The Pennsylvania State University
The Graduate School

AGENDA DYNAMICS IN THE U.S. FEDERAL COURTS

A Dissertation in
Political Science
by
Douglas R. Rice

Submitted in Partial Fulfillment
of the Requirements
for the Degree of

Doctor of Philosophy

August 2013

The dissertation of Douglas R. Rice was reviewed and approved* by the following:

Christopher Zorn
Liberal Arts Research Professor
Department of Political Science
Dissertation Advisor, Chair of Committee

Marie Hojnacki
Associate Professor
Department of Political Science

Burt Monroe
Associate Professor
Department of Political Science

Jeffery Ulmer
Associate Professor
Department of Sociology and Crime, Law & Justice

Lee Ann Banaszak
Graduate Program Officer and Professor
Department of Political Science

*Signatures are on file in the Graduate School.

Abstract

The attention an institution such as the Supreme Court pays to any issue area is linked to other institutions' attention to that issue. For this reason, scholars studying issue attention have emphasized the importance of focusing on cross-institutional shifts in attention. Yet despite this emphasis on including multiple institutions in such analyses, only rarely have the courts been included, and in those few instances research has been limited to a subset of Supreme Court activity. With the courts omitted, two separate perspectives have emerged on issue attention dynamics both within the judicial hierarchy and between the courts and other institutions. In the first view, the courts are portrayed as passive implementers of policy, with attention in the courts following attention in other institutions. Contrary to this perspective, an emerging literature suggests the courts can be used by litigants and interest groups to proactively shift issue attention across institutions.

Whether the courts are an agenda setter or simply reactive is a question unresolved by scholars, and one with important implications for policymakers. Can interest groups encourage attention through the judiciary, as some scholars urge them to do? Can citizens directly impact the attention of government through their involvement in the courts? Do judges encourage attention for unresolved issues in the law? In sum, what part do the federal courts play in the policy process? To answer these questions, I integrate the judiciary into our understanding of the policy process. In particular, I examine changes in the issue attention of the litigants, judges and interest groups within the federal courts and document the relationships in issue attention among these actors. In order to study these patterns in issue attention for actors within the judiciary, I utilize a variety of natural language processing and machine learning methods for information extraction and topic modelling tasks. Then, I move beyond the context of the courts and also test competing theories of how the policy attention and activity of these actors within the courts impacts or is impacted by attention to policy in Congress and the executive branch.

In so doing, this study provides the broadest examination to date of the influence of courts in the formation of public policy as well as the broad dynamics of issue attention in American government. I have collected information on the issues addressed in over 10 million cases at all levels of the federal court system in the United States. Such comprehensive information on the issues which the federal courts are addressing permits previously impossible analyses of how changes in government policies percolate throughout the different institutions of the federal government. In these analyses, I uncover evidence supporting both proactive and passive courts perspectives, with the dynamics of issue attention contingent on the actors and issue areas under consideration. Within the judicial hierarchy, the research provides evidence suggesting the Supreme Court settles areas of increasing litigation, while also signalling interest groups and judges about areas the Court considers a priority. Across institutions, the evidence indicates issue attention relationships vary considerably across issue areas and actors, with the courts actually leading other institutions in attention to particular issue areas in the time period under study. In all, the research suggests federal courts systematically matter for the issue attention of institutions of American government.

Table of Contents

List of Figures

List of Tables

Acknowledgments

Throughout my time in graduate school, and in completing the research in this manuscript, I have had the privilege of the advice, friendship, and guidance of innumerable individuals. The completion of this stage in my life is in no small part a tribute to their contributions to my growth as a person and as a scholar.

My advisor, Chris Zorn, has selflessly and endlessly given of his time to help guide me through the graduate school experience. It has been a great privilege to study under, and work with, Chris across these last five years. He has shown tremendous patience throughout this process, and his insightful guidance, support, and friendship have had a profound influence on my professional and personal development. I can never repay all of the help he has provided, but I owe him my deepest gratitude.

I also owe thanks to Marie Hojnacki, whose incisive comments and attention to detail have vastly improved the quality of my work throughout my time in graduate school, and whose mentoring contributed greatly to my professional development. Marie has been an invaluable mentor and friend, and her contributions to my research, and my growth as a scholar, can not be overstated. I thank Marie for all of her help in guiding me to this point.

Through countless conversations, Burt Monroe has been a profound influence on the direction I have taken as a scholar. Burt has given of his decidedly sparse time to help guide me through a host of considerations as I learned to treat text as data. His willingness to join my dissertation committee at the last minute, and his valuable input, have certainly improved the final product. More importantly, Burt was there throughout my time in graduate school – no matter how insignificant the event may have been – to provide thoughtful comments and suggestions on my research. I thank him for all of his help along the way.

Beyond the members of my committee, I am very grateful to present and past faculty at Penn State, including James Honaker, Michael Berkman, Zach Baumann, Doug Lemke, Jeffery Ulmer, Suzie Linn, David Lowery, Bumba Mukherjee, Adam Nye, Eric Plutzer, Phil Schrodt, Lee Ann Banaszak, and Zaryab Iqbal. I find it hard to believe that a more supportive, collegial, and downright enjoyable department

than that of Penn State may exist. I can not thank the members of the department enough for their help, and perhaps more frequently their patience, during my time at Penn State.

I would also like to thank the National Science Foundation, the College of the Liberal Arts at Penn State University, and the Quantitative Social Science Initiative at Penn State for the financial and research support they have provided for my research. This support ensured that the research was completed in a timely manner, and vastly improved the quality of the work.

I had the great fortune of sharing the experience of graduate school with a collection of intelligent and fun fellow graduate students. Through their friendship, support, and insightful comments on my research, these colleagues have made me a better scholar. I am particularly indebted to Ben Bagozzi, Andrew Boutton, Vito D'Orazio, Steven Landis, Kathleen Marchetti, Jonathan Moody, and Eitan Tzelgov.

Beyond the academic community, I would never have arrived at this point without a tremendous support system of friends and family. To my many friends, including Paul Albright, Jesse Collmann, Adam Lanser, Mike Toenniges, Eric Boyle, and Vincent Camacho, thank you for always being there. Brian Schneider deserves particular recognition, as his calm perspective settled many a brewing fiasco, and his friendship and support helped me through my time in graduate school. I have also been blessed with not one, but two amazing families. Thank you to the DiFilippos for embracing a poor graduate student as a member of the family. Their love and support have been priceless as Laura and I made it through this stage of our lives. I owe particular gratitude to Deb and Gene, who have gone above and beyond in their support for me. Their trust and faith is more than I ever could have asked for. Thank you also to the Stokes brood, a beautiful family who have never failed to brighten my day. I also owe my sincerest thanks to my brother, Greg Rice, who has been an inspiration to me from the day I could walk. I would not have arrived at, nor finished, a doctoral program without his unfailing guidance. And though it is almost certainly inappropriate, I would also like to thank our family dogs, Nash and Marlie, for the innumerable walks and endless love and enthusiasm, which never failed to calm me down and cheer me up.

I am especially grateful to my parents and my role models, Bob and Linda Rice. I would not be where I am today without their undying love and support, and their many sacrifices. Their strength, in the face of far too many obstacles, has been an inspiration to me throughout my life. As I age, I find myself more and more thankful for all that they have done and given. I thank them from the bottom of my heart.

Finally, I owe my greatest debt to Laura Rice, my wife, my accomplice, and my best friend. From the moment we joined up, she has given of herself endlessly, tolerating random late nights and even more random early mornings, predictable breakdowns, unpredictable schedules, and endless proofreading and practice presen-

tations. Though she has made countless sacrifices, both personal and professional, she has been unceasingly gracious, optimistic, and supportive of my goals, never failing to uplift my spirit when I most needed it. Her mastery of her field, and her constant pursuit of improvement, have been an absolute inspiration to me as a person and as a scholar. Simply put, I can imagine no better person with whom to travel through all the adventures of life.

Dedication

For Mom and Dad.

Chapter 1

Issue Attention in the Federal Courts

The Patient Protection and Affordable Care Act (PPACA) took effect March 23, 2010, following months of intense legislative debate. Less than two years later, there had been 28 lawsuits initiated in federal courts challenging various aspects of the law. Meanwhile, in completely separate litigation in the federal courts, a number of lawsuits challenged the Defense of Marriage Act (DOMA), a fifteen year old law which defined marriage as between a man and a woman. In response to a district court decision declaring DOMA unconstitutional, the Obama administration stated that the Department of Justice would no longer defend the Act, Democrats in Congress introduced the Respect for Marriage Act, and Republicans in Congress took up the legal defense of DOMA.

The PPACA and the DOMA exemplify two long-standing but fundamentally opposed theories about the role of the judiciary in the policymaking process. In the case of the PPACA, landmark legislation led to an immediate increase in judicial attention to an issue area. The pattern reflects what we might call the *passive view* of courts in the policy process. In this view, courts are cast as unbiased interpreters and implementers of the law. The courts' attention increases only after Congressional and presidential attention and legislation, perhaps only if there are controversies

during implementation, and issue attention within the judiciary holds little to no sway on issue attention elsewhere. Proponents of this view point to a number of constraints on the courts, including the judiciary's lack of explicit implementation powers, as reasons contributing to why issue attention within the courts lags behind issue attention elsewhere.

In contrast to this passive courts perspective, judicial attention to the DOMA sparked increases in both presidential and congressional attention. That pattern reflects a dynamic view of courts, and mimics the oft-cited example of *Brown v. Board of Education*, where attention within the federal courts forced other actors into taking action (Kluger, 1975; Monti, 1980; Neier, 1982; Murphy et al., 2006, cf. Rosenberg, 1991). Here, the courts take a *proactive* role in the policy process by directing the attention of other institutions to new and unaddressed issues, thereby stoking policy change. In this view, the judiciary's unique institutional characteristics encourage policy attention within the courts on the issues which are unattended to by other branches of government. The issue attention of courts then precedes and encourages issue attention in other branches.

Proponents of either view of the court can point to a myriad of anecdotal examples, similar to the PPACA and DOMA discussed above, wherein patterns of attention across institutions provide evidence for their view. Considering these and other anecdotes, though, begs a general question as to which of the two perspectives dominates when we incorporate courts in the macrodynamics of issue attention. Do the courts generally lag behind other institutions in addressing policy areas, as the passive view suggests, or do they instead spur the attention of other institutions, as the proactive view suggests? Whether the courts are an agenda setter or simply react to the attention of others is a question unresolved by legal scholars and social scientists, and one with important implications for policymakers. Can interest

groups encourage attention to their issues through the judiciary, as some scholars urge them to do (Strolovitch, 2007)? Or are interest groups' efforts at policy change wasted in the courts (Rosenberg, 1991)? Can citizens directly impact the attention of government through their involvement in the courts (Zemans, 1983)? Can judges encourage attention for unresolved issues in the law? In sum, what part do the federal courts play in the policy process?

To answer these questions, in this dissertation I integrate the judiciary into our understanding of the policy process. In particular, I examine changes in the issue attention of the primary participants within the federal courts: litigants, judges and interest groups. I examine these changes across each level of the federal courts, and document relationships in the issue attention of these actors within the confines of the federal court system. In particular, I assess what the Supreme Court's attention implies for the attention of litigants, judges, and interest groups in the lower federal courts, and then move beyond the context of just federal courtrooms and test competing theories of how the issue attention and activity of these actors within the courts impacts or is impacted by attention to policy in Congress and the executive branch.

In so doing, this study provides the broadest examination to date of the place of courts in the formation of public policy, and of the broad dynamics of issue attention in American government. This research provides the first long-term, comprehensive understanding of the judicial agenda, and delineates how issue attention manifests both within the judiciary and between courts and other institutions. This project contributes both to our understanding of the relationships within the judicial hierarchy and contributes to our understanding of the place of courts in the policy process. Within the hierarchy, the research uncovers whether the Supreme Court reacts to shifts in issue attention in the lower courts in order to settle areas of law, or

whether the Supreme Court proactively shifts the attention of the federal judiciary by signalling litigants, interest groups, and judges as to areas the Court considers a priority. Beyond the judicial hierarchy, the research is the first to systematically examine whether federal courts are simply interpreting and implementing policy constructed in other institutions, or whether the federal courts can be used to focus the attention of other branches of government on specific issue areas.

In the rest of this chapter, I introduce the basic theory and outline the structure of the remainder of the dissertation. In the next section, I describe the importance of institutional issue attention and introduce two separate perspectives on the implications of judicial issue attention, which are then developed in Chapter 2. I then describe what is meant by the judicial agenda, which I later introduce and measure in Chapter 3 of this dissertation. After that, I describe the different implications of the passive and proactive courts perspectives for issue attention dynamics both within the judiciary (hierarchically) in Chapter 4 and across institutions (cross-institutionally) in Chapter 5.

Institutional Agendas and the Judiciary

Consistent with Kingdon (2003) and Cobb and Elder (1983), I define the political agenda as the subjects and problems to which governmental and non-governmental actors are paying attention. For actors trying to change policy, simply being able to place an issue on the agenda is an absolutely crucial step (Bachrach and Baratz, 1962). Therefore, political actors seeking policy change must carefully select and prioritize issue areas (Hilgartner and Bosk, 1988) and venues (Baumgartner and Jones, 1993). The accompanying shifts in the agendas of institutions are crucial

aspects in understanding the formation of public policy.[1]

The U.S. Supreme Court's agenda itself has undergone substantial change across the history of the United States. Over the past century the Supreme Court's agenda has moved from a docket composed primarily of economic cases to one more oriented towards civil rights and liberties issues (Pacelle, 1991, 1995; Baumgartner and Gold, 2002). As change occurs in the attention any institution devotes to an issue area, change in the actual public policy becomes respectively more or less likely (Schattschneider, 1960). When issue attention changes within an institution, as it has with the Supreme Court's docket, it indicates that there has been a shift in the importance ascribed to a policy area, a disruption of the policy subsystem, and a change in the scope of conflict within that policy area (Baumgartner and Jones, 1993).

Because the institutional agendas are directly linked together by the design of our government as established by the founders in the U.S. Constitution, shifts in institutional agendas occur within an institution affect the activities of other political institutions. This institutional linkage, through powers such as the presidential veto or judicial review, is arguably the defining characteristic of American government. Beyond the explicit linkages between branches of the federal government, the institutional agendas are further linked by the decisions of policy actors engaged in *venue shopping* (Baumgartner and Jones, 1993). Venue shopping refers to the actions of actors who seek to identify institutions which are particularly receptive to their political preferences.[2] Thus, attention to a particular policy in one venue

[1]For my purposes, I define public policy as, "...what public officials within government, and by extension the citizens they represent, choose to do or not to do about public problems" (Kraft and Furlong, 2007, p. 4). The present position, though, is arrived at via a complex policy process that has been the subject of extensive study. In fact, edited volumes have been devoted to introducing and understanding even a sample of the multitude of models proposed for the policy process (e.g., Sabatier, 2007).

[2]In the case of the courts, I refer to the judiciary as a "venue." However, litigants also engage in

may be related to attention elsewhere, and changes in attention within a venue may contribute to changes in issue attention overall (Baumgartner and Jones, 1993).

In all, the degree of attention paid by any one institution to an issue is connected to the attention that issue receives in other institutions. Scholars, observing this simple fact, have therefore emphasized the importance of shifts in collective attention *across* institutional settings (Jones, 1994; Flemming, Wood and Bohte, 1999); in other words, they have focused expressly on macro-political dynamics (Redford, 1969). Engaging in such comprehensive studies, they argue, provides a more complete picture of the process through which policy change is realized or prevented.

But while scholars have incorporated multiple institutions in their effort to understand the policy process, activity in the federal courts has generally been omitted from consideration and analysis. The omission of the courts is partially attributable to the long-held notion of judges as independent and unbiased interpreters of the law (Barclay and Birkland, 1998). Though this notion is now widely dismissed, its legacy has perpetuated in models and studies of issue attention and the policy process. For example, in recalling the participants in his influential model of the policy process, Kingdon states:

> The visible cluster of actors, those who receive considerable press and public attention, include the president and his high-level appointees, the prominent members of Congress, the media, and such elections-related actors as political parties and campaigners. The relatively hidden cluster includes academic specialists, career bureaucrats, and congressional

venue shopping amongst the individual courts, which I refer to as "forum" shopping. This occurs most prevalently in cases with concurrent jurisdiction where the litigant has the decision of whether or not to bring a case in federal or state court systems. The underlying reasoning for the behavior of the political actor is much the same: some courts are more receptive to arguments than others.

staffers. (1984, 199)

This same treatment of judicial attention is common throughout agenda studies. Only rarely have courts been incorporated in these cross-institutional analyses of issue attention, and there the research focused solely on Supreme Court activity (Flemming, Bohte and Wood, 1997; Flemming, Wood and Bohte, 1999; Jones, Larsen-Price and Wilkerson, 2009).

Yet while courts have rarely been incorporated in these studies, it is important to note that in those rare studies, judicial issue attention has uniformly *mattered* for the issue attention of other institutions. For example, research has suggested that the Supreme Court's attention to civil rights and civil liberties issues may encourage other branches to pay attention to those issues (Flemming, Wood and Bohte, 1999). And despite this clear evidence of the importance of the courts in policymaking, no study has included the vast majority of activity in the federal courts, as the overwhelming bulk of judicial branch activity occurs in the lower federal courts. This is true even though we know there have been changes in patterns of issue attention in the Supreme Court (Pacelle, 1991, 1995) and in the far larger number of lower federal courts (Casper and Posner, 1974; Kaheny, 1999). Moreover, that courts exert policymaking influence is relatively uncontroversial; even unpublished opinions in district courts may hold policy impact (Zemans, 1983; Mather, 1995). Thus, prior research has provided evidence that courts matter for public policy, and that in some issue areas at least the Supreme Court matters for attention to public policy. Yet to date no comprehensive evidence exists of the role of the federal courts in agenda-setting and policymaking.

Because courts have not been included in cross-institutional analyses of issue attention, the relationship between issue attention in the federal courts and the

corresponding issue attention in other branches of the federal government remains an unanswered question. The dearth of existing research therefore provides little empirical and theoretical guidance as to how issue attention in the courts relates to issue attention elsewhere. Instead, legal scholarship and existing work in political science suggest two contradictory perspectives, one of passive courts and the other of proactive courts.[3] In the *passive courts* perspective, the decisions of the courts are simply one phase of the implementation of public policy. This perspective is reflected in the standard "textbook" model of the policy process (e.g., Nakamura, 1987), where attention in courts is presumed to lag behind attention elsewhere in government. In contrast, the *proactive courts* perspective emerged from research on the judiciary which suggests the courts may influence the attention of other actors and institutions. In this view, courts can shift policy through their decisions or change the scope of conflict within an issue area, and thus can serve as an important influence on the macro-dynamics of issue attention. In Chapter 2, I provide additional theoretical background on these contrasting perspectives, which I then develop at length throughout the remainder of the dissertation. But before doing so, I turn to the measurement of issue attention within the federal courts.

Issue Attention in the Federal Judiciary

The agenda of a court, or courts, is most often operationalized as the number of cases within the court(s) devoted to particular policy areas (Pacelle, 1991, 1995; Flemming, Bohte and Wood, 1997; Flemming, Wood and Bohte, 1999; Baumgartner and Gold, 2002; Baird, 2004, 2007; Peters, 2007; Jones, Larsen-Price and Wilkerson,

[3]These perspectives mimic what Rosenberg (1991) has described as the Constrained and Dynamic Court perspectives. However, in his research Rosenberg (1991) was concerned entirely with the Supreme Court. Here, I will refer to these as the passive court and proactive court perspectives because the research now extends to all federal courts.

2009). The corresponding measure of issue attention then is case counts within a policy area (Pacelle, 1991). The judicial agenda is defined in this way because a court case is a rather obvious allocation of resources; litigation is an expensive and time-consuming process for everyone involved.

The nature of this measure raises the question of exactly who is allocating their resources to these cases. A court case necessarily involves litigants and at least one judge. Yet neither of these speaks directly to a central participant both in the judiciary (Caldeira and Wright, 1988, 1990; Epstein, 1994; Collins, 2008) and in the policy process as a whole (Truman, 1951): organized interests, who often sponsor cases and appeals, file amicus curiae briefs, and engage in myriad other activities to advance their policy goals through the judicial process. Taken together, the three actors account for all of the activity in the federal courts. Therefore, any comprehensive study of the judicial agenda must necessarily take care to include changes in the issue attention of each of these actors.

To date, very little is known about how these actors pursue their activities in the judiciary, or how their issue attention has shifted over time. Further, what little knowledge we have is based mostly on the docket of the Supreme Court; those judicial agenda studies have focused almost exclusively on dynamics related to the Supreme Court's internal agenda-setting processes (Tanenhaus et al., 1963; Teger and Kosinski, 1980; Provine, 1980; Caldeira and Wright, 1988; Perry, 1991; Ulmer, 1984; Black and Owens, 2009). Despite this overwhelming focus on just the Supreme Court, a few dynamics documented in prior research do bear mentioning. First, for the past fifty years the docket of the Supreme Court has been shrinking, and has settled in at approximately 70 cases per term (Clark and Kastellec, 2012*a*). Second, over the past century the Supreme Court's docket has shifted from economic to civil rights and liberties issues (Pacelle, 1991, 1995), and in more recent years towards

questions of federalism. Third, the number of cases in lower federal courts has been rapidly expanding,[4] and the workload of lower court judges has become the subject of criticism and debate (Pettigrew and Stras, 2010; O'Scannlain, 2009). Finally, there has been a vast increase in the participation of organized interests in the judiciary, and particularly at the Supreme Court (Collins, 2008).

Thus, we have evidence of changes in the size of the agendas of federal courts at all levels, and evidence that, at the very least, the distribution of attention across issues within one of these courts, the Supreme Court, has undergone substantial change over time. In Chapter 3, I expand on these basic facts by presenting comprehensive data on the distribution of issue attention across each level of the federal courts for each of three actors: litigants, judges, and interest groups. In doing so, Chapter 3 provides the most complete description of the judicial agenda offered by any study to date. That serves as a precursor to the following chapters, in which I examine whether the observed changes in the judicial agenda support the passive or proactive court perspectives.

Attention Dynamics Within the Judiciary

The federal court system in the United States is organized hierarchically, with 94 district trial courts sitting under 12 intermediate appellate courts, all of which fall under the discretionary appellate jurisdiction of the U.S. Supreme Court. Research on the judicial hierarchy has focused primarily on judicial decision-making, including work on the extent to which the justices of the Supreme Court can control the decisions of lower courts (Cameron, Segal and Songer, 2000; Kastellec, 2007) or differences in ideological voting across levels of the hierarchy (Zorn and Bowie, 2010).

[4] *2011 Summary of the Judicial Business of the Federal Courts*, published by the Administrative Office of the Federal Courts.

While this research has been invaluable to studies of judicial behavior, little is known about the Supreme Court's ability to influence the *agenda* of the lower courts, or the cases which actually reach lower court judges.

For this, the agenda-setting role of the Supreme Court within the hierarchy, the passive and proactive courts perspectives provide different empirical expectations. A passive perspective suggests that issue attention in the lower courts should decrease as Supreme Court decisions settle areas of law, or resolve difficult questions. Alternatively, a more proactive view suggests that Supreme Court attention to an issue could encourage additional issue attention within the court system.

The first of these, the passive courts perspective, is rooted in the traditional public law notion of courts as dispute settlers. From this perspective, cases which reach the Supreme Court are those where conflicts of interpretation have arisen in interpretation in lower courts, and which have widespread implications for the legal system. Indeed, Rule 10 of the Supreme Court Rules, which addresses the factors the Court considers in granting review to cases, explicitly lays out these two criteria. By choosing to resolve cases in areas where there is legal uncertainty, the Supreme Court settles an area of law. This emphasis on settling the law is reflected in former Justice Brandeis' admonishment in *Burnet v Coronado Oil & Gas Co.*[5] that in most matters of law, it is more important the law be settled than that the law be settled correctly.

In this view, the actions of Supreme Court justices serve as efforts to enhance understanding in lower courts of the proper method of adjudicating similar disputes. The expected impact of this clarification is a reduction in total agenda space allocated in the federal courts for issues where the Supreme Court has settled the law. The Supreme Court's focus on settling the law means that increases in attention

[5] *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932), Brandeis dissenting.

to an issue in the lower courts should lead to additional attention at the Supreme Court.

Contrary to this passive courts view, the proactive perspective suggests that the Supreme Court may play a role in shaping the agenda of the federal courts. From this perspective, issue attention in the Supreme Court provides signals to litigants, and particularly interest groups, of areas the Court considers a priority. Litigants and groups subsequently mobilize within those areas, ultimately expanding the judiciary's attention and influence within an issue area (Baird, 2004, 2007; Baird and Jacobi, 2009*a*).

In the words of Baird, "(t)he incentive to support litigation in particular policy areas varies over time in accordance with litigants' changing perception of Supreme Court justices' policy priorities" (Baird, 2007, pg. 4). While this model is specifically concerned with the implications of litigant mobilization for Supreme Court attention, it also implies that lower court attention to an issue area should increase as litigants mobilize following these indications of the Supreme Court's prioritization of an issue area. Moreover, there should be a particular increase in the participation of interest groups.[6]

In sum, there are two broad contrasting theories for how the Supreme Court's agenda relates to the agenda of the lower federal courts. A passive court perspective leads us to believe the Supreme Court will seek to settle areas of debate, thereby shrinking the agenda space devoted to that issue. Meanwhile, the proactive court perspective indicates that litigants and interest groups respond to signals from the Supreme Court by bringing additional cases, which increases the attention to that issue area within the judiciary. By examining issue attention in the lower courts

[6] As will be noted later, aspects of this work have been called into question in other, subsequent research (Peters, 2007, e.g.,).

following Supreme Court to that issue area, I will determine which of these perspectives holds within the federal courts. That analysis will be the subject of Chapter 4.

Attention Dynamics Across Institutions

Having addressed issue attention dynamics within the federal courts, I move on in the remainder of the dissertation to compare the agendas of the courts to those of other institutions. Here again, as was the case for attention dynamics within the judiciary, the passive and proactive courts views provide different expectations for issue attention relationships between the three branches of government. These two perspectives have vastly different implications for, amongst others, the role of the judiciary in American government and the strategies of organized interests.

The "Textbook Model" and Passive Courts

Across institutions, the passive view can be traced as far back as *Federalist 78*, and Alexander Hamilton's contention that the Supreme Court was the budding nation's "least dangerous branch." In more recent research on the policy process, this view of courts as primarily reactive, and largely powerless in policymaking, is rooted in the passive institutional position of courts in the "textbook" model of the policy process. In the textbook model, the policy process is roughly broken into the following four stages: the setting of the agenda, the definition of the alternative policy choices available, the choice among those alternatives, and, finally, the implementation of the chosen alternative. Under the model, the courts are involved solely in the implementation stage. To consider one prominent example, Kingdon's seminal work on the policy process (1984) focused on the first two stages. Reflecting

the textbook view wherein courts are solely involved in implementation, his work contains absolutely no reference to the judiciary. Simply put, within this vein of research, court attention to issues will always follow that of other actors. From this perspective, the courts are wholly passive institutions.

Contrast this judicial role with the textbook model's characterization of the part Congress plays in the policymaking process. The textbook model predicts that the pressure of legislation, marked by increases in Congressional attention, will lead to additional court cases as details of the law's implementation are worked out. Judges may even be forced to deal with issue areas which Congress intentionally leaves vague. This leaves judges with the task of defining through their opinions the unattended-to details of policy constructed in Congress. Moreover, Congressional legislation may also reduce procedural hurdles for litigation, such as happened for private antitrust and securities cases in the mid-twentieth century (Casper and Posner, 1974), which further encourages litigation following Congressional attention. In each of these cases, the issues with which the judiciary deals and the extent of that involvement are almost entirely determined by Congress.

Similarly, the textbook model posits an even more direct role for the President in determining issue attention in the judiciary. Presidential electoral campaigns, and their actions once in office, shape legislative agendas and political networks (Whittington, 2009). They have a central role in pursuing, enacting, and implementing Congressional legislation. Finally, their office may directly influence litigation patterns through the Department of Justice's role in pursuing court cases. Once again issue attention in the judiciary is largely driven by the priority accorded to issues by the other branches.

The judiciary necessarily lags behind the attention of other institutions, proponents of this view suggest, for a number of reasons. In his important work, Rosenberg

(1991) proffers three fundamental constraints on courts that prevent them from creating social change.[7] First, within judicial venues litigants are required to convince the court that the rights being asserted are required by law. Second, litigants must overcome the reluctance of courts to act in opposition to public opinion (Peltason, 1961; Hoekstra, 2000). Finally, courts lack an independent power of implementation, and thus must rely on their legitimacy for compliance with their rulings. Each of these constraints impinges on the ability of courts to create policy change, making natural the textbook model's characterization of courts as passive implementers of policies constructed elsewhere. In sum, under the passive courts perspective, constraints placed on the judiciary prevent the courts from doing anything other than implementing policy formulated by the legislative and executive branches.

Proactive Courts

Whereas the proponents of the passive courts perspective see limitations constraining the courts from acting, subscribers to the proactive courts view believe that the courts, by virtue of uniquely judicial characteristics, are able to address issues when other institutions can not. From this standpoint, the institutional characteristics of courts make them a valuable venue for resolving difficult issues. Federal courts are open to all individuals and groups, are independent of political connections, and are relatively insulated from electoral pressures through appointments and life tenure, making them well-positioned to address contentious issues. Of particular importance for studies of policymaking, the proactive court view incorporates a critical indirect effect wherein courts are able to create policy change through "dra-

[7]Though Rosenberg's constraints were specifically described for just the Supreme Court, they apply to lower courts to an even greater degree. Lower courts have the same requirements to establish standing, are even more vulnerable to local public opinion (Peltason, 1961; Hoekstra, 2000) and confront even greater difficulties in implementation than does the Supreme Court.

matizing issues and spurring action" (Rosenberg 1991, 25). In so doing, access to the judicial agenda offers an opportunity to spark political change, beginning with placing an issue on the agenda of other institutions.

Despite this perspective, no prominent theory of the policy process has, to date, explicitly incorporated a proactive court perspective into their description of the policy process. For example, in the advocacy coalition framework (Sabatier and Jenkins-Smith, 1988; Sabatier, 1993), judges can be members of advocacy coalitions, but no systematic evidence is available for their role in garnering attention. The punctuated equilibrium framework of issue attention (Baumgartner and Jones, 1993) also allows for the possibility of a judicial role, but this role has only been explored in a single study comparing the Supreme Court's agenda to the Congressional agenda (Baumgartner and Gold, 2002). In neither case do we see a serious accounting for the potential proactive influence of issue attention in the federal courts.

Yet from a proactive perspective, the federal courts directly influence the issue attention of both Congress and potentially the president. There are different mechanisms through which the issue attention of Congress and the president could be stoked by attention in the courts. First, some scholars have argued that it is the individual *litigants* who encourage additional attention simply through litigation (Zemans, 1983) and the accumulation of legal complaints about particular policies. Alternatively, *interest groups* may encourage additional attention through their participation in the courts (Monti, 1980; Neier, 1982; McCann, 1992; Strolovitch, 2007), either by altering existing policy and policy subsystems through judicial decisions or by simply getting an otherwise ignored or overlooked issue discussed. Finally, the specific policies crafted by *judges* in their published opinions may stoke attention elsewhere (Eskridge, 1991*a*,*b*; Hettinger and Zorn, 2005).

How might these relationships play out between the courts and Congress, or

the Courts and the president, respectively? In the case of Congress, the influence of judicial attention could be driven by several different mechanisms. First, groups who meet with an unreceptive Congress may seek attention for their policy proposals by using the courts (McCann, 1992). In fact, this potential mechanism is often cited as a possible means for out-groups to seek policy change (e.g., Strolovitch, 2007). On the other hand, Congress may also seek to address an issue after an increase in judicial attention if judicial decisions conflict with the preferred policy of members of Congress (Eskridge, 1991*a*,*b*; Hettinger and Zorn, 2005). In all, through both shifts in policy as well as through simply garnering attention of governmental actors, the courts may be used to encourage Congress to confront issues which Congress has otherwise proven reticent to address.

A similar pattern may exist with respect to the influence of the judiciary on presidential attention. Presidents may react if the preferred policy of the president comes into conflict with the policy outcomes emanating from lower court opinions (Whittington, 2009). Confronting the judiciary over judicial review, or leaving certain issues to the Court, may offer solutions to the president as they pursue their substantive agenda (Whittington, 2009). As before, then, the proactive courts perspective holds that an institutional actor, here presidents, may systematically be forced to address issues which the courts are placing on the agenda.

In Chapter 5, I examine the potential relationships between issue attention in the federal courts and elsewhere in the federal government. In doing so, I provide the first evidence of the (passive or proactive) role of the federal courts in the policy process. Moreover, I delineate this relationship across the multiple actors within the federal courts, litigants, judges, and interest groups. By taking account of litigants, interest groups and judges separately, I can disentangle the possible processes underlying the proactive courts theory. In doing so, I provide a complete assessment of the

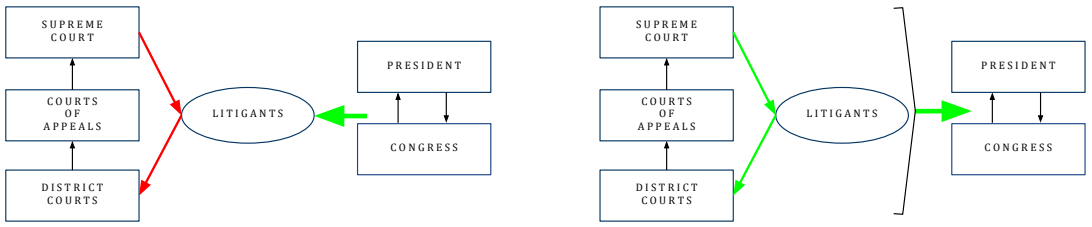
potential avenues through which the national political agenda shapes, and is shaped by, the federal courts.

To that end, I analyze the relationship between indicators of Congressional and presidential attention and the attention of each of the actors at each of the levels of the federal courts. I estimate a series of vector autoregressive (VAR) models of issue attention in each institution, and a series of lags of issue attention in each of those institutions, as the covariates. The passive courts perspective is supported in these equations in models where issue attention in the courts, and particularly lower courts, is found to be predicted by issue attention in other institutions. On the other hand, support for the proactive courts perspective would be reflected in models where issue attention in the courts is found to predict subsequent issue attention in other institutions.

Conclusion

Figure 1.1 provides a summary of the dynamics implied by these two separate perspectives, dynamics which I set out to examine in detail in this project. Whether the federal courts play a passive role and are primarily only involved in the interpretation and implementation of public policy, or whether they proactively lead the attention of other policymaking institutions to specific issue areas, is an open question in social science and legal studies. My aim here is to provide as definitive an answer as possible to this question on patterns of issue attention within the federal courts, and in the federal government more broadly.

To do so, in Chapter 2 of this dissertation I outline and provide a theoretical background for the passive and proactive courts perspectives, the predominant strains of thought regarding how issue attention in the courts relates to issue at-



Passive Courts *Proactive Courts*

Figure 1.1: Comparison of dynamics implied by the passive and proactive courts perspectives, respectively. Arrows indicate the perspective suggests this as an avenue for agenda influence. Green indicates additional attention, while red indicates decreasing attention.

tention elsewhere in government. Having done so, in Chapter 3 of this dissertation, I then provide the most comprehensive picture to date of issue attention in the federal courts. In Chapter 4, I examine issue attention dynamics internal to the judicial hierarchy and provide evidence supporting the (passive or proactive) role of the Supreme Court. Then, having assessed internal issue attention, in Chapter 5 I expand outwards and examine the relationship between issue attention in the courts with issue attention elsewhere in government.

In the final chapter, I summarize the findings of the preceding chapters and the evidence uncovered for both passive and proactive courts perspectives. For social scientists, legal scholars, and political actors, this research offers a number of important implications, which I also explore in the final chapter. For example, for litigants and groups seeking to use the courts as part of a broad strategy to influence public policy, the ability of courts to influence issue attention throughout the federal government has direct implications for potential litigation strategies.

In sum, two perspectives, implying opposite dynamics for the role of federal courts, are prevalent in legal and social science research. How can two such opposing perspectives persist in scholarly studies? By way of preview, I find that the longevity is supported by the considerable nuance, across policy areas and actors, in issue attention relationships. For some actors, particularly litigants, I document substantial support for the passive courts perspective. On the other hand, for other policy-minded, repeat-player actors like judges and interest groups, I find considerable support for the proactive courts view. In all, both proactive and passive courts perspectives receive support, but they are also each limited to particular contexts defined by actors and issue areas.

Chapter 2

The Passive and Proactive Courts Perspectives

> *"Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nittygritty."*
> – Antonin Scalia, dissenting in *Sykes v. United States* (2011).

> *"This is not the first time the Court has ordered a cramped interpretation of Title VII, incompatible with the statute's broad remedial purpose...Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII."*
> – Ruth Bader Ginsburg, dissenting in *Ledbetter v. The Goodyear Tire & Rubber Company* (2007).

In the separate dissenting opinions quoted above, we see two differing perspectives in the movement of policy between two institutions – Congress and the Supreme Court – of the United States government. In *Sykes v. Unites States*, the court addressed the question of what constituted a violent felony under the Armed Career

Criminal Act (ACCA), legislation passed in 1984 which has subsequently been at issue in a number of Supreme Court cases. In his dissent in *Sykes*, Justice Antonin Scalia laments the Court's continued involvement in parsing what he perceives as purposeful vagaries in Congressional language. This vague (or "fuzzy") language, in his view, is an effort to leave the difficulty of implementation to the courts. In *Ledbetter. v Goodyear Tire and Rubber Company*, the majority of the Court held that Title VII of the Civil Rights Act of 1964 does not entitle protections against discrimination if a suit is not initiated within 180 days of the employer's action. Dissenting, Justice Ruth Bader Ginsburg openly invited Congress to address the issue and modify the (in her view, incorrect) holding of the majority. The Lilly Ledbetter Fair Pay Act was soon after introduced, and, in 2009, became the the first piece of legislation President Barack Obama would sign into law.

My broad goal is to determine whether the interaction of the courts with the other institutions of government is generally marked by the sort of implementation which Scalia laments, or by the invitations which Ginsburg provides. More specifically, I attempt to determine what role the federal courts generally play in the policy process. Do they direct the attention of other institutions to unaddressed issues? Or, does issue attention in the judiciary simply follow the attention of other branches, as the courts implement the policies constructed by Congress and the president? For litigants, interest groups, and judges in court rooms across the country, is their activity part of the realization of policy and the final step in the process, or does their attention to a policy systematically impact the attention that policy gets from other national institutions?

In this chapter, I outline two arcs in the research of political scientists and legal scholars on the interactions between courts and other institutions. These two arcs reflect contrasting views of how issue attention in the courts relates to issue

attention elsewhere in government. I term these contrasting views the passive and proactive courts theories, and argue that their competing expectations can be empirically tested by examining the agendas of each institution. The chapter proceeds as follows. I begin by exploring why issue attention matters as well as the dynamics of issue attention proposed in prior studies of the policy process. Second, I introduce each perspective in order and outline the theory and research underlying that perspective. Having done so, I propose testable hypotheses derived from each of the perspectives, hypotheses which serve to differentiate which of these two perspectives has been reflected in the policymaking of the United States over the second half of the twentieth century.

Issue Attention

I begin with the simple proposition that, in politics and policymaking, attention matters. Paying attention to an issue, or having an issue on the agenda of policymakers, is one of, if not the, most important steps in policymaking (Pacelle, 1991). Attention is, of course, a necessary precondition for any sort of change in public policy (Flemming, Wood and Bohte, 1999). Because policymakers have limited time and resources, they attend to only a finite number of issues at any one time. With limits on the number of issues that can be addressed at one time, the issues on the agenda are not static; rather, they change across time. Thus, issue attention varies over time, as actors with limited resources carefully prioritize certain issues at the expense of others (Hilgartner and Bosk, 1988).

