, that the Supreme Court of Georgia is co-equal

and co-ordinate with the Supreme Court of the United States, and not inferior and subordinate to that Court. That as to the reserved powers, the State Court is supreme; that as to the delegated powers, the U.S. Court is supreme; that as to powers, both delegated and reserved--*concurrent powers*--both Courts, in the language of Hamilton, are "equally supreme"; and that as a consequence, the Supreme Court of the United States has no jurisdiction over the Supreme Court of Georgia; and cannot, therefore, give it an order, or make for it a *precedent*" (506) (emphasis in original).

Judge Benning, with the implicit consent of his colleagues on the Georgia Supreme Court, essentially repudiated the Supreme Court's interpretation of the Constitution as it existed in 1854, as well as the entire system established by the Judiciary Act of 1789 that made Supreme Court review of state court decisions possible. In the *Padelford* case, the Supreme Court of Georgia rejected every facet of the constitutional architecture that had been built by the U.S. Supreme Court: a broad interpretation of federal commercial power and of other enumerated powers, the corresponding inability of a state to impair interstate commerce, imports, or other objectives of federal policy, and the duty of the Supreme Court to police the boundary between federal and state power. The court, by Benning, at great length disparaged John Marshall and Joseph Story as partisan hacks—robed politicians serving party interests—for their roles in establishing these features (509).

There is no indication that Padelford & Co. ever attempted to bring their case to the U.S. Supreme Court under Section 25. Perhaps they knew the Georgia courts or the relevant officials would not enforce a Supreme Court judgment in their favor. They had effectively been put on notice in Judge Benning's opinion that a U.S. Supreme Court decision invalidating the Savannah tax would be met in the state with flagrant noncompliance. Nevertheless, if any parties could have ever felt justified in claiming the protections involved in Supreme Court policing of state courts, it would have been Padelford and Fay.

Federal Court Implementation of Supreme Court Doctrine

The comparative willingness of state and federal courts to apply basic constitutional norms has been a hot topic in U.S. constitutional history. To be sure, state court defiance of the Supreme Court has been a recurring, historical theme. The courts of the State of Georgia (as discussed in glowing terms by Judge Benning) famously refused to comply with a Supreme Court decision on Cherokee Indian removal in the 1830s (Warren 1922). We have seen how, in 1854, the Georgia Supreme Court emphatically rejected the binding nature of Chief Justice Marshall's Supreme Court opinions on state courts, based on the theory that the Georgia Supreme Court was superior in authority to the U.S. Supreme Court. One hundred years later the Supreme Court of Georgia told the U.S. Supreme Court, in Dickson's (1994) characterization, to "go to hell."

The Parity Thesis

Early empirical efforts at testing for the comparative willingness of Twentieth Century state and federal courts to uphold constitutional rights generated a cottage industry among, primarily, legal scholars (Bator 1981; Chemerinsky 1988; Neuborne 1977; Redish 1988, Solomine and Walker (1983)). Research done by Bator (1981) and Solimine and Walker (1983) found that rough parity does, in fact, exist: state courts were as willing to uphold civil liberties as were federal courts. This finding called into question earlier claims made by legal scholars and liberal civil rights advocates, such as Neuborne (1977), that parity was intuitively unlikely. Later, Chemerinsky (1988), accepted Solimine and Walker's findings but questioned the likelihood that President Reagan's federal court appointees would preside over a continuation of the trend of parity. The same considerations also prompted Neuborne (1994) to change his theory; perhaps, given the appointments of federal judges in the 1980s, state judges could provide more receptive

forums for certain federal law claims than federal courts did. Furthermore, Chemerinsky called into question previous attempts to verify parity empirically, for which he felt that there could “never be any meaningful empirical measure” (236). To date, no one appears to have risen to the challenge of designing an empirical measure that offers a satisfactory comparison between state and federal courts. This has prompted Benesh and Martinek (2009) to conclude that “despite the voluminous expenditures of scholarly time and attention, we do not know how the High Court’s influence on the federal circuit courts compares with its influence on state courts of last resort” (796).

Nevertheless, the studies that attempt to compare the simultaneous implementation of the same Supreme Court policy in state and federal courts typically find a higher degree of compliance in the federal courts than the state courts (e.g., Beiser 1968; Canon 1977; Haas 1982; Benesh and Martinek 2009). For instance, Benesh and Martinek (2009), while simultaneously criticizing measures of comparative impact, find that U.S. Courts of Appeals are more likely than states’ highest courts to invalidate the coerced confessions of criminal defendants. Haas (1982) finds that federal courts are more protective of the rights of prisoners than state courts are.

State Court Implementation of Court Doctrine

Aside from these comparative studies, a well-developed literature exists on the question of state court implementation of Supreme Court decisions (e.g., Canon 1973; Reid 1988; Kilwein and Brisbin 1997; Eakins and Swinson 2007). The difficulties that the Supreme Court has had in ensuring routine compliance with its decisions by state courts have appeared as a salient feature in political science research on judicial impact, going back as early as Murphy’s (1959) analysis of state court “checks” on the Supreme Court’s desegregation decisions. Canon (1973) finds considerable variation among states in the degree to which the states have implemented the

exclusionary rule of *Mapp v. Ohio* (1961). Songer (1988) finds that state courts have varied in their interpretation of *Miranda v. Arizona* (1966). Eakins and Swenson (2007) likewise find that states' highest courts exercise for themselves wide latitude in implementing *Republican Party of Minnesota v. White* (2002), a decision that protected a state judicial candidate's campaign speech. All of these variations, as well as those found in other studies of state implementation of Supreme Court doctrine (Kilwein and Brisbin 1997; Hoekstra 2005), are attributed to features of state systems that are not present in the federal system—the different methods of judge selection, for instance (e.g. Kilwein and Brisbin 1997). To take yet another example, Benesh and Martinek (2002) find that state court implementation of Supreme Court coerced confession doctrine is frustrated by many states' courts' willingness to defer to less generous state constitutional provisions in that area, rather than to Supreme Court precedent.

The more recent research generally is intended to demonstrate how important state courts are in the implementation of Supreme Court policies in criminal defendants' rights, as well as to assess how different state judicial structures might predict different reactions to a specific judicial policy. For instance, Benesh and Martinek (2002) find that state courts, while generally willing to defer to the Supreme Court, are not above taking advantage of federalism—and the smaller Supreme Court docket allocation to cases heard by states' highest courts—to evade certain rulings. Camparato and McClurg (2007) find that methods of state judicial retention predict the degree of receptiveness of state supreme courts to U.S. Supreme Court precedents. These findings, in connection with the routine finding of a high degree of compliance in U.S. Courts of Appeals (e.g., Songer, Segal, and Cameron 1994, Songer and Sheehan 1990), suggest that any move toward the federal courts in the implementation of Supreme Court policy should represent an advance in Supreme Court power. Hall (2011), in his recent book-length study of

the conditions for the implementation of Supreme Court policies, shows that the Supreme Court will be more successful in policy implementation if lower federal courts are the primary implementers of the ruling. His study, however, mostly compared implementation by federal courts with implementation by lateral federal actors and state legislatures, not state courts.

A fair reading of the literature would render the conclusion that while state court implementation of U.S. Supreme Court decisions may have improved since the 1950s (let alone the 1850s), the federal court system of today appears to be more favorable than state systems when it comes to the uniform and predictable implementation of Supreme Court policy.

Reasons to Expect State Court Noncompliance. Aside from the research findings above, there are theoretical reasons for why state court noncompliance might be the rule rather than the exception in certain areas of Court policy. States can make use of elective judges. In many states, it may be popular with the electorate for a judge to reject controversial Supreme Court decisions protecting, for example, the criminally accused, unpopular speech, politically vulnerable minority groups, unconventional religious practice, or even the rights of corporations (see e.g. Brace and Boyea (2008)). This creates tension for a state judge who wishes both to retain his job and to follow the Supreme Court. Appointed federal judges, who serve “during their good behavior,” feel no similar pressure. Secondly, state judges may defer to the wishes not just of the electorate responsible for their jobs. Appointed state judges might be loyal to the political and legal elite of the state, from which they probably emerged. These elites will normally nurture a strong affinity for state policy, and will not look kindly on judicial behavior that imperils that policy (Shepherd 2009). Again, there is no reason to expect federal judge loyalty to state policies as a systematic or routine matter.

The Judiciary Act of 1789, as has been discussed in Chapter 2, entrusted the implementation of most constitutional cases—especially those involving state regulatory actions—to state judiciaries. States ultimately supervised themselves—they had the right to pass on the conformity of state policy to federal law and the Constitution, subject to Section 25 review. I argue that, given this scenario, the Court was relatively powerless over constitutional and federal policy matters compared to its situation once federal courts were allowed to implement these types of decisions. For this reason, the lack of federal court implementation of general federal law and constitutional cases was the first defect of the Judiciary Act of 1789 to be rectified by Congress. This fix came in 1875 with the Jurisdiction and Removal Act.

The Jurisdiction and Removal Act of 1875

During Reconstruction, Congress distrusted the willingness of state courts to protect the civil liberties of former slaves under the Reconstruction Amendments (Wiecek 1969). This prompted the enactment of important rights of removal from state court if a party's defenses were made under certain federal civil rights statutes, notably the Civil Rights Act of 1867. "Removal" of a case from state court to federal court was not a new concept. The Act of 1789 allowed out-of-state defendants to remove their cases from state to federal circuit court if there was complete diversity between plaintiff and defendant.²⁰ However, it was not until the passage of the Jurisdiction and Removal Act of 1875, often called the Removal Act, that parties were given the general right to file cases in or remove cases to federal court when they made claims or defenses arising out of the Constitution or a federal statute (Fallon et al 2003; Gillman 2002; Wiecek 1969). According to the act:

“[T]he circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits civil in nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five

hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority...”²¹

Section 2 of the Act allowed a party to remove any case of the foregoing description that had been initiated against him in state court. Thus, and pertinent to my study, a person claiming a federal defense to state action—such as a federal statutory immunity from state regulation or the general constitutional right of an interstate commercial actor to unimpeded activity—had the right to assert that defense in federal court. This Act stands as the first major modification of the federal judicial structure created by the Judiciary Act of 1789.

Consider how the right of removal may have affected Padelford and Fay had it been available to them in their case in 1854. They could have removed the City of Savannah’s tax enforcement action against them out of state court into a federal circuit court. They could have pressed their claim that the tax violated the original package doctrine of *Brown* before a federal district judge and, perhaps alongside that district judge, a U.S. Supreme Court Justice. Of course, this carried for them no guarantee of success, but the circuit justice working in Georgia at the time, Justice James M. Wayne, was on record as a supporter of the notion that Congress had exclusive power over interstate and international commerce. “[I]t cannot be doubted that it was intended by [the framers of the Constitution],” Justice Wayne wrote in his strikingly pro-national concurrence in the *Passenger Cases* (1849), “that Congress should have the legislative power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, to the exclusion of any regulation for such commerce by any one of the States” (415). Also, in the same opinion, Wayne embraced the continued validity of *Brown* and the original package doctrine—that property is free of state taxation until it passes out of the hands of the importer—suggesting that he would not concur with the Georgia Supreme Court’s assertion that

the doctrine had been overruled two years before in the *License Cases* (1847) (423). It does not appear that District Judge Nicoll of the Southern District of Georgia ever offered an opinion on these matters in his judicial capacity. In any event, it is highly likely that the federal circuit court as constituted in Georgia in 1854 would have been more sympathetic to Padelford and Fay's defense against the tax than the Georgia Supreme Court had been.

Theory and Hypotheses

My theory is that Supreme Court power—as defined by the Court's ability to secure a lower court's compliance with its decisions—is enhanced, and was historically enhanced, when federal courts implement Court doctrine. Supreme Court strength is, therefore, enhanced by any development whereby federal courts are made to shoulder more of a responsibility in implementing Supreme Court constitutional decisions. The enactment of the Removal Act was one such development. I will demonstrate this by comparing the implementation of the Supreme Court's Commerce Clause jurisprudence by state courts and federal courts, for the period of 1825 to 1891. The theory underlying this comparison is that, as a general matter, federal courts will more likely apply—to the detriment of state action—Supreme Court precedent that curtails states' rights than will state courts. Insofar as this is true, 1875 should have marked an increase in Supreme Court influence over lower court implementation of interstate commerce regulation. My specific expectation is that the grant of federal question jurisdiction to federal trial courts under the Jurisdiction and Removal Act of 1875 helped the Court to overcome a problem of localism in the federal judicial system. Federal court implementation allowed parties to bypass obstacles to the enforcement of pro-federal Supreme Court decisions that had prevailed in state courts, as exemplified by the *Padelford* case.

This expectation carries with it certain empirical assertions that will be tested in this chapter. The first is that state courts demonstrated a low likelihood of compliance with pro-national Supreme Court doctrine. The second is that federal circuit courts demonstrated a comparatively greater willingness to comply with the same Supreme Court doctrine than state courts did. Lastly, the effect of the Removal Act should have been to transfer a large number of cases involving interstate commerce to the federal circuit courts, and out of the state courts, thus enhancing the likelihood of a pro-national decision in a given case.

This theory yields four hypotheses:

Hypothesis 1: Federal circuit courts after 1875 more likely invalidated state laws challenged on Commerce Clause grounds than did states' highest courts prior to 1875.

Hypothesis 2: Federal circuit courts after 1875 were more likely to invalidate state laws challenged on Commerce Clause grounds than were states' highest courts after 1875.

Hypothesis 3: Whether a particular case is heard by a federal circuit court will be a significant predictor of whether a state law is invalidated.

Hypothesis 4: Federal circuit court decision making will be more similar to the decision making of the Supreme Court in Commerce Clause cases than is the case for state courts.

Measuring Lower Court Compliance

As a measure of compliance, I will assess the likelihood that a court will invalidate a state law. A state court's willingness to invalidate a law of its own state's making could certainly betoken obedience to a higher judicial authority. This measure is necessary to test Hypotheses 1, 2, and 3. However, I will also analyze lower court compliance by seeing whether a specific lower court invalidated state laws with the same or similar frequency as did the Supreme Court, and also, whether similar case factors led to an invalidation by the lower court and the Supreme Court. This measure will aid in evaluating Hypothesis 4.

Data and Methods

The cases involving a challenge to a state law under the Commerce Clause present a good opportunity to test the willingness of a state court to invalidate state laws. The question of state versus federal power was extremely divisive in the run up to the Civil War. During Reconstruction and the years thereafter in this study, the issue of nationalism versus localism receded in national politics, but the question of federal versus state regulation of business activity continued to be heavily litigated (McCloskey 1964). The doctrine of federal supremacy in matters of interstate commerce, and under what circumstances state regulations of interstate commerce were valid, was settled as far as the Supreme Court was concerned, but it was far from accepted by much of the state-level political and judicial elite.

Case Retrieval and Case Coding Strategy

To retrieve the appropriate cases, I used the Lexis-Nexis U.S. Legal database of state and federal cases. I used multiple search protocols in order to retrieve all states' highest courts cases, federal circuit court cases, and U.S. Supreme Court cases decided between 1824 and 1891 addressing the constitutionality of a particular state regulation of interstate commerce. The specific methods of case retrieval are described in the Appendix. I chose 1824 as the beginning point for analysis because this was the year of the *Gibbons* decision. I chose 1891 as an end point because that year marked the creation of the Circuit Courts of Appeals, the appearance of which dramatically altered the structure of the federal courts. The result, after necessary discards of cases made during the coding process, was a sample of cases that squarely addressed a Commerce Clause-based defense against some state action totaling to $N=328$ in state supreme courts. There were 115 U.S. Supreme Court cases for the same period. The number of federal circuit court cases totaled to 100. Broken down by period and by court, the resulting sample sizes

are 144 state cases from the period between 1824 and 1875, and 184 state cases from the 1876 to 1891 period. The number of Supreme Court cases before 1875 was 39; 76 cases were post-1875. There were only 18 circuit court cases in the sample prior to 1875, with the remaining 82 having been heard after the passage of the Removal Act.

I read each case in the sample in order to create the following variables:

Case Outcome. This is the only dependent variable, indicating whether a state law was invalidated (1) or upheld (0) by a court.

Case Year. This is the year the case was decided. Cases heard after 1875, according to Hypotheses 1 through 3, will more likely result in an invalidation of the challenged state law, at least in lower courts.

Forum. Whether a specific case was heard in a state court, a lower federal court, or the Supreme Court. A case heard in a lower federal forum or the Supreme Court would more likely result in a pro-national outcome than a case heard in a state forum.

State Action Conflicts with Federal Statute. This is a variable indicating whether the court found that the state action conflicted with a federal statute (1). Given the Court's holding in *Gibbons*, such a finding should be correlated with the invalidation of the challenged state law.

Regulated Activity is Interstate Commerce. This is an indication of whether the court specifically characterized the activity regulated by the state as interstate commerce (1) or not (0). A court's failure to characterize one way or another is coded (0). My expectation is that a determination that the state is regulating interstate commerce will predict an invalidation of that state regulation.

Tax, Toll, Fee, or License. Indicates whether the state action in the case concerns the payment of some assessment to the state. This along with the other state action variables below are created primarily to compare Supreme Court behavior to lower court behavior

Inspection. The law in question requires state inspection of certain persons or articles.

Ban or Regulation. Refers to any state action that prohibits some conduct or sets conditions on conduct (distinct from the requirement of inspection, tax, toll, fee, or license).

River Obstruction. Refers to state action that places a physical impediment on navigable water, such as a bridge or dam.

Navigation. The law in question applies to commerce on water or waterborne vessels.

Liquor. The law in question specifically pertains to liquor or other alcoholic beverages.

Railroad. The state law applies to the property or operations of railroads.

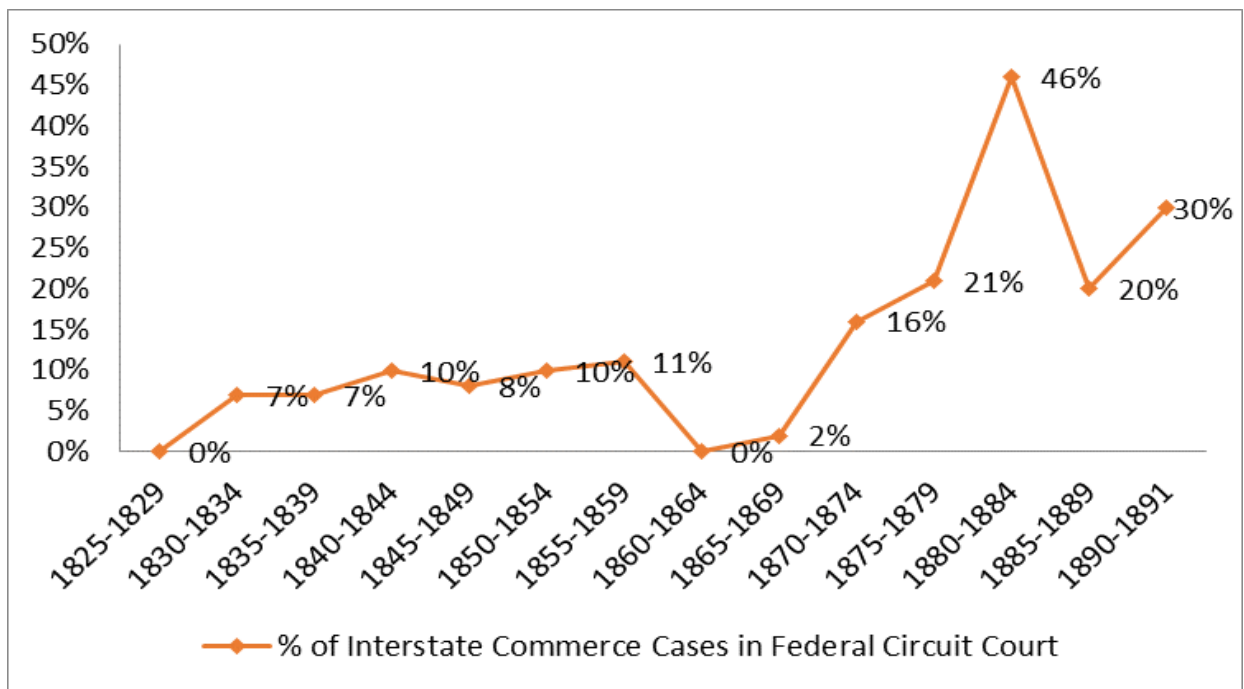
Telegraph. The state law applies to the property or operations of telegraph companies.

Results

The primary impact of the Removal Act of 1875 was to transfer judicial business in the United States from state court systems to the federal courts. In the sample, 31% of the post-1875 interstate commerce cases were heard in federal circuit court. To further illustrate, the graph presented in Figure 3.1 below shows the five-year average of the total of Commerce Clause cases in federal court as a proportion of all such cases heard by lower courts from 1825 to 1891. These percentages reveal the dramatic extent to which state courts implemented Supreme Court Commerce Clause jurisprudence (even after 1875), but they also reveal that the federal courts increased their role in deciding Commerce Clause cases steadily over time. After 1875, the federal courts never heard less than 20% of all of the interstate commerce cases heard by all lower courts, with a real uptick in federal caseload after 1880. For much of the fifty year period

prior to 1875, the federal courts failed to hear even 10% of the commerce cases heard by all lower courts. The lack of general federal question jurisdiction severely limited the ability of federal courts to hear cases involving a Commerce Clause-based challenge to a state law. The Removal Act, however, opened up the federal courts to this type of case, to the point where almost half of them heard by lower court judges in the United States were heard by federal judges within the first decade of the Act, averaging out to 31% of all Commerce Clause cases from 1875 to 1891.

Figure 3.1. Five-Year Average of the Percentage of Commerce Clause Cases in Federal Court, 1825-1891



Having established that the Removal Act did lead to an increase in the likelihood that a particular interstate commerce case would have been heard in federal court, the next question is whether this amounted to a corresponding increase in the likelihood of lower court compliance with the Supreme Court.

Table 3.1 shows a summary comparison of the lower courts' willingness to invalidate

state laws that are challenged by parties with interstate commercial interests.

Table 3.1. Proportion of Cases Invalidating State Action

Period	U.S. Supreme Court	States' Highest Courts	Inferior Federal Courts
1824-1875	16/39 (41%)	29/144 (20%)	7/18 (39%)
1876-1891	37/76 (49%)	60/184 (33%)	43/82 (53%)

As expected, there was a significantly higher percentage of state law invalidations in the U.S. Supreme Court and the federal circuit courts than in state courts both before and after 1875. It is evident that, when it came to the willingness to invalidate a state law challenged on Commerce Clause grounds, the federal courts behaved significantly more like the Supreme Court than state courts did. What is curious is that so many cases ($n=184$) involving constitutional and federal law defenses continued to be heard in state courts even after the passage of the Removal Act. The answer to why this is the case must lie in the fact that the Removal Act required a minimum amount in controversy, \$500, in order for a defendant to invoke the jurisdiction of the federal courts. After all, not all cases were high-stakes railroad cases. For example, some of the cases involved state civil actions for petty violations of liquor laws or for the peddling of inexpensive goods without a license. While it is impossible to say, perhaps if the federal courts had been able to hear cases of a lower dollar value the trend toward greater federalization of the caseload (and, therefore, toward a greater likelihood of state law invalidations) would have been even more pronounced.

Using the percentages reported in Table 3.1, I conducted multiple difference of proportions tests in order to compare the rate of state law invalidation between courts and period. There is no significant difference between the invalidation rate of the Supreme Court either before (41%) or after 1875 (49%) and that of the federal circuit courts in the same periods (39%

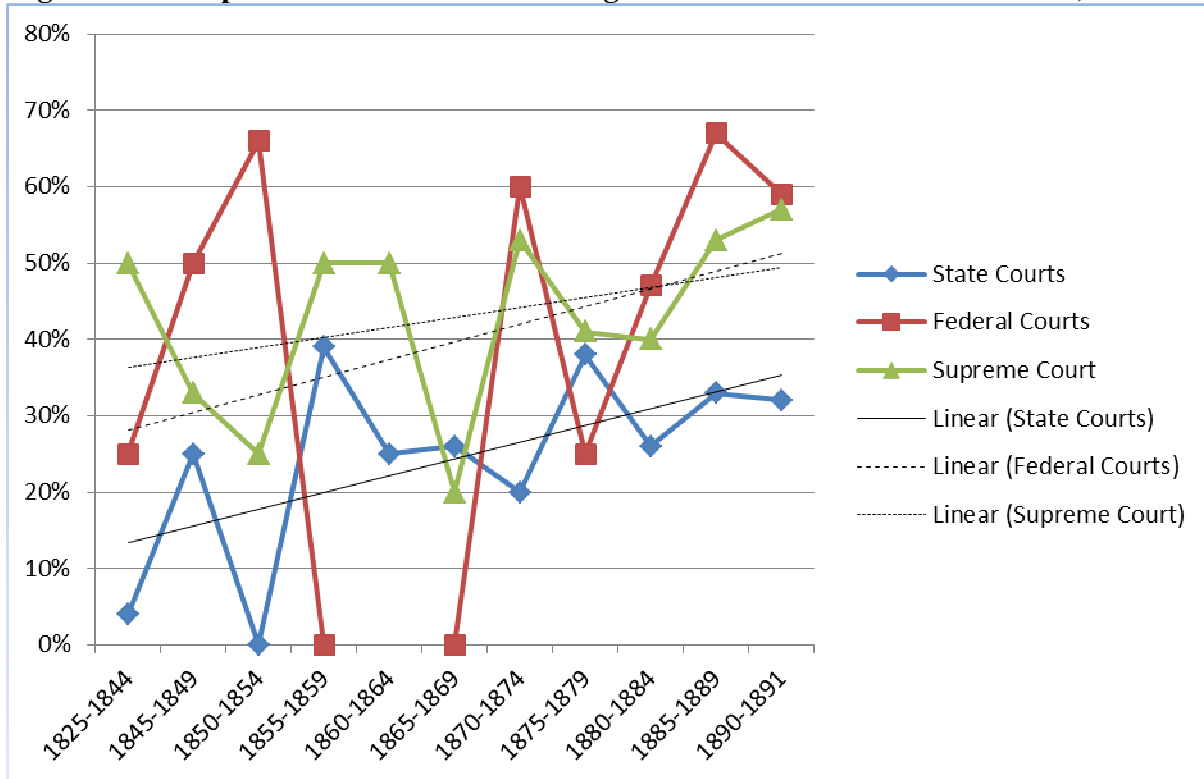
and 53%, respectively). On the other hand, the difference between the state courts and the Supreme Court both before and after 1875 was significant at the 99% confidence level. This difference is predicted in Hypotheses 1 and 2: the behavior of the federal courts and state courts differed, with the Supreme Court and inferior federal courts virtually identical. This is preliminary evidence that the federal courts, but not the state courts, faithfully followed the Supreme Court.

