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DYNAMIC AGENDA-SETTING ON THE UNITED STATES SUPREME COURT: AN EMPIRICAL ASSESSMENT*

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According to the "dynamic" account advanced by William Eskridge and other scholars, statutory interpretation is not simply a matter of the text's plain meaning or legislative history. Rather, by this account, justices interpreting a statute also consider the likely responses of other governmental branches. This Article presents a dynamic account of the Supreme Court's decision-making at the certiorari stage. Because Congress cannot easily override constitutional decisions, the authors hypothesize that the justices will accept a higher proportion of constitutional cases, as opposed to statutory ones, when two conditions are met: first, the political predilections of a majority of justices must be out of line with Congress's; and second, the justices must be too politically heterogeneous amongst themselves to produce the near-unanimous statutory decisions that prior research indicates Congress is unlikely to override. The authors present empirical evidence supporting their view from the Court's 1946–1992 Terms.

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* The authors gratefully acknowledge research support provided by the National Science Foundation (SBR-9320284). For their many useful comments, we also thank Gregory A. Caldeira, Barry Friedman, Valerie Hoekstra, William Keech, Jack Knight, Lewis Kornhauser, Lynn Mather, David W. Rohde, Nancy C. Staudt, Gerald N. Rosenberg, and faculty at New York University School of Law, where we presented an earlier version of this Article.

All data used in this Article are available at http://artsci.wustl.edu/~polisci/epstein/research/dynamic.html. We used STATA and SPSS to analyze the data.

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However diverse they may be, traditional approaches to statutory interpretation—such as, textualism,[1] intentionalism,[2] purposivism,[3] and their variants—share a common feature: They place emphasis on laws at the time the legislature wrote them, requiring judges to undertake "archeological" digs to interpret them.[4] To the extent that these approaches would have judges—regardless of who those judges are or when the interpretation occurs—reach the same conclusions about a statute's meaning, they are static.

It is this feature of traditional accounts with which Professor William N. Eskridge, Jr. (and various co-authors), in a series of highly influential works, takes issue.[5] "Just as modern literary theory has taught that the meaning of literary texts changes from reader to reader and over time," so too, Eskridge argues, "the meaning of statutory texts changes over time." Hence, "statutory texts, like literary texts, are transformed every time they are interpreted."[6] To ignore this *dynamic* aspect of statutory interpretation would be to ignore the realities of how judges, espe-

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[1] Textualism comes in different variants. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 38–47 (1994) (outlining and criticizing "plain meaning" textualism, which focuses only on the "ordinary meanings of words and accepted precepts of grammar and syntax," and "holistic textualism," which permits consideration of contextual factors such as the traditional meaning of words, the statute's overall structure, and any policy presumptions articulated in the statute); WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 223–35 (2000) (describing a "soft plain meaning rule"). One variant that has received a good deal of attention, perhaps because its proponents include Justice Antonin Scalia and Judge Frank Easterbrook, commends that judges interpret a statute in accord with the apparent meaning of the words in the statute's text. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997); Frank Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988).

[2] The theory of intentionalism or legislative intent suggests that judges interpret a statute in line with what the legislature intended when it enacted the statute. According to WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 338 (1994) [hereinafter Eskridge, DYNAMIC INTERPRETATION], the earliest discussion of intentionalism is in a sixteenth-century manuscript, *A Discourse upon the Exposicion & Understandinge of Statutes with Sir Thomas Egerton's Additions*. *See id.* The manuscript was published in 1942 by Samuel E. Thorne. *Id.*

[3] The theory of purposivism or legislative purpose holds that judges should try to discover the purpose of laws so as to interpret specific phrases in light of that overarching objective. Henry M. Hart and Albert M. Sacks may be the legal scholars most closely associated with this approach. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[4] *See* T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21–32 (1988); ESKRIDGE, *supra* note 2, at 13–47.

[5] *See, e.g.*, ESKRIDGE, DYNAMIC INTERPRETATION, *supra* note 2; ESKRIDGE, FRICKEY & GARRETT, *supra* note 1; William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) [hereinafter Eskridge, *Reneging*]; William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) [hereinafter Eskridge, *Overriding*].

[6] WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 571 (1ST ED. 1988).

cially justices of the United States Supreme Court, reach decisions—or so the argument goes.

While "dynamic statutory interpretation" may seem innocuous enough, it has (at least in the way Eskridge and others explicate it)[7] some rather dramatic normative and empirical implications. Most notably: (1) Justices should and do interpret laws in line with the policy preferences of *contemporary* political actors (including the President and members of Congress, especially congressional "gatekeepers," such as committee chairs and party leaders) rather than in accord with the intent of the *enacting* legislators; and (2) justices should and do behave in this way even if their policy preferences are out of line with the desires of contemporary political actors. For when justices are inattentive to the preferences of the contemporaneous Congress and the President—that is, when they fail to act *strategically*[8]—they run the risk of seeing their most preferred interpretations overridden by the political branches.[9] To put it in somewhat different terms, under Eskridge's account, justices have goals that, according to him, amount to seeing their policy preferences written into law,[10] but realize that they cannot achieve them without taking into account the preferences and likely actions of other relevant political actors.

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[7] *See, e.g.*, Eskridge, *Overriding*, *supra* note 5; Eskridge, *Reneging, supra* note 5. For similar studies, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); Lee Epstein, Jack Knight & Andrew D. Martin, *The Supreme Court as a Strategic National Policy Maker*, 50 EMORY L.J. 583 (2001); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J.L. ECON. & ORG. 263 (1990); Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions*, 23 RAND J. ECON. 463 (1992).

[8] Here and throughout the Article, we adopt the following definitions of acting *strategically* (i.e., strategic behavior) and of two interrelated terms, acting in a *sincere* or an *insincere* fashion (i.e., sincere or insincere behavior). Strategic decision making is "about interdependent choice: an individual's action is, in part, a function of her expectations about the actions of others. To say that a justice acts strategically is to say that she realizes that her success or failure depends on the preferences of other actors and the actions she expects them to take, not just on her own preferences and actions." EPSTEIN & KNIGHT, *supra* note 7, at 12. Sometimes, strategic calculations will lead a justice to make decisions that reflect her sincerely held preferences (sincere behavior); other times, they will lead her to act in a sophisticated or insincere fashion (insincere or sophisticated behavior), that is, in ways that do not accurately reflect her true preferences.

[9] *See generally* Eskridge, *Reneging*, *supra* note 5; Eskridge, *Overriding*, *supra* note 5.

[10] Eskridge is not alone. Many proponents of strategic approaches to statutory interpretation assume that the goal of most justices is to see the law reflect their most preferred policy positions. *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 7; Spiller & Gely, *supra* note 7. This need not be the case, however. Strategic actors—including justices—can be, in principle, motivated by many things. As long as the ability of a justice to achieve his or her goal, whatever that may be, is contingent on the actions of others (as Eskridge suggests), his or her decision is interdependent and strategic. *See supra* note 8. For an example of a strategic account of judicial decisions in which justices are motivated by jurisprudential principles, see John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L. REV. L. & ECON. 263 (1992).

Given these implications, it is hardly surprising that "dynamic statutory interpretation" has been the subject of intense debates since the day Eskridge first developed it. Some are normative in nature, with scholars questioning whether judges should read statutes dynamically;[11] others are empirical, with analysts asking whether, in fact, judges do take into account changes in the political context when they interpret statutes.[12] Certainly, Eskridge believes that they do, claiming that justices on the United States Supreme Court keep a watch on the halls of Congress and on the oval office when they engage in statutory interpretation.[13] Indeed, he further claims that such attentiveness may explain why "conservative" Courts sometimes render "liberal" interpretations of laws and vice versa: they do not want to be overridden by irate Congresses.[14]

Though the normative debates will undoubtedly continue, as an empirical matter, many scholars have come to believe that Eskridge has captured an important feature of United States Supreme Court decision-making, that justices do read statutes dynamically, and that they are attentive to the preferences and likely actions of the contemporaneous Congress and other political actors when they go about reaching decisions on the merits of cases.[15]

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[11] Even leading proponents of this account acknowledge that problems may emerge when judges ignore the purpose of or intent behind a law and, instead, read it in light of the climate of the times. Eskridge and Frickey, for instance, note that decisions that conflict with the text or legislative history of a statute may appear illegitimate:

> [I]t may seem illegitimate if an interpretation goes against both the text and the legislative history of the statute to promote current values, for in that instance the court might be seen as violating a clear legislative command. Moreover, even if a court may sometimes do that, are we confident that the current values reflected in the Supreme Court's opinions are defensible ones? Might dynamic statutory interpretation become just another way the "Haves" in our polity advance their interests, at the expense of the "Have Nots"?

WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION 127 (Supp. 1992).

[12] *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 7; Spiller & Gely, *supra* note 7; JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 326–51 (2002); Epstein, Knight & Martin, *supra* note 7; Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997).

[13] *See, e.g.*, Eskridge, *Reneging*, *supra* note 5; Eskridge, *Overriding*, *supra* note 5; *see also supra* note 8. Our language in this sentence takes its cues from CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864–88, at 118 (1987) ("The historian of the Court should keep his watch in the halls of Congress, not linger in the chamber of the Court.").

[14] *See generally* Eskridge, *Reneging*, supra note 5; Eskridge, *Overriding*, supra note 5.

[15] *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 7; Gely & Spiller, *supra* note 7; Andrew David Martin, Strategic Decision Making and the Separation of Powers (1998) (unpublished Ph.D. dissertation, Washington University) (on file with Washington University library); Andrew D. Martin, *Congressional Decision Making and the Separation of Powers*, AM. POL. SCI. REV. (forthcoming 2001) [hereinafter Martin, *Congressional Decision Making*]. For an exception, see Segal, *supra* note 12.

This Article attempts an empirical analysis of a related issue: how do the justices decide whether to grant or deny certiorari? Do they take into account the preferences and likely actions of the elected branches when they go about the task of "deciding to decide"?[16] Do they engage in dynamic "agenda-setting," to borrow Eskridge's phrase?

From a theoretical vantage point, the answer may seem evident. If, as Eskridge's theory suggests, justices are concerned about the preferences and likely actions of Congress when they interpret laws, then they should be equally—*if not more*—attentive to those preferences and actions when they go about the task of making their certiorari decisions. That is to say, it seems reasonable to suppose that justices avoid placing cases on their agenda when they think their decisions will cause elected officials to react in an adverse fashion. To push the argument even further, we might question—as our emphasis above on "if not more" implies—why justices, *in the main*,[17] would need to bend to the wishes of Congress (again, as Eskridge suggests they occasionally must) given that they could avoid granting certiorari to petitions that would force them to bend in the first place.