These shifts in attention, when observed, indicate periods when the scope of the conflict in a policy debate has changed or is changing (Baumgartner and Jones, 1993). Changes in the scope of the conflict - or the number of participants, amount

of change, and resources invested for a policy dispute (Baumgartner, 1989) - have long been recognized by policy scholars as critically important, with the scope of the conflict serving as the primary determinant of who wins in a policy debate (Schattschneider, 1960).

Changes or shifts in attention, because they indicate shifts in the scope of the conflict, thus have a fundamental relationship with the content of that policy (Pacelle, 1991), with fluctuations in attention indicating periods when policymaking routines have been disrupted (Flemming, Wood and Bohte, 1999). Thus, scholars interested in studying policy making and policy making power have in part "focused on the rise and fall of issues on the public or institutional agendas" (Baumgartner, 2001, 289). For instance, when debate over an issue moves from specialized policy communities to broad national agendas, there has been a shift in the scope of the conflict (Carmines and Stimson, 1989; Baumgartner and Jones, 1993). This shift in the scope of the conflict is reflected in the issue attention of the institutions, and likely benefits one side of the debate while disadvantaging the other (Schattschneider, 1960).

Perspectives on Issue Attention Dynamics

That issue attention matters is thus an uncontroversial claim, well-established in the literature for at least 40 years (Baumgartner, 2001). How issue attention shifts, though, has been the subject of extensive debate and continued research. The American system of government divides power and responsibilities across institutions. In doing so, the system opens the door to a multitude of possibilities for how issue attention in any one institution relates to issue attention in other institutions. Because there has been only limited work in this area, "...we have few clues as to what the structure of attention linking the various agendas might look like" (Flemming,

Wood and Bohte, 1999, 77). Research suggests three[1] potential patterns for the macrodynamics of issue attention: the textbook model, the unstructured multiple-streams model (Kingdon, 2003), and a horizontal-sequential model introduced in research by Flemming, Wood and Bohte (1999).

I begin with the textbook model. Also known as the stages heuristic, the "textbook" (Nakamura, 1987) model contends that the policy process is roughly broken into four stages: the setting of the agenda, the definition of the alternative policy choices available, a choice amongst those alternatives, and, finally, implementation (Sabatier, 2007). In this model of the policy process, courts are solely involved in the implementation phase, with their role effectively being the interpretation of law (Johnson and Canon, 1984). With the exception of constitutional decisionmaking, the courts are believed to play two primary roles: first, they serve as a venue of last resort for those unsuccessful in pursuing policy change elsewhere; and second, as a locus for "resolving issues that already have been heard in other arenas" (Barclay and Birkland, 1998, 231). In both of these roles, the courts simply follow the attention of other institutions. In cases involving constitutional decisions, courts are held to establish the boundaries within which other institutions will construct policy (Barclay and Birkland, 1998), but not to actually establish policy. Therefore, in constitutional decisions, the courts neither lead nor lag in the construction of public policy. Taken together, in the textbook model issue attention in the courts will generally lag behind issue attention in other institutions.

Contrary to the textbook perspective, the multiple streams framework (Kingdon, 2003) holds that policymaking is multifaceted and multilayered. Rather than

[1]These three do not include March and Olsen's (1976) Hierarchical Model. The general idea of that model is to differentiate the systemic and institutional agendas, or popular attention to issues and attention within government, respectively. Here, I do not incorporate measures of media attention, though future iterations of this research may.

the distinct stages postulated above, the multiple streams framework postulates a number of simultaneously occuring streams. The separate streams - problems, proposed policy solutions, and the political environment - move along independently of one another. Policy is created when policy entrepreneurs successfully couple their solutions to problems in light of the political environment (Baumgartner, 1989, 23). In this framework, issue attention in one institution is only weakly related to issue attention in other institutions, and the relationships in issue attention between institutions are random and unpredictable. The punctuated equilibrium framework, developed primarily in work by Baumgartner and Jones (1993), furthers the multiple streams model by postulating that policy is generally at a stable equilibrium, but that vast changes in issue attention periodically occur before attention settles back into a new equilibrium. As is the case with the multiple streams framework, there is no reason to expect issue attention in any one institution to systematically precede attention in other institutions. In other words, the multiple streams and punctuated equilibrium frameworks predict little to no systematic relationships in issue attention across institutions.

The models above were developed within the literature on public policy and policymaking. Research in this field has lagged behind research on public law in incorporating the notion of courts as policymakers (Barclay and Birkland, 1998). Instead, the above models have generally followed the very earliest models of the policy process and regarded courts as institutions in which there is "'neutral' discovery of legal principles" (Barclay and Birkland, 1998, 236). Yet with the emergence of legal realism and the view of judges as something other than neutral umpires, there is a general acceptance of courts as policymaking institutions (Murphy et al., 2006). Despite this acceptance, the courts remain relatively absent in models of the policy process (Barclay and Birkland, 1998).

One exception is Flemming, Wood and Bohte (1999), who, in their horizontal-sequential model, shift the agenda-setting and policy process research by explicitly incorporating the U.S. Supreme Court. Specifically, Flemming, Wood and Bohte (1999) ask whether particular institutions can systematically lead other institutions into considering particular issues. As they explain it, "[p]revious research on agenda-setting slights consideration of interactions between institutional agendas that may lead to specialized patterns of attention or to sequential patterns between the three branches" (Flemming, Wood and Bohte, 1999, 79). Thus, there may exist systematic relations of issue attention among the three branches. As one example of such a relationship, the President could potentially influence the Supreme Court's agenda through the office of the Solicitor General, through which the executive may directly influence the Court's decisions on which cases to hear and decide (e.g., Caldeira and Wright, 1988; Zorn, 2002).

In three broad issue areas, Flemming, Wood and Bohte (1999) document complex inter-relationships between the executive branch, Congress, and the Supreme Court. Consistent with their horizontal model of issue attention dynamics, they find that Supreme Court attention encourages additional Congressional attention to civil liberties and civil rights issues.[2] They show that "[t]he Supreme Court appears extremely important in the areas of civil rights and civil liberties policy" in setting the agenda, and they criticize previous literature for "neglect[ing] the Supreme Court as an agenda setter" (Flemming, Wood and Bohte, 1999, 104). In sum, prior research provides evidence of systematic, horizontal relationships in issue attention with a prominent role accorded to at least one judicial institution.

Despite evidence supporting their horizontal model, Flemming, Wood and Bohte

[2]Flemming, Wood and Bohte (1999) also find that the relationship periodically runs in the opposite direction, with Congressional attention influencing subsequent Supreme Court attention to civil liberties and civil rights issues.

(1999) also explain that it would be misleading to rely purely on any one model to explain patterns of issue attention across issues and institutions. Rather, they argue that the dynamics issue attention are interdependent, with systemic issue attention and the institutional agendas of Congress, the presidency, and the Supreme Court linked in a complex web (Flemming, Wood and Bohte, 1999). While their research offers support of horizontal relationships in particular policy areas, it does not do so across all issue areas. They therefore urge future research to be open to each model.

In all, we have three perspectives on the macrodynamics of issue attention. Each suggests different patterns in the relationship between issue attention in the federal courts and elsewhere. From the textbook perspective, the courts are implementers and interepreters of policy, so issue attention within the courts should lag behind issue attention elsewhere. From the multiple streams and punctuated equilibrium frameworks, the courts are but one of many venues, so there is little reason to suspect that the courts would ever systematically lead issue attention as institutional issue attention relationships are stochastic. Finally, the horizontal approach proposed by Flemming, Wood and Bohte suggests that the federal courts, like the Supreme Court, could be advantaged in leading issue attention to policy for certain issue areas.

Legal scholars and social scientists have, implicitly or explicitly, adopted one or a combination of the above policy process perspectives in research on the courts. In doing so, one line of research has provided a multitude of reasons for why the courts necessarily follow the attention of other institutions, while another line of research has suggested ways in which the Court actually garners attention for issues. Why might we expect the issue attention of courts to lag behind, or be entirely unrelated to, issue attention elsewhere? In contrast, what reasons do we have to believe the courts could lead attention to issue areas? In the remainder of this chapter, I outline

the theories proposed in previous research for why courts passively react, or why they proactively shift, the issue attention of government.

Passive Courts Theory

The idea that issue attention in the courts lags behind issue attention elsewhere can be traced back to classical notions of jurisprudence in the United States. These early views reflected the Blackstonian ideal of judges whose "function was only to declare the law" (Murphy et al., 2006, 10) after they have, without bias, discovered the legal principles of the case. The view is reflected in *Federalist 78*, where Hamilton declares that judges "had neither force nor will, but merely judgment." In this view, judges are simply declaring what the law is, so their attention was necessarily subsequent to the actions of other institutions. As mentioned above, it is this very notion which is built into the classic, and earliest, models of the policy process (Barclay and Birkland, 1998).

Yet by the early twentieth century, many legal scholars had already rejected the notion of a judge simply declaring the law. The prospect that judges were motivated by political preferences even began to creep into social science research (Pritchett, 1948), and the fact that the Supreme Court was an important national policymaker was generally accepted by the mid twentieth century (Dahl, 1957). While judges began to be viewed as more political, proponents of a passive courts view did not embrace the courts as on equal ground with other institutions. Rather, these scholars postulated that the courts were constrained in a number of ways which impinged on their policymaking effectiveness. These fall into two broad categories: legal process constraints and political constraints.

The first category, constraints imposed by the legal process, relates to charac-

teristics of the legal process which inhibit courts from addressing issues in a way that encourages additional attention elsewhere. The first of these stems from the fact that, to use the courts, litigants must have a live controversy and standing to see it resolved. In a judicial venue, they must assert that they have been "denied some benefit" or have been subject to some "arbitrary and discriminatory action," for which they are entitled to the intervention of the legal system (Rosenberg, 1991, 11). This task is particularly difficult in a common law system like the United States, with its emphasis on *stare decisis* and deciding similar cases in similar ways. Litigants wishing to gain attention for an issue are thus limited, as they can not plausibly present all of their policy goals as legal claims (Rosenberg, 1991).

A second procedural constraint is that the courts are ostensibly to address only the particular issue or issues presented by the litigants in the case. This is known as the *sua sponte* doctrine, which disfavors courts from addressing issues which they are not prompted to address. The doctrine is so entrenched that Epstein, Segal and Johnson (1996) argue it is now a norm in even the Supreme Court. This constraint impinges on the influence of judicial attention, as judges can only adjudicate those issues with which they are presented, thus reducing the universe of issues which a court may address. For proponents of the passive court perspective, this serves as an important limit on the courts. For the courts to exert any policy influence, they must be presented with the issues by litigants, and the judge or judges must be amenable to those issues. This further limits the utility of courts, proponents of the passive courts view suggest, because some issues are simply beyond the limits of the legal system (Note, 1977).

With the requirements of the standing and live question doctrines and the limits imposed by the *sua sponte* doctrine, litigation necessarily becomes oriented towards dealing with specific situations rather than the broader root causes of those situa-

tions (Rosenberg, 1991). Formulating policy solutions in individual court cases is difficult under these constraints. Thus, the ability of courts to influence policy requires large-scale and comprehensive litigation efforts (Epp, 1998). This is the third procedural constraint. Ultimately, for courts to systematically impact issue attention requires prolonged and comprehensive efforts on the part of members of the litigant community. Lacking widespread and prolonged litigation, most court cases are likely to remain blips on the radar for all but the individuals directly impacted.

In addition to procedural hurdles, the judiciary, as the "least dangerous branch" of the federal government, faces substantial political hurdles as well. Political constraints, proponents of a passive court view suggest, arise from the fact that the courts are not adequately insulated from the political pressures of other institutions. As such, the courts do not stray too far from the preferences of other institutions and the public (Dahl, 1957). Rather than addressing and reframing issues, engendering issue attention throughout government, the courts address only those issues for which they have popular support. Formally, the political constraints stem from, first, the court's dearth of explicit implementation powers, and second, the formal checks on judicial power held by Congress and the executive.

The first of the political constraints is the court's implementation powers, or lack thereof. In the words of one scholar, "the judiciary is given no positive powers and depends heavily upon political will to give effect to its decisions" (Clark, 2009, 973). The courts ultimately rely, in large part, on their institutional legitimacy in order to secure compliance with judicial decisions. Moreover, risking confrontations with other institutions, or backlash amongst the public, could lead to lower levels of judicial legitimacy (Caldeira and Gibson, 1992). Proponents of the passive court view thus suggest that the courts must limit their levels of policy influence, so as to secure a minimal level of legitimacy. This tradeoff between judicial impact

and judicial legitimacy restrains the courts from ever straying too far from the existing political mood. In fact, courts rarely do stray far from the dominant political consensus (Peltason, 1961; Hoekstra, 2000). Instead, the decisions of at least the Supreme Court are not typically far from the public's preferred positions (Mishler and Sheehan, 1993; McGuire and Stimson, 2004).

Beyond legitimacy constraints, efforts to curb the actual power of the judiciary have been utilized to limit the influence of the courts on public policy by, for instance, removing jurisdiction for particular types of cases. In the first place, Congress controls the allocation of funding for specific policies, and thus can refuse to appropriate funds for particular policies, as happened with school busing in 1980 (Murphy et al., 2006, 337). In addition to control over the purse strings, Congress can override or modify the Court's interpretation of law in statutory by decisions by creating and passing subsequent legislation; and, in fact, Congress often does so (Eskridge, 1991*a*). Beyond statutory decisions, in constitutional cases Congress can propose amendments to the Constitution, or again attempt to modify the decisions through legislation (Murphy et al., 2006). On the whole, these court-curbing proposals are legislative efforts to "restrict, remove, or otherwise limit judicial power" (Clark, 2009, 978). For the Supreme Court, such proposals matter influence its willingness to exercise judicial review, as the Court limits the use of judicial review when it is facing a hostile Congress (Clark, 2009). Evidence also suggests that, following increases in court-curbing, the Supreme Court generally defers more to the preferences of Congress (Hansford and Damore, 2000). In all, Congress has a number of potential avenues for influence over the courts, which members of Congress have not been reticent to employ when the courts have strayed from Congressional preferences.

Just as Congress can influence the judiciary, so too can the president. In the first place, presidents, with the advice and consent of Senate, select the justices who

comprise the courts. At some lag, then, federal judges are reflective of the prevailing political majority (Dahl, 1957). Moreover, it is typical for the chosen judge to be representative of the community in which they reside (Chase, 1972).Such judges would be expected to decide cases consistent with the values of the community, and could resist Supreme Court precedents which are not in line with their interpretations. The executive branch can also influence the outcomes of cases through the involvement in the judicial process of the office of Solicitor General, which enjoys unusual success within the federal courts. The executive may even utilize the office in order to further issues which the president considers a priority. For example, during the presidency of Ronald Reagan, the Solicitor General was said to pursue "agenda cases," or cases which were part of a broader social agenda (Salokar, 1992; Wohlfarth, 2009), a practice which continued into the presidency of George H.W. Bush (Pacelle, 2003; Wohlfarth, 2009), and offered an important avenue by which the president can directly influence the judicial agenda.

If these influences do not secure an outcome in the courts which the matches the president's preference, the president has further recourse. In the extreme, presidents can simply refuse to implement judicial decisions. Perhaps the most famous example of this is *ex parte Merryman*[3], where then Chief Justice Roger Taney issued a writ of habeas corpus for John Merryman, a prisoner being detained at the time by the Army. President Abraham Lincoln promptly disregarded Taney's ruling, as well as a subsequent opinion excoriating what Taney believed to be the President's abuse of power. As this incident demonstrates, in the face of outright executive refusal to comply, the courts are left with little recourse. If they do not wish to directly refuse to execute a decision, which may be the case for a variety of reasons (Whittington, 2009), the president may use the immense public profile of their office in order to

[3]17 F. Case. 144 (1861).

attack particular judicial decisions or precedents, as Presidents Jackson, Lincoln, Reagan, and George W. Bush have done (Murphy et al., 2006).

In sum, proponents of the passive courts perspective believe that there are an extensive number of potentially severe constraints on the judiciary. Judges are reflective of their communities and, often, the preferences of the prevailing political party. Even in the event they are not, they face potentially severe repercussions for straying from the preferences of those other institutional actors. Moreover, by nature of the legal process, they are limited to solely the issues which are appropriately presented to them by litigants. Litigants, in pursuit of policy change, must then consider the likelihood of positive outcomes through a judicial strategy, and the limited scope of any one of those outcomes. Taken comprehensively, the passive courts perspective suggests that courts will be relegated to a secondary role in the policy process.

Proactive Courts Theory

In contrast to the passive courts view, proponents of the proactive courts perspective believe that federal courts play a dynamic role in the policy process through their ability to act when other institutions cannot. Many of the procedural constraints, mentioned above, are viewed not as inhibiting the courts from leading the charge into new policy areas, but rather as encouraging the courts to take the lead. Because of the unique characteristics of courts, they can serve a critical policy role by "dramatizing issues and spurring action" (Rosenberg, 1991, 25). In this view, the courts trigger the attention of policymakers and motivate groups to "mobilize and take political action" (Rosenberg, 1991, 26). In totality, the accessibility of courts to litigants and interest groups gives them a point from which they can goad the

attention of other institutions.

This accessibility arises from some of the very constraints that concerned the passive courts proponents. Recall that lower courts must hear the cases properly brought before them. While this may limit the scope of issues discussed in courts, this "constraint" also means that litigants, when they can properly bring the case into the courts, can force the courts' attention towards a particular policy which other institutions, subject to partisan political pressures, may not be willing or able to address. Gaining issue attention in the courts is particularly important as "the pluralist system is predicated on the notion of access for citizens and groups. The agenda provides that access. This is especially relevant for the Supreme Court, which has traditionally served as a point of access for groups and issues that are inappropriate for or denied access to in the elected branches of government" (Pacelle, 1991, 15). Pacelle's view is accurate, except he is too limiting; the lower courts are the actual point of access and not the Supreme Court. Lower courts hear all cases properly brought, while the Supreme Court can still exercise discretion over its docket through the certiorari process. Over time, these issues may percolate up to the Supreme Court. Thus, it is the lower federal courts which provide a critical venue for the airing of grievances and issues which cannot or will not be raised in other institutions.

It is for this very reason that out-groups are often urged to pursue policy change through litigation. Strolovitch (2007), for example, urges intersectionally disadvantaged groups to use the courts to gain attention for their issues. For proponents of the proactive courts theory, this access is absolutely crucial for a number of reasons. These reasons are best recounted by Rosenberg, who states:

> Courts can provide publicity for issues and serve as a 'catalyst' for change

> (Halpern 1976, 75). Where the public is ignorant of certain conditions, and political elites do not want to deal with them, court decisions can 'politicize issues that otherwise might have remained unattended' (Monti 1980, 237). This may put public pressure on elites to act. Indeed, litigation may 'often' be 'the best method of attracting public attention to institutional conditions and of publicly documenting abuses' (Neier 1982, 29). By bringing conditions to light, and showing how far from constitutional or statutory aspirations practice has fallen, court cases can provide a 'cheap method of pricking powerful consciences' (Note 1977, 463). Thus, litigation 'serves as a catalyst, not a usurper, of the legislative process' (Sax 1971, 157). As Sax puts it, 'courts can be used to bring matters to legislative attention, to force them upon the agendas of reluctant and busy representatives' (Sax 1971, xviii).

The proactive courts theory thus suggests that court cases give voice to issues which are unaddressed elsewhere, and in so doing stoke the attention of other policy-making actors. Moreover, litigation provides a signal of conflict on particular issues, with case resolutions potentially leading to new equilibria. With greater attention and changes in the level of conflict on a particular issue, there is an increased incentive for other institutions to address the issue. In the words of Baumgartner (1989, 9), "[p]ublic salience and conflict determine the incentives for members of Congress to intervene in a given issue." It is in this way that proponents of the proactive court view believe issue attention in the courts could lead to greater issue attention throughout government.

But given the constraints outlined by proponents of the passive court view, how could new issues actually arrive? Proponents of the proactive courts perspective

believe that the constraints are minimally difficult to overcome, and that new issues therefore arrive in the courts in one of two ways: through the aggregation of individuals seeking redress for their individual grievances and disputes in the federal courts, or by coordinated litigation strategies by organized interests.

The first of these is through the aggregation of invidual disputes. To start, note that simply entering the legal system is a form of political activity (Zemans, 1983). While there is a constraint from "jurisidictional rules that structure participation, individual litigants actually set the agenda of the judicial branch of government" (Zemans, 1983, 691). In each case, even if the issue is of purely personal interest, there is the possibility of some influence on policy. Even trial court cases settled out of court occasionally have significant influence of the shape of public policy, as was the case in Mather's widely-recognized story of the fired football coach (Mather, 1995). As more and more cases are heard, with individual litigants pursuing their own interests, the aggregation of those decisions leads to a shift in policy. Over time, "individual choice and demands on public authority by invoking legal rights are closely interwoven with the making of public policy without any requisite involvement by a collectivity or any necessity for a public consciousness" (Zemans, 1983, 692).

What prompts this aggregative process? For proponents of the passive courts view, the process occurs after other institutions have already had their say on the issue area or, in other words, during the implementation of policy. In contrast, proponents of the proactive view note that "in many instances legal mobilization is generated not by the writing of new laws, but by changing social perceptions of the nature of problems and the appropriateness of the intervention of state authority" (Zemans, 1983, 697). As the image of a particular policy changes, it may become more suitable for redress through the courts. Thus, proponents of the passive court

view believe that legal mobilization could occur not only through new legislation, but instead that it could arise solely within the court system. As legal mobilization occurs, other institutions take notice and respond.

Legal mobilization is defined as involving all litigation, and thus it involves all types of litigants. However, the aggregative process is particularly concerned with "one-shotters," litigants who very rarely use the courts for redress of their grievances or resolution of their disputes (Galanter, 1974). Beyond these one-shotters, issues also arise in the courts by virtue of the strategies of organized interests. Those organized interests, "who wish to shape public policy - or prevent others from shaping policy - find it necessary to influence judges' choices of issues to address as well as solutions they will apply to problems of law and policy" (Murphy et al., 2006, 267). As such, organized interests are common participants in the judiciary.

Group involvement in the courts typically takes one of two forms: sponsorship of litigation or filing of amicus curiae briefs. Groups can sponsor litigation by providing litigants with attorneys and other forms of legal help. Interest groups may sponsor a case after it has arisen, if it involves their particular policy, or they may choose to search out a particular event that can serve as a test case (Murphy et al., 2006). Beyond direct involvement, interest groups may also participate as amicus curiae. The participation of groups as amici has exploded in recent years, both at the Supreme Court (Collins, 2008) and in state courts (Epstein, 1994). The influence of these groups on decision-making has been the subject of extensive study and continued debate (Epstein and Rowland, 1991; Collins, 2004, 2007, 2008), and their influence on the agenda of the the Supreme Court is well-established (Caldeira and Wright, 1988; McGuire and Caldeira, 1993). To wit, one group of scholars states that, "because judges have to wait for cases to come before them, groups help set the judicial agenda" (Murphy et al., 2006, 272).

Perhaps the best known example of an organized interest participating in the federal courts is the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund. The Legal Defense and Educational Fund employed an extensive litigation strategy, which was particularly aimed at achieving desegregation. The NAACP mapped out a legal strategy which involved pursuing a variety of different lawsuits addressing a broad swath of the complications arising from segregation in society, and in so doing challenging the separate but equal doctrine. As Kluger (1975) recounts in fine detail, over time victories in cases like *Sweatt v. Painter* led to larger ones, eventually culminating in the *Brown v. Board of Education* decisions.

Moreover, not only can groups use the courts to pursue policy change, but their involvement also potentially invokes a positive feedback loop, as court decisions may encourage and legitimize group actions (Scheingold, 1974; McCann, 1992; Rosenberg, 1991). The Supreme Court, as the highest and most visible court in the land, is particularly capable of doing so. Scholars have recently proposed that the through signals in Court actions, the Court mobilizes litigants, especially policy-minded interest groups, to revise arguments and pursue litigation in areas the Court considers a priority (Baird, 2004, 2007; Baird and Jacobi, 2009*a*,*b*). In so doing, the courts overcome many of the procedural constraints imposed by waiting for litigants, as judges can signal arguments to which the courts are particularly receptive. Interest groups, with their concern over public policy, thus play a crucial role in responding to these signals.

Taken together, proponents of the proactive courts perspective believe that the courts serve as an important catalyst of policy change by forcing issues onto the agenda of other institutions. Courts serve this role in part because they do not have the same barriers to gaining agenda space as other institutions. Instead, issue

attention is determined by litigation. The attention of other institutions is then attracted to certain policy areas, in part by the aggregation of many individual litigant filings and in part by the litigation efforts of organized interests. Overall, the proactive courts perspective suggests that courts will actually lead the attention of other institutions in the policy process.

Hypotheses

To this point, I have outlined three general models of the policy process, each of which suggests a different role for the courts. Research on the courts, rather than supporting any one of these models, provides two clear schools of thought on how the courts fit into models of the policy process. On the one hand, the textbook model of the policy process and the passive court theory nicely dovetail. These scholars believe that issue attention in the courts lags behind issue attention elsewhere. On the other hand, the horizontal model of the policy process and the proactive court theory also nicely dovetail. Here, scholars believe that issue attention in the courts could systematically lead the attention of other institutions to particular issues. In between the two frameworks, the policy streams model of the policy process suggests the courts will neither lag nor lead the issue attention of other institutions, as attention to any one issue is stochastic.

In the remainder of this chapter, I delineate the questions, hypotheses and predictions generated from each of these perspectives. To begin, I outline what each perspective suggests for the influence of the Supreme Court on the issues which the federal courts address. Then, having delineated dynamics of issue attention within the judiciary, I outline the expectations arising from each perspective for how the issue attention of courts relates to the issue attention of other institutions.

Attention Dynamics in the Judicial Hierarchy

For attention dynamics internal to the judiciary, both the passive and proactive court perspectives provide clear predictions about what should happen after the Supreme Court takes action. The passive courts perspective suggests that as the courts implement the law, Supreme Court decisions will have the effect of settling areas of uncertainty in the law and thus will lead to less litigation. The proactive courts perspective, however, predicts that Supreme Court activity will serve to mobilize litigants and groups, as the Court's decisions attract and encourage the attention of litigants and groups to particular policies.

Take first the passive courts prediction that the Court's attention to a policy area will be followed by reduced attention to that policy area in lower federal courts. Recall that in the passive courts perspective, courts are implementing policy constructed elsewhere. Under this formulation, the Supreme Court is primarily engaged in dispute settling. Scholars supportive of the passive courts perspective will point to the guidelines offered by the Court in how they select which cases to review. In particular, Rule 10 of the Supreme Court rules explicitly lays out widespread importance and legal uncertainty as criteria for the selection of court cases for the Court's review. The Court specifically chooses cases in order to maximally quell areas of uncertainty.

In doing so, the decisions of the Court also have the effect of making litigation outcomes more predictable which in turn reduces the incentives to pursue litigation (Priest and Klein, 1984). As both parties have improved clarity as to their prospects for success or failure, litigants can avoid costly litigation altogether in a greater number of situations where they are unlikely to succeed. A reduction in legal uncertainty then also has the effect of leading to fewer legal disputes in lower courts

in the issue areas the Supreme Court pays attention to (Casper and Posner, 1974). Thus, the passive courts theory suggests the following hypothesis:

> *Passive Hierarchy Hypothesis: An increase in the Supreme Court's attention to an issue will lead to* ***fewer*** *cases on that issue in the district courts and the courts of appeals.*

The proactive courts perspective provides a diametrically opposite prediction for the influence of the Supreme Court on lower court issue attention. Proponents of the proactive courts perspective predict that Supreme Court decisions within an issue area will lead to a temporary increase of attention to those issue areas in the federal courts. The Supreme Court, as the most visible legal institution in the United States, provides the most publicity of any legal institution. In so doing, it not only provides signals to the legislature and executive of issue areas in need of attention, but also provides signals to litigants.

Indeed, proponents of the proactive courts perspective have formalized this process in prior research. They believe the decisions of the Supreme Court signal litigants, and in particular interest groups, of areas the Court considers a priority, and of arguments within those areas to which the Court is especially receptive (Baird, 2004, 2007; Baird and Jacobi, 2009*a*,*b*). Subsequently, groups bring and support additional cases in those areas, cases which eventually reach the Supreme Court. Thus, for example, proponents of this perspective have pointed to research which documents increases in the number of published opinions within an issue area in the Courts of Appeals three to four years after the Supreme Court has addressed those issue areas as evidence of legal mobilization (Baird, 2007). Thus, the proactive courts hypothesis for the attention dynamics of the judicial hierarchy is as follows:

> *Proactive Hierarchy Hypothesis: An increase in the Supreme Court's attention to an issue will lead to* ***more*** *cases on that issue, and* ***more***

interest groups involved on those cases, in the district courts and the courts of appeals.

The proactive and passive courts perspectives thus provide two different, empirically-discernible expectations for the patterns of attention dynamics within the federal court system. By examining shifts in the issue attention of actors in the lower federal courts after Supreme Court attention to particular policy areas, I directly test which of these perspectives predominates. In Chapter 4, I elaborate upon these hypotheses of issue attention within the judicial hierarchy, and find evidence suggesting support for both, as lower court responses are contingent on the lower court actor – litigant, interest group, or judge – under consideration.

Attention Dynamics of American Institutions

Beyond the judiciary, I also seek to determine how issue attention in courts relates to attention in other institutions, specifically, Congress and the presidency. As is the case with the dynamics of attention within the judicial hierarchy, the passive and proactive perspectives offer clear and diametrically opposed predictions for what should be observed in cross-institutional attention dynamics.

Take first the passive courts perspective. This view suggests that the courts are primarily responsible for interpreting policy constructed elsewhere. As detailed above, a host of constraints, both legal and political, prevent the courts from positively shaping policy on an issue in the absence of legal necessity or the wishes of the other institutions. Recall, for instance, Justice Scalia's quote which began this chapter, in which he laments the decision of Congress to leave secondary policy details to be worked out by the courts. With the rigid constraints imposed on the judiciary, the issues addressed in the court system necessarily lag behind the issues addressed elsewhere.

As such, the passive courts perspective suggests the following hypothesis for overall levels of litigation in the federal courts:

> *Passive Litigation Hypothesis: An increase in presidential and congressional attention to an issue area will lead to* ***more*** *cases on that issue in the district courts and the courts of appeals.*

Contrast this with the proactive courts perspective. While they acknowledge that courts have important constraints, proponents of the proactive courts perspective believe that courts also have a number of positive characteristics which make them especially valuable venues for the pursuit of policy change. In particular, courts serve a potentially vital role in placing issues on the agenda of other institutions and the public. In doing so, courts serve as a "catalyst" for change (Halpern, 1976) and provoke the attention of other policymakers to issue areas which have been ignored.

In this view, two processes enable courts to stir attention in particular areas. First, as individual litigants pursue their individual cases in the courts, the aggregation of their claims serves a critical policymaking function, signalling issue areas in need of government attention. Thus, the proactive courts perspective suggests the following hypothesis for the relationship of overall levels of litigation with issue attention throughout government:

> *Proactive Litigation Hypothesis: An increase in litigation in the federal courts on an issue will lead to* ***more*** *congressional and presidential attention to that issue.*

Beyond the aggregation of claims, proponents of the proactive courts hypothesis also believe that the attention of other institutions is stirred by the participation of organized interests in the courts. In the federal courts, groups have the opportunity

to sponsor litigation or participate as amicus curiae. To this end, their influence on the issue attention of the Supreme Court has been well-established. Therefore, the proactive court perspectives suggest the following hypothesis for the relationship of interest group issue attention in the courts with the issue attention of other institutions:

> *Proactive Groups Hypothesis: An increase in interest group participation in the federal courts on an issue will lead to* ***more*** *congressional and presidential attention to that issue.*

As the reader might expect, this stands in contrast to the role envisioned for interest group participation in the judiciary by proponents of the passive courts perspective. When courts are solely implementing the law, interest groups will mobilize in the courts only to secure or limit the policies which have been constructed elsewhere. Therefore, interest group participation in the judiciary should lag behind presidential and congressional attention. This suggests the following hypothesis:

> *Passive Groups Hypothesis: An increase in presidential and congressional attention to an issue area will lead to* ***more*** *interest group participation on that issue in the district courts and the courts of appeals.*

In Chapter 5, I further delineate the theoretical underpinnings for these cross-institutional issue attention hypotheses and examine them in detail. Specifically, I examine the relationship between issue attention across levels of the federal courts with the issue attention of Congress and the presidency. I analyze patterns of attention by policy area and look for systematic patterns in which one institution leads another institution to address an issue. As in Chapter 4, the analyses reveal considerable nuance to issue attention relationships across institutions.

The hypotheses are summarized in Table 2.1. The lightly shaded area represents hypotheses to be tested in Chapter 4, while the unshaded area represents hypotheses which I test in Chapter 5. Yet before I can examine any of the above hypotheses, I must first determine how to validly and reliably measure issue attention in the federal courts. Having done so, I must then classify the issue in the hundreds of thousands of cases brought annually to federal courtrooms throughout the United States. In the next chapter, I turn to these tasks.

PASSIVE COURTS PERSPECTIVE					
	Increases in attention in this institution				
Response in attention	Supreme Court	Courts of Appeals	District Courts	Congress	President
Supreme Court				+	+
Courts of Appeals	-			+	+
District Courts	-			+	+
Congress					
President					

PROACTIVE COURTS PERSPECTIVE					
	Increases in attention in this institution				
Response in attention	Supreme Court	Courts of Appeals	District Courts	Congress	President
Supreme Court					
Courts of Appeals	+				
District Courts	+				
Congress	+	+	+		
President	+	+	+		

Table 2.1: *Summary of hypothesized relationships in the issue attention of institutions according to the passive and proactive courts perspectives.* A plus sign indicates an increase in the issue attention of the institution denoted by the column will lead to an increase in the issue attention of the institution denoted by the row. A negative sign indicates an increase in the issue attention of column institution will lead to a decrease in the issue attention of the row institution.

Chapter 3

Issue Attention in the Federal Courts

> *"Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."* – Alexis de Tocqueville (1840).

Over more than two centuries, the federal courts of the United States have, in some capacity, addressed nearly every issue imaginable with implications for all aspects of life in America. While de Tocqueville's observation, made in the early years of the country, still rings true today, *how* questions move from institution to institution is still unclear. In the first two chapters, I laid out two separate perspectives on how issue attention in the federal courts propagates both within the judicial hierarchy and across the three branches of government. Each of these perspectives offers different expectations for how the issue attention of political actors within the judiciary - litigants, judges, and interest groups - relates to the attention of other political actors at different levels within the federal courts as well as to issue attention in other national institutions.

The first step in empirically examining these dynamics is to determine the issue areas towards which these actors in the federal courts devote their attention. Towards that end, my purpose in the current chapter is to introduce the reader to the

federal courts, the three primary actors therein, and the issues on which the courts, and particularly these primary participants in the legal process, are working. I begin by providing a brief background on federal courts, offering context for what comes next. I subsequently set about systematically analyzing issue attention in the federal courts, taking care to address the differing attention of each participant. With patterns of issue attention determined for these litigants, judges, and interest groups, I turn in Chapters 4 and 5 to analyzing their relationships both across courtrooms, and across the branches of the United States government.

The Federal Courts

Article III of the United States Constitution, in concert with the Judiciary Act of 1789,[1] established the judiciary of the United States. In the beginning, three levels of courts were defined - district courts, circuit courts, and the Supreme Court. The district courts served as trial courts, with individual district judges presiding at trial. The circuit courts had mixed appellate and trial jurisdiction, though they were mainly trial courts as well (Posner, 1996), with cases heard by one district judge and two Supreme Court justices who "rode circuit." The Supreme Court sat *en banc* and predominantly heard appeals. As riding circuit became too arduous for the Supreme Court Justices, pressure built for reform and, eventually, the Judiciary Act of 1891[2] was passed. This act created the "circuit courts of appeals," which were handed jurisdiction over most ordinary appeals from the district courts. Note that the circuit courts of appeals are not, and should not be confused with, the circuit courts, which maintained some trial court jurisdiction until 1911, at which

[1] *1 Stat. 73*
[2] *26 Stat. 826*

time they were abolished.

The general structure of the federal courts – district courts, courts of appeals, and the Supreme Court – was thus established. However, to address growing concerns over the caseload of the Supreme Court, as well as the types of cases making up the Court's docket, the Judiciary Act of 1925 gave the Supreme Court nearly-total discretionary jurisdiction over its caseload. Appeals are brought primarily through petitions for a writ of certiorari and the Court selects only those cases which at least four justices deem worthy of review. The Court's newly-acquired agenda-setting power redefined the Supreme Court's role in the judiciary, with the Court now hearing only those cases which four justices deemed of sufficiently widespread importance as to require the Court's attention.

With only minor modifications, this system persists to the present day. As it now stands, there are three principal levels which comprise the federal judicial hierarchy.[3] The U.S. Supreme Court sits at the top of the hierarchy and hears a very limited number of appeals, which are overwhelmingly chosen by the Court at its discretion. Under the Supreme Court are twelve U.S. Circuit Courts of Appeals.[4] These courts represent regional constituencies (circuits), and hear appeals from district courts within their circuit as well as from administrative agencies. Finally, there are 94 district courts, at least one in each state, which serve as the trial courts for federal court cases.

A vast number of citizens and government officials pass through these courts every year. In the recent year from March of 2009 to March of 2010, there were

[3]This analysis will not include a number of specialty courts. These courts include the U.S. Bankruptcy Court, the U.S. Court of International Trade, the U.S. Court of Federal Claims, and Military Courts, the Court of Veterans Appeals, or the U.S. Tax Court.

[4]The U.S. Court of Appeals for the Federal Circuit, which primarily decides cases in specialized areas such as administrative law, intellectual property, and money damages against the U.S. government, will not be included in subsequent analyses.

over 60,000 appeals terminated in the federal courts of appeals[5] and over 362,000 cases terminated in federal district courts.[6] In fact, so much activity occurs at such a rapid pace in the federal courts that debate has persisted for decades as to the implications of expanding caseloads for the U.S. legal system, as well as methods for reforming the courts to address the expansion (Newman, 1993; Williams, 1993; Posner, 1986, 1996; O'Scannlain, 2009).

In light of the huge workloads of the lower federal courts, it is hardly surprising that this volume of data has not been comprehensively examined. Hand coding the policy content of these cases is infeasible if not altogether impossible, a fact which contributes to the lack of attention the lower court agenda has received from scholars. However, the growth of government data collection on the federal court docket, the increasing availability of published federal court opinions, and increases in computing power and methods for automated content analysis, open the possibility of constructing reliable and valid measures of the policy content of these hundred of thousands of cases.

Measuring the Judicial Agenda

Recall from Chapter 1 that, in studies of the federal judicial agenda, measures of issue attention are typically case counts within a policy area (e.g., Pacelle, 1991). The underlying logic of this measurement strategy is that litigation requires both substantial time and capital investment. For instance, one recent survey of attorneys active in federal courts found that, in addition to whatever time is required to litigate each case, the median cost of a closed civil case was $15,000 for plaintiffs and $20,000

[5]This number does not include terminations in the Federal Circuit Court of Appeals.

[6]Data from the Federal Judicial Caseload Statistics, released by the Administrative Office of the United States Courts and available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/

for defendants (Lee and Willging, 2009). These costs mean that those who choose to pursue a court case do not decide to do so lightly. In fact, in the same survey the median stakes reported for these litigants were $160,000 for plaintiffs and $200,000 for defendants.

