

The Effect of Politically Salient Decisions on the U.S. Supreme Court's Agenda

Vanessa A. Baird

University of Colorado—Boulder

The U.S. Supreme Court is widely recognized as setting its agenda by choosing to hear certain cases and refusing to hear others. But what influence, if any, does the Court have on the types of cases that are appealed to it? The Court has no formal power to solicit cases, but I contend that potential litigants interpret politically salient Court decisions as signals of its willingness to hear additional cases in certain policy areas. When this happens, the Court receives additional well-framed cases that allow it to make policy in those areas. The theoretical implications are twofold: (1) by signaling the litigant community to support litigation in certain policy areas, the Supreme Court can bring cases onto its agenda well before the certiorari process begins, and (2) the Supreme Court is dependent on extra-judicial actors and their resources to make comprehensive policy.

Scholars have long recognized that knowledge of the agenda-setting process is essential to a full understanding of the political power of an institution. Schattschneider (1960) calls agenda setting the “supreme instrument of power,” and Bachrach and Baratz (1962) regard the agenda-setting process as one of the “two faces of power.” Much of the focus on agenda setting deals with how Congress determines the subject of its attention (e.g., Baumgartner and Jones 1993; Downs 1972; Kingdon 1995). But how do courts—the U.S. Supreme Court, in particular—set their agendas? The obvious answer is that the Supreme Court chooses from a wide assortment of cases that are appealed to it every year. The conventional view, in other words, is that the Court’s agenda-setting function effectively begins when it is presented with a list of cases to choose from—cases that litigants themselves have chosen to bring to the Court. This view distinguishes the Supreme Court from Congress in the freedom to put issues on the agenda. As long as Congress can claim federal jurisdiction, it can put any issue on its agenda with few external constraints. On the other hand, the Supreme Court’s power to set its agenda is limited by the cases brought to it. However, if litigants choose cases based on their perceptions of the Supreme Court’s policy priorities, then the Supreme Court has greater power to drive its agenda than previously believed. The pathway by which the Supreme Court exerts power over the range of cases it receives is the focus of this article.

United States Supreme Court agenda-setting scholars conventionally address the determinants of the cases that make them more appealing to justices. The aspects of cases that have been found to matter include conflict, disagreement with lower courts' decisions, the presence of amicus briefs, support from the Solicitor General, and strategic considerations of justices, such as defensive denials and aggressive grants (Boucher and Segal 1995; Brenner 1979; Brenner and Krol 1989; Caldeira and Wright 1988, 1990; Caplan 1987; Epstein and Knight 1998; Perry 1991; Provine 1980; Schubert 1959; Ulmer 1972, 1984). Unlike most previous research on Supreme Court agenda setting, the attributes of cases that make them stand out in the certiorari process are not the focus here. By contrast, in this article, I argue that actors in the litigant community—parties to the cases, lawyers, or interest groups—use information about the Supreme Court's policy priorities to determine which cases to bring to the Court.

This article proceeds in three steps. First, I discuss the previous literature that explains the attention of courts to certain policy areas, as well as the literature that bolsters my theoretical expectations. Secondly, I provide evidence that politically salient decisions bring about the broadening of the Supreme Court's agenda. The third step consists of a number of corroborative analyses to substantiate the link between litigant strategies and the Supreme Court's agenda.

Explaining the Supreme Court's Attention to Policy Areas

Among the most common explanations for the issues that end up on a court's agenda is that since legislatures have been overwhelmed with complex issues, they abdicate their role of legislating in certain policy areas. These issues are then eventually resolved by courts (Lowi 1979; Mooney and Lee 1995; Tate and Vallinder 1995). The idea is that when legislatures fail to act, courts take up the reins. On the other hand, there is good reason to suspect that the legislative agenda affects the judicial agenda because the loser in the legislative process has the opportunity to challenge legislation in court. Therefore, legislative activity, rather than inactivity, might bring cases to the Supreme Court's agenda.

Other scholars suggest that legislatures have nothing to do with courts' agendas, but rather the process is driven entirely by activist justices (Rabkin 1989). In part, this view is well founded; a decline in justices' willingness to hear cases in certain policy areas would obviously reduce the Court's involvement in those areas. However, issues do not magically transfer from Congress to the Supreme Court. The Supreme Court requires cases and controversies to make policy. To prevent gender discrimination, for example, Congress can freely identify issues of equal pay, equal benefits, social security, wrongful firing, or pregnancy discrimination, among many others to be included in legislation. When Supreme Court justices want to make policy regarding the multiplicity of issues within gender discrimination policy, on the other hand, cases that represent those issues must be litigated. Thus, the ability of the Court not to hear cases is unequivocal; the interesting question is how the Supreme Court acquires the breadth of issues necessary to make comprehensive policy.

Along the same lines, Epp (1998) suggests that justices' intentions are a necessary but insufficient condition for making policy. He uses the case of India to show that even when justices are politically motivated to protect the rights of ordinary citizens, they are incapable of making effective policy changes without those who support comprehensive sets of cases. Courts can easily make a few important decisions without the help of strategic litigants. However, since judicial policy making is an iterative process, justices rely on the ability of litigants to pay attention to the cues contained within previous cases to make effective, comprehensive policy.

