A TANGLED TALE: STUDYING STATE SUPREME COURTS

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Bliss Cartwright (1975) "Conclusion: Disputes and Reported Cases," 9 *Law & Society Review* 369.

Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman, and Stanton Wheeler (1977) "The Business of State Supreme Courts, 1870-1970," 30 *Stanford Law Review* 121.

Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman, and Stanton Wheeler (1977-78) "The Evolution of State Supreme Courts," 76 *Michigan Law Review* 961.

Lawrence M. Friedman, Robert A. Kagan, Bliss Cartwright, and Stanton Wheeler (1981) "State Supreme Courts: A Century of Style and Citation," 33 *Stanford Law Review* 733.

Robert A. Kagan, Bobby D. Infelise, and Robert R. Detlefsen (1984) "American State Supreme Court Justices, 1900-1970," *American Bar Foundation Research Journal* 371.

Robert A. Kagan (1984) "The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts," 18 *Law & Society Review* 323.

Stanton Wheeler, Bliss Cartwright, Robert Kagan and Lawrence Friedman (1987) "Do the 'Haves' Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970." 21 *Law & Society Review* 403.

> No part of the history of U.S. courts presents such a tangle of detail as does the handling of appeals. Nor does the tangled story unwind toward a happy solution.
>
> James Willard Hurst, *The Growth of the Law: The Law Makers* (1950:101)

Writing in 1950, Hurst (1950: 183) noted that there was far more opinion on the function of courts than actual knowledge of their work. Thirty years later his assessment was only slightly more encouraging, but he noted at least some positive developments. Among them was "a substantial increase in ordered collection and assessment of facts about the flow of court business" (1980–81: 407), some of which tried to cover broad areas of the

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country and reached back into the nineteenth century. Much of this came from a number of longitudinal studies of court business the findings of which began appearing in publications in the mid-1970s.[1] These were ambitious, pioneering, and often theoretically challenging studies that have spawned a thriving subfield in both the United States and Europe.[2] One of these works is a sixteen-state study of supreme courts covering the years 1870 to 1970, conducted by Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman, and Stanton Wheeler. My purpose here is to provide an overview of the seven articles reporting on this study that appeared between 1975 and 1987, and to provide a critical review of the four central articles in the series.

The articles are intended to be an interconnected series dealing with the functions of state supreme courts. In the most recent of the seven pieces, Wheeler *et al* (1987: 406) look back at the earlier articles and state, "our interest has been in drawing a broad portrait of the functioning of state supreme courts and explaining how that function has changed over the past century." Accordingly, my approach to the series is to view it as an interconnected set of essays forming an entity that is itself evolving and developing over time, trying to adapt to or deal with new (and often expected) findings as a species may try to adapt to changes in its environment. I want to describe this intellectual evolution, which is a tangled process that has yet, unfortunately, to unwind toward a happy solution.[3]

The process of evolution that unfolds over the ten-plus years of the series is not a teleological one leading smoothly and clearly to a specific theoretical end. Rather, it is a slow, irregular process of adjustments and readjustments to patterns in the findings that reach no satisfactory end. Of the seven articles in the series, my focus is on four of them, which constitute a distinct institutional path within that evolution: Kagan *et al.* (1977); Kagan *et al.* (1978); Friedman *et al.* (1981); and Kagan *et al.* (1984).

These four articles seem to be the central pieces in the series. They provide a unique, general description of aggregate changes in state supreme courts (SSCs) over a century, and the importance of this description should not be underestimated. This project has

[1] Among them are studies of federal district courts (e.g., Grossman and Sarat, 1975; Clark, 1981); federal appellate courts (Baum *et al.*, 1981–82; Howard, 1981); state supreme courts (e.g., Kagan *et al.*, 1977, 1978); and state trial courts (e.g., Wanner, 1974, 1975; Friedman and Percival, 1976; Lempert, 1978; McIntosh, 1980–81).

[2] For example, Kaupen and Langerwerf, 1983; Daniels, 1985; Munger, 1986; Stookey, 1986; Blegvad and Wulf, 1986; Verwoerd and Blankenburg, 1986.

[3] My discussion is limited to the work of the principal investigators. I do not discuss the subsidiary work of the various students associated with the project in any way, since this would require a separate review given that their interests were often different than those of the principal investigators, e.g., Yale Law Journal, 1978; Meeker, 1982, 1984; Harris, 1985a, 1985b.

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made a major contribution. It marks a watershed of sorts with respect to longitudinal studies of state courts. Before this research project began, "there were no theories, no data to build on, only virgin terrain to be mapped" (Kagan, private correspondence with the author). Together with Friedman and Percival's (1976) work on trial courts, which began appearing at the same time as these four articles, this project forms the foundation for a growing literature of longitudinal court studies focusing on the relationships between social and legal change. These articles remain an important source for any longitudinal study of state courts.

In addition to providing that unique description, the four central articles also suggest a model for explaining the described aggregate changes in SSCs. It is here that problems arise, but these problems and the attempts to deal with them are not without benefit. They offer valuable insights into conducting both longitudinal and historical research on courts and theoretically on the relationships between social and legal change.

My discussion will be divided into four parts: (1) the theoretical perspective(s) of the seven-article series as a whole and the questions addressed; (2) the data used and the study's design; (3) the basic findings of the four central articles that comprise the institutional part of the series; and (4) the implications of those four articles. Because no summary or synthesis of the series has appeared, my discussion of necessity includes a fair amount of summarization.

I. OVERVIEW OF THEORETICAL PERSPECTIVE(S)

All of the articles in the series profess an interest in the *function* of supreme courts. With the exception of the first article in the series (Cartwright, 1975), there is little conceptual discussion of the term function, yet it appears throughout as a unifying theme. To understand what function means within the series, to lay out the series' logic, and to lay a framework for interpreting the findings of the four central articles, it is necessary to briefly trace its intellectual evolution over those ten-plus years. This will reveal that function has a different meaning in each article, and that there are clear discontinuities in the evolutionary process. Most importantly, what emerges as the main path of development—four essays with a distinct institutional orientation—comes to an abrupt and disappointing end in 1984. This ending and the discontinuities cloud the nature of the series' contribution to our theoretical understanding of the links between socioeconomic and legal change.[4]

[4] In one sense the contribution of this set of articles to the theory-building enterprise is not clouded. As Kagan noted in a letter to me "the study made some important theoretical contributions. By examining a large number of plausible relationships, the articles show that simple theories don't hold up . . . The results, in short, aren't simple. That . . . makes a significant contribu-

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A. The First Break: Integration Hypotheses

1. Cartwright (1975): "Disputes and Reported Cases." The first of the series appeared as a short article by Cartwright in 1975 on the use of appellate opinions as a data source in studying courts. Its importance lies in something else it seems to do, that is lay the theoretical groundwork for a large-scale study by discussing the types of hypotheses on appellate courts that could be addressed using published opinions. The clear implication is that such hypotheses are the primary focus of the state supreme court study, the data collection for which the article discusses. According to Cartwright, "case samples can be used to map potential variations in judicial functions across time and jurisdictions" (1975: 380). This can be done, he says, with stratification hypotheses (who wins or loses, and why) and integration models of appellate review (the contribution of these courts to the continuing viability of the legal system and the larger social system of which it is a part). Little discussion, however, is devoted to stratification hypotheses. Cartwright devotes his efforts, instead, to hypotheses on the integrative functions of SSCs and the effects over time of socioeconomic characteristics and the power of discretionary review on those functions. Basically, Cartwright hypothesizes that if socioeconomic factors are held constant then the integrative functions of SSCs will increase when there are increases in the power of discretionary review (1975: 381). To make this argument he uses function in the teleological sense (see Lempert, 1978: 92). The issue, in classic sociological terms, is not simply what these courts do but rather their contribution to the continuing viability of the system.

