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Recent research has shown that economic liberalism no longer explains the Burger Court's business decisions. To discover what does, Hagle and Spaeth (1992) systematically analyzed the universe of Burger Court business decisions and found that a small set of ideological variables, which they labeled "instrumental libertarianism" accounted for most of these decisions. To supplement our 1992 study, we have constructed optimal models for the 10 most frequently participating Burger Court justices. These vary little from that of the Court. The three most antibusiness justices support governmental regulation, as do the two probusiness states' righters. Three justices are libertarians, one is a national supremacist, and one displays no distinctive behavior on any of our independent variables. In support of their regulatory preferences, the individual justices display varying support for agency action and judicial activism/restraint.

O nce upon a time, if someone coded a case in which a decision of the FCC had been challenged, a decision in favor of the government would be classified as liberal. Now, however, with the participation of various conservative and liberal interest groups as parties and intervenors before agencies, it is not at all clear how such cases should be coded, as Dudley and Ducat (1986) and Ducat and Dudley (1987) have shown. The shift in the focus of much agency action itself, the increased complexity of government regulation, the impinging of noneconomic concerns on economic actors (e.g., environmental protection, commercial speech) now preclude the reliable categorization of business cases on the overarching dimension of economic liberalism/conservatism (hereafter, economic liberalism). Hence, it is no longer possible to successfully construct cumulative scales of the Court's business decisions as it was during the Vinson and Warren Courts (Schubert 1962, 1965; Spaeth 1963; Rohde and Spaeth 1976).

To discover what does explain the Burger Court's business decisions, Hagle and Spaeth (1992) systematically analyzed the universe of Burger Court business decisions using the highly reliable data contained in the United States Supreme Court Judicial Database. Employing an attitudinal model that views the Court as a policy-making body whose decisions reflect the policy preferences of the individual justices, they found that a small set of ideological variables, which they labeled

"instrumental libertarianism," had displaced economic liberalism and accounted for most of the Court's business decisions. Because the model that best explains the Court's decisions may not fit the behavior of the individual justices, we supplement the earlier Hagle-Spaeth study by focusing here on how the individual members of the Burger Court voted in these business cases.

## PROCEDURE

Comparison of the Court's decisions with those of the individual justices dictates that we strictly adhere to the Hagle-Spaeth coding rules which produced a data set of 481 cases. The data are the same as those in the Hagle-Spaeth analysis: all orally argued cases identified in the United States Supreme Court Judicial Database (Spaeth 1991) pertaining to business. The dependent variable also remains the same: support or opposition to business. The only difference is that the focus here is the individual justices; there it was the Court.

Although the business cases for the entire Burger Court form neither a single cumulative scale nor a set of issue specific scales, it is possible that the votes of at least some of the justices do scale on the basis of economic liberalism—the construct that explained the justices' behavior in the Vinson and Warren Courts. In other words, some of the justices may have continued to vote consistently on this basis throughout the entirety of the Burger Court. We examine the behavior of only 10 of the 13 justices who sat on the Burger Court. We exclude the three who served most briefly: Black, Harlan, and Douglas. Their service also coincided with the early Burger Court, a time when the demise of economic liberalism was not fully apparent. Table 1 presents scalability data for the 10 justices under examination.

The votes on which table 1 is based were cast in the cases that the Hagle-Spaeth study considered. They were formed into scales and quasiscales[1] as specific in content as the Court's decisions permit. The data in table 1 comprise the sum of each justice's votes in each of these scales and quasiscales. Thus, if a justice cast 3, 10, 15, and 22 votes in four different scales and quasiscales, of which 1, 2, 0, and 3 respectively were nonscale, table 1 would show said justice casting 50 total votes, of which 6 were nonscale, for a scalable percentage of 88.0%. The justices' vote totals in table 1 differ from those appearing later in table 3 because the determination of the scalability of a set of votes excludes unanimous decisions.