The argument that litigants respond to indications of the Supreme Court's policy priorities is compatible with the above-mentioned explanations of judicial agenda setting. Justices who wish to exert additional influence in certain areas can hand down decisions that indicate that willingness, which serve as information for potential litigants. Extrajudicial actors, who may or may not be frustrated with failed attempts in Congress, respond to those signals by bringing well-framed litigation in those policy areas. Their responses transform litigation patterns and bring cases to the Court that might not otherwise be available. When this happens, the breadth of the agenda within that policy area should expand, which allows the Court to elaborate on previous decisions, generating more comprehensive policy. This could be a function of legislative inefficiency or ineffectiveness, but only if litigants perceive that justices want to settle those cases and respond by providing the Court with relevant cases. Cases that transform the judicial agenda do not magically appear at the doorstep of the Court simply because other institutions fail; litigants bring them there. But, without information that the Supreme Court is interested in attending to those policy areas, litigants might not support the kinds of cases necessary to transform the Supreme Court's agenda.¹

My argument that litigants respond to information about the Supreme Court's policy priorities by supporting litigation strategically is also consistent with previous studies of Supreme Court agenda setting. For example, Pacelle (1991) presents evidence of this process by showing that a policy area develops in the Court with a small number of cases, and then after a period of time, the number of issues within that policy area expands. Another finding that is consistent with this theory is that the Supreme Court's agenda drives Courts of Appeals' agendas, rather than the other way around (Hurwitz 1998). Thus, the demand for cases at the level of the Supreme Court causes the supply of cases at the appellate court level, consistent with the theory that information related to this demand is driving the process. Furthermore, Perry (1991), after having interviewed many justices and clerks, finds that Supreme Court justices claim that they signal for additional

¹ As a caveat, it is important to mention that litigants' responses to these signals are in no way the only explanation of cases that reach the Supreme Court. The random events that happen to inspire litigation, such as police brutality, obscenity legislation, or a corporation ignoring environmental regulations might all be causes of individual Supreme Court cases that have nothing to do with litigants' responses to salient decisions. However, since I am interested in the Supreme Court's ability to hear a broad set of cases within a particular policy area, I am interested in what affects general trends rather than what causes any single case.

litigation in their opinions. They themselves acknowledge, therefore, that they depend on extrajudicial actors to read their signals. This article contributes to these earlier studies by showing that these signals have an impact on the Supreme Court's agenda.

Research Design

One way to test the theory that information about the Court's priorities results in increased litigation would be to use signals of those priorities as the independent variable, while the aggregate number of decisions to sponsor litigation would be the intervening variable that eventually transforms the Supreme Court's agenda. However, we do not have information about the number of aggregate decisions to support litigation. For this reason, and particularly because the primary interest is in what transforms the Supreme Court's agenda, the dependent variable is conceptualized as the attention that the Supreme Court gives to certain policy areas.²

The primary hypothesis is that information that the Court is interested in exerting influence in a particular policy area will cause an increase in the number of high-quality cases available to the Court in later years. The theory is that if litigants had not acted on their interpretation of the Supreme Court's policy priorities, those additional cases that were framed using information about the policy preferences and priorities of the justices would not be among the potential set of cases available to the Supreme Court in the certiorari process. This claim is difficult to ascertain without an analysis of the number and quality of cert petitions and therefore must be corroborated indirectly.³ There are a number of ways to substantiate the claim that the cases that transform the Supreme Court's agenda would not be in the pipeline without the support of those who read the Court's signals. One is to examine the litigation pipeline directly, something I do later in the paper.

Another is to make predictions about the time lag between the signal and the expanding agenda. The additional cases provided by those litigants could not pos-

²Even if we had information about every time a decision was made to engage in strategic litigation, since I am interested in how this affects the policymaking capacity of the Supreme Court, it would be necessary to substantiate the link between those strategies and the agenda of the Supreme Court. To show that the Supreme Court depends on this litigation, in other words, it is necessary to show that these signals actually result in a change in the Court's agenda. It is important, however, to try to substantiate that the change in the Supreme Court's agenda is a function of litigants' responses to it, which I attempt to do indirectly, through a number of corroborative analyses.

³An analysis of the variance in the number of cert petitions would be insufficient to satisfy the weakness in the research design. My argument is not necessarily predicated on the assumption that there will be more cases, but instead on the notion that litigants use the Court's signals to frame cases in such a way as to make them particularly appealing to Supreme Court justices. Thus, it may be that the number of cases does not change very much, but the quality of cases should change. For this reason, a portion of the corroborative analysis focuses on analysis of the changes in the quality of the cases that reach the Supreme Court, in comparison with other years and other policy areas.

sibly reach the Court immediately, since it takes time to find cases, try them, and take them through the appellate process to reach the Supreme Court. If these cases are already in the pipeline, their presence is not likely to be due to strategic litigation. Immediate agenda transformation is more likely to be completely a function of the Supreme Court's certiorari decisions and therefore would be consistent with the null hypothesis. The logic behind this corollary test is simple. Unless there is an alternative explanation for the additional cases taking years to get to the agenda, then the proposition that signals combined with the responding litigation drive the expanding number of cases becomes more plausible.⁴ Thus, the only time lag that would be consistent with my theory would be approximately the time that it would take for litigants to find and sponsor cases from the trial court to the Supreme Court.

There is no way to predict the exact time this would take. Not all cases undergo the same trajectory of trials and appeals. Furthermore, the time lag is not simply a function of the trial trajectory. The time frame begins with a litigant's decision to change strategy and search for a case. Thus, because cases are likely to vary in the amount of time that it takes to find and try them, the time lag would be difficult to estimate. Though there is no theoretical reason to expect a particular time lag between information and the eventual agenda expansion at the Supreme Court, this process is likely to take several years. Consequently, a corollary hypothesis in this analysis is that the effect of the Supreme Court's signals on its resulting agenda expansion will also take several years.

Data and Measurement

The data for this analysis comprise Phase I of the United States Supreme Court Database,⁵ which include all Supreme Court cases from the terms 1953 to 2000. The data are compiled as a cross-sectional time series, with eleven panels that represent broadly defined policy areas.⁶ The dependent variable is operationalized as the number of cases in those policy areas over time.

