

Liberal Justices, Conservative Cases? Explaining the Ideological Nature of the Supreme Court's Agenda

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Liberal Justices, Conservative Cases? Explaining the Ideological Nature of the Supreme Court's Agenda

The Supreme Court has considerable discretion when deciding the ideological nature of the cases it wishes to hear. To examine which factors affect the ideological composition of the Court's agenda, we test whether the Court takes cases similar to or opposite its median member's ideology. Also, we examine whether the court behaves strategically by considering the President's and Congress's ideology. To test our hypotheses, we gather data on the percentage of liberal lower court decisions to which the Court granted certiorari from 1953 to 2000 over 12 issue areas. We learn that the Court is more likely to take lower court cases which oppose its ideology, when Congress is conservative and when the President is liberal, given a conservative Court.

The Supreme Court occupies a unique place in American politics. It sits atop the federal judicial hierarchy, which allows it to hear appeals of decisions made by other courts and deliver policy decisions that these other courts must follow. In addition, it serves with Congress and the executive branch as one of the three institutions primarily responsible for setting national policy in the United States. As a result, the Court plays an enormously significant role in the policymaking process.

Unlike the rest of the federal judiciary, the Court has considerable latitude with respect to choosing which cases it hears. Those who lose in the lower courts have the right to appeal the outcome to the Court; yet the Court then gets to decide whether it wants to hear the case. Having such power means that the Court has the ability to set its agenda, and as part of this process gets to decide what sorts of cases it wants to hear. It can decide, for example, whether to hear a higher proportion of cases that deal with civil rights, or due process, or federalism, or any other policy area it wants to influence. Similarly, it might choose to hear cases where the U.S. is a party, or perhaps to settle disputes among the states. By choosing specific cases, the Court can emphasize some sorts of issues and approaches more than others.

Furthermore, the Court also gets to choose the *ideology* of the cases it hears. Like all courts, the decisions of lower courts have an ideological component and can be categorized as either liberal or conservative. When parties appeal cases, the Court can choose whether it wants to hear appeals of liberal decisions, or whether it would rather hear appeals of conservative ones. In this paper we examine why the ideological makeup of the Court's agenda varies over time.

That is, we seek to explain why in some years the Court hears appeals of more liberal cases than conservative cases, while in other years it does the reverse.¹

Our analysis focuses on the aggregate level – that is, on the percentage of liberal cases that the Court hears, and why this percentage varies from year to year. In exploring this variation, we seek to add to knowledge of the Court, and more generally, political institutions, in two ways. First, we examine whether the median member of the Court’s ideology influences the type of case that the Court hears. Do liberal Courts, for example, tend to favor an agenda that consists predominantly of liberal cases? Or do they prefer to hear mostly conservative cases? Examining the influence of the Court’s ideology will let us distinguish between the error correction approach and what we call the affirm-extend approach, both of which researchers have proposed as explanations of the Court’s certiorari decisions. Second, we investigate whether the preferences of Congress and the President influence the Court’s agenda. In recent years, scholars have paid a great deal of attention to the idea of strategic behavior by the judiciary, and our analysis will contribute to this debate by determining whether the Court strategically takes into account the ideology of other actors when it determines the ideological makeup of its own agenda.

The paper proceeds as follows. First, we review the relevant literature. Second, we introduce some empirically derived hypotheses. Third, we test those hypotheses using data on all cases granted certiorari by the Supreme Court from 1953 through 2000. After discussing our results we conclude with some caveats as well as suggestions for further research.

Background

¹ Throughout this paper, when we refer to “liberal cases” or “liberal decisions” we are referring to cases decided by lower courts – usually appellate courts – in a liberal direction.

When Supreme Court justices meet to decide which cases they will hear during the session, they have a wide range of cases to choose from. Because they can hear only a small fraction of these cases – approximately 1.1% in the 2002 term – they have to decide what sorts of cases they want to hear (Rehnquist 2004). Several previous studies have examined the Court’s agenda setting process, and have identified the factors that influence whether or not the Court will hear a case. For example, we know that the Court is more likely to hear a case when more parties submit *amicus curiae* briefs about that case (Caldeira and Wright 1988, 1990, 1998). In addition, the Court is more likely to hear cases where federal courts conflict with one another regarding the policy area of that case (Caldeira and Wright 1990; Perry 1991). Further, the odds that the Court will hear a case increase when the U.S. government is a party to that case (Caldeira and Wright 1990; Perry 1991). Finally, the Court has become more likely to hear civil liberties and due process cases since the 1950s, and less likely to hear cases which deal with federalism, federal government regulations, economic issues and tax laws in those years (Lanier 2003; Pacelle 1991; Perry 1991).