The dual figures appearing in the nonscale vote column of table 1 for some of the justices result because, occasionally, a nonscale vote may properly be assigned to one of two possible justices. This variance is also reflected in the table 1 column specifying the percentage of cumulatively scalable votes each justice cast. Because the Court's decision rules tend to produce regularized patterns of voting, at least 95% of the scalable votes should produce a consistent voting pattern. A justice

[1]A quasiscale is a set of issue-specific cases that fails to meet the criteria of scalability, of which the most important for our purposes is a coefficient of reproducibility ≥.95.

TABLE 1

THE SCALABILITY OF THE JUSTICES' VOTES

| Justice | Total Votes | Nonscale Votes | % Scalable |
|---------|-------------|----------------|------------|
| Rehnquist | 311 | 5/6 | 98.4/98.1 |
| O'Connor | 96 | 3 | 96.9 |
| Brennan | 351 | 14 | 96.0 |
| Marshall | 351 | 18/19 | 94.9/94.6 |
| White | 353 | 18/19 | 94.9/94.6 |
| Burger | 352 | 19/21 | 94.6/94.0 |
| Powell | 278 | 19/20 | 93.1/92.8 |
| Stewart | 240 | 17/18 | 92.9/92.5 |
| Blackmun | 333 | 40/41 | 87.8/87.7 |
| Stevens | 228 | 40 | 82.5 |

who adheres to economic liberalism should display an equivalent amount of voting consistency.

Only Rehnquist, O'Connor, and Brennan exceed the 95% cutoff, with Marshall, White, and Burger close. One may therefore fairly conclude that economic liberalism continues to motivate the behavior of these justices. But even for them, close analysis shows that economic liberalism does not operate in all issue areas. Six/seven of Marshall's 17/18 nonscale votes occur in antitrust. Approximately one-third of White's locate in the small governmental corruption and natural resources scales, while Burger shows much inconsistency in national supremacy and preemption issues (seven of 19/21 nonscale votes). The concentration of these justices' nonscale votes in these issue areas undoubtedly results because the stimuli these cases contain trigger responses in the form of votes that presumptively pertain to instrumental libertarianism rather than economic liberalism. At the other extreme, economic liberalism clearly does not explain the votes of Stevens and Blackmun, and to a lesser extent those of Powell and Stewart.

FINDINGS

We now turn to an examination of instrumental libertarianism as applied to the votes of the individual Burger Court justices. Table 2 presents the Hagle-Spaeth model of the Court's decisions, followed by the optimal model as estimated by probit for each of the 10 individual justices whom we analyze.[2]

[2]To allow the models for the individual justices to manifest maximum independence from the Court's, 15 other situational and case characteristic variables were tested. None of them made a substantial improvement for any of the justices. The models for the individual justices presented in table 2 also do not include variables from the Court's model that proved irrelevant to the justice's votes. Thus, for example, in estimating the votes of Justice Brennan, both *Federalism-S* and *Proagency* failed to reach an acceptable level of significance and detracted from the performance of Brennan's model. As a result, neither variable appears in Brennan's optimal model.

We can see from table 2 that the optimal model for each of the justices varies little from the Hagle-Spaeth model for the Court. (The justices are ordered from least to most supportive of business; see table 3.) First, the two *Libertarianism* variables,[3] which were highly significant for the Court, are also significant for each of the justices, except for O'Connor on *Libertarianism-G*. Similarly, *Proagency* and *Projudicial*[4] produce an identical result: significant for each of the justices, except for Brennan on *Proagency*. At the other extreme, the two *Federalism* variables,[5] which were two of the three least significant of the ideological variables for the Court, are also such for the justices. *Federalism-F* is significant for seven of the justices, *Federalism-S* for only three. *Statute*,[6] alone among the variables, fails to match its aggregate performance at the individual level. This controlling variable was irrelevant for seven of the justices and, thus, does not appear in their models. For the other three justices, *Statute*'s estimated coefficient barely reaches the $p < .10$ level for Brennan and White, and the somewhat stronger $p < .07$ level for Blackmun.

