REACTIONS OF STATE SUPREME COURTS TO A U.S. SUPREME COURT CIVIL LIBERTIES DECISION

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Political scientists have in recent years been focusing more of their attention on compliance with Supreme Court decisions. Of course, with rare exceptions, the Supreme Court does not issue orders directly; rather it announces broad policies in the form of opinions. Detailed interpretation and application of these policies are, insofar as the judicial system is concerned at least, left to other courts. Thus those interested in the nature of compliance with Supreme Court policies must explore the manner in which lower courts handle the high court decisions.

Because of its direct relationship and administrative responsibilities, the Supreme Court can exercise a closer supervisory control over the lower federal courts than it can over state courts. But many controversial Supreme Court policies of the last couple of decades have involved issues coming from the state courts, *e.g.*, obscenity prosecutions, right to counsel, desegregation, exclusion of illegally seized evidence, police interrogation practices, etc.

Considering the origin and structure of our federal system, a natural antagonism exists between the Supreme Court and state courts — particularly the states' highest appellate courts. While this was perhaps most dramatically illustrated in the early classic struggles between John Marshall and Spencer Roane, the mistrust and resistance is ever-present. It attained unusual visibility in 1958 when the Council of State Chief Justices in a 36-8 vote adopted a resolution criticizing the U.S. Supreme Court Justices for promoting "an accelerating trend towards increasing power of the national government and correspondingly contracted power of the state governments" and charging that judicial federalism was endangered by "the extent of the control over the action of the states which the Supreme Court exercises under its views of the Fourteenth

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Amendment" (quoted in Wasby, 1970: 196; *cf. New York Times,* August 24, 1958: 1, 42). While some of the criticism may have been primarily reactive to the desegregation decision, the sizeable margin of the vote indicates that the chief justices' hostility transcended any particular issue or sectional grievance.

The remonstrance went unheeded. The Supreme Court accelerated its use of the fourteenth amendment in the 1960's as it imposed what amounted to a "constitutional revolution" in judicial federalism on the states. This was accomplished as the Court incorporated one provision after another of the Bill of Rights concerning the rights of criminal defendants into the amendment's "due process" clause — and then broadly interpreted these guarantees. Where at the beginning of the decade no such provision was fully and meaningfully applicable against the states, by 1969 the states were subject to all but two of the Bill of Rights' provisions relating to criminal prosecutions.

While nothing so dramatic as a formal resolution of censure occurred in the 1960's, many state supreme court justices individually voiced their disapproval of the Court's new course of action. Justice Henriod of Utah was one of the most outspoken (*State v. Louden,* 1963 [concurring opinion]). Asserting his right to criticize the Supreme Court "until bondage preempts it," he predicted the Court's decisions would be responsible for

> . . . the emasculation of states' rights in favor of totalitarian federal control, heralding the ultimate destruction of the fundamental font of government in which our forefathers bathed in each's blood.

Justice Hammond of Maryland accused the high court of making "fantastic new law" in its "inexorable march toward complete federalization of the criminal law" and urged state judges to overcome their traumatic frustrations and Pavlovian conditioning and stick with established precedents as long as legally possible (*Gross v. State,* 1964 [dissenting opinion]). In a similar vein, Alabama Justice Lawson denounced "the onslaughts of federal courts" (*Boulden v. State,* 1965) and his colleague Justice Livingston charged that the Supreme Court was engaging in the "systematic destruction of state sovereignty" (*New York Times,* August 11, 1963: 49). In addition to such states' rights oriented denunciations, high court decisions were also the object of considerable substantive criticism[1] from some justices on state supreme courts.[2]

By comparison with other people, however, state judges were infrequent and restrained in their comments. Law en-

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forcement officials and politicians loudly denounced the Supreme Court for "handcuffing the police" or "ignoring the rights of the victim (or of society)." "Law and order" — a code phrase implying a more restrictive interpretation of the Bill of Rights' guarantees pertaining to defendants' rights — became a favorite political platform. So intense did feeling run against the Supreme Court (motivated by the school prayer and reapportionment as well as the defendants' rights decisions) that in the mid-1960's the Council of State Governments sponsored a constitutional amendment which would establish a "Court of the Union" composed of the chief justices of each state high court as the final arbiter of questions involving state-federal conflict.[3]

Given the natural hostility of state courts to Supreme Court decisions affecting the states and considering the heightened tensions accompanying the "constitutional revolution" of the 1960's, political scientists interested in compliance with and the impact of Supreme Court decisions should naturally be curious as to just how state supreme courts interpreted and implemented Supreme Court decisions which expanded defendants' rights.

FOCUS AND METHOD

This is an exploratory paper focusing on the way in which state supreme courts interpreted and applied *Mapp v. Ohio* (1961) during the 1960's. *Mapp* imposed the exclusionary rule on the state courts, that is, evidence secured contrary to the provisions of the fourth amendment could not be admitted into criminal prosecutions. Because in appellate considerations a comparatively large number of such cases turn on how evidence is procured, it must be considered one of the most important and far-reaching of the Supreme Court's "selective incorporation" decisions of the 1960's. Moreover, having been decided in June 1961, *Mapp* constituted the "opening gun" of the decade's "constitutional revolution." This is advantageous for our purposes as it gives us about nine years' worth of state cases to explore. This time length not only gives us some longitudinal perspective on their response, but assures sufficient cases to have some confidence in our generalizations.

As political scientists have found out in recent years, it cannot be assumed that lower court judges — particularly those in the states — follow closely the letter or more especially the spirit of Supreme Court pronouncements (Murphy, 1959; Manwaring, 1963, 1968; Wasby, 1970: 196-203). This is particularly

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true when the high court decision breaks new ground and its scope and depth are — initially at least — likely to be quite uncertain and ambiguous. Often the language of the decision may contain modifications or qualifications, or the Court may fail to overrule or differentiate detracting precedents, or dissenters may intimate that the battle over the new principle is not yet over. Sometimes it may be several years or more before the Supreme Court gets around to clarifying the thrust of its intentions in an unmistakable manner. Moreover, even to the extent that the decision announcing a new direction or doctrine is relatively explicit, the Court seldom tries to anticipate the many difficult legal questions and problems surrounding it which are sure to arise.