In choosing cases on these sorts of grounds, the Court gets to set the legal or policy basis of its agenda. Simultaneously, the Court also gets to determine the *ideological nature* of its agenda. That is, the Court decides what sorts of cases it wants to hear based on the ideological direction of the lower court’s decision. The Court can decide whether it wants to hear appeals of decisions that were decided in a liberal direction, or whether it would rather concentrate its efforts on hearing cases that lower courts decided in a conservative direction.

The percentage of liberal lower court decisions to which the Court grants a writ of certiorari has fluctuated greatly from 1953 to 2000. Aggregating across all policy areas, we define “Lower Court Liberal Decisions” as the percentage of cases that the Court hears that a

lower court decided in a liberal direction. Figure One shows that the percentage of liberal decisions on the Supreme Court's agenda varies from as low as 16% in 1966 to as high as 56% in 1982. Thus, in some years a majority of the cases that the Court decided to hear had been decided in a liberal direction by lower courts. In many other years, however, the overwhelming number of cases had conservative decisions. During the time period we examine, the Court's agenda contained an average of 36.7% of lower court liberal decisions. More importantly, there is a great deal of variation from one year to another.

[FIGURE ONE ABOUT HERE]

What accounts for the dramatic variance over time shown in Figure One? That is, why does the Court sometimes choose to hear mainly cases that were decided in a liberal direction, while other times choosing to hear mainly cases decided in a conservative direction? While the explanations discussed at the beginning of this section provide valuable insight into understanding whether the Court will hear specific cases, these approaches provide little leverage on whether the Court will be more likely to hear appeals of liberal or conservative decisions, unless one assumes, for example, that either liberal or conservative cases are more likely to have certain legal characteristics that make them more appealing to the Court.² Thus, in the next section we turn to two approaches – the attitudinal and strategic models – to motivate hypotheses about the ideological nature of the Court's agenda.

Influences on the Court's Aggregate Caseload

What factors might predict when the Court becomes more likely to hear a higher percentage of liberal decisions? First, justices may choose cases simply based on policy

² One exception is that proponents of the legal model argue that the Court chooses to hear appeals of lower court liberal decisions when it decides that those decisions merit being heard on legal grounds (Edwards 1985; Ulmer 1974).

grounds. That is, they could look at the ideological direction of the lower court decision, consider their own ideology, and then decide whether to hear an appeal of the case based on those factors. Examining this possibility would give us a sense of whether, and how, ideology on the Court affects the ideology of the cases that the Court chooses to hear, as well as information on whether they hear cases in order to affirm them or to overrule them. Second, justices may take into account the ideological leanings of other political actors. Examining this possibility would give us a handle on whether justices behave strategically, considering the potential actions of others, when deciding which cases to hear. We now turn to an explication of each of these possibilities.

The Court's Ideology and Direction of Lower Court Decisions

The attitudinal model is perhaps the foremost approach to the study of the judiciary today. Stated in its most simple and straightforward form, the attitudinal model holds that justices have policy preferences and take actions that are consistent with those preferences (Segal and Spaeth 2002). Hence, when choosing how to vote on a case before the Court, a liberal justice will vote in a liberal direction, while a conservative justice will vote in a conservative direction. Similarly, proponents of the attitudinal model argue that each justice's primary goal in the decision-making process is to make public policy (Rohde and Spaeth 1976, 72; Segal and Spaeth 2002, 92). For instance, each justice decides whether to vote in favor of granting certiorari based on whether that case advances his or her policy goals. Ostensibly, a justice will vote in favor of granting certiorari to a case which advances his or her policy goals.

Consistent with the attitudinal model, Supreme Court justices might want to hear appeals of cases based purely on the ideological disposition of the lower court's decision. But that could

have two separate interpretations. First, justices might choose to hear cases that were decided in a direction consistent with their personal ideologies. In other words, a liberal justice might want to hear appeals of cases that were decided in a liberal direction, while a conservative justice might do the reverse. A justice may act in this way because he or she thinks that the lower court got it right (Perry 1991) and because he or she wants to send a message to other courts by affirming the lower court's judgment. A further consequence of affirming such lower court decisions is that justices can apply a policy they agree with to the entire country, rather than to the region from which the case came (Perry 1991). For instance, if the Supreme Court agreed to hear more liberal than conservative lower court decisions, then doing so might mean that the Court thought that the liberal decisions reached by the lower courts were correct and that these decisions should be affirmed and extended.