While the first piece in the series appears to lay out a theoretical agenda for subsequent articles, this early theoretical focus on integration abruptly disappears when a second piece appeared in 1977 (Kagan *et al.*, 1977). This effort marks the first important break in the series because a different meaning of function replaces the one used by Cartwright. Subsequent articles use function not in a teleological sense, but simply to describe what SSCs do with no concern for integration. Most of the series continues to explore the effects of socioeconomic factors and structural factors such as discretionary docket control, while failing to evaluate Cartwright's integration hypotheses. Other, institutionally-oriented issues become more important, and the last of the series in 1987 (Wheeler *et al.*) presents still another break in the theoretical evolution as stratification hypotheses come to the forefront after a twelve-year hiatus.

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tion to the theory-building enterprise." In showing that simple theories will not help us understand the relationships between social and legal change, these articles, Kagan said, have paved the way for more sophisticated theories. The important theoretical issue now is what can we learn from these articles about the kinds of more sophisticated explanations that are needed.

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B. The Four Central Articles: An Institutional Focus

1. Kagan *et al.* (1977): "The Business of State Supreme Courts." The second article in the series presents a new set of theoretical issues. The theoretical focus of these issues is derived from a political science orientation rather than a sociological one, and is concerned with SSCs as institutions and not with their integrative functions. In one fashion or another this set of issues guides the four central articles in the series, and it lays out the agenda for these articles. The stated purpose of Kagan *et al.* is "to investigate the business of SSCs and the responsiveness of their workload to social change" (1977: 122). Their goal is partly descriptive ("to set out the basic trends in the size and focus of SSC workloads") and partly theoretical ("to increase our understanding of the complex relationships between legal institutions and society, and the effect of economic, legal, and institutional change on the nature and volume of adjudication.") (Ibid.: 122–123). The authors want "to suggest at least the beginnings of an explanation for changes in SSC business" (Ibid.: 123).

Gone is the concern over integrative (or teleological) functions that characterized Cartwright (1975). Instead, an institutional focus appears, and Kagan *et al.* (1977) outline four sets of factors that affect change in SSC business: socioeconomic factors; judicial structure; judicial culture; and substantive doctrine (Ibid: 123–24). None of these factors alone explains changes in SSCs, and the line (or lines) of causation are unclear at this point. The implication is that some kind of complex and subtle multivariate set of relationships is at work in which socioeconomic factors appear to be the driving force, with the other factors somehow working as either intervening variables or secondary factors explaining any residual variation. The 1977 article explores the effects of substantive doctrine, the fourth factor. Subsequent articles address structure and culture directly. Socioeconomic factors are not the focus of any one work, but are continually examined throughout the four central articles.

2. Kagan *et al.* (1978): "The Evolution of State Supreme Courts." A third article, also by Kagan *et al.* quickly followed up on the new scheme laid out in "Business." Kagan *et al.* (1978) addresses the second factor in the new scheme—judicial structure—and in so doing they try to boldly assess the question of causation and the complex relationship between socioeconomic factors and structural change in SSCs, as well as the relationship between structural change, on the one hand, and the business of SSCs, on the other. The authors' general interest is in exploring "the direction of SSC development and . . . the causal links between social conditions and legal change" (Ibid.: 961). Specifically, their interest focuses on the effects of social conditions on caseloads; the effects of rising

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caseloads on court structure; and the effects of structural change on the function of SSCs as indicated by changes in the mix of business, the way courts make decisions, and the results of cases (Ibid.: 962). The model proposed is a complex one that builds on the effects of changing social conditions, especially with regard to population size. Changing social conditions, the model says, lead to significantly increasing caseloads that at some point lead to substantial structural change in the court system (in particular, the creation of intermediate appellate courts [IACs] and grants of substantial discretionary docket control to SSCs). These structural changes then cause changes in what SSCs do—in their function.

Once these structural changes are in place, they should blunt the effects of social conditions, effectively breaking the immediate relationship between social development and SSC function. Structural changes such as those noted above should bring with them a broader, more policy-oriented role for SSCs compared to what earlier was essentially an error-correction role. This change in function is indicated by marked changes in the mix and amount of business, the way decisions are made, and the nature of decisions. In effect, Kagan *et al.* posit an evolutionary process through which SSCs pass that is driven by social development but with structural changes as the key element.

While structural factors are now the key element in the model, they still do not provide a full explanation of change (Ibid.: 997). Other factors are also at work, factors the effects of which may be enhanced to some degree by structural changes but that are also independent of those changes. Two subsequent articles look specifically at judicial culture, the remaining factor from the 1977 model. As we will see later in the discussion of findings, these two pieces are attempted adaptations to unexpected findings, adaptations that are ultimately unrewarding.

3. Friedman *et al.* (1981): "A Century of Style and Citation." The 1981 article by Friedman *et al.* is the first of the two (perhaps mutually exclusive) articles dealing with judicial culture. As is function, the term judicial culture (and the more general concept of legal culture) is a slippery one at best. Its meaning is even more difficult to grasp when, as here, it is used in an attempt to explain a substantial amount of residual variation from the effects of socioeconomic and structural factors (where the data end, culture begins). Without a clear understanding of this key concept, the contribution of this article to the theoretical task laid out in "Business" is problematic.

It appears that judicial culture refers to judges' notions of law and of the judicial role. Its meaning becomes confused, however, because the authors use judicial culture and legal culture interchangeably (even though legal culture is often used in the literature to refer to a much broader and more general concept than

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judges' notions of their role). The idea of legal culture plays a prominent part in much of Friedman's historical writing, but those pieces provide little help in clarifying the concept here or the distinction between legal culture and judicial culture. If anything, legal culture is used even more expansively in his other writings (e.g., Friedman, 1986: 52–63; 1976: 193–94; 1980: 669).

The confusion in "Style," however, goes even deeper than the ambiguity over the meaning of culture. There is a problem in the way in which Friedman *et al.* operationalize judicial culture in light of the lines of causation sketched out in the model proposed in "Business." That model holds that judicial culture will affect SSC functions—specifically, that changes in judicial culture push SSCs in a more policy-oriented direction. Friedman *et al.* are interested in evaluating this proposition. To do so they look at what are called three objective facets of opinions as empirical indicators of judicial culture: the length of opinions, dissent rates, and citation patterns (Friedman *et al.*, 1981: 774). A more policy-oriented judicial culture would be indicated by longer opinions needed to remodel doctrine and deal with the social and economic impact of legal doctrine (Ibid.: 776), by more dissents that occur because of differences among judges in policy preferences (Ibid.: 785),[5] and by a greater amount and variety of citations needed to justify more broad-ranging and innovative decisions (Ibid.: 794). The confusion arises because these same facets of opinions are used in "Evolution" as indicators of the *consequences* of structural changes in court systems on SSC functions. Do patterns in these facets of opinions reflect cause or effect? In "Evolution" they are dependent variables reflecting effects. In "Style" they are independent variables representing an important causal factor in the model. This is especially confusing because it does not seem that struc-

[5] Dissent rates are not used with precision, adding even more confusion. At times it appears to be dissents (dissent rate), and at others it appears to be dissents and concurrences together (the dissensus rate) (Friedman *et al.*, 1981: 787–788). More importantly, a dissent index, the usual measure employed in the literature on judicial decision-making, is not used (e.g., Jaros and Canon, 1970; DuBois, 1980; Hall, 1986). For example, according to Hall 1986: 69–70:

> Absolute numbers mask the actual level of dissent. The number of judges hearing cases and a court's caseload are important variables that affect the incidence of dissent. For example, courts with seven judges are statistically more likely to dissent than are those with three judges. Or, to put the matter another way, courts of three judges that issue the same number of dissents as courts with seven judges display greater discord. A simple Index of Dissent brings uniformity to the analysis by taking account of these variables. The higher the index, the greater the amount of judicial contentiousness. This index is expressed by $ID = D_a/D_e$, where ID is the index of dissent, D_a is the actual proportion of cases in which dissent occurred, and D_e is the expected proportion of cases in which dissent might have occurred, based on the mean actual number of judges hearing cases. Because it controls for the number of judges and the size of the caseload, the index can be used to compare dissent rates over time on courts of varying sizes.

