Assessing Cross-Institutional Constraints on Supreme Court Agenda Setting

Lee Epstein, *Washington University in St. Louis*
EPSTEIN@ARTSCI.WUSTL.EDU
Jeffrey A. Segal, *SUNY-Stony Brook*
JSEGAL@DATALAB2.SBS.SUNYSB.EDU

Prepared for presentation at the 1997 Annual Conference on the Scientific Study of Judicial Politics, Atlanta, GA. We gratefully acknowledge research support provided by the National Science Foundation (SBR-9320284). We also thank Gregory A. Caldeira, Valerie Hoekstra, William Keech, and David Rohde for offering many useful comments.

Readers will be able to obtain all the data and documentation necessary to replicate this analysis at: http://www.artsci.wustl.edu/~polisci/epstein/ We used SPSS to analyze the data.

Political Science Working Paper No. 343

Agendas foreshadow outcomes: the shape of an agenda influences the choices made from it... In the twentieth century, as governments have grown in size and complexity, the agenda function has become wholly apparent, so much so that making agendas seems just about as significant as actually passing legislation. —*William Riker*

Because agenda setting is one of the most important activities undertaken by political actors, it is hardly surprising to find a rather large body of literature devoted to how the various institutions go about performing this task (*e.g.*, Cobb and Elder 1972, 1983; Kingdon, 1984; Light 1982; Riker 1993; Carmines and Stimson 1989; Walker 1977).[1] Even the Supreme Court, whose members face more constraints than their elected counterparts in seeking to form their agenda,[2] has received substantial attention (Caldeira and Wright 1988; Perry 1991; Tanenhaus et al., 1963). We now know that justices go about the task of "deciding to decide" with some regard to the long-term payoffs (that is, whether they will ultimately prevail at the merits stage) (Boucher and Segal 1995; Caldeira, Zorn, and Wright 1996), the significance (or lack thereof) of particular questions (Caldeira and Wright 1988), and the need to resolve divisions of opinion among other courts (Ulmer 1983, 1984).

What is surprising is that the bulk of the agenda-setting literature views the institutions of government in isolation, establishing their own policy priorities with little attention to the

---

[1]As a mere glance at the works cited above would attest, there is by no means agreement over the definition of "agenda setting." In this paper, we use the term as a shorthand way to describe how the branches of government go about deciding which of the issues on the "public" agenda (containing all the issues of concern to society) they will "schedule for active and series consideration" and, thus, place on their "institutional" agenda (Cobb and Elder 1983, 14; see also Kingdon 1984, 4). So, for example, most judicial specialists refer to agenda setting as the process by which the Court makes decisions over which disputes to hear and resolve. More specifically, because the vast majority of the thousands of cases that arrive at the Court each year come as requests for certiorari, we typically say that agenda setting involves selecting those cases to which the Court will grant cert and those to which it will deny cert.

[2]Some of these emanate from Article III, such as the requirement that disputes present real cases and controversies (see Epstein and Walker 1995, ch. 2); others are norms, such as the one disfavoring the creation of new issues (see Epstein, Segal, and Johnson 1996).

preferences and likely actions of one another.[3] To see this point, we need only consider those factors scholars have offered to explain the Supreme Court's agenda decisions; as the above list indicates, they mostly center on intra-Court considerations.[4]

In this paper, we take a different tack.[5] Based on a strategic model of agenda setting, we hypothesize that actors in one political institution will be *attentive* to the preferences and likely actions of members of other political institutions when they go about establishing their agendas, if those actors hope to maximize their preferences. More specifically, we assess the following prediction: Political actors in one branch of government will avoid placing policies on their institutional agenda when they believe that members of other branches would move policy far from their ideal points unless they also believe that they can insulate their ultimate policy decisions from reversal.

Our assessment enfolds in two steps. First, we lay out the strategic account of agenda setting from which we generate the behavioral prediction noted above. Next we turn to assessing empirically this expectation. Although the strategic account suggests that it ought well

---

[3]There are, of course, exceptions but most (1) focus on Congress and (2) consider the influence of only one branch on the legislature's agenda-setting process (*e.g.*, Kingdon 1984). Typically the judiciary is the omitted branch, as in Kingdon (but see Henschen and Sidlow 1988). Moreover, we do not mean to imply that the literature ignores all external actors. To the contrary: Many studies of agenda setting highlight the role played by interest groups (*e.g.*, Caldeira and Wright 1988; Cobb and Elder 1972, 1983). We only wish to emphasize that existing studies generally omit consideration of actors in the other branches of government (for a recent exception at the state level, see Brace, Hall, and Langer 1996).

[4]It is worth noting, however, that judicial specialists have paid a good deal of attention to the impact of the Solicitor General (SG) on the Court's agenda-setting decisions. But it is unclear whether the success of the SG is due to (1) deference on the part of the justices to the wishes of the President, (2) litigation expertise on the part of the SG, or (3) other factors, such as the message the SG's participation sends about the importance of a petition. Moreover, this literature virtually ignores the role of Congress in the agenda-setting process. What makes this imbalance so surprising is that the potential influence of Congress over a sitting Court should be far greater than the potential influence of the Solicitor General and/or the executive branch.

[5]Epstein and Knight (1998) initially proposed this tack. This paper is an effort to develop their ideas and systematically assess them.

describe the agenda-setting behavior of actors in all three branches of government, for this paper we focus on Supreme Court justices. Our rationale for this empirical reference point is as follows: Because the Court may be the least likely of all the branches to make strategic calculations over its agenda (see, *e.g.*, Krol and Brenner 1990), data confirming the expectation might permit for speculation about inter-branch strategic agenda setting among the other political institutions.

A Strategic Account of Agenda Setting

In the not-so-distant past, political scientists treated agenda-setting decisions as divorced from the choices over policy matters (see, *e.g.*, Cobb and Elder 1972). Such was certainly true of scholarship on the Supreme Court: The early research on certiorari tended to offer explanations that were grounded in the petitions themselves, without much regard to later stages in the policy-making process. Consider Tanenhaus et al. (1963), which was for years, even decades, the seminal study of agenda setting. This research asserts that four cues guide the certiorari decision: when (1) the federal government seeks review, (2) dissension exists in the court below, (3) a civil liberties or (4) economics issue is present. In other words, justices are not forward thinkers when they "decide to decide;" rather, they base their choices on cues contained in the petitions themselves.

More recent generations of scholars tell a much different story.[6] They assert that if justices wish to create efficacious policy as close as possible to their most preferred positions—the predominant goal for most justices in most cases—then they must attempt to formulate expectations about the preferences and likely actions of their colleagues at the merits stage. Should they fail to think prospectively, they run the risk of accepting cases for review that the majority of the Court will decide against their interests or of rejecting petitions in which their most preferred policy could, but will not, become the law of the land.