The difference in the invalidation rate between the state courts prior to 1876 (20%) and the federal courts after 1875 (53%) was statistically significant at the 99% confidence level. This tends to show that the Removal Act's transfer of judicial business from state court to federal court had a positive impact on the rights of interstate commercial actors. Likewise, the difference between the state (33%) and federal courts (53%) after 1875 was statistically significant at the 99% level. The state court percentage change in invalidation rate after 1875 was also significant (but only at 95%), meaning that the 1875 Act even had an effect on state court behavior. The Removal Act, however, did not cause state courts to comply with the Supreme Court to the degree that federal courts did.

I also broke the data down over time, and looked at the percentage of challenged state laws invalidated by each court from 1825 through 1844, and for every five-year period from 1845 to 1891. The trend lines reported in Figure 3.2 below suggest that federal courts were at all times closer to the Supreme Court in their willingness to invalidate state laws, and that both the federal courts and the Supreme Court were on a much more pro-national trajectory than the state courts. The state courts never invalidated more than 40% of challenged state laws at any point, despite the fact that the Supreme Court was above 40% at all times after 1875. There were very few lower federal court cases reported prior to 1870, and none for the period of 1860 to 1864.

But by 1880, however, federal courts were very closely aligned with the Supreme Court in their willingness to invalidate state laws challenged on Commerce Clause grounds. This happens to correspond precisely to the dramatic increase in the proportion of Commerce Clause cases heard in federal circuit courts as demonstrated in Figure 3.1.

Figure 3.2. Proportion of Cases Invalidating State Laws Per Five-Year Period, 1825-1891



The results of logistic, multivariate regression reinforce the summary comparisons reported in Table 3.1 and Figure 3.2. One can see from the logit results of Models 1 and 2 strong support for Hypothesis 1 and 2 in that a trial in a federal forum, as opposed to in a state court, increased the likelihood that the pro-national claim would prevail in a case. Model 1 includes all cases in the dataset, regardless of the court that heard the case. Whether a case was heard in a lower federal court or the Supreme Court is significantly correlated with the invalidation of a state law. Specifically, the odds of an interstate commercial actor prevailing against a state increase if his case is heard by a federal judge in a federal forum.

Model 1 shows that a federal circuit court, the Supreme Court, and any court's finding that the state's action conflicts with a federal statute or that it regulates interstate commerce all rate as significant predictors of a ruling in the federal claimant's direction. The information supplied in the *Impact* column will aid in further interpreting the coefficients. For instance, the impact of a case's having been heard in a federal forum instead of a state court increased the likelihood of a pro-national ruling by over 100%, from 24% to 50%. The impact of a case's having been heard in the U.S. Supreme Court rather than a state court increases the chances of a state law being invalidated by almost as much. Model 2 is designed to test Hypothesis 3—that when a case is heard in a federal and not a state court, this fact predicts a ruling in favor of an interstate commercial actor. Model 2 consists only of lower court cases, excluding the Supreme Court cases. Here, the *Forum=Lower Federal Court* variable is of primary interest. Whether a case was heard in a federal court (instead of a state court) is one of the strongest predictors of a ruling against a state law, comparable to when a state law is found to conflict with a federal law or when the court finds the regulated activity to be interstate commerce. We can reject the null Hypothesis 3. It is clear that the federal courts were considerably more likely—and in this propensity, closer to the Supreme Court than were the state courts—to invalidate a state law.

Another way to assess the impact of the Removal Act of 1875 is to see whether the willingness of a lower court (state *or* federal) to invalidate a state law increased after 1875. Model 3, like Model 2, involves only lower court decisions, and replaces the *Case Year* variable with a dummy variable indicating whether a case was heard after 1875 (*After 1875*). According to the results in Table 3.3, the variable is indeed a significant predictor—at the 95% confidence level—of whether a Commerce Clause-based claim would prevail against a state law. If a case is heard after 1875, the likelihood that a court will invalidate the challenged state law in that case

increases from 20% to 32%. Bear in mind that the majority of these lower court cases, even after 1875, were state cases. Much of this increase in likelihood thus reflects the behavior of state courts. The presence of the *After 1875* variable in the model rather than the *Case Year* variable also strengthened the coefficient for the federal forum variable.

Table 3.2. Regression Results for Models 1 and 2

1=invalidates state law	Model 1 (All Cases)	Std. Error	Impact	Model 2 (Lower Court Cases Only)	Std. Error	Impact
Case Year	0.019	0.01**		.024	.0104**	
Forum=Lower Federal Court	1.12	0.314***	24%, 50%	.985	.310***	22%, 44%
Forum=Supreme Court	0.874	0.288***	24%, 45%			
Tax, Toll, Fee, or License	-1.11	0.710		-0.912	0.823	
Inspection Law	-0.688	0.816		-0.496	0.954	
Ban or Regulation	-1.47	0.727**		-1.05	0.836	
River Obstruction	-2.09	0.928**		-1.40	1.05	
Railroad Case	0.101	0.331		0.066	0.365	
Telegraph Case	-0.130	0.690		-1.29	.998	
Regulates Navigation	-0.847	.325***		-0.698	.370**	31%, 18%
Liquor Law	0.188	0.370		0.024	0.408	
State Action Conflicts with Federal Law	3.65	0.678***	24%, 92%	3.36	.695***	23%, 90%
Regulated Activity is Interstate Commerce	2.35	0.309***	8%, 49%	1.94	.324***	10%, 43%
Constant	-38.06	18.17**		-47.13	19.71**	
LR chi2	204.16			134.05		
Prob > chi2	0.000			0.000		
Number of obs.	535			424		
Pseudo R2	0.2943			0.2505		

***significant at 0.01

**significant at 0.05

*significant at 0.10

Table 3.3. Regression Results for Model 3

1=invalidates state law	Model 3 (Lower Court Cases Only)	Std. Error	Marginal Effect
After 1875	0.599	.296**	20%, 32%
Forum=Lower Federal Court	.990	.311***	22%, 44%
Tax, Toll, Fee, or License	-1.00	0.832	
Inspection Law	-0.567	0.963	
Ban or Regulation	-1.13	0.846	
River Obstruction	-1.56	1.05	
Railroad Case	0.115	0.363	
Telegraph Case	-1.23	0.979	
Regulates Navigation	-0.773	.366**	
Liquor Law	0.035	0.409	
State Action Conflicts with Federal Law	3.34	.696***	
Regulated Activity is Interstate Commerce	1.97	.324***	
Constant	-1.75	.894**	
LR chi2	132.38		
Prob > chi2	0.000		
Number of obs.	424		
Pseudo R2	0.2474		

I also interacted the *Forum* and *After 1875* variables in Model 3. The result of this interaction was that if a case was heard after 1875 in a federal court the coefficient (1.59) is significant at the 99% confidence level and is in the expected direction. The marginal effect shows that if a case was heard after 1875 *and* in federal court the likelihood of a pro-national outcome more than triples, from 16% to 50%. If a case was heard in a state court after 1875, the coefficient is weaker (.626) but is significant at the 90% level. The likelihood of a pro-national outcome improves from 16% to 27%. State judges seemed to respond to the availability of federal forums for interstate commerce cases by slightly increasing their willingness to protect interstate commercial actors.

To test for whether the *After 1875* variable is not simply capturing a secular increase in pro-national court outcomes, I replaced the variable in the model with an *After 1855*, *After 1865*, and an *After 1885* dummy, in turn. The *After 1855* variable was not significant. The *After 1865* variable was significant only at the 90% level of confidence, making it weaker than the *After 1875* variable. The *After 1885* variable was not significant.

In Table 3.4, I make a comparison among the three types of courts, in order to test the hypothesis that federal courts responded in the same way to the same variables in Commerce Clause cases as the Supreme Court did. The small numbers of cases within each category made it difficult to use meaningful interactions in a regression equation; summary statistical comparisons will have to suffice. Table 3.4 compares the percentage of cases within each of the listed subsets of cases that were decided in against the state law, organized by court. For example, in all of the cases in which a person challenged a state tax, toll, or license requirement before the U.S. Supreme Court, the Court invalidated the law 54.9% of the time. In the same type of case presented in state courts, the state courts invalidated the state law only 31.5% of the time.

Table 3.4. Comparison between the Supreme Court and Lower Courts

	Supreme Court	State Courts	Federal Courts	diff state	diff fed
Tax, Toll, License	54.9%	31.5%	43.6%	23.4%	11.3%
Inspection Law	60.0%	14.3%	83.3%	45.7%	-23.3%
Ban or Regulation	26.7%	23.5%	63.9%	3.2%	-37.2%
Regulates Navigation	37.2%	18.5%	40.0%	18.7%	-2.8%
Physical Obstruction	14.3%	11.1%	28.6%	3.2%	-14.3%
Liquor	50.0%	23.6%	50.0%	26.4%	0.0%
Railroad	40.0%	36.7%	64.7%	3.3%	-24.7%

Interstate Commerce	65.3%	44.6%	51.4%	20.8%	14.0%
Telegraph	100.0%	0.0%	100.0%	100.0%	0.0%
Total				244.6%	-77.0%

The last two columns take the difference between the Supreme Court and the other two courts. In eight of the 11 categories of cases, the federal courts were more closely aligned to the Supreme Court in their likelihood of invalidating a state law than were the state courts. In all eight of these categories, the Supreme Court was more pro-national than the state courts by at least 18 points. In fact, the Supreme Court was more pro-national than state courts in every category. The only category of case in which the state courts even approached a 50% likelihood of invalidation were those cases in which the court made the specific finding that the state's law affected interstate commerce.

In the three categories in which the Supreme Court was more closely aligned with state courts than with federal courts, the federal courts were more pro-national than the Supreme Court. This suggests that a pro-national outcome by a lower court was not always the compliant outcome if Supreme Court decision trends set the standard to be followed by lower courts.

Let these findings stand as tentative support for Hypothesis 4—that the federal courts responded to various types of cases in a similar way to the Supreme Court. There is not a perfect congruence between the two types of court, but certainly the federal courts were more closely in league with the Supreme Court than were the state courts.

Conclusion

The Removal Act of 1875 had the effect of transferring more Commerce Clause cases to the federal courts, and federal courts more likely found state laws to be in conflict with the

Commerce Clause. The likelihood of a pro-national outcome in federal court rivaled the likelihood of this event in the Supreme Court. In this way, the Removal Act assisted the Supreme Court in creating, and enforcing, a body of jurisprudence suitable to a national, commercial republic. The forces of localism still prevailed in state courts, but the Removal Act, as hypothesized, provided a partial escape for interstate commercial actors. In fact, the statistics reported in this chapter do not fully convey just how protective the Court was of interstate commercial activity. After the Civil War, the Supreme Court handed down numerous decisions under the Commerce Clause that protected various interstate actors and activities from state legislation, even when no federal statute protected the commerce: traveling salesmen (e.g. *Ward v. Maryland* 1871), telegraph companies (e.g. *Pensacola Telegraph Co. v. Western Union* 1877), railroads (e.g. *Reading Railroad Co. v. Pennsylvania* 1872), and sales of liquor from other states (e.g. *Railroad Co. v. Husen* 1878). The Court continued its policy of protecting incoming ship passengers (*Henderson v. Mayor of New York* 1876) and sellers of imports from state taxation and regulation (*Cook v. Pennsylvania* 1878). The court rejected all state laws that that operated in such a way that discriminated against the people or products of another state (e.g. *Crandall v. Nevada* 1868). And the Court, at times, appeared annoyed that state courts did not respect its Commerce Clause precedents when it came to state laws discriminating against sellers (called “drummers” in the legislation of the era) of out of state goods. In *Asher v. Texas* (1888), the Court scolded the Court of Appeals of Texas for its willful refusal to apply a Court decision from the prior year—clearly applicable in the case—that protected a seller of out of state goods from a state occupational tax. I found no similar instance of the Court lamenting any lower federal court’s refusal to protect interstate commerce.

The Removal Act deserves to be a part of the story of the development of Supreme Court power. It certainly appears to be the case that the opening up of federal forums helped secure the faithful lower court application of Supreme Court doctrine—particularly pro-national doctrine. The Removal Act assisted the Court in overcoming the forces of localism in the federal system. It would be interesting to see if what has been found about Commerce Clause cases holds true in other Court policy areas immediately after 1875. Civil rights law, for example, stands out as a strong candidate for review in a similar study of the period, though there is not likely a strong pro-national streak in the Supreme Court’s civil rights jurisprudence for this era (Goldstone 2011). In the next chapter, I will examine federal circuit court application of other pro-national doctrines in the Supreme Court specifically involving railroads in light of the creation of intermediate appellate courts in 1891.

CHAPTER 4

The Early Influence of Circuit Courts of Appeals on Supreme Court Power

In 1891, Congress passed the second major Judiciary Act. This Act amounted to the “first permanent and major alteration of the federal judiciary since 1789” (Semoneche 2005). Called the Evarts Act after its Senatorial sponsor, the Act created the Circuit Courts of Appeals. This is a level of courts immediately beneath the Supreme Court in the federal judicial hierarchy. The Evarts Act also relieved Supreme Court justices of their longstanding duty to “ride circuit,” by authorizing new circuit judgeships for each federal judicial circuit. Before 1891, a pairing of some combination of a Supreme Court justice, a circuit judge, or a district judge heard circuit-level appeals from the district courts (Semoneche 2005). After 1891, circuit level appeals were handled by courts that existed solely for appellate purposes. To the great frustration of anyone who desires to explain the judicial hierarchy of this time, the Evarts Act retained the circuit courts of before, but converted them into exclusively trial courts that were subordinate to the Circuit Court of Appeals. Thus the judicial hierarchy consisted of two trial-level courts working side-by-side: circuit and district courts, and intermediate courts (viz., the Circuit Courts of Appeals), and the Supreme Court.

As was demonstrated in the preceding chapter, the circuit courts had served as nationalizing agents beginning in 1875. It was then that they received general federal question jurisdiction, enabling them to hear for the first time various constitutional challenges to state laws. This allowed the Supreme Court to fashion pro-national interpretations of the Constitution, as it had before, but with the expectation that lower federal courts would apply these rulings in

the course of restraining state action. Finally, purely national objectives such as interstate commerce had been entrusted to the lower courts of the nation, not solely to the courts of states.

But the Court did not limit its preference for national commerce to its constitutional policy making. At about the same time as the Court was accelerating the rate at which it was extending the protections of the Commerce Clause to multiple forms of commercial activity, it was also propounding the legal standards applicable to other, more common types of cases in the federal courts. Indeed, the Court looked to the circuit courts to be forums “in which interstate business could secure a hearing free from the local interests that dominated state courts” (Hall 1989, 229). In this chapter, I continue the broad themes of this dissertation: the paramount importance of Congressional statutory development (the Evarts Act) to a judicial nationalization (the federal common law) that was led by a Supreme Court whose decisions are faithfully implemented in lower courts (circuit courts).

Common Law Cases in Federal Court

Sometime in 1880, a worker named Mr. Thomas was killed by a train while he was trying to cross a railroad track in upstate New York. His widow, Emma, brought suit against the Delaware, Lackawanna & Western Railroad Company, the company whose train had hit Thomas. Mrs. Thomas claimed that the company’s negligence had caused her husband’s death. The unfortunate facts of the case certainly made it a difficult one for District Judge William Wallace, who was presiding alone in the circuit court for the Northern District of New York.

Thomas, on foot, had attempted to cross the track at a point where the track intersected with a private road near a noisy factory where he was employed. Before he started across the track, he had been standing behind some empty freight cars on the side track that had obstructed his view, the jury found, of the oncoming train. Evidently without thinking, Thomas emerged

onto the track from behind one of these railcars and was killed by the train. The evidence showed that, prior to the collision, the train had been traveling at a high rate of speed and had not given a signal indicating its approach to the unregulated intersection where Thomas had attempted to cross.

The question for Judge Wallace was whether the jury that had heard the case had been justified in finding for the Thomas estate in the case. The railroad had petitioned the court for a new trial on the basis that the undisputed facts in the case showed that it was not responsible for the accident; Mr. Thomas's own careless actions were. In the new trial that the railroad's attorneys wanted, Judge Wallace would simply have to instruct the jury to render a verdict in favor of the railroad.

In 1881, there were no federal statutes touching on the matter of injuries caused by railroads. The incident involving the locomotive of the Delaware, Lackawanna & Western Railroad and Mr. Thomas did not pose any constitutional question for Judge Wallace. This was a clear common law personal injury case involving two private parties and an unfortunate accident. The case was in federal circuit court on diverse citizenship grounds: Thomas was a citizen of New York and the railroad was incorporated in a different state. In order to sort out the rights of each party in the dispute, Judge Wallace would have to draw from other legal sources besides federal statutes or the Constitution in order to determine whether a verdict for the railroad was required in the case.

The Supreme Court had furnished doctrine that was relevant to Judge Wallace's case. "In the late Nineteenth century," notes White (2003, 51), "the Supreme Court was a major source of common law tort decisions." The Court's *Swift v. Tyson* (1842) decision, as discussed in Chapter 2, was a primary driver of this. *Swift* interpreted the Judiciary Act of 1789 to require that the

federal courts, in cases involving parties of diverse citizenship, apply common law doctrines propounded by the Supreme Court, not the court-created doctrines of the state where the case arose. State statutes, however, superseded federal common law doctrines. By the late 1870s, the *Swift* requirement combined with a rapidly increasing incidence of railroad accidents to give birth to a specifically federal common law of railroad-caused injuries (White 2003). The Supreme Court, atop the federal judicial hierarchy, took the lead in crafting this law for the diversity cases litigated in federal forums.

Contributory Negligence in Railroad Injury Cases

One such doctrine of seeming applicability to the Thomas case was that of contributory negligence. For federal courts, this rule—requiring that if an injured party’s actions in any way contributed to his injury he could not recover—stemmed from two U.S. Supreme Court cases from the Court’s 1877 term: *Railroad Company v. Jones* (1877) and *Railroad Company v. Houston* (1877). In both of these cases the Court held that any negligence on the part of the injured person would bar a recovery against the railroad regardless of any negligence on the part of the railroad. The doctrine was to be applied to deny a jury trial to the plaintiff, because where there was incontrovertible evidence of a plaintiff’s negligence—however slight—the judge was required, under *Jones* and *Houston*, to instruct the jury to return a verdict in favor of the defendant. Justice Swayne formulated the rule, in *Railroad Company v. Jones* (1877), thusly:

“One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is: 1. Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or, 2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the

misfortune would not have happened. In the former case, the plaintiff is entitled to recover. In the latter, he is not” (442).

According to Friedman (1973, 412), contributory negligence “became the favored method by which judges kept tort claims from the deliberations of the jury.” In *Jones* and *Houston*, respectively, the Supreme Court for the first time applied contributory negligence to defeat the claim of the injured plaintiff in a railroad case. The difference in the two cases consisted of the type of plaintiff in each case. In *Jones*, the injured party was a railroad employee who, with his supervisor’s permission, was riding on the front (called the “pilot”) of a train that rear-ended an idle car on the same track. The impact of the collision severed one of Jones’s legs and nearly severed the other. The Court found that the railroad had been negligent in causing the collision. However, Jones was also negligent because he had been warned in the past—by the same supervisor who had authorized his ride on the day of the accident—of the dangers of riding on the front of a train. Therefore, the jury was required to find for the railroad. In *Houston*, the injured party was a non-employee pedestrian who was killed by a train when she attempted to cross a railroad track at an intersection with a public road. The deceased evidently did not see the train, and the train’s engineer failed to sound its signal upon his approach to the intersection. There was also evidence that the train was traveling at an excessive rate of speed. “Negligence of the company’s employes [*sic*] in these particulars,” Justice Field nevertheless held, “was no excuse for negligence on [Houston’s] part” (698). Field continued:

“She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for

the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant” (698).

Another difference between *Houston* and *Jones* is that in *Houston* the Court appears to have been interpreting a Missouri railroad liability statute allowing recovery against a railroad that caused injury through “negligence, unskillfulness, or criminal intent,” not crafting federal common law per se. But the close proximity in time of *Houston* to *Jones* seems to reinforce the *Jones* decision and the Court’s willingness to apply the doctrine of contributory negligence in railroad injury cases.

In fact, by my count, the Supreme Court applied the holdings of *Jones* or *Houston* to deprive an injured party of a jury trial in at least six cases between 1877 and 1900,²² while in five other cases applying *Jones* or *Houston* the Court held that the facts were unclear enough in the case so that question of contributory negligence was properly decided by a jury.²³ Whether found by the judge or by the jury, however, contributory negligence was fatal to the plaintiff’s claim. Other Court decisions suggested that the lower courts should take into account all of the facts and circumstances of each case, including the capacity of the injured person to appreciate the circumstances leading up to the accident. Children, for example, could not be contributorily negligent, but a parent could be in allowing his or her child to place himself in a position of danger (*Railroad Company v. Gladmon* 1873).

* * *

In hearing the *Thomas v. The Delaware, Lackawanna & Western Railroad Company* (1881) case, Judge Wallace did not have the benefit of any of the Court’s subsequent applications of the *Jones* or *Houston* doctrine. In an attempt to balance the equities of the case, Judge Wallace noted that Mr. Thomas had a right to be on the private road that intersected with the track (729). However, since it was a private and not a public road, there was no legal

obligation on the part of the train operator to use signals indicating the train's approach (729). Judge Wallace allowed the train conductor's failure to signal to be considered as evidence of the railroad's negligence even though this was not required under New York law. Also, there was no speed limit imposed on trains in the state of New York. Yet, Judge Wallace allowed the jury to consider the train's "furious rate of speed"—40 miles per hour—as evidence of the conductor's negligence (730). Lastly, Wallace imputed to the train operator the knowledge that a pedestrian's view might be obstructed by the railcars that were sitting at the intersection (732).

Pointing out the potentially negligent actions of the railroad did not necessarily conflict with the policy tenor of *Jones* or *Houston*. In *Jones*, the railroad was explicitly found to be negligent. In *Houston*, as in the *Thomas* case under consideration, the Court had pointed out that the train was going at an excessive rate of speed and that it had failed to signal its approach to an intersection.

Where Judge Wallace relaxed the requirements of *Jones* and *Houston*, arguably, was in his analysis of the conduct of Mr. Thomas. Thomas was a grown man who from all indication in the case record was in complete control of his faculties. He put himself into a position of danger, knowingly, when he started across a railroad track before taking *any* extra precaution: by trying to listen for a train, by moving to a place where he had a view of the distant track, or perhaps just by peeking around the railcar to look for an oncoming train. Citing to New York and other state cases, Judge Wallace found that Thomas was justified in assuming that a train operator would realize the precariousness of the intersection and take extra precaution not to hit him.

Judge Wallace had to characterize Thomas's assumptions as entirely reasonable in order to avoid the unforgiving consequences of *Jones* and *Houston*. The Court in *Jones*, for example, could easily have found that Mr. Jones was entitled to assume that the train operator in his case

would realize that someone was riding on the pilot and would, therefore, take extra precaution against colliding with the caboose of another train. The Court in *Houston* could readily have found that Mrs. Houston was entitled to assume that once a train conductor saw her attempting to cross the track he would take extra precaution by slowing down. The Court in both cases, however, had declined to do so. Citing, again, a New York case, Judge Wallace held: “The absence of any fault upon the part of the deceased may be inferred from the circumstances in connection with the ordinary habits, conduct, and motives of men. The natural instinct of self-preservation in the case of a sober and prudent man stands in the place of positive evidence” (731). In other words, since there was no evidence that Thomas took extra precaution, the jury can assume that he did because, after all, there was no evidence that Mr. Thomas wanted to die.

District Judge Wallace’s reasoning had the tendency to undermine the entire doctrine of contributory negligence, not four years after it had been put forward so emphatically by the Supreme Court. Thomas *obviously* didn’t take extra precaution, because if he had, he would not have tried to cross the track at a place where he had no way to look or to listen for an oncoming train. But Wallace went even further than that. Even if Thomas had seen the train approaching, the judge held, Thomas was not necessarily negligent in attempting to cross the track in front of it (732). Judge Wallace held that Thomas was entitled to risk a crossing on the assumption that the train was traveling toward him more slowly than it actually was (732). Judge Wallace even admitted that the Supreme Court rejected this proposition in *Houston*. The injured party in that case should have waited for the train to pass, according to the Court, rather than have made a guess about the oncoming train’s speed. In *Houston*, the injured party’s miscalculation of speed raised the irresistible presumption that she was negligent. Judge Wallace, in the *Thomas* case,

shifted the presumption in favor of Mr. Thomas—since Mr. Thomas tried to cross, it must have meant that Thomas had reasonably concluded that the train was not going to hit him.

In the course of his opinion, Judge Wallace never took notice of the *Jones* decision.

Judge Wallace allowed Mr. Thomas’s widow to recover against the railroad. The D,L.,&W. Railroad Company did not get its new trial or its directed verdict. The case was not appealed to the Supreme Court. The most likely reason for this is that the amount in controversy requirement—\$2,000 for diversity cases appealed to the Supreme Court from the circuit courts—was not met in the case. Judge Wallace, a district judge from Syracuse, presided over the case from start to finish, and had the final say on all of the legal issues in it. While the case resulted in a published opinion, Judge Wallace did nothing more in this opinion than review his own compliance with the law during the first trial of the case. It is perhaps not surprising, then, that Wallace began his opinion by noting that “the points raised by the defendant in its motion for a new trial are not well taken,” since they basically were challenges to his earlier rulings (729). Wallace heard an appeal of his own ruling, and evidently flouted the Supreme Court’s doctrine in both stages of the *Thomas* case. Neither Wallace’s circuit judge nor his circuit justice participated in the review of the case. As was discussed in Chapter 2, it was the rule rather than the exception in 1881 for a district judge to preside alone in circuit court.