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tural change causes change in judicial culture within the model. If anything, culture may be a partial explanation of structural change.[6]

4. Kagan, *et al.* (1984): "American State Supreme Court Justices." The article by Kagan, Infelise, and Detlefson also stands clearly within the institutional path. It, too, is concerned with judicial culture. It takes a different, but no more enlightening, approach than "Style." Although the article was not written by the four collaborators, it more explicitly and consistently attempts to build on "Evolution," and it, rather than "Style," is the real follow-up on that earlier article. "Justices" specifically returns to the issue left by "Evolution," explaining the residual variation in opinion length, dissent rate, and citation patterns. In "Justices," as in "Evolution," these are dependent variables, indicators of changes in SSC functions. By turning to judicial culture in "Justices" Kagan *et al.* seek to explain the residual variation in these indicators that structural changes do not explain.[7]

Kagan *et al.* try to avoid the problem of defining judicial culture by using the social background characteristics of judges as surrogates, an approach that is ultimately unsuccessful. They assume, it seems, that a change in the backgrounds of judges faithfully reflects a change in judicial culture (although no clue is given as to why and how), and they conclude that the residual variation in opinion length, dissent rate, and citation patterns may be explained by changes in the social backgrounds of judges.

"Justices" represents a substantial adaptation in dealing with the problem of the unexpected and unexplainable findings in "Evolution." It looks to an entirely new source of data for independent variables, and tries to blend another theoretical perspective into the model. As Kagan *et al.* (1984: 371–372) note, they are utilizing an old idea from political science, namely, that social backgrounds can explain judicial behavior. They draw from a

[6] For instance, in "Evolution" Kagan *et al.* have argued that reform-minded jurists and other reformers pressed for changes that would make SSCs more self-directed and less reactive. The idea was to make these courts more policy-oriented: "Reformers pressed for integrated, rational court structures, supported by administrative staffs, to monitor the flow of business and assure that judicial manpower was sensibly allocated. They called in particular for intermediate appellate courts and they felt a supreme court should be able to choose its cases and write its own rules of procedure" (1978: 973).

[7] Kagan *et al.* (1984: 401) note that

> even if court structure and caseload size influence the nature of decisions and opinion style, there is clearly room for other factors in explaining intercourt variation, such as state-specific legal doctrine, the leadership qualities or the contentiousness of individual judges, and the "judicial culture" of particular courts. The latter may be influenced by the variations in characteristics of the judges.

This idea originally appeared in "Business" where Kagan *et al.* (1977: 193–94) argued that judicial culture may be influenced by the backgrounds of judges and the ideology of judges.

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literature in which, they admit, statistical relationships "while sometimes suggestive, have rarely been very strong" (Ibid.: 372). It is a literature with a checkered history and mixed results. Still, they think that judges' social backgrounds, education, and career experiences can explain the residual variation left after "Evolution." However, no specific hypotheses concerning these independent factors are offered; all that is forthcoming is the vague idea that changes in these factors may somehow contribute to change in SSC function (Ibid.: 772).[8]

The need to reach out to a new source of data for independent variables and the introduction of a theoretical perspective of questionable utility indicate a problem with the series' theoretical task of developing an explanation for changes in SSC functions. The existence of a problem becomes more evident with the last two articles in the series.

C. *The Second Break: Divergent Interests*

1. Kagan (1984): "The Routinization of Debt Collection." The last two articles in the series stand outside the institutional path, and signal another break in the evolution. The first of the two is a 1984 article written by Kagan alone. It takes a very different approach to change in SSC functions, and in effect stands as an alternative to the four institutional articles. Unlike the broad interests of the previous works, this article is concerned with a single type of case, debt. Specifically, Kagan is interested in the marked decline in debt cases on SSC dockets over time. For him, the disappearance of these cases poses an historical and theoretical puzzle: "Why has a type of legal dispute so central to socioeconomic relations in a market economy and so often a focus of political conflict all but faded away as a subject for judicial policy-making? (Kagan, 1984: 327).

The explanatory factors Kagan evaluates reflect a very different perspective on the possible causes of change in SSC function than that of the institutional articles. He examines five hypotheses for explaining the disappearance of debt cases (Ibid.: 327–328): fluctuations in the number of problem-generating events; litigation costs; legal rationalization; political conflict over existing legal rules and political demands for legal change; and trends toward systemic stabilization. In the respect that it takes a different approach to explaining change and uses different explanatory factors, this article not only stands outside the main series but actually poses a challenge to its approach and theoretical under-

[8] Instead of hypotheses, Kagan *et al.* timidly suggest that it is "plausible" to presume that judicial culture will change if different types of people are recruited to SSCs. "Put otherwise, judicial background might be viewed as operating *cumulatively*, affecting the character and style of courts (not merely individual judges) and helping to explain how and why one court differs in spirit from another" (1984: 772).

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pinnings. As an alternative, it is in many ways more imaginative, thorough, and successful.

2. Wheeler *et al.* (1987): "Do the 'Haves' Come Out Ahead?" The next article is the most recent (Wheeler *et al.*, 1987) and it returns to the SSC opinion data set as a whole, in contrast to Kagan's focus on one type of case. This article, too, stands outside the institutional path. It has no direct connection to the model laid out in "Business." In fact, change, the primary theoretical issue of institutional articles, is only a secondary concern in "Haves." Instead, "Haves" returns to one of the two theoretical issues raised by the project's very first article (Cartwright, 1975), the issue that received scant attention then and none subsequently: stratification hypotheses. As Cartwright suggests (Ibid.: 369), Wheeler *et al.* want "to use the general framework of Galanter's analysis to explore outcomes in cases decided by state supreme courts" (Wheeler *et al.*, 1987: 404). In doing so, they explore an as yet unexamined aspect of the SSC opinion data set, parties. Specifically, their purpose, as stated in an earlier version of this piece, "is to set the stage for an analysis of the effects of differential resources of the parties on the outcomes of state supreme court cases . . ." (1986: 6). The path charted out in "Business" has clearly ended.

Looking back at the series, we see the first path of development quickly ends (Cartwright, 1975) and is replaced by another set of issues (Kagan *et al.*, 1977) that emerges as the focus for the central articles in the series. The theoretical evolution remains clear and well-defined through "Business" and "Evolution"; it waivers with "Style"; it seems to straighten out but still waivers in "Justices"; it begins to falter with "Debt"; and then it suddenly ends with "Haves." Consequently, we are left with a wealth of descriptive findings on changes in SSC functions and yet with no summary and little idea of what it all means. We are also left with a model the utility of which in providing meaning remains unproven.

The next section of this article briefly describes the main data set for the SSC project and helps set the stage for the following two sections that discuss, respectively, the main findings of the institutional articles and their implications. Because the institutional issues and the model laid out in Kagan *et al.* (1977) set the agenda for the four central articles, and since the institutional path in the series' theoretical evolution ends without any summary or attempt at synthesis, my focus is on the findings of those four articles: "Business," "Evolution," "Style," and "Justices."

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II. DATA

The main data set for the series consists of a sample of 5,904 SSC opinions rendered by sixteen SSCs between 1870 and 1970 that are at least one page in length. In addition to opinions of less than one page, unpublished opinions, cases decided without opinion, and rehearings are also excluded (Kagan *et al.*, 1977: 126 n.11). *Shepard's Citations* was the sole source used in identifying the cases included in the study, and as a consequence Kagan *et al.* characterize this as ". . . a study . . . of cases treated as significant by the courts themselves" (Ibid.).

For largely practical reasons, Kagan *et al.* decided that sixteen states would provide a representative sample of the country as a whole (one third of the states, excluding Alaska and Hawaii, which entered the union at the end of time period covered). To choose the sixteen states Kagan *et al.* divided the forty-eight states into five clusters based on similarities over the 100-year period in population, industrialization, urbanization, per capita income, and racial composition, ". . . as well as evaluations of legislative innovativeness and other variables that seemed likely to bear some relationship to the legal business of a state court system" (Ibid.: 125). One cluster includes the plains states; a second includes the most urban, industrialized states; a third includes the southern states; a fourth includes the Rocky Mountain states; and the fifth includes a mixed and diverse set of states, the leftovers (Ibid.: 125).[9] Apparently not included in the criteria for the design scheme are legal factors that are likely to vary among the states and that may arguably bear some relationship to the legal business of a state court system, even though judicial structure, judicial culture, and substantive doctrine are key parts, along with socioeconomic characteristics, of the model laid out in "Business." The interesting question is the effect on the findings of leaving such factors out of the design scheme.

