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# Preferences and Situations

Points of Intersection  
Between Historical and  
Rational Choice Institutionalism

Ira Katznelson and Barry R. Weingast  
Editors

Russell Sage Foundation, New York

## Endogenous Preferences About Courts: A Theory of Judicial State Building in the Nineteenth Century

Charles M. Cameron

National courts in federalist systems face a fundamental and recurring political dilemma: what is their role in relation to state governments and state judiciaries? Putting it more bluntly: who will have power? In many respects, this is the fundamental issue in the law of federal courts.

From this perspective, the history of federal courts in the United States presents a pretty puzzle: how can we account for the vast expansion of federal judicial power at the expense of the states?

That such an expansion occurred is beyond doubt. In the early republic, the jurisdiction of federal courts was severely restricted, limited to cases involving the law of ships and shipping (admiralty), suits between citizens of different states (diversity cases), and suits between foreigners and U.S. citizens (alienage cases). With few exceptions, all else belonged exclusively to state courts. Federal judges themselves numbered but a handful. Supreme Court justices spent much of their time "riding circuit," traveling the miserable roads of the day. And, the clumsy hierarchical structure of the federal courts imposed by the Judiciary Act of 1789 limited the justices' ability to impress their rulings uniformly across geographically scattered subordinate judges. Not surprisingly, the social status of federal judges was low.<sup>1</sup> The weakness of the federal judiciary persisted at least until the Civil War. But then, the jurisdiction of federal courts over hitherto state matters underwent a tremendous expansion.<sup>2</sup> In addition, in the late nineteenth and early twentieth centuries Congress reorganized the judicial hierarchy, creating a structure that allowed much tighter control of the bottom by the top. The numbers and prestige of federal judges increased as well. The growth of the national adminis-

trative state after 1932 necessarily propelled the federal judiciary into myriad new areas previously ceded to the states. Finally, the explosion of federal judicial jurisdiction in the 1960s and 1970s (for example, by incorporating the Bill of Rights into the Due Process Clause) completed an astounding revolution in the power of the federal judiciary.

That the expansion of federal judicial power was consequential is also beyond question. A few examples will suffice. First, in the second half of the nineteenth century, the Supreme Court strove, largely successfully, to create a continental free trade zone (Bensel 2000). To construct continental markets, the Court crafted new doctrines, invented new rights for property holders and companies, and severely restricted the powers of sovereign state governments. Second, federal courts severely limited the ability of the central government to raise revenue, effectively delaying the rise of a national welfare state. The Supreme Court's assault on the federal income tax in the late nineteenth century, which kept that source of revenue out of bounds for the federal government for a generation, provides the most dramatic instance. Third, federal courts repeatedly expanded, and in some cases contracted, national citizenship rights. For instance, after the Civil War, lower federal courts moved to create national citizenship rights for the freed slaves, rights that the U.S. Supreme Court subsequently restricted (Smith 1997; Keyssar 2000). Finally, the role of the Warren Court in creating new national citizenship rights is an oft-told story. In all these examples, puissant federal courts profoundly altered the political economy of the United States and the rights of its citizens.

If one examines scholarly attempts to explain the course of federal judicial state building in the United States, one finds two distinct traditions.<sup>3</sup> Neither takes federalism seriously. The first is a Congress-centered perspective, in which Congress constructs the federal judiciary. In this account, the federal judiciary is passive bystander with respect to new jurisdiction, always acted upon and rarely much of an actor. States and state interests make no appearance. The second is a court-centered perspective, in which the Supreme Court itself constructs the jurisdiction of the federal courts (including limitations binding the hands of federal judges). In this account, the high court is the prime mover and Congress largely a spectator. Again, states play no role. Both accounts are able to point to significant episodes that seem to support their particular analytic approach. But how satisfactory can federalism-free theories of federal courts be?

Here I present a new theory of federal courts, drawing heavily on recent theoretical advances in the study of federalism (Cremer and Palfrey 2002; Besley and Coate 2003). The model brings together the states, Congress, and the Supreme Court as jointly important actors in judicial

state building. In the model, two distinct paths determine the jurisdiction of the federal courts: a delegation path in which a majority coalition of state delegates in Congress is the prime mover, and a unilateral action path in which Congress eschews that role and the Supreme Court assumes it instead. The model identifies circumstances in which one path or the other will predominate. I use the analytic lens of the model to examine a variety of episodes in federal judicial state building in the nineteenth century. These narratives serve less as a test of the theory than as plausibility check and, perhaps, as down payment on more systematic inquiry in the future. Among the episodes I consider are controversies over the Fugitive Slave Act, apparent preference reversals by antebellum abolitionists and slaveholders, the passage of the Removal Act of 1875, and multiple twists and turns in the history of state sovereign immunity.

Before plunging into the analytics and history of judicial federalism, however, it is incumbent on me to explain how I will illustrate the themes of this book.

### Deep Preferences, Induced Preferences, and Judicial Politics

How does the history of judicial federalism illustrate preferences and situations? Some gentle formalism facilitates precision about this question. Consider an actor with a vision of a good society, which I will call a deep preference. By choosing different means of action, the actor can alter the state of affairs that prevail, moving it closer or farther from her vision of a good society. What determines the actor's preferences for the different means, her induced preferences about means?

More precisely, denote different states of affairs as points ( $y$ ) on a line ( $Y$ ). Let  $\bar{y}$  denote the actor's ideal state of affairs (her deep preference). Let her evaluation of actual states of affairs be given by  $u(y;\bar{y}) = -(y - \bar{y})^2$ . (The key point here is that the actor prefers states of affairs that are closer to her vision of the good society than farther from it.) Let  $X$  be the set of means available to the actor, with  $x$  indicating a specific means. Finally, let means of action affect states of affairs through a simple technology:  $y = f(x;\theta)$ , where  $\theta$  denotes factors that affect the relationship between means and ends, which I will call structure.

Within this simple formalism, it is easy to understand the logic of the actor's preferences about means. Suppose for concreteness that  $y = x + \theta$ , with  $x$  and  $\theta$  being real numbers.<sup>4</sup> It is easy to confirm that the actor's most preferred action is then  $x^* = \bar{y} - \theta$ .

This result is deeper than it initially appears. It shows clearly that the actor's (induced) preferences about means of action depend directly on

her deep preferences about the ideal society ( $\bar{y}$ ), but also equally directly on the structure relating means and ends ( $\theta$ ). Changes in either deep preferences or structure will change preferences about means. In this sense, preferences about means are endogenous.

In the jurisdiction game, the model is game theoretic rather than decision theoretic, unlike the simple example just given. The strategic complexity of American political institutions necessitates a move to game theory. Not surprisingly, the situation facing the actors is much more complicated than in the example. Nonetheless, the basic logic goes through.

More concretely, the actors include voters from slave states and voters from free states, who send representatives to Congress. These actors (and thus their delegates to Congress) have very different conceptions of the good society: their deep preferences are distinct. The means of action for the delegates in Congress is, strengthen or weaken federal courts. The structure, as elaborated in the model, is quite complex. It includes the externalities imposed on slave-holding voters and abolitionist voters by the opposing ways of life pursued in different states. It also includes the number of delegates from free and slave states in Congress, the decision rules in Congress used to choose policies, and the deep preferences of the high court (which are structure from the perspective of the congressmen). The model also includes the Supreme Court as an active player. It too has deep preferences about slavery (for example). The high court's means of action is, assert or refuse federal jurisdiction over state policy. Structure for the Court includes, critically, its enforcement costs for imposing policy on the states. The model then provides a framework for tracing out how changes in deep preferences and changes in structure drive the politics of federal judicial state-building—including changes in induced preferences about the power of federal courts.