Of course, even if an individual justice wants engage in this affirm-extend approach – that is, to hear a case because he or she agrees with it, wants to affirm it, and wants to apply the policy outcome in the case to the entire country – he or she might be limited by the preferences of the other justices. Suppose, for example, that all nine justices on the Court want to hear only decisions that they agree with, in order to affirm them, but that eight of the justices are conservative and only the ninth is liberal. In this situation, the Court will hear appeals of conservative cases, rather than liberal cases. The liberal justice might want to hear appeals of liberal cases, but he or she is out of luck in two ways. First, he or she would not be able to muster the requisite four votes needed to grant certiorari, since the conservative justices would rather hear conservative cases. Second, the liberal justice would want to hear liberal cases to affirm them; but if the appellate court ruled in a liberal direction, this conservative-dominated Court would not affirm it but rather would overturn it. Thus, because the case would fail to

garner the four votes needed to hear it and the five votes needed to affirm it, that case would not – assuming, again, that justices want only to affirm cases they agree with – be heard by the Court.

Justices, then, might choose to hear cases they agree with in order to affirm and extend the reach of these cases. At the same time, justices are likely to do so only when they believe that the entire Court would also affirm the case (Ulmer 1972), since the worst-case scenario, for a liberal justice who wants to hear a liberal case, would be for the Court to overturn that case. If that were to occur, this liberal justice would have been far better off keeping the case off the Court's agenda in the first place. As the Court becomes more liberal, justices can be increasingly certain that the Court would not overturn liberal cases, and thus it may be more likely to hear appeals of liberal cases. We summarize this position in our first hypothesis:

Hypothesis 1A: SIMILARITY HYPOTHESIS. The Supreme Court is more likely to hear a higher proportion of liberal cases as the median justice becomes more liberal.

A second possibility is also consistent with the attitudinal approach: justices might want to hear not those cases with which they agree, but instead those with which they *disagree*. As in the discussion of the similarity hypothesis, justices will take into account the likely outcome that will occur if the case is brought before the Court. If a lower court issues a liberal decision, then the preferred action for conservative justices would be to overturn this decision. The worst case, however, would be to hear the case and affirm it; if this were to happen, the conservative justices would have been better off leaving the case at the appellate level, with its limited reach and application. Thus, justices who want to overturn cases are likely to grant certiorari to them only when they are relatively sure that the Court will actually overturn them, which implies that as a Court becomes more liberal (conservative) it will hear a higher proportion of conservative (liberal) cases. Our hypothesis encapsulates this view:

Hypothesis 1B: DIFFERENCE HYPOTHESIS. The Court is more likely to hear a higher proportion of liberal lower court decisions as the median justice becomes more Conservative.

Our first two hypotheses thus present two contrary views of how the Court might set its ideological agenda. If the Court leans in a liberal direction, then Hypothesis 1A suggests that the Court will likely employ an affirm-extend approach by hearing a higher percentage of liberal cases and fewer conservative cases. At the same time, Hypothesis 1B suggests that a liberal Court will engage in an “error correction” approach by hearing a higher percentage of conservative cases and fewer liberal cases. Both of these hypotheses are plausible; both receive support from discussions of justices’ behavior; and both are consistent with the basic foundation of the attitudinal model, which is that justices will be driven by policy concerns (although we also argue that the overall ideological composition of the Court will influence actions).

Because both hypotheses are plausible and defended in the literature on the Court, we will allow the data to differentiate and to see whether one approach – affirm-extend or error correction – dominates over the other. Implicitly, our arguments assume that a liberal Court would hear a conservative case in order to overturn it, but a liberal case in order to affirm it; and that a conservative Court would do the reverse. To examine whether this is true, Table One presents evidence for all Courts in which the median justice was liberal, and Table Two does the same for conservative Courts.³ The findings provide initial support for the idea that when a Court of a certain ideological leaning hears a case of a similar leaning, it does so to affirm that case, but would hear a case with a different ideology in order to overturn it. Thus, Table One shows that liberal Courts are slightly more likely to affirm liberal cases than conservative cases,

³ We use Martin and Quinn’s (2002) scores to determine what constitutes liberal and conservative Courts. A Court is liberal when the median Justice’s score is less than zero and conservative when the median Justice’s score exceeds zero. To determine the direction of the rulings made by the lower court and the Supreme Court, we use The Original Untied States Supreme Court Database “lctdir” and “dir” measures, respectively (See Spaeth 2003).