This was largely the situation in the wake of *Mapp*. Although the decision was undoubtedly clear enough in spirit and in its central holding, it was silent and uncertain at every detailed edge. It did not tell the state courts to whom or under what circumstances the fourth amendment was applicable to them. It shed no light on such closely related questions as what constitutes probable cause to arrest or to search without a warrant or to grant an application for a warrant; nor did it say what was a reasonable search incident to arrest or as part of executing a search warrant. The federal judiciary had developed its own answers here in the half century following its adoption of the exclusionary rule. (In recent years, however, this development was seemingly marred by aberrations at the Supreme Court level; *e.g., Harris v. United States,* 1947; *Trupiano v. United States,* 1948; *United States v. Rabinowitz,* 1950.) But in *Ker v. California* (1963) two years after *Mapp* the Court held that the federal doctrines and rules were not necessarily applicable to the states. *Ker* announced, however, that "the standard of reasonableness is the same under the Fourth and Fourteenth Amendments" (1963: 33). By rejecting the option of imposing pre-existing federal rules on the states, but nonetheless insisting on one "standard of reasonableness," the Court was certainly promoting a period of ambiguity and uncertainty.

To be sure, the Supreme Court eventually spelled out a few concrete applications of the exclusionary rule. Even here, however, the decisions were often so narrow in their focus as to be very piecemeal answers (*Warden v. Hayden,* 1967; *Bumper v. North Carolina,* 1968; *Sibron v. New York,* 1968; *Davis v. Mississippi,* 1969; *Frazier v. Cupp,* 1969), or they were seemingly contradictory to each other (*cf. Preston v. United*

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States, 1964, with *Cooper v. California,* 1967), or they continued to leave states considerable discretion by refusing to extend a particular holding into an absolute rule (*Fahy v. Connecticut,* 1963; *Terry v. Ohio,* 1968). And even when the high court did make a rather broad and clear interpretation of *Mapp* and the "reasonableness standard" in *Ker,* it usually did so late in the decade after at least some states had much earlier grappled with the problem on their own.[4]

Two other characteristics of *Mapp* are worth brief mention in regard to expectations of compliance. First, the vote was rather close (5-3), the dissent vigorous, and the majority unable to agree on a common rationale for its holding. Second, Justice Clark's opinion announcing the Court's judgment contained some seemingly ambiguous or qualifying phrases, designed perhaps to ameliorate opposition, but also capable of serving as justifications for narrow interpretation.[5]

One purpose of this paper is to test and explore some hypotheses about conditions governing lower court compliance with and implementation of Supreme Court decisions. Rather than spell out the hypotheses here and then wait until after presentation of the data to analyze them, we shall discuss them at the paper's conclusion. Another important purpose of this paper is the development of some measures useful in analyzing and comparing state supreme court reactions to U.S. Supreme Court decisions. Far too often, political scientists and other commentators try to draw implicit generalizations by relying on some quotations (often highly emotional or otherwise unusual) from a few state court opinions or by noting the logic or direction of a few decisions rendered in the more prestigious state courts.

For a thorough understanding of the role which state supreme courts have in implementing Supreme Court decisions, such devices are hardly reliable. We need measures designed to inform us about what the state supreme courts have done (rather than said) in their reaction to a common stimuli. The measures should also facilitate interstate comparison so that we can note variations and investigate conditions responsible for them. Of course, such measures are not easily developed. Because a decision's rhetoric sometimes belies its direction and impact, analyzing opinion content is a dubious proposition. And because different courts are faced with differing factual and legal problems, general quantitative who won-who lost analysis is dangerous. Perhaps the best strategy is to make compari-

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son on the basis of common legal problems facing the courts. Admittedly, the particulars in cases posing such problems vary in facts and emphases from court to court. Nonetheless, basic commonalities do exist — indeed, the woof and warp of the law is rooted in them.

The author has constructed a comparative measure of response based on the way in which state supreme courts settled 16 rather frequently recurring legal questions which arose in the wake of the *Mapp-Ker* imposition of the fourth amendment upon the states. The data were gathered through the Shepardization of all citations to *Mapp* and *Ker* in these courts.[6] Obviously such a measure is limited in that it does not record behavior in those cases not directed toward answering the common legal questions. Decisions involving the 16 legal questions cover about 60% to 70% of the total number of cases in which a state supreme court seriously attempted to interpret or apply *Mapp* and/or *Ker*.[7] Nonetheless, within its limits such a measure seems a useful comparative tool and the author is hopeful that it is susceptible to a more widespread application.

The 16 questions were seemingly left unsettled or ambiguous by the Supreme Court (at least for some years). To be included in the measure, a question had to be decided by at least four state supreme courts. Most were settled by approximately ten to a dozen and one was before 28 state high courts. Only questions settled divergently by the state supreme courts were included (in other words, if all the courts answered the question in essentially the same manner, the question was excluded from the measure). For all questions, the interpretative alternatives were basically dichotomous — that is, the court had to choose between admitting or excluding the evidence. For purposes of this paper, decisions excluding the evidence are considered to be within the spirit or thrust of *Mapp*. Decisions admitting evidence are not necesarily held to be a defiance or evasion of *Mapp*. As pointed out earlier, *Mapp* and *Ker* offered lower courts few specific guidelines. Such decisions are thought, however, to connote a lesser willingness to accept *Mapp's* philosophy and a reluctance to extend it very broadly. In other words, we are measuring state supreme court reactions to *Mapp*.[8] We are not in any real sense measuring their compliance with, or the impact of, the decision.

The legal questions used for measuring the reactive and implementative behavior of state supreme courts are set forth below. Lack of space precludes anything but the briefest pre-

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sentation. (For some of them, material in law reviews or legal encyclopedias can furnish a comprehensive discussion, but for others no such single source seems available.)[9] Not all of the courts answered any given question with the same breadth, thoroughness or precision. But for purposes of comparison, we have recorded a state supreme court as settling such a question if the result and/or language of a decision indicated that the court was either answering or strongly predisposed toward settling the question in one direction or another — in other words, the case would serve as a viable precedent here.[10]

There were five questions which most (two-thirds or more) state high courts settled in a manner limiting the application of *Mapp* — that is, allowing disputed material to be admitted into evidence. These will be termed Group I questions.