Non-Compliance in the Federal Judicial Hierarchy Prior to 1891

Like the *Padelford* (1854) case from Chapter 3, the *Thomas* (1881) decision illustrates how a problem in the Judiciary Act of 1789-created federal judicial hierarchy contributed to an instance of non-compliance with the Supreme Court. I expect to capture this problem, and its solution, systematically, in this chapter. The *Thomas* case also helps to portray the type of case that will be used in this chapter to show how the Evarts Act increased the likelihood of

compliance with the Supreme Court. I argue that the creation of intermediate courts of appeals (that is, courts created to handle appeals from the circuit or district courts) in 1891 improved the likelihood of compliance by the trial courts in the federal system. To validate this theory, I will examine railroad injury cases—like the *Thomas* case—from 1870 to 1911, in order to capture the initial effects that intermediate courts had in the national judicial system. My argument is that before this legislation went into effect, the Supreme Court had considerably less influence on the rulings of lower federal courts, but that this influence improved after 1891.

The Importance of Intermediate Courts to the Supreme Court

My contention is that when intermediate courts adopt higher court doctrine, lower-level courts respond to that adoption in a positive way. The guiding theory of this inquiry is that the policy pronouncement of the Supreme Court has a more direct influence on the decision making of the lowest level courts when an intermediate-level court signals its intention to follow that policy.

This chapter involves two assumptions, both grounded in the literature. The first is that Supreme Court preferences are clarified and legitimated by the Circuit Court of Appeals adoption process. The second is that a Court of Appeals' favorable treatment of a precedent signals to a subordinate court its willingness to monitor the lower court's treatment of the precedent. In short, the Court of Appeals assists the Supreme Court with communication and monitoring. Whether the motivation of the inferior court judge is a dutiful desire to comply with the Supreme Court precedent or a fear of reversal by the Court of Appeals, the judge's behavior will look the same.

The Communication Theory

No matter how clearly articulated by the Court, the ruling must be communicated

faithfully and authoritatively to the subordinate court in a relevant case. Baum (1976) points to the likelihood of message distortion as a factor to consider in weighing the impact of a ruling on lower courts. Canon and Johnson (1998) show that channels of communication from the Supreme Court to the ultimate message recipient affect the reception of that message. They point to a lack of reliable publications for judicial opinions that plagued the judicial hierarchy even into the Twentieth Century.

Communication of a higher court's decisions in a judicial system is not a complicated concept, but it is important. Even today, in an era where a relatively low number of Court opinions are handed down in a term, few federal judges have the time or inclination to follow the Supreme Court's docket or to read the opinions issuing forth from the Court at the end of each term. Except for perhaps a salient, newsworthy case, lower court judges (like most lawyers) only become familiar with a Supreme Court decision as the need to learn about it arises due to pending business. And, of course, judges rely upon that pending case's parties' lawyers, *amicus* briefs, and research assistants (when they have them) to apprise them of any Supreme Court cases of relevance to a dispute before them (Carp and Stidham 1985). While it is comforting to believe that judges read the opinions offered to them in a case, it is more realistic to say that they rely upon summaries of Supreme Court cases prepared by litigants or assistants. This further confounds the communication process.

More to the point of this chapter, does the extent of circuit-level treatment of a Supreme Court precedent enhance the communication of that precedent to the district court? Reid (1988, 516) suggests that intermediate appellate courts see their role as that of "middle managers" in the federal system. Haire, Lindquist, and Songer (2003) find that the Courts of Appeals supervise the federal district courts according to the Court of Appeals' perception of the current Supreme

Court's preferences; Courts of Appeals engage in "mistake correction" of districts, but they also make policy for the district courts to follow. There are also sound theoretical reasons for thinking that Court of Appeals' behavior influences district-level decision making. First, the Courts of Appeals stand in roughly *more* of a supervisory relationship to the federal district courts than the Supreme Court does to the Courts of Appeals, given the automatic appeal (Haire, Lindquist, and Songer 2003). It is reasonable to think that district courts, in the first instance, look primarily to their most immediately higher court for policy and interpretive guidance. Secondly, in the case of a vague Supreme Court policy that is clarified in a later opinion by a Court of Appeals, the district court will find "safe harbor" in applying the clarified policy of the Court of Appeals rather than trying to untangle on its own the vague Supreme Court policy. While a fear of Supreme Court reversal has not been shown to explain Court of Appeals compliance (Klein and Hume 2003), it is plausible that this motivation has more effect on district judges, who must know that higher court review of their decisions is extremely likely. This effect has been accounted for by Smith (2006) in his evaluation of district judge behavior—district judges respond in a compliant manner to actual, instead of probable, Court of Appeals reversal. Thirdly, the district judge who is reluctant to apply Supreme Court doctrine might find that the possibility of reversal by his or her Court of Appeals increases as the Court of Appeals comes to accept the Supreme Court policy (Haire, Lindquist, and Songer 2003). Thus, an authoritative signal from the circuit's Court of Appeals informs the district court that a decision of the Supreme Court will be applied in the circuit and of how it will be applied. Lastly, if a district judge is looking to avoid reversal or remand, he or she will find it more difficult to "hide" non-compliant behavior from a circuit's Court of Appeals than from a further removed Supreme

Court. This is the essence of Baum's (1976) theory of proximity: compliance is less likely the further removed, geographically, a higher court is from a lower court.

There is some evidence, from the era to be examined in this chapter, that subordinate judges initially viewed the intermediate courts as their most immediate resource for legal guidance. One judge, in an 1895 railroad injury case from the circuit court for the Eastern District of Tennessee, seemed to acknowledge the communicative purpose of the rulings from the new intermediate courts. On the question of whether a trial judge should, on his own initiative, instruct a jury to rule for a railroad when the injured plaintiff's negligence is in evidence, Judge Clark observed: "This is a question that has given this court great trouble, not only in this but other cases; and I shall be very glad indeed when the circuit court of appeals for this circuit shall have occasion to pass judgment upon this question, so that this court may have an authoritative general rule, at least, in the determination of this question" (*Spiro v. Felton* 1895, 92). Another judge, in a case from 1897, after recounting that one of his prior decisions had been overturned by the Circuit Court of Appeals, declared that despite his wishes he "[felt] constrained to strictly observe the positive decisions of United States appellate courts, clearly expressed in learned and elaborate opinions" (*Wright v. Southern Railway Company* 1897, 262). In a 1903 case, the circuit judge made clear his desire not to deviate from the policy of his Circuit Court of Appeals. "One thing," he affirmed, "...is certain—that the decisions promulgated by the Circuit Court of Appeals of this circuit are authoritative and binding as far as this court is concerned" (*Gilbert v. Rock Island & Peoria Railway Company* 1903, 835). It would appear from statements like these that the intermediate courts had an initial, positive influence on circuit judges.

The Judiciary Act of 1891 (the Evarts Act)

To provide greater context for the period of 1870 to 1911, several attributes of the federal courts should be reiterated. First, in this entire period both federal district and circuit courts sat as courts of original jurisdiction to hear diversity of citizenship cases.²⁴ The circuit courts could hear diversity of citizenship cases if the amount in controversy in the case was \$500 or more; all others went to the district courts (Fallon, Jr., et al, 2003). In the Evarts Act of 1891, Congress created Circuit Courts of Appeals and authorized them to hear certain cases by direct appeal from district and circuit courts. Diversity cases, such as the ones to be examined in this chapter, were to be directly appealed to these Circuit Courts of Appeals; they could not bypass these courts on the way to the Supreme Court (Fallon, Jr., et al, 2003). This marked a change from before 1891, when virtually all cases heard in the circuit courts could be appealed in some way directly to the Supreme Court, subject to an amount-in-controversy requirement. As was shown in Chapter 2, the 1891 Act had the tendency to lighten the caseload of the Supreme Court. The Act allowed the Supreme Court to offload extremely routine diversity cases to the Circuit Courts of Appeals (Fiss 2006). The Supreme Court could still hear, by certiorari, any diversity case decided by the Courts of Appeals. However, according to Fiss (2006), the Evarts Act envisioned that the Courts of Appeals would be practically final in diversity cases. Lastly, in the Act, circuit courts lost their appellate function, but continued to function alongside district courts as trial level courts until they were abolished in 1911 (Crowe 2012).²⁵

Consider how a true intermediate court of appeals structured like the ones created by the Evarts Act might have changed the dynamics of the 1881 *Thomas* case. At the most basic level, Judge Wallace's ruling could have automatically gone up for review by a panel of judges who had not passed judgment on the case before, in a venue further removed from the events and persons involved in the case. As it stood, the appeal in the *Thomas* case had none of these

features. Moreover, this intermediate court, through its more specialized focus on appeals, could be more attuned to the federal common law and to the decisions of the Supreme Court. It might have rebuked Wallace for his liberal use of New York case law that tended to contradict the paramount federal common law as expressed in *Houston* and *Jones*. It might have disagreed with Wallace by finding that *Houston* must be applied to the detriment of the plaintiff, or by finding that *Jones* had some applicability in the case. The intermediate court would be one degree removed from the local pressures that could enter into the decision making of a district judge.

While Judge Wallace was a Republican appointee who might be expected to favor railroad enterprises over factory workers, he was also a product, like Mr. Thomas, of upstate New York.²⁶ The railroad wasn't. Judge Wallace, as the trial judge in the case, had heard all of the emotional eyewitness testimony in a case that had—regardless of fault—involved a gruesome, fatal accident; evidence that was undoubtedly put on by plaintiff's counsel in a way to elicit the sympathy of the jury. He would have seen Thomas's grieving widow at trial. These elements could have factored into Judge Wallace's judgment in the case in a way that would not have been a factor to an appellate court in New York City hearing abstract legal arguments only.

And when he had to make a legal decision in the case, Judge Wallace would have had the benefit, perhaps, of his intermediate court's prior adoption and application of the Supreme Court's legal doctrines relevant to the case. Had the Court of Appeals addressed any circumstances, for instance, where a person was found *not* negligent in crossing a track in front of a train? Had the Court of Appeals found that a person was *always* entitled to assume that another person will take notice of a dangerous situation and act reasonably and prudently? Was this rule qualified in some way? In the absence of intermediate court guidance, Wallace had to

sort these questions out for himself, to the point where he apparently failed to comply with Supreme Court precedent.

Hypotheses, Data, and Research Design

My theory is that intermediate courts assist higher courts in the policy communication to and monitoring of the lowest courts in a judicial hierarchy. I have laid out a theory of intermediate court communication more fully in the discussion of the importance of intermediate courts above. These considerations, in the context of the historical period examined in this chapter, lead to two hypotheses to be tested in this chapter:

Hypothesis 1: Cases decided by the circuit courts after the passage of the Evarts Act are more likely to conform to *Jones* or *Houston* than are those decided before the Act.

Hypothesis 2: Cases decided by the circuit courts after the adoption of either *Jones* or *Houston* by the applicable Circuit Court of Appeals are more likely to conform to *Jones* or *Houston* than are cases decided before adoption.

Circuit Adoption of *Jones* or *Houston*

Hypothesis 2 refers to the adoption of *Jones* or *Houston* by a Circuit Court of Appeals. Circuit adoption, for this study, is where a Circuit Court of Appeals extends favorable treatment to a Supreme Court precedent. Favorable treatment means the Court of Appeals applied the rule announced in the precedent to a factual context similar to the precedent and with the same directional consequence (see the similar measure of compliance used by, e.g., Gruhl 1980; Gruhl 1981; Reddick and Benesh 2000). A good example of Court of Appeals adoption would be the strong, affirmative language in an opinion of the Court of Appeals of the District of Columbia, in *Jones v. Baltimore & Ohio Railroad Company* (1894), concerning *Railroad Co. v. Jones* (1877):

“There are, doubtless, a great variety of views to be found in the reports of cases upon this subject [of contributory negligence], and there may be found cases that afford color to the contention of the plaintiff in this case. But there is a case of the highest authority,

and one that is binding and conclusive upon this court, and which in principle would seem fully to embrace and control this case, and that is the case of *Railroad Company v. Jones*...” (170).

Mere citation to either *Jones* or *Houston* for ancillary legal principles does not, for the purposes of this study, rise to the level of adoption. Likewise, the citation of the precedent in a case where the court reaches the opposite outcome of the precedent, or any effort to distinguish the precedent, does not serve to amplify and enhance the authority of the Supreme Court precedent and, therefore, is not treated as adoption.

To create the variable indicating whether *Jones* or *Houston* had been adopted by a Circuit Court of Appeals, I developed a list of the Circuit Court of Appeals case for each circuit that first adopted *Jones* and *Houston* by using Shepard’s Citations for each precedent. Shepard’s is a legal research feature that provides a summary of all subsequent court treatments of a specific, “Shepardized” case. I treat a case in which Shepard’s indicates that positive treatment is extended by a Court of Appeals to *Jones* or *Houston* as “adoption” by that circuit. Tables 4.1 and 4.2 below provide a list of the initial adopting cases and the dates of these cases in each circuit for both the *Jones* and *Houston* cases. Note that several circuits never adopted one or even both of these decisions. The Fifth Circuit Court of Appeals, for example, refused to apply *Jones* and contributory negligence to the detriment of an injured employee after three clear opportunities to do so.²⁷ The fact that some circuits failed to adopt one or both of the decisions before 1911 improves this study, since it adds more variation to a comparison of circuit court behavior between adopting and non-adopting circuits.

Table 4.1. Circuit Court of Appeals Adoption of *Jones*

Circuit	Date of Circuit's Adoption of <i>Jones</i>	Adopting Opinion	Judges (Circuit (C) or District (D))
1	None	None	None
2	February 1, 1904	<i>Lauterer v. Manhattan RR Co.</i>	Lacombe (C), Townsend (C), Coxe (C)
3	None	None	None
4	November 6, 1907	<i>Washington Mills v. Cox</i>	Goff (C), Wadill (D), Boyd (D)
5	None	None	None
6	April 14, 1896	<i>MacLeod v. Graven</i>	Taft (C), Lurton (C), Hammond (D)
7	None	None	None
8	October 17, 1892	<i>Chicago & NW Ry Co. v. Davis</i>	Caldwell (C), Sanborn (C)
9	February 6, 1905	<i>Demko v. Carbon Hill Coal</i>	Gilbert (C), Ross (C), Morrow (C)
D.C.	October 1, 1894	<i>Jones v. B&O Ry. Co.</i>	Alvey

Note: The present-day 10th and 11th Circuits were created after the end date of this study.

Case Selection and Case Coding

The data for this study consists of federal circuit court cases from a period beginning in 1870 and ending in 1911. The cases selected were those in which a person who was injured by the operations of a railroad sued the railroad for the injury, and the railroad claimed that the injured party was contributorily negligent.

To derive the dataset, I used the Lexis-Nexis U.S. Legal Database. In that database I executed multiple searches for cases heard by circuit courts for the relevant time period in which

a railroad asserted that a plaintiff's own negligence caused an injury. For a more thorough discussion of these searches, see the Appendix. The searches netted 123 cases that could be included in the study.²⁸ Fifty-two of the cases were heard before the Evarts Act, and the remaining 71 were heard after the Evarts Act.

Table 4.2. Circuit Court of Appeals Adoption of *Houston*

Circuit	Date of Circuit's Adoption of <i>Houston</i>	Adopting Opinion	Judges (Circuit (C) or District (D))
1	None	None	None
2	March 1, 1899	<i>Grand Trunk Ry. v. Baird</i>	Lacombe (C), Shipman (C)
3	None	None	None
4	Feb. 7, 1894	<i>Tucker v. B&O R.R.</i>	Goff (C), Seymour (D), Simonton (D)
5	March 29, 1898	<i>Southern Ry. Co. v. Smith</i>	Pardee (C), McCormack (C), Swayne (D)
6	February 7, 1893	<i>Horn v. B&O Ry. Co.</i>	Jackson (C), Taft (C), Swan (D)
7	December 14, 1894	<i>Cleveland & STL Ry. v. Tartt</i>	Woods (C), Jenkins (C), Baker (D)
8	September 18, 1893	<i>Missouri Pac. Ry. v. Moseley</i>	Brewer (C), Sanborn (C)
9	August 5, 1895	<i>Southern Pac. Co. v. Johnson</i>	McKenna (C), Gilbert (C), Morrow (D)
D.C.	April 1, 1895	<i>Stearman v. B&O RR</i>	Shepard

I coded each case in the sample for the following variables:

Court Finds in Favor of Railroad. This is the dependent variable, indicating whether a court found in favor of the railroad (1) or not (0).

Case Year. This is a code of the year the case was decided, including the month and day, in order to derive dummy variables indicating whether the decision was pre- or post- the relevant Court of Appeals' adoption, pre- or post- the Evarts Act, pre- or post-1877, or pre- or post-FELA.

District Judge. This is an indication of whether the case was presided over by a district judge sitting alone (1) or whether a circuit judge or circuit panel heard the case (0). My expectation is that if a district judge decides the case alone, as was true of Judge Wallace in the *Thomas* case, without the assistance of other judges, a pro-railroad outcome is *less* likely.

Circuit. This is the judicial circuit in which each case is heard. For example, a case heard in the circuit court for the Western District of North Carolina would have been within the Fourth Circuit. The Federal Judicial Center website provides the assignment of states to circuits for this time period. Cases decided in circuits that had adopted *Jones* or *Houston* will more likely be in favor of the railroad.

Opinion Cites Jones; Opinion Cites Houston; Cites Supreme Court Authority (other than Houston or Jones); Cites COA Authority. This is a code for whether the court expressly applied either *Jones* or *Houston* or any other Court opinion. A court's citation to either the *Jones* or *Houston* decision should correlate to a decision in favor of the railroad. Also, I code for whether the circuit court cites any cases from the relevant Court of Appeals.

Injured Employee. This variable indicates whether the injured party worked for the railroad (1) or not (0). While I make no estimate about predictive power for this variable, it will be useful in classifying the cases in the dataset.

Court of Appeals (COA) has Adopted Jones; COA has Adopted Houston. This indicates whether a circuit court's relevant Circuit Court of Appeals has, at the time of the court's opinion, adopted *Jones* or *Houston* according to the definition of "adoption" offered above.

A Responsiveness Measure of Compliance

A case outcome-based measure of compliance—often referred to as a measure of *responsiveness*—has been employed often in the literature (see e.g. Brent 1999; Songer and Haire 1992; Songer and Sheehan 1990; Songer 1987). Responsiveness is where a higher court hands down a pro-railroad decision at t , for example, and a pro-railroad outcome in a lower court becomes more likely at $t+1$. In this study, a finding in favor of a railroad's claim that an injured party was negligent will be considered responsive to the Court of Appeals adoption of *Jones* or *Houston*. This is a rough measure, to be sure, but the logic behind it is that the default, attitudinal position of a district judge would be to rule for the injured party as an object of judicial sympathy who likely had ties to the judge's district. Contributory negligence is a harsh doctrine—even by the standards of the time; easier, perhaps, to espouse in the abstract than it is to apply to an actual case involving serious injury. I surmise that trial judges will apply it only when there is Court of Appeals-level pressure to do so. Put another way, any trend showing an *increase* in the number of rulings for the railroads in the lower courts after either 1891 or after a Court of Appeals adoption would only be explained as an obedient response to a higher court, not as an awakened desire to rule against injured plaintiffs.

What Judges Heard these Cases?

Finally, it is necessary to address a preliminary concern about the data. After 1891, circuit judges could hear both trials in the circuit courts *and* appeals in the Courts of Appeals (though they were prevented by the Evarts Act from hearing appeals of their own decisions). Also, district judges—as today—sometimes sat in the Courts of Appeals. Thus, a judge presiding over a trial in the post-1891 period might have been personally involved in the Court of Appeals' earlier adoption of *Jones* or *Houston*. In this situation the trial judge would simply be

“complying” with his own prior decision that, in light of *Jones* or *Houston*, contributory negligence was the applicable standard in railroad injury cases.

To account for this potential problem, I have identified the judges who voted to adopt *Jones* or *Houston* in Tables 4.1 and 4.2 above. Fortunately, only four of the cases in the sample involved a judge presiding over a circuit court trial after having voted in the Court of Appeals to adopt *Jones*. Another four involved a judge presiding over a trial after having voting in his Court of Appeals to adopt *Houston*. Given the small number of instances where there was an overlap between the adopting Court of Appeals judge and the applying circuit court judge, I am inclined to leave these eight cases in the sample without controlling for them.

The tabulation presented in Table 4.3 below shows that an overwhelming percentage (73%) of the circuit court cases in the sample involved a single district judge presiding, alone, in the case. This reinforces the notion that circuit judges, particularly after 1891, focused less on trial work in the circuit courts and spent their time instead hearing appeals in the Courts of Appeals. The low percentage of cases heard by a panel of judges—a panel perhaps consisting of a circuit judge plus a district judge—suggests that circuit judges neither routinely heard trials alone nor sat with the district judge in a panel in the circuit court. In the sample, only seven of the 71 post-1891 cases involved a circuit judge. The remaining cases were heard by solo district judges.

The reason this is important is that it allows for the possibility that the Courts of Appeals, once established, could be effective in monitoring the behavior of the circuit courts. District judges, toiling at the bottom of the judicial hierarchy, did the work of hearing circuit trials; circuit judges in the Courts of Appeals reviewed the trial rulings of the district judges. This allowed for the first time a true division of labor in the federal judicial system. It is important to

this study to rule out the possibility that the circuit judges simply bounced back and forth between the circuit courts and the Courts of Appeals, monitoring themselves.

Lastly, and not surprisingly given the time period of this study, most of the judges and panels hearing cases in the dataset consisted of appointees of Republican presidents. A full 100 of 123, or 81%, of the cases were heard by either a Republican appointee or a majority-Republican appointed panel. While this feature of the data might predict an overwhelming tendency to rule for railroads in the cases, it also means that any significant *change* in circuit court case outcomes is likely not explained by a variation in the partisanship of the judges.

Table 4.3. Breakdown of the Judges Hearing Railroad Injury Cases in U.S. Circuit Courts, 1870-1911

Court Configuration	Proportion of Cases	Percent
District Judge, Sitting Alone	91/123	74%
Circuit Judge, Sitting Alone	16/123	13%
Supreme Court Justice, Sitting Alone (pre-1891)	4/123	3%
Panel of Judges (including the Supreme Court of the District of Columbia)	12/123	10%

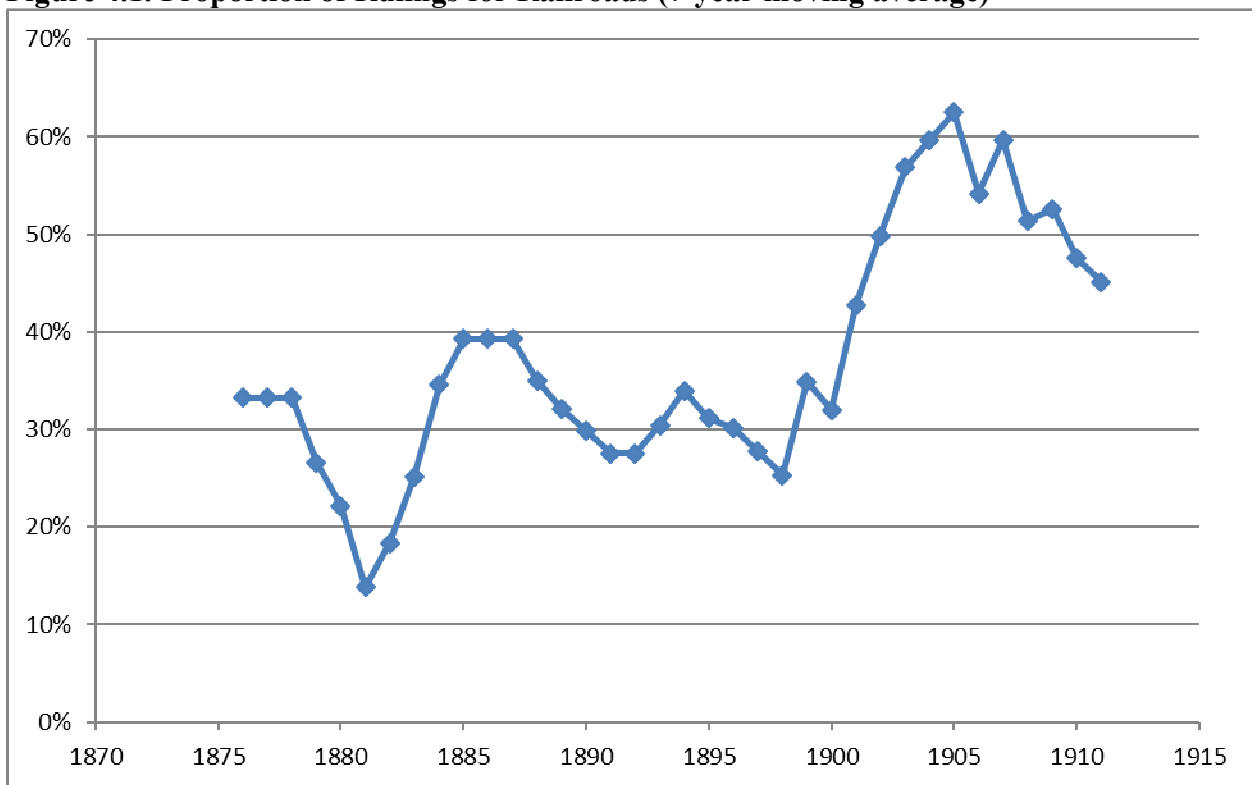
Results

Tabulation of Case Outcomes

Overall, railroads were not as successful in the federal courts as one might suppose given historical reviews of the period (e.g. Hall 1990; Gillman 2002; White 2003). Railroads prevailed in 51 of 123 of the cases, or 41.4% of the time. In the remaining cases, the court allowed a jury's

finding in favor of an injured plaintiff to stand. As can be seen in Figure 4.1, which is a moving average of the percentage of rulings for railroads over time, this proportion does not exceed 40% at any point until after 1900. After this year, the federal courts became sharply more pro-railroad. Interestingly, this is about the same time that the highly-populated, railroad-heavy Second Circuit's Court of Appeals (New York, Connecticut, Vermont) adopted *Houston* (1899) and *Jones* (1904).

Figure 4.1. Proportion of Rulings for Railroads (7-year moving average)



The caseload of the Second Circuit was so large that Congress authorized an additional circuit judge for the circuit in 1902 (32 Stat. 106). Indeed, 33% of the cases in the sample after 1900 come from the Second Circuit.