The justices' models continue to show the importance of the direction of the lower court's decision (*lower court*)[7] as a controlling variable, reaching at least the $p < .005$ level for *every* justice. This is an important finding. To the extent that the Court accepts cases to reverse them, we might expect significantly different reversal rates for those justices whose voting patterns are more ideologically extreme. This proves not to be the case in this area. The relatively even distribution of lower court decisions supporting business, along with that of the Court, gives all the justices an opportunity to exercise an error correction strategy. We can see this in the similarlity of the reversal patterns between Justices Powell and Brennan, respectively, the most and least supportive of business (see table 3). When casting antibusiness votes, both justices are only slightly more likely to reverse a probusiness lower-court decision when doing so. In sharp contrast, both justices are much more likely to reverse the lower court when they cast a probusiness vote. While it may not be surprising that when Powell casts a probusiness vote, the lower-court decision is over two-and-one-half times more likely to be antibusiness than probusiness, it *is* surprising that the rate is an even higher three times as likely for Brennan.

[3]*Libertarianism-G* is coded 1 when the decision favors government local, state, or federal, and 0 otherwise. Conversely, *Libertarianism-I* is coded 1 when the decision opposes government, and 0 otherwise.

[4]These variables are coded 1 for support, 0 for neutrality, and −1 for opposition to agency action or the exercise of judicial power, respectively.

[5]*Federalism-S* is coded 1 if the decision both favors the state government and opposes the federal government or its authority, and 0 otherwise. *Federalism-F* is coded 1 if the decision both favors federal authority and opposes state or local government, and 0 otherwise. The *Libertarianism* and *Federalism* variables form a mutually exclusive set: no two of them may be coded 1 in any given case. All may be coded 0, however.

[6]The variable is coded 1 if the decision construes a statute and 0 otherwise.

[7]This variable is coded 1 if the lower court's decision opposed business, and 0 if it did not.

## TABLE 2

### THE COURT'S MODEL AND THOSE OF THE INDIVIDUAL JUSTICES

| | Libertarianism | | Federalism | | Projudicial | Proagency | Statute | Lower Court | Constant |
|---|---|---|---|---|---|---|---|---|---|
| | G | I | S | F | | | | | |
| **Court** | | | | | | | | | |
| Estimated Coefficient | 0.65* | −0.90* | 0.54 | −0.75* | 0.75* | 0.48* | −0.27* | −0.90* | 0.71 |
| *t*-statistic | 3.90 | −4.40 | 1.55 | −2.75 | 4.22 | 3.66 | −1.89 | −6.99 | 4.44 |
| % Correct 74.43    ROE = 45.6 | | | | | | | | | |
| **Brennan** | | | | | | | | | |
| Estimated Coefficient | 0.42* | −0.90* | — | −1.13* | 0.65* | — | −0.20 | −0.72* | 1.16 |
| *t*-statistic | 2.40 | −4.38 | — | −4.12 | 3.78 | — | −1.35 | −5.27 | 7.00 |
| % Correct 78.45    ROE = 32.0 | | | | | | | | | |
| **Marshall** | | | | | | | | | |
| Estimated Coefficient | 0.51* | −0.87* | 0.34 | −0.96* | 0.68* | 0.36* | — | −0.56* | 0.68 |
| *t*-statistic | 3.05 | −4.44 | 0.93 | −3.60 | 3.82 | 2.66 | — | −4.30 | 5.72 |
| % Correct 74.08    ROE = 28.6 | | | | | | | | | |
| **White** | | | | | | | | | |
| Estimated Coefficient | 0.64* | −0.84* | 0.95* | −0.51* | 0.72* | 0.42* | −0.19 | −0.85* | 0.69 |
| *t*-statistic | 3.83 | −3.96 | 2.19 | −1.97 | 4.11 | 3.18 | −1.31 | −6.50 | 4.38 |
| % Correct 73.37    ROE = 39.5 | | | | | | | | | |
| **Stevens** | | | | | | | | | |
| Estimated Coefficient | 0.68* | −0.63* | 1.61* | −0.36 | 0.52* | 0.47* | — | −0.41* | 0.28 |
| *t*-statistic | 3.35 | −3.02 | 3.18 | −1.21 | 2.49 | 3.06 | — | −2.63 | 2.00 |
| % Correct 70.35    ROE = 35.2 | | | | | | | | | |
| **Blackmun** | | | | | | | | | |
| Estimated Coefficient | 0.53* | −0.91* | 0.43 | −0.96* | 0.69* | 0.50* | −0.22 | −0.65* | 0.62 |
| *t*-statistic | 3.05 | −4.58 | 1.07 | −3.49 | 3.86 | 3.65 | −1.52 | −4.93 | 3.77 |
| % Correct 72.16    ROE = 39.6 | | | | | | | | | |