Let me be clear about what is not in the model. It takes changes in deep preferences and structure as data, then works through the consequences for induced preferences and judicial state-building. It does not explain why structures or deep preferences about fundamental values change. But, endogenizing such changes is possible. For example, one could embed the jurisdiction game in an economic model of trade and growth, so that as interregional trade grows, externalities across states increase. This endogenous change in structure would then trace out into predictable struggles over federal judicial power. Alternately, one could at least in theory connect the jurisdiction game to a model of social movements. The rise of abolitionism, for example, as a social and political movement would alter endogenous deep preferences, with predictable consequences for the politics of federal judicial power.

Also missing from the story is a more subtle but intriguing notion: the co-evolution of preferences and institutions.<sup>5</sup> By this I mean, the

expansion of federal judicial power will itself create voters and judges with altered deep preferences, whose deep preferences in turn feed back into changes in judicial institutions. For example, suppose newly empowered federal judges force changes in state electoral laws. The resulting change in state electorates may lead to the selection of different delegates to Congress. Nomination politics driven by the new delegates will then change the population of federal judges, who in turn act to alter federal jurisdiction again. Thus, over time deep preferences and judicial institutions would evolve together, toward stable points in which institutions and preferences fit together in a social-political equilibrium.

Many readers of this volume might prefer to see models of endogenously changing structures and deep preferences and co-evolving preferences and institutions. Me too! But one must walk (or stumble) before one can run. In that spirit, I turn to a more circumscribed but nonetheless rich model of judicial federalism.

### Theories of Federal Courts

I have used the artful phrase judicial power without defining what I mean. By judicial power I mean the ability of a court system to formulate legal rules, modify them, use them to resolve a multitude of disputes, and make the resulting judgments stick. Many factors go into judicial power, including budgets, staffing, organizational structure, and autonomy in making procedural rules. But here I focus on jurisdiction, the formal ability to hear cases. Legal historian William Wiecek explains why jurisdiction must be the centerpiece in any account of judicial state building:

To a court, jurisdiction is power: power to decide certain types of cases, power to hear the pleas and defenses of different groups of litigants, power to settle policy questions which affect the lives, liberty, or purses of men, corporations and governments. An increase in a court's jurisdiction allows that court to take on new powers, open its doors to new parties, and command the obedience of men formerly strangers to it its writ. Thus it is that in crabbed and obscure jurisdictional statutes a hundred years old we may trace out great shifts of power, shifts that left the nation supreme over the states in 1876 and that gave the federal courts greater control over the policies of Congress than they had before the Civil War. (1969, 333)

There are two distinct analytic traditions concerning the jurisdiction of federal courts. The first, which might be associated with Felix Frankfurter's and William Landis's acknowledged masterpiece of twentieth-

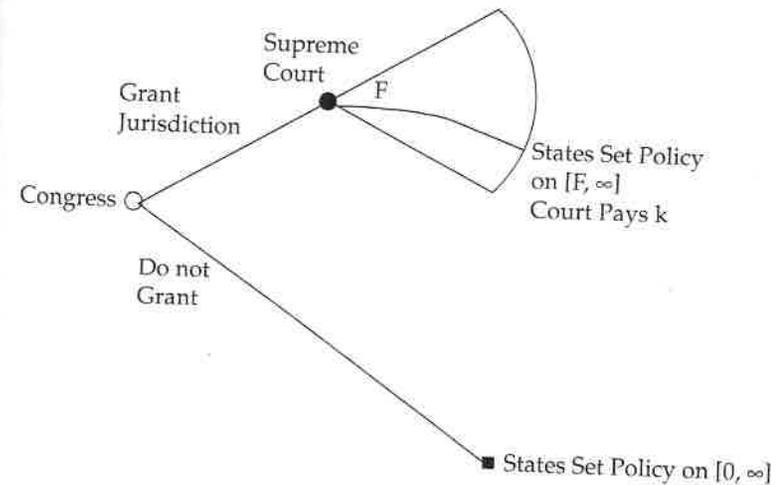
century legal scholarship, *The Business of the Supreme Court: A Study in the Federal Judicial System* (1927), emphasizes congressional warrants of jurisdiction. The second, which one might associate (somewhat symbolically) with Henry Hart and Herbert Wechsler's monumental work *The Federal Courts and the Federal System*, first published in 1953, emphasizes unilateral judicial action (Bator et al. 1988). In a fascinating recent article on judicial state building in the late nineteenth century, Howard Gillman clarifies and extends the Congress-centered approach (2002). In a sophisticated and ingenious paper, legal scholar Larry Kramer and political scientist John Ferejohn add a novel twist to both accounts, by emphasizing the way federal courts unilaterally restrict their own jurisdiction (2002).

### The Congress-Centered Account

To focus on the essence of a Congress-centered account, I render it in a stark game theoretic fashion. The starting point for all that follows is the following observation: the default position in American federalism is that state governments and state judiciaries set their own policies, absent explicit federal authority and intervention. This essential fact about American federalism was the backdrop for struggles over the development of public infrastructure in the antebellum years, the fate of slavery and the civil rights of African Americans, the creation and regulation of national markets, and the construction of a powerful welfare state. To capture the notion of state policies, let the possible policy in a state be a point on the positive line—that is, in the interval  $[0, \infty]$ .

Figure 7.1 offers what I take to be a plausible formulation of the jurisdiction game implicit in Frankfurter's and Landis's book and somewhat more explicit in Gillman's recent analysis. First, Congress may pass legislation that extends federal judicial jurisdiction over a policy arena. If Congress does so, the Supreme Court sets a minimum floor policy  $F$ , a federal standard to be obeyed by the states.<sup>6</sup> For example,  $F$  might connote a basic level of procedural rights for recipients of welfare programs, a minimal level of rights for freed slaves,<sup>7</sup> a minimum degree of protection from state harassment for federal officials,<sup>8</sup> a minimal level of protection for creditors in bankruptcy cases,<sup>9</sup> a minimal degree of accessibility of public buildings for the handicapped, and so on. Each state is then free to set its own policy, but if the state policy does not lie at or above  $F$  (that is, in the interval  $[F, \infty]$ ), the Court (following litigation) may reset the state's policy to  $F$ , possibly assessing a penalty against the state. If Congress does not extend jurisdiction to the federal courts, the states remain free to set whatever policy they wish, that is, they can set policy to any point in  $[0, \infty]$  and the federal courts cannot intervene.

Figure 7.1 The Congress-Centered Account (Version 1)



Source: Author's compilation.

In essence, the Congress-centered account is a delegation game: Congress creates authority and delegates it to the Supreme Court, which enforces it against the states (Bendor, Glazer, and Hammond 2001). To illustrate, consider Gillman's account (2002) of the Judiciary and Removal Act of 1875. This for the first time allowed the removal of cases with a significant federal question from state courts to federal courts. Critically, the act was passed by a lame duck Republican Congress facing the certainty of an incoming Democratic majority. In Gillman's view, which such prominent legal historians as Wiecek share, the economic federal judiciary as a reliable guarantor of property rights and *laissez faire* principles, especially in relation to state governments in the South, Midwest, and West. Hence, they conferred broad new jurisdiction on the federal judiciary, assuring acceptable enforcement of property rights in all the states, a level of enforcement the outgoing Republicans could not otherwise achieve. Of course, the incoming Democrats wished to repeal the act, and repeatedly tried to do so, but were continually hamstrung by divided party government. The Republicans of 1875 thus accomplished what the Federalists had tried but failed to do in 1801.<sup>10</sup>