Supposition is different from support, however, and on this score the answers to the questions we pose are murkier. Despite an immense amount of writing—by social scientists and legal academics alike—on the subject of agenda-setting and especially on the correlates of the Court's decision to grant certiorari,[18] no study of which we are aware has

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[16] Throughout this Article, we use the terms "deciding to decide" and "agenda-setting" (in the next sentence) as shorthand ways to describe how the branches of government go about the task of determining which of the issues on the "public" agenda (which contains all the issues of concern to society) they will schedule "for active and serious consideration" and, thus, place on their "institutional agenda." *See* ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING 14 (1992); *see also* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 4 (1984). We recognize that that some cases arrive at the Court by routes such as appeal or certification rather than a grant of certiorari, but because the great majority of the more than 7000 cases that arrive at the Court each year arrive as requests for certiorari, we generally presume throughout this Article that granting and denying certiorari is the process by which the Supreme Court sets its agenda and "decides to decide." Other Supreme Court scholars have used similar terminology. *See, e.g.*, H. W. PERRY, DECIDING TO DECIDE: AGENDA-SETTING IN THE UNITED STATES SUPREME COURT 5–7 (1991); Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda-Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109 (1988).

[17] We stress "in the main" because we do believe that, under some circumstances, justices may feel compelled to grant certiorari to petitions that they realize could eventually force them to disregard their own policy views and accommodate congressional preferences at the merits stage. That circumstance might arise, for instance, when a petition involves a question of statutory interpretation that several Circuits of the United States Courts of Appeals have answered differently.

[18] *See, e.g.*, SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE (1986) [hereinafter ESTREICHER & SEXTON, COURT'S ROLE]; PERRY, *supra* note 16; DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT (1980); GLENDON A. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 210–54 (1959) [hereinafter SCHUBERT, QUANTITATIVE ANALYSIS]; Virginia C. Armstrong

considered the role that elected political actors may play in the Court's agenda-setting process.[19] What has instead received the lion's share of

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& Charles A. Johnson, *Certiorari Decisions by the Warren and Burger Courts: Is Cue Theory Time Bound?*, 15 POLITY 141 (1982); Saul Brenner & John F. Krol, *Strategies in Certiorari Voting on the United States Supreme Court*, 51 J. POL. 828 (1989); Saul Brenner, *The New Certiorari Game*, 41 J. POL. 649 (1979); Robert L. Boucher, Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision-Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995); Caldeira & Wright, *supra* note 16; Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J.L. ECON. & ORG. 549 (1999); Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681 (1984) [hereinafter Estreicher & Sexton, *A Managerial Theory*]; Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years after the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000); John F. Krol & Saul Brenner, *Strategies in Certiorari Voting on the United States Supreme Court: A Reevaluation*, 43 W. POL. Q. 335 (1990); Robert M. Lawless & Dylan Lager Murray, *An Empirical Analysis of Bankruptcy Certiorari*, 62 MO. L. REV. 101 (1997); Kevin T. McGuire & Gregory A. Caldeira, *Lawyers, Organized Interests, and the Law of Obscenity: Agenda-setting in the Supreme Court*, 87 AM. POL. SCI. REV. 717 (1993); Jan Palmer, *An Econometric Analysis of the U.S. Supreme Court's Certiorari Decisions*, 39 PUB. CHOICE 387 (1982); Glendon Schubert, *Policy without Law: An Extension of the Certiorari Game*, 14 STAN. L. REV. 284 (1962) [hereinafter Schubert, *Policy*]; Donald R. Songer, *Concern for Policy Outputs as a Cue for Supreme Court Decisions on Certiorari*, 41 J. POL. 1185 (1979); Kevin H. Smith, *Justice for All? The Supreme Court's Denial of Pro Se Petitions for Certiorari*, 63 ALB. L. REV. 381 (1999); Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, *in* JUDICIAL DECISION-MAKING 111 (Glendon Schubert ed., 1963); Stuart Teger & Stuart Kosinski, *The Cue Theory of Supreme Court Certiorari Jurisdiction: Further Consideration of Cue Theory*, 42 J. POL. 834 (1980); Todd J. Tiberi, *Supreme Court Denials of Certiorari in Conflict Cases: Percolation or Procrastination?*, 54 U. PITT. L. REV. 861 (1993); S. Sidney Ulmer, *The Decision to Grant Certiorari as an Indicator to Decision "On the Merits,"* 4 POLITY 429 (1972) [hereinafter Ulmer, *Decision to Grant*]; S. Sidney Ulmer, *Conflict with Supreme Court Precedent and the Granting of Plenary Review*, 45 J. POL. 474 (1983) [hereinafter Ulmer, *Conflict with Precedent*]; S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901 (1984) [hereinafter Ulmer, *Predictive Variable*].

[19] To be sure, legal scholars have paid a good deal of attention to the impact of the Solicitor General ("SG") on the Court's agenda-setting decisions. *See, e.g.*, Lawless & Murray, *supra* note 18, at 112 (noting that the Supreme Court grants three quarters of the Solicitor General's certiorari requests); Stewart A. Baker, *A Practical Guide to Certiorari*, 33 CATH. U. L. REV. 611, 622–23 (1984) (same); Caldeira & Wright, *supra* note 16, at 1121 (noting that the Solicitor General's position is a significant factor in the statistical likelihood that the Court will accept certiorari); Eric Schnapper, *Becket at the Bar—The Conflicting Obligations of the Solicitor General*, 21 LOY. L.A. L. REV. 1210 (1988) (noting that the Solicitor General had requested certiorari in approximately 25% of the Supreme Court's cases between 1952 and 1985, and that the Court granted 75% of the Solicitor General's certiorari requests during that period); Tanenhaus et al., *supra* note 18, at 122–23 (noting the Supreme Court's deference to the Solicitor General's position on certiorari questions). It is unclear, however, 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. More relevant to us, this literature virtually ignores the role of Congress in the agenda-setting process, though the influence of Congress over a sitting Court should also be significant. *See, e.g.*, Eskridge, *Reneging*, *supra* note 5, at 617 (arguing that the Supreme Court has traditionally been more attentive to the preferences of the current Congress than to legislative history, but noting that the Rehnquist Court appears more "activist" in the sense of neglecting the preferences of the current Congress); Eskridge, *Overriding*, *supra* note 5, at 378–87 (arguing the Supreme Court's decisions are

attention are factors internal to the Court (or to the judicial branch more generally), such as whether conflict exists in the lower courts over the matter at hand[20] or whether the justices, when they cast their vote for or against review of a particular dispute, believe they can ultimately prevail on its merits.[21] In other words, existing explanations for the Court's certiorari decisions depict an institution in isolation, establishing its own policy priorities with little attention to the desires of elected politicians.[22]

In this Article we take a different tack—one embodied in what we call a dynamic account of agenda-setting. This account, which takes seriously Eskridge's notions about the dynamic, strategic nature of Supreme Court decision-making, tests the following hypothesis: If, as Eskridge argues, it is generally plausible[23] that Supreme Court justices are attentive to the preferences and likely responses of external actors when they decide cases on the merits, then *they should be even more likely to consider the preferences of those actors at the agenda-setting stage*. In other words, we assume, as Eskridge does, that justices seek to establish policies that are other political actors are unlikely to override.[24] We take the inquiry a step further and examine the "decision to decide": Why would justices accept a petition for review if the likely response to their decision by other political actors would ultimately generate laws distant from their preferences?

Our thesis is that the justices' certiorari decisions rest not only on their perception of internal dynamics on the Court, but also on their perception of the political environment they confront. For example, if the justices believe, first, that Congress will dislike their interpretation of a statute, and, further, that they cannot achieve a near-unanimous decision

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often attentive to the preferences of the current Congress).

[20] *See, e.g.*, PERRY, *supra* note 16; Estreicher & Sexton, *A Managerial Theory*, *supra* note 18; Lawless & Murray, *supra* note 18; Baker, *supra* note 19; Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251 (1989); Tiberi, *supra* note 17; Ulmer, *Predictive Variable*, *supra* note 18.

[21] *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 7; PERRY, *supra* note 16; Boucher & Segal, *supra* note 18; Caldeira et al., *supra* note 18; Schubert, *Policy*, *supra* note 18; Ulmer, *Decision to Grant*, *supra* note 18. For more on this perspective, see *infra* notes 29–35 and accompanying text.

[22] We do not mean to imply that the literature ignores all external actors. To the contrary, several recent studies of agenda-setting highlight the role played by interest groups. *See, e.g.*, Caldeira & Wright, *supra* note 16, at 1122–23 (reporting statistical evidence that Supreme Court certiorari decisions are influenced by interest-group amicus briefs); *see also supra* note 19 (noting the Solicitor General's influence on certiorari decisions). We only wish to emphasize that existing research does not consider the effect that elected actors, especially members of Congress, may have on the Court's case selection decisions.

[23] *See supra* note 17.

[24] *See* Eskridge, *Reneging*, *supra* note 5, at 616 (positing "a model of the Court as a political actor in statutory interpretation"); Eskridge, *Overriding*, *supra* note 5, at 334 (positing a model of interaction between Congress, the President, and the Supreme Court in which "ultimate statutory policy is set through a sequential process by which each player—including the Court—tries to impose its policy preferences").

such that Congress will hesitate to overturn their interpretation,[25] then we predict that they will shift into "constitutional mode," and avoid statutory decisions, either by denying certiorari to statutory cases or by reaching decisions on constitutional grounds. This strategy will reflect the presumption, shared by jurists and academics alike, that Congress can overturn statutory decisions more easily than constitutional ones.[26] On the other hand, if the justices believe that Congress holds similar policy preferences to the Court, then, we posit, they will accept petitions of what-

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[25] Empirical evidence suggests that Congress is less likely to overturn Supreme Court decisions that are unanimous or near-unanimous. *See* Virginia A. Hettinger, The Supreme Court as an Independent Policy Maker: Statutory Interpretation and the Separation of Powers, at 21 (1998) (paper presented at the Midwest Political Science Association, Chicago, Ill.) (on file with the authors) (concluding on the basis of statistical analysis of 660 statutory civil rights and and civil liberties cases in the Supreme Court's 1964–88 terms that unanimity in the Court's decision decreased the likelihood of Congressional override); Christopher J. Zorn & Gregory A. Caldeira, Separation of Powers: Congress, the Supreme Court, and Interest Groups, at 12, 18–19 (1995) (paper presented at the Public Choice Society, Long Beach, Cal.) (on file with the authors) (presenting statistical analysis showing that the House and Senate were unlikely to attempt responsive action following a unanimous Supreme Court decision); *see also infra* notes 58–62 and accompanying text and Table 1.

[26] For examples of scholarly literature examining Congress's power to override statutory decisions, see EPSTEIN & KNIGHT, *supra* note 7, at 141; Eskridge, *Overriding*, *supra* note 5, at 394–95; Eskridge, *Reneging*, *supra* note 5, at 617; Segal, *supra* note 12, at 28. Recent cases from the Supreme Court have made clear, as a matter of constitutional law, that Congress may not override the Court's constitutional decisions. In Boerne v. Flores, 521 U.S. 507 (1997), the Supreme Court rejected Congress's attempt to dictate the level of scrutiny that the Court should apply to state laws that burden religious exercise. The Court had held in Employment Division v. Smith, 494 U.S. 872 (1990), that such laws do not receive heightened scrutiny. *See id.* at 885. Congress then passed the "Religious Freedom Restoration Act ("RFRA"), which mandated strict scrutiny review. *See Boerne*, 521 U.S. at 545–61 (quoting statute). The Court's decision to invalidate the statute included the following strong statement of judicial supremacy in constitutional matters:

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

Id. at 535–36. Three years later, the Court reiterated this message in Dickerson v. United States, 530 U.S. 428 (2000). At issue was a law Congress enacted in 1968 that was designed to overturn the Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966). Once the justices held that *Miranda* announced a constitutional rule, they concluded that the 1968 congressional law was unconstitutional. *See Dickerson*, 530 U.S. at 427 ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution.") (citing *Boerne*, 521 U.S. at 517–21).

ever variety they desire, for they will perceive little risk of Congressional override.