The creation of the Courts of Appeals in 1891, moreover, could be said to have arrested a steady downward trend in rulings for railroads in the years immediately prior to 1891. The proportion started to decline again in the late 1890s, a trend that reversed when the Circuit

Courts of Appeals (like the Second) adopted *Jones* and *Houston* into their jurisprudence.

Table 4.3 below provides a good indication that Courts of Appeals did have an initial impact on subordinate judicial decision making in railroad injury cases. The numerator in the fractions reported in each cell represents the number of cases decided in favor of railroads. Two proportions appear in each cell in order to allow before and after comparisons for each variable, which are listed in the leftmost column. Note that each variable represents an independent event; all cases in the sample are included in each variable's tabulation. In this table, a few distinct patterns appear, most of which are confirmatory of this study's hypotheses. First, note that the percentages of cases in which the circuit court found in favor of railroads moved in the expected direction for each variable when all cases in the sample are considered together. Also, contrary to my expectation, a Circuit Court of Appeals' adoption of *Houston* did not result in a change of behavior by circuit courts in cases involving injured non-employees, despite the fact that *Houston* had involved an injured non-employee pedestrian. Nevertheless, the overall trend supports the notion that the introduction of each variable—the creation of Courts of Appeals, the adoption of *Jones* by a Court of Appeals, and the adoption of *Houston* by a Court of Appeals—modestly moved the needle in favor of railroad defendants, at least in the decision making of circuit courts. The presence of these variables made it more likely that circuit courts would apply the doctrine of contributory negligence to defeat an injured plaintiff's claim.

Table 4.4 contains the multivariate regression coefficients and associated standard error terms for a model that is intended to depict the effect of Court of Appeals adoption. For certain significant variables, I have reported the marginal effect (impact) of that variable. The marginal effect demonstrates the increase or decrease in likelihood of a ruling for a railroad given the presence of the variable.

The model includes mostly variables that refer to the point in time of a specific circuit court decision. Only one of the two Court of Appeals adoption variables of primary interest—whether a case was heard after Circuit Court of Appeals adoption of *Jones*—predicts a ruling in favor of a railroad. The *Houston* adoption variable is not significant. This represents mixed

Table 4.3. Proportion of Circuit Court Cases Decided in Favor of Railroads

Variable	Type of Case		
	Injured Employee	Injured Other	All Cases
<u>Before 1877</u>	1/2 (50%)	1/5 (20%)	2/7 (29%)
<u>After 1877</u>	27/62 (44%)	22/54 (41%)	49/116 (42%)
<u>Before 1891</u>	8/23 (35%)	12/29 (41%)	20/52 (38%)
<u>After 1891</u>	20/41 (49%)	11/30 (37%)	31/71 (44%)
<u>Before the COA had adopted Jones</u>	16/39 (41%)	18/50 (36%)	34/89 (38%)
<u>After the COA had adopted Jones</u>	12/25 (48%)	5/9 (56%)	17/34 (50%)
<u>Before the COA had adopted Houston</u>	14/35 (40%)	17/42 (40%)	31/77 (40%)
<u>After the COA had adopted Houston</u>	14/29 (48%)	6/17 (35%)	20/46 (43%)

Table 4.4. Logit Analysis

1=Ruling for a Railroad (Defendant)	Coefficient	Standard Error	Impact
Post-1877	.854	.955	
Post-1891	.598	.559	
COA has adopted <i>Jones</i>	1.08*	.770	34%, 60%
COA has adopted <i>Houston</i>	-.854	.791	
Opinion Cites either <i>Jones</i> or <i>Houston</i>	1.20**	.717	38%, 70%
Cites SC Authority	-.628*	.394	49%, 33%
District Judge	-.638	.524	
Constant	-.837	.841	

p<.01=***

p<.05=**

p<.10=*

LRchi(7)=9.44

Prob > chi2=0.22

support for the effect that Court of Appeals adoption had on subordinate federal courts, per Hypothesis 2. If a Court of Appeals had adopted *Jones* for the circuit, the likelihood of a circuit court's ruling in favor of a railroad improves from 34% to 60%. At the same time, adoption of *Houston* had no significant effect on circuit courts. This finding was somewhat anticipated by the summary statistics of Table 4.3. The effect of the Act of 1891, alone, is not significant in the model. This suggests that the mere existence of intermediate courts, alone, does not change lower court behavior. Instead, the intermediate court must take steps to communicate its preference for a certain Supreme Court policy through the adoption process. The same could be said of the mere existence of the *Jones* and *Houston* decisions. The post-1877 variable is not significant, even though 1877 was the year both cases were handed down by the Court. Evidently, it was not until *Jones* had been adopted by an intermediate court that the decision had any effect in the decision making of circuit courts.

Also, interestingly, there is a relationship between the citation behavior of circuit courts and a ruling in favor of a railroad. There is a significant correlation between a circuit court's citation to *Jones* or *Houston* and a ruling in favor of a railroad. If a circuit court cites to any Supreme Court opinion besides *Jones* or *Houston*, however, a ruling for a railroad becomes significantly less likely. This finding has possible explanations grounded in the attitudinal model of judicial behavior, which holds that a judge's choice of citations only serve to reinforce his policy preferences in a particular case (Segal and Spaeth 2002). In this case, perhaps if a judge wanted to rule in favor of an injured plaintiff, he did not cite *Jones* or *Houston*; he located other Supreme Court precedents that were more supportive of plaintiffs.

Whether a case was heard by a single district judge approaches significance but ultimately is not a significant predictor of a decision in favor of an injured party against the

railroad. This indicates that district judges, flying solo, were not relative mavericks compared to more responsive circuit judges, Supreme Court Justices, and panels of judges.

Discussion

The fact that *Jones* adoption seems to count for much more than *Houston* adoption in predicting a ruling in favor of a railroad defendant is not without some explanation. There are a few reasons to believe that *Jones* might have overshadowed *Houston* in the thinking of the circuit courts. The *Jones* opinion was sweeping in its articulation of the contributory negligence principle, specifically bringing the doctrine into the federal common law, while *Houston* purported to apply a state negligence statute. And while *Jones* only dealt with the claim of an injured railroad employee, there is nothing in the Court's opinion in *Jones* that would limit the holding to the railroad employment context. In some circuits, *Jones* could have "expanded" to cover fact situations more analogous to *Houston's* as it descended down the judicial hierarchy. Circuit courts then looked to these cases, derived from *Jones*, instead of *Houston* or those that were derived from *Houston*. Since the Supreme Court handed down both decisions at virtually the same time, *Houston* was simply crowded out by *Jones*.

A second explanation for the seemingly minimal impact of the adoption of *Houston* is that for every judicial circuit except for the Sixth and the District of Columbia, *Jones* was adopted after *Houston*. At the point *Jones* was adopted by most Courts of Appeals, *Houston* had already been adopted. Perhaps circuit judges responded more to their Court of Appeals' later adoption of *Jones* because it meant at that point that the Court of Appeals was clearly serious about applying the Supreme Court's contributory negligence principle. A decision favorably treating *Jones* would, in that event, serve as sort of a "second warning" to the circuit courts that a failure to apply contributory negligence will result in reversal (see, e.g. Haire, Songer, and

Lindquist (2003) for this idea). Therefore, any compliance with *Jones* could be attributable to the adoption of *Houston* as well as of *Jones*. In fact, in the 34 cases heard in circuits that had adopted both *Houston* and *Jones*, the railroad won 17 times (50% success). In the 12 cases that fell in a period where a Court of Appeals had adopted *Houston* but not *Jones* railroads won only three times (25%). No cases in the sample were heard in a time when a Court of Appeals had adopted *Jones* but not *Houston*, which means that we have no indication of the impact of *Jones*-adoption independent of *Houston*-adoption. Lastly, these findings do not support the idea that *Houston* did not matter to circuit courts—only that a relevant Court of Appeals adoption of *Houston*, by itself, did not make the circuit courts more likely to rule in favor of railroads.

Conclusion

This chapter has provided some support for the hypothesis that the Evarts Act had a direct impact on Supreme Court power over lower court outcomes. I have shown that the mere creation of intermediate Courts of Appeals in the Evarts Act did not make it more likely that circuit courts ruled in a way that was responsive to the Supreme Court in railroad injury cases. However, a Circuit Court of Appeals' specific adoption of the Supreme Court's pro-railroad decision in *Railroad Company v. Jones* (1877) significantly improved the chances that a railroad company won a trial-level case within that circuit. These results, while modest and tentative, help show the initial effect of the Circuit Courts of Appeals on Supreme Court. They help explain the growth of Supreme Court power within the federal system, thereby contributing to this developmental account of how lower court compliance with Supreme Court policy became an institutional feature in the U.S. legal system. The findings of this chapter support the placement of the idea of intermediate court adoption more firmly in our understanding of instances of present-day U.S. district court compliance with the Supreme Court.

Most importantly, I believe that this chapter provides a research design that could be further developed using many other instances of Court of Appeals adoption. Multiple Supreme Court precedents from various areas of law could be combined in a single study. Perhaps the downside that we have seen to be the result of the close proximity of *Jones* and *Houston* in time and in policy tenor will prove to be instructive as other researchers look for the ideal Supreme Court policy to use in a study of circuit-level adoption. There is no limit, really, to the amount of data or study that could be applied to the question of Court of Appeals influence in the federal system.

CHAPTER 5

Docket Control and Clear Policy Making in Supreme Court Constitutional Cases, 1910-41

In 1925, Congress passed another landmark piece of federal courts legislation. The Judiciary Act of 1925, often referred to as the Judges Act, gave the Court virtually total discretion over the cases that it would hear and decide for the first time in the Court's history. Similar to the format of Chapters 3 and 4, in this chapter I will first illustrate, in the form of a mini-case study, the problems associated with the Court's lack of case-selection discretion before 1925. I will then discuss the Judges Act, offer a theory of how it improved Court supervision of lower courts, and test this theory empirically.

* * *

In 1923, Ramon Rodríguez, Capele José Santos Rodríguez, Isidoro Cardona, and Narciso Rodríguez were accused by Puerto Rican authorities of violating the National Prohibition Act of 1919, also called the Volstead Act. They were convicted in a municipal court of Puerto Rico and fined \$50 each for manufacturing liquor in violation of the recently enacted ban on liquor in the United States and its territories. In 1923, Puerto Rico was held as a possession of the United States, as it is today, as a result of the Spanish-American War of 1898. Rodríguez and his co-defendants appealed their conviction to an island district court in Puerto Rico, which upheld the conviction, and then carried their appeal to the Supreme Court of Puerto Rico.

Before the Supreme Court of Puerto Rico, in a case called *Puerto Rico v. Rodríguez et al* (1923), the defendants argued that their prosecution in the courts of the island was entirely

improper. They argued that they had not been accused of violating any law of Puerto Rico or any provision enacted in the name of the people of that territory by the local government. In that case, they maintained, the island court of Puerto Rico lacked jurisdiction over their prosecution for the manufacture of liquor. The only appropriate venue for the prosecution of an offense against the United States would be by U.S. officials in the U.S. District Court for the District of Puerto Rico. Implicit in this argument was the defendants' belief that they would receive better procedural guarantees in a court of the United States than they would in the local court.

The initial problem for defendants was that Congress had, by a 1922 statute, unambiguously given the island courts of Puerto Rico concurrent jurisdiction with the U.S. District Court in Puerto Rico over prosecutions for violations of the Volstead Act. Not only that, these prosecutions, according to Congress, should be subject the same jurisdiction of the local courts as were any crimes under Puerto Rico's local law. This meant the defendants, among other things, did not necessarily receive a grand jury indictment or a jury trial, that they might be convicted on hearsay or other questionable evidence, and that they were subject to double jeopardy. The island's customary forms of justice governed the proceedings.

It was left to Rodriguez and his co-defendants, then, to make a much more elaborate argument: the 1922 law of Congress allowing the island courts to hear Volstead Act prosecutions was unconstitutional. The first constitutional claim was that the procedures used in the island's provincial courts did not meet the standards required by Congress for the courts of the United States. Since the U.S. District Court in Puerto Rico had, before the Act of 1922, exclusive jurisdiction over Volstead prosecutions, the law allowing for Puerto Rican court prosecutions diminished the due process rights formerly enjoyed by Puerto Ricans. The second claim was that

Congress could not require any territory's local court to assume jurisdiction over what should be a federal court case.

The constitutional issues raised by *Rodriguez* had been thoroughly treated by the Court. However, they had been addressed in the context of a Court docket that was not discretionary, creating problems with the coherence of the doctrine. By the time of the *Rodriguez* case, the question of the extent to which the Constitution applied in colonies held by the United States as a result of its victory in the Spanish-American War had been the subject, by Sparrow's (2006) count, of 35 U.S. Supreme Court decisions since 1901. These decisions were not without dissension, controversy, and internal contradictions from the outset, as the Court addressed in a piecemeal fashion the constitutional implications of America's newly-acquired overseas empire. For reasons ethnic, cultural, economic, and geographic, the territories acquired from Spain in the Treaty of Paris of 1898 were unlike those held by the United States—usually just for a short time prior to their eventual statehood—in the past.²⁹ There was really never any intention, according to Fiss (2006), to prepare these newly acquired colonies for statehood.

Taken together, these cases adjudicating the constitutional status of these territories are known as the *Insular Cases*. Briefly summarized, the Court eventually held in the *Insular Cases* that the Constitution did not automatically limit the power of Congress over the colonies, as these territories did not automatically become part of the United States when they were ceded by treaty to the United States. There were, however, certain “fundamental” constitutional guarantees that Congress could not deny the inhabitants. It was up to the Supreme Court, not Congress, to decide which rights were fundamental. To further complicate the doctrine, after much internal disagreement among the justices the Court converged on a distinction between territories that had been “incorporated” by Congress and those that had not been (Fiss 2006). By the Court's

reasoning, a colony could be *held* by the United States as a possession but not incorporated as a territory of the United States. According to the Court, Congress only incorporates a territory by explicit treaty or statutory language stating so. Inhabitants of *incorporated* territories were entitled to (all?) specific constitutional guarantees, while inhabitants of *unincorporated* ones were only entitled to certain fundamental rights as defined by the Court on a case-by-case basis.

These considerations made the doctrine highly amenable to a case-by-case approach in a couple of respects. First, it allowed the Court to determine whether a territory had been incorporated or not, which was a statutory or treaty-interpretation question. Second, it allowed the Court to define the scope of constitutional protection entitled to the inhabitants of a territory in either event. The Court chose this piecemeal approach over two alternatives, both of which had support at times by certain justices on the Court, and both of which would have been much clearer to lower courts. One camp held that the Constitution automatically applied to territories in the same manner as it applied within the states of the United States—the Constitution follows the flag. The alternate school of thought was that Congress and the president were entitled to great deference in the decisions they made about the territories and their inhabitants. In time, the Court converged on the idea that territories were in some respects like states, but in other respects akin to foreign nations (Sparrow 2006). Sometimes the Constitution limited the powers of Congress over the colonies, but mostly it did not.

In the *Rodriguez* case, Judge Carlos Franco Soto of the Supreme Court of Puerto Rico put forward his interpretation of Court doctrine as it had evolved since 1901. “[I]t seems necessary to say,” the judge held forth, “that the Congress of the United States in relation to the territories occupies a dual position as one of the United States Congress of limited powers by the Constitution, and the other with the character of a local legislature to which many of the

constitutional limitations do not apply to it” (395). Assuming this to be an accurate statement of doctrine, the problem (not new with the *Rodriguez* case) was in determining in which capacity Congress was acting when it authorized Volstead prosecutions in local courts. Rodriguez and company obviously wanted the former interpretation of the power of Congress in this instance. They argued that since the Eighteenth Amendment, in authorizing liquor prohibition, gave states and Congress *concurrent* jurisdiction over the prohibition of alcohol “by appropriate legislation,” the Amendment put a limit on the power of Congress. Congress could not create a prohibition law for a state, or dictate how or whether prosecution of a liquor law violation should be carried out in a state court. Rodriguez’s counsel analogized Puerto Rico to a state that was entitled to enact its own regime of liquor prohibition under the Eighteenth Amendment, and argued that the courts of Puerto Rico were like state courts in that they should enforce only Puerto Rico’s, not the United States’, prohibition law. Therefore, not only did the law of Congress violate Rodriguez’s due process rights under the Fifth Amendment, it also violated the sovereign right of Puerto Rico under the Eighteenth Amendment.

Judge Franco Soto, writing in a three-vote-to-two majority opinion, rejected this argument in every respect. According to Franco Soto, Congress had plenary authority over Puerto Rico (396). Any constitutional provision limiting Congressional power over the states was not applicable to the territory of Puerto Rico, which was not a state with sovereign attributes but was instead a “domestic dependent territory” (397). The territorial legislature and courts of Puerto Rico, unlike those of states, Franco Soto held, act only with power delegated to them by Congress. In its sovereign determination, according to Franco Soto, Congress may decide to use the local system of justice to prosecute liquor violations in Puerto Rico, and essentially assume

the identity of the local government and of “The People of Puerto Rico” in implementing the Volstead Act.

As for the due process claim raised by Rodriguez, Judge Franco Soto again referred to the authority of a handful of the *Insular Cases*. Borrowing the language of two such cases, Franco Soto held that any constitutional limits on Congressional action with respect to territories “exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, not by any express and direct application of its provisions” (396). These abstract guarantees provide “fundamental limitations in favor of personal rights which are formulated in the Constitution” (396). These inferred rights, however, do not include the right to a grand jury indictment or a petit jury. The preexisting legal system of the colony—however constituted—may be used by Congress in criminal prosecutions. Franco Soto was on solid ground here, because the Court had recently held, in *Balzac v. Porto Rico* (1922), that Puerto Ricans did not enjoy a constitutional right to a jury trial while in Puerto Rico even though they were made U.S. citizens by Congress in 1917. Until Congress explicitly incorporates the territory into the United States, the Court had held, the specific provisions of the Constitution do not apply to it, regardless of the citizenship status of the inhabitants.

Two Justices joined in a dissenting opinion that was authored by Justice Wolf. Wolf was careful not dispute plenary Congressional power over Puerto Rico, but he interpreted Congress to state that when the local courts of Puerto Rico implement the Volstead Act, they must follow all of the procedures applicable in a U.S. district court. “If courts of Puerto Rico are enacting a federal statute,” according to Justice Wolf, “[they have] the same powers as the courts of the United States, according to the words of the law of 1922” (407-8). Wolf claimed the authority of prior Congressional practice to this effect in authorizing suits in a territory’s local courts. Justice

Wolf further believed that Congress could not have intended to create an inequitable situation, where some prosecutions under the Volstead Act would be before juries and others not. “The National Prohibition Act cannot be a local and federal law at the same time depending on which court assumes jurisdiction,” reasoned Justice Wolf (409). Therefore, Rodriguez and his cohorts were entitled to a jury trial and the other attributes of a normal, federal criminal case.

None of the Justices of the Puerto Rico Supreme Court availed themselves of legal positions made available to them by certain of the *Insular Cases*. That is, none took the position that Puerto Rico was incorporated, that the Constitution applied in full to the island, or that the right to a jury or to an otherwise fair trial was fundamental even in the case of unincorporated territories. None adopted the “extension” doctrine announced by Justice Brown in *Downes v. Bidwell* (1901). That is the idea that once Congress extends, by statute, a certain constitutional guarantee to a territory (like the right to have one’s case heard in federal court), that guarantee becomes more or less a vested right of the people in the colony.

I offer the example of the *Insular Cases* as emblematic of the post-1891, pre-1925 regime of Supreme Court practice and influence over lower courts. Earlier chapters have hopefully made clear that the Evarts Act in 1891 relieved the Supreme Court’s crowded docket, in part, by allowing appeals of extremely routine diversity-of-citizenship cases and other non-constitutional cases to go to the Circuit Courts of Appeals for final resolution. The Court could still grant certiorari in a specific case if it wanted, for instance, to craft federal common law for the instruction of the Courts of Appeals. The Court even engineered its own doctrine in this regard. The Court should only grant certiorari, in the words of Chief Justice Fuller, if a case has “gravity and general importance” (Fiss 2006). The Court should instead expend its time in consideration of cases of greater legal consequence—cases presenting constitutional questions, cases calling

for the interpretation of federal statutes, cases adjudicating federal crimes, or anything else the Court was required by Congress to hear. Consequently, certiorari was rarely granted between 1891 and 1925 (Epstein 2003, 53). While the work of the Circuit Court of Appeals might have made the average Supreme Court case more legally consequential, the Court continued to lack discretion over the growing number of cases that presented constitutional and federal law questions. The Court could not deny constitutional cases that a losing party wanted it to hear. No matter how well settled a constitutional matter might have been, that is, an aggrieved party could have his day in Court. The Court was expected to correct any errors that might have been made by the lower court, even if repeated correction came with costs to the quality and clarity of the body of Court precedents.

As the caseload data presented in Chapter 2 attests, after 1891 the Court continued to labor under a crowded docket, even after relatively unimportant cases had been relegated to Courts of Appeals, and it struggled to keep up with that docket. For example, in 1911, the Court disposed of 502 cases. Of these, only 116 were disposed of by a denial of certiorari. The remaining 378 cases required a full review and written opinion—even if the opinion might simply have consisted of a brief explanation of why the Court did not have jurisdiction over the case.

The focus of this chapter is whether the sheer volume of written opinions and a lack of discretion in the Court's constitutional caseload affected Court decisions in ways that had implications for lower court compliance. My argument is that the problems in the Court's supervision of the judicial hierarchy from 1891 to 1925 come down to problems of quantity and problems of quality. The Court was forced to give attention to *all* constitutional cases in which a party demanded a hearing, regardless of the *quality* of that case in terms of the novelty or

importance of the legal questions presented or in terms of the suitability of the case as an instrument of Supreme Court policy making.

That said, there is no doubt that the *Insular Cases* raised important—perhaps vital—constitutional and federal law questions about America’s empire. Each of the 35 of them perhaps might have been chosen for review by the Court had they all fallen in the post-1925 certiorari regime. In any event, the Court bore the responsibility for making constitutional policy governing the territories within the strictures of a mandatory docket that sent territorial cases to the Court in untidy clusters in the first decade of the Twentieth Century. According to the timeline prepared by Sparrow (2006) in his recent, comprehensive treatment of the *Insular Cases*, in 1901 the Court decided 10 cases involving the question of the status of the territories. The Court heard five more in 1904, and an additional four in 1905. The Court heard three more in 1907. The Court heard one in each term from 1908 to 1912. After the ensuing decade where the Court averaged over one Insular Case per term, the Court finally heard what is considered the last such case with *Balzac* in 1922. It is probably no coincidence that the Justice most associated with the Court’s power of case selection, Chief Justice Taft, authored what can be considered a clear and concise policy directive in the Court’s eight-to-one decision in *Balzac*. In that case, the Court finally settled on the notion that incorporation by Congress was key to whether a territory enjoyed rights under the Constitution. The Court also found that a jury trial was not constitutionally required in an unincorporated territory such as Puerto Rico.

Consider the difference that the power of case selection might have made to the Court’s efforts to clarify imperial policy. *Balzac* shows how one opinion containing a clear, unmistakable ruling may effectively settle the question of the applicability of the Constitution to a territory. Had the Court been able to elide review of all imperial cases, save *Balzac*, it might have spared

the legal and political community a lot of uncertainty in the doctrine—uncertainty that had been generated by the Court’s imperative to review the conduct of various provincial Supreme Courts and federal courts since 1901. My post-hoc attempt to ascribe coherence and regularity to the policies of the *Insular Cases* does not necessarily portray how the cases might have appeared to lower court judges as they were being decided, in midstream, before *Balzac*. Aside from the high number of such cases decided by the Supreme Court on the topic, lower court judges had to wrestle with pockets of ambiguity found *within* the cases. They had to wrestle with the notion that the Constitution should be considered “operative, but not applicable” in the colonies (*Hawaii v. Manchiki* 1903, 218). What protections, exactly, fell under the “general spirit of the Constitution?” (*Downes v. Bidwell* 1901, 268). Under some circumstances, the general spirit of the Constitution (but not the Sixth Amendment of it) required a trial by jury, while in other circumstances it didn’t (*Dorr v. United States* 1904; *Rasmussen v. United States* 1905). A territory’s courts could not inflict cruel and unusual punishments (*Weems v. United States* 1910), nor were they permitted to inflict double jeopardy on an accused person (*Kepner v. United States* 1904). There was the subtle distinction between “incorporation” of a colony and the “extension” of constitutional guarantees to one (*Rasmussen v. United States* 1905). Could a treaty alone do these things, or must Congress do them by positive legislation? Just when the Court seemed to converge on a certain doctrine, it would issue an anomalous opinion that would not seem to square with the doctrine. And then there were, according to Sparrow (2006, 142), the ever-shifting coalitions on the Court in favor of various approaches to all of the imperial questions. Such are the fruits of the multiplicity of cases generated by the error correction model of Supreme Court supervision.

* * *

Three years after the Court's decision in *Balzac v. Porto Rico* (1922) Congress enacted the Judiciary Act of 1925. This legislation is often called the Judges Act of 1925 because it was drafted by Chief Justice Taft, with the help of Taft's Court colleagues William Day, Willis Van Devanter, and James McReynolds (Buchman 2003; Sternberg 2008). The effects of this law are the focus of this chapter, and will be the final legislative contribution to this account of the development of Supreme Court power over inferior courts. The Act gave the Court certiorari (or discretionary) jurisdiction over virtually all final decisions in the Circuit Courts of Appeals and over any states' highest courts' federal law and U.S. constitutional judgments. The Court was not even required to hear every constitutional or federal law case that a party wanted it to hear—a provision that far surpassed all earlier reform proposals, which had at least retained the mandatory docket for such cases (Sternberg 2008). To this end, the Judges Bill gave the Circuit Courts of Appeals more responsibility than before in monitoring district courts, suggesting that Congress (and the law's drafting Justices) was pleased with the performance of these courts as stewards of Court policy since 1891.