In the Congress-centered account, Congressional lawmakers extend writs of authority to the federal courts when it serves the purposes of those who control the levers of power in Congress, and when the courts

but state courts

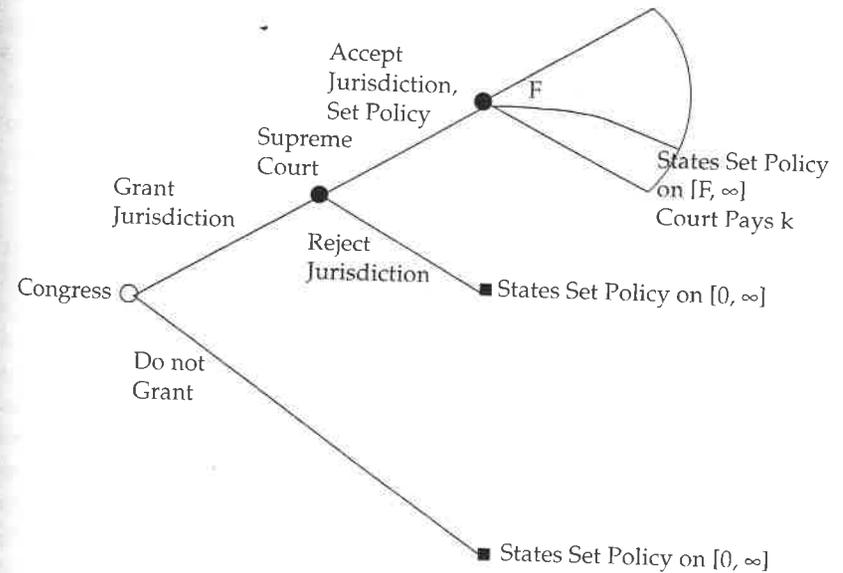
seem likely to be faithful agents. In this sense, the Congress-centered theory of federal judicial jurisdiction shares much with Congress-centered accounts of bureaucracy (McNollgast 1987, Epstein and O'Halloran 1999, Huber and Shipan 2002). Gillman goes a step further, identifying a majority political party as the key congressional actor. Thus, in his particular account, a dominant party shapes the jurisdiction of the federal judiciary so as to serve its partisan ends. But one need not be so heavily committed to a party-system view of American political history. Rather, the Congress-centered account is perfectly compatible with the view that representation in Congress is based on geography (Arnold 1979; Ferejohn 1974; Weingast, Shepsle, and Johnsen 1981). In this view, majority coalitions in Congress typically reflect shared economic and ideological interests across the states, rather than party per se. I will return to this point, because it affords an entrée for putting federalism back into the theory of federal courts.

Ferejohn and Kramer add an interesting twist to the Congress-centered account. They note that federal courts have been remarkably inventive in unilaterally restricting their jurisdiction. Hence, after Congress proffers jurisdiction to the federal courts, the Supreme Court may reject it (see figure 7.2).<sup>11</sup> But why should the high court limit its own power? In their account, the Supreme Court will do so to avoid bruising and potentially devastating confrontations with Congress. Of course, the Court could also do this simply by setting an innocuous federal standard—and if so, why limit jurisdiction? They provide an ingenious answer, which hinges on a collective action problem in the judicial hierarchy: lower court judges have an incentive to push warrants of authority into dangerous realms. In essence, lower court judges impose an externality on all federal judges should Congress respond to their provocations. But the Supreme Court faces the full impact of the many dangerous moves below, if Congress acts. Thus, the Court has an incentive to limit the rash actions of lower court judges by ruling dangerous policy arenas off-limits.

Obviously, this argument turns on the inability of the Supreme Court to police doctrine within the federal judiciary directly, a point that Ferejohn and Kramer (2002) do not establish.<sup>12</sup> In fact, it seems at odds with recent empirical scholarship, at least about the modern judicial hierarchy.<sup>13</sup> Moreover, there is a much simpler explanation, one that leaps irrepressibly from the pages of *The Business of the Supreme Court*: enforcement costs. As Frankfurter and Landis continually insist, every addition to the Court's jurisdiction brings a heavier workload. Every legal rule created under new jurisdiction burdens the courts with greater enforcement costs, especially when state governments resist assertions of federal authority.

(costs of jurisdiction)

Figure 7.2 Congress-Centered Account (Version 2)

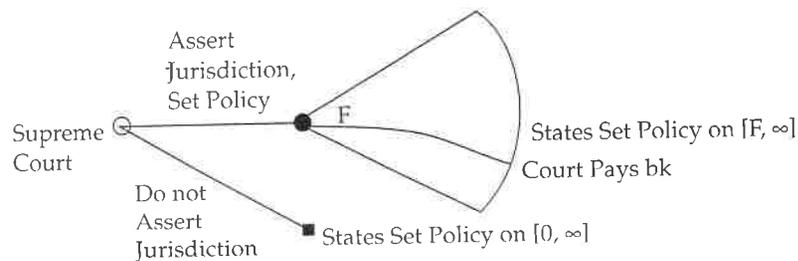


Source: Author's compilation.

Not surprisingly, the Supreme Court has created limitations on federal jurisdiction precisely to lighten a burdensome caseload. For example, Ferejohn and Kramer note,

The advent of the regulatory state brought legislation creating countless new interests that had not been protected at common law, interests that invariably were shared by large numbers of people. At the same time, the Supreme Court recognized a myriad of new constitutional rights, also widely held, that likewise did not resemble traditional forms of liberty or property. These changes forced courts to address, in the words of one group of leading commentators, "who, if anyone, should be able to sue to ensure governmental compliance with statutory and constitutional provisions intended to protect broadly shared interests of large numbers of citizens." Taken for all they were worth, the new procedural and substantive regimes might have opened the doors of the courthouse to practically anyone unhappy with anything the government did. Instead, the Supreme Court circumscribed access to the judiciary by fabricating the doctrines of standing and ripeness. (2002, 1008–9)

Figure 7.3 The Court-Centered Account



Source: Author's compilation.

Thus, in the context of the simple model of figure 2, imagine the Supreme Court faces a workload or enforcement cost  $k$ , associated with new warrants of jurisdiction and the declaration of new rights or national standards. To limit the adverse impact of enforcement costs, the Court might shrink its jurisdiction or (in the very stark version of the model I consider for clarity) eschew new jurisdiction all together.

### The Court-Centered Account

The Court-centered account, in its baldest form, can be represented by the game in figure 7.3. Absent congressional action, the Supreme Court may simply assert jurisdiction and sets a federal standard  $F$ . It may also remain quiescent. In this case,  $F$  might be a minimal level of procedural rights for people in police custody, minimal rights for people incarcerated in state prisons, or a minimal absence of racial gerrymandering in electoral districts.

This rendering brings an obvious issue to the fore: what restrains the high court from assuming universal judicial authority and imposing all-encompassing federal standards on the states? Here, the standard accounts are silent. However, one answer involves raw power relations between the federal courts and the states' representatives in Congress. As Ferejohn and Kramer (2002) note, individual federal judges possess important protections, such as life tenure under good behavior; but the federal judiciary possesses relatively few. Thus, the judiciary is vulnerable if an assault on state sovereignty angers a majority in Congress.

In the area of jurisdiction, two examples of Congressional retaliation are often cited: the Reconstruction-era *McCordle* case involving military rule and habeas corpus, and the 1932 Norris-LaGuardia Act, which limits

the ability of federal courts to use injunctions against labor unions.<sup>14</sup> The fact remains, though, that every other congressional effort to strip the Court of jurisdiction following a controversial ruling has failed. Of course, the paucity of jurisdiction-stripping legislation may simply reflect the skill of justices in avoiding controversy, not just the difficulty of enacting such legislation. And, as Ferejohn and Kramer (2002) note, by focusing on the most spectacular instances of court curbing, one misses more subtle expressions of congressional power, such as the limits on federal judicial discretion in sentencing.