I-a. Does failure of the defendant to make a timely motion for suppression of illegally seized evidence (usually a pre-trial motion) waive his right to invoke the exclusionary rule later?

I-b. Can one spouse waive the fourth amendment rights of the other and consent to a search of the home?

I-c. Is evidence secured during a routine, non-criminal (but warrantless) search, *e.g.*, a building inspection, admissible in criminal prosecutions?

I-d. Is *Mapp* retroactive? *i.e.*, does it apply to cases where the trial occurred before *Mapp* but an appeal of the verdict was still pending?

I-e. Is evidence secured from one who was stopped for "suspicious behavior" admissible under the fourth amendment?

There were eight questions on which the state supreme courts did not line up preponderantly either for admissibility or exclusion of evidence. These will be termed Group II questions.

II-a. Are searches of automobiles following a traffic arrest valid?

II-b. Must appellate courts overturn convictions in which illegally obtained evidence was introduced but did not constitute a vital or major proportion of the evidence upon which the verdict was based?

II-c. Does a defendant who does not reside (or have a business interest) in the premises from which the evidence was illegally seized have standing to object to its admission?

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II-d. Are warrants issued or searches made on the basis of anonymous "tips" valid?

II-e. Generally, must a waiver of one's fourth amendment rights be interpreted narrowly? *i.e.*, is the burden on the state to prove that the defendant voluntarily and knowingly consented to a search and are disputes over the breadth of consent settled in the defendant's favor?

II-f. Can evidence be admitted which is secured in good faith but nonetheless illegally (*e.g.*, a warrant is later determined to be void)?

II-g. Are searches made in accordance with so-called "no-knock" laws or policies valid?

II-h. When a defendant is under arrest or in custody, is a waiver of his fourth amendment rights presumed to have been coerced and thus void unless the state can rebut the presumption?

There were three questions which most state supreme courts settled by ruling the disputed evidence inadmissible. These will be termed Group III questions.

III-a. Is evidence seized illegally admissible in non-criminal proceedings where the state is attempting to deprive the defendant of property or a privilige (*e.g.*, license revocation cases)?

III-b. Is testimony about evidence which was illegally seized admissible?

III-c. Is evidence seized in the course of an invalid arrest admissible?

STATE COURT RESPONSE PATTERNS

In Table 1 we show the directional propensity of each state supreme court on the preceding questions. A plus sign indicates a ruling of exclusion, a minus sign one of admissibility. It is clear that there is a considerable degree of variation in the courts' interpretative responses to *Mapp*. Although the break-

TABLE 1: DECISIONS OF STATE SUPREME COURTS ON 16 LEGAL QUESTIONS STEMMING FROM MAPP AND KER

	Group I					Group II								Group III		
	a.	b.	c.	d.	e.	a.	b.	c.	d.	e.	f.	g.	h.	a.	b.	c.
Alabama	–	*						–						+	*	* +
Alaska	–					+		–					–			
Arizona	+	+		+				+				+				
Arkansas		–					+	+								
California	–				+			–	+	+		+		+		+
Colorado	–			–												

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	Group I					Group II								Group III		
	a.	b.	c.	d.	e.	a.	b.	c.	d.	e.	f.	g.	h.	a.	b.	c.
Connecticut	+			+		+	–									
Delaware								+					–			
Florida				–												
Georgia		–												+		
Hawaii	–	+						+							+	
Idaho																
Illinois		–							+							
Indiana		–			–		–	–								
Iowa	–	–	–	–				–								
Kansas	–			–		–		–								
Kentucky	–												+		+	
Louisiana	–		–					–		–						
Maine				–				+								
Maryland	–	–		+				+							–	+
Massachusetts			–	+							+		+			
Michigan				+	–	+							+			
Minnesota		–		–	–	–	–	–		–	–					
Mississippi	–	+				–		–							+	
Missouri	–					–							–			
Montana	–							–		+			–			
Nebraska								–								
Nevada							+	+					+		+	
New Hampshire		–		–									–			+
New Jersey				–	–						+	–	+	+		
New Mexico	–															+
New York	–	–	+	–	–				–		+		+	+		+
N. Carolina	–	+	–										–			
N. Dakota		–								+						
Ohio	–	–		–		+		+			–			–		
Oklahoma	–					–		–							+	
Oregon																
Pennsylvania		–		–	+		+	–	–	+		+	+	–		
Rhode Island					+							–				
S. Carolina								+	+	–						
S. Dakota	–							–								
Tennessee								+		–						
Texas		–			–	–		–						+		–
Utah		–				–					–					
Vermont																
Virginia								–								
Washington		–						–		+						
W. Virginia																
Wisconsin	–	–					–	+	–				+	+		
Wyoming																
+	2	4	1	5	3	4	3	12	3	4	3	3	8	7	6	5
—	21	16	4	11	6	7	5	16	3	4	3	2	5	2	1	1

** + Indicates a ruling of exclusion.
* — Indicates a ruling of admissibility.

ing points and inclusion criteria are necessarily somewhat arbitrarily determined, we can make some general categorizations of these response patterns. This is done in Table 2. The three categories shown there and discussed below give us a

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TABLE 2: RESPONSE CATEGORIZATIONS OF STATES TO MAPP AND KER

Positive	Intermediate	Negative	Uncategorized
Arizona	Alabama	Indiana	Colorado
Arkansas	Alaska	Kansas	Delaware
California	Iowa	Louisiana	Florida
Connecticut	Kentucky	Missouri	Georgia
Hawaii	Maryland	Minnesota	Idaho
Massachusetts	Mississippi	Ohio	Illinois
Michigan	Montana	Oklahoma	Maine
Nevada	New Hampshire	Texas	Nebraska
New York	New Jersey	Utah	New Mexico
	North Carolina		North Dakota
	Pennsylvania		Oregon
	South Carolina		Rhode Island
	Washington		South Dakota
	Wisconsin		Tennessee
			Vermont
			Virginia
			West Virginia
			Wyoming

useful summary description of variations found in Table 1 and a point of departure for further exploration.

Positively Responding States. The criterion for inclusion in this category is either (1) the court decided at least one Group I question broadly (for exclusion) without having decided a preponderance of the Group II questions or any of the Group III questions narrowly (for admissibility); or (2) if the first criterion was not met, then the court had to decide the preponderance of Group II questions broadly. By these criteria, nine state supreme courts fell into a positive response category: Arizona, Arkansas, California, Connecticut, Hawaii, Massachusetts, Michigan, Nevada and New York.