| | C1 | C2 | C3 | C4 | C5 | C6 | C7 | C8 | C9 |
|---|---|---|---|---|---|---|---|---|---|
| **Rehnquist** | | | | | | | | | |
| Estimated Coefficient | 0.95* | −0.64* | 1.05* | −0.31 | 0.57* | 0.66* | — | −0.59* | 0.0002 |
| t-statistic | 5.87 | −2.77 | 3.62 | −0.91 | 2.97 | 4.79 | — | −4.39 | 0.01 |
| % Correct 75.35  ROE = 47.8 | | | | | | | | | |
| **Stewart** | | | | | | | | | |
| Estimated Coefficient | 0.78* | −0.97* | — | — | 0.79* | 0.43* | — | −0.59* | 0.22 |
| t-statistic | 3.89 | −4.14 | — | — | 3.44 | 2.71 | — | −3.63 | 1.63 |
| % Correct 73.97  ROE = 44.1 | | | | | | | | | |
| **O'Connor** | | | | | | | | | |
| Estimated Coefficient | 0.38 | −0.93* | 0.66 | −1.06* | 0.55* | 0.46* | — | −0.63* | 0.29 |
| t-statistic | 1.37 | −2.34 | 1.61 | −2.32 | 1.91 | 2.06 | — | −2.81 | 1.43 |
| % Correct 73.08  ROE = 41.7 | | | | | | | | | |
| **Burger** | | | | | | | | | |
| Estimated Coefficient | 0.60* | −1.07* | — | −1.02* | 0.81* | 0.58* | — | −0.81* | 0.30 |
| t-statistic | 3.76 | −5.11 | — | −3.30 | 4.50 | 4.51 | — | −6.23 | 2.76 |
| % Correct 75.63  ROE = 45.8 | | | | | | | | | |
| **Powell** | | | | | | | | | |
| Estimated Coefficient | 0.87* | −0.73* | — | −0.81* | 0.59* | 0.69* | — | −0.82* | 0.26 |
| t-statistic | 4.67 | −3.61 | — | −2.41 | 2.96 | 4.40 | — | −5.52 | 2.00 |
| % Correct 75.20  ROE = 44.0 | | | | | | | | | |

ROE = reduction of error

*Entries are statistically significant at at least $p < .05$.

Consequently, what we see is a stable reaction to the direction to the lower-court decision that spans the ideological spectrum: a greater tendency for each justice to reverse antibusiness lower-court decisions than those that are probusiness. If economic liberalism continued to explain the justices' votes, we would not expect such behavior from any but conservative justices.

As a second point of comparison, the directions of the estimated coefficients of the independent variables for the individual justices match those of the Court. More specifically, at no point did the direction of the estimated coefficients differ between the individual and aggregate levels. For example, each justice was more likely to cast an antibusiness vote when that vote supported the exercise of governmental power (*Libertarianism-G*) and opposed nongovernmental entities (*Libertarianism-I*). In addition, each was also more likely to cast an antibusiness vote when that vote supported agency action or the exercise of judicial power. These patterns are also incompatible with the continued viability of economic liberalism.

Third, the percentage of votes that each justice's model correctly classifies varies no more than approximately 4% from the Court's model (74.4%). Brennan's is 4% higher than the Court's and Stevens' is 4% less. The models of seven other justices are within a mere 1.5% of the percentage the Court's model correctly classifies. The striking similarity of the patterns of the individual justices with that of the Court makes us confident that the identified instruments explain rather well the votes of the justices in the Burger Court's business cases. As a result, we turn to the remaining part of our task: characterizing the voting pattern of each justice within the construct of instrumental libertarianism. We do this by specifying the extent to which each of the justices supports each of these instruments. Table 3 provides these data.