In short, our dynamic account of agenda-setting suggests that Supreme Court justices who are interested in maximizing their policy preferences will be attentive to the preferences and likely responses of actors in other governmental branches when they go about setting the Court's agenda. That attention will not necessarily lead the justices to behave "insincerely"[27] and decline certiorari petitions in cases they would prefer to decide; when justices believe the Court will produce the sort of near-unanimous decision that can fend off Congressional attack, they may accept a case notwithstanding their perception of Congress's views. Yet the sentiments of other branches will always be a factor in their decision.

Our assessment of this hypothesis proceeds in three steps. In Part II, we lay out the dynamic account of agenda-setting from which our theory flows. In Parts III and IV, we turn to testing the proposition empirically. Although a range of possible research strategies exists, we have adopted the following approach: We consider the percentage of cases on the Court's plenary docket that raise statutory (rather than constitutional) questions.[28] Our presumption is that the percentage should decrease when the Court's and Congress's policy preferences diverge, unless the Court also believes it can insulate its decisions from reversal. Our analysis of the data leads us to conclude that the justices do indeed consider the preferences and likely responses of other political actors in deciding whether to grant certiorari. In Part V we take stock of our results, reflecting on their implications for future discussions of agenda-setting on the United States Supreme Court, as well as for relations between the Court and the elected branches of government.

I. A Dynamic Account of Agenda-Setting on the United States Supreme Court

As we noted above, the bulk of the contemporary agenda-setting literature depicts justices as isolated decision-makers who establish their priorities without paying heed to the interests of elected officials.[29] Indeed, at least some of this literature goes so far as to suggest the Supreme Court's certiorari decisions are divorced not only from the priorities of other governmental actors, but also from the justices' own assessments of the cases' merits. The early social science research reflected this view,[30]

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[27] For our definition of this term, see *supra* note 8.

[28] The Court's plenary docket consists of those cases that the Court has agreed to decide on their merits, that is, mainly cases to which it has granted certiorari. *See supra* note 16.

[29] *See supra* text accompanying notes 18–22.

[30] *See, e.g.*, Tanenhaus, et al., *supra* note 18; Ulmer, *Conflict with Precedent*, *supra* note 18; Ulmer, *Predictive Variable*, *supra* note 18; *but see* Schubert, *supra* note 18, at 211

and many studies by legal academics today do as well.[31] These works offer explanations that are grounded in the petitions themselves, giving little regard to the decisions that the justices ultimately have to make on the merits of the disputes they agree to resolve.

An early article by Tanenhaus, et al.,[32] which for years was the seminal study of agenda-setting,[33] provides an example of this approach. Tannehaus's research asserts that four "cues" guide the certiorari decision: (1) whether the federal government seeks review; (2) whether there is dissension in the courts below; and (3) whether a civil liberties or (4) an economics issue is present.[34] Justices are not, on this view, strategic forward-thinking actors when they "decide to decide";[35] rather, they base their choices on issues presented in the petitions pending before them.

While recent scholars describe the agenda-setting very differently,[36] they likewise neglect the impact of external considerations on certiorari decisions. These scholars presume that justices generally seek to further their own policy preferences, and thus conclude that the justices must formulate expectations about the preferences their colleagues on the Court will assert at the merits stage.[37] Should justices fail to think prospectively, such scholars argue, they run the risk of accepting cases for review that the majority of the Court will ultimately decide against them, or of rejecting cases in which their most preferred policy could have become the law of the land.[38] These scholars do not consider, however, that the justices may also formulate expectations about actors outside the Court in deciding which certiorari decisions to accept.

(presenting model of the Supreme Court as a "power group, with sub-groups whose organization, motivation, and behavior are political").

[31] *See, e.g.*, ESTREICHER & SEXTON, *supra* note 18; Estreicher & Sexton, *A Managerial Theory*, *supra* note 18, at 714; Lawless & Murray, *supra* note 18; Tiberi, *supra* note 18; *but see* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227 (1979) ("Not every denial of certiorari means that the Court agrees with the decision and opinion below, but in a significant number of cases a denial does indicate that most of the Justices were not strongly dissatisfied with the actions below.").

[32] Tanenhaus, et al., *supra* note 18.

[33] *See* PERRY, *supra* note 16, at 114–15 (deeming it "one of the earliest and most important articles . . . on the Court's certiorari process"); PROVINE, *supra* note 18, at 76 (writing that it "may be the best-known attempt to determine review criteria from the pattern of grants and denials").

[34] *See* Tanenhaus, et al., *supra* note 18.

[35] H. W. Perry coined this phrase in the title of his book. *See* PERRY, *supra* note 16.

[36] *Compare* Boucher & Segal, *supra* note 18, at 824 (concluding there is "strong evidence that justices who wish to affirm carefully consider probable outcomes, but . . . no evidence that justices who wish to reverse do so"), *with* Caldeira et al., *supra* note 18, at 549 (finding that justices not only grant certiorari aggressively but also deny it defensively).

[37] *See supra* note 24 and accompanying text. *See also* EPSTEIN & KNIGHT, *supra* note 7; JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 4–7 (1993).

[38] *See id.*

To be sure, some scholars continue to take issue with the claim that the justices behave "strategically" with respect to their colleagues' preferences, let alone the preferences of external actors. According to Krol and Brenner, for example, justices simply vote against accepting petitions from lower court decisions that accord with their ideological preferences and vote in favor of hearing petitions from lower court decisions that do not.[39] Yet evidence to support the strategic view has grown substantial, particularly following a noteworthy study by Caldeira, Wright, and Zorn.[40] Unlike most previous efforts, Caldeira and his colleagues go to great lengths to include variables to account for the ideological preferences of the individual justices *along* with those of their colleagues.[41] 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 preference), they show that there is equally strong evidence of strategic behavior (defined in the study as voting to grant or deny inconsistently with the justice's own most preferred policy position).[42]

We have no doubt that debates over whether justices act strategically vis-à-vis their colleagues at the agenda-setting stage will continue. At the same time, however, the evidence, especially that offered by the most recent (and sophisticated) studies, tips the scales substantially in favor of the strategic camp.[43] Indeed, many judicial specialists have come to the same conclusion as scholars who study legislators: It is difficult to believe that policy-maximizing members of Congress "who initiate proposals [do not] tailor the policy content to have a chance to win."[44]

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[39] *See* Krol & Brenner, *supra* note 18.

[40] Caldeira et al., *supra* note 18.

[41] *See id.* at 559–61.

[42] *See id.* at 561–66. While both types of behavior may be forms of strategic voting, only the second type can be explained solely in strategic terms.

[43] *See, e.g.*, Boucher & Segal, *supra* note 18, at 824 (reporting "strong evidence that justices who wish to affirm carefully consider probable outcomes"); Caldeira et al., *supra* note 18, at 549 (analyzing data from the Supreme Court's 1982 October Term and concluding that justices anticipate likely decisions at the merits stage in deciding how to vote on certiorari).

[44] Calvin J. Mouw & Michael B. MacKuen, *The Strategic Agenda in Legislative Politics*, 86 AM. POL. SCI. REV. 87, 87 (1992); *see also* Caldeira et al., *supra* note 18, at 549 (concluding justices engage in strategic decision-making at the certiorari stage); Boucher & Segal, *supra* note 18, at 824 (same). Even journalists have taken note of strategic behavior at the agenda-setting stage. For example, in an article reporting on a statement filed by four justices concerning their dissent from the denial of certiorari in a Texas death penalty case, Linda Greenhouse observes:

> What made this statement unusual 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.

Linda Greenhouse, *Justices Refuse to Review Texas Death Penalty Case*, N.Y. TIMES, Oct.

If we consider seriously Eskridge's notions about the dynamic nature of Supreme Court decisions, we can push the strategic argument even further. Just as it seems counterintuitive to believe that preference-maximizing Supreme Court justices would not be attentive to the most preferred positions and likely actions of their colleagues at the agenda-setting stage, *it seems equally difficult to understand why they would not consider the preferences and likely actions of external actors who may be in a position to thwart their efforts to make policy*. While this claim—which embodies what we call a dynamic account of agenda-setting—may hold across a range of disputes, we believe it is especially apt in cases of statutory interpretation. In these cases justices know that a non-trivial probability exists that Congress will override or, at least, scrutinize their opinions.[45]

This logic is illustrated in Figure 1, depicting a hypothetical set of preferences over a particular policy, in this example a federal civil rights statute. The horizontal line represents a policy space, ordered from left (most "liberal") to right (most "conservative"). The vertical lines show the preferences (the "most preferred positions") of the relevant actors: the President, the median member of the Court, the median member of Congress, and the key committees and other gatekeepers in Congress that make the decisions over whether to propose civil rights legislation to their respective houses.[46] Note that we also identify the committees' indifference point "where the Court can set policy which the committee likes no more and no less than the opposite policy that could be chosen by the full chamber."[47] To put it another way, because the indifference point and the median member of Congress are equidistant from the committees, the committees like the indifference points as much as they like the most preferred position of Congress; they are indifferent between the two.

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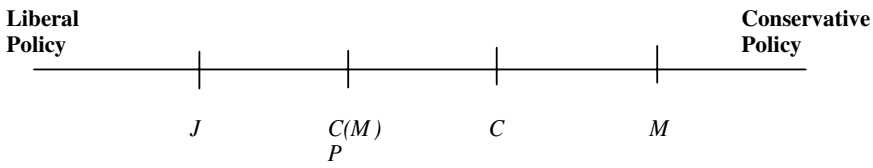
21 1997, at A23.

[45] *See* Eskridge, *Overriding*, *supra* note 5, at 387–89.

[46] In denoting these "most preferred" (or "ideal") points, we assume that the actors prefer an outcome that is nearer to that point than one that is further away. Or, to put it more technically, "beginning at [an actor's] ideal point, utility always declines monotonically in any given direction. This . . . is known as single-peakedness of preferences." Keith Krehbiel, *Spatial Models of Legislative Choice*, 13 LEGIS. STUD. Q. 259, 263 (1988). We also assume, that the actors possess complete and perfect information about the preferences of all other actors and that the sequence of policy-making enfolds as follows: the Court interprets a law, the relevant congressional committees propose (or do not propose) legislation to override the Court's interpretation, Congress (if the committees propose legislation) enacts (or does not enact) an override bill, the President (if Congress acts) signs (or does not sign) the override bill, and Congress (if the President vetoes) overrides (or does not override) the veto.

[47] Eskridge, *Overriding*, *supra* note 5, at 378.

FIGURE 1. HYPOTHETICAL DISTRIBUTION OF PREFERENCES[48]



Equilibrium Result, x ≅ C(M)

Note: J is justice *J*'s most preferred position (assume she is 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 most preferred position of the key committees in Congress that decide whether or not to propose legislation to their respective houses; and *C(M)* represents the committees' indifference point, that is, the point on the policy spectrum of which the committee becomes indifferent as to whether that policy option or the Court's view is adopted because the committee prefers neither.