Arizona and Connecticut, in particular, seemed most willing to implement *Mapp* in a receptive spirit. Their supreme courts stood alone in ruling that failure to file a timely motion for suppression did not vitiate the defendant's right to object to the introduction of illegally seized evidence and were among the very few courts to hold that *Mapp* was applicable retroactively. Hawaii, Masachusetts and Michigan all decided one Group I question contrary to the prevailing trend and while this was not the case with Arkansas or Nevada, the latter two decided for exclusion in all Group II questions before them. Arkansas' inclusion in the positive response category is the result of timing as much as anything else. Apparently the state supreme court was on the verge of embracing the exclusionary rule itself just prior to *Mapp* (*Clubb v. State,* 1959); consequently some subsequent decisions are favorably inclined toward its rationale and implications.

Two states in this category, California and New York, deserve particular attention because their high courts are both

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comparatively frequently receptive to innovations and highly respected among American appellate courts. Moreover, along with Pennsylvania and Minnesota, these two states settled more of the legal questions we are focusing upon than did any other. While both state supreme courts settled one Group I question in favor of exclusion, New York settled four in the opposite direction and both ruled for admission in one Group II question. Additionally, both courts decided a couple of questions not on our measure (because too few courts had ruled on them) with a narrow interpretation of *Mapp*.[11] In short, although both California and New York meet our criteria for inclusion in the positive responding category, neither can be labelled as extremely receptive to *Mapp*.[12]

Negatively Responding States. Included in this category are courts which either decided a Group III question for admissibility or which decided a preponderance of two or more Group II questions narrowly. However, no court was included here if it had decided one or more Group I questions for exclusion. By these criteria, nine states fell into the negatively responding category: Indiana, Kansas, Louisiana, Missouri, Minnesota, Ohio, Oklahoma, Texas and Utah.

Of the nine, only Ohio and Texas settled a Group III question narrowly. Ohio, however, settled two Group II questions in favor of exclusion and only one for admission and, in addition, rendered a noteworthy decision (not among our 16 legal questions) broadly interpreting the defendant's rights under *Mapp*.[13] Thus we cannot really consider the Ohio supreme court as one extremely reluctant to implement the spirit of *Mapp*. The Texas court, on the other hand, not only was the only state to admit evidence seized in the execution of an invalid arrest warrant, but settled both Group II questions before it narrowly. Moreover, it was emphatic in holding that the entire automobile could be searched when stopped for a traffic violation (*Lane v. State*, 1967) and that warrantless policemen could tramp through yards and peer through windows without violating the fourth amendment (*Giacona v. State*, 1962; *Thompson v. State*, 1969).

The remaining seven states in the Negative Response category have pretty similar records, with Minnesota being perhaps the most notable in that it settled five Group II questions — all in favor of admissibility. Beyond the 16 questions, other decisions made in these states' high courts support an inference of considerable resistance to a broad implementation of *Mapp*.[14]

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Four states permitted the admission of evidence stemming from pretextual traffic arrests (*State v. Clifford,* 1966; *State v. Durham,* 1963; *Dorrough v. State,* 1969; *State v. Dodge,* 1961), while Minnesota and Utah permitted parents to waive the fourth amendment rights of their adult sons (*State v. Kinderman,* 1965; *State v. Tuttle,* 1965). Indiana and Louisiana upheld the search of automobiles several blocks from the scene as being "incident to arrest" (*Peterson v. State,* 1968; *State v. James,* 1964). And the Kansas court limited the scope of *Mapp* by reference to old doctrines of common law (*State v. Hoy,* 1967; *State v. Blood,* 1963).

Intermediately Responding States. Fourteen states whose high courts determined three or more of the legal questions but did not fall into the other categories are in the Intermediate Response category. They are: Alabama, Alaska, Iowa, Kentucky, Maryland, Mississippi, Montana, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, Washington and Wisconsin. In those states which had determined several questions, most of the courts seemed to consider them on an *ad hoc* rationale rather than on the basis of either a generalized hostility or receptivity to the spirit of *Mapp.* New Jersey, for instance, thoughtfully answered question II-h for exclusion (holding that custody creates a presumption of coercion), but also justified the acceptance of evidence coming from "no-knock" type searches. Wisconsin's behavior was similar. However, such an approach was not necessarily the case for states settling only a few of the questions.

Two states in this category, Maryland and Pennsylvania, are particularly noteworthy. They are marked by the fact that they have settled a Group I question for exclusion and a Group III question for admissibility and thus are distinguishable from the others which did not have such contradictory response patterns. Both states seemed to oscillate in reaction to *Mapp.* Maryland applied *Mapp* retroactively, yet was the only state to permit testimony in its courts about evidence seen or seized in an illegal search. And, somewhat astonishingly, her high court held that while one could not waive a guest's fourth amendment rights, he could waive his spouse's same rights. Pennsylvania's high court took positive stances on the suspicious behavior and "no-knock" questions, but also permitted a search of an automobile 57 hours later as being "incident to arrest" (*Commonwealth v. Cockfield,* 1963).

The explanation for this seemingly incongruous behavior

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is somewhat different in the two states. In his study of Maryland's highest court, Sickels concludes that the nature of particular decisions is largely a function of the random assignment of opinion responsibility among the justices (Sickels, 1965). In other words, the court norm is that the justices do not interfere with one another's cases regardless of outcome. Our data seem consistent with this suggestion. The opinions accompanying exclusionary decisions on our 16-question measure were written by different justices from those accompanying pro-admission decisions.[15] In Pennsylvania, on the other hand, the inconsistencies most likely reflect in part at least the dissent-prone nature of its court and the personal animosities which separate its judges (Glick, 1971: 107-9).