In studying how actors, with limited resources (Hilgartner and Bosk, 1988), choose to allocate those resources within the judiciary, we can therefore look to the number of court cases they are active on within an issue area. Each case represents an expenditure of time and energy on a particular topic, so an increase in the number of court cases within an issue area indicates the prioritization of that particular issue. I employ this operationalization of the agenda, and measure issue attention in the federal courts via case counts within policy areas during each year.

As discussed previously, three actors play an integral role in determining the attention an issue receives in the federal courts: litigants, judges, and interest groups. From a passive courts perspective, the policy attention of each of these actors should, if anything, lag behind the attention of actors in other institutions. Within the proactive courts perspective, however, there are different mechanisms through which institutional attention could be stoked by attention in the courts. First, some scholars have argued it is the individual *litigants* who encourage additional attention simply through the aggregation of individual litigation (Zemans, 1983). Alternatively, *interest groups* may encourage additional attention through their participation in the courts (Monti, 1980; Neier, 1982; McCann, 1992; Strolovitch, 2007). Finally, the specific policies crafted by *judges* in their published opinions may stoke attention elsewhere (Eskridge, 1991*a*,*b*; Hettinger and Zorn, 2005).

To account for the different mechanisms postulated by the proactive courts framework, I examine the issue attention of each of these actors. Overall, the activities of these three actors account for the bulk of the federal courts' institutional agendas.

By chronicling the issue attention of litigants, interest groups and judges separately, I can disentangle the possible processes underlying the proactive courts theory. In the following three sections, I discuss each of these actors in detail and their role in shaping the agenda of the federal courts.

Litigants

Ultimately, the judiciary can only address those cases which litigants properly bring before the court. The most populous actor within the federal courts, litigants represent individuals from all walks of life, and include those who are both newcomers to the federal courts and those who have made a career of their participation (Galanter, 1974). These litigants are the first actor with which I am concerned, as I propose to measure the level of litigant participation in the federal courts within a policy area.

Operationalizing litigant participation in the federal courts is relatively straightforward. Recall that, while justices on the Supreme Court can pick and choose their cases, judges on lower federal courts are required to hear all cases properly brought before them. For that reason, the total caseload of lower federal courts within particular issue areas offers a direct indicator of the priorities of litigants (Grossman and Sarat, 1975). For total caseload, I use the total number of all cases terminated in a court within an issue area during a calendar year. This total caseload by court and policy area is my measure of *individual mobilization*.

Individual mobilization reflects two related underlying concepts: first, the total participation of the public in the courts, and second, the overall policy attention of the courts. In the former case, the measure is a compilation of the individual demands of actors for legal remedies. Conscious of their rights, citizens assert them via litigation, or the effort to secure a legal remedy (Zemans, 1983). In the latter

case, this measures the total number of issues on which the courts actually touch, or the overall scope of issue attention in the federal courts. Even those cases which are settled before trial, with no published opinion and from which no binding precedent issues, can have the effect of shifting public policy (Mather, 1995). As such, the levels of litigation within any policy area offer a powerful signal of how much influence the federal courts are wielding in that policy area.

The proactive and passive courts perspectives each provide different predictions for how the levels of litigation will shift over time. For the passive courts perspective, the courts are predominantly concerned with the interpretation of policy. Thus, the courts iron out the details of public policies designed elsewhere. Within the hierarchy, the Supreme Court addresses those issues which the lower federal courts could not reach a consensus resolution of. The opinion of the Court establishes a new legal rule, which guides both individual behavior and the behavior of lower court judges (Wahlbeck, 1998). Insofar as the Supreme Court's interpretation is accepted, less litigation should arise. In totality, the passive courts perspective suggests Supreme Court opinions should lead to lower levels of individual mobilization, while legislation may lead to temporary increases in individual mobilization.

Contrary to this prediction, the proactive courts perspective suggests that individual mobilization may be encouraged by Supreme Court opinions, and may lead to additional policymaking attention in other institutions. For attention patterns within the federal courts, temporary increases in litigation will follow Supreme Court attention as signaling results in, "...more cases being brought in a policy area when Justices signal that the policy area is a judicial priority" (Baird and Jacobi, 2009*b*, pg. 217). Across institutions, the synthesizing of numerous individual demands for legal remedy in the federal courts could lead to broad based policy change (Zemans, 1983). For example, Monti (1980) states that "[t]he courts have helped to politicize

issues that otherwise might have remained unattended and have introduced to at least part of the political process more issues and a broader range of parties than have previously had occasion to use it effectively." In summary, the two theories laid out in Chapter 2 predict very different relationships between individual mobilization in the lower federal courts and issue attention on the Supreme Court, as well as between the issue attention in the federal courts and issue attention in other policymaking institutions. The desire for legal remedies drives litigants into the courts, but how these individual pursuits relate to the attention of other institutions is an open question.

Interest Groups

While individual mobilization includes the participation and thus issue attention of all litigants within the federal courts, we know that there are qualitative differences across litigants. In particular, certain litigants participate more often and are particularly effective (Galanter, 1974). Amongst this special category of repeat player litigants is one of the most oft-studied actors in political science research, the interest group. Thus, I also measure and study the patterns of issue attention for these important participants within the federal courts.

Since at least the 1950s, and probably well before (e.g. Bentley, 1908), scholars have understood the importance of interest group involvement in politics (Truman, 1951), and more specifically in the courts (Caldeira and Wright, 1988; Epstein and Kobylka, 1992; Vose, 1957). One of the principal pathways for their influence within the legal venue is through filing an amicus curiae, or "friend of the court," brief. These briefs are filed by groups or individuals who are not involved in the litigation but who have some desire to offer their view to the court. In general, the amicus brief presents an argument, typically policy-related, while also "highlighting diverse

perspectives on the broader policy concerns implicated by the dispute" (Collins, 2008, 2). Though amicus briefs offer the opportunity to influence the judicial agenda and decision making (Caldeira and Wright, 1988; Collins, 2008), they are also very costly and involve significant resource expenditures on the part of groups (Caldeira and Wright, 1988; Hansford, 2004*a*). In light of these costs, groups must carefully weigh whether to seek policy change in the judiciary through amicus briefs. I refer to the shifts in interest group participation in the judiciary as *collective mobilization*, and measure this as the number of cases with an amicus brief by court within a policy area during a year.

In recent years, there have been marked improvements in our understanding of amicus brief filings in the federal courts, particularly in regard to the scholarly understanding of the factors motivating groups to file amicus briefs (Kobylka, 1987; Scheppele and Walker, 1991; Epstein and Knight, 1999; Hansford, 2004*a*,*b*; Martinek, 2006; Solowiej and Collins, 2009; Hansford, 2011), the influences of amicus briefs on agenda setting (Caldeira and Wright, 1988; McGuire and Caldeira, 1993), on decision making (Songer and Sheehan, 1993; Collins, 2004, 2008; Collins and Martinek, 2011), and on the content and direction of policies laid out in opinions (Epstein and Kobylka, 1992; Spriggs and Wahlbeck, 1997). While the vast majority of these studies have focused on the Supreme Court, others have started to move into more systematic analyses of the federal courts of appeals (Martinek, 2006; Collins and Martinek, 2011). These studies have vastly improved and enriched the scholarly understanding of interest groups as well as the judiciary by clarifying the motivations of groups in seeking their policy goals through amicus briefs, and assessing exactly how influential these briefs are.

For example, the above-cited research provides strong evidence that the intention of groups in filing amicus briefs is primarily to shape public policy, whether by pro-

viding information or influencing the content or direction of court opinions. Beyond specifically shaping the policy, at the certiorari stage groups are motivated in filing brief to garner attention for particular issues by signalling through their involvement the widespread importance of an issue at stake in a case. Finally, membership-based groups may seek to file based on their desire to provide purposive incentives to enhance support for their organization.

Again, for purposes of this research, the question is how the two perspectives predict this issue attention will relate to issue atttention elsewhere. I begin with the passive courts perspective. Within the judicial hierarchy, the passive view suggests little reason for the activity of interest groups within the judiciary to be related to attention elsewhere. If anything, there should be fewer interest groups active in the courts following increases in Supreme Court attention, as Supreme Court decisions settle areas of unsettled law. Similarly, the passive courts theory suggests interest group attention in the federal courts should generally follow issue attention in other institutions, as the courts are used to iron out details of public policies.

The proactive courts perspective, on the other hand, suggests groups may seek to spur action through the courts. By gaining attention for their policies, the group can encourage other institutions to take action. The dynamics are the same as in the case of individual litigants, but the process is now coordinated and organized by strategic interest groups seeking policy influence. Within the judicial hierarchy, the sophisticated legal counsel of interest groups can respond to specific signals in Supreme Court opinions and seek out the appropriate case vehicles on which they mobilize (Baird, 2004, 2007; Baird and Jacobi, 2009*a*,*b*). Thus, interest group activity as amicus curiae within an issue area in the lower federal courts should increase following Supreme Court attention to that issue area.[7] Thus, the proactive courts

[7]Prior research advocating for the litigant signal theory of Supreme Court agenda setting cites

perspective predicts that increases in group activity in the courts would be followed by increases in attention elsewhere. In summary, the proactive and passive courts perspectives again offer opposite expectations for the dynamics of issue attention, but this time for interest groups.

Judges

Finally, neither of these measures captures a shift in the priorities of the judges. Because Supreme Court justices choose which cases to hear, the total caseload measure for the Supreme Court reflects the priority the justices accord to an issue area. Therefore, for the Supreme Court the total caseload measure reflects *judicial priorities*. Lower court judges, on the other hand, do not choose their cases. They do, though, determine whether a case warrants a published opinion. Where judges have limited resources and growing caseloads, the additional cost of publishing an opinion suggests a prioritization of the issue area. Therefore, within the lower courts, there is also a published agenda, signified by the number of published opinions within an issue area, which reflects *judicial priorities*.

Courts of appeals opinions, as Songer (1990) reviews, are published by different standards across circuit courts, issue areas, judges, and litigants. What is uniform, though, is that published opinions are imbued with precedential value. Therefore, these cases indicate new approaches, applications, or developments of legal rules. To the extent that the presiding judge(s) believed a new frame was being presented, they would deem publication of an opinion necessary to ensure that future cases could use the decision as precedent. Differentiating these published opinions from the overall agenda would not be valuable if in fact the number of published opinions

evidence of an increase in the number of cases with amicus curiae briefs within samples of published courts of appeals opinions after Supreme Court attention as corroborative evidence for the hypothesis. Subsequent research has called this finding into question, however (Peters, 2007).

directly correlated with the overall rate of litigation. However, this is unlikely to be the case. There are a number of differences between published opinions and the total activity of the courts. Often the unpublished opinions would have precedential value if they were to be published, with a large fraction of the cases being reversals of trial court decisions (Davis and Songer, 1989). These cases are disproportionately of certain issue types and from certain courts with certain litigants participating. Given the above points, it is likely that the cases which prompt full decisions will involve conflict (with precedent, other circuit courts, district courts, or through dissents) and will have higher rates of participation of policy-minded litigants.

The passive courts perspective predicts a decrease in the number of published opinions in an issue area after the Supreme Court has acted in that issue area. This follows from similar reasoning as before. With the Supreme Court settling areas of law through their decisions, lower court judges are left with clear legal rules and less litigation to deal with. Consequently, they should publish fewer opinions. Cross-institutionally, the passive courts perspective suggests that judges in lower courts may need to establish new legal rules in order to iron out the details of legislation. Thus, the passive perspective suggests an increase in published opinions after the attention of other policymaking institutions increases. Alternatively, the proactive courts perspective predicts an increase in the number of published courts of appeals opinions after Supreme Court attention, and a positive relationship between published opinions within an issue area in the federal courts and subsequent attention to that issue area in other policymaking branches.

Therefore, the two perspectives once again produce opposing expectations for the relationship between issue attention in the lower federal courts and issue attention in other policymaking institutions. Moreover, the expectations derived from each perspective is testable using the measures proposed above. These measure are

Table 3.1: Proposed Measures of Judicial Agenda

Measure	**Actors**	**Operationalization**	**Court Levels**
a) Individual Mobilization	Litigants	Number of Court Cases	Supreme Court Courts of Appeals District Courts
b) Collective Mobilization	Organized Interests	Amicus Curiae	Supreme Court Courts of Appeals District Courts
c) Judicial Priorities	Judges	Concurrence & Dissent Published Opinions Published Opinions	Supreme Court Courts of Appeals District Courts
NOTE: The actual measure is the operationalization per issue area per year.			

summarized in Table 3.1.

Data and Methodology

The variety of actors and activities comprising the judicial agenda leads to two major empirical challenges. First, examining the issue attention of each requires data on the total number of court cases in each federal court, the total number of published opinions in each federal court, and a count of amicus briefs in each federal court, all across an extended time period. Second, these data must be classified into issue areas, such as "civil rights" or "environment," in order to compare agendas across institutions. Moreover, these issues must be consistent with similar measures for the legislative and executive branches.

The first of the challenges is to acquire the raw data on the cases in the federal courts. While a project of this scope was infeasible until recently, procuring this data is now possible due to government data collection on the federal courts' dockets, the availability of federal court opinions in electronic format, and increases in computing power. To secure each of the measures, I rely on four sources: the Policy Agendas

Project,[8] the Administrative Office of the U.S. Courts (AO), public.resource.org, and Lexis-Nexis. For measures of the issue attention of the Supreme Court, Congress, and the President, the Policy Agendas Project maintains data. The remaining venues of interest are the lower federal courts. Data on all cases in the lower federal courts is available through the AO,[9] which has maintained data on every case in the federal district courts and courts of appeals from 1970 to the present. Though some variables suffer from missingness and inconsistent coding, the bulk of the data are reliably coded (Eisenberg and Schlanger, 2003).

One variable not reliably coded is disposition, or whether the case was decided with a published opinion. Moreover, there is no variable included in the AO data to indicate *collective mobilization*, or amicus curiae filings for cases. The text of published Courts of Appeals opinions is available, however, in electronic format through public.resource.org. I acquired all published opinions from 1950 to 1996 through this source.[10] The texts of district court opinions are available online through Lexis-Nexis. Of these, all published opinions from 1950 through 2000 were acquired.

Finally, to acquire the measure of collective mobilization, I utilize information included in the published opinions. The heading of both district court and courts of appeals published opinions includes information on amicus participants, or the legal representation of amicus participants. I wrote a computer program (in Perl) which extracted all information on amicus briefs actually reported in the published

[8]The Policy Agendas Project measures and chronicles policy attention across the institutions of American government. The data for the Policy Agendas Project were originally collected by Frank R. Baumgartner and Bryan D. Jones, with the support of National Science Foundation (SBR 9320922 and 0111611), and are distributed through the Department of Government at the University of Texas at Austin.

[9]Specifically, the Federal Court Cases: Integrated Database 1970-2000; 2001; 2002; 2003; 2004; 2005; 2006; maintained by Federal Judicial Center. Conducted by the Federal Judicial Center. ICPSR08429-v7. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [producer and distributor], 2005-04-29. doi:10.3886/ICPSR08429

[10]There are opinions available from later years but these years seem to include opinions which were never actually published, as well as other content that was not published opinions.

opinion. This information typically took one of two forms. In the first situation, the published opinion would explicitly mention the filer of an amicus curiae brief. In the second situation, the published opinion would not explicitly mention the name of the amicus curiae, but would offer information on the attorneys representing the amicus. In both cases, the program extracted information on the amicus and coded whether or not an amicus was present in the case.[11] For purposes of this project, I utilized the simple dichotomization of whether or not an amicus was present in a case. I then aggregated the number of cases with an amicus by circuit, policy and year.

While this approach captures the scope of interest group activity in terms of cases, it does not capture the scope of interest group activity in terms of the total number of groups. This is because not all groups are reported along with their amicus brief. That being said, measurement via the total number of cases with amicus participation rather than the total number of interests offers two specific advantages. While filing an amicus brief carries very high costs (Caldeira and Wright, 1988), co-signing amicus briefs is relatively costless (Hansford, 2011). If a very specific issue is being dealt with by the courts, multiple groups could sign on to a brief due to the low costs of doing so but the resolution of the case will still only affect that specific issue. Because my interest lies in the macrodynamics of issue attention, I am more concerned with the broad sweep of involvement on issues. Thus, a higher number of cases with amici present indicates that conflict has spread across a multitude of more specific issues within a broad issue area.

With the data collected, the second challenge is to classify each case measure into policy areas in order to provide a comparable measure of policy attention across

[11] I include in my analysis all amicus briefs, including those by individuals qua individuals. Removing individuals was not possible due to the inconsistent reporting employed in many of the published opinions.

Table 3.2: Variables

Measure	**Source**	**Years**
Supreme Court		
Cases, Total	Policy Agendas Project	1944-2009
Cases, Salient	Supreme Court Database	1950-2010
Courts of Appeals		
Cases, Total	Administrative Office of the U.S. Courts	1970-2005
Cases, Published Opinion	bulk.resource.org published opinions	1950-1996
Cases, Amicus Participant	bulk.resource.org published opinions	1950-1996
District Courts		
Cases, Total	Administrative Office of the U.S. Courts	1971-2005
Cases, Published Opinion	Lexis-Nexis published opinions	1950-2000
Cases, Amicus Participant	Lexis-Nexis published opinions	1950-2000
Congress		
Public Laws	Policy Agendas Project	1948-2007
Congressional Hearings	Policy Agendas Project	1946-2008
CQ Almanac initiatives	Policy Agendas Project	1948-2007
President		
State of the Union mentions	Policy Agendas Project	1946-2005
Executive Orders	Policy Agendas Project	1945-2003

institutions. The Policy Agendas Project uses 19 major topic (or issue) codes into which they categorize each of their measures of policy activity (Supreme Court cases, Congressional hearings, public laws, State of the Union mentions, and executive orders). In categorizing the lower court measures, I use these same 19 major issue categories.[12] Issue categories are assigned based on the policy content of the measure. For example, the landmark case of *Lawrence v. Texas*,[13] where the Supreme Court ruled a Texas law banning sodomy violated the Due Process Clause, is coded as "Civil Rights, Minority Issues, and Civil Liberties."

With the size of the federal judicial agenda, classifying these opinions across an extended time period is nearly impossible without a vast resource investment. Yet recent advances in methods for automated document classification open the door

[12]The 19 major issue categories are available from the Policy Agendas Project website at http://www.policyagendas.org/page/topic-codebook.

[13]539 U.S. 558 (2003)

to coding the policy content of these opinions. Methods for automated document classification have begun to make inroads in political science (Quinn et al., 2010; Hopkins and King, 2010; Grimmer, 2010), and legal studies (Evans et al., 2007; Corley, 2008; Owens and Wedeking, 2012). Moreover, recent advances in supervised machine learning methods have opened the possibility of coding large archives of text according to presently prevalent schemes (Szmer and Edwards, 2011). In supervised learning, a subset of data, here Supreme Court cases, are hand-coded. Part of the subset is then used to train a model based on the words in those texts. The model is evaluated by it's ability to predict the human-coded labels of the remaining subset (Quinn et al., 2010). This process allows for optimization of the model, which is then used to classify any remaining cases, here the published opinions of lower federal courts.

A whole suite of methods for supervised learning classification tasks have been proposed, including neural nets, naive Bayes (Caruana and Niculescu-Mizil, 2006), supervised latent Dirichlet allocation (Blei and McAuliffe, 2007), and labelled latent Dirichlet allocation (Ramage et al., 2009). These methods decrease the costs of coding large corpora, but they also have high initial costs in that they require a subset of hand-coded data. However, with the information available from the Policy Agendas Project, supervised learning in this context has minimal initial costs and a huge benefit in the potential coding of lower court cases. In this study, an additional benefit of supervised learning is that the cases are coded in a manner consistent with measures of other institutions, enabling direct cross-institutional comparisons.

To clarify, the goal of supervised learning is to infer features from *labeled* data, then to use those features to classify *unlabeled* data. In the context of the judiciary, the Policy Agendas Project has coded the policy content of Supreme Court opinions, thereby offering a set of labeled data. From this labeled data, I infer a function

based on the words used in each opinion which optimally predicts the labels, or topics. Having done so, I then use the same function with the texts of published lower court opinions to predict the appropriate classification of those opinions.

I therefore acquired the texts of Supreme Court opinions to serve as training documents for the analysis. Opinions were retrieved from `resource.org`, and subsequently matched to corresponding records in the Policy Agendas Supreme Court database, yielding 6,396 unique opinion-issue matches.[14] I utilized a number of preprocessing steps in order to prepare the texts for analysis, consistent with standard practices in natural language processing and topic modeling.[15]

As training and evaluation data, I used the hand-coded Supreme Court opinions. I matched each of the Supreme Court opinions with their Policy Agendas Project label. In so doing, I could then use the words of the individual opinions as data to predict the classifications. Because any one supervised learning method is subject to individual biases, I employ three separate models and then employ a simple ensemble classification algorithm to predict the final classification. By combining the predictions of different models, ensemble methods ensure superior predictive accuracy than any constituent model (Hastie, Tibshirani and Friedman, 2008).

[14]Only the actual text of the opinion, not including the summary and syllabus, is retained for training purposes.

[15]I stripped all punctuation and capitalization from the corpus, as well as a list of very common, non-informative words. In addition to standard stop-words, I removed the following terms, each of which appeared over 70,000 times in the opinions: "court", "led2d","district", "requir", "sct", "unit", "act." I then wrote a computer program in Perl which collapsed case citations and federal statutes into unique terms. For instance, "338 U.S. 1 became 338us1." By doing so, I was able to incorporate citations and statutes into the models as words, which provides leverage on recent analyses using citations to map the development of law on the Supreme Court (Fowler et al., 2007; Fowler and Jeon, 2008). I removed all remaining numbers from the corpus. Finally, I stemmed each term according to the Porter stemming algorithm (Porter, 1980). Once these preprocessing steps were completed for the corpora, I determined the term-frequency inverse document frequency (tf-idf) of the remaining tokens. I retained only those tokens with tf-idf scores greater than approximately the median, consistent with (Blei and Lafferty, 2009). I did so to eliminate particularly infrequent and extremely common words, which would lack meaning for determining topics and would slow computation.

I estimate naive Bayes, maximum entropy, and decision tree classifiers. The models were trained on a random subset of 90% of the Supreme Court opinions, which were then used to predict the remaining 10% of opinions. The accuracy of these methods at predicting the opinions is as follows: the naive Bayes classifier was accurate in 69.7% of cases, the maximum entropy classifier was accurate in 61.9% of cases, and the decision tree classifier was accurate on 43.4% of cases. A 10-fold cross-validation comparison ensured that these accuracy rates were consistent across different subsets of the data.

These models were then used to classify the published opinions of the courts of appeals and district courts. Inevitably, the methods came to different classification conclusions for certain cases. To address these instances, I utilized a simple ensemble method. First, all cases where the three methods agreed were classified as that policy. Second, any remaining cases on which the naive Bayes classifier and one of the other two agreed was classified as such. I gave preference to the naive Bayes classifier due to the higher out-of-sample accuracy performance. Opinions on which the decision tree and maximum entropy classifier agreed were then categorized as such. Finally, all remaining opinions were classified according to the naive Bayes classifier, again owing to superior out-of-sample accuracy.

For the district courts, I classified all published opinions from 1950 through 2000, while for the courts of appeals I classified all opinions from 1950 through 1996.[16] I aggregated the published opinions by assigned classification for each court and year, thus yielding the measure of *judicial prioritization*.

With all of this done, it was simple to calculate the next measure, the amount of interest group activity (*collective mobilization*). Having coded the published opin-

[16]The courts of appeals opinions are from a more limited timespan because of an apparent change in the types of cases included on bulk.resource.org in later years.

ions via the supervised topic model, I wrote another computer program to extract information on whether or not an amicus curiae, or an attorney representing an amicus curiae, was present in the information included in the opinions files. I then aggregated the number of cases with at least one amicus participant by issue area and court for each year with available data. The measure thus provides a picture of changes in group participation, or collective mobilization, within my 19 issue areas across an extended time period.

Finally, to construct the measure of the overall agenda, or *litigant mobilization*, I utilize the classifications of the published opinions in concert with the overall agenda measures available from the AO. All cases in the AO data include codes for the nature of the suit in civil cases or for the offense in criminal cases. To determine the issue content of these cases, I match case records from the AO data with their published opinions, and therefore to the issue assigned through the supervised topic model. For each nature of suit or offense code, I can therefore determine the predominant policy area, yielding a set of measures comparable within the lower courts and across institutional settings. The result is a crosswalk matching the AO nature of suit and offense codes to the Policy Agendas issue coding scheme and providing a consistent, cross-institutional measure of issue content for *all* cases.[17] In the remainder of this chapter, I present and discuss this new, comprehensive data on issue attention in the federal courts.

Litigants

I begin by examining the total amount of litigation in the federal courts across an extended time period, or what I have termed litigant mobilization. Here, I seek

[17] Additional information on the Administrative Office data compilation for this measure is available in the appendix to this chapter.

to understand what issue areas are the subject of the greatest levels of litigation, and how patterns of litigation within issue areas have changed over time.

To begin answering these questions, in Figure 3.1 I present the number of cases terminated across all federal courts of appeals for a policy area during each calendar year from 1970 to 2005. These plots thus represent the total amount of attention paid to any particular issue area by litigants in the federal courts of appeals. Three characteristics of the courts of appeals caseload, evident in Figure 3.1, warrant discussion: first, the generally expanding caseloads; second, the declines in some issue areas around 1990; and third, the specific decrease in economic cases.

The first of these points deals with the general expansion of federal appellate caseloads across issue areas. Of course, this was to be expected. As mentioned earlier, the increase in litigation in the federal courts has led to ongoing debate over judicial reform (Posner, 1986, 1996; O'Scannlain, 2009). Immediately evident from Figure 3.1 is that the increase has not been consistent across policy areas. Instead, while the agenda is generally expanding across issues, at least up until the 1990s, much of the expansion has occurred in the Law, Crime and Family issue area. This topic, which comprises the bulk of the activity of all litigation in the federal courts, pertains to a number of criminal issues including fraud, drug crimes, child abuse, and assaults on federal officials. This category accounts for a large portion of the attention of the federal courts. Yet while Law, Crime, and Family litigation in the federal courts of appeals has continued to increase, attention to a number of other issue areas have tailed off at different period after reaching peaks. For example, in Figure 3.1, there are marked decreases in the number of Civil Rights[18] cases from the late 1990s into the 2000s, while there is a decrease in Social Welfare cases terminated

[18]The civil rights issue area includes issues of racial, gender, handicap, employment and age discimination as well as voting rights, freedom of speech and religion, and right to privacy issues.

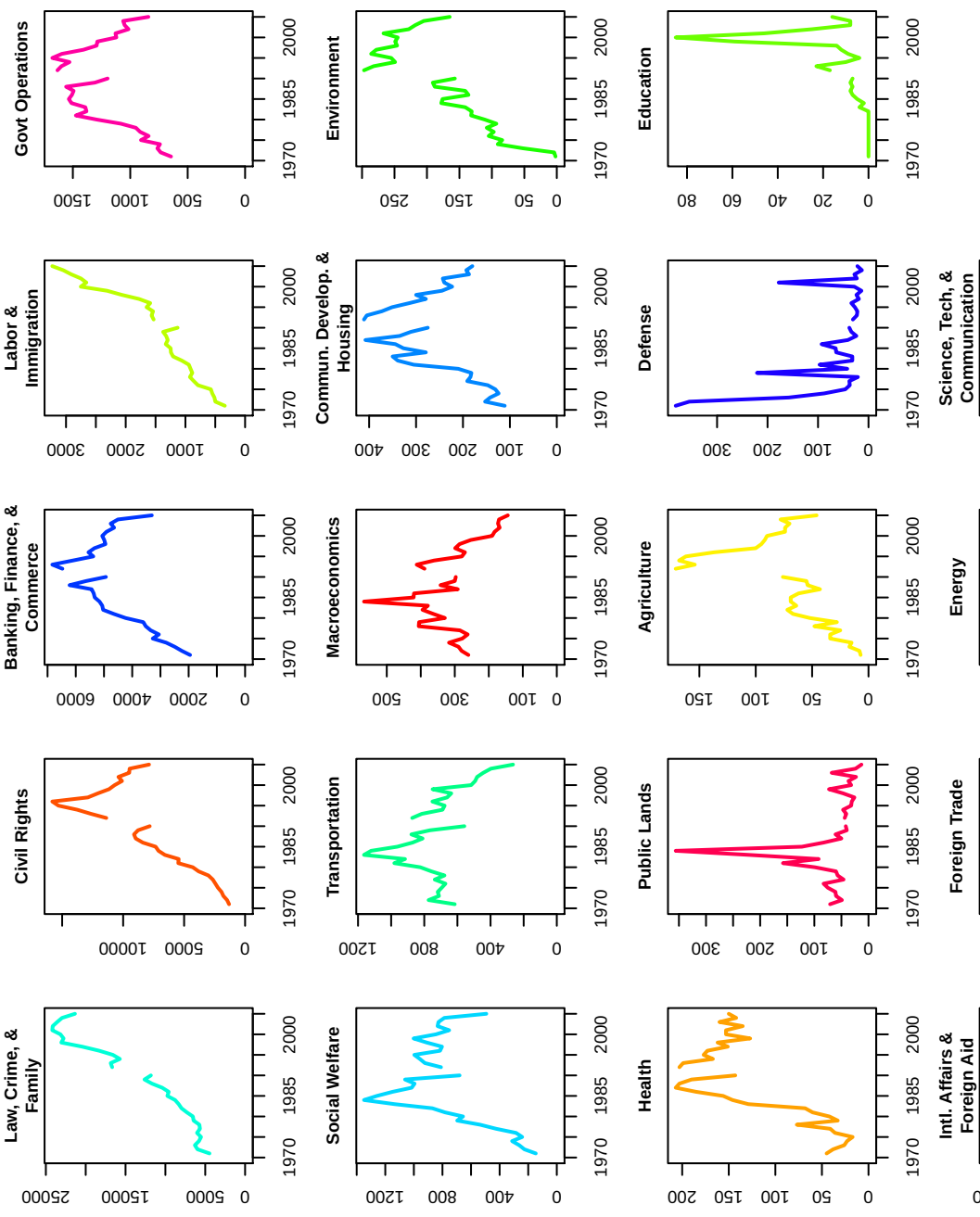


Figure 3.1: *Line plots of cases terminated, by policy area, the federal courts of appeals, 1970-2005.* The y-axis represents the number of all cases terminated in the federal courts of appeals within the policy area during the specified year. Data for 1991 are missing for three courts of appeals.

in the federal courts of appeals in the 1980s. Thus, we have convincing evidence that rates of litigation shift over time, and that the shifts across policy areas are not uniform.

The third point demonstrates why this is so important for the dynamics of issue attention. The Banking, Finance, and Commerce issue area is another for which attention peaked around 1992 and then tailed off. This shift away from economic issues was previously documented at the Supreme Court level (Pacelle, 1991; Baumgartner and Gold, 2002). This, of course, begs the question of whether the shift in the Supreme Court's attention was a strategic choice by the justices, as has been argued previously (Pacelle, 1991), or whether there were simply fewer cases in the pipeline. My analysis in Chapter 4 explores these issue attention patterns in greater detail, and in particular whether the Supreme Court encouraged this decrease.

Moving to the district courts, Figure 3.2 presents the number of cases terminated across all district courts over a similar time period. Again, the overall increases are primarily tied to an increase in the number of Law, Crime, and Family cases, though there are also substantial increases in the number of Civil Rights and Labor and Immigration cases in the district courts. The marked declines that were evident in the courts of appeals are far less evident in the district courts. Rather, across most issue areas there is a relatively consistent increase in the total amount of litigation in these original trial courts. Indeed, as but one example, litigation in the Banking, Finance and Commerce issue area increases at a relatively constant rate. Thus, the decreases in attention to economic issues documented at both the Supreme Court and courts of appeals levels does not persist when the focus of study is shifted to the trial court level.

The plots also make clear a number of peculiar, though interesting, shifts in issue attention. For instance, the reader may notice a huge increase in the number of cases

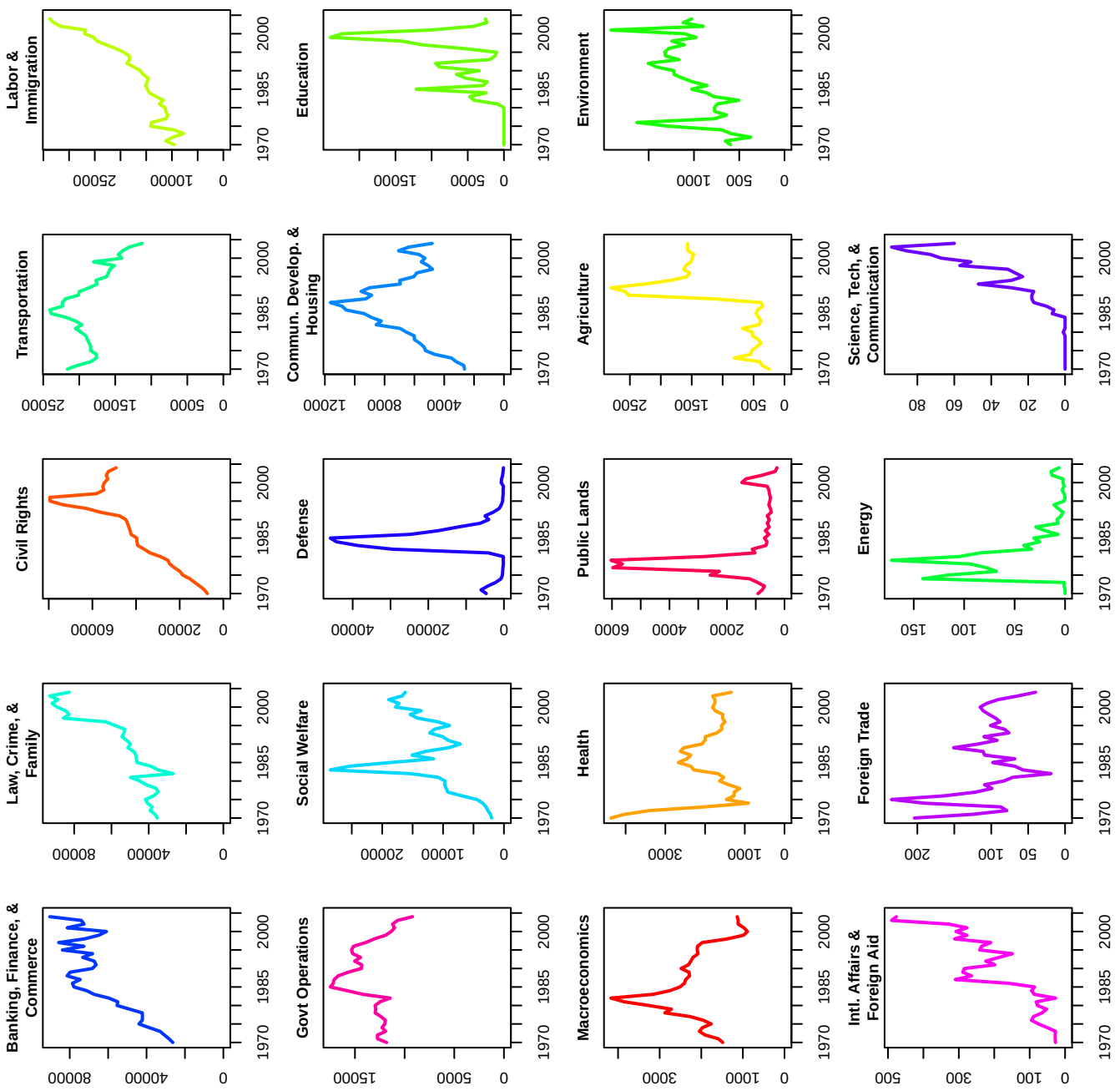


Figure 3.2: *Line plots of cases terminated, by policy area, the federal district courts, 1971-2006.* The y-axis represents the number of all cases terminated in the federal district courts within the policy area during the specified year.

classified as Defense in the mid-1980s. This explosion is accurate in that it reflects a shift in the mid-1980s when there was a substantial but temporary increase in the number of suits by federal agencies seeking to recover overpayments of veterans benefits. However, this increase was quickly curtailed by changes in government policy (Galanter and Epp, 1992). That the data pick up on this temporary shift in issue attention provides further support for the face validity of the measurement strategy.

In summary, the amount of litigation in the federal courts has increased in totality over time, but the increase has not been uniform across issue areas. Rather, a subset of issues, most notably Law, Crime, and Family cases, account for the bulk of the increase in caseload across the district courts and courts of appeals. Moreover, the levels of litigation across most issues demonstrate unique shifts. How these shifts in individual mobilization relate to issue attention elsewhere in government will be explored further in subsequent chapters.

Judges

The above section makes clear that patterns of litigation have not been consistent across time, and that the focus of litigation has also shifted. I now turn to determining how issue attention is distributed in the published opinions. While total litigation indicates mass legal mobilization within an issue area, it also includes many routine matters. Published opinions, on the other hand, offer evidence of cases which were regarded by the presiding judge as more important, or specifically as having precedential value. Published opinions, in other words, offer direct evidence of shifts in public policy, occurring within the judicial venue, on a particular issue area.

I again begin with the courts of appeals. Figure 3.3 presents the aggregated number of published opinions in the Courts of Appeals for each of the policy areas for 1950 through 1996. As would be expected based on the total caseload statistics presented above, cases in the Law, Crime, and Family issue area comprise the overwhelming bulk of judicial attention as measured by the publication of opinions. Further, again consistent with the total volume of litigation being pursued in the judiciary, the secondary categories of attention are Banking, Finance, and Commerce, Labor and Immigration and Civil Rights.