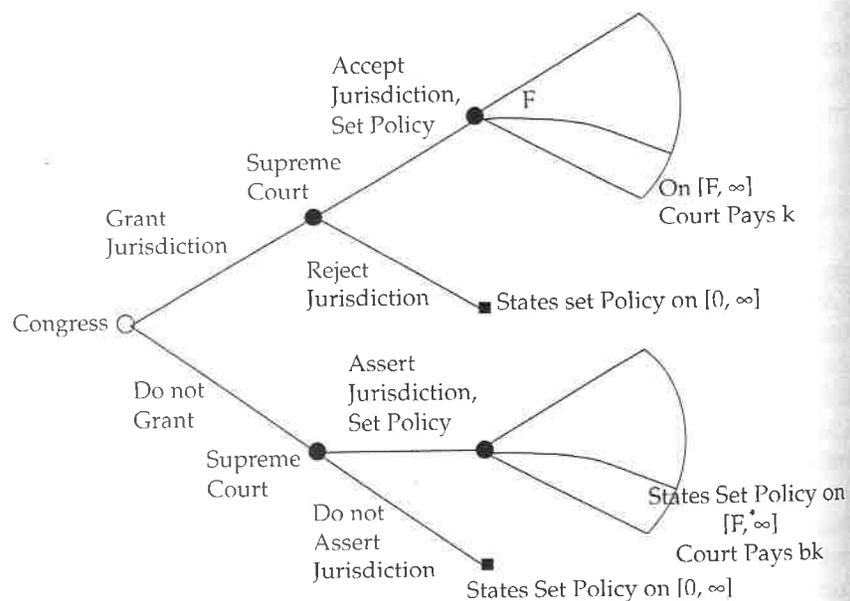
Still, while conceding the very real possibility of congressional road rage, I explore an alternative explanation, one that is symmetric with the Congress-centered account sketched above: unilateral assertion of federal judicial authority over state policy inevitably levies an enforcement cost on the federal courts. Moreover, those costs are likely to be particularly onerous when the judiciary asserts jurisdiction unilaterally. When working in tandem with Congress, the federal courts generally share the enforcement burden with a federal regulatory agency, including the Justice Department. But when federal judges issue a judicial hunting license to themselves, they must bear the resulting workload and enforcement costs alone, or at least disproportionately. To capture these enhanced costs, replace  $k$  in the Congress-centered account with  $bk$ , where  $b$  is a parameter greater than one, capturing the workload and enforcement costs the federal judiciary must bear if it unilaterally asserts jurisdiction and sets a federal standard.

On this account, a principal brake on federal judicial activism is state resistance to federal encroachment, because greater resistance increases  $k$  and thus the enforcement burden  $bk$  borne by federal judges.<sup>15</sup> The prospect of massive resistance is apt to check the impulses of the Supreme Court, even on weighty matters, though, of course, not always. In much the same spirit, congressional restrictions on federal judicial capacity act as another brake on federal judicial activism. Examples include limiting the number of federal judges, and mandating procedures that make more difficult the efficient disposition of cases (for example, Congress required the Supreme Court to hear all appeals no matter how trivial, until well into the twentieth century). In the interests of simplicity and clarity, though, I will focus on judicial enforcement costs rather than congressionally imposed limits on judicial capacity.

### A New Approach: The Jurisdiction Game

Figure 7.4 brings together both the Congress- and Court-centered accounts, in an obvious way. In the model, Congress may extend warrants of authority to the Supreme Court, which may accept or reject them. But

Figure 7.4 The Jurisdiction Game



Source: Author's compilation.

Note: Prior to Congressional action, state voters elect congressmen.

if Congress does not act, the Court may assert authority unilaterally and announce a standard for the states. Following federal action, if any, the states set their policies and the federal courts pay an enforcement cost.

The jurisdiction game puts federalism back into the theory of federal courts in three ways. First, it departs from Gillman's assumption of a free-standing dominant party controlling Congress (2002). Instead, in the spirit of the new analytic literature on federalism (for example, Cremer and Palfrey 2002; Besley and Coate 2003), the model portrays each state as sending to Congress a delegate who faithfully pursues the interests of her constituents. In turn, the delegates (senators, as it were) decide whether to extend jurisdiction over an issue to the federal courts. Second, federal judicial policy directly affects the states, and hence the choices of the delegates (through anticipation). Finally, state resistance to federal judicial authority imposes costs on the federal courts. Thus, federal judicial action affects states; states interact directly with federal courts via resistance costs and indirectly through the actions of legislators in Con-

gress, who anticipate judicial actions. The high court is both acted on by Congress, and acts itself to shape its jurisdiction.<sup>16</sup>

First, what do state voters, and thus their federal delegates in Congress, want? I assume the voters in each state have a preferred policy for their state. When the extant policy in the state deviates from this ideal policy, the state's voters suffer a loss. In addition, voters (and thus delegates) may care about policies in other states, because policies elsewhere impose burdens via externalities. The model emphasizes the burden imposed on voters in state 1 by policy in state 2, say, because state 1's residents believe state 2's policy is morally wrong, not just different from state 1's.

The logic of this situation drives delegates into three categories, given a minimum standard  $F$  that will be imposed by an empowered federal judiciary (see proposition 2 in the appendix). First are the nationalizers, who always favor extending jurisdiction to the federal courts. The critical fact about nationalizers is that their ideal policy is higher than that preferred by the Supreme Court. Thus, if the Court imposes its most preferred standard, the policy in the nationalizers' states will be unaffected because it is higher than the standard—but cross-state externalities from low policy states, who will be hit by the federal standard, will decline as the policies in those states ratchet upward.

Second are the states rightists. These delegates always oppose extending jurisdiction to the federal courts. States rightists have ideal points so low, relative to the Supreme Court, that a federal judicial standard not only hurts them directly; it does so indirectly by moving many other states away from their preferred position. Consequently, they oppose a national standard whether or not they care little about externalities—but sensitivity to externalities makes them oppose a federal judicial standard even more intensely.

Third are the moderates. These delegates have ideal points lower than the Supreme Court, but relatively close to it. They oppose a federal judicial standard, if they care only about policy in their state. But if they are sensitive to externalities from states with very low policies, they may nonetheless support federal jurisdiction, to bring the low-lying states in line with a policy they see as better, albeit imperfect.

What does Congress want? Because the state delegates constitute the Congress, their preferences, as aggregated through the rules, structures, and procedures of that organization, determine congressional policy action. In reality, committee jurisdictions, gate-keeping powers, minority filibusters, and presidential vetoes all play a role in aggregating the preferences of the delegates. But here, again in the interests of simplicity and clarity, I treat Congress as broadly majoritarian, so that the delegates determine congressional policy through pure majority rule. Thus, if the

median member or delegate is, say, a states-rightist, Congress will favor a states rights policy. Obviously, the relative numbers of different types of delegates become critical for Congress's policy choice.<sup>17</sup>

What does the Supreme Court want? One assumes it has a most-preferred policy, and that it cares equally about policy in all the states. Given this straightforward assumption, the logic of the situation creates three varieties of federal courts (see proposition 1 in the appendix). The first is a retiring court, which will reject federal jurisdiction over a policy arena even if Congress offers it. (Of course, retiring courts never unilaterally assert jurisdiction). Retiring courts tend to prefer a low policy standard (so the benefits of a federal standard are low) or face massive resistance in the states if they accept jurisdiction. The second kind is a deferential court, which will accept jurisdiction if Congress proffers it but will not assert it unilaterally if Congress does not offer it. Such courts tend to favor higher standards and face substantial but bearable enforcement costs, but only if the Supreme Court works in tandem with federal regulators. The third kind is an activist court, which will assert jurisdiction even if Congress refuses to offer it. These courts stand to gain substantially from enforcing their preferred standard and face relatively low enforcement costs if they do.