and are far more likely to overturn conservative cases than liberal cases. Likewise, Table Two shows that conservative Courts are more likely to overturn liberal decisions, and are more likely to affirm conservative cases.⁴

[TABLES ONE AND TWO HERE]

Congress and the President

The Supreme Court cannot set policy by itself in a political vacuum because other actors can alter its judgments (see, e.g., Ferejohn and Shipan 1990; Spiller and Gely 1992). Thus, the Court might base its decisions about what sorts of cases to hear not just on its own preferences, but also on the preferences of other political actors. Following this line of reasoning, the Court may consider the reactions of other political actors not only when they reach decisions, but also when they decide whether to take that case in the first place. Because the House, Senate, and president can decide whether to pass a law that undoes the Court's decision, the Court will, according to this view, adjust its actions to account for presidential and congressional preferences.

Why might justices pay attention to Congress? To begin with, Congress has the power to overturn the Court's decisions by passing a constitutional amendment, as it has done on five occasions.⁵ More frequently, Congress has debated, and often passed, laws that overturn Court decisions (Eskridge 1991, Ignagni and Meernik 1994). And more generally, Congress can hold hearings, threaten to pass laws, lower the budget for federal courts, alter the jurisdiction of those

⁴ When taken together, these tables also show that liberal courts hear a higher percentage of conservative cases than conservative courts, and that a liberal court is 2.3 times more likely to hear a conservative case than a conservative court which suggests some initial support for our Difference Hypothesis.

⁵ Congress has overturned the following Supreme Court decisions by constitutional amendment: 1) *Chisholm v. Georgia* (Eleventh Amendment); 2) *Scott v. Sandford* (Fourteenth Amendment); 3) *Pollock v. Farmer's Loan and Trust Company* (Sixteenth Amendment); 4) *Minor v. Happersett* (Nineteenth Amendment); and 5) *Oregon v. Mitchell* (Twenty-Sixth Amendment) (Segal and Spaeth 2002).

courts and change the size of the judiciary to make life more difficult for the courts when it disagrees with their decisions.

The Court has similar incentives to pay attention to the preferences of the president. First, as the only person elected by a national constituency, the president is America's public opinion leader. Knowing this, the Court could use the president's ideology as a shortcut to estimate public opinion. Second, the Constitution charges the executive branch with enforcing the Court's decisions. If the Court enacts a decision that the President disagrees with, it may find that this decision is not enforced, thereby reducing the policy gains the Court hoped to gain and also striking a blow at the legitimacy of the Court. And finally, the president can join Congress in passing laws that overturn or undercut Court decisions.

Evidence is mixed about the extent to which justices' votes are influenced by the preferences of other political actors, with Segal (1997) finding no influence and Bergara, Richman, and Spiller (2003) finding support for strategic behavior. But perhaps one reason for the mixed nature of the evidence is that the Court takes these other actors' preferences into account at an earlier stage – namely, when deciding which cases to hear. Figure Two provides an illustration of how this might work. Consider first the situation where a liberal Supreme Court, SC_L , needs to choose whether to hear a liberal lower court decision, LC_L , or a conservative lower court decision, LC_C , and where the location of the other political actors is denoted by P (for Politician). In this case, the Court could overturn the conservative lower court decision or affirm the liberal lower court decision, in both cases producing an outcome near the Politician's ideal point. Both the Court and the Politician, however, would reap greater gains in utility from overturning the conservative lower court case, so we might expect the Court, in this case, to hear more appeals of liberal decisions.

[FIGURE TWO HERE]

If the Court is conservative, located at SC_C , its calculations differ. No longer can it choose a case, select a policy outcome, and assume that the Politician will go along with it, as the ideologies of the two institutions are quite different. If the Court chooses to hear LC_C , and affirms this case, the Politician suffers no loss in utility and may not respond to the Court decision. Conversely, if the Court hears an appeal of the liberal case to overturn it, the Politician would suffer a large utility loss when the policy is moved from LC_L to SC_C . The Politician might react by overturning the decision, or by threatening the Court in some other way (e.g., reduced jurisdiction, hearings and bill introductions, a lower budget, etc.). Thus, the Court would be better off choosing to hear appeals of conservative lower court cases.⁶

These examples demonstrate that if the Court behaves strategically with respect to other institutions, then regardless of its ideology it will choose to hear cases that contrast with the ideology of the other political actors. That is, the Court will choose to hear liberal cases when other political actors are conservative, and conservative cases when other political actors are liberal, as we spell out in the following two hypotheses:

Hypothesis Two: CONGRESS. When both houses of Congress are liberal, then a conservative court will more likely engage in an affirmative approach and hear conservative cases.