States Not Categorized. Eighteen state high courts settled no more than two of the legal questions upon which we have based our categorization measure. Consequently, these states have been left uncategorized. Many of them are sparsely populated states where apparently relatively few search and seizure issues arise in trials and even fewer are appealed to the state supreme courts. (West Virginia and Wyoming had no such cases at all; Delaware and Idaho only one; North and South Dakota just two apiece.) But in a few reasonably populous states (*e.g.,* Tennessee and Virginia) the state high court did handle several search and seizure cases involving aspects of the *Mapp* decision but less than three of them involved the questions on our measure.[16]

Dissent in Mapp Cases. State high courts are collegial bodies and their decisions sometimes result from compromised opinions or mutual accommodation (Glick, 1971: Ch. 5; Sickels, 1965). When these cannot be obtained, justices in the minority will usually file a public dissent. Unanimity is the norm, however, and dissents are infrequent when compared to the U.S. Supreme Court. In the 1960's, they occurred in 13.5% of the decisions rendered and were even less frequent in criminal cases, happening only 11.2% of the time (Canon and Jaros, 1970: 191). Here we shall discuss the occurrence of dissent in those cases where state supreme courts handled the 16 legal questions. Such attention should give us further insight into the impact of *Mapp* and *Ker* on state supreme courts and the nature of their reactions.

The first thing to note is that dissent in these cases is comparatively frequent. Of the 180 cases, exactly one-quarter (45) contain a dissent. This is almost twice the normal dissent rate

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and more than twice that in criminal cases. Clearly, the cases involving the 16 *Mapp* issues are more than ordinary run-of-the-mill appeals where the justices' viewpoints are almost always rather similar or easily accommodated. Rather these cases frequently provoke considerable thought and divergent views which are not so easily bridged. The justices more often realize that the questions being settled are controversial and important. The desire for unanimity may remain, but it becomes much less easy to accomplish.

Within this group of cases, we would expect the extreme interpretations of *Mapp* to be more likely to produce dissent. By extreme interpretations, we mean those decisions which seem unusual, innovative and contrary to the prevailing decisional pattern, *i.e.*, Group I issues decided in favor of excluding and Group III issues decided in favor of admitting the evidence. Such decisions are likely to be recognized as particularly implementative or resistant by some members of the court. For reasons of their own substantive attitudes or sense of judicial propriety these justices feel that an accommodation is not possible and dissent is necessary. By contrast, less "extreme" interpretations of *Mapp* (*i.e.*, those deciding Group II issues) should produce less dissent; and conventional or prevailing interpretations, (*i.e.*, Group I cases decided in favor of admission and Group III for exclusion) may provoke very little dissent. Here substantive or judicial sensibilities are not likely to be so offended that agreement or compromise are impossible.

This is, in general, what happens. In the extreme cases (as defined above), dissent occurred 45% of the time. Thus the cases we have labeled as extreme because they have gone contrary to the prevailing decisional pattern are also those which provoke the most dissent. However, the opposite expectation — that cases settling Group I and III issues with the prevailing trend will provoke relatively little dissent is not borne out very well. In such cases, dissent has occurred 22.4% of the time. This hardly differs from the dissent rate of 22.6% in all Group II cases. In other words, the Group I and III issues are not so clear or well settled as to provoke dissent only when a contrary or maverick decision is rendered; the seemingly more orthodox decisions here produce about as much dissent as do decisions in the more open and unsettled Group II issues.

It might be argued that the high rate of dissent in these cases generally and the "extreme" cases particularly is not so much a function of the nature of the cases as it is of the fact

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that the courts most frequently deciding these cases have much higher dissent rates than normal. In other words, supreme courts in some states such as California, New York and Pennsylvania are frequently given to split decisions — and these states have contributed disproportionately to our total of 180 cases. We can test this argument in two ways. First, we can take those states having the highest general dissent rates and the highest dissent rates in criminal cases during the 1960's and compare their average dissent rate with the average dissent rate for the same states in our 16 issues. Table 3 shows such

TABLE 3: COMPARISON OF DISSENT RATES FOR ALL CASES AND ALL CRIMINAL CASES WITH DISSENT RATE FOR MAPP CASES IN THE 1960's[a]

	Average Dissent Rate		
	All Cases	Criminal Cases	16 Mapp Issues
States with average dissent rate in all cases in excess of 20%[b]	32.4		46.3
States with average dissent rate in criminal cases in excess of 20%[c]		27.3	49.1
All states rendering an "extreme" decision	16.8	12.9	35.1

[a] Data taken from Bradley C. Canon and Dean Jaros (1969), "State Supreme Courts: Some Comparative Data," 42 *State Government* 264.

[b] California, Florida, Indiana, Louisiana, Michigan, New York, Ohio, and Pennsylvania.

[c] California, Indiana, Iowa, Michigan, Montana, Nevada, New York and Pennsylvania

data for the eight states with general or criminal dissent rates in excess of 20%. As can be seen, the average dissent rate for the 16 issues in these states exceeds the general and criminal dissent rate averages by 14% and 22% respectively. Second, we can look at those state courts which have rendered one or more "extreme" decisions and compare their average general and criminal dissent rates with that of the same states for the 16 issues. Again, as Table 3 illustrates, there is quite a disparity with the general and criminal dissent rate averages falling 18% and 22% respectively below that for the 16 issues. Certainly, it does not seem that the high incidence of dissent for our 16 issues is a function of the disproportionate contribution of cases from states with dissent-prone supreme courts. While we cannot discount the effect of pre-existing conflict and variation in norms relating to dissent in the state supreme courts as factors contributing to dissensus on the 16 issues, it seems clear that it

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is the nature of the issues themselves which have provoked the high dissent rate.

Given the political controversy surrounding *Mapp* and other Supreme Court decisions expanding defendants' rights in the 1960's, we might expect dissent to reflect quasi-ideological dimensions. That is, one or more justices on a particular court might continually dissent in favor of excluding evidence or vice-versa. Given the small number of dissents for any given court, analysis of the size, consistency and stance of dissenting justices is difficult. To make it easier, we will look at not only dissents in cases deciding the 16 issues, but those in other *Mapp* cases as well. Even with this expansion, only 11 state supreme courts had four or more instances of dissent (see Table 4).

TABLE 4: STATE SUPREME COURTS WITH FOUR OR MORE DISSENTS IN ALL MAPP CASES

State	All Cases	Cases With Dissent	%
Pennsylvania	13	12	92.3
Indiana	6	4	66.7
New York	26	16	61.5
California	19	10	52.6
Ohio	10	5	50.0
Arkansas	11	5	45.5
Washington	12	5	41.7
Texas	15	6	40.0
Michigan	14	4	28.6
Maryland	18	5	27.8
Iowa	22	6	27.3

In two states rigid bloc voting marked dissensual cases. The blocs were most closely balanced in Indiana where a three man pro-admission majority regularly prevailed over two dissenters in all four cases.[17] In the Texas Court of Criminal Appeals, four justices favoring admittance repeatedly overwhelmed a lone dissenter, who picked up an ally only once.