SSC opinions for these states were sampled every fifth year to avoid drawing a very thin sample from each year. Financial resources allowed a total sample size of approximately 6,000 opinions. With twenty-one sample years—every fifth year between 1870 and 1970—this allowed for a sampling of eighteen cases per sample year per sample state. The population of opinions for each year and SSC ". . . was determined by counting the entries in the *Shepard's Citations* volumes for SSC cases decided in that year" (Ibid.: 126 n.11). The eighteen cases per state were then chosen randomly.

This sampling scheme yielded a sample of 5,904 opinions drawn from a population of 66,950 opinions published by the six-

[9] The sixteen states chosen were Alabama, California, Idaho, Illinois, Kansas, Maine, Michigan, Minnesota, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and West Virginia.

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teen SSCs during the relevant years. Kagan *et al.* acknowledge that eighteen cases per sample year is not much and may not be a reliable sample per year, ". . . but when we aggregate the sampled opinions for 16 states for 30 year periods, as we do in the text, we are dealing with a very reliable sample of 2,016 cases. Similarly, when we aggregate a single SSC's sampled cases for a 30-year period (7 sample years), the sample size is 126, enabling us to generalize about that SSC's overall workload with considerable confidence" (Ibid.: 126, n.12). Unfortunately, some of the articles tend to ignore the thirty-year aggregation and use smaller time spans or even varying time spans within a piece with the same confidence. For instance, when writing about dissent in "Style" Friedman *et al.* say (1981: 786–787):

> Unanimous opinions have been, and remain, overwhelmingly dominant. . . . In the late 19th century . . . 91.3% of the published opinions were unanimous. . . . In the late 20th century, the dissent rate gradually crept upward, from 6.4% in 1900–10, to 10.2% in 1930–40, and to 12.8% in 1960–70, double the rate of a century earlier. Still, even in 1960–70, 83.5% of SSC opinions were unanimous.

In "Evolution," dissent rates are analyzed in the promised thirty-year time spans (Kagan *et al.*, 1978: 994); but in "Justices," Kagan *et al.* concentrate only on the 1950–70 period.

While the practical and financial reasons for the design, the reliance on *Shepard's*, and the sampling scheme are obvious, there are still problems that can affect the findings and their meanings. First, the reliance on *Shepard's* clearly omits some number of SSCs decisions on the merits, how many and how this may vary across time and state is unknown, as is the potential effect on the findings. The reliance on opinions alone, while for obvious practical reasons, may also have some drawbacks in certain situations. For instance, it would seem that an important part of assessing the impact of structural changes on SSC function would entail some kind of comparison between the mix of business for filings and the mix for opinions in discretionary SSCs. If structural changes are the key factor for changes in function, then these two mixes should be different, at least in the short run after the structural changes have been made. If not, then the line of causation may run the other way (as Kagan *et al.* suggest, but then dismiss): from the changing mix of business to structural change, rather than from structural change to changing mix of business (Kagan *et al.*, 1978: 990, n.69).

Second, the practical decision to sample eighteen cases per state every fifth year and then aggregate to thirty-year time spans may also have had important effects on the findings and their meaning. This sampling scheme seems to be designed to detect only broad, general (meaning national) patterns and changes among the SSCs over relatively wide (thirty-year) time spans, as

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opposed to concentrating on one or a handful of states that can be covered in more depth and detail or concentrating on a shorter time period because of some particular set of characteristics or changes that may be theoretically relevant. While the design and sampling scheme are well-suited for broad descriptive purposes, neither is sensitive enough to pick up the needed detail on the contexts in which these courts operated, nor to provide the needed depth in coverage for explaining the differences among clusters of states or control for variations within clusters. This is a major problem, and it will unavoidably affect the findings and cloud their meaning. Additionally, the need to aggregate the data to thirty-year periods makes one skeptical of any longitudinal or cross-sectional statistical analyses utilizing these data, especially any correlation or regression-based analyses (see Kagan *et al.*, 1978: Table 1, Multivariate Appendix; Friedman *et al.*, 1981: 781; Kagan *et al.*, 1984: 399–405).

III. FINDINGS: THE FOUR CENTRAL ARTICLES

The institutionally-oriented part of the series—from "Business" to "Justices"—is concerned with exploring the model laid out in "Business." The findings, however, provide little verification for the model's utility. The findings leave one both intrigued and disappointed. Each of the four central articles provides a wealth of descriptive information concerning changes in SSCs, but little help in understanding what the findings mean. For each essay, the conclusions are strikingly similar: the expected differences among specific groups of SSCs rarely emerge clearly and variations within groups of SSCs are likely to be as great as those among groups, or even greater. In terms of the two purposes outlined in "Business," the descriptive task (". . . to set out the basic trends in the size and focus of SSCs workloads" [Kagan *et al.*, 1977: 122]) has largely been met with the exception of providing a general summary. The findings provide for the first time a broad, general picture of the changes in SSCs over a century. Achievement on the more theoretical task (". . . to increase our understanding of the complex relationship between legal institutions and society, and the effect of economic, legal, and institutional change on the nature and volume of adjudication") [Ibid.] has fallen short.

The findings of the four institutionally-oriented articles are too extensive and varied to examine in detail. My summary discussion includes only their general findings in light of the model outlined in "Business," which has also laid the groundwork for the institutional essays by describing the basic changes in SSCs. As a part of this Kagan *et al.* (1977) have explored one of the explanatory factors in the model, substantive doctrine, and it is here that I begin.

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A. *Kagan* et al. *(1977): "The Business of State Supreme Courts"*

1. The Groundwork. Before exploring the effects of substantive doctrine Kagan *et al.* briefly summarize the general finding that they are seeking to explain in this and subsequent articles. They begin by noting that in 1870, only one of the sixteen states sampled had an intermediate appellate court (IAC), and that SSCs had little or no discretion in selecting cases. Caseloads were generally lower in the 1870s, but as populations grew and levels of development rose SSC caseloads grew dramatically (Kagan *et al.*, 1977: 128). "Eventually—usually when a state's population reached the 1.5–2.5 million range—measures were taken to reduce the volume of appeals decided by SSCs" (Ibid.: 130). These measures usually involved grants of more discretionary docket control and, in larger states, the creation of IACs. In states with both IACs and docket control, the volume of opinions was dramatically reduced (Ibid.: 130–131). Making such changes, Kagan *et al.* (Ibid.: 131) say, had a "dramatic effect" on SSCs. As the number of opinions decreased the length of opinions increased, as did the numbers of dissenting and concurring opinions and the proportion of cases involving constitutional issues.

Kagan *et al.* (Ibid.: 132) interpret these changes as a change in SSC functions. There was an increased willingness to innovate. In short, these courts had become more policy-oriented. But within this broad, general trend, Kagan *et al.* still find substantial interstate variations: "This apparent shift of focus to a smaller number of perhaps more significant and controversial cases, it should be emphasized, is of surprisingly recent vintage, and is far from uniform across states . . ." (Ibid.). The problem, of course, is not only explaining the general trends but the interstate variations as well, a task hampered by the research design and sampling scheme.

2. Substantive Doctrine. In the 1977 article, Kagan *et al.* concentrate on one possible explanation for their findings, substantive doctrine. They explore the influence of changes in substantive doctrine on SSC functions by examining the mix of business SSCs faced (at least in terms of opinions). Such changes can potentially explain not only general shifts in functions viewing all sixteen SSCs together, but the interstate variations as well. Looking at the overall findings, there is a significant shift in business over time. Early in the period ". . . SSCs were deeply involved in ordinary commercial disputes . . . [and] they decided mostly cases of commercial, contract, and property law. Their basic function, at least quantitatively, was to settle private disputes arising out of *market* transactions" (Kagan *et al.*, 1977: 132–133). With time, SSCs did *proportionately* less market-oriented and more nonmarket-oriented work. Kagan *et al.* say: "Our study shows a great increase in tort and criminal cases and a drop in contract and

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debt collection cases; it shows more public law cases and, except for government regulation of land use, fewer property cases" (1977: 133).