Hypothesis Three: PRESIDENCY. As the President becomes more conservative, the Court will hear a higher proportion of liberal lower court decisions.

⁶ Stated somewhat differently, when the Politician is conservative and the liberals constitute a majority of the Court, the Court may take more liberal lower court cases. That is, when the Court and Politician have similar ideologies, the Court will engage in an error correction strategy, and when their ideologies differ, it will take an affirm-extend approach. Thus, the Court will “play defense” by taking ideologically similar cases when doing otherwise could cause the Politician to overturn the case.

Data and Methods

Our analysis focuses on the years 1953 to 2000. Our dependent variable is the percentage cases on the Court's agenda, in each issue area, that were decided in a liberal direction by the lower courts.⁷ Ideally, we would have a list of all cases that could possibly be appealed, along with the ideological characteristic of each case. Since we do not have this, we do not use the individual case as the unit of analysis, but rather look at each year. Thus, our data is similar to that shown in Figure One, with the exception that we use a separate percentage for each policy area, as we discuss below. While using aggregate level data has some costs, it also has the benefit that it allows us to see whether the Court's overall agenda is affected by the factors we have identified.

We computed the values of our dependent variable using the Supreme Court Database. We began by gathering data on all cases to which the Court granted certiorari and filtered those cases by docket number.⁸ Next, we separated the cases for each year by issue area. We then computed the total number of cases and number of liberal cases which the Court heard in each issue area and then calculated the percentage of liberal cases. For example, in 2000, the Court heard 25 cases which dealt with criminal procedure, 44% of which were appeals of liberal lower court decisions, and 16 cases in the issue area of civil liberties, 56.3% of which were appeals of liberal lower court decisions. Thus, we have a cross-sectional time series dataset, with the percentage liberal in different issue areas for the years 1953-2000.

⁷ The Original United States Supreme Court database defines 15 possible issue areas. Because the Court did not hear cases in all 15 areas during this period, we were only able to use 12 of them. These issue areas are cases which dealt with criminal law, civil liberties, the First Amendment, due process, privacy, attorney-client relations, unions, economic activity, judicial power, federalism and federal taxes.

⁸ We filtered cases in this manner because Spaeth's dataset duplicates many cases to which the Court granted Certiorari. Since we want to know the ideological composition of the Supreme Court's agenda, we are only interested in the ideological direction of those cases which the Court heard.

To test our hypotheses, we need measures of ideology for the various political actors we have discussed. Our first independent variable, which we use to test the Difference and Similarity hypotheses, is an annual measure of the median Court member's ideology. In recent work, Martin and Quinn (2002) have created such scores using a Markov chain Monte Carlo approach. We use these scores to measure each justice's preferences and calculate the median score for each year. We recoded these scores such that more liberal justices receive higher ideology scores. Thus, for example, the median recoded score in 2000 was -.598, indicating that the Court was slightly to the right of center.

To test our other hypotheses, we need measures of ideology for the President and the median members of the House and Senate. We use first dimension, common space NOMINATE scores to measure these preferences. As with the scores for the justices, we recoded these scores such that more liberal presidents, members of the House, and Senators receive higher ideology scores.

Finally, we also include a set of dummy variables to control for the various issue areas that appear before the Court. Previous studies have shown that the Court will treat certain issue areas differently when they consider whether to hear more liberal or conservative lower court decisions (Baum 1995, Perry 1991). More specifically, Perry (1991) argues that the Court is more likely to review civil liberties and privacy-related decisions if the lower courts ruled in a conservative direction. He also found that the Court is more likely to hear criminal, due process, and union-related lower court decisions that oppose the Court's ideology because it will hear such cases when it wants to overturn them (Perry 1991). To control for these sorts of effects, we

create a series of issue dummies to control for issue-specific effects that invariably affect the likelihood that the Court grants a writ of certiorari to a particular case.⁹

Because our dependent variable is a percentage in a cross-sectional, time series dataset, we employ grouped logit with panel corrected standard errors to test our hypotheses. This approach allows us to correct for heteroskedasticity by assigning more weight to observations coming from populations with smaller variability and less weight to observations coming from populations with larger variability (Gujarati 2002). We implement panel corrected standard errors (PCSEs) to rectify violations of the independence assumption and correct for correlated errors (Beck and Katz 1995). This technique is a vast improvement over Ordinary Least Squares in such situations, since using OLS with our dataset would result in heteroskedastic errors, observational interdependence, and correlated errors.