Table 3 orders the justices based on the frequency of their antibusiness votes (the dependent variable) and shows their frequency of support for each of the ideological variables.

Because *Projudicial* and *Proagency* are measured on a three- rather than a two-point scale, we divide them into pro (support) and anti (nonsupport) subsets that consider only those cases in which the issue (the exercise of judicial power or support of agency action) was present. In this form they parallel the bifurcated character of the libertarianism and federalism variables. Thus, a high score on the pro subset of *Projudicial* indicates that the justice is a judicial activist, while a high score on the anti subset indicates judicial restraint. Similarly for *Proagency*, justices scoring high on the pro portion support agency action; those who are high on the anti side oppose agency action. While there is no absolute scale against which to measure the justices' behavior, nor an appropriate test of significance, we can compare each justice's voting pattern with those of the other Burger Court justices, and with the aggregate decisions of the Court. Thus, a determination of whether a justice scores high or low on any of the ideological variables is made relative to the scores of the other justices—as well as the Court's score—on the ideological variable in question.

TABLE 3

PERCENTAGE OF SUPPORTIVE VOTES BY JUSTICE BY VARIABLE

| Justice | %Anti-business | Total Votes | Libertarianism G | I | Federalism S | F | Projudicial pro | anti | Proagency pro | anti |
|---------|----------------|-------------|------------------|------|--------------|------|-----------------|------|---------------|------|
| Court | 53.0 | 481 | 62.1 | 37.9 | 37.8 | 62.2 | 51.5 | 48.5 | 74.8 | 25.2 |
| Brennan | 68.3 | 464 | **68.0** | 32.0 | 35.6 | 64.4 | 52.9 | 47.1 | **77.6** | 22.4 |
| Marshall | 63.7 | 463 | 65.1 | 34.9 | 34.8 | 65.2 | **59.1** | 40.9 | **77.3** | 22.7 |
| White | 56.6 | 472 | 65.1 | 34.9 | 30.4 | **69.6** | 52.2 | 47.8 | **76.6** | 23.4 |
| Stevens | 54.3 | 317 | 52.9 | 47.1 | 43.6 | 56.4 | 51.2 | 48.8 | 60.8 | **39.2** |
| Blackmun | 53.9 | 449 | 58.4 | 41.6 | 27.3 | **72.7** | 53.8 | 46.2 | **80.2** | 19.8 |
| Rehnquist | 47.2 | 426 | 67.1 | 32.9 | **59.1** | 40.9 | 35.6 | **64.4** | 67.8 | 32.2 |
| Stewart | 46.6 | 292 | 53.4 | **46.6** | 30.8 | **69.2** | 40.5 | **59.5** | 60.5 | **39.5** |
| O'Connor | 46.2 | 156 | 65.4 | 34.6 | **44.8** | 55.2 | 54.2 | 45.8 | 60.5 | **39.5** |
| Burger | 45.0 | 476 | 57.4 | 42.6 | 34.8 | 65.2 | 49.3 | 50.7 | 71.5 | 28.5 |
| Powell | 44.3 | 379 | 51.7 | **48.3** | 42.1 | 57.9 | 55.8 | 44.2 | 64.8 | 35.2 |

Note: As described in the text, bold facing identifies the cells that characterize the justices' behavior.

Justices Brennan and Marshall, the two most antibusiness of the 10 justices, display a similar pattern across all the ideological variables, except for *Projudicial.* They support transfers of power to the government more than the Court does (*Libertarianism-G*). They voted, for example, to apply the antitrust laws to businesses that trade price information for competitive purposes (*United States* v. *United States Gypsum Co.* 1978); and supported a state ban on oil refiners operating gas stations (*Exxon Corp.* v. *Governor of Maryland* 1978). Conversely, they are among the least supportive of giving more power to nongovernmental entities (*Libertarianism-I*). Hence, in the business arena, libertarians they are not. Brennan and Marshall (along with Burger) come closest to matching the Court's level of support for the federal government over the states. While they do support the federal government over state governments, relative to the other justices, their mid-level support for the *Federalism* variables indicates that they are neither states' righters nor national supremacists. They simply favor governmental regulation of business, a posture evidenced in their high degree of support for administrative agency action (*Proagency*-pro).