In examining the trends for different kinds of cases, the effects of doctrine are evident but not determinative because of the simultaneous effects of other factors: structure, socioeconomic development, and judicial culture. If SSCs are functionally autonomous from such factors, then doctrine alone should explain all changes and interstate variations, but it cannot do so uniformly. For instance, there is a substantial decline in debt cases after 1930 in all SSCs (regardless of structure and economy), but doctrinal changes are only a small part of the reason. Kagan *et al.* point instead to other changes that lessened business failures and improved the credit system. A similarly mixed picture emerges in regard to property cases, with a variety of factors working together to diminish the opportunity for disputes to arise: ". . . many of the factors that produced litigation over property ownership undoubtedly have changed, as title insurance spread, as procedures for transferring and recording titles were standardized and as problems involving occupancy of and title to public lands declined" (1977: 140). Such broader changes, of which doctrine is only a part, are what Kagan in "Debt" summarizes as "systemic stabilization" (1984: 328).

3. **Other Factors.** Kagan *et al.*'s speculations on the sources of the kinds of change and variation they would find reflect the complexity and subtlety that would be involved in any explanation. "No single variable can account for these changes in SSC agendas. The evidence suggests that socioeconomic factors are important, but so are structural and doctrinal factors that are more responsive to the world of legal institutions and less responsive to short-run changes in outside factors" (1977: 153). SSCs are not functionally autonomous, but neither are they simply mirrors of their environments since ". . . there also have been enormous socio-economic changes that have had little or no impact on SSC dockets . . ." (Ibid.).[10]

Structural changes, Kagan *et al.* argue, are perhaps the most important factor: "These are powerful filters, and they make the SSC's relatively autonomous" (Ibid.: 154). The driving force behind change in SSCs is socioeconomic change, but the effects will

[10] "A tremendously expanded corporate economy has not led to more cases dealing with the law of business associations. Few SSC cases deal with computers, airplanes, frozen foods, or other stars of our new technology. Urbanization has not brought with it a flood of landlord-tenant cases. Consumer credit has grown to the point where some people foresee a cashless society, but credit and banking disputes are dim figures in the SSCs of the 1960s. SSC dockets have reflected only vaguely the dramatic rise of the welfare state; education is a leading American industry, yet cases involving schools have played only a walk-on role in the SSCs" (Kagan *et al.* 1977: 153–54).

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be filtered by structural changes where they have been made. Doctrine, which is also affected by socioeconomic change, at best plays some kind of intervening role in explaining change in SSCs. Where structural changes have occurred, they may filter the effects of doctrine, but where changes have not been made the effects of doctrine should be greater and more immediate (Ibid.: 155).

Additionally, Kagan *et al.* suggest that judicial culture may explain some of the interstate variation they found. Culture may be more important than doctrine, especially where structural changes have been made (Ibid.). The implication is that while structural changes may insulate an SSC from many, if not most, environmental and doctrinal factors, they may also provide the opportunity for cultural factors to come to the forefront in explaining interstate variations.[11] They even claim that culture may explain some specific changes in SSCs, such as the general shift in business from commercial to noncommercial matters. More specifically, Kagan *et al.* argue that "SSC judges have come to view their role less conservatively. They seem to be less concerned with the stabilization and protection of property rights, more concerned with the individual and the downtrodden, and more willing to consider rulings that promote social change" (Ibid.). All of this, however, is speculation. Subsequent pieces turned directly to structure and judicial culture.

B. *Kagan* et al. *(1978): "The Evolution of State Supreme Courts"*

Since substantive doctrine alone is an insufficient explanatory factor, in "Evolution" Kagan *et al.* move on to examine the complex relationships between socioeconomic factors and structural change, and then between structural change and SSC development. Kagan *et al.* argue that their findings demonstrate an evolutionary process through which SSCs pass, one that allows them to categorize or type SSCs by stages in this process. But when examined more closely this too is found to be plagued by unexpected findings and unexplained variations that undermine confidence in Kagan *et al.*'s interpretation of their findings.

According to Kagan *et al.* (1978: 962):

> By arranging and rearranging our information on fluctuating supreme court caseloads, and by comparing it with other quantitative measures of court performance, such as dissent rates, length of opinions, and types of issues decided, we discerned a rough pattern of evolution: as a

[11] ". . . the business of SSCs is undoubtedly affected by variations in *judicial culture*, especially as more and more courts acquire discretion to select cases. We noted that SSC's in similar states did not participate equally in the general increase in criminal and constitutional cases. Some of the variation may be due to differences in the style, values or priorities of judges. . . ." (Kagan *et al.*, 1977: 155).

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state's population grew, its supreme court's caseload (measured by published opinions) usually grew along with it, sometimes quite dramatically. The increase in caseloads naturally evoked efforts to reorganize the judiciary system to relieve the pressure on the court. Eventually, states with heavy caseloads introduced structural reforms, principally intermediate appellate courts, and increased the supreme court's control over its docket. These changes, moreover, seemed to affect the supreme courts' legal role, for they coincided with changes in the type of case heard, the ways courts made decisions, and the results of cases.

The key to evolutionary movement in this scheme is breaking the relationship between rapidly increasing population and social development, on the one hand, and caseloads, on the other. Two structural changes are important in breaking this relationship: the creation of IACs, and increasing discretionary docket control. Based on population size, caseload size, and the nature of structural change, Kagan *et al.* argue that there are three rough phases in this evolutionary process and three corresponding types of SSCs. Type I SSCs are found in low caseload/low population states. These courts are in states with fewer than one million people, and they have little or no discretionary docket control. Most SSCs began as Type I courts in the past. Rapid social development brought caseload increases in some states, thereby pushing these SSCs to the next level of evolutionary development. SSCs in states that have not undergone substantial development remained in this arrested condition as reactive, error-correcting institutions rather than proactive, policy-oriented institutions.

Type II SSCs are found in medium-sized states with populations exceeding one million and in large states with little or no supreme court discretion. These are high caseload/low discretion courts. In these states no structural changes have intervened to effectively insulate the SSCs and to break the relationship between caseload and social development. While all states that have experienced substantial social development reach this stage in the evolutionary process, not all move up to the next rung on the evolutionary ladder. Some remain at this stage.

Type III SSCs are found in medium-sized or in large states that have given their supreme courts substantial control over their dockets and have created a tier of IACs. These are low caseload/high discretion SSCs. Kagan *et al.* (1978: 1000) also see a fourth rung on the evolutionary ladder emerging, with the largest states entering a stage of high discretion/low caseloads (measured as opinions), but with high workload because of increasing *filings*.

However, Kagan *et al.* note that this evolutionary pattern is only a rough one, and in their discussion of its possible explanation we see that it can be rough indeed. In terms of the effects of social development they find that "the relationships are neither perfect nor exact. The supreme courts of the different states developed in

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the same direction. But they have not moved in lockstep through fixed stages of development. Court reform, always a complex process, was uniquely shaped in every state by intensely local battles" (Ibid.: 962). They find that "[i]ndividual states . . . followed divergent patterns, and consequently . . . the correlation between population growth and caseloads did not decline in a linear fashion" (Ibid.: 965). Not until the 1960s did most large and medium-sized states make substantial structural changes, and Kagan *et al.* are unsure as to why reform had not come sooner. The reasons may be state specific (Ibid.: 979–980).

Kagan *et al.* cannot explain the evolutionary process they find by social development (their scheme for choosing the sixteen states): "Interestingly, the states in these types [Types I, II and III] did not correlate closely with the clusters of states (defined by economic and social variables) from which we picked our sample. . . . Differences in the organization and work of SSCs, therefore, cannot be explained as direct results of differences in the social and economic character of the states" (Ibid.: 986). As with substantive doctrine, socioeconomic characteristics alone will not provide the key to understanding change in SSC functions.