---

[6]Actually, it was Schubert in 1959 who first offered a strategic account of certiorari. But his line of thinking failed to receive systematic treatment until Brenner (1979) and Palmer (1982).

To be sure, some take issue with this characterization of justices as strategic actors with regard to their colleagues; for example, Krol and Brenner (1990) argue that justices simply vote against hearing cases with lower court decisions they like (ideologically speaking) and vote for hearing those cases with lower court decisions they dislike. But evidence to support the strategic view has grown rather substantial—with a study by Caldeira, Wright and Zorn (1996) particularly noteworthy. Unlike many past efforts in this area, Caldeira et al. go to great lengths to include variables to account for the ideological preferences of the individual justices along with those of their colleagues. The results are clear: While the researchers find evidence of policy voting (defined in the study as voting to grant or deny certiorari based on ideological preferences), they show that there is equally strong support for strategic behavior (defined as voting to grant or deny inconsistently with one's ideal policy point) (see also Segal and Spaeth 1993; Boucher and Segal 1995).[7]

We have no doubt that debates over whether justices act strategically vis-à-vis their colleagues at the cert stage will continue. But we believe that the evidence—especially that offered by the most recent (and sophisticated) studies—tips the scales substantially in favor of the strategic camp. Indeed, it would be hard to believe that preference-maximizing justices do not operate in this fashion.[8]

And, yet, we would push the strategic argument even further: Just as it seems counterintutive to believe that preference-maximizing Supreme Court justices would not be attentive to the preferred positions and likely actions of their colleagues at the agenda-setting

---

[7]Of course, both types of behavior may be forms of strategic voting. But only the second type can be explained solely in strategic terms.

[8]Even journalists have taken note of strategic behavior at the agenda-setting stage. In a recent article, Greenhouse (1997) reports that four justices filed a statement concerning the dissent from denial of certiorari in a Texas death penalty case. "What made this statement unusual," Greenhouse writes, "was that it takes the votes of only four of the nine justices to grant review of a case. So these four had the ability to add this case to the docket for argument and decision. That they chose not to do so may reflect their concern that the other five justices, if put to the test, would vote to uphold the Texas law and, in doing so, convert a single state court's decision into a national rule of law."

stage, it seems equally difficult to understand why they would not consider other actors who might be in a position to thwart their efforts to make efficacious policy. This is especially true in cases of statutory interpretation in which justices know that a non-trivial probability exists that Congress will override or, at least, scrutinize their opinions (Eskridge 1991a, 1991b).

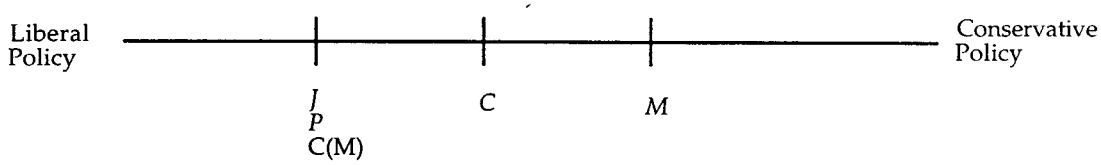
To see the logic of our argument, consider a justice who believes that the majority of her colleagues will adopt her most preferred policy position should the Court decide to grant a given petition. For most certiorari studies—even the new research advancing strategic accounts of agenda setting—this would be enough for the justice to vote to grant. But suppose the petition required the Court to interpret a *federal statute*. Would our justice end her strategic calculations with establishing expectations about her colleagues? If she wishes to establish efficacious policy, then the answer is no: She would need to concern herself with the preferences and likely actions of the other political actors (*e.g.*, members of Congress, congressional leaders, and the President) who could completely override her preferred interpretation of the law or move it outside of a range she would deem acceptable.

More to the point, she must make calculations over whether she is operating in a political environment that does not constrain her (depicted in Figure 1a) or that does (Figure 1b). If she observes the first, then she would be free to establish policy as she sees fit. So, presuming that she believes that a majority of the Court will go along with her interpretation of the law, she would have every reason to vote to grant certiorari. If the second exists, her decision at the margins is more complex, with three possible courses of action existing. First, she could agree to hear the statutory case and place policy where she sincerely wants it, thereby risking a congressional override. Second, she could agree to hear the statutory case and place the policy relatively far from where she ideally wants it, thereby selecting a point on the line with which Congress could live. Third, she could refuse to hear the statutory case and, instead, select one of the constitutional variety, thereby minimizing chances of a congressional override.

(Figure 1 about here)

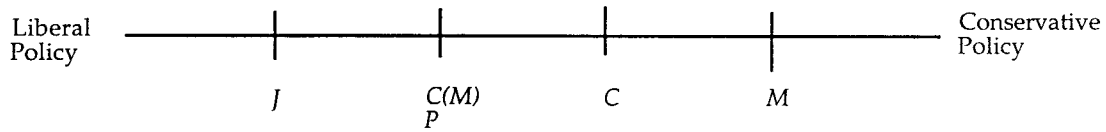
Figure 1. Hypothetical Distributions of Preferences

Figure 1a. *Unconstrained Court*



Equilibrium Result, $x \equiv j$

Figure 1b. *Constrained Court*



Equilibrium Result, $x \equiv C(M)$

Note: J is the justices' preferred position based on the attitudes of the median member of the Court; *M* and *P* denote, respectively, the most preferred positions of the median member of Congress and the president; *C* is the preferred position of the key committees in Congress that make the decision of whether or not to propose legislation to their respective houses; and *C(M)* represents the committees' indifference point (between their preferred position and that desired by *M*).

Adopted from: Eskridge 1991b.

This last alternative, while perhaps underappreciated, is an obvious selection for policy-seeking justices; indeed, it would seem rather implausible to believe that a justice at odds with Congress would agree to decide a case involving, say, affirmative action challenged as a violation of Title VII when, among the thousands of certiorari petitions, she could surely locate a similar dispute brought under the Fourteenth Amendment. And, yet, as so many scholars have told us, there are circumstances under which the first course of action is rational, that is, when a justice would agree to decide the statutory case and interpret the law as she sees fit, even in the face of constrained political environment. For example, if congressional preferences are not fixed but, rather, can be influenced by the Court (Eskridge 1991b; Epstein and Knight 1988; see Miller 1993 for empirical support for this proposition), the Court might have the institutional wherewithal to safeguard itself from reversal. Alternatively, the Court might not be able to change congressional preferences, but could nevertheless change congressional beliefs about the consequences of various actions (see, *e.g.*, Gilligan and Krehbiel 1989). Finally, if Congress does not necessarily have the last word (Ferejohn and Weingast 1992; Segal 1997), the Court could signal its willingness to battle congressional overturns.