⁴This time lag test is not dispositive. There are other reasons that the Supreme Court justices might be cautious in settling many cases within the same policy area in adjacent years, for example, to maintain legitimacy. This alternative explanation is tested later.

⁵ICPSR number 9422. Spaeth, Harold J. United States Supreme Court Judicial Database, 1953–1997 Terms [Computer file] 9th ICPSR version. East Lansing: Michigan State University, Dept. of Political Science [producer], 1998. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 1999.

⁶These categories match the designation of VALUE from the Spaeth database pretty closely, with the exception of the addition of environment, the inclusion of tort actions and government liability into due process cases, and the inclusion of state and federal taxation into the same category. Miscellaneous and attorney law issues are excluded from the analysis. The policy areas in the analysis include:

| | | |
|---------------------|-----------------|--------------------------------------|
| Discrimination | First Amendment | Privacy |
| Criminal Rights | Labor | Environment |
| Economic Regulation | Taxation | Due Process and Government Liability |
| Judicial Power | Federalism | |

The primary independent variable is conceptualized as information regarding the Supreme Court's policy priorities, a difficult concept to measure, because as Epstein and Segal claim, we "cannot survey, say, members of the Supreme Court to ascertain those cases that are especially salient to the justices" (2000, 66). For this reason, any measure of their policy priorities will have to be ascertained indirectly. Nonetheless, for litigants who pay attention to the Supreme Court in developing litigation strategies, identifying justices' policy priorities through particularly important cases is better than guessing. Information must not necessarily be perfect in order to have an impact on behavior, consistent with Theil's (1965) definition of information as the "reduction of uncertainty."

The assessment of the importance of a Supreme Court decision is not a new problem in the literature (see Cook 1993; Epstein and Segal 2000). Judicial scholars have accumulated several assessments based on constitutional law textbooks to assess the importance of a Supreme Court decision, which are problematic because they have an obvious bias against important statutory cases. Furthermore, Biskupic and Witt (1997) and Epstein et al. (1996) have derived measures of "landmark decisions." The problem with these assessments is that they are retrospectively evaluated, perhaps even with their impact on future litigation in mind. If I based my measure on the effect of the case on future litigation, then my analysis would contain an element of circularity. Moreover, these measures tend to be biased toward civil rights and liberties cases (Epstein and Segal 2000), and they underestimate the importance of economic or other constitutional issues.

Therefore, it is essential that I measure contemporaneous rather than retrospective evaluations of the importance of a case, and furthermore, it is important that I use a measure that is less biased against statutory and economic decisions. Epstein and Segal (2000) suggest that the presence of a Court decision on the front page of the *New York Times* is a valid measure of contemporaneous evaluations of the case's political salience. The salience of the decision would be likely to inspire litigants into action for two reasons. First, appearing on the front page of the *Times* is simply a proxy measure for the political importance of the case.⁷ Secondly, not only do they want to influence policy, but they also would like national recognition for doing so. From potential litigants' perspectives, if decisions are reported on the front page of the *Times*, this indicates an increased probability that a decision of a case that they support might also end up on the front page of the *Times*. For both strategies, the salience of the decision, as measured by its presence on the front page of the *Times*, is a meaningful indicator of the potential benefits of pursuing litigation.⁸ Thus, data made available by Epstein

⁷ Potential litigants do not rely on the *New York Times* to find out about important cases; it is likely that they know about these cases long before they are decided. Nevertheless, they pay attention to the same attributes of these cases that caused the *New York Times* to report them on the front page. Thus, this is a surrogate measure of a case's salience.

⁸ There are a number of different mechanisms by which potential litigants could gauge justices' priorities. When justices declare legislation unconstitutional, when they reverse lower court decisions at higher rates than usual, and when they simply grant certiorari to more cases in a particular policy

and Segal on the number of politically salient decisions from 1953 to 1995 are used in the following analysis as the independent variable representing signals of the perceived policy priorities of U.S. Supreme Court justices.

Analysis

Modeling cross-sectional time-series data is not perfectly straightforward since several alternative statistical methodologies might be appropriate. One is to use an estimation technique that computes Ordinary Least Squares parameter estimates with panel corrected standard errors, according to Beck and Katz's (1995) recommendations. This estimation technique is preferred to OLS, because OLS standard errors are estimated to be 50% lower than the true value (Beck and Katz 1995), which produces findings that tend to be biased toward rejecting the null hypothesis.

Alternatively, since the dependent variable is a count of cases or amicus briefs, the other potential method of analysis is cross-sectional *poisson* regression (King 1988, 1989). Since either method could be appropriate, the most robust test of the theoretical model is to compare the results of both statistical tests, ensuring that the findings are not the result of statistical anomalies.⁹ There are no differences in the substantive conclusions from either model. Because the magnitude of the effect represented by OLS coefficients is easier to interpret, I report OLS parameters with panel-corrected standard errors in the following analysis.

Time series cross-sectional models tend to be afflicted with problems of heteroskedasticity, autocorrelation, and interpanel (in this case, interpolicy area) correlation. Since the policy areas may be correlated, I have specified a model that allows for correlation among the cross-sections rather than specifying a model that assumes that they are not correlated. Furthermore, since there is a great deal of variation in the number of cases across policy areas, I control for such variation by including a dummy variable for each policy area. This ensures that the findings are not a function of a high number of both politically salient decisions and cases in a particular policy area.

Consistent with the theory, Table 1 shows that the most significant effect, statistically and substantively, on the number of cases at the Supreme Court occurs five years after the Court has signaled its interest in a particular policy

area, they signal their policy priorities to potential litigants. In fact, I have tested for the effect of all of these measures (including the Epstein et al. (1996) and Biskupic and Witt (1997) measures of "landmark decisions"), and they all have the same substantive impact on the Supreme Court's agenda as the Epstein and Segal (2000) measure of salient decisions. I chose the Epstein and Segal measure for theoretical reasons. Future contributions to this question could focus on the use of many different kinds of information that would steer potential litigants in a particular direction.