Now suppose a justice (whom we have labeled as *J*) must decide whether to grant certiorari to a petition that would require the Court to interpret a federal civil rights statute. Further suppose that *J* believes that the majority of her colleagues will adopt her most preferred statutory interpretation, should the Court agree to grant review. At the same time, given the preference distribution in Figure 1, *J* realizes that if the Court accepts and decides the case, her most preferred policy may not "stick": The most preferred positions of all the key elected actors—the congressional committees, the median member of Congress, and the President—are to the right of her most preferred point. So, surely, there is some possibility that these external actors will attempt to override her policy and replace it with a more conservative one.

What would justice *J* do? Would she vote to grant certiorari? On the account offered by many contemporary studies of agenda-setting—including Caldeira, Wright, and Zorn's—the answer is simple enough: as long as *J* believes that a majority of the Court will support her preferred interpretation (as she does), she would agree to hear the case.[49] She would do so because, under these accounts, the only strategic calculations that justice *J* makes pertain to the preferences and likely actions of her colleagues.

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[48] We adapt this figure from Eskridge, *Overriding*, *supra* note 5, at 381.

[49] *See, e.g.*, Boucher & Segal, *supra* note 18, at 824; Caldeira et al., *supra* note 18, at 549.

There is an obvious problem with this analysis: why would a justice who wants to establish policy for the nation concern herself exclusively with the preferences and likely actions of her colleagues, when elected actors (e.g., members of Congress and the President) are in a position to override her most preferred position or move it outside a range she would deem acceptable? The answer, according to a dynamic account of agenda-setting, is that she would not. Rather, she would also formulate expectations about the preferences and likely actions of those other actors, and use those expectations to make a case-selection decision.

What would those calculations lead her to do? The answer depends on the sort of political environment in which she believes that she is operating. On the one hand, if she observes a political environment that *does not constrain* her (say, Congress and the President agree with her most preferred interpretation of the statute) and she continues to believe that a majority of her colleagues share her preference, then she would have every reason to vote to grant certiorari.

If, on the other hand, she observes a political environment that *constrains* her (for instance, the sort depicted in Figure 1), then her decision is more complex, as she has two possible courses of action. First, she could attempt to frustrate efforts on the part of Congress and the President to override Court decisions by "strategically selecting certain judicial instruments over others."[50] In the agenda-setting context, such strategizing would take the form of *opting out of a statutory mode and into a constitutional one*, either by (1) rejecting a petition that requires her to interpret a federal act, in favor of one that raises constitutional questions; or (2) focusing on constitutional claims contained in a petition, rather than on those of a statutory nature.[51]

While scholars have not previously appreciated the likelihood of such strategic behavior on the level of the United States Supreme Court,[52] this account of the justices' agenda-setting decisions has intuitive appeal. Indeed, given that it is far more difficult for the elected branches to override a constitutional decision than a statutory one,[53] it seems implausible

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[50] Joseph P. Smith & Emerson H. Tiller, The Strategy of Judging: Evidence from Administrative Law 7 (1997) (unpublished working paper, Center for Legal and Regulatory Studies, Graduate School of Business, University of Texas) (on file with the authors).

[51] In so writing, we assume that justices are free to pick and choose among the issues they will address in their decisions—an assumption resting on firm empirical ground. *See, e.g.*, Kevin T. McGuire & Barbara Palmer, *Issue Fluidity of the U.S. Supreme Court*, 89 AM. POL. SCI. REV. 691 (1995); S. Sidney Ulmer, *Issue Fluidity in the U.S. Supreme Court: A Conceptual Analysis*, *in* SUPREME COURT ACTIVISM AND RESTRAINT 322 (Stephen D. Halpern & Charles M. Lamb eds., 1982).

[52] The vast majority of work on strategic instrumentation has centered on the ways United States Court of Appeals judges attempt to insulate their decisions from reversal by the United States Supreme Court. *See, e.g.*, Smith & Tiller, *supra* note 50; Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349, 362 (1999).

[53] *See supra* note 26.

that a justice at odds with Congress would agree to hear and decide, for example, an affirmative action case brought solely on Title VII grounds, when among the thousands of certiorari petitions she could surely locate a similar dispute raising (at least some) Fourteenth Amendment claims.

The justice does, of course, have a second option: she could grant the statutory petition and risk a congressional override. While some scholars seem to view this as an "irrational" choice for policy-oriented justices,[54] other research has suggested that there are circumstances when it is not.[55] For example, if congressional preferences are not fixed but rather can be influenced by the Court, the justices might have the institutional wherewithal to safeguard themselves from reversal. Alternatively, the Court might not be able to alter congressional preferences, but could change congressional beliefs about the consequences of various actions.[56] Finally, if Congress does not necessarily have the last word, the justices could signal their willingness to battle Congress over the issue.[57]

To be sure, 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.[58] Eskridge has provided data to support this claim.[59] As Table 1 shows, the percentage of congressional override attempts increases as the degree of unanimity decreases.[60] To put it another way, a Supreme Court decision handed down by a one-vote margin has about a one in two chance of get-

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[54] *See, e.g.*, Spiller & Gely, *supra* note 7 (arguing against the possibility that a policy-oriented justice would risk a congressional override).

[55] *See, e.g.*, Mark C. Miller, *Courts, Agencies, and Congressional Committees: A Neo-institutional Perspective*, 55 REV. POL. 471, 486 (1993) (reporting results from personal interviews suggesting that three House committees "treat court decisions with much more deference than they treat decisions from federal agencies," and concluding that "committee reactions to court decisions are seen as much more unusual than reactions to agency decisions"); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 565 (1992) ("[C]ourt action that determines the meaning of statutes fundamentally affects the deliberative processes in the other branches").

[56] *See* Martin, *Congressional Decision Making*, *supra* note 15.

[57] *See* Ferejohn & Weingast, *supra* note 55, at 566–67 (arguing that the Court's interpretive decisions may "profoundly affect the kind of democracy that is practiced in the more overtly political branches" by creating incentives for legislators to adopt certain deliberative processes).

[58] *See, e.g.*, BRADLEY C. CANON & CHARLES A. JOHNSON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT (1999); THOMAS MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989).

[59] *See* Eskridge, *Overriding*, *supra* note 5, at 350; *see also* Hettinger, *supra* note 25, at 21; Zorn & Caldeira, *supra* note 25, at 12, 18–19.

[60] *See* Eskridge, *Overriding*, *supra* note 5, at 350.

ting the congressional once-over.[61] The odds are only one in four for unanimous decisions.[62]

TABLE 1. CONGRESSIONAL OVERRIDE ATTEMPTS BY VOTE SPLITS IN SUPREME COURT DECISIONS, 1978–1984[63]

Vote Split on the Court	**% Scrutinized by Congress**
9-0 Decisions (N=85)	28
8-1 Decisions (N=33)	33
7-2 Decisions (N=36)	45
6-3 Decisions (N=65)	41
5-4 Decisions (N=56)	48

A. Prediction from the Dynamic Account of Agenda-Setting

Particular data points in Table 1 are, to be sure, of interest. It is the more general lesson, however, that should not be missed: Justices can insulate their decisions from override attempts if they are able to muster substantial majorities behind them.

When we couple this point with our observation that justices may decide strategically to hear constitutional rather than statutory cases,[64] the dynamic account of agenda-setting leaves us with a straightforward prediction about case-selection decisions. If contemporaneous political actors affect the Court's agenda-setting decisions, then the effects of those actors should manifest themselves in the following way: Justices will opt into a constitutional mode, eschewing statutory decisions for those of a constitutional variety, *unless they believe that they can insulate their ultimate policy decisions from reversal*. In other words, justices will pursue constitutional decisions, rather than statutory ones, unless they believe they can produce statutory decisions that are near-unanimous and thus unlikely to face Congressional reversal. Of course, we are not saying that justices need know with certainty whether their Court will produce unanimous or near-unanimous decisions. We are simply suggesting, as our emphasis on "believe" indicates, that they have some general sense of

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[61] *See id.*
[62] *See id.*
[63] Adapted from Eskridge, *Overriding*, *supra* note 5, at 350.
[64] *See supra* notes 50–51 and accompanying text.

how their colleagues will vote and, thus, of the margins of victory their decisions will produce**.**

B. Scattered Evidence Supporting the Dynamic Account's Prediction

In its most general and conceptual form, our prediction suggests that political actors in one branch of government may avoid placing policies on their institutional agenda when they believe that members of other branches would move policy far from their most preferred points, unless they also believe that they can insulate their ultimate policy decisions from reversal. Certainly, we recognize that we are not the first to offer such a hypothesis—at least not in this general form and as it may pertain to other political organizations. Academics who study the legislative process, for example, have long observed that congressional committees contemplate the likely outcomes on the floor, as well as the probable actions of the President, when they consider proposing legislation.[65]

Even within the scholarship on law and courts there is scattered evidence to support the view that courts facing the sort of environment depicted in Figure 1 act in a sophisticated fashion when it comes to case selection. We know, for example, that there are many salient and seemingly "certworthy" petitions that the Court has denied over the years,[66] *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 Vietnam War, despite its obvious importance and many requests to do so.[67] Further, Supreme Court clerks (who make recommendations to the justices regarding certiorari) occasionally point out the political consequences of accepting petitions.[68]

Consider the following advice, proffered by Justice Burton's clerk, regarding a miscegenation petition (*Naim v. Naim*),[69] which arrived at the Court's doorstep the very year after it issued its highly controversial decision in *Brown v. Board of Education*:[70]

> 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

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[65] *See, e.g.*, PETER M. VAN DOREN, POLITICS, MARKETS, AND CONGRESSIONAL POLICY CHOICES (1991); Mouw & MacKuen, *supra* note 44.

[66] Writers have invoked the term "certworthy" to signify those petitions that, by virtue of some identifiable feature, seem to merit the Court's attention. *See, e.g.*, PERRY, *supra* note 16. Usually the feature is a conflict among federal circuit courts over the matter at hand. *See id.*

[67] *See* PROVINE, *supra* note 18, at 54–60 (discussing the same examples).

[68] *See id.*

[69] 350 U.S. 985 (1955) (denying a motion to recall the mandate and to set the case down for oral arguments), *vacated & remanded*, 350 U.S. 891 (1955).

[70] 347 U.S. 483 (1954).