Obviously these circumstances differ in form but they share at least one important feature: All three are more likely to obtain when the Court presents a united front to Congress rather than when it is deeply divided. While the deployment of, say, an 8-1 or even unanimous decision does not guarantee congressional compliance, scholars, legislators, and the justices themselves have acknowledged that the more authoritative an opinion, the less likely that Congress will attempt to overturn it (see Eskridge 1991b; Johnson and Canon 1984; Kluger 1976; Marshall 1989).

Behavioral Prediction

From the strategic account of agenda setting flows a straightforward-enough behavioral prediction: Political actors in one branch of government will avoid placing policies on their institutional agenda when they believe that members of other branches are far from them, unless

they also believe that they can insulate their ultimate policy decisions from reversal.

Of course, we are not the first to offer such a hypothesis. Legislative specialists have observed that congressional committees do the obvious: They consider likely outcomes on the floor and the preferences/likely actions of the President when deciding whether to pass legislation (Van Doren 1991; Eskridge 1991a). Even within the judicial literature there is scattered evidence to support the view that Courts facing the sort of environment depicted in Figure 1b act in a sophisticated fashion when it comes to agenda setting (see, generally, Epstein and Knight 1998). We know, for example, that there are many salient and seemingly certworthy petitions that the Court has denied over the years, at least in part because it desired to avoid collisions with Congress and the President. Along these lines, the justices never resolved the question of the constitutionality of the Viet Nam war, despite its obvious importance and many requests to do so.[9] Further, Supreme Court clerks (who make recommendations to the justices regarding cert) occasionally point out the political consequences of accepting petitions. By way of illustration, consider the following piece of advice. It was proffered by Justice Burton's clerk on a miscegenation petition (*Naim v. Naim*), which arrived at the Court's doorstep the very year after it issued its highly controversial decision in *Brown v. Board of Education* (1954):

> In view of the difficulties engendered by the segregation cases it would be wise judicial policy to duck this question for the time being...[but] I don't think we can be honest and say that the claim is unsubstantial... It is with some hesitation...that I recommend that we NPJ [note probable jurisdiction—the functional equivalent of granting review]. This hesitation springs from the feeling that we ought to give the present fire a chance to burn down.

Burton declined to take his clerk's advice, voting instead to dismiss. But four others (Douglas, Reed, Black, and Warren) wanted to resolve the dispute. Despite the existence of a sufficient number of votes to review, the Court put the case on hold. On the next vote, only Douglas, Reed, and Black agreed to note jurisdiction and, at the final conference, the justices unanimously agreed to issue a vacate and remand order. Why the change? According to Justice

---

[9]We adopt the examples in this paragraph from Provine 1980, 54-60.

Clark, the author of the published order in the case, the probability of a negative reaction to a decision on the merits "had been an important consideration in the decision."

There is also more systematic evidence, albeit of a limited nature. Provine (1980, 60) shows that between 1954 (after *Brown*) and 1957, the Court received at least five petitions involving major segregation issues, in addition to *Naim*; it granted cert in just one, *Holmes v. City of Atlanta* (1955), only to vacate the lower court's ruling without a full hearing on the merits. Invoking more recent data on cases involving equal employment practices, Epstein and Knight report that during the 1978 term, when the (Republican) Court was more conservative than the (Democratic) Congress and the President, the justices rejected nearly 90% of these petitions, with many of those they denied presenting seemingly important (and certworthy) issues.[10] When the political landscape changed in the early 1980s, what with all three branches moving in a more conservative direction (all majority Republican except for the House), so too did the Court. During the 1982 term, it agreed to hear 28 % of the employment cases, nearly 15% more than it did in 1978 and over five times its average acceptance rate (6%) for that term. Finally, there is Friedman's (1996, 797-798) analysis of *United States v. Lopez* (1995), in which the Court (for the first time in 60 years) struck down an act of Congress as a violation of the commerce clause. In speculating on why the justices have, since *Lopez*, denied cert to several similar cases, he suggests that "the Court, having made its views know in *Lopez*, simply is biding it time, watching to see what a very different Congress might do with regard to new legislation."

Research Design

To be sure, these and other bits of evidence are tantalizing. What we do not know, however, is whether they represent systematic behavior that can be uncovered using accepted standards of social scientific inquiry. Do Supreme Court justices, who clearly (at least to us)

---

[10] *Westinghouse v. State Human Rights Appeal Board* is a case in point. It involved a highly salient issue, the exclusion of pregnancy-related disability benefits from an employer's disability plan, and one that had created conflict among the Nation's state courts. The International Union of Electrical, Radio, and Machine Workers even filed an amicus curiae brief at the review stage, further underscoring the case's importance.

engage in forward thinking with regard to their colleagues at the agenda-setting stage, also take into account the likely reactions of other relevant actors (*e.g.*, the Congress and the President)?

There are no shortage of ways to answer this question. We could, for example, follow the leads of Provine (1980) or Epstein and Knight (1998) and investigate particular areas of the law. But this approach can only tell us whether the Court is engaging in strategic agenda setting over that legal issue, and not in the main. Since we are interested in making general claims, we take another route: We consider the percentage of constitutional and non-constitutional cases that the justices have agreed to hear since 1946, hypothesizing that the percentage of constitutional cases will increase in times when the justices and external political actors are far apart in policy terms, but that this effect will be mitigated when the Court is relatively homogenous. We shall refer to this prediction, which follows from the strategic account of agenda setting, as the "Court wherewithal" hypothesis. This nomenclature reflects our belief that the Supreme Court justices (or any other political actors, for that matter) can overcome strategically disadvantaged policy positions vis-à-vis the other branches of government when they believe they have the institutional wherewithal to insulate themselves from reversal.

Assumptions

Before turning to measurement issues, we ought comment on the assumptions embedded in this operational rephrasal of our prediction. The first is obvious: We assume that most justices, in most cases, pursue policy, that is, they want to move the substantive content of law as close as possible to their preferred position (Epstein and Knight 1998; Segal and Spaeth 1993). To be sure, justices may have goals other than policy, but no serious scholar of the Court would claim that policy isn't prime among them. Indeed, this is perhaps one of the few things over which almost all students of judicial politics agree.

Second, we believe that justices are freer to pursue their sincere preferences in constitutional cases than in non-constitutional ones. We realize this assumption is not perfect; in fact, some of the examples we used above (*e.g., Brown, Lopez*) suggest that the constraint

imposed by other actors, to the extent that it exists, may also be operative in constitutional cases. Still, in the main and for the reasons we provide above, this is an assumption that has guided most of the theoretical work on judicial policy making (see, *e.g.*, Eskridge 1991a, 1991b; Segal 1997; Epstein and Knight 1998), and one we think plausible to make in our study of agenda setting.