Each of these judicial stances can be rationalized through a jurisprudential philosophy. Judicial reticence comports well with nullification, for example. More interestingly, deferential courts pursue the Progressive jurisprudence of a Frankfurter or Learned Hand, accepting a relatively activist role if, but only if, Congress requests it. Finally, activist courts can invoke the rights-oriented jurisprudence of a Warren, Fields, or Taney. From this perspective, jurisprudence is (arguably) endogenous to particular political configurations in the same way that administrative law doctrines appear to be (Shapiro 1988). But I will not pursue this point further here.

The three types of delegates (as median voter in Congress) intersect with the three kinds of high court to create outcomes (equilibria) in the jurisdiction game (detailed in proposition 4 in the appendix and in table 7.1). Activist courts always end up with jurisdiction; retiring courts never do; and deferential courts may or may not, depending on the lead of Congress.

The real payoff from the analysis comes in the comparative statics of the jurisdiction game. These involve both deep preferences and structure. As either change, they can impel the players from one equilibrium to another. Broadly speaking, the critical comparative statics will involve, first, changes in judicial preferences relative to state policies or in enforcement costs (state resistance) that move the Supreme Court across the spectrum from retiring, to deferential, to activist; and second, changes

Table 7.1 Equilibria in the Jurisdiction Game

	Activist Court	Deferential Court	Retiring Court
Nationalizer or pro-jurisdiction moderate Congress	Congress offers, Court accepts.	Congress offers, Court accepts	Congress does not offer, Court does not assert
States rightist or anti-jurisdiction moderate Congress	Congress does not offer, Court asserts	Congress does not offer, Court does not assert	Congress does not offer, Court does not assert

Source: Author's compilation.

in state preferences, changes in sensitivities to cross-state spillovers, or changes in the identity of the median voter in Congress, that move the median congress member from states rightist, to antijurisdiction moderate, to projurisdiction moderate, to nationalizer.

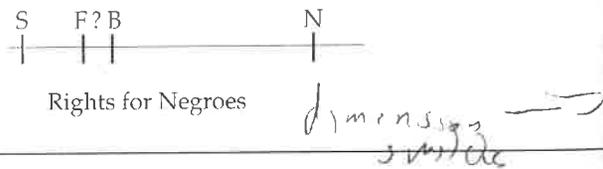
### Playing the Jurisdiction Game: Congressional Delegation of Judicial Authority

As the discussion of the Removal Act of 1875 may have suggested, the delegation part of the story is often relatively straightforward. Here I will briefly illustrate it with brief vignettes from the antebellum period. In these cases, the jurisdiction game provides a framework for understanding how altered preferences or sensitivity to spillovers changed the politics of judicial state building.

In the years before the Civil War, the law of slavery was highly decentralized, allowing states considerable freedom in their own arrangements. In fact, this decentralized regime received special protection in the Constitution which, for example, prohibited Congress from banning the importation of slaves in the early years of the Republic. In the Deep South, of course, the law of slavery assumed ever more elaborate and savage forms. In the North, through statutes, constitutional provisions, and judicial precedents, nearly all states ended slavery. Many border states favored slavery, but with less fervor than in the Deep South.

State policy on rights for Negroes reveals that law in the North was antislavery, in the South proslavery, and in the border states (B) proslavery but less so than in the South (see figure 7.5). The Supreme Court was dominated by southerners, but the policy it would set (F) would proba-

Figure 7.5 Northern Abolitionists are Nationalizers in Terms of Rights for Negroes, Southerners are States Rightists



Source: Author's compilation.

bly be less pro-slavery than that prevailing in the southern states. In these circumstances, most southerners in Congress were states rightists. In the absence of much concern about slavery, moderates were generally antifederal jurisdiction—their laws might not be touched by federal action and they were insensitive to the plight of slaves in the Deep South. But notably abolitionists, who were acutely sensitive to the terrible situation of the slaves, were typically nationalizers. Federal courts represented virtually the only way to alter laws in the South, and any intervention, however tepid, would most likely be an improvement. Accordingly, abolitionist lawyers such as Salmon Chase exercised considerable ingenuity trying to craft arguments in constitutional law that would support or even require unilateral antislave action by the federal courts (Hyman and Wiecek 1982). In fact, northern senators were typically staunch nationalizers (of course, economic concerns loomed large here). Not surprisingly, the Supreme Court remained unsympathetic to these arguments.

By about 1850, however, southerners began to see a problem with a decentralized slave regime. Southerners traveling with their slaves through northern states might find their “property” seized and declared free. As interstate commerce and travel increased, the saliency of these northern policies increased. Given the slavery-friendly leanings of the Taney Court and the federal judiciary (Fehrenbacher 2001; Cover 1975), many southerners began to reverse their adherence to states rights, instead advocating substantial expansion of federal judicial power over state policy (Finkelman 1981).

Figure 7.6 illustrates how this remarkable preference reversal could occur. The key is the policy dimension in question: protection of property rights in slaves. As shown, southern states had very high protection for such property rights. Northern states had none. Northern disregard for this kind of property right was of little concern to southerners so long as North and South had little contact. But with the growth of cross-

Figure 7.6 Southerners are Nationalizers in Protecting Slave “Property”; Abolitionists become States Rightists



Source: Author's compilation.

state spillovers, federal jurisdiction began to appear attractive to southerners.

In September 1850, Millard Fillmore signed into law a new Fugitive Slave Act substantially expanding federal judicial power. Sensibilities in the North were rubbed raw as federal courts backed raids by slave catchers. Northern states enacted so-called liberty laws and state courts in the North resisted the slave-catchers. Southerners pushed for further expansions in federal authority—and northern senators (whose states in earlier years had been bastions of support for federal courts) began to echo the nullification doctrines espoused in South Carolina in the 1830s and encapsulated in the Virginia and Kentucky resolutions. Abolitionist Ohio Senator Benjamin Wade declared,

I am no advocate for Nullification, but in the nature of things, according to the true interpretation of our institutions, a State, in the last resort, crowded to the wall by the General Government seeking by the strong arm of power to take away the rights of the State, is to judge of whether she shall stand on her reserved rights. (McDonald 2000, 175)

Later in the antebellum period Republicans tried to repeal Section 25 of the Judiciary Act, which gave the Supreme Court the power to apply judicial review to state legislation. This preference reversal by the abolitionists, and northern resistance to federal authority, is again easily understood in the context of figure 7.6.

In the years before the Civil War, southern courts adopted increasingly draconian slave policies. Some of the new rulings returned individuals freed during stays in northern states to slavery—which was, as might be expected, deeply offensive to northern sensibilities. Even worse, and almost incredibly, other rulings returned to slavery some individuals who had been voluntarily freed by their owners. By 1860, “the courts of the North and South had diverged to such an extent that a judicial seces-

sion had taken place" (Finkelman 1981, 183, and chap. 7 more generally). The political effect was to further inflame northern fears of a so-called Slave Power Conspiracy and engender even greater northern resistance to extensions of power to the slavery-friendly federal courts.

In the context of the jurisdiction game, the increasing extremity of the southern states suggested to northerners that the Supreme Court might move F (as shown in figure 6) to even higher levels. The northern response to this perceived threat was predictable.

### Playing the Jurisdiction Game: Judicial Assertions of Authority

The unilateral action path has rarely been articulated as baldly as I have done, though implicitly it is a staple of textbook discussions of federal courts and constitutional law. Because of its novelty, I will illustrate this part of the jurisdiction game with a more extended look at the strange career of state sovereign immunity. I draw heavily on Orth's *The Judicial Power of the United States: The Eleventh Amendment in American History* (1987), which contains an exhaustive bibliographic essay on the subject, and his "The Interpretation of the Eleventh Amendment, 1798–1908" (1983).

In the early years of the republic, many states had reason to fear lawsuits by American Tories and British creditors whose property had been confiscated during the American Revolution. If these individuals could sue state governments and recover their property, the effect would be devastating for many who had loyally supported the revolution—and, no doubt, as their wrath sought a target, their representatives in state legislatures. It was with considerable interest, then, that state lawmakers followed the fate of the first important case heard by the fledgling Supreme Court, *Chisholm v. Georgia* (1793). In that case, Chisholm, a resident of South Carolina, sued the state of Georgia over a debt owed to an estate, of which he was the executor.