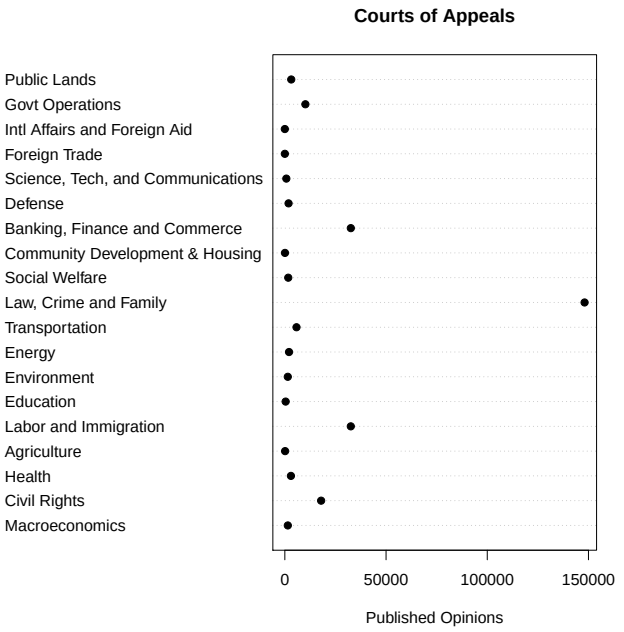


Figure 3.3: *Dot plots of published opinions, by policy area, in the federal courts of appeals, 1950-1996.*

To examine the rate of publication changes over time, I again plot the number of cases, but this time only those cases with published opinions, over time for each issue area in Figure 3.4. The plot immediately makes evident the difference in the measures of individual mobilization versus judicial priorities, as across most issue areas there is now a rather consistent increase in the number of published opinions. Contrast this with Figure 3.1, in which many issue areas saw peaks before trailing off to lower levels of litigation. A comparison of the two plots offers further justification for the fact that the two measures capture unique elements of issue attention in the federal courts. It also suggests that prior analyses relying solely on a sample

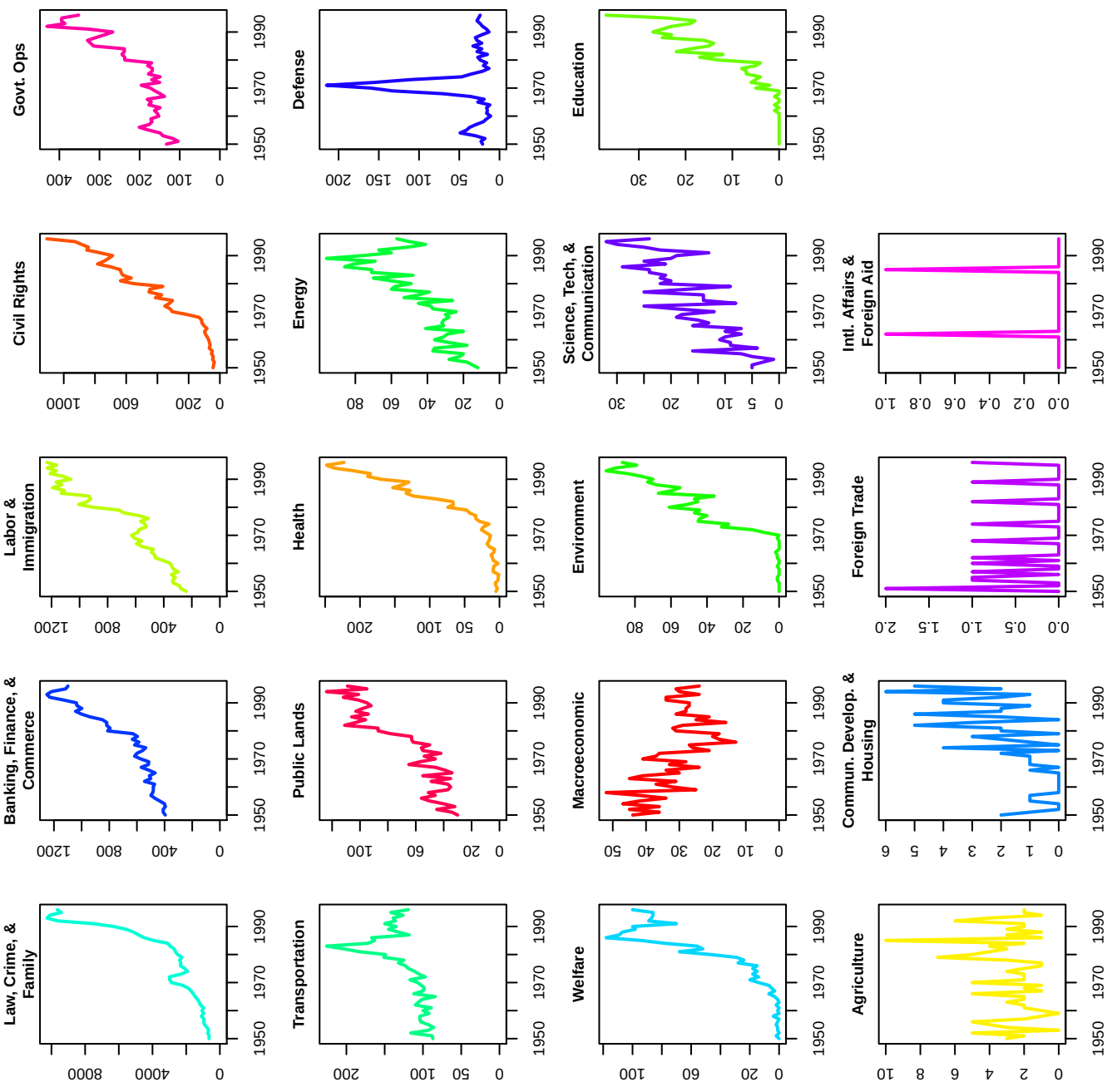


Figure 3.4: *Line plots of published opinions, by policy area, in the federal courts of appeals, 1950-1996.* The y-axis represents the number of all published opinions in the federal courts of appeals within the policy area during the specified year.

of published opinions as a measure of the courts of appeals agenda (e.g., Hurwitz, 2006) only captured an unrepresentative portion of issue attention in lower federal courts.

Moving to the district courts, Figure 3.5 presents the number of published opinions in the district courts from 1950 to 2000. Consistent with prior results, the same four issue areas account for the overwhelming bulk of judicial attention in the district courts, with Law, Crime, and Family yet again serving as the predominant focus. For both the district courts and the courts of appeals, the primary issue areas are the same. Conversely, issues which are extremely atypical in the federal courts, such as Foreign Aid and Foreign Trade, appear equally infrequently across the time span in both types of courts, thus offering further evidence of the face validity of the classification process.

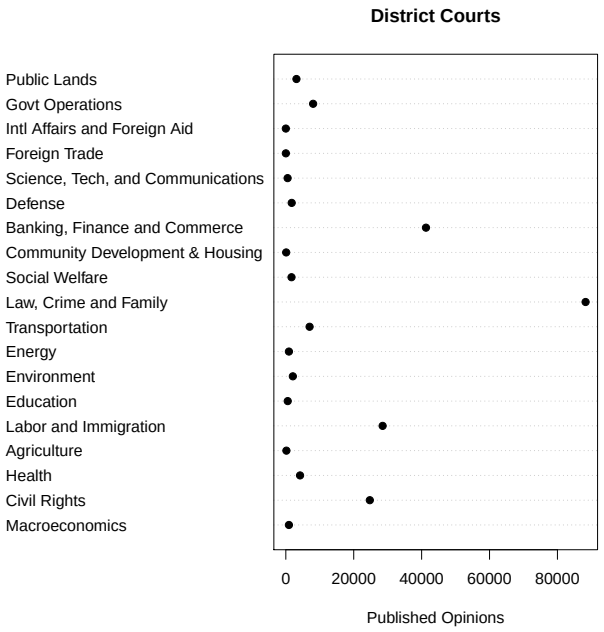


Figure 3.5: *Dot plots of published opinions, by policy area, in the federal district courts, 1950-2000.*

How has judicial prioritization of each of these issues changed over time in the district courts? To see this, in Figure 3.6 I plot the number of published opinions in the district courts by issue area for the years 1950 through 2000. The general increase in the number of published opinions in each policy area observed in the courts of appeals data is again observed at the district court level. Across most

issues, the number of published opinions in an issue area is increasing.

Across all four measures, we have observed a relatively consistent increase in the number of federal court cases, whether with published opinions or without. Even if one discounts cases disposed of without published opinions as having no policy impact, the increase in the number of published opinions in each policy area means the federal courts are exerting increasing levels of influence on public policy. As was touched on previously, opinions are published in cases where the presiding judge(s) believe the case has precedential influence. Such cases exert some new influence on public policy, even if it is solely within that district or circuit. It is critical that we have a better understanding of how these patterns of attention, and influence, relate to what is happening elsewhere in government.

Interest Groups

The intention of the first two measures was to present initial information on the issue attention of litigants in the federal courts, as measured by overall levels of litigation by policy area, and the issue attention and policy influence of judges in developing legal rules, as measured by the number of published opinions by issue area. This leaves amicus curaie briefs, or a particular type of participation frequently utilized by interest groups in the federal courts. My final measure of issue attention in the federal courts captures the priorities of interest groups by examining the scope – and changes in the scope – of amicus curiae participation on published opinions in the federal courts. As such, it captures a still higher degree of attention to a particular policy area.

I measure amicus curiae participation as the number of published opinions featuring at least one amicus curiae participant. I present the total number of these

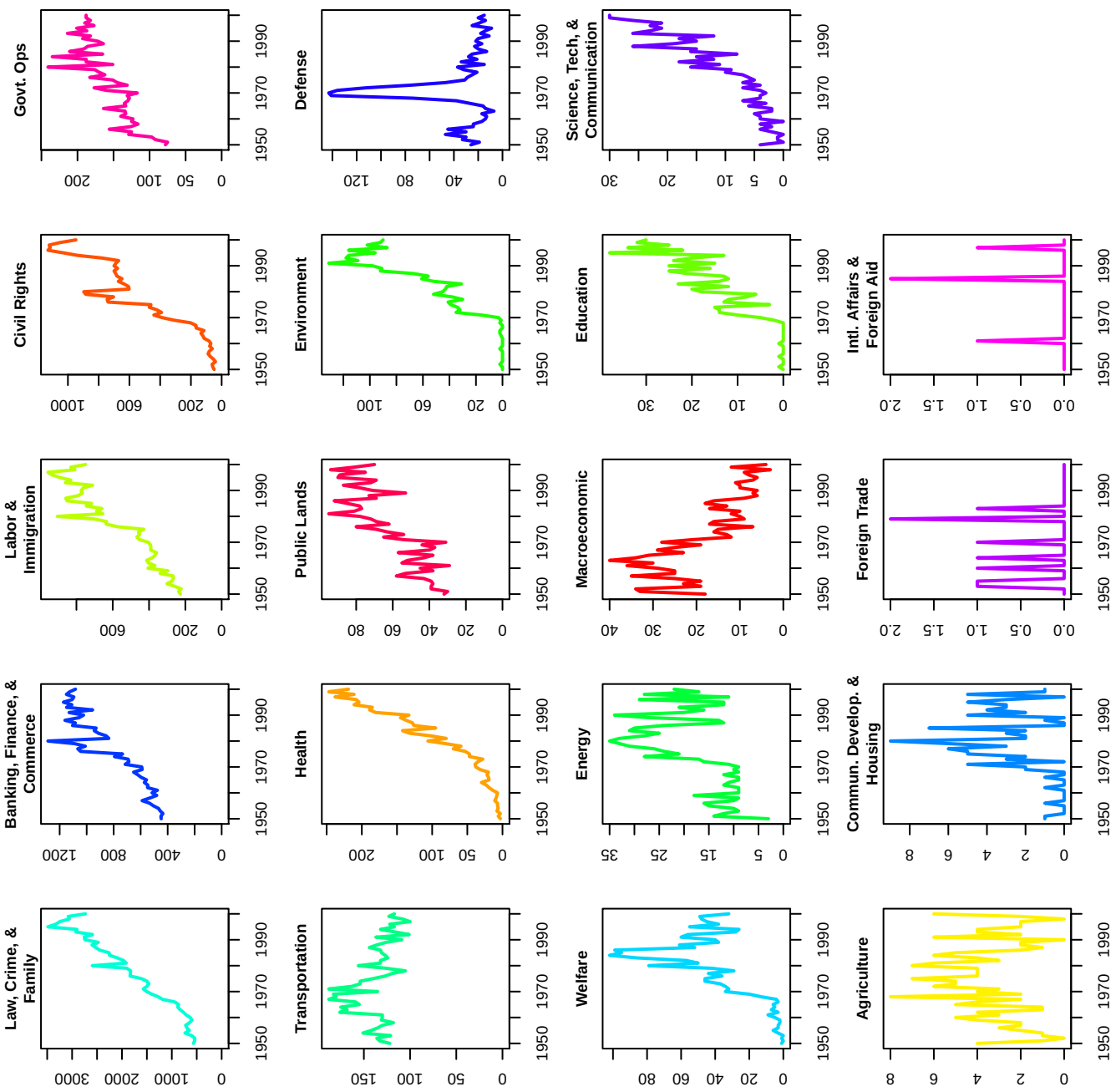


Figure 3.6: *Line plots of published opinions, by policy area, in the federal district courts, 1950-2000.* The y-axis represents the number of all published opinions in the federal district courts within the policy area during the specified year.

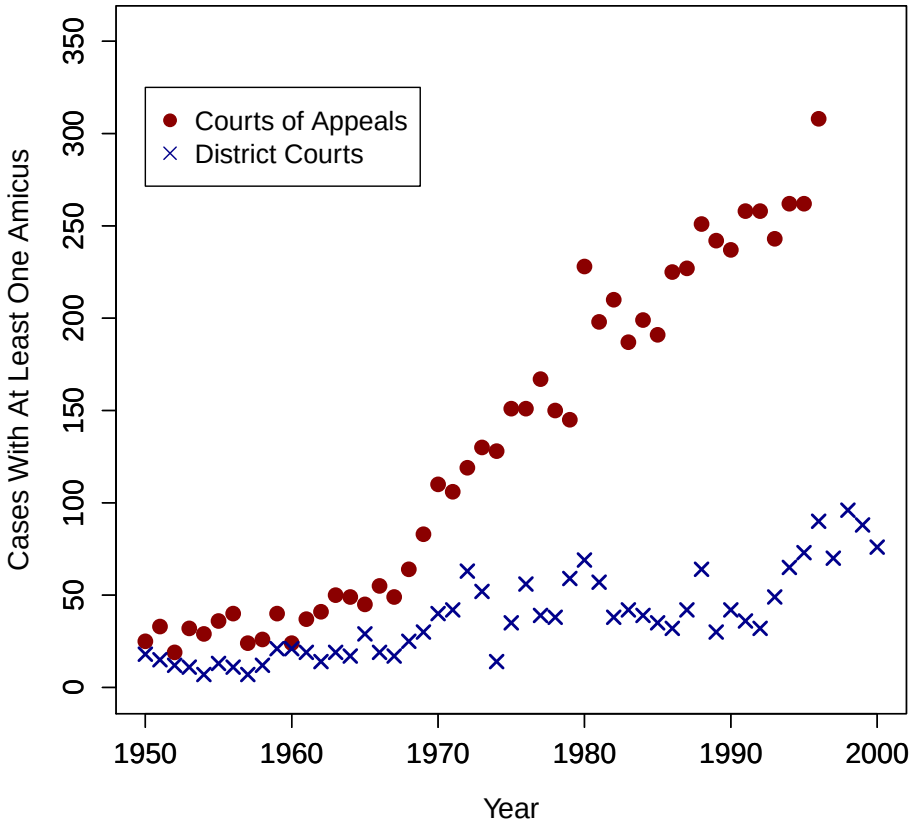
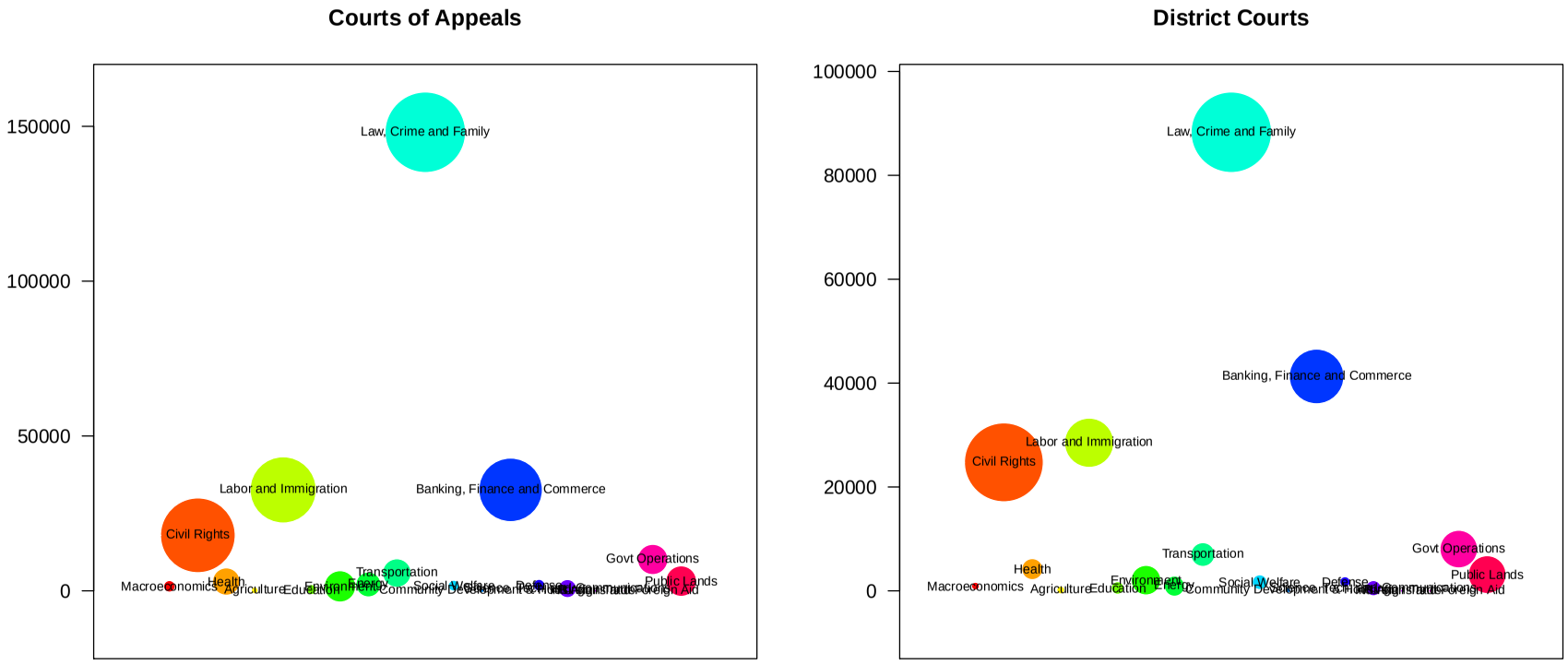


Figure 3.7: *Counts of Cases with At Least One Amicus Brief in the Federal Courts of Appeals and District Courts.*

published opinions, aggregated across policy areas and courts, in Figure 3.7. While it is difficult to empirically assess the face validity of the measure, there is evidence of a rapid acceleration in the number of amicus briefs filed in the federal courts of appeals beginning in the late 1960s, as would be expected based on prior research (e.g., Epstein and Kobylka, 1992; Martinek, 2006). In the case of the district courts, amicus briefs are infrequent but increasing slightly in number over time, which again is in line with expectations.

One conceivable concern with this measurement of interest group participation



Courts of Appeals

District Courts

Figure 3.8: *Bubble plot of published opinions and cases with at least one amicus curiae participant.* The y-axis represents a count of published opinions within the issue area in the indicated level of the hierarchy. The area of the circle represents the number of cases for that particular policy with at least one amicus curiae participant. The x-axis is an index for the policy name.

is whether the number of amici are nothing more than the number of cases. In other words, if interest group participation is approximately constant across policy areas, we would expect to see positive correlation between the number of cases with at least one amicus curiae. To see this visually, I have plotted in Figure 3.8, for both the district courts and courts of appeals, the number of amicus curiae as the area of the dots in a vertical dotplot of the number of published opinion. What should be immediately clear is that while the areas are generally proportional to the number of published opinions in an issue area, there is also a reasonable amount of discrimination between the two measures. As an example, note that there are more cases with amicus participants in cases dealing with Civil Rights and Liberties in both the district courts and the courts of appeals than would be expected solely based on the number of published opinions. In other words, interest groups are more active on Civil Rights and Liberties cases than in other issue areas. Similarly, despite making up only a small proportion of the total published opinions at each level, the Environment and Public Lands categories have a disproportionate number of cases with amicus participants.

Figure 3.8 thus provides relatively conclusive evidence that the measure of published opinions with at least one amicus curiae participant is not simply duplicative of the published opinions measure. Moreover, Figure 3.7 provides evidence that patterns of amicus curiae participation have both changed measurably over time and that the change in rates of participation is not constant. Thus, interest groups are participating at different rates within different policy areas.

How has this participation changed over time? To see this, in Figure 3.9 I plot the number of published opinions with at least one amicus curiae brief in the federal district courts and courts of appeals for the four issue areas which comprise the bulk of amicus activity. For each, there is a general increase across the time period, evi-

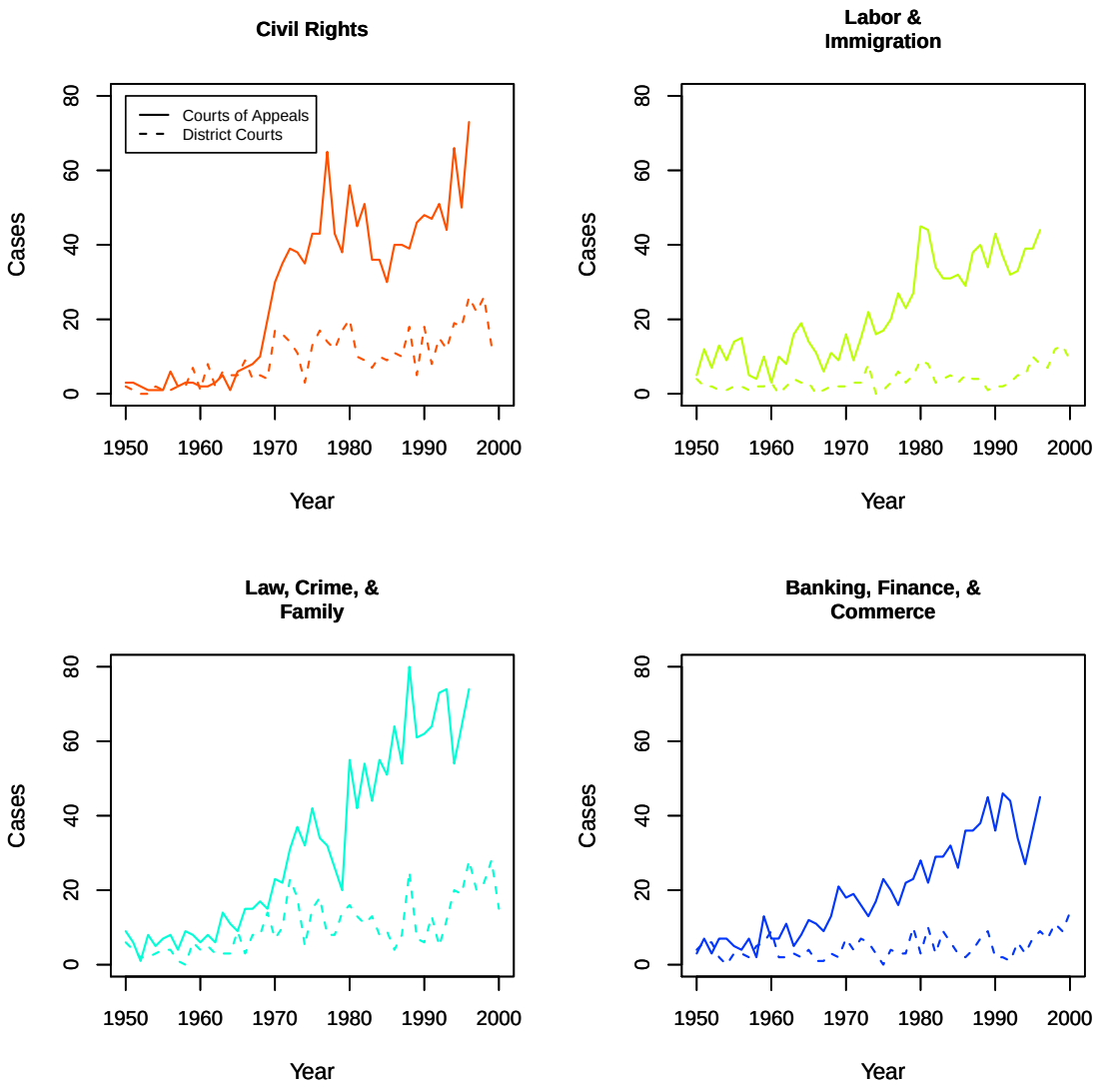


Figure 3.9: *Cases with at least one amicus curiae participant in the district courts and courts of appeals.* The y-axis represents a count of published opinions within the issue area in the indicated level of the hierarchy.

dencing increasing attention from interest groups in cases within the federal courts. However, the increases do not appear to happen uniformly across issues. Rather, within the Civil Rights issue area there is a large spike in the number of cases with amicus curiae participants in the courts of appeals occurs in the 1960s, after which

the number of participants increases only slightly over time. In contrast, for both Labor and Immigration and Banking, Finance, and Commerce the increase in cases with amicus curiae participation is more gradual over time. In sum, the measure once again demonstrates diverse patterns of issue attention for a subset of actors, this time interest groups.

Policy Agendas and the Courts

Before moving to analyses in the remaining chapters, it is worthwhile to discuss a noticeable dynamic in the classifications documented above. Specifically, using an ensemble of supervised learning methods, I have classified as Law, Crime, and Family the majority of cases across each of the agenda measures presented above. This raises the question as to whether the Policy Agendas coding scheme is appropriate for use in the context of the judiciary, or whether it instead inappropriately over-classifies cases as Law, Crime, and Family. For the purposes of this project, I believe it is decidedly the former, for two principal reasons I lay out below.

First, a majority of cases fall into the Law, Crime, and Family issue area because the issue area captures specifically judicial topics. Therefore, the cases – which we, given the focus of the judiciary on the administration of justice, would expect to be a majority of the agenda of the courts – are appropriately classified. To wit, a sampling of the subtopics falling under the Law, Crime, and Family topic shows white collar and organized crime, drug production and trafficking, juvenile crime, prisons, criminal sentencing, civil suits, capital punishment, and child abuse. These issues explicitly involve the judiciary, and thus it is no surprise that a bulk of judicial activity is classified as such. Moreover, these topics – which, to repeat, are specifically judicial – receive attention from other institutions, and analyzing the

patterns of issue attention related to such topics thus offers an avenue for determining the influence from, or towards, other institution's attention to such judicial topics.

Further, in other research (e.g., Rice, 2012), the Policy Agendas classification scheme for courts is shown to be as effective, if not superior, to alternatives for purposes of supervised learning. The classification scheme employed by the principal alternative – the Supreme Court Database [SCDB][19] – is focused on the disposition of individual cases, and thus includes as issue codes particularly procedural concerns (i.e., mootness) which have little relation to attention dynamics and thus are inappropriate for research in this context. Additionally, these procedural codes are particularly difficult to identify in a supervised learning design, as there is typically a public policy issue present in the cases which is discussed before being dismissed on procedural grounds. This policy content, which maps onto other issue codes which are also included in the scheme, leads to a disproportion number of incorrect classifications for cases which the SCDB has classified into particularly legalistic issue areas. Finally, beyond these problems with supervised learning, the SCDB scheme has come under criticism for incorrectly identifying the issues of cases (Shapiro, 2009), as well as for coding issues in line with the implicit voting blocs of the Court in order to make sense of ideological alignments for some opinions (Harvey and Woodruff, 2011). Both criticisms provide evidence that the issue classifications are potentially inaccurate, and thus inappropriate for my purposes.

With that said, in my empirical analyses, I take care to carefully consider potential complications from particular issues, namely Law, Crime, and Family, exerting too much influence on the results. In Chapter 4, I employ mixed-effects models in order to estimate a general effect across issue areas while avoiding undo influence from particularly concentrated issues. In Chapter 5, I estimated issue-specific mod-

[19] Available at `scdb.wustl.edu`.

els, then look for general patterns across many different issues. In both contexts, my approach minimizes inappropriate leverage from the Law, Crime, and Family issue area on the research findings.

Summary

In this chapter, I introduced readers to the structure of the federal courts and identified three principal actors therein, litigants, judges and interest groups. Having done so, the primary purpose of this chapter was to conceptualize and measure the issue attention of each of these actors in the federal courts, and to ensure that their attention has not remained stagnant over time. I utilize data on all cases in the federal courts as well as multiple techniques for automated content analysis to generate these measures, and find evidence which suggests that the three actors each devote their resources in slightly different ways within the courts.

For litigants, reflecting what I term individual mobilization, I presented data on the total amount of litigation in the federal district courts and courts of appeals in order to test the entire scope of attention in the federal courts. This analysis confirmed prior expectations of an expanding federal courts caseload, but also indicated that the expansion was not uniform across policy areas. Instead, the mobilization of individual litigants within particular issue areas shifted in different ways and at different points in time.

Similar patterns were evident in the measure of judicial prioritization, the attention individual judges devote to particular issue areas through their decisions whether or not to publish opinions for cases in particular issue areas. Because publication of an opinion is left to the discretion of the presiding judge(s), these published opinions reflect the priority judges accord to particular issue areas. Beyond the pri-

oritization of judges, these published opinions also represent the direct influence of the courts on the state of legal rules, as the publication signals that the case has some precedential value for that issue. As before, I presented data on the total number of published opinions in the federal courts by issue area, which again evidenced disparate and unique patterns across issue areas and time. The attention judges devote to particular issues, and their influence on policies within those issue areas, change over time.

Observed differences between the patterns of publication – a measure of judicial prioritization – and the total caseload measure – a measure of litigant mobilization – has implications for much of the prior agenda research involving the lower federal courts. In particular, the data suggest that prior research relying solely on published opinions as a measure of the agenda of lower federal courts (Baird, 2004, 2007; Hurwitz, 2006; Peters, 2007) may have failed to account for significant variation in a prior step of the agenda process: studies examining only published opinions may have been confounded by changing litigation patterns overall. By considering the actor responsible for the agenda at each level, I am able to address this concern.

Finally, I presented data on the scope of interest group involvement in the federal courts as "friends of the court," or amici curiae. I analyzed the total number of cases containing an amicus curiae brief in both the federal district courts and courts of appeals, and found the collective mobilization, or participation of interest groups on cases, varies dramatically by policy and issue area. Yet again, the actors under consideration – here, interest groups – are found to be more active in certain areas, and the scope of their activity changes over time. In addition, the movement is not perfectly, or even closely, correlated to that of litigants and judges. The variation in the scope and direction of changes in issue attention across each of these actor-specific measures suggests support for my contention that, in agenda studies of

the lower federal courts, it is important to consider the differing roles of actors in the lower federal courts, and their potential influence on policy. In the analyses of Chapters 4 and 5, each actor-specific attention measure will be considered separately, providing evidence of "whom" is influential or influenced in the dynamics of issue attention within and across institutions.

In conclusion, each of these measures constitutes a more refined level of analysis for issue attention in the federal courts. That each shifts, both over time and in different directions, provides evidence of the volatility of issue attention in the federal courts. These changes in issue attention are the conscious decisions of actors in the federal courts to devote, or not to devote, their resources to some particular issue area. In the remainder of the dissertation, I turn to analyzing how these choices relate to issue attention in other institutions. I expand yet further on the proactive and passive courts perspectives, and systematically test whether and how issue attention in the federal courts fits into our understanding of policymaking in the United States.

Chapter 4

The Influence of Supreme Court Attention on Issue Attention in Lower Federal Courts

> *"Traditionally, students of law lost interest in a case after the final decision was handed down. But for scholars concerned with relations among law, politics, and society, the most interesting aspect of the judicial process may only be beginning when a court issues its mandate."* – Murphy et al. (2006, 691).

> *"Clearly, the Supreme Court has notable authority over judicial agendas from its perch atop the judicial hierarchy."* Hurwitz (2006, 337).

What happens when the Supreme Court decides a case? A rich empirical tradition has examined this question extensively and through a variety of approaches. Researchers have focused specifically on the impact of Court decisions on society (Johnson and Canon, 1984; Rosenberg, 1991; McCann, 1992), the reaction of the public to court decisions (Franklin and Kosaki, 1989; Mondak and Smithey, 1997; Caldeira and Gibson, 1992), changes in broad decisional trends in lower federal

courts (Songer, 1987), and the reaction of other institutions to the Court's decisions (Eskridge, 1991*a*; Segal, 1997; Spriggs, 1997; Clark, 2009). These studies have been impressive, thorough, and have contributed a great deal to advance both the study of the Court and of American politics more generally.

Yet critically this research overlooks how Supreme Court decisions actually shape the very issues discussed in the lower federal courts. In particular, studies of compliance in the lower courts have examined whether and when lower court judges comply with Supreme Court decisions, but have expressed only rare concern for the influence a Supreme Court decision may have on which cases are heard in the courts, or on the issues discussed in those cases. In other words, scholars have not addressed how Supreme Court decisions may fundamentally alter opportunities for lower court compliance. Scholars have paid a great amount of attention to case outcomes in the federal courts, but given scant consideration to the fact that the docket itself may have been shaped by the Court's activity. More than 30 years ago, the potential biases introduced by this approach were already apparent. In the words of one scholar studying compliance:

> "[P]erhaps more troubling, it is possible that lower courts may react to a Supreme Court decision by ignoring it or by not mentioning it in their opinions. Many factors may bring about such an occurrence – a wish to evade the decision, a feeling that there is no need to cite a case in support of a legal principle, or the writing style of the lower court judge." (Johnson, 1979, 795)

The Court's potential influence on the agenda of the federal courts is thus a critical oversight, an area of concern which is crucial to studies of political power and policymaking. Since at least Bachrach and Baratz (1962), the importance of

determining the issues which are actually being discussed has been a fundamental precept in the study of politics. As attention is directed towards, or diverted away from, particular issue areas, policy change in that issue area is more or less likely, respectively. Thus, understanding whether, and how, the Supreme Court actually shapes the issues discussed in the federal courts holds stark implications for both our understanding of the Supreme Court's role as a national policymaker and, even more critically, how the federal courts are involved in the policy process.

As for how the Court's activity shapes the agenda of lower federal courts, the passive and proactive perspectives outlined previously suggest different responses for each of the three previously outlined actors – litigants, judges, and interest groups. In this chapter, I set about testing whether, and how, the Supreme Court's activity alters the issue attention of lower federal courts. First, I describe in detail what these two perspectives suggest happens in the lower courts after Supreme Court decisions. I then empirically examine the attention of litigants, judges, and interest groups relative to the attention of the Supreme Court. The results suggest that, while the Court's decisions settle areas of routine litigation, they also encourage additional attention among the repeat players – judges and interest groups – in the legal system. These analyses reveal that the federal courts are engaged in a dialogue across levels of the judicial hierarchy, a dialogue which holds important implications for studies of the policy process.

Passive Courts

I begin by addressing the predictions implied by the perspectives previously outlined in Chapter 2. In the passive courts view, the courts follow other institutions into the fray in particular policy areas, interpreting policies constructed by other institutions. Over time, the toughest issues and questions percolate up through the

hierarchy to the Supreme Court. Sitting at the top of the judicial hierarchy, the Supreme Court is the the final arbiter in the interpretation of federal law. The Court hears and decides only a small proportion of the cases available for review every year, but by deciding these cases it effectively settles areas of the law. As such, the passive courts perspective holds that increased Supreme Court attention within a policy area will lead to less attention to that policy area in lower federal courts in subsequent years. As support, proponents of the passive courts perspective can point to two related characteristics of the Court: first, how the Court chooses the cases which it will hear, and second, what the Court intends to do in deciding those cases.

I begin with how the Court chooses which cases it will review. What little formal guidance exists for this process, Rule 10 of the Supreme Court Rules, suggests they explicitly focus on identifying areas where the Court's intervention will settle some area of law. Rule 10 specifically identifies resolving areas of conflictual interpretation as a criterion for Supreme Court review. Importantly, Rule 10 also states that consideration should be given when a lower court "...has decided an important question of federal law that has not been, but should be, settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court." In short, the guidance provided by Rule 10 indicates the priority of settling law, whether due to conflict in interpretation among courts or because the Court has yet to address an important issue. By design, then, the Supreme Court is to choose cases in order to settle law in the lower courts.

Accordingly, justices generally focus on identifying and selecting cases with wide-ranging importance and contradictory resolutions across different courts, or even across different judges within the same court, in the federal judiciary. A lengthy tradition of high-quality research on the specific factors which influence the likelihood

of Supreme Court review (see Tanenhaus et al., 1963; Teger and Kosinski, 1980; Provine, 1980; Ulmer, 1984; Brenner and Krol, 1989; Segal and Spaeth, 1993; Epstein and Knight, 1998) has borne out the importance of these two factors. The Court uses these, in addition to some others, to determine cases which provide the best vehicles for ensuring lower court compliance with the Court's preferences (Songer, Segal and Cameron, 1994; Cameron, Segal and Songer, 2000). That research complements the words of the justices themselves, as in the words of former Chief Justice Fred Vinson:

> "The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts....To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."[1]

Across both the accounts of justices as well as scholarly research, there is ample reason to believe that the Supreme Court chooses cases to hear with the intent of answering questions of widespread impact which lower courts have left unresolved. For this, conflict in the lower courts offers a clear signal of an area where a decision would have broad consequences, and of questions which have yet to be resolved uniformly.

While the public guidance from the Court thus indicates the primacy of identifying cases which will enable the Court to settle areas of the law, the Court's decisions must then carry through on this intention. To this end, research has suggested that

[1] As cited in Perry (1991). Address of Chief Justice Vinson before the American Bar Association, September 7, 1949, 69 S. Ct. v, vi.

the Court's decisions establish or amend legal rules which are ostensibly intended to guide the decision making of lower courts on those issues (Friedman, 1967).[2] In other words, the Court hears cases so as to "...further the 'legal' goals of consistency and certainty in the law" (Baum, 1977, 14). From this perspective, when the Court is confronted with unresolved questions, the justices seek to answer those questions in order to resolve uncertainties. Facing repeated litigation within an issue area, "the court is therefore likely to develop a rule that can be delegated to other authorities for administration" (Friedman, 1967, 815). The rule they establish "...perhaps can end the constant probing by litigants for definition and the constant search for the boundaries of the rule" (Friedman, 1967, 815).

In deciding a case, the Court lays out legal rules which are intended to guide future behavior (Knight, 1992; Wahlbeck, 1998). The Supreme Court thus establishes a rule which "minimizes the risk of further litigation and maximizes the extent to which other private or public agencies can apply the rule, thus taking pressure for decision away from the courts" (Friedman, 1967, 815). Insofar as individuals comply with the legal rule, the decision should yield less litigation in the first place (Wahlbeck, 1998). Beyond this initial impact, after the Supreme Court has announced a new legal rule, lower court judges are more likely to support the Court's legal rule than to support a revision to the rule (Wahlbeck, 1998), at least in some issue areas. This reduces the uncertainty of litigants, as lower courts comply with the legal rule laid out by Supreme Court decisions (Merryman, 1954). When uncertainty over outcomes is reduced, litigants garner more accurate assessments of the legal landscape, which decreases the need for, and utility of, costly litigation to resolve disputes (Merryman, 1954; Priest and Klein, 1984). Over time, the reduction

[2]There is, of course, still the possibility that some cases will lead to more litigation as the Court's decisions are "only an attempt to provide a solution." (Friedman, 1967, 820)

in litigation signals that the law is settled as both members of the legal community and the general public arrive at a shared understanding of a legal rule (Phillips and Grattet, 2000). The settling of a legal rule therefore presages less attention in lower courts.

Thus, the passive courts perspective suggests that Supreme Court attention to a particular issue leads both to more compliance with legal rules, and with a clearer set of guidelines for instances of non-compliance. In this view, lower courts will comply at higher rates with the new legal rule, reducing legal uncertainty and further reducing litigation. Consistent with this perspective, the justices seek primarily to quell rising tides of litigation in areas where there is confusion or dissensus, areas where their decisions will have the most general impact. In sum, the passive courts perspective predicts that when the Supreme Court addresses an issue, there will be less subsequent attention to that issue in lower federal courts.

Proactive Courts

In contrast to the passive court perspective, the proactive courts view begins with the premise that courts are actively engaged in policymaking. The Supreme Court may choose to hear cases based on the policy motivations of the justices (Ulmer, 1972; Baum, 1977; Segal and Spaeth, 2002), if only partially (Black and Owens, 2009). Litigants, interest groups and judges are all involved in the policy making through the courts, and pay attention to how the courts are influencing public policy. From this perspective, Supreme Court decisions provide a signal as to how receptive the court is to particular policy or issue areas and frames. Actors in the federal courts then respond to those signals, bringing more cases addressing an issue after Supreme Court attention to that issue. Overall, the activity of the Supreme Court within an issue area leads to additional activity in that issue area in

lower federal courts.

This perspective is exemplified by recent research in which scholars propose that when the Supreme Court acts, its decisions positively impact subsequent litigation patterns. In this view, the sitting justices exert considerable influence on the future agenda of the federal courts because "(t)he incentive to support litigation in particular policy areas varies over time in accordance with litigants' changing perception of Supreme Court justices' policy priorities" (Baird, 2007, pg. 4). At the Supreme Court, increases in attention within a policy area offer signals – to litigants, judges, and interest groups – of the Court's desire to address that policy area. As a result, there are subsequently temporary increases in the Court's attention within that area, as litigants bring additional, better-framed cases. In all, these researchers state "... that some time after Justices signal their interest in hearing particular types of cases, a significantly higher number of those cases will be brought to the courts and result in case outcomes" (Baird and Jacobi, 2009*b*, pg. 222-223). Proponents of this perspective thus suggest that:

> "When the justices assert their agenda priorities, they send signals to the judicial, legal, and political communities. Numerous actors in these systems respond accordingly, one tangible consequence of which is the Court's agenda preferences eventually are observed in the varying rate of appeals in the circuit courts" (Hurwitz, 2006, 337).