Third, we assume that justices recognize that they could insulate themselves from legislative reversal by reaching authoritative decisions but, at the same time, acknowledge that internal heterogeneity may prevent them from so doing. Hence, when justices lack the institutional wherewithal to deploy a wide-margin opinion on a matter of statutory interpretation because of ideological divisions on the Court, they will increase the number of constitutional cases they agree to decide.

Finally, we assume that there are a sufficient number of constitutional and statutory cases each term such that the Court, at the margins, can substitute one type of case with another. Given that the justices receive 5,000-7,000 petitions per term, and decide only 3-5 percent, we do not think that this is a particularly onerous assumption to make.

Data and Measurement

Animating our research design requires us to obtain data on the dependent variable, the Court's case mix (specifically the percentage of constitutional and non-constitutional cases it decides each year). We also must create measures of our two independent variables, preference homogeneity on the Court, which ought tap the degree to which the justices believe they can insulate themselves from legislative reversal; and the preferences of the political institutions, which must assess the extent of the constraints that the other institutions place on the Court.

The first task is easy enough. The specific dependent variable, as depicted in Figure 2, is the percent of all constitutional and statutory cases that are statutory. We define constitutional cases as those in which the primary authority for the Court's decision, according to Spaeth's U.S. Supreme Court Database, is judicial review at the national or state level. Statutory

decisions are those in which the Court interpreted a federal statute, treaty, court rule, executive order, administrative regulation, or administrative rule. Note that under these definitions, as the figure shows, a great deal of variance exists in the percentage of statutory cases heard in any term. (The percent ranges from a high of 77.6 in the 1956 term to a low of 40.5 in the 1976 term). Note too that there does not appear to be a long-term secular increase or decrease in the data.

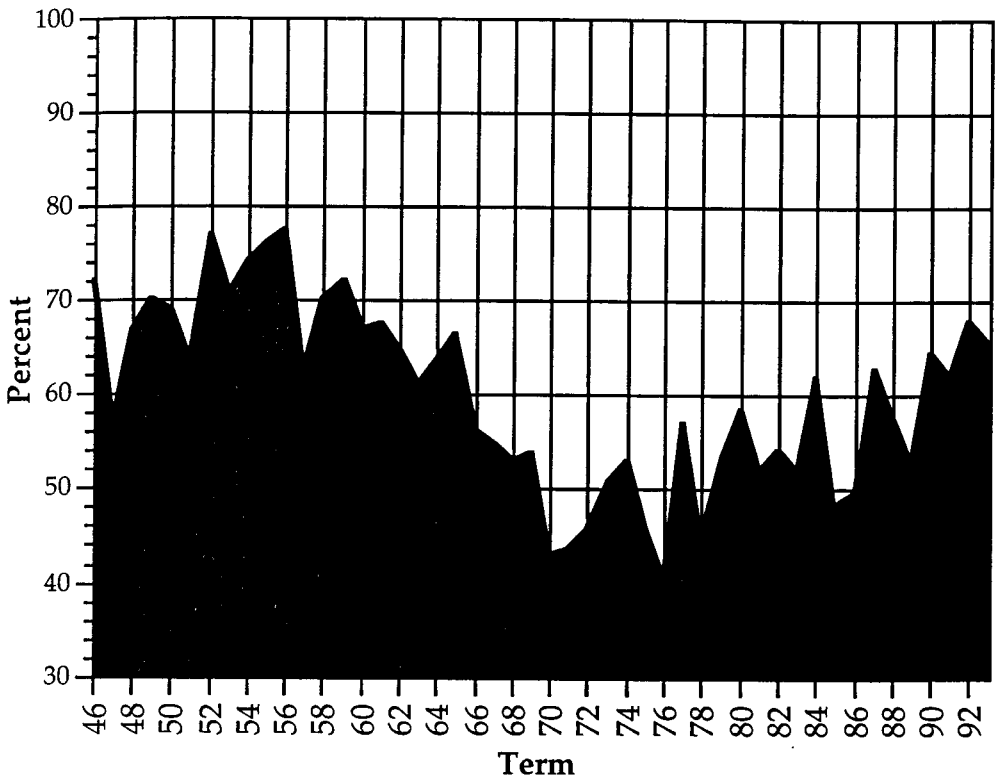
(Figure 2 about here)

The second task is equally straightforward. To develop a measure of homogeneity, we took the standard deviations of Segal and Cover's (1988) measures of justices' preferences, centered those standard deviations around their mean, and multiplied by -1. This measure, we believe, is extremely well suited to our purposes. In the first place, we require an indicator that reflects our view of the information possessed by justices about the likely actions of the Court: that they have some general sense of the victory margins that decisions will produce but do not know with certainty. Because the Segal/Cover scores are based on newspaper editors' assessments of the justices, rather than on the votes in specific cases, they nicely fit the bill. Second, while the Segal/Cover scores tap into general perceptions of the preferences of justices, they provide a satisfactory predictor of votes on the Court. Certainly, they explain the votes in some issue areas better than they do others, but, overall, across a range of cases, they have above-threshold predictive power (see Epstein and Mershon 1996).

The final task, determining the constraints placed on the Court by the other branches is more complex. We begin by taking seriously the notion, advanced by Eskridge and others, that justices foresee what Congress and the President would do if the Court heard a case and decided it in any given direction. This requires that justices either have, or act as if they have, an intuitive model of national lawmaking.

But, because there is no agreement among political scientists on how best to model the legislative process, we rely on three separate accounts hoping to find consistent results

Figure 2. Percent of Court's Plenary Docket Composed of Statutory Cases, 1946-1993 Terms



Data Source: Spaeth's U.S. Supreme Court Judicial Data Base.

regardless of which model we use. The first, the committee-gatekeeping model, requires that committees report legislation to the floor for consideration under open rule, closely resembling the separation-of-powers model developed by Ferejohn and Shipan (1990). The multiple-veto model grants extensive veto power over the consideration of legislation to committee chairs and the majority party leaders. Finally, the party-caucus model assumes that majority party leaders, committee chairs, and even majority party committee members, act as relatively faithful agents of their party caucus (see Segal 1997 for further discussion of these models).

To animate all three legislative process models, we measure (revealed) ideological preferences of members of Congress with the support scores provided by the Americans for Democratic Action. While ADA scores have noted deficiencies (*e.g.*, the fact that non-voting members are counted as voting against the ADA position), this should have very little influence on chamber and committee medians. Moreover, recent research demonstrates the reliability, validity, and stability of ADA scores as a measure of congressional ideology (Herrera, Epperlein, and Smith 1995). Finally, unlike NOMINATE scores, ADA scores are available throughout the entire period of study.