Chisholm invoked the original jurisdiction of the Supreme Court to hear "all cases . . . in which a state shall be party," so the case would be heard by the high court. Georgia, which denied that the Supreme Court had valid jurisdiction, declined to appear to defend itself. In lengthy opinions, the federalist dominated Supreme Court held that it properly had jurisdiction over the case. It also held that a state could indeed be sued in federal court by someone not a resident of the state. The intention behind the opinion was reasonably clear, and in some of the opinions (including that of Chief Justice John Jay) explicit: the Supreme Court would defend the rights of creditors, including foreigners, to facilitate the growth of "public credit" (in Hamilton's phrase). To do otherwise would lead to the exclusion of government from credit markets.

The case is easy to interpret in the framework of the jurisdiction game: the Supreme Court desired a very high degree of protection for creditors, declared that it had jurisdiction over the appropriate cases, and moved to impose a high standard on the states.

As predicted by the lone dissenter, Justice Iredell, the opinion unleashed a fire storm in the states and in Congress. Within three weeks, both houses of Congress had proposed the Eleventh Amendment. Within a year, twelve of the fifteen state governments—the necessary number—had ratified the amendment.<sup>18</sup> Even federalist strongholds like Massachusetts supported the amendment.

The Eleventh Amendment curtails the jurisdiction of federal courts in words that are anything but unclear: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." And from 1795 to 1823, the Supreme Court took the amendment on its face value. But in 1824, the Supreme Court under Chief Justice John Marshall found a new way to read the amendment.

Without a doubt Marshall, a staunch federalist, must have disliked the outcome of the *Chisholm* episode. In *Osborn v. The Bank of the United States* (1824) he devised a path around the plain meaning of the amendment. If someone sued an officer of the state, rather than the state itself, Marshall's court held, the Eleventh Amendment did not apply. In that case, federal courts could exercise jurisdiction and move policy in the correct direction.

An obvious question is, why did the Supreme Court again move to exert jurisdiction after the earlier rebuff? By 1824, the Revolutionary War debts were mostly a memory, no longer the third rail of American politics. In the years preceding *Osborn*, the Supreme Court had issued a series of rulings that, in essence, tested the waters without stirring up too much resistance.<sup>19</sup> By 1824, Marshall could interpret the Eleventh Amendment out of existence, assert federal jurisdiction over the relevant cases, and begin to impose tougher standards on the states. This remained the position of the Supreme Court for half a century, through the rest of the antebellum years, the Civil War, and Reconstruction. In fact, the Supreme Court affirmed and extended the *Osborn* doctrine as late as 1873 and 1876.<sup>20</sup>

The end of Reconstruction brought a new, and in many respects the most interesting, chapter in the history of state sovereign immunity. During Reconstruction, the governments in the southern states had issued debt at a furious rate. Southern bonds raised capital to fund public works, education programs, and social services for the freedmen—in other words, to create a new economy and a new society in the South.

Whether these plans could ever have worked remains a fascinating question. But, in the event, they failed in the face of terrorist resistance by whites in the South, corruption and incompetence by the new governments in the South, and waning northern enthusiasm for indefinite occupation of the South after the Panic of 1873. In short, the borrowed money was spent or stolen, the rebuilding failed, and one by one southern states were "redeemed" as the Democratic Party and former Confederates resumed power.

Needless to say, raising taxes and repaying debt issued by carpetbaggers for the benefit of ex-slaves had minimal appeal for the power brokers in the redeemed but impoverished South. (In fact, by late Reconstruction tax rates in many southern states were three to four times the pre-war levels). In state after state, renegeing on the debts—repudiation—became a centerpiece of southern politics. The creditors holding the southern bonds were equally determined to get the money the states had solemnly pledged when they issued the debt contracts—and which the federal courts seemed obliged to enforce under the Osborn doctrine.

It is important to grasp what pro-creditor rulings by the federal courts implied: if southern legislators complied with the ruling, they would be obliged to pass laws raising taxes, actually gather the revenue from a hostile citizenry, and then positively disburse the funds to creditors. Shortly thereafter, the legislators would face the near-certain prospect of unemployment. On the other hand, if a state government refused to comply with a federal judicial order, what realistic prospect did a federal judge have of making the order stick? To do so would require raw federal force—marshals or troops, plus unending lawsuits and intense judicial supervision. After the election of 1876, raw force was exactly what the Hayes administration would never supply. Finally, if federal judges did not support the creditors, the bondholders would be left with worthless paper, because southern state courts would be extremely loathe to recognize their claims. (They could invoke sovereign immunity themselves.)

This situation is easily understood in terms of the jurisdiction game. First, the federal courts assert jurisdiction and enforce their preferred (pro-creditor) position against low policy states, at a time when state resistance is low (the Osborn case). Suddenly, however, state resistance to the federal standard skyrockets. Enforcement costs become huge. What are the courts to do?

The answer occurred in 1883 in *Louisiana ex rel. Elliott v. Jumel*, when the Supreme Court reluctantly concluded, contra Osborn, that the words of the Eleventh Amendment in fact mean what they seem to say. The Louisiana state government that had issued the debt in question had

done practically everything possible to reassure creditors: amending the state constitution to require repayment, setting up an automatic tax to avoid annual appropriations, making diversion of those funds to any other purpose a felony, and depriving state judges of the power to enjoin the collection of the tax. But to no avail: the new state government refused to honor the debts. A creditor sued the state auditor, Jumel (as per Osborn), and petitioned the U.S. Supreme Court to issue a mandamus compelling the payment according to the original contract. The Court refused to issue the mandamus, declaring,

The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it is related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full. (107 U.S. 711, 727)

And this the Court refused to do.

A series of other rulings in the 1880s continued in this vein—with one telling exception. The Supreme Court ruled consistently against the state of Virginia and in favor of its creditors. The reason lay not in any special animus for the repudiators of the Old Dominion, or special affection for its creditors. Rather, the Reconstruction government of Virginia had hit upon a unique method for repaying bonds: Virginia bondholders could use the bonds in lieu of cash to pay state taxes. Given this state law, state bondholders themselves could enforce repayment in a radically decentralized way that required no ongoing federal judicial supervision. All the U.S. Supreme Court had to do to protect Virginia's creditors was to strike down new Virginia laws changing the repayment method! This it could do at little cost—and did do, over and over again.<sup>21</sup>

The final chapter in the story of state sovereign immunity may come as little surprise. Over time, passions over debt repudiation faded in the South, as bonds expired and creditors passed away. But the Supreme Court remained dominated by economic nationalists who strongly favored economic development and protection of corporations against populist or progressive state governments. Beginning about 1890 (in *Hans v. Louisiana*), the Supreme Court again found loopholes for escaping the reach of the Eleventh Amendment. After about 1894, the Court regularly enjoined state officers from taking actions adverse to interests of railroads. In essence, it reassumed the jurisdiction favored by John Marshall. To reach this end, several Supreme Court justices, such as Justice Bradley,

adopted positions on state sovereign immunity at complete variance with those they had taken in the debt repudiation cases of the 1880s—a form of strategic behavior easily understood in terms of the jurisdiction game.

## Conclusion

In federalist systems of government, expansions of national judicial authority inevitably come at the expense of states' legal and political autonomy. Consequently, the central political dynamic in federal judicial state-building is the struggle over national versus state power. Yet, existing theories of federal courts have been largely silent about this struggle. The object of this chapter has been to bring federalism back into the positive theory of federal courts.