When Kagan *et al.* examine the effects of structural change, the key to their evolutionary pattern, the results are much the same and we again see that the pattern is rough indeed. To examine the effects they compare different types of SSCs (SSCs on different rungs of the evolutionary ladder) and look specifically at three items that are, apparently, indicators of function: (1) mix of business; (2) opinion style; and (3) case results. The findings regarding the effects of structural changes on function are mixed. In terms of mix of business, Kagan *et al.* ". . . hypothesized that courts with high discretion and low caseload (Type III) would tend, on the average, to *lead* the shift away from private-law cases toward criminal and public law cases and that they would also lead the shift toward cases raising constitutional issues" (Ibid.: 988). They find this to generally be the case, but the relationships are not powerful. The differences between types of SSC's are not great, ". . . and marked individual variations exist within each type of court. . . . Differences within types of states tended to be larger than differences among types" (Ibid.: 990). They conclude that while structure clearly influences mix of business, it alone is not determinative. Other factors are also at work, and the relationships are complex (Ibid.: 990–991, n. 70).[12]

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[12] Kagan *et al.* (1978: 990–991 n. 70) elaborate:

> As we suggested earlier, a state's social, economic, and political characteristics—in addition to its court structure—undoubtedly affect the mix of cases selected by its supreme court. But the relationships are complicated, and judicial culture and attitudes also play a part . . . . Consequently, attempts to show direct relationships between social, economic, and political variables, on one hand, and supreme court

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The picture is much the same for opinion style (Ibid.: 991):

> We might expect that courts with high discretion and small caseloads would be able to devote more time to their decisions and, hence, to write longer opinions, cite more cases and make more use of law review articles. The opinions of such courts might be well-regarded and therefore frequently cited by other courts.

The high discretion SSCs do tend to write longer opinions, generally speaking. "But again, differences within groups are greater than those among groups" (Ibid.). Type III courts did cite more law review articles, but ". . . more striking than the comparisons is the paucity of law review citations by any supreme court" (Ibid.). Case law citations are more usual, but again the relationships to type of court are not strong (1978: 993). Finally, "[o]pinions by Type III courts were cited more often, but the differences are rather small. . . . Individual differences . . . seem stronger than differences by type of state" (Ibid.).

In terms of case results, the picture is the same. Kagan *et al.* look at three things: percentage of reversals, the percentage of nonunanimous decisions, and the percentage of cases in which something is declared unconstitutional. Type III courts, for instance, should have higher dissent rates because they choose to hear more controversial cases and to emphasize the controversial issues. Kagan *et al.* find that these courts do reverse more, but patterns for dissent are not uniform and dissent generally is unusual for most SSCs (Ibid.: 995).[13] "Here too, though, differences among states are more striking than differences among categories" (Ibid.: 996).

Perhaps the most troubling thing about the evolutionary scheme laid out is the consistent finding of more within-group variation than between-group variation. This raises a host of questions concerning the scheme's logic, the choice of indicators for SSC function, and even the study's design—especially the sampling scheme and the need to aggregate to such wide time intervals.

3. Friedman *et al.* (1981): "A Century of Style and Citation." Having found that social development and especially structural change affect the functions of SSCs, but that neither (nor both together) can provide a full explanation, the next article in the institutional part of the series moves on to judicial culture in search of an explanation for the residual variation. Friedman *et al.* return in detail to opinion style and specifically to opinion length, dissent rate, and citation patterns. But, as noted earlier, the dual use of these indicators—first as dependent variables in "Evolution," and

agenda on the other, have produced inconclusive results for the most part.

[13] Dissent rate here is defined as nonunanimous opinions—both dissents and concurrences; see footnote 5.

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now as independent variables—and the ambiguity concerning the meanings of legal and judicial culture cloud the contribution of this piece. And even though Friedman *et al.* go into more detail on these items than did Kagan *et al.* in "Evolution," they add nothing new.[14] This article does, however, highlight the problems of unexpected findings and unexplained variation that can most likely be tied to the design and sampling scheme, and that obscure the meaning of the findings.

In explaining the patterns they find, Friedman *et al.*, as had the authors of the earlier institutional articles, describe rough, general patterns with unexpected and unexplained variations among states. With regard to opinion length, they find that the statistical correlation between opinion volume and opinion length is weak (1981: 781). Furthermore, "there are also wide differences in opinion length within groups of courts with similar caseloads" (Ibid.: 783). They find, at least in the 1945–70 period,[15] that high discretion SSCs had "a much higher incidence of nonunanimous opinions" (Ibid.: 789). But, according to Friedman *et al.*, "more impressive than the relationship between discretion and dissent, however, is the enormous variation in dissent rates between SSCs with comparable court structures" (Ibid.). For citation patterns, they find some relationship with caseload size, but this varied from one time period to another, and "by the 1940–1970 period there was more variation within each of the three groups of SSCs . . . than between them" (1981: 800). The same image emerges in terms of non-case law citations. For example, "our data show wide variation among states in how frequently statutes are cited, but few patterns that we can point to 'explain' the variation" (Ibid.: 810).

As possible explanations of these variations, Friedman *et al.* repeatedly suggest state- or court-specific factors. In terms of opinion length, for instance, they say: ". . . to explain all the ins and outs of the data would require close study of the judicial culture of particular courts, along with the details of court jurisdiction, workload, and opinion-writing practices" (1981: 785). Of dissent patterns, they note that "these variations suggest that more subtle intracourt cultural factors were powerfully at work, as do the striking variations in dissent rates within the same SSC over

14 Kagan *et al.* found overall that opinion length increased, with much of the increase being found in "important cases" (those cited subsequently more than twelve times) (1981: 780). While the dissent rate overall did increase, they found that "[u]nanimous opinions have been, and remain, overwhelmingly dominant." (1981: 786–787). Again, dissent rates were somewhat higher for "important cases." (1981: 787–788). In terms of citation patterns, case citations ". . . account for the bulk of authorities cited in SSC opinions and the trend . . . has been to cite more and more of them" (1981: 795). Interestingly, there does not appear to be any clear relationship among these three indicators though logically they should all be positively related.

15 The meaning of the findings here are obscured even more by the tendency to use varying time widths for comparisons, and not to adhere closely to the thirty-year time span promised in "Business."

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time" (Ibid.: 791).[16] The same idea, which increasingly seems to apply to all of the essays, appears in the very last sentence of the article itself: "Explaining individual state variations requires knowledge of the idiosyncratic legal culture of the states in question, a task largely beyond the resources of the present study" (Ibid.: 818).

4. Kagan *et al.* (1984): "American State Supreme Court Justices." In "Justices," the second of the judicial culture pieces, Kagan *et al.* take a very different approach than that taken in "Style." They first consider changes in the social backgrounds of SSC justices as a surrogate for changes in culture, and then look for statistical relationships between backgrounds and dissent rates, opinion length, and citation patterns. Here, as in "Evolution," these items are clearly dependent variables. Nonetheless, as in "Style," "Justices" does little to solve the problems of unexpected findings and unexplained variations.

Kagan *et al.* look specifically at prior judicial experience, prejudicial career, legal education, former legal practice, and age, tenure, and turnover; and they concentrate on the 1950–1970 period.[17] To add to the problems inherent in the study's design and sampling scheme, Kagan *et al.*'s data on judges, as they note, are less than satisfactory. A particular problem is the missing detailed information on the judges' familial and occupational backgrounds. Kagan *et al.* rely heavily on self-reported biographical statements in which "some judges may have underreported their memberships in political parties or even have left out some public offices. For almost a quarter of the judges, information on the type of private legal practice was sketchy or missing" (1984: 374). The source material also gives "no reliable basis for determining social and economic backgrounds. In most cases, the judges did not report their fathers' occupations" (Ibid.).[18] Not surprisingly, they find ". . . either no systematic relationship, or only weak and inconsis-

[16] Internal norms may have a powerful influence on dissent rates and decision-making. In Illinois, for instance, there has been a long-standing tradition of random opinion assignment, one that goes back to at least the turn of the century (see Carter, 1906). This, in turn, appears to have led to a norm of acquiescence that discourages not only dissents but concurrences as well (see Daniels *et al.*, 1984). On the other hand, the literature on IACs suggests that for some courts the business is so routine that there is little to dissent about (see Wold and Caldiera, 1980; Howard, 1981; Davies, 1982), and this may apply to many SSCs as well (see Daniels *et al.*, 1984).

[17] Again, we see the use of a different time span than the one promised in "Business."