> claim is unsubstantial . . . . It is with some hesitation . . . that I recommend that we NPJ [note probable jurisdiction, i.e., grant review]. This hesitation springs from the feeling that we ought to give the present fire a chance to burn down.[71]

Justice Burton declined to take his clerk's advice, voting instead to dismiss.[72] Four others, however, namely, Justices Douglas, Reed, Black, and Warren, wanted to resolve the dispute.[73] Despite the existence of a sufficient number of votes to review, the Court put the case on hold.[74] On the next vote, only Justices Douglas, Reed, and Black agreed to note jurisdiction and, at the final conference, the justices unanimously agreed to issue a vacate and remand order.[75] Why the change? According to Justice 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."[76]

There also is more systemic evidence, albeit of a limited nature. Provine shows that between 1954 (after *Brown*) and 1957, the Court received at least five petitions (in addition to *Naim*) involving major segregation issues.[77] It granted certiorari in just one, *Holmes v. City of Atlanta*,[78] only to vacate the lower court's ruling without a full hearing on the merits.[79] Invoking more recent data on petitions raising claims of race and sex discrimination in employment practices, Epstein and Knight report that during the 1978 term, when the Court's Republican-appointed majority 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.[80] When the political landscape changed in the early 1980s, with all three branches moving in a more conservative direction (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 overall average acceptance rate

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[71] PROVINE, *supra* note 18, at 59–60.
[72] *See id.* at 60.
[73] *See id.*
[74] *See id.*
[75] *See id.*
[76] *Id.*
[77] *See id.*
[78] 350 U.S. 879 (1995).
[79] *See* PROVINE, *supra* note 18, at 60 (citing Speed v. City of Tallahassee, 356 U.S. 913 (1958); Florida ex rel. Hawkins v. Bd. of Control, 355 U.S. 839 (1957); Hood v. Bd. of Trustees, 352 U.S. 870 (1956); Holmes v. City of Atlanta, 350 U.S. 879 (1955); Ill. Commerce Comm'n v. Ill. Cent. R.R. Co., 348 U.S. 823 (1954)).
[80] *See* EPSTEIN & KNIGHT, *supra* note 7, at 83. The authors examined cases listed under the subject "Equal Employment Practices," subheading "Race" and "Sex," listed in the index of the *CCH Supreme Court Bulletin. See id.*; *see also* http://www.artsci.wustl.edu/~polisci/epstein/choices/ (describing coding rules and data).

for that term (6%).[81] Finally, there is Friedman's analysis of *United States v. Lopez*,[82] in which the Court (for the first time in 60 years) struck down an act of Congress as a violation of the Commerce Clause.[83] In speculating on why the justices have, since *Lopez*, denied certiorari to several similar cases, Friedman suggests that "the Court, having made its views known in *Lopez*, simply is biding its time, watching to see what a very different Congress might do with regard to new legislation."[84]

II. Research Design

These 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 empirical inquiry. Do Supreme Court justices, who clearly (at least to us) engage in forward thinking with regard to their colleagues at the certiorari stage, also take into account the likely reactions of other relevant actors (for example, the Congress and the President), as the dynamic account would predict?

We can envisage many ways to address this question.[85] Given our interest in making general claims about the agenda-setting process, one emerges as particularly appropriate: We consider the percentage of constitutional and non-constitutional cases that the justices have agreed to hear since 1946, expecting that—if the dynamic account holds—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, speaking, relatively homogenous in ideology and, thus, in a position to produce authoritative decisions.

A. Assumptions

Before turning to the data, we ought to comment on the assumptions embedded in our plan for assessing the dynamic account. The first is ob-

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[81] *See* Epstein & Knight, *supra* note 7, at 83.

[82] 514 U.S. 549 (1995).

[83] *See* Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of* United States v. Lopez, 46 Case W. Res. L. Rev. 757 (1996).

[84] *Id*. at 797–98. Since the publication of Friedman's piece, the Supreme Court has decided several cases based on the Commerce Clause. Most notable is United States v. Morrison, 529 U.S. 598 (2000), in which the justices relied on *Lopez* in striking down portions of a federal statute creating civil remedies for gender-motivated violence. *See id.* at 601; *see also Jones v. United States*, 529 U.S. 848 (2000) (holding that a federal criminal statute against arson, passed pursuant to the commerce power, could not be applied to regulate behavior taken against a private residence that was not used in any commercial activity).

[85] We could, for example, follow the leads of Provine, *supra* note 18, or Epstein & Knight, *supra* note 7, and investigate particular areas of the law. This approach, however, can tell us only whether the Court is engaging in dynamic agenda-setting over that legal issue, and not in the main.

vious: As we noted earlier, we adopt a mainstream assumption about the goals of justices: they wish to establish policy that other political actors will respect and comply with and is as close as possible to their own most preferred position. Thus, we agree with the sentiment: "[A]lthough justices occasionally pursue other goals and the occasional justice never pursues policy, most justices in most cases seek to establish law as close as possible to their own preferences."[86]

Second, we believe that justices are freer to pursue their sincere preferences in constitutional cases than in non-constitutional ones. We realize that this assumption is not perfect. For example, some scholars argue that the constraints imposed by other actors—if they, in fact, exist—may also be operative in constitutional cases.[87] To the extent that members of Congress are able to deploy any number of weapons to attack the Court when it issues constitutional (or, for that matter, any other sort of) decisions it dislikes[88] and the justices are aware of these weapons, we appreciate this argument. Still, for the simple reason that it is far more difficult for the elected branches to override a constitutional decision than a statutory one, this is an assumption that guides Eskridge's and others' work on judicial decisions,[89] and one we think plausible to make in our study of dynamic agenda-setting.[90]

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[86] EPSTEIN & KNIGHT, *supra* note 7, at 49; *see also* SEGAL AND SPAETH, supra note 37, at 4, 17–18.

[87] *See, e.g.*, Epstein, Knight, & Martin, *supra* note 7; FRIEDMAN, *supra* note 83. Furthermore, even some of the examples we used above suggest as much. *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954); *Lopez*, 514 U.S. at 549.

[88] A few of these weapons are outlined in Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. OF POL. 369 (1992). For example, the Senate could use its confirmation power to select judges who hold certain views. *See id.* at 377. Alternatively, Congress could pass a bill to amend the Constitution. *See id.* In extreme situations, judges who often rule against Congress could be impeached. *Id*. Congress may also attempt to reinstate regulations held unconstitutional by the Court by suggesting an alternative constitutional ground for the policy. *Compare* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009-369, 3009-372 (1996) (amending 18 U.S.C. § 922(q) to provide criminal penalties for knowing possession in a school zone of a firearm that "has moved in or that otherwise affects interstate or foreign commerce") *with* United States v. Lopez, 514 U.S. 549, 551 (1995) (invalidating a previous version of § 922(q) that banned knowing possession of a firearm within a school zone without requiring that the gun have moved in interstate commerce); *cf.* Boerne v. Flores, 521 U.S. 507, 535–36 (1997) (invalidating a statute which Congress passed with the express purpose of overruling a prior Constitutional decision by the Court). To the extent that the Court believes Congress may invoke such powers, the mere threat of their use may constrain the Court, even if Congress rarely uses them in practice.

None of this takes away from the point we make in the text; namely, that it is more difficult to override constitutional decisions than statutory ones, particularly in light of Court decisions like Boerne and Dickerson. *See supra* note 26.

[89] *See, e.g.*, Eskridge, *Overriding*, *supra* note 5, Eskridge, *Reneging*, *supra* note 5; Segal, *supra* note 12.

[90] Certainly there are some scholars who argue that "Congress can and does attempt to reverse Supreme Court [constitutional] rulings." James Meernik & Joseph Ignagni, *Judicial Review and Coordinate Construction of the Constitution*, 41 AM. J. POL. SCI. 447, 458 (1997); *see also* LOUIS FISHER, CONGRESSIONAL CHECKS ON THE JUDICIARY, CONGRESS

Third, we assume that justices recognize that they may be able to insulate their policies from legislative reversal by reaching authoritative decisions (those that are as close to unanimous as possible)[91] but, at the same time, acknowledge that internal heterogeneity may inhibit their ability to do so. Hence, when justices believe that ideological divisions on the Court will prevent them from deploying a wide-margin opinion on a matter of statutory interpretation (that is, when they believe they lack the institutional wherewithal to discourage a congressional override attempt), they will eschew making statutory decisions in favor of those of a constitutional variety.

Finally, we assume that there are a sufficient number of constitutional and statutory petitions each term (or enough that raise both kinds of claims) that the Court could substitute one type of case for the other (or address one kind of claim to the neglect of the other).[92] Given that the justices receive more than 7000 petitions per term, and issue written opinions on fewer than 1% of them, we do not think that this is a particularly onerous assumption to make.[93]

B. 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 decisions it reaches each year). We also must create measures of our two independent variables (those variables we are invoking to explain variation in case mix): preference homogeneity on the Court, which ought tap the degree to which the justices *believe* they can insulate themselves from legislative reversal by producing authoritative decisions; and the preferences of the political institutions, which should reveal the extent of the *constraints* that the other institutions place on the Court.

CONFRONTS THE COURT: THE STRUGGLE FOR LEGITIMACY AND AUTHORITY IN LAWMAKING 28 (Colton C. Campbell & John F. Stack eds., 2001). Even they do not argue, however, that it is more difficult for Congress to override statutory interpretations than constitutional ones.

[91] There is no shortage of literature to support this assumption. For examples, *see* CANON & JOHNSON, *supra* note 58; WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 66 (1964) ("The greater the majority, the greater the appearance of certainty and the more likely a decision will be accepted and followed in similar cases.").

[92] To return to our earlier example: We assume that a Court at odds with Congress could locate, for example, an affirmative action petition raising Fourteenth Amendment claims, rather than one brought exclusively under Title VII.

[93] During the last term for which available data exist (1999), the Court received 7374 requests for review; it granted 1.2% (n=92). *See* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 15 (2001). Of the terms we analyze in this Article (1946–1992; *see infra* p. 416), the Court received the fewest petitions in 1950 (n=1,055). It granted review to 10% (n=106) that term. *See* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 80 (1996).

The first task is easy enough. The dependent variable, as depicted in Figure 2, is the percentage of all constitutional and statutory decisions (issued by the Court between the 1946 and 1992 terms) that are statutory. We define constitutional decisions as those in which the *primary* authority for the Court's decision, according to Spaeth's United States Supreme Court Judicial Database,[94] 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.[95] Note that under these definitions, as the figure shows, a great deal of variance exists in the percentage of statutory decisions made 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). Additionally, no long-term secular increase or decrease appears to exist in the data.

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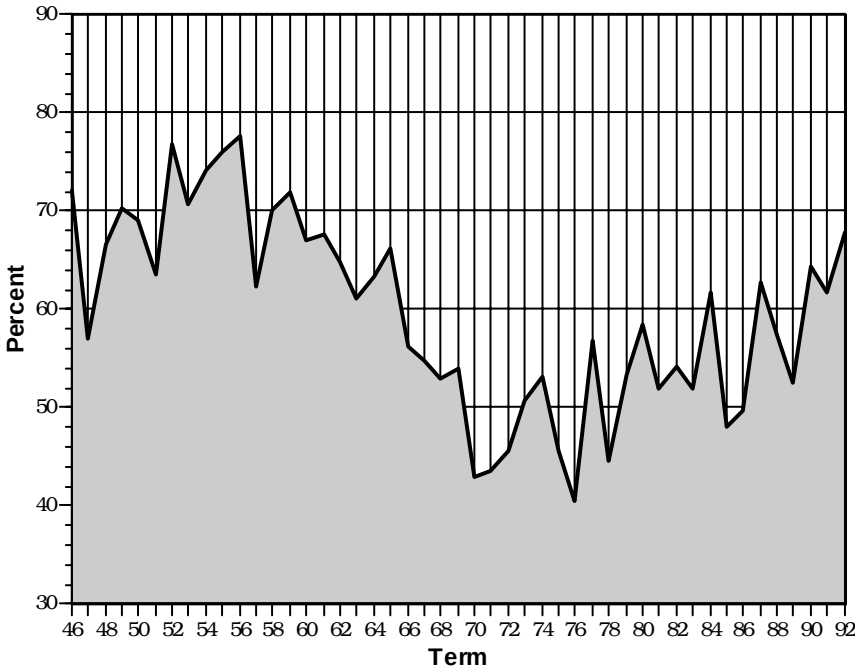
[94] The United States Supreme Court Judicial Database (and its variants) is a multi-user database that Harold J. Spaeth, created in the late 1980s. It contains scores of attributes of Court decisions, handed down since 1946, ranging from the date of the oral argument to the identities of the parties to the litigation to how the justices voted. The database (and the documentation necessary to use it) is available at: http://www.ssc.msu.edu/~pls/pljp/sctdata1.html.