The actual history of the jurisdiction, organization, and procedural operation of American federal courts is almost unbelievably convoluted. No single model can hope to explain everything about the law of federal courts, or even more than a small portion. Nonetheless, the virtue of the jurisdiction game—if it may be said to have any virtues—is to highlight the basic logic of the political choices facing judges, legislators, and voters as they wrestle with the allocation of judicial authority in a federalist system of government.

As I explained earlier, the approach taken in this chapter integrates institutions and preferences, but only to a degree. The model is arguably useful for exploring the *consequences* for federal judicial power of shifting moral passions (deep preferences), enforcement costs, and so on. At present, it says little about the origins of shifting passions and structure. Thus, in the cases I discussed, I emphasized the way structural changes—enforcement costs in the states or increased interstate commerce and travel—affected the politics of federal judicial power. I also emphasized the importance of shifting deep preferences, for example, over slavery. And, I acknowledged the importance of compelling ideas, for example, those that led nineteenth-century federal jurists to favor creditors over debtors whenever they could. But, given the focus of the model, I spent little time exploring (for example) the origins of abolitionism in nineteenth-century religious values; abolitionism's spread as a social movement; the intellectual roots of laissez-faire jurisprudence; or the diffusion of laissez-faire jurisprudence through the works of key treatise writers. This is not because these matters were unimportant for the history of judicial federalism in the United States—manifestly, they were important. A strength of the model is that it provides a framework for understanding how they could be.

The bare-bones jurisdiction game can be extended in many ways. For

example, taking federal judicial enforcement costs out of the black box would surely be interesting. This would allow state citizens to play a more active role than simply as voters in congressional elections, and could illuminate the enforcement nexus between federal courts and federal administrative agencies (a hugely understudied subject, even in the area of electoral law). Extending the model to address federal judicial procedure and federal judicial organization, not just jurisdiction, could be quite interesting. As I mentioned, it might be very useful to better articulate the model of national lawmaking by incorporating more details about Congress and introducing a president with the veto power. From the perspective of preferences and situations, working harder to endogenize structure and deep preferences would be worthwhile. And, looming over the horizon is the fascinating prospect of co-evolving preferences and institutions.

## Appendix: The Jurisdiction Game

The game form is that indicated in figure 7.4. The actors are voters in states, state delegates to Congress (for example, senators), and a Supreme Court. I seek sub-game perfect equilibria to the game. First, I recapitulate the assumptions in the text, impose some structure on preferences, and make some additional simplifying assumptions (some of which are quite strong).

The policy space in state  $i$  is  $X_i = [0, \infty]$ . The policy in place in state  $i$  is  $x_i \in X_i$  and the most preferred policy for voters in state  $i$  is  $t_i \in X_i$ .<sup>22</sup> The utility function for the delegate from state  $i$  is:

$$-|t_i - x_i| - a_i \sum_{j \neq i} |t_j - x_j|$$

(externalities)

The coefficient  $a_i \geq 0$  indicates the sensitivity of voters in  $i$  to cross-state spillovers or externalities from the policies in the other states. Note that this definition of externalities is essentially ideological or moral rather than economic: if all the states had the same policy, there could be still be cross-state externalities imposed on voters who believe the policy is wrong. (Think of slavery or abortion policy.) An alternative definition emphasizes what might be seen as economic externalities:  $-|t_i - x_i| - a_i \sum_{j \neq i} |x_j - x_i|$ . Here, externalities arise because other states have different policies, and this heterogeneity gives rise to transactions costs when voters from different states interact. (Think of railroad gauges or systems of weights and measures.) Both kinds of externalities are important, but here I focus on moral externalities.

The ideal policy for the Supreme Court is  $t_i \in X$ . Its utility function is  $-\sum_i |t_i - x_i|$  if the Court has not assumed jurisdiction,  $-\sum_i |t_j - x_i| - k$  if the Court has assumed jurisdiction after being offered it by Congress, and  $-\sum_i |t_j - x_i| - bk$  if it has assumed it without being offered by Congress ( $b > 1$ ). In other words, the Supreme Court cares about policy in all the states, equally.

The following lemma is obvious but useful:

*Lemma 1* In the absence of federal jurisdiction, the voters in state  $i$  set policy to  $t_i$ . Given federal jurisdiction and standard  $F$ , voters in state  $i$  set policy to  $t_i$  if  $F \leq t_i$ .

*Proof.* Follows from majority rule, and the non-binding nature of a minimum standard when voters prefer a higher one (Quod est demonstratum [QED]).

To avoid the complications and unnecessary distraction of modeling an enforcement game between the federal judiciary, the states, a federal regulatory agency, and litigants I employ the following costly compliance assumption: If the Supreme Court has set a standard  $F$  and  $t_i < F$ , policy in state  $i$  ultimately becomes  $F$ , but only after enforcement cost  $k$  is imposed on, or  $bk$  assumed by, the federal judiciary. This is relatively unobjectionable, but in the interest of simplicity I further assume  $k$  and  $bk$  are independent of  $F$ . This is clearly unrealistic and could not be maintained in most enforcement games. It is justified here only as a simplifying assumption that facilitates a focus on jurisdiction rather than judicial policy making per se.<sup>23</sup>

Given Lemma 1 and the costly compliance assumption, the following lemma follows immediately.

*Lemma 2* If the Supreme Court accepts or asserts jurisdiction, it sets  $F = t_j$ .

*Proof.*  $F$  cannot lower the policy in high  $t$  states. It can only raise it in low  $t$  states, to  $F$ . Raising policy in a state above  $t_j$  imposes a loss on the Court. Hence, the best the Court can do is to set  $F$  to its ideal point, raising policy to  $t_j$  in all states whose policy would otherwise have been lower than  $t_j$  (QED).

I now consider the jurisdiction decision of the high court.

*Proposition 1* If Congress has offered the Court jurisdiction, the Court will accept if and only if  $k \leq \sum_{t_i < t_j} (t_j - t_i)$ . If Congress has not offered the Court jurisdiction, the Court will assert it if and only if  $k \leq \frac{1}{b} \sum_{t_i < t_j} (t_j - t_i)$ .

*Proof.* If the Court has no jurisdiction, it receives  $-\sum_{t_i \leq t_j} (t_j - t_i) - \sum_{t_i > t_j} (t_i - t_j)$  (using Lemma 1). If the Court accepts or asserts jurisdiction, the Supreme Court sets  $F = t_j$  (Lemma 2). This yields utility  $-\sum_{t_i > t_j} (t_i - t_j) - k$  if jurisdiction has been offered and  $-\sum_{t_i > t_j} (t_i - t_j) - bk$  if not, a gain of  $\sum_{t_i < t_j} (t_j - t_i)$  at respective costs  $k$  and  $bk$  (QED).

For reticent courts,  $\sum_{t_i > t_j} (t_i - t_j) < k$ , for deferential courts  $k \leq \sum_{t_i > t_j} (t_i - t_j) < bk$ , and for activist courts  $bk \leq \sum_{t_i > t_j} (t_i - t_j)$  (QED).

I now consider the voting decisions of the state delegates in Congress. The following points about externalities are useful. Consider a distribution of state ideal points below  $t_j$ ; call the lowest of these  $t_l$  and the highest  $t_h$ . If the Court assumes jurisdiction, it will move all these states' policy up to  $t_j$ . For any  $t_i < \frac{t_l + t_j}{2}$ , the resulting change in externalities must be adverse, since all other states below  $t_j$  will move to a point farther from  $i$ 's ideal point than their initial position. And, for  $t_i > \frac{t_h + t_j}{2}$ , the resulting change in externalities must be favorable since all states below  $t_j$  will move closer. This argument establishes the existence of a type, between  $\frac{t_l + t_j}{2}$  and  $\frac{t_h + t_j}{2}$ , for whom the resulting change in externalities is zero. For all higher types, the resulting change in externalities will be favorable, and for lower types adverse. (Note that this type might not be a member of the actual distribution of states.) Call this type  $\hat{t}$ .