Marshall leads the Court in support of the pro side of *Projudicial* showing him to be the most judicially active of the Burger Court justices. Nevertheless, his score of 59.1% does not differ much from those of the other six justices who uphold the exercise of judicial power with more than half their votes. Accordingly, if Marshall is a judicial activist, he is only marginally such compared to the others. Marshall's behavior in cases where a vote was necessarily antithetical to either an agency or the Court bolsters this judgment. He supported the agency almost twice as often (12 of 19 times) as he upheld the exercise of judicial power when those two values conflicted.

Justice White, though substantially less antibusiness than Brennan and Marshall—notwithstanding their mutual dissents to decisions upholding mergers and acquisitions[8]—nonetheless shares their behavioral syndrome supportive of governmental regulation, especially agency action. His voting pattern sustaining the federal government at a rate nearly 2 1/3 times that of the states when they conflict marks him as one of the Court's most national supremacist justices (second only to Blackmun).

Justice Blackmun most closely approximates the Court's proportion of pro- and antibusiness outcomes, only 0.9% more antibusiness than the Court. He is the most national supremacist of the justices. Like Justice White, who has the second highest support rate for the federal government over the states, he also supports agency action. Inasmuch as *Proagency* pertains exclusively to federal regulation, the manifestation of national supremacy in the garb of agency autonomy is attitudinally consistent. Indeed, Blackmun leads the Court in backing agency regulation with a ratio of support more than four times greater than his opposition to agency action, for example, his staunch support of the Securities and Exchange Commission is dissenting opinions in such cases as *Aaron* v. *SEC* (1980) and *Dirks* v. *SEC* (1983). Unlike White, Marshall, and Brennan, however, Blackmun does not support government sufficiently often to warrant an antilibertarian label.

Justice Stevens, who falls between White and Blackmun in percentage of antibusiness votes, and Justice Powell, who is the most probusiness of all 10 justices, come the closest to libertarianism. Thus, for example, Stevens' assertion that no legitimate purpose justified a state's hostility to unregistered out-of-state corporations.[9] Or Powell's opinion in *Lake Carriers' Assn.* v. *Macmullan* (1972), objecting to the majority's decision subjecting commercial carriers to state court proceedings. Although they lead the Court on *Libertarianism-I* and are least supportive of *Libertarianism-G,* their support/nonsupport is quite modest: less than half their votes on the former and barely half on the latter. Both uphold the federal government against the states about as frequently as they do the states against the federal government. Stevens' slightly greater hostility to agency action distinguishes his ideological pattern from that of Powell.

On the probusiness side of the dependent variable, Justice Rehnquist—supports business less than any of the five justices who cast more than half of their votes in favor of business. He is no more a libertarian than Brennan, as his ratio of support for government is more than twice that for nongovernmental entities. He supports *Libertarianism-I* only two-thirds as frequently as Stevens and Powell. On the other hand, he alone among the justices supports the states more often than the federal government when they conflict. His vote and opinion in *Federal S & L Assn.* v. *De la Cuesta* (1982), upholding a state ban opposing federal regulations

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[8] *United States* v. *General Dynamics Corp.,* 415 U.S. 486 (1974); *United States* v. *Marine Bancorporation,* 418 U.S. 602 (1974).
[9] *G. D. Searle & Co.* v. *Cohn,* 455 U.S. 404 (1982), at 420.

authorizing due-on-sale clauses when homes are sold typifies his states' rights sentiments. Clearly then, his high fraction of *Libertarianism-G* votes results because he supports state, rather than federal, action. See for example his solo dissent in *Virginia Pharmacy Board* v. *Virginia Consumer Council* (1976), upholding state restraints on drug price advertising. He also exercises judicial restraint markedly more than any of his colleagues, while concomitantly casting the lowest fraction of judicially active votes. Of Nixon's four appointees, Rehnquist comes closest to Nixon's desire for a restraintist justice who would support decentralization of federal power while not increasing individual power.