[95] All data used in this Article are available at: http://artsci.wustl.edu/~polisci/epstein/research/dynamic.html. So, suffice it to note here, we included cases (from the Spaeth database) that met the following definitions: analu=0 or 1 or 4 (meaning each docket number, plus split vote cases, included); dec_type=1 or 6 or 7 (meaning orally argued cases decided by signed opinions, judgments, or per curiams included).

FIGURE 2. PERCENTAGE OF COURT'S PLENARY DOCKET COMPOSED OF STATUTORY CASES, 1946–1992 TERMS[96]



The second task, developing a measure of justices' beliefs on preference homogeneity on the Court, is equally straightforward: We rely on Segal and Cover's judicial preference scores[97]—scores that many scholars have invoked to study judicial decisions.[98] To derive them, the researchers content-analyzed newspaper editorials written between the time of justices' nominations to the United States Supreme Court and their confirmations. Specifically, and as Segal and Cover tell it,

> [W]e trained three students to code each paragraph [in the editorial] for political ideology. Paragraphs were coded as *liberal,*

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[96] *See* Harold J. Spaeth's United States Supreme Court Judicial Database, *supra* note 94.

[97] Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 560 (1989).

[98] *See, e.g.*, EPSTEIN ET AL., *supra* note 93; Epstein, Knight, & Martin, *supra* note 7; Lee Epstein & Carol Mershon, *Measuring Political Preferences*, 40 AM. J. POL. SCI. 260 (1996); SEGAL & SPAETH, *supra* note 37; Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 813 (1995).

> *moderate*, *conservative*, or *not applicable.* Liberal statements include (but are not limited to) those ascribing support for the rights of defendants in criminal cases, women and racial minorities in equality cases, and the individual against the government in privacy and First Amendment cases. Conservative statements are those with an opposite direction. Moderate statements include those that explicitly ascribe moderation to the nominees or those that ascribe both liberal and conservative values.[99]

Segal and Cover then measure judicial policy preferences by subtracting the fraction of paragraphs coded conservative from the fraction of paragraphs coded liberal and dividing by the total number of paragraphs coded liberal, conservative, and moderate. Their resulting scale of policy preferences ranges from –1 (unanimously conservative) to 0 (moderate) to +1 (unanimously liberal)—with Table 2 displaying the specific scores for justices serving on the Court since 1946.[100]

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[99] Segal & Cover, *supra* note 97, at 559.

[100] *Id.* Table 2 displays the scores in the form that Segal and Cover report them. *Id.* To use them for our analysis, we take the standard deviations of the scores, multiply by –1 (to make the more homogeneous courts larger) and add .40 (to give the least homogeneous Court a positive score of .01; the most homogeneous Court has a score of .23).

TABLE 2. MEASURING JUSTICES' BELIEFS ABOUT PREFERENCE HOMOGENEITY ON THE COURT: THE SEGAL-COVER SCORES[101]

Justice	Segal/Cover Score
Black	.75
Blackmun	–.77
Brennan	1.00
Breyer	–.05
Burger	–.77
Burton	–.44
Clark	.00
Douglas	.46
Fortas	1.00
Frankfurter	.33
Ginsburg	.36
Goldberg	.50
Harlan	.75
Jackson	1.00
Kennedy	–.27
Marshall	1.00
Minton	.44
Murphy	1.00
O'Connor	–.17
Powell	–.67
Reed	.45
Rehnquist	–.91
Rutledge	1.00
Scalia	–1.00
Souter	–.34
Stevens	–.50
Stewart	.50
Thomas	–.68
Vinson	.50
Warren	.50
Warren	.50
White	.00
Whittaker	.00

[101] The Segal/Cover values are from 1.00 (most liberal) to –1.00 (most conservative). They were derived from content analyses of newspaper editorials prior to confirmation. We obtained them from Segal & Cover, *supra* note 97, at 560.

For two reasons, these measures are ideal for our purposes. First, as we note above, we require an indicator that reflects the sort of information we believe the justices possess about the likely actions of the Court; namely, that they have beliefs about, but do not know with certainty, the ultimate size of the majority coalition. Because the Segal/Cover scores are based on newspaper editors' assessments of the justices and, thus, measure general perceptions of preferences, they nicely fit the bill. Second, while the Segal/Cover scores are independent of judicial votes, they provide a satisfactory predictor of them. 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.[102]

The final task, determining the constraints placed on the Court by the other branches, is more complex. We begin by considering the notion, advanced by Eskridge and other proponents of dynamic accounts of Court decisions, that justices foresee what Congress and the President would do if the Court heard a case and decided it in any given direction.[103] This requires that justices either have, or act as if they have, an intuitive model of national lawmaking.

Nevertheless, little agreement exists among academics over how best to model the legislative process. Accordingly, we rely on two separate accounts, hoping to find consistent results regardless of which we use.[104] The first, the Committee-Power model, requires that committees report legislation to the floor for consideration under an open rule.[105] The second, 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.[106] Under this model, the type

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[102] *See* Epstein & Mershon, *supra* note 98.

[103] Eskridge, *Overriding*, *supra* note 5, at 378 ("The Court is attentive to current congressional (and, as will be shown, presidential) preferences when it interprets statutes."); Eskridge, *Reneging*, *supra* note 5, at 644 ("The Court/Congress/President game assumes that each player operates with complete information about other players' preferences, and, therefore, perfectly anticipates the future course of play.").

[104] *See* Segal, *supra* note 12, for a full discussion of these models. The Multiple-Veto model is a third option; however, since this model produces only one year in which the Court is constrained by the relevant political actors, we are unable to assess the dynamic account against it.

[105] This model takes its cues from the account offered by John Ferejohn & Charles Shipan, *Congressional Influence on the Bureaucracy*, J.L. Econ. & Org. Special Edition 1990 at 1, 3–4.

[106] *See, e.g.*, Gary W. Cox & Matthew D. McCubbins, Legislative Leviathan: Party Government in the House 251–52 (1993) ("Because the payoffs of the majority leadership reflect the collective interests of the party . . . the leadership's scheduling preferences do too."); D. Roderick Kiewiet & Matthew D. McCubbins, The Logic of Congressional Parties and the Appropriations Process 92–93 (1991) ("The party caucus should be reluctant to entrust such important duties to members whose preferences over spending levels are unrepresentative of the caucus as a whole. Assuming that a reliable indicator of members' preferences across a wide range of policies is their position along a general, liberal-conservative continuum, we hypothesize that the congressional party, in order to achieve its desired policy goals, strives to make the median voter in its

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 to the right when control passes from Democrats to Republicans. For example, the recent takeover of the Senate by the Democrats moves the balance of power in that chamber and in its Judiciary Committees to the left.

These two models, of course, differ in their depiction of the legislative process. For our purposes, they overlap in an important way: To test the prediction flowing from our dynamic account of agenda-setting, we must: (1) develop measures of the preferences of the key actors embedded in each model; and (2) identify the set of irreversible decisions so that we can calculate the constraints (or lack thereof) the Court faced each year from those actors.

1. Measuring Preferences

To measure the (revealed) ideological preferences of members of Congress, we use support scores provided by the Americans for Democratic Action ("ADA"). While ADA scores have noted deficiencies (for example, the ADA counts non-voting members as voting against its position), those flaws should have little influence on chamber and committee medians.[107] Moreover, recent research demonstrates the reliability, validity, and stability of ADA scores as a proxy for congressional ideology.[108]

Assuming that ADA scores measure preferences on a liberal-conservative dimension, we require an indicator of Supreme Court preferences that does the same and is independent of the preferences of Congress. We obtain such a measure from research by Segal, who uses predicted, annual, liberalism support scores in non-unanimous civil liberties constitutional cases.[109] These allow us to derive the median justice and, thus, our measure of the Court's most preferred position.

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contingent on a committee coincide with the median voter of the caucus as a whole.").

[107] While any factor that leads to a change in a member's voting score would change the *mean* for that member's chamber, changes in a member's voting score only change the chamber's *median* if the member passes from one side of the median to the other. Yet, even this would only shift the median from what was the 50th percentile Congressman to what was the 49th (or 51st) percentile Congressman.

[108] RICHARD HERRERA ET AL., *Stability of Congressional Roll-Call Indexes*, 48 POL. RES. Q. 403 (1995). Alternatively, we could have used the NOMINATE scores developed in KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997). Given the advantages of the ADA scores, we believe: (1) the ADA approach is superior, and (2) the substitution of NOMINATE scores would not appreciably affect our results since the two scores are highly correlated. (The correlation is typically around 0.9). *See* E. Scott Adler & John S. Lapinski, *Demand-Side Theory and Congressional Committee Composition: A Constituency Characteristics Approach*, 41 AM. J. POL. SCI. 895 (1997).

[109] As Segal, *supra* note 12, indicates, he goes to great lengths to ensure that these scores are independent of congressional preferences. First, and for obvious reasons, he excludes statutory decisions. Second, Segal uses only civil liberties cases because the

2. Identifying the Set of Irreversible Decisions

With these preferences measures in hand, we must determine—for both models of the legislative process—the set of irreversible decisions that the Court faced each year, such that decisions mapping within that set could not be reversed. From these we calculate the constraints confronting the Court. If the Court's predicted preference falls within the set of irreversible decisions, 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 (or below the minimum), then the constraint is the distance from the Court to the maximum (minimum). The larger the distance, the more likely the Court should be to agree to hear constitutional cases over statutory ones.

To construct these "winsets,"[110] we invoke the procedures outlined in Segal,[111] with Table 3 displaying the specific calculations for the two models of the legislative process. Note that these calculations do not merely take into account the relevant congressional actors but the President as well. This ensures that we capture a key feature of the dynamic agenda-setting account, and an underlying feature of Eskridge's theory of dynamic statutory interpretation, that the justices should be attentive to

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House and Senate Judiciary Committees have jurisdiction over almost all of the Court's civil liberties decisions. While this method might limit generalizability, it does so over an area that encompasses a large proportion of the Court's docket. Third, Segal selects nonunanimous decisions only. He does so to enhance the ability to scale these decisions with the ADA measure of congressional preferences. Fourth, he uses annual support scores, not aggregates across an entire career. A fair number of justices demonstrate long-term changes in their sincere preferences. *See* Lee Epstein et al., *Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices*, 60 J. POL. 801 (1998). Fifth, Segal uses OLS regression predicted annual support scores, not actual annual support scores. This further works to ensure 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.