Assuming that ADA scores measure preferences on a liberal-conservative dimension, we next require a measure of Supreme Court preferences that does the same and is independent of the preferences of Congress. We obtain such a measure from Segal (1997), which uses predicted, annual, liberalism support scores in non-unanimous civil liberties constitutional cases, as derived from the U.S. Supreme Court Judicial Database.[11] These enable us to derive

[11]It is worth noting that we go to lengths to ensure that these scores are independent of congressional preferences. First, and for obvious reasons, we exclude statutory decisions. While others have argued that the justices' votes in *all* past cases are the best measure of their sincere preferences (Epstein and Mershon 1996), this can only be true if the separation-of-powers argument is false, a point we do not address in this paper. Second, we use only civil liberties cases because the House and Senate Judiciary Committees have jurisdiction over almost all of the Court's civil liberties decisions (Segal 1995). While this decision might limit generalizability, it does so over an area that encompasses a large proportion of the Court's docket. Third, we select nonunanimous decisions only. We do so to enhance the ability to scale these decisions with the ADA measure of congressional preferences (for more on this point, see below). Fourth, we use annual support scores, not aggregates across an entire career. As recently demonstrated, a fair number of justices demonstrate long-term changes in their sincere

the median justice and, thus, our measure of the Court's ideal point.

We then determine for each legislative process model the set of Pareto optimals that the Court faced for each year, such that decisions mapping within that set could not be reversed. From these we calculate the constraints facing the Court each year. If the Court's predicted preference falls within the set of Pareto optimals, the constraint is zero and the Court can safely act on its sincere policy preferences. If the Court's predicted preference falls above the maximum (below the minimum), then its constraint is the distance from the Court to the maximum (minimum). The larger the distance, the more likely the Court should be to hear constitutional cases over statutory cases.

The Committee-Gatekeeping Model. For eras with a Republican President, the minimum of the set is the minimum of the 33rd percentile House member, the 33rd percentile Senate member, the median of the House Judiciary Committee, the median of the Senate Judiciary Committee, the House Judiciary indifference point, and the Senate Judiciary indifference point.[12] The maximum of the set is the maximum of the House median, the Senate median, the median

---

preferences (Epstein, Hoekstra, Segal, and Spaeth 1998). Fifth, we use OLS regression predicted annual support scores, not actual annual support scores. This further helps insure that these votes are independent of short-term contemporary congressional preferences. It also has the added advantage of eliminating short-term fluctuations due to changes in case stimuli (Baum 1988).

After taking these steps, we scale the scores for their comparably to ADA scores. Because there is no clear way of so doing, we followed Segal's approach. He sought expert judgments from four highly regarded public law colleagues, asking them how these scores related, in their judgments, to ADA scores. For example, is 93.3 (Douglas' score) about where Douglas would be if he had real and comparable ADA scores, or is it too high, or two low? Is 5.0 (Rehnquist's score) about where Rehnquist would be if he had real and comparable ADA scores, or is it too high, or too low? The three scholars who answered Segal's query unanimously stated that it was preferable to use the scores "as is" rather than rescaling them higher, lower, more toward the middle, more toward the extremes, or any combination thereof.

As this is our view as well, we use the scores as is. While this is obviously not a textbook example of scaling, the results have, we believe, a fair amount of face validity, and are certainly less arbitrary than the placement of players that one finds in some of the literature.

[12]These are the points on the other side of the committee from the legislature where the committees are indifferent to the legislative outcome. In the unilateral case this equals 2L-G, where L is the legislative median and G is the gatekeeping median. But in the bicameral case the committees must look forward to the ultimate 2-chamber outcome, not the parent chamber outcome. Though the final outcome could obtain anyplace between H(ouse) and S(enate), we use the midpoint between the two.

of the House Judiciary Committee, the median of the Senate Judiciary Committee, the House Judiciary indifference point, and the Senate Judiciary indifference point. For eras with a Democratic President, the minimum of the set is the minimum of the median House member, the median Senate member, the median of the House Judiciary Committee, the median of the Senate Judiciary Committee, the House Judiciary indifference point, and the Senate Judiciary indifference point. The maximum of the set is the maximum of the 67th percentile House member, the 67th percentile Senate member, the median of the House Judiciary Committee, the median of the Senate Judiciary Committee, the House Judiciary indifference point, and the Senate Judiciary indifference point.

The Multiple-Veto Model. If multiple players can prevent legislation from being voted on, it may be necessary to include the preferences of the House Rules Committee median (R), the House Rules Committee Chair (R_C), the House and Senate Judiciary Committee Chairs (J_C^H, J_C^S) the Speaker of the House (*Sp*) and the Senate Majority Leader (*SML*) in the model. R, R_C, J^H, J^S, J_C^H, S_C^H, *Sp*, and *SML* should only support remedial legislation if they prefer the expected outcome of the Conference Committee (CC=[H+S]/2]) over the Court's position (X_{ct}).[13] Thus, under a Republican President, the set of Pareto optimals is given by [min(H_{33}, S_{33}, J^H, J^S, $J^H(CC)$, $J^S(CC)$, $R(CC)$, $R_C(CC)$, $J_C^H(CC)$, $J_C^S(CC)$, $Sp(CC)$, $SML(CC)$), max(H, S, J^H, J^S, $J^H(CC)$, $J^S(CC)$, $R(CC)$, $R_C(CC)$, $J_C^H(CC)$, $J_C^S(CC)$, $Sp(CC)$, $SML(CC)$)]. Under a Democratic President, the set of Pareto optimals is given by [min(H, S, J^H, J^S, $J^H(CC)$, $J^S(CC)$, $R(CC)$, $R_C(CC)$, $J_C^H(CC)$, $J_C^S(CC)$, $Sp(CC)$, $SML(CC)$), max(H_{67}, S_{67}, J^H, J^S, $J^H(CC)$, $J^S(CC)$, $R(CC)$, $R_C(CC)$, $J_C^H(CC)$, $J_C^S(CC)$, Sp(CC),

[13]While the Rules Committee can enforce a closed rule on the House floor, it cannot enforce one on the Conference Committee. Thus the Rules committee cannot guarantee that it can obtain the Judiciary Committee result if it prefers that to the House median.

$SML(CC))]$.[14]

The Party-Caucus Model. Recent models of congressional lawmaking provide theoretical and empirical evidence that policy making typically represents neither independent committee preferences nor independent leadership preferences, but the preferences of the majority party caucus (Kiewiet and McCubbins 1991; Cox and McCubbins 1993). Under such models, the type of legislation that can come to a vote and be approved by a chamber moves to the left when the chamber switches from Republican control to Democratic control and moves to the right when control passes from Democrats to Republicans. For example, the takeover of the Senate by Republicans, as in the 1980 elections, moves the balance of power in that chamber and in its Judiciary Committees to the right.