[18] Curiously, Kagan *et al.* seem to overlook an alternative approach that may be more helpful in explaining change in judicial culture—prosopography, or collective biography—which Hall (1980) has used successfully to explain changes in the lower federal courts from 1789 to 1899. They also overlook, perhaps for financial reasons, the likely existence of superior data sources on judges (see Hall, 1979: 336–337).

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tent relationships, between courts' rankings on the judge variables and their rankings on case variables" (1984: 402).

There are, Kagan *et al.* say, at least some suggestive findings on the relationship between political party and consensus on a court and dissent rate. There may be ". . . a weak tendency for courts with judges from a single political party to maintain consensus better than courts with judges from different parties" (Ibid.: 403). There may be a similar weak tendency between party consensus and declarations of unconstitutionality (Ibid.: 403–404). For whatever they are worth, these weak relationships are overshadowed by the fact that no clear patterns emerged even for the Type III SSCs. Clear differences among the types of SSCs should emerge. For Kagan *et al.* this seems troubling, for ". . . the differences among courts with similar jurisdictional structures raise the question of whether differences in judges' backgrounds account for the variations in opinions" (Ibid.: 405).

"Justices" ends on an unusual note, and, as does the ending of "Style," it may apply more broadly. In a sense, Kagan *et al.* seem to throw their hands into the air in the article's conclusion, apparently resigning themselves to the *fact* that the problem of explaining patterns and changes in SSCs is intractable: ". . . appellate judicial decision making is so clearly a product of multiple factors, so subject to case-specific contingencies that the search for a scientific or predictive theory of intercourt variation among SSCs, while feasible in principle, may in fact not be worth much further effort" (Ibid.: 406). The problem of variation has plagued all four of the institutional essays, and none has been able to solve it. This sense of resignation may well apply to all of these essays, and it effectively marks the end of this path in the series' evolution. To paraphrase Hurst, the tangled story does not unwind toward a happy solution.

IV. IMPLICATIONS

There are two important implications of the four institutional articles. The first has to do with how the study of SSCs is conceptualized and then designed. Much if not most of the ambiguity and uncertainty that arises consistently in these works can be traced to the study's overly ambitious purpose and concomitant design. The original intention was to make generalizable statements concerning the nation as a whole for a 100-year period and to indulge in macro-social theory. This set of articles reflects a strangely naive view of science: broad generalizations can confidently be made without any understanding of what lies beneath the aggregate figures. Its approach is longitudinal but not sufficiently historical, and this is aggravated by a sampling scheme that necessitates the aggregation of data to very wide time intervals. The series is not sufficiently historical in the sense that so little attention is paid to

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the substance of the contexts in which the SSCs developed (see Munger, 1986), something admittedly not possible—as the collaborators note—given the broad longitudinal purpose and the practical limitations of the study. Yet, the four institutional essays increasingly point to the importance of context—to state and/or court-specific factors and their histories—in explaining patterns and changes over time. Instead of macro-level theory, what is needed are micro-level analyses that help us understand the kinds of variation encountered in these articles.

This strongly suggests the shortcomings of this type of broad, aggregate analysis covering an extended period of time in trying to understand the relationships between legal institutions and society, and the effect of economic, legal, and institutional change on SSC functions. Without theoretical building blocks—a body of more detailed studies of individual SSCs—our understanding of these relationships will not improve (see Monkkonen, 1986). The lesson of the series is that the bare longitudinal approach is insufficient. Instead, we need studies of smaller numbers of courts or of even one court to obtain the requisite depth and detail, some of which requires research outside the law library and into the basements and storerooms that house old indices, docket books, fee books, files, and archives. We also need studies of shorter periods of time, chosen for a specific theoretical reason because of some particular set of characteristics or changes.[19] Only by designing such studies can we hope to capture the complex interrelationships behind changes in the functions of SSCs.

Without any knowledge of context, it is unrealistic to think that broad, longitudinal studies as this one can do more than provide a very general, aggregate description. This does not mean, as Kagan *et al.* (1984) imply in their conclusion to "Justices," that the problem of understanding the relationships between legal institutions and society is intractable. It *does* mean that another approach is needed and that the despair of sorts that ended the institutional part of the series in "Justices" may be a result of misplaced expectations rather than the intractability of the problem.[20]

The second implication is of a different order and has to do

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[19] For example, in his study of civil litigation in the trial courts of three West Virginia counties, Munger concentrated on the period 1870 to 1940, a period in which ". . . West Virginia experienced rapid economic growth and social development" (1986: 326). Hall, in his recent study of dissent on the California Supreme Court, concentrated on the period 1850 to 1920, ". . . the so-called 'party period' of American history . . ." (1986: 63). Among other things, Munger was interested in the effects of developmental "take-off" on litigation; Hall was interested in the links between judicial culture and party politics, and between judicial accountability and judicial independence.

[20] If this expectation is based on some notion that being "scientific" means having to find a predictive theory of the kind usually associated with the so-called "hard sciences," then the problem will always appear intractable. Perhaps there is something to be learned from the attitude of evolutionary bi-

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with the model laid out in "Business." The problem in the four central articles is not in the questions they ask but in how they try to answer those questions. With some adjustment that model, with its emphasis on the interaction of environmental and structural factors and their effects on institutional change, can still provide a useful framework for studying not only SSCs but state courts generally, and I would like to speculate on this use of the model.

Looking at *all* levels of state courts, structural factors play the central role in a revised model, they operate as the constraints within which courts work. Socioeconomic factors provide the driving force for patterns and changes in court functions (in what they do), while structural factors act as constraints or intervening variables mediating or channeling the effects of environmental factors. Patterns and changes in court functions are a result of the interaction of these two sets of factors within a given *local* context and a given time period. The diversity found in the SSC series reflects these varying local contexts, local environments and structures, and their development.

In a given setting, the functions of courts may be affected by both long-term environmental trends and short-term fluctuations. The SSC series is concerned with only the former, necessarily so considering its purpose and design. Both, however, are important. The former will change a locale's socioeconomic character over a number of years, and such changes may affect courts as they may affect other governmental institutions. For instance, in their respective studies of civil litigation in state trial courts McIntosh (1980–81) and Friedman and Percival (1976) argue that such long-term environmental trends may explain the decreasing rate of property cases (as a locale becomes settled) and the increasing rate of tort cases (as a locale becomes more urbanized and/or mechanized). The latter reflect the short-term fluctuations in a locale's economic prosperity that take place against the background of long-term trends. These fluctuations are also likely to affect courts, leading to corresponding fluctuations in what courts do.

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ologists toward the task of explaining change scientifically, Ernst Mayr, in *Animal Species and Evolution* (1965: vi), said:

> Comparing two such different fields as, let us say, the evolutionary biology of species and enzyme chemistry brings home the enormous contrasts within science. In chemistry we deal with repeatable unit phenomena and with actions that, once correctly described, are known forever. In evolutionary biology we deal with unique phenomena, with intricate interactions and with balances of selection pressures—in short, with phenomena of such complexity that an exhaustive description is beyond our power. We can approach the truth only by a trial-and-error process of increasing accuracy.

At this point, the study of court functions over time is much closer to Mayr's characterization of evolutionary biology than it is to the study of enzyme chemistry. Providing the kinds of theoretical building blocks now missing would do a great deal toward moving us through that trial-and-error process of increasing accuracy.

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Stookey (1986), in his study of civil litigation in Arizona, has shown convincingly the effects of fluctuations in economic prosperity on trial court business.

Environmental factors, long-term or short-term, will not necessarily affect all types of cases in the same way or to the same degree. The findings in "Business" and every other longitudinal study that has disaggregated caseload totals show differing patterns over time for different types of cases.[21] Some kinds of cases may be more affected by long-term environmental trends. McIntosh's and Friedman and Percival's arguments concerning property and tort cases noted above provide an example. Other types of cases, particularly those including contracts, debt, or financial support, may be affected more by short-term fluctuations in prosperity (Daniels, 1986; Stookey, 1986; but see Kagan, 1984). Similar patterns may appear on the criminal docket as well (Daniels, 1985).