Because some litigants, and particularly interest groups, are policy-minded, these litigants pay attention to the signals in Supreme Court decisions about how arguments could be framed in future cases so as to garner the litigant's preferred policy result (Baird and Jacobi, 2009*b*). Thus, whereas the passive courts perspective suggests *reduced* incentives to litigate after the Supreme Court has addressed an issue

area, the proactive courts perspective suggests *enhanced* incentives, leading to more and better-framed litigation. In Supreme Court decisions, litigants find evidence to support the importance of an issue to the current Court, and the opportunity to achieve agenda change through the judiciary in accord with the signals in the decision.

Previous research has provided corroborative evidence for the Supreme Court's ability to manipulate this reaction. Baird (2004, 2007) supported the notion of litigant mobilization through evidence of increased Supreme Court attention to policy areas anywhere from four to six years after the Court had indicated that policy area as a priority. Similarly, Baird (2004, 2007) documented an increase in a sample of published courts of appeals opinions within policy areas four years after the Supreme Court indicated the area as a priority. This research asserts that the existence of such a lagged effect is consistent with the period of time necessary for cases and issues to "percolate" through the lower federal courts to the Supreme Court, with litigation being an arduous process and the "perfect" case taking time to eventually make it through the judiciary, and through certiorari, to the Court. Beyond the general findings of this four to six year lag in attention, further research uncovered evidence that the Supreme Court paid additional attention to questions of federalism in years after dissents argued that cases should be decided on the basis of federal-state power relations (Baird and Jacobi, 2009*a*,*b*).

While this signalling model has been the subject of much scholarly attention, whether litigants and interest groups are driving this process is still in dispute. There is contradictory evidence as to whether litigants change their behavior in filing amicus curiae briefs within an issue area after Supreme Court decisions in that issue area (Baird, 2007; Peters, 2007). In addition, in other venues, such as law reviews, where the new frames would be expected to be discussed, Peters (2007)

shows that there is no increased attention after Supreme Court activity. Finally, the model does not account for the counter-mobilization of litigants opposing judicial attention (Solowiej and Collins, 2009), behavior which could offset the efforts of litigants pursuing policy change. While some groups may be eager to seek policy change through the courts, other groups are active in efforts to *prevent* issues from reaching the judicial agenda. With contradictory group efforts in the courts, any potentially positive influence on the agenda may be offset or simply negated.

Despite these disputes, the proactive courts perspective provides a set of clear empirical expectations about the effects of Supreme Court rulings on the issue attention of lower federal courts. Specifically, it suggests – in contrast to the conventional wisdom – that after the Supreme Court pays particular attention to an issue, the level of attention paid by lower courts to that issue area will increase. Actors in the federal courts identify signals in Supreme Court activity, and respond accordingly to those signals, bringing additional litigation through the federal courts to the door of the Supreme Court.

Who Responds?

Of course, as was clear in Chapter 3, issue attention in the lower federal courts is not defined by a single actor. Rather, there are a multitude of actors – litigants, judges, and interest groups – in the lower federal courts who may respond to what the Supreme Court does. Both of the above perspectives suggest a different directional response for these actors, with the passive courts view suggesting each actor responds by paying less attention to issues the Supreme Court addresses, and the proactive courts view suggesting the opposite. Yet because each of these actors has a different motivation, or goal, in their work in the lower federal courts, their response need not be consistent with the other actors in order to provide support for either of the

perspectives. Instead, each actor may respond uniquely according to their goals, offering evidence at the actor level for one of the two perspectives. In this section, I briefly explore the goals of each actor as they relate to their response to Supreme Court attention.

I begin, again, with litigants, who determine the baseline scope of policy attention in the federal courts. Involving all litigation, this conception thus includes all types of one-shotters and repeat players in Galanter's (1974) continuum of participation in the legal process. As such, they have a host of different motivations. Common across all litigants, though, is an explicit focus on winning the case at hand.[3]

As an example, take the case of *Miranda v. Arizona*[4]. In the case, the defendant, Ernesto Miranda, was arrested and questioned extensively without being made aware of his right to counsel, or his right to remain silent. He eventually confessed to kidnapping and rape. In court, his attorney argued that the confession was inadmissible in light of the fact that Miranda was unaware of his rights in the situation. The Supreme Court eventually sided with Miranda. While the case had far-reaching public policy consequences in the form of the Miranda warnings, Miranda's goal in the litigation was entirely personal (a reduction in his criminal sentence).

Hence, I posit here that, on the whole, all litigation is characterized by the goal of winning the case at hand. Litigants will respond to Supreme Court attention in line with the goal of using the Supreme Court decision to inform their likelihood of winning the cases. To understand how individual litigants actually respond, I look to the total amount of litigation in a particular issue area after the Supreme Court addresses that issue.

The next actor I consider in my research are the judges on lower federal courts.

[3]While repeat players may be more concerned with establishing favorable precedent, it is fair to say they are almost never motivated to lose a case.

[4]384 U.S. 438 (1966)

Lower federal court judges are considered part of the interpreting population for Supreme Court decisions (Johnson and Canon, 1984). According to Johnson and Canon (1984, 16), after a Supreme Court decision, members of the interpreting population "respond to the policy decisions of a higher court by refining the policy announced by the higher court. This population, in other words, interprets the meaning of the policy and develops the rules for matters not addressed in the original decision." Lower court judges have a multitude of options as they react to Supreme Court decisions; those that disagree with the Court's opinions can defy the Court, avoid deciding new cases in the policy area on the merits, or limit application of the Court's opinion, while those that enthusiastically agree can seek to expand the scope of the opinion (Johnson and Canon, 1984). In the former instance, they may also distinguish their case from the Supreme Court precedent (Benesh and Reddick, 2002; Caminker, 1994).

In his work on judicial behavior, Baum (1997) points to a host of goals motivating the behavior of judges as they make decisions in each case. One common theme across the motivations Baum discusses is an explicit focus on what I term "legal policy." For some judges, legal policy will effectively equate to public policy, while for other judges it has much more to do with a reductionist philosophy of the judicial role. In either case, judicial behavior is motivated by their legal policy preferences. Understanding the intricacies of limiting, distinguishing or expanding Supreme Court precedent would offer the most direct opportunity to understand how judge's respond to Supreme Court decisions in light of their legal policy goals. However, the simple act of deciding whether or not to publish an opinion also provides evidence of those responses.

As discussed earlier, one signal of how judges are prioritizing policy areas can be found in their decisions as to whether or not to publish an opinion. When judges

publish these opinions, they "attempt to demonstrate the social utility of the actual decision to interested parties outside the immediate circle of litigants" (Friedman, 1967, 811). Moreover, we know that judges likelihood of publishing opinions varies in accord with signals in their external environment, such as the possibility for advancement in the judiciary (Morriss, Heise and Sisk, 2005; Black and Owens, N.d.).

In light of the Supreme Court's activity, then, judges may decide to simply avoid deciding new cases in a policy area on the merits (Johnson and Canon, 1984) or may decide to pay additional attention to that policy area. An example is instructive. In work examining the relationship between lower federal courts and the Supreme Court, Murphy (1959) points to the decision of the Supreme Court in *Mallory v. United States*.[5] Here, the Court held that the confession of Mallory, a convicted rapist, was inadmissible because he had not been arraigned sufficiently soon after his arrest and therefore he was to be freed. Though the Supreme Court's decision established a legal rule, it was quickly appropriated and altered by lower court judges "[b]y means of explaining, limiting, and distinguishing," which resulted in the "use in evidence of a high percentage of confessions secured during delays in arraignment" (Murphy, 1959).

Following *Mallory*, lower court judges reshaped doctrine announced by the Supreme Court. However, in some other cases, they simply avoided the precedent altogether (Murphy, 1959). My goal here is to determine which of these two responses occurs generally; in other words, whether the activity of the Supreme Court encourages, on balance, more or less attention to particular issues in the lower federal courts. As such, examining changes in published opinions after Supreme Court activity provides a direct measure of how lower court judges prioritize issue areas the Supreme

[5]354 U.S. 449 (1957)

Court addresses.

Finally, I turn to interest groups. These groups are explicitly motivated by their desire to shape public policy. For example, in the aforementioned case of *Miranda v. Arizona*, the American Civil Liberties Union filed an amicus curiae brief urging the Court to rule in favor of Miranda's Sixth Amendment right against self-incrimination. The group was not primarily concerned with the outcome for Miranda, but rather with establishing favorable public policy, which in this case was achieved through the now famous Miranda warnings.

As discussed earlier, amicus curiae briefs are but one of a variety of methods for participation in the courts for interest groups. Such briefs, however, offer a clear signal of issues on which groups are active. Amicus briefs are costly, and explicitly provide information intended to influence the direction of the decision (Hansford, 2004*a*, 2011). Moreover, they provide readily observable signals of how interest groups are seeking to advance their public policy goals by shaping the content of decisions (Hansford, 2004*a*, 2011). Because they are a clearly observable and consistent signal of interest group prioritization of particular issue areas, I utilize the participation of groups as amicus curiae as a measure of interest group priorities in the federal courts. If the goal is to understand how interest group priorities change within the federal courts after the Supreme Court acts, as it is here, we can again look to changes in the number of cases with an amicus brief within an issue area.

The Agendas of Courts

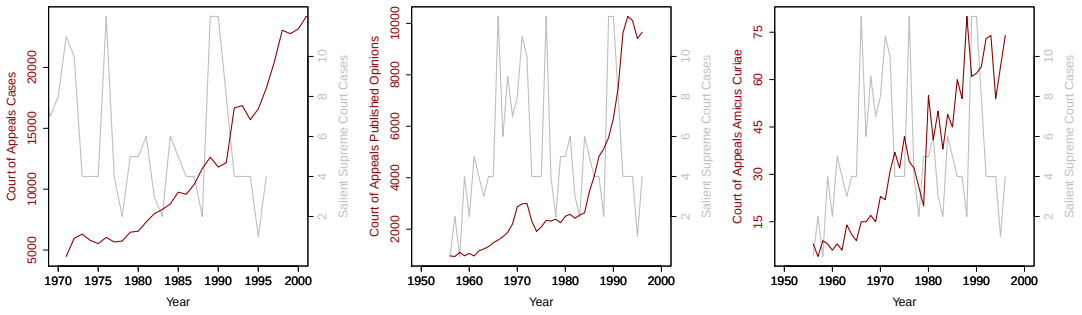
The question to be answered is how each of these three actors respond to the Supreme Court's attention at both of the lower levels of the federal courts. How has the issue attention of these actors changed, relative to the change in the Supreme Court's issue attention over time? To form an initial impression, we can examine

the data graphically. Figure 4.1 plots the change in issue attention for three primary issues – "Law, Crime, and Family," "Civil Rights and Civil Liberties", and "Banking, Finance, and Commerce" – for each of the three actors in the U.S. courts of appeals across the time period under study, as well as for the Supreme Court. To the extent the Supreme Court encourages additional (less) litigation, we may be able to identify increases (decreases) in the lower court measures after Supreme Court attention. Issue areas are organized by rows, while the columns represent each of the three actors.

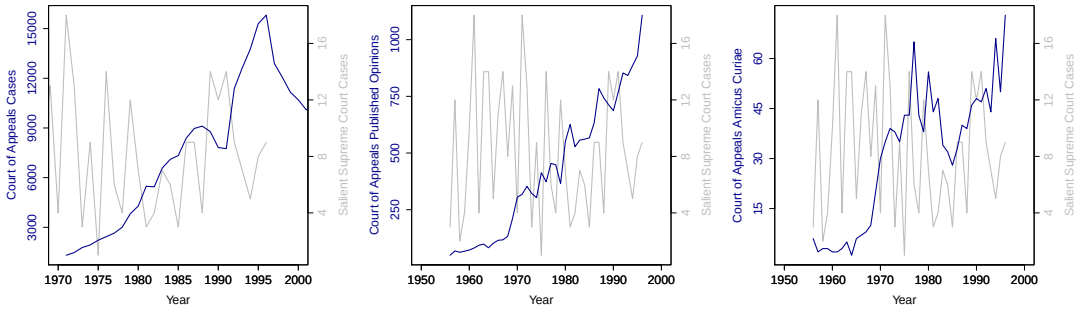
This visual representation offers little evidence supporting either theory. The attention of the Supreme Court, as measured by salient decisions,[6] appears very volatile, with a series of spikes and valleys. With the volume of activity in the courts of appeals of a vastly different magnitude, the same volatility is not as evident until we get into the relatively infrequent occurrence of interest group involvement as amicus curiae. That being said, some areas do provide some possible initial evidence, but in directions which support both passive and proactive courts theories. In the first graph of the third row in Figure 4.1, for example, we see that increases in Supreme Court attention to Banking, Finance, and Commerce in the mid 1980s corresponded with a decrease in the amount of attention litigants paid to those issues in the Courts of Appeals. On the other hand, it appears that for Civil Rights and Civil Liberties issues, Supreme Court attention in the 1960s correlated with increases in attention for interest groups in the Courts of Appeals in subsequent years.

Moving to the district courts, we see similar dynamics and patterns in Figure 4.2. During the period under examined, increases in the amount of attention to

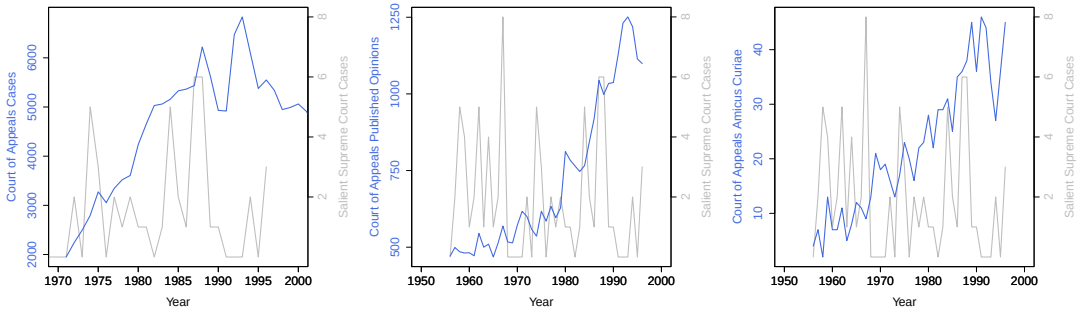
[6]I describe salient decisions, and justify this measurement of Supreme Court attention, later in this chapter.



Law, Crime and Family

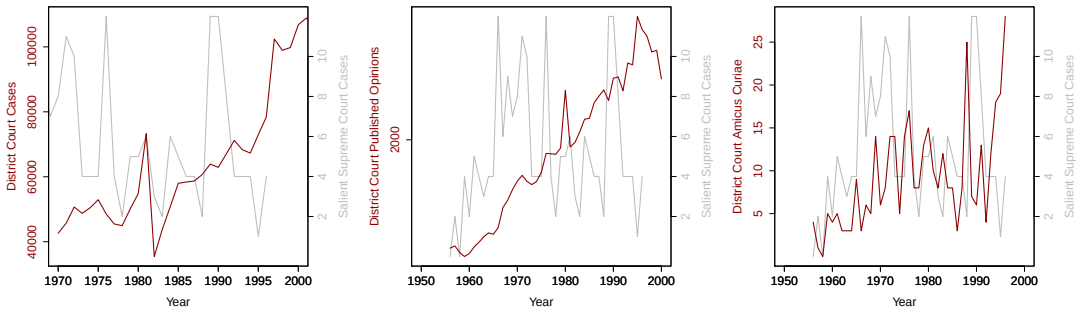


Civil Rights and Civil Liberties

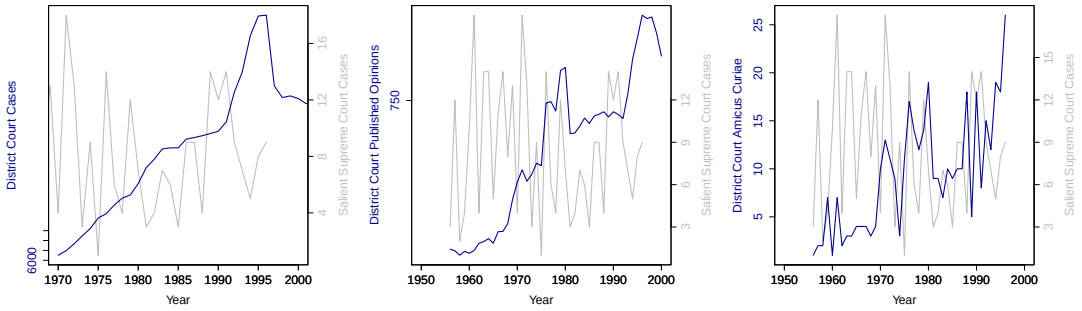


Banking and Commerce

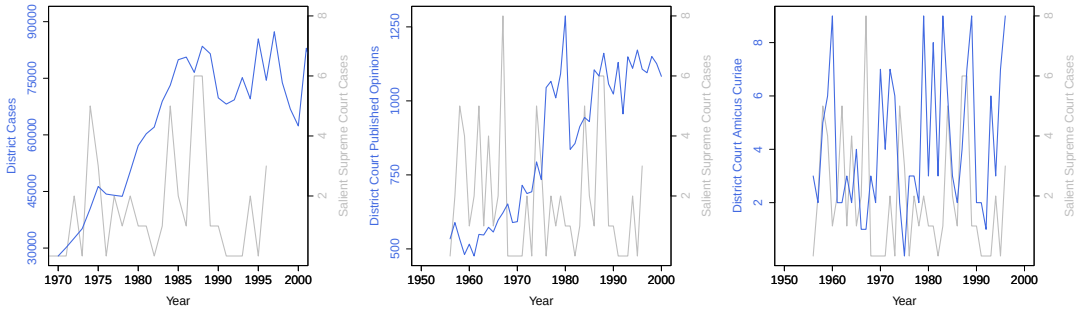
Figure 4.1: Issue Attention Comparisons for the Courts of Appeals and Supreme Court for "Law, Crime and Family," "Civil Rights and Civil Liberties," and "Banking, Finance, and Commerce" issue areas. Columns provide issue measures for litigants, judges, and interest groups, in order.



Law, Crime and Family



Civil Rights and Civil Liberties



Banking and Commerce

Figure 4.2: Agenda Comparisons for the District Courts and Supreme Court for "Law, Crime and Family," "Civil Rights and Civil Liberties," and "Banking, Finance, and Commerce" issue areas. Columns provide issue measures for litigants, judges, and interest groups, in order.

each of these issue areas are observed for each of litigants, judges, and interest groups. These plots reveal, in one striking observation, that attention to Banking, Finance, and Commerce issues decreases in the district courts just prior to the decrease in attention at the courts of appeals. As previously discussed, prior research has documented the Supreme Court's shift from an agenda dominated by economic issues towards a civil rights and civil liberties agenda (Pacelle, 1991, 1995). The pattern observed here, with the decrease observable at the trial level prior to the appellate level, suggests the shift may in part have been driven by changes in the type of litigation being pursued within the federal courts, rather than simply a discretionary decision by the Court. With less litigation percolating in lower federal courts, the Supreme Court is likely to have had a different pool of certiorari petitions, which may have encouraged the Court's movement away from economic issues.[7]

Overall, while the graphs present broad patterns of changes in agenda attention for actors across levels of the federal courts, the volatility of attention makes it difficult to distinguish precise patterns in these plots. Systematic relationships in issue attention across a multitude of issue areas, actors, and court levels are difficult to decipher graphically, as each series varies significantly every year. As such, in the next section I move to directly modelling and then testing the relationships.

Hypotheses, Model, Covariates

The dependent variables in these analyses are the measures introduced in Chapter 3 for issue attention in the lower federal courts. The independent variable of interest in the analyses is a measure of Supreme Court attention. For this, I utilize the

[7]Though the above presents evidence that there was less litigation in lower federal courts on economic issues prior to the Supreme Court's shift away from the issue area, it should be noted that it is not necessarily the case that fewer petitions for certiorari were filed. The evidence above does suggest, though, the potential utility of future research in this area.

number of politically salient Supreme Court decisions in an issue area in a year. Salience is determined using the Epstein and Segal (2000) measure, which is simply whether or not an opinion was covered on the front page of the *New York Times* the day after it was announced and whether it was the lead case in the story.

I choose to use only counts of politically salient decisions within an issue area during a year as these present the clearest opportunity to capture signals which actors in lower federal courts would receive. These signals are critical to the proactive courts perspective on intra-judicial dynamics. In fact, prior research (Baird, 2004, 2007; Peters, 2007) has utilized the same measure to identify signals from the Supreme Court. The obvious alternative, all cases within an issue area, poses the potential problem of adding noise to the measurement of signals from the Supreme Court, potentially biasing the results in favor of the passive courts perspective. On the other hand, using just salient decisions should not introduce any such bias, as according to the passive courts perspective all decisions should uniformly lead to fewer cases.

The model also includes two additional independent variables as controls, addressing possible executive or congressional attention influences on issue attention in the lower federal courts. These relationships will be addressed in greater depth in the next chapter, but here they are included simply as a precaution against omitted variable bias. For executive attention, I include the number of mentions a particular issue area receives in the President's annual state of the union address.[8] For congressional attention, den Dulk and Pickerill (2003) suggest that interest groups become more active in the courts after legislation in at least one issue area. Therefore, I

[8]As was the case for the Supreme Court data, both variables have been acquired from the Policy Agendas Project. As such, the variables have each been classifed into the Policy Agendas issue classifications framework. By aggregating each variable by issue area for each year in the study, these provide consistent measures of issue attention across institutions.

include the number of public laws passed in a particular issue area during a year. This addresses any potential surges or declines associated with legislation.

With the data compiled, I estimate six autoregressive distributed lag models (Greene, 2003, 571-579). I choose this specification in order to remain consistent with prior research on the litigant signal model (Baird, 2004, 2007; Peters, 2007), a key component of the proactive courts perspective. The models estimated are of the form:

$$\begin{aligned} y_{ijt} = f(&Lagged\ Dependent\ Variable \\ &+ Salient\ Supreme\ Court\ cases_{it-1:6} \\ &+ Number\ of\ public\ laws_{it-1:6} \\ &+ State\ of\ the\ Union\ Mentions_{it-1:6}) \end{aligned}$$

where y is one of three different dependent variables within an issue area (i) in a circuit or district court (j) – (logged) counts of all cases, counts of cases with published opinions, or counts of cases with published opinions and at least one amicus brief. Models of litigation are estimated as a linear mixed effects regressions, while all other models are estimated as zero-inflated negative binomial regression models with mixed effects.

I estimate mixed effects models to account for variance across issue area and circuit court. Variance by issue area in judicial behavior is a topic often discussed and explored in prior research (e.g. Flemming and Wood, 1997; Lauderdale and Clark, 2012). Take, for instance, research by Benesh and Reddick (2002) in which lower court compliance with Supreme Court decisions varies by issue area. Similarly, Friedman (1967) argues that while some areas of litigation may demand Supreme Court

attention, the Court may never develop a legal rule in that area. Above and beyond this research, both courts and issue areas are characterized by different pools of litigants and interest groups, which may influence the responsiveness observed across these grouping factors. Estimating the models as mixed effects allows coefficient estimates to vary by unit while also avoiding a "no-pooling approach" which would yield large and unreasonable variances across estimates in the the court and issue area groupings (Gelman and Hill, 2007). Between the extremes of large variance or no variance across court-issue areas, mixed effects modeling will converge towards the correct pooling specification. It therefore offers an optimal approach to the structure of this data and the subject of interest.

At the outset, it is important to note that my concern is purely directional in these models. The passive and proactive courts perspectives offer diametrically opposing expectations for how issue attention in lower federal courts is related to Supreme Court attention. Therefore, in order to test the perspectives I care about the direction of relationships far more than the magnitude of particular relationships. With that said, I now move to the results of my analyses.

Model of Litigant Attention

I begin with the results of the models of all litigation in the lower federal courts, or the measure of litigant mobilization. How do litigants, motivated by the outcome of the case at hand, respond to Supreme Court attention? Table 4.1 contains the results of models of all litigation in the federal district courts and courts of appeals. In Chapter 5, I will explore the relationship between legislative and executive attention in greater detail. As such, I do not emphasize these observed dynamics here. Instead, I am concerned with the relationship between Supreme Court attention and overall litigation in the lower federal courts. Across the six lags of our measure

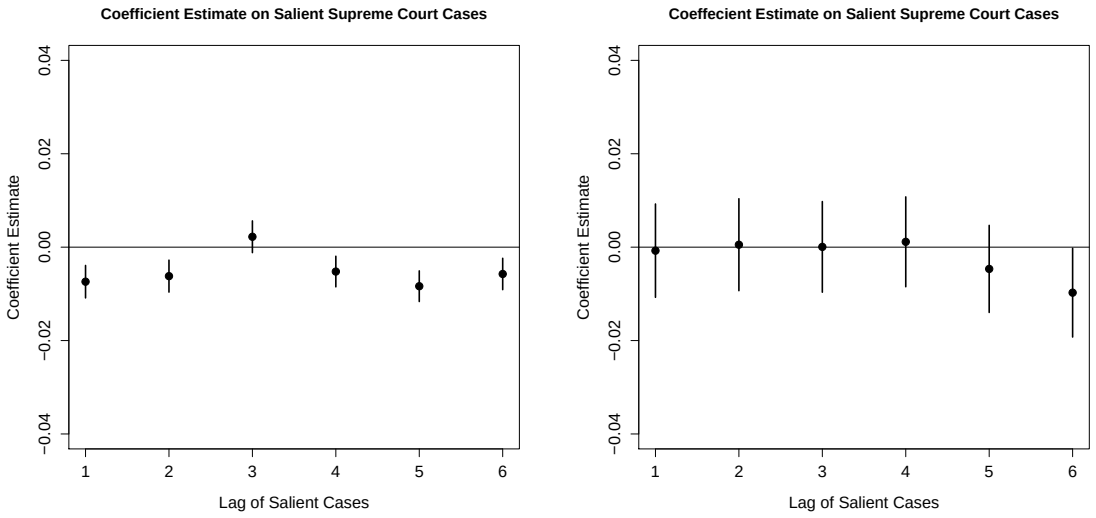
	District Courts		Courts of Appeals	
Variable	β	s.e.	β	s.e.
(Intercept)	0.500	0.086	0.630	0.212
Log(Cases)_{t-1}	0.843*	0.002	0.651*	0.010
Salient Supreme Court Cases_{t-1}	-0.007*	0.002	-0.001	0.005
Salient Supreme Court Cases_{t-2}	-0.006*	0.002	<0.001	0.005
Salient Supreme Court Cases_{t-3}	0.002	0.002	<0.001	0.005
Salient Supreme Court Cases_{t-4}	-0.005*	0.002	0.001	0.005
Salient Supreme Court Cases_{t-5}	-0.008*	0.002	-0.005	0.005
Salient Supreme Court Cases_{t-6}	-0.006*	0.002	-0.010*	0.005
Public Laws_{t-1}	0.004*	<0.001	0.003*	0.001
Public Laws_{t-2}	0.002*	<0.001	0.002	0.001
Public Laws_{t-3}	-0.003*	<0.001	0.002	0.001
Public Laws_{t-4}	-0.002*	<0.001	<0.001	0.001
Public Laws_{t-5}	<0.001	<0.001	0.001	0.001
Public Laws_{t-6}	-0.001*	<0.001	0.003*	0.001
$\text{SOTU Mentions}_{t-1}$	0.001*	<0.001	0.001*	<0.001
$\text{SOTU Mentions}_{t-2}$	0.001*	<0.001	<0.001	<0.001
$\text{SOTU Mentions}_{t-3}$	<0.001	<0.001	0.001*	<0.001
$\text{SOTU Mentions}_{t-4}$	0.001*	<0.001	<0.001*	<0.001
$\text{SOTU Mentions}_{t-5}$	<0.001	<0.001	<0.001	<0.001
$\text{SOTU Mentions}_{t-6}$	<0.001*	<0.001	<0.001	<0.001

NOTE: * indicates $p < .05$ (two-tailed). For the district courts model, N = 44,650, groups: policy = 19, circuits = 12. For the courts of appeals model, N = 5,168, groups: policy = 19, circuits = 12.

Table 4.1: Models of all litigation in the federal District Courts (1970-2005) and Courts of Appeals (1971-2006).

of Supreme Court attention, salient Supreme Court cases, we see a generally negative relationship with subsequent litigation in federal district courts, and a negative relationship at the sixth lag in courts of appeals.

Figure 4.3 clarifies the dynamics suggested in the table. In Figure 4.3, I plot the coefficient estimates and associated confidence intervals for each of the six lags of the measure of the Supreme Court attention. In this figure, we see stark evidence for the passive courts perspective in the response of all litigants, particularly in the federal district courts. Increased Supreme Court attention to an issue area correlates



District Courts Model *Courts of Appeals Model*

Figure 4.3: Fixed Effects Estimates for Influence of Supreme Court Issue Attention on Overall Federal Court Caseloads. Each plot includes the fixed effects coefficients on lags of Supreme Court issue attention, measured as a count of salient cases within a policy area during a year, from a mixed effects linear regression model of (logged) total caseloads, or overall issue attention, in the district courts (left panel) and federal courts of appeals (right panel). Error bars indicate the 95% confidence intervals on the fixed effects estimates.

with less district court attention to that issue in nearly all subsequent years under analysis. Thus, litigants, in general, pay less attention to issue areas which the Supreme Court addresses, and do so for a substantial period of time.

Thus, it appears from this particular analysis that the Supreme Court does exactly what justices claim: the Court addresses issues with the goal of settling areas of the law where uncertainty is high. Litigants, motivated by the likelihood of winning their individual cases, have less incentive to litigate as Supreme Court decisions clarify or establish legal rules which help to guide behavior. Over time, then, Supreme Court decisions lead to less litigation. In sum, the Court fulfills its role as the final arbiter in the legal system, resolving difficult questions. This dynamic suggests support for the passive courts perspective.

Model of Judge Attention

While Supreme Court attention stems overall levels of litigation, how does it shape the priorities of judges and interest groups, important repeat players in the federal court system? I now move to an analysis of the priorities of judges, reflected in the number of published opinions in an issue area. The results of the models of published opinions in the lower federal courts are presented in Table 4.2. Here, the results present a different picture. Through their published opinions, judges address an issue area more often after the Supreme Court pronounces on that same issue, a finding consistent with the proactive courts perspective.

In contrast with the attention of all litigants, the attention of judges actually increases four and five years after periods of Supreme Court attention. Again, I present the results as ropeladder plots of the coefficient estimates and associated confidence intervals in Figure 4.4. The dynamics of the relationship are clear and dramatic; there is little change in the attention of lower court judges to particular policy areas until four years after the decision, at which point judges pay significant additional attention to the issue area. This additional attention quickly tapers off, however. Note that these observed dynamics are entirely consistent with prior research (Baird, 2004, 2007) in support of the proactive courts perspective, research based entirely on published opinions.

Judges, who I argue are motivated by legal policy goals, exert additional influence in policy areas which the Court addresses. For judges supportive of the legal rule established in the Supreme Court opinion, this could mean they seek to expand the rule through their published opinions. For judges in disagreement, they can seek to limit the applicability of the rule. In either case, the Supreme Court's attention to an issue encourages additional attention from judges in lower courts. The Court is

	District Courts		Courts of Appeals	
Variable	β	s.e.	β	s.e.
(Intercept)	0.500	0.539	0.630	0.589
Published Opinions$_{t-1}$	0.009	0.002	0.004*	<0.001
Salient Supreme Court Cases$_{t-1}$	-0.004	0.002	<0.001	0.005
Salient Supreme Court Cases$_{t-2}$	-0.001	0.002	-0.002	0.005
Salient Supreme Court Cases$_{t-3}$	0.007	0.002	0.005	0.005
Salient Supreme Court Cases$_{t-4}$	0.014*	0.002	0.011*	0.005
Salient Supreme Court Cases$_{t-5}$	0.007*	0.002	0.008	0.005
Salient Supreme Court Cases$_{t-6}$	0.003	0.002	0.005	0.005
Public Laws$_{t-1}$	<0.001	0.001	-0.001	0.001
Public Laws$_{t-2}$	-0.001	0.001	<0.001	0.001
Public Laws$_{t-3}$	0.001	0.001	<0.001	0.001
Public Laws$_{t-4}$	0.002	0.001	0.002	0.001
Public Laws$_{t-5}$	0.002*	0.001	0.004*	0.001
Public Laws$_{t-6}$	0.004*	0.001	0.002	0.001
SOTU Mentions$_{t-1}$	0.001	0.001	0.001	<0.001
SOTU Mentions$_{t-2}$	0.002*	0.001	0.001*	<0.001
SOTU Mentions$_{t-3}$	0.002*	0.001	0.001	<0.001
SOTU Mentions$_{t-4}$	0.001	0.001	0.003*	<0.001
SOTU Mentions$_{t-5}$	0.001	0.001	0.002*	<0.001
SOTU Mentions$_{t-6}$	-0.001	0.001	0.001	<0.001

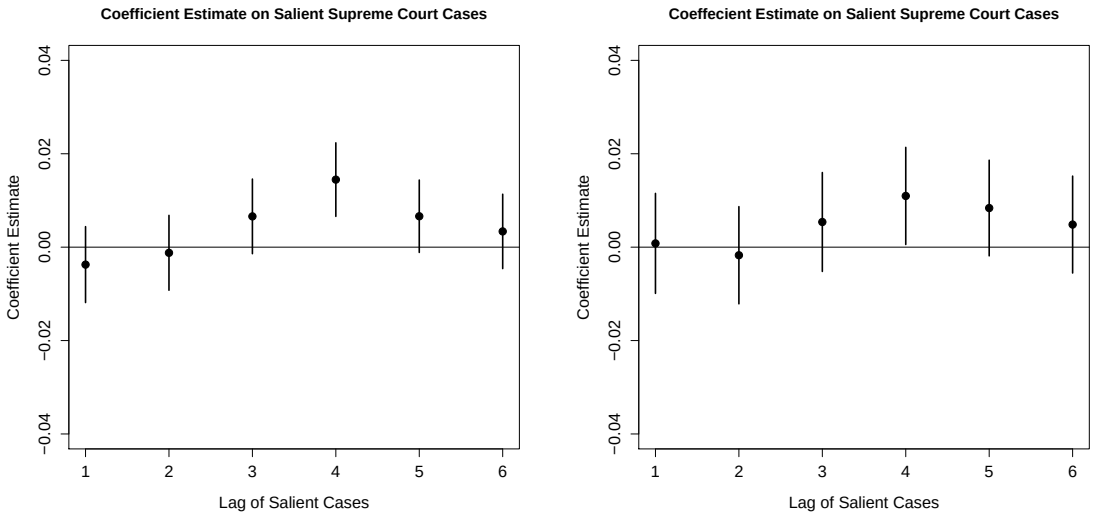
NOTE: * indicates $p < .05$ (two-tailed). For both models, N = 8,759, groups: policy = 19, circuits = 12.

Table 4.2: Models of Published Opinions in the Federal District Courts (1950-2000) and Courts of Appeals (1950-1996).

thereby able to engage in a dialogue with lower federal courts over the state of legal policy, encouraging additional issue percolation in lower federal courts (Clark and Kastellec, 2012*b*) and thus opening the door to greater judicial influence on public policy.

Model of Interest Group Attention

Across these first two actors, then, we have evidence which suggests that Supreme Court attention to an issue area both discourages additional litigation in that issue area while also encouraging additional attention toward that issue among judges.



District Courts Model *Courts of Appeals Model*

Figure 4.4: Fixed Effects Estimates for Influence of Supreme Court Issue Attention on Cases with Published Opinions in Lower Federal Courts. Each plot includes the fixed effects coefficients on lags of Supreme Court issue attention, measured as a count of salient cases within a policy area during a year, from a mixed effects zero-inflated negative binomial model of the count of cases with published opinions, or judge prioritization, in the district courts (left panel) and federal courts of appeals (right panel). Error bars indicate the 95% confidence intervals on the fixed effects estimates.

Our final actor, interest groups, constitute an important class of repeat players in the federal courts. Recall that interest groups are particularly concerned with public policy, and are hypothesized to be at the center of the litigant signal model. As repeat players, with goals most closely aligning with those of judges, the above results suggest that interest groups will respond positively to Supreme Court attention.

The results are presented in Table 4.3. There, we see results that are generally consistent the proactive courts perspective: Increased Supreme Court attention to an issue is correlated with additional attention to the same issue in lower federal courts approximately four years later in both federal district courts and U.S. courts of appeals. As above, the coefficient estimates on Supreme Court attention are

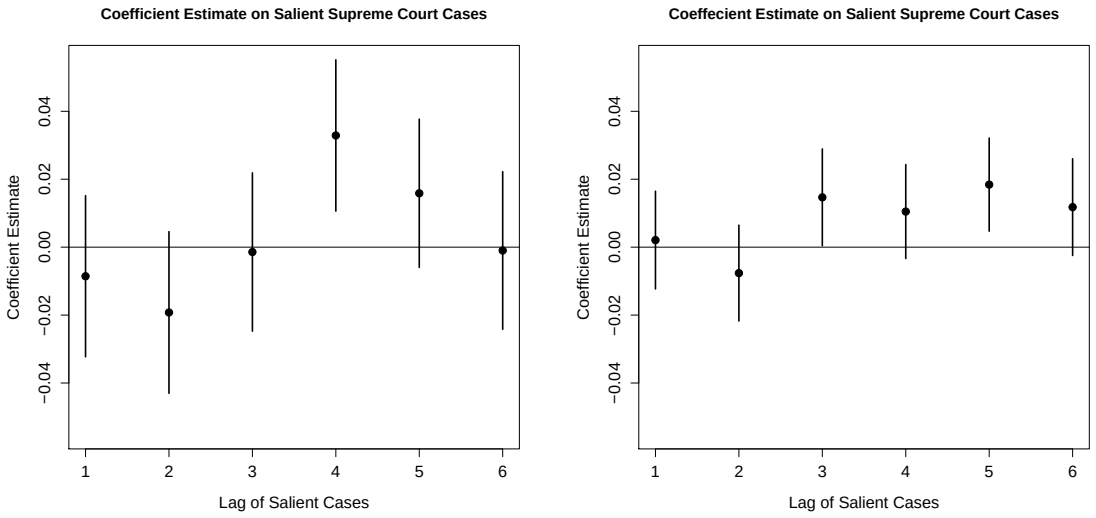
	District Courts		Courts of Appeals	
Variable	β	s.e.	β	s.e.
(Intercept)	-3.340*	0.474	-2.078*	0.487
Cases with Amicus$_{t-1}$	0.273*	0.036	0.199*	0.009
Salient Supreme Court Cases$_{t-1}$	-0.009	0.012	0.002	0.007
Salient Supreme Court Cases$_{t-2}$	-0.019	0.012	-0.008	0.007
Salient Supreme Court Cases$_{t-3}$	-0.001	0.012	0.015*	0.007
Salient Supreme Court Cases$_{t-4}$	0.033*	0.011	0.010	0.007
Salient Supreme Court Cases$_{t-5}$	0.016	0.011	0.018*	0.007
Salient Supreme Court Cases$_{t-6}$	-0.001	0.012	0.012	0.007
Public Laws$_{t-1}$	-0.005	0.004	-0.007*	0.003
Public Laws$_{t-2}$	-0.006	0.004	-0.001	0.002
Public Laws$_{t-3}$	<0.001	0.004	-0.002	0.003
Public Laws$_{t-4}$	0.001	0.004	-0.001	0.003
Public Laws$_{t-5}$	-0.001	0.004	0.001	0.002
Public Laws$_{t-6}$	0.001	0.004	-0.002	0.002
SOTU Mentions$_{t-1}$	0.002	0.002	0.003*	0.001
SOTU Mentions$_{t-2}$	0.006*	0.002	0.002	0.001
SOTU Mentions$_{t-3}$	-0.002	0.003	0.002	0.002
SOTU Mentions$_{t-4}$	-0.001	0.003	<0.001	0.002
SOTU Mentions$_{t-5}$	-0.001	0.003	-0.001	0.002
SOTU Mentions$_{t-6}$	0.002	0.003	0.002	0.002

NOTE: * indicates $p < .05$. For both models, N = 8,759, groups: policy = 19, circuits = 12.