After taking these steps, we, like Segal, scale the scores for their comparability to ADA scores. We followed Segal's approach since there is no other clear method. He sought expert judgments from four highly regarded public law colleagues, asking them how, in their judgments, these scores related to ADA scores. For example, is 93.3 (Justice Douglas's score) about where Douglas would be if he had real and comparable ADA scores, or is it too high, or too low? Is 5.0 (Justice Rehnquist's score) about where Justice 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, we believe the results have a fair amount of facial validity, and are certainly less arbitrary than the placement of players that one finds in some of the extant literature.

[110] We call them "winsets" because the Court should behave in predicted ways when it is within the boundaries of these constraint sets. They are not Pareto sets, for there are points in each constraint set that are in equilibrium but suboptimal.

[111] Segal, *supra* note 12; Jeffrey A. Segal, *Correction to 'Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 92 AM. POL. SCI. REV. 923 (1998).

all relevant elected actors in a position to move policy away from their most preferred position, not just legislators.

TABLE 3. CONSTRUCTION OF WINSETS (CONSTRAINT SETS) FOR TWO LEGISLATIVE MODELS

Committee-Power Model		**Party-Caucus Model**	
Republican President	**Democratic President**	**Republican President**	**Democratic President**
Minimum	*Minimum*	*Minimum*	*Minimum*
HSE33, SEN33, HJMed, SJMed, HJind, SJind	HSEMed, SMed, HJMed, SJMed, HJind, SJind	HSE33, SEN33, HMCaucm, SMCaucm, HMCind, SMCind	HSEMed, SMed, HMCaucm, SMCaucm, SMCind, HMCind,
Maximum	*Maximum*	*Maximum*	*Maximum*
HSEMed, SMed, HJMed, SJMed, HJind, SJind	HSE67, SEN67, HJMed, SJMed, HJind, SJind	HSEMed, SMed, HMCaucm, SMCaucm, HMCaucm, HMCind, SMCind	HSE67, SEN67, HMCaucm, SMCaucm, HMCind, SMCind

Key: HSE33=33rd percentile member of the House; SEN33=33rd percentile member of the Senate; HJMed=House Judiciary Committee Median; SJMed=Senate Judiciary Committee Median; HJind=House Judiciary Committee indifference point; SJind=Senate Judiciary Committee indifference point; HSEMed=House Median; SMed=Senate Median; HSE67=67th percentile member of the House; SEN67=67th percentile member of the Senate; HMCaucm=House Majority Party Caucus median; SMCaucm=Senate Majority Party Caucus median; HMCind=House Majority Party Caucus indifference point; SMCind=Senate Majority Party Caucus indifference point. Note: Indifference points only matter when gatekeepers are outside the constraints set by the chamber medians and veto-override points.

Using the ADA scores to make the requisite calculations, we find that—over the forty-six terms we examined—the median of the Court falls outside the set of irreversible decisions four times in the Committee-Power model and three times in the Party-Caucus Model. Such results tell us that the justices are almost always unconstrained (at least under our measurement scheme) to go about their agenda-setting task without fear of eventual override, given their perceptions of the preferences of the sitting Congress. From a statistical standpoint, the results also commend

caution in conducting our investigation. That is because we are invoking models with few non-zero constraints to predict a rather long series of annual data. Certainly this is not unusual in quantitative research but it does suggest that the analysis ought proceed gingerly.[112]

C. Assessing the Dynamic Account of Agenda-Setting

Despite the fact that our models of the legislative process produce only three (the Party-Caucus Model) or four (the Committee-Power Model) terms in which the median justice lies outside the irreversible set, it is surely important to examine those instances when they occur and, more specifically, to determine whether the prediction flowing from our dynamic agenda-setting account accurately captures Court behavior. To do so, we follow the same procedure for both models of the legislative process. We begin by placing 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 irreversible decisions established by the relevant model. Then, for each year, we measure: (1) the degree of homogeneity on the Court, as revealed by the Segal/Cover scores, and (2) whether, under each model of the legislative process, the Court is constrained and, if so, by how much and in which direction. Finally, we use these data to determine whether the constraints influence the relative percentage of constitutional and statutory cases on the Court's plenary docket.

III. RESULTS

We are, of course, most interested in assessing the predictive value of the dynamic account of agenda-setting. Let us start, however, with the simpler, bivariate notion suggested by some scholars:[113] when the Court is constrained by Congress, it lacks the institutional wherewithal to withstand challenges; in other words, it is completely *dominated* by the legislative branch and cannot overcome that domination even when its homogeneity permits it to produce authoritative decisions. In empirical terms this simply means that as the Court's preferences move further from those of Congress the percentage of statutory cases heard by the Court decreases. We begin this way, even though, as we noted earlier, attentiveness to the preferences of other institutions need not always lead to sophisticated behavior, for it is unlikely that, under our Madisonian system, one political institution can be wholly dominated by another.

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[112] We could cite many illustrations, but one that readily comes to mind is research on the effect of war on presidential popularity, using the presence or absence of conflict in a given year as an independent variable. A classic example is John E. Mueller, *Presidential Popularity from Truman to Johnson*, 64 AM. POL. SCI. REV. 18 (1970).

[113] *See* Spiller & Gely, *supra* note 54.

We assess this simple "domination" prediction with an AR(1) process using maximum likelihood techniques.[114] Table 4 presents the results, that is, the correlation coefficients for each legislative model on the percentage of statutory cases the Court hears each term.[115] As we can see, the findings are weak at best. Both the Committee-Power model and the Party-Caucus models yield substantively and statistically insignificant coefficients. In other words, the Court does not respond to a constrained political environment by simply retreating from statutory cases: either the external political environment has no effect on the agenda-setting process, or the process, as the prediction flowing from our dynamic account anticipates, is more complex.

TABLE 4. ASSESSING THE DOMINANCE PREDICTION OF SUPREME COURT AGENDA-SETTING

	Model of the Legislative Process	
	Committee-Power	**Party-Caucus**
Estimate		
ß	–.22	–.16
S.E. ß	.27	.24
Significance	n.s.	n.s.
Constant	60.84	60.76
ρ	.71	.71

To determine which has the better case, let us now turn to that more nuanced prediction of agenda-setting: the one that we have posited here. On this "dynamic" prediction, the effect of the distance of the Court from the set of irreversible decisions 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 ad-

[114] Unlike the OLS (ordinary least squares) model, which assumes that prediction errors from regression models are uncorrelated with one another, the AR, or autoregressive model, allows prediction errors at one point to be related to the prediction errors at another point systematically. The AR(1) indicates the common expectation that these time points will be sequential to one another. For example, if a statistical model underpredicts President Bush's approval rating in March 2002 due to unmeasured factors, then an AR(1) model suggests that the model will likely underpredict Bush's approval rating in April 2002.

[115] Since the vast majority of the Court's decisions for a given term come down the following year, we match decisions from each term with ADA scores for the following year. While such a procedure assumes that the Court peers a bit into the future when creating its docket, this is exactly what backward induction requires.

verse congressional reaction. Thus the predictive equation is multivariate: the extent to which Congress's preferences are decisive is alternately limited by the Court's own preference set and the homogeneity of that set. Statistically, this takes the following form:

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

where

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

X_1 = the distance from the set of irreversible decisions and
X_2 = the degree of homogeneity on the Court; and
Y_i = the percentage of statutory (as opposed to constitutional) cases the Court will hear.

Substitution demonstrates that the congressional constraint on the Court's willingness to take statutory cases is influenced by the Court's homogeneity and its own distance from Congress's preferences:

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

The relationship between the congressional constraint and Court homogeneity is now conditional: the greater the homogeneity on the Court (and, thus, the higher the probability that the Court will be able to produce a unanimous or near-unanimous decision), the lesser the impact of the congressional constraint. Importantly, the conditional-effects specification, made explicit in the dynamic account's prediction, changes the normal interpretation of ß$_1$ and ß$_2$. They are now the effect of each variable when the other variable is at zero.[116] Accordingly, as the homogeneity variable bottoms close to zero (.01), we can interpret ß$_1$ as the impact of the distance from the set of irreversible decisions when Court homogeneity is at its lowest level.

We expect ß$_1$ to be negative and ß$_3$ to be positive: at the lowest observed levels of Court homogeneity, we anticipate increases in the distance to the set of irreversible decisions to lower the percentage of statutory cases the Court would hear, but that this impact would be counterbalanced as the Court becomes more homogenous.

The prediction for ß$_2$ is not as clear. If Congress is the only factor that influences the Court's agenda, when the congressional preference constraints are at zero, the Court would be free to proceed in accord with

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[116] Robert Friedrich, *In Defense of Multiplicative Terms in Multiple Regression Equations*, 26 AM. J. POL. SCI. 797 (1982).

its own preferences regardless of whether it was homogenous or heterogeneous. If, however, the Court is concerned about other factors—including reactions from the lower courts or future Congresses—then homogeneity might be a significant consideration 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 5. Note, first, that a homogenous Court is indeed more likely to reach statutory decisions even when unconstrained by Congress. That is, the effect of homogeneity on the Court's agenda, while *partially* dependent on Congress (a point to which we return momentarily), exists even when the Court is free from contemporaneous congressional constraints. In situations in which the Court faces no constraints from Congress (such that the "Constraint" and "Homogeneity*Constraint" variables drop out), a Court with average levels of homogeneity would hear about a 60-40 mix of statutory to constitutional cases. If we then jump to the maximum levels of homogeneity,[117] which occurred during roughly half of the Warren Court years (the 1959–1965, 1967, and 1968 Terms) and the final pre-Clinton terms of the Rehnquist Court (1991 and 1992), we would expect to find about a 68-32 split of statutory to constitutional cases under the Party-Caucus model. Alternatively, if we moved to the minimum levels of homogeneity, which occurred during the 1971–1980 terms of the Burger Court, we would expect to find a 53-47 split of statutory to constitutional cases.

[117] Recall that the homogeneity scores range from .01 (most heterogeneous) to .23 (most homogeneous). *See supra* note 100**.**

TABLE 5. ASSESSING THE DYNAMIC ACCOUNT PREDICTION OF SUPREME COURT AGENDA-SETTING (MAXIMUM LIKELIHOOD ESTIMATES)

	Model of the Legislative Process	
	Committee-Power	**Party-Caucus**
Variable		
Constraint ($ß_1$)	–5.41	–7.09
	(3.61)	(2.68)
Homogeneity ($ß_2$)	78.14	68.94
	(14.10)	(15.92)
Interaction ($ß_3$)	21.48	30.23
	(15.94)	(11.89)
Constant	50.75	51.91
ρ	.33	.46

Note: N=47. Standard errors are in parentheses.

β_1 significant at $p < .10$ (C-P model) and $p < .01$ (P-C model), one tailed.
β_2 significant at $p < .01$ (both models).
β_3 significant at $p < .10$ (C-P model) and $p<.01$ (P-C model), one tailed.