⁹The other potential model is negative binomial regression, the results of which are substantively identical to the *poisson* and OLS results.

TABLE 1

The Effect of Salient Decisions on the Number of Cases on the U.S. Supreme Court's Agenda

| | Supreme Court Cases |
|------------------------------------|---------------------|
| Supreme Court Cases _{t-1} | .32 (.05) |
| Salient Decisions _{t-1} | .17 (.15) |
| Salient Decisions _{t-2} | .34 (.15) |
| Salient Decisions _{t-3} | .08 (.15) |
| Salient Decisions _{t-4} | .15 (.19) |
| Salient Decisions _{t-5} | .50 (.15) |
| Salient Decisions _{t-6} | .11 (.12) |
| Rehnquist Court | -2.73 (.89) |
| Burger Court | .67 (.67) |
| Constant | 4.65 (.56) |
| Number of Observations | 407 |
| Years | 1953-1995 |
| R ² | .85 |

Note: Entries are Ordinary Least-Square unstandardized regression coefficients with panel corrected standard errors in parentheses, calculated according to Beck and Katz (1995). The number of cases is measured as a count of Supreme Court cases in that policy area for each year. Salient decisions are measured as the number of times that policy area is represented on the front page of the *New York Times* for each year. Controls for each policy area are included in the analysis but are not reported in this table.

area. Interpreting the magnitude of the coefficient is not straightforward when a lagged endogenous variable is included in the model, because they tend to bias coefficients toward zero (Achen 2000; Harvey 1990). Ostrom (1990, 73) suggests that we can estimate the magnitude of the effect of the independent variables according to the following equation:

$$\beta/1-\rho$$

where ρ is the coefficient of the lagged dependent variable and β is the coefficient on the independent variable.¹⁰ Computed in this way, one politically salient decision results in .74 additional cases at the Supreme Court five years later. This is generally what would be expected given the time it takes to find a case and bring it from the trial courts through the appellate process, and finally to the Supreme Court. Thus, as predicted, signals in particular policy areas lead to greater attention to those policy areas on the agenda of the Supreme Court.

¹⁰Ostrom (1990) suggests this computation for independent variables on the first lag. Therefore, the true estimate is somewhere between the coefficient and the estimate that is computed using this formula.

Corroborative Analyses

The Quality and Quantity of Litigation in the Pipeline

With this analysis, it is still difficult to make the inference that those additional cases would not have otherwise been available to the Court without responses to the indications of its policy priorities. Therefore, I test and confirm a number of corroborative hypotheses in order to strengthen the inference that those additional cases on the Court's agenda are the result of responses to the Supreme Court's signals. To do this, I test the effect of salient decisions on the litigation pipeline, using the number of cases on the Courts of Appeals in those policy areas as a proxy measure of that pipeline.

Given that my argument is predicated on the idea that there will be better cases from which to choose (in terms of their policy making potential), another way of substantiating the theory is to measure aspects of the quality of cases that appear on these courts' agendas, in response to the Supreme Court's signals. If the cases that reach the agendas of the Supreme Court and the Appeals Courts are perceived to be better for making policy than other cases on those agendas in other years and policy areas, then we have more ammunition to claim that there were better cases from which to choose. An increase in amicus activity shows that amici participants believe that those cases have more significant policy implications than cases that are on those agendas in other years and policy areas. For example, after the Supreme Court handed down *Furman*,¹¹ which outlawed the death penalty, other death penalty cases that were in the pipeline at the time when *Furman* was handed down were not likely to have been suitable for the Supreme Court. In this case, amici participants interested in death penalty policy would probably wait until more appropriate cases reached the Court. For this reason, I test the effect of salient decisions on the number of amicus briefs, at both the Supreme Court and Courts of Appeals. The increasing number of briefs at both courts should occur simultaneously with the increase in cases, if the cases are good policy vehicles responsive to Supreme Court signals for litigation. Therefore, in this analysis, I control for the increase in cases to show that there is an increase in the proportion of amicus briefs per case, showing that, on average, the cases that appeared on the court's agenda in response to its signals are perceived by amicus participants as better policy vehicles.

In sum, modeling the process with the Supreme Court's agenda as the dependent variable leaves one major aspect of the process untested: whether the availability of additional cases results directly from litigation in response to the Supreme Court's signals. In the following analysis, I show that salient decisions bring about additional cases in Appeals Courts exactly one year before the additional cases show up at the Court. I also show that support from amici increases simultaneously with the increase in cases in both courts, even controlling for the increase of cases. This helps to corroborate that actors are responding to signals,

¹¹ *Furman v. Georgia*; 408 U.S. 238 (1972).

and it also helps to show that these additional cases attract additional attention from those interested in the public policy aspects of those cases, indicating their political importance.

To test the following corroborative hypotheses, I have incorporated data from the United States Appeals Courts cases for 1953–1988¹² and Phase II¹³ of the United States Supreme Court Judicial Database. To measure the Appeals Courts' agendas, the U.S. Courts of Appeals' cases are counted for each policy area and year. To measure the amicus brief filings, I counted the number of amicus brief filings in the Supreme Court, and all of the U.S. Courts of Appeals for each policy area and year. As with the previous analysis, I have substantiated the evidence presented here with cross-sectional *Poisson* regression, the substantive conclusions of which are identical to the analysis presented here.