In two other states, there was a strong suggestion of bloc voting, but the pattern was not so rigid. In Iowa's nine judge court, five pro-admission justices were cohesive enough to win all but one split decision. The minority had a hard core of two while the remaining two individually voted sometimes one way and sometimes the other. In Arkansas, by contrast, it was a four judge pro-exclusion majority which prevailed all but one time. There was one consistent dissenter. He picked up a colleague on two occasions and the two of them found a third ally once.

Voting patterns resembled more a spectrum rather than opposite blocs in some states. California is the prototype. One justice dissented to all seven exclusionary decisions. He was

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joined by another justice in four cases and in two of them a third justice voted with them. Similarly, there was one regular dissenter to the three pro-admission decisions and he was aligned with two colleagues in one vote. In New York and Pennsylvania the spectrum was not so clear. Justices at the extreme could be identified. New York had two long-serving justices who voted consistently for admission and another one who nearly always was for exclusion, while in Pennsylvania one justice anchored down each end of the spectrum. But there was less consistency in the center. This was particularly true in Pennsylvania whose high court we noted earlier was wracked by personal conflicts; majorities seemed pretty *ad hoc* from case to case.[18]

A suggestion of a spectrum was visible in Maryland, Ohio and Washington, but the small n's in the first two states and the division of the court into separate departments in the third precluded meaningful analysis. In Michigan, analysis was marred by a maverick justice who dissented in all four cases, two favoring admission and two exclusion.

In sum, settling *Mapp* issues did produce some quasi-ideologicial consistency among justices (when measured in dissensual cases). Bloc voting or spectral gradations were clearly visible in five states and suggestive patterns occurred in two more.

COMPLIANCE HYPOTHESES

Scholars have recently advanced a number of hypotheses about the circumstances which enhance or reduce compliance with Supreme Court decisions. Most of them have been catalogued and summarized by Wasby (1970: Chap. 8).[19] Wasby, however, uses the term "compliance" in an inexact and ambiguous fashion. If we can take the liberty of equating compliance with a broad interpretation of *Mapp* and *Ker* (decisions excluding evidence), some of these hypotheses are open to testing or commentary in relation to our data and comparative categories.

Two hypotheses, susceptible to fairly rigid testing, are set forth below. The first is Wasby's own hypothesis (1970: 149-51) based largely on his description of the aftermath to *Gideon v. Wainwright,* the right to counsel decision. The second one, it is worth noting, is largely derived from Manwaring's (1963) study of the reaction in California's District Courts of Appeal to *Mapp* in the early 1960's.

—*Where Supreme Court rulings reinforce an existing state policy, compliance will be greater than where such [a policy] does not exist.*

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—*Non-compliance with the specifics of a Court ruling may be greater on the part of those already following the general thrust of the ruling than on the part of those not already abiding by the general principle.*

These are virtually contradictory hypotheses, of course. We can test them and see which is stronger or more appropriate here because approximately half the states did in fact subscribe to the exclusionary rule of their own accord prior to 1961.[20] Of course these states were not immune to changes resulting from the "reasonableness standard" imposed by *Ker,* but according to the first hypothesis we would expect supreme courts in these states to be more receptive to the spirit of *Mapp* than would courts in states lacking the rule. According to Manwaring's hypothesis, however, these states would have developed their own reasonableness standards (most likely at some variance with those of the federal judiciary) and consequently would be more reluctant to accept federal standards than would courts which had never had to develop such standards.

In Table 5 we cross-tabulate prior adoption of the exclusionary rule with the categorizations. Virtually no relationship

TABLE 5: RELATIONSHIP BETWEEN PRIOR ADOPTION OF THE EXCLUSIONARY RULE AND RESPONSE TO MAPP AND KER

	Prior Adoption	
Categorization	**Yes**	**No**
Positive	3	6
Intermediate	7	7
Negative	4	5
	14	18

between previous adoption and implementation of *Mapp* occurs. The fact that six of the positively responding states had no previous experience with the rule while only three had such experience gives perhaps slight support to Manwaring's hypothesis, but on the whole it seems that previous state court decisions on the exclusionary rule had little relationship to their reaction to *Mapp* and *Ker* in either direction. Neither hypothesis is validated or really supported.

To what can we attribute the fact that the data support neither one of the alternative hypotheses? The most likely explanation is that prior adoption of the exclusionary rule is not as significant a variable as we had assumed. Bits and pieces of data are indicative of this. In returns from his post-*Mapp* questionnaire relating to changes in police search and seizure practices, Nagel (1965) found only very modest differences between states which previously had adopted the exclusionary

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rule and those which had not. In *The Self-Inflicted Wound,* Graham, an experienced lawyer and journalist, argues that in the former states many trial and appellate judges stretched or narrowed the rule to the extent that it was not a serious factor affecting admission of evidence in criminal trials (1970: 139-40, 205-6). Indeed, in his study of *Mapp's* impact in North Carolina, Katz (1966) found that many judges, prosecutors and lawyers were *unaware* that the exclusionary rule had prevailed in that state before *Mapp*. On the other side of the coin, Miller, in his study of decisions to prosecute, notes that many Kansas district attorneys were reluctant to press charges when their case rested primarily on illegally seized evidence, even though Kansas had not adopted the rule (1970: 40).

If the rule was seldom invoked and/or narrowly construed in those states which had adopted it and given some informal honor in those which had not, then the issue of adoption may not have been a very important one to state appellate judges. The intensity of their feelings on the matter may have been rather low. Thus when *Mapp* decided the question for them, their reactions were governed more by their attitudes toward judicial federalism or the "law and order" issue than by any commitment to their state's prior position on the exclusionary rule.