Table 4.3: Models of Cases with Amicus Curiae in the Federal District Courts (1950-2000) and Courts of Appeals (1950-1996).

plotted in Figure 4.5 for ease of interpretability. Interest groups are more involved in cases before the lower federal courts in issue areas which the Supreme Court has addressed three to five years earlier.

This result holds potentially important implications for the actual policy being constructed. Because amicus briefs "supplement or reinforce arguments made by the litigants (Epstein & Kobylka 1992, Spriggs & Wahlbeck 1997)...one expects parties that have substantial amicus support to be strategically advantaged" (Wahlbeck, 1998, 624), a theory which Wahlbeck (1998) finds empirical support for. Therefore, if important Supreme Court decisions are encouraging additional amicus participation



District Courts Model *Courts of Appeals Model*

Figure 4.5: Fixed Effects Estimates for Influence of Supreme Court Issue Attention on Cases with At Least One Amicus Curiae. Each plot includes the fixed effects coefficients on lags of Supreme Court issue attention, measured as a count of salient cases within a policy area during a year, from a mixed effects zero-inflated negative binomial model of cases with published opinions and at least one amicus curiae, or interest group mobilization, in the district courts (left panel) and federal courts of appeals (right panel). Error bars indicate the 95% confidence intervals on the fixed effects estimates.

within a policy area, and those sides are strategically advantaged, then one side is potentially gaining an overwhelming advantage in pursuing policy change through the courts.

Across these analyses, actors motivated by legal or political policy – judges and interest groups, respectively – pay additional attention to issue areas after the Supreme Court addresses those issues by taking some particularly notable action. As the Supreme Court decides more salient cases within an issue area, judges and interest groups devote greater resources to that issue area in the lower federal courts. Yet while these repeat players devote additional attention to the issues which the Court is addressing, overall litigation, or the overwhelming volume of activity in

the federal courts, decreases. Here, litigants are observed to pay less attention to issues overall in lower federal courts after the Supreme Court addresses that issue. The Supreme Court, in devoting attention to an issue, thus stems tides of litigation in that issue area, but also encourages additional attention among the more policy-minded actors in the lower federal courts.

Summary and Implications

Supreme Court decisions settle routine litigation, which is primarily the type in which individual litigants are involved. It is often assumed that such litigants consider a cost-benefit analysis when deciding whether to become involved in the courts (Priest and Klein, 1984). Insofar as Supreme Court decisions clarify areas of the law that were previously unsettled, they reduce the error bounds for the parties as they estimate the utility of litigating, and provide signals to at least one that the potential benefit of litigation is unlikely to be realized.[9] Supreme Court attention therefore accomplishes exactly what former Chief Justice Vinson says the Court attempts to do. The Court resolves difficult questions with widespread impact on the legal system, often establishing legal rules which preclude litigation within the issue area in which the Court has acted.

Yet, litigants do not share the same goals as judges and interest groups. Rather, judges and interest groups are policy-minded actors in the judiciary, participating in a multitude of often similar cases within an issue area. These differing goals for judges and interest groups mean that, for this subset of actors in lower federal courts, their responses to Supreme Court decisions may be in the opposite direction from those of rank-and-file litigants. Indeed, I find evidence above that for these actors,

[9]While it is certainly true that for most criminal litigants this calculus will almost always lean towards litigating, the Supreme Court decisions may still provide sufficient clarity for their legal representatives so as to discourage additional attention.

Supreme Court attention actually correlates with additional lower court attention in later years. Thus, while the justices on the Supreme Court can accomplish their stated goal of producing clear legal rules, the Court can also engage in a policymaking dialogue with the lower federal courts. As such, policy-minded justices are able to fulfill their perceived legal duty while also pursuing their policy preferences (Segal and Spaeth, 1993, 2002). Judges and interest groups, concerned to different degrees with public policy and its relation to the legal system, pay additional attention to those issues and policies which the Court identifies as priorities through its decisions.

Beyond the specific implications of these relationships for the role of the Supreme Court and the participation of courts in the policy process, this hierarchical relationship also potentially allows the Supreme Court to delegate power to the lower federal courts. Specifically, the Court can delegate the imposition of "tough" policies to the lower federal courts, allow the issues to percolate, and then re-address the problem in subsequent years. Murphy (1959) discusses the school desegregation cases as just such an instance, with the Court "directing the widest sort of judicial discretion, guided only by the flexible formula 'with all deliberate speed' " (1028-1029). As such, the courts are able to exert considerable public policy influence, as they use the plethora of cases within the judiciary to touch on a variety of relatively minor topics all falling under a more all-encompassing issue area, and in aggregation shaping and developing policy on that issue. Only addressing the issue in bits and pieces, the Supreme Court can oversee this process while remaining relatively insulated from the pressures of public opinion. Similarly, the lower federal courts can address the issues in a variety of ways while themselves remaining insulated from severe public opinion backlash due to the general lack of public oversight. In sum, this dialogue across levels enables courts to exert considerable and previously understudied public policy influence.

In this chapter, I have found evidence supporting both the passive and proactive courts perspectives, with the existence of support for a perspective contingent on the actors in the lower federal courts under consideration. But while the Supreme Court settles litigation and also encourages this additional attention from lower federal court judges and interest groups, what is occurring in other institutions? For this, the passive and proactive courts perspectives each carry their own set of implications, and the findings of this chapter suggest the dynamics of attention are more nuanced than previously imagined. Are the courts simply working out the details after other institutions have addressed an issue area? Or are they instead, by engaging in this dialogue, signaling other institutions to mobilize? Perhaps the answer lies somewhere in between. In the next chapter, I turn to these questions and analyze how issue attention across levels of the federal courts relates to issue attention in other institutions, and whether the courts fulfill a passive or proactive role in the broader policy process of the American government.

Chapter 5

Issue Attention Dynamics in American Politics

> *"We know little about who influences whom in agenda setting in Washington, and there is little theory to guide our investigation. Nevertheless, there is reason to believe that influence does occur."* Edwards and Wood (1999, 328).

My intention in this study is to understand issue attention dynamics both within the judiciary as well as across the formal institutions of the U.S. government. To do so, I outlined two perspectives – passive courts and proactive courts – which dominated thought and research on the courts and American political institutions more generally. In the preceding chapter, I tested issue attention dynamics implied by those two perspectives within the judicial hierarchy. There, we saw evidence for both theories, contingent on which actor in the lower federal courts we considered. Importantly, we also saw evidence suggesting that courts, though they are members of the interpreting population (Johnson and Canon, 1984), are also engaged in an important policy dialogue across levels.

In this chapter, I set about examining the broader question of how this dialogue

within the federal judiciary relates to issue attention elsewhere. Insofar as the federal courts trail other institutions into issue areas, the dynamics identified in Chapter 4 would simply suggest the courts are adjusting policy at the margins. However, if this attention within the judiciary encourages other institutions to shift their focus to different issue areas, to reprioritize, it would suggest the courts are constructing policy uniquely and thus serving as an important determinant in the broader agenda-setting process.

In this chapter, I examine each policy area separately, employing two approaches – vector autoregression and Granger-causality estimates – to determine the directionality of the relationship between the federal courts and other institutions. My research and analyses again offer support for both proactive and passive courts perspectives, as the analyses reveal complex dynamics between issue agendas which are contingent upon the lower court actor and the issue under study. The very complexity of the cross-institutional relationships, with variation by issue and actor, suggests an explanation for the ongoing prevalence of, and unending debate regarding, the two seemingly contradictory perspectives. That being said, the results also provide important evidence that courts, and particularly the lower federal courts, must be considered in studies of the policy process, as the results in this chapter will suggest that the courts have systematically encouraged greater institutional attention to issues like Civil Rights and Liberties over the last half century.

The chapter proceeds as follows. I begin by briefly reconsidering the importance of issue attention, and macro-level studies of it. Then, I move to considering connections, both formal and informal, between Congress and the courts, and how these connections contribute to passive and proactive perspectives. A similar discussion of connections between the president and the courts then follows, after which I present my research strategy for estimating the macrodynamics of issue attention across in-

stitutions. Finally, I reveal the results of my analyses and discuss the implications of these results for studies of the policy process, the courts, and American political institutions, generally.

Macrodynamics of Issue Attention

In the words of Green-Pedersen and Wilkerson (2006, 1040), "politics is not simply about left-right policy preferences, but also about which issues or dimensions of issues will be the focus of attention." The decision to pay attention to particular issues determines the agenda, which I, following prior research, formally define as the "set of issues that are the subject of decision making and debate within a given political system at any one time " (Baumgartner, 2001, 288). As was documented in Chapter 3 for the lower federal courts, the share of attention an issue receives from any institution is likely to vary over time. In fact, the dynamics of this rise and fall in social problems on to, and subsequently off of, the agenda, has been formalized in much prior work (Downs, 1972; Peters and Hogwood, 1985; Baumgartner and Jones, 1993). In the punctuated equilibrium framework (Baumgartner and Jones, 1991, 1993), the spikes in these cycles are "related to dramatic and long-lasting policy changes" (Baumgartner, 2001, 289).

These fundamental theories from studies of the policy process offer clear expectations for dynamics of issue attention within an individual institution, and for such dynamics across the political spectrum as a whole. However, they fail to hypothesize about structural linkages across institutions. Rather, research by Kingdon (2003) and Baumgartner and Jones (1991, 1993) suggests that issue attention is "unsegmented" (Flemming, Wood and Bohte, 1999) across institutions, with issue attention in any one institution unrelated, on average, to issue attention in other institutions. In response to this research, Flemming, Wood and Bohte (1999), in their horizontal-

sequental model, suggest that "specialized patterns of attention" (79) may develop across institutions, due to the particular concerns and specializations of individual institutions.

As outlined in Chapter 2, proponents of the passive courts perspective believe a number of constraints on the judiciary inhibit the courts from leading the charge into policy areas. As noted in the quote that begins this chapter, by the nature of the legal process courts have limited agenda-setting capabilities. From this perspective, we would expect that attention in the courts will lag behind attention in other institutions. On the other hand, proponents of the proactive view suggest that the judiciary is uniquely designed to lead the charge into new issue areas. As such, litigation may be used to attract the attention of other institutions to particular policy areas. In a sequential issue attention model, then, we would expect attention in the federal courts to systematically precede attention in other institutions. Thus, the passive and proactive perspectives provide empirically testable propositions of how issue attention could propagate across institutions.

Congress and the Courts

The relationship between Congress and the courts has been the subject of extensive research. Primarily, these studies have focused on the Supreme Court, and more particularly on the influence of Congressional preferences on the decisions on the merits of Supreme Court justices. In this vein, some research has contributed evidence which suggests the justices respond directly to Congressional preferences (Spiller and Gely, 1992; Harvey and Friedman, 2006; Hansford and Damore, 2000), while other research has suggested little to no such influence (Segal, 1997). In the other direction, research has also examined how the Supreme Court influences the voting behavior of members of both houses of Congress (Martin, 2001). Thus, a

rich tradition of studies have examined influences on actual voting behavior which extend from Congress to the Court – and in the reciprocal direction – while *issue attention* influences across these same institutions have been neglected.

Instead, studies of policy agendas have focused primarily, if not exclusively, on Congress and the Congressional agenda (Baumgartner and Jones, 1991; Kingdon, 2003). Unlike the courts, which are ultimately still dependent on litigants for cases, Congress can choose the policies or issues which receive time for consideration in the form of committee hearings, floor debate, and so on. Across these two important institutions, prior research suggests that how Congress chooses to allocate their attention may matter for the Supreme Court and the president, at least in the area of environmental issues (Flemming, Bohte and Wood, 1997). How this propagates across issue areas, however, is an open question for which our two perspectives provide disparate expectations. In the remainder of this section, I outline what characteristics of courts and Congress suggest passive and proactive perspectives, respectively.

I begin with the passive perspective, which postulates that issue attention in the courts will, in general, lag behind the issue attention of Congress. Fundamentally, Congress, by passing laws, determines the content of cases before the courts (Flemming, Wood and Bohte, 1999). Much of what the courts do lies in interpreting Congress-made law (Johnson and Canon, 1984). Beyond shaping the content of cases, legislation itself can also directly influence what the courts actually have jurisdiction over. As but one example, Baumgartner and Jones (1991) point to the National Environmental Protection Act (NEPA) of 1969, which expanded access to the courts and "forced [courts] to give greater consideration to certain aspects of environmental policy which had been ignored in the past" (1049).

Moreover, for interest groups involved in crafting or fighting legislation before

Congress, the courts may offer a natural follow-up venue for their conflict. For interest groups on the losing end of the legislative battle, the courts offer an opportunity to seek to limit or explicitly override legislation. On the other hand, groups who have successfully fought for legislation in Congress may "seek codification of the ruling in order to cement the outcome or to broaden its effect" (Staudt, Lindstadt and O'Connor, 2007).

Actual legislation, however, is only one of many potential constraints which Congress can place on the agenda of the courts. In addition to legislation, the courts are composed of appointees who, though they are chosen by the executive, must receive approval from the legislature. Particularly given the norm of senatorial courtesy, whereby the executive consults with members of the Senate prior to nominating a given judicial appointment, Congress can shape the ideological makeup of the federal judiicary. Moreover, as Rosenberg (1991) argues, the Senate could only confirm judges of certain ideological bents. In addition to appointment, Congress can also decrease funding, remove jurisdiction, and, in extreme cases, impeach justices. Each of these constraints enables the legislative branch to shape the actual physical character of the federal courts. Thus, a judiciary which strays too far from the preferred policies of the legislative branch faces potentially severe consequences.

Finally, strategic accounts of judging suggest that Supreme Court justices consider the "preferences and likely actions of other relevant actions" and adjust their behavior, including on cert, in light of those factors (Eskridge, 1991*a*,*b*; Martin, 2001; Epstein, Segal and Victor, 2002). In this vein, proponents suggest that "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" (Epstein, Segal and Victor, 2002, 399). The Supreme Court, with discretion over it's s agenda, may never address an issue or case, "*at least in part because it desired*

to avoid collisions with Congress and the President" (Epstein, Segal and Victor, 2002, 411) (emphasis in original). Yet for inferior federal courts, the need for this strategy of issue avoidance is minimal for litigants and interest groups, as there is little incentive for these actors to fear "collisions with Congress and the President."

The incentives for judges in the lower federal courts, however, remain the same as for their counterparts on the Supreme Court. We can think of their decision to publish an opinion in light of the strategy accorded to Supreme Court justices in deciding whether, and how, to decide cases. For Supreme Court justices, prior research suggests that they are cognizant and responsive to the agendas of the president and Congress (Yates, Whitford and Gillespie, 2005). These lower court judges may choose not to publish opinions in areas which would lead to direct confrontations with the president or Congress, minimizing the amount of attention the individual case would receive while still allowing the judge to enact their preferred policy.

The passive courts perspective suggests that issue attention in the courts will follow the issue attention of other institutions. Whether or not this response is negative or positive depends on the actual measure under consideration. With respect to litigation, the passive perspective carries with it an expectation of either no relationship or additional issue attention after Congress addresses an issue.[1] In the area of judicial prioritization, we again expect either no relationship, or a negative response as lower court judges avoid direct confrontations with the revealed preferences of Congress. Finally, in the area of interest group mobilization, we expect additional attention after Congressional attention as groups shift their conflict to the courts and interpreting legislation which has passed.

[1]This assumes that jurisdiction stripping or granting measures will, on the whole, balance out. Of course, this may vary within the time series under consideration by policy area. As such, in subsequent analyses each individual issue area is analyzed separately. Doing so provides an additional check on the variability of grants and restrictions.

The proactive courts perspective, again, provides staunchly different expectations for the relationship between Congressional and judicial agendas. Here, the courts may force issues onto the agenda of Congress. Starting again with the Supreme Court, prior studies have documented that in at least some issue areas (especially civil rights), the Court may encourage Congressional attention. How the Court is able to accomplish this goal, though, remains up for debate. Some authors hypothesize the Court may do so by altering the attention the media pays to an issue (Flemming, Bohte and Wood, 1997), a finding corroborated by subsequent research (Ura, 2009). However, media attention to lower federal court decisions is minimal at best. That being said, there are other pathways for judicial influence on the issue attention of other institutions.

One such pathway is through encouraging mobilization. Judicial decisions themselves, suggests McCann (1994), may encourage groups to undertake political action (Riddell, 2004). The coalition and mobilization of groups could lead to further pressure on other institutions to address the issues which the groups prioritize. In Chapter 4, we saw that important decisions of the Supreme Court, in general, correlate with additional interest group attention in the form of amicus briefs in subsequent years. Whether or not the response to judicial decisions propagates across institutions, and whether or not it can arise from the attention of inferior federal courts, is an open question which I examine here.

Beyond mobilizing groups, court activity may itself provoke responses from Congress, particularly if court decisions run counter to congressionally-preferred policies (e.g. Eskridge, 1991*a*,*b*; Hettinger and Zorn, 2005; Clark, 2009). In these instances, Congress can choose to explicitly override decisions they disagree with, or reshape policy in areas where judicial decisions have shifted policy away from Congressional preferences. This very act of producing court-curbing legislation, through the rela-

tively frequent efforts seeking to override Court decisions (Eskridge, 1991*a*,*b*; Ignani and Meernik, 1994), means that Congress has to address an issue area it otherwise would not have addressed.

Interest groups could play an important role in these cases, as their activity within the judiciary may signal the importance of a particular issue area, or may encourage change on that particular policy, and in doing so may encourage Congress to address the issue. In fact, prior research has documented that amicus activity in the federal courts positively predicts subsequent Congressional overrides (Hettinger and Zorn, 2005). There exists some initial evidence, therefore, that the activity of groups within the confines of the federal courts may engender greater attention to their causes in Congress, consistent with the proactive courts perspective.

With respect to the judges themselves, this congressional oversight may in fact be advantageous. Research by Spiller and Tiller (1996) suggests that, for some subset of justices on the Supreme Court, Congressional overrides of Court decisions offer an opportunity to achieve policy and legal rule outcomes in the same case which would otherwise be impossible. In their words, "[a]s Congress can 'unlink' the policy and judicial rule outcomes for the Court, a majority in the Court may find it to be a good strategy to vote for its preferred rule, even if it leads to a bad policy outcome in the case as long as the Court can count on a congressional response that will put policy in position favored by a majority in the Court" (Spiller and Tiller, 1996, 504-505). Similar dynamics may be present in the strategy of lower court judges as they choose where to set legal policy, and whether or not publish an opinion.

To this point, I have generally referred to congressional responses in negative terms, as Congress responds to court decisions in order to overturn or limit an undesirable new policy. However, it must be noted that responses in congressional attention following judicial activity on particular policy are not necessarily limited

to this antogonistic relationship. Instead, Staudt, Lindstadt and O'Connor (2007) suggest that Congress may actually respond to some Supreme Court activity by codifying or citing decisions, at least in the area of tax policy. In their study, legislators discussed 54%, a slight majority, of the Supreme Court's decisions on tax policy (Staudt, Lindstadt and O'Connor, 2007). The authors hypothesize and find evidence that:

> "Members of Congress, for example, frequently look to Court opinions to glean an understanding of current judicial approaches to statutory interpretation. Legislators then rely on these intrepretive norms to craft statutes that will withstand scrutiny down the road should they be challenged in federal court. In other contexts, legislators refer to Court cases in debates and hearings as a means to signal important and emerging issues to constituents, journalists, and other interested parties" (Staudt, Lindstadt and O'Connor, 2007, 1342-1343).

Indeed, Supreme Court justices can and have explicitly *invited* Congressional attention and Congressional response (Staudt, Lindstadt and O'Connor, 2007; Hausegger and Baum, 1999; Spiller and Tiller, 1996). For instance, in his dissent in *Sykes v. United States*[2], a case dealing with the Armed Career Criminal Act (ACCA), Justice Antonin Scalia stated, "I do not think it would be a radical step – indeed, I think it would be highly responsible – to limit ACCA to the named violent crimes. Congress can quickly add what it wishes." Rather than encouraging congressional reversal of the Court's opinion, Justice Scalia simply requested an interpretation of extant legislation which would invite additional congressional attention. In other words, the Court invited Congress to act on a particular policy in a particular way.

[2]561 U.S. _ (2010), Scalia dissenting.

This cross-institutional dialogue, and the Court's direct invitations for congressional involvement, are especially likely when a case involves major changes in policy, as "they believe Congress is the appropriate body to make major policy decisions in certain legal contexts" (Staudt, Lindstadt and O'Connor, 2007, 1365)

Thus, the proactive courts perspective presents a number of potential mechanisms by which the courts could lead congressional attention to issues. Congress may be encouraged to address an issue area by a flood of litigation, with a volume of opportunities for judicial influence on the status of policy. Similarly, Congress may decide to address an issue area as a result of the influence of judges in lower federal courts. Judges, by prioritizing a particular issue, may shift policy and precendent on a particular issue and provoke a Congressional response to codify or reject the policy. Judges may even – as they have done in the past – explicitly invite a Congressional response. Finally, interest groups may seek to use the courts when Congress has been unwilling or unable to address their cause.

To measure the Congressional agenda, I use the number of public laws passed in a given year within each of the nineteen policy areas previously discussed. These data are available from the Policy Agendas Project and cover the period under study here. They present a demanding hurdle for the proactive courts perspective; not only must the issues which lower courts address be discussed in Congress, but they must also be enacted into law.[3] However, the measure provides a direct feature critical for the passive courts perspective. Public laws provide a mechanism by which litigation may, and from the passive courts perspective should, arise in the federal courts. Therefore, in these analyses I focus on public laws.

[3]One alternative is congressional hearings, which have been widely-used in prior research (Baumgartner and Jones, 1993; Edwards, Barrett and Peake, 1997). I plan to incorporate these measures in future iterations of this research.

The President and the Courts

Lastly, we turn to the presidency. The President's influence on the agenda is widely recognized and acknowledged, with some scholars even stating that "no other single actor can focus attention as clearly, or change the motivations of such a great number of other actors, as the president." (Baumgartner and Jones, 1993, 241). The president can do so through a multitude of methods. For example, the president can, and frequently does, attempt to shape the media's agenda, both through press releases and press conferences (Maltese, 1992; Edwards and Wood, 1999). Presidents have also tried to influence the agenda through the State of the Union message, though the success of this strategy is debatable (Gilberg et al., 1980; Wanta et al., 1989; Cohen, 1995), and in general have simply tried "hard to set Congress's agenda" (Edwards and Wood, 1999, 328).

How successful have presidents been in this endeavour? Research in this area suggests the answer is complex, with presidential efficacy here dependent on the issue area under study. To wit, Edwards and Wood (1999) find that most of the time on foreign policy, the issue attention of the president actually reacts to or follows media attention and events. On domestic policy, however, they find evidence that past presidents have been able to lead congressional attention to health care and education. Yet further, in the area of economic policy, other research suggests that the president primarily responds to media attention (Eshbaugh-Soha and Peake, 2006). Thus, prior research suggests the president both leads and follows issue attention of other actors, with the response contingent on the issue area under consideration.

As should be clear, research has primarily documented presidential issue attention relationships with Congress and the media; little is known of how the issue

attention of the president relates to the courts. Here, as in the case of Congress and the courts, the little we do know relates solely to the dynamics in relation to the Supreme Court. Research in this area suggests that, in the areas of civil liberties and civil rights, the Supreme Court appears to positively influence subsequent presidential issue attention. On the other hand, in the area of environmental policy there is little evidence of a relationship in presidential and judicial issue attention (Flemming, Wood and Bohte, 1999). Whether these findings persist at lower levels of the federal judiciary, and how they occur across additional issue areas, is an open question. For this, the competing passive and proactive courts perspectives again provide different expectations based on both prior research and institutional characteristics.

A number of constraints imposed directly by institutional rules support the passive courts perspective and the belief that the issue attention of the president will subsequently influence the issue attention of the courts. In the first place, the most important litigant before the federal courts is the solicitor general. For the Supreme Court, the solicitor general plays a critical role in the certiorari process (Tanenhaus et al., 1963; Caldeira and Wright, 1988; Schnapper, 1988). While presidential influence on lower court agendas has no such opportunity for agenda-stage influence, the president can still influence the subset of the case which comes before the judiciary. Zorn (2002) finds that, at the Supreme Court, the office of the solicitor general chooses to pursue cases they are likely to win on appeal, a pattern which may also be present in the courts of appeals. Beyond this influence, presidents can also refuse to implement the court decisions. Research also suggests that, in criminal justice policy, the president's rhetoric influences the implementation process (Meier, 1994; Yates and Whitford, 2009). Finally, the office of the solicitor general offers an opportunity for the president to directly pursue "agenda" cases (Salokar, 1992), a

practice common during both Ronald Reagan and George H.W. Bush's presidencies (Salokar, 1992; Pacelle, 2003; Wohlfarth, 2009).

Beyond the influence of the solicitor general, the president, by and with the advice and consent of the Senate, selects the judges and justices on all of these courts. Presidential priorities may therefore come to be reflected by the judges on the lower federal bench, just as they are for the Supreme Court (Dahl, 1957). For example, Rowland, Songer and Carp (1988) find that President Reagan appointees were substantially less supportive of criminal defendants than those appointed by President Nixon, and even moreso the appointees of President Carter. This changing ideological tenor of the courts is a finding which has proven robust over alternative time periods, as well (Goldman, 1975; Gottschall, 1983; Rowland, Carp and Stidham, 1984). Over time, then, we could see the published opinions also shifting, as judges prioritize policy areas consistent with the preferences of their appointing president.

In all, the passive courts perspective suggests that there exist a number of executive influences on the courts, and that these constraints suggest issue attention in the courts will follow the issue attention of the president. As they persist across actors, the constraints suggest that for each of our measures of attention in lower federal courts – all litigation, published opinions, and amicus briefs– the executive branch will exert considerable influence on the judicial agenda.

While these constraints clearly impose hurdles to the potential influence of the courts on the presidential agenda, followers of the proactive courts perspective believe that, despite the constraints, the courts are uniquely positioned to alter the attention the president pays to issue areas, just as they could do for Congress. In the case of judicial-presidential relations, this takes two forms.

First, the president must respond to the unanticipated and/or the salient (Edwards and Wood, 1999). Prominent examples of this occurring in the context of

the Supreme Court abound; take, for instance, President Obama's 2009 State of the Union Address, in which he attacked the Court's rejection of limitations on corporate and union campaign financing in the case of *Citizens United v. Federal Election Commission*.[4] Moreover, at the least, the Supreme Court can alter the attention the media pays to an issue (Flemming, Bohte and Wood, 1997), and influence public opinion on those issues. For instance, research by Franklin and Kosaki (1989), Hoekstra (2000), and Stoutenborough, Haider-Markel and Allen (2006) indicates that the Supreme Court's decisions influence public attitudes on particular issues. Doing so pushes those issues onto the systemic agenda, and thus onto the president's agenda (Edwards and Wood, 1999).

Beyond the influence which could arise from their actual decisions, presidents who face a Congress unreceptive to their policy goals may find the courts can serve as advantageous allies (Whittington, 2009). The courts are free to address and shift policy within a particular area when Congress is unwilling or unable to address that issue. So long as the shift is consistent with the policy preferences of the sitting president, that freedom offers an opportunity to establish advantageous policy while exerting further pressure on Congress to address the issue. Taken together, then, research in this vein suggests each of the three measures of judicial attention should actually predict subsequent increases in presidential issue attention.

As before, the proactive and passive courts perspectives therefore present diametrically opposing expectations for issue attention relationships between institutions. While presidential attention is notoriously hard to measure, due to the fact that "[t]he president's public face may not be a true reflection of what is happening behind the scenes" (Edwards and Wood, 1999, 330), it is rather straightforward for this study. For our purposes, we are concerned solely with what the president is

[4]558 U.S. 310 (2010).

willing to publicly take a position on. As was the case with measuring Supreme Court attention via salient decisions, we wish to obtain a measure of presidential priorities as popularly understood. To the extent that they are, litigants, judges and interest groups would be privy to the president's priorities.

Consistent with other prior research (Cohen, 1995; Light, 1991; Yates, Whitford and Gillespie, 2005), I therefore measure presidential attention using the percentage of the State of the Union addressed to particular issue areas. The positions staked by presidents in State of the Union addresses are broadly consistent with those taken by the Solicitor General (Meinhold and Shull, 1998), and, in general, presidents have followed through after voicing support by supporting economic policy and foreign relations legislation, though they have done so far less in the area of health and social welfare policy (Cummins, 2008). This offers one reason why, in later analyses, it is necessary to examine issue attention dynamics individually by policy area.

One alternative strategy would be to measure the president's agenda as all public speeches. However, using all public speeches, as some scholars have (Edwards and Wood, 1999; Wood and Peake, 1998), "possibly negate[s] the distinct impact the nationally televised address may have on the president's agenda-setting success" (Eshbaugh-Soha and Peake, 2006, 129). Therefore, I utilize in these analyses the proportion of mentions in the president's annual State of the Union message classified into each of nineteen policy areas.[5] The measure thus captures how much the president is willing to publicly prioritize particular issues, relative to the spectrum of issues which they could prioritize.

[5]These data were again acquired from the Policy Agendas project, classified into the same major issue area coding scheme as the other institutional measures.

A Note On Congressional-Presidential Relations

While the focus of this project is on the relationship of issue attention in the federal courts with issue attention in the other two branches of the national government, there is of course a relationship *between* the issue attention of those other two institutions. The relationship between the issue attention of Congress and the president is far more direct than that which is under study here today, given the political ties between the institutions.

It is commonplace for presidents to"try to implement [their] agenda through legislative processes" (Fishel, 1985; Flemming, Wood and Bohte, 1999). One way of doing so is through position-taking, which can only occur on legislation which is already under consideration in Congress (Shull and Shaw, 2004). However, members responsible for setting the agenda of Congress may take into account the president (Mouw and Mackuen, 1992), and therefore adjust their priorities in the legislative process according to the potential veto threat they face. Across institutions, though, it is clear that the presidential and congressional agendas are tightly linked, a fact which has received substantial empirical support (Flemming, Wood and Bohte, 1999; Edwards and Wood, 1999). What we know far less about is how all federal courts, including the Supreme Court, play into this relationship. Further, what we know next to nothing about is the role of the inferior federal courts in this process. I set now to testing this.

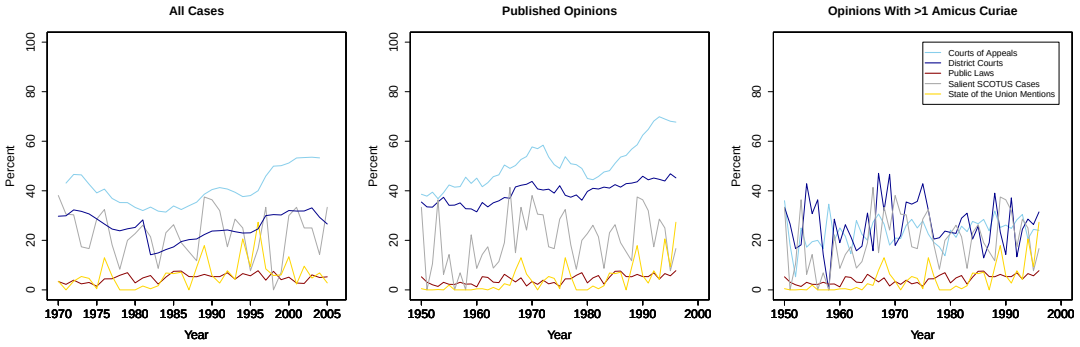
Research Strategy

In Chapter 4, each agenda measure was calculated as a count within a policy area during a given year. I did so in order to estimate a common fixed effect of Supreme Court attention on the agenda attention of lower federal courts, having accounted for

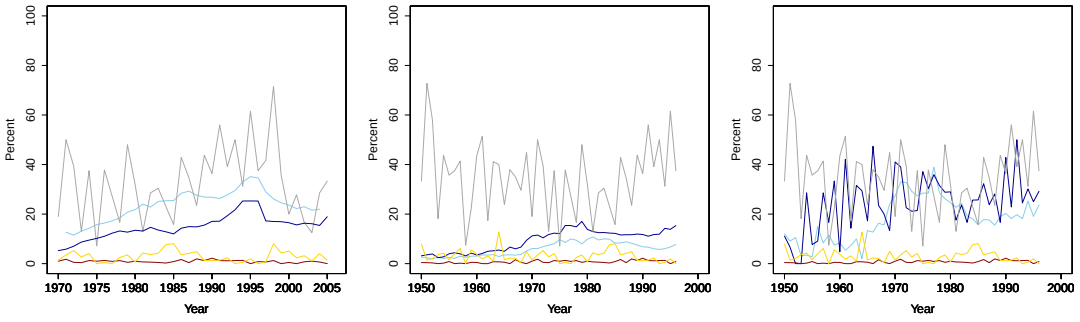
policy and court effects. There, I had little reason to suspect diametrically opposite reactions across policy areas, which would pool the fixed effects estimates towards zero. Here, by contrast, research has instead suggested that relationships may vary across institutions by particular policy areas (Flemming, Wood and Bohte, 1999; Edwards and Wood, 1999; Flemming, Bohte and Wood, 1997). Moreover, while in Chapter 4 I had an expected direction of causation, in these analyses the two perspectives actually suggest the variables are endogenous. Modeling this endogeneity requires that I utilize specifications like vector autoregression, for which panel data are ill-suited.

Given the above, I pool the counts of court attention variables (total litigation, published opinions, and cases with at least one amicus curiae) by issue area during a given year. I then calculate the proportion of the total number of the agenda measure (e.g., total litigation across all policy areas) which falls within each policy area. I also estimate, for each of the nineteen issue areas, the proportion of all public laws in that issue area during a year, the proportion of state of the union mentions in that issue area during a year, and the proportion of all salient Supreme Court cases in that issue area during a year. To see this, in Figure 5.1 I have plotted the topic percentages for three prominent issue areas. Each row represents a different topic, while each column represents a different measure of the lower court agenda. In order from left to right, they are total litigation, published opinions, and cases with at least one amicus curiae.

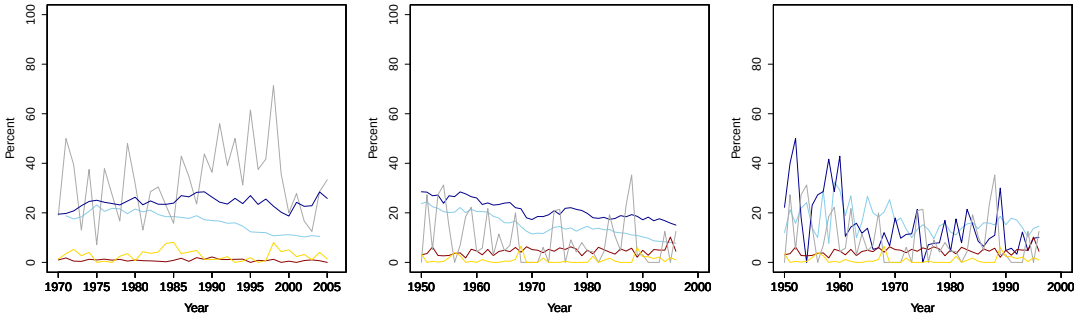
What I seek to test in this chapter is whether the observed changes in each institutional agenda – the lines in these plots – are linked to the observed changes in other institutional agendas. If so, which of the variables leads the other variables? The plots in Figure 5.1, unfortunately, do not provide any conclusive evidence on this front. They do, however, offer some general observations consistent with our



Law, Crime and Family



Civil Rights and Civil Liberties



Banking and Commerce

Figure 5.1: Agenda Comparisons for "Law, Crime and Family," "Civil Rights and Civil Liberties," and "Banking, Finance, and Commerce" issue areas. Columns provide issue measures for litigants, judges, and interest groups, in order. Each plot presents the percentage of the measure (e.g., percentage of all cases which were of that particular policy type).

expectations. For instance, lower federal courts devote a greater proportion of their attention to Law, Crime, and Family issues than do other institutions. The predominance of the Law, Crime, and Family issue area persists across each of the measures of the lower court agenda. Moreover, the federal courts devote a considerably higher proportion of their attention to Civil Rights and Civil Liberties in comparison to other institutions.

Yet despite these initial observations, the plots provide little systematic evidence of any linkages across institutional agendas. For this, the passive and proactive perspectives suggest separate attention dynamics across institutions. This means that the very direction of causality is at issue as the agendas for each of these institutions is potentially interrelated with the agenda of any other institution. In cases such as these, the appropriate modeling specification must account for the potential endogeneity of the variables under study (Brandt and Freeman, 2009). Vector autoregressive approaches are appropriate in these instances (Freeman, Williams and min Lin, 1989; Flemming, Wood and Bohte, 1999).

As such, I begin by estimating 57 reduced form vector autoregression equations, one for each of the 19 major policy areas for each of the three measures of issue attention in the lower federal courts. Doing so accounts for the possibility of inconsistent relationships across policy areas. Each equation includes five variables: for a given topic, the proportion of attention devoted to that topic during given year in the district courts, courts of appeals, executive, legislature, and the Supreme Court. For each of the 19 policy areas, there are three equations, with each using a separate measure – litigation, published opinions, and published opinions with an amicus curiae brief – of the lower court agenda.

Analysis

I begin with the vector autoregressions including all cases in the lower federal courts. Recall that in Chapter 4, Supreme Court attention, measured as the number of salient cases within a policy area, preceded decreased overall attention to that policy area in the lower federal courts. In Figure 5.2, I have plotted the impulse response functions for each of the issue-specific vector autoregressions.[6] In Figure 5.2, the figure in the third column of the first row represents the simulated response in the percentage of cases in an issue area in the district courts from a unit increase in the percentage of salient Supreme Court cases on that issue. Each line represents the response for a particular policy area across an extended period of time. Here, we see results which are broadly consistent with this dynamic. For both the district courts and the courts of appeals, the overwhelming majority of policy areas see negative impulse responses, with the lower federal courts paying less attention in terms of overall caseloads to the issue areas for which the Supreme Court devoted additional attention.

Having established this, what do we see across institutions? Here again, consistent with the passive courts perspective, the total caseload appears related to the agendas of Congress and the president. In general, impulses to congressional attention, as measured by the proportion of public laws within a particular policy area, yield subsequent increases in attention in the lower federal district courts. The dynamic is less dramatic in the Court of Appeals.

Responses in the total caseloads of the lower federal courts to presidential atten-

[6]Impulse responses are estimated from VARs as a way of estimating the short- and long-term response in one variable to increases in the value of another variable. They are calculated based on the Wold moving average representation of the VAR (Pfaff, 2008). I could not estimate the impulse response function of an issue-specific VAR for the issue area of Agriculture. The difficulty here lies in the fact that, in the period under study, there are no salient Supreme Court cases which are classified as Agriculture.