Table 2 shows us precisely what we would expect in the context of the U.S. Courts of Appeals, given the lag structure for the effect of salient cases on the Supreme Court's agenda. There is an increase in the number of cases four years after an increase in the number of salient decisions in that same policy area. This effect occurs one year before the effect shows up at the U.S. Supreme Court. Correcting for autocorrelation, on average, there are 1.6 additional cases on the Appeals Court agenda in response to each politically salient decision in that policy area. This finding strengthens the inference that there are more cases available to the Supreme Court from the Appeals Courts the previous year.

Table 2 also shows that there are 3.4 (following Ostrom 1990) additional amicus briefs five years after an increase in the number of salient decisions. The evidence that three-and-a-half additional amicus briefs are filed at the Court five years after each politically salient decision in that policy area suggests indeed that amici are responding to the cases inspired by politically salient decisions. Furthermore, the same year that there are additional cases in the Appeals Courts, there is also an increase in the number of amicus briefs in the Appeals Courts, even controlling for these additional cases. This suggests that the additional cases in the pipeline as a result of politically salient decisions are sufficiently important to garner extra attention from amici.

¹²ICPSR number 2086. Songer, Donald R. United States Courts Of Appeals Database Phase 1, 1925–1988 [Computer file]. ICPSR version. Columbia, SC: Donald R. Songer [producer], 1990. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 1998. A random sample of cases from each circuit for each year between 1925 and 1988 was coded for the nature of the issues presented, the statutory, constitutional, and procedural bases of the decision, the votes of the judges, and the nature of the litigants. The variables are divided into four sections: basic case characteristics, participation, issues, and judges and votes. The cases of the Appeals Courts do not actually represent all cases handed down by Appeals Courts (as they do in Phase I and Phase II of the Supreme Court), but rather represent a random sample of each circuit and year. Since my analysis requires that I consider a random sample of all cases within a year, I weighted the Appeals Courts cases by the total proportion of cases that were handed down that year.

¹³ICPSR number 6987. Gibson, James L. United States Supreme Court Judicial Database, Phase II: 1953–1993. ICPSR version. Houston: University of Houston [producer], 1996. Inter-university Consortium for Political and Social Research, Ann Arbor, MI [distributor], 1997.

TABLE 2

The Effect of Salient Decisions on the Number of Cases and Amicus Briefs on the U.S. Supreme Court and U.S. Courts of Appeals

| | Appeals Courts Cases | Supreme Court Amicus Briefs | Appeals Courts Amicus Briefs |
|----------------------------------|-------------------------|--------------------------------|---------------------------------|
| Lagged Dependent Variable | .65 (.04) | .51 (.05) | .27 (.08) |
| Salient Decisions _{t-1} | .06 (.21) | -1.19 (.63) | .01 (.09) |
| Salient Decisions _{t-2} | .32 (.25) | 1.60 (.53) | -.12 (.07) |
| Salient Decisions _{t-3} | .37 (.23) | -1.20 (.59) | .03 (.06) |
| Salient Decisions _{t-4} | .56 (.21) | -.75 (.62) | .23 (.07) |
| Salient Decisions _{t-5} | -.68 (.18) | 1.67 (.66) | -.04 (.07) |
| Salient Decisions _{t-6} | .30 (.25) | -1.57 (.60) | -.10 (.08) |
| Rehnquist Court | -7.42 (3.55) | — | 2.50 (1.33) |
| Burger Court | .37 (.89) | 1.81 (3.19) | .83 (.51) |
| Constant | 2.06 (1.14) | .35 (2.92) | -.52 (.34) |
| Number of Observations | 240 | 297 | 240 |
| Years | 1953–1988 | 1953–1985 | 1953–1988 |
| R ² | .95 | .66 | .63 |

Note: Entries are Ordinary Least-Square unstandardized regression coefficients with panel corrected standard errors in parentheses, calculated according to Beck and Katz (1995). The number of cases is measured as a count of Appeals Courts cases in that policy area for each year. The number of amicus briefs is measured as a count of amicus briefs in that policy area for each year, in both the Supreme Court and Appeals Courts models. Salient decisions are measured as the number of times that policy area is represented on the front page of the *New York Times* for each year. Several controls are included in this analysis but are not reported in this table, including policy area dummy variables, six lags of Appeals Courts cases in the Appeals Courts amicus briefs model, and six lags of Supreme Court cases in the Supreme Court amicus briefs model. The purpose of including the six lags of cases is to ensure that the increase in amicus briefs in the respective courts is not simply a result of the increase of cases. Since the number of cases was so few among some policy areas in the Courts of Appeals, I had to exclude the following policy areas from the analysis of the two models of the Appeals Courts: due process and government liability (except for criminal cases related to due process), environment, and privacy.

Mysteriously, there is a significant negative effect after the first year in both Supreme Court models. I have two potential explanations for these negative effects. First of all, in accordance with my theory, this might be an indication that there are few “good” cases from which to choose in the first year after a politically salient decision. If litigants successfully frame cases in order to respond to those politically salient decisions, then there is little chance that any of those high-quality cases would be available for the Court in the following year, and therefore, justices refuse to grant cert to those cases. Furthermore, they are less worthy of attention from amici.

However, the negative result could also indicate that the Supreme Court itself avoids cases in policy areas in which it has just handed down controversial polit-

ically salient decisions. That the Supreme Court might behave in this way in order to protect its legitimacy has anecdotal support (Epstein and Knight 1998; Rosenberg 1991). If this is true, then it could be that the lag of five years has nothing to do with the litigation trajectory, but instead is a result of the Supreme Court's strategy to acquire legitimacy by making policy in slow increments over time.¹⁴ I will test for this possible alternative explanation below.