Moreover, under the Act, the Courts of Appeals could hear by appeal or by writ of error “all cases” from the U.S. district courts in states and (not coincidentally) from district courts in Hawaii and Puerto Rico.³⁰ The Courts of Appeals could hear almost all cases coming from the district courts in Alaska and the Virgin Islands.³¹ Tellingly, the Act gave certain Courts of Appeals jurisdiction over appeals from “the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds \$5,000, and in all habeas corpus proceedings.”³² Since most of the *Insular Cases* had come to the Court by way of

appeals from territorial Supreme Courts, this provision was definitely more than a simple tidying up of the legislative language to account for all possible lower courts. The Judges Act, in essence, cut off the spigot of cases coming to the Court from the territories (Frankfurter and Landis 1928a). Congress here was recognizing and rectifying the circumstances that had led to almost three dozen Supreme Court opinions on the applicability of the Constitution to territories held or incorporated by the United States. That problem was the inability of the Court to decline to hear and decide territorial cases if doing so would not serve the purposes of further clarifying policy for lower courts.

In this chapter, I offer and test hypotheses about the relationship between the Court's ability to control its own docket and the policy making capacity of the Court. After 1925, the Court was given the power to decide which cases to review, presenting the Court with strategic opportunities to craft constitutional policy for lower courts in suitable, representative cases. Now that the Courts of Appeals could hear constitutional cases, this supervisory, constitutional policy making took on more of an importance in the judicial hierarchy. Also, the potential of case selection allowed the Court to *limit* its policy pronouncements in certain doctrinal areas, making it easier for lower courts discern Court policy from among two or three, not 35, relevant precedents. The Court could spend its time in developing the law for the inferior courts—particularly, now, the Circuit Courts of Appeals—rather than reviewing alleged errors afflicting the work of federal district courts and state (or territorial) Supreme Courts. My theory is that the Court took the opportunity to limit its policy pronouncements on constitutional issues and to craft more coherent opinions (and policy within the opinions) than had issued from the Court in the 1891 to 1925 period—the *Insular* period.

Opinion Clarity and Lower Court Compliance

According to Clark (2013), “[a]n often overlooked, but nevertheless critical, aspect of the task facing high courts is the difficulty of clearly and completely communicating with lower courts.... Scholars have grown increasingly interested in the Court’s decision to craft a more or less clear rule...” (1). The quality of the judicial decision and of its legal pronouncement has been shown to affect compliance with the decision. Lawrence Baum, among others, offers that clear, non-ambiguous opinions more likely engender compliance than do unclear ones (Baum 1976; Carp and Stidham 1985; Combs 1982; Spriggs 1997), and formal models have been built around stylized notions of opinion clarity (Clark 2013; Jacobi and Tiller 2007; Lax 2012). On the other hand, vague or ambiguous opinions have been found to lead to non-compliance, or the implementation of the subordinate’s preferences instead of the superior’s (Spriggs 1997; Eakins and Swenson 2007). A clear policy is less likely to be ignored or evaded by an unreceptive lower court judge, because as Spriggs (1997) notes in the context of agency action, clear decisions specify the policy change that is expected out of the implementing population as well as the consequences of disobedience. On the other side of the coin, lower court judges who desire to follow the Supreme Court policy dutifully—as the legal model (Johnson 1987) or team model of judging (Kornhauser 1995) suggest—must also have a clear policy signal in order to know precisely what is to be done by them in a given case.

In summary, there is every reason to expect that clear policy directives of higher courts are more likely to be implemented by lower courts than unclear ones, no matter the reason for the lack of clarity. The nature and quality of the Court’s articulation of legal policy matters to the efficacy of the Court in having its decisions implemented. Any statutory development that allows the Court to render clearer opinions for the benefit of lower courts, therefore, belongs in an account of the development of Supreme Court influence over lower courts.

Reasons for Unclear Judicial Policy

There are multiple possible impediments to an opinion's clarity. First is the opinion's relationship to decisions in the same area of law—the multiplicity of cases in a particular issue area increases the likelihood of a mixed signal (Hansford and Spriggs 2006; Benesh and Reddick 2002). Second, policy can be blurred by the compromise often required by opinion crafting on a collegial court (Carp and Stidham 1985; Corley 2009), as evidenced by the effect of concurring or dissenting behavior (Corley 2009; Spriggs 1997; Westerland et al 2010). Third, certain legal approaches taken by the Court, such as the adoption of a “balancing test” or some sliding scale between two (or more) competing values that must be weighed by the lower court may fail to signal a preferred Supreme Court outcome (Jacobi and Tiller 2007; Lax 2012). These notions have been the basis of recent theoretical investigation (Jacobi and Tiller 2007; Lax 2012; Staton and Vanberg 2008). Lax (2012), drawing on the long line of “rules-versus-standards” literature, theorizes about the difference in impact between a “bright-line” rule and a mere “standard” in judicial policy making. “Bright-line” rules or multi-pronged “tests” requiring the application of certain elements of analysis will better serve to guide the lower court's response than would a relatively loose standard such as “the totality of the circumstances.” This has been validated empirically (Luse et al 2009; Smith and Todd forthcoming). Combs (1982), for one, uncovers how ambiguity in Supreme Court precedent on school desegregation empowered significant discretion in Courts of Appeals to make policy on their own. Furthermore, the literature on jurisprudential regimes suggests that the content of legal doctrine, if narrowly drawn, can serve to constrain future courts in the application of that doctrine to future cases (Kritzer and Richards 2003; Kritzer and Richards 2005; Luse et al 2009; Richards and Kritzer 2002). Lastly, scholars have looked at the effect of negative treatment by the Supreme Court of a certain precedent and

have found a negative relationship between this type of treatment and faithful lower court implementation of the questioned policy (Benesh and Reddick 2002; Hansford and Spriggs 2006). To summarize, lack of clarity may arise from multiple sources. However, to a great extent the Court is able to control its own policy's clarity in the process of drafting its opinions, in the way it treats other, similar cases, and in the degree to which the justices are willing to converge on a policy.

This collection of findings has a couple of implications for my theory about the Judges Act of 1925. First, these findings identify an impediment to clarity in terms of an unclear relationship between one Court decision and another, a problem that logically increases as the number of Court opinions increases. This problem is possibly compounded by concurring and dissenting behavior in specific cases (a feature, arguably, of the *Insular Cases*). Second, these findings identify clarity in terms of the substance of the policy itself (another feature, arguably, of certain doctrines promulgated in the *Insular Cases*). I offer a third notion of clarity that is less salient in the existing research on lower court compliance. This notion suggests that clarity is also present when it is clear to the reader of a judicial opinion that the Court is providing legal instructions having future applicability in lower courts.

The Relationship Between Court Workload and Opinion Clarity

Is there a relationship between a court's degree of docket discretion and the clarity of the decisions of that court? Despite a lot of scholarly attention to a supposed caseload crisis in lower federal courts in more recent times (Levy 2013; Posner 1991; Richman and Reynolds 2013), not a lot of research has attempted to link, directly and empirically, the size of a court's caseload to the characteristics of the opinions of that court. Scholars have associated a large caseload with other forms of judicial behavior, such as summarily disposing of cases, dispensing with oral

argument in a case, delegating research and other time-consuming chores to assistants, declining to produce a written opinion in a case, or producing only a short, unpublished opinion in the case—what (Levy 2013, 415) calls the “unseen backbone of appellate docket management” since about 1970. This perhaps illustrates just as well how a large caseload might serve to impair the policy making capacity of a court. Writing clear, well-reasoned judicial policy takes time and effort. Hastily prepared opinions, Levy (2013) argues (though without providing much empirical support for the notion), merely add to the body of precedents without improving the clarity of the law and perhaps serve to diminish the clarity of the law. Tom Clark and his various co-authors have developed a substantial literature on the question of docket control, but mostly this has remained at the theoretical level (Carrubba and Clark 2012; Clark and Staton 2013; Clark and Strauss 2010). For example, Clark and Strauss (2010) develop a formal model around the relationship between a court’s docket control and its performance, which they measure as the ability of the court to maximize the number of cases decided according to the preferences of the court. In their conception, this involves some mix of judicial policy making in “hard” cases and auditing of the lower courts in a sample of “easy” cases. The general thrust of this literature is that a court’s docket size should, a priori, determine the level of attention the court can devote to the problem of supervising lower courts. Clark and Staton (2013) refer to the “optimal” docket size to allow a court to engage in the distinct functions of (new) rule making and (prior) law application. New rule making versus prior law application is analogous to the “policy making model” and “error correction model” of a superior court’s relationship to inferior courts that I outlined in Chapter 2.

I argue that the Judges Act of 1925 shifted the court away from an error correction

function (“law application”) and toward a policy making (“rule making”) conception of its responsibilities vis-à-vis lower courts. Frankfurt and Landis (1928a, 1) refer to this as a “new dispensation” in the history of the Court. Court power over case selection was a revolutionary departure from the Court’s pre-1925 experience. One might surmise that the Court’s nature had completely changed. The assumption to be tested is that the nature of the Court’s function in relation to lower courts changed not only quantitatively in terms of the number of cases it reviewed, which has been well documented, but also qualitatively in terms of the kinds of things the justices were doing in their opinions.

Measuring the Clarity of a Judicial Opinion

Researchers have been measuring the clarity of judicial opinions with increasing sophistication (see, e.g., the review by Owens and Wedeking 2012). The enterprise of discerning opinion clarity has, with the assistance of computerized content analysis, come a long way since Johnson’s (1987) use of law student coders to determine whether an opinion is clear or not. Some recent studies worthy of brief mention illustrate the potential that linguistic software brings to our measurement of certain textual attributes, like clarity, of Court opinions.

Owens and Wohlfarth (2012a) equate an opinion’s clarity with its readability, and find that as the readability of a Court opinion increases, the opinion is more likely to be positively treated by even ideologically-distant subsequent Supreme Courts and lower courts. Using linguistic software, Owens and Wohlfarth apply an objective and replicable measure—the Coleman-Liau index. This index takes into account the number of polysyllabic words and the sentence length of a particular text, to determine the readability of a random sample of Supreme Court opinions from 1953 to 2004. In a separate study, Owens and Wohlfarth (2012b) evaluate the readability of Court opinions as a dependent variable. Using in this instance the Gunning-Fog

readability index, an index having inputs similar to those for Coleman-Liau, they conclude that the Court writes more readable opinions when it suspects non-compliance by an implementing court, in hopes that the public might recognize the lower court's non-compliance. They also find in this study that readability is a predictor of lower court compliance. Owens, Wedeking, and Wohlfarth (2013) use once more the Coleman-Liau index in finding that the Court writes less clear opinions when it suspects that its decision might be scrutinized by an ideologically hostile Congress. Corley and Wedeking (2014) use linguistic analysis to measure Court opinion certainty, and find that more certain language in opinions leads to more lower court compliance.

In this chapter, I intend to follow on this recent strand of literature by analyzing Court opinions according to certain linguistic attributes. I will split the concept of clarity into two dimensions for testing in this chapter. The first dimension is the clarity of the overall opinion—what is typically meant by the term “clarity” in the literature (Owens and Wohlfarth 2012). How easily can a reader comprehend an opinion? How advanced a reader must a person be to understand the opinion? Does that opinion author choose words, phrases, and concepts that easily convey the author's meaning? The second dimension is the clarity of the Court's intention to make policy—that is, how clear is it that the Court, in an opinion, is crafting rules applicable to future cases in lower courts? Is the Court doing this, or is it merely correcting errors committed by the lower court in the case or summarily disposing of frivolous claims?

Theory and Hypotheses

My theory is that the Judges Act of 1925 changed the way the Supreme Court carried out its responsibilities vis-à-vis lower courts in measurable ways. The Act visibly reduced the Court's workload by making most of the Court's docket discretionary. I theorize that this control over caseload made it more likely that the Court did three things that, as discussed, have been

linked in the literature to lower court compliance. First, it gave the Court the time to put thought into drafting clearer opinions. Second, it allowed the Court to select only exemplary cases with which to make policy for lower courts, enhancing policy clarity in terms of the restricted number of cases decided by the Court in a given policy area and by removing from consideration cases lacking a meritorious legal argument. Third, it caused the Court to conceive of itself as a policymaker to lower courts, not an error corrector, with demonstrable consequences to the language the Court employed in its opinions. I will attempt to test in this chapter the first and third of these theories. My hypotheses, therefore, are as follows:

Hypothesis 1: As the Court's docket control increases, Supreme Court opinions will more likely be clearer.

Hypothesis 2: As the Court's docket control increases, the Supreme Court will more likely use language in its opinions that is associated with policy making for lower courts.

Data, Methods, and Research Design

To test these hypotheses, I will use all of the constitutional decisions of the Supreme Court for the period beginning in January 1911 (which was partway through the October 1910 term) to December 1941 (partway through the October 1941 term). This period accounts for three full Chief Justiceships—White, Taft, and Hughes—and an almost equal number of terms before and after the statutory change in 1925. For the specifics of my retrieval of these cases, see the Appendix. The total number of such cases is 903, with 477 of them decided before October 1, 1925, and the remaining 426 of them decided after that date.³³ I chose to analyze only constitutional cases because of the commonplace expectation that the Court should render an authoritative interpretation of the Constitution for subordinate courts. One would expect that the 1925 docket relief would allow the Court to redouble its efforts to promulgate clear policy in such cases. According to Sternberg (2008), the Court's problem with its docket before 1925 was

not a lack of constitutional cases. In fact, as the numbers in the sample would indicate, the number of constitutional decisions rendered per term did not change very much after 1925. Rather, the problem was the proportion of frivolous constitutional claims that the Court had to address prior to the reform. According to Sternberg (2008), before 1925 the Court had to entertain repeated challenges to Prohibition, to U.S. domestic policy during World War I, and to the compulsory military draft law.

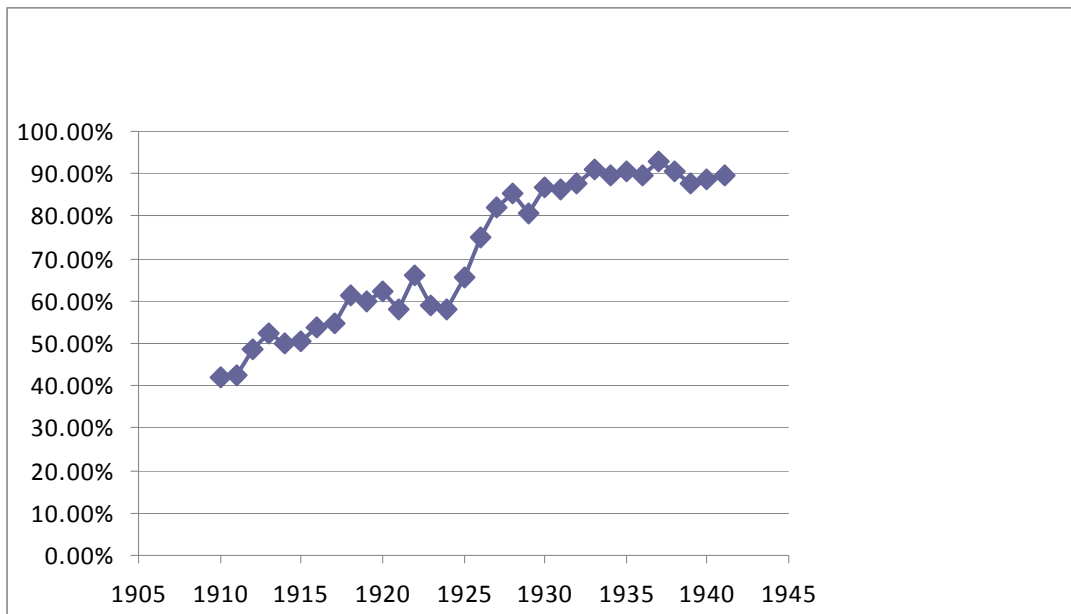
Independent and Control Variables

The independent variable of interest in this study will be represented by a measure of the Court's docket control.³⁴ This indicator best represents the effect of the Judges Act, because the Act was designed to give the Court more power to decline the cases presented to it for review. A case presented to the Court for its review is "docketed" by the Court Clerk even if the Court ultimately denies certiorari in the case under Rule 12 of the Supreme Court (Rules of the Supreme Court 7). But for reasons that I explored in Chapter 2, it is misleading simply to use the raw number of the cases on the docket of the Court as a measure of the Court's workload. In that time period and even now the Court has very little control over the raw number of cases presented to it in which a party requests review (yet all such cases are given a docket number by the Supreme Court Clerk). Instead, the relevant variable would represent the extent of Court *control* over the cases presented to it; control, that is, over cases placed on the docket.

To construct the variable *Docket Control*, I assign a number to each Court term that represents the percentage of the docketed cases that are disposed of by the Court (the disposed-to-docketed ratio) in that term. I then apply the term's number to all of the opinions in the sample that were drafted in that term. In the October 1915 term, for example, that percentage was 50.4%. All opinions from 1915 have been assigned this percentage. For the 1930 term, however,

that percentage was 86.6%. Figure 5.1 reports the level of docket control for all the terms from 1910 to 1941. The trendline provides a strong validation that docket control did, in fact, improve after 1925. By 1928, the Court was able to dispose of almost 81% of its docket, up from the 59% of just four years before. In those intervening four years, docket control improved each year. From 1928 to the end of the period examined, docket control exceeded 80% and, in some years, exceeded 90%. This disposed-to-docketed percentage, I expect, will be positively correlated to the two dependent variables (*Opinion Clarity*; *Opinion Policy Making Focus*, both discussed below).

Figure 5.1. Percentage of the Court's Docket Disposed of Per Term, 1910-1941



Docket control, further, cannot be measured according to the number of written opinions issued by the Court in a term. Docket control could very easily bear an inverse relationship to the number of opinions written by the Court in a given term. For illustrative purposes, I provide a measure of the absolute number of written opinions issued in a given term.³⁵ Figure 5.2 suggests the relationship between docket control and the number of opinions per term. Just as the Court became able to dispose of a larger share of its docket from term to term by use of denials of

certiorari after 1925, the number of written opinions declined after 1925. The trendlines of Figure 5.2 below show a wide gulf, after 1925, between the cases officially disposed of by the Court and the number of written opinions of the Court. Contrast that to the pre-1925 period, when the number of written opinions more closely tracks the number of cases disposed. Since denials of certiorari could only be made in a small subset of pre-1925 cases, the only way for the Court to dispose of the average case—particularly the average constitutional case—was actually to decide it.

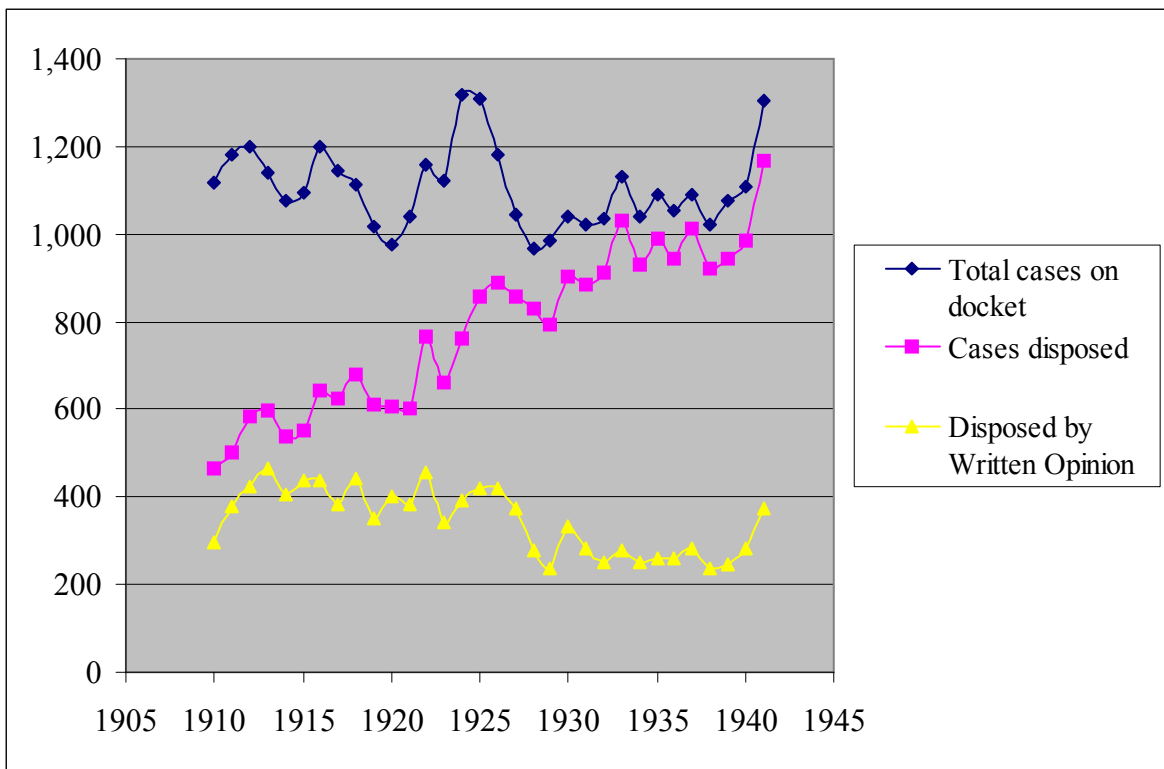


Figure 5.2. Docket Control and Court Opinions Issued Per Term, 1910-1941

Dependent Variables

To measure clarity as a dependent variable for the purposes of Hypothesis 1, I partially borrow from Owens, Wedeking, and Wolfarth (2012) by measuring the clarity of an opinion from the perspective of an opinion’s readability. Each opinion in the sample was assigned three

common readability scores. All three scores estimate—as a continuous, not an ordinal variable—the educational grade level required of a reader in order that the reader might understand a piece of text. The first score is the Coleman-Liau index, which is the index used by Owens, Wedeking, and Wolfarth (2012).³⁶ The second measure, which has also been used by Owens and Wohlfarth (2011), is the Gunning Fog readability score.³⁷ The third is the Automated Readability Index.³⁸ All three of these measures make use of virtually the same information about a piece of text: the average word length and the average sentence length of the text. They differ on the value of the fixed coefficients in their respective formulas. I combined each opinion's three scores into one variable called *Opinion Readability*, with a *lower* numeric value associated with greater readability. The average opinion readability in the sample is 35.86, and the standard deviation from that mean is 7.55. If divided by the three indices of readability, a rounded score of 35.86 corresponds approximately to the 12th grade reading level.

As a measure of opinion policy making intention, and to test Hypothesis 2, I will incorporate into the study other text attributes that are available through LIWC analysis. I expect that judicial policy making takes the form of more proactive, not reactive language. LIWC allows the user to derive from a piece of text the proportion of words in the text that focus on past, present, and future events, respectively. I have generated these proportions for each of the 903 opinions in the sample. I suspect that as the Court shifts away from a primary purpose of error correction, it will employ less language in its opinions that focuses on past events. The error correction or law application model would have the Court place intense focus on the prior behavior of the lower court in a given case. The policy making model, in force after 1925, would instead shift the Court's attention to the present state of the law, the future applicability of any

new policy, and the prospective behavior of lower courts. The difference between opinion focus on past events and present and future events will widen as docket control increases.

Table 5.1 below reports that average values of these variables, among other items of information. The average level of docket control in the sample is .69. That is, for the average opinion, the Court disposed of 69% of the docketed cases in that opinion’s term. The average readability of an opinion is 35.86. Since readability is a composite of three measures, we can state that each opinion averages almost to a level 12 per measure—the 12th grade reading level. The average focus of each opinion on past events is 2.83. This is the proportion of words per opinion that refer to something that happened in the past.

Table 5.1. Summary of Each Variable

Variable	Mean	Std. Dev.	Min	Max
Docket Control	.69	.172	.42	.93
Opinion Length (in words)	2962.44	2261.32	373	23465
Readability	35.86	7.55	18.13	76.07
Past Focus	2.83	1.00	.65	6.6
Present Focus	2.93	.798	.8	6.34
Future Focus	.984	.383	0	2.43
Difference between Present + Future Focus and Past Focus	1.08	1.63	-4.39	5.84

The validity of readability and of past, present, and future orientation of an opinion’s language as a measure of clarity may be seen in seven case examples. These cases are from different periods in the post-1925 history of the Court. I have chosen these opinions because I have determined that in them the Court demonstrated a specific intention to make policy for lower courts. These decisions instruct lower courts on how to perform a particular legal duty—

lower courts are necessarily the target audience and implementers of these cases. By applying measures of readability and language orientation to them, I show how these deliberately policy-focused decisions compare to the average case in the sample. One would expect these to be more readable and, on balance, more oriented toward the present and future than the past. Referring to the results shown in Table 5.2, and comparing them to the averages reported in 5.1 above, all of these decisions except for *Brown v. Board of Education II* (1955) and *Younger v. Harris* (1971) are more readable than the average constitutional case in the sample. *Brown II* is only 0.25 above the average readability.

Four of the seven opinions are more readable than the average constitutional opinion in the post-1925 period (which is 34.02), with *Allen v. Wright* (1984) a mere 0.68 above the average.

All seven of the opinions focus less on past events than did the average constitutional case from 1910 to 1941. In fact, all seven of them are below the average post-1925 opinion focus on past events (which is 2.63). Four of the seven employ more than the average present-oriented language, and four are more future-oriented than the average constitutional case. Five of the seven achieve an above-average differential between past focus and present plus future focus, while a sixth, *Mapp* (1961), is a mere 0.07 below the average.

It appears that when the Court is purposely attempting to make policy for lower courts, it will write an opinion that is of above-average readability. The Court will also focus less than it normally would on the past in its opinion, and more on the present and future.