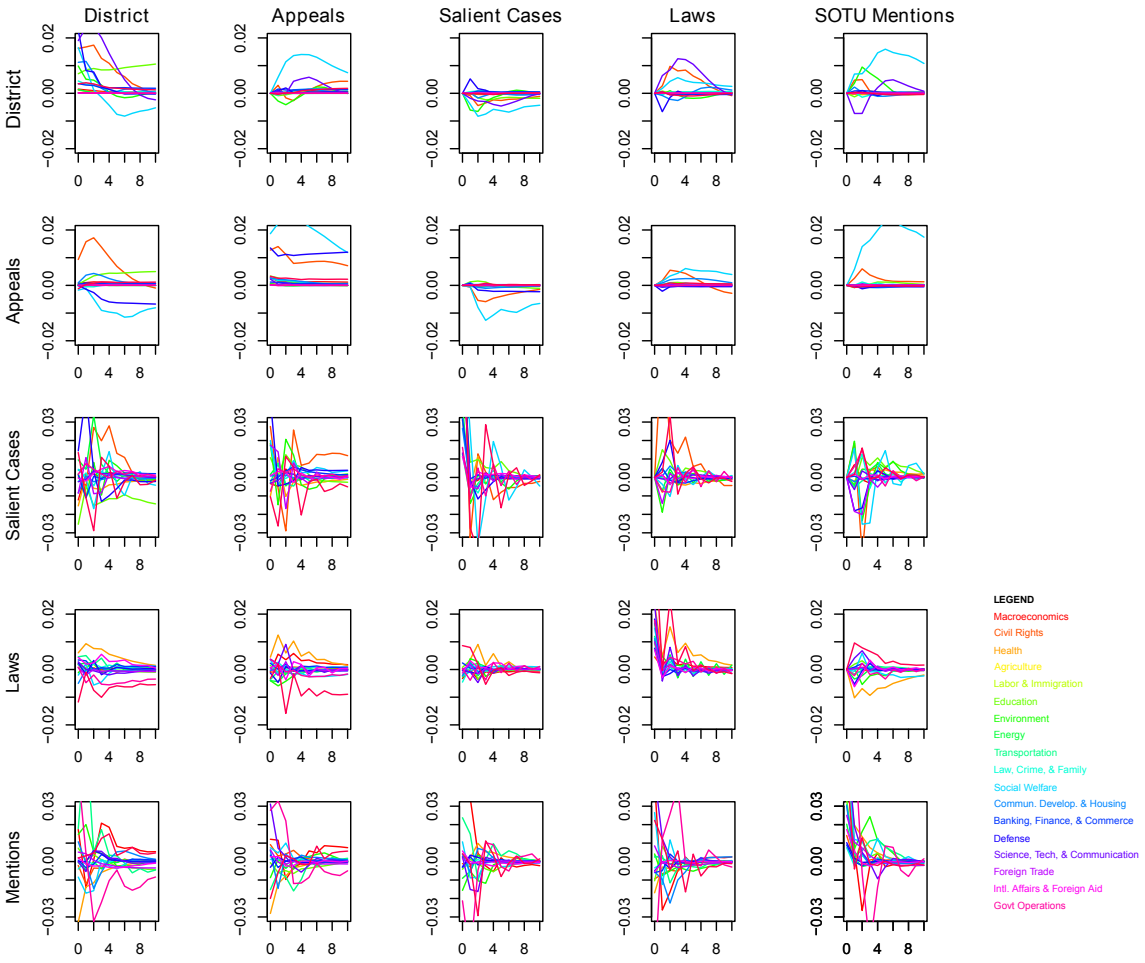


Figure 5.2: *Impulse Response Functions from Vector Autoregressions by Policy Area for Models with Lower Court Agenda Measured as All Cases.* Each plot features the impulse response function for each issue-specific vector autoregression. The columns represent the impulse variable, while the rows represent the response variable.

tion are even more dramatic. Here, we see positive responses in a number of issue areas, including Social Welfare and Environment issues. The ability of the executive to directly influence the priorities of the Department of Justice thus seem to have important ramifications for the overall issue attention of the federal courts, in a manner which is also consistent with a passive courts perspective. Moreover, while impulses to executive and congressional attention correspond with decreased overall attention, or total litigation, in the lower federal courts, we also do not see evidence

which suggests impulses to litigant mobilization in the lower federal courts would encourage additional attention in these other institutions. In short, broad litigation efforts themselves do not seem to encourage additional attention.

I move now to the VARs which included the number of published opinions as a measure of the lower court agenda; these are plotted in Figure 5.3. Here, we capture the attention of judges, and the results reflect how judicial prioritization of particular policy areas relates to issue attention in other institutions. Here, we again see evidence suggesting that the Supreme Court's attention to a policy area, in general, leads to additional attention from the lower federal court judges. This further substantiates the proactive influence documented in Chapter 4.

What of interbranch relations? On this, the impulse response plots are less clear. Across issue areas, the relationship between issue attention in the lower federal courts and the issue attention of Congress and the executive varies greatly by policy area. For example, for Social Welfare issues, congressional and presidential attention seem to precipitate greater attention from judges in the lower federal courts, while additional attention to Health issues in the courts of appeals precipitates greater congressional attention.

Finally, how does the issue attention of groups in the lower federal courts relate to the issue attention of other institutions? Again, the impulse responses of lower federal courts to impulses in salient cases is consistent with the evidence in Chapter 4. On balance, then, these models provide consistent evidence suggesting that the Supreme Court both encourages additional judge and interest group attention, supporting the proactive courts perspective, while also settling areas of broad-based litigation, therein also supporting the passive courts perspective.

Again, the impulse response functions for interest group attention, plotted in Figure 5.4 provide mixed evidence for the passive and proactive perspective. There

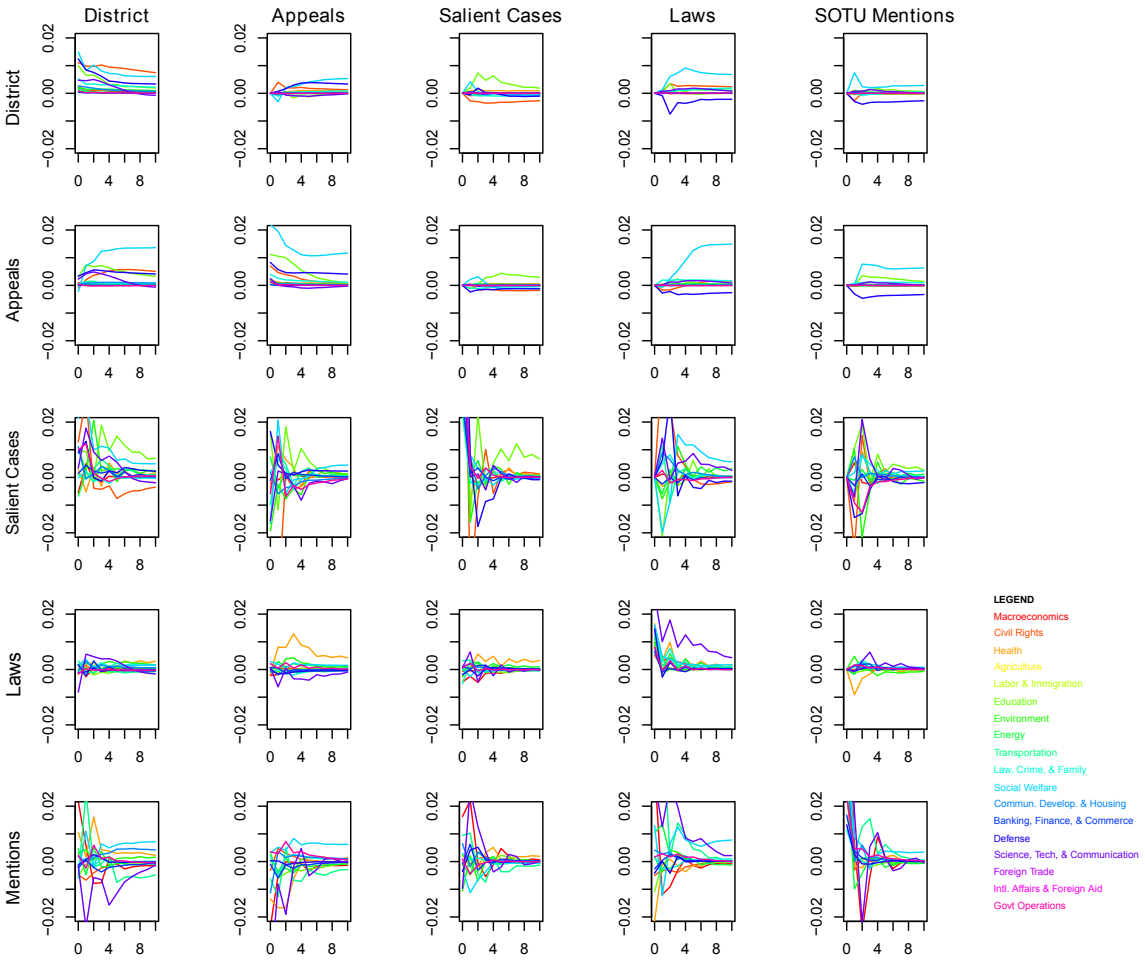


Figure 5.3: *Impulse Response Functions from Vector Autoregressions by Policy Area for Models with Lower Court Agenda Measured as Published Opinions.* Each plot features the impulse response function for each issue-specific vector autoregression. The columns represent the impulse variable, while the rows represent the response variable.

is relatively consistent evidence across policy areas suggesting that additional amicus curiae in the lower federal courts precede additional presidential attention at a short lag. However, there is also evidence that additional laws lead to fewer amicus curiae in the lower district courts, particularly in the issue area of Community Development and Housing.

Throughout, then, we see mixed evidence. These results suggest that whether

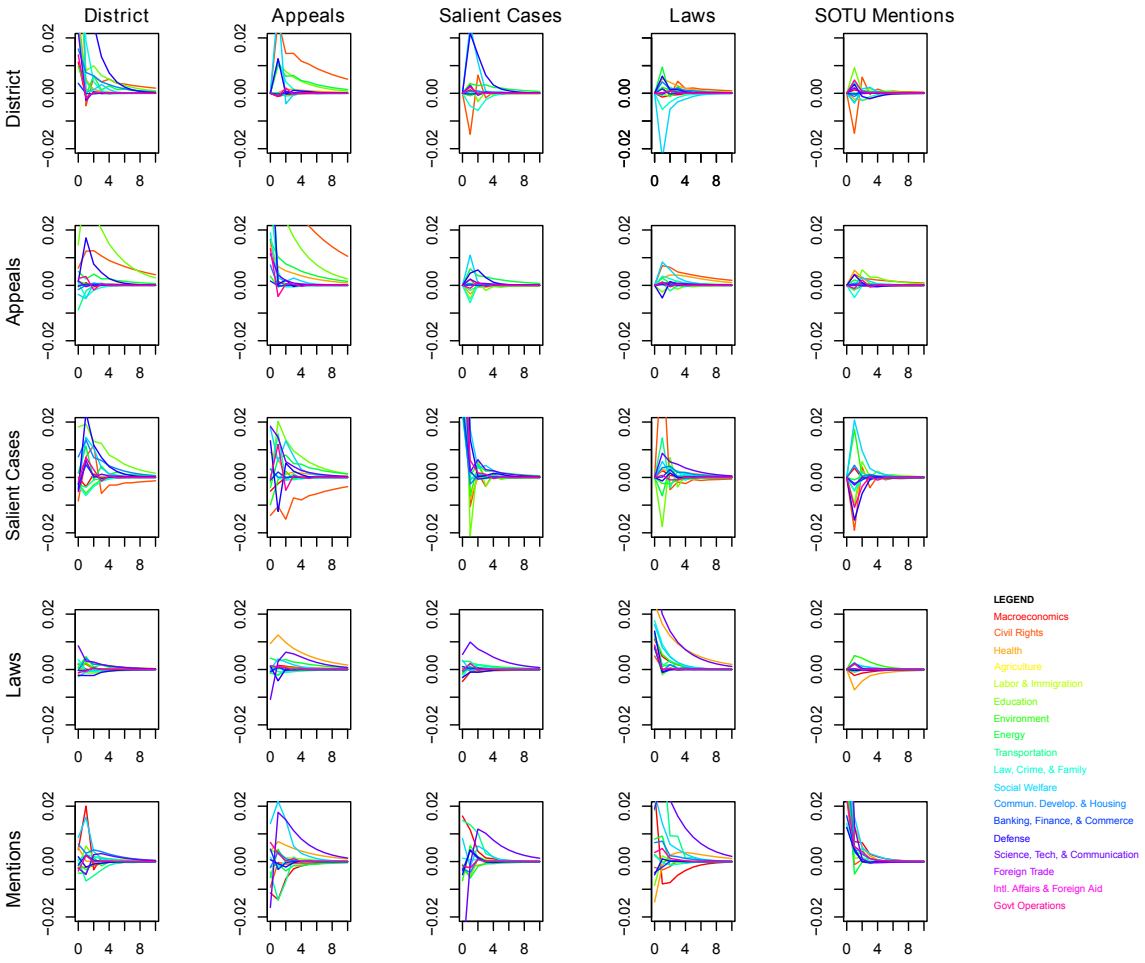


Figure 5.4: *Impulse Response Functions from Vector Autoregressions by Policy Area for Models with Lower Court Agenda Measured as Amicus Curiae.* Each plot features the impulse response function for each issue-specific vector autoregression. The columns represent the impulse variable, while the rows represent the response variable.

the issue attention relationship between the federal courts and other institutions is consistent with the passive or proactive courts perspective is highly contingent on the policy area under study and the actor under consideration in the lower federal courts. As such, in the next section I move to Granger-causal analyses, which offer another opportunity to measure the directionality of the relationship by each policy area.

Granger-causal Analyses

A variable "Granger-causes" another variable if lagged values of that variable provide statistically significant information, determined here by F-tests, about future values of the other variable. I therefore estimate a series of issue-specific Granger-causality tests to determine, by issue area, whether issue attention to that policy in the judiciary precedes, or responds to, issue attention in the more frequently studied institutions of Congress and the president.

I begin with tests of whether the courts Granger-cause shifts in issue attention for Congress and the president. More specifically, for each policy area, I test whether lower courts (district courts of appeals) or all courts (district courts, courts of appeals, and salient Supreme Court cases[7]) Granger-cause the agenda of the remaining endogenous variables in the system. Recall that the proactive courts perspective suggests the attention of the courts should precede the attention of other institutions. In particular, we should see evidence that additional amicus curiae activity Granger-causes additional attention from Congress and the executive.

The results of these analyses are in Table 5.1. The second and third columns present the results from analyses with lower court agenda attention measured as the proportion of all cases during a given year falling in that policy area, or a measure of litigant mobilization within an issue area. Here, we see that litigant attention to civil rights in the lower federal courts, as well as in the federal courts generally, Granger-causes attention to civil rights and liberties for Congress and the president. This fits with the common conception of the courts as protectors of individual rights and liberties. Beyond civil rights and liberties, though, there

[7]Salient Supreme Court cases are retained in these analyses as the measure of Supreme Court attention consistent with prior research suggesting that important Supreme Court cases conditionally generate a response in the agenda of Congress, the executive, and the media (Flemming, Bohte and Wood, 1997; Flemming, Wood and Bohte, 1999).

is little evidence that broad changes in overall levels of litigation Granger-cause changes in the attention of other institutions. For only five of the eighteen tested issue areas does overall litigation in the federal courts precipitate change in the issue attention of other institutions at a statistically significant level. Moreover, for three of these five areas (macroeconomics, energy, and foreign trade), there is very little litigation overall. Thus, while litigant mobilization in the federal courts does precipitate change in the issue area most frequently associated with the judiciary (civil rights and liberties), there is little evidence in these examinations to suggest mobilization is able to encourage any meaningful attention from other institutions.

Moving to columns four and five, I present the results from analyses of whether the attention of judges in the lower federal courts Granger-causes the attention of the Supreme Court, Congress and the executive (column 4) and whether attention of judges in all federal courts Granger-causes the attention of Congress and the executive (column 5). Ten of these eighteen Granger analyses suggest that the attention judges are paying to particular issues does Granger-causes issue attention in other institutions. This provides initial evidence suggesting that the attention of judges, and their influence on policy through the publication of opinions, does in fact matter for Congress and the executive.

Two issue areas bear particular mention. First, civil rights and liberties is again an issue area in which the attention of the lower federal courts matters for other institutions. In particular, the influence of judges on policies within the civil rights and liberties issue area Granger-causes additional attention from the Supreme Court, Congress, and the executive. Second, law, crime and family issues account for the majority of the activity in lower federal courts. The analyses provide evidence which suggests the publication of opinions within this issue area Granger-causes additional Congressional and executive attention. This is perhaps unsurprising; in this issue

	All Cases		Published Opinions		Amicus Curiae	
Issue Area	Lower →	All →	Lower →	All →	Lower →	All →
Macroeconomics	0.06	**0.05**	0.23	0.29	0.24	0.42
Civil Rights	**<0.01**	**<0.01**	**0.04**	0.32	0.06	0.12
Health	0.96	0.78	**<0.01**	**<0.01**	0.11	0.31
Agriculture	-	-	-	-	-	-
Labor & Immigration	0.72	0.47	0.17	0.40	**0.01**	0.17
Education	0.12	0.19	**0.01**	**<0.01**	0.52	0.11
Environment	**<0.01**	0.37	0.07	**0.04**	**<0.01**	**0.01**
Energy	**<0.01**	**<0.01**	**0.01**	0.18	**<0.01**	0.47
Transportation	0.26	0.16	**<0.01**	**0.01**	0.30	0.46
Law, Crime & Family	0.18	0.20	**<0.01**	0.07	0.11	0.12
Social Welfare	0.19	0.10	0.37	0.41	**<0.01**	**0.01**
Commun. Develop. & Housing	0.09	0.11	**0.03**	**0.01**	0.51	0.35
Banking, Finance & Commerce	0.31	0.20	0.47	0.22	**0.04**	**0.02**
Defense	0.08	0.43	**<0.01**	**0.01**	**0.01**	0.14
Science, Tech., & Commu.	0.76	0.85	0.42	0.55	0.48	0.53
Foreign Trade	**<0.01**	**<0.01**	0.68	0.87	-	-
Intl. Affairs & Foreign Aid	0.73	0.91	0.19	0.11	-	-
Govt. Operations	0.24	0.10	0.22	0.42	0.41	0.30
Public Lands	0.32	0.35	**0.01**	**<0.01**	0.44	0.27

Table 5.1: P-values from Granger-causality tests, with lower federal courts (district courts and courts of appeals) or all federal courts (district courts, courts of appeals, and salient Supreme Court cases) as causes. For each, I test whether the court variables Granger-cause the remaining endogenous variables from the VARs (Supreme Court, Congress and Executive for Lower →, while Congress and Executive for All →).

area, Congress and the president can use the courts to sift through the volumes of routine litigation. Judges can then alert other institutions as to particular problems in the area via the publication of opinions, engendering a response.

Finally, in columns six and seven I present the results from analyses of the influence of amici curiae in the courts on the agenda of other institutions. This potential pathway for influence is perhaps the most prevalently discussed in prior research suggesting the proactive courts perspective. Here, we see that in six of the eighteen tests, amicus curiae participation in the federal courts Granger-cause the issue attention of other institutions. Of these six, defense and energy policy are relatively minor portions of the agenda of the federal courts. The remaining four issue areas, however, provide interesting examples of the influence of amicus curiae in the federal courts. In the issue area of labor and immigration, amici curiae in the lower federal courts Granger-cause the attention of the Supreme Court, Congress and the executive. Similarly, the courts exert important issue attention influences in the area of environmental, social welfare and banking, finance, and commerce issues also Granger-causes attention in other institutions.

The results also offer evidence that amici curiae in the federal courts, in totality, pique the attention of Congress and the president to particular policies. As the presence of amicus curiae can point out areas of conflict and public interest, the involvement of interest groups in the courts precedes periods of increased attention to those areas in subsequent years. Thus, these results validate the call by prior researchers like Strolovitch (2007) for groups to use the courts in order to gain public attention for their cause, even in instances where they are unlikely to succeed on the merits.

Overall, then, we see that the proactive influences of the federal courts are conditional on the type of attention and the issue area considered. We now move to

analyses of passive courts perspective, and whether the issue attention of the federal courts is Granger-caused by the issue attention of other institututions. These results are presented in Table 5.2.

The columns present the p-values from Granger-causality tests of the impact of Congress, the president, and the Supreme Court on attention in lower courts ($\rightarrow$ Lower) and the impact of Congress and the president on the federal courts as a whole ($\rightarrow$ All), respectively. In totality, we see far fewer issue areas across models which provide evidence of Granger-causality from Congress and the executive, or from Congress, the executive, and the Supreme Court, on the agenda of the lower courts.

Three issue areas bear particular mention here. First, in the total litigation models, changes in the issue attention of Congress and the president Granger-cause subsequent changes in the issue attention of the federal courts to civil rights and civil liberties issues. The identification of reciprocally causal relations in the area of civil rights and civil liberties issues is consistent with prior research by Flemming, Wood and Bohte (1999), in which "the Supreme Court and Congress are involved in a set of reciprocally causal relations in which their respective concerns and priorities drive one another through time " (104). Here, we see that for lower courts the primary avenue of congressional influence is on the total amount of litigation which is actually pursued in the federal courts.

Second, we also see evidence that, in the area of law, crime, and family, the attention of other institutions Granger-causes the attention of the lower federal courts when operationalized as all cases, which complements the findings documented in Chapter 4. Given the issue-specific subject matter, this is not unexpected. In the model of all opinions, there is evidence that federal judges are quite responsive to the attention of other institutions.

	All Cases		Published Opinions		Amicus Curiae	
Issue Area	→ Lower	→ All	→ Lower	→ All	→ Lower	→ All
Macroeconomics	0.96	0.94	0.26	0.81	0.82	0.79
Civil Rights	0.25	**0.01**	0.25	0.17	0.76	0.20
Health	0.14	0.17	0.15	0.43	0.02	**0.01**
Agriculture	-	-	-	-	-	-
Labor & Immigration	0.37	0.49	**0.01**	0.52	0.81	0.60
Education	**<0.01**	**<0.01**	0.26	**0.04**	**0.04**	**0.05**
Environment	0.89	0.85	0.08	0.14	**0.01**	0.08
Energy	0.62	0.10	0.27	0.86	0.96	0.17
Transportation	0.12	0.10	0.16	0.06	0.16	0.35
Law, Crime, & Family	**0.04**	0.22	**0.03**	**0.03**	0.16	0.45
Social Welfare	0.08	0.49	0.98	0.75	0.16	0.17
Commun. Develop & Housing	0.33	0.44	0.14	0.20	0.08	0.08
Banking, Finance & Commerce	0.96	0.67	**0.04**	**0.04**	0.82	0.89
Defense	0.26	**0.03**	0.53	**0.05**	0.74	0.83
Science, Tech., & Commu.	0.50	0.11	0.85	0.58	0.20	0.19
Foreign Trade	0.10	0.96	0.09	**0.03**	-	-
Intl. Affairs & Foreign Aid	0.17	**<0.01**	0.75	0.48	-	-
Govt. Operations	0.79	0.22	0.08	0.07	0.32	0.41
Public Lands	0.56	0.90	0.83	0.37	**0.01**	0.63

Table 5.2: P-values from Granger-causality tests, with lower federal courts (district courts and courts of appeals) or all federal courts (district courts, courts of appeals, and salient Supreme Court cases) as response variables. For each, I test whether other institutions ((Supreme Court, Congress and Executive for → Lower, while Congress and Executive for → All) Granger-cause the court variables from the VARs.

Finally, the issue area of Education provides the most consistent evidence of a passive courts relationship. Across 5 of 6 Granger-causality tests, other institutions are found to Granger-cause subsequent issue attention in the federal courts. As Congress and the president address education issues, the total amount of litigation, and the number of interest groups active on that litigation, in the federal courts increases. In the reciprocal direction tested above, we saw only that the attention of judges leads to additional attention in other institutions. Prioritizing education, therefore, seems to be uniquely reserved for Congress and the president.

Thus, while earlier we observed evidence supporting a proactive courts perspective in some issue areas and for some actors, here we have contrary evidence for other issue areas and actors. In short, the relationship in issue attention between Congress, the president and the federal courts is exceedingly complex, with dynamics that vary significantly by issue area and actor. In some issue areas, notably education, actors in the courts appear to be quite passive, responding to the attention of other institutions. In other issue areas, judges and interest groups in the lower federal courts encourage other institutions to pay attention to particular policies.

Summary and Implications

In general, then, the analyses in this chapter point to two primary conclusions. In the first place, the dynamics of issue attention vary by policy area, with the role of the federal courts contingent on the policy under examination. Yet these analyses also suggest that, at least for some issue areas, the federal courts exert considerable influences on the amount of attention an issue receives from other, more prominent institutions of government. Thus, these findings – perhaps paradoxically – provide support for both proactive and passive courts proponents. That two perspectives, seemingly so divergent in expectations, both have sustained for so long

in prior research on the courts, though, appears to be attributable in part to the very complexity uncovered above.

The analyses in this chapter could have undermined the findings reported in Chapter 4, wherein the Supreme Court takes on roles consistent with passive and proactive courts perspectives, contingent on the lower court agenda measure under consideration. Examining the dynamics of the relationship between Supreme Court agenda attention and lower court agenda attention, and now accounting for endogeneity, I still found that Supreme Court attention to a policy area led to less litigation. Taking these findings in conjuction with the findings reported in Chapter 4, we have strong evidence that the Supreme Court engages in an important dialogue with actors in the lower federal courts. In general, when the Supreme Court addresses an issue, it both settles an issue in the law, thereby stemming tides of litigation, while also encouraging additional policy discussions for judges and interest groups active in these venues.

Beyond validation of the Chapter 4 findings, this examination provides important insights into the issue attention relationships between the federal courts and other institutions. As in Chapter 4, we saw evidence which supported both passive and proactive courts perspectives, contingent on the policy area and measure under consideration. Given the inconsistency of the dynamics by subgroupings, it is unsurprising that both perspectives have arisen and sustained over time in research on the federal courts. Yet it is also important to note that across policy areas, the extent to which issue attention in the federal courts Granger-causes issue attention in other institutions outweighs the reciprocal dynamics. In other words, issue attention in the federal courts *matters* for the issue attention of Congress and the president.

By varying their attention to issues, judges and interest groups, in particular, encourage additional presidential and congressional attention to those very same

issues. While the consistency of influence from litigants across issues is somewhat less, it is nonetheless notable especially in the area of civil rights and civil liberties. This area, the one for which courts are perhaps most notable as a bastion of policy innovation, sees changes in litigation attention Granger-cause changes in attention to civil rights and civil liberties for Congress and the president.

In totality, the analysis in this chapter suggests that the federal courts play an important, though limited, agenda-setting role. Given the importance of the agenda, and the calls of prior scholars for disadvantaged groups to use courts in this way (e.g., Strolovitch, 2007), this holds important implications for the study of the courts and the policy process, more generally. While the inconsistency of the findings may seem an unfulfilling result of this research, the complexity of the policy process and cross-institutional relationships suggest this may simply be the expected state of affairs.

This should not, however, overstate the case. Congress and the president still place severe constraints on the courts, and in some issue areas determine the agenda of the federal courts, consistent with the proactive courts perspective. Moreover, this research reports only on what these institutions are actually paying attention to, not the content of their attention. Congress and the president, though they address these issues, may simply override or limit the reach of cases which the court deals with. In other words, while the courts may systematically alert other institutions of policy areas in need of attention, they may also have little control over the content of the policy that arises from the attention then devoted by those other institutions.

With that said, these results do suggest that, at the very least, the federal courts have been too uncommon in research on agenda-setting and policymaking in the American context. In some issue areas, the attention of actors within the federal courts systematically matters for what other institutions choose to address in sub-

sequent years. In federal court rooms around the country, increases in the attention of litigants, judges or interest groups to an issue area may systematically encourage additional attention from Congress and the president to issues which those institutions had previously neglected. Federal courts can thus serve an important role in the policymaking process, by place issues on the agenda when other institutions have failed to do so.

Chapter 6

Conclusions

Throughout this study, I have offered as examples a cross-section of court cases which addressed major issues in American life before, during, and after those same issues were addressed by Congress and the president. These cases provided specific and concrete examples of attention to an issue travelling within the judicial hierarchy as well as across the major institutions of the federal government. The broader goal of my study, though, was to step back from these specifics, and to determine how the thousands upon thousands of cases heard in the federal courts every year related to the activity of other institutions in the aggregate.

On this point, two theoretical perspectives provided opposite expectations. My empirical findings suggest these two perspectives have emerged because both operate, albeit across different actors and at different levels in the federal courts. In this section, I review my findings, and the implications of these findings for both the academic community and for legal and political professionals. Having done so, I then make explicit many of the limitations of the research, and offer considerations of possibilities for future research to build on the work reported here.

Summary of Findings

The courts play an important – albeit understudied role – in the policy process. Taking issue with prior research on the policy process, research which either ignored courts entirely (Kingdon, 2003) or never explicitly incorporated them into analyses (Baumgartner and Jones, 1993), I considered the potential role of the judiciary, and the multitude of actors therein, in the macrodynamics of issue attention. On this point, I argue that two perspectives, both of extensive lineage in prior research, provide different testable predictions for the flow if issue attention across institutions.

The first perspective, which traces back to core theories of judges as unbiased "declarers" of the law, holds that the courts are part of a passive population which interprets policy constructed by Congress and the executive branch. Owing to an abundance of constraints on the judiciary, actors within the federal courts – litigants, judges, and interest groups – face significant hurdles to ever encouraging other institutions to take note of issues which are not yet on the agendas of those other institutions. Particularly when examined in the aggregate, proponents of this perspective suggest that these actors are generally unable to overcome these constraints and thus attention in the courts lags behind that of other institutions, with courts simply interpreting the policies other institutions create.

Researchers (e.g. Rosenberg, 1991) have only rarely contrasted this perspective with a second view of the courts, one which offers diametrically opposite expectations for the role of the courts. In this proactive perspective, the courts are employed as a means to garner the attention of other institutions. Thus, the aggregation of individual litigant claims (Epp, 1990, 1998) or the activity of interest groups on court cases within a certain issue area in the judiciary (McCann, 1992, 1994) stokes the attention of Congress and the president, encouraging those institutions to address

that very same issue area. In so doing, the courts become an important agenda setter in American politics.

These perspectives, though, carry certain identifiable empirical expectations, which I assess in the remaining chapters. To do so, I analyzed attention in all federal courts. I generated this data by automating the classification of litigation in the lower federal courts, using the texts of published opinions, available government records, and an ensemble of supervised machine learning methods for classification. The research indicates a rapidly growing caseload, with more cases, more published opinions, and more interest group activity in the federal courts over the second half of the twentieth century and the start of the twenty-first. This additional activity was not constant across issue areas, however, with attention to issues shifting demonstrably from year to year, and decade to decade. How these changes relate to issue attention in other institutions offers evidence to further our understanding the puzzle introduced by the presence of both passive and proactive courts perspectives.

To start, I argued that the perspectives each suggest different dynamics within the judicial hierarchy; I tested these expectations in Chapter 4. In those analyses, the nuance of the issue attention relationships began to manifest itself as a theme of this research. They revealed that attention dynamics within the judicial hierarchy are subject to the actor and level of courts under consideration. The Supreme Court fulfills the justices' stated goal of furthering the clarity of the law, with Supreme Court attention to an issue area leading to less litigation within that issue area in subsequent years, consistent with a passive courts perspective. On the other hand, judges and interest groups – actors concerned with the state of policy – respond to Supreme Court attention by placing greater emphasis on that same issue area, consistent with the proactive courts perspective. Within the judicial hierarchy, both passive and proactive perspectives are supported.

The relationship of this attention within the judicial hierarchy with the issue attention of Congress and the president was then analyzed in Chapter 5. There I find evidence substantiating the within-hierarchy effects but also document a multitude of nuanced relationships in cross-institutional issue attention relationships. The attention of courts certainly shifts in light of the attention of other institutions, but the exact relationship – passive or proactive – is contingent on the policy area, level of the judiciary, and the actors under consideration. In the time period under study, increases in litigant attention to civil rights and civil liberties – the hallmark of the judiciary – systematically correlates with increases in issue attention in Congress and the presidency. Judges and interest groups, on the other hand, encourage additional attention across an amalgam of different policies. For instance, interest group participation as amicus curiae on social welfare issues and on banking, finance and commerce issues systematically correlates with subsequent attention to those issues in other institutions. Each of these dynamics suggests support for the proactive courts hypothesis. On the contrary, though, I also find evidence that suggests congressional and presidential attention to an issue leads to additional attention in the courts, with education a notable issue on which the courts generally lag behind. There is evidence, then, indicating support for both passive and proactive perspectives in cross-institutional agenda dynamics.

The growth and subsequent perpetuation of these two separate but opposite perspectives on the role of the courts is unsurprising in light of the subtleties suggested by these analyses. The decision to generalize findings from analyses conducted only at fine-grained levels of analysis is ill-advised. In this dissertation, certain contextual variables – judicial actor, court level, or issue area – are documented as having critical importance for which of the perspectives is supported. The research thus offers substantiation of the calls made by previous researchers (Flemming, Bohte

and Wood, 1997; Flemming, Wood and Bohte, 1999) for future analyses to focus on how attention dynamics play out across the multitude of issue areas addressed in public policy by the American government.

Taken in their entirety, these findings suggest that the federal courts are, at times, an important determinant of issue attention in the United States, as well as a critical participant in the policy process. This finding may appear at first glance to be unsurprising given given the complexity of the policy process and the multitude of extant actors and institutions in American government. However, existing models of the policy process either do not account for these systematic patterns of issue attention, or they do not formally incorporate the courts into their understandings of issue attention dynamics. Beyond this important finding, though, I also show that attention in the judiciary does, at times and under certain contextual conditions, encourage other institutions to address an issue area which those institutions may have been avoiding. Despite the existence of so many constraints on the judiciary, it is still able to operate at times as an important agenda setter in American politics.

Implications

These findings have a number of significant implications for scholars interested in the courts, public policy, and interest groups, as well as for public policy professionals. For scholars studying the courts, this research suggests scholars must take seriously the dual roles of the courts, as the judiciary both interprets law constructed elsewhere but also serves as an important agenda-setter when other institutions are unable or unwilling to address an issue. For scholars studying issue attention and public policy, my findings indicates the necessity of explicitly incorporating the courts into both theories and analyses. Scholars who fail to do so overlook

an important component in the dynamics of issue attention. Finally, for scholars studying organized interests, the research suggests, contrary to prior research (e.g., Rosenberg, 1991), that the courts do serve an important agenda-setting role, at least in some issue areas, when other institutions prove unreceptive.

First, consider the implications of this research for the study of the judiciary. Recall that the passive and proactive perspectives are part of two broader research strains encompassing a significant fraction of all research on the courts. Into the latter stages of the twentieth century, the passive perspective was in large part adopted by the legal academy, and so too by researchers studying the policy process (Barclay and Birkland, 1998). On the other hand, the proactive perspective arose in studies by social scientists and ascribed a policymaking role to the courts, or at least the Supreme Court (Dahl, 1957). Each perspective presents a starkly different picture of the role of the judiciary; one, the passive role, features a largely subjugated judiciary involved solely in interpretation, while the other perspective portends an active policymaking branch which can serve as a valuable tool for policy change.

My research in this dissertation, and the findings reported above, melds these two seemingly divergent perspectives together. The judiciary fulfills both the interpretive, legalistic functions which prior research stemming from the passive perspective suggests, but also exercises considerable influence in drawing attention to issues, as the proactive perspective suggests. The support for both passive and proactive perspectives is consistent with other research suggesting (for example) the importance of both legal and extra-legal factors in the judicial context (Black and Owens, 2009). For scholars studying the courts, this research suggests that care must be taken to consider both the role of courts as interpretive institutions as well as their position as active participants in policymaking.

This brings us to the second important implication, which is for scholars studying

issue attention dynamics and the policy process. Throughout this dissertation, I have consistently pointed to the dearth of existing research on the role of courts in the policy process as a severe drawback of existing theories of the policy process. The absence of courts would have been justified in part if the research here provided no evidence of consistent patterns of issue attention emanating *from* the courts. However, the analyses in Chapter 5 suggest that the courts, or at least actors within the courts, do indeed play an active and important role in at least some policy areas in the period under study. Thus, existing research on issue attention dynamics is, at best, incomplete, with an important omitted variable – judicial attention – left out of most analyses and theorizing. In civil rights and civil liberties, in particular, as well as some other issue areas, issue attention in the courts portends additional attention from Congress and the presidency, just as the architects of interest group strategies in the courts hypothesized it may.

A final, related implication is for scholars studying organized interests and their strategies. This research offers some refutation of the general doubts expressed by Rosenberg (1991) as to the utility of the courts, through indirect effects like encouraging attention to issues, for creating social change. Instead, the research in this dissertation indicates that, perhaps not across all issue areas but at least across a few, the courts serve as an important catalyst to encourage subsequent attention. Thus, the calls of some scholars for groups to use the courts towards exactly these ends (Strolovitch, 2007) appear to be justified

Beyond the cross-institutional implications for interest group research, this study also has implications for the litigant signal model of judicial agenda-setting. The discrepant results of Baird (2004, 2007); Baird and Jacobi (2009*a*) and Peters (2007) may in fact be related to the presence of two attention patterns propagating after Supreme Court attention to an issue area. While litigation decreases in lower courts

after Supreme Court attention, the attention of interest groups actually increases. The litigant signal model, therefore, operates at one level, but it is extremely important to note that it is a complex relationship. While interest groups may mobilize, consistent with the model, the Court also settles area of law, consistent with Peters finding of less attention to those issues in venues like law reviews. The presence of both dynamics suggests the subsequent influence on the agenda of the Supreme Court, as hypothesized in the litigant signal model, may be mitigated by an overall decrease in attention to that issue area in the courts.

Limitations and Caveats

In all, this research touches on numerous actors and institutions in the study of American politics, and as such carries implications across a multitude of areas of study in political science. Yet while the research presented here offers a number of important implications, there are also important limitations to what we can conclude from the analyses offered in this dissertation.

First, it is important to remember that the observed relationships are only general patterns. As such, any circumstances or events may conspire to lead an issue into an entirely different pattern as could be predicted from the patterns observed here. These analyses did not establish hard, or even soft, rules for the movement of issue attention between, and in the case of courts within, institutions. Rather, the analyses established only that the courts have, within the period of study, played an important and too-often ignored role in the macrodynamics of issue attention in the American context.

Second, the analyses here utilized here for the attention of interest groups in the federal courts captures only one, albeit a very important one, component of

interest group activity in the federal courts. In addition to the filing or joining of amicus curiae briefs, interest groups could also pursue a strategy which involves sponsorship of test cases or simply assuming the costs representation for particular litigation. Moreover, multiple interest groups could be active as amicus curiae in any one case, or even on any one brief. Finally, the measure employed here is calculated only for published opinions, rather than all litigation. I have assumed that only a miniscule number of cases in the lower federal courts would feature an amicus brief but not a published opinion, but this is not necessarily the case.

In not one of these cases does the measure capture the same dynamics as would be captured by some alternatives. Rather, the measure I have employed captures broad changes in interest group involvement across the entirety of cases on which they could possibly be involved. It is important for future research and subsequent work on interest group involvement in the courts to refine and improve upon these measures, capturing different patterns of interest group involvement and potentially entirely different dynamics.

Third, due to a dearth of available data, and the financial and time costs in acquiring yet more extensive data on the Supreme Court's agenda, the time period under analysis is relatively short, particularly for overall litigation. With the success of the NAACP Legal Defense Fund's desegregation strategy and the *Brown v. Board of Education* decision, subsequent generations of litigants, judges, and particularly interest groups in the federal courts may have perceived an opportunity to shape public policy. The patterns observed for particular policy areas may therefore be conditional on the particular period under study, with earlier generations of the courts less likely to encourage additional issue attention in other institutions.