To assess the party-caucus model, we operationalize potential gatekeepers (the Judiciary committees and chairs, as well as majority party leaders) as representing the preferences of the median member of the House and Senate majority party caucus (MPC^H and MPC^S). Under a Republican President, the set of Pareto optimals is given by [min(H_{33}, S_{33}, MPC^H, MPC^S, $MPC^H(CC)$, $MPC^S(CC)$), max(H, S, MPC^H, MPC^S, $MPC^H(CC)$, $MPC^S(CC)$)]. Under a Democratic President, the set of Pareto optimals is given by [min(H, S, MPC^H, MPC^S, $MPC^H(CC)$, $MPC^S(CC)$), max(H_{67}, S_{67}, MPC^H, MPC^S, $MPC^H(CC)$, $MPC^S(CC)$)].

Assessing the Court Wherewithal Hypothesis

The tests for each model of the legislative process follow a similar procedure. We

---

[14]One problem in deriving the set of Pareto optimals for this model is that, in any given year, a large number of missed votes can skew the ADA scores for any individual who was ill, running for President, or for other such reasons. For example, in 1980, Judiciary Committee Chair Ted Kennedy registered an ADA score of but 33 as he sought delegates to the Democratic convention. A larger measurement problem surrounds the Speaker, who rarely votes except in the case of a tie. As such, ADA does not provide scores for him. For relevant members other than the Speaker, large numbers of missed votes affect the scores of Rules Chairman Sabath (D, IL) in 1952, House Judiciary Chair Rodino (D, NJ) in 1978, Senate Judiciary Chair Kennedy (D, MA) in 1980, Senate Judiciary Chair Biden (D, DE) in 1988, and Senate Majority leader Mansfield (D, MT) in 1968. For each of those years we use the person's ADA score from the previous year. For Speakers, we use their average for the years prior to them becoming Speaker.

attempt to place the Supreme Court (as measured by the median justice) and members of Congress on a consistent ideological dimension and measure the preferences of the Court vis-à-vis the set of Pareto optimals established by the relevant model. For each year, we measure (1) the degree of homogeneity on the Court, as revealed by the Segal/Cover scores, for each term and (2) whether, under each model of the legislative process, the Court is constrained and, if so, by how much and in which direction. We then use those data to determine whether the constraints influence the Court's relative share of constitutional and statutory cases.

Results

We start our investigation with a basic, bivariate "domination" prediction of agenda setting—one which assumes that the Court will be constrained by Congress but does not have the institutional wherewithal to withstand challenges. In other words, the operational prediction is simply that as the distance from the Court to the set of Pareto optimals increases, the percent of statutory cases heard by the Court decreases. We begin this way, even though we recognize that (1) attentiveness to the preferences of other institutions—as the strategic account suggests— need not mean timidity, for it is unlikely that, under our Madisonian system, one political institution can be wholly dominated by another and (2) the aggregate amount of influence in these models will necessarily be low, for in a system in which the President nominates and the Senate confirms Supreme Court justices and congressional decision making might be fairly decentralized, most justices, and especially the median justice (Lemieux and Stewart 1988), will fall within the set of Pareto optimals (see Segal 1997). Nonetheless, we believe it is important to examine what the Court does in the few instances when it is outside the set.

Because of overwhelming autocorrelation in the OLS models, we assessed the domination prediction for our three versions of the legislative process with an AR(1) process using maximum likelihood techniques. Table 1 presents the results, that is, the ML estimates for

each legislative model on the percent of statutory cases the Court hears each term.[15] As we can see, the maximum likelihood estimates are in the negative direction (just as the simple domination account predicts) but they are dwarfed by their standard errors. Hence, at least under our operational definitions, an explanation of the Court's aggregate agenda setting which suggests that the Court is simply constrained by Congress in a fight it cannot win does not appear to be of much value.

(Table 1 about here)

Let us now turn to the more nuanced "Court wherewithal" hypothesis of agenda setting—the one that we have set forth throughout this paper. On this prediction, the effect of the distance of the Court from the set of Pareto optimals will be conditional on the Court's ability to influence the preferences and beliefs of members of Congress, as well as on its ability to signal a willingness to fight back in response to adverse congressional reaction. Statistically, this takes the following form:

$$Y_i = \beta_0 + \gamma_1 X_1 + \beta_2 X_2 + \varepsilon_i$$

where

$$\gamma_1 = \beta_1 + \beta_3 X_2 + \varepsilon_i,$$

X_1 = the distance from the set of Pareto optimals and

X_2 = the degree of homogeneity on the Court.

Substituting yields the familiar interactive model:

$$Y_i = \beta_0 + \beta_1 X_1 + \beta_2 X_2 + \beta_3 X_2 X_3 + \varepsilon_i.$$

The relationship between the congressional constraint and Court homogeneity is now conditional: the greater the homogeneity on the Court, the lesser the impact of the congressional

---

[15]Since the overwhelming majority of the Court's decisions for a given term come down the following year, we match decisions from, say, the 1978 term, with ADA scores from 1979. Though this requires the Court peer a bit into the future when choosing its docket, this is exactly what backward induction requires.

Table 1. Assessing the Dominance Prediction of Supreme Court Agenda Setting (Maximum Likelihood Estimates)

	Models of the Legislative Process		
	Committee-Power	*Multiple-Veto*	*Party-Caucus*
Estimates			
β	-.15	-.15	-.11
S.E. β	.27	.56	.25
Significance	ns	ns	ns
Constant	60.86	60.71	60.73
ρ	.70	.71	.71

constraint. Importantly, the conditional-effects specification, made explicit in the Court wherewithal model, changes the normal interpretation of β_1 and β_2. They are now the effect of each variable when the other variable is at zero (Friedrich 1982). Because the homogeneity variable is centered about its mean, we can interpret β_1 as the impact of the distance from the set of Pareto optimals when Court homogeneity is at its mean.

We expect β_1 to be negative and β_3 to be positive: At mean levels of Court homogeneity, increases in the distance to the set of Pareto optimals would lower the percent of statutory cases the Court would hear, but this impact would be counterbalanced as the Court becomes more homogenous. The expectation for β_2 is not as clear cut. If Congress is the only factor that influences the Court's agenda, then when the set of Pareto optimals is at zero, the Court could do what it wanted regardless of whether it was homogenous or heterogeneous. But if the Court is concerned about other factors—such as, compliance by lower courts or the reaction of future Congresses—then homogeneity might matter even when the contemporaneous Congress is not a threat to the Court.