Table 5.2. Readability and Language Focus of Selected Cases

Case	Holding	Readability	Past Focus	Present	Future	Difference between Past and Present + Future
<i>Erie v. Tompkins</i> (1938)	Requires federal courts to apply state common law in diversity cases	17.65	2.59	2.44	0.59	0.44
<i>Brown v. Board of Education II</i> (1955)	Requires federal courts to remedy segregation “with all deliberate speed”	36.11	1.07	3.53	2.35	4.81
<i>Mapp v. Ohio</i> (1961)	Requires courts to exclude illegally seized evidence	32.19	2.46	2.83	0.64	1.01
<i>Miranda v. Arizona</i> (1966)	Requires courts to exclude coerced confessions	29.72	2.56	4.1	1.19	2.73
<i>Younger v. Harris</i> (1971)	Requires federal courts to abstain from interfering with state criminal prosecutions	43.62	2.25	3.43	1.04	2.22
<i>Allen v. Wright</i> (1984)	Specifies requirements for a party to have standing to sue in federal court	34.70	1.6	3.02	0.65	2.07
<i>BMW v. Gore</i> (1996)	Specifies factors for a court to balance in	25.59	1.86	2.52	1.02	1.68

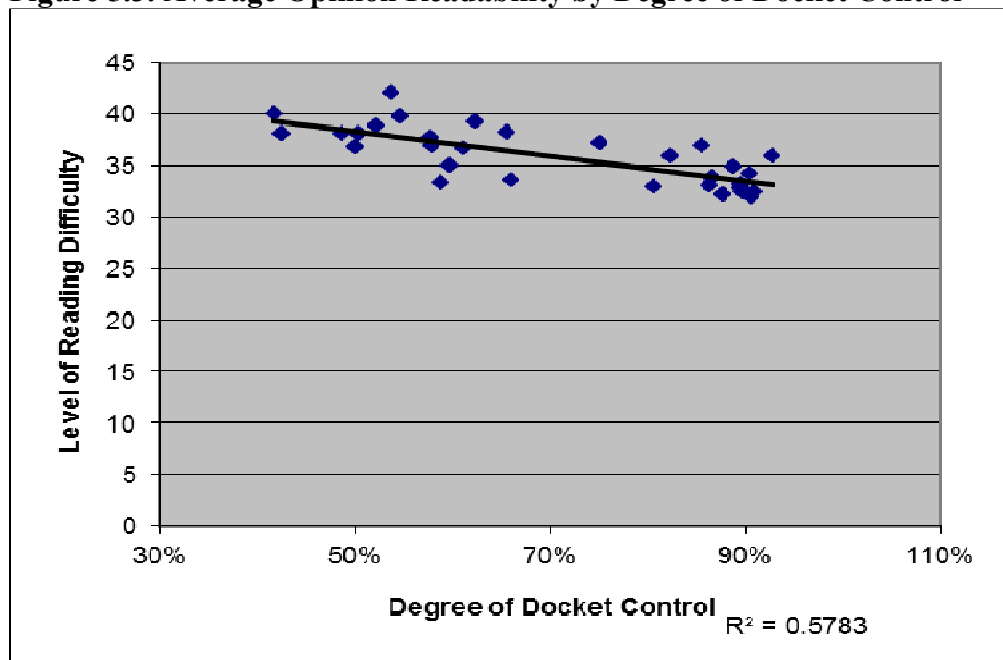
	awarding punitive damages					
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Results

Hypothesis 1: Clarity of the Court's Opinions

The scatter plot below, Figure 5.3, indicates that cases heard in terms in which the Court disposed of a large proportion of its docket were more readable than the opinions issued in terms in which the Court failed to clear its docket. Indeed, the trend line suggests a strong relationship between the two variables: docket control and opinion readability. (The y -axis should be interpreted so that a higher number corresponds to a higher level of reading difficulty.).

Figure 5.3. Average Opinion Readability by Degree of Docket Control



As indicated above, the post-1925 period allowed for a high disposal rate because of the Court's certiorari power over most types of cases. This ability to decline review of most cases, in turn, allowed the Court the time it needed to craft more readable opinions in the cases it actually decided. The improvement in readability from the lowest-control Court terms to the highest-

control Court terms is the approximate equivalent of one standard deviation from the average readability of the cases in the sample. The implication is clear that the degree of docket control of the Court is closely correlated with the Court's ability to craft opinions that can be read, and comprehended, by a broader audience. If the Court can quickly dispose of unimportant cases, it can reserve its energies for the more careful drafting of opinions in cases deemed more worthy of its consideration.

Given the tight connection between an increase in docket control and time, is the trend in favor of enhanced Supreme Court opinion readability merely an artifact of a trend in American society on the greater readability of texts in the early Twentieth Century? To the extent that this question has been examined, there is reason to think not. Fowler, Jr. and Smith (1979), in a review of newspaper articles from 1904, 1933, and 1965, found no improvement in readability for newspaper articles over time. They conclude that “[i]n both 1904 and 1965 the newspaper was somewhat easier to read than in 1933....” (7). This is indicative of a fluctuation between more or less readability, not a straight-line trend. According to the same study, magazines from the same three periods did not improve in readability, either—they stayed at the 10th grade reading level.

Hypothesis 2: Clarity of the Court's Policy making Intention

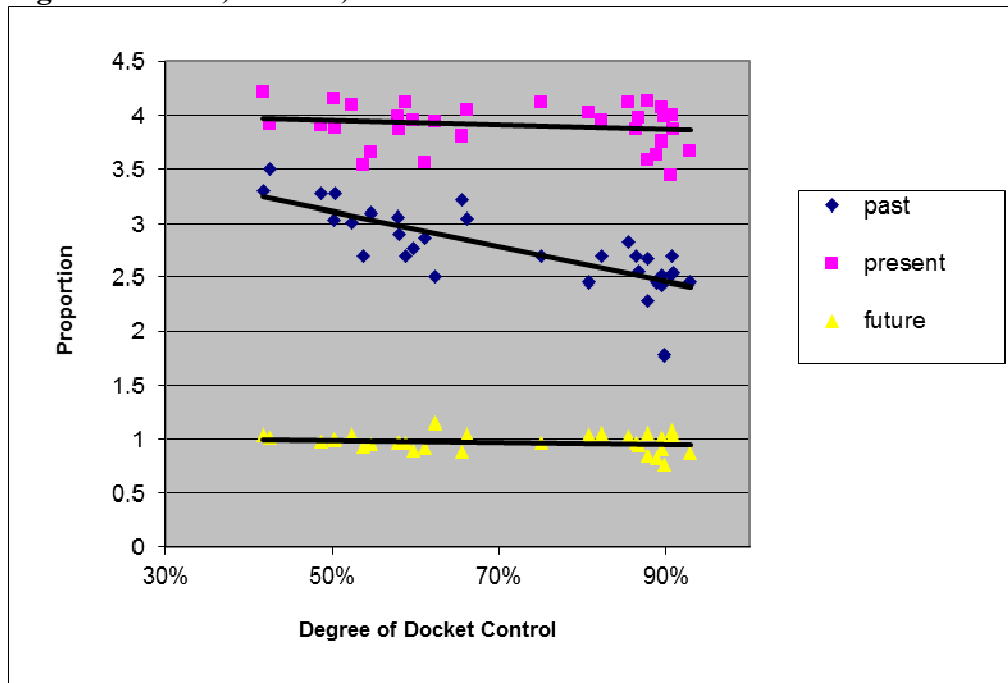
Figure 5.4 illustrates the relationship between the Court's docket control and the focus of its opinion language. I use as the measure of the Court's policy making intention the degree to which the Court refers to past events relative to present and future events. I report below the average opinion-language focus for each tense across levels of docket control.

The most striking finding in connection with the focus of the Court's language is that in

the low docket control terms the Court appears to have been focused on discussion of past events at a much greater rate than it did in the higher control terms. Future and present-oriented language use remains fairly constant across levels of docket control.

It is perhaps understandable that the focus of much of the Court's discussion is oriented toward past events. The facts of every case, obviously, occur prior in time to the Court's decision, necessitating much use of the past tense in an opinion. What is intriguing and suggestive is that an elevated focus on past case facts should hold true for the entire period. Indeed, it is hardly possible to author an opinion on the merits—regardless of the Court's intentions—without providing some account of the historical events of the case. There is no reason to suspect that the Court became less focused on reciting case facts as is shifted from the

Figure 5.4. Past, Present, and Future Orientation and Docket Control

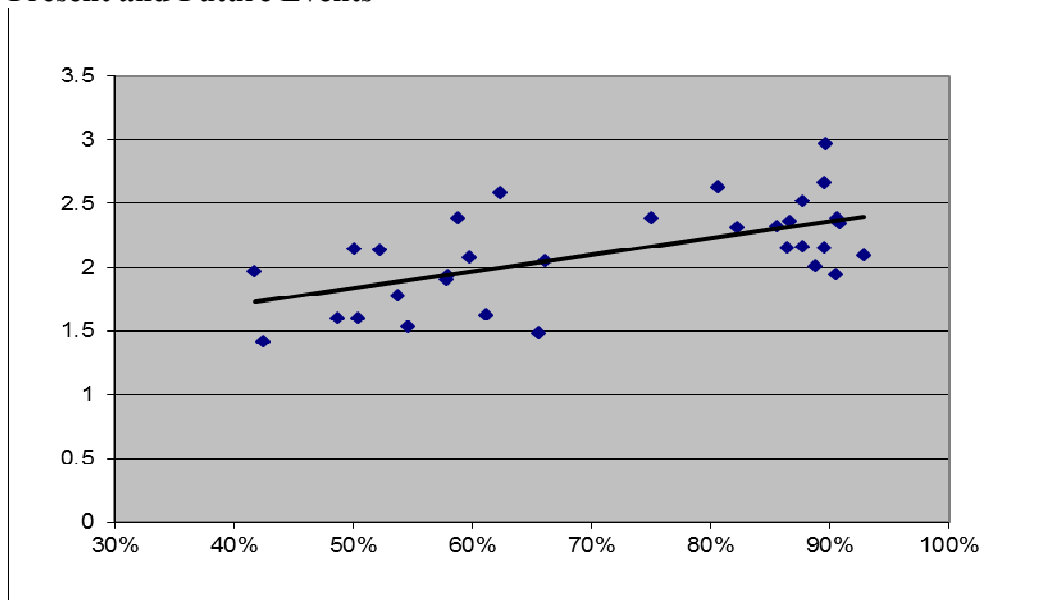


error correction function to one of policy making for lower courts. A recitation of facts is a fixture of most every type of opinion. However, as the trendline for the scatter plot of Figure 5.4 shows, the improvement in Court docket control is correlated with a significant decline in past-

focused language in Court opinions (the trendline's R-squared is .061). My explanation for this decline in the Court's focus on the past is that the Court became less focused on discussion of the behavior of the lower court in each case as it shifted to the discretionary docket. There *is* reason to suspect that the Court, in rendering new policy for lower courts, would focus less on the past behavior of the lower court in a given case. After all, a lower court could have very faithfully applied the existing policy in a given case, but the Supreme Court may have decided to overrule that policy—rendering meaningless any extended, critical discussion about the lower court's behavior in the case. The lower court would have made no error in need of correction.

The discussion of present and future events was more or less constant across all levels of docket control. At all levels of docket control, future events received the least amount of treatment by the Court, and present events the most. Figure 5.5 maps the evolution, across levels of docket control, in the difference between discussion of past events and the discussion of present *plus* future events. It is clear that as the Court reached higher levels of docket control the gap widened between its use of past tense and its use of present plus future tense.

Figure 5.5. Difference between Discussion of Past Events and Discussion of Present and Future Events



Multivariate Regression Models

In order to control for other factors other than docket control that might have influenced the justices to craft readable, less past-focused decisions, I ran an OLS regression for three models. The dependent variables for the first two models are 1) opinion readability, and 2) opinion focus on present and future events minus focus on past events (both are discussed above and represented in Figures 5.3 and 5.5, respectively). I add a third model that regresses on total opinion length (discussed below), to test for any relationship between docket control and opinion length. There is reason to think that multiple factors might be at work in dictating the clarity and policy focus of the Court's majority opinions from 1910 to 1941. Borrowing, in part, from the Black and Spriggs (2008) model of Court opinion length, these factors are:

Docket Control. This variable is the percentage of the Court's docket that the Court was able to dispose of (whether through written opinion, denial of certiorari, summary affirmance, or other means) in a given opinion's term. A higher percentage is indicative of greater docket control. When the Court received its expanded certiorari power in 1925, it was able to dispose of more cases each term by denying certiorari. As shown above, this variable is correlated with time and should predict greater readability and less use of past tense in opinions.

Law Clerk Use. Law clerks can assist a justice in making an opinion clearer, through their role as editor of opinions (Black and Spriggs 2008; Peppers 2006). In 1919, the justices were given funding by Congress for one clerk (Peppers 2006). However, many justices before 1919 had clerks that they had paid using their own resources. According to Black and Spriggs (2008), clerks were used from 1920 to 1953 mainly for editorial assistance, not for opinion drafting. Some justices, like Taft and Brandeis, tended to use multiple clerks at once. I have found that there is enough variation in law clerk use between 1910 to 1941 to code each case for how many

clerks a majority opinion's author had assisting him in the opinion's term, using the compilation of Peppers (2006).

Size of Majority Coalition. I include in the regression a variable indicating how many justices joined the Court's majority opinion. While unanimous decisions might be associated with clarity, as there are no concurrences and dissents for the reader to sift through, a larger coalition could suggest that more compromise was necessary in the case. This would tend to diminish the clarity *of the majority opinion itself*. This notion has some empirical support. Using a measure of opinion complexity, Owens and Wedeking (2011) find that minimum winning coalitions craft the least complex opinions. But compare this to Black and Spriggs (2008), who argue that more compromise—and less decisive language—is necessary in smaller-majority cases to preserve a slim winning coalition, making such opinions longer. Each case in the sample is coded for the size of its majority coalition (five to nine).

Unanimous Opinion. I further follow Black and Spriggs (2008) by including a dummy measure of whether an opinion commanded unanimous support among the justices (1) or not (0).

Opinion Length. Black and Spriggs (2008), in the most comprehensive and scholarly treatment of Court opinion length to date, argue that longer opinions reduce legal clarity and, for this reason, are harder for lower courts to implement. Black and Spriggs (2008) show a steady increase in length during the period of this chapter's study. I expect that as the justices were freed from the rigors of deciding frivolous cases they spent more time writing opinions, which could have meant longer opinions. However, it would be interesting to see if variation in opinion length accounts for any variation in clarity as measured by the two dependent variables. It could be that any improvements in clarity are simply explained by the use of longer opinions over time. Each case in the sample is coded for its word count.

Freshman Author. Black and Spriggs (2008) include in their model of opinion length a variable indicating whether an opinion’s author is new to the Court or not. Following the literature on this point, they code for whether an author is in his first two terms (1) or not (0). The theory behind this variable is that “freshman” justices work harder to establish themselves with their more senior colleagues. The amount of effort put into a single opinion is greater for freshman-authored opinions. This leads to systematic differences between freshman-authored opinions and all others, and suggests that freshmen justices would work harder to write authoritatively and with great precision.

Judges Act Author. Chief Justice Taft wrote the Act, along with a committee he formed that included his fellow justices Day, Van Devanter, and McReynolds. All of these justices drafted opinions that are in the sample. In an effort to control for any systematic bias that these justices might have had in favor of a more policy-focused opinions, I introduce a dummy variable assigned to each opinion indicating if one of these four Justices drafted an opinion (1) or not (0).

Table 5.3. Ordinary Least Squares Regression Results

Variable Name	Model 1—Level of Reading Difficulty	Model 2—Focus on Pres. + Fut. - Past	Model 3—Opinion Length
Docket Control	-11.41 (1.59)***	0.935 (.352)***	1135.105 (476.32)**
Majority Coalition Size	-1.100 (8.11)	-0.141 (.187)	-295.64 (251.33)
Opinion Length	0.000569 (.0001)***	0.0000358 (.000024)	---
Clerk Use	-1.172 (.394)***	0.072 (.090)	-299.66 (121.89)**
Freshman Author	-1.36 (.629)***	-0.0648 (.144)	95.8 (195.11)
Judges Act Author	1.83 (.543)***	-0.127 (.124)	-246.04 (168.3)
Unanimous Opinion	2.13 (1.29)*	-0.164 (.295)	-963.27 (399.36)**
Constant	53.97 (6.39)***	1.49 (1.462)	6745.14 (1967.61)***

p<.01=***

p<.05=**

p<.10=*

Number of obs.=894 for all three models

PR > F=0.000 for all three models

Adjusted R-Squared: 0.13 (Model 1); 0.0324 (Model 2); 0.06 (Model 3)

The OLS regression results reported in Table 5.2 above confirm the significance of docket control on Court constitutional opinions. In the first column, the variable *Docket Control* is substantially and significantly correlated with an improvement in the readability of a Court opinion. As the extent of the Court's control improved, the reading difficulty level of opinions decreased. Also, the number of clerks assisting the opinion writer had a positive effect on opinion readability (recall that readability improves as the measure of readability decreases in value). An increase in clerk assistance to a justice could be considered an indirect effect of an increase in docket control (and of the Judges Act), as review of petitions for certiorari was a clerk responsibility in this period (Black and Spriggs 2008; Peppers 2006; Rehnquist 2004). A justice may have hired additional clerks to screen petitions after 1925, with the incidental effect of having more staff available to review the justice's opinions. In fact, I calculated that in the

pre-1926 period, each opinion averaged the assistance of 0.55 clerks. In the period of 1926 to 1941, each opinion averaged the assistance of 0.85 clerks. This difference in the likelihood of clerk involvement is significant at the 99% confidence level, and could certainly be explained by hiring patterns in the wake of the Judges Act, but this inference needs further examination.³⁹ For example, there is no way to know (outside of detailed archival analysis) the extent to which each justice used clerks in opinion drafting, and whether clerks actually helped on specific cases.

Also as predicted, new justices to the Court drafted more readable opinions than their more established colleagues, but, contrary to expectation, the very justices who drafted the Judges Act did not show a tendency to write clearer opinions.

As for Model 2, *Docket Control* is the only variable that is significantly predictive of an increase in future and present-oriented language relative to past tense language. The coefficient for *Docket Control* is significant and in the positive direction. This is consistent with the strong trend depicted in Figures 5.4 and 5.5 above, and, for reasons stated in connection with that finding, allows for the interpretation that the Court became less focused on correcting the errors in a lower court's opinion as it took control of its docket through denials of certiorari. Interestingly, there is no clerk effect for this dependent variable. I surmise that this is because clerk involvement in the era was editorial in nature only—clerks simply did not have control over opinion content in that day to the extent that they do now. Clerks could edit prose to make it more readable, and perhaps suggest stylistic changes bearing on opinion complexity, but a clerk would not change the justice's overall focus in the case.

Lastly, Model 3 regresses on opinion length. As the justices got a better handle on their docket after 1925, they began to write longer opinions. While I did not hypothesize about this relationship one way or another, the finding raises important points to consider. The policy

making model places supreme importance on the written opinion as a communicative vehicle. The opinion is drafted with an implementing audience in mind. It is consistent with the overall theory of this chapter that the Court, after achieving control over whether to hear specific cases or not, would prioritize its communications to lower courts in the cases that are selected. This included the painstaking work of making its opinions more readable—not an easy task for attorneys who have been trained in the dense language of the law. But it also may have involved making certain that the essential details of the Court’s policy were to be found in each opinion, which could involve writing longer opinions.

Conclusion

The Judges Act of 1925 constituted an enduring shift toward greater Supreme Court power in the American legal system. A major effect of the Judges Act was that the Court became increasingly able to dispose of the cases on its docket through denials of certiorari. In fact, Hartnett (2000) argues that the Court took the expansion of certiorari given to it in 1925 and, in the years following, began to exert a practical discretion over *all* types of cases presented to it. The Court, furthermore, found justification in the Judges Act simply to address one legal question in a case, and not review the entire case itself. This is indeed a high degree of discretion.

Just about a decade after the implementation of the Act, in the heat of the controversy over President Franklin D. Roosevelt’s Court-packing plan, Chief Justice Hughes could report to Congress:

“The Supreme Court is fully abreast of its work. When we rose on March 15th (for the present recess) we had heard argument in cases in which certiorari had been granted only four weeks before—February 15th...there is no congestion of cases upon our calendar. This gratifying condition has obtained for several years. We have been able for several

Terms to adjourn after disposing of all cases which are ready to be heard” (quoted in Rehnquist 2004, 128).

When Hughes had served on the White Court as an Associate Justice for six years (1910 to 1916), he must have come to learn of the *ungratifying* condition arising from the work demands that came with a low degree of docket control. The cautious Chief Justice White—despite the entreaties of his Associates—refused to push for a reform in the mandatory docket of the Court. White feared the unintended consequences of Congressional tinkering with the Court’s docket (Sternberg 2008).

There is a strong connection between the Act and an enduring improvement in Court docket control. This heightened docket control meant that Supreme Court opinions became clearer insofar as clarity can be associated with readability. This trend toward readability does not appear to mirror a general societal trend. On the policy making-intention front, the Court seems to have reduced its focus on language associated with past events (past tense verbs) relative to other tenses as its docket control improved. This is consistent with the structure of the seven Court opinions listed in Table 5.2 that few would deny gave explicit policy instructions to lower courts.

Aside from this evidence of the effect of the Judges Act on the Court’s behavior, this chapter has offered an example of how LIWC may be incorporated into a systematic study of judicial opinions. My hope is that scholars will develop what has been done in this chapter into something better. The ability of the user of LIWC to define concepts according to his or her own word associations will allow for increasingly sophisticated testing of Court policy making for lower courts, far above the rudimentary—yet hopefully in some way pioneering—initial efforts of this chapter.

CHAPTER 6

Supreme Court Policy Implementation Since 1925

The Judges Act completed the trifecta of major reforms of the federal judicial structure bequeathed by the Founding generation in the Judiciary Act of 1789. It added to the foundation laid in earlier reforms, all of which improved the Act of 1789 in the direction of more Supreme Court authority.

In 1935, for the first time in its long history, the Court had its own facilities, a headquarters befitting a co-equal branch of government. As if to celebrate its first full decade of

self-conscious crafting of constitutional policy for a hierarchical system of courts, the Court moved into a marble palace—the one used by the Court today. The justices finally had a place of their own to do their work. Chief Justice Taft, just as he had for the Judges Bill, lobbied hard for the funding for this building. As Chief Justice Rehnquist (2004) explains in his history of the Court, before the erection of the building, the justices mostly worked from home. They heard their cases in chambers allowed to them in the Capitol Building, which did not afford them much office space. When the justices spent eight to nine months of the year in their circuits, prior to 1891, they did their Supreme Court work in their temporary lodgings in Washington (Brown 2012). As if to signify how far the Court had come since 1789, Congress, in 1935, gave the Court the physical architecture in which to do its work. It was as though this edifice was the visual representation of the legal architecture Congress had erstwhile given the Court with which to have its decisions implemented.

This chapter looks at what, if any, consequences follow from the findings developed in Chapters 3 through 5 for the ability of the post-1925 Supreme Court to have its decisions implemented by lower courts. Did the improvements in the ability of the Supreme Court to have its decisions implemented in lower courts after each statutory change endure? Do they form a part of any explanation of Court power since 1925? Should they be considered in any recounting of the Court's policy triumphs of the 20th Century? The argument of this conclusion is a resounding yes. For Supreme Court decisions to be effective—that is, to have a decisive effect in American law—they must be implemented faithfully by lower courts. The Court of the 20th Century certainly staked out a claim as paramount expositor of the Constitution—not only over lower courts, but also as against the other branches of the federal government (*Cooper v. Aaron* 1958). It dared to venture into contentious areas of social policy, and to upset the inherited

understanding of the Constitution in just about every respect.

In Chapter 3, it was shown that the faithful implementation of Nineteenth Century Supreme Court Commerce Clause doctrine was more likely to occur in federal forums than in state forums. In Chapter 4, it was shown that the adoption of a Supreme Court policy in diversity of citizenship cases by an intermediate federal court made it more likely that a federal district court would apply that policy. And in Chapter 5, it was shown that as Supreme Court docket control increased it was more likely that the Court would craft opinions in a way that was mindful of their prospective implementation by lower courts. Judiciary Acts have greased the wheel of lower court implementation of Supreme Court decisions.

To round out this developmental account of lower court compliance, this chapter will attempt a broad survey of Court policy making since 1925. The focus will not be on the policies per se, but will instead be on research findings about the extent of lower court compliance with major Supreme Court policies—particularly those policies that, due to their controversial nature, might have challenged in some major way lower court allegiance to Court preferences. This is in an attempt to bring lower courts into an otherwise fairly familiar account of Court constitutional policy making. I will further engage in this survey from the perspective of how features of the Judiciary Acts examined in earlier chapters might be implicated in lower court compliance.

Court Policy in the Aftermath of the Judges Act

Any discussion of the Court even in the immediate aftermath of 1925 will quickly lead to a few conclusions, all of which suggest that the Court had established itself to be a powerful institution in American government and a decisive force in constitutional policy making. In the same decade as the Judges Act, the Court began the process of incorporation—of applying, in deliberate fashion, select provisions of the Bill of Rights to the states by operation of the

Fourteenth Amendment's Due Process Clause (*Gitlow v. New York* 1925; *Near v. Minnesota* 1931). The relief provided to the Court through case selection opened up docket space for Court judicial policy making of the highest order: limiting state power through the innovative application of federal constitutional guarantees. Frivolous constitutional claims—against Prohibition, against the military draft, against insular policy—no longer percolated up through the federal hierarchy and onto the Court's agenda.

Once settled into its new home, the Court expended its energies beginning in the 1930s in favor of two major policies, both of which upset longstanding Court interpretation of the Constitution, and both of which favored national uniformity against the forces of localism. The Court signaled, in the famed Footnote Four of *United States v. Carolene Products* (1938), that it would henceforth apply “more searching judicial inquiry” into cases involving the specific guarantees of the Bill of Rights, the rights in the political process, and the rights of religious, racial, and other “discrete and insular minorities” who lack political power. The Court's dictum in *Carolene Products* would later transform American constitutional law, by evolving into doctrine specifying the levels of heightened scrutiny to be applied to the use of racial, national origin, and other invidious classifications in law. Kilwein and Brisbin (1997) observe that state courts adopted the Supreme Court's heightened scrutiny analysis for a particular legislative classification when that requirement was adequately communicated and reinforced by the Court. If the Court had reiterated, in a second or more opinion, an intensified scrutiny doctrine within the preceding five-year period, Kilweid and Brisbin find, a state court was more likely to adopt that doctrine in a compliant manner rather than diverge from it.