Results

We present our results in Table Three. Column One in this table shows the results that are relevant to our four hypotheses. First, the negative and highly significant coefficient for the Court's ideology variable provides strong support for our Difference Hypothesis rather than the Similarity Hypothesis. More specifically, the model in Column One suggests that a shift in the median member of the Court from Justices O'Connor to Kennedy in 2000 means that the weighted odds that favor a higher percentage of liberal cases heard by the Court will increase by .3%.¹⁰ This support for the Difference Hypothesis indicates that the Court is more likely to hear

⁹ We use civil rights as our comparison category for both models that we estimate in this paper. We do this so that we do not overspecify our model (see Kennedy 1998).

¹⁰ Justice O'Connor's recoded ideology score is -.5983884 whereas Kennedy's is -.8300233 for 2000. For comparison sake, the most conservative justice in this year was Thomas, with a score of -3.854203, which the most liberal justice was Stevens with a score of 3.124141.

cases that it disagrees with, in order to overturn, or correct, these cases, than it is to hear cases with which it agrees.

[TABLE THREE ABOUT HERE]

The results in Column One also provide at least some evidence that the Court takes the preferences of other political actors into account when choosing the ideological nature of its agenda. This support occurs for the Congress hypothesis, since our results show that the Court hears a higher percentage of lower court decisions that are liberal as the House becomes more conservative, and vice versa. More specifically, the model shows that a .1 increase in the median House member's ideology yields a .9% decrease in the weighted odds that favor a higher percentage of lower court decisions which are liberal and granted certiorari. The results for the Senate and President, however, are not significant in the predicted direction. Surprisingly, however, the variable for the President is significant in a positive direction, indicating that as the President becomes more liberal, the Court is more likely to hear a higher percentage of cases that are liberal.

Thus far we have conducted the two parts of our investigation – first, whether the Court tends to hear cases that it agrees with or that it disagrees with, and second, whether the Court takes the preferences of other political actors into account – separately from each other. That is, in Column 1 of Table Three, we include these terms additively, rather than interactively. It is possible, however, that the effects are conditional. For example, it may be that the Court is likely to engage in an error correction approach, and hear cases that differ from it ideologically, under some conditions, but will take a different approach and hear cases it agrees with in order to affirm them under other conditions. Furthermore, these other conditions may involve the ideological biases of the other political institutions.

In Column Two we interact the Supreme Court's ideology with the ideology measures for each of the other institutions. First, the results strongly support the Difference Hypothesis because liberal Courts are more likely to hear conservative cases and conservative Courts are more likely to hear liberal cases. The substantive effect is almost the same as what we reported for Column One. Second, we again see support for our Congress Hypothesis, with the presence of a negative and significant coefficient on the House Ideology variable indicating that the Court will be more likely to hear conservative cases when the House is liberal, and vice versa.

One difference between the results presented in Column One and those presented in Column Two concerns the President. We now find that although the President Ideology variable continues to be positive, it is no longer significant. More importantly, we find that the interaction of the Supreme Court's ideology with the President's ideology produced a negative coefficient. Thus, the Court is more likely to hear a higher percentage of liberal cases when the President is liberal; but this is true only if the Court itself is conservative.¹¹

Discussion and Conclusion

The Supreme Court has the power – unique among federal courts – to set its own agenda. As part of this agenda-setting power, it can choose whether it wants to hear appeals of lower court decisions that were liberal, or whether it prefers to hear cases that were decided in a conservative direction. Analyzing aggregate trends in the ideological nature of the Court's agenda allows us to test whether the Court engages primarily in an error correction strategy, as some scholars have contended, or an affirming strategy, as others have argued. At the same time, analyzing these trends lets us contribute to a growing literature on whether the Court behaves strategically with respect to other institutions.

¹¹ In this context, a conservative court is one whose median justice has an ideology score less than zero.

On the first point, we find strong evidence that the Court tends to hear cases that it disagrees with. Following this error correction strategy, the Court can overturn cases where the ideology of the case diverges from its own ideology. A conservative Court, then, is more likely to hear a higher percentage of liberal cases, while a liberal Court is more likely to hear a higher percentage of conservative cases. This pattern holds true even when we control for issue specific effects. The evidence, then, demonstrates that an error correction approach is the Court's primary mode for granting certiorari.