Second (and of direct relevance to the dynamic account's prediction), note that under both models, at the lowest levels of Court homogeneity, the greater the distance between the Court and Congress, the lower the percentage of statutory cases that the Court hears. Moreover, as the Court's homogeneity increases, the impact of Congressional preference markedly decreases. In other words, when the justices confront a constrained political environment and do not believe they can produce authoritative decisions, they opt out of a statutory mode and into a constitutional one. At the same time, when they believe they can produce authoritative decisions, they continue to engage in statutory interpretation even in the face of a constrained political environment.

This is precisely the behavior predicted by the dynamic account of agenda-setting. Is it behavior of consequence? Or does it merely generate a statistically significant finding with little substantive import? For two reasons, we cannot offer systematic conclusions for a single isolated vari-

able. First, the conditional effects specification necessarily means that there is no straightforward effect of congressional constraints.[118] Second, the estimates of the coefficients are bound to be imprecise because the Court is so seldom (at least under our measurement procedures) constrained. We can, however, demonstrate the combined effect of the constraint and the interaction for those terms when the Court is actually constrained.

Table 6 presents the results of this analysis. We predict rather large drops in the percentage of statutory cases under the Committee-Power model for the 1947 and 1967 terms, and under the Party-Caucus model for the 1947 and 1976 terms. In fact, the magnitude of the predicted decrease is so substantial that we cannot help but believe that the combined effect of the constraint and the interaction is not merely one of conceptual or statistical significance. This suggests that when Congress, the Court as a whole, and individual members of the Court are distant in policy terms, legislation may be at greater risk of Court override on constitutional grounds than it is on an "incorrect" (at least in the eyes of Congress) statutory interpretation. This follows from the fact that justices respond to constraints and internal heterogeneity by making non-trivial increases in the percentage of constitutional cases they accept—just as the dynamic account of agenda-setting hypothesizes.

TABLE 6. PREDICTED IMPACT OF CONGRESSIONAL CONSTRAINTS ON THE COURT'S PERCENTAGE OF STATUTORY DECISIONS, 1946–1992 TERMS

	Model of the Legislative Process	
	Committee-Power	**Party-Caucus**
Term		
1947	–11.22	–12.37
1966	–1.90	.00
1967	–10.93	–3.23
1968	–3.14	.00
1976	.00	–9.23

Note: In all other terms, the predicted impact is .00.

[118] 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 the constraint is at 0. This is not only a theoretically meaningful level, but also a level that actually occurs in a significant portion of our sample.

IV. Implications

This last point, an implication of our study, is ironic indeed. Just at historical moments when the Court and relevant political actors are at ideological odds and when the justices feel relatively defenseless (owing to a perceived inability to produce authoritative rulings), it may be the Court, not Congress or even the President, that triumphs. That is because the justices, recognizing their "constrained" position, act in accord with the dynamic account of agenda-setting: They opt into a constitutional mode, thereby making it exceedingly difficult for the legislature and the executive to override them.

This is an intriguing implication of our study for a number of reasons, not the least of which is that it casts the Court in a somewhat different light than does Eskridge's theory of dynamic statutory interpretation. On Eskridge's account, once the Court grants certiorari to a case requiring it to interpret a statute, it must bend to the will of contemporaneous elected actors if it wishes to avoid a legislative override. This would suggest the court is relatively powerless when it confronts a hostile political environment. On our account, the Court emerges as anything but powerless, for not only can it avoid (via strategic instrumentation or some other selection rule at the agenda-setting stage) the sort of cases that might induce it to cave to Congress in the first place. It also can, under certain circumstances, create constitutional rules that are extraordinary difficult, if not impossible, for Congress to override.

This distinction between our account and Eskridge's emerges because we begin our consideration of Court decision-making at an earlier stage in the process: dynamic statutory interpretation considers its starting point to be the Court's deliberations over a petition it has accepted, while dynamic agenda-setting begins at the certiorari phase. We believe that focusing on this initial stage has the advantage of incorporating features of the process that may be otherwise obscured, including the Court's ability to remain a powerful force in American society even when it operates in an adverse political setting. It also calls into question the extent to which the justices must actually bend to the wishes of Congress when they go about interpreting statutes. Although we can imagine certain circumstances under which they would have to modulate their views in the way Eskridge suggests to avoid congressional overrides,[119] on our account justices typically would not need to act in an insincere fashion at the merits stage. They could cull from their docket those cases that would put them in a position to do so, supplanting them with constitutional disputes which the justices could then decide without fear of congressional reprisal.

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[119] *See supra* note 17.

In other ways, though, our analysis lends support to some of Eskridge's general assumptions. For example, we too find that the Court seems attentive to the preferences and future conduct of relevant political actors. While it may be true that the justices (at least by our measurement strategy) are rarely constrained by Congress, during those years when they are, the Court's agenda reflects the effect of that constraint. The Court's agenda in those years also reveals the justices' internal calculations over whether they have the institutional wherewithal to overcome a hostile legislature.

This basic finding, as it pertains to the merits stage, led Eskridge and others to identify numerous implications of "dynamic statutory interpretation" for on-going discussions about the Court. Our account of dynamic agenda-setting lends itself to similar conclusions. One, which we have already detailed, has direct bearing on the balance of power between the elected branches and the Court; others implicate future thinking about certiorari, a topic of significant interest to the legal community. Along these lines, we hope our results encourage academics to contemplate the dynamic nature of Supreme Court agenda-setting.

In this Article, we offered evidence to show that other (contemporaneous) political actors affect the sorts of disputes that the justices agree to hear and decide. While we feel confident that the evidence we offer is solid and that our test is appropriate given the prediction we offered, we can imagine other ways to measure some of the concepts contained in the dynamic account. We attempted to invoke salient disputes as dependent variables, and the following figures as independent variables: (1) the presence or absence of divided government; (2) the number of congressional overrides; and (3) the presence or absence of ideological division in the lower courts. We also attempted to adjust the ADA scores to make them more comparable over time and across the chambers of Congress.[120] These particular strategies failed and, given recent concerns about the adjustment strategy itself, we do not commend this particular approach to others. Nevertheless, we hope that future researchers will develop distinct and creative ways to evaluate our account. Only through additional assessments can we become more (or less) certain that it accurately captures an important feature of the Supreme Court's agenda-setting process.

Assuming our account does hold up under other systematic tests, several extensions of it could be examined. One example would be to consider Caldeira and Wright's seminal study of agenda-setting,[121] which assesses many factors that may influence the Court's certiorari decisions, including conflict in the lower courts, the presence of amici curiae, and

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[120] Tim Groseclose, Steven D. Levitt & James M. Snyder, *Comparing Interest Group Scores Across Time and Chambers: Adjusted ADA Scores for the U.S. Congress*, 93 AM. POL. SCI. REV. 33 (1999).

[121] Caldeira & Wright, *supra* note 16.

the justices' ideologies. What the authors exclude, however, may be equally as important as what they include. For example, the study excluded variables designed to capture the degree to which justices are constrained by external political actors as they go about constructing their docket. Certainly we understand why Caldeira and Wright omitted such indicators. At the time they were writing, little justification existed for their inclusion.[122] Based on our findings, however, future investigations should rectify this omission by attempting to account for the political environment within which the justices operate.

A second implication of our findings also pertains to future scholarship, particularly to studies exploring constitutional courts in emerging democracies rather than in the United States. As these courts in Eastern Europe and elsewhere struggle to establish the rule of law in their societies (along with their own legitimacy), they have been asked to resolve many politically delicate disputes—ranging from whether elections have been conducted fairly to whether presidents can serve additional terms.[123] Naturally, the great bulk of discussion within the legal community has focused on how these constitutional courts have gone about deciding such cases. To our minds, however, the disputes they "decide not to decide" may be equally interesting. As one justice on the Russian Constitutional Court puts it:

> The Court must avoid getting entangled in current political affairs, such as partisan struggles. . . . When in December 1995, before the [parliamentary] elections and in the very heat of the electoral campaign, we received a petition signed by a group of deputies concerning the constitutional validity of the five percent barrier for party lists. We refused to consider it. I opposed considering this request, because I believe that the Court should not be itching for a political fight.[124]

Is this dispute (or justice) an anomaly or part of a larger pattern? Is Russia a special case or is the behavior of their constitutional court representative of its counterparts in other new democracies? Addressing these sorts of questions via a dynamic account—one that takes into account both intra- and inter-branch constraints on agenda-setting—would

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[122] *Id*. Moreover, the authors only examined one term at the Court; assessments of the dynamic account require longer periods of time in order to capture variation in the political environment.

[123] *See, e.g.*, Albert P. Melone, *Judicial Independence and Constitutional Politics in Bulgaria*, 80 JUDICATURE 280 (1997); *see also* HERMAN SCHWARTZ, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE (2000).

[124] Quoted in Leonid Nikitinsky, *Interview with Boris Ebzeev, Justice of the Constitutional Court of the Russian Federation*, 6 E. EUR. CONST. REV. 83, 85 (1997).

not only help to shed light on the work of courts elsewhere, but also on the part they play in the democratization process.

A third implication is of a different sort because it pertains to Congress rather than the scholarly community. While our results suggest that justices, when they find themselves at odds with Congress, attempt to insulate themselves from reversal by "deciding to decide" constitutional disputes rather than those that require the interpretation of statutes, members of the legislature are not entirely powerless. To be sure, under existing Supreme Court precedent they may find it difficult to overturn constitutional decisions by simple legislation. Nevertheless, as we noted earlier, they can deploy a whole host of other weapons to "punish" the Court.[125] Imposing sanctions, especially on a regular basis, could lead justices to depart from the strategy we observe here.

A final implication of our study takes the form of a recommendation: since we found evidence of an external constraint operating on the justices' case selection decisions, we encourage others to investigate how the Court might constrain agenda-setting in the two other branches of government. This seems a particularly apropos enterprise at a time in American history when even journalists report that Members of Congress take into account the effect of Supreme Court rulings on their ability to set policy[126]—not to mention at a time when the Court itself seems to be telling Congress how to carry out its deliberative process.[127] Only a handful of academics have paid even the slightest attention to this general phenomenon.[128] We can and should fill this unfortunate gap, for doing so will provide us with a more developed picture of the role the Supreme Court plays in American society.

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[125] *See supra* note 88. These "weapons" include, *inter alia*, the Senate's advise and consent function as well as Congress's discretion over the judiciary's budget.

[126] Eric Schmitt, *Campaign Finance: The Congress; Senate Debates Campaign Bill, But Two Sides Remain Divided*, N.Y. TIMES, Sept. 27, 1997, at A1.

[127] *See, e.g.*, William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 87 (2001). In addressing the constitutionality of federal legislation, the United States Supreme Court recently has put great weight on the state of "the legislative record."

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), demonstrates the full emergence of this new intensive and skeptical review of legislative materials. In *Garrett*, the Court invalidated provisions of the Americans with Disabilities Act, asserting that the legislative record did not contain sufficient evidence of unconstitutional discrimination by states in the context of employment to warrant congressional action. *See id.* at 374. The Court in *Garrett* raised legislative record review to new, dispositive significance by focusing its ruling on the perceived inadequacy of legislative materials. *See id.*

[128] *See* Martin, *Congressional Decision Making*, *supra* note 15, for a rare example of this type of scholarship.