Secondly, in the 1930s, the Court rejected economic “substantive due process”—an interpretation of the Due Process Clause of the Fourteenth Amendment, exemplified by *Lochner*

v. *New York* (1905) and *Adkins v. Children's Hospital* (1923), designed to protect mainly business interests against “protective” state legislation. The Court eventually came to the conclusion that there were no valid constitutional defenses against state regulation of prospective economic transactions such as employee wages and hours (*Nebbia v. New York* 1934; *West Coast Hotel v. Parrish* 1937). A Judiciary Act passed by Congress in 1914 had given the Court more supervisory power over states in this regard.⁴⁰ As was discussed in Chapter 2 above, Section 25 of the Judiciary Act of 1789 had originally only given the Court jurisdiction over constitutional cases in which a state law was *upheld* against a constitutional challenge. In response to a New York Court of Appeals decision in *Ives v. South Buffalo Railway Company* (1911) that had invalidated the state’s workers’ compensation law using substantive due process, Congress amended Section 25 to allow Supreme Court review of all state court constitutional decisions (Frankfurter and Landis 1928b; Mazzone 2010). In a recent study of state court responses to Supreme Court decisions on the constitutionality of state wages and hours regulation from 1900 to 1940, Hoekstra (2005) finds that state courts generally set aside their policy preferences in order to follow the movement of Supreme Court doctrine (324-325). Thus, when the Court eventually gave states more regulatory latitude, using its 1914 power over state courts to enforce pro-regulatory constitutional doctrine, the state courts followed suit. This is an impressive track record of lower court compliance because, as McCloskey (1964) notes, the Court used substantive due process very selectively and unpredictably from 1900 to 1937.⁴¹

We see in the Judiciary Act of 1914 another instance of the statutory foundation of lower court compliance. Though not reconstitutive of the federal judicial hierarchy to the level of the legislation examined in preceding chapters (all of which addressed longstanding structural problems in the judicial hierarchy), the Act nonetheless furthered judicial nationalism and

Supreme Court power. It diminished the power of state courts to use the federal Constitution to prohibit state regulations in ways not supported by the Supreme Court. The problem had hitherto been that state courts failed to apply the Court's constitutional doctrine to invalidate state laws when appropriate. An expansive interpretation of federal constitutional rights by state courts was therefore a relatively new problem. The Judiciary Act of 1914 is consistent with this dissertation's thesis in that it furthered the uniformity purpose behind the Constitution's provision of *one* Supreme Court atop the judicial hierarchy. It enhanced Supreme Court power over state courts, by modifying the target audience component of implementation. As a result of the Act, state courts had to be attentive to *pro-state* Court doctrines in a way that had not been necessary before. Certain types of laws could not, logically, violate the U.S. Constitution in one state but not in another state, depending on the different proclivities of the states' highest courts. The Court must decide on one interpretation of the Constitution that has nationwide applicability.

In a third evolution of Court doctrine, and after initial, well-recognized reluctance, the Court provided constitutional sanction for the activist federal government of the New Deal period and beyond. The Court enabled what one may refer to as the three-legged stool of federal activism: Congressional power to delegate rulemaking authority to administrative agencies so long as an "intelligible principle" guided the agency's discretion (*J.W. Hampton, Jr. & Co. v. United States* 1928), an extremely expansive if not unlimited definition of Congressional power under the Commerce Clause (*Wickard v. Filburn* 1942), and the authorization of federal taxing and spending for any purpose (*Steward Machine Co. v. Davis* 1937). Such a broad interpretation of national power raised the specter of state court non-compliance in ways reminiscent of Justice Benning's defiance of the pro-national doctrine of the Marshall Court (see Chapter 3). The state and federal cases examined in Chapter 3, however, usually did not involve the question of

whether Congress had the power to enact a certain law; rather, they focused on state police regulations that arguably impinged upon interstate commerce. However, given the findings of that chapter, it is not inconceivable that implementation of the New Deal Court's pro-national doctrines followed a similar pattern.

While I cannot locate a specific study on lower court reactions to the Court's 1937 willingness to abandon precedent in order to support New Deal legislation, Benesh and Reddick (2002) find that lower court compliance is less likely when the Court overturns recent precedent (545). They also find that high-salience overrulings—such as would certainly characterize, for example, *National Labor Relations Board v. Jones & Laughlin Steel Co.* (1937) and the other New Deal-enabling cases of 1937—do not necessarily engender more compliance than regular alterations of precedent. This study would suggest that lower courts responded slowly to the Court's new interpretation of Congressional power under the Commerce Clause.

Donald Songer, in a 1987 study, sought to address a deficit in the literature that resulted from a lack of interest in the question of lower court compliance with the Court's economic decisions. He finds that for the period of 1947 to 1977 the Courts of Appeals were responsive to the ideological ebbs and flows of Court labor and antitrust doctrine. Using as a test of compliance whether the decisional trends in the lower courts tended to move in the same ideological direction as the Supreme Court, Songer reports substantial lower court compliance (1987, 835). Even Republican judges tended to move in a liberal direction when Court policy dictated it. This has important implications for the communication of Court decisions from the Courts of Appeals to the district courts.

Warren Court I: Equal Protection

After a relatively sleepy interlude of Court history during the Chief Justiceships of Stone

(1941-46) and Vinson (1946-53), where the doctrinal achievements of the New Deal Court were consolidated and the “modern Constitution” was born (Wiecek 2006), the Warren Court (1953-69) expended judicial power on behalf of civil rights and desegregation for racial minorities. More than any other, Warren Court desegregation policy tested the outer limits of Court power over subordinate courts. The core, school desegregation holding of *Brown v. Board of Education I* (1954) is well known, along with the requirement that lower courts remedy segregation in public education with “all deliberate speed” in *Brown v. Board of Education II* (1955). But less remembered are the desegregation decisions outside of the public education context, which expanded the holding of *Brown* to contexts beyond the scope of the schooling-focused reasoning of *Brown*. The desegregation decisions presented to the Court the greatest implementation challenge it has ever faced. By its heavy reliance on desegregation remedies crafted in inferior federal courts, *Brown* inspired the concept of lower court compliance—or in this case, resistance—as a matter of scholarly inquiry among political scientists and other courts observers (Murphy 1959; Beatty 1972; Haas 1982). According to Haas (1982), “[b]efore the 1950s, most constitutional law casebooks concentrated almost entirely on the decisions of the Supreme Court, virtually ignoring the activities of lower federal and state courts” (721).

Policy Clarity, Case Selection, and Desegregation

Resistance to *Brown* from 1954 to 1968 by certain lower courts has been explained by the lack of any clear declaration by the Court, until 1968, that the Equal Protection Clause required the states to do more than merely forbid forcible segregation (Garrow 2008; Peltason 1971). As a result some lower courts, even in the wake of *Brown II*, did not take affirmative steps to integrate schools—to overcome *de facto* segregation. The Fourth Circuit Court of Appeals, for example, interpreted *Brown* as a requirement that school districts not be forcibly segregated, not as a

requirement that they be forcibly integrated (*Briggs v. Elliott* 1955). At the same time, as discussed below, federal judges appeared to be equally likely to apply *Brown* to desegregate non-educational facilities. In *Green et al v. County School Board* (1968), however, the Court finally came to the declaration that the Constitution required the transition to a “unitary, nonracial system of public education,” and in *Swann v. Charlotte-Mecklenburg Board of Education* (1971), it upheld busing as a means to integration.

Garrow (2008) further demonstrates how, during the 1954 to 1968 period, case selection gave the Court the ability to decline certain cases (such those challenging interracial marriage bans) that would have further inflamed racial tensions in the years in which the Court preferred instead to advance Equal Protection doctrine in areas not so directly touching on the social relations between blacks and whites (such as legislative apportionment). Garrow argues that the Court denied certiorari in at least four cases involving racial issues where, in the Court’s strategic determination, a ruling against the specific injustices at issue in the cases would have provoked further resistance to or evasion of *Brown* (14-15). Under an error-correction model of Court docket control, such as prevailed before 1925, the Court would not have been able to act upon its conclusion that certain cases, if decided, would do more short-term harm than long-run good. Court-enforced school integration, then, could be considered as part of the legacy of the Judges Act.

Federal versus State Forums and the Implementation of Desegregation

Yet it is unfair to suggest that, in the decade after *Brown*, the Court gave up on the broader project of racial integration. In fact, it is the case that inferior federal courts, by their faithful application of the equality holding of *Brown* to other, non-educational instances of segregation, allowed the Court to expand *Brown* through affirmances of Court of Appeals’

opinions without their own opinion (Rosenberg 2008; Schwartz 1993). In five cases between 1955 and 1963, the Court was able to affirm—without opinion—lower federal court decisions desegregating public beaches and bathrooms (*Baltimore v. Dawson* 1955), municipal golf courses (*Holmes v. Atlanta* 1955), municipal bus systems (*Gayle v. Browder* 1956), courtroom seating (*Johnson v. Virginia* 1963), and public restaurants (*Turner v. Memphis* 1962). Because of lower court behavior that most legal scholars have now accepted as compliant with *Brown* (Chemerinsky 2001), the Court was able to desegregate all of the foregoing without having to confront how segregation in these areas fit within the public-education focused logic of its opinion in *Brown*.⁴² Lower federal court fidelity thus spared the Court a potentially discrediting opinion at a time when the Court needed to preserve its authority the most.

And even in the area of schools, specifically, the picture of widespread lower court noncompliance in the South is mistaken. Federal judges within the crucial Fifth Circuit, such as John Minor Wisdom, J. Skelly Wright, and Frank Johnson, sought to apply *Brown* faithfully by interpreting the decision to require affirmative integration before the Supreme Court did (Garrow 2000, 1226). The Fifth Circuit then consisted of Florida, Georgia, Alabama, Mississippi, Louisiana, and Texas. The Fourth Circuit (the Carolinas, Virginia, Maryland, and West Virginia), as noted above in the *Briggs v. Elliott* (1955) case, initially read *Brown* only to require “permissive transfers” from segregated to integrated schools. However, after the Court’s opinion in *Green*, the Court of Appeals eventually approved busing as an appropriate response to the imperatives of *Brown I* and *II*, in the Charlotte-Mecklenburg School District. Combs (1982) suggests that the Court strategically used denials of certiorari from 1954 to 1973 rather than confront the constitutional implications of *de facto* segregation in the North. Combs finds that Northern federal appellate courts then took the lead, given the Court’s ambiguous mandate in

Brown about *de facto* school segregation, in communicating the implications of *Brown* to district courts. Vines (1964) examines the 291 federal district court cases from eleven Southern states for the period of 1954 to 1962 in which African-American plaintiffs had sued to challenge some instance of racial inequality. Over half of the cases (52.7%) involved segregation in education, and the district courts ruled against the school districts in 60.7% of the cases. In the remaining non-education cases, black plaintiffs won just over half of the cases (51.3%). If *Brown* was ultimately not successful in providing for societal integration, as Rosenberg (2008) has argued, it would seem that the cause of failure was not widespread resistance by the inferior federal judiciary. A more recent study by Sanders (1995) evaluates 132 federal district court cases on Equal Protection for minorities from 1944 to 1964 and found that cases decided after the *Brown* decision improved the likelihood of a liberal, pro-equality outcome by 39%, irrespective of the court's geographical location. Sanders concludes that "adherence to *Brown*'s principles was not substantially lower (or higher) in the South after 1954 than it was in other regions" (744). Giles and Walker (1975) characterize the state of federal court-supervised school desegregation in 1970 as "an intensely political question gradually eroding into technical applications of Supreme Court established national legal policy" (936). Romero and Romero (2003) find that federal appellate courts were pro-minority rights even before *Brown*, and that *Brown* only amplified this tendency. Vines (1963) draws the conclusion that "the function of the Circuit Courts of Appeals in race relations cases has been to revise district court decisions decided in response to local values and against the national viewpoint" (314). And the much more recent study of Haire, Lindquist, and Songer (2003), in their review of circuit court monitoring of district courts in civil rights cases from 1971 to 1999, reveals that "circuit courts tend[ed] to reverse decisions below in order to further their own preferences as well as the preferences of the circuit's principal at the

Supreme Court” (162). Indeed, it is after their review of civil rights cases that Haire, Lindquist, and Songer are able to apply a principal-agent construct to the Supreme Court-Court of Appeals relationship.

It appears that Court doctrine against the segregation of public places found reception in the federal courts of all parts of the country, just as had pro-national Commerce Clause doctrine in the late 19th Century. This doctrine was adopted and amplified in the Courts of Appeals, bringing district courts in compliance, just as they had done in the case of contributory negligence doctrine in railroad injury cases.

As for state court reaction to *Brown*, the results are mixed, reinforcing the commonly assumed lack of parity (discussed in Chapter 3) between state and federal courts when it comes to implementation of pro-national doctrines. Walter Murphy (1959) concedes that “when pressed, no state supreme court has yet failed to concede that the School Desegregation cases are the law of the land and binding on lower courts” (1959, 1019-1020). Unlike federal courts, however, Murphy finds that state courts were more reluctant to expand *Brown* to other areas of segregation. He also finds them to be more tolerant of state officials’ attempts to evade desegregation. Romero and Romero (2003), however, compare state court and federal court implementation of *Brown*, and conclude that “...*Brown* made a significant difference in federal district court decisions, shifting overall outcomes from generally unsympathetic to strongly in support of minority claims, regardless of region. But [from 1954 to 1964] it had no such impact at the state level” (810). Vines (1965) calculates a 35.8% success rate for African-American litigants in civil rights cases in Southern state supreme courts from 1954 to 1963, compared to 51.3% in federal district courts. Expanding his scope beyond civil rights, Beatty (1972) reviews general state court evasion of Supreme Court decisions from 1959 to 1969. Using as his measure

of non-compliance (“evasion”) whether the Supreme Court had to engage in a *second* review of a state court case or whether a state court judge dissented by stating that the decision violated the Court’s original order (“quasi-evasion”), Beatty finds that in 72.9% of cases state courts—even in the South, even during the contentious aftermath of *Brown*, complied with the Court’s order on remand. He further finds that in the 27.1 % of cases that were evasive—where the state court did not comply with the initial Court order, necessitating a second Court order—the evasion could often be explained by the fact that the Court had been “ambiguous or merely suggestive, thus giving the lower court greater discretion” in its initial order (262-263). Beatty concludes that “on second appeal the supremacy of the Supreme Court ultimately prevailed” (285). It appears that state courts responded best to Court directives that gave them very little interpretive leeway, suggesting once more the need for clarity in Court opinions.

The demise of *de jure* segregation would have been unthinkable in the absence of federal district court jurisdiction over constitutional cases. The end of segregation would have been less likely without the strategic use of Court case selection and the consequent clear instructions to state courts in specific cases. It would have been less likely there had been a lack of willingness of Courts of Appeals to serve as transmitters of *Brown* down the judicial hierarchy. *Brown* and desegregation policy alone provide a particularly rich case study in how the legacies of the Removal Act, the Evarts Act, and the Judges Act all served to enhance Supreme Court power long after their enactment.

Warren Court II: The Rights of the Accused

Warren Court judicial activism also revolutionized constitutional protection of the accused. Almost all provisions of the Bill of Rights involving criminal process were made applicable to the states, and these provisions were given unprecedented interpretive breadth and

operation (Canon 1973). These were backed by an unforgiving exclusion of evidence if the prosecution erred in any respect. In *Mapp v. Ohio* (1961), the Court held that the exclusionary rule barred illegally seized evidence from use by the prosecution at trial in state criminal cases.⁴³ In *Escobedo v. Illinois* (1964), the Court held that police must inform suspects in custody of their right to remain silent before interrogation. In *Miranda v. Arizona* (1966), the Court added to the requirement of *Escobedo* the full panoply of what have come to be known as the *Miranda* warnings: the right to remain silent along with a warning about the consequence of speaking and the right to an attorney. In *In re Gault* (1967) the Court for the first time applied due process protections to juvenile offenders facing delinquency hearings.

The criminal procedure decisions of the Warren Court—and any subsequent modifications of them by the Burger and Rehnquist Courts—planted a fertile field for lower court compliance research. They offered scholars an opportunity to study an area of law having roughly equally likely application in both state and federal criminal cases. Moreover, criminal cases occur frequently in both systems, providing a large sample size to empirical compliance tests. The large volume of criminal cases also made the probability of Supreme Court review of many lower court decisions extremely low, providing useful tests of how judges act when higher review is not likely. Hence the Court's criminal procedure doctrines provided—and still provide—a convenient test of the fidelity lower courts to the Supreme Court. Scholars, led by Baum (1978), saw in these policies a better test of routine Supreme Court influence than the higher profile, more politically salient desegregation decisions.

The research on lower court implementation of the rights-of-the-accused decisions of the Court paint a picture of fairly routine compliance, particularly in federal courts. Canon (1973; 1975), in two early studies, seized on the potential for non-compliance by state Supreme Courts

with the *Mapp*, *Escobedo*, *Miranda*, and *Gault* decisions. In his 1975 study of state court “contumacy” in the face of these decisions, Canon recognizes that policy implementation consists of a “multi-level chain of authoritative communication [that is] influenced by the interpretations and glosses passed down the chain” (52). This is the essence of the communication theory of compliance discussed in Chapter 4. In looking at state court responses for evidence of “explicit, negative evaluation[s]” of these four decisions from 1961 to 1972, Canon presents evidence of approximately 100 hostile state treatments of these decisions (or 5% of the total of opinions), across 32 states concentrated in no particular region, compared to two-dozen favorable receptions of them largely concentrated in Western states.

Romans (1974), in a more systematic study of coerced confession cases in state courts from 1958 to 1968, finds that even conservative state supreme courts systematically complied with *Miranda* but that this was not the case with *Escobedo*. He argues that the difference between the two was not ideological—both were liberal decisions not likely to be favored by conservative proponents of strict policing. The difference was that *Miranda* provided clear guidance to lower courts, while *Escobedo* did not. *Escobedo* exemplifies the clarity theory of lower court compliance. Romans describes the decision as “poorly constructed” and noted that it “failed to explain clearly the rationale, intent, or ultimate goal of the Court” (1974, 42). On top of the Romans study of state courts, Songer and Sheehan (1990) find that *Miranda* had a strong impact on the behavior of U.S. Courts of Appeals. They determine that in 250 cases in which self-incrimination was at issue in the Courts of Appeals there was an application of *Miranda* principles in 94.8% of them. Songer and Sheehan note several instances where federal district courts had applied pre-*Miranda* law only to be reversed by the Court of Appeals (307). This is similar to the communicative behavior reviewed in Chapter 4: the Court depends upon

intermediate courts to relay and enforce its precedents down to the trial level courts, and it appears that this was the case with *Miranda*.

Gruhl (1981) looked at state court compliance with a Burger Court opinion—*Harris v. New York* (1971), that arguably weakened *Miranda* by allowing illegally obtained statements to be used to impeach the credibility of the accused. He finds that in 81% of state cases in response to *Harris* the court allowed the impeachment. At the same time, Gruhl finds that state courts willingly followed later Burger Court decisions that made it clear that a defendant's *silence* could not be used for impeachment purposes. Gruhl concluded that state courts generally took the signal from the Burger Court that *Miranda* could be relaxed, but that they did not relax *Miranda* in a way that can be considered non-compliant with the Fifth Amendment decisions of the Burger Court. Using 661 cases involving defendant confessions from the period 1970-91, Benesh and Martinek (2002) find that the ideological preferences of state court judges mattered far less in determining whether to exclude the confession than did the Court's most recent precedent on coerced confessions at the time of the case (122-123). They expand on their examination of compliance with coerced confession doctrine in a later study (2009) by including Courts of Appeals, and find that both lower state and federal courts were compliant, though to differing degrees. Federal circuit courts were found to be generally more compliant than state courts (2009, 816-817).

A number of studies have looked at the implementation of the Court's search-and-seizure doctrine. Canon (1973) looks at state court implementation of *Mapp v. Ohio* (1961) (imposing the exclusionary rule on state courts) from 1961 to 1970. While the *Mapp* decision was explicit in its holding that unreasonably seized evidence should be excluded at trial, it was less clear about what constituted "unreasonable" or how (and when) a defendant might invoke the

exclusionary rule. Canon finds that state courts vary significantly in how they answer these questions, with most states tending to be more inclined not to exclude evidence. State supreme courts tend, Canon finds, to vote according to the state's "regional politico-legal culture[]" (130). This suggests once more the importance of clarity in a Court opinion, especially for state supreme courts that might be "politico-legally" disinclined toward a particular policy directive. The most notable search-and-seizure study, perhaps, is the Songer, Segal, and Cameron (1994) study testing whether there is a principal-agent relationship between the Supreme Court and Courts of Appeals in search and seizure cases from 1960 to 1991. They find that Courts of Appeals generally attached the same legal consequence to each fact presented in a search-and-seizure case as did the Supreme Court, even as the Court's doctrine evolved. This finding made a strong impression on the study's authors, because they had theorized that in such a type of case there are plenty of motivations and opportunities for lower courts to be unfaithful (690).

To summarize, lower courts have tended to implement faithfully Court-created protections for the accused despite, at times, sharp disagreements with these decisions. U.S. Courts of Appeals, in every study of them, were found to be faithful agents of the Supreme Court. This undoubtedly trickled down to the federal district courts, although specific studies of their implementation of the Court's rights-of-the-accused policies are lacking. State courts, despite the political pressures on them to be tough on crime, appear to have complied as though they had no real alternative in the long run.

Contentious Areas of Social Policy: Religion, Abortion, and Speech

Just as the Court began to discard an interpretation of the Due Process Clause that accorded substantive protection to economic rights against state legislation, the Court transformed substantive due process to protect other rights that were considered, by the Court, to

be “the very essence of a scheme of ordered liberty” (*Palko v. Connecticut* 1937, 325). For the most part, the specific guarantees of the Bill of Rights informed the substance of due process. The process of selectively incorporating the specific guarantees of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment began with speech (*Gitlow v. New York* 1925), the press (*Near v. Minnesota* 1931), and religious exercise (*Cantwell v. Connecticut* 1931). In 1947, the Court deemed the First Amendment’s Establishment Clause to be applicable against the states (*Everson v. Board of Education* 1947), and later propounded the three-part test, from *Lemon v. Kurtzman* (1971), to govern when a governmental practice abridged the separation of church and state. The doctrine of incorporation later developed to cover almost all of the Fourth, Fifth, and Sixth Amendment rights of the accused (as discussed above), and, even later with the Warren Court, the Court read into the Constitution less-textually grounded rights such as marital privacy (*Griswold v. Connecticut* 1965), general sexual privacy (*Eisenstadt v. Baird* 1971), and abortion (*Roe v. Wade* 1973). Meanwhile, the Court continued to evolve its free speech doctrine to protect unpopular speech, such as speech libelous of public persons (e.g. *New York Times v. Sullivan* 1964), obscene and pornographic speech (*Miller v. California* 1973), and all but the most dangerous types of political or social advocacy (*Brandenburg v. Ohio* 1969).

With so many new and controversial limitations placed on the states that—like the substantive due process of old—had varying degrees of constitutional warrant, the post-1925 Court once more tested its level of influence over inferior courts. Also, and probably not by design, the Court provided political scientists with rich new opportunities to develop ever more sophisticated tests of this influence.

There is every reason to expect lower court non-compliance with Court decisions that so directly challenged cultural norms or that disrupted longstanding state and local practices. The

fact that the Court would even offer such provocative interpretations of the Constitution suggested its confidence that they would be backed by a faithful implementation by lower courts (a reasonable expectation in light of the findings discussed above in relation to *Brown*). Otherwise, the Court's legitimacy might have suffered even after the hard-won gains it made in the area of civil rights and Equal Protection.

Speech

After finding that lower federal courts "complied with the Court's rules consistently" in the area of libel law, Gruhl (1980, 517) concludes that the Supreme Court occupied its position atop the judicial hierarchy according to the "upper court" theory. This theory supposes that the Court's decisions are always followed by lower courts. Gruhl explains his finding by noting that the Court had been clear and consistent in its willingness, after *New York Times v. Sullivan* (1964), to protect defendants in libel and slander suits involving public figures. In a subsequent study, Gruhl looked at whether both state and federal courts were properly applying the Court's "actual malice" standard and appropriately evolving their decisional trends from 1964 to 1971. Gruhl (1982) finds high rates of compliance for both federal appellate (95% compliant) and state supreme courts (84%), contrary to his hypothesis predicting greater federal compliance.

Lower federal courts were found to be similarly compliant with a change in Court doctrine that lowered protection of speech deemed by state and local governments to be obscene (Songer and Haire 1992). However, this finding is qualified because other non-legal factors, such as the party of a judge's appointing president, also show up as a significant predictor of a vote in an obscenity case.

In a review of state Supreme Court responses to the Court's 2002 decision protecting judicial candidate speech from regulation in *Republican Party of Minnesota v. White* (2002),

Eakins and Swenson (2007) find that “most [state courts] chose to comply rather quickly,” in a manner that “accords with the literature concluding that the Supreme Court and state high courts have a principal-agent relationship” (378). In response to *White*, state courts struck down state bans on a judicial candidate’s announcement of his or her policy positions on various issues that might occur in the courts. Eakins and Swenson found that two state courts were non-compliant with the decision, while 19 were either compliant or even went beyond the requirements of *White* in protecting speech. The remaining states’ courts had not acted as of the date of the study.

It appears that the Court has had little difficulty having its speech doctrines implemented by lower courts, state or (especially) federal.

Religion

Since the time of Court’s incorporation of the Establishment Clause, the Court’s jurisprudence in controversial church-state cases has largely been driven by its test of whether a governmental practice has a secular purpose, whether it excessively entangles church and state, and whether the practice advances or inhibits religion—the *Lemon* test (Kritzer and Richards 2005). Kritzer and Richards (2005) call this test a “jurisprudential regime,” because it structures the decision making of courts that must apply it. *Lemon* makes clear the three dispositive factors in every Establishment Clause case.

Luse et al (2009) find that circuit courts seek to make “legally sound” rulings in Establishment Clause cases by applying the Court’s three-part *Lemon* test in religion cases. Reviewing all circuit court cases from 1972 to 1999, the researchers find that U.S. Courts of Appeals “do pay heed to the criteria established by *Lemon* when deciding Establishment Clause cases,” and determined that “compliance is driven in a meaningful way by legal factors...though some role for the ideology of lower court judges remains” (97). This suggests that the Court’s

use of a jurisprudential regime served to communicate Court policy in a clear manner.

When it comes to the Free Exercise Clause of the First Amendment, Brent (1999) evaluates Court of Appeals responses to *Oregon Employment Division v. Smith* (1990). In *Smith*, the Court held that states need not accommodate religious exercise in their generally-applicable laws. Brent found that “the Courts of Appeals became significantly less receptive to free exercise claims following the *Smith* decision” (254). The likelihood of plaintiff success in a free exercise of religion challenge dropped from 31.8% before *Smith* to 20% after *Smith*. The post-*Smith* coefficient was also significant in predicting a ruling against a free exercise claimant. This finding verifies the hypothesis that the Courts of Appeals “would be willing to act as agents of the Supreme Court following the *Smith* decision...” (254). In fact, they remained faithful agents of the Court even after Congress attempted to overturn the Court’s decision in the Religious Freedom Restoration Act of 1993.