On the second point, as we noted earlier, evidence has been mixed about the extent to which the Court behaves strategically. Although studies indicate that other political actors behave strategically with respect to the Courts (e.g., Moraski and Shipan 1999; Martin 2001), the jury is still out, so to speak, regarding whether justices take the preferences of other political actors into account when making decisions. Some detailed case study evidence indicates that justices do modify their behavior to take into account the preferences of other actors (Epstein and Knight 1998). At the same time, however, statistical evidence of justices' votes provides only mixed evidence for the idea that justices behave strategically, with some finding support for the idea of strategic voting (Bergara, Richman, and Spiller 2003) while others do not (Segal 1997).

Our results indicate one potential reason why it might be difficult to find evidence of strategic behavior at the level of individual votes on specific cases: it might be that the set of cases is biased, due to the Court having taken these preferences into account at an earlier stage – namely, the certiorari stage. We find that the Court's agenda is shaped in part by the preferences of other political institutions. More specifically, when the House is liberal, the Court will tend to hear primarily conservative cases; and vice versa. We find similar results for the president, although only when the Court shares the president's ideology.

While these results are promising, they come with some caveats. First, we do not know the underlying ideological distribution of potential cases from which the Supreme Court must choose, and it is possible that without knowing this distribution we would make errors of inference. For example, if 60% of the cases on the Court's agenda are liberal, this takes on a different meaning if 90% of the potential cases are liberal than if 30% are liberal. We believe, however, that this is not a serious problem, in large part because the Court hears such a small percentage of the cases appealed to it. Thus, selection effects are unlikely to be a problem. Still, one potential way to control for this effect would be to take the partisan composition of the lower courts into account. Assuming that Democrats are mostly liberal and Republicans are predominantly conservative, the Court will receive more appeals of liberal lower court decisions when Democrats comprise the majority of lower court judgeships, and thus may hear a high percentage of liberal lower court decisions when it has a high percentage of liberal lower court decisions to begin with. Testing such a hypothesis requires that we know the partisan composition of the lower courts.

Second, we use aggregate-level data. Using such data does not allow us to determine whether case-specific factors make the Court more or less likely to hear a specific case. For example, our data does not allow us to examine the appellate court from which the case originated that may influence the Court's decision to accept or deny certiorari. However, our data does allow us to examine the effects of factors that may influence the ideological composition of the Court's agenda over time once the Court grants certiorari to these cases.

Finally, we need to work further to determine when the Court will engage in an error correction approach and when it will use an affirm-extend approach. Our results show that the error correction approach is the predominant mode, but clearly, as Tables One and Two

demonstrate, liberal Courts often hear liberal cases and conservative Courts often hear conservative cases. Clearly, in any given year, the Court adopts a mixture of these two strategies. Future work should concentrate on identifying the specific conditions under which the Court views the error correction approach as more beneficial, and when it prefers to affirm and extend cases with which it agrees.

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Figure One: Percentage of Liberal Lower Court Decisions Heard by the Supreme Court from 1953 to 2000.