Justice Stewart, closest to Rehnquist in proportion of probusiness votes, shares the relatively high support for nongovernmental entities over the government shown by Powell and Stevens. Unlike them, he is less of a judicial activist and more of a national supremacist. Rather oddly, his support for the United States against the states is not reflected by support of agency action. Although he participated in only one case that simultaneously concerned federal-state conflict in the context of administrative regulation, his antagonism to agency action suggests greater antipathy to states' rights than unequivocal partiality toward federal economic regulation. Stewart's vote in the relevant case, *City of Burbank* v. *Lockheed Air Terminal* (1973), is to the contrary, however. He joined Rehnquist's pro-state dissent disputing Federal Aviation and Environmental Protection Agency preemption of municipal authority to curfew jet airplane noise between 11 p.m. and 7 a.m. As between his judicial restraint and opposition to agency action, he split his votes evenly in those cases where a restraintist vote necessarily supported agency action (nine) and those in which an antiagency vote was concomitantly activist (eight). Hence, neither his restraint nor his opposition to agency action appears to be an artifact of the other.

Justice O'Connor, third most supportive of business among the 10 justices, is also third in support of government power. Unlike the antibusiness adherents of government power, O'Connor's preference for economic regulation is more supportive of states' rights than any justice other than Rehnquist, as her opinions have made clear:

> The true "essence" of federalism is that the States as *States* have legitimate interests which the National Government is bound to respect even though its laws are supreme (*Garcia* v. *San Antonio Metropolitan Transit Authority* 1985, at 581).

Superficially, her numbers indicate slightly more support for the federal government than for the states. A close examination of her voting behavior, however, provides evidence that she and Rehnquist differ but little. First, of the 16 cases in which she upheld the federal level against the states, all produced a probusiness outcome—10 unanimously so. Moreover, 11 of her 16 national supremacy votes concern the narrow issue of federal preemption of state regulation. She voted with the majority in each of these cases. Not only are seven of them unanimous, but also only five of the 95 votes cast in these cases are dissents. If these 11 preemption

cases are excluded from consideration, O'Connor's support for the United States
in federal–state conflicts falls to 27.8%, while her pro-state votes rise to 72.2%.
Second, absent a conflict of laws, O'Connor supported the states proportionately
more frequently (70.6%) than all the other justices except Rehnquist (72.6%).
The other justices more closely approximate the Court's percentage (55.5%) than
they do hers. Third, O'Connor joins the more libertarian Stevens and Stewart as
an opponent of agency action. Although such opposition typically does not arise in
the context of federal–state conflicts, in the two cases in which such conflicts did
occur, her antiagency vote also supported state action. Federal efforts, she wrote,
to "conscript state utility commissions into the national bureaucratic army . . . is
antithetical to the values of federalism, and inconsistent with our constitutional
history."[10] Ideologically, of course, a states' righter can be expected to manifest
disapproval of federal action not only when laws conflict but also when federal
regulation stands alone.

The pattern of support displayed by the remaining justice, Burger, is uniquely
undistinctive. He does not particularly support governmental regulation, nor can
he be characterized as a libertarian. His votes in support of the two federalism
variables neither indicate states' rights sentiments nor approval of national su-
premacy. Although he exercised judicial restraint slightly more frequently than
judicial activism, he was not in the same league with Rehnquist or Stewart. Nei-
ther did his agency voting type him as either a proponent or an opponent thereof.

## CONCLUSION

We have found that the optimal model for each of the justices that best explains
their business decisions varies but little from that of the Court. This finding is im-
portant for three primary reasons. First, it shows the similarity between individ-
ual- and aggregate-level outcomes when the same source data are used. We believe
this similarity supports the study of both levels. Neither level dominates, and each
adds to our overall understanding. Second, the strength and direction of the esti-
mated coefficients for *Lower Court* suggest that economic liberalism no longer ex-
plains the business votes of the individual justices, even for justices whose votes
continue to scale. Third, given the demise of economic liberalism as an explana-
tion for the Court's business decisions, we need to understand how the individual
justices configure themselves on the more complex construct of instrumental lib-
ertarianism. We found the justices configured themselves on this ideological con-
struct as follows.