Alternative Explanations of the Lag Structure

Since the Court might choose to stay away from policy areas represented by salient decisions the previous year to maintain its legitimacy, I must test for whether the five-year lag structure is a function of the Court strategically spacing the timing of its decisions apart.¹⁵ One way to do this is to look at the autocorrelation patterns of the Supreme Court's politically salient decisions. This is a conservative test of the hypothesis, because if justices are trying to maintain legitimacy by staying out of the limelight after handing down controversial salient decisions, they are least likely to accomplish their goal if they immediately hand down additional salient decisions in the same policy areas that end up on the front page of the *Times*. Justices probably perceive that politically salient decisions will affect their legitimacy more than a simple increase in the number of ordinary cases. The logic of the following test, therefore, is as follows. If the time frame between politically salient decisions within the same policy area is shorter than five years, then the five-year lag between salient decisions and the eventual increase in the number of cases is not likely to be the result of justices refusing to hear cases to preserve institutional legitimacy.

Evidence for this can be found by looking at the pattern of autocorrelation of politically salient decisions. Table 3 presents evidence that the Court is more likely to hand down a politically salient decision just two years after previous ones. The Court's willingness to hand down politically salient decisions in the same policy area that end up on the front page of the *New York Times* within two

¹⁴ Epstein and Knight (1998), Rosenberg (1991), Perry (1991), and Pacelle (1991) have argued that justices space their decisions apart in order to maintain legitimacy. For example, they argue that this happened in the case of the Supreme Court's refusal to hear an interracial marriage case filed the year after *Brown* was handed down. Marshall's notes revealed that they refused to hear the case specifically because the justices were unwilling to stir the waters in the year after *Brown*.

¹⁵ Because the Supreme Court's attention to certain policy areas could be affected by congressional attention to those policy areas, it is necessary to include controls for the legislative agenda in the analysis. I have incorporated several variables in the analysis for this purpose. The first relates to the attention that Congress gives to certain policy areas, as reported in the Congressional Quarterly Almanac. The second consists of the number of hearings that Congress hears in a particular policy area. Bryan Jones and Frank Baumgartner have provided both measures in their Policy Agendas Database. These data were distributed through the Center for American Politics and Public Policy at the University of Washington and the Department of Political Science at Penn State University, with the support of National Science Foundation grant number SBR 9320922. (Neither NSF nor the original collectors of the data bear any responsibility for the analysis reported here.)

TABLE 3
Autocorrelation Patterns in Politically Salient Decisions

| | Number of Salient Decisions |
|----------------------------------|-----------------------------|
| Salient Decisions _{t-1} | .05 (.08) |
| Salient Decisions _{t-2} | .20 (.07) |
| Salient Decisions _{t-3} | -.02 (.07) |
| Salient Decisions _{t-4} | .01 (.07) |
| Salient Decisions _{t-5} | .09 (.07) |
| Salient Decisions _{t-6} | -.02 (.07) |
| Rehnquist Court | -.73 (.25) |
| Burger Court | -.50 (.21) |
| Constant | .99 (.30) |
| Number of Observations | 407 |
| R ² | .59 |

Note: Salient decisions are measured as the number of times that policy area is represented on the front page of the *New York Times* for each year. Controls for each policy area are included in the analysis but are not reported in this table.

years shows that it is not likely to wait five years before it expands the number of cases on its agenda, simply to maintain legitimacy. With this evidence, the idea that justices wait five years before expanding the Court's agenda to maintain legitimacy is less likely. Without an alternative explanation for why it would take a politically salient decision five years before the agenda expanded in that policy area, a stronger case can be made that the time lag is a function of the time that it takes to find appropriate cases in the right policy area and bring them through the litigation trajectory.¹⁶

Implications

The evidence presented here suggests that salient Supreme Court decisions in particular policy areas act as information to potential litigants about the Supreme Court's policy priorities and result in an increase in the number and quality of

¹⁶ Furthermore, because the ideological direction of the Court might affect the kinds of cases that are litigated, it is necessary to control for the ideological composition of the Court as well as the direction of its decisions in those policy areas. It might be, for example, that as the Court becomes more liberal, potential litigants respond with additional litigation, or vice versa. I have incorporated two measures here for the purpose of controlling for the ideological output of the Court. The first uses Martin and Quinn's (2002) estimation of Supreme Court justices' dynamic ideal points to estimate the ideological direction of any particular Court case with the mean ideal points of those who voted with the majority. I then aggregated these means across all policy areas and years to estimate the mean of majority coalitions of all decisions made by the Court. Secondly, I included the percent of liberal decisions as an additional ideological control. The results are identical to those without the controls.

cases on the Supreme Court's agenda in those same policy areas. I infer that the additional cases on the Court's agenda result from the availability of additional litigation inspired by salient decisions by showing that the number of cases at the Courts of Appeals increases one year before the additional cases reach the Supreme Court. Furthermore, I make the inference that those additional cases are qualitatively different, indicated by the increase in the number of amicus briefs filed at both the Supreme Court and Courts of Appeals, which happens simultaneously with the increase in litigation that reaches each of the courts. This shows that these additional cases are sufficiently important to attract increasing attention from amici, even controlling for the number of cases. Thus, it is not simply that the Supreme Court grants certiorari to more cases in that policy area, but also that justices are able to hand down more decisions that have important policy consequences. Though it is difficult to show that these cases are more important for making policy, this finding shows that amici seem to think they are.

A number of caveats must be taken into consideration here. First, it is difficult to say conclusively that the substance of the certiorari petitions have changed in response to the signals. Evidence of a change in the Courts of Appeals does not conclusively show that these cases were then appealed to the Supreme Court. More work in this area could benefit from an analysis of certiorari petitions. This would address the exclusion of state cases from the analysis of the litigation pipeline as well.