In addition to those focusing on prior policy, we can test two hypotheses relating regional variations to interpretative behavior. The first involves the post-*Brown* (1954) antagonism of Southern judges to the Supreme Court. It was a widespread phenomenon and several scholars have documented the resistance in the Southern state supreme courts (*e.g.*, Vines, 1965; Murphy, 1959; Greenberg, 1959). Wasby (1970: 258) hypothesizes that:

> —*Individuals are more likely to resist court decisions when they have done so in the past than when they have not done so.*

If the term "individuals" is applicable to judges, we might well find a greater reluctance to implement *Mapp* in the Southern states than elsewhere. The second hypothesis comes from Goldman and Jahnige's suggestion that the greater exposure of state judges in the Northeast to more sophisticated and liberal newspapers and legal communication channels leads to a greater willingness to accept and implement Supreme Court decisions, while less exposed judges in more provincial regions of the country will be more resistant (Goldman and Jahnige, 1971:

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247-48). If this suggestion has merit, we should find the Northeastern states most willing to broadly implement *Mapp*.

The cross-tabulations shown in Table 6 indicate that regional variation does exist. The Northeastern states are, as anticipated, given to a broad or moderate interpretation of *Mapp*

TABLE 6: RELATIONSHIP BETWEEN REGION AND RESPONSE TO MAPP AND KER

Categorization	Northeast	South	Midwest	West
Positive	3	1	1	4
Intermediate	4	5	2	3
Negative	0	3	5	1
	7	9	8	8
Uncategorized	4	5	4	5

and *Ker*; none was categorized as a negative responder. Although not hypothesized, the Western states are also comparatively highly receptive to *Mapp*. Four of them were in the positive response category and only one showed sharp hostility to the decision. The Southern and Midwestern states, as expected, were rather unwilling to implement *Mapp* broadly, with eight states falling in the negative response category compared to only two in the positive category. The negative response patterns in the South, however, did not seem particularly actuated by resentment over the desegregation decisions. The South as a whole was less negative than the Midwest; moreover, only one of its three negative response states was in the so-called Deep South.

If we discount prior Southern resistance to desegregation as an important explanatory variable here, we are left with the Goldman-Jahnige thesis about the exposure of judges to sophisticated communications. Although plausible, this thesis is not necessarily persuasive. There is no hard evidence as to what state supreme court justices read in terms of newspapers and legal communications. Moreover, the hinterlands are not without liberal or sophisticated communicatory organs, *e.g.*, the *St. Louis Post-Dispatch* or the *Michigan Law Review*. And, of course, the Jahnige-Goldman thesis fails to account for the lack of resistance in the West.

The quality and urbanity of justices' legal training may also be a variable contributing to the regional differences. The training received at Harvard, Yale, Stanford, and other prestigious private law schools is probably more likely than that obtained in other schools to leave a student with a receptive attitude toward legal innovations and a willingness to respond

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to Supreme Court policies. Graduates of such law schools are more often found on the supreme courts of Northeastern and Far Western states than on those in between. They constituted a majority of the court in three states: New Jersey, Massachusetts and Connecticut, and over 25% of the court in 14 other states, all but three of which were in the Northeast or West.[21] In the other states, the justices were by and large products of the local state university law school. Of course, some state law schools such as California, Michigan and Wisconsin have outstanding academic reputations. Still, few of their graduates found their way to high judicial positions in other states and of these three states two were in the positive response category.

While the quality of legal training seems viable as a partial explanation for regional interpretative differences, it is hardly a complete one. In two negatively responding states, Indiana and Utah, over 25% of the justices had degrees from prestigious private law schools. Moreover, in one positively responding state, Arkansas, no such graduate was serving and in another, Arizona, only one justice was such a graduate.

In sum, these two variables do seem related to regional differences in state supreme court responses to *Mapp* and *Ker*. But either standing alone or in combination, they are not highly controlling. We have noted some caveats and contrary data to each. Perhaps differences in the availability of liberal and sophisticated legal communication channels and in the justices' quality of legal training are particularly visible manifestations of broader regional differences in politico-legal culture. Although they have been explored suggestively by several scholars such as Elazar (1966: Chap. 4) and Patterson (1968), such differences are not always given to sharp distinctions based upon hard measurement. The two factors analyzed here are perhaps among the more obvious and measurable variations in regional politico-legal culture differences. But their influence on state supreme court interpretative behavior should not be separated from the more subtle and less tangible aspects of regional variation in politico-legal culture.

CONCLUSION

There were observable differences in the reactions of state supreme courts to *Mapp*. Of course, our measure did not succeed in capturing the full scope and subtleties of these differences. The categorizations have necessarily been based on limited data and arbitrary cutting points and have thus distorted or simplified the portrait of state supreme court response

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patterns. Nonetheless, our measure has demonstrated that coniderable variation does occur — that the behavior of the Arizona and Connecticut high courts is quite different than that of the Minnesota and Texas courts.

We have obtained some insights into the causes of the variation, but it cannot now be explained adequately. We had expected courts' prior policy positions on the exclusionary rule to be a primary factor governing response behavior. To our surprise, the data failed to support either of our hypotheses relating prior policy to post-*Mapp* behavior. On reflection, however, it seems that our expectations here were probably not well grounded empirically. Rather, the variation seemed related to differences in regional politico-legal cultures. The arguments concerning the effect of regional variation in media exposure and law school training here are certainly viable, but standing alone they are not fully convincing. There needs to be sufficient refinement of the somewhat amorphous concept of regional culture to support further probing and testing before we can develop satisfactory answers here.

Perhaps more important than the nature of the findings themselves is the fact that we have been able to test several hypotheses on a nation-wide scale. The impact literature is replete with hypotheses stemming from common sense suggestions, case studies or limited comparisons.[22] Here we have gathered data on the responses of similar institutions in all 50 states. While in 18 of them there was not sufficient data for our purposes, the comparison of 32 state supreme courts on similar dimensions is a step forward in the long task of verifying, modifying or refuting these many hypotheses.

Moreover, although we have only been able to test about four such hypotheses in this paper, the data gathered and presented here will, in conjunction with other data, prove useful both in testing other hypotheses[23] and in exploring in greater detail differences in state supreme courts. Decisions such as *Gideon* (1963), *Douglas* (1963), *Escobedo* (1964), *Miranda* (1966), and *Gault* (1967) have undoubtedly imposed problems of scope and ambiguity on the states in a manner similar to *Mapp* and are prime candidates for research similar to that done here. The resultant data would enable us to better compare and understand variations in state supreme court reactions. If we found that the same states showed similar response patterns to all cases, we would develop and test hypotheses relating the reponses to regional legal culture, local political environment or

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the backgrounds and attitudes of the incumbent justices. If receptivity or resistance varies from state to state depending on which Supreme Court decision is being considered, we would look more to prior local policy and the characteristics of the decision (logic, persuasiveness) as primary variables or important intervening variables qualifying those mentioned above.