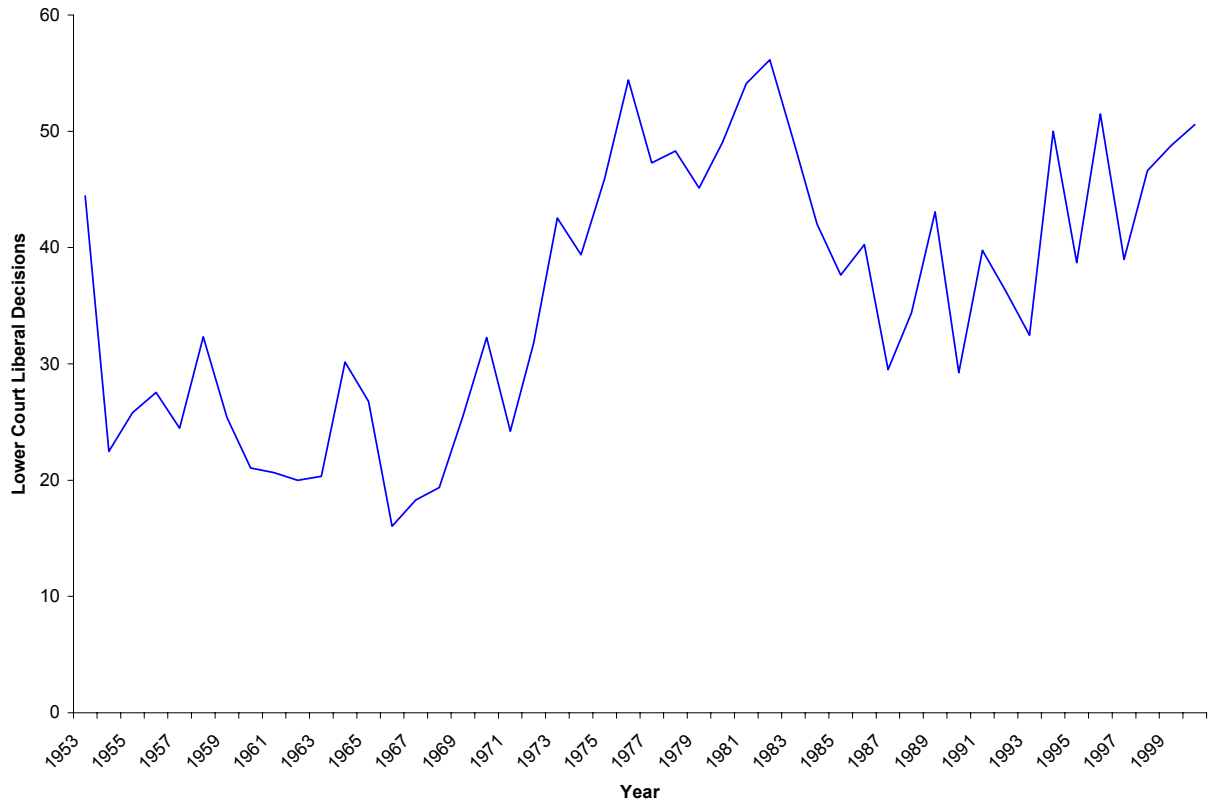


Figure Two: A Model of Ideologically Similar House, Senate and Supreme Court.



Table One: Percentage of Decisions that a Liberal Supreme Court Affirms and Overturns by Lower Court Decision Type from 1953 to 2000.

Lower Court Decision Type	Outcome		
	Affirm	Overturn	Total
Liberal	134 (52.34%)	122 (47.66%)	256 (100.00%)
Conservative	284 (30.57%)	645 (69.43%)	929 (100.00%)

Note: All percentages in this chart are percent of the total number of cases in each row.

Table Two: Percentage of Decisions that a Conservative Supreme Court Affirms and Overturns by Lower Court Decision Type from 1953 to 2000.

Lower Court Decision Type	Outcome		
	Affirm	Overturn	Total
Liberal	1174 (40.96%)	1692 (59.04%)	2866 (100.00%)
Conservative	2585 (58.76%)	1814 (41.24%)	4399 (100.00%)

Note: All percentages in this chart are percent of the total number of cases in each row.

Table Three: Percentage of Lower Court Decisions Heard by the Supreme Court that are Liberal from 1953 to 2000, N=539.

<u>Independent Variable</u>	<u>Model One</u>	<u>Model Two</u>
Supreme Court Ideology	-.014*** (.003)	-.015* (.007)
President Ideology	.030** (.008)	.012 (.009)
House Ideology	-.095* (.045)	-.122*** (.034)
Senate Ideology	-.011 (.062)	.040 (.059)
Supreme Court Ideology*President Ideology	-	-.041*** (.009)
Supreme Court Ideology*House Ideology	-	-.091 (.067)
Supreme Court Ideology*Senate Ideology	-	.081 (.059)
<i>Control Variables</i>		
Civil Liberties	.098** (.034)	.098** (.034)
First Amendment	.166*** (.046)	.166*** (.046)
Due Process	.236*** (.067)	.236*** (.067)
Privacy	.350** (.103)	.349** (.103)

Table One Continued on Next Page

Table Three (Continued): Percentage of Lower Court Decisions Heard by the Supreme Court that are Liberal from 1953 to 2000, N=539.

<u>Independent Variable</u>	<u>Model One</u>	<u>Model Two</u>
Attorney-Client Privilege	.239* (.097)	.239* (.097)
Unions	.248** (.072)	.248** (.072)
Economic Activity	.113** (.037)	.113** (.037)
Judicial Power	.122** (.038)	.122** (.038)
Federalism	.240** (.073)	.240** (.073)
Federal Tax	.185 (.125)	.185 (.125)
Constant	.070*** (.013)	.072*** (.014)
N	531	531
Pseudo R ²	.633	.636
Wald Chi-Squared	109.27	114.11
Prob>Chi-Squared	<.0001	<.0001

Notes: The values in parentheses are Panel Corrected Standard Errors. Also, * denotes p<.05, ** denotes p<.01, *** denotes p<.001; all two-tailed tests.