*Proposition 2* First, delegates whose ideal point is less than  $\hat{t}$  always oppose federal jurisdiction. Second, delegates whose ideal point is greater than or equal to  $\hat{t}$  always strictly favor federal jurisdiction, for any  $a_i > 0$ . Third, delegates whose ideal point is above  $\hat{t}$  but below  $t_j$  favor or oppose jurisdiction, depending on the magnitude of  $a_i$ .

*Proof.* From the argument above, types below  $\hat{t}$  suffer adverse externalities from federal jurisdiction. In addition, they suffer a direct policy loss from the change in policy in their state. Therefore, even if  $a_i = 0$ , these delegates oppose federal jurisdiction. Types at or above  $t_j$  escape the minimal standard; consequently, they suffer no direct policy loss. Since the ideal policy of these delegates lies above  $\hat{t}$  (see above), they gain from the change in externalities. Hence, for any positive  $a_i$ , no matter how small, these delegates favor federal jurisdiction. Delegates whose ideal point lies above  $\hat{t}$  but below  $t_j$  gain from the change in externalities

but suffer a direct policy loss (that is, on balance states move closer to their ideal point than formerly, but the state's policy itself now diverges from its ideal). These states favor federal jurisdiction only if  $a_i$  is sufficiently large that the gain in externalities outweighs the direct policy loss (QED).

Part one of the proposition defines states rightists, part two defines nationalizers, and part three defines moderates. Let  $\hat{a}$  be the critical level of sensitivity to externalities that pushes moderates to favor federal jurisdiction.

The following describes Congressional jurisdiction choice in which all state delegates behave sequentially rationally.

*Proposition 3* If  $k \leq \sum_{t_i < t_j} (t_j - t_i)$  and the median voter in Congress, one, has ideal policy greater than or equal to  $t_j$  and  $a_i > 0$ , or, two, has ideal policy greater than  $\hat{a}$  and  $a_i \geq \hat{a}$ , Congress offers federal jurisdiction to the Supreme Court. Otherwise, it does not.

*Proof.* The proposition follows directly from Proposition 2 and standard voting theory. However, note the "vote no if indifferent assumption": Congress does not offer jurisdiction if it will be refused (in which case, the median voter who would otherwise favor jurisdiction will be indifferent about offering it), will not offer it if a majority of delegates oppose federal jurisdiction but the Court will unilaterally assert it (so a median voter who opposes jurisdiction loses nothing by offering it), does not offer if the ideal point of the median voter is greater than  $t_j$  but  $a_i = 0$  (so the median voter neither gains nor loses from federal jurisdiction and is thus indifferent) (QED).

The following proposition, detailing equilibria, follows straightforwardly from combining Propositions 1 and 3.

*Proposition 4* One, Congress offers jurisdiction and the Court accepts it when  $k \leq \sum_{t_i < t_j} (t_j - t_i)$  and either conditions one or two in Proposition 3 hold. Second, Congress declines to offer jurisdiction and the Court unilaterally asserts it when  $k \leq \frac{1}{b} \sum_{t_i < t_j} (t_j - t_i)$  and neither condition one nor two in Proposition 3 hold. Third, Congress declines to offer jurisdiction and the Court declines to assert it when  $k > \sum_{t_i < t_j} (t_j - t_i)$ , or when conditions one and two in Proposition 3 both fail and  $k \leq \sum_{t_i < t_j} (t_i - t_j) < bk$  (QED).

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## Notes

1. On the jurisdiction, structure, and capacity of the early federal courts, see Warren (1926), Frankfurter and Landis (1927), Surrency (1987), Holt (1989), and Goebel (1971).
2. On the Civil War and Reconstruction, see Hall (1975), Wiecek (1969), Kutler (1968), Hyman and Wiecek (1982), Frankfurter and Landis (1927), Fairman (1971), Avins (1966), and Friedman (2002).
3. I pass over functionalist accounts that invoke agent-free "historical inevitability" in one form or another. For examples, see Goebel (1971), Hall (1989), and Kagan et al. (1978).
4. They need not be. Readers who are interested in just how far one can push this formalism might consult Ashworth and Bueno de Mesquita (2005) and those references.
5. For a general discussion see Bowles (2004), and for a fascinating example involving the family as an institution see Fernandez, Fogli, and Olivetti (2002).
6. This formalism mirrors that in Cremer and Palfrey (2002).
7. For example, under the 1867 Habeas Corpus Act, which for the first time allowed federal courts to review the judgments of state courts, even those affirmed by state supreme courts, and apply habeas corpus. Many other Reconstruction statutes could be cited here, for example, the Civil Rights Acts of 1866 and 1871, and the 1871 Voting Rights Enforcement Act, among others.
8. For example, under the Habeas Corpus Acts of 1863 and 1866 and the Internal Revenue Act of 1866. These first two laws protected federal officials from suits for false imprisonment. They also voided all proceedings in state courts after a removal to a federal court, and made any person involved in such a void proceeding liable for damages and double costs. The latter act protected Treasury officials from hostile local courts. See Wiecek (1969, 338–39).
9. For example, under the Bankruptcy Act of 1867 and the Chandler Act of 1898.
10. In 1801, the outgoing Federalists not only passed the infamous Midnight Judges Act, but also reorganized the federal judiciary to make it more effective and gave it federal question jurisdiction, in the Judiciary Act of 1801. The first act of the incoming Republicans was repeal of the legislation (Ellis 1971).

11. A more nuanced rendering would allow the Supreme Court to restrict rather than reject jurisdiction. The reader should appreciate that this is my rendering of Ferejohn's and Kramer's argument; those scholars might view this game theoretic précis as a mischaracterization.
12. If the high court can police the lower courts effectively, then it need not restrict jurisdiction; it can just force policy to its most preferred alternative among those that will not provoke Congress. In the Ferejohn-Kramer account, the high court must limit federal jurisdiction to tie the hands of otherwise unreachable *lower* federal judges.
13. For an example, see Cameron, Segal, and Songer (2000), among others.
14. Epstein and Walker (1995) provide a game-theoretic analysis of McCardle.
15. A more finely articulated model would allow the states to set a resistance level  $k$ , and endogenously determine  $b$  through a federal-state enforcement game. But in the interest of maximum simplicity and clarity, I treat  $k$  and  $b$  as parametric.
16. In the appendix to this chapter, I impose enough structure on the jurisdiction game to allow an explicit solution.
17. One could elaborate a more finely articulated model with bicameralism, committees, filibusters, and vetoes. My reading of the history persuades me that doing so could cast additional light on federal judicial state-building. But I leave this to the future, as this paper's primary ambition is to put federalism (not, bicameralism, committees, filibusters, and vetoes) back into the theory of federal courts.
18. This response is exactly the kind discussed by Ferejohn and Kramer, and by Epstein and Walker (1995), which I have downplayed. The young Supreme Court had little experience with separation of powers games, which do sometimes have real bite.
19. These are detailed in Orth (1987, 34–40).
20. In *Davis v. Gray* (1873) and *Board of Liquidation v. McComb* (1876).
21. This is a very summary history of some extraordinarily intricate legal maneuvering. However, the details of the twists and turns, such as the special provisions in Supreme Court doctrine for creditors in the West and holders of county debt, confirm the picture of a court pursuing a pro-creditor policy when costs allowed, and compromising or retreating when state opposition was too formidable. See Orth (1987, chapters V–VII).
22. One may allow heterogeneous voters in each state, but this is just a distraction here.
23. If state compliance is simply assumed to be perfect (as in Cremer and Palfrey 2000), then it is hard to see why the judiciary would bear any costs  $k$ . But in that case, the federal judiciary would always assert jurisdiction, an uninteresting case. Hence, we require costly compliance, implying positive  $k$ .

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