With these statistical expectations in mind, let us turn to the results displayed in Table 2. Note that for two of the three models of the legislative process the findings lend support to the Court wherewithal hypothesis: Under the Multiple-Veto and Party-Caucus models, at mean levels of Court homogeneity, the greater the distance between the Court and Congress, the lower the percentage of statutory cases that the Court will hear. *But*, as Court homogeneity increases, the impact of Congress markedly decreases.

(Table 2 about here)

We also find that a homogenous Court is more likely to take statutory cases even when there is no constraint from Congress. In other words, the effect of homogeneity on the Court's agenda, while partially dependent on Congress, exists even when the Court is free from contemporaneous congressional constraints. In situations where the Court faces no constraints

Table 2. Assessing the Court Wherewithal Prediction of Supreme Court Agenda Setting (Maximum Likelihood Estimates)

	Models of the Legislative Process		
	Committee-Power	*Multiple -Veto*	*Party-Caucus*
Variables			
Constraint (β_1)	-.41 (.40)	-23.37 (16.03)	-4.23 (2.51)
Homogeneity (β_2)	83.95 (12.00)	81.53 (12.61)	73.92 (15.29)
Interaction (β_3)	-2.19 (3.69)	202.19 (145. 57)	36.28 (23.16)
constant	60.36	60.14	59.97
ρ	.19	.22	.39

n=47. Standard errors in parentheses.
β_1 significant at p =. 08 (M-V model) and p = .05 (P-C model)
β_2 significant at p < .01, all models.
β_2 significant at p=.09 (M-V model) and p=.07 (P-C model).

from Congress (and, thus, the impact of Constraint and Homogeneity*Constraint drop out), a Court with average levels of homogeneity would hear about a 60-40 mix of statutory to constitutional cases. If we then jumped to the maximum levels of homogeneity,[16] which occurred during most of the latter Warren Court (the 1959-1965 terms, and 1967-68 terms) and the final pre-Clinton terms of the Rehnquist Court's (1991 and 1992), we would expect to find about a 69-31 split of statutory to constitutional cases. Alternatively, if we moved to the minimum levels of homogeneity, which occurred during from the 1971-1980 terms of the Burger Court, we would expect to find a 51-49 split of statutory to constitutional cases.

Unfortunately, two problems prevent us from assessing the impact of these constraints on the Court's agenda. One is substantive: The conditional effects specification necessarily means that there is no straightforward effect of congressional constraints.[17] The other is more technical: The estimates of these coefficients are bound to be imprecise because the Court is so seldom constrained.[18] Hence, at average levels of homogeneity,[19] the Party-Caucus model, which yields our most significant estimates, predicts that each unit that the Court is from the set of Pareto optimals results in slightly over a four percent decrease in the percent of statutory cases. This would mean that a Court of average homogeneity, which was 10 units away from the set of Pareto optimals, would drop its mix of statutory cases by about 43 percentage

---

[16]Recall that we calculated Court homogeneity by taking the term-by-term standard deviation of the Segal-Cover scores, centering them about their mean, and then dividing by -1. The scores range from -.11 (most heterogeneous) to .11 (most homogeneous).

[17]Technically, we face this problem in trying to assess the impact of homogeneity as well, but the problem here is ameliorated by the fact that the homogeneity variable represents the impact of homogeneity when constraint is at 0. This is not only a theoretically meaningful level, but a level that actually occurs in a vast majority of our observations.

[18]For two of our three models of the legislative process, we have two variables—Constraint and Constraint*Homogeneity—predicting the three occasions when the Court is outside the set of Pareto optimals.

[19]As we set it up, this is when homogeneity equals 0.

points. And, while a more homogeneous Court would drop its mix somewhat less, a less homogenous Court would drop its mix even more.[20]

In short, our statistical models provide some support for the hypothesis flowing from strategic accounts of agenda setting: Justices do seem to avoid placing policies on their institutional agenda when they believe that members of the elected branches would move policy far from their ideal points unless they also believe that they can insulate their ultimate policy decisions from reversal. But the fact that the Court is so rarely constrained by Congress makes it difficult for us to compare predictions against the data.

Discussion

In this paper, we attempted to test a notion derived from a strategic account of agenda setting: Supreme Court justices faced with a hostile political environment would, at the margins, avoid hearing cases that could potentially be overturned, but that this constraint would be limited to situations in which the Court had the wherewithal to make its decisions stick. Since overriding constitutional decisions is far more difficult than overriding those of the statutory variety, we argued that evidence of the plausibility of this prediction would show the Court taking a higher proportion of constitutional cases as the political constraints increased. The statistical analyses provide some support for this claim: In two of the three models we tested, constraints imposed by the political environment appear to result in lower percentages of statutory cases, but that homogenous Courts could counteract these effects. Nevertheless, the actual values of our slope coefficients, combined with the fact that the Court almost never faces such constraints, lead us to regard our results with some caution.

To the extent that our findings do hold, they present important lessons for future research. First, we encourage more studies of the external context of Court agenda setting. While we believe that our test is a solid one, we also recognize that we have not exhausted the

[20] Almost needless to add the slope coefficients for the Multiple-Veto model fall well beyond what any actual impact could be given average levels of homogeneity.

possibilities. Indeed, given the nature of our results, we think it especially important to validate them by measuring constraints faced by the Court in other ways. One that immediately comes to mind involves comparing the percentage of statutory and constitutional cases during periods of Court-Congress tension (*i.e.* Court-curbing periods) and those during which harmony prevailed.

A second lesson returns us to point we made at the onset of this paper; namely, that if we found evidence of an external constraint operating on the justices' agenda setting decisions, then this should encourage a broader search for inter-branch strategic agenda setting. With some degree of evidence in hand, we are ready to suggest that students of Congress and the Executive at least begin to investigate how the Court might constrain agenda setting in those branches. This is seems a particularly apropos enterprise at a point in American politics when even journalists report that members of Congress take into account the effect of Court rulings on their ability to set policy, as they apparently did during the recent battle over campaign financing (see, *e.g.*, Schmitt 1997).

References

Boucher, Robert L., Jr. and Jeffrey A. Segal. 1995. "Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials." *Journal of Politics* 57:824-837.

Brace, Paul, Melinda Gann Hall, and Laura Langer. 1996. "Judicial Choice and the Politics of Abortion: Institutions, Context, and the Autonomy of Courts." Paper presented at the annual meeting of the American Political Science Association, San Francisco.

Brenner, Saul. 1979. "The New Certiorari Game." *Journal of Politics* 41:649-655.

Brown v. Board of Education. 1954. 347 U.S. 483.

Caldeira, Gregory A. and John R. Wright. 1988. "Organized Interests and Agenda Setting in the U.S. Supreme Court." *American Political Science Review* 82:1109-1128.