Furthermore, this paper does not address the subject of who is responding to salient decisions by bringing additional cases meant for the Supreme Court's agenda. Much of the previous research on the relationship between interest groups and courts suggests that interest groups are at the center of this process. Beginning with Vose (1959), scholars have documented the high volume of litigation supported by interest groups or policy entrepreneurs (Epstein 1985; Rosenberg 1991; Wasby 1970, 1976, 1995). Thus, it is likely that interest groups drive much of the change in litigation patterns. If this is true, then these findings imply that it matters whether and under what conditions interest groups decide to engage in litigation. Baumgartner and Leech lament that "[u]nfortunately, with few exceptions, scholars have not linked the systematic study of lobbying tactics with a discussion of the contexts in which each tactic is chosen" (1998, 148).¹⁷ Therefore, future research in this area could make a significant contribution to our understanding of how the political and legal contexts affect interest groups' strategies in addition to our understanding of how those strategies affect the Supreme Court's agenda-setting process.

In addition, it is possible that the effect of salient decisions on the Supreme Court's agenda could be either mitigated or reinforced by other factors in the political context. If litigants have an effect on the agenda, then the variations of their strategies, the political context, or an interaction between the two will also

¹⁷ Exceptions include Spill (1997), McFarland (1991), Kollman (1998), and Baumgartner and Jones (1993).

have an impact on the Supreme Court's agenda, and therefore its policymaking capacity. Moreover, along with that idea, this paper only considers one form of information: salient decisions. If it is true that the information pathway between the Supreme Court and potential litigants matters for the agenda-setting process, then this article only skims the surface in teaching us about all the possible ways that other kinds of information could matter for the attributes of the cases that litigants choose. The information link between the Supreme Court and extrajudicial actors is undoubtedly more complicated than the model presented here; this analysis merely paves the way for future research in this area.

The policymaking process described here takes place between two kinds of actors who are not necessarily under pressure to be responsive to the public—Supreme Court justices and litigants. When justices communicate their policy priorities to litigants, they each can increase their own power over the policy-making process, without the need to be representative of the public, bringing about a potential democratic deficit. Furthermore, understanding how the Supreme Court is able to set its agenda in accordance with its policy priorities might teach us something about the global trends toward the judicialization of politics, which Tate and Vallinder believe might become one of the most important political phenomena in the twenty-first century (1995).

These findings also might give rise to worry for those who believe that a court's role is to protect minorities even against majority will (i.e., Dahl 1989). Enormous resources are required to fund the necessary amount of litigation to develop sufficiently broad policies that can protect human rights effectively. Without groups that support litigation, such as the American Civil Liberties Union or the National Association for the Advancement of Colored People, civil liberties and rights may not get protected, and legislation may not be checked for its constitutionality. Consequently, it matters whether those who support the rights of minorities (or the minorities themselves) have sufficient resources to support such litigation. When limited resources are available to support litigation, as in the case of India (Epp 1998), justices are dependent on the random appearance of a few cases. Under these conditions, even when justices are motivated to protect those rights and even when the law is clear, those who violate human rights might continue, sensing the low probability of their actions being challenged in court. These findings therefore highlight the importance of the symbiotic relationship between interest groups and the Supreme Court in terms of democratic representation and the protection of minority rights.

My analysis of the Supreme Court's agenda shows that litigants help to translate changes in Supreme Court policy priorities into actual changes in its agenda. It teaches us that the relationship between high courts and the litigant community matters for the Supreme Court's policymaking capacity. How does the Supreme Court gain access to high-quality cases in the policy areas that it cares about? It can use current decisions to focus the attention of litigants on particular policy areas, thereby increasing its ability to make comprehensive policy in those areas in the future. This shows that the agenda-setting process begins well

before the certiorari process begins, and it shows that the agenda-setting process depends on the ability of potential litigants to react to the Court's signals.

Acknowledgments

I would like to thank the following people for their generous comments during the preparation of this manuscript: Christopher H. Achen, E. Scott Adler, Paul Brace, David Branham, Raymond M. Duch, Robert S. Erikson, Roy Flemming, Mark N. Franklin, Amy Gangl, James L. Gibson, Ann C. Keller, Stefanie Lindquist, Donald S. Lutz, Lauren McLaren, John McIver, Walter F. Murphy, Roland Paris, Rorie Spill, Sven Steinmo, Harry P. Stumpf, Chris Wlezien, and B. Dan Wood.

Manuscript submitted December 10, 2001

Final manuscript received August 14, 2003

References

- Achen, Christopher H. 2000. "Why Lagged Dependent Variables Can Suppress the Explanatory Power of Other Independent Variables." Presented at the Annual Meeting of the Political Methodology Section of the American Political Science Association, UCLA.
- Bachrach, Peter, and Morton S. Baratz. 1962. "Two Faces of Power." *American Political Science Review* 56(4): 947–52.
- Baumgartner, Frank R., and Bryan D. Jones. 1993. *Agendas and Instability in American Politics*. Chicago: University of Chicago Press.
- Baumgartner, Frank R., and Beth L. Leech. 1998. *Basic Interests: the Importance of Groups in Politics and in Political Science*. Princeton: Princeton University Press.
- Beck, Nathaniel, and Jonathan N. Katz. 1995. "What to Do (and Not to Do) with Time-Series-Cross-Section Data in Comparative Politics." *American Political Science Review* 89(3): 634–47.
- Biskupic, Joan, and Elder Witt. 1997. *Guide to the U.S. Supreme Court*, 3rd ed. Washington: Congressional Quarterly.
- Boucher, Robert L., and Jeffrey Segal. 1995. "Supreme Court Justices as Strategic Decision Makers." *Journal of Politics* 57(3): 824–37.
- Brenner, Saul. 1979. "The New Certiorari Game." *Journal of Politics* 41(2): 649–55.
- Brenner, Saul, and John F. Krol. 1989. "Strategies in Certiorari Voting on the United States Supreme Court." *Journal of Politics* 51(4): 828–40.
- Caldeira, Gregory A., and John R. Wright. 1988. "Amici Curiae Before the Supreme Court: Who Participates, When and How Much?" *Journal of Politics* 52(3): 782–806.
- Caldeira, Gregory A., and John R. Wright. 1990. "The Discuss List: Agenda Building in the Supreme Court." *Law and Society Review* 24 (3): 807–36.
- Caplan, Lincoln. 1987. *The Tenth Justice: The Solicitor General and the Rule of Law*. New York: Alfred A. Knopf.
- Cook, Beverly B. 1993. "Measuring the Significance of U.S. Supreme Court Decisions." *Journal of Politics* 55(4): 1127–39.
- Dahl, Robert A. 1989. *Democracy and Its Critics*. New Haven: Yale University Press.
- Downs, Anthony. 1972. "Up and Down With Ecology: The Issue Attention Cycle." *The Public Interest* 28 (Summer): 38–50.

- Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: The University of Chicago Press.
- Epstein, Lee. 1985. *Conservatives in Court*. Knoxville: University of Tennessee Press.
- Epstein, Lee, and Jack Knight. 1998. *The Choices Justices Make*. Washington: Congressional Quarterly.
- Epstein, Lee, and Jeffery A. Segal. 2000. "Measuring Issue Salience." *American Journal of Political Science* 44(1): 66–83.
- Epstein, Lee, Harold Spaeth, Jeffery Segal, and Thomas Walker. 1996. *The Supreme Court Compendium: Data, Decisions, and Developments*, 2nd ed. Washington: Congressional Quarterly.
- Harvey, Andrew C. 1990. *The Econometric Analysis of Time Series*, 2nd ed. Cambridge: MIT Press.
- Hurwitz, Mark S. 1998. "Institutional Arrangements and Agenda Setting in the United States Supreme Court and Courts of Appeals." 1998. Presented at the annual conference on the scientific study of judicial politics, Michigan State University.
- King, Gary. 1988. "Statistical Models for Political Science Event Counts: Bias in Conventional Procedures and Evidence for the Exponential Poisson Regression Model." *American Journal of Political Science* 32(3): 838–63.
- King, Gary. 1989. *Unifying Political Methodology*. Cambridge: Cambridge University Press.
- Kingdon, John W. 1995. *Agendas, Alternatives, and Public Policies*. New York: HarperCollins College Publishers.
- Kollman, Ken. 1998. *Outside Lobbying: Public Opinion and Interest Group Strategies*. Princeton: Princeton University Press.
- Lowi, Theodore J. 1979. *The End of Liberalism: The Second Republic of the United States*. New York: Norton.
- Martin, Andrew D., and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999." *Political Analysis* 10 (Spring): 134–53.
- McFarland, Andrew S. 1991. "Interest Groups and Political Time: Cycles in America." *British Journal of Political Science* 21 (July): 257–84.
- Mooney, Christopher Z., and Mei-Hsien Lee. 1995. "Legislative Morality in the American States: The Case of Pre-Roe Abortion Regulation Reform." *American Journal of Political Science* 39(3): 599–627.
- Ostrom, Charles W. 1990. *Time Series Analysis Regression Techniques*, 2nd ed. London: Sage.
- Pacelle, Richard L. 1991. *The Transformation of the Supreme Court's Agenda: From the New Deal to the Reagan Administration*. Boulder: Westview Press.
- Perry, H. W. Jr. 1991. *Deciding to Decide: Agenda Setting in the United States Supreme Court*. Cambridge: Harvard University Press.
- Provine, Doris Marie. 1980. *Case Selection in the United States Supreme Court*. Chicago: University of Chicago Press.
- Rabkin, Jeremy A. 1989. *Judicial Compulsions: How Public Law Distorts Public Policy*. New York: Basic Books.
- Rosenberg, Gerald. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press.
- Schattschneider, E. E. 1960. *The Semisovereign People: A Realist's View of Democracy in America*. New York: Holt, Rinehart and Winston.
- Schubert, Glendon. 1959. *Quantitative Analysis of Judicial Behavior*. Glencoe, IL: Free Press.
- Spill, Rorie. 1997. *Fighting with One Hand Tied Behind their Back: The Constraints of Environment and Structure on Interest Group Litigation (Lobbying)*. Ph.D. Dissertation, The Ohio State University.
- Tate, C. Neal, and Torbjörn Vallinder. 1995. *The Global Expansion of Judicial Power*. New York: New York University Press.
- Theil, Henri. 1965. "The Information Approach to Demand Analysis." *Econometrica* 33 (January): 67–87.

- Ulmer, Sidney S. 1972. "The Decision to Grant Certiorari as an Indicator to Decision 'On the Merits'." *Polity* 4 (Summer): 429-47.
- Ulmer, Sidney S. 1984. "The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable." *American Political Science Review* 78(4): 901-11.
- Vose, Clement E. 1959. *Caucasians Only: The Supreme Court, the NAACP, and the Restrictive Covenant Cases*. Berkeley: University of California Press.
- Wasby, Stephen L. 1970. *The Impact of the United States Supreme Court: Some Perspectives*. Homewood, IL.: Dorsey.
- Wasby, Stephen L. 1976. *Small Town Police and the Supreme Court*. Lexington: D.C Heath.
- Wasby, Stephen L. 1995. *Race Relations Litigation in an Age of Complexity*. Charlottesville: University Press of Virginia.

Vanessa A. Baird is assistant professor of political science, University of Colorado-Boulder, Boulder, CO 80309 (Vanessa.Baird@Colorado.edu).