FOOTNOTES

[1] *See e.g.*, Goldman and Jahnige (1971) (Ind. and Penn.); Taft (1964) (Ohio); *New York Times* (April 30, 1966, p. 13) (*New York*); *Montgomery v. State* (1965); *State v. Bitz* (1965); *State v. Carter* (1965); *People v. Blessing* (1966); *Hammer v. Com.* (1966); *McNear v. Rhay* (1965).

[2] In this paper the term supreme court will be used generically to describe the highest appellate court in a state's judicial system and the term justice will be used to designate members thereof.

[3] For the Court of the Union proposal, see *New York Times* (April 14, 1963: 1).

[4] For instance the retroactivity question was settled four years later in *Linkletter v. Walker* (1965). Two other important decisions, *Camera v. Municipal Court* (1967) and *Chimel v. California* (1969) came later.

[5] One phrase, "There is no war between the Constitution and common sense" (*Mapp v. Ohio*, 1961: 657), was sometimes used by lower court judges to justify a narrow interpretation of *Mapp*. Clark's statement that "state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected" (*Mapp v. Ohio*, 1961: 643, fn. 9) also led to the frequent denial of poorly timed or phrased motions to exclude evidence.

[6] The time period runs from *Mapp* through December 31, 1969. Because regional reporters are not strictly chronological in recording cases, the data include a few cases from early in 1970. In addition to *Shepard's Citations*, the author found citations in relevant entries in legal encyclopedias such as *American Jurisprudence 2d*, *Corpus Juris Secundum* and *American Law Review*. The encyclopedias, however, were mainly useful for organizing and clarifying the case material rather than finding it.

[7] The author has not attempted to define or quantify this phrase. It is used to differentiate such cases from those cited in *Shepard's* which turned on factual questions or on questions of law unrelated to *Mapp* and *Ker*.

[8] From a general perspective, the data may present a slightly warped picture of the way in which the states have handled the exclusionary rule because some states which had adopted the rule prior to 1961 had already decided a few of the legal questions positively (for excluding the evidence). Such decisions would not be included in our data. This paper, however, is not focusing on the exclusionary rule generally, but on the reaction to its imposition on the states through *Mapp*.

[9] Questions I-b, II-a, II-b, II-c, II-e, II-h, and III-a are the subject of discussion in *ALR 2nd* or *3rd*. On questions I-b and II-c, see also *Washington University Law Quarterly* (1965) and *Chicago Law Review* (1967). On question II-g see *Washington University Law Quarterly* (1970).

[10] In making these determinations, the author was assisted by a graduate research assistant working independently. Where disagreements occurred, the case was submitted to a law professor for his judgment.

[11] *See People v. Lane* (1961) (exclusionary rule does not apply to confessions secured as a result of an illegal search); *People v. Kaiser* (1967) (exclusionary rule does not apply to evidence secured via an illegal wiretap); *People v. Edwards* (1969) and *People v. Bradley* (1969) (exclusionary rule does not extend to evidence taken from backyards, trash-cans, etc.).

[12] Most of the nine positively responding state supreme courts showed little inclination to set their responses to *Mapp* in any broad framework of interpretative philosophy. One exception was the California court

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which argued that courts "cannot and should not struggle" to escape *Mapp's* mandate (*People v. Reeves,* 1964).

[13] *See City of Akron v. Williams* (1963) (Admission of possession of illegally seized material in a suppression motion cannot be used at trial). Manwaring (1968) concludes that Ohio has a relatively high rate of compliance with *Mapp.* His data cover intermediate appellate courts as well and end in 1964.

[14] The negatively responding states also seldom set their decisions in a broad interpretative framework. However, several Utah justices were exceptions. One argued that the fourteenth amendment was unconstitutional and void while another excoriated the Supreme Court for usurping states' rights. The latter opinion urged the state to proceed "without any *Mapp* to guide us." *See Dyett v. Turner* (1968) and *State v. Louden* (1963) respectively.

[15] Maryland's six decisions answering questions on our reactive measure all occurred within a three year time span (1962-64) in which six of the seven justices remained constant. Thus the court's behavior cannot be accounted for by changes in personnel. Moreover, if one looks at all 18 of the Maryland cases involving interpretation of *Mapp,* the data are still largely consistent with Sickels' conclusion. With only two exceptions, the justices writing exclusionary decisions are different from those writing pro-admission decisions.

[16] In two states, Florida and Illinois, most search and seizure cases were handled by intermediate appellate courts.

[17] In one case, *Williams v. State* (1966), the court divided 2-2 in upholding a trial court's decision admitting the evidence.

[18] For reasons of brevity, the time factor has been ignored in the analysis of each court's voting patterns. Most "blocs" underwent some personnel changes over time and new justices replaced old ones on spectrums. However, replacements in Indiana, Texas, Iowa and California seemed to adopt their predecessors' voting patterns. Only in New York did personnel changes produce some discontinuity in voting patterns.

[19] All hypotheses set forth verbatim in this section are taken from this chapter.

[20] A listing is given in *Elkins v. United States* (1960), at 224.

[21] Ten prestigious private law schools were rather arbitrarily chosen for these calculations. They are: Chicago, Columbia, Cornell, Duke, Harvard, Northwestern, Pennsylvania, Stanford, Vanderbilt and Yale. For figures on justices graduating from these schools, see Canon (1972).

[22] Wasby (1970) lists 136 hypotheses in his propositional inventory.

[23] These data, in comparison with other appropriate data, would be relevant to the testing of at least three more of Wasby's hypotheses: (1) Noncompliance will be greater when dissenting and/or concurring opinions exist than in unanimous decisions; (2) Federal court judges are more likely to comply with Supreme Court rulings affecting the states than are state court judges; (3) A decision in which a precedent is overruled will create more resistance than one in which there is no overruling (*Mapp* overruled *Wolf v. Colorado,* 1949).

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