Privacy and Abortion

Very little has been done in the way of research of lower court compliance with Court policy on privacy and abortion. This is a bit surprising, given the salience and controversial nature of this line of Supreme Court cases. Stidham and Carp (2002) find that from 1984 to 1995 federal district courts resolved 51.9% of cases in favor of the right of privacy (these were 260 cases involving “abortion, homosexuality, contraception, alleged violations of the Right to Privacy Act, body cavity searches, and random drug searches...”) (555). The study does not evaluate compliance with any particular Supreme Court case, nor does it attempt to relate lower court decision making to any trend in the Supreme Court. Instead, it finds that Democratic judges are considerably more likely (69.2%) to support right of privacy claims than are Republican judges (39.3%).

There has been limited attention to the question of state court compliance with the various right to privacy decisions of the Court. In the most comprehensive study to date, Flemming, Holian, and Mezey (1998) find that in 219 state court privacy cases from 1965 to 1994, “[t]he evidence suggests that state court judges tend to follow U.S. Supreme Court rulings in their decisions” (46). State court judges are found to be more responsive to Supreme Court privacy precedent than they are to the privacy guarantees of their own states’ constitutions. The researchers find that in cases involving activities in which the Supreme Court had identified a privacy interest (such as contraception or abortion), state courts find in favor of the right of privacy 90% of the time. On the other hand, for activities in which the Court has rejected a privacy interest, the state courts find in favor of the government 61.9% of the time. Further, they find that “the applicability of a U.S. Supreme Court precedent upholding a privacy right substantially increases the probability that a judge will support that right at the state level,” and a pro-privacy Court precedent is significant in predicting a vote in favor of privacy at the 99% significance level (47). This is true for both Democratic and Republican judges.

Conclusion

I have attempted to account for the studies of lower court implementation of major Supreme Court policies since 1925. The purpose of this review is not to elide the very good work on lower court compliance that takes into account Supreme Court decisions from less-controversial areas of law, such as prisoners’ rights cases (Haas 1982), or cases involving public access to trials (Reid 1988). Nor did I analyze important studies that combine a sample of Supreme Court decisions into the same study (e.g., Johnson 1987; Klein and Hume 2003; Westerland et al 2010), or that look at Court case characteristics without reference to the legal policy of them (such as plurality decisions (Corley 2009) or precedent reversals (Reddick and

Benesh 2000)). These studies arguably provide more generalizable insights about compliance than do the case studies, pioneered in the aftermath of *Brown*, that were the subject of this chapter. My purpose instead has been to retell, in summary fashion, the story of the post-1925 Supreme Court with an eye toward how the Court's most recognizable policies were advanced in and by the lower courts, state and federal. The focus is on the Supreme Court as a decisive national policymaker, successfully having its vision of the Constitution implemented by subordinates.

This review has strengthened the theory of this entire work. First, it vindicates the foundational assumption of this dissertation: that lower courts in the post-1925 system typically comply with the Supreme Court, even in controversial areas of policy. Thus it brings the work full-circle. In Chapter 1, I assert a norm of compliance and a prototypical functioning of the federal judiciary as illustrated in the *Arizona v. United States* (2012) case and its aftermath. Second, this review reinforces the importance of lower federal forums for Supreme Court power. In just about every policy area, federal forums outperformed state forums in following Court policy. This validates the Removal Act as a foundation of Court power—the Court simply was more powerful after the passage of the Removal Act than it had been at any point before. The experience of the 20th Century suggests that the Removal Act constituted an *enduring* shift in the direction of Court power over implementation. Imagine, for instance, if the Court had been dependent only upon state courts for the implementation of *Brown* or *New York Times v. Sullivan* or even the *Arizona* decision. The high, albeit lesser, degree of state court compliance with Court policy might be taken as an artifact of the Removal Act. Recall that Chapter 3 demonstrated that after the passage of the Removal Act, state courts began to rule in a more pro-national direction in Commerce Clause cases, though they still lagged the Supreme Court and federal courts. It

could have been the case then in interstate commerce policy, and subsequently in other policy areas, that state judges came to believe that resistance to the Court was futile given the parallel availability of federal forums.

Third, the studies discussed in this chapter portray the behavior of intermediate federal courts much the way I theorized it in the discussion of the Evarts Act. They were routinely faithful—and often even instrumental—to the Court in the implementation of Court policy. They spared the Court the lion’s share of the work when it came to monitoring district courts or in policy development, especially when such development was vital but at the same time hazardous to the institutional interests of the Court. The circuits are seen likewise as articulators of the implications of Court policy in their capacity as monitors of specific district courts.

Lastly, the studies show how clarity in Court policy is an essential variable in the implementation process. The reality of our federal system is that state courts will necessarily shoulder much judicial business in the United States—in state criminal prosecutions, for example. Certain doctrines, such as abstention, prohibit lower federal court intervention in pending state cases.⁴⁴ The right of removal from state to federal court is generally not available in criminal prosecutions.⁴⁵ Thus, the efficacy of Court doctrines governing criminal process, even with federal forums available to the full extent of the constitutional grant, depends heavily upon state court fidelity. Since the Court cannot review even a fragment of the criminal caseload of the states, it depends mightily on the levels of court most distant from it. The tendency of the studies has been to find that state courts, while on the whole compliant even with the most controversial policies, respond best to Court directives that speak with the greatest degree of clarity. Since the Court might not be able to depend upon state supreme courts to develop its policies for state trial courts in the same manner as do U.S. Courts of Appeals for federal trial

courts, it appears to be important that the Court make its criminal justice opinions as clear as possible.

CHAPTER 7

Conclusion

Judiciary Acts have constructed the judiciary in such a way that the Supreme Court now has a decisive influence over inferior courts, both state and federal. In the way of conclusion to this work, I will outline this evolution—from a weak to a strong Court, which I hope by now has been made clear to the reader of this work.

The Supreme Court, under the Judiciary Act of 1789, labored under a statutory framework that was not designed to give it influence over lower courts. Under the Act, general

cases involving the constitutionality of state laws were not heard in federal courts. State courts, instead, primarily decided these cases. As was shown in Chapter 3, Nineteenth Century state courts were overwhelmingly unlikely to invalidate their own states' laws on federal constitutional grounds. This reluctance was in spite of the fact that the Supreme Court, as evidenced both by its precedents and by its decision trends, stood ready to use the Commerce Clause to prohibit certain state activities that frustrated interstate commerce.

The Jurisdiction and Removal Act of 1875 authorized federal circuit courts to hear general constitutional cases. The effect of this change was immediate and profound. Gradually, more cases involving interstate commerce were heard in lower federal courts rather than in state courts. At the same time, federal courts were significantly more likely than were state courts (either before or after 1875) to invalidate state laws that impaired interstate commerce. A comparison of decision trends in state courts, federal courts, and the Supreme Court showed that the federal courts and the Supreme Court were similar in their willingness to invalidate certain kinds of state laws, while the state courts lagged behind both of them, considerably. Without question, the Removal Act of 1875 gave the Supreme Court more power, in that the Court could count on a more reliable target audience (i.e., lower federal courts) for its constitutional decisions.

The Judiciary Act of 1789 created a weak Supreme Court in other ways. The justices of the Court were required to hear cases in the circuits, away from Washington, for eight to nine months out of every year. In the circuit, the justice served on a panel with a district judge. Circuit cases were hardly constitutional cases of the first rank. Most often, they involved trials about property or contracts involving citizens from two different states; cases that had to be decided under state law, according to the Judiciary Act of 1789. The travel requirements involved in

attending circuit courts for a justice of a more remote circuit took a toll on the justice's health, his wealth, and his availability for Court responsibilities. Congress applied a partial corrective in 1869 by establishing U.S. circuit judges for each circuit, who could do the work of the justices in the circuits. By the 1880s, it became very commonplace for circuit courts to be held without the attendance of the justice.

In Chapter 2, I highlight the reasons why the configuration of the circuit courts under the Judiciary Act of 1789 failed to support Supreme Court influence over circuit courts even though justices themselves, in theory, presided over these courts. These reasons include the fact that the justices often used their position on circuit courts to protest the policy of the Supreme Court, the high absentee rates for the justices, the limited applicability of Court-created doctrine in circuit cases, and the powers that the resident district judge had in the process. Rather than restate all seven of the reasons here, I simply offer that they all pointed to the need for a true intermediary between the Supreme Court and the circuit courts.

That intermediary was created in the Evarts Act of 1891. The Evarts Act created Circuit Courts of Appeals, or what are today known as U.S. Courts of Appeals. These courts initially served to monitor the circuit courts in cases involving diverse citizenship. They communicated Court policy to the circuit courts. For these reasons, they made circuit court compliance with the Supreme Court more likely, specifically after they had adopted the policy of the Court in a certain case. In Chapter 4, I employed the concept of circuit adoption to identify instances in which the Circuit Courts of Appeals gave favorable treatment to a specific Supreme Court decision. It was shown that when a Court of Appeals adopted the Court's doctrine of contributory negligence, the circuit courts under that Court of Appeals' jurisdiction more likely ruled consistently with that doctrine. More specifically, because railroads benefited from the

doctrine when sued by injured parties, railroads were significantly more likely to win their case within a circuit that had adopted the Court's contributory negligence principle. Definitely, the Evarts Act of 1891 fostered greater lower court compliance by circuit courts. The communication and monitoring conception of intermediate courts appears to have some empirical basis.

The final, major deficiency of the Judiciary Act of 1789 concerns the Court's docket. Under the Act, the Court had little control over its docket. There simply were not ways available to the Court—other than to dismiss a case for lack of jurisdiction or to hear and decide a case on the merits—to dispose of docketed cases. This eventually presented a major problem for the justices. For one, this Court caseload combined with a large circuit caseload to tax the limits of the circuit-riding justices. There were only so many months of the year that the justices could dedicate to Supreme Court work because of their circuit duty. And, as the nation grew and developed economically, more and more disputes flooded into the courts. By the late Nineteenth Century, the size of the Court's docket was beyond the capability of the justices to manage. In Chapter 5, I offered evidence that the Court of this era disposed of a very low percentage of its cases from term to term. I also showed that almost every case that was disposed of by the Court, moreover, was done so by means of a written opinion, unlike today. The Evarts Act of 1891 helped ease this burden, by allowing the Court the discretion to deny review of diverse citizenship cases that had been decided by the Courts of Appeals. In the Judges Act of 1925, however, the Court was given near-complete discretion over its docket. Using denials of the writ of certiorari, the Court was (and still is) able to dispose of a large percentage of its docket each term. This disposal mostly takes the form of something other than deciding a case with a written opinion, in contrast to the pre-1925 practice. This power of disposal allowed the Court to spend

more time in the contemplation of each case chosen for review. The Court could draft qualitatively better opinions: opinions that were easily comprehended and that demonstrated that the Court was mindful of its responsibility to furnish policy to—not just correct the errors of—subordinate courts.

In Chapter 5, I provided support for this linkage. Using a measure of Court docket control, I was able to map the correlation between the degree of Court docket control and the pre- and post-Judges Act periods. The Court's degree of docket control was also shown to predict the level of readability of Court constitutional opinions. As the Court's control increased, so too did the readability of its opinions. As control increased, the Court's focus on past tense verbiage in opinions declined relative to other tenses, suggesting that the Court became less interested in correcting the errors of the lower courts and more focused on the future policy implications of its decisions. As the Court took hold of its docket, error correction declined in opinions while policy making increased. These findings would suggest that as the Judges Act of 1925 gave the Court docket control, the Court took this control and used it in service of its policy making ambitions in constitutional cases.

The topical review of the judicial impact literature dating back to the 1950s serves to round out this work. The literature shows how institutional features have assisted the Court in implementing some of the most socially-consequential decisions in U.S. history. The Court was able to craft revolutionary civil rights policies because of the availability of federal district courts, aside from the state courts, in implementing these policies. The U.S. Courts of Appeals served the function of communicating, clarifying, developing, and enforcing civil rights policy. It appears that in this area, more than any other, the effect of the Removal Act of 1875 shows up in the current system. Federal district courts, likewise, were shown to be slightly more willing than

state courts to apply Court doctrines protecting the criminally accused. No study that I can locate shows a systematic lack of fidelity to the Supreme Court by U.S. Courts of Appeals. Instead, every indication is that these courts discharge the role intended of them by Congress in the Evarts Act: transmitters and enforcers of Supreme Court policy. I also find support for the notion that clear Court opinions influence state court behavior more so than unclear ones. If the Court is willing to spell out its policy—as was the case, for example, in the *Miranda* decision, state courts comply, even if grudgingly. While federal judges may be looking to comply with Court policy, state courts might be looking to shirk Court policy. Hence the need for clarity in that policy.

The Supreme Court has developed into a forceful instrument of national policy making. The Court since 1925 has been the beneficiary of an institutional design that was not foreseen by any of the framers and that would have been the envy of the early nationalists on the Court. This design has facilitated and nourished a norm of lower court compliance that must surely be unparalleled among the free legal systems of the world.

Yet the Court, even after 225 years of existence, still continues to have nothing in the way of the physical ability to implement its preferred policies. It issues judgments, but does little else. In this respect the observation of Alexander Hamilton about the Court lacking the sword and the purse remains true. These features of the constitutional design have not been changed. However, the power of Congress to shape the jurisdiction and contours of the federal court system--rooted in the Constitution--has done as much for Court power as a constitutional amendment granting it the powers of the purse, and perhaps even the sword, might have.

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APPENDIX

The following is a discussion of case retrieval protocols used for various portions of this work.

Case Retrieval for the Section 25 Cases of Chapter 2

In Chapter 2, I reviewed and coded the total number of cases that the Supreme Court reviewed under its Section 25 jurisdiction over states' highest court Constitutional decisions from 1816 to 1876. For the time period, I used the Lexis-Nexis Academic Database of state and federal cases and executed a search of the terms “25th Section” or “twenty fifth section” or “twenty-fifth section” in all Supreme Court opinions. I furthermore searched the terms “writ of error’ /s ‘judiciary act’” for the same period to derive additional cases not accounted for in the earlier search. I included in the sample all cases derived from these searches in which the Court took jurisdiction over the case; denials of Section 25 jurisdiction were not counted. Each case was coded only for its outcome—that is, whether the state court was reversed or not.

Case Retrieval for the Interstate Commerce Cases of Chapter 3

In Chapter 3, I reviewed and coded states' highest court, federal circuit court, and Supreme Court decisions involving state regulations of interstate commerce for the period of 1825 to 1891. As with the Section 25 cases above, I used the database of cases available through Lexis-Nexis Academic. The difference in the way Commerce Clause cases are discussed today and how they were discussed in the mid-19th Century made finding the appropriate search terms

rather difficult. For example, courts typically did not employ the expressions “interstate commerce” or “Commerce Clause” even in cases about these topics. Therefore, I executed five searches in an effort to account for all relevant cases. The first was a search of all opinions containing “commerce” /s “among” /s “several” /s “states”. To derive additional cases I searched “LN-Summary(interstate commerce) or CORE-TERMS(interstate commerce) or HEADNOTES(interstate commerce) or LN-HEADNOTES(interstate commerce).” Then, I searched “HEADNOTES(Commerce Clause) or LN-HEADNOTES(Commerce Clause).” Then, I simply searched “Commerce Clause.” Lastly, I used Shepard’s Citations to find decisions subsequently citing to the interstate commerce cases discussed in Chapter 3: *Gibbons v. Ogden*, *Brown v. Maryland*, *Mayor of New York v. Miln*, all of the *License Cases* and *Passenger Cases*, and *Cooley v. Board of Wardens*.

Case Retrieval for the Railroad Injury Cases in Chapter 4

In Chapter 4, I reviewed and coded federal circuit court cases from 1870 to 1911 in which a railroad asserted contributory negligence as a defense in a lawsuit. For this search, I used the Lexis Nexis Academic database of U.S. legal cases. I searched for all cases in which the combination of terms “contributory” w/5 “negligence” and “injury” and “railroad” all appeared. I also executed the search “LN-Summary(contributory negligence)”, which yielded three additional cases. One additional case could be found by the search terms “railroad” w/5 “death”. Note that Lexis-Nexis does not have a search-narrowing category for U.S. circuit courts since they no longer exist. To derive circuit court cases, one must look within U.S. Courts of Appeals cases for the period 1870 to 1911.

Case Retrieval for the Constitutional Cases in Chapter 5

In Chapter 5, I reviewed and used content analysis techniques for U.S. Supreme Court constitutional cases from 1910 to 1941. To derive these cases, I used the Lexis-Nexis Academic database and searched “LN-Headnotes(Constitution)”.

ENDNOTES

¹ Justice Kagan did not participate in the case.

² Georgia's law was called the Immigration Reform and Enforcement Act of 2011, or House Bill 87; Alabama's law was called the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, or House Bill 56.

³ See Denial of Petition for Certiorari 12-884. The Justices voted eight to one against certiorari for the Alabama case (over Justice Scalia's dissent). Georgia elected not to pursue the case to the Supreme Court, and instead the legislature chose to clarify the parts of the 2011 law that survived. In 2013, Judge Thrash dismissed a challenge to the law, citing the Eleventh Circuit's ruling allowing for police officer questioning about immigration status.

⁴ The circuit courts heard federal criminal cases, cases brought by the United States, and cases involving parties of diverse state citizenship where the amount in controversy exceeded \$500 (Frankfurter and Landis 1928a). The circuit courts entertained appeals from the district courts only in admiralty cases; any other district case over \$50 could be reviewed by a circuit court by the process of a writ of error (Fallon et al 2003).

⁵ Maine and Kentucky were still part of Massachusetts and Virginia, respectively, in 1789, but they were given their own districts under the Judiciary Act. Tennessee and Ohio did not receive districts until they achieved statehood. Other than Louisiana, no state-to-be would receive a judicial district prior to entering the Union (Surrency 2002).

⁶ Congress changed this in 1914, when it gave the Court the power to review states' highest courts' decisions that ruled state laws to be unconstitutional or against federal law. 38 Stat. 390.

⁷ For example, the Court's opinion in *Barron v. Baltimore* (1833) rejected limits to state action based upon the provisions of the Federal Bill of Rights. Nevertheless, according to Mazzone (2010), some state courts chose to limit their state's action under the Bill of Rights, contrary to *Barron*. See also Warren 1913.

⁸ For a discussion of the retrieval method I used to find these Section 25 cases, see the Appendix .

⁹ The "overturn" rate for state laws in the Supreme Court is both an under-inclusive and over-inclusive measure of Supreme Court activity in policing state courts. It is over-inclusive because some of these overturning cases may

have originated in a lower federal court as a diversity or admiralty case. It is under-inclusive because not all state action to be scrutinized by the Court under Section 25 is statutory in nature.

¹⁰ For example, the Constitutionality of circuit riding itself came up in the 1803 circuit court case of *Laird v. Stuart*. The case was decided without a written opinion by Chief Justice Marshall sitting alone at the circuit level. The full Supreme Court eventually upheld the practice of circuit riding in *Stuart v. Laird* (1803). For a discussion, see Glick 2003.

¹¹ Congress allowed California a circuit judge from 1855 to 1862.

¹² Evidently these diversity cases failed to meet the jurisdictional minimum for Supreme Court review of circuit court cases (\$2,000), and the certificate of division (with no minimum amount in controversy) could not be employed because the judges were not divided.

¹³ 1 Stat. 73.

¹⁴ This decline in new, docketed cases is probably explained by the fact that the Circuit Courts of Appeals were created in 1891 primarily to hear appeals of diversity cases from circuit courts. These appeals had formerly gone directly to the Supreme Court.

¹⁵ Disposing of a case, in the Court's nomenclature, does not necessarily result in a written opinion in that case. Disposal of a case can take many forms. It ranges in practice from a written opinion to a denial of review on procedural or jurisdictional grounds (Wasby 1978).

¹⁶ The court, on the other hand, reasoned that since the tax fell equally on imports and domestic products, it was not discriminatory.

¹⁷ One suspects that the tax was an effort to protect the state's slave market, since the tax specifically applied to "negroes" brought into the state.

¹⁸ In *Chisolm v. Georgia* (1793), the Supreme Court held that a state could be sued in federal court by a citizen of another state. The decision was eventually overturned by the Eleventh Amendment.

¹⁹ In *Worcester v. Georgia* (1832), the Court invalidated a Georgia law that made it illegal for white people to settle on Cherokee lands.

²⁰ 1 Stat. 73, Section 12.

²¹ 18 Stat. 470, Section 1 (March 3, 1875).

²² These decisions were: *Griggs v. Houston* (1882) (contributory negligence was conclusively established in the undisputed facts); *Schofield v. Chicago, Milwaukee & St. Paul Ry. Co.* (1885); *Goodlett v. Louisville & Nashville Ry. Co.* (1887) (directed verdict for the defendant was appropriate); *Elliot v. Chicago, Milwaukee & St. Paul Ry. Co.* (1893) (clear evidence of contributory negligence); *St. Louis and San Francisco Ry. Co. v. Schumacher* (1894) (directed verdict for the railroad was appropriate); *Northern Pac. R. Co. v. Freeman* (1899) (directed verdict for the railroad appropriate).

²³ These decisions were: *Delaware, Lackawanna, and Western Ry. Co. v. Converse* (1891); *Kane v. Northern Central Ry. Co.* (1888); *Northern Pac. Ry. Co. v. Egeland* (1896); *Texas Pac. Ry. Co. v. Gentry* (1896); *Grand Trunk Ry. Co. v. Ives* (1892).

²⁴ In this chapter, to aid in clarity, any reference to “circuit courts” means the trial-level courts, “circuit” means a judicial circuit, and “Court of Appeals” indicates the Circuit Courts of Appeals that were created in the Evarts Act of 1891.

²⁵ As for the staffing of these Circuit Courts of Appeals, the Evarts Act provided for a greater division of labor than ever existed in the judicial hierarchy prior to 1891. District judges like Judge William Wallace would no longer be allowed to hear the appeals of their own rulings. The Act authorized a second circuit judge for each judicial circuit who, along with the circuit judge already serving in each circuit, would hear appeals. The two circuit judges made a quorum, but one of the circuit’s district judges (assuming the judge had not participated in the trial of a particular case) could sit on a panel to hear appeals (as today). This three-judge panel was to hear *only* appeals—not trials. A Supreme Court justice was allowed to sit on the Circuit Court of Appeals of his assigned circuit (as today), but the justices were finally relieved of mandatory circuit duty.

²⁶ Biographical information about Judge Wallace is available through the Federal Judicial Center (www.fjc.gov). President Grant appointed Wallace to the district judgeship in 1874. President Arthur elevated Wallace to circuit judge in 1882. Wallace would serve in the Second Circuit until his retirement in 1907.

²⁷ These opportunities were: *Southwestern Tel. and Tel. Co. v. Robinson* (1892); *Southern P. Co. v. Burke* (1893); *New Orleans & N.E.R. Co. v. Thomas* (1894).

²⁸ Lexis-Nexis does not differentiate between circuit courts and Circuit Courts of Appeals. Most of the cases in the original 757 case sample were Circuit Courts of Appeals cases. Furthermore, a good number of the circuit court cases consisted of the published jury charge in the case, not the final decision by the judge in the case.

²⁹ The territories acquired as a result of the 1898 war included Puerto Rico, Guam, Cuba, and the Philippines. Cases involving Hawaii and Alaska are also considered by many scholars to be a part of the *Insular Cases*, even though these were not acquired by the United States as a result of the Spanish-American War. See Sparrow (2006).

³⁰ 43 Stat. 936, §138 (February 13, 1925).

³¹ Ibid.

³² Ibid. The First Circuit Court of Appeals could hear cases from the Puerto Rican Supreme Court beginning in 1915. However, this review did not include Constitutional and federal law cases.

³³ The Judges Act went into effect in May of 1925, except insofar as the Court had cases already pending. For simplicity, I measure the regime change from the beginning of the Court's October 1926 term.

³⁴ Use of the term "docket" follows the Federal Judicial Center statistics. The FJC considers cases presented to the Court for review to be "docketed" cases, whether the Court has agreed to hear the case or not.

³⁵ The number of written opinions in of the Court is available as a Federal Judicial Center statistic beginning in 1932. To derive opinions issued from 1923 to 1932, I use FJC statistics to subtract the number of petitions for writs of certiorari that were denied from the number of cases disposed of for each term. For years prior to 1923, I derived the number of opinions by searching for all available Supreme Court opinions on Lexis-Nexis from October 1 of a given year until September 30 of the following year (i.e., the 1920 term would run from October 1, 1920 to September 30, 1921). I then deducted from each year's total of opinions those opinions that simply denied certiorari in a case. These search results better match the Cases Disposed number available for these terms on www.fjc.gov than do the numbers published in the *Supreme Court Compendium*.

³⁶ The Coleman-Liau index formula is: $0.0588(\text{average number of letters per } 100 \text{ words}) - 0.296(\text{average number of sentences per } 100 \text{ words}) - 15.8$.

³⁷ The Gunning fog index formula is: $0.4[(\text{words per sentence}) + 100(\text{complex words}/\text{words})]$. Instead of complex words, which are generally defined as polysyllabic words, I used the ratio of six-letter or greater words to all words.

³⁸ The Automated Readability Index formula is: $4.71(\text{characters per word}) + 0.5(\text{words per sentence}) - 21.43$.

³⁹ If one isolates the 1919 to 1926 period, the pre-and-post 1925 difference vanishes (0.81 clerks per opinion). The 1919 authorization of one paid clerk per Justice seems to account for almost all of the clerk assistance to the Justices.

⁴⁰ 38 Stat. 790 (Dec. 23, 1914).

⁴¹ McCloskey (1964) counts 140 decisions in which the Court invalidated state regulations using substantive due process, but the Court certainly did not invalidate the state law in every case it heard.

⁴² Recall that *Brown* had focused on the importance of education in American society, how educational segregation had retarded the psychological development and well being of school children.

⁴³ Ibid.

⁴⁴ In *Younger v. Harris* (1971), the Court held that a federal court could not “stay or enjoin pending state court proceedings except under exceptional circumstances.”

⁴⁵ The Removal Act of 1875 authorized removal only for “any suit of a civil nature” involving federal law or a Constitutional provision. 18 Stat. 470.