The three most antibusiness justices—Brennan, Marshall, and White—along
with Rehnquist and O'Connor, support government regulation. Three others are
libertarian: Powell, who is most probusiness, Stevens and Stewart. O'Connor and
Rehnquist are states' righters, while Blackmun, White, and Stewart are national

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[10]*Federal Energy Regulatory Commission* v. *Mississippi*, 456 U.S. 742 (1982), at 775. The other case
was *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

supremacists. Marshall is a judicial activist, Rehnquist and Stewart are judicial re-straintists. Brennan and Marshall, along with White and Blackmun, also uphold agency action. Stevens, O'Connor, and Stewart appear hostile to agency action. Chief Justice Burger, who was second of the 10 justices in support of business, was the only one who displayed no distinctive behavior on any of the independent variables.

Viewed from a regulatory perspective, the justices divide themselves in this manner: Three support business regulation (Marshall, Brennan, and White); two are states' righters (Rehnquist and O'Connor); three are libertarians (Powell, Stevens, and Stewart); and one is a national supremacist (Blackmun). The votes of the remaining justice, Burger, fit none of these patterns. To implement their regu-latory preferences, the three government regulators uphold agency action (Mar-shall, Brennan, and White), along with the national supremacist (Blackmun). Two of the three libertarians oppose agency action (Stevens and Stewart), along with the states' righter O'Connor. The other states' righter (Rehnquist) exercises judi-cial restraint, as does Stewart. Marshall, alone among the justices, supplements his proagency proclivities with a modicum of judicial activism. Powell does not appre-ciably rely on either instrument to effectuate his libertarianism. Burger's inde-terminate ideological orientation toward economic regulation carries over into his instrumental voting as well.

When the percentage of pro- and antibusiness votes cast by each of the justices is considered, our results generally comport with commonly accepted labels for the justices' ideological positions (see Rohde and Spaeth 1976, 143). When the justices' votes are considered along the four ideological factors we have identified, however, individual differences emerge among justices who heretofore have been grouped together as "conservatives" or "liberals." These differences also suggest the emergence of a new, more complex, ideology. This new ideology, labeled in-strumental libertarianism by Hagle and Spaeth (1992), reflects the policy views of justices called upon to resolve the economic issues confronting a postindustrial society.

This is not to say that the Burger Court faced substantially different issues than the Warren Court. On the contrary, the emergence of new legal issues seems not to explain the breakdown of economic liberalism. Four of the six issues that either did not surface during the Warren Court, or arose too infrequently to admit of scaling, scale acceptably for the Burger Court: the takings clause, commercial speech, OSHA, and zoning. By contrast, only three of the 17 issues common to both the Warren and Burger Courts produce acceptable scales.

In large part, the demise of economic liberalism seems to have resulted because new justices joined the Court. Of the four whose votes scale least acceptably, three did not serve on the Warren Court: Stevens, Blackmun, and Powell. These three, plus Stewart, are either libertarians or national supremacists (Blackmun). By com-parison, of the six justices who voted compatibly with the ideology of economic liberalism—the business regulators (Brennan, Marshall, and White), the states'

righters (Rehnquist and O'Connor), and the probusiness Burger—only three did not serve on the Warren Court (Burger, Rehnquist, and O'Connor). Nevertheless, as indicated, even for those justices who did serve on both Courts the old ideology was less operative in certain business issues during the Burger Court than it was formerly.

Whether the new ideology of instrumental libertarianism and the differences among the justices that it has evoked are stable attitudinal patterns, or only a temporary phenomenon, requires further research. This examination of the Burger Court's justices is of more than historical interest since eight of the 10 justices examined have also served on the Rehnquist Court. It may be an odd coincidence that of the five justices no longer on the Court, two are the least supportive of business (Brennan and Marshall) and two are the most supportive (Powell and Burger). Nevertheless, it is unlikely their replacements (Scalia, Kennedy, Souter, and Thomas) will match their behavior. This makes it even more important that we understand the complex interrelationships distinguishing the votes of justices with similar levels of support for business.

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