Finally, the research I have presented in this dissertation considers only general patterns of issue attention across a subset of the history of these institutions. I em-

phasized broad patterns of issue attention for a number of reasons, including to be consistent with prior cross-institutional (Flemming, Bohte and Wood, 1997; Flemming, Wood and Bohte, 1999) and judicial hierarchy (Baird, 2004, 2007) research as well as to maximize the effectiveness and accuracy of the supervised learning algorithms, which perform better when there are fewer classifications to be identified. However, this choice meant that multiple, specific policies nested under the broad issue areas which I actually analyzed. Therefore, the results of the analyses are liable to subsequent refinement at the more specific policy level. Particularly given the nuance uncovered throughout my research in this dissertation, I expect a multitude of refinements to be necessary for the more general findings I have reported.

Future Research

Despite these limitations, my research in this dissertation has provided the broadest examination to date of within-hierarchy and cross-institutional issue attention influences in American government. However, this research only scratches the surface of these dynamics, with two clear opportunities for future research. First, research could begin to directly model issues across institutions, rather than fitting the courts in the Policy Agendas, or some other, topic rubric. Second, and perhaps more importantly, the research in this dissertation leaves open the question as to the conditions under which issue attention in the courts leads to additional attention elsewhere, with my findings solely asserting that the courts do systematically lead attention in some issue areas.

In the first case, I utilized in this research the most widely used database for cross-institutional issue attention studies, the Policy Agendas database. In part, this decision was made in order to gain comparable measures across the multitude

of institutions under study. Yet given the growth, improvement, and refinement of unsupervised methods of topic classification (Blei, Ng and Jordan, 2003; Blei, 2011, e.g.), there is an opportunity now to directly model similarities in the textual content of judicial opinions, executive statements, and congressional legislation. Such an approach would certainly carry intense computational demands, though these demands are likely to be met. The benefit of such an approach would be an estimate of institutional attention, consistent across time and institution, derived solely from the institution's expressed agenda. Whereas the Policy Agendas framework is optimized for the study of Congress and the President, and therefore assigns a large proportion of cases to the law, crime & family issue area, an unsupervised approach would optimize the division of topics based solely on the words used in the texts, and the number of topics specified. In all, a joint topic model of these texts could provide the best possible measure for movement in public policies and issue attention across and within institutions.

In the second case, this research has left unanswered the conditions under which the courts lead attention to a particular issue area. In Rosenberg's classic *The Hollow Hope*, he outlines a number of conditions which must be met in order for the Supreme Court to encourage broad social change. Contrary to Rosenberg's approach, I have first found evidence documenting that the courts do, in fact, systematically lead attention to at least some issues. What must now be determined, however, is what characteristics of these issua areas, or what institutional conditions, enable the courts to systematically lead attention to those areas. For instance, the analyses in Chapter 5 uncovered evidence suggesting that judicial prioritization of education, or an increase in the number of published opinions on the topic of education, correlates with subsequent increases in congressional and presidential attention to issues in that area. This pattern could be observable because judges in the fed-

eral courts are setting off alarms about problems in existing legislation,. It may alternatively arise because judges are altering or modifying existing educational policy, forcing congressional response or codification (Staudt, Lindstadt and O'Connor, 2007; Hettinger and Zorn, 2005; Eskridge, 1991*a*,*b*). Future research can begin to refine the analyses in this dissertation by determining the exact processes underlying dynamics like that of education.

Agenda Dynamics in the Federal Courts

In *Federalist 78*, Alexander Hamilton introduces us to the propose judicial branch of the new United States, and assures the people that these proposed courts are in every way inferior to their legislative counterparts, with their decisions "bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." Yet despite Hamilton's belief in the purely interpretive role of judges, stories of policy change like that of the civil rights movement suggest a different story, one in which the courts are active and important participants in the construction of public policy. I have argued in this research that courts are active participants, but that our view of how their activity relates to these other institutions is incomplete. In this dissertation, I have found that their activity, as it relates to the attention of other institutions, is exceedingly nuanced. Increases in the attention and activity of actors within certain issue areas in the federal courts begets additional attention to this issue areas, while activity in other issue areas seems to follow the attention of other institutions.

In the present day, with the rapidly expanding dockets of the federal courts and increasing gridlock in Congress, the time may be ripe for actors in the courts to use this venue to exercise even greater influence on public policy. The courts, with an

agenda that touches on all aspects of American life, may offer a venue with which to achieve policy outcomes, or at least to increase attention to particular issues, which are increasingly unlikely to be heard or decided upon in a modern Congress widely described as dysfunctional. It is perhaps during these periods when the courts can best be used to encourage other institutions into action, as so many proponents of the proactive courts perspective suggest.

Yet it may also be the case that, for some issue areas, no change can arise from the attention of the courts, no matter the efforts of litigants, judges, or interest groups in alerting the government to their issue. Moreover, the signals arising from the attention of these actors, the alarm bells which they are attempting to trigger, may not be received by other branches so racked by polarization. The constraints on courts, as pointed out by proponents of the passive courts perspective, may prevent them from stoking the attention of other branches, when those other branches are so hampered themselves.

My research suggests the answer lies somewhere in between. The federal courts are supremely important institutions, with a systematic influence in determining the extent to which Congress and the president discuss and consider some of the hallmark issues – civil rights and civil liberties, for example – in American politics. Litigants, judges, and interest groups, through their activity in the federal courts, play an important role not only in shaping public policy in the United States, but in shaping the policy areas which the government addresses. Yet they also respond to the signals of other institutions for particular issue areas in need of attention. In all, the dialogue over public policy in America occurs not just in the legislative and executive branches, but also in courtrooms across the country, with that judicial attention mattering for the future course of public policy.

Appendix

Administrative Office Data

To compile the individual mobilization measure, I utilized the nature of suit code provided for civil cases and the offense code for criminals cases. For criminal cases, I used the *termination* offense (`toffcd1`) rather than the *filing* offense (`foffcd1`). I used the termination code because the focus of the work is on the issue addressed in the output of the courts.That being said, the correlation between the variables in compiled criminal dataset is 0.946. This gives me confidence that the choice should not impact the results reported.

To calculate the date of a case, I use the date on which the case is reported as terminated. After assigning issue codes, I combine all cases terminated within a calendar year within a court for the assigned issue area. The variable is thus a count of case terminations within a policy area, within a court (district or appellate), within a year.

One important caveat is how I deal with cases which are terminated, then re-opened, and terminated again. In these instances, the case will be counted twice in a single year. While it could be argued that this leads to double-counting of particular cases within an issue area, I assume the process that precedes the actual termination is demanding enough that the additional expenditure of resources warrants counting the case twice.

In totality, for the district courts there are 7,561,942 civil cases assigned issue codes and 2,179,244 criminal cases assigned issue codes. For the courts of appeals, there are 1,294,823 cases assigned issue codes.

Bibliography

Bachrach, Peter and Morton Baratz. 1962. "The Two Faces of Power." *American Political Science Review* 56(4):947–952.

Baird, Vanessa. 2004. "The Effect of Politically Salient Decisions on the U.S. Supreme Court's Agenda." *The Journal of Politics* 66(3):755–772.

Baird, Vanessa. 2007. *Answering the Call of the Court: How Justices and Litigants Set the Supreme Court Agenda*. Charlottesville: University of Virginia Press.

Baird, Vanessa and Tonja Jacobi. 2009*a*. "How the Dissent Becomes the Majority: Using Federalism to Transform Coalitions in the U.S. Supreme Court." *Duke Law Journal* 59:183–238.

Baird, Vanessa and Tonja Jacobi. 2009*b*. "Judicial Agenda-Setting through Signaling and Strategic Litigant Responses." *Washington University Journal of Law and Policy* 29:215–239.

Barclay, Scott and Thomas Birkland. 1998. "Law, Policymaking and the Policy Process." *Policy Studies Journal* 26:227–243.

Baum, Lawrence. 1977. "Policy Goals in Judicial Gatekeeping: A Proximity Model of Discretionary Jurisdiction." *American Journal of Political Science* 21(1):13–35.

Baum, Lawrence. 1997. *The Puzzle of Judicial Behavior*. Ann Arbor, MI: University of Michigan Press.

Baumgartner, Frank. 1989. *Conflict and Rhetoric in French Policymaking*. University of Pittsburgh Press.

Baumgartner, Frank. 2001. Political Agendas. In *International Encyclopedia of Sical and Behavioral Sciences: Political Science*, ed. Niel Smelser and Paul Baltes. New York: Elsevier Science pp. 288–290.

Baumgartner, Frank and Bryan Jones. 1991. "Agenda Dynamics and Policy Subsystems." *Journal of Politics* 53(4):1044–1074.

Baumgartner, Frank and Bryan Jones. 1993. *Agendas and Instability in American Politics*. Chicago: University of Chicago.

Baumgartner, Frank and Jamie Gold. 2002. The Changing Agendas of Congress and the Supreme Court. In *Policy Dynamics*, ed. Frank Baumgartner and Bryan Jones. Chicago: University of Chicago Press.

Benesh, Sara and Malia Reddick. 2002. "Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent." *Journal of Politics* 64(2):534–550.

Bentley, Arthur. 1908. *The Process of Government: A Study of Social Pressures*. Chicago: University of Chicago Press.

Black, Ryan and Ryan Owens. 2009. "Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence." *The Journal of Politics* 71:1062–1075.

Black, Ryan and Ryan Owens. N.d. "Elevation Adaptation: How Circuit Judges Alter Their Behavior for Promotion to the Supreme Court.".

Blei, David. 2011. "Introduction to Probabilistic Topic Models." *Communications of the ACM* .
URL: *http://www.cs.princeton.edu/ blei/papers/Blei2011.pdf*

Blei, David, Andrew Ng and Michael Jordan. 2003. "Latent Dirichlet Allocation." *Journal of Machine Learning Research* 3:993–1022.

Blei, David and John Lafferty. 2009. Topic Models. In *Text Mining: Classification, Clustering, and Applications*, ed. A Srivastava and M Sahami. Chapman and Hall/ CRC Press.

Blei, David M. and Jon D. McAuliffe. 2007. Supervised Topic Models. In *Neural Information Processing Systems*.

Brandt, Patrick and John Freeman. 2009. "Modeling Macro-Political Dynamics." *Political Analysis* 17(2):113–142.

Brenner, Saul and John Krol. 1989. "Strategies in Certiorari Voting on the U.S. Supreme Court." *The Journal of Politics* 51(4):828–840.

Caldeira, Gregory and James Gibson. 1992. "Etiology of Public Support for the United States Supreme Court." *American Journal of Political Science* 36(3):635–664.

Caldeira, Gregory and John Wright. 1988. "Interest Groups and Agenda-Setting in the Supreme Court of the United States." *American Political Science Review* 82:1109–1127.

Caldeira, Gregory and John Wright. 1990. "Amici Curiae Before the Supreme Court: Who Participates, When, and How Much?" *Journal of Politics* 52(3):782–806.

Cameron, Charles, Jeffrey Segal and Donald Songer. 2000. "Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions." *The American Political Science Review* 94:101–116.

Caminker, Evan. 1994. "Why Must Inferior Courts Obey Superior Court Precedents?" *Stanford Law Review* 46(4):817–873.

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

Caruana, Rich and Alexandru Niculescu-Mizil. 2006. An Empirical Comparison of Supervised Learning Algorithms. In *Proceedings of the 23rd International Conference on Machine Learning*.

Casper, Gerhard and Richard Posner. 1974. "A Study of the Supreme Court's Caseload." *The Journal of Legal Studies* 3:339–375.

Chase, Harold. 1972. *Federal Judges: The Appointing Process*. Minneapolis: University of Minnesota Press.

Clark, Tom. 2009. "The Separation of Powers, Court Curbing, and Judicial Legitimacy." *American Journal of Political Science* 53(4):971–989.

Clark, Tom and John Kastellec. 2012*a*. "The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model." Working Paper.
URL: *http://userwww.service.emory.edu/ tclark7/circuitconflict.pdf*

Clark, Tom and John Kastellec. 2012*b*. "The Supreme Court and Percolation in the Lower Courts: An Optimal Stopping Model." *Journal of Politics* 75(1):(forthcoming).
URL: *http://userwww.service.emory.edu/ tclark7/circuitconflict.pdf*

Cobb, Roger and Charles Elder. 1983. *Participation in American Politics: The Dynamics of Agenda-Building*. Johns Hopkins University Press.

Cohen, Jeffrey. 1995. "Presidential Rhetoric and Agenda Setting." *American Journal of Political Science* 39:87–107.

Collins, Paul. 2004. "Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation." *Law and Society Review* 38(4):807–32.

Collins, Paul. 2007. "Lobbyists Before the U.S. Supreme Court: Investigating the Influence of Amicus Curiae Briefs." *Political Research Quarterly* 60(1):55–70.

Collins, Paul. 2008. *Friends of the Supreme Court: Interest Groups and Judicial Decision Making*. Oxford University Press.

Collins, Paul and Wendy Martinek. 2011. Judges and Friends: The Influence of Amici Curiae on U.S. Court of Appeals Judges. In *Paper prepared for delivery at the Midwest Political Science Association meeting, March 31-April3*.

Corley, Pamela. 2008. "The Supreme Court and Opinion Content: The Influence of Parties' Briefs." *Political Research Quarterly* 61(3):468–478.

Cummins, Jeff. 2008. "State of the Union Addresses and Presidential Posititon Taking: Do Presidents Back their Rhetoric in the Legislative Arena?" *The Social Science Journal* 45:365–381.

Dahl, Robert. 1957. "Decision-making in a Democracy: The Supreme Court as a National Policy-Maker." *Journal of Public Law* 6:279–295.

Davis, Sue and Donald Songer. 1989. "The Changing Role of the United States Courts of Appeals: The Flow of Litigation Revisited." *Justice System Journal* 13:323–340.

de Tocqueville, Alexis. 1840. *Democracy in America*. New York: New American Library.

den Dulk, Kevin and Mitchell Pickerill. 2003. "Bridging the Lawmaking Process: Organized Interests, Court-Congress Interaction, and Church-State Relations." *Polity* 35(3):419–440.

Downs, Anthony. 1972. "Up and Down with Ecology: The "Issue-Attention cycle"." *Public Interest* 28:38–50.

Edwards, George, Andrew Barrett and Jeffrey Peake. 1997. "The Legislative Impact of Divided Government." *American Journal of Political Science* 41:545–563.

Edwards, George and B. Dan Wood. 1999. "Who Influences Whom? The President, Congress, and the Media." *American Political Science Review* 93:327–344.

Eisenberg, Theodore and Margo Schlanger. 2003. "The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis." *Notre Dame Law Review* 78(5):1456–1496.

Epp, Charles. 1990. "Connecting Litigation Levels and Legal Mobilization: Explaining Interstate Variation in Employment Civil Rights Litigation." *Law and Society Review* 24:145–164.

Epp, Charles. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago.

Epstein, Lee. 1994. "Exploring the Participation of Organized Interests in State Court Litigation." *Political Research Quarterly* 47(2):335–351.

Epstein, Lee and CK Rowland. 1991. "Debunking the Myth of Interest Group Invincibility in the Courts." *American Political Science Review* 85(1):205–217.

Epstein, Lee and Jack Knight. 1998. *The Choices Justices Make*. Washington, DC: Congressional Quarterly.

Epstein, Lee and Jack Knight. 1999. Mapping Out the Strategic Terrain: The Informational Role of Amici Curiae. In *Supreme Court Decision Making: New Institutionalist Approaches*, ed. Cornell Clayton and Howard Gillman. Chicago University Press.

Epstein, Lee and Jeffrey Segal. 2000. "Measuring Issue Salience." *American Journal of Political Science* 44(1):66–83.

Epstein, Lee, Jeffrey Segal and Jennifer Victor. 2002. "Dynamic Agenda-Setting on the United States Supreme Court." *Harvard Journal on Legislation* 39:395–433.

Epstein, Lee, Jeffrey Segal and Timothy Johnson. 1996. "The Claim of Issue Creation on the U.S. Supreme Court." *The American Political Science Review* 90(4):845–852.

Epstein, Lee and Joseph Kobylka. 1992. *The Supreme Court and Legal Change*. University of North Carolina Press.

Eshbaugh-Soha, Matthew and Jeffrey Peake. 2006. "Presidents and the Economic Agenda." *Political Research Quarterly* 58(1):127–138.

Eskridge, William. 1991*a*. "Overriding Supreme Court Statutory Interpretation Decisions." *Yale Law Journal* 101:331–391.

Eskridge, William. 1991*b*. "Reneging on History? Playing the Court/Congress/President Civil Rights Game." *California Law Review* 79:613–683.

Evans, Michael, Wayne McIntosh, Jimmy Lin and Cynthia Cates. 2007. "Recounting the Courts? Applying Automated Content Analysis to Enhance Empirical Legal Research." *Journal of Empirical Legal Studies* 4:1007–1039.

Fishel, Jeff. 1985. *Presidents and Promises.* Washington, DC: CQ Press.

Flemming, Roy and B. Dan Wood. 1997. "The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods." *American Journal of Political Science* 41(2):468–498.

Flemming, Roy, B. Dan Wood and John Bohte. 1999. "Attention to Issues in a System of Separated Powers: The Macro-Dynamics of American Policy Agendas." *Journal of Politics* 61(1):76–108.

Flemming, Roy, John Bohte and B. Dan Wood. 1997. "One Voice Among Many: The Supreme Court's Influence on Attentiveness to Issues in the United States." *American Journal of Political Science* 41(4):1224–1250.

Fowler, James and Sangick Jeon. 2008. "The Authority of Supreme Court Precedent." *Social Networks* 30(1):16–30.

Fowler, James, Timothy Johnson, James Spriggs, Sangick Jeon and Paul Wahlbeck. 2007. "Network Analysis and the Law: Measuring the Legal Importance of Supreme Court Precedents." *Political Analysis* 15(3):324–346.

Franklin, Charles and Liane Kosaki. 1989. "Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion." *American Political Science Review* 83(3):751–771.

Freeman, John, John Williams and Tse min Lin. 1989. "Vector Autoregression and the Study of Politics." *American Journal of Political Science* 33(4):842–877.

Friedman, Lawrence. 1967. "Legal Rules and the Process of Social Change." *Stanford Law Review* 19:786–840.

Galanter, Marc. 1974. "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change." *Law and Society Review* 9:95–160.

Galanter, Marc and Charles Epp. 1992. "A Beginner's Guide to the Litigation Maze." *Business Economics* 27(4):33–38.

Gelman, Andrew and Jennifer Hill. 2007. *Data Analysis Using Regression and Multilevel/Hierarchical Models.* New York: Cambridge University.

Gilberg, Sheldon, Chaim Eyal, Maxwell McCombs and David Nicholas. 1980. "The State of the Union Addressa nd the Press Agenda." *Journalism Quarterly* 57:584–588.

Goldman, Sheldon. 1975. "Voting Behavior ont he United States Courts of Appeals Revisisted." *American Political Science Review* 69:491.

Gottschall, Jon. 1983. "Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals." *Judicature* 67:165.

Green-Pedersen, Christoffer and John Wilkerson. 2006. "How Agenda-setting Attributes Shape Politics: Basic Dilemmas, Problem Attention, and Health Politics Developments in Denmark and the US." *Journal of European Public Policy* 13(7):1039–1052.

Greene, William H. 2003. *Econometric Analysis*. Prentice Hall.

Grimmer, Justin. 2010. "A Bayesian Hierarchical Topic Model for Political Texts: Measuring Expressed Agendas in Senate Press Releases." *Political Analysis* 18:1–35.

Grossman, Joel and Austin Sarat. 1975. "Litigation in the Federal Courts: A Comparative Perspective." *Law and Society Review* 9(2):321–346.

Halpern, Charles. 1976. The Right to Habilitation: Litigation as a Strategy for Social Change. In *The Right to Treatment for Mental Patients*, ed. Stuart Golann and William Fremouw. New York: Irvington pp. 73–98.

Hansford, Thomas. 2004*a*. "Information Provision, Organizational Constraints, and the Decision to Submit an Amicus Curiae Brief in a U.S. Supreme Court Case." *Political Research Quarterly* 57(2):219–230.

Hansford, Thomas. 2004*b*. "Lobbying Strategies, Venue Selection, and Organized Interest Involvement at the U.S. Supreme Court." *American Politics Research* 32:170–197.

Hansford, Thomas. 2011. "The Dynamics of Interest Representation at the U.S. Supreme Court." *Political Research Quarterly* 64(4):749–764.

Hansford, Thomas and David Damore. 2000. "Congressional Preferences, Perceptions of Threat and Supreme Court Decision Making." *American Politics Quarterly* 28(4):490–510.

Harvey, Anna and Barry Friedman. 2006. "Pulling Punches: Congressional Constraint on the Supreme Court's Constitutional Rulings, 1987-2000." *Legislative Studies Quarterly* 31(4):533–562.

Harvey, Anna and Michael Woodruff. 2011. "Confirmation Bias in the United States Supreme Court Judicial Database." *The Journal of Law, Economics, and Organization* .

Hastie, Trevor, Robert Tibshirani and Jerome Friedman. 2008. *The Elements of Statistical Learning*. Second ed. Springer-Verlag.

Hausegger, Lori and Lawrence Baum. 1999. "Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation." *American Journal of Political Science* 43(1):162–185.

Hettinger, Virginia and Christopher Zorn. 2005. "Explaining the Incidence and Timing of Congressional Responses to the U.S. Supreme Court." *Legislative Studies Quarterly* 30(1):5–28.

Hilgartner, Stephen and Charles Bosk. 1988. "The Rise and Fall of Social Problems: A Public Arenas Model." *American Journal of Sociology* 94:53–78.

Hoekstra, Valerie. 2000. "The Supreme Court and Local Public Opinion." *The American Political Science Review* 94(1):89–100.

Hopkins, Daniel and Gary King. 2010. "A Method Of Automated Non-Parametic Content Analysis For Social Science." *The American Journal of Political Science* 54(1):229–247.

Hurwitz, Mark. 2006. "Institutional Arrangements and the Dynamics of Agenda Formation in the U.S. Supreme Court and Courts of Appeals." *Law & Policy* 28(3):321–344.

Ignani, Joseph and James Meernik. 1994. "Explaining Congressional Attempts to Reverse Supreme Court Decisions." *Political Research Quarterly* 47(2):353–371.

Johnson, Charles. 1979. "Lower Court Reactions to Supreme Court Decisisons: A Quantitative Examination." *American Journal of Political Science* 23(4):792–804.

Johnson, Charles and Bradley Canon. 1984. *Judicial Policies: Implementation and Impact*. CQ Press.

Jones, Bryan. 1994. *Reconceiving Decision-Making in Democratic Politics: Attention, Choice, and Public Policy*. Chicago: University of Chicago Press.

Jones, Bryan, Heather Larsen-Price and John Wilkerson. 2009. "Representation and American Governing Institutions." *The Journal of Politics* 71:277–290.

Kaheny, Erin. 1999. "Agenda Change in the U.S. Courts of Appeals, 1925-1988." *Justice System Journal* 20:275–298.

Kastellec, Jonathan. 2007. "Panel Composition and Judicial Compliance on the US Courts of Appeals." *The Journal of Law, Economics, and Organization* 23:421–441.

Kingdon, John. 2003. *Agendas, Alternatives, and Public Policies*. Second ed. New York: Longman.

Kluger, Richard. 1975. *Simple Justice*. Random House.

Knight, Jack. 1992. *Institutions and Social Conflict*. Cambridge University Press.

Kobylka, Joseph. 1987. "A Court Created Context for Group Litigation: Libertarian Groups and Obscenity." *Journal of Politics* 49(4):1061–1078.

Kraft, Michael and Scott Furlong. 2007. *Public Policy: Politics, Analysis, and Alternatives*. Second ed. CQ.

Lauderdale, Benjamin and Tom Clark. 2012. "The Supreme Court's Many Median Justices." *American Political Science Review* 106(4):847–866.

Lee, Emery and Thomas Willging. 2009. National, Case-Based Civil Rules Survery: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules. Technical report Federal Judicial Center.

Light, Paul. 1991. *The President's Agenda: Domestic Policy Choice from Kennedy to Reagan*. Baltimore: The Johns Hopkins University Press.

Maltese, John. 1992. *Spin Control: The White House Office of Communications and the Management of Presidential News*. Chapel Hill: University of North Carolina Press.

Martin, Andrew. 2001. "Congressional Decision Making and the Separation of Powers." *American Political Science Review* 95(2):361–378.

Martinek, Wendy. 2006. "Amici Curiae in the U.S. Courts of Appeals." *American Politics Research* 34:803–826.

Mather, Lynn. 1995. The Fired Football Coach (Or, How Trial Courts Make Policy). In *Contemplating Courts*, ed. Lee Epstein. Washington, DC: CQ Press.

McCann, Michael. 1992. "Reform Litigation on Trial." *Law and Social Inquiry* 17:715–743.

McCann, Michael. 1994. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: University of Chicago Press.

McGuire, Kevin and Gregory Caldeira. 1993. "Lawyers, Organized Interests, and the Law of Obscenity: Agenda-Setting in the Supreme Court." *American Political Science Review* 87:717–726.

McGuire, Kevin and James Stimson. 2004. "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences." *The Journal of Politics* 66(4):1018–1035.

Meier, Kenneth. 1994. *The Politics of Sin: Drugs, Alcohol, and Public Policy.* M.E. Sharpe.

Meinhold, Stephen and Steven Shull. 1998. "Policy Congruence Between the President and Solicitor General." *Political Research Quarterly* 51:527–537.

Merryman, John. 1954. "The Authority of Authority: What the California Supreme Court Cited in 1950." *Stanford Law Review* 6:613–673.

Mishler, William and Reginald Sheehan. 1993. "The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions." *American Political Science Review* 87:87–101.

Mondak, Jeffery and Shannon Smithey. 1997. "The Dynamics of Public Support for the Supreme Court." *Journal of Politics* 59(4):1114–1142.

Monti, Daniel. 1980. "Administrative Foxes in Educational Chicken Coops: An Examination of the Critique of Judicial Activism in School Desegregation Cases." *Law & Policy* 2:233–256.

Morriss, Andrew, Michael Heise and Gregory Sisk. 2005. "Signaling and Precedent in Federal District Court Opinions." *Supreme Court Economic Review* 13:63–98.

Mouw, Calvin and Michael Mackuen. 1992. "The Strategic Agenda in Legislative Politics." *American Political Science Review* 86:87–105.

Murphy, Walter. 1959. "Lower Court Checks on Supreme Court Power." *American Political Science Review* 53(4):1017–1031.

Murphy, Walter, C. Herman Pritchett, Lee Epstein and Jack Knight. 2006. *Courts, Judges, & Politics: An Introduction to the Judicial Process.* Sixth ed. New York, New York: McGraw-Hill.

Nakamura. 1987. "The Textbook Policy Process and Implementation Research." *Policy Studies Review* 7(1):142–154.

Neier, Aryeh. 1982. *Only Judgment: The Limits of Litigation in Social Change.* Wesleyan University Press.

Newman, Jon. 1993. "1,000 Judges - The Limit for an Effective Federal Judiciary." *Judicature* 76:187–188.

Note. 1977. "Implementation Problems in Institutional Reform Litigation." *Harvard Law Review* 91(2):428–463.

O'Scannlain, Diarmuid. 2009. "Striking a Devil's Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century." *Lewis & Clark Law Review* 13:473–483.

Owens, Ryan and Justin Wedeking. 2012. "Predicting Drift on Politically Insulated Institutions: A Study of Ideological Drift on the United States Supreme Court." *Journal of Politics* 74(2):487–500.

Pacelle, Richard. 1991. *The Transformation of the Supreme Court's Agenda: From the New Deal to the Reagan Administration*. Boulder: Westview.

Pacelle, Richard. 1995. The Dynamics and Determinants of Agenda Change in the Rehnquist Court. In *Contemplating Courts*, ed. Lee Epstein. Washington, D.C.: Congressional Quarterly.

Pacelle, Richard. 2003. *Between Law and Politics: The Solicitor General and the Structuring of Race, Gender, and Reproductive Rights Litigation*. College Station, TX: Texas A & M University Press.

Peltason, Jack. 1961. *Fifty-Eight Lonely Men: Southern Federal Judges and School Desegregation*. University of Illinois Press.

Perry, H.W. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge: Harvard University.

Peters, B. Guy and Brian Hogwood. 1985. "In Search of the Issue Attention Cycle." *Journal of Politics* 47:239–253.

Peters, C. Scott. 2007. "Getting Attention: The Effect of Legal Mobilization on the U.S. Supreme Court's Attention to Issues." *Political Research Quarterly* 60:561–572.

Pettigrew, Shaun and David Stras. 2010. "The Rising Caseload in the Fourth Circuit: A Statistical and Institutional Analysis." *South Carolina Law Review* 61:421–445.

Pfaff, Bernard. 2008. "VAR, SVAR, and SVEC Models: Implementation Within R Package vars." *Journal of Statistical Software* 27(4).
URL: *http://www.jstatsoft.org/v27/i04/*

Phillips, Scott and Ryken Grattet. 2000. "Judicial Rhetoric, Meaning-Making and the Institutionalization of Hate Crime Law." *Law & Society Review* 34:567–606.

Porter, Martin. 1980. "An Algorithm for Suffix Stripping." *Program* 14(3):130–137.

Posner, Richard. 1986. *The Federal Courts: Crisis and Reform*. Cambridge, MA: Harvard University Press.

Posner, Richard. 1996. *The Federal Courts: Challenge and Reform*. Cambridge, MA: Harvard University Press.

Priest, George and Benjamin Klein. 1984. "The Selection of Disputes for Litigation." *Journal of Legal Studies* 13:1–55.

Pritchett, Herman. 1948. *The Roosevelt Court.* New York: Macmillan.

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

Quinn, Kevin, Burt Monroe, Michael Crespin, Michael Colaresi and Dragomir Radev. 2010. "How to Analyze Political Attention With Minimal Assumptions and Costs." *American Journal of Political Science* 54:209–228.

Ramage, Daniel, David Hall, Ramesh Nallapati and Christopher D. Manning. 2009. Labeled LDA: A Supervised Topic Model for Credit Attribution in Multi-Labeled Corpora. In *Empirical Methods on Natural Language Processing.*

Redford, Emmette. 1969. *Democracy in the Administrative State.* Oxford University Press.

Rice, Douglas. 2012. Measuring the Issue Content of Supreme Court Opinions Through Probabilistic Topic Models. Presented at the Society for Political Methodology's 2012 Summer Methods Meeting.

Riddell, Troy. 2004. "The Impact of Legal Mobilization and Judicial Decisions: The Case of Official Minority-Language Education Policy in Canada for Francophones Outside Quebec." *Law & Society Review* 38(3):583–610.

Rosenberg, Gerald. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press.

Rowland, C.K., Donald Songer and Robert Carp. 1988. "Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges." *Law & Society Review* 22(1):191–200.

Rowland, C.K., Robert Carp and Ronald Stidham. 1984. "Judges' Policy Choices and the Value Basis of Judicial Appointments: A Comparison of Support for Criminal Defendants Among Nixon, JOhnson, and Kennedy Appointees to the Federal District Courts." *Journal of Politics* 46:886.

Sabatier, Paul. 1993. *Policy Change and Learning: An Advocacy Coalition Approach.* Boulder, CO: Westview Press.

Sabatier, Paul. 2007. *Theories of the Policy Process.* Boulder, CO: Westview Press.

Sabatier, Paul and Hank Jenkins-Smith. 1988. "An Advocacy Coalition Model of Policy Change and the Role of Policy Oriented Learning." *Policy Sciences* 21:129–168.

Salokar, Rebecca. 1992. *The Solicitor General: The Politics of Law*. Philadelphia, PA: Temple University.

Sax, Joseph. 1971. *Defending the Environment: A Strategy for Citizen Action*. New York: Knopf.

Schattschneider, E.E. 1960. *The Semi-Sovereign People*. Hinsdale, IL: Dryden Press.

Scheingold, Stuart. 1974. *The Politics of Rights: Lawyers, Public Policy, and Social Change*. Second ed. Ann Arbor, MI: The University of Michigan Press.

Scheppele, Kim and Jack Walker. 1991. The Litigation Strategies of Interest Groups. In *Mobilizing Interest Groups in America*, ed. Jack Walker. Ann Arbor: University of Michigan Press.

Schnapper, Eric. 1988. "Becket at the Bar - The Conflicting Obligations of the Solicitor General." *Loyola of Los Angeles Law Review* 21(4):1187–1272.

Segal, Jeffrey. 1997. "Separation-of-Powers Games in the Positive Theory of Congress and Courts." *American Political Science Review* 91(1):28–44.

Segal, Jeffrey and Harold Spaeth. 1993. *The Supreme Court and the Attitudinal Model*. Cambridge: Cambridge University.

Segal, Jeffrey and Harold Spaeth. 2002. *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University.

Shapiro, Carolyn. 2009. "Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court." *Hastings Law Journal* 60:477–540.

Shull, Steven and Thomas Shaw. 2004. "Determinants of Presidential Position Taking in Congress, 1959-1995." *The Social Science Journal* 41:587–604.

Solowiej, Lisa and Paul Collins. 2009. "Counteractive Lobbying the U.S. Supreme Court." *American Politics Research* 37(4):670–699.

Songer, Donald. 1987. "The Impact of the Supreme Court on Trends in Economic Policy Making in the United States Courts of Appeals." *Journal of Politics* 49(3):830–841.

Songer, Donald. 1990. "Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules versus Empirical Reality." *Judicature* 73:307–313.

Songer, Donald, Jeffrey Segal and Charles Cameron. 1994. "The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions." *American Journal of Political Science* 38(3):673–696.

Songer, Donald and Reginald Sheehan. 1993. "Interest Group Success in the Courts: Amicus Participation in the Supreme Court." *Political Research Quarterly* 46:339–354.

Spiller, Pablo and Emerson Tiller. 1996. "Invitations to Override: Congressional Reversals of Supreme Court Decisions." *International Review of Law and Economics* 16(4):503–521.

Spiller, Pablo and Rafael Gely. 1992. "Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor Relations Decisions, 1949-1988." *RAND Journal of Economics* 23(4):463–492.

Spriggs, James. 1997. "Explaining Federal Bureaucratic Compliance with Supreme Court Opinions." *Political Research Quarterly* 50(3):567–593.

Spriggs, James and Paul Wahlbeck. 1997. "Amicus Curiae and the Role of Information at the Supreme Court." *Political Research Quarterly* 50(2):365–386.

Staudt, Nancy, Rene Lindstadt and Jason O'Connor. 2007. "Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954-2005." *New York University Law Review* 82:1340–1402.

Stoutenborough, James, Donald Haider-Markel and Mahalay Allen. 2006. "Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases." *Political Research Quarterly* 59(3):419–433.

Strolovitch, Dara. 2007. *Affirmative Advocacy: Race, Class, and Gender in Interest Group Politics*. Chicago: University of Chicago Press.

Szmer, John and Barry Edwards. 2011. "Future Directions in Data Analysis and Collection." *Law and Courts Newsletter* 21:16–19.

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

Teger, Stuart and Douglas Kosinski. 1980. "The Cue Theory of Supreme Court Certiorari Jurisdiction: A Reconsideration." *Journal of Politics* 42(3):834–846.

Truman, David. 1951. *The Governmental Process: Political Interests and Public Opinion*. New York: Alfred A. Knopf.

Ulmer, S. Sidney. 1984. "The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable." *American Political Science Review* 78(4):901–911.

Ulmer, Sidney. 1972. "The Decision to Grant Certiorari as an Indicator to Decision 'On theMerits'." *Polity* 4:429–447.

Ura, Joseph. 2009. "The Supreme Court and Issue Attention: The Case of Homosexuality." *Political Communication* 26:430–446.

Vose, Clement. 1957. "National Consumers' League and the Brandeis Brief." *Midwest Journal of Political Science* 1:178–190.

Wahlbeck, Paul. 1998. "The Development of a Legal Rule: The Federal Common Law of Public Nuisance." *Law & Society Review* 32:613–638.

Wanta, Wayne, Mary Ann Stephenson, Judy VanSlyke Turk and Maxwell McCombs. 1989. "How President's State of Union Talk Influence News Media Agendas." *Journalism Quarterly* 66:537–541.

Whittington, Keith. 2009. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*. Princeton University Press.

Williams, Victor. 1993. "Solutions to Federal Judicial Gridlock." *Judicature* 76:185–186, 191–193.

Wohlfarth, Patrick. 2009. "The Tenth Justice? Consequences of Politicization in the Solicitor General's Office." *The Journal of Politics* 71:224–237.

Wood, B. Dan and Jeffrey Peake. 1998. "The Dynamics of Foreign Policy Agenda Setting." *American Political Science Review* 92:173–184.

Yates, Jeff and Andrew Whitford. 2009. "Race in the War on Drugs: The Social Consequences of Presidential Rhetoric." *Journal of Empirical Legal Studies* 6(4):874–898.

Yates, Jeff, Andrew Whitford and William Gillespie. 2005. "Agenda Setting, Issue Priorities, and Organizational Maintenance: The US Supreme Court, 1955 to 1994." *British Journal of Political Science* 35(2):369–381.

Zemans, Frances. 1983. "Legal Mobilization: The Neglected Role of the Law in the Political System." *American Political Science Review* 77(3):690–703.

Zorn, Christopher. 2002. "U.S. Government Litigations Strategies in the Federal Appellate Courts." *Political Research Quarterly* 55(1):145–166.

Zorn, Christopher and Jennifer Bowie. 2010. "Ideological Influence in the Federal Judicial Hierarchy: An Empirical Assessment." *The Journal of Politics* 72.

Vita

Douglas R. Rice

Education

Ph.D., Political Science. Penn State University, State College, Pennsylvania, 2013.
M.A., Political Science. Penn State University, State College, Pennsylvania, 2010.
M.A., Political Science. Villanova University, Villanova, Pennsylvania, 2008.
B.A, Political Science. Elizabethtown College, Elizabethtown, Pennsylvania, 2005.

Appointments

Pre-doctoral Fellow, Quantitative Social Science Initiative, Penn State University, 2011-2012.

Publications Related to the Doctoral Thesis

Rice, Douglas. "The Impact of Supreme Court Activity on the Judicial Agenda: Calling to Action or Settling the Law." Presented at the 2010 Midwest Political Science Association Conference, April 23, 2010 and the 2010 Conference on Empirical Legal Studies, November 6, 2010.
Rice, Douglas "Measuring the Issue Content of Supreme Court Opinions Through Probabilistic Topic Models." Poster presented at the Society for Political Methodology's 2012 Summer Methods Meeting, July 20, 2012; invited presentation at New Faces in Political Methodology at Penn State University, April 28, 2012; paper presented at 2012 Midwest Political Science Association Conference, April 23, 2012.

Other Significant Publications

Rice, Douglas and Christopher Zorn. 2014. "Troll-In-Chief? Affective Opinion Content and the Influence of the Chief Justice." In David Danelski and Artemus Ward, eds. *The Chief Justice: Appointment and Influence.* Under contract, University of Michigan Press.
Rice, Douglas. "Measuring Salience: An Automated Text Analysis of Media Coverage of Supreme Court Cases." Presented at the 2011 Midwest Political Science Association Conference, April 1, 2011.

Grants and Awards

National Science Foundation Doctoral Dissertation Research Improvement Grant SES-1228581 ($23,999), 2012
APSA Law and Courts Section, Best Graduate Student Paper Award, 2012-2013.
APSA Law and Courts Section, Best Graduate Student Paper Award, 2010-2011.
Runner-up, ICPSR Graduate Student Paper Award, 2011
Dissertation Support Grant, College of the Liberal Arts, Penn State University, Fall 2012 ($4,000)
Departmental Travel Grants (2010, 2011, 2012)
Outstanding Graduate Student Award, Department of Political Science, Penn State University (2010-2011)
Best Master's Thesis Award, Department of Political Science, Penn State University (2009-2010)