Caldeira, Gregory A., John R. Wright, and Christopher J. W. Zorn. 1996. "Strategic Voting and Gatekeeping in the Supreme Court." Paper presented at the annual meeting of the American Political Science Association, San Francisco.

Carmines, Edward G. and James A. Stimson. 1989. *Issue Evolution: Race and the Transformation of American Politics.* Princeton: Princeton University Press.

Cobb, Roger W. And Charles D. Elder. 1972. 1983. *Participation in America: The Dynamics of Agenda Building.* Baltimore: Johns Hopkins University Press.

Cox, Gary W. and Matthew D. McCubbins. 1993. *Legislative Leviathan: Party Government in the House.* Berkeley: University of California Press.

Epstein, Lee and Jack Knight. 1998. *The Choices Justices Make.* Washington, D.C.: CQ Press.

Epstein, Lee and Carol Mershon. 1996. "Measuring Political Preferences." *American Journal of Political Science* 40:260-294.

Epstein, Lee, Jeffrey A. Segal, and Timothy Johnson. 1996. "The Claim of Issue Creation on the U.S. Supreme Court." *American Political Science Review* 90:845-852.

Epstein, Lee and Thomas G. Walker. 1995. *Constitutional Law for a Changing America: Institutional Powers and Constraints.* Washington, D.C.: CQ Press.

Epstein, Lee, Valerie Hoekstra, Jeffrey A. Segal, and Harold J. Spaeth. 1998. "Do Sincere Political Preferences Change?"*Journal of Politics,* forthcoming.

Eskridge, William N. Jr. 1991a. "Reneging on History?: Playing the Court/Congress/President Civil Rights Game." *California Law Review* 79 : 613-684.

Eskridge, William N. Jr. 1991b. "Overriding Supreme Court Statutory Interpretation Decisions." *Yale Law Journal* 101:331-417.

Ferejohn, John and Charles Shipan 1989. "Congressional Influence on Administrative Agencies: A Case Study of Telecommunications Policy." In *Congress Reconsidered*, ed. Lawrence C. Dodd and Bruce I. Oppenheimer. Washington, D.C.: CQ Press.

Ferejohn, John and Charles Shipan. 1990. "Congressional Influence on the Bureaucracy." *Journal of Law, Economics, & Organizations* 6: 1-27.

Ferejohn, John and Barry Weingast. 1992. "Limitation of Statutes: Strategic Statutory Interpretation." *Georgetown Law Review* 80: 565-582.

Friedman, Barry. 1996. "Legislative Findings and Judicial Signals: A Positive Political Reading of *United States v. Lopez*." *Case Western Law Review* 46: 757-800.

Friedrich, Robert. 1982. In Defense of Multiplicative Terms in Multiple Regression Equations. *American Journal of Political Science* 26:797-833.

Greenhouse, Linda. 1997. "Supreme Court Rejects Texas Sentencing Law." *New York Times*, October 21.

Henschen, Beth M. and Edward I. Sidlow. 1988. "The Supreme Court and the Congressional Agenda-Setting Process." Paper presented at the annual meeting of the Midwest Political Science Association, Chicago, IL.

Herrera, Richard, Thomas Eperlein, and Eric R.A.N. Smith. 1995. "Stability of Congressional Roll-Call Indexes." *Political Research Quarterly* 48:403-416.

Johnson, Charles A. and Bradley C. Canon. 1984. *Judicial Policies—Implementation and Impact.* Washington, D.C.: CQ Press.

Kiewiet, D. Roderick and Matthew D. McCubbins. 1991. *The Logic of Delegation: Congressional Parties and the Appropriations Process.* Chicago: University of Chicago Press.

Kingdon, John W. 1984. *Agendas, Alternatives, and Public Policies.* Boston: Little, Brown.

Kluger, Richard. 1976. *Simple Justice.* New York: Knopf.

Krol, John F. and Saul Brenner. 1990. "Strategies in Certiorari Voting on the United States Supreme Court." *Western Political Quarterly* 43:335-342.

Lemieux, Peter H. and Charles H. Stewart, III. 1988. Advise? Yes. Consent? Maybe. Senate Confirmation of Supreme Court Nominees." Paper presented at the annual meeting of the American Political Science Association, Washington, D.C.

Light, Paul C. 1982. *The President's Agenda.* Baltimore: Johns Hopkins University Press.

Marshall, Thomas R. 1989. *Public Opinion and the Supreme Court.* Boston: Unwin Hyman.

Miller, Mark C. 1993. "Courts, Agencies, and Congressional Committees: A Neoinstitutional Perspective." *The Review of Politics* 55: 471-489.

Naim v. Naim. 1955. 350 U.S. 891.

Palmer, Jan. 1982. "An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions." *Public Choice* 39:387-398.

Perry, H.W. 1991. *Deciding to Decide* . Cambridge: Harvard University Press.

Provine, Doris Marie. 1980. *Case Selection in the United States Supreme Court.* Chicago: University of Chicago Press.

Riker, William H., ed. 1993. *Agenda Formation.* Ann Arbor: University of Michigan Press.

Schmitt, Eric. 1997. "Senate Debates Campaign Financing Bill, But Two Sides Remain Divided." *New York Times,* September 27.

Schubert, Glendon A. 1959. *Quantitative Analysis of Judicial Behavior.* Glencoe, IL: Free Press.

Segal, Jeffrey A. 1997. "Separation-of-Powers Games in the Positive Theory of Law and Courts." *American Political Science Review* 91:28-44.

Segal, Jeffrey A. 1995. "Marksist (and Neo-Marksist) Models of Supreme Court Decision Making: Separation-of-Powers Games in the Positive Theory of Law and Courts." Paper presented at the annual meeting of the American Political Science Association, Chicago, IL.

Segal, Jeffrey A. And Harold J. Spaeth. 1993. *The Supreme Court and the Attitudinal Model.* New York: Cambridge University Press.

Segal, Jeffrey A. and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83: 557-565.

Tanenhaus, Joseph, Marvin Schick, Matthew Muraskin, and Daniel Rosen. 1963. "The Supreme Court's Certiorari Jurisdiction: Cue Theory." In *Judicial Decision-Making,* ed. Glendon Schubert. New York: Free Press.

Ulmer, S. Sidney. 1983. "Conflict with Supreme Court Precedents and the Granting of Plenary Review." *Journal of Politics* 45: 474-478.

Ulmer, S. Sidney. 1984. "The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable." *American Political Science Review* 78:901-911.

United States v. Lopez. 1995. 115 S. Ct. 1624.

Van Doren, Peter M. 1991. *Politics, Markets, and Congressional Policy Choices.* Ann Arbor: University of Michigan Press.

Walker, Jack L. 1977. "Setting the Agenda in the U.S. Senate: A Theory of Problem Selection." *British Journal of Political Science* 7:423-445.