There will not necessarily be total flexibility in response to environmental factors and changes; the model is not a simple adaptationist one. The functions of courts are also affected by institutional constraints, legal and most importantly structural factors, that act as intervening variables mediating or channeling the effects of environment. The most important are the most obvious factors: the structural, jurisdictional, and procedural constraints within which courts operate. Such factors may limit the range or the possibility of potential response to the environment. They may even blunt the effects of some environmental factors and changes. Even with its ambiguities and uncertainties, this is *the* key message of the SSC study.

Within a given set of constraints, identifiable patterns in court function may develop. There will be fluctuations, but they will exist within the range defining the pattern. Such fluctuations, however, are not necessarily cumulative nor lead, slowly and inexorably, to some larger change. Change in function comes with change in the constraints. This also means that change is discontinuous, irregular, and not a foregone conclusion in every situation. Change is contingent. This is evident in "Evolution" with its idea of the three types of SSCs and three stages of evolution *and* the finding that not all medium to large-sized states smoothly and automatically moved to becoming Type III SSCs on some set, predictable timetable, or at all. Major changes in the constraints may come in response to pressures that build as a result of fundamental environmental developments; but again the message from "Evolution" is that changes in constraint *may* come about, they do not *necessarily* and *automatically* come about.[22]

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[21] For example, see Baum *et al.*(1981–82); Howard (1981) (federal IACs); Clark (1981) (federal trial courts); Davies (1982) (state IACs); Laurent (1959); Friedman and Percival (1976); McIntosh (1980–81) (state trial courts).

[22] The notion of discontinuous and contingent change has appeared in a

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We can theorize that patterns and changes in court functions (for state courts generally, not only SSCs) are primarily, although not exclusively, the result of microevolutionary or local environmental factors rather than simply the manifestation or product of some grand, macro-evolutionary trends (see Daniels, 1984). Within a given locale, court functions will respond to both long-term environmental trends and short-term fluctuations in economic conditions. Environmental factors, long-term and short-term, will not necessarily affect all types of cases in the same way or to the same degree, and some types of cases may be more affected by one rather than the other. There will not be total flexibility in response to environmental factors and changes. Court functions will also be affected by certain institutional constraints that act as intervening variables mediating or channeling the effects of the environment. Within a given set of constraints, identifiable patterns will emerge. Changes in patterns are likely to occur when key constraints change, meaning that change is likely to be discontinuous, irregular, and contingent (Ibid.).

This general model, which is built on the interaction of environmental factors and institutional constraints, will differ in specifics by level of court as the respective factors' effects shift. Environmental factors are likely to be far more important for state trial courts than for higher courts because their constraints are fewer and weaker. Trial courts are on the edge of the court system and they meet the environment head on. Consequently, they should be most affected by short-term factors, and trial dockets will include a greater proportion of those types of cases strongly affected by short-term factors. Because the importance of these factors will outweigh the importance of the long-term factors, there should be greater fluctuation over time in what these courts do than in the upper courts.

Supreme courts in a three-tiered system should be much less influenced by short-term factors than trial courts. In fact, there may be little if any effect at this level because the constraints may effectively insulate a high court from most short-term fluctuations and from those types of cases most affected by such factors. To the extent these courts are affected by environmental factors, they will be influenced even more by long-term factors. It is possible that SSCs in a three-tiered system may be so well-insulated that they are primarily influenced by factors internal to the legal system. As a result, there should be much less fluctuation and much more stability in the amount and nature of what these courts do compared to trial courts. Change, when it occurs, will be more abrupt and should come only with change in the structural con-

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number of disciplines ranging from evolutionary biology (e.g., Gould and Eldredge, 1977) to sociology (e.g., Wright, 1978) to political science (e.g., Burnham, 1970; Sundquist, 1973; Skowronek, 1982); also see Daniels, 1984.

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straints. Changes in structural constraints, in turn, result as pressures produced by long-term environmental trends build.

Environmental factors are likely to have a greater effect on intermediate appellate courts (and SSCs in a two-tiered system) than on SSCs because the constraints are likely to be fewer and so the insulation will be less. But the constraints will be strong enough so that environmental factors will not have as much effect as they do on trial courts. To the extent external factors do make their influence felt, both long-term and short-term factors will be important. The long-term factors, however, should be relatively more important because the constraints are still likely to be strong enough to blunt the sharp, immediate effects of short-term factors that trial courts cannot avoid. Therefore, there is likely to be more fluctuation in what these courts do compared to SSCs in three-tiered systems, but it should be much less pronounced than at the trial level.

This rough scheme on the relationship between legal institutions and society, and the effects of economic, legal, and institutional change on court functions provides only a framework. Given the lack of theoretical building blocks, fleshing out this longitudinal model requires the type of deeper and more detailed analysis that would come with a study of one or a handful of states for a shorter time period chosen for theoretical reasons. Perhaps the ideal way to investigate the relationships between courts and society, and the effects of economic, institutional, and legal change on what courts do would be a study that looks at courts at *all* levels (to the extent practical) in a given state for a well-defined time period. The state should be one with sufficient socioeconomic diversity to allow for meaningful intrastate comparisons, and the time period should be chosen because of certain environmental changes and their possible effects on courts and other institutions.

This study would collect as detailed a data set as possible on both filings and decisions for the state supreme court and the intermediate appellate courts (data on parties, types of cases, dispositions, and the like). Intrastate comparisons would be possible if the counties of origin were among the data collected along with the appellate district where a districting scheme operates (most IACs are organized on a district basis and the supreme court data could also be organized using such district boundaries). Additionally, indicators of long-term and short-term socioeconomic factors would need to be collected for each county and then aggregated to the district level. This would allow for statewide comparisons of the SSC and the IAC, and more importantly it would allow for comparisons *within* districts of the two levels of courts (thus permitting the testing of hypotheses concerning the effects of legal factors since district socioeconomic factors would be held constant and there would be identifiable differences between the levels of courts in jurisdiction, etc.). It also would allow for comparisons

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among districts for each of the two levels of appellate courts (thus permitting the testing of hypotheses concerning the effects of socioeconomic factors, both long-term and short-term, since legal factors would be held constant).

Because there are far more trial courts than appellate courts, not all trial courts could be included in this study. A sample of courts would be used that captures some of the state's diversity (e.g., urban and rural counties). Detailed socioeconomic data would be collected at each site along with detailed data on all trial court filings, civil and criminal, and to the extent possible data would be collected for *all* levels of trial courts, not only the highest level of trial court. This would allow for the same types of comparisons suggested for the appellate courts: comparison of different levels of trial courts within a county (holding the environment constant); and comparison of a given level of trial court across counties (holding legal factors constant).

The use of a shorter time span within a state makes the investigation of legal factors, legal or attempted reforms, court traditions, court makeup, and other contextual matters manageable. An interesting time period for theoretical purposes would be around the turn of the century, roughly from 1870 to 1920. A number of historians and political scientists have concentrated on this era as particularly important because of the rapid pace and the scope of both socioeconomic and political change and because of the effects of these changes on public policy and institutions, including the eclipse of the so-called "party period" in American history (see McCormick, 1979); the critical, or realigning, election of 1896 (see Burnham, 1970; Sundquist, 1973); the rapid growth of industrialization and urbanization (see Keller, 1977; Hurst, 1964); and the rise of the modern American state (see Skowronek, 1982). According to Skowronek (1982: 11–12):

> In the eyes of contemporary historians, American history between 1877 and 1920 reveals a rapid movement from social simplicity to social complexity. Scholars have traced in these years the destruction of the isolated local community and its replacement with one interdependent nation tying together every group and section. . . .
>
> . . . To accommodate this transformation in American life, early American government had to change dramatically.

These developments brought about substantial institutional change in the public sector, which laid the foundation for institutional arrangements throughout the twentieth century. A detailed analysis of how the changes that occurred during this period affected the different levels of courts within one state would go a long way toward improving our understanding ". . . of the complex relationships between legal institutions and society, and the effect of economic, legal, and institutional change on the nature and volume of adjudication" (Kagan *et al.*, 1977: 122). In this way we can

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begin uncovering a happy solution to the tangled story of the history